

**ÉTUDE DE FAISABILITÉ SUR LA MÉDIATION TRANSFRONTIÈRE EN MATIÈRE
FAMILIALE – RÉPONSES AU QUESTIONNAIRE**

document établi par le Bureau Permanent

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**FEASIBILITY STUDY ON CROSS-BORDER MEDIATION IN FAMILY
MATTERS – RESPONSES TO THE QUESTIONNAIRE**

document drawn up by the Permanent Bureau

*Document préliminaire No 10 de mars 2008
à l'intention du Conseil d'avril 2008
sur les affaires générales et la politique de la Conférence*

*Preliminary Document No 10 of March 2008
for the attention of the Council of April 2008
on General Affairs and Policy of the Conference*

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1. OBSERVATIONS DES MEMBRES – COMMENTS OF MEMBERS

ALLEMAGNE – GERMANY

Du Ministère de la justice d'Allemagne – From the Ministry of Justice of Germany

Question 1:

The Special Commission to review the operation of the 1980 Convention and the practical implementation of the 1996 Convention has already invited the Permanent Bureau "to continue to keep States informed of developments in the mediation of cross-border disputes concerning contact and abduction". The Permanent Bureau might be asked to maintain a more general watching brief on, and to report periodically upon, the development of cross-border mediation in family matters. This modest exercise would nevertheless be useful in terms of encouraging the spread of ideas and good practices in this area.

Response:

Periodic reporting by the Permanent Bureau on the development of cross-border mediation in family matters is, in principle, a good idea. It would enable information on model projects, the different standards applied in mediation in family matters and practical experience to be disseminated among the Member States and to be put up for discussion.

The German delegation thus proposes, following consultations with experienced experts from the Member States, developing a short, standard questionnaire with a fixed structure and precisely defined checkpoints. It could then also be left up to Member States to submit additional individual reports on model projects and relevant experience gained in concrete cases. However, this should not lead to information being regularly requested from Member States as a mere reflex action or even to the introduction of regular reporting to The Hague Conference.

Question 2:

Further work, including consultations could be carried out by the Permanent Bureau on the question whether the lack of a fully comprehensive regime of private international rules concerning agreements in the family law area gives rise to any practical disadvantages or impediments for the mediation process such as would justify the development of a private international law instrument.

Response:

The German delegation is of the opinion that a fully comprehensive regime of rules concerning the family law area would be a very ambitious project that would be impossible to realise at this point in time. One must also take into account that Hague conference agreements already exist in some areas of the applicable law and that the content of agreements in the family law area sometimes vary quite significantly. Reference is here also made to Article 6 para. 4 and Recitals 20 and 21 of the text of the Mediation Directive (Document 15003/07 JUSTCIV 301 CODEC 1225).

Nevertheless, the German delegation does not, within the context of any future international legal instrument regarding mediation, rule out the possibility of examining to what extent certain very concrete practical difficulties could be solved by introducing additional regulations in that international legal instrument. Please also refer to our response to Question 3.

Question 3:

Consultations could be carried out with Member States to explore the desirability of developing an instrument designed to improve the flow of

information and to provide for closer co-operation between States in facilitating the use of mediation and in giving effect to mediated agreements.

Response:

The German delegation would welcome an examination of whether an instrument should be developed or measures initiated to improve the flow of information and to provide for closer co-operation between Member States. This could facilitate the use of cross-border family mediation and improve the efficiency of agreements reached in the course of such mediation.

This could include, among other things, Member States sharing information on how judges exchange information and communicate in practice (e.g. contacts via the EJM, liaison judges and direct communication between judges) as well as on legal instruments applied by individual States (e.g. mirror orders, safe harbour orders).

In this context it is also worth considering organising seminars, for instance on "Mediation in international parent and child cases, especially in The Hague Conference and Brussels Ila procedures". These seminars could be aimed at (specialist) judges as well as staff from the various Member States' central authorities. They would learn about and deepen their knowledge of cross-border mediation in family matters; the contacts with other States could serve active co-operation. The EU's "Civil Justice" Framework Programme specifically contains projects on such topics to provide "training for practitioners of justice in mediation techniques".

Question 4:

Further consultations might also be conducted in relation to the issues of confidentiality, accreditation and the development of a code of practice or a guide to good practice to be applied and used by mediators in cross-border family mediation.

Response:

We support the idea of introducing further consultations on the issues of confidentiality in mediation, accreditation of mediators and the development of a guide to good practice for cross-border family mediation.

More specifically: As regards the **principle of confidentiality** it should be pointed out that Article 7 of the Draft of the EU Mediation Directive already contains specific regulations governing the level of confidentiality mediators must adopt. It is expected that the Directive will come into effect in early summer 2008. However, the Directive only contains regulations governing issues of confidentiality between EU Member States.

As regards the issue of **accreditation of mediators** it should be pointed out that the Federal Ministry of Justice has for more than two years been supporting mediation associations in Germany so that these can run special seminars for fully trained family mediators to receive further training in issues concerning international parent and child conflicts (topics include: legal peculiarities of The Hague Conference and Brussels Ila Procedures / special intercultural problems in binational family conflicts / improving cross-border communication and co-operation between institutions and occupational groups in various States).

Representatives of foreign missions in Germany and foreign family mediators from neighbouring countries living in Germany and in neighbouring states also take part in these seminars.

As a medium-term goal one should consider suggesting to the Member States that they introduce special advanced training courses for mediators working in cross-border family mediation.

*As regards developing a code or guide to good practice, reference is here made to the fact that Germany has developed what has become known as the **Binational Co-mediation Model** for resolving international parent and child cases (including international child abduction cases) and has gained increasingly positive experience with this model since early 2003. The model envisages that one mediator from each of the parents' home countries, that is a total of two mediators, are charged with handling the mediation. One mediator should be female, one male; one should be a professional working in a psychological/educational field and the other should be working in a legal profession. Both mediators have to have completed advanced binational mediation training. The two mediators should have at least one language in common. A survey of some of the parents involved in the Franco-German professional binational mediation model project between 2003 and 2006 showed that the binational approach has met with great acceptance (the survey was carried out as part of an academic study).*

ARGENTINE - ARGENTINA

De l'Autorité centrale d'Argentine pour la Convention de 1980 sur l'enlèvement international d'enfants – From the Central Authority of Argentina under the 1980 Hague Child Abduction Convention

(Unofficial Translation provided by the Central Authority)

Cross-border mediation in family matters

The task of gathering compilation labor carried out by the Hague Conference on Private International law, related to cross-border mediation in family matters, is extremely important to the States part of the convention, and provides a clear view of the use of mediation as an alternative method for the resolution of the 1980 Hague Convention cases.

Family conflicts present particular characteristics given by their high affective content, by conflict generating causes, sometimes of a long time and due to the need to keep ties between the parties. The adversarial judicial system usually entails the deepening of the conflictive situation, since the parties involved in the process take every court's decision as a victory or a defeat, and while they become more and more absorbed by the dispute, they lose capacity to find a solution to their problems.

Opposite to this alternative, mediation appears as a process capable of offering parties the possibility of solving their conflicts themselves, arriving to an agreement beneficial to the whole family group.

For its singular characteristics, mediation offers a big number of advantages that make it more favorable for the resolution of family conflicts than the judicial procedure:

- *Trust among the parties, which will open up more to a mediator than to a judge.*
- *Broadness of the solution, since the family litigation exceeds purely legal aspects that can be resolved or attenuated in the frame of the mediation.*
- *It helps to keep future relations that parents will have one way or another.*
- *Confidentiality principle which guarantees that the matters set forth in the mediation will be known exclusively by the mediator, and that no document will be written, except for the agreement, in case of being successful. By this way, parties can get more involved with the mediation process and the misunderstandings and aggressions that usually provoke the judicial proceedings will be avoided.*

Speed: mediation must be carried out in a short period of time, especially bearing in mind that the Convention foresees that the restitution procedure should not spread beyond 6 weeks.

- *Agreement's Fulfillment: parties in a family procedure are more liable to fulfill agreements that respond to their convictions, than a court order.*
- *Economy: parties that resort to mediation procedures to solve their conflicts will have fewer costs emotionally, as well as in terms of time length and financially speaking.*

In child abduction cases, mediation can act not only as a preventive and a dissuasive measure, but also as a way of solving a case in which a child has been wrongfully removed to or retained in a State different from that of his habitual residence.

When the family rupture is produced, children will usually live with one of their parents, and have a more or less fluid contact with the other. Reaching a good agreement, which establishes custody and access rights favorable to all the family members, constitutes the best remedy against child abduction, since satisfied parts will not intend to modify the status quo.

When a child is wrongfully removed or retained, mediation will act as a suitable channel for parties to arrive at an agreed resolution, if dialogue between them is possible and they are capable of compromising their positions and taking into consideration the other's point of view.

Projects promoted in the matter have demonstrated that cases resolution by mediation was positive in a large percentage of cases, producing, also, a decrease of the grade of conflict even in the cases in which it was not possible to arrive at an agreement.

Nevertheless, as we can observe in the documents in analysis and the responses given by Central Authorities of the States Parties, to the Questionnaire prepared by the Conference in the year 2006, relative to the practical application of the Hague Convention of October 25, 1980 on the Civil Aspects of the International Child Abduction, States resort to the use of mediation of diverse ways and in accordance with their possibilities, infrastructure, human and financial resources and training of their operators.

In this way, amongst the universe of States parties of The 1980 Hague Convention, we count with projects of mediation designed especially to address child abduction cases, others that without being designed to the effect, specialize in family matters yet deal with cases of child abduction, others, more informal, by means of getting parties together, attempt to find an agreed solution to conflicts and others for which the mediations institute is still very recent and enjoys neither the development nor diffusion necessary to think about a systematization of the procedure for cases so specific as those proposed in here.

Nevertheless, the achievement of a pursuit in the matter and the production of reports that reflect experiences carried out by the States in mediation, as well as the achievement of consultations tending to detect possible disadvantages or obstacles for the implementation of the cross-border mediation, would be very useful to the States interested in the use of the mediation as a method of conflict resolution relative to minors in the international arena.

Encouraging cooperation, adopting suitable measures to provide information about legislation and available services of children protection, facilitating communications, promoting mediation, conciliation and other similar means of conflict resolution are of vital importance to improve child abduction cases procedures, thus allowing the better fulfillment by the States parties, of the targets foreseen in the 1980 Hague Convention.

The participation of a mediator in family conflicts requires experience in interpersonal relations, handling of conflict, and knowledge of family law, which favors widely interdisciplinary work.

Thereby, and as it has been indicated in the reports prepared by the Conference, it is suitable that mediation be carried out by operators belonging to the legal and psychosocial fields, with specific knowledge in the matter in question.

With regards to mediation in conflicts relative to child abduction, mediators must be qualified to deal with international conflicts; which, aside from proper peculiarities of any family conflict, add peculiar characteristics (cultural differences, idiomatic questions, implication of two juridical different systems, etc.).

For the reasons stated above, we consider vitally important to train mediators specialized in The Hague Convention, whether they are people from the legal or psychosocial areas.

In this aspect, all the cooperation the Conference could offer to the States, such as giving seminars and courses, as well as drafting documents and guides of good practices, which include guidelines for the design of mediation programs that allow solving appropriately child abduction cases, would be greatly appreciated.

