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CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

PROJET RÉVISÉ DE GUIDE DE BONNES PRATIQUES

en vertu de la *Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants*

CINQUIÈME PARTIE – MÉDIATION

établi par le Bureau Permanent

* * *

REVISED DRAFT GUIDE TO GOOD PRACTICE

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

PART V – MEDIATION

drawn up by the Permanent Bureau

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GLOSSARY

Mediation

For the purposes of this Guide it is important to distinguish between "mediation" and similar methods of facilitating an agreed resolution of disputes.

The definitions of "mediation" that can be found in legal texts and publications vary significantly and often reflect certain minimum requirements regarding the mediation process and the person of the mediator in the relevant jurisdictions. Drawing together the common features in these various definitions, mediation can be defined as a voluntary, structured process whereby a "mediator"[1] facilitates communication between the parties to a conflict, enabling them to take responsibility for finding a solution to their conflict.[2] This Guide refers to "mediation" in this broad sense, without prejudice to the model and method applied. Other commonly required but not uniformly applied principles that are sometimes incorporated in the definition of mediation, such as confidentiality, neutrality or impartiality, will be dealt with in the relevant Chapters of the Guide.

Mediator

Many definitions of the term "mediator" in national or regional instruments mirror the necessary (legal) requirements a person has to fulfil to be a "mediator" and the manner in which mediation has to be conducted. Concentrating again on the common features, a "mediator" will be understood in this Guide as an impartial third party, who is conducting the mediation. The term is used, unless mentioned otherwise, without prejudice to the professional background of the mediator and which specific requirements a person has to fulfil to be able to name him or herself "mediator".

The term "mediator" is used in this Guide without prejudice to whether mediation is conducted as co-mediation or as single mediation, *i.e.*, unless mentioned otherwise, any principle mentioned in this Guide making reference to the term "mediator" in the singular is also meant to apply to co-mediation models.

Conciliation

Mediation and conciliation are sometimes used as synonyms,[3] which may be a cause of confusion. Today, conciliation is generally characterised as a more directive process than that of mediation. Conciliation will therefore be understood for the purposes of this Guide as a dispute resolution mechanism in which an impartial third party takes an active and directive role in helping the parties find an agreed solution to their dispute. Mediation can be proactive, but cannot be directive. For mediation, emphasis has to be placed on the fact that the mediator him or herself is not in a position to make a decision for the parties, but only assists the parties in finding their own solution. Conversely, the

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[1] Mediation can also be conducted by more than one mediator, see section 6.2.2 below. Where the term "mediator" is used in this Guide, it is without prejudice to whether mediation is conducted as co-mediation, as single mediation, etc.

[2] For a concise comparative overview of mediation definitions used in different countries, see K.J. Hopt and F. Steffek, *Mediation – Rechtstatsachen, Rechtsvergleich, Regelungen*, Mohr Siebeck, Tübingen, 2008, pp. 12 *et seq*.

[3] See, for example, the UNCITRAL Model Law on International Commercial Conciliation adopted by UNCITRAL in 2002, available at < http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf > (last consulted 14 March 2012), Art. 1(3): "For the purposes of this Law, 'conciliation' means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship."

conciliator can direct the parties towards a concrete solution.[4] This can be illustrated by the following example. A judge with mediator training may conduct mediation, but only in a dispute where he / she is not the judge seised and where the judge refrains from influencing the result of the parties' conflict resolution process. A judge seised can, by definition, never "mediate" in a case before him or her, *i.e.*, where the parties know that the judge is the person rendering the decision if their attempt to find an amicable solution should fail.[5] A process by which the judge in the case before him / her engages in assisting the parties in finding an agreed solution and in bringing about a judicial settlement would rather fall under the meaning of conciliation as understood in this Guide.[6]

Counselling

Mediation has to be distinguished from counselling. In contrast to mediation, counselling does not focus on the solution of a specific dispute.

Arbitration

Mediation and conciliation can be distinguished from arbitration in that the former two aim at developing an agreed solution between the parties, whereas in arbitration the impartial third party (arbitrator) solves the dispute by making a decision. While the parties must agree to arbitration and to abide by the outcome, the arbitration process is not geared towards bringing about an agreed outcome.[7]

Early neutral evaluation

In "early neutral evaluation" the parties receive a non-binding expert evaluation of their legal situation, subsequent to which they are given the opportunity to negotiate an agreed solution.[8]

Collaborative law

In the "collaborative law" model, the parties are assisted by "collaborative lawyers" who use interest based problem solving negotiation techniques to resolve the dispute without going to court.[9] Where no agreement is found and the matter has to be solved in judicial proceedings, the collaborative lawyers are disqualified from continuing representation.

Co-operative law

The "co-operative law" model follows the principles of the "collaborative law" model, except that the representatives are not disqualified when the matter has to be brought before a court.[10]

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[4] Regarding the differences between mediation and conciliation see also "A fair say – A Guide to Managing Differences in Mediation and Conciliation" (August 1999), drawn up by the Australian National Alternative Dispute Resolution Advisory Council (NADRAC), p. 1, available at < http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_AFairSay > (last consulted 14 March 2012).

[5] This is a widely respected principle, see, for a comparative overview of mediation definitions used in different countries, K.J. Hopt and F. Steffek (*op. cit.* note 2), p. 12; see also Art. 3 of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, *OJ L 136*, 24.5.2008 (hereinafter, "European Directive on mediation"), available at < http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:NOT > (last consulted 14 March 2012).

[6] But definitions of conciliation differ, see for example the UNCITRAL Model Law on International Commercial Conciliation (ref. *supra*, note 3), Art. 1(3).

[7] See for further details on distinguishing mediation and arbitration, *inter alia*, N. Alexander, *International and Comparative Mediation*, Austin – Boston – Chicago – New York – the Netherlands, Wolters Kluwer, 2008, pp. 26, 27.

[8] N. ver Steegh, "Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process", 42 *Fam. LQ* (2008-2009), 659, at p. 663.

[9] *Ibid.* (*op. cit.* note 8), p. 667.

[10] *Ibid.* (*op. cit.* note 8), p. 668.

Direct or indirect mediation

When using the term "direct mediation", the Guide refers to mediation in which both parties directly participate in the mediation sessions with the mediator, either in a face-to-face meeting with the mediator or in a long-distance meeting using video / teleconferencing facilities or communication over the Internet. [11]

Conversely, the term "indirect mediation" refers to mediation in which the parties do not directly meet one another during the mediation but each meet with the mediator separately. The separate meetings with the mediator can be held across two separate States or in the same State with mediation taking place at different times or at the same time but in different rooms.[12]

It is, of course, also possible for a mediation process to include both indirect and direct mediation. For example, a direct mediation can be accompanied or preceded by so called "caucus" meetings, where the mediator meets with each party separately.

Court based / court annexed mediation

In this Guide the terms "court based mediation" or "court annexed mediation" are used to refer to mediation services that are run by or through the court itself. In these schemes mediation is offered either by independent mediators working for the court or by judges with mediator training who can, of course, only "mediate" in cases where they are not the judge seised. The mediation venue is often somewhere in the court building itself.

Out of court mediation

The term "out of court mediation" is used in this Guide to refer to mediation operated by a body not directly linked to the court. It may involve State run or State approved bodies and mediation services provided by individuals as well as private mediation organisations.[13]

Mediated agreement

This Guide uses the term "mediated agreement" when referring to the outcome of mediation, *i.e.*, the agreed solution reached by the parties in mediation. It should be noted that in some jurisdictions the term "memorandum of understanding" is preferred to refer to the immediate outcome of mediation, to avoid any assumption as to the legal nature of the mediated result. (See in more detail below under Chapter 12.)

To avoid confusion, it should be noted that the Guide also uses the term "contract to mediate" which relates to a contract between the mediator and the parties in dispute prior to mediation, by which the specifics of the mediation process as well as costs and other issues may be defined.[14]

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[11] "Note on the development of mediation, conciliation and similar means to facilitate agreed solutions in transfrontier family disputes concerning children especially in the context of the Hague Convention of 1980", drawn up by S. Vigers, former Legal Officer of the Permanent Bureau, Prel. Doc. No 5 of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (The Hague, 30 October – 9 November 2006) (hereinafter, "Note on the development of mediation, conciliation and similar means"), 4.1, p. 14, available at < www.hcch.net > under "Child Abduction Section" then "Preliminary Documents/Information Documents" ("Special Commission meetings on the practical operation of the Convention").

[12] See *ibid.* (*op. cit.* note 11), 4.1, p. 15.

[13] For further details on court annexed and out of court mediation, see also "Feasibility Study on Cross-Border Mediation in Family Matters", drawn up by the Permanent Bureau, Prel. Doc. No 20 of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference, section 2.4, p. 6, available at < www.hcch.net > under "Work in Progress" then "General Affairs".

[14] See section 3.5 below.

Parental responsibility

As defined in the 1996 Hague Child Protection Convention, the term "parental responsibility" refers to "parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child".[15] In other words, "parental responsibility" includes all legal rights and duties a parent, a guardian or other legal representatives have in respect of a child with a view to raising the child and ensuring the child's development. The concept of "parental responsibility" encompasses "rights of custody" as well as "rights of contact", but is much broader than these two. Where parental rights and duties are referred to as a whole, many legal systems as well as regional and international instruments today refer to the term "parental responsibility". This is to overcome the terminological focus in this area of law on the parents' rights and to acknowledge the equal importance of parental duties and children's rights and welfare.

As concerns the term "rights of access", the Guide gives preference to the term "rights of contact" which reflects a child-centred approach in line with the modern concept of "parental responsibility".[16] The term "contact" is used in a broad sense to include the various ways in which a non-custodial parent (and sometimes another relative or established friend of the child) maintains personal relations with the child, whether through periodic visitation or access, by distance communication or by other means.[17] The Guide uses the term "rights of custody" in accordance with the terminology of the 1980 Hague Child Abduction Convention.

Left-behind parent and taking parent

The parent who claims that his / her custody rights were breached by a wrongful removal or retention is referred to in this Guide as the "left-behind parent". In accordance with Article 3 of the 1980 Hague Child Abduction Convention, a removal or retention is considered wrongful where it is in breach of actually exercised custody rights attributed to a person, an institution or other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention. As is indicated by this definition, in a small number of cases within the scope of the 1980 Convention it is a person other than the parent (a grandparent a step-parent or any other related or unrelated person) or an institution or other body whose custody rights are breached by a wrongful removal or retention of the child. To avoid lengthy descriptions throughout the Guide, unless otherwise stated, the term "left-behind parent" will be used in a sense to include any other person or body[18] whose custody rights are allegedly breached by a wrongful removal or retention.

The parent who is alleged to have wrongfully removed a child from his / her place of habitual residence to another State or to have wrongfully retained a child in another State will be referred to in this Guide as the "taking parent". In parallel to the use of the term "left-behind parent", unless otherwise stated, reference in this Guide to the term "taking parent" will be meant to include any person, institution or other body[19] who is alleged to have wrongfully removed or retained a child.

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[15] See Art. 1(2).

[16] This is in line with the terminology used by the *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children* (Jordan Publishing, 2008), hereinafter, "Guide to Good Practice on Transfrontier Contact", see at p. xxvi.

[17] This is in line with the terminology used by the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), see at p. xxvi.

[18] Of course, if an institution or other body is concerned, the question of mediation may not arise, or may differ immensely to mediation between natural persons if it arises.

[19] Of course, if an institution or other body is concerned, the question of mediation may not arise, or may differ immensely to mediation between natural persons if it arises.

Domestic violence and child abuse

The term "domestic violence" may, depending on the definition used, encompass many different facets of abuse within the family. The abuse may be physical or psychological; it may be directed towards the child ("child abuse") and / or towards the partner (sometimes referred to as "spousal abuse") and / or other family members.

This Guide uses the term "domestic violence", unless stated otherwise, in the broad sense outlined above. Regarding domestic violence against a child, the Guide will distinguish between indirect and direct violence. The first is domestic violence towards a parent or other members of the household, which affects the child, and the second is domestic violence towards the child. Only the latter will be referred to as "child abuse" in this Guide.[20]

[20] See Chapter 10 on domestic violence.

OBJECTIVES AND SCOPE

This Guide promotes good practice in mediation and other processes to bring about the agreed resolution of international family disputes concerning children which fall within the scope of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter, "the 1980 Hague Child Abduction Convention" or "the 1980 Convention"). In line with other modern Hague Family Conventions, the 1980 Hague Child Abduction Convention encourages the amicable resolution of family disputes. Article 7 of the 1980 Convention states that Central Authorities "shall take all appropriate measures to secure the voluntary return of the child or to bring about an amicable resolution of the issues". The more recent of the modern Hague Family Conventions explicitly mention the use of mediation, conciliation and similar methods.[21]

Among the different means of amicable dispute resolution, this Guide primarily addresses "mediation" as one of the most widely promoted methods of alternative dispute resolution in family law. This Guide, however, also refers to good practices with regard to other processes to facilitate agreed solutions, such as conciliation. A separate chapter[22] is dedicated to these other methods and due consideration is given to their specific nature. However, some of the mediation good practices promoted in this Guide are applicable or adaptable to a number of these other processes.

While highlighting the particularities of amicable dispute resolution in the context of abductions and disputes over access / contact under the 1980 Hague Child Abduction Convention, this Guide outlines principles and good practices which it is hoped will be valuable in the use of mediation and similar processes in cross-border family disputes in general. As such, the Guide is meant to be of assistance to States Parties to the 1980 Convention, but also States Parties to other Hague Conventions that promote the use of mediation, conciliation or similar means to facilitate agreed solutions. These Conventions include the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter, "the 1996 Hague Child Protection Convention" or "the 1996 Convention"), the *Hague Convention of 13 January 2000 on the International Protection of Adults* and the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.* In addition, this Guide is intended to assist States that are not Parties to these Hague Conventions, but that are considering how best to develop effective structures to promote cross-border mediation to assist with the resolution of cross-border family disputes. The Guide is addressed to governments and Central Authorities appointed under the 1980 Convention and under other relevant Hague Conventions, as well as judges, lawyers, mediators, parties to cross-border family disputes and other interested individuals.

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[21] See Art. 31 *b)* of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*; Art. 31 of the *Hague Convention of 13 January 2000 on the International Protection of Adults*; and Arts 6(2) *d)*, 34(2) *i)* of the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*.

[22] Chapter 15.

This Guide is the fifth Guide to Good Practice developed to support the practical operation of the 1980 Hague Child Abduction Convention. The four previously published Guides are: *Part I — Central Authority Practice*; *Part II — Implementing Measures*; *Part III — Preventive Measures*; and *Part IV — Enforcement*.[23]

In addition, the *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children*[24] relates to both the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention.

Nothing in this Guide may be construed as binding on State Parties to the 1980 Hague Child Abduction Convention. The general principles set forth in this Guide are purely advisory in nature.

All State Parties, and in particular Central Authorities designated under the 1980 Hague Child Abduction Convention, are encouraged to review their own practices and, where appropriate and feasible, to improve them. For both established and developing Central Authorities, implementation of the 1980 Convention should be seen as a continuing, progressive or incremental process constantly tending towards improvement.

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The Permanent Bureau would like to thank the many experts including experts from non-governmental organisations, whose accumulated wisdom and experience has contributed to the Guide.[25] Particular thanks are due to Juliane Hirsch, former Senior Legal Officer with the Permanent Bureau, who carried out the principal work on this Guide and to Sarah Vigers, former Legal Officer with the Permanent Bureau, who in 2006 prepared a comparative study on the development of mediation, conciliation and similar means in the context of the 1980 Hague Child Abduction Convention which informed the drafting of this Guide.

[23] *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice* (Jordan Publishing, 2003), hereinafter, "Guide to Good Practice on Central Authority Practice"; *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II – Implementing Measures* (Jordan Publishing, 2003); *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III – Preventive Measures* (Jordan Publishing, 2003), hereinafter, "Guide to Good Practice on Preventive Measures"; *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement* (Jordan Publishing, 2010), hereinafter, "Guide to Good Practice on Enforcement". The Guides to Good Practice are available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Guides to Good Practice".

[24] Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16).

[25] Ms Gladys Alvarez (Argentina), the Honourable Judge Peter F. Boshier (New Zealand), Ms Cilgia Caratsch (ISS), Mr Eberhard Carl (Germany), Ms Denise Carter (United Kingdom), Ms Sandra Fenn (Reunite), Mme Lorraine Filion (AIFI), Mme Danièle Ganancia (France), Mme Barbara Gayse (Belgium), Mrs Ankeara Kaly (France), Mrs Robine G. de Lange-Tegelaar (Netherlands), Judge Wilney Magno de Azevedo Silva (Brazil), Mrs Lisa Parkinson (United Kingdom), Mr Christoph C. Paul (Germany), Ms Toni Pirani (Australia), Ms Els Prins (IKO, Netherlands), Ms Kathleen S. Ruckman (United States of America), Mr Craig T. Schneider (South Africa), Ms Andrea Schulz (Germany), Mr Peretz Segal (Israel), Ms Sarah Vigers (United Kingdom), Ms Lisa Vogel (United States of America) and Ms Jennifer H. Zawid (United States of America).

INTRODUCTION

A. BACKGROUND WORK OF THE HAGUE CONFERENCE ON INTERNATIONAL MEDIATION IN FAMILY MATTERS AND SIMILAR PROCESSES TO BRING ABOUT AGREED SOLUTIONS

1. The Hague Conference's work in recent decades reflects the increasing importance of mediation and other methods to bring about agreed solutions in international family law. Most of the modern Hague Family Conventions explicitly encourage mediation and similar processes for finding appropriate solutions to underlying family disputes. Several of the Guides to Good Practice drafted to support the effective implementation and operation of these Conventions draw attention to the importance of promoting agreed solutions.[26]

2. At the same time, mediation in cross-border family disputes in general has been discussed for many years as one of the topics of future work for the Hague Conference at meetings of the Council on General Affairs and Policy of the Conference (hereinafter, "the Council").

3. In April 2006, the Permanent Bureau of the Hague Conference was mandated by its Members to:

> "prepare a feasibility study on cross-border mediation in family matters, including the possible development of an instrument on the subject".[27]

4. The "Feasibility Study on Cross-Border Mediation in Family Matters",[28] which explored possible directions of future work for the Hague Conference in the field of cross-border family mediation, was presented to the Council in April 2007. The Council decided to invite the Hague Conference Members to:

> "provide comments, before the end of 2007, on the feasibility study on cross-border mediation in family matters […] with a view to further discussion of the topic at the spring 2008 meeting of the Council".[29]

5. In April 2008, the Council:

> "invited the Permanent Bureau to continue to follow, and keep Members informed of, developments in respect of cross-border mediation in family matters".[30]

6. Furthermore, the Permanent Bureau was asked, as a first step, to commence work on:

> "a Guide to Good Practice on the use of mediation in the context of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child*

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[26] See for example the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), Chapter 2, pp. 6 *et seq.*; Guide to Good Practice on Central Authority Practice (*op. cit.* note 23), section 4.12, Voluntary return, pp. 49 *et seq.*; Guide to Good Practice on Preventive Measures (*op. cit.* note 23), section 2.1.1, Voluntary agreement and mediations, pp. 15-16.

[27] Conclusions of the Special Commission of 3-5 April 2006 on General Affairs and Policy of the Conference, p. 3, para. 3, available at < www.hcch.net > under "Work in Progress" then "General Affairs".

[28] *Op. cit.* note 13.

[29] Recommendations and Conclusions adopted by the Council on General Affairs and Policy of the Conference (2-4 April 2007), p. 1, para. 3, available at < www.hcch.net >, under "Work in Progress", then "General Affairs".

[30] Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (1-3 April 2008), p. 1, 3rd para., available at < www.hcch.net > under "Work in Progress" then "General Affairs".

> *Abduction* […], to be submitted for consideration at the next meeting of the Special Commission to review the practical operation of that Convention, which is likely to be held in 2011".[31]

7. In its Conclusions and Recommendations, the 2009 Council meeting confirmed that decision:

> "The Council reaffirmed its decision taken at the meeting of April 2008 in relation to cross-border mediation in family matters. It approved the proposal of the Permanent Bureau that the Guide to Good Practice for Mediation in the context of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* be submitted for consultation to Members by the beginning of 2010 and then for approval to the Special Commission to review the practical operation of the 1980 Child Abduction Convention and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* at its next meeting in 2011."[32]

8. It should be noted that the discussion regarding the use of mediation and similar means in the context of the 1980 Hague Child Abduction Convention also dates back many years. The topic had been explored at a series of meetings of the Special Commission to review the practical operation of the 1980 Convention. In October 2006, the Permanent Bureau published a comparative study[33] which focused on mediation schemes in the context of the 1980 Convention for discussion at the Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the implementation of the 1996 Hague Child Protection Convention (October / November 2006).

9. The 2006 meeting of the Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the practical implementation of the 1996 Hague Child Protection Convention reaffirmed Recommendations Nos 1.10 and 1.11 of the 2001 meeting of the Special Commission:

> "1.10 Contracting States should encourage voluntary return where possible. It is proposed that Central Authorities should as a matter of practice seek to achieve voluntary return, as intended by Article 7[(2)] *c)* of the Convention, where possible and appropriate by instructing to this end legal agents involved, whether state attorneys or private practitioners, or by referral of parties to a specialist organisation providing an appropriate mediation service. The role played by the courts in this regard is also recognised.
>
> 1.11 Measures employed to assist in securing the voluntary return of the child or to bring about an amicable resolution of the issues should not result in any undue delay in return proceedings."

10. As regards mediation itself, the 2006 Special Commission concluded:

> "1.3.2 The Special Commission welcomes the mediation initiatives and projects which are taking place in Contracting States in the context of the 1980 Hague Convention, many of which are described in Preliminary Document No 5.[34]
>
> 1.3.3 The Special Commission invites the Permanent Bureau to continue to keep States informed of developments in the mediation of cross-border

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[31] *Ibid*.
[32] Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (31 March – 2 April 2009), p. 1, available at < www.hcch.net > under "Work in Progress" then "General Affairs".
[33] S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11).
[34] *Ibid. (op. cit.* note 11).

> disputes concerning contact and abduction. The Special Commission notes that the Permanent Bureau is continuing its work on a more general feasibility study on cross-border mediation in family matters including the possible development of an instrument on the subject, mandated by the Special Commission on General Affairs and Policy of April 2006."[35]

11. Work on the Guide to Good Practice on Mediation under the 1980 Hague Child Abduction Convention commenced in 2009. A group of independent experts[36] from different Contracting States was invited to assist with the preparation of the Guide. A draft Guide[37] was circulated to the Contracting States of the 1980 Convention and the Hague Conference Members in advance of Part I of the Sixth Meeting of the Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention. The Special Commission: "welcome[d] the draft Guide to Good Practice on Mediation under the 1980 Convention" and requested that the Permanent Bureau "make revisions to the Guide in light of the discussions of the Special Commission, taking account also of the advice of experts" and to circulate a revised version to Members and Contracting States for final consultations.[38]

12. Further to the work on the Guide to Good Practice on Mediation under the 1980 Hague Child Abduction Convention, the Hague Conference was mandated by its Members at the 2009 Council meeting to establish, in the context of the Malta Process,

> "a Working Party to promote the development of mediation structures to help resolve cross-border disputes concerning custody of or contact with children. The Working Party would comprise experts from a number of States involved in the Malta Process, including both States Parties to the 1980 Child Abduction Convention and non-States Parties."[39]

13. The Malta Process, a dialogue between judges and senior government officials from certain "Hague Convention States" and certain "non-Convention States", whose laws are based on or have been influenced by Shariah law, focuses on seeking solutions to cross-border disputes concerning child custody, contact and abduction that are particularly difficult due to the non-applicability of relevant international legal frameworks. Three conferences were held, in 2004, 2006 and 2009, to make progress on the issue. The idea of establishing a Working Party to promote the development of mediation structures was a result of the Third Malta Conference.[40]

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[35] See Conclusions and Recommendations of the Fifth Meeting of the Special Commission to review the operation of the 1980 Hague Child Abduction Convention and the practical implementation of the 1996 Hague Child Protection Convention.

[36] Members of the group of experts: Ms Gladys Alvarez (Argentina), the Honourable Judge Peter F. Boshier (New Zealand), Ms Cilgia Caratsch (ISS), Mr Eberhard Carl (Germany), Ms Denise Carter (United Kingdom), Ms Sandra Fenn (Reunite), Mme Lorraine Filion (AIFI), Mme Danièle Ganancia (France), Mme Barbara Gayse (Belgium), Mrs Ankeara Kaly (France), Mrs Robine G. de Lange-Tegelaar (Netherlands), Judge Wilney Magno de Azevedo Silva (Brazil), Mrs Lisa Parkinson (United Kingdom), Mr Christoph C. Paul (Germany), Ms Toni Pirani (Australia), Ms Els Prins (IKO, Netherlands), Ms Kathleen S. Ruckman (United States of America), Mr Craig T. Schneider (South Africa), Ms Andrea Schulz (Germany), Mr Peretz Segal (Israel), Ms Sarah Vigers (United Kingdom), Ms Lisa Vogel (United States of America) and Ms Jennifer H. Zawid (United States of America).

[37] Preliminary Document No 5 of May 2011 for the attention of the Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention.

[38] See No 58, Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011).

[39] Conclusions and Recommendations adopted by the 2009 Council, p. 2, *supra* note 32.

[40] For further information on the Malta Process and the Malta Conferences, see the Malta Declarations, available at < www.hcch.net > under "Child Abduction Section" then "Judicial Seminars"; see also *The Judges' Newsletter on International Child Protection*, Vol. XVI (spring 2010) on the Third Malta Judicial Conference on Cross-Frontier Family Law Issues (23-26 March 2009), available at < www.hcch.net > under "Publications" then "Judges' Newsletter".

14. Following the Council's mandate, a Working Party was established in June 2009 and consisted of a small number of independent mediation experts as well as experts from Australia, Canada, Egypt, France, Germany, India, Jordan, Malaysia, Morocco, Pakistan, the United Kingdom and the United States of America. The latter list comprises both Contracting and non-Contracting States to the 1980 Hague Child Abduction Convention. The Working Party held two conference call meetings, on 30 July and 29 October 2009, as well as one in-person meeting from 11 to 13 May 2010 in Ottawa (Canada). Two Questionnaires, one on existing mediation structures and one on the enforceability of mediated agreements, were circulated in preparation of the Working Party conference calls, responses to which are published on the Hague Conference website at < www.hcch.net > (under "Child Abduction Section" then "Cross-border family mediation"). Following the second conference call meeting, Draft Principles for the establishment of mediation structures were established, then discussed and further elaborated by the Working Party at the in-person meeting in Ottawa. The Principles were finalised in autumn 2010 together with an Explanatory Memorandum, both of which are available on the Hague Conference website (at the above-mentioned address), in English, French and Arabic.[41]

15. In early 2011, some States commenced implementation of the Principles in their jurisdictions and designated a Central Contact Point for international family mediation.[42] In April 2011 the Council "welcomed the Principles for the establishment of mediation structures in the context of the Malta Process and agreed that the Principles should be presented for discussion at the Sixth Meeting of the Special Commission".[43] At the same time, the Council mandated the Working Party to continue work on the implementation of mediation structures in the context of the Malta Process.[44]

At its meeting in June 2011, the Special Commission to review the practical operation of the 1980 and the 1996 Hague Conventions noted "the efforts already being made in certain States to establish a Central Contact Point in accordance with the Principles" and encouraged States "to consider the establishment of such a Central Contact Point or the designation of their Central Authority as a Central Contact Point".[45]

B. WORK BY OTHER BODIES

16. Mediation and other means of alternative dispute resolution are also promoted by other multilateral instruments and initiatives.

17. An example of a regional instrument encouraging the use of mediation and similar processes is the *European Convention on the Exercise of Children's Rights* prepared by the Council of Europe and adopted on 25 January 1996.[46]

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[41] "Principles for the Establishment of Mediation Structures in the context of the Malta Process", drawn up by the Working Party on Mediation in the context of the Malta Process with the assistance of the Permanent Bureau, November 2010 (hereinafter, "Principles for the Establishment of Mediation Structures"), see Annex I, available at < www.hcch.net > under the "Child Abduction Section" ("Cross-border family mediation").

[42] These States include Australia, France, Germany and Pakistan. Further information on the Central Contact Points is available at < www.hcch.net > under the "Child Abduction Section" and then "Cross-border family mediation".

[43] Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (5-7 April 2011), p. 1, available at < www.hcch.net >, under "Work in Progress", then "General Affairs".

[44] *Ibid*.

[45] See No 61, Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011).

[46] Council of Europe – ETS-No 160, available at < http://conventions.coe.int/treaty/en/treaties/html/160.htm > (last consulted 14 March 2012), Art. 13 (Mediation or other processes to resolve disputes):

> "In order to prevent or resolve disputes or to avoid proceedings before a judicial authority affecting children, Parties shall encourage the provision of mediation or other processes to resolve disputes and the use of such processes to reach agreement in appropriate cases to be determined by Parties."

18. A further example is Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter, "the Brussels IIa Regulation").[47]

19. At the same time, the increasing use of mediation in national and international commercial and civil law prompted several international and regional initiatives to develop rules and minimum standards for the mediation process itself.[48]

20. On 21 January 1998, the Council of Europe adopted Recommendation No R (98) 1 on family mediation,[49] encouraging States to introduce and promote family mediation or to strengthen existing family mediation while, at the same time, requesting adherence to principles to ensure the quality of mediation and the protection of vulnerable persons affected. The principles address national family mediation as well as international family mediation.

21. On 18 September 2002, the Council of Europe adopted Recommendation Rec (2002)10 on mediation in civil matters,[50] which is broader in scope and describes further principles important for the promotion of mediation in a responsible manner.

22. In 2001 the National Conference of Commissioners of Uniform State Laws of the United States of America developed the Uniform Mediation Act[51] as a model law to encourage the effective use of mediation and ensure legal privilege for all mediation communications. Several US states, meanwhile, have implemented these rules in their jurisdiction.[52] In 2005, the American Arbitration Association, the American Bar Association's Section of Dispute Resolution and the Association for Conflict Resolution adopted the "Model Standards of Conduct for Mediators" revising an older version of Standards from 1994.[53] The Model Standards are meant to give guidance to mediators but also serve to inform the mediating parties and to promote public confidence in mediation.[54]

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[47] See Brussels IIa Regulation, Preamble, para. 25:
"Central authorities should cooperate both in general matter and in specific cases, including for purposes of promoting the amicable resolution of family disputes, in matters of parental responsibility. To this end central authorities shall participate in the European Judicial Network in civil and commercial matters created by Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters."
See also Art. 55 e):
"The central authorities shall, upon request from a central authority of another Member State of from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to: […] e) facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end."

[48] Many of these regional and international instruments focus on alternative dispute resolution in commercial matters, see for example, the UNCITRAL Model Law on International Commercial Conciliation (ref. *supra*, note 3) and the UNCITRAL Conciliation Rules, adopted in 1980, available at < http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf > (last consulted 14 March 2012).

[49] Recommendation No R (98) 1 of the Committee of Ministers to Member States on family mediation, adopted by the Committee of Ministers on 21 January 1998, available at
< https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1153972&SecMode=1&DocId=450792&Usage=2 > (last consulted 14 March 2012).

[50] Recommendation Rec (2002)10 of the Committee of Ministers to Member States on mediation in civil matters, adopted by the Committee of Ministers on 18 September 2002, available at
< https://wcd.coe.int/ViewDoc.jsp?id=306401&Site=CM > (last consulted 14 March 2012).