In accordance with the opinion given by this office to the Questionnaire on difficulties in the access to foreign law, we also consider of vital importance the development of a database that contains internal law on family and children matters, so that mediators and, specially, the lawyers entrusted to advise the parties, have a direct and fast access to all the necessary elements in order to reaching an agreement capable of being recognized and executed in both States.

Therefore, we think that, any contribution the Hague Conference could make in order to spread and promote the use of cross-border meditation as a way of solving family international conflicts, will benefit in a great extent the families involved, reducing the cases' grade of conflict and allowing its members to arrive at agreements that reflect their interests and needs, and also the respect of the best interest of children who have been subjected to a wrongful removal or retention.

Mediación transfronteriza en asuntos de familia

La tarea de recopilación de antecedentes y prácticas relativas al desarrollo de la mediación familiar transfronteriza, llevada a cabo por la Conferencia de La Haya es sumamente importante para los Estados parte del convenio, e ilustra claramente el panorama del uso de la mediación como método alternativo para la resolución de los casos relativos al Convenio de La Haya de 1980.

Los conflictos familiares poseen características particulares, dadas por su alto contenido afectivo, por causas generadoras de conflicto en ocasiones de antigua data y por la necesidad de mantenimiento del vínculo entre las partes. El sistema judicial adversarial, habitualmente conlleva la profundización de la situación de conflicto, ya que las partes involucradas en el proceso toman cada decisión del juez como un triunfo o una derrota, y cada vez mas absorbidas por la disputa, pierden la capacidad de auto composición del litigio.

Frente a esta alternativa, aparece la mediación como un proceso capaz de brindar a las partes la posibilidad de resolver ellas mismas sus conflictos, arribando a un acuerdo que sea beneficioso para todo el grupo familiar.

Por sus singulares características, la mediación posee un gran número de ventajas que la hacen más favorable para la resolución de conflictos familiares que el procedimiento judicial:

- Confianza de las partes, las que se expresarán con mayor fluidez frente a un mediador que frente a un juez.
- Amplitud de la solución, dado que el litigio familiar excede aspectos puramente legales que pueden ser resueltos o atenuados en el marco de la mediación.
- Facilita el mantenimiento de las relaciones futuras que los progenitores deberán tener de un modo u otro.
- Principio de confidencialidad, que garantizará a las partes que los asuntos ventilados en la mediación serán conocidos exclusivamente por el mediador, no constando por escrito en ningún documento, a excepción del acuerdo, en caso de ser logrado. De este modo, se creará un clima de mayor compromiso de las partes y se evitarán los roces y agresiones que suelen provocar los escritos judiciales.
- Celeridad: La mediación debe llevarse a cabo en un lapso acotado de tiempo, máxime teniendo en cuenta que el Convenio prevé que el procedimiento de restitución no se extienda más allá de las 6 semanas.
- Cumplimiento del acuerdo: las partes en un procedimiento de familia son más propensas a cumplir acuerdos que respondan a sus convicciones, que a acatar ordenes dictadas por un juez.
- Economía: las partes que recurren al procedimiento de la mediación para resolver sus conflictos tendrán menores costos en los ámbitos emocional, temporal y económico.

En lo que a los casos de sustracción de menores se refiere, la mediación puede actuar tanto como medida preventiva y disuasoria, como para resolver un caso en el que un niño ha sido trasladado o retenido ilícitamente en un Estado diferente al de su residencia habitual.

Una vez producida la ruptura familiar, lo más usual es que los niños vivan con uno de sus progenitores, teniendo un contacto más o menos fluido con el otro. La elaboración de un buen acuerdo, que establezca un régimen de custodia y visitas favorable a todos los miembros del grupo familiar, constituye el mejor remedio contra la sustracción, ya que las partes satisfechas no buscarán alterar el status quo.

Frente a un traslado o retención ilícitos de un niño, la mediación actuará como canal idóneo para arribar a una resolución consensuada entre las partes, siempre y cuando el diálogo entre ellas sea posible y se encuentren en condiciones de flexibilizar sus posiciones y considerar el punto de vista de la otra.

Los proyectos realizados en la materia han demostrado que la resolución de los casos en los que se recurrió a la mediación fue positiva en un porcentaje elevado de casos, produciendo, asimismo, una disminución del grado de conflicto incluso en los casos en los que no fue posible arribar a un acuerdo.

Sin embargo, tal como podemos observar en los documentos en análisis y las respuestas brindadas por las Autoridades Centrales de los Estados parte al Cuestionario elaborado por la Conferencia en el año 2006, relativo al funcionamiento práctico del Convenio de La Haya de 25 de octubre de 1980 sobre los Aspectos Civiles de la Sustracción Internacional de Menores, los Estados recurren al uso de la mediación de modos diversos y de acuerdo a sus posibilidades, infraestructura, recursos humanos y económicos y capacitación de sus operadores.

De éste modo, contamos dentro del universo de Estados parte del Convenio de La Haya de 1980 con proyectos de mediación diseñados especialmente para abordar casos de restitución de menores, otros que sin estar diseñados al efecto, se especializan en asuntos de familia y entienden en casos de restitución de menores, otros informales, que buscan mediante la realización de reuniones entre las partes llegar a una resolución consensuada del conflicto y otros para los cuales el instituto de la mediación es aún muy reciente y no goza del desarrollo ni difusión necesarios como para pensar en una sistematización del procedimiento para casos tan específicos como los aquí propuestos.

No obstante, la realización de un seguimiento en la materia y la producción de informes que reflejen experiencias en mediación llevadas a cabo por los Estados, así como la realización de consultas tendientes a detectar posibles inconvenientes u obstáculos para la implementación de la mediación transfronteriza serían de suma utilidad para los Estados interesados en la utilización de la mediación como método de resolución de conflictos relativos a menores en el ámbito internacional.

La promoción de la colaboración, la adopción de disposiciones apropiadas para proporcionar información sobre legislación y servicios disponibles de protección de menores, la facilitación de las comunicaciones, la promoción de la mediación, conciliación o cualquier otro medio análogo son de vital importancia para agilizar la tramitación de los procedimientos de restitución de menores, facilitándose de este modo el cumplimiento, por parte de los Estados de los objetivos previstos en el Convenio de La Haya de 1980.

La participación de un mediador en conflictos familiares requiere experiencia en relaciones interpersonales, manejo del conflicto, y conocimiento de la ley de familia, todo lo que favorece ampliamente el trabajo interdisciplinario.

De este modo, tal como se ha señalado en los informes elaborados por la Conferencia, es conveniente que la mediación sea llevada a cabo por operadores pertenecientes a los campos legal y psico-social, con conocimientos específicos en la materia en cuestión.

En el caso de la mediación en conflictos relativos a sustracción de menores, los mediadores deben estar capacitados para afrontar conflictos internacionales; los que a las particularidades propias de todo conflicto familiar, añaden sus peculiares características (diferencias culturales, cuestiones idiomáticas, implicancia de dos sistemas jurídicos diferentes, etc.).

Por lo expuesto, consideramos de vital importancia la capacitación de mediadores especializados en el Convenio de La Haya, ya sea que se trate de personas provenientes de los ámbitos jurídicos o psico-social.

En este aspecto, sería importante la colaboración que la Conferencia pudiera brindar a los Estados, mediante el dictado de cursos y la elaboración de documentos y guías de buenas prácticas, que incluyan criterios orientadores para el diseño de programas de mediación que permitan resolver adecuadamente casos de restitución de menores.

Con un criterio coincidente al expuesto en la respuesta que ésta Dirección brindara al cuestionario sobre dificultades en el acceso al derecho extranjero, consideramos, asimismo, de vital importancia la elaboración de una base de datos que contenga derecho interno en materia de familia y menores, de modo que los mediadores y en su caso los abogados encargados de asesorar a las partes, posean acceso directo y ágil a los elementos necesarios como para la elaboración de un acuerdo susceptible de ser reconocido y ejecutado en ambos Estados.

Por todo lo expuesto, consideramos que, todo aporte que pueda realizar la Conferencia de La Haya a los fines de difundir la mediación y promover su utilización como método de resolución de los conflictos familiares internacionales, beneficiará en gran medida a las familias involucradas, viéndose reducido el grado de conflicto de los casos y permitiendo a sus miembros la conclusión de acuerdos que reflejen sus intereses y necesidades, garantizándose, asimismo, el respeto al interés superior de los niños víctimas de una situación de retención o traslado ilícitos.

BRÉSIL - BRAZIL

De l'Autorité centrale du Brésil pour la Convention de 1980 sur l'enlèvement international d'enfants - *From the Central Authority of Brazil under the 1980 Hague Child Abduction Convention*

The possibility of the development of new ideas and a code of practice or Guide to Good Practice to be applied by mediators and other personnel involved in cross border family mediation is most welcome by the Brazilian Central Authority as such an instrument could facilitate solutions in transfrontier family disputes concerning children.

Over the years, the number of child abductions cases has increased in our country and the establishment of a regime of rules concerning agreements would certainly favour the work of the Central Authority in dealing with these disputes. It could also help to promote adequate solutions that will benefit the child's best interest in the long run.

The concept of mediation is not a new subject under the Brazilian legislation. In fact, as a means to reduce the high number of cases brought before the courts, the Brazilian government established the so-called "Juizados Especiais Cíveis" or Special Civil Courts. These courts were created to promote quick and low cost solutions in small disputes related to traffic accidents; property damage; credit default; and other issues. The possibility of taking a case to these special courts is determined by the cost of the compensation involved. Any individual is able to address the court directly just by filling out an application in which he/she will provide basic information and the reasons for the requirement. Then the court will establish a date for an audience to which both parties will be summoned. A mediator will act to settle the dispute, thus avoiding the need for regular proceedings to take place.

The use of mediation is also common in Brazil in the case of disputes related to family issues but most of the agreements related to children's custody or contact should be approved by courts in order to guarantee that child's rights are enforced. Even though mediation is not a mandatory step in our legal system before court proceedings begin, most courts try to promote agreements between the parties or at least try to ensure that the parties analyse this possibility.

I should point out that child abduction cases represent a new subject in our legal system as the implementation of the Hague Convention of 1980 in Brazil only began about four years ago when the first cases of child abduction were brought before Federal Courts by the General Attorney's Office, which is the Government agency that represents the Brazilian Central Authority.

When the administrative procedures for the implementation of the Hague Convention of 1980 were set up, the Brazilian Secretariat for Human Rights, acting as Central Authority, decided that a notification should be sent to all abducting parents, once the location of the child had been confirmed by Interpol. This notification became a standard procedure in abduction cases and its main objective is to inform the abducting parent of the accusations pending against him/her in the other country; to inform about the existence of the application submitted by the other parent under the Hague or Interamerican Convention; and to provide an opportunity for an amicable solution through the mediation of the BCA before proceedings are initiated.

Hence, mediation has become one of the activities of the BCA provided that both parties involved in a child dispute are willing to reach an amicable settlement. The mediation process carried out by the BCA usually involves the participation of legal representatives of both parties, that should advise on the agreements before any commitment takes place. If an agreement becomes possible, it should be approved by a local family court in order to guarantee that the parties comply to the terms that were established. Afterwards, in order to conclude a case the court should formulate the agreement into a consent order and thus ensure enforceability.

If this out-of-court mediation undertaken by the BCA is not successful, a second attempt could be promoted by a Federal Court once proceedings begin. I should point out that mediation in Brazil is not organized by a set of regulations and as a result, court-annexed mediation takes place in accordance to the circumstances of each particular case of child abduction. It is usually the judge himself who will conduct the process and act as a mediator due to the lack of rules for the conduction of mediation attempts in Hague cases. If the judge feels that an amicable solution could be reached by both parties, he/she may adjourn proceedings for mediation to take place. In some child abduction cases brought before Federal courts judges have decided to suspend proceedings for a given period of time in order to allow parties more flexibility and neutrality to discuss their proposals.

In all child abduction cases conducted by the BCA, State Attorneys are appointed to represent the case before a court. Nonetheless, it is also possible for the left-behind parent to hire a private attorney who may act as a legal adviser or as an assistant to the State Attorney in the follow up of proceedings and in providing support whenever it is necessary.

It is considered that private attorneys might play an important role in the settlement of solutions during court proceedings as they keep direct and permanent contact with the parties and can facilitate the dialogue, thus setting down the path for an amicable solution to be reached. But the participation of die attorneys in Hague cases would be better organized if a standard set of regulations were established to guide this approach, so that solutions could be analysed and negotiated to fit the particular needs of each given case while at the same time laying the foundation for a direct dialogue between the parties to continue in the future.

A new set of regulations addressing conciliation on child abduction cases could support the work of the Central Authorities and provide for quicker settlements in family disputes involving children, as well as help relieve the workload of courts, thus reducing costs. Most importantly, it would present a new alternative for dialogue between the parties in the long run with a view to guarantee that the child's best interest is secured.

In our opinion, the lack of a fully comprehensive regime of rules or directives concerning agreements in family matters, and particularly, in child abduction cases, is certainly an issue that deserves attention and which could become the subject of future discussions by the Hague Conference of International Private Law. Such a possibility is most welcome by our Central Authority and we would be glad to participate and cooperate in any future meetings that address this important issue.

COMMUNAUTÉ EUROPÉENNE - EUROPEAN COMMUNITY

Du Conseil de l'Union Européenne – *From the Council of the European Union*

In April 2006 the Special Commission on General Affairs and Policy of The Hague Conference on Private International Law 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 European Community and its Member States thank the Permanent Bureau for the thorough feasibility study issued in March 2007 and welcome the opportunity to comment on possible future directions of work in this field.

The European Community and its Member States agree that work in the field of cross-border mediation in family law matters should be continued.

The European Community and its Member States welcome the idea that the Permanent Bureau should follow developments in this field. As a starting point it would be useful to get an overview of the current situation in the Member States of the Hague Conference. Such a report would enable information on mediation and practical experiences to be circulated and discussed among the Member States of the Hague Conference.

The European Community and its Member States are of the opinion that work could be launched on a good practice guide which could be of benefit to the parties and the mediators in different countries. It could cover aspects such as the definition of mediation, methods of mediation, flow of information, qualifications of mediators and confidentiality. The guide could also pay particular attention to mediation in the context of the relevant Hague Conventions (concerning child abduction, the protection of children and adults, child support and maintenance). On the basis of the experience gained in preparing the guide it could be useful to re-examine whether working on an instrument in this field would be a feasible option.

JAPON - JAPAN

Du Gouvernement japonais - *From the Government of Japan*

Comments of the Government of Japan on possible future work for the Conference in the field of cross-border mediation in family matters

The Government of Japan would like to express its deepest appreciation for and sincere compliment to the remarkable results achieved by all of the Permanent Bureau of the Hague Conference on Private International Law.

At the request of the Permanent Bureau in its letter cited L.c. ON No 29(07), the Government of Japan is very honoured to submit our comments on possible future work for the Conference in the field of cross-border mediation in family matters as follows:

1. Comment on paragraph 5.11, subparagraph 3 of the "Feasibility Study on Cross-Border Mediation in Family Matters"

The Government of Japan does not believe it to be appropriate to regulate a broad range of procedural matters of cross-border mediation such as costs and fees, legal aid, legal representatives, the question of attendance at a mediation meeting, the opening of procedure to the public, the access to case records, and the recognizability and enforceability of mediated settlements.

Under the current situations, the procedures of mediation of each country differ very widely from each other. Such variances come from reasonable causes such as differences in the subject matter of mediation and in specific circumstances of each individual country. Therefore, it is not appropriate to regulate procedural matters (especially the opening of procedure to the public and the access to case records) through a convention because such a convention does not necessarily give sufficient consideration to these differences. In addition, because of such variances in mediation procedures, it is also inappropriate to govern the recognizability and enforceability of mediated settlements through a convention.

With respect to administrative cooperation, it is not appropriate to regulate procedural matters such as legal aid, exemption from costs and the rule of application because of the above-stated differences. In particular, matters relating to legal aid and exemption from costs are dependent on the internal situation of each country including the financial state of its government. Therefore, each country should have its own laws which are consistent with the actual circumstances of that country, and it is not appropriate to obligate the countries through a convention to provide administrative cooperation relating to a broad range of procedural matters of cross-border mediation.

2. Comment on paragraph 5.11, subparagraph 4

Qualification for accreditation of mediators or organizations providing mediation should be determined in accordance with specific circumstances of each country, and therefore such qualification should be judged based upon domestic regulations.

LITUANIE - LITHUANIA

Du Ministère de la justice de Lituanie– *From the Ministry of Justice of Lithuania*

Cross-border mediation in family matters

The Ministry of Justice of the Republic of Lithuania presents its compliments to the Permanent Bureau of the Hague Conference on Private International Law and welcomes the research work of the Conference in the field of cross-border mediation in family matters.

The Ministry of Justice of the Republic of Lithuania got acquainted with two recent studies on cross-border mediation in family matters: "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" and "Feasibility Study on Cross-Border mediation in Family Matters" and found these studies very useful for future developments in cross-border mediation in family matters. The Ministry of Justice of the Republic of Lithuania would welcome all future initiatives in the mediation of cross-border disputes concerning contact and abduction as well as further consultations. The development of an instrument which could improve the flow of information and provide for closer co-operation between States in facilitating the use of mediation and in giving effect to mediated agreements would also be desirable. The Ministry of Justice of the Republic of Lithuania would also welcome the development of a guide to good practice concerning mediation in the context of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

The Ministry of Justice of the Republic of Lithuania is ready for further co-operation in the future work of the Conference in the field of cross-border mediation in family matters.

MALAISIE - MALAYSIA

De l'Attorney General's Chamber de la Malaisie - *From the Attorney General's Chamber of Malaysia*

Comments on cross-border mediation in family matters

1. Background

1.1 *The Permanent Bureau of the Hague Conference Private International Law (HCPIL) (hereinafter referred to as "the Permanent Bureau") has produced two studies on Cross-Border Mediation In Family Matters (CBMFM) recently which are—*

- (i) *"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", Preliminary Document No. 5 of October 2006; and*

(ii) "*Feasibility Study on Cross-Border Mediation In Family Matters*", Preliminary Document No 20 of March 2007,

(hereinafter referred to as "the Documents").

1.2 The Attorney General's Chambers of Malaysia (AGC) takes note that discussion on CBMFM will be held at the next meeting of the Council on General Affairs and Policy of the Conference which is to take place in the spring of 2008. In view of this meeting, the Permanent Bureau invites some suggestions or comments from the States Parties including Malaysia.

2. Introduction

2.1 The objectives of the proposed CBMFM, among others, are to relieve the workload of courts and tribunals, to avoid the stress of contentious litigation in two countries, to avoid the uplifting of the children from the requesting State to the home State and followed by custody proceedings which will in any way damage the well being of the child, and to be regarded as the best way to settle disputes where the parties intend to have an ongoing relationship. These objectives are in line with the Syariah principles and thus, this proposal is highly recommended.

2.2 However, it is foreseeable that the implementation of CBMFM would face some difficulties due to different languages, cultures, religions, and geographical factors among the States Parties. Besides that, differences in legal system among the States Parties also can affect the implementation of the mediation process.

2.3 Malaysia practises a dual legal system consisting of the civil law and the Syariah law with regard to personal and family matters. However in this paper, the AGC will only comment on some important points in respect of the mediation process under the Syariah law.

2.4 Mediation is encouraged by Islam and it is always considered as the best solution to resolve disputes among the Muslims, especially in family matters. In Surah An-Nisa' (4:128), Allah S.W.T. says—

"If a woman fears ill treatment from her husband, or desertion, it is no sin for them twain if they make terms of peace (Sulh) between themselves. Peace (Sulh) is better"...

2.5 The Prophet Muhammad (peace be upon him) also recommended sulh as one way to settle disputes among the Muslims where in one hadith the Prophet says—

"Peace (Sulh) is recommended among the Muslim (in all matters) except prohibiting something which is lawful and permitting something which is prohibited" (Reported by At-Tirmidzi).

2.6 Therefore, the AGC notes that the implementation of the proposed CBMFM is to allow, to the extent possible, consistency with the Syariah principles (Sulh) that govern the mediation process. This in turn will facilitate the Muslim countries' acceptance and participation of the proposed CBMFM.

3. The practice of mediation in Muslim family matters in Malaysia

- 3.1 *Mediation process or sulh is recognized by the Syariah courts in Malaysia. It is applied in Muslim family matters and it can take in few forms. Generally, the process of sulh can be conducted by the sulh officers who are the court officers, the Syarie counsels and the officers of the Legal Aid Bureau.*
- 3.2 *The provisions on sulh can be found in the Syariah Court Civil Procedure Act/Enactments and the Federal Territories/States Syariah Court Civil Procedure (Sulh) Rules 2004. For instance, section 99 of the Syariah Court Civil Procedure (Federal Territories) Act 1998 provides that–*
- "99. The parties to any proceedings may, at any stage of the proceeding, hold 'Sulh' to settle their dispute in accordance with such rules as may be prescribed or, in the absence of such rules, in accordance with Islamic Law".*
- 3.3 *In general, sulh which can be conducted by the sulh officers (also known as Majlis Sulh (Sulh Council)) involve disputes relating to family matters such as maintenance, custody, and consolatory gift (muta'ah) to a woman who is divorced without just cause. It is not applicable to matters relating to divorce.*
- 3.4 *In the case of divorce, the mediation process is governed by subsection 47(5) of the Islamic Family Law Enactment (Selangor) 2003 where it provides that where one of the parties in an application for divorce does not consent to the divorce or it appears to the court that there is reasonable possibility of a reconciliation between the parties, the court shall appoint a conciliatory committee who will act as mediator for the parties.*
- 3.5 *Besides the conciliatory committee, the Syarie counsel and the officers of the Legal Aid Bureau may also conduct mediation in cases of unofficial divorce. If the parties agreed to settle their disputes amicably through this reconciliation process, the Syarie counsel and the officers of the Legal Aid Bureau will record the terms of the agreement accordingly and produce it before the court for endorsement. Once endorsed, it becomes a court order. Sulh is proved to be effective, in terms of time and costs.*

4. Structure and process of mediation

- 4.1 *According to the Documents, the structure of mediation in different jurisdictions can be categorised under two main headings, namely court-annexed mediation and out-of-court mediation. The latter can be further sub-categorised into mediation provided by State run or State approved bodies and mediation provided by individuals or organisations without State control. They have their own structure and mode of operation. These mediation structures can be compared with the current mediation practice in Malaysian Syariah courts which are as follows:*

(i) *Majlis Sulh (Court-annexed mediation)*

The normal procedure in Majlis Sulh is, after the party filed his application in the Syariah court, the mediation process will begin 21 days after the case has been registered. The settlement period given to the disputed parties is three (3) months. Normally, during this stage, the following situations will take place:

- (a) *if the parties do not wholly agree to the 'Sulh' settlement, the dispute will be brought for trial;*
 - (b) *if the parties partly agree to the 'Sulh' settlement, the part which is being disputed will be brought for trial;*
 - (c) *if the settlement is agreed upon wholly by both parties, the agreement of the settlement shall be endorsed as a court order.*
- (ii) Mediation process by the Syarie counsel and the officers of the Legal Aid Bureau (Out-of-court mediation)

Basically, an out-of-court mediation is conducted by the officers of the Legal Aid Bureau or the Syarie counsel. For the former, it is subject to the provisions of the Legal Aid Act 1971, whereas for the latter it is made without the Syariah court's intervention. The out-of-court mediation is made voluntarily and the parties are free to withdraw from the mediation process at any stage. However, in the court-annexed mediation, the parties are bound to go for mediation once ordered by the court.