[51] The text of the Uniform Mediation Act (hereinafter, "United States UMA") in its amended version of August 2003 is available on the Uniform Law Commission website (< http://www.nccusl.org >).

[52] See information on the Uniform Law Commission website (< http://www.nccusl.org >).

[53] The text of the Model Standards of Conduct for Mediators (hereinafter, "US Standards of Conduct") is available at
< http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf > (last consulted 14 March 2012).

[54] See Preamble of the US Standards of Conduct, *ibid*.

23. With the assistance of the European Commission, a group of stakeholders developed the "European Code of Conduct for Mediators",[55] launched on 2 July 2004. The European Code of Conduct established a number of principles to which individual mediators in civil and commercial mediation may commit themselves on a voluntary basis and under their own responsibility.

24. On 21 May 2008, the European Parliament and the Council of the European Union concluded the "European Directive on certain aspects of mediation in civil and commercial matters".[56] According to Article 12 of the Directive, EU Member States are obliged to "bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before 21 May 2011 with the exception of Article 10, for which the date of compliance shall be 21 November 2010 at the latest".[57] Another European Union initiative should be mentioned in this context: following a ministerial seminar organised by the Belgian Presidency of the European Union on 14 October 2010, a working group on family mediation in cases of international child abduction was set up within the European Judicial Network in civil and commercial matters in order to draw a synthesis of the different related initiatives and works and to propose means to promote and improve the use of the mediation in this matter.

25. In addition, several bilateral arrangements drafted to address cross-border family disputes concerning children promote the amicable resolution of these disputes.[58]

C. STRUCTURE OF THE GUIDE

26. The Principles and Good Practices in this Guide are explored in the following order:

- Chapter 1 gives a general overview of the advantages and risks regarding the use of mediation in international family disputes.
- Chapter 2 explores the specific challenges posed by mediation in international child abduction cases within the scope of the 1980 Hague Child Abduction Convention.
- Chapter 3 deals with the question of the special qualifications necessary to mediate in international child abduction cases.
- Chapters 4 to 13 follow the mediation process in international child abduction cases in a chronological order from questions of access to mediation to the outcome of mediation and its legal effect.
- The last Chapters are dedicated to the use of mediation to prevent child abductions (Chapter 14), the use of other alternative dispute resolution mechanisms to bring about agreed solutions in international child abduction cases (Chapter 15) and, finally, special issues regarding the use of mediation in non-Convention cases (Chapter 16).

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[55] Available at < http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm > (last consulted 14 March 2012).
[56] European Directive on mediation (ref. *supra*, note 5).
[57] Regarding the measures taken in the European Union Member States to comply with the Directive see the European Judicial Atlas at < http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm > (last consulted on 14 March 2012) under "Mediation (Directive 2008/52/EC)".
[58] See, for example, Art. 6 of the "Agreement between the Government of Australia and the Government of the Arab Republic of Egypt regarding cooperation on protecting the welfare of children", Cairo, 22 October 2000; Art. 2 of the "Convention entre le gouvernement de la République française et le gouvernement de la République algérienne démocratique et populaire relative aux enfants issus de couples mixtes sépares franco-algériens", Alger, 21 June 1988; Art. 2 of the "Protocole d'accord instituant une commission consultative belgo-marocaine en matière civile", Rabat, 29 April 1981; the texts of all of these bilateral arrangements are available at < www.incadat.com >, under "Legal Instruments" then "Bilateral Arrangements".

D. THE CONTEXT – SOME TYPICAL CASES

27. Some typical factual situations may illustrate the usefulness of mediation in international family disputes concerning children under the 1980 Hague Child Abduction Convention.

(a) In the context of international child abduction, mediation between the left-behind parent and the taking parent may facilitate the voluntary return of the child or some other agreed outcome. Mediation may also contribute to a return order based on the consent of the parties or to some other settlement before the court.

(b) Mediation may also be helpful where, in a case of international child abduction, the left-behind parent is, in principle, willing to agree to a relocation of the child, provided that his / her contact rights are sufficiently secured. Here an agreed solution can avoid the child being returned to the State of habitual residence prior to a possible subsequent relocation.

(c) In the course of Hague return proceedings, mediation may be used to establish a less conflictual framework and make it easier to facilitate contact between the left-behind parent and the child during the proceedings.[59]

(d) Following a return order, mediation between the parents may assist in facilitating the speedy and safe return of the child.[60]

(e) At a very early stage in a family dispute concerning children, mediation can be of assistance in preventing abduction. Where the relationship of the parents breaks down and one of the parents wishes to leave the country with the child, mediation can assist the parents in considering relocation and its alternatives, and help them to find an agreed solution.[61]

[59] This topic is also covered by the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16).
[60] This topic is also covered by the Guide to Good Practice on Enforcement (*op. cit.* note 23).
[61] This topic is also covered by the Guide to Good Practice on Preventive Measures (*op. cit.* note 23).

THE GUIDE

1. THE GENERAL IMPORTANCE OF PROMOTING AGREEMENTS IN CROSS-BORDER FAMILY DISPUTES OVER CUSTODY AND CONTACT

28. There is increasing use of mediation and similar processes facilitating the amicable resolution of disputes in family law in many countries. At the same time, an increasing number of States allow for more party autonomy in the resolution of family disputes while safeguarding the rights of third parties, in particular children.

1.1 Advantages of agreed solutions

- **All appropriate steps should be taken to encourage the parties to a cross-border family dispute concerning children to find an agreed solution to their dispute.**

29. The promotion of dispute resolution by agreement has proven to be particularly helpful in family disputes concerning children, where the parties to the conflict will usually need to co-operate with each other on a continuing basis. Hence, in a dispute arising out of a parental separation, an agreed solution can be particularly helpful to assist in securing the "child's right to maintain on a regular basis […] personal relations and direct contacts with both parents" as guaranteed by the United Nations Convention on the Rights of the Child (hereinafter, "the UNCRC").[62]

30. Agreed solutions are more sustainable since they are more likely to be adhered to by the parties. At the same time, "they establish a less conflictual framework for the exercise of custody and contact and are therefore strongly in the interests of the child".[63] Furthermore, agreed solutions are said to be more satisfactory for the parties; each party can influence the result and engage in finding a solution considered "just" for both parties. Solving disputes by agreement avoids the perception of one party "winning" and one "losing" as an outcome. In contrast, court proceedings concerning matters of custody and contact can worsen the relationship between the parents, as a result of which children are likely to suffer psychologically.[64]

31. Among the different methods to bring about agreed solutions in family disputes, the process of mediation has particular advantages; it facilitates communication between the parties in an informal atmosphere and allows the parties to develop their own strategy regarding how to overcome the conflict. Mediation is a structured but flexible process, which can easily be adapted to the needs of the individual case; it allows for the simultaneous discussion of legal and extra-legal considerations as well as for the informal involvement of (third) persons who might not have legal standing in the case.[65] Another very important advantage of mediation is that it empowers the parties to face future conflicts in a more constructive way.[66] Also, since the threshold for entering into mediation is generally lower than for entering into court proceedings, mediation can be of assistance at an early stage of a conflict before a possible escalation. Mediation may allow the parties to avoid cumbersome legal proceedings. In cross-border family disputes

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[62] *United Nations Convention of 20 November 1989 on the Rights of the Child*, see Art. 10(2), text available at < http://www2.ohchr.org/english/law/crc.htm > (last consulted 14 March 2012).

[63] W. Duncan, "Transfrontier Access / Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Final Report", Prel. Doc. No 5 of July 2002 drawn up for the attention of the Special Commission of September / October 2002, available at < www.hcch.net > under "Child Abduction Section" then "Preliminary Documents" ("Special Commission meetings on the practical operation of the Convention"), at para. 89; see also the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 2.1, p. 6.

[64] See, for example, for **Germany** the findings of the evaluative report comparing mediation and legal proceedings in national family disputes over custody and contact commissioned by the German Federal Ministry of Justice drawn up by R. Greger, "Mediation und Gerichtsverfahren in Sorge- und Umgangsrechtskonflikten", January 2010, p. 118, available at < http://www.reinhard-greger.de/ikv3.pdf > (last consulted 14 March 2012).

[65] See N. Alexander (*op. cit.* note 7), p. 48.

[66] See also K.J. Hopt and F. Steffek (*op. cit.* note 2), p. 10.

concerning children, where legal proceedings in one country may be followed or accompanied by legal proceedings in another country concerning different aspects of the same dispute, an agreement-based solution can be particularly advantageous.

32. This points to another benefit that mediation may bring, which is cost-effectiveness. Mediation can offer a path to avoiding costly legal proceedings – costly both for the parties and for the State.[67] However, since mediation costs differ immensely from jurisdiction to jurisdiction and, since some jurisdictions may offer legal aid for judicial proceedings but not for mediation, it cannot be said that mediation will in every case be less costly than legal proceedings for the parties. But when comparing costs in the individual case, the possibility that the mediation is more likely to lead to a sustainable solution, and is therefore likely to avoid possible legal proceedings between the same parties in the future, needs to be taken into consideration. On the other hand, costs necessary to render the mediated agreement binding and enforceable in the two jurisdictions concerned, which may require the involvement of judicial authorities, need to be included in the calculation of mediation costs.[68]

33. An example will illustrate some of the advantages that mediation may offer in an international child abduction case:

> In 2005, F and M, unmarried and both nationals of State A, move from State A to the distant State Z together with their 2-year-old daughter, for whom they have joint custody according to the law of both State A and State Z. The reason for their relocation is the employment of the father (F) by a firm in State Z. In the following years the family settles in State Z, although the mother (M) finds it difficult to adapt to the new environment due to language and cultural differences. Since State A is several thousand kilometres away, family visits are rare; the maternal grandparents therefore put pressure on M to return to State A. Following relationship problems, M finally decides to move back to State A in 2010. She secretly makes preparations and following the Christmas holidays of 2010 which she spends at her parents' home in State A together with the child, she informs her husband that she and the child will not return to State Z. F is shocked and, having found out about the 1980 Hague Child Abduction Convention which is in force between State A and State Z, he lodges a return application and return proceedings are initiated in State A. At the same time, F applies to the courts in State Z for provisional sole custody of his daughter.
>
> Apart from the obvious advantages of an agreed solution for the child in such a case in terms of maintaining personal relations and direct contact with both parents, an amicable resolution can help the parties to avoid a cumbersome and lengthy judicial resolution of the matter in the courts of the two States concerned. Namely: (1) return proceedings in State A, which, if none of the restricted exceptions to return apply, will lead to an expeditious return of the child to State Z, (2) the ongoing custody proceedings in State Z, which may possibly be followed by (3) proceedings for relocation from State Z to State A initiated by the mother. The lengthy judicial resolution of the parental dispute will not only deplete the financial resources of the parties but will most probably deepen the parents' conflict. Also, if the return proceedings in State A (1) should end with a refusal to return, further proceedings (namely custody and contact proceedings) are likely to follow if the parental conflict is not settled.

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[67] See for example for **Germany**, the findings of the evaluative report comparing mediation and legal proceedings in national family disputes over custody and contact commissioned by the German Federal Ministry of Justice drawn up by R. Greger (*op. cit.* note 64), p. 115); see also for the **United Kingdom (England and Wales)** the report from the National Audit Office: Legal aid and mediation for people involved in family breakdown, March 2007, pp. 8, 10, available online at
< http://www.nao.org.uk/publications/0607/legal_aid_for_family_breakdown.aspx > (last consulted 14 March 2012).

[68] See further regarding costs of mediation under section 4.3.

Should the parents be able to find an agreed solution, they can both "move on" and concentrate on exercising their parental responsibilities amicably.

Mediation is flexible and can adapt to the needs of the specific case. For example, the mediation process could, if both parties agree and it is considered appropriate and feasible, include discussions with the maternal grandparents, who would not have legal standing in the judicial proceedings[69] to the conflict but who have a strong influence on one of the parties. Ensuring their support for the resolution of the conflict can make the solution more sustainable. Mediation can be advantageous at the organisational level, since it can be organised cross-border with mediation sessions taking place through video link, for example, if the parties' participation in an in-person meeting is not feasible.

1.2 Limits, risks and safeguards

- **Safeguards and guarantees should be put in place to prevent engagement in mediation from resulting in any disadvantage for either of the parties.**

34. The limits and risks that can be connected with agreed solutions reached in mediation or through similar dispute resolution mechanisms should not normally be taken as a reason to avoid the use of these means as a whole, but should lead to awareness that necessary safeguards may need to be established.

35. Not all family conflicts can be solved amicably. This is an obvious point, but it cannot be emphasised enough. Some cases require the intervention of a judicial authority. This may be related to the nature of the conflict, the specific needs of the parties or the specific circumstances of the case, as well as to particular legal requirements. Parties in need of a judicial determination should not be denied access to justice. Precious time can be lost in attempting mediation in cases where one party is clearly not willing to engage in the mediation process or in cases otherwise not suitable for mediation.[70]

36. Even where both parties agree to mediation, attention needs to be paid to specific circumstances such as possible indications of domestic violence. The very fact of a joint meeting between the parties in the course of a mediation session might put the physical or psychological integrity of one of the parties, and indeed that of the mediator, at risk. Also, consideration may have to be given to the possibility that drug or alcohol abuse by one of the parties may result in that person's inability to protect his or her interests.

37. Assessment of cases for suitability for mediation is an essential tool to identify cases of special risk.[71] Potential mediation cases should be screened for the presence of domestic violence, as well as drug and alcohol abuse and other circumstances that may affect the suitability of the case for mediation. Where mediation in a domestic violence case is still considered feasible,[72] necessary safeguards need to be taken to protect the security of those affected. Also, attention needs to be paid to differences in bargaining power, whether due to domestic violence or other circumstances or simply resulting from the personalities of the parties.

38. There may also be a risk that the agreed solution will not have legal effect and thus may not safeguard the parties' rights in case of further dispute. There are various

[69] In some States grandparents may have a contact right of their own and could thus be a party to judicial proceedings concerning contact with the child.
[70] The question of assessing the suitability for mediation is dealt with in detail under section 4.2 below.
[71] See for further details section 4.2 below.
[72] See Chapter 10 on the subject of domestic violence.

possible reasons for this. The mediated agreement or part of it may be in conflict with the applicable law or not legally binding and enforceable due to the fact that the agreement has not been registered, court approved and / or included in a court order where this is required. It needs to be highlighted in this regard that several jurisdictions restrict party autonomy in regard to certain aspects of family law.[73] For example, in some systems agreements on parental responsibility may have no legal effect unless approved by a court. Also, many legal systems restrict the ability of a parent to limit the amount of payable child support by agreement.

39. In cross-border family disputes especially, the legal situation is complex. The interplay of two or more legal systems needs to be taken into account. It is important that parents be well informed about the law applicable to the subject matters dealt with in mediation as well as the law applicable to the mediation process itself, including confidentiality, and about how to give legal effect to their agreements in both (all) legal systems concerned.[74]

40. Some of the risks that may occur when agreements are drawn up without taking into consideration all necessary aspects of the legal situation are illustrated by the following variations of the example given above at paragraph 33.

Variation 1
Following the wrongful removal of the child from State Z to State A by the mother (M), the parents agree that M will return to State Z with the child under the condition that the father (F) will provide, until the custody proceedings in State Z are finalised, the necessary maintenance to enable the returning parent to remain in State Z with the child, including use of the family home, while F promises to reside in another location to avoid further disputes. Subsequently M, relying on the agreement, returns to State Z with the child; but F refuses to leave the family home and to financially support M. Given that the parental agreement was neither rendered enforceable in State A nor State Z before its implementation, and given that neither State considers a parental agreement of that kind to have any legal effect without court approval, one parent can easily resile on the agreement to the disadvantage of the other.

Variation 2
Following the wrongful removal of the child from State Z to State A by the mother (M), the parents agree that the child is to stay with M in State A and will spend part of the school holidays each year with the father (F) in State Z. Three months following the date of the wrongful removal, the child travels to State Z to spend the Easter holidays with F. At the end of the holidays F refuses to send the child back to State A. He claims that he is not wrongfully retaining the child since the child is now back at her place of habitual residence from which she had only been away due to the wrongful removal by M. F also refers to the provisional sole custody order the competent court in State Z had granted him immediately after the wrongful removal by M. Again, in cases where the mediated solution is not rendered legally binding in the relevant jurisdictions before its practical implementation, it can easily be disobeyed by one of the parents.

Variation 3
The child is wrongfully removed from State Z to a third State T where the mother (M) wants to relocate for work reasons. While the left-behind unmarried father (F) has *ex lege* custody rights under the laws of State A and State Z, he does not have custody rights according to the laws of State T. The 1996 Hague Child Protection Convention is not in force between these States. Unaware of this situation, F gives his acquiescence to the relocation of the mother and child to State T based on the

[73] See for further details Chapter 11.
[74] See below, section 6.1.2 "Informed consent", section 6.1.7 "Informed decision-making", section 4.5 "Contract to mediate" and Chapter 11.

condition that he can have regular personal contact with the child. The mediated agreement, drawn up without taking into consideration the legal situation, is not registered or in any other way formalised; it does not have legal effect under the law of State Z or State T. A year later, M disrupts the contact between father and child. According to the law of State T, which is, in this case, now applicable to custody and contact rights due to the change of the child's habitual residence, the unmarried father has no parental rights in respect of the child.[75]

41. Another difficult issue in the mediation of international family disputes over custody and contact is how best to safeguard the rights of the children concerned. The court in a contact or custody decision will – according to the law of most countries – take into consideration the best interests of the child. However, mediation differs substantially from court proceedings when it comes to introducing the child's views into the process. A judge may, depending on the age and maturity of the child, hear the child in person or have the child interviewed by a specialist with the appropriate safeguards to protect the child's psychological integrity. The views of the child can thus directly be taken into account by the judge. The procedural powers of a mediator, in contrast, are limited. He or she has no interrogative powers and cannot, as judges can in some countries, summon the child to a hearing or order an expert interview of the child.[76] Safeguards need to be taken to protect the rights and welfare of children in mediation.[77]

1.3 General importance of linkage with relevant legal procedures

- **Mediation and other processes to bring about agreed solutions of family disputes should generally be seen as a complement to legal procedures, not as a substitute.**
- **Access to judicial proceedings should not be restricted.**
- **Mediation in international family disputes needs to take account of relevant national and international laws, to prepare the ground for a mediation agreement that is compatible with the relevant laws.**
- **Legal procedures should be available to give legal effect to the mediated agreement.**

42. It is important to note that mediation and similar processes facilitating agreed solutions should not be seen as a complete substitute for judicial procedures, but as a complement.[78] A close link between these processes can be fruitful in many ways and at the same time help to overcome certain shortcomings that exist in both judicial proceedings and amicable dispute resolution mechanisms, such as mediation.[79] It has to be emphasised that even where mediation and similar processes introduced at an early stage of an international family dispute are able to avoid litigation, complementary

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[75] If the 1996 Hague Child Protection Convention is in force between State T and State Z, the father's *ex lege* parental responsibility will subsist; see Art. 16, para. 3, of the Convention. See also P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention, *Proceedings of the Eighteenth Session (1996)*, Tome II, *Protection of children*, The Hague, SDU, 1998, pp. 535-605, available at < www.hcch.net > under "Publications" then "Explanatory Reports", pp. 579, 581.

[76] See above in Glossary, "Mediation".

[77] See section 6.1.6 "Consideration of the interests and welfare of the child" and Chapter 7 "Involvement of the Child".

[78] See also Council of Europe Recommendation Rec (2002)10 on mediation in civil matters (ref. *supra*, note 50), Preamble: "Noting that although mediation may help to reduce conflicts and the workload of courts, it cannot be a substitute for an efficient, fair and easily accessible judicial system"; and Principle III, "5. Even if parties make use of mediation, access to the court should be available, as it constitutes the ultimate guarantee protecting the rights of the parties."

[79] It should be added that if amicable dispute resolution means are to be used in an international child abduction case, the close linkage with judicial proceedings is not just fruitful but almost inevitable, see further below, particularly at 2.2.

"judicial processes" will frequently be required to render an agreed solution legally binding and enforceable in all legal systems concerned.[80]

43. When mediation is offered to the parties to an international family dispute, they need to be informed that mediation is not their only recourse. Access to judicial proceedings must be available.[81]

44. The legal situation in international family disputes is often complex. It is important that the parties have access to relevant legal information.[82]

45. In international family disputes it is particularly important to ensure that the mediated agreement has legal effect in the relevant jurisdictions, before implementation of the agreement begins.[83] Appropriate procedures should be made available to give legal effect to mediated agreements, be it by court approval, court registration or otherwise.[84] Again, close co-operation between mediators and legal representatives of the parties may be very helpful in this regard, as well as the provision of relevant information by Central Authorities or Central Contact Points for international family mediation.[85]

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[80] The processes required to render a mediated agreement legally binding and enforceable differ from one legal system to another. See for further details on the topic Chapters 12 and 13 below.

[81] See also Council of Europe Recommendation Rec (2002)10 on mediation in civil matters (ref. *supra*, note 50), Principle III, 5 (Organisation of mediation): "5. Even if parties make use of mediation, access to the court should be available, as it constitutes the ultimate guarantee protecting the rights of the parties." See also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 5.1, p. 17.

[82] See Chapters 11 and 12 below; for the role of Central Authorities and other bodies in facilitating the provision of this information, as well as regarding the role of the parties' representatives, see section 4.1 below.

[83] See also the Principles for the Establishment of Mediation Structures (*op. cit.* note 41); see Chapter 11 below.

[84] See also the European Directive on mediation (ref. *supra*, note 5), Art. 6 (Enforceability of agreements resulting from mediation):

> "1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.
>
> 2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.
>
> 3. Member States shall inform the Commission of the courts or other authorities competent to receive requests in accordance with paragraphs 1 and 2.
>
> 4. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1."

[85] See the Principles for the Establishment of Mediation Structures (*op. cit.* note 41).

2. THE USE OF MEDIATION IN THE FRAMEWORK OF THE 1980 HAGUE CHILD ABDUCTION CONVENTION – AN OVERVIEW OF SPECIFIC CHALLENGES

46. The 1980 Hague Child Abduction Convention promotes a search for amicable solutions. Article 7 states that the Central Authorities "shall take all appropriate measures […] *c)* to secure the voluntary return of the child or to bring about an amicable resolution of the issues", which is partially repeated in Article 10: "The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child."

47. Chapter 2 of this Guide is meant to draw attention to the specific challenges to the use of mediation in international child abduction cases under the 1980 Hague Child Abduction Convention.

48. It cannot be emphasised enough that there is a difference between national family mediation and international family mediation. Mediation in international family disputes is much more complex and requires mediators to have relevant additional training. The interplay of two different legal systems, different cultures and languages makes mediation much more difficult in such cases. At the same time, the risks that go with the parties relying on mediated agreements which do not take into account the legal situation and have no legal effect in the jurisdictions concerned are much higher. The parties might not be aware that the cross-border movement of persons or goods, to which they have agreed, will result in a change of their legal situation. When it comes to rights of custody or contact, for example, habitual residence is a widely used "connecting factor" in private international law. Hence the change of the child's habitual residence from one country to another following the implementation of a parental agreement may affect jurisdiction and applicable law regarding custody and contact, and may thus affect the legal evaluation of the parties' rights and duties.[86]

49. International child abduction cases characteristically involve high levels of tension between the parties. The left-behind parent, often in shock as a result of the sudden loss, may be driven by the fear of never seeing his / her child again while the taking parent, once realising the full consequences of his / her action, may be in fear of legal proceedings, a forced return and a possible negative impact on custody proceedings. Besides the practical difficulties of how to engage the parents in a constructive mediation process, there is the all-encompassing need for expeditious action. Additional difficulties might arise from criminal proceedings brought against the taking parent in the country of the child's habitual residence, as well as from visa and immigration issues.

2.1 Timeframes / Expeditious procedures

- **Mediation in international child abduction cases has to be dealt with expeditiously.**
- **Mediation should not lead to delay in Hague return proceedings.**
- **The parties should be informed about the availability of mediation as early as possible.**
- **The suitability of mediation should be assessed in the particular case.**
- **Mediation services used in international child abduction cases need to provide for the scheduling of mediation sessions on short notice.**
- **Initiating return proceedings before commencing mediation should be considered.**

[86] See Chapter 12 below.

50. Time is crucial in international child abduction cases. The 1980 Hague Child Abduction Convention seeks to ensure the child's prompt return to the State of his / her habitual residence.[87] It is the Convention's purpose to restore the *status quo ante* the abduction as quickly as possible to lessen the harmful effects of the wrongful removal or retention for the child. The 1980 Convention protects the interests of the child by preventing a parent from gaining advantage through establishing "artificial jurisdictional links on an international level, with a view to obtaining [(sole)] custody of a child".[88]

51. It has to be emphasised that in abduction cases, time plays on the side of the "taking parent"; the longer the child stays in the country of abduction without the underlying family dispute being resolved, the more difficult it becomes to restore the relationship between the child and the left-behind parent. Delay may affect the rights of the left-behind parent, but more importantly it undermines the right of the child concerned to maintain continuing contact with both parents, a right embodied in the UNCRC.[89]

52. Where the return proceedings are commenced before the court more than one year after the abduction, the 1980 Hague Child Abduction Convention gives discretion to the court to refuse the return, provided that it is proven the child has settled into his / her new environment (Art. 12(2)).

53. Mediation in child abduction cases has to be conducted rapidly at whatever stage it is introduced. Circumvention of the 1980 Hague Child Abduction Convention to the disadvantage of the children concerned is one of the major issues against which safeguards in the use of mediation need to be established.[90] As much as it is in everybody's interest that an amicable resolution of an international family conflict be attempted, the misuse of mediation by one parent as a delaying tactic must be prevented.

54. Entrusted with a return application, Central Authorities under the 1980 Hague Child Abduction Convention will, as soon as the whereabouts of the child are known, generally try to bring about a voluntary return of the child (Arts 7(2) *c)* and 10). At this very early stage, where appropriate services for child abduction cases are available, mediation should already be suggested. See also Chapter 4 below ("Access to mediation").

55. The suitability of mediation in the specific child abduction case should be assessed before mediation is attempted, to avoid any delays that might result from proceeding with mediation where it is not likely to be effective.[91]

56. Mediation services offered for abduction cases under the 1980 Hague Child Abduction Convention need to provide short-notice scheduling of mediation sessions. This requires a lot of flexibility from the mediators involved. However, the burden can be lowered with the help of a pool of qualified mediators who commit themselves to a system that secures availability on short notice.

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[87] See the Preamble of the 1980 Hague Child Abduction Convention.
[88] See E. Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, *Actes et documents de la Quatorzième session (1980)*, Tome II, *Child abduction*, The Hague, Imprimerie Nationale, 1998, pp. 425-476, at p. 428, also available at < www.hcch.net > under "Publications" then "Explanatory Reports".
[89] See Art. 10(2) of the UNCRC.
[90] See also S. Vigers, "Mediating International Child Abduction Cases – The Hague Convention", Hart Publishing, Oxford 2011, pp 42 *et seq*.
[91] For more information on the initial screening, particularly regarding what issues may influence the suitability for mediation as well as who can conduct the screening, see Chapter 4 below ("Access to mediation").

57. In some States, mediation schemes specifically developed for international child abduction cases are already successfully providing such services.[92] Typically, they may offer two or three mediation sessions spread over a minimum of two (often subsequent) days, each session taking up to three hours.[93]

58. The institution of Hague return proceedings before commencing mediation should be considered. Experience in several countries has shown that the immediate initiation of return proceedings followed, where necessary,[94] by a stay of these proceedings for mediation works well.[95] This approach has several advantages:[96]

(a) It may positively affect the taking parent's motivation to engage in finding an amicable solution when otherwise faced with the concrete option of court proceedings.

(b) The court may be able to set a clear timeframe within which the mediation sessions must be held. Thus the misuse of mediation as a delaying tactic is avoided and the taking parent is not able to gain any advantages from the use of Article 12(2) of the 1980 Hague Child Abduction Convention.

(c) The court may take necessary protective measures to prevent the taking parent from taking the child to a third country or going into hiding.

(d) The left-behind parent's possible presence in the country to which the child was abducted to attend the Hague court hearing can be used to arrange for a short

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[92] For example, in the **United Kingdom (England and Wales)**, the non-governmental organisation reunite International Child Abduction Centre (hereinafter, "reunite") has offered specialist mediation services in cases of international child abduction for more than 10 years, see the reunite website at < www.reunite.org >; see also the report of October 2006 on "Mediation In International Parental Child Abduction – The reunite Mediation Pilot Scheme" (hereinafter, "2006 Report on the reunite Mediation Pilot Scheme"), available at < http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Mediation%20Report.pdf > (last consulted 14 March 2012). In **Germany**, the non-profit organisation MiKK e V., founded in 2008 by the German associations BAFM and BM, is continuing the work of the latter associations in the field of "Mediation in International Disputes Involving Parents and Children" including specialist mediation in Hague abduction cases. Mediation services are currently available under four bi-national co-mediation programmes: the **German-Polish** project (commenced in 2007), the **German-American** project (commenced in 2004), the **German-British** project in co-operation with reunite (commenced in 2003/4) and the **German-French** project carrying on the work of the Franco-German mediation scheme organised and financed by the French and German Ministries of Justice (2003-2006). A fifth mediation scheme involving **German** and **Spanish** mediators is in preparation, see < www.mikk-ev.de > (last consulted 14 March 2012). In the **Netherlands**, the non-governmental organisation Centrum Internationale Kinderontvoering (IKO) offers specialist mediation services in Hague child abduction cases organised through its Mediation Bureau since 1 November 2009, see < www.kinderontvoering.org > (last consulted 14 March 2012), see also R.G. de Lange-Tegelaar, "Regiezittingen en mediation in internationale kinderontvoeringszaken", Trema Special, No 33, 2010, pp. 486, 487.

[93] See, *e.g.*, the mediation services offered in the **United Kingdom (England and Wales)** by reunite (< www.reunite.org >), see also the 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 92), p. 11; see also the mediation services offered in **Germany** through the association MiKK e.V., see S. Kiesewetter and C.C. Paul, "Family Mediation in an International Context: Cross-Border Parental Child Abduction, Custody and Access Conflicts: Traits and Guidelines" in C.C.Paul and S.Kiesewetter (Eds), *Cross-Border Family Mediation - International Parental Child Abduction, Custody and Access Cases*, Wolfgang Metzner Verlag, 2011, pp. 39 *et seq* ; see also in the **Netherlands**, the Dutch Mediation Pilot Programme using 3x3-hour sessions in the course of two days, see I. Bakker, R. Verwijs *et al., Evaluatie Pilot Internationale Kinderontvoering*, July 2010, p. 77.

[94] States, which do not stay the return proceedings for mediation are, for example, **France**, **Germany** and the **Netherlands**. In **Germany** and the **Netherlands**, the mediation in international abduction cases is integrated into the schedule of the court proceeding, *i.e.*, mediation takes place within the short period of 2-3 weeks before the (next) court hearing. A stay of proceedings is therefore not necessary in these States. In **France**, mediation is conducted as a process parallel to, and independent of, the Hague return proceedings; i.e. the return proceedings follow the usual timeline regardless of whether there is an ongoing mediation or not. An amicable result reached in the parallel process of mediation can be introduced into the return proceedings at any time.

[95] For example, **Germany** and the **United Kingdom**; see also S. Vigers, Mediating International Child Abduction Cases – The Hague Convention (*op. cit.* note 90), pp. 45 *et seq*.

[96] See also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 2.4, p. 10.

sequence of in-person mediation sessions without creating additional travel costs for the left-behind parent.

(e) The court seised could, depending on its competency in this matter, decide on provisional contact arrangements between the left-behind parent and the child, which prevents alienation and may have a positive effect on the mediation process itself.

(f) Funding for court-referred mediation may be available.

(g) Furthermore, the fact that the parties will most likely have specialist legal representation at this stage already helps to ensure that the parties have access to the relevant legal information in the course of mediation.

(h) Finally, the court can follow up the result of mediation and ensure that the agreement will have legal effect in the legal system to which the child was abducted, by turning the agreement into a court order or taking other measures.[97] The court can also assist with ensuring that the agreement will have legal effect in the other relevant jurisdiction.

59. However, the question of when to institute return proceedings where mediation is an option may be answered differently. Depending on how the Hague return proceedings are organised in the relevant legal system and depending on the circumstances of the case, the commencement of mediation before the institution of return proceedings can be an option. In Switzerland, for example, the legislation implementing the 1980 Convention provides for an explicit possibility for the Central Authority to initiate conciliation or mediation procedures.[98] In addition, the Swiss implementation legislation emphasises the importance of attempting an amicable settlement of the conflict by requiring that the court once seised with the Hague return proceedings initiate mediation or conciliation procedures if the Central Authority has not already done so.[99]

Independent of whether mediation or similar processes in international child abduction cases under the 1980 Convention are introduced prior to the commencement of return proceedings or following the institution of return proceedings, it is of the utmost importance that Contracting States take safeguards to ensure that mediation and similar processes take place with very clear and limited timeframes.

60. Regarding the scope of mediation, a balance has to be struck between giving the communication process between the parties sufficient time and not delaying possible return proceedings.[100]

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[97] On the question of rendering the agreement enforceable and the question of jurisdiction, see Chapters 12 and 13 below.

[98] See Articles 4 of the **Swiss** Federal Act of 21 December 2007 on International Child Abduction and the Hague Conventions on the Protection of Children and Adults, which entered into force on 1 July 2009 (*Bundesgesetz über internationale Kindesentführung und die Haager Übereinkommen zum Schutz von Kindern und Erwachsenen (BG-KKE) vom 21 Dezember 2007*), available at < http://www.admin.ch/ch/d/sr/2/211.222.32.de.pdf > (last consulted 14 March 2012), unofficial English translation available at < http://www.admin.ch/ch/e/rs/2/211.222.32.en.pdf > (last consulted 14 March 2012); see also A. Bucher, "The new Swiss Federal Act on International Child Abduction", *Journal of PIL*, 2008, pp. 139 *et seq*., at 147.

[99] *Ibid*, Article 8.

[100] See Chapter 5 below; see also the Conclusions and Recommendations of the Fourth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22–28 March 2001), No 1.11, "Measures employed to assist in securing the voluntary return of the child or to bring about an amicable resolution of the issues should not result in any undue delay in return proceedings", reiterated in the Conclusions and Recommendations of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006), No 1.3.1; available at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings".

2.2 Close co-operation with administrative / judicial authorities

- **Mediators and bodies offering mediation in international child abduction cases should co-operate closely with the Central Authorities and courts.**

61. Mediators and organisations offering mediation in international child abduction cases should co-operate closely with the Central Authorities and courts on an organisational level to ensure a speedy and efficient resolution of the matter. The mediators should do their best to make the organisational aspects of the mediation procedures as transparent as possible, while safeguarding the confidentiality of mediation. For example, the Central Authority and the court seised should be informed whether mediation will be conducted or not in the case. The same is true when mediation is terminated or interrupted. This information should be communicated speedily to the Central Authority and the court seised. It is therefore advisable in international child abduction cases that the Central Authority and / or the relevant court should maintain close links with the specialist mediation services on an administrative level.[101]

2.3 More than one legal system involved; enforceability of the agreement in both / all jurisdictions concerned

- **Mediators need to be aware that mediation in international child abduction cases has to take place against the background of interaction between two or more legal systems and of the applicable international legal framework.**
- **The parties need to have access to relevant legal information.**

62. Specific difficulties for the mediation process itself may result from the fact that more than one legal system is involved. To find a sustainable solution for the parties that can have legal effect, it is therefore important to take the laws of both / all legal systems concerned into consideration, as well as regional or international law applicable in the case.

63. It has already been stressed above in section 1.2 how dangerous it can be when parties rely on mediated agreements that have no legal effect in the relevant jurisdictions. Mediators conducting mediation in international family disputes concerning children have a responsibility to draw the parties' attention to the importance of obtaining the relevant legal information and specialist legal advice. It needs to be highlighted in this context that mediators, even those having the relevant specialist legal training, are not in a position to give legal advice to the parties.

64. Legal information becomes particularly relevant with respect to two aspects: first, the content of the mediated agreement, which needs to be compatible with legal requirements; and second, the question of how to give legal effect to the mediated agreement in the two or more legal systems concerned. Both are closely linked.

65. The parties should be made aware of the fact that specialist legal advice may be needed with regard to the relevant legal systems' approaches to the law applicable to the matters discussed in the mediation. The parents' autonomy regarding agreements on custody and contact in respect of their child may be restricted in that the law may provide for mandatory court approval of any such agreement to ensure that the best interests of the child are secured.[102] At the same time, the parents should understand

[101] For example, in **Germany**, the Central Authority concluded a co-operation contract with the specialist mediation organisation MiKK e.V., which includes, *inter alia*, terms on a speedy information exchange on an organisational level.
[102] See Chapter 12.

that, once a mediated agreement has legal effect in one jurisdiction, further steps might be necessary to give it legal effect in the other legal system(s) concerned in their case.[103]

66. The parties should ideally have access to pertinent legal information throughout the mediation process. That is why many mediators working in the field of international child abduction encourage the parties to maintain specialist legal representatives throughout the mediation process. Relevant information may also be provided Central Authorities or Central Contact Points for international family mediation.[104]

2.4 Different cultural and religious backgrounds

- **Mediation in international family disputes should take due consideration of the possibly different cultural and religious backgrounds of the parties.**

67. One of the particular challenges of international family mediation in general is that the parties often have different cultural and religious backgrounds. Their values and expectations regarding many aspects of the exercise of parental responsibility, such as the education of their children, may differ immensely.[105] The cultural and religious backgrounds of the parties may also affect the way they communicate with each other and with the mediator.[106] The mediator needs to be aware that a part of the family dispute may be caused by misunderstandings due to a lack of recognition of the other party's cultural differences.[107]

68. Mediators conducting mediation in such cases should have a good understanding of the cultures and religious background(s) of the parties.[108] Specific training is needed in this respect.[109] Where a choice of specialist mediators is available and feasible for the parties, it can be helpful to employ mediators versed in the cultural and religious backgrounds of the parties or sharing one party's background and being versed in the other party's culture and religion.

69. A model that has been successfully followed in some mediation schemes and which was specifically developed for cross-border child abductions involving parents from different States of origin is that of "bi-national" mediation.[110] Here, the requirement that the mediators have a good understanding of the parties' cultural backgrounds is met by employing, in co-mediation, two mediators from the two States concerned, each being knowledgeable of the other culture. "Bi-national" could as well stand for "bi-cultural" in this context. It is important to highlight that mediators are neutral and impartial and do not represent one or other of the parties.[111]

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[103] See Chapter 12 and 13.
[104] On the role of Central Authorities and other bodies in facilitating the provision of this information as well as the role of the parties' representatives, see section 4.1 below.
[105] See, *e.g.*, K.K. Kovach, *Mediation in a nutshell*, St. Paul, 2003, at pp. 55, 56; D. Ganancia, "La médiation familiale internationale", Érès, Ramonville Saint-Agne 2007, 132 ff; R. Chouchani Hatem, "La différence culturelle vécue au quotidien dans les couples mixtes franco-libanais", *Revue Scientifique de L'AIFI*, Vol. 1, No 2, *Automne* 2007, pp. 43-71; K. Kriegel, "Interkulturelle Aspekte und ihre Bedeutung in der Mediation", in S. Kiesewetter and C.C. Paul (Eds), *Mediation bei internationalen Kindschaftskonflikten - Rechtliche Grundlagen, Interkulturelle Aspekte, Handwerkszeug für Mediatoren, Einbindung ins gerichtliche Verfahren, Muster und Arbeitshilfen*, Verlag C.H. Beck, 2009, pp. 91-104; M.A. Kucinski, "Culture in International Parental Kidnapping Mediations", *Pepperdine Dispute Resolution Law Journal*, 2009, pp. 555-582, at 558 *et seq*.
[106] See, *e.g.*, K.K. Kovach, *ibid.* (*op. cit.* note 105), at pp. 55, 56 pointing out that eye contact may in some cultures be considered as insulting or demonstrating a lack of respect, while in most Western cultures it is on the contrary a sign of active listening. D. Ganancia, "La médiation familiale internationale", *ibid.* (*op. cit.* note 105), 132 ff.
[107] See K.K. Kovach, *ibid.* (*op. cit.* note 105), at p. 56.
[108] See also section 6.1.8 below (Intercultural competence).
[109] See Chapter 3 on Training.
[110] Franco-German Project of Bi-national Professional Mediation (2003-2006); US-German Bi-national Mediation Project; Polish-German Bi-national Mediation Project; see also section 6.2.3 below.
[111] See further under Chapter 6, section 6.2.3 below.

2.5 Language difficulties

- **In mediation each party should, as far as possible, have the opportunity to speak a language with which he or she feels comfortable.**

70. A further challenge to mediation in international family disputes arises when the parties to the dispute speak different mother tongues. Where the parties have different native languages, they may in mediation, at least temporarily, each prefer to speak their own language. This may be the case even if one of the parties masters the other's language or is comfortable using a language other than his / her mother tongue in the everyday context of their relationship. In the emotionally stressful circumstances of discussing their dispute, the parties may simply prefer speaking their mother tongue, and this might also give them the feeling of being on equal footing.

71. On the other hand, parties with different mother tongues may well feel comfortable speaking a third language in mediation, *i.e.*, the mother tongue of neither of the parties, or one party may be willing to speak the other's language. In any case, the mediator has to be aware of the additional risk of misunderstandings as a result of language difficulties.

72. The wishes of the parties regarding the language(s) used in mediation should be respected as much as possible. Ideally, the mediator(s) themselves should be able to understand and speak those languages.[112] Co-mediation allows for the involvement of mediators fluent in the two mother tongues in question or possessing a good knowledge of the other language (so called "bilingual" co-mediation).[113] Co-mediation may also include one mediator speaking the mother tongue of one party and the other being fluent in the two relevant languages. Here, however, the mediator speaking the two languages will partly play an interpreting role.

73. Offering the parties the possibility to directly communicate in their preferred language during mediation is clearly the first choice; however, there may be cases where this is not feasible. Communication in the preferred language might also be facilitated through the use of interpretation. Where interpretation is considered an option, the interpreter has to be chosen with care and needs to be well prepared and aware of the highly sensitive nature of the conversation, and of the emotional atmosphere of the mediation, so as not to add a further risk of misunderstanding and put an amicable resolution at risk. Furthermore, safeguards concerning confidentiality of mediation communications must be extended to include interpreters.[114]

2.6 Distance

- **The geographical distance between the parties to the dispute needs to be taken into account when it comes to making arrangements for a mediation meeting, as well as in relation to the modalities agreed on in the mediated agreement.**

74. Another challenge of mediation in cases of child abduction from one country to another is that of geographical distance between the parties. The distance between the State of the child's habitual residence, which is where the left-behind parent resides, and the State to which the child was taken may be very great.

75. Distance may on the one hand affect the practical arrangements for the mediation sessions. On the other hand, distance may play a role regarding the content of the mediated solution itself, which may need to take account of the possibility that a considerable geographical distance will remain between the parents in the future. The latter would be the case, for example, if the left-behind parent agreed to relocation of the child together with the taking parent, or in cases where the child is returned to the State of habitual residence but the taking parent decides to remain abroad.

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[112] Please see also section 3.3 regarding lists of mediators.
[113] The bi-national mediation programmes referred to under note 110 are all bilingual mediation programmes.
[114] Regarding confidentiality, see section 6.1.5 below.

76. When it comes to arranging a mediation session, the distance between the parties and the potentially high travel costs will affect the question of the appropriate venue for mediation, and the question of whether direct or indirect mediation should be used. Both topics are dealt with in detail below (the place of mediation under section 4.4, and the question of direct or indirect mediation under section 6.2). Of course, modern means of communication such as video-link or internet communication may assist in mediation.[115]

77. As regards the content of an eventual agreement allowing for the exercise of cross-border custody and / or contact rights, *i.e.*, where the parents decide to reside in different countries, the geographical distance as well as the connected travel costs need to be given due consideration. Any arrangements agreed on need to be realistic and feasible in terms of time and expenses. This topic will be explored further under Chapter 11 ("Reality check").

2.7 Visa and immigration issues

- **All appropriate measures should be taken to facilitate the provision of necessary travel documents, such as a visa, to a parent wishing to attend an in-person mediation meeting in another State.**
- **All appropriate measures should be taken to facilitate the provision of necessary travel documents, such as a visa, to any parent needing to enter another country to exercise his / her custody or contact rights with his / her child.**
- **The Central Authority should take all appropriate steps to assist the parents with obtaining the necessary documents through provision of information and advice, or by facilitating specific services.**

78. In cases of international family disputes, visa and immigration issues often add to the difficulties of the case. In order to promote amicable resolutions of international family disputes, States should take measures to ensure that a left-behind parent is capable of obtaining necessary travel documents to attend a mediation session in the country to which the child was abducted, or indeed to participate in legal proceedings.[116] At the same time, States should take measures to facilitate the provision of necessary travel documents to the taking parent to re-enter the State of the habitual residence of the child for a mediation session and / or legal proceedings.[117]

79. The provision of travel documents may also play an important part in the result of legal proceedings or mediation in an international parental dispute. For example, where the return of a child is ordered in Hague return proceedings, the taking parent might need travel documents to re-enter the State of the child's habitual residence together with the child. States should facilitate the provision of necessary travel documents in such cases. The same applies to cases where the taking parent decides to return the child voluntarily, including where a return of the child and parent has been agreed on in mediation. Nor should visa and immigration issues constitute an obstacle to the cross-

[115] See for further details section 4.4 below.
[116] See for information on possible assistance with visa and immigration issues the Country Profiles under the 1980 Hague Child Abduction Convention developed by the Permanent Bureau, finalised in 2011, available at < www.hcch.net > under "Child Abduction Section" then "Country Profiles", at sections 10.3. j) and 10.7. l).
[117] See also No 31, Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011).

border exercise of contact rights; the right of children to have contact with both their parents, as protected by the UNCRC, needs to be safeguarded.[118]

80. The Central Authority should assist the parents in obtaining the necessary travel documents by providing information and advice or by providing assistance with the application for any necessary visa.[119]

2.8 Criminal proceedings against the taking parent

- **Mediation in international child abduction cases needs to take into consideration possible criminal proceedings initiated against the taking parent in the country from which the child was abducted.**
- **Where criminal proceedings were initiated, the issue needs to be addressed in mediation. Close co-operation among the relevant judicial and administrative authorities may be needed to help ensure that any agreement reached in mediation is not frustrated by ongoing criminal proceedings.**

81. Although the 1980 Hague Child Abduction Convention only deals with the civil aspects of international child abduction, criminal proceedings against the taking parent in the country of the child's habitual residence may affect return proceedings under the Convention.[120] The criminal charges may include child abduction, contempt of court and passport offences. Pending criminal proceedings in the State of the child's pre-abduction residence can – under certain circumstances – result in the court seised with a Hague return application refusing to return the child. This may, in particular, be the case where the child was abducted by the actual carer and the return order would result in the separation of actual carer and child,[121] and this separation – due to the age of the child or other circumstances – would constitute a grave risk of physical or psychological harm in the sense of Article 13(1) *b)* of the 1980 Convention.[122]

82. One problem with pending criminal proceedings is that the individual who initiated them may not have the power to stop them in order to facilitate the return of the child. Depending on the criminal law of the State in question, it may be a matter for the prosecutor or court alone to decide whether criminal proceedings may be terminated. This means that even if a left-behind parent, having initiated criminal proceedings, later realises that the criminal proceedings are an obstacle to securing the return of the child or to finding an agreed solution, he or she may have little influence on removing this obstacle.

83. Within mediation in international child abduction cases, it is important to take into consideration that the left-behind parent may have initiated criminal proceedings, openly or in secret, or that he or she may intend to initiate criminal proceedings upon the agreed return of the taking parent and child. In view of the possible implication these proceedings may have it is crucial to address the issue in mediation. Central Authorities and courts involved should as far as possible support the parties in obtaining the

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[118] See also the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 4.4, pp. 21, 22.
[119] See also the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 4.4, pp. 21, 22.
[120] The responses to the 2006 Questionnaire showed that criminal proceedings are commonly, but not necessarily, viewed as having a negative effect, see Report on the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006), drawn up by the Permanent Bureau, March 2007, available at < www.hcch.net > under "Child Abduction Section" ("Special Commission meetings on the practical operation of the Convention") then "Reports" ("Special Commission of October-November 2006"), note 59, p. 56.
[121] Because the parent's only choice was between not returning with the child or imprisonment upon return.
[122] "This problem has sometimes been resolved by suspending (the enforcement of) the return order until the charges against the abducting parent are withdrawn", see the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 4.4, pp. 21, 22 and note 118.

necessary general information on the relevant laws governing the initiation and termination of criminal proceedings as well as on the specific status of criminal proceedings. Close co-operation among the relevant judicial and administrative authorities may be necessary to ensure that criminal proceedings are not, or are no longer pending before a mediated agreement providing for the taking parent or child to travel to the State of the child's pre-abduction residence is implemented, or that no such proceedings can be initiated following the return of the taking parent and child. With regard to co-operation among the relevant judicial authorities, the International Hague Network of Judges may be of particular use.[123]

General information regarding criminal law aspects of international child abduction in the different Contracting States including information on who is able to initiate, withdraw or suspend criminal proceedings relating to the wrongful removal or wrongful retention of a child can be found in the Country Profiles under the 1980 Hague Child Abduction Convention.[124]

[123] For more information on the International Hague Network of Judges and the functioning of direct judicial communications see "Emerging rules regarding the development of the international Hague Network of judges and draft General Principles for judicial communications, including commonly accepted safeguards for direct judicial communications in specific cases, within the context of the International Hague Network of Judges", Prel.Doc. 3 A of March 2011 and P. Lortie, "Report on Judicial Communications in relation to international child abduction", Prel. Doc. No 3 B of April 2011, both documents drawn up for the attention of the Special Commission of June 2011, available at < www.hcch.net > under "Child Abduction Section" then "Preliminary Documents/Information Documents" ("Special Commission meetings on the practical operation of the Convention").

[124] See section 11.3. of the Country Profiles, *supra* note 116.

3. SPECIALISED TRAINING FOR MEDIATION IN INTERNATIONAL CHILD ABDUCTION CASES / SAFEGUARDING THE QUALITY OF MEDIATION

3.1 Mediator training – existing rules and standards

84. To guarantee the quality of mediation it is indispensible that those conducting mediation have undergone appropriate training. Some States have enacted legislation regulating mediator training or the qualifications or experience[125] a person must have before being able to obtain the title "mediator", be registered as such, or be allowed to conduct mediation or certain forms of mediation (for example, State funded mediation).

85. For example, Austria established a State register for mediators in 2004. Registration requires mediators to comply with regulated training requirements.[126] The registration is only valid for five years; renewal requires proof of continuing training as set forth in the law.[127]

86. France also introduced legislation regarding the training for family mediation and penal mediation.[128] A State diploma in family mediation was introduced in 2004.[129] Only candidates with professional experience and / or a national diploma in the social or health sectors are admitted,[130] and they must have successfully passed the selection process.[131] The curriculum is regulated in detail and comprises 560 hours of training in, *inter alia*, law, psychology and sociology, 70 hours of which must be devoted to practice.[132] Another way to obtain the diploma is through recognition of professional experience.[133]

In many of the legal systems where mediator training has not been regulated by legislation, mediation organisations and associations have, with a view to guaranteeing the quality of mediation, established minimum training requirements which they request mediators to fulfil when joining the network. However, often due to the lack of a central point of reference regarding the training requirements for the relevant jurisdiction, there is no uniform approach to training standards.

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[125] The following States indicated in the Country Profiles under the 1980 Convention (see *supra* note 116) that legislation on mediation (and in the case of some States, specific legislation on family mediation) addresses the issue of necessary qualifications and experience of mediators: **Argentina**, **Belgium**, **Finland**, **France**, **Greece**, **Hungary**, **Norway**, **Panama**, **Paraguay**, **Poland**, **Romania**, **Slovenia**, **Spain**, **Switzerland** and the **United States of America.**

[126] See *Bundesgesetz über die Mediation in Zivilrechtssachen (ZivMediatG)* of 6 June 2003, available at < http://www.ris.bka.gv.at/Dokumente/BgblPdf/2003_29_1/2003_29_1.pdf > (last consulted 14 March 2012) and *Zivilrechts-Mediations-Ausbildungsverordnung* (ZivMediatAV) of 22 January 2004, available at < http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2004_II_47/BGBLA_2004_II_47.html > (last consulted 14 March 2012).

[127] See Arts 13 and 20 of the *Bundesgesetz über die Mediation in Zivilrechtssachen (ZivMediatG)* of 6 June 2003 (ref. *supra*, note 126).

[128] See K. Deckert, "Mediation in Frankreich – Rechtlicher Rahmen und praktische Erfahrungen", in K.J. Hopt and F. Steffek (*op. cit.* note 2), pp. 183-258, at pp. 242, 243.

[129] See *Décret No 2003-1166 du 2 décembre 2003 portant création du diplôme d'État de médiateur familial* and *Arrêté du 12 février 2004 relatif au diplôme d'État de médiateur familial – Version consolidée au 28 juillet 2007*, available at < http://www.legifrance.gouv.fr > (last consulted 14 March 2012); see also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 7, p. 22.

[130] See for details *Arrêté du 12 février 2004 relatif au diplôme d'État de médiateur familial – Version consolidée au 28 juillet 2007* (réf *supra*, note 129), Art. 2.

[131] See for details *Arrêté du 12 février 2004 relatif au diplôme d'État de médiateur familial – Version consolidée au 28 juillet 2007* (réf *supra*, note 129), Art. 3.

[132] See for details *Arrêté du 12 février 2004 relatif au diplôme d'État de médiateur familial – Version consolidée au 28 juillet 2007* (réf *supra*, note 129), Arts 4 *et seq*.

[133] Two stages are necessary for the recognition of professional experience: the public authorities first assess the applicant's admissibility and then a panel of examiners assesses the development of skills acquired through experience, see also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 7, p. 22.

An example for a jurisdiction in which central training requirements have evolved indirectly through self-regulation is England and Wales, where only mediators who have completed the Legal Services Commission (LSC) recognised training and have passed successfully the LSC's Assessment of Competence for family mediation are permitted to undertake publicly funded meditation.[134]

87. Furthermore, the issue of mediator training is addressed in several national[135] and regional non-binding instruments, such as mediation standards and codes of conduct[136] or recommendations.[137] However, there is not necessarily consensus regarding the training standards among the different bodies promoting mediator training. Also, many of the rules and standards address mediator training generally and do not focus specifically on training for family mediation, let alone international family mediation.

88. Among the initiatives for regionally promoting standards of mediator training for family mediation is that of AIFI,[138] an interdisciplinary non-governmental organisation with members in Europe and Canada. The AIFI Guide to Good Practice in Family Mediation, drawn up in 2008, addresses the issue of specialised training and accreditation for international family mediation.[139] Another organisation active in this field of mediation is the European Association of Judges for Mediation (GEMME, *Groupement Européen des Magistrats pour la Médiation*),[140] which consists of several national sections. The organisation links judges from different European States with the aim of promoting methods of amicable dispute resolution, in particular mediation. In 2006, GEMME France published a Practical Guide on the use of judicial mediation, which also touches upon issues of mediator training and professional ethics.[141]

89. Some non-binding regional mediation instruments encourage States to provide relevant structures to secure the quality of mediation. For example, Council of Europe Recommendation No R (98) 1 on family mediation encourages States to ensure the existence of "procedures for the selection, training and qualification of mediators" and emphasises that, "[t]aking into account the particular nature of international mediation, international mediators should be required to undergo specific training".[142] In addition, Council of Europe Recommendation Rec (2002)10 on mediation in civil matters requests States to "consider taking measures to promote the adoption of appropriate standards for the selection, responsibilities, training and qualification of mediators, including mediators dealing with international issues.[143] Also the European Directive on mediation, a binding

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[134] See Legal Services Commission Mediation Quality Mark Standard, 2nd ed. September 2009, available online at
< http://www.legalservices.gov.uk/docs/cls_main/Mediation_Quality_Mark_Standard_September_2009.pdf > (last consulted 14 March 2012).

[135] See for example regarding a training model developed by the National Centre for Mediation and Conflict Resolution in the Ministry of Justice in **Israel**, E. Liebermann, Y. Foux-Levy and P. Segal, "Beyond Basic Training – A Model for Developing Mediator Competence", in *Conflict Resolution Quarterly* 23 (2005) pp. 237-257.

[136] For example, the European Code of Conduct for Mediators (ref. *supra*, note 55), which establishes a number of principles to which individual mediators may commit themselves on a voluntary basis, states that "[m]ediators must be competent and knowledgeable in the process of mediation" and emphasises that "[r]elevant factors include proper training and continuous updating of their education and practice in mediation skills […]", see Point 1.1.

[137] See also "Legislating for Alternative Dispute Resolution – A Guide for Government Policy-Makers and Legal Drafters", pp. 49 *et seq*., drawn up by the Australian National Alternative Dispute Resolution Advisory Council (NADRAC), available at
< http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_Legislatingforalternativedisputeresolution > (last consulted 14 March 2012).

[138] *Association Internationale Francophone des intervenants auprès des familles séparées*.

[139] Original title: "Guide de bonnes pratiques en médiation familiale à distance et internationale », see Art. 5.

[140] The GEMME website can be found at < http://www.gemme.eu/en >.

[141] The Guide is available on the GEMME website at < http://www.gemme.eu/nation/france/article/le-guide > (last consulted 14 March 2012).

[142] Ref. *supra* (note 49), see parts II, c) and VIII e).

[143] Ref. *supra* (note 50), see Principle V.

regional instrument, requests European Union Member States to "encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties".[144]

3.2 Specific training for mediation in international child abduction cases

- **Mediation in international child abduction cases should only be conducted by experienced family mediators who preferably should have undergone specific training for mediation in international child abduction cases.**
- **Mediators working in this field need continuing training to maintain their professional competence.**
- **States should support the establishment of training programmes and standards for cross-border family mediation and mediation in international child abduction cases.**

90. In view of the particular nature of mediation in international child abduction cases, only experienced family mediators preferably having received specific training for international family mediation and, more specifically, mediation in international child abduction cases should conduct mediation in such cases.[145] Less experienced mediators should ideally only mediate such cases in co-mediation with more experienced colleagues.

91. Training for mediation in international child abduction cases should prepare the mediator to face the specific challenges of cross-border child abduction, as set out above, while building on the foundation of the regular mediator training.[146]

92. Generally, the mediator must possess the socio-psychological and legal knowledge necessary for conducting mediation in high conflict family cases. The mediator must have adequate training in assessing the suitability of an individual case for mediation. He or she must be able to assess the parties' capacity to mediate, *e.g.*, recognise mental impairment and language difficulties, and must be able to identify patterns of domestic abuse and child abuse and to draw the necessary conclusions.

93. Furthermore, training for international family mediation should encompass the development or consolidation of the necessary cross-cultural competence as well as the necessary language skills.

94. At the same time, the training needs to impart knowledge and understanding of the relevant regional and international legal instruments as well as the applicable national law. Although it is not the mediator's role to give legal advice, basic legal knowledge is crucial in cross-border family cases. It enables the mediator to understand the greater picture and conduct mediation in a responsible manner. Responsible mediation in international child abduction cases includes encouraging the parents to focus on the needs of the children, and reminding them of their prime responsibility for their children's welfare. It stresses the need for them to inform and consult their children, and draws the

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[144] See Article 4 of the European Directive on mediation, *supra* note 5.

[145] See also Council of Europe Recommendation No R (98) 1 on family mediation (ref. *supra*, note 49), VIII (International matters): "e. Taking into account the particular nature of international mediation, international mediators should be required to undergo specific training."

[146] An example for a specialised training programme is the EU-co-founded project TIM (Training in international family mediation), which aims to create of a network of international family mediators in Europe. For further details on the TIM project, which is carried out by the Belgian NGO Child Focus in cooperation with the Katholieke Universiteit van Leuven and the German specialist mediation organisation MiKK e.V. with the support of the Dutch Centre for International Child Abduction, is available on the website of the German MiKK e.V. at < http://www.mikk-ev.de/english/eu-training-project-tim/ > (last consulted 14 March 2012).

parties' attention to the fact that their agreed solution can only be sustainable if it complies with both (all) legal systems involved and is rendered legally binding in those legal systems, all of which will require specialist legal advice.

95. Furthermore, specialised training is required for child-inclusive mediation that takes into account the views of the child in child abduction cases.

96. Mediators working in the field of international child abduction need continuing training to maintain their professional competence.

3.3 Establishment of mediator lists

- **States should consider supporting the establishment of publicly available family mediator lists through which specialist mediators can be identified.**

97. With a view to promoting the establishment of mediation structures for cross-border family disputes, States should consider encouraging the establishment, on a national or supra-national level, of publicly available family mediator lists through which specialist mediators and mediation services can be identified.[147] Ideally, these lists should include the mediators' contact details, information about their field(s) of speciality, training, language skills, intercultural competence and experience.

States can also facilitate the provision of information on specialised international family mediation services available in their jurisdiction through a Central Contact Point on international family mediation.[148]

3.4 Safeguarding the quality of mediation

- **Mediation services used in cross-border family disputes should be monitored and evaluated, preferably by a neutral body.**
- **States are encouraged to support the establishment of common standards for the evaluation of mediation services.**

98. To safeguard the quality of international family mediation, mediation services should be monitored and evaluated ideally by a neutral body. However, where no such body exists, mediators and mediation organisations should themselves establish transparent rules on the monitoring and evaluation of their services. In particular, the parties should be able to give their feedback on the mediation and a procedure to file complaints should be available.

99. Mediators and mediator organisations working in the field of international child abduction should have a structured and professional approach to administration, record keeping, and evaluation of services, and should have access to the requisite administrative and professional support.[149]

States should work towards the establishment of common standards for the evaluation of mediation services.

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[147] For example, **France,** one of the first States to establish a Central Contact Point for international family mediation, is preparing a central list of specialised mediators; **Austria** has established a central register for mediators in 2004 (see for further details above para. 85), which is accessible online at < http://www.mediatoren.justiz.gv.at/mediatoren/mediatorenliste.nsf/contentByKey/VSTR-7DXPU8-DE-p > (last consulted 14 March 2012). Furthermore, the Country Profiles indicate (see *supra* note 116) for the following legal systems an availability of mediator lists (although not necessarily one central list) together with information from which bodies these lists can be obtained: **Argentina**, **Belgium**, **China (Hong Kong SAR)**, **Czech Republic**, **Denmark**, **Estonia**, **France**, **Greece**, **Hungary**, **Ireland**, **Norway**, **Panama**, **Paraguay**, **Poland**, **Romania**, **Slovenia**, **Spain**, **Switzerland,** the **United Kingdom (England and Wales, Northern Ireland)** and the **United States of America.**

[148] See regarding the Central Contact Point on international family mediation below paras 101 *et seq*.