5. Cost associated with mediation

- 5.1 *The Documents recommended that before the mediation proper begins, parties must be informed about the fees and costs associated with the mediation. The costs include travel to and from the mediation venue, accommodation, subsistence, mediator's fee, interpreter's fee and other costs.*
- 5.2 *According to the Documents, in general the costs of mediation are borne by the parties and may be divided equally or into different proportions as decided by a court or by the individuals. However, in some countries, mediation is publicly funded and where mediation is annexed to court proceedings it may be funded through legal aid if the party is eligible.*
- 5.3 *With regard to the mediator's fee, the Documents acknowledged that mediators are often required by law or code of conduct to which they have adhered, to charge reasonable fees taking into account the type and complexity of the subject matter, the expected time the mediation will take and the relative expertise of the mediator. In most code of conduct, it is stressed that the fees charged by a mediator should not be contingent on the outcome of the mediation.*
- 5.4 *In comparison, in Syariah family disputes in Malaysia, no mediator's fee is incurred if the mediation is conducted by the sulh officers or the officers of the Legal Aid Bureau. The parties are only required to pay a very nominal sum for the registration fee. However, in a private mediation conducted by the Syarie counsel, certain fees may be imposed upon the parties.*
- 5.5 *The AGC is of the view that a means and merits test can be considered in deciding whether to provide legal aids to the parents. Therefore, a commonly acceptable criterion and standard should be crafted in order to ascertain whether the parents are eligible to be fully funded, half funded, or not eligible to be funded at all.*

6. Training, qualification and registration of mediators

- 6.1 *The Documents also emphasized on the importance of training, qualification and registration of mediators. It is recommended that the mediators should be trained and qualified persons and be registered with professional mediation organisations.*
- 6.2 *In Malaysia, sulh officers are appointed among the Syariah court officers who are public officers. They must possess a degree in Syariah law and diploma in Administration of Islamic Judiciary and well-versed in Hukum Syarak. Constant trainings are given to the mediators in order to improve and expand their mediation skills. For instance, recently the mediators had participated in a mediation professional course organized by the Syariah Judicial Department of Malaysia in collaboration with the Accord Groups International Australia. Besides Malaysia, this course is also recognized by the United Kingdom, Australia and New Zealand.*

7. Other issues

- 7.1 *The Documents also discussed about the viability of a child's presence in a mediation process. It is recommended that a child who has attained certain age and maturity, and with the agreement of his parents, should be given the right to be heard before the mediator. This is because his involvement might be beneficial to the mediation process. Therefore, in this circumstance, special skills to interact with a child are needed.*
- 7.2 *The AGC is of the view that only a child who has attained maturity age according to Hukum Syarak should be given the right to be heard and attending the mediation process. This is because at this age, the child are matured enough to think and determine what is good for his future. For a child who has not attained the age of maturity, the discretion should be given to the mediator whether to allow him to attend the mediation process.*
- 7.3 *The Documents also recommended that indirect mediation can be exercised when either party is unable to attend the mediation process due to certain reasons. In this circumstance, the mediation process can take place in the form of video conferencing or with the attendance of a representative duly appointed by the Central Authority.*
- 7.4 *The AGC is of the view that as far as possible, the CBMFM should be conducted directly with the presence of both parties. However, if their presences are not possible, then indirect mediation can be allowed. Recently, a proposal has been made by the Syariah Judicial Department of Malaysia for the use of video conferencing in Syariah court proceedings, including the mediation process.*
- 7.5 *The Documents also discussed on whether the mediation process should be initiated by the Requesting State or both States, and whether both parties should have their own mediator.*
- 7.6 *The AGC is of the view that the mediation process can be initiated by either States. However, the laws applicable to both States must be strictly adhered to in the mediation process and justice must always be exercised. With regard to the appointment of a mediator, in order to maintain impartiality, it is proposed that the mediator should be appointed from a third party State and one mediator would suffice.*

8. Conclusion

8.1 *With regard to the possible directions set out in the "Feasibility Study on Cross-Border Mediation in Family Matters" at paragraph 5.11, the AGC is of the view that they can be given due consideration. Similarly, for the proposal for the Permanent Bureau to develop a guide to good practice concerning mediation in the context of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, the AGC is of the view that the proposal can be considered in order to standardize the practices of States.*

NORVÈGE - NORWAY

Du Ministère de la justice et de la police de Norvège – *From the Ministry of Justice and the Police of Norway*

Norway has no particular views regarding cross-border mediation in general.

However, in relation to child abduction cases, it seems important that the mediation instrument is sufficiently flexible and does not contribute to an unnecessary prolongation of these cases. Furthermore, it should be taken into consideration that due to resource matters it might be difficult to carry out mediation. In some cases, it might neither be appropriate nor practical to make use of mediation.

ROUMANIE – ROMANIA

Du Ministère de la justice de Roumanie – *From the Ministry of Justice of Romania*

Romania has adopted the Law No 192/2006 on mediation and organisation of the profession of mediator, which entered in force on 25 May 2006.

Law No 192/2006 includes in Chapter VI, Section 1, Special provisions regarding family conflict, Articles 64-66, according to which disagreements among spouses referring to the continuations of marriage, exertion of parental rights, establishment of the children's residence, parents' contribution to the maintenance support of the children, as well as any other disagreements occurring among spouses with regard to rights they may benefit of according to the law may be solved by mediation.

The spouses' agreement with regard to the dissolution of marriage and resolution of aspects accessory to divorce shall be forwarded by the parties to the court competent to pronounce the divorce. The Mediator shall take care for the result of the mediation not to be against the best interest of the child, shall encourage the parents to focus with priority upon the needs of the child, and for the undertaking of parental responsibility, the de facto separation or the divorce not to impede upon the growth and development of the child. Before the conclusion of the mediation contract or, if may be the case, during the procedure, the mediation shall make any effort to verify if the parties have a relation of an abusive or violent nature, and if the effects of such situations may influence the mediation and shall decide if, in such circumstances, resolution by mediation may be appropriate. If, during mediation, the mediator becomes aware of facts which may endanger the normal growth and development of the child or brings severe prejudices to the child's best interest, he or she is compelled to notify the competent authority.

We are mentioning that even though the Mediation Council has already drafted the Regulation on its organisation and operation, the procedure for the certification of mediators in Romania is still pending.

Finally, we are bringing to you knowledge that Romania has adopted the **Law No 369/2004 regarding the application of the Hague Convention on the Civil Aspects of International Child Abduction, signed at the Hague on 25 October 1980, to which Romania is part of according to Law No 100/1992**. Law No 369/2004 has entered in force on 29.12.2004. According to Article 21, in fulfilling its obligations, the Romanian Central Authority may, if may be the case, try to solve the conflict amiably or may propose the parties to request mediation.

SUISSE - SWITZERLAND

Du département fédéral de justice et police de Suisse – *From the Federal Department of Justice and Police of Switzerland*

La Suisse tient à saluer les efforts déployés par la Conférence de droit international privé dans le domaine de la médiation familiale transfrontière, qui tentent de répondre à un besoin croissant dans les relations internationales.

Nous tenons toutefois à souligner que le domaine dans lequel les besoins en matière de médiation familiale internationale se font sentir de la manière la plus urgente est celui des enlèvements internationaux d'enfants. Le projet de protocole additionnel à la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants proposé par la Suisse (Doc. L.c. ON No 35(07)) vise notamment à combler le manque de cadre légal en la matière. Il nous semblerait donc logique que le projet d'un tel protocole devrait figurer parmi les priorités les plus urgentes dans l'agenda de la Conférence de La Haye de droit international privé.

Concernant les orientations possibles mentionnées dans le document de travail du 8 octobre 2007, la délégation suisse est d'avis qu'au moment actuel manquent encore des éléments pertinents pour décider de l'opportunité de l'élaboration d'un projet approfondi de la Conférence de La Haye sur la médiation familiale internationale. Depuis la dernière réunion du Conseil sur les affaires générales et politiques aucune information du Bureau permanent ni sur la forme, ni sur le contenu d'un tel projet n'ont été enregistrées. Si une autre forme qu'un accord international était envisagée, cela signifierait un changement fondamental dans la politique législative de la Conférence de La Haye, qui devrait encore être discuté en détail.

TURQUIE - TURKEY

Du Ministère de la justice de Turquie – *From the Ministry of Justice of Turkey*

Turkish Ministry of Justice reviewed the "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" and the "Feasibility Study on Cross-Border Mediation in Family Matters" and would like to share the following observations with the Secretariat:

- *In Turkey, the efforts on adopting a code concerning the "Mediation on Civil Law Disputes" are ongoing in order to accelerate the cases and to resolve them with minimum cost and maximum effectiveness. However, in Article 1 of the draft Code, it is foreseen that mediation would only be possible in the transactions which the parties regulates freely and not in the matters related with public order.*

- *Furthermore, preparation of a "good practice" on mediation in the concept of the Hague Convention of 25 October 1980 by the Secretariat in order to provide the cooperation between State Parties and the flow of information would be useful to all State Parties. Therefore, the Ministry of Justice would like to draw the attention of the Secretariat to the necessity and the benefits of preparing such a "good practice".*

2. OBSERVATIONS D'ORGANISATIONS NON-GOUVERNEMENTALES – COMMENTS OF NON-GOVERNMENTAL ORGANISATIONS

ASSOCIATION INTERNATIONALE FRANCOPHONE DES INTERVENANTS AUPRÈS DES FAMILLES SÉPARÉES (AIFI)

Recommandations spécifiques de l'AIFI pour favoriser le recours à la médiation familiale, prévenir les enlèvements d'enfants, permettre une coopération plus étroite entre les États et donner effet aux accords conclus par voie de médiation familiale

Que dans tout conflit relatif au partage des responsabilités parentales (garde ou hébergement, accès au parent non gardien ou relations personnelles, pension alimentaire), soumis à l'autorité centrale, impliquant un enfant de parents séparés résidant dans deux pays différents ou provinces différentes, le recours à la médiation familiale internationale ou à distance soit favorisé, de préférence, avant le dépôt de toute procédure judiciaire et qu'à cet effet, une session d'information ait lieu.

Que si l'un ou les parents ne dispose (nt) pas de moyens financiers pour assumer le coût de cette séance d'information sur la médiation familiale, que ce coût soit assumé par l'État ou partagé entre les États impliqués.

Que lorsque l'enfant est gardé illicitement par un parent, que la question de son retour soit d'abord soumise à la médiation familiale internationale ou à distance, dans les plus brefs délais, et que si les deux parents y consentent, la médiation familiale internationale soit entreprise pour une durée spécifique, durée renouvelable du consentement des deux parents.