[149] See the Principles for the Establishment of Mediation Structures (*op. cit.* note 41).

4. ACCESS TO MEDIATION

- **Information on available mediation services for international child abduction cases as well as other related information, such as mediation costs, should be provided through the Central Authority or a Central Contact Point for international family mediation.**
- **Contracting States to the 1980 Hague Child Abduction and other relevant Hague Conventions[150] are encouraged to establish a Central Contact Point for international family mediation to facilitate access to information on available mediation services and related issues for cross-border family disputes involving children, or to entrust this task to their Central Authorities.**

100. It is important to facilitate access to mediation. This begins by providing parties who wish to consider mediation with information on mediation services available in the relevant jurisdiction along with other related information.

101. It should be noted that the Principles for the Establishment of Mediation Structures drawn up by the Working Party on Mediation in the context of the Malta Process, the aim of which is to establish structures for cross-border family mediation,[151] ask States which agree to implement those Principles to establish "a Central Contact Point for international family mediation", which should, *inter alia*, "provide information about family mediation services available in that country", such as a list of mediators and organisations providing mediation services in international family disputes, information on mediation costs and further details. Furthermore, the Principles request the Central Contact Point to "provide information on where to obtain advice on family law and legal procedures […] on how to give the mediated agreement binding effect [as well as] on the enforcement of the mediated agreement".

102. According to these Principles, the "information should be provided in the official language of that State as well as in either English or French". Furthermore, the Principles demand that "the Permanent Bureau of the Hague Conference should be informed of the relevant contact details of the Central Contact Point, including postal address, telephone number, e-mail address and names of responsible person(s) as well as information on what languages they speak" and that "[r]equests for information or assistance addressed to the Central Contact Point should be processed expeditiously".

103. Although these Principles were drawn up with a view to establishing cross-border mediation structures for non-Hague cases, they are also relevant for Hague cases. With the rapid and diverse development of family mediation services in recent years, it is difficult to obtain an overview of the services offered, or to judge which of the services may be suitable for mediation in cross-border child abduction cases. It would therefore be extremely valuable if Contracting States to the 1980 Hague Child Abduction Convention and / or other relevant Hague Conventions were to collect and provide information on mediation services available for international family disputes in their jurisdiction, as well as other related information which could be pertinent to mediation in cross-border family disputes, and more specifically in international child abduction cases.

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[150] See above, "Objectives and Scope", regarding the promotion of mediation by other Hague Children's Conventions.

[151] Principles for the Establishment of Mediation Structures (*op. cit.* note 41), see Annex 1. See also the "Explanatory Memorandum on the Principles for the Establishment of Mediation Structures in the context of the Malta Process", also available at < www.hcch.net > under "Child Abduction Section" ("Cross-border family mediation").

104. In Contracting States to the 1980 Hague Child Abduction Convention, the Central Authority under the Convention might be in an ideal position to take on that role.[152] However, some Contracting States to the 1980 Convention may prefer to establish an independent Central Contact Point for international family mediation to provide the relevant information. The Central Authority could in that case refer interested parties to that Central Contact Point for international family mediation, provided that the co-operation of Central Authority and Central Contact Point is regulated on an organisational level in a way that the parties' referral to that point will not lead to a delay in the processing of the return application.

105. Where a private organisation is appointed to serve as a Central Contact Point for international family mediation, measures should be taken to avoid any conflicts of interest, especially where that private organisation offers mediation services itself.

106. It should be noted that the Country Profile under the 1980 Hague Child Abduction Convention developed by the Permanent Bureau, finalised in 2011 and subsequently filled in by the Contracting States, can be a helpful source of information on mediation services available in these States.[153]

4.1 Availability of mediation – stage of Hague return proceedings; Referral / Self-referral to mediation

- **The possibility of using mediation or other processes to bring about agreed solutions should be introduced as early as possible to the parties to an international family dispute concerning children.**
- **Access to mediation and other processes to bring about agreed solutions should not be restricted to the pre-trial stage, but should be available throughout the proceedings, including at the enforcement stage.**

107. The possibility of using mediation or other means of amicable dispute resolution should be introduced as early as possible to the parties to an international family dispute concerning children. Mediation can already be offered as a preventive measure at an early stage of a family conflict to avoid a subsequent abduction.[154] This is particularly significant in cases where, following a couple's separation, one of the parents considers relocation to another country. While awareness needs to be raised that generally one parent may not leave the country without the consent of the other holder of (actually exercised) custody rights or an authorisation by the competent authority,[155] mediation can offer valuable support in finding an amicable solution.

108. It should be emphasised that the manner in which "parents are approached to consider mediation is very important"[156] and may be "critical to its prospects of success".[157] Since mediation is still relatively new in many jurisdictions, "parents need full

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[152] At its meeting in June 2011, the Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention encouraged States "to consider the establishment of such a Central Contact Point or the designation of their Central Authority as a Central Contact Point" see No 61, Conclusions and Recommendations of Part I of the Sixth Meeting of the Special Commission (1-10 June 2011).

[153] See Part V of the Country Profiles, *supra* note 116.

[154] See the Guide to Good Practice on Preventive Measures (*op. cit.* note 23), section 2.1, pp. 15-16; see also Chapter 13 below.

[155] See the "Washington Declaration on International Family Relocation", *International Judicial Conference on Cross-Border Family Relocation*, Washington, D.C., United States of America, 23-25 March 2010, co-organised by the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children (ICMEC) with the support of the U.S. Department of State: "States should ensure that legal procedures are available to apply to the competent authority for the right to relocate with the child. Parties should be strongly encouraged to use the legal procedures and not to act unilaterally." The Washington Declaration is available at < www.hcch.net > under "Child Abduction Section", "Judicial Seminars on the International Protection of Children" then "Other Judicial Seminars".

[156] See S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 5.1, p. 17.

[157] 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 92), p. 8.

and frank explanations as to what mediation is and what mediation is not, so that they can come to mediation with appropriate expectations".[158]

109. Once child abduction has occurred, parents should be informed about the possibility of mediation as early as possible, where specific mediation services are available for these cases. It should, however, be highlighted that mediation "is not the only recourse the parents have and that the availability of mediation does not affect a parent's right to litigate if they prefer".[159]

110. With a view to increasing the chances of an amicable resolution of the dispute, mediation or similar means should be available not only at a pre-trial stage, but also throughout the judicial proceedings, including at the enforcement stage.[160] The most appropriate of the available processes facilitating agreed solutions at a particular stage of the proceedings will depend on the circumstances. In the course of judicial proceedings, court-annexed mediation or conciliation are commonly used in many legal systems.

111. As discussed in detail in section 2.1 (Timeframe / Expeditious procedures), it is of the utmost importance that safeguards be taken to ensure that mediation cannot be used as a delaying tactic by the taking parent. A helpful measure in this regard can be the initiation of return proceedings and, if necessary, the staying of those proceedings for the duration of the mediation.[161]

4.1.1 Role of the Central Authority

- **Central Authorities shall, either directly or through any intermediary, take all appropriate measures to bring about an amicable resolution of the dispute.**
- **When receiving a return application, the Central Authority in the Requested State should facilitate the provision of information on mediation services appropriate for cross-border child abduction cases within the scope of the 1980 Convention where available in that jurisdiction**
- **States should include information on mediation and similar processes and their possible combination in the training of their Central Authority staff.**

112. Central Authorities under the 1980 and 1996 Hague Conventions play a key role in encouraging an amicable resolution of international family disputes concerning children. Both the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention recognise the need to promote agreed solutions and require Central Authorities to play an active role in achieving that goal. Article 7(2) *c)* of the 1980 Convention requires Central Authorities to take all appropriate measures "to secure the voluntary return of the child or bring about an amicable resolution of the issues". Similarly, Article 31 *b)* of the 1996 Convention requires the Central Authorities to take all appropriate steps "to facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies".

113. Central Authorities under either Convention should therefore, as early as possible, facilitate the provision of information on mediation services or similar means available to

[158] S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 5.1, p. 18.
[159] See S. Vigers, *ibid.* (*op. cit.* note 11), 5.1, p. 17.
[160] See also the Guide to Good Practice on Enforcement (*op. cit.* note 23), sections 5.1, 5.2, p. 25.
[161] See section 2.1 above.

assist with finding an agreed solution where parties seek the Central Authority's support in a cross-border family dispute.[162] Such information however should not be given instead of, but rather in addition to, information on procedures under the Hague Conventions and other related information.

114. For example, in an international child abduction case, the Central Authority in the Requested State should, when contacted by the left-behind parent (either directly or through the Central Authority in the Requesting State), provide the parent with information about the mediation and similar services available in that jurisdiction along with information on the Hague procedures. At the same time the Central Authority may, when approaching the taking parent to encourage the voluntary return[163] of the child, inform that parent about the possibilities for mediation and similar processes facilitating agreed solutions. Also, the Central Authority in the Requesting State can provide information to the left-behind parent on methods to solve disputes amicably alongside information on the Hague return proceedings. The task of providing information on relevant mediation services can also be delegated to another body.[164]

115. However, the duty of the Central Authority to process return applications expeditiously must not be compromised. Central Authorities have a special responsibility to stress that abduction cases are time-sensitive. Where the Central Authority delegates the provision of information on relevant mediation services to another body, the Central Authority has to ensure that the parties' referral to that body does not lead to a delay. Furthermore where the parties decide to attempt mediation, they should be informed that mediation and return proceedings can be pursued in parallel.[165]

116. In 2006, the comparative study on mediation schemes in the context of the 1980 Hague Child Abduction Convention[166] identified some Central Authorities that actively promote mediation, either by offering mediation themselves in certain cases or by employing the services of a local mediation provider. Today, as is also indicated by the Country Profiles[167] under the 1980 Convention, an increasing number of Central Authorities are active in encouraging parties to attempt mediation or similar processes to bring about an agreed solution of their dispute.[168]

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[162] The Central Authority may in this regard serve as a Central Contact Point in the sense described in the Principles for the Establishment of Mediation Structures (*op. cit.* note 41); for further details on the Principles, see the introduction to Chapter 4 above. See also section 4.1.4 below.

[163] Art. 7(2) *c)* and Art. 10 of the 1980 Hague Child Abduction Convention.

[164] For example, a requested State may have designated another body other than the Central Authority as Central Contact Point for international family mediation (see above paras 101 *et seq*.) and tasked the Central Contact Point with not only the provision of information on mediation in non-Hague cases but also with the provision of information on specialised mediation services for international child abduction cases falling within the scope of the 1980 Convention.

[165] Regarding the advantages of an initiation of Hague proceedings prior to the commencement of mediation, see section 2.1 above.

[166] See S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 2.4, p. 10.

[167] See *supra* note116.

[168] For example: In **France**, in April 2007 the Central Authority took over the tasks formerly carried out by the Assistance Mission to International Mediation for Families (*Mission d'aide à la médiation internationale pour les familles*, MAMIF), an office established to promote mediation of cross-border family disputes and that was involved in the successful Franco-German bi-national mediation programme, see for further information on the Assistance to international family mediation (l'aide à la médiation familiale internationale, AMIF) now carried out by the French Central Authority < http://www.justice.gouv.fr/justice-civile-11861/enlevement-parental-12063/la-mediation-21106.html > (last consulted 14 March 2012). In **Switzerland**, the Federal Act of 21 December 2007 on International Child Abduction and the Hague Conventions on the Protection of Children and Adults, which entered into force on 1 July 2009, implemented concrete obligations for the Swiss Central Authority in regard to promoting conciliation and mediation procedures, see Art. 3, Art. 4 (*Bundesgesetz über internationale Kindesentführung und die Haager Übereinkommen zum Schutz von Kindern und Erwachsenen (BG-KKE) vom 21 Dezember 2007*), *supra* note 98. In **Germany** the Central Authority notifies the parents about the possibility to mediate. Furthermore, the following other States indicated in the Country Profiles (*supra* note 116) that their Central Authorities provides information on mediation: **Belgium**, **China (Hong Kong SAR)**, **Czech Republic**, **Estonia**, **Greece**, **Hungary**, **Paraguay**, **Poland** (only to applicant), **Romania**, **Slovenia**, **Spain**, the **United Kingdom (England and Wales, Northern Ireland)**, the **United States of America** und **Venezuela**. In **Argentina** and in the **Czech Republic** the Central Authority offers mediation, see section 19.3 of the Country Profiles (*supra* note 116).

117. States are encouraged to include in the training of Central Authority staff general information on mediation and similar processes, as well as specific information on available mediation and similar services in international child abduction cases.

4.1.2 Role of the judge(s) / courts

118. The role that courts play in family disputes has changed considerably over the past decades in many legal systems. In civil proceedings generally, but especially in family law proceedings, the promotion of agreed solutions has been put on a statutory footing in many States.[169] Nowadays, judges are often under an obligation to attempt the amicable settlement of a dispute. In some legal systems, in family disputes concerning children, attending an information meeting on mediation or attempting mediation or other processes to bring about agreed solutions may even be obligatory for the parties under certain circumstances.[170]

- **The judge(s) seised in an international child abduction case should consider whether a referral to mediation is appropriate in the case before him / her, provided that mediation services appropriate for cross-border child abduction cases within the scope of the 1980 Convention are available in that jurisdiction. The same applies for other available processes to bring about agreed solutions.**
- **States are encouraged to include information on mediation and similar processes and their possible combination with judicial proceedings in the training of judges.**

119. In international child abduction cases, courts play an important role in promoting agreed solutions. Regardless of whether mediation has already been suggested by the competent Central Authority, a court seised with Hague return proceedings should consider the referral of the parties to mediation or similar services, where available and regarded as appropriate. Among the several factors that may influence this consideration are issues affecting the general suitability of the individual case for mediation[171] as well as the question of whether appropriate mediation services, *i.e.*, services that are compatible with tight timeframes and other specific requirements for mediation in international child abduction cases, are available. Where mediation has already been

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[169] See, for example, in **Israel**, the State courts presiding in a civil matter may, at any stage in the proceedings, propose to the parties that the matter or part of it be referred to mediation, section 3 of the State of Israel Regulation No 5539 of 10 August 1993. See also for **Australia**, Art. 13 C *et seq.* of the Family Law Act 1975 (last amended by Act No 147 of 2010), according to which "[a] court exercising jurisdiction in proceedings under this Act may, at any stage in the proceedings, make one or more of the following orders: […] (b) that the parties to the proceedings attend family dispute resolution", which includes mediation, the full text of the law is available at < http://www.comlaw.gov.au/Details/C2010C00870 > (last consulted 14 March 2012). See also, more generally on the promotion of alternative dispute resolution in Australia, the website of the National Alternative Dispute Resolution Advisory Council (NADRAC) at < http://www.nadrac.gov.au/ >; NADRAC is an independent body established in 1995 to provide policy advice to the Australian Attorney-General on the development of ADR. In **South Africa**, the Children's Act 38 of 2005 (last amended in 2008), available at < http://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf > (last consulted 14 March 2012) also encourages the amicable resolution of family disputes and allows judges to refer certain matters to mediation or similar processes.

[170] See for example in the **United Kingdom (England and Wales)** the Practice Direction 3A – Pre-Application Protocol for Mediation Information and Assessment – Guidance for HMCS, entered into force on 6 April 2011, available at < http://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_03a > (last consulted 14 March 2012), which regulates for family proceedings as follows, unless one of the exceptions stated in the Protocol applies:

> "Before an applicant makes an application to the court for an order in relevant family proceedings, the applicant (or the applicant's solicitor) should contact a family mediator to arrange for the applicant to attend an information meeting about family mediation and other forms of alternative dispute resolution (referred to in this Protocol as 'a Mediation Information and Assessment Meeting')."

[171] See below under section 4.2.

attempted without success before the institution of the Hague return proceedings, referral to mediation for a second time may not be appropriate. When a judge refers a case to mediation, the judge needs to remain in control of the timeframe. Depending on the applicable procedural law, the judge may choose to adjourn the proceedings[172] for mediation for a short period of time or, where no adjournment is necessary, set the next court hearing before which mediation has to be finalised, within a reasonably short time, *e.g.,* between two and four weeks.[173]

120. Furthermore where a judge refers a case to mediation, it is preferable for that judge to retain sole management of the case in the interest of continuity.

121. When it comes to mediation at the stage of judicial proceedings, two types of mediation can be distinguished: "court based or annexed mediation" and "out of court mediation".[174]

122. Several "court based or annexed mediation schemes" have been developed for disputes in civil matters, including family matters.[175] In these schemes mediation is offered either by an independent mediator working for the court or by a judge with mediator training, who is not the judge seised in the case.[176] However, in most States, these "court annexed or court based mediation services" were created with a clear focus on purely national disputes, *i.e.*, disputes without international links. Therefore, the adaptability of existing "court based or annexed mediation schemes" to the special needs in international family disputes and particularly disputes within the scope of the 1980 Hague Child Abduction Convention has to be considered carefully. Only where an existing "court annexed or court based mediation service" fulfils the principal criteria set out in this Guide as essential for child abduction mediation schemes should a referral to that service be considered in Hague return proceedings.

123. Referral to mediation at the stage of court proceedings is also possible to "out of court" mediation services, *i.e.*, mediation services operated by mediators or mediation organisations not directly linked to the court.[177] As for "court based or annexed mediation

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[172] For example in the **United Kingdom (England and Wales)** the court seised with Hague return proceedings can refer the parties to mediation to take place during an adjournment of the proceedings, see S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 5.2, p. 18, referring to the United Kingdom and the reunite Pilot Scheme (*op. cit.* note 93). See above regarding the advantages of an initiation of Hague proceedings prior to the commencement of mediation, in section 2.1. On the subject of compulsory mediation sessions, see section 6.1.1 below.

[173] See, for example, for the family court of **New Zealand**, the Practice Note "Hague Convention Cases: Mediation Process – Removal, Retention And Access", available at < http://www.justice.govt.nz/courts/family-court/practice-and-procedure/practice-notes/ > (last consulted 14 March 2012), which provides for a 7- to 14-day period within which mediation in Hague child abduction cases should occur.

[174] See above, Glossary, see also Council of Europe Recommendation Rec (2002)10 on mediation in civil matters (ref. *supra*, note 50), Principle III (Organisation of mediation): "4. Mediation may take place within or outside court procedures."

[175] Among the many States in which court annexed mediation schemes currently exist are: **Argentina** (*Ley 26.589 - Mediación y Conciliación of 03.05.2010*, *Boletín Oficial de 06.05.2010* replacing earlier legislation dating back to 1995; attending mediation is mandatory in most civil case save regarding certain exceptional matters such as custody, see Arts 1 and 5 of the law); **Germany** (court annexed mediation schemes operate in several *Bundesländer* in civil matters, see, *inter alia*, the report on the mediation pilot project in Lower Saxony, commissioned by the Lower Saxony Ministry of Justice and Economics and Culture, drawn up by G. Spindler, "Gerichtsnahe Mediation in Niedersachsen", Göttingen 2006), and **Mexico** (see *Ley de Justicia Alternativa del Tribunal Superior de Justicia para el Distrito Federal* of 8 January 2008, last revised on 8 February 2011, published in *Gaceta Oficial Del Distrito Federal El 08 De Enero De 2008, No 248* and *Gaceta Oficial Del Distrito Federal El 08 De Febrero De 2011, No 1028*; mediation is facilitated through the *Centro de Justicia Alternativa* (Alternative Dispute Resolution Center) within the *Tribunal Superior de Justicia del Distrito Federal* (Superior Court of Justice of the Federal District); the centre administers the mediation processes, including the appointment of the mediator out of a list of registered mediators).

[176] See, regarding the difference between mediation by a judge and conciliation by a judge, the Glossary above.

[177] See above Glossary, see also the Feasibility Study on Cross-Border Mediation in Family Matters (*op. cit.* note 13), section 2.4, p. 6.

services" the adaptability of existing "out of court" mediation services to the special needs in international family disputes has to be considered carefully.

Many of the mediation schemes specifically developed for child abduction cases within the scope of the 1980 Hague Child Abduction Convention are currently run as "out of court mediation".[178]

124. Once the parties have reached an agreement in mediation or through similar means, the court seised with Hague return proceedings may, depending on the content of the agreement and the court's jurisdiction[179] in this regard, be asked to turn the agreement into a court order.

125. It is of great importance that judges dealing with international family disputes be well informed about the functioning of mediation and similar processes facilitating amicable dispute resolution and their possible combination with judicial proceedings. States are therefore encouraged to include general information on such matters in the training of judges.

126. In particular, the training of judges dealing with Hague return proceedings should include details on mediation schemes and similar processes suitable for use in international child abduction cases.

4.1.3 Role of lawyers and other professionals

127. In recent years, in many jurisdictions, the role of lawyers in family disputes has changed, along with that of courts, with greater emphasis being placed on finding agreed solutions. Recognising the importance of a stable and peaceful basis for ongoing family relations, lawyers today are more inclined to promote an agreed solution rather than to take a purely partisan approach on behalf of their clients.[180] Developments such as collaborative law and co-operative law[181] and the growing number of lawyers with mediator training reflect this trend.

- **Information on mediation and similar processes should be included in the training of lawyers.**
- **Lawyers and other professionals dealing with the parties to an international family dispute should, where possible, encourage the amicable resolution of the dispute.**
- **Where the parties to an international family dispute decide to attempt mediation, the legal representatives should support the parties by providing the legal information needed for the parties to make an informed decision. At the same time, the legal representatives need to support the parties in giving legal effect to the mediated agreement in both / all legal systems involved in the case.**

128. As has been highlighted above in relation to judges' training, it is important that States raise awareness within the legal profession of amicable dispute resolution. Information on mediation and similar processes should be included in the curriculum of lawyers.

129. When representing a party to an international family dispute over children, lawyers should be aware that their responsibility towards their client encompasses a certain responsibility for the interests and welfare of the child concerned. Given that an agreed solution will generally be in the child's best interests, the legal representative should,

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[178] For example in **Germany**, the **United Kingdom (England and Wales)** and the **Netherlands**, see for details, *supra*, note 92.
[179] See Chapters 12 and 13 below.
[180] See N. ver Steegh (*op. cit.* note 8), pp. 666 *et seq.*, with further references.
[181] See Chapter 15 for examination of other means of solving disputes amicably and their suitability for international child abduction cases.

where the parents are willing to attempt mediation, be supportive and, as far as his / her mandate allows, co-operate closely with the other party's legal representative.

130. Once the parties have decided to commence mediation, the legal representatives play an important role in providing the legal information necessary for the parties to make informed decisions and in ensuring that the mediated agreement has legal effect in both / all legal systems concerned. It should be emphasised that, due to the complexity of the legal situation in international family conflicts, lawyers should only agree to represent a party to such a conflict when they have the necessary specialist knowledge. The involvement of a non-specialist lawyer in international child abduction cases can have negative effects and may create additional obstacles to finding an amicable resolution of the matter. In mediation it can add to an imbalance of powers between the parties.

131. Depending on how the mediation process is organised and on how the mediator(s) and parties wish to proceed, legal representatives may be present during all or part of the mediation sessions. It is, however, important that lawyers attending a mediation session together with their clients understand their very different role during the mediation session, which is a subsidiary one.

132. Close co-operation with the specialist legal representatives is particularly important when it comes to evaluating whether the solution favoured by the parties would fulfil the legal requirements in both jurisdictions concerned and determining what additional steps may be necessary to render the agreed solution legally binding and enforceable.

133. A lawyer, of course, may also conduct mediation him or herself, if he or she meets any existing requirements for acting as a mediator in his or her jurisdiction. However a lawyer may not "mediate" a case in which he or she represents a party, due to conflicts of interest.[182]

134. A lawyer may also engage in the amicable resolution of a family dispute in other ways. See Chapter 15 below on other mechanisms to encourage agreed solutions, such as co-operative law.

4.2 Assessment of suitability for mediation

- **Initial screening should take place to assess the suitability of the individual case for mediation.**

135. Before commencing mediation in international child abduction cases, an initial screening should be conducted to assess the suitability of the individual case for mediation.[183] This helps to avoid delays that can be caused by attempting mediation in cases poorly suited to it. At the same time, initial screening helps to identify cases that carry special risks, such as cases involving domestic violence or alcohol or drug abuse, where either special precautions must be taken or mediation might not be appropriate at all.[184]

136. Two important questions arise in this context, (1) what issues should be addressed in the assessment of suitability for mediation and (2) who can / should carry out this assessment.

137. Whether a case is suitable for mediation needs to be decided on an individual basis. It has to be noted that there are no universal rules on this question. The suitability of the case for mediation will depend on the circumstances of the individual case and, to a

[182] The lawyer cannot be a neutral and impartial third party and at the same time respect the professional obligation to protect the interests of his / her client.
[183] See sections 19.4 *c)* and *d)* of the Country Profiles under the 1980 Hague Child Abduction Convention (*supra* note 116) for information on the assessment of suitability for mediation in the different Contracting States to the 1980 Convention.
[184] See also Chapter 10 below (mediation in domestic violence cases).

certain extent, on the facilities and characteristics of the available mediation services and standards applied by the mediator / mediation organisation to such matters.

138. Among the many issues that may affect the suitability of an international child abduction case for mediation, are:

- willingness of the parties to mediate[185],
- whether the views of one or both of the parties are too polarised for mediation,
- indications of domestic violence and its degree,[186]
- incapacity resulting from alcohol or drug abuse,[187]
- other indications of a severe imbalance in bargaining powers,
- indications of child abuse.

139. The assessment of the suitability of the case for mediation should involve a confidential exchange with each party individually to enable each party to express his / her possible concerns regarding mediation freely.

140. The initial exchange with the parties to assess the suitability of the case for mediation can be used to address various logistical issues, arising, for example, from disabilities of one of the parties, which might need to be taken into account when making practical arrangements for the mediation session. Also, the language(s) that mediation should be conducted in can be addressed in the initial exchange. At the same time, it can be assessed whether contact with the child should be arranged and whether the child concerned has attained an age or degree of maturity at which his / her views should be heard. See further in Chapter 7 below regarding hearing the child in mediation.

141. The initial screening interview is also an ideal occasion to inform the parties of the details of the mediation process and about how mediation and Hague return proceedings affect each other.[188]

142. The assessment of the suitability of the case for mediation should be entrusted to a mediator or other experienced professional with knowledge of the functioning of international family mediation. Appropriate training is required to recognise cases of special risk and indications of differences in bargaining powers. Whether the assessment should be conducted by a person linked to the relevant mediation service itself or a person working for the Central Authority, another central body or the court will very much depend on the way mediation is organised in the relevant jurisdiction. Some mediators emphasise the importance of the assessment being carried out by the mediator(s) who are to mediate the case. Other mediators prefer the assessment to be made by a colleague mediator familiar with the mediation service suggested to the parties.

143. Should the assessment of the suitability of the case for mediation be carried out by a person not familiar with the mediation services in question, there is a risk that a second assessment by a person familiar with the mediation services or the mediator(s) who is (are) appointed to mediate the case might be necessary, which may lead to an unnecessary delay of the matter and possibly additional costs.

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[185] Of course, where a party with no knowledge of the mediation process is opposed to the idea of mediation, the provision of more detailed information on how mediation works may affect that party's willingness to attempt mediation positively. See, however, section 6.1 below regarding the principle of voluntariness of mediation.

[186] In cases involving alleged domestic violence for example, some mediators generally refuse to conduct mediation. Others may consider a case with alleged domestic violence suitable for mediation, depending on the alleged degree of violence and on the protective measures available to avoid any risks associated with the mediation process, see Chapter 10 below.

[187] Where the individual case is still considered to be suitable for mediation, safeguards may need to be taken to avoid disadvantages for that party.

[188] See also section 6.1.2 below (Informed consent).

144. Many mediation services established for international child abduction cases successfully use initial screening.[189] In some programmes the suitability of the case for mediation is assessed through a written questionnaire in combination with a telephone interview.

4.3 Costs of mediation

- **All appropriate efforts should be made to avoid a situation in which the costs of mediation become an obstacle or a deterrent to the use of mediation.**
- **States should consider making legal aid available for mediation in child abduction cases.**
- **Information on costs for mediation services and possible further cost implications, as well as the interplay with costs for Hague return proceedings, should be made available in a transparent way.**

145. The willingness of parties to attempt mediation is likely to be influenced by the overall costs connected with the mediation. These costs may include costs for the initial assessment of the case's suitability for mediation, the mediator's fee, travel expenses, costs for reserving the rooms in which mediation is to take place, possible interpretation fees or for the involvement of other experts, and the possible costs of legal representation. Mediator's fees, which may be charged on an hourly or daily basis, may differ immensely from jurisdiction to jurisdiction and between different mediation services.

146. Some pilot projects specifically designed for mediation in international child abduction cases have offered mediation to the parties cost-free.[190] However, in many jurisdictions it has proven difficult to secure the funding to offer such services to parties for free on a long-term basis.

147. In many jurisdictions, no legal restrictions on mediator fees apply; the question is left to the self-regulation of the "market".[191] However, many mediators sign up to a fee scheme when joining a mediation association, or to codes of conduct requiring them "to charge reasonable fees taking into account the type and complexity of the subject matter, the expected time the mediation will take and the relative expertise of the mediator".[192] At the same time, several codes of conduct stress that "the fees charged by

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[189] For example, in the **United Kingdom (England and Wales)** the reunite scheme, see "Mediation Leaflet", available at < http://www.reunite.org/edit/files/Downloadable%20forms/Mediation%20Leaflet.pdf (last consulted 14 March 2012); see also the 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 92), pp. 10, 13, the following are considered as indicative of unsuitability for mediation in child abduction cases: (1) one parent is not willing to attend mediation; (2) the views of the parents are too polarised; (3) there are concerns about domestic violence or its alleged degree; (4) there are allegations of child abuse;.

[190] For example, the Franco-German bi-national mediation project, and see the 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 92). See S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11); regarding the reunite Mediation Pilot Scheme, see 5.3, p. 19:

> "To undertake its pilot project reunite was awarded a research grant by the Nuffield Foundation. All costs associated with the mediation, including travel to and from the UK were fully funded for the applicant parent up to an upper limit. Hotel accommodation and additional travel and subsistence costs were also fully funded. The mediators' fees, administration fees and interpreters' fees were also covered by the grant. The UK based parent was also reimbursed for all travel and subsistence costs and provided with accommodation where necessary."

[191] See K.J. Hopt and F. Steffek (*op. cit.* note 2), at p. 33.

[192] See Feasibility Study (*op. cit.* note 13), section 2.7.3, p. 12.

a mediator should not be contingent on the outcome".[193] In other States, mediation fees are regulated by law or may be defined by a court and allocated between the parties.[194]

148. Every effort must be made to ensure that the cost of mediation will not become an obstacle or a deterrent to its use. Acknowledging the advantages of promoting mediation in international child abduction cases, some States offer mediation in international child abduction cases free of charge or have opened their legal aid system to mediation.[195] States that have not yet done so should consider the desirability of making legal aid available for mediation, or otherwise ensure that mediation services can be made available either cost-free or at a reasonable price for parties with limited means.[196]

149. It should be noted that it is a great achievement of the 1980 Hague Child Abduction Convention that return proceedings are made available to the applicant parent in some States completely cost-free;[197] in other States the national legal aid systems can be used for Hague proceedings.[198] It would be encouraging if similar support could be made available for mediation in international child abduction cases in the context of the 1980 Convention.