Qu'une campagne de publicité dissuasive soit entreprise par les divers États signataires de la Convention de La Haye sur les aspects civils de l'enlèvement international afin de sensibiliser la population aux effets dévastateurs chez l'enfant de l'enlèvement.

Que l'AIFI, sous l'égide de la Conférence de La Haye, entreprenne des démarches en collaboration avec toutes les Associations nationales de médiation familiale pour promouvoir l'utilisation du guide de bonnes pratiques adopté par l'AIFI auquel devraient adhérer tous les médiateurs familiaux à distance et internationaux.

Que chaque pays signataire de la Convention de La Haye développe un cadre légal pour la médiation familiale et désigne des magistrats et des policiers spécialisés dans les procédures applicables, sensibilisés à la médiation familiale à distance et internationale.

Guide de bonnes pratiques en médiation familiale à distance et internationale

Présenté au Bureau permanent de la Conférence de La Haye de droit international privé - 25 janvier 2008

Par L'Association internationale des intervenants auprès des familles séparées (A.I.F.I.)

Avec nos remerciements aux professionnels suivants et à l'Association Père, Mère, Enfant (APME) qui ont enrichi la réflexion des membres du conseil d'administration de l'AIFI sur ce guide de bonnes pratiques

- o Jocelyne Dahan, médiatrice familiale, Responsable pédagogique de l'Unité Médiation de l'Institut Kurt Bosch, Sion, Suisse et Directrice du Centre de recherche et de médiation (CERME), Toulouse, France
- o Oscar d'Amours, juge retraité et suppléant, Cour du Québec (Chambre de la Jeunesse), Québec, Canada et Vice Président de l'Association Internationale des Magistrats de la Jeunesse et de la Famille
- o Nadia DE VROEDE, Substitut du procureur général à Bruxelles, Belgique

- o Lorraine Fillion, médiatrice familiale et formatrice à la Médiation Familiale et à l'Approche Médiation, chef du Service d'expertise et médiation, Centre Jeunesse de Montréal, Cour Supérieure du Québec à Montréal, Québec, Canada
- o Pierre Grand, médiateur familial, Boutique de droit, Amely, et formateur, Lyon, France
- o Monique Stroobants, médiatrice familiale, formatrice à la médiation et à la médiation familiale, Vice-présidente de la Commission Fédérale de Médiation, Belgique
- o Agnès Van Kote, médiatrice familiale et Directrice de l'APME et les médiateurs de l'APME (Association Père, mère, enfant de Versailles), France

Préambule *

A l'invitation du Bureau Permanent de la Conférence de droit international privé en octobre 2007, l'AIFI en tant qu'OING, a été sollicitée pour fournir ses observations et ses recommandations quant aux futures voies que pourraient emprunter les travaux de la Conférence dans le domaine de la médiation familiale transfrontière, entre autre quant à l'élaboration d'un guide de bonnes pratiques.

L'AIFI a pris contact avec diverses Associations de médiation familiale des pays suivants (Belgique, Canada, France, Liban, Luxembourg, Monaco, Pologne, Suisse) afin de consulter les médiateurs quant à leur pratique, leurs besoins et recueillir leurs recommandations. Des personnes ressource tant au niveau juridique que psychosocial ont été consultées et ont contribué de façon marquante à la réflexion des administrateurs de l'AIFI.

Ce guide de bonnes pratiques dans le domaine de la Médiation Familiale à Distance et Internationale a été approuvé par le Conseil d'administration de l'AIFI. Il a été établi afin de garantir l'éthique et les conditions professionnelles nécessaires à l'exercice de la médiation familiale à distance et internationale.

Ce présent guide constitue un ensemble de règles définissant le cadre, le déroulement et le fonctionnement de la Médiation Familiale à Distance et Internationale. Il offre également des garanties de probité et d'intégrité tant vis-à-vis des familles que des Institutions, des pouvoirs publics des divers pays où se pratique ce type de médiation.

*** N.B. Dans ce texte, afin de simplifier la lecture, le genre masculin est utilisé pour représenter le genre féminin et masculin.**

1. Introduction

Objectifs d'un guide de bonnes pratiques

En vue d'assurer le développement optimal de la médiation familiale à distance et internationale, l'application de hauts standards de pratique ainsi qu'une harmonisation dans la qualité de la pratique de la médiation familiale à distance et internationale, il apparaît opportun d'établir certaines normes de pratique communes à tous les médiateurs.

Dans les pays où s'exerce la médiation familiale, et selon les lois et règlements en vigueur, balisant la pratique des médiateurs.

Vu la diversité des procédures et des règles d'accréditation ou d'agrément des médiateurs, vu qu'il n'existe encore aucun guide de déontologie du médiateur familial à distance et internationale, il semble donc opportun de fournir à chaque médiateur, des règles écrites donnant des indications sur la pratique de la médiation familiale à distance et internationale, tant du point de vue du processus que de ses résultats, permettant à tout médiateur d'effectuer son travail de façon consciencieuse, diligente et efficace.

2. La nature et la portée du guide de bonnes pratiques

2.1 Statut du guide de bonnes pratiques

Cet encadrement complète la législation professionnelle régissant chaque praticien et praticienne de la médiation familiale du pays ou de la province où celui-ci exerce la médiation familiale. Il va de soi que les dispositions et lois particulières des professions ayant accès à ce champ de pratique des divers pays ou s'il s'agit d'une profession (diplôme d'état) comme cela est le cas en France, les codes de déontologie de ces professionnels priment sur le *Guide de bonnes pratiques en médiation familiale* à distance et internationale.

Dans leur pratique quotidienne et ce, quel que soit leur lieu de pratique, les professionnels doivent respecter un certain nombre de dispositions légales. Le législateur ne peut cependant prévoir le détail de toutes les situations. Aussi, l'existence de documents complémentaires, sans avoir force de loi ou de règlement, orientent néanmoins l'exercice professionnel. C'est le cas d'un guide de bonnes pratiques en médiation familiale à distance et internationale, qui constitue une forme d'autoréglementation spécifique à ce secteur de pratique.

Comme la médiation familiale à distance et internationale est un réel laboratoire, l'adoption d'un guide de bonnes pratiques est plus simple et plus rapide que celle d'une loi ou d'un règlement. Il est toujours possible de s'ajuster rapidement à l'évolution de l'exercice professionnel de cette fonction en constante évolution.

La rédaction d'un guide de bonnes pratiques nous est apparue la formule la plus appropriée pour en arriver ensuite à l'adoption de normes communes pour une pratique multidisciplinaire nationale et internationale telle que la médiation familiale à distance et internationale. De plus ce guide de bonnes pratiques pourra servir à préciser et compléter la législation professionnelle pour fins de formation, d'inspection professionnelle et de discipline dans le contexte particulier de la médiation familiale à distance et internationale.

2.2 Champ d'application

Ce guide de bonnes pratiques régit les relations entre les médiateurs familiaux les co-médiateurs, les superviseurs, leurs clients, les officiers de justice, les représentants de l'Autorité centrale désignée dans le cadre de la Convention de La Haye des divers pays ainsi que les autres intervenants sociaux et judiciaires.

2.3 Distribution et disponibilité du guide

Le médiateur familial doit informer ses clients de l'existence de ce guide de bonnes pratiques en médiation familiale à distance et internationale.

Une copie du présent *Guide* doit être à la disposition de la clientèle dans le lieu de pratique du médiateur familial. Sur demande d'un client, le médiateur familial doit remettre une copie du Guide. De plus, le guide pourrait être porté à la connaissance des Autorités centrales et judiciaires.

Article 1 : définition et objectifs de la médiation familiale internationale

L'expression médiation familiale transfrontière est souvent remplacée par médiation familiale internationale et nous avons retenu cette expression pour les fins du guide.

Nous proposons cette définition de la médiation familiale internationale : La médiation familiale est un processus par lequel un tiers impartial et qualifié, dûment accrédité, accompagne des couples séparés ou en voie de séparation, résidant dans deux pays

différents, à établir ou rétablir une communication et à trouver ensemble des accords tenant compte des besoins de chacun et particulièrement des enfants dans un esprit de coopération parentale ».

La médiation familiale aborde les enjeux de la désunion, principalement relationnels, économiques, patrimoniaux. Ce processus peut être accessible à l'ensemble des membres de la famille, concernés par une rupture de communication dont l'origine est liée à une séparation. Le but de la médiation familiale internationale est de permettre aux parties d'en arriver à une entente équitable faisant l'objet d'un consentement libre et éclairé.

Article 2 : déroulement de la médiation familiale internationale

Elle implique que les deux parents résident ou ont l'intention de résider dans deux pays différents au moment où la médiation a lieu; elle peut impliquer un ou deux médiateurs; les séances de médiation se font par les moyens électroniques ou autres, et plus exceptionnellement peuvent comporter des sessions face à face, conjointes ou individuelles.

Elle peut se dérouler sur quelques jours, semaines voire même une période de quelques à plusieurs mois, selon les besoins. Toutefois, s'il y a urgence, la médiation familiale internationale peut se dérouler dans un laps de temps très court (par La médiation familiale à distance est un processus par lequel un tiers impartial et qualifié, dûment accrédité, accompagne des couples séparés ou en voie de séparation, vivant dans le même pays, état ou province, mais à une certaine distance, à établir ou rétablir une communication et à trouver ensemble des accords tenant compte des besoins de chacun et particulièrement de ceux des enfants, dans un esprit de coopération parentale.

Article 3 : définition et objectifs de la médiation familiale à distance

La médiation familiale à distance aborde les enjeux de la désunion, principalement relationnels, économiques, patrimoniaux. Ce processus peut être accessible à l'ensemble des membres de la famille, concernés par une rupture de communication dont l'origine est liée à une séparation. Le but de la médiation familiale à distance est de permettre aux parties d'en arriver à une entente équitable faisant l'objet d'un consentement libre et éclairé.

Article 4 : déroulement de la médiation familiale à distance

La médiation à distance implique que la distance entre le lieu de résidence des deux parents est si grande que des séances conjointes face à face sur une base régulière sont impossibles; les deux parents résident dans le même pays ou la même province; les séances de médiation se font par les moyens électroniques et plus exceptionnellement peuvent comporter des sessions face à face ou autre moyens de communication. Elle peut se dérouler sur quelques jours, semaines voire même une période de quelques à plusieurs mois, selon les urgences et les besoins.

Article 5 : compétence, accréditation et désignation des médiateurs familiaux à distance et internationaux

La fonction de médiateur familial à distance et international oblige à la fois :

- 5.1 à disposer d'une compétence et de connaissances relatives au processus de médiation familiale. A cette fin, il doit notamment avoir reçu une formation spécialisée en médiation familiale dans son pays ou sa province et mettre à jour de façon continue sa formation théorique et pratique, en fonction des normes applicables dans son pays ou sa province.

- 5.2 à suivre une formation complémentaire spécifique de 60 heures sur les aspects suivants : les diverses conventions applicables, les aspects juridiques (connaissance de base en droit international), les enjeux interculturels, les enjeux éthiques en médiation et co-médiation, la place de l'enfant : comment prévenir un déplacement illicite et comment soutenir un enfant victime d'un tel déplacement, évaluation des risques pour l'enfant, des connaissances sur les divers moyens de communication (internet, webcam, visioconférence) les stratégiques spécifiques à la médiation au téléphone.
- 5.3 à être accrédité dans son pays ou sa province pour exercer la médiation familiale.
- 5.4 à être un médiateur familial en exercice depuis plus de trois années, titulaire de la validation d'une qualification en regard des critères ou textes de son pays ou sa province.
- 5.5 à accepter sa désignation après avoir obtenu le consentement des parties et s'être assuré qu'il a la compétence requise pour exercer le mandat qu'on lui confie.

Article 6 : principes déontologiques

6.1 Garantie du consentement

Le médiateur familial désigné entreprend une médiation familiale à distance ou internationale après avoir assuré aux parties le caractère indépendant de sa fonction et après s'être assuré de l'accord des deux parties sur sa désignation. S'il s'agit d'une co-médiation, les mêmes précautions s'appliquent aux deux médiateurs qui peuvent résider dans deux pays différents. Si l'une des parties ou les deux parties réfutent ledit médiateur, un autre médiateur doit être désigné.

Pour ce faire le médiateur familial doit :

- donner une information claire et complète sur les principes déontologiques et les modalités de la médiation familiale à distance ou internationale,
- s'assurer que les informations données et reçues, ont été bien comprises,
- informer les personnes de la possibilité qu'elles ont de consulter à tout moment, tout professionnel ou service de leur choix pour connaître leurs droits et obtenir des informations complémentaires,
- expliquer les avantages et les exigences de la médiation en solo et la co-médiation avec un autre médiateur,
- faire l'inventaire des procédés techniques pouvant être utilisés en médiation familiale internationale (conférence téléphonique, visioconférence, recours à la webcam ...) et selon le choix du moyen, en garantir la confidentialité,
- discuter avec les parties du choix de la langue utilisée ou de la possibilité d'introduire un interprète pendant la durée de la médiation,
- fournir aux parties dès le premier entretien, une information complète sur le mode de rémunération qui sera appliqué pour un ou deux médiateurs, et inclure ces précisions au consentement à la médiation familiale à distance ou internationale lequel devra être signé lors du premier entretien ; ce document devra également faire état des autres frais spécifiques tels que les frais des conférences téléphoniques, les visioconférences et tout autre moyen de communication par exemple le transport.

Article 7 : la confidentialité de la médiation familiale à distance et internationale

Dans la plupart des pays, le médiateur familial est tenu à la confidentialité en vertu d'une Réglementation spécifique à ce sujet.

7.1 Le principe

Le médiateur ne révélera, ni communiquera, ni ne transmettra, aucun renseignement obtenu durant la médiation à qui que ce soit n'étant pas partie à la médiation, sans le consentement écrit de toutes les parties.

Le médiateur doit préserver la confidentialité des dossiers de ses clients et s'assurer que son personnel en fait de même lors de la gestion ou de la destruction des dossiers.

Une autorisation écrite des parties est requise pour tout enregistrement des séances de médiation ou des conversations avec l'une ou l'autre des parties, sur support mécanique ou autrement, de même que pour l'utilisation spécifique qui en sera faite.

Les renseignements fournis à des fins de discussion de cas, de recherche, d'éducation ou de supervision ne doivent pas permettre l'identification des parties et ne peuvent être fournis que conformément aux dispositions des lois sur la protection des renseignements personnels dans le secteur public ou dans le secteur privé, selon le cas, du pays ou de la province concernée.

Le médiateur, dans son rôle de superviseur, est soumis aux mêmes règles de confidentialité que le médiateur agissant auprès des parties.

7.2 Les exceptions

Selon les lois et règlements en vigueur dans son pays ou sa province, des exceptions sont probablement prévues. Le médiateur se doit de respecter ces règles. En dépit de son devoir de préserver la confidentialité, le médiateur révélera certains renseignements obtenus durant la médiation lorsque la loi l'ordonne expressément (Loi sur la protection de la jeunesse, Loi d'enquête des coroners, autres lois....) ou lorsque les renseignements font état d'un danger réel ou potentiel menaçant des vies humaines ou la sécurité.

Tout renseignement divulgué conformément à la présente section 7.2 sera, dans chaque cas, limité au strict nécessaire selon des critères de pertinence et d'intérêt légitime.

Article 8 : l'impartialité

8.1 L'obligation du médiateur à l'impartialité

8.2 Le médiateur familial doit faire preuve d'impartialité et s'assurer à toutes les étapes de la médiation qu'il conserve la confiance des parties. L'impartialité signifie que le médiateur familial doit être libre de tout favoritisme, préjugé ou conflit d'intérêts à l'égard de l'une ou l'autre des parties, tant dans ses propos, ses attitudes que dans ses actes.

Le médiateur familial doit être conscient que des relations professionnelles antérieures ou postérieures à la médiation risquent de compromettre son habileté à agir en tant que médiateur impartial. Ainsi pour éviter tout conflit d'intérêt possible pouvant affecter son devoir d'impartialité, le médiateur familial ne peut exercer auprès des mêmes parties, aucun autre rôle que celui de médiateur familial à distance ou international, pendant et après la médiation.

Le médiateur familial s'abstiendra de participer à toute activité susceptible de créer un conflit d'intérêt. Il n'établira avec ses clients aucun lien risquant de porter atteinte à son jugement professionnel ou dont il pourrait tirer, d'une quelconque façon, un profit, au détriment de l'un ou l'autre de ses clients. Entre autres, le

médiateur familial ne prendra pas en charge les cas impliquant ses amis proches, les membres de sa famille, des personnes faisant partie de son milieu de travail immédiat.

Le fait que l'une des parties ou les deux parties croient que le médiateur familial est partial n'oblige pas ce dernier à retirer ses services; cependant, il devrait, dans ces circonstances, rappeler aux deux parties leur droit de mettre fin à la médiation.

8.3 Les exceptions

En dépit de son devoir d'impartialité, le médiateur familial doit signaler aux parties tout aspect de l'entente qui peut être préjudiciable à l'une ou à l'autre des parties ou à l'intérêt des enfants, les mettre en garde et les inviter à explorer d'autres options. De plus, il doit fournir de l'information et de la documentation, recommander de recourir à un expert en la matière et mettre un terme à la médiation s'il estime qu'il est contre-indiqué de la poursuivre.

Article 9 : relations entre les parties

9.1 Co-médiateurs

Les co-médiateurs sont soumis, individuellement, aux mêmes normes. Les co-médiateurs doivent informer adéquatement les parties quant aux modalités de pratique de leur co-médiation, notamment s'ils fonctionnent exclusivement en co-médiation.

Lorsque plus d'un médiateur familial participent à la médiation d'un cas particulier, chacun doit informer les autres des développements essentiels à la bonne marche du dossier. Toute mésentente entre co-médiateurs doit être résolue en privé, et non en présence des parties, en considérant l'intérêt supérieur des parties impliquées. Pour favoriser la coopération et le bon déroulement du processus de médiation, les médiateurs familiaux adopteront des règles communes de fonctionnement.

9.2 Rencontres individuelles

Lorsqu'il s'avère pertinent d'avoir une rencontre individuelle entre le médiateur familial et l'une ou l'autre des parties, ces rencontres ne peuvent avoir lieu sans le consentement des parties, sur le fait qu'il y aura de telles rencontres, sur le but, le déroulement, ainsi que sur la nature des rapports à fournir à l'autre partie, le cas échéant.

Les mêmes règles s'appliquent lorsque le médiateur familial juge à propos de rencontrer les enfants ou d'autres membres de la famille.

Dans le cas où le médiateur familial serait autorisé à révéler le contenu des rencontres individuelles, ce dernier ne doit révéler que les éléments qu'il juge utiles à la poursuite de la médiation.

Dans le cas où le médiateur familial ne serait pas autorisé à révéler le contenu des rencontres individuelles, ce dernier doit s'assurer que les éléments qu'il juge nécessaires à la poursuite de la médiation soient révélés, à défaut de quoi, le médiateur familial devrait mettre fin à la médiation.

9.3 Procureurs des parties

Selon les lois et règlements applicables à la présence des avocats aux séances de médiation, le médiateur familial pourra les inviter ou refuser qu'ils y participent.

Les parties peuvent, de leur propre initiative ou à la suggestion du médiateur familial, suspendre toute séance afin de prendre conseil auprès de leur procureur ou d'une autre personne, selon la nature du conseil recherché.

9.4 Autres intervenants

Le médiateur familial doit respecter les liens complémentaires qui unissent les professionnels des services de médiation, des services juridiques, de la santé mentale et des autres services sociaux. Il coopère avec ces professionnels, tout en respectant les règles de confidentialité, et encourage ses clients à les consulter au besoin.

Avec l'accord des parties et après avoir obtenu leur consentement écrit, le médiateur familial pourra informer la ou les intervenants impliqués dans ce conflit entre autre, la ou le représentant de l'Autorité centrale désignée dans le cadre de la Convention de La Haye ainsi que les Autorités judiciaires, de l'évolution du processus de médiation et du résultat, le cas échéant.

Article 10 : les accords provisoires et finaux

Lorsque des ententes surviennent au cours de la médiation, le médiateur familial peut juger à propos, du consentement des parties ou à la demande de celles-ci de consigner par écrit des ententes évolutives et provisoires.

A l'issue de la médiation, le médiateur familial remet à chacune des parties, un résumé des ententes dans les plus brefs délais, ce qui termine son mandat et constitue la fin de l'acte professionnel de médiation familiale à distance ou international.

Les accords énoncent les points sur lesquels les personnes sont parvenues à s'entendre au cours et en fin de la médiation. Le médiateur familial s'assurera que les personnes en comprennent les termes.

Selon les lois et règles en vigueur dans son pays ou sa province, ce résumé des ententes peut être signé ou non par les parties en présence du médiateur familial.

En vertu du guide de normes de pratique en médiation applicable dans son pays ou sa province, ce résumé inclut une recommandation invitant les parties à consulter pour obtenir des avis indépendants, de nature juridique ou autre, et des informations sur les procédures à entreprendre afin de faire entériner leurs ententes par le tribunal.

Article 11 : interruption d'une médiation familiale à distance et internationale

11.1 L'interruption du processus

Le médiateur familial a le devoir de suspendre ou de mettre un terme à la médiation si la poursuite de celle-ci risque de causer un préjudice à une ou plusieurs des parties. C'est le cas quand la médiation est utilisée afin de :

1. se servir des enfants pour accentuer ou perpétuer le conflit entre les parents;
2. dilapider les biens ou les cacher;
3. rendre ou demander des comptes, afin de les utiliser en dehors de la médiation;
4. harceler, mépriser ou nuire à l'autre partie.

11.2 Le médiateur familial doit également suspendre ou mettre un terme à la médiation si :

1. le médiateur familial croit que l'une ou toutes les parties ne sont pas en mesure de poursuivre la médiation ou ne le désirent plus;

2. l'une des parties n'est pas en mesure de participer à un processus équitable de médiation pour des raisons physiques ou psychologiques. Le médiateur familial peut alors référer les parties aux ressources appropriées, s'il y a lieu;
3. le médiateur familial croit que l'atteinte d'une entente raisonnable est peu probable;
4. une situation de violence conjugale persiste et que la personne qui abuse, ou celle qui est abusée, ne peut négocier face à face dans le respect.

11.3 Le médiateur familial ne peut retirer ses services sans raison valable, toutefois la perte de confiance de l'une ou de l'autre des parties constitue une raison valable. S'il envisage de mettre toutefois fin à sa prestation, il doit donner aux clients un avis et ce, dans un délai raisonnable de manière à ne pas causer de préjudices aux parties.