150. The costs associated with mediation are an essential aspect of access to mediation in practice. Information on mediation fees and other possible related costs, such as fees for rendering the mediated agreement binding in the two (all) legal systems concerned, is important for the parties to decide on whether to attempt mediation or not.

151. Parents should therefore be given detailed and clear information on all possible expenses connected with mediation, to allow them to properly estimate their likely financial burden.[199]

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[193] See *ibid.* (*op. cit.* note 13), section 2.7.3, pp. 12, 13, with further references.

[194] See S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 5.3, p. 19, referring, *inter alia*, to France, where court control has been established regarding the fees of court-annexed mediation; see also K.J. Hopt and F. Steffek (*op. cit.* note 2), at p. 34 for further examples.

[195] Free of charge mediation in international child abduction cases under the 1980 Convention is, for example, available in: **Denmark**, **France** (mediation arranged for by the Central Authority), **Israel** (for mediation through the court assistance unit) **Norway** and **Sweden** (if the court appoints the mediator), see also Country Profiles (*supra* note 116) at section 19.3 *d)*. Legal Aid for mediation in international child abduction cases is available under certain conditions, for example in the **United Kingdom (England and Wales)** provided the mediation is conducted by mediators, or mediation organisations, which hold a Public Funding Franchise from the Legal Services Commission can offer publicly funded mediation to clients who are eligible for legal aid, see < http://www.legalservices.gov.uk > (last consulted 14 March 2012). Similarly, in the **Netherlands**, legal aid is available for mediation costs provided mediation is conducted by mediators registered with the Dutch Legal Aid Board (official website < www.rvr.org >), see the Dutch Legal Aid Act (*Wet op de rechtsbijstand*, last consulted 14 March 2012). Furthermore, according to the Country Profiles, legal aid may cover mediation costs in international child abduction cases, for example, in the following jurisdictions: **Argentina**, **Israel**, **Slovenia**, **Switzerland** and the **United Kingdom (Northern Ireland)**.

[196] See also Council of Europe Recommendation Rec (2002)10 on mediation in civil matters (ref. *supra*, note 50), Principle III (Organisation of mediation):

> "9. States should consider the opportunity of setting up and providing mediation, wholly or partly free of charge, or of providing legal aid for mediation, in particular if the interests of one of the parties require special protection.
>
> 10. Where mediation gives rise to costs, they should be reasonable and proportionate to the importance of the issue at stake and to the amount of work carried out by the mediator."

[197] Art. 26(2) of the 1980 Convention requests Contracting States to "not require any payment from the applicant towards cost and expenses of the [Convention] proceedings", but many Contracting States have made use of the possibility to declare a reservation regarding Art. 26 and have thereby subjected Hague proceedings to the normal legal aid rules in their jurisdiction; see also for details the Country Profiles filled in by the Contracting States to the 1980 Convention, *supra* note 116.

[198] See also Feasibility Study (*op. cit.* note 13), sections 2.7.3, p. 12; see also for details the Country Profiles filled in by the Contracting States to the 1980 Convention, *supra* note 116.

[199] See also the European Code of Conduct for Mediators (ref. *supra*, note 55), 1.3 (Fees):

> "Where not already provided, mediators must always supply the parties with complete information as to the mode of remuneration which they intend to apply. They must not agree to act in a mediation before the principles of their remuneration have been accepted by all parties concerned."

152. "It is often recommended that such information is put in writing before the mediation";[200] it can be made part of the contract to mediate that is usually concluded between the mediator and the parties before commencing the mediation.[201]

4.4 Place of mediation

153. As set out under section 2.6, geographical distance poses special challenges for mediation in international child abduction cases. Arranging for an in-person meeting for one or several mediation sessions may be costly and time-consuming. Nonetheless, many experienced mediators recommend an in-person meeting if feasible.

- **The views and concerns of both parents need to be taken into consideration when determining in which State an in-person mediation session should be convened.**
- **The venue chosen for the in-person mediation sessions needs to be neutral and appropriate for mediation in the individual case.**
- **Where the physical presence of both parties in a mediation session is not appropriate or feasible, long-distance and indirect mediation should be considered.**

154. The appropriate location of an in-person meeting will depend on the circumstances of the individual case. Very often, mediation sessions in child abduction cases are held in the country to which the child was abducted. One advantage of such an arrangement is the possibility to arrange for contact between the left-behind parent and the child during the left-behind parent's stay in that country; this can have a positive effect on the mediation.[202] Another advantage is that this simplifies linking the mediation process with the Hague court proceedings. However, choosing as the location the State to which the child was taken may be construed as an additional injustice by the left-behind parent who might already consider his / her agreement to attempt mediation (instead of simply following the Hague return proceedings) as a concession. Besides practical impediments, such as travel expenses, the left-behind parent might also face legal difficulties in entering the State to which the child was abducted due to visa and immigration issues (see above, section 2.7). On the other hand, the left-behind parent's possible presence in the State to which the child was taken, to attend the Hague return proceedings (for which a visa should also be granted – see section 2.7) can be used as an opportunity to attempt mediation in that State. In such a case at least no additional travel costs need to be borne by the left-behind parent.

155. Holding an in-person mediation session in the country from which the child was wrongfully removed, by contrast, may pose some additional practical challenges. The taking parent might face criminal prosecution in that country (as to which, see section 2.8 above) or be reluctant to leave the child in the care of a third person during his / her absence.

156. In exceptional circumstances consideration may be given to holding an in-person mediation meeting in a third "neutral" country. However, travel costs and visa issues may be impediments.

157. As concerns the actual venue for the in-person mediation meeting, it is evident that the meeting must take place in neutral premises, such as rooms in a court building or the premises of an independent body offering the mediation service. A religious or community building might also be considered a neutral location by the parties. The

[200] See Feasibility Study (*op. cit.* note 13), section 2.7, p. 12.
[201] See section 4.5 below on the mediation contract.
[202] S. Kiesewetter and C.C. Paul, "Family Mediation in an International Context: Cross-Border Parental Child Abduction, Custody and Access Conflicts: Traits and Guidelines", in S. Kiesewetter and C.C. Paul (Eds) (*op. cit.* note 93), pp. 46, 47.

location of the mediation meeting must be suitable to the individual case, for example providing adequate security for the persons involved if necessary.[203]

158. Although mediators often consider the atmosphere of an in-person meeting as conducive to reaching an amicable resolution, the circumstances of the individual case will determine which option is feasible and most appropriate. Where an in-person mediation session is not appropriate or feasible, long-distance mediation may be an option. With the help of modern technology virtual in-person meetings may be relatively easy to set up.[204] In some States, such as Australia, due to their large geographic territory, long-distance mediation services, by phone, video link or online (also referred to as Online Dispute Resolution – ODR) have developed rapidly in the past years.[205]

159. Long-distance mediation, however, faces a number of specific challenges[206], one of which is how to ensure the confidentiality of the mediation session. At the same time, the practical arrangements for the mediation session have to be considered carefully. For example, to avoid any doubts regarding fairness and neutrality of the mediation, it may be helpful to avoid the mediator joining a video link together with one of the parties (*i.e.*, in the same room as the party).

160. Long-distance mediation might also be of interest for cases where there are allegations of domestic violence and one of the parties indicates that, though wishing to mediate, the prospect of being in the same room with the other party would be very difficult.[207]

4.5 The contract to mediate – informed consent to mediation

- **To ensure that the parties are well informed about the terms and conditions of the mediation service, it can be advisable to establish a contract between the mediator and the parties (contract to mediate).**
- **The contract to mediate should be clear and provide the necessary information on the mediation process, including detailed information on possible costs.**
- **Where no such contract to mediate is established, it must be ensured that the parties are otherwise well informed about the terms and conditions of the mediation service before entering into mediation.**

161. With a view to ensuring the informed consent of the parties to the mediation, the establishment of a written agreement between the mediator and the parties on the terms and conditions of the mediation service should be considered, unless otherwise regulated in the relevant legal system.[208] This contract to mediate should be clear and contain the necessary information on the mediation process.

162. The contract should explain the mediator's role as a neutral and impartial third party. It should be highlighted that the mediator only assists with communication between the parties and that he or she does not represent (one of) the parties. The latter is of particular importance where mediation is to be conducted as bi-national, bilingual

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[203] See, *e.g.*, regarding the specific needs in domestic violence cases, Chapter 10 below.
[204] See regarding the use of technology in international family mediation, for example, M. Kucinski, "The Pitfalls and Possibilities of Using Technology in Mediating Cross-Border Child Custody Cases", Journal of Dispute Resolution, 2010, pp. 297 *et seq*. at pp. 312 *et seq*.
[205] Regarding the development of an online family dispute resolution service in **Australia** see for example, T. Casey, E. Wilson-Evered and S. Aldridge, "The Proof is in the Pudding: The Value of Research in the Establishment of a National Online Family Dispute Resolution Service", 11th Australian Institute of Family Studies conference proceedings, available at < http://www.aifs.gov.au/conferences/aifs11/docs/casey.pdf > (last consulted 14 March 2012).
[206] See, regarding the special challenges of long-distance mediation, the Draft Principles for Good Practice on "Dispute Resolution and Information Technology", drawn up by Australian National Alternative Dispute Resolution Advisory Council (NADRAC), 2002, available at < http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_TechnologyandADR > (last consulted 14 March 2012).
[207] See Chapter 10 below ("Mediation and accusations of domestic violence").
[208] See also section 6.1.2.

co-mediation, in a cross-border family conflict where the parties might tend to feel a closer link with mediators who speak the same language and share their cultural backgrounds.[209]

163. A contract to mediate drawn up for an international family dispute should draw attention to the importance of acquiring relevant legal information / advice regarding parental agreements and their implementation in the different legal systems concerned, while pointing out that the mediator him or herself, even if referring to legal information, will not give legal advice.[210] This is where close co-operation with the specialist legal representatives of the parties can be helpful and / or the parties can be referred to sources of independent specialist legal advice.

164. The contract to mediate should highlight the importance of confidentiality of the mediation process and should draw attention to any applicable legal provisions.[211] In addition, the contract may include terms obliging the parties not to subpoena the mediator.[212]

165. Reference should be made in the contract to mediation methods / models used and to the scope of mediation.[213]

166. The contract should also provide detailed information on the possible costs of the mediation.[214]

167. Where no contract to mediate is drawn up the above information should nonetheless be made available to the parties in writing, for example through information leaflets, a personalised letter or general terms and conditions available on the website to which reference is made before commencing mediation.

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[209] See also section 6.2.3.

[210] See also Council of Europe Recommendation No R (98) 1 on family mediation (ref. *supra*, note 49), III (Process of mediation):

> "States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: […]
>
> x. the mediator may give legal information but should not give legal advice. He or she should, in appropriate cases, inform the parties of the possibility for them to consult a lawyer or any other relevant professional person."

[211] For further details on confidentiality, see section 6.1.5 below.

[212] For the example of including a deterring provision "that a party must pay the mediator's attorneys' fee if the party subpoenas the mediator and the testimony is not compelled" where the law does not protect the confidentiality of the mediation, see K.K. Kovach (*op. cit.* note 105), at pp. 197, 198.

[213] On the scope of mediation, see Chapter 5 below.

[214] See also Standard VIII of the US Standards of Conduct, prepared by the American Bar Association, the American Arbitration Association and the Association for Conflict Resolution in 1994, as revised in 2005 (ref. *supra*, note 53).

5. SCOPE OF MEDIATION IN INTERNATIONAL CHILD ABDUCTION CASES

168. A point always highlighted when referring to the advantages of mediation in comparison with court proceedings is that of the scope of mediation. It is said that mediation can better deal with all the facets of a conflict, since mediation can also include topics that are not legally relevant and which would therefore have no place in a court hearing. In a family dispute, mediation can help with disentangling old, long-lasting family feuds of which the current dispute might be a mere symptom. However, this can mean engaging in a time-consuming process.

5.1 Focus on the issues of urgency

- **Mediation in international child abduction cases under the 1980 Hague Child Abduction Convention has to comply with very rigid time requirements and may therefore need to be limited in scope.**
- **A good balance needs to be struck between including the topics necessary to work out a sustainable agreed solution and complying with the strict time requirements.**

169. Mediation in the particular circumstances of international child abduction has to be conducted against the background of the applicable international legal framework. To be compatible with the 1980 Hague Child Abduction Convention, mediation has to comply with very rigid time requirements and thus may need to be limited in scope. The 1980 Convention may furthermore give indications as to the subjects addressed in the mediation.

170. The primary issue at stake is, evidently, the return of the child. As the comparative study prepared for the 2006 Special Commission highlighted in this context:

> "[An] application under the Convention is primarily concerned with seeking the return of a child habitually resident in one Contracting State who has been wrongfully removed to or retained in another Contracting State […] The basic premise of the Convention is that the State of the child's habitual residence retains jurisdiction to decide on issues of custody / contact and that prompt return of the child to that State will enable such decisions to be made expeditiously in the interests of the child without the child having the time to become settled in another State."[215]

171. The 1980 Hague Child Abduction Convention seeks to expeditiously restore the *status quo ante* the abduction, leaving the long-term decisions on custody and contact, including the question of a possible relocation of the child, to the competent court which, in accordance with the 1996 Hague Child Protection Convention and other relevant instruments supporting that principle, is in the State of the child's habitual residence. Where none of the exceptions apply, the judge seised with a Hague return application is required to order the return of the child.

172. One could consequently raise the question of whether mediation in child abduction cases under the 1980 Hague Child Abduction Convention should be restricted to discussing the modalities of the immediate return of the child to the competent jurisdiction. The clear answer is no. Mediation in the context of the 1980 Convention can also discuss the possibility of a non-return, its conditions, modalities and connected issues, *i.e.*, the long-term decision of the child's relocation. Dealing with those issues in

[215] See S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 3.1, pp. 10, 11.

mediation is not, in principle, in contradiction with the 1980 Convention and other relevant instruments, although the legal framework naturally affects what *in concreto* may be agreed upon.[216]

173. It should be noted that mediation does not face the same jurisdictional restrictions as judicial proceedings. While court proceedings can only deal with matters for which the court has (international) jurisdiction, mediation is not restricted in the same way, even though jurisdictional issues will play a role when it comes to rendering the mediated agreement legally binding in the different legal systems involved. It is therefore widely accepted that mediation in international child abduction cases can also deal not only with the conditions and modalities of a return or non-return but also other longer-term issues affecting the parental responsibility of the parties, including custody, contact or even child support arrangements.

174. By contrast, Hague return proceedings cannot, in general, address the merits of custody Article 16 of the 1980 Hague Child Abduction Convention states that "[a]fter receiving notice of a wrongful removal or retention of a child […] the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned […]". The 1996 Hague Child Protection Convention works hand in hand with the 1980 Convention in this regard: long-term decisions on custody are left to the jurisdiction of the competent court in the State of the habitual residence of the child immediately before the abduction. According to Article 16 of the 1980 Convention, the possibility of a change in jurisdiction on matters of custody to the courts of the requested State generally only arises when the ongoing Hague return proceedings have ended.[217]

175. When it comes to deciding exactly which issues can be covered in the mediation sessions in the individual international child abduction case, a good balance has to be struck between addressing the topics necessary to work out a sustainable agreed solution and complying with rigid time requirements. Also, the possible (additional) steps required to render the agreement on a certain subject matter legally binding and enforceable in both legal systems concerned, need to be considered carefully, when deciding on the scope of mediation. It is, for example, conceivable, that in the individual case, the inclusion of maintenance issues in an agreement on the return of the child may risk delaying considerably the process of rendering the mediated agreement enforceable in the two legal systems. Here it may be advisable to separate the matter of maintenance from the issues primarily at stake in the international child abduction situation, i.e. the question of return or non-return of the child and possibly related questions concerning the parental responsibility. The parties should be made aware that the exclusion of any matters from the scope of the mediation at this stage does not constitute an obstacle to taking up these matters in separate mediation sessions at a later stage.

5.2 Importance of jurisdiction and applicable law regarding parental responsibility and other subjects dealt with in the mediated agreement

- **In international family mediation, the interrelation between the subjects covered in mediation and aspects of jurisdiction and applicable law need to be taken into account.**

[216] See also S. Vigers, Mediating International Child Abduction Cases – The Hague Convention (*op. cit.* note 90), pp. 39 *et seq*; see also E. Carl and M. Erb-Klünemann, "Integrating Mediation into Court Proceedings in Cross-Border Family Cases", in S. Kiesewetter and C.C. Paul (Eds) (*op. cit.* note 93), pp. 59-76.).

[217] See below, Chapter 13 (Issues of jurisdiction and applicable law rules); see regarding a change of jurisdiction in accordance with Art. 7 of the 1996 Convention also Chapter 13 of the Practical Handbook on the 1996 Hague Child Protection Convention, available on the Hague Conference website at < www.hcch.net > under "Publications" then "Practical Handbooks".

176. Mediation in international family disputes needs to take into consideration the interrelation between the matters dealt with in mediation and issues of applicable law and jurisdiction. Giving legal effect to a mediated agreement will often require the involvement of a court, be it for registration purposes or for turning the agreement into a court order. Hence, considering which court(s) may have jurisdiction on the issues that are to be included in the mediated agreement is important, as is the question of applicable law. Where a mediated agreement covers a wide range of subjects, it may be that the involvement of more than one judicial or administrative authority in the process of giving legal effect to the content of that agreement becomes necessary.[218]

[218] See below, Chapter 13 (Issues of jurisdiction and applicable law rules).

6. MEDIATION PRINCIPLES / MODELS / METHODS

177. With a view to guaranteeing the quality of mediation, several mediation principles have been developed, many of which can be found incorporated in mediation legislation, codes of conduct and other relevant instruments. Some of these principles, such as impartiality and neutrality, are often even featured in the definition of mediation itself.

178. Even though the mediation principles promoted in different jurisdictions and by individual mediation bodies may vary, many common elements can be identified. This Guide deals with good practice regarding the most commonly promoted principles, which have particular relevance for mediation in international child abduction cases.

179. When it comes to mediation models and methods employed in different States and by different mediation schemes, the picture is even more diverse and this Guide cannot give an exhaustive overview. While respecting the diversity in approach to mediation methods and models, the Guide aims to draw attention to certain good practices useful for mediation in international child abduction cases.

6.1 Mediation principles – international standards

6.1.1 Voluntary nature of mediation

- **Mediation is a voluntary process.**
- **The commencement of Hague return proceedings should not be made contingent upon attendance at mediation or at a mediation information session.**
- **The willingness or lack thereof to enter into mediation should not influence the Hague return proceedings.**

180. It is the very nature of mediation to engage the parties in a voluntary process of finding an amicable resolution to their dispute. "Voluntariness" is a basic and undisputed principle of mediation commonly used in mediation definitions and it has, therefore, also been incorporated in the definition of mediation for this Guide.[219]

181. The principle of "voluntariness" is not contrary to the requirements in some jurisdictions of mandatory information meetings on mediation.[220] Even in jurisdictions where it is compulsory for the parties to a dispute to attempt mediation,[221] it can be argued that this is compatible with the voluntary nature of mediation as long as the parties are not forced to actually settle their dispute in mediation.

182. In international child abduction cases, the use mediation should not delay expeditious return proceedings, and thus the use of "compulsory" measures to promote mediation has to be considered carefully.

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[219] See above, Introduction, Part D (Terminology).

[220] For example in **France** and in **Germany**, in a parental dispute over children, the family judge may oblige the parents to attend an information meeting about mediation, but may not oblige them to attempt mediation, see Art. 373-2-10 (last amended 2004) and Art. 255 (last amended 2002) of the French Civil Code and § 156 paragraph 1 sentence 3 (last amended 2012) and § 81 paragraph 2, number 5 (last amended 2012) of the German domestic Family Law Procedure Act; also in **Australia**, a court may order "that the parties to the proceedings attend family dispute resolution […]", which includes mediation, see Art. 13 C *et seq.* of the Family Law Act 1975 (last amended by Act No 147 of 2010) (ref. *supra*, note 169). For further information on compulsory meetings regarding mediation in civil matters in some States, see also K.J. Hopt and F. Steffek (*op. cit.* note 2), at p. 12.

[221] See H. Joyce, Comment, "Mediation and Domestic Violence: Legislative Responses", 14 *J. Am. Acad. Matrimonial Law* (1997), p. 451.

The institution of Hague return proceedings should not depend on the attendance of both parties at a mediation information session, especially, if, as a result, the taking parent would be given the possibility to delay unilaterally the institution of proceedings. Furthermore, any compulsory measures encouraging parents to mediate cannot disregard the specific circumstances of international abduction cases. States need to consider whether the mechanisms used in national family law disputes to promote the use of mediation are appropriate for international child abduction cases under the 1980 Convention.

183. A recurring pattern of these cases is, for example, that the left-behind parent is not familiar with the legal system of the requested State (the State to which the child was taken) and does not speak the language of that State, while the taking parent usually has at least the language link with this State. Here, pressure put on the left behind parent to enter into mediation only available in the language of the requested State, i.e. in which the left-behind parent will not be able to communicate in his or her mother tongue, will most likely be perceived as unfair by that parent. Giving the left-behind parent in such a situation the impression that the commencement of Hague proceedings is dependent on his or her attempting mediation might well be viewed by the parent as undue pressure and therefore be counterproductive.

184. Both parents need to be informed that mediation is only an option, which exists in addition to recourse to Hague return proceedings. The parents' willingness or lack of willingness to enter into mediation or to continue mediation once commenced should not influence the decision of the court.[222]

6.1.2 Informed consent

- **The parties' decision to enter into mediation should be based on informed consent.**

185. All necessary information on mediation and connected issues should be provided to the parties in advance of the mediation process to allow the parties to make an informed decision about entering into mediation.[223] This information should include: details on the mediation process and the principles determining that process, such as confidentiality; details on the method and model used, as well as information on the practical modalities; the possible costs involved for the parties. Furthermore, information should be given on the interrelation of mediation and judicial proceedings. The parties should be informed that mediation is only one option and that attempting mediation does not prejudice their access to judicial proceedings.

186. Where a contract to mediate between the mediator(s) and the parties is drawn up on the terms and conditions of the mediation, the relevant information could be reflected in that contract; see also section 4.5 above on the subject of the "contract to mediate".

187. Since the legal situation in international family disputes is particularly complex, the parties' attention should be drawn to the fact that specialist legal information is necessary to inform the discussion in mediation and to assist with drafting the mediated agreement, as well as with giving legal effect to the agreement in the jurisdictions concerned. Access to this information could be facilitated by the Central Authority or a Central Contact Point for international family mediation set up for this purpose (see

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[222] See also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 5.1, pp. 17, 18, referring to the reunite Mediation Pilot Scheme (see *supra*, note 93):
"When potential participants for the reunite pilot project were approached it was emphasised to both parents that mediation could only be undertaken with the full consent of both parties and an unwillingness to enter mediation would have no effect on the outcome of the Hague application."

[223] See the Principles for the Establishment of Mediation Structures (*op. cit.* note 41), including the general principle of "Informed consent".

Chapter 4 above, "Access to mediation") or could be provided by specialist legal representatives of the parties.[224]

6.1.3 Assessment of suitability for mediation

- **A screening process should be applied to assess the suitability of mediation for the particular case.**

188. The advantages of an initial screening have been set out above in sections 2.1 and 4.2.

6.1.4 Neutrality, independence, impartiality and fairness

- **The general principles of neutrality, independence, impartiality and fairness are indispensible for mediation; they need to be safeguarded.**

189. The principles of neutrality, independence, impartiality and fairness are crucial to mediation.[225] They are closely linked although they address different aspects of the mediation process. Mediation should be neutral in relation to the outcome of the process. The mediator needs to be independent as to the way in which he or she conducts mediation. At the same time, the mediator needs to be impartial towards the parties.[226] Finally, the mediation must be conducted fairly. The latter implies that the parties need to be given equal opportunity to participate in the mediation process. The mediation process needs to be adapted in each individual case to allow for balanced bargaining powers. For example, parties wishing to use their mother tongue or a language with which they feel comfortable should be respected as far as possible.[227]

6.1.5 Confidentiality

- **States should ensure that appropriate safeguards are in place to support the confidentiality of mediation.**
- **States should consider the introduction of rules ensuring that the mediator and others involved in the mediation may not be compelled to give evidence on communications related to the mediation in civil or commercial proceedings unless certain exceptions apply.**
- **In international family mediation, the parties need to be fully informed about the rules applicable to confidentiality in the different jurisdictions concerned.**

190. All communications in the course of, and in the context of, mediation should, subject to the applicable law,[228] be confidential, unless otherwise agreed by the

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[224] See below, section 6.1.7, regarding informed decision making; see also Council of Europe Recommendation No R (98) 1 on family mediation (ref. *supra*, note 49), III (Process of mediation):
"States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: […]
x. the mediator may give legal information but should not give legal advice. He or she should, in appropriate cases, inform the parties of the possibility for them to consult a lawyer or any other relevant professional person."

[225] See also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 3.2-3.4, pp. 11-13, and also Council of Europe Recommendation No R (98) 1 on family mediation (ref. *supra*, note 49), III (Process of mediation):
"States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles:
i. the mediator is impartial between the parties;
ii. the mediator is neutral as to the outcome of the mediation process;
iii. the mediator respects the point of view of the parties and preserves the equality of their bargaining positions".

[226] See also Standard II of the US Standards of Conduct (ref. *supra*, note 53); see also Art. 8 of the AIFI Guide to Good Practice in Family Mediation (*op. cit.* note 139); see also J. Zawid, "Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators", *Inter-American Law Review*, Vol. 40, 2008, 1 *et seq.*, 37 *et seq*.

[227] See section 2.5 above.

[228] See below, para. 195.

parties.[229] Confidentiality of communications related to the mediation helps to create the atmosphere of trust needed for the parties to engage in discussing possible compromises to their dispute. The parties may be less willing to consider different options if they fear that their proposals may be taken as a concession and held against them in legal proceedings. In a child abduction case for example, the left-behind parent is likely to feel reluctant to indicate that he or she could agree to the child remaining in the other jurisdiction, if he or she fears that this might be interpreted as "acquiescence" in the sense of Article 13(1) *a)* of the 1980 Hague Child Abduction Convention.

191. Passing on purely administrative information regarding whether the mediation has commenced, is continuing or has been terminated to the competent court or Central Authority who was involved in the referral to mediation does not infringe confidentiality.[230] On the contrary, sharing this information is an important part of the organisational co-operation between mediators, the Central Authorities and courts in international child abduction cases.[231]

192. Different measures are applied to help secure the confidentiality of mediation. In many Contracting States[232] to the 1980 Hague Child Abduction Convention, confidentiality of mediation is addressed in legislation. Furthermore, contracts concluded between the mediator and the parties before commencing mediation often include rules on confidentiality.[233] The contract may, for example, include terms that forbid the parties to subpoena the mediator, and even include as a deterrent a provision whereby a party that subpoenas the mediator needs to cover the mediator's attorneys' fees.[234]

However, where no legislation or other rules binding the courts exist, exempting the mediator and others involved in the mediation process from being called to give evidence on information obtained in connection with the mediation in civil or commercial proceedings, the confidentiality of mediation can be pierced in the course of such legal proceedings.

193. States should consider the introduction of rules to ensure that this would not be the case unless certain exceptions apply.[235] Different regional instruments, such as the European Directive on mediation[236] or the United States of America's model law on

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[229] See also Standard V of the US Standards of Conduct (ref. *supra*, note 53); see also Art. 7 of the AIFI Guide to Good Practice in Family Mediation (*op. cit.* note 139).

[230] See also Council of Europe Recommendation No R (98) 1 on family mediation (ref. *supra*, note 49), V, b, iii:
"V. Relationship between mediation and proceedings before the judicial or other competent authority […]
b. States should set up mechanisms which would: […]
iii. inform the judicial or other competent authority whether or not the parties are continuing with mediation and whether the parties have reached an agreement."

[231] See above section 2.1.2.

[232] See the Country Profiles (*supra* note 116), section 19.2; the States with legislation on the confidentiality of mediation include: **Belgium**, **Denmark**, **Estonia**, **Finland**, **France**, **Greece**, **Hungary**, **Ireland**, **Israel**, **Lithuania**, **Norway**, **Panama**, **Paraguay**, **Poland**, **Romania**, **Slovenia**, **Spain**, **Sweden**, **Switzerland** and the **United States of America** (different rules apply in the different US federal states).

[233] See above section 4.5, see also S. Vigers, Mediating International Child Abduction Cases – The Hague Convention (*op. cit.* note 90), pp. 47 *et seq*.

[234] See K.K. Kovach (*op. cit.* note 105), at pp. 197, 198.

[235] For the exceptions, see para. 195 below.

[236] European Directive on mediation (ref. *supra*, note 5), see Art. 7 (Confidentiality of mediation):
"1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:
(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or
(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.
2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation."
See also Council of Europe Recommendation No R (98) 1 on family mediation (ref. *supra*, note 49), III (Process of mediation):
"States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: […]
v. the conditions in which family mediation takes place should guarantee privacy;

mediation (the United States UMA),[237] request that confidentiality of mediation be safeguarded by such legislative measures. And many States have indeed already introduced such measures.

194. The mediator needs to inform the parties fully about the applicable rules on confidentiality. In international family mediation it is of the utmost importance that the views of both (all) jurisdictions on the issue of confidentiality be considered. The parties need to know whether the information exchanged in the course of the mediation can be used in court in any of the jurisdictions in question. If the mediator has no knowledge of the other jurisdictions' confidentiality rules, he or she needs to draw the parties' attention to the fact that these rules may be different and that the communications in the course of mediation might not be considered confidential by the other jurisdiction. Inquiries with the specialist legal representatives of the parties can be encouraged. Also the Country Profiles under the 1980 Hague Child Abduction Convention can be a useful source of information regarding existing legislation on the confidentiality of mediation in a Contracting State to the Convention.[238]

195. There are, of course, exceptions to the principle of confidentiality when it comes to information on committed or planned criminal acts. Many rules regulating the confidentiality of mediation include explicit exceptions in this regard.[239] In addition,

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vi. discussions in mediation are confidential and may not be used subsequently, except with the agreement of the parties or in those cases allowed by national law".

[237] United States UMA (ref. *supra*, note 51), see Section 4 (Privilege against disclosure; admissibility; discovery):

"(a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.

(b) In a proceeding, the following privileges apply:

(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation."

[238] See *supra* notes 232 and note 116. Relevant legislation referred to in the Country Profiles is, if submitted by the relevant Contracting States, also available on the Hague Conference's website together with the Country Profiles.

[239] See also the European Directive on mediation (ref. *supra*, note 5), Art. 7 (a), providing for an exception "where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person"; see also the United States UMA (ref. *supra*, note 51), Section 6 (Exceptions to privilege):

"(a) There is no privilege under Section 4 for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) available to the public under [insert statutory reference to open records act] or made during a session of a mediation which is open, or is required by law to be open, to the public;

(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(4) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;

(6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or

(7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the [Alternative A: [State to insert, for example, child or adult protection] case is referred by a court to mediation and a public agency participates.]