11.4 Chaque partie peut se retirer à tout moment du processus de médiation.

Article 12 : respect de ce guide de bonnes pratiques

Tout médiateur familial à distance et international doit souscrire à ces principes et s'engager à les respecter. Les organismes qui fournissent des services de médiation familiale peuvent souscrire à ces principes, en demandant aux médiateurs familiaux qui exercent sous leur égide de respecter ce guide. De plus ces organismes peuvent diffuser des informations au sujet des mesures qu'ils prennent pour encourager le respect de ce guide par leurs médiateurs familiaux, au moyen par exemple, de la formation, de l'évaluation et de la supervision.

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Documents et expériences de référence à la rédaction de ce guide de bonnes pratiques

- Σ Conseil des Ministres du Conseil de l'Europe du 21 janvier 1998 sur la Médiation Familiale (recommandation art 9 (98))
- Σ Conférence de La Haye de Droit International Privé – art 13 de ladite convention (examen de l'intérêt de l'enfant) La Convention internationale sur les droits de l'enfant (20 novembre 1989) signée et ratifiée par 191 pays (deux pays seulement - les Etats Unis et la Somalie -n'ont pas encore ratifié la Convention) préconise le maintien des relations personnelles et des contacts réguliers entre l'enfant et ses deux parents.
- Σ Conseil de l'Europe (1291, art. 7) sur l'enlèvement international d'enfant stipule: « les États membres doivent mettre sur pied des commissions de médiation qui se saisissent dans les meilleurs délais, de tous les cas conflictuels de rapt parental et proposent des solutions au bénéfice objectif de l'enfant. »
De plus, la Résolution No R (98), V111. Questions internationales se lit comme suit:
« b. La médiation internationale devrait être considérée comme un processus approprié de nature à permettre aux parents d'organiser la garde et le droit de visite, ou de régler des différends consécutifs à des décisions visant ces questions» ;
« d. Les États devraient, dans toute la mesure du possible, promouvoir la coopération entre les services de médiation familiale existants afin de faciliter l'utilisation de la médiation internationale» ;
« e. Compte tenu des spécificités de la médiation internationale, les médiateurs familiaux devraient être tenus de suivre une formation complémentaire spécifique».
- Σ Déclaration de Crans-Montana, Valais /Suisse – septembre 2005 entre autre, article 4 : « Nous appelons la société civile, les États ainsi que les organisations internationales à prévenir et à régler les situations de conflits à tous les niveaux, en demandant l'intervention d'un médiateur, tiers impartial, indépendant et qualifié ». Cette déclaration a été faite lors du Forum mondial de la médiation.
- Σ Expérience de l'AIFI (2003) en tant que OING qui a participé aux travaux de la Commission spéciale sur le fonctionnement de la Convention de La Haye sur les aspects civils de l'enlèvement international d'enfants (octobre – novembre 2006)
- Σ Expérience de formation à la médiation Familiale internationale (CEMFI dispensée par

l'Institut Universitaire Kurt Bosch à SION (Suisse)

- Σ Expérience de la MAMIF (Mission d'aide à la Médiation Internationale pour la Famille) en France
- Σ GANANCIA DANIELLE, LA MÉDIATION FAMILIALE INTERNATIONALE : LA DIPLOMATIE DU COEUR DANS LES ENLÈVEMENTS D'ENFANTS, ÉRES, FRANCE, 2007
- Σ Guide de normes de pratique en médiation familiale du Comité des organismes accréditeurs en médiation familiale au Québec (COAMF), Canada, adopté par tous les organismes accréditeurs en janvier 2004
- Σ Livre vert de 2002 émanant de la Commission Européenne – rédaction du Code de conduite européen des médiateurs en juillet 2004 et version révisée du 25 mai 2006
- Σ Le règlement européen dit "Bruxelles II bis" : Le règlement n° 2201/2003 du Conseil de l'union européenne, relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et de responsabilité parentale (appelé aussi « Bruxelles II bis ») a été adopté le 22 novembre 2003 et est entré en application le 1^{er} mars 2005. En vertu de l'article 25 : (25) Les autorités centrales devraient coopérer tant de manière générale que dans les cas particuliers, y compris en vue de favoriser le règlement à l'amiable des conflits familiaux en matière de responsabilité parentale. De plus, la médiation est introduite dans le droit des pays membres
- Σ Traité de Maastricht du 9/10 décembre 1991-crédation d'un espace de liberté, de sécurité et de justice

SERVICE SOCIAL INTERNATIONAL (SSI) – INTERNATIONAL SOCIAL SERVICE (ISS)

The "Mediation-based Approach"

A frame concept for the solution of parental conflicts with preservation of the child's best interest

(This article has been written for the 2005 Annual Report of ISS Switzerland. The French version can be downloaded under:

http://www.ssiss.ch/pdf_f/Approche_basee_sur_mediation%20_f.pdf)

A number of events picked up by the Swiss media in the year 2005 – especially in connection with children's abductions or binational family conflicts – showed that the participating experts only rarely manage to bring about solutions that preserve the rights and needs of the affected children. This is all the more dramatic as it is exactly the children who are the most vulnerable in an escalated parental conflict and who therefore need our protection and our support the most. Measures of various types are taken with much energy and great deal of time (social reports, medical expertises, pedagogic accompaniment, legal proceedings of all kinds, police interventions etc.), but not seldom they are uncoordinated, sometimes even contradictory single actions. Both parents wall themselves in their positions, surround themselves with private and institutional assistance and are ready to drive their case home at any costs. The ones suffering the most are certainly the children, but the parents as well do not get away without damage, because the psychological and financial consequences of such a conflict and of the resulting protracted proceedings are considerable.

In view of such a situation, the International Social Service and the experts in general are facing the challenge to take countermeasures against these developments and to find ways and solutions so that the affected children might find back to a stable life frame which promotes development as soon as possible: The concept of a "mediation-based approach" could be a step in the right direction.

The basic idea of a "mediation-based approach"

The basic idea of a "mediation-based approach" is that the experts involved in a conflict between parents orient themselves along certain guidelines which have been developed in the context of the mediation movement: The actions of each participant (social workers, welfare workers, psychologists, doctors, attorneys, Central Authorities, ISS, etc.) should be compatible with the spirit and some key concepts of mediation, if a solution in the best interest of the child is to be found. It has to be emphasized that, in such an approach, mediation is not seen as a goal by itself or as a new "miracle cure", but rather as a "treasure", a source of inspiration and a practical instrument with the aid of which the actors can be empowered to work out a "child friendly" solution. Furthermore, the "mediation-based approach" makes it possible to tie together the diverse (legal, psychological, social) measures and to focus them so that a better cooperation and coordination can be assured.

From this point of view, a "mediation-based approach" is based both on some key values which have been crystallised in the past 30 years from mediation, as well as on certain methods and work assets developed by the international mediation movement.

What has a "mediation-based approach" in common with the mediation in the more strict sense of the word?

- *orientation towards future*
- *orientation towards a solution*
- *empowerment and integration of the affected parties into responsibility*
- *child focus: the process is oriented towards the child's needs*
- *putting the main focus on (direct) communication between the affected parties*
- *acknowledgement and respect of the feelings and needs of each individual*
- *strife for sustainable solutions*
- *"sense of reality", i.e. pragmatism and flexibility, adaptation to the institutional, cultural etc. peculiarities of each single situation*
- *creativity and the ability to improvise and innovate*

However, the "mediation-based approach" does not necessarily require the taking of a formal procedure for direct mediation. But it is possible and often also desirable to consider a direct mediation if this seems useful at a certain point of the process. The choice of the appropriate method for intervention at a given stage of the process is each time made pragmatically and is after all determined by the goal that needs to be achieved, i. e. the preservation of the child's best interest. However, it is important during the entire case management that each step is undertaken in ways that respect the spirit of basic mediation principles. In a certain sense it can be said that each method of intervention should be "mediation-compatible", because this guarantees the best that the diverse actors cooperate and coordinate their intervention in a coherent manner.

Advantages – fields of application– obstacles

One of the advantages of the "mediation-based approach" is that it provides to the parties in conflict – and especially to the parents – a common platform and language. Thus it is made possible for them to coordinate and arrange between each other their actions with a view to achieve a goal on which they often agree, namely the child's well-being. Such an approach supports and empowers the parents in their effort to find a solution by mutual consent. The conflict is channelled and reduced, because there is no winner or loser, but everybody can adopt the solution found by their own decision. Such a constellation is one of the best security guarantees for the affected children.

The experience also shows that a "mediation-based approach" can considerably reduce the emotional and financial effort and the duration of the parental conflict, especially if we have an international conflict which is even augmented as there are the most different boundaries to be crossed at this occasion.

For ISS, this approach is especially advantageous in the following fields of activity:

- *parental rights (custody and visiting right)*
- *child abduction (prevention, risk reduction, taking care after the child's return)*
- *counselling binational pairs*
- *establishment of the origin and obtaining support payments*

The factors that could prove to be in the way for the success of a "mediation-based approach" seem to be the same as the ones that impeach a mediation in the classical sense of the word. When the positions have become entrenched, because the procedure has been prolonged over many years, or if the history of the pair is characterized by physical and/or mental violence and therefore the power relationship between the partners is very unbalanced, one partner can feel such a need for protection, revenge or punishment that it is not possible for him/her to indulge in a mediation-oriented work.

Terms and criteria for implementation

At present, the Swiss Foundation of the International Social Service is composing a package of measures for the practical implementation of a "mediation-based approach" in the interest of children and their parents, the essential contents of which are the following:

- *mediation-oriented schooling of ISS caseworkers*
- *formation of interdisciplinary casework-teams (social workers, lawyers and graduate mediators) in both Geneva and Zurich offices*
- *team-oriented casework*
- *better collaboration and coordination with other actors (central authorities, local authorities etc.)*
- *active participation in the public debate with a view to a better implementation of the Hague Convention on Civil Law Aspects of International Children's Abductions of 1980*
- *Lobbying for the ratification of the Hague Convention of 1996 on Child Protection*
- *Participation in a worldwide SSI training programme in the field of mediation*

Conclusion

As far as Switzerland is concerned, especially the better coordination between ISS and the authorities on the cantonal and federal levels will help that in conflict cases the child's best interest will be better preserved in the future. In view of this we must already today act in the sense of The Hague Convention of 1996 which was signed by Switzerland on 1 April 2003 and commit ourselves to its ratification and putting into force. The Convention especially makes it possible for all parties involved to fully make use of the opportunities provided for in Article 31:

"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 (...) of the child"

This article, which already exists in the Hague Convention of 1980 (Article 7c) in a somewhat less developed form, lies the normative grounds for an official acknowledgement of the "mediation based approach". It provides for the necessary legitimacy for ISS in its efforts to improve and better coordinate the intervention of all parties, in the best interest of the affected children.

REUNITE

We are writing in response to your request for comments on the future work of the Permanent Bureau following the Fifth Meeting of the Special Commissions of the 1980 Convention, when considering the four possible directions set out in the feasibility study on cross-border mediation in family matters. We would be most grateful if the Council on General Affairs and Policy of the Conference would take into account the following comments from **reunite** International Child Abduction Centre:

5.11 Possible directions

1) **reunite** supports the recommendation from the Fifth Special Commission that the Permanent Bureau continues to keep Member States and interested non-governmental organisations informed of developments in the use of mediation in cross-border disputes concerning abduction and contact, **reunite** will continue to make available to the Permanent Bureau any reports originating from our mediation service or findings from research projects undertaken by the **reunite** Research Unit.