[Alternative B: public agency participates in the [State to insert, for example, child or adult protection] mediation] […]."

exceptions may derive directly from other rules such as criminal law rules. According to such rules a mediator or other person involved in mediation may be obliged to report certain information to the police and, where the information is related to a potential risk of psychological or physical harm to a child, possibly to additional child welfare organisations or other child protection bodies. Whether a mediator can, in such cases, be asked to give evidence before a court on the information obtained in the context of the mediation is another question, and will depend on the applicable law.

6.1.6 Consideration of the interests and welfare of the child

- **Mediation in international child abduction cases needs to take the interests and welfare of the child concerned into consideration.**
- **The mediator should encourage parents to focus on the needs of the children and remind them of their prime responsibility for their children's welfare, and of the need for them to inform and consult their children.**[240]

196. Given that the outcome of mediation in parental conflicts on custody and contact directly affects the child concerned, mediation needs to take the interests and welfare of the child into account. Of course, mediation is not a directive process; the mediator only facilitates communication between the parties, enabling them to find a self-accountable solution to their conflict. However, the mediator:

> "should have a special concern for the welfare and best interests of the children, should encourage parents to focus on the needs of children and should remind parents of their prime responsibility relating to the welfare of their children and the need for them to inform and consult their children".[241]

197. The Principles for the Establishment of Mediation Structures in the context of the Malta Process[242] recognise the importance of this point by stating that parents should be assisted with reaching an agreement "that takes into consideration the interests and welfare of the child".

198. Taking into account the interests and welfare of the child concerned does not only give due importance to the rights of the child, but may also be decisive when it comes to giving legal effect to the mediated agreement. In many States, parental agreements relating to parental responsibility will need to be approved by the court ensuring that the agreement is compatible with the best interests of the child concerned.

6.1.7 Informed decision-making and appropriate access to legal advice

- **A mediator conducting mediation in international child abduction cases needs to draw the parties' attention to the importance of considering the legal situation in both / all legal systems concerned.**
- **The parties need to have access to the relevant legal information.**

199. The parties' agreed solution should be the result of informed decision making.[243] They need to be fully aware of their rights and duties, as well as the legal consequences of their decisions. As already noted, the legal situation in international family disputes is

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[240] This principle is included in Council of Europe Recommendation No R (98) 1 on family mediation (ref. *supra*, note 49), under III (Process of mediation).
[241] See Council of Europe Recommendation No R (98) 1 on family mediation (ref. *supra*, note 49), III (Process of mediation).
[242] *Op. cit.* note 41.
[243] See the Principles for the Establishment of Mediation Structures (*op. cit.* note 41), including the general principles of "Informed decision making and appropriate access to legal advice".

particularly complex. The parties' attention must therefore be drawn to the fact that specialist legal information is necessary to inform the discussion in mediation sessions, and to assist both with drafting the mediated agreement and giving it legal effect in the jurisdictions in question.

200. The parties should have access to specialist legal advice.[244] Access to relevant legal information could be facilitated by the Central Authority or a Central Contact Point for international family mediation set up for this purpose (see section 4.1.4 above), or could be provided by specialist legal representatives of the parties.[245]

201. Where only one party is legally represented, the mediator needs to draw the other party's attention to the necessity of accessing legal information. Certain legal information can also be provided by the mediator him or herself, of course, with the latter making clear, however, that he / she is not in a position to give legal advice.

6.1.8 Intercultural competence

- **Mediation in international family disputes needs to be conducted by mediators with intercultural competence.**

202. As has been pointed out above, mediation in international family disputes regularly involves parties from different cultural and religious backgrounds.[246] Mediators conducting mediation in such cases need to be knowledgeable regarding, and sensitive to, the cultural and religious issues that may be involved. Specific training is needed in this regard.[247]

6.1.9 Qualification of mediators or mediation entities – minimum standards for training

- **Mediation in international child abduction cases needs to be conducted by experienced family mediators specifically trained for this kind of mediation.**

203. Specialist training is required for mediators conducting mediation in international child abduction cases. See Chapter 3 above for further information.

6.2 Mediation models and methods

204. As stated above, when it comes to mediation models and methods employed in different States and by different mediation schemes, this Guide cannot possibly give an exhaustive overview. Nor can it conclude that one model is preferable to another. The Guide aims to provide information about some of the models currently employed, and to draw attention to specific good practices useful for mediation in international child abduction cases.

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[244] See also above, section 6.1.2, (Informed consent), para. 174.

[245] See also Council of Europe Recommendation No R (98) 1 on family mediation (ref. *supra*, note 49) III (Process of mediation):

"States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: […]

x. the mediator may give legal information but should not give legal advice. He or she should, in appropriate cases, inform the parties of the possibility for them to consult a lawyer or any other relevant professional person."

[246] See section 2.4 above; see also, for example, K. Kriegel, "Interkulturelle Aspekte und ihre Bedeutung in der Mediation", in S. Kiesewetter and C.C. Paul (Eds) (*op. cit.* note 93), pp. 91-104; R. Chouchani Hatem, "La différence culturelle vécue au quotidien dans les couples mixtes franco-libanais" (*op. cit.* note 105), pp. 43-71; D. Ganancia, "La médiation familiale internationale" (*op. cit.* note 105), pp. 132 *et seq.*; M.A. Kucinski, "Culture in International Parental Kidnapping Mediations" (*op. cit.* note 105), pp. 555-582.

[247] On the subject of training, see Chapter 14 below.

6.2.1 Direct or indirect mediation

- **Whether direct or indirect mediation is most appropriate in the individual case will depend on the circumstances of the case.**

205. The decision on whether to use direct or indirect mediation[248], or a combination of the two, will depend on the circumstances of the case, such as the costs related to geographical location, and also allegations of domestic violence (see Chapter 10), etc. The decision is closely linked to that of determining the place of mediation (see above, section 4.4), once a face-to-face meeting has been identified as the way forward.

6.2.2 Single or co-mediation

- **In highly conflictual international child abduction cases the use of co-mediation should be encouraged where feasible.**

206. Co-mediation, *i.e.*, mediation conducted by two mediators, has been used successfully in international child abduction cases by different mediation schemes set up specifically for those cases.

207. Mediation in highly conflictual international child abduction cases is very intense and complex; the parties' discussion may be very emotional and can be potentially explosive. At the same time, mediation in such cases has to take place within a very limited period of time. The use of co-mediation in such circumstances has proven to be particularly advantageous.[249] Co-mediation will profit from the experience, knowledge and methodology of two mediators, which increases the likelihood of arriving at an agreed outcome. Already the presence of two mediators in the room can make it easier to create a calm and constructive atmosphere for discussion in these highly conflictual cases. The mediator's co-operation can serve as an example to the parents. Furthermore, the very fact that co-mediation can guarantee that the parties are never left alone with each other throughout the mediation sessions is an advantage. At the same time, it has to be taken into account that mediation in international child abduction cases has to take place within a tight time-frame, which can mean that mediation sessions might have to be organised in a short sequence of mediation sessions of two to three hours. Taking into account that mediation under such circumstances places a heavy burden on the mediator, co-mediation can be helpful for the sake of all involved.[250]

208. However, there may be cases where co-mediation is not feasible. Co-mediation is likely to be more expensive than single mediation. In addition, finding two appropriate mediators within the given short time-frame may be difficult. Furthermore, if the two mediators have not co-mediated before, there may be a risk that they will need time to adapt to the different dynamics of co-mediation. This mirrors the advantages of single mediation by a mediator with experience in mediating disputes on international child abduction, which is likely to be less costly, may be easier to schedule and does not involve the risk that the methodology of two mediators who have not co-mediated before will conflict.

209. Nonetheless, in view of the various advantages of co-mediation, when envisaging the setting up of a mediation scheme for child abduction cases under the 1980 Hague Child Abduction Convention, the introduction of co-mediation for high conflict cases should be considered.[251]

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[248] For the definitions see the Glossary, above.

[249] See for example the 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 92), pp. 42-44 on the experience of mediators in international child abduction cases.

[250] In the 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 92), at p. 11, mediators highly recommended that mediation be conducted as co-mediation in such cases.

[251] For Contracting States to the 1980 Hague Child Abduction Convention, in which co-mediation is available see also the Country Profiles (*supra* note 116) at section 19.1 d). Co-mediation is, for example, available in **Australia**, **Belgium**, **France**, **Germany**, **Hungary**, **Lithuania**, **Slovenia**, the **United Kingdom (England and Wales, Northern Ireland)** and the **United States of America**.

6.2.3 Concept of bi-cultural, bilingual mediation

- **Where appropriate and feasible, the use of bi-cultural, bilingual co-mediation should be encouraged in cross-border child abduction cases.**
- **Information about the possible mediation models and procedures should be made available to interested parties through the Central Authority or a Central Contact Point for international family mediation.**

210. A special form of co-mediation is bi-cultural, bilingual mediation. Bi-cultural, bilingual co-mediation addresses the specific needs for intercultural competence as well as language skills when mediating between parties from different States of origin with different mother tongues.

211. According to this model, mediation is to be conducted by two experienced family mediators: one from each party's State of origin and cultural background. Where different languages are spoken in the States of origin, the mediators will bring with them the necessary language skills, although it has to be highlighted that at least one of them needs to have a good understanding of the other language involved. There are two further issues that some of the mediation schemes set up for international child abduction using bi-national mediation try to balance, *i.e.*, the gender and professional expertise of the mediators. Co-mediation in these schemes is conducted by one female and one male mediator, one with a legal background and one with a socio-psychological background. This allows for the combining of professional expertise and cultural competence in handling different mediation issues. These co-mediation schemes involving mediators of different genders and from different professional backgrounds could thus be referred to as bi-cultural, bi-lingual, bi-gender and bi-professional mediation schemes.[252]

212. Historically, the development of bi-cultural mediation schemes in the context of child abductions under the 1980 Hague Child Abduction Convention goes back to a bi-national French-German parliamentary mediation initiative. To assist particularly difficult abduction cases between Germany and France, involving nationals from both countries, the Ministers of Justice of France and Germany decided in 1998 to establish a group of Parliamentarian mediators and to fund its work. The group, comprising three French and three German Parliamentarians, one of each being Members of the European Parliament, commenced its work in 1999. Cases were mediated in co-mediation by one French and one German mediator.[253] In 2003 the parliamentary scheme was replaced by a scheme involving non-Parliamentarian professional mediators from both countries, which operated until 2006.[254] Moving away from the involvement of Parliamentarians and towards co-mediation by professional independent mediators was a step forward in

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[252] For example, the mediation schemes currently accessible through the German non-profit organisation MiKK e.V.: the **German-Polish** project (commenced in 2007), the **German-American** project (commenced in 2004), the **German-French** project carrying on the work of the Franco-German mediation scheme organised and financed by the French and German Ministries of Justice 2003-2006, the **German-British** project in co-operation with reunite (commenced in 2003/4), see further *ibid.* (*op. cit.* note 92). See also the Wroclaw declaration from 2008 for the principles to which these "bi-cultural" mediation schemes aspire to adhere, discussed in S. Kiesewetter, C.C. Paul, and E. Dobiejewska, "Breslauer Erklärung zur binationalen Kindschaftsmediation" in FamRZ 8/2008, pp. 753 *et seq.*; the Wroclaw declaration is also available at: < http://www.mikk-ev.de/english/codex-and-declarations/wroclaw-declaration/ > (last consulted 14 March 2012).

[253] See brief description of the parliamentary mediation initiative project in: T. Elsen, M. Kitzing and A. Böttger, "Professionelle binationale Co-Mediation in familienrechtlichen Streitigkeiten (insbesondere Umgang) – Endbericht", Hannover 2005. In the French-German parliamentary mediation project there were also professional mediators involved, see report on the German–French programme.

[254] See also *loc. cit.*, "The German Ministry of Justice estimates that around 30 cases of mediation have been or are being handled by this group for the period from its establishment in October 2003 until its termination in March 2006." Knowing that the governmental funding of the project would end in 2006, the professional mediators involved in these cases established in 2005 an association for bi-national family mediation in Europe – *Médiation familiale binationale en Europe* (MFBE) – to allow the project to continue.

avoiding the politicisation and nationalistic characterisation of some private family disputes.[255]

213. Following the positive experiences of the Franco-German mediation project,[256] further bi-national mediation projects were initiated in Germany (one with the United States of America, as well as a Polish-German bi-national pilot mediation scheme).

214. Of course, it is not the nationality of the professional mediators *per se* which makes them particularly well-suited to conduct mediation in tandem in cases where parties from the mediators' home countries are involved. It is rather the mediator's cultural background and resulting ability to understand the party's values and expectations which is important, as well as the ability to translate culturally linked verbal and non-verbal communication in a way that renders it more understandable for the other party. The latter evidently presupposes that the mediator has a good knowledge of the other party's culture.

215. Recognising that a person's culture is influenced by many factors, of which nationality is only one, and that in a given case other aspects like religion and the link to a specific ethnic group might influence a person's culture in a much stronger way than his or her citizenship, one might wish to speak of encouraging "bi-cultural" mediation as a principle.[257]

216. The big advantage of "bi-cultural", "bilingual" co-mediation is that it may provide a confidence-building framework for the parties, creating an atmosphere where the parties feel understood and assisted in their communication by someone from their own linguistic and cultural background. In view however of the possible danger of a party identifying him or herself with one of the mediators and considering this person as a representative in the mediation, the mediators need to highlight their role as neutral and impartial third parties.

217. The model of "bi-cultural" mediation can also be helpful where the parties come from the same State of origin but have a different cultural identity because they belong to different religious or ethnic communities and where mediation could then be conducted in co-mediation by mediators with the same cultural backgrounds.

218. Disadvantages of the "bi-cultural", "bilingual" co-mediation can be the cost implications. Moreover, it might be even more difficult to find appropriate, available mediators within a short time-period than with regular co-mediation, particularly when the mediation is in addition to be "bi-gender", "bi-professional" mediation.

219. Clearly, in cases where the parties come from the same cultural background, "bi-cultural" mediation does not bring an added value; however, "bi-gender", "bi-professional" co-mediation might, where feasible.

220. Information about mediation models should be made available to interested parties through the Central Authority or a Central Contact Point for international family mediation (see Chapter 4 above).

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[255] Unfortunately, many of the particularly difficult international child abduction cases are additionally polarised by the media, regularly overemphasising the nationality aspects of the cases. For the relevant international legal framework, especially the 1980 Hague Child Abduction Convention but also other instruments such as the 1996 Hague Child Protection Convention and the Brussels IIa Regulation, the nationality of the parties does not play a role. What matters according to these instruments is the habitual residence of the child who is the subject of the parental dispute.

[256] For details see the report on the German Bi-national Professional mediation project drafted on request of the German Ministry of Justice: T. Elsen, M. Kitzing and A. Böttger, "Professionelle binationale Co-Mediation in familienrechtlichen Streitigkeiten (insbesondere Umgang) – Endbericht", Hannover 2005; see also E. Carl, J.-P. Copin and L. Ripke, *Das deutsch-französische Modellprojekt professioneller Mediation*, KindPrax 2005, 25-28.

[257] See also S. Vigers, Mediating International Child Abduction Cases – The Hague Convention (*op. cit.* note 90), pp. 34 *et seq*.

7. INVOLVEMENT OF THE CHILD

221. In international family disputes concerning children, the involvement of the child in the resolution of the dispute can serve different purposes. First, listening to the child's views provides insight into his or her feelings and wishes, which may be important information when it comes to determining whether a solution is in the child's best interests. Second, it may open the parents' eyes to their child's wishes and help them to distance themselves from their own positions for the sake of an acceptable common solution.[258] Third, the child's involvement respects the child's right to be heard[259] while at the same time providing an opportunity for the child to be informed about what is going on.

222. In considering the extent to which children could and should be in involved in mediation in international child abduction cases, it is helpful to take a brief look at the involvement of children in Hague return proceedings and family law proceedings in general in different legal systems. Particularly when it comes to rendering a mediated agreement legally binding and enforceable, the standards set by the relevant legal systems concerned will have to be considered.

7.1 Involvement of the child in Hague return proceedings and family law proceedings

223. In return proceedings under the 1980 Hague Child Abduction Convention, the child's views can, depending on his or her age and maturity, inform the judge's decision. Particular emphasis is given to a child's objection to return. Article 13(2) of the 1980 Convention provides that the court may "refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views".[260]

224. Historically, this provision was to be read in connection with Article 4 of the 1980 Hague Child Abduction Convention, which limits the Convention's application to children under the age of 16 years and acknowledges that "a person of more than sixteen years of age generally has a mind of his own which cannot easily be ignored either by one or the other of his parents, or by a judicial or administrative authority".[261] Article 13(2) was introduced to give the court discretion regarding the return order if an older child under the age of 16 years objects to being returned.[262]

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[258] See for example J. McIntosh, *Child inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors*, Australian Family Relations Clearinghouse, 2007, pp. 1-23.

[259] See Art. 12 of the UNCRC, which promotes the child's right "to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law"; full text available at < http://www2.ohchr.org/english/law/crc.htm > (last consulted 14 March 2012); see regarding the effective implementation of Art. 12 the General Comment No 12 (July 2009) – The right of the child to be heard, drawn up by the Committee on the Rights of the Child, available under < http://www2.ohchr.org/english/bodies/crc/comments.htm > (last consulted 14 March 2012).

[260] In addition, interviewing the child might be important in considering whether "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation", in the sense of Art. 13(1) *b)* of the 1980 Convention.

[261] E. Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention (*op. cit.* note 88), p. 450, para. 77; see also P. Beaumont and P. McEleavy, *The Hague Convention on International Child Abduction*, Oxford 1999, pp. 177, 178.

[262] See also P. McEleavy, pointing out that it "was the intention of the drafters that the exception would be primarily directed towards teenagers who were not prepared to go back to their home State", INCADAT-Case Law Analysis Commentary: Exceptions to Return – Child's Objection – Requisite Age and Degree of Maturity, available at < www.incadat.com > under "Case Law Analysis".

225. Today, however, this provision is increasingly viewed in the wider context of the child's right to be heard,[263] as recognised by the UNCRC,[264] the 1996 Hague Child Protection Convention[265] and several regional instruments[266] and initiatives.[267]

226. It should be added that case law in many Contracting States also reflects the increased awareness of the need for separate representation of the child in certain difficult abduction cases.[268]

227. Nevertheless, it has to be said that the paths States take to protect children's rights and interests in legal proceedings are diverse and the manner in which the child may be involved or represented in legal proceedings, or the methods by which the child's views may be ascertained, differ considerably.[269] In some States judges in family proceedings concerning parental responsibility hear children directly; the child may be interviewed in a normal court hearing or in a special hearing, where the judge interviews the child alone or in the presence of a social worker, etc.[270] But even among the countries that involve

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[263] See P. Beaumont and P. McEleavy (*loc. cit.* note 261).

[264] See Art. 12 of the UNCRC, which promotes the child's right "to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law"; see, regarding the effective implementation of Art. 12, General Comment No 12 (July 2009) – The right of the child to be heard (ref. *supra*, note 259).

[265] Inspired by Art. 12 of the UNCRC, the 1996 Hague Child Protection Convention provides in Art. 23(2) *b)* that recognition of a measure taken in a Contracting State may be refused "if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State"; see also P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention (*op. cit.* note 75), p. 585, para. 123.

[266] For example, in 1996 the Council of Europe adopted the *European Convention on the Exercise of Children's Rights,* which entered into force 1 July 2000 aiming to protect the best interests of children through a number of procedural measures to allow the children to exercise their rights, in particular in judicial family proceedings. The Convention is at the time of writing in force in Austria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Latvia, Montenegro, Poland, Slovenia, The former Yugoslavian Republic of Macedonia, Turkey and Ukraine, see
< http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=160&CM=8&DF=05/12/2010&CL=ENG >
(December 2010); also, the Brussels IIa Regulation, applicable as of 1 March 2005 for all EU Member States except Denmark, which supplements the application of the 1980 Hague Child Abduction Convention in these States, reflects the recent rapid developments in promoting children's rights in legal proceedings. Based to a large extent on the 1996 Hague Child Protection Convention, the Brussels IIa Regulation encourages even more vigorously the consideration of children's wishes.

[267] For example, the "Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice", adopted on 17 November 2010 by the Committee of Ministers of the Council of Europe, available at
< https://wcd.coe.int/wcd/ViewDoc.jsp?id=1705197&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet
=EDB021&BackColorLogged=F5D383 > (last consulted 14 March 2012); see also "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - An EU Agenda for the Rights of the Child" COM(2011)60 final of 15.2.2011, in particular p. 6, available online at < http://ec.europa.eu/justice/policies/children/docs/com_2011_60_en.pdf > (last consulted 14 March 2012).
See futhermore the preparatory report, U. Kilkelly, "Listening to children about justice: Report of the Council of Europe on Child-friendly Justice", available at
< http://www.coe.int/t/dghl/standardsetting/childjustice/CJ-S-
CH%20_2010_%2014%20rev.%20E%205%20oct.%202010.pdf > (last consulted 14 March 2012).

[268] See, regarding the **United Kingdom**, M. Freeman and A.-M. Hutchinson, "Abduction and the Voice of the Child: Re M and After", *IFL* 2008, 163-167; see also, for example, in **New Zealand**, the Practice Note: Hague Convention Cases: New Zealand Family Court Guidelines, available at
< http://www.justice.govt.nz/courts/family-court/practice-and-procedure/practice-notes > and sec, 106 and 6 of the New Zealand Care of Children Act 2004 No 90 (as at 29 November 2010), available at
< http://www.legislation.govt.nz/act/public/2004/0090/latest/DLM317233.html > (last consulted 14 March 2012).

[269] See for example a comparison of different European States, M. Reich Sjögren, "Protection of Children in Proceedings", Note prepared for the European Parliament's Committee on Legal Affairs, Brussels, November 2010, PE 432.737.

[270] See for example **Germany**: children have to be heard as of the age of 14 years or younger if the child's views are considered particularly relevant for the proceedings (§159 FamFG replacing § 50 b FGG), which will normally be the case in custody proceedings (here children are sometimes heard as early as 3 or 4 years old); see also a study requested by the Ministry of Justice on the hearing of children, M. Karle, S. Gathmann, G. Klosinski, Rechtstatsächliche Untersuchung zur Praxis der Kindesanhörung nach § 50 b FGG, 2010. In **France** children can be heard by the judge or a person designated by the judge to hear the child in accordance with Art. 388-1 of the French Civil Code.

children directly in judicial proceedings, views on the earliest age at which a child may be involved differ. In other States, where judges are reluctant to hear children directly, the child's view might be submitted to the court through a report prepared, for example, by a social worker or psychologist who interviews the child for that purpose.[271]

228. Apart from the question of how the child's views can be made known to the judge seised, the separate question of how much importance should be accorded the child's opinions and wishes will depend on the subject matter of the case and the child's age and degree of maturity.

7.2 The voice of the child in mediation

- **The child's views should be considered in mediation in accordance with the child's age and maturity.**
- **How the child's views can be introduced into the mediation and whether the child should be involved directly or indirectly must be given careful consideration and depends on the circumstances of the individual case.**

229. In the mediating of a family dispute concerning children, the child's views need to be taken into consideration.[272] The same applies to other alternative dispute resolution mechanisms. Particularly in view of the developments in safeguarding children's rights and interests in judicial proceedings, there should be a parallel respect for children's rights and interests, and particularly for the child's right to have his / her views taken into account, in alternative forms of dispute resolution.

230. Confirming this principle, in its discussion of the effective implementation of Article 12 of the UNCRC, the Committee on the Rights of the Child stated in its 2009 General Comment on the right of the child to be heard that the right "to be heard in any judicial and administrative proceedings affecting the child" also needs to be respected where those proceedings "involve alternative dispute mechanisms such as mediation and arbitration".[273]

231. When it comes to "hearing the voice of the child" in mediation, two major differences exist in comparison with judicial proceedings. First, the means by which a child's voice may be introduced into the mediation process may differ considerably from those available in the context of judicial proceedings. Second, there is a difference in the manner in which the child's opinions and wishes can be taken into consideration.

232. Whether and the means by which the voice of the child can be introduced in the mediation process will to some extent depend on the parents' agreement to a certain procedure. This is due to the fact that in most jurisdictions mediators do not have interrogative powers, i.e. in contrast to judges, mediators are generally not in a position to summon the child to a hearing or to order an expert interview of the child and a report being drawn up. The mediator can only draw the parents' attention to the importance of hearing the child's voice and indicate, where applicable, that the court requested to

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[271] See, with further references, M. Reich Sjögren, "Protection of Children in Proceedings" (*op. cit.* note 269); in the **United Kingdom** the court can order a Welfare report from a specialist social worker of the Children and Family Court Advisory and Support Service (CAFCASS) in the context of custody or contact proceedings; see also M. Potter, "The Voice of the Child: Children's 'Rights' in Family Proceedings", *IFL* 2008, 140-148, at p. 143.

[272] See also "The Involvement of Children in Divorce and Custody Mediation – A Literature Review", published by the Family Justice Services Division of the Justice Services Branch (British Columbia Ministry of Attorney General), March 2003, available at < http://www.ag.gov.bc.ca/dro/publications/index.htm > (last consulted 14 March 2012).

[273] See General Comment No 12 (2009) – The right of the child to be heard (ref. *supra*, note 259), see p. 12, para. 33; see also p. 15, para. 52.

render the agreement legally binding and enforceable may examine whether the child's views have been sufficiently taken into account. The mediator should recommend a procedure of introducing the child's voice into mediation taking into consideration the circumstances of the individual case (*e.g.*, the age of the children, the risk of re-abduction, whether there is a history of domestic violence, etc.). One possible option is the direct participation of the child in one or more of the mediation sessions. Another possibility is arranging for a separate interview of the child and reporting back to the parents.[274] However, the person interviewing the child needs to have specialised training,[275] to guarantee that the consultation with the child is conducted in a "supportive, and developmentally appropriate manner" and to ensure "that the style of consultation avoids and removes any burden of decision-making from the child".[276]

233. Once the child's views have been introduced into the mediation process, the manner of taking them into consideration differs from judicial proceedings. In judicial proceedings, the judge will draw his / her conclusions from the hearing and, depending on the age and maturity of the child, will take the child's views into consideration when making his / her decision regarding the child's best interests. In contrast a mediator can only draw the parties' attention to the child's point of view or to aspects that may be relevant to the interests and welfare of the child, but it remains entirely up to the parents to decide on the content of their agreement. As already stated above, it needs to be emphasised in this respect that the mediator "should have a special concern for the welfare and best interests of the children [and] should encourage parents to focus on the needs of children and should remind parents of their prime responsibility relating to the welfare of their children […]".[277]

234. Depending on the legal systems involved, the mediator may also need to remind the parents that judicial approval of the agreement may depend on whether the rights and interests of the children have been properly protected.

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[274] In the Mediation Pilot project of the *Centrum Internationale Kinderontvoering* in the **Netherlands**, a specially trained mediator, who was not conducting the mediation in the specific case, interviewed the child concerned and submitted a report on the interview; in the **United Kingdom**, the mediators involved in the reunite mediation scheme, where appropriate, ask the court seised with the return proceedings to order that the child be interviewed by a Children and Family Court Advisory Support Service Officer (CAFCASS Officer) and that the report be made available to the parents and mediators, see report on reunite Mediation Pilot Scheme (*op. cit.* note 93), p. 10.

[275] For example in the **United Kingdom (England and Wales)** , the Family Mediation Council's "Code of Practice for Family Mediators" agreed by the Member Organisations, 2010, available at < www.familymediationcouncil.org.uk >, provides that "[m]ediators may only undertake direct consultation with children when they have successfully completed specific training approved by their Member Organisation and / or the Council and have received specific clearance from the Criminal Records Bureau" (at paras 3.5 and 5.7.3); see also Chapter 14 below.

[276] See J. McIntosh (*op. cit.* note 258), p. 5.

[277] See Council of Europe Recommendation No R (98) 1 on family mediation (ref. *supra*, note 49), under III (Process of mediation); on the principle of consideration of the interests and welfare of the child, see section 6.1.6 above.

8. POSSIBLE INVOLVEMENT OF THIRD PERSONS

- **Where the parties to the conflict agree, mediation should be open to the involvement of third persons whose presence might be of assistance in finding an agreed solution.**

235. To reach a sustainable solution in a family dispute, it can sometimes be helpful to include within the mediation process a person who has close links with one or both of the parties and whose co-operation is needed to implement the agreed solution successfully. This may be, for example, the new partner of one of the parents or a grandparent. Depending on the parties' cultural background, the parties might wish to have a senior representative of their community participate in the mediation.

236. It is indeed one of the advantages of mediation that the process is flexible enough to allow for the inclusion of persons that do not have a legal standing in the case, but who may still have a strong influence on the success of the dispute resolution. However, the mediator will have to decide on a case-by-case basis whether the inclusion of a third person in a mediation session or part of it is feasible and appropriate without endangering the effectiveness of mediation. The attendance of a third person at a mediation session or arranging for a mediator to interview a third person, of course, presupposes the agreement of both parties. The inclusion of a third person may constitute a challenge particularly when it comes to ensuring that there is no imbalance of power between the parties. Also, should a third person participate in mediation communications, the issue of confidentiality has to be addressed.

237. When it comes to the agreed solution found in mediation, it has to be emphasised that it is an agreement between the parties and that the third person does not through his or her involvement in the mediation become a party to that agreement. However, in certain cases it may be helpful if the third person, on whose co-operation the implementation of the agreement depends, gives his or her endorsement to the agreement of the parties as a sign of his or her commitment to support that agreement.

9. ARRANGING FOR CONTACT BETWEEN THE LEFT-BEHIND PARENT AND CHILD DURING THE MEDIATION PROCESS

238. Child abduction regularly leads to a sudden and complete disruption of contact between left-behind parent and child. This is very painful for both and may, depending on the duration of the disruption of their contact, lead to alienation. In order to protect the child from further harm and in view of the child's right to maintain contact with both parents, the swift restoration of contact between child and left-behind parent is important. There are various ways by which contact can be restored on an interim basis immediately following the abduction. Modern means of communication can be considered (including e-mail, instant messaging, internet calls, etc.).[278]

239. If the left-behind parent is travelling to the requested State on the occasion of a court hearing in connection with Hague return proceedings or for a mediation meeting, it is highly recommended that measures be considered to allow for an in-person meeting between the child and the left-behind parent.[279] This is a valuable step towards de-escalation of the conflict. Particularly in mediation, where constructive dialogue between the parties is crucial, such in-person meetings can be very helpful. Mediators with experience in international child abduction cases acknowledge the positive effects of such in-person contact on the mediation process itself.[280]

9.1 Safeguards / Avoiding re-abduction

- **Safeguards may need to be put in place to ensure respect for the terms and conditions of interim contact arrangements and to eliminate any risk of re-abduction.**

  Such safeguards may include:[281]

  - **the surrender of passport or travel documents, requesting that foreign consulates / embassies should not issue new passports / travel documents for the child;**
  - **requiring the requesting parent to report regularly to the police or some other authority during a period of contact;**
  - **the deposit of a monetary bond or surety;**
  - **supervision of contact by a professional or a family member;**
  - **restricting the locations where visitation may occur, etc.**

240. For further details see the Guide to Good Practice on Transfrontier Contact Concerning Children,[282] Chapter 6 (pp. 31 *et seq*.), which takes into consideration the objectives of the Council of Europe *Convention of 15 May 2003 on Contact concerning Children*.[283]

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[278] See the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 6.7, p. 33.
[279] See also S. Vigers, Note on the development of mediation, conciliation and similar means (*op. cit.* note 11), 6.1, p. 20.
[280] See, *e.g.*, S. Kiesewetter and C.C. Paul, "Family Mediation in an International Context: Cross-Border Parental Child Abduction, Custody and Access Conflicts: Traits and Guidelines", in S. Kiesewetter and C.C. Paul (Eds) (*op. cit.* note 93), p. 47.
[281] See the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 6.7, p. 33.
[282] *Op. cit.* note 16.
[283] CETS 192; Convention text available at < http://conventions.coe.int >.

9.2 Close co-operation with Central Authorities and administrative and judicial authorities

- **When arranging for contact between the left-behind parent and abducted child in the course of the mediation process, co-operation with the authorities may be necessary to eliminate any risks for the child, including re-abduction.**

241. Under the 1980 Hague Child Abduction Convention the Central Authority has a responsibility "in a proper case, to make arrangements for organising or securing the effective exercise of rights of access" (see Art. 7(2) *f)*; see also Art. 21).

242. Although States take different views on whether interim contact applications are covered by Article 21,[284] the 1980 Hague Child Abduction Convention's objective of giving effect to the child's right to maintain contact with both parents implies an additional duty for Central Authorities to assist parents with arranging for interim contact in the course of the ongoing Hague return proceedings.[285]

243. Article 7(2) *b)* of the 1980 Hague Child Abduction Convention obliges Central Authorities to take all appropriate measures "to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures". Where a risk of re-abduction exists, the Central Authority can therefore be asked to provide assistance with taking or arranging for the necessary protective measures.

[284] For details see the Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16), section 4.6, p. 23.
[285] *Ibid*. (*op. cit.* note 16).

10. MEDIATION AND ACCUSATIONS OF DOMESTIC VIOLENCE

244. Domestic violence, unfortunately, is a widespread phenomenon that can take many forms: it can consist in physical or psychological abuse;[286] it can be directed towards the child ("child abuse")[287] and / or towards the partner;[288] and it can range from a single isolated incident to being part of a sustained and recurring pattern. Where domestic violence is recurring, a typical cycle of violence can consist of: (1) a tension-building phase with minor assaults; (2) an acute incident with an escalation of violence; and (3) a reconciliation phase, in which the perpetrator often begs for forgiveness and promises never to be violent again while the victim tries to believe the assurances, sometimes even feeling responsible for the abuser's psychological well-being.[289] It is a characteristic of recurring violence that the victim feels trapped in the cycle of violence and helpless, believing that the situation cannot change and afraid to leave the perpetrator for fear of retaliatory violence.[290]

245. In international abduction cases, allegations of domestic violence are not rare. Some of these accusations may prove to be unfounded but others are legitimate and may be the reason why the taking parent left the country with the child. Domestic violence is a very sensitive issue and needs to be dealt with accordingly.

246. Views differ widely as to whether family disputes involving domestic violence are suitable for mediation. Some experts consider mediation in such cases generally inappropriate, for a number of reasons. They point out that mediation may put the victim at risk. Based on the consideration that the moment of separation from the abuser is the most dangerous time for the victim, they argue that a possible face-to-face contact with the abuser at that time carries the risk of further violence or traumatisation.[291] Furthermore, it is reasoned that mediation as a means of solving disputes amicably is ineffective in cases involving domestic violence, since mediation is based on co-operation[292] and its success depends on the parties having equal bargaining powers. It is argued that, since victims of domestic violence often have difficulties in advocating their own interests when facing the abuser, mediation is bound to lead to unfair agreements.[293] Some of those opposed to the use of mediation in domestic violence cases point out that mediation would legitimise domestic violence instead of punishing abusers.

247. By contrast, many experts are against a general exclusion of mediation in cases involving domestic violence, provided that well-trained professionals knowledgeable in the subject matter are involved.[294] They point to the fact that cases of domestic violence differ significantly, and that a case-by-case assessment is key: some cases may be amenable to a mediation process while some should clearly be dealt with by the

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[286] Physical and psychological abuse can extend to sexual, emotional and even financial abuse. Domestic violence is "a complex and culturally nuanced phenomenon" and "cuts across gender, race, ethnicity, age and socio-economic lines", see J. Alanen, "When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense", 40 *U. Miami Inter-Am. L. Rev.* 49 (2008-2009), p. 64.

[287] Regarding violence against the child, the Guide distinguishes direct from indirect violence. Direct violence is defined as violence directed towards the child and the latter is violence directed against a parent or another member of the household, which affects the child. See also the definition of domestic violence in the Glossary above and below para. 253.

[288] In the majority of cases, the woman in a couple is the victim of domestic violence; see, *e.g.*, "Domestic Violence Parliamentary Report of the United Kingdom", published in June 2008, Summary in *IFL* 2008, pp. 136, 137, "the vast majority of serious and recurring violence was perpetuated by men towards women"; see also H. Joyce, Mediation and Domestic Violence: Legislative Responses (*op. cit.* note 221), p. 449, "Women are the victims in 95 percent of reported domestic violence incidents."

[289] See *ibid.* (*op. cit.* note 221), pp. 499, 450.

[290] See *ibid.* (*op. cit.* note 221), pp. 499, 450.

[291] For further references regarding this view, see *ibid.* (*op. cit.* note 221), p. 452.

[292] For further references regarding this view, see *ibid.* (*op. cit.* note 221), p. 452.

[293] For further references regarding this view, see *ibid.* (*op. cit.* note 221), p. 451.

[294] See, for example, the 2006 Report on the reunite Mediation Pilot Scheme (*op. cit.* note 92), p. 53.

courts.[295] Where a victim has received sufficient information to make an informed choice, the victim's wish to participate in a process that could be beneficial – if safe – should be respected.[296] Some authors have stated that a victim's involvement in an appropriate and well-run mediation process can be empowering for that person.[297] Concerns about victims' safety in the course of mediation are met with the counter argument that mediation does not necessarily have to involve in-person mediation sessions, but can also be conducted as a telephone conference or as shuttle mediation.

248. In relation to the mediation process, the argument is that there are many ways in which it can be adapted to protect and empower the victim. For example, the rules set out for the mediation session can prohibit degrading behaviour combined with a provision for the mediation's immediate termination if these rules are not respected. Mediation professionals should be aware of rehabilitation programmes and other resources that might be available for an abusive parent.

249. The different views are also reflected in legislation. In some jurisdictions statutory provisions explicitly bar the use of mediation in family disputes involving children where there is evidence of a "history" of domestic violence, or make mediation in such cases subject to certain conditions.[298]

250. It should be emphasised that the domestic violence itself often constitutes a serious offence and is not, of course, the subject of the mediation; at issue in mediation are such matters as child custody and access, support stipulations, and other family organisation matters.[299]

10.1 Treatment of domestic violence in Hague return proceedings

251. Before addressing the question of mediation in child abduction cases involving accusations of domestic violence, it is important to say a few words on domestic violence accusation in Hague return proceedings in general.

252. Where a child abduction has occurred, Central Authorities are under the obligation "to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures" in accordance with Article 7(2) *b)* of the 1980 Hague Child Abduction Convention. Thus, if there is a risk that the taking parent could harm the child, the Central Authority could, depending on the powers given to it by the relevant Contracting State, take provisional measures or cause the competent authority to take such measures. This provision works hand in hand with Article 11 of the 1996 Hague Child Protection Convention which, in cases of urgency, confers jurisdiction to take necessary protective measures on the authorities of the Contracting State where the child is present.

253. In the majority of cases, however, accusations of domestic violence are not made against the taking parent but against the left-behind parent.[300] An immediate safety risk for the taking parent and / or the child will be met by the authorities in the requested State in accordance with that States' procedural law. Measures may for example be taken by the Central Authority and / or the court to avoid revealing the current

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[295] See, with further references, N. ver Steegh (*op. cit.* note 8), p. 665.
[296] See, with further references, *ibid.* (*op. cit.* note 8), p. 665.
[297] J. Alanen, "When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense", 40 *U. Miami Inter-Am. L. Rev.* 49 (2008-2009), p. 69, note 69.
[298] See also H. Joyce Mediation and Domestic Violence: Legislative Responses (*op. cit.* note 221), pp. 459 *et seq.*
[299] J. Alanen, When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense (*op. cit.* note 297), pp. 87-88, note 151.
[300] Art. 7(2) *b)* of the 1980 Hague Child Abduction was drawn up mainly with a view to avoiding another removal of the child. See E. Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention (*op. cit.* note 88), para. 91.

whereabouts of the victim of domestic violence to the other parent, or to otherwise ensure that an unaccompanied meeting of the parties does not occur.[301]

In the course of the Hague return proceedings, domestic violence accusations play a role when it comes to deciding whether an exception to the child's return in accordance with Article 13(1) *b)* of the 1980 Hague Child Abduction Convention can be established. According to that Article, the judicial or administrative authority of the Requested State is not bound to order the return of the child if it is established that "there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation". Not just child abuse, but also domestic violence against the taking parent which indirectly affects the child, may be the cause of such a risk. However the exceptions of Article 13, in line with the objectives of the 1980 Convention, are construed narrowly.[302] Whether the conditions for the grave risk exception are fulfilled in a case with domestic violence allegations, will, besides the circumstance of the individual case, also depend on the ability to arrange for protective measures to ensure the safe return[303] of the child and possibly the taking parent to the State of his / her habitual residence.

Even though the 1980 Convention deals with the return of the child, the safe return of the taking parent will often be a matter of concern for the court seised with the Hague return proceedings, particularly where the taking parent is the sole primary carer of the child. Arranging for the safe return of the taking parent can be a necessary condition to ordering the child's return, if the separation of parent and child due to the inability of the taking parent to return would expose the child to a grave risk of harm. See also above section 2.8 regarding criminal proceedings as obstacle to the taking parent's return.

254. Where it is established that the return would expose the child to a grave risk of physical or psychological harm or otherwise place the child in an intolerable situation, the court seised with the return application is not obligated to order the return of the child.[304] A non-return decision will, in most cases, ultimately result in a shift of jurisdiction[305] on custody issues to the State of the child's new habitual residence.[306]

255. Dealing with domestic violence accusations in Hague return proceedings is a very sensitive issue and can, particularly in view of the many facets of cases in which domestic violence is alleged, not be generalised. The Sixth Meeting of the Special Commission on the practical operation of the 1980 and 1996 Conventions highlighted the autonomy of the court seised with the return proceedings regarding "the evaluation of the evidence and the determination of the grave risk of harm exception (Art. 13(1) *b)*), including allegations of domestic violence, […] having due regard to the aim of the 1980

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[301] Regarding the often somewhat more limited possibilities of the extrajudicial mediation process to meet an acute threat of violence, see below para. 258.

[302] See E. Pérez-Vera, *ibid.* (*op. cit.* note 88), p. 434, para. 34; see also the Conclusions and Recommendations of the Fourth Special Commission Meeting, No 4.3, p. 12 and the Conclusions and Recommendations of the Fifth Meeting Special Commission Meeting, No 1.4.2, p. 8.

[303] Measures to ensure the safe return can include mirror orders, safe harbour order or other protective measures. See further the Guide to Good Practice on Enforcement (*op. cit.* note 23), Chapter 9, pp. 35 *et seq.*; see also J.D. Garbolino, *Handling Hague Convention Cases in U.S. Courts* (3rd ed.), Nevada 2000, pp. 79 *et seq*.

[304] The Brussels IIa Regulation, which works hand in hand with the 1980 Hague Child Abduction Convention, contains the additional rule in Art. 11(4) that "A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return".

[305] See, regarding questions of jurisdiction, Chapter 13 below; see also Chapter 13 of the Practical Handbook on the 1996 Hague Child Protection Convention regarding a change of jurisdiction in accordance with Art. 7 of the 1996 Convention.

[306] According to Art. 11(8) of the Brussels IIa Regulation, the child might have to be returned despite the non-return decision in the event of "any subsequent judgment [requiring] the return of the child issued by a court having jurisdiction under this Regulation".

Convention to secure the prompt and safe return of the child."[307] At the same time, the Special Commission suggested measures to promote greater consistency in the interpretation and application of Article 13(1) *b)*.[308]

10.2 Safeguards in mediation / Protection of the vulnerable party

- **The use of mediation in cases where there is an issue of domestic violence should be considered carefully. Adequate training in assessing the suitability of a case for mediation is necessary.**
- **Mediation must not put the life or safety of any person at risk, especially those of the victim of domestic violence, family members or the mediator. The choice between direct and indirect mediation, the mediation venue and the mediation model and method must be adapted to the circumstances of the case.**
- **Where mediation is considered suitable in a case involving an issue of domestic violence, it needs to be conducted by experienced mediators specially trained to mediate in such circumstances.**

256. The suitability of mediation for an international child abduction case in which accusations of domestic violence are raised against one parent needs to be given careful consideration. The person assessing whether the case is suitable for mediation needs to be trained accordingly.[309] Even where no accusations of domestic violence have been made, an assessment of the suitability of the case for mediation needs to take into consideration that domestic violence may nevertheless be involved in a given case.

257. The following factors may be of particular relevance when assessing the suitability of a specific case for the available mediation service:[310] the severity and frequency of the domestic violence;[311] the target of the domestic violence; the pattern of violence;[312] the parties' physical and mental health;[313] the likely response of the primary perpetrator;[314] the availability of mediation specifically designed for domestic violence cases; how the mediation service available can address safety issues; whether the parties are represented.[315] It should also be emphasised that if, in the course of initial screening or later in the mediation process, a mediator learns of circumstances that constitute a criminal offence (*e.g.*, sexual abuse of a child), in many jurisdictions he or she will be

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[307] See No 80, Conclusions and Recommendations of Part II of the Sixth Meeting of the Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (25-31 January 2012).

[308] *Ibid*, paras 81 and 82:

"81. The Special Commission recommends that further work be undertaken to promote consistency in the interpretation and application of Article 13(1) *b)* including, but not limited to, allegations of domestic and family violence.

82. The Special Commission recommends that the Council on General Affairs and Policy authorise the establishment of a Working Group composed of judges, Central Authorities and cross-disciplinary experts to develop a Guide to Good Practice on the interpretation and application of Article 13(1) *b)*, with a component to provide guidance specifically directed to judicial authorities, taking into account the Conclusions and Recommendations of past Special Commission meetings and Guides to Good Practice."

[309] See regarding the importance of skilled screening procedures, L. Parkinson, Family Mediation – Appropiate Dispute Resolution in a new family justice system, 2nd edition, Family Law 2011, Chapter 3, pp. 76 et seq.

[310] See also Art. 48 of the Council of Europe Convention on preventing and combating violence against women and domestic violence of 11 May 2011, available at < http://www.coe.int/t/dghl/standardsetting/convention-violence/texts/Convention_en.pdf > (last consulted 14 March 2012), which requests State parties to "take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention".

[311] See, with further references, N. ver Steegh (*op. cit.* note 8), p. 665.

[312] *Ibid*. (*op. cit.* note 8), p. 665.

[313] *Ibid*. (*op. cit.* note 8), p. 665.

[314] *Ibid*. (*op. cit.* note 8), p. 665.

[315] *Ibid*. (*op. cit.* note 8), p. 665.

under an obligation to report to the authorities, for example the police and child protection agencies. This obligation exists despite the principle of confidentiality of mediation.

258. Mediation must not put the life or safety of any person at risk, especially those of the victim of domestic violence, family members and the mediator. A face-to-face meeting, be it in the course of the mediation or as a preparatory meeting, should only be convened where safety can be ensured. Depending on the circumstances of the case, the assistance of State authorities might be necessary.[316] In other cases, avoiding opportunities for the parties to meet unaccompanied may be sufficient. In such cases for example, the chance for the parties to inadvertently meet on their way to the mediation venue should be eliminated; thus separate arrivals and departures should be arranged for.[317] Further measures may include an emergency button in the room where the mediation session is to take place. In the course of the mediation session, the parties should never be left alone. In this regard, the use of co-mediation may be particularly helpful. The presence of two experienced mediators will be reassuring for the victim and may help to defuse any tensions. Should one mediator have to leave the session for whatever reason, this also ensures an experienced mediator will remain in the parties' presence. The presence of other persons, such as a lawyer or provider of support, may also be considered where appropriate.[318]

259. Where the available mediation service is not equipped to eliminate the safety risks associated with a face-to-face meeting, or if such a meeting proves inappropriate for other reasons, the use of indirect mediation through separate meetings between the mediator with each party (so called caucus meetings) or the use of modern technology such as a video link or Internet communications may be considered.

260. Once safeguards have been established against the risk of harm in mediation, measures must be taken to guarantee that mediation is not prejudiced by unequal bargaining powers.[319] Mediation needs to be conducted by experienced and specially trained mediators; mediators need to adapt the mediation process to the challenges of each individual case. Safety issues associated with implementing the mediated agreement at a later stage need to be given due consideration.

261. In general, close co-operation with the judicial and administrative authorities is conducive to avoiding safety risks.[320]

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[316] The more severe the circumstances, the less likely are the case's general suitability for mediation.

[317] See also L. Parkinson, Family Mediation – Appropiate Dispute Resolution in a new family justice system, 2nd edition, Family Law 2011, Chapter 3, pp. 76 et seq.

[318] See, with further references, N. ver Steegh (*op. cit.* note 8), p. 666.

[319] See also Council of Europe Recommendation No R (98) 1 on family mediation (ref. *supra*, note 49), III (Process of mediation):

> "States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: […]
> ix. the mediator should pay particular regard to whether violence has occurred in the past or may occur in the future between the parties and the effect this may have on the parties' bargaining positions, and should consider whether in these circumstances the mediation process is appropriate".

[320] See sections 19.4 *g)* and *h)* of the Country Profiles under the 1980 Hague Child Abduction Convention (*supra* note 116) for information on the availability of certain specific safeguards.

262. Mediators should in general pay attention to and need to be able to recognise[321] signs of domestic violence and / or risks of future violence, including where no accusations have been made by one of the parties, and must be prepared to take the necessary precautions and measures.[322]

10.3 Information on protective measures

- **Information should be available regarding the possible protective measures for the parent and child in the jurisdictions concerned.**

263. Information regarding the possible protective measures which may be taken for the parent and the child in the State of the child's pre-abduction residence, as well as in the State to which the child has been abducted, should be made available to inform the discussion in the mediation session. The provision of this information could be facilitated by the Central Authority or a Central Contact Point for international family mediation.

[321] See regarding the different types of violence and abuse a mediator should be able to recognise and distinguish, for example, L. Parkinson, Family Mediation – Appropiate Dispute Resolution in a new family justice system, 2nd edition, Family Law 2011, Chapter 3, pp. 76 et seq.

[322] See also Council of Europe Recommendation No R (98) 1 on family mediation (ref. *supra*, note 49), III (Process of mediation):

"States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: […]

ix. the mediator should pay particular regard to whether violence has occurred in the past or may occur in the future between the parties and the effect this may have on the parties' bargaining positions, and should consider whether in these circumstances the mediation process is appropriate".

11. THE TERMS OF THE MEDIATED AGREEMENT – REALITY CHECK

- **The terms of the mediated agreement need to be drafted realistically and to take into consideration all related practical issues, especially concerning the arrangement of contact and visitation.**

264. Once an agreed solution is in sight, the mediator has to assist the parties with working out the details of their agreement. The mediator will in many cases be the one who drafts the actual "agreement" or "memorandum of understanding" in accordance with the parties' wishes.[323]

265. As stated above in Chapter 5 ("Scope of mediation"), mediated agreements in international child abduction cases are likely to include the following points: an agreement on the return or non-return of the child and in the later case an agreement on where the child is to establish his / her new residence; with whom the child will live; the question of parental responsibilities and their exercise. Furthermore, the agreement is likely to address certain financial issues such as travel expenses, but also, in some cases, issues of child and spousal support.

266. It is important that the mediated agreement be drawn up in compliance with the applicable legal framework, so that it is capable of obtaining legal effect in both / all jurisdictions concerned. In this respect, although it is clearly not the mediator's role to give legal advice, he or she can refer the parties to the relevant national or international legal framework. In any case, the mediator should draw the parties' attention to the importance of consulting their specialised legal representatives in this regard, or of otherwise obtaining specialist legal advice on the legal situation in their case.

267. Once the agreement has been drafted, it may be advisable if the parties so wish "to allow a limited time for reflection […] before signing".[324] This time should also be used to make necessary legal inquiries.[325]

268. The mediated agreement needs to be realistic and as detailed as possible regarding all the obligations and rights to which it refers. This is not only important for a problem free implementation of the agreement but also with regard to the agreement's capability of becoming enforceable (see also Chapter 12). For example, if the parents agree on the return of the child, the modalities of the return, including the question of travel costs and the question with whom the child is to travel back and where the child will stay immediately following the return, need to be addressed.[326] Where the parents are to reside in different States, the cross-border exercise of parental responsibilities needs to be realistically regulated.[327] When drafting cross-border contact arrangements, for example, specific dates and time periods should be included to take account of school holidays, etc. Also travel expenses need to be addressed. It is important to eliminate, in so far as possible, any possible source of misunderstandings in the use of the contact arrangement. In a case, for example, where a left-behind parent agrees that the child may remain with the taking parent in the State to which the child was taken, provided that his or her contact rights are sufficiently secured, it might seem reasonable for the parents to agree that the taking parent will buy the flight tickets for the child to spend the summer holidays in the prior State of residence with the left-behind parent. In practice, however, this approach may raise difficulties if the exercise of contact between

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[323] See K.K. Kovach (*op. cit.* note 105), at p. 205.

[324] See Council of Europe Recommendation Rec (2002)10 on mediation in civil matters (ref. *supra*, note 50), Principle VI (Agreements reached in mediation):

"16. In order to define the subject matter, scope and conclusions of the agreement, a written document should usually be drawn up at the end of every mediation procedure. The parties should be allowed a limited time for reflection, which is agreed on by the parties, after the document has been drawn up and before signing it."

[325] See below, Chapter 12 (Rendering the agreement legally binding and enforceable).

[326] See regarding the details which need to be included in a return order, Chapter 4 of the Guide to Good Practice on Enforcement (*op. cit.* note 23), pp. 21 *et seq*.

[327] See Principles for the Establishment of Mediation Structures (*op. cit.* note 41), Part B.3.

child and left-behind parent is linked to an activity of the taking parent which in itself depends on the financial resources of the taking parent at the time when the travel expenses are due. The future financial capabilities have to be addressed, and to avoid any ad-hoc difficulties with the payment of the flight tickets, the parents could, for example, agree that a certain amount of money be deposited well in advance of the travel and that the left-behind parent will make the travel arrangements.[328]

Caution is necessary with regard to conditions that go beyond the sphere of influence of the parties. For example, an agreement should not task one of the parties with the withdrawal of criminal proceedings, if, in the relevant legal system concerned, criminal proceedings once initiated, can only be dismissed by the prosecutor or the court.[329]

[328] See also Guide to Good Practice on Transfrontier Contact (*op. cit.* note 16).
[329] See regarding the special challenge of criminal proceedings above section 2.8.

12. RENDERING THE AGREEMENT LEGALLY BINDING AND ENFORCEABLE

- **The terms of the mediated agreement need to be drafted in such a manner as to allow for the agreement to obtain legal effect and become enforceable in the relevant jurisdictions.**
- **It is highly recommended that, before the agreement is finalised, a limited time for reflection is given to the parties to enable them to obtain specialist legal advice on the full legal consequences and on whether the content of their "provisional agreement" complies with the law applicable in the different legal systems concerned.**
- **The measures necessary to give legal effect to the agreement and render it enforceable in the relevant jurisdictions should be taken with due speed and before the agreement's implementation.**
- **Access to information on the relevant procedures in the jurisdictions concerned should be facilitated by Central Authorities or Central Contact Points for international family mediation.**
- **Co-operation among administrative / judicial authorities may be needed to help facilitate the enforceability of the agreement in all the States concerned.**
- **Courts are encouraged to make use of national, regional[330] and international judicial networks, such as the International Hague Network of Judges, and to seek the assistance of Central Authorities where appropriate.**[331]
- **States should, where necessary, examine the desirability of introducing regulatory or legislative provisions to facilitate procedures for rendering mediated agreements enforceable.**

269. With a view to its serving as a basis for a sustainable dispute resolution, the agreed solution reached in mediation should meet the requirements for obtaining legal effect in the States concerned and should be rendered legally binding and enforceable in these States before commencing with its practical implementation. The enforceability in both / all legal systems concerned is particularly crucial where the agreed solution involves the cross-border exercise of parental responsibility. The child concerned needs to be protected from a possible re-abduction in the future, or from any other harm caused through a parent's lack of compliance with the agreement. At the same time, once the parents have agreed, a return of the child should be implemented as speedily as possible to avoid any further confusion or alienation for the child.

270. To start with, the solution reached in mediation should be documented in writing and signed by both parties. Depending on the matters dealt with in the parties' agreement and depending on the law applicable, an agreement might constitute a legally binding contract between the parties from the moment of its conclusion. Many legal systems, however, restrict party autonomy in family law to a certain extent, particularly when it comes to parental responsibility.[332] Here, many States consider that the rights and welfare of the child concerned need to be safeguarded through the involvement of judicial or administrative authorities. Agreements concerning the exercise of parental responsibilities, which are nonetheless encouraged by most of these systems, might, for

[330] An example for a regional network is the European Judicial Network in Civil and Commercial Matters, see for further information: < http://ec.europa.eu/civiljustice/index_en.htm >.
[331] See the Guide to Good Practice on Enforcement (*op. cit.* note 23), Principle 8.2.
[332] See also the Feasibility Study on Cross-Border Mediation in Family Matters (*op. cit.* note 13), para. 5.4, p. 23.

example, need court approval verifying that they comply with "the best interests of the child" to obtain legal effect.[333]

271. Furthermore, there may be restrictions to party autonomy regarding other family law matters such as child support. Some legal systems, for example, limit the ability of the parents to contract out of child support obligations arising under the applicable law.

272. It should also be noted that a situation may arise where among the different matters dealt with in the mediated agreement some are at the free disposal of the parties and some are not, and that according to the applicable law, the agreement becomes immediately binding on the parties in relation to the former matters, while the latter part of the agreement depends on court approval.[334] This can be an unfortunate situation if the court approval is not obtained (or obtainable) for the remainder of the agreement, since the parties will usually agree on a whole "package" and the partially binding agreement might favour one of the parties.[335]

273. Since the legal situation in international family disputes is often complex, it is strongly recommended that, before the mediated agreement is finalised, there is a "time-out" for the parties to obtain specialist legal advice regarding the full legal consequences of what they are about to agree on and whether the content of their "provisional agreement" complies with the law applicable to these matters in the different legal systems concerned. It might be that a parent is not aware that he or she is agreeing to relinquish certain rights, or that the agreement or its practical implementation may lead to a (long-term) change in jurisdiction and the law applicable to certain matters. For example, where a left-behind parent agrees to the relocation of the child and taking parent, this will sooner or later bring about a change of the "habitual residence" of the child,[336] which is likely to result in a change of jurisdiction and applicable law regarding a number of child related issues.[337]

274. If all or part of the agreement's validity depends on court approval, the terms of the agreement should include that its entry into force will be conditional upon the court's approval being successfully obtained. In these cases it may be advisable to refer to the outcome of mediation as a "provisional agreement" and to reflect this in the title and wording of the document recording the agreed solution.

275. In some legal systems, mediators refer to the immediate outcome of mediation as a "memorandum of understanding" instead of "agreement" to avoid any suggestion that the agreement is binding at that stage.

276. It should be emphasised that not every agreement which is legally binding on the parties in one legal system is also automatically enforceable in that legal system. In those legal systems where agreements relating to parental responsibility require the approval of judicial or administrative authorities to become legally binding, the measure granting the approval (for example, the inclusion of the terms of the agreement in a court order) will often be at the same time the measure rendering the agreement

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[333] See for example **France**, see Arts 376 and 373-2-7 of the Civil Code or **Germany**, see § 156 paragraph 2 FamFG; see also the responses to Questionnaire II of the Working Party on Mediation in the context of the Malta Process, available at < www.hcch.net > under "Child Abduction Section" ("Cross-border family mediation") then "Working Party on Mediation in the context of the 'Malta Process'"; see also M. Lloyd, "The Status of mediated agreements and their implementation", in *Family mediation in Europe – proceedings*, 4th European Conference on Family Law, Palais de l'Europe, Strasbourg, 1-2 October 1998, Council of Europe Publishing, April 2000, pp. 87-96.

[334] See also above para. 38.

[335] Of course, problems will only arise where the favoured party would claim his / her rights out of the partial agreement and many legal systems would remedy such a situation but legal proceedings would be necessary.

[336] Provided the child's habitual residence has not already changed; for further details on the meaning of "habitual residence", see P. McEleavy, INCADAT-Case Law Analysis Commentary: Aims and Scope of the Convention – Habitual Residence, available at < www.incadat.com > under "Case Law Analysis".

[337] See Chapter 13 below.

enforceable in that jurisdiction. On the other hand, a parental agreement which is upon its conclusion legally binding in a legal system may require notarisation, or homologation by a court, in order to render it enforceable, unless the laws of that State regulate otherwise. For the formalities required to render mediated agreements enforceable by Contracting States to the 1980 Hague Child Abduction Convention see the Country Profiles under the 1980 Convention. [338]

277. For example, where the agreement has been embodied in a court order, enforceability of what is contained in the court order will usually[339] be guaranteed in that jurisdiction.[340]

278. As concerns rendering an agreement which has become enforceable (by embodiment in a court order or otherwise) in one legal system (State A), legally binding and enforceable in the relevant other legal system (State B), there are generally two paths which can be considered:

(1) The path of recognition and enforcement in State B:

A court order obtained in State A embodying the agreement may be recognised in State B, either because an international, regional or bi-lateral instrument provides for such recognition or because a foreign court order can otherwise be recognised in that legal system in accordance with State B's law. When it comes actually to enforcing the agreed solution, an additional declaration of enforceability or registration in State B may be necessary. Problems can arise in this scenario when the courts of State B consider that the courts of State A were lacking international jurisdiction to render a decision on the subject matter (see further on the jurisdictional challenges in international child abduction cases, Chapter 13).

It is furthermore conceivable that rules between State A and State B apply which allow for the recognition in State B of an agreement enforceable in State A without it being embodied in a court order.[341]

(2) The path of taking the agreement itself to State B and making the necessary arrangements to render the agreement binding and enforceable in State B:

The parties could turn to the authorities of State B with their agreement requesting that it be rendered legally binding and enforceable under domestic procedures in State B. This means that they would then proceed regardless of the legal status their agreement has (obtained) in State A. Problems may arise regarding this solution due to jurisdictional issues. For example, it could be that the authorities of State B consider that they lack (international) jurisdiction to turn the agreement into a court order or take other necessary steps to render the agreement binding,

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[338] See section 19.5 b) of the Country Profiles (*supra* note 116). In some States, more than one option exists. The following States indicated that a court approval is necessary to render the agreement enforceable: **Argentina**, **Australia**, **Belgium**, **Brazil**, **Burkina Faso**, **China (Hong Kong SAR)**, **Costa Rica**, **Czech Republic**, **Denmark**, **Estonia**, **Finland (by the Social Welfare Board)**, **France**, **Greece**, **Honduras**, **Hungary (by the Guardianship Authority)**, **Ireland**, **Israel**, **Latvia**, **Lithuania**, **Mauritius**, **Mexico**, **Norway**, **Paraguay**, **Poland**, **Romania**, **Slovenia**, **Spain**, **Sweden (by the Social Welfare Board)**, **Switzerland**, the **United Kingdom (Northern Ireland; England and Wales)**, the **United States of America** and **Venezuela;** notarisation is an option in: **Belgium**, **Burkina Faso**, **Denmark**, **Estonia**, **Hungary**, **Romania**, **Slovenia** and registration with the court is an option in: **Australia**, **Burkina Faso**, **Estonia**, **Greece**, **Honduras** a registration of the agreement with the (Country Profiles – as at January 2012).