Furthermore, **reunite** would support the Permanent Bureau maintaining a more general watching brief on the development of cross-border mediation in family matters. We believe it is important that all Member States and interested organisations are kept abreast of developments on an international level and we believe the Permanent Bureau are best placed to undertake this work.

2) **reunite** would support the development of a private international law instrument in support of mediation in abduction and contact cases but believe that at present there are limited findings from research into the use of mediation which could justify, and give direction to, such an instrument. We understand that, to date, it is only **reunite** who has published such findings and we believe that further research, and associated findings, from other member States should also be considered before there is justification to develop an international instrument.

We believe it would be useful for the Permanent Bureau to contact Member States who are undertaking mediation so they can provide feedback on matters such as the expertise of the mediators, how cases are identified, the speed of the mediation process, the mediation model and practices, and how any agreement made within mediation becomes legally binding so to protect both parents' position and ensure that the child is able to maintain contact with both parents. With this information made available to the Permanent Bureau, it would then be appropriate to consider the development of a private international law instrument to support the use of mediation.

3) Whilst **reunite** agrees that consultation should be carried out with Member States to explore the desirability of developing an instrument designed to improve the flow of information and in giving effect to mediated agreements, we believe that the development of a good practice guide should come first.

Without a good practice guide, Member States will not have a framework against which to develop a professional and effective mediation model and practice, nor a framework for ensuring that any agreement reached in mediation is underpinned by a consent order and registered within the courts of the other Member States.

4) We wholeheartedly support the development of a code of practice covering matters such as confidentiality and accreditation/expertise of mediators. We believe that Member States, i.e. the Central Authority or a specialist NGO, should identify a pool of mediators, or an accredited mediation service, to be trained in line with the 1980 Convention and to undertake mediation training in these high conflict cases.

A code of practice would assist in the development of uniformity of mediation practice, will encourage confidence in the use of mediation, and will provide a means of monitoring and measuring the long term effectiveness of mediation in such cases.

As an aside, reunite would welcome the establishment of a working group to consider the future direction of mediation in line with the 1980 Convention and would be happy to provide any assistance to the Permanent Bureau.

ADDENDUM NO 1 – RÉPONSES DES ÉTATS-UNIS D'AMÉRIQUE ET DE MONACO AU QUESTIONNAIRE / RESPONSES TO QUESTIONNAIRE FROM THE UNITED STATES OF AMERICA AND MONACO

1. OBSERVATIONS DES MEMBRES – COMMENTS OF MEMBERS

ÉTATS-UNIS D'AMÉRIQUE – UNITED STATES OF AMERICA

The United States of America believes that cross-border mediation can be a very positive method of resolving difficult international family disputes. The two studies produced by the Permanent Bureau will be very helpful in guiding a discussion on how best to utilize mediation in the context of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (the Convention).

The United States is particularly pleased to see the Permanent Bureau continue to work in this area because the U.S. Central Authority ("USCA") recognizes the many practical challenges to creating a cross-border family law mediation program in the United States. Within the United States, mediation as a process is often connected to proceedings in state and local courts and is therefore highly variable in its structure, accessibility, and quality. In addition, each state has different types of licensing requirements for mediators and, as these two studies note, there is not even an agreed-upon definition of mediation.

The unique questions presented by international family law cases, and in Hague proceedings in particular, including the very short timetables involved, make finding a pool of qualified professionals a distinct challenge. Obtaining the necessary funding for training existing qualified professionals can also be a difficult task.

Given the many practical difficulties involved in helping parents find appropriate mediators, the United States looks forward to working with the Permanent Bureau on mediation issues.

Of the possible directions enumerated in paragraph 5.11 of the "Feasibility Study on Cross-Border Mediation in Family Matters," the United States believes it would be most helpful to focus on numbers 1 and 4 as well as on the development of a guide to good practice in this area. In all of its future work on Cross-Border Mediation in Family Matters, the Permanent Bureau should, in our view, work to assist States to incorporate mediation services in such a way that they complement the legal process set forth in the Convention, rather than compete with or undermine the Convention process.

Suggestion number 1. To assist States in staying informed of developments in cross-border mediation, in learning from each other and in forming bi-national projects and larger scale programs, it would be of great utility to be able to compare the success rates of different types of mediation programs. For example, do couples have greater success when mediation is begun before or after Hague Convention proceedings begin? Does mediation work better with co-mediators? With input from the children? In order to compare success rates, of course, some kind of uniform measure of success would be required. The United States recognizes that each party State must determine how to measure success according to its own priorities. Thus, the Permanent Bureau might not be able to recommend a particular measure of success, but it would be very helpful for the Permanent Bureau to accurately report on the different models that States are currently using.

Suggestion number 4. This suggestion addresses some of the serious practical issues that can make it difficult to find and use qualified mediators in these types of cases (*e.g.*, confidentiality, accreditation and the need for a code of practice). Any international standards with regard to these issues that the Permanent Bureau is able to offer as examples could be used by member States to help create their own domestic standards and training programs.

In this suggestion, and in the creation of a good practice guide, we believe it will be important for the Permanent Bureau to study ways to fold mediation into a State's practice in a way that does not interfere with the Convention. For example, it would be important to make sure that mediation is offered concurrently with the legal case, not as an alternative to the legal case. That way, if the mediation is not successful, the parties have not harmed their legal positions by delaying filing their Hague application. This is particularly important given the short deadlines involved with a Hague case, and ultimately with the one year limit on filing.

In addition to timing issues, topics discussed in mediation must not be subject to being interpreted as acquiescence on the part of the left behind parent. Focusing on how to use mediation to complement the Convention, rather than undermine it would be a good use of the Permanent Bureau's expertise and resources.

MONACO

**Observations de M. Jérôme Fougeras Lavergnolle,
Juge tuteur de la Principauté de Monaco,
transmises par l'Ambassade de la Principauté de Monaco
au Bureau Permanent le 20 mars 2008**

Par une transmission en date du 16 Novembre 2007, vous avez bien voulu me solliciter afin de vous faire part de mon avis sur les orientations possibles des travaux que le Bureau Permanent de la Conférence de La Haye de droit international privé pourrait emprunter dans le domaine de la médiation familiale transfrontalière.

Il me paraît avant tout important de relever qu'il est nécessaire en cette matière d'enlèvements internationaux d'enfants de pouvoir procéder à toute tentative de médiation ou de conciliation afin d'obtenir la remise volontaire de l'enfant ou de favoriser un règlement à l'amiable du litige de manière à permettre un retour rapide de l'enfant dans son Etat d'origine.

Néanmoins, il me semble opportun de considérer que le recours à la médiation familiale ne doit pas retarder l'issue d'une procédure engagée ni être systématique mais être au contraire une possibilité complémentaire aux recours judiciaires.

Par ailleurs, il convient de souligner que la confidentialité, l'impartialité et l'indépendance sont des éléments essentiels au succès d'une médiation qui doit se faire dans le cadre de la Loi et par des professionnels bénéficiant de formation sur les instruments juridiques en vigueur dans les différents Etats en sorte que l'élaboration d'un guide de bonnes pratiques en cette matière dans le cadre de la Convention de La Haye du 25 Octobre 1980 me paraît utile.

Ainsi, la mise en œuvre de travaux et de consultations tels que proposés par le Bureau Permanent de la Conférence de La Haye de droit international privé et dont l'objet est de centraliser et de faciliter les échanges d'information concernant la médiation internationale dans les différents systèmes nationaux ainsi que d'élaborer un cadre juridique en matière de droit international privé afin d'accroître l'efficacité et l'effectivité des accords conclus en médiation doit être encouragée.

Monaco, le 10 Décembre 2007

ADDENDUM NO 2 – RÉPONSES D'ISRAËL AU QUESTIONNAIRE
ADDENDUM NO 2 – RESPONSES TO QUESTIONNAIRE FROM ISRAEL

ISRAËL – ISRAEL

Developing an International Instrument for Cross-Border Mediation in Family Matters – Proposal of the State of Israel

Introduction

The illuminating report of the Permanent Bureau: 'Feasibility Study on Cross-Border Mediation in Family Matters', General Affairs and Policy, Prel. Doc. No 20, March 2007, address the issue 'whether there is a lack of a fully comprehensive regime of private international law in the family law area gives rise to any practical disadvantages or impediments for the mediation process such as would justify the development of a private international law instrument.' (5.11(2) p. 29, hereinafter – report). This restricted proposition is based on the analysis of the current practice of cross-border mediation in family matters (hereinafter – CBM) in Chapter 5 of the report (see especially 5.6, pp. 26-27). The State of Israel proposes a consideration on this issue from a different perspective.

1. The importance of CBM

The advantages of mediation as a favorable mechanism as far as adjudication for resolving most family disputes, has become nowadays internationally accepted. In more and more legal systems it is mandatory or at least strongly recommended. A cross-border family dispute does not change the nature of this dispute and the preference to resolve it through mediation (report 5.2, pp. 22-23). However, the complexity of these disputes and the wish to assure the possibility to enforce a resolution abroad may deter the parties from using mediation. A private international law instrument can therefore promote CBM and make it accessible and secure for customers.

2. CBM agreements

Legal systems have recognized the need to approve suitable mediated resolutions in family disputes although they defer from the general family laws. Even states that do not recognize arbitrated awards in family matters (for example - Quebec) promote the use of mediation and recognize mediated agreements. A similar policy should apply to the context of private international law. A mediated agreement should not be exempted unless it is manifestly contrary to public order or it does not comply manifestly to family law of the state of enforcement.

3. The scope of the international law instrument

States that have legislated mediation have limited the scope of that law into the elements that are necessary to assure the fairness of the process and in principal to assure that a mediation agreement will be recognized by law. The scope of the international law instrument should hence be limited to such elements that will make CBM accessible and legally recognized, such as:

- (a) Agreement to mediate and due process – ensuring that mediation will be informed and with full consent, *i.e.* approving the right of the parties to cease the process at any time, and that the refusal to participate or cease the mediation will not have any effect on court proceedings.
- (b) Jurisdiction - the consent of the parties to mediate will be assumed as agreed jurisdiction with the Law of the State chosen for mediating in regard to the process and the agreement, but will not be implied to agree with the adjudication of that State when a mediation agreement is unaccomplished.

- (c) Choice of law - the parties should have a right to choose the law that will apply to the issues in the mediation 'in so far as there ability to choose a governing law is not constrained by mandatory law' (report 5.5.2-6, pp. 25-27).
- (d) Confidentiality - securing the principal of confidentiality of the mediation process in private international law and articulating the circumstances that confidentiality may be removed.
- (e) Limitation period - when the parties agree to mediate the limitation period should stop.
- (f) Enforceability - similarly to Article 30 of the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (report 5.5.1, pp. 24-25) and additionally, enforcement may be refused if the right of a child or another third party who is resident of the state of the enforcement was manifestly disregarded.

4. Further work

To promote CBM and assure its elements in a private international law instrument it should be legislated in an international Hague convention. This convention will provide access to justice through mediation in the private international law. It may specifically approve that using mediation according to the excising Hague conventions can be a preferable way to achieve their goals and assist to retain family relationship. A comparative research of the Permanent Bureau on State Laws that have legislated mediation in family matters can serve as a framework for the issues that this convention should contain and extent the work that it will entail.