[339] The details will depend on the relevant procedural law.

[340] Should the agreement be legally binding upon conclusion without court approval or other intervention of the authorities, the enforceability of the agreement might, depending on the legal system, require that the agreement be notarised or registered with the court or turned into a court order / declared enforceable.

[341] See for example, Article 46 of the European Brussels IIa Regulation, whereby "agreements between the parties that are enforceable in the [European Union] Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments [under the Regulation]". See also Article 30 of the 2007 Hague Child Support Convention providing that "[a] maintenance arrangement made in a Contracting State shall be entitled to recognition and enforcement as a decision […] provided that it is enforceable as a decision in the State of origin."

because they regard the authorities of State A to have the exclusive jurisdiction to deal with the subject matter(s) covered by the agreement.

279. The ideal situation is one where an international, regional[342] or bi-lateral instrument provides for simplified recognition and enforcement of court orders from one State to the other. The 1996 Hague Child Protection Convention is such an instrument. Under the Convention, a court order embodying an agreement concerning custody or contact in one Contracting State, constitutes a "measure of protection" and will as such be recognised by operation of law and enforceable in all Contracting States. This means "that it will not be necessary to resort to any proceeding in order to obtain […] recognition"[343] in other Contracting States. When it comes to the actual enforcement of the measure, however, a declaration of enforceability or registration becomes necessary (Art. 26(1)). But the Convention obliges Contracting States to apply "*a simple and rapid procedure*" in this regard (Art. 26(2), emphasis added). The declaration of enforceability or registration can only be refused when one of the restricted reasons for non-recognition listed in Article 23(2) applies. Reasons for refusal are, for example, that the "the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for" in the Convention and that "the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State".

Possible doubts regarding grounds for non-recognition can be dispelled at an early stage by using the procedure of "advance recognition" of Article 24 of the 1996 Convention. According to that Article "any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State." (See the Practical Handbook for further details on the 1996 Hague Child Protection Convention.[344])

280. It needs to be emphasised that in child abduction cases the jurisdictional situation is very complex.[345] Both the 1980 and the 1996 Convention are based on the idea that, in a child abduction situation, the authorities in the State to which the child was abducted (requested State) shall have the competency to decide on the return of the child but not on the merits of custody.[346] The court seised with the Hague return proceedings in the requested State will therefore have difficulties turning a mediated agreement into a court order if this agreement covers besides the question of return also matters of custody or other matters on which the court seised with the Hague proceedings lacks (international) jurisdiction (see for further details on the special jurisdictional situation in international child abduction cases Chapter 13).

A further complication to the jurisdictional situation can result from the inclusion of additional matters, such as spousal and child support issues in the agreement. As a result, the involvement of different authorities, possibly in different States might become necessary to render the full agreement legally binding and enforceable in the legal systems concerned. Specialist legal advice on which steps to take and in which of the States involved may be needed in such cases.

281. Access to information on where to seek specialist legal advice and on steps that are required to render an agreement enforceable in the States concerned could be facilitated

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[342] Similarly to the 1996 Hague Child Protection Convention, the European Brussels IIa Regulation contains rules on a simplified recognition and enforcement of decisions in matters of parental responsibilities. In addition, Article 46 of the Brussels IIa Regulation provides for the recognition and enforcement of agreements themselves, provided they are enforceable in the Member State in which it is concluded, see *supra* note 341.

[343] See P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention (*op. cit.* note 75), p. 585, para. 119.

[344] See *supra* note 217.

[345] See for further details Chapter 13.

[346] See Art. 16 of the 1980 Hague Child Abduction Convention; Art. 7 of the 1996 Hague Child Protection Convention.

by the Central Authority or another body serving as Central Contact Point for international family mediation in the relevant jurisdictions.[347]

282. Co-operation between the administrative / judicial authorities of the different States concerned may be necessary when it comes to ensuring the enforceability of the agreement in the different jurisdictions.

283. The courts should, to the extent feasible, support the sustainability of the agreed solution by assisting the parties in their efforts to render the agreement legally binding and enforceable in the different legal systems concerned. This may include the use of mirror orders or safe-harbour orders.[348] Furthermore, the courts should, where feasible and appropriate, make use of existing judicial networks[349] and seek the assistance of Central Authorities. A judicial network of particular relevance in this regard is the International Hague Network of Judges specialising in family matters, which was created[350] to facilitate communications and co-operation between judges at the international level and to assist in ensuring the effective operation of international instruments in the field of child protection, including the 1980 Hague Child Abduction Convention.[351] Through the use of direct judicial communications a judge seised with Hague return proceedings may be able to co-ordinate the support for a parental agreement including matters of custody with the judge competent for custody matters in the State of return.[352]

[347] See the Principles for the Establishment of Mediation Structures (*op. cit.* note 41), Part C (Rendering mediated agreements legally binding).

[348] The term "mirror order" refers to an order made by the courts in the requesting State that is identical or similar to (i.e. "mirrors") an order made in the requested State. A "safe-harbour order" is one made by a court in the requesting State often on the application of the left-behind parent with the aim to ensuring the terms of the return. For further details on the use of mirror orders and safe harbour orders in international child abduction cases see the Guide to Good Practice on Enforcement (ref *supra* note 23), Chapter 5 "Promoting voluntary compliance" and Chapter 8 " Cross-border co-operation to ensure safe return". See regarding examples also, E. Carl and M. Erb-Klünemann, "Integrating Mediation into Court Proceedings in Cross-Border Family Cases", in S. Kiesewetter and C.C. Paul (Eds) (op. cit. note 93), pp. 59 *et seq.*, at p. 72; see also K. Nehls, "Corss-border family mediation – An innovative approach to a contemporary issue", in S. Kiesewetter and C.C. Paul (Eds) (op. cit. note 93), pp. 18 *et seq*, at p. 27.

[349] See regarding the use of direct judicial communications to ensure legal recognition and enforceability of agreements in international child abduction cases the report of two German judges, E. Carl and M. Erb-Klünemann, "Integrating Mediation into Court Proceedings in Cross-Border Family Cases", in S. Kiesewetter and C.C. Paul (Eds) (op. cit. note 93), pp. 59 *et seq.*, at pp. 72, 73.

[350] The network was created following a proposal at the 1998 De Ruwenberg Seminar for Judges on the international protection of children; for more information see < www.hcch.net > under "Child Abduction Section" then "Other Judicial Seminars" ("Judicial Seminars on the International Protection of Children"). See for more information on the International Hague Network of Judges and the functioning of direct judicial communications *supra* note 123.

[351] See the Conclusions and Recommendations of the Joint EC-HCCH Judicial Conference, 15-16 January 2009, available at < www.hcch.net > under "Child Abduction Section" then "Judicial Communications"; adopted by consensus by more than 140 judges from more than 55 jurisdictions.

[352] See, for example, the report from an Australian expert at the Sixth Meeting of the Special Commission, "Conclusions and Recommendations and Report of Part I of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011)", Prel. Doc. No 14 of November 2011, drawn up for the attention of the Special Commission of June 2011, at para. 252, available at < www.hcch.net > under "Child Abduction Section" then "Preliminary Documents / Information Documents" ("Special Commission meetings on the practical operation of the Convention"); see also: E. Carl and M. Erb-Klünemann, "Integrating Mediation into Court Proceedings in Cross-Border Family Cases", in S. Kiesewetter and C.C. Paul (Eds) (op. cit. note 93), pp. 59 *et seq.*, at p. 72.

284. States should facilitate simple procedures through which mediated agreements can, on the request of the parties, be approved and / or rendered enforceable by the competent authority.[353] Where no such procedures exist, States should examine the desirability of introducing regulatory or legislative provisions facilitating such procedures.[354]

[353] See regarding the development in the European Union Art. 6 of the European Directive on mediation (ref. *supra*, note 5), according to which the European Union Member States are requested to "ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable." Exceptions mentioned by Art. 6 are cases in which "either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability." Art. 6 highlights that "[n]othing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with [this Article]". See regarding the measures taken in the European Union Member States to comply with the Directive the European Judicial Atlas at < http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm > (last consulted on 14 March 2012) under "Mediation (Directive 2008/52/EC)".

[354] See also Council of Europe Recommendation No R (98) 1 on family mediation (ref. *supra*, note 49), IV (The status of mediated agreements):

> "States should facilitate the approval of mediated agreements by a judicial authority or other competent authority where parties request it, and provide mechanisms for enforcement of such approved agreements, according to national law."

13. ISSUES OF JURISDICTION AND APPLICABLE LAW RULES

- **Issues of jurisdiction and applicable law need to be taken into consideration when drawing up the mediated agreement.**
- **The judicial and administrative authorities of the requested State and the requesting State should co-operate with each other as far as possible to overcome possible difficulties in rendering an agreement that amicably settles an international child abduction dispute legally binding and enforceable in both States. The use of direct judicial communications may be particularly helpful in this regard.**

285. As has been highlighted in Chapter 12, the consideration of jurisdiction and applicable law matters is crucial in international family disputes when it comes to securing the enforceability of mediated agreements in the different States concerned. It may well be that the scope of mediation has to be adapted following this consideration due to the complications which the inclusion of certain additional matters, such as maintenance, would bring.[355]

Regarding jurisdiction in cross-border family disputes the question of international jurisdiction (i.e. which State has jurisdiction) needs to be distinguished from the question of internal jurisdiction (i.e. which court or authority has jurisdiction on a certain matter within one State). Multilateral treaties containing rules on jurisdiction regularly address only international jurisdiction while leaving the regulation of internal jurisdiction to the individual States.

286. With regard to international jurisdiction in international child abduction cases, particular attention needs to be paid to the implications that may result from the combination of the two matters regularly dealt with in mediated agreements in international child abduction cases, which are (1) the question of return or non-return of the child and (2) the regulation of custody and contact rights to be implemented following the return or non-return. It is the wrongful removal or retention itself which creates a special jurisdictional situation in international child abduction cases falling within the scope of the 1980 and / or 1996 Conventions. According to a widely applied principle of international jurisdiction it is the court at the child's habitual residence which has jurisdiction to take long-term decisions concerning custody of and contact with a child, as well as decisions on cross-border family relocation. This principle is supported by the 1996 Hague Child Protection Convention,[356] which works hand in hand with the 1980 Convention, as well as by relevant regional instruments.[357] The principle is based on the consideration that the court of the child's habitual residence is generally the most appropriate forum to decide on the issue of custody since it is the court with the closest connection to the child's regular environment, *i.e.*, the court which can easily assess the child's living conditions and is most suited to make a decision in the best interests of the child. In an abduction situation, the 1980 Hague Child Abduction Convention protects the interests of the child by preventing a parent from establishing "artificial jurisdictional links on an international level, with a view to obtaining [(sole)] custody of a child".[358] In this spirit, Article 16 of the 1980 Convention ensures that "after receiving notice of a wrongful removal or retention of a child", the courts in the requested State cannot "decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following the receipt of the notice".

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[355] Nothing prevents the parties from returning to mediation once the child abduction case is settled to deal with these additional matters.

[356] Habitual residence is the main connecting factor used in all the modern Hague family Conventions, as it is in many regional instruments related to child protection such as the Brussels IIa Regulation.

[357] For example, the Brussels IIa Regulation.

[358] See E. Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention (*op. cit.* note 88), p. 428.

In the same spirit, reinforcing the 1980 Convention, Article 7 of the 1996 Hague Child Protection Convention provides that, in the case of the wrongful removal or retention of a child, the authorities of the State in which the child had his / her habitual residence before the removal or retention keep their jurisdiction until a number of conditions are met.[359]

287. As concerns the combined parental agreement referred to above, the court seised with the Hague return proceedings will only have jurisdiction to deal with part (1) of this agreement, i.e. the return or non-return, and will lack international jurisdiction to approve part (2) of the agreement on rights of custody and long-term contact. Should the court nonetheless include the full agreement of the parents in its court order with which it terminates the Hague proceedings, the court order may not be binding on the courts in the requesting State (i.e. the State from which the child was abducted) as far as long term custody matters are concerned due to the lack of international jurisdiction on custody matters.

An example illustrates the difficulties these jurisdictional issues may cause in practice:

> Following severe relationship problems, a young married couple, parents of an eight year old child, decide to divorce. The spouses, originally from State B, have been habitually resident in State A since their child's birth. While the divorce proceedings are ongoing in State A, the mother (M) wrongfully removes the child to State B (requested State), fearing she might lose the shared custody of the child. On the request of the father (F), return proceedings under the 1980 Convention are initiated in State B. Meanwhile F is granted the interim sole custody of the child by the court in State A (requesting State). While F is present in State B for the purpose of attending the court hearings, an attempt at mediation is successful. In the course of the mediation sessions the parents develop an elaborate agreement, according to which they agree to shared custody and an alternate residence of the child. They furthermore agree that they will travel back to State A and that M will cover the travel expenses.
>
> M and F want to render their agreement legally binding before its implementation. Particularly, since the father has been granted interim sole custody of the child in State A as a consequence of the wrongful removal, the mother wants to have some assurance that the courts in State A will respect the parental agreement.
>
> They learn that the court seised with the Hague proceedings in State B can only include the part of the agreement dealing with the return and the modalities of the return into a court order but that the terms relating to the merits of custody cannot be included, or at least not in a way that they would be binding on the authorities in State A. In particular M is not satisfied with a partial approval of the agreement. M and F therefore consider turning to the authorities in State A having international jurisdiction on the custody matters. However, they hear that the competent court in State A, although likely to approve a parental agreement, will generally insist on the presence of both parties and on hearing the child, as part of the statutory duty for a best interests of the child test in custody matters. But M is not willing to return to State A with the child until she is reassured that the agreement will be respected by the authorities of State A.

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[359] According to Art. 7(1) of the 1996 Convention "the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and
a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment."

The practical difficulties that may result from the special jurisdictional situation in international child abduction cases have been discussed in some detail at Part I of the Sixth Meeting of the Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention in June 2011.[360] A further elaboration on the issue can also be found in Preliminary Document No 13[361] of November 2011 drawn up in preparation for Part II of the Sixth Special Commission Meeting in January 2012, where the matter was revisited in the greater context of discussing a possible need for a simplification of recognition and enforcement of agreements in family law.[362]

In the current legal situation, the sustainability of an agreed solution reached in an international child abduction case will to a large extent depend on the co-operation among the judicial authorities in the requested State and those in the requesting State in assisting the parties in their efforts to render the agreement legally binding and enforceable in both States. As mentioned in Chapter 12, there are a number of measures that both the court seised with the return proceeding and the courts in the requesting State can take to support the agreement (see further regarding mirror orders and safe-harbour orders etc. above). The use of direct judicial communications can be of particular assistance in these cases.[363]

To overcome the described jurisdictional problems also the transfer of jurisdiction under Articles 8 and 9 of the 1996 Hague Child Protection Convention can be considered if the two States concerned are Contracting States to the 1996 Convention. (See for further details on the transfer of jurisdiction the Practical Handbook on the 1996 Hague Child Protection Convention.)

288. In view of the described complexity of rendering agreements in international child abduction cases legally binding, it is highly recommendable that the parents obtain specialist legal advice regarding their case. Central Authorities should support the parties and the courts as much as possible with information and support their efforts to overcome jurisdictional obstacles to rendering the mediated agreement legally binding and enforceable in both the requested and requesting State.

289. In addition to jurisdictional matters, questions of applicable law can play an important role in mediation in international family law. The agreement reached in mediation needs to be compatible with the applicable law in order to serve as a viable basis for the dispute resolution. The parties to an international family dispute have to be made aware that the law applicable to certain subject matters dealt with in the mediation is not necessarily the law of the State in which the mediation is taking place. They need to know that there is even a possibility that different States' laws will apply to the different subject matters discussed in mediation.

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[360] See "Conclusions and Recommendations and Report of Part I of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (1-10 June 2011)", Prel. Doc. No 14 of November 2011 (ref. supra 352) at paras 247 *et seq*., available at < www.hcch.net > under "Child Abduction Section" then "Preliminary Documents / Information Documents" ("Special Commission meetings on the practical operation of the Convention").

[361] See in particular paras 29 *et seq*. "Guide to Part II of the Sixth Meeting of the Special Commission and Consideration of the desirability and feasibility of further work in connection with the 1980 and 1996 Conventions", Prel. Doc. No 13 of November 2011 for the attention of the Special Commission of January 2012.

[362] The Special Commission recommended "that the Council on General Affairs and Policy consider authorising the establishment of an Expert Group to carry out further exploratory research, which would include identification of the nature and extent of the legal and practical problems in this area, including, specifically, jurisdictional issues and would evaluate the benefit of a new instrument in this area, whether binding or not", see No 77, Conclusions and Recommendations of Part II of the Sixth Meeting of the Special Commission to review the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (25-31 January 2012).

[363] See *supra* note 352; see for further information on direct judicial communications *supra* note 123.

In an international abduction case, for example, where the mediation is taking place in the requested State (i.e. the State to which the child has been taken) alongside the Hague return proceedings, the substantive law applicable to the merits of custody will regularly not be the law of that State but quite likely the law of the requesting State (i.e. the State of habitual residence of the child immediately before the abduction). Of course, a generalisation in this regard is difficult, since the applicable law situation in the particular case depends on international or regional treaties in force in the relevant States and, in the absence of such treaties, the relevant national conflict of laws rules. If the 1996 Hague Child Protection Convention is applicable in the case, the court having jurisdiction on the merits of custody in the immediate child abduction situation (which is as discussed above a court in the requesting State) will in accordance with the 1996 Convention as a general principle apply its own law (see Art. 15 of the 1996 Convention). In this situation the provisions of the mediated agreement, in so far as they concern matters of custody and long-term contact, will therefore have to be compatible with the substantive law of the State of the child's habitual residence (see for further details on the 1996 Convention the Practical Handbook).

290. As regards other matters dealt with in the mediated agreement, for example child support or spousal maintenance provisions, the rules concerning jurisdiction and applicable law may vary. Depending on the circumstances of the case and the private international law rules applicable to the case, it may be another court than that competent for custody matters which has jurisdiction for maintenance matters and it may be another substantive law than that applicable to the custody matters which governs questions of maintenance. This is an added complication, again pointing to the need for the parties to have specialist legal advice regarding their individual case.

14. THE USE OF MEDIATION TO PREVENT CHILD ABDUCTIONS

- **Promoting voluntary agreements and facilitating mediation in relation to issues of custody or contact / access may help to prevent subsequent abductions.**[364]
- **The advantages of providing specialist mediation for couples in cross-cultural relationships may be considered.**[365]

291. Recognising that the breakdown of a relationship between persons from different States lies at the heart of many international child abduction cases, "securing a voluntary agreement at a stage when parents are separating or discussing issues of custody or contact / access is a useful preventive measure".[366]

292. For example, if one parent wishes to relocate to another State following separation from the partner, introducing mediation at an early stage may be particularly helpful. Specialist mediation can enable the parents to better understand each other's point of view and find an agreed solution taking account of their child's needs. The outcomes may be as varied as the circumstances of each individual case, including the relocation of both parents to the new State, both parents remaining in the same State or the relocation of one parent with the contact rights of the other parent being sufficiently secured.

293. At the same time, the use of mediation in securing that contact arrangements, both within the boundaries of one State or cross-border, are respected can assist in preventing situations that may lead to international child abduction. For further details regarding situations where there may be a heightened risk of child abduction, see the Guide to Good Practice on Preventive Measures (*op. cit.* note 23), at paragraph 2.1.

294. Facilitating the provision of information on mediation and the measures that are necessary to render a mediated agreement enforceable in the two jurisdictions in question through Central Authorities or Central Contact Points on international family mediation will help to promote mediation as a measure for the prevention of child abduction.

295. Mediation of course remains just one of many possibilities. Access to judicial proceedings for relocation should not be made conditional upon attendance of the parties in mediation sessions.[367]

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[364] See Principles taken from the Guide to Good Practice on Preventive Measures (*op. cit.* note 23), para. 2.1, p. 15.
[365] See Principles taken from the Guide to Good Practice on Preventive Measures (*op. cit.* note 23), para. 2.1, p. 15.
[366] See the Guide to Good Practice on Preventive Measures (*op. cit.* note 23), para. 2.1, p. 15.
[367] See the Washington Declaration on International Family Relocation (ref. *supra*, note 155).

15. OTHER PROCESSES TO BRING ABOUT AGREED SOLUTIONS

- **Aside from mediation, the use of other processes to bring about agreed solutions should be encouraged in international family disputes concerning children.**
- **Processes to bring about agreed solutions available for national cases should only be considered for use in international family disputes if adaptation to the special needs of international disputes is possible.**
- **States should provide information on the processes to bring about agreed solutions which are available in their jurisdiction for international child abduction cases.**

296. This Guide seeks to encourage the use of processes to bring about agreed solutions to settle amicably international family disputes involving children.

297. Aside from mediation, many other processes to bring about agreed solutions have been developed and are successfully applied to family disputes in different countries. These include "conciliation", "parenting co-ordination", "early neutral evaluation", and models of conflict resolution advocacy such as the "collaborative law" or "co-operative law" approaches.

298. "**Conciliation**", often conducted in the course of judicial proceedings by the sitting judge, is one of the most directive dispute resolution processes in this list. As pointed out above in the Glossary, conciliation is sometimes confused with mediation. In mediation, the neutral third party cannot be a person who is in a position to make a decision for the parties; the mediator only facilitates the parties' communication, assisting them with finding a self-accountable resolution of their dispute. In contrast, in conciliation, the neutral third party regularly has a much greater influence on the parties' solution of the conflict.[368] Conciliation is used on a regular basis in many countries in judicial proceedings concerning family disputes, especially in divorce proceedings and proceedings concerning parental responsibility.[369] Conciliation by the judge seised can easily be applied in Hague return proceedings, where considered appropriate and feasible, to bring about a court settlement, without risking delay.

299. In the United States of America, some jurisdictions offer programmes of "**parenting co-ordination**" for high-conflict custody and access cases where parents have, on a recurring basis, already demonstrated their inability or unwillingness to comply with court orders or parental agreements.[370]

> "Parenting co-ordination is a child-focused alternative dispute resolution process in which a mental health or legal professional with mediation training and experience assists high conflict parents to implement their parenting plan by facilitating the resolution of their disputes in a timely manner, educating parents about children's needs, and with prior approval of the parties and / or the court, making decisions within the scope of the court order or appointment contract."[371]

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[368] For more details on the distinction between mediation and conciliation, see Glossary above, "Mediation".

[369] For example, in **Morocco**, before a court decides on a divorce "re"-conciliation of the spouses needs to be attempted, see Arts 81 *et seq*. of the Moroccan Family Code (*Code de la Famille – Bulletin Officiel* No 5358 du 2 ramadan 1426, 6 *octobre* 2005, p. 667), available at < www.justice.gov.ma >. Similarly, in **Italy**, the attempt of reconciliation between spouses is compulsory in separation and divorce proceedings, see Art. 708 of the Code of Civil Procedure and Arts 1 and 4.7 of the Italian Divorce Act (*Legge* 1 December 1970, No 898, *Disciplina dei casi di scioglimento del matrimonio*, in *Gazzetta Ufficiale* n. 306, 03 December 1970).

[370] See N. ver Steegh (*op. cit.* note 8), pp. 663, 664.

[371] See "Guidelines for Parenting Coordination" developed by the Association of Family and Conciliation Courts (AFCC) Task Force on Parenting Coordination, May 2005, available at < http://www.afccnet.org/Portals/0/PublicDocuments/Guidelines/AFCCGuidelinesforParentingcoordinationnew.pdf > (last consulted 14 March 2012).

300. The parenting co-ordinator is appointed by the court competent for the custody proceedings. "Parenting co-ordination" was established following a recommendation of an interdisciplinary conference on high-conflict custody disputes funded by the American Bar Association in 2000.

301. A further means encouraging the agreed solutions of family disputes is "**early neutral evaluation**",[372] by which the parties receive a non-binding expert evaluation of their legal situation, subsequent to which they are given the opportunity to negotiate an agreed solution.[373] This process has become available in some jurisdictions of the United States of America, where the "early neutral evaluation" sessions last two to three hours, are conducted by one or more experts and are confidential.[374]

302. The promotion of processes to bring about agreed solutions in different legal systems is also reflected in the changing approach of lawyers to family law advocacy. Today, lawyers tend to focus more on finding agreements as the best possible outcomes for their clients.

303. The first of two interesting processes that should be mentioned in this regard is the "**collaborative law**" model. According to this model, the parties are assisted by "collaborative lawyers" who use interest based problem solving negotiation techniques to resolve the dispute without going to court.[375] Where no agreement is found and the matter has to be solved in judicial proceedings, the collaborative lawyers are disqualified from continuing representation; the parties thus need new representation in such case. In some jurisdictions, such as in some states of the United States of America, the collaborative law model has successfully been used in the past. Some of these legal systems have meanwhile introduced legislation, or an "ethical opinion" on "collaborative law".[376]

304. The second model of amicable conflict resolution advocacy is that of "**co-operative law**". The "co-operative law" model follows the principles of the "collaborative law" model, except for the representatives' disqualification when the matter has to be brought before a court.[377]

305. The use of processes that are available to bring about agreed solutions of national family disputes should be considered in international family disputes. But these processes must be adapted to the special challenges of international family disputes, and in particular to the specific challenges of international child abduction cases, as set out above in relation to mediation. For example, the use of the collaborative law model in international child abduction cases might not be advisable, where the parties risk needing a second pair of representatives if rendering their agreement reached in this process binding includes going to court and their representatives would be obliged to resign at that stage.

306. The good practices set forth in this Guide in relation to mediation should be adapted to these other processes.

307. States are encouraged to make available within their jurisdictions information on processes to bring about agreed solutions which can be applied in international child abduction cases. This information could be provided through the Central Authorities and the Central Contact Points for international family mediation.

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[372] N. ver Steegh (*op. cit.* note 8), p. 663.
[373] *Ibid*. (*op. cit.* note 8), p. 663.
[374] *Ibid*. (*op. cit.* note 8), p. 663.
[375] *Ibid*. (*op. cit.* note 8), p. 667.
[376] *Ibid*. (*op. cit.* note 8), pp. 667, 668.
[377] *Ibid*. (*op. cit.* note 8), p. 668.

16. THE USE OF MEDIATION AND SIMILAR PROCESSES TO BRING ABOUT AN AGREED RESOLUTION IN NON-HAGUE CONVENTION CASES

- **The use of mediation and similar processes to bring about agreed solutions should also be encouraged in international family disputes concerning children, and especially cases of child abduction to which the 1980 Hague Child Abduction Convention or other equivalent instruments do not apply.**
- **States should promote the establishment of mediation structures for such cases, as set out in the "Principles for the Establishment of Mediation Structures in the context of the Malta Process".**[378] **In particular, States should consider the designation of Central Contact Points for international family mediation to facilitate the dissemination of information on available mediation and other related services, on the promotion of good practices regarding specialised training for international family mediation, and on the process of international mediation. At the same time, assistance with rendering mediated agreements binding in the legal systems concerned should be provided.**
- **Where needed, countries should "examine the desirability of introducing regulatory or legislative provisions for the enforcement of mediated agreements".**[379]

308. Where international family disputes concerning children involve two States between which the 1980 Hague Child Abduction Convention, the 1996 Hague Child Protection Convention or another relevant regional legal framework is not in force, mediation or other processes to bring about agreed solutions may be the only resource and the only way to help the children concerned "to maintain on a regular basis […] personal relations and direct contacts with both parents", a right promoted by the UNCRC.[380]

309. Of course, the non-applicability of relevant regional or international instruments does not prejudice the parent's legal remedies under national law. However, in cases where an international child abduction occurred or another cross-border dispute concerning child custody and contact is ongoing, the lack of an applicable regional or international legal framework regularly leads to conflicting decisions in the different jurisdictions concerned, which is often a dead-end for a legal solution to the conflict.

310. As set out above,[381] the Working Party on Mediation in the context of the Malta Process developed "Principles for the Establishment of Mediation Structures in the context of the Malta Process". States should promote the establishment of mediation structures as set forth in these Principles. In particular, States should consider the designation of Central Contact Points for international family mediation to facilitate the dissemination of information on available mediation services and other relevant information. Furthermore, States should promote good practices regarding the training of mediators for international family mediation and regarding the process of international mediation.

311. The good practices set forth in this Guide regarding mediation in international child abduction cases under the 1980 Hague Child Abduction Convention are equally applicable to such cases. As in international child abduction cases within the scope of the 1980

[378] *Op. cit.* note 41.
[379] See the Principles for the Establishment of Mediation Structures, *ibid.* (*op. cit.* note 41).
[380] See its Art. 10(2).
[381] See paras 14, 101 *et seq.*

Convention, mediation needs to be conducted with the greatest care and the mediated agreement needs to be drafted with a view to its being compatible with and rendered enforceable in the jurisdictions in question. Time is also of the essence where no regional or international legal framework is applicable in international abduction cases; contact between the child and the left-behind parent should be restored as quickly as possible to avoid alienation.

312. On balance, mediation in international child abduction cases in the absence of an applicable regional or international legal framework is conducted under very special circumstances. There is no fall-back to a solution through judicial proceedings if mediation fails, or when the mediated agreement is rendered enforceable in the relevant jurisdictions but something goes wrong with its practical implementation. It is crucial, therefore, that any agreed solution arrived at in these cases be made legally binding and rendered enforceable in the different legal systems concerned before commencing its practical implementation. In this manner, mediation can overcome the conflicting situation of the different legal systems concerned; the mediated agreement itself then serves as a basis for establishing a uniform legal opinion on the case in the different legal systems concerned.

313. All possible assistance with rendering their mediated agreement binding and enforceable in the relevant legal systems should be given to the parties to a cross-border family conflict. The provision of information on what steps are needed to give legal effect to an agreement should be facilitated by Central Contact Points for international family mediation. Where needed, States should "examine the desirability of introducing regulatory or legislative provisions for the enforcement of mediated agreements".[382]

314. Mediators in international family disputes on child custody and contact to which no international / regional legal framework applies should be aware of the extent of their responsibility. They need to draw the parties' attention to the legal implications of non-applicability of relevant regional or international legal instruments, and to the need to obtain specialist legal advice as well as rendering the agreement enforceable in the relevant legal systems before commencing with its practical implementation. The parties need to be made aware of the special implications of the lack of supranational rules on recognition and enforcement regarding custody and contact decisions for the future. They have to understand that, even if their agreement has been rendered enforceable in both jurisdictions concerned following the mediation, changes in circumstances may affect the agreement's enforceability in the future. Any adaptation of the agreement's content will have to be acknowledged by both legal systems, a process which will require the parties' co-operation.

[382] See the Principles for the Establishment of Mediation Structures (*op. cit.* note 41).

A N N E X E S

GROUPE DE TRAVAIL SUR LA MÉDIATION DANS LE CADRE DU PROCESSUS DE MALTE
WORKING PARTY ON MEDIATION IN THE CONTEXT OF THE MALTA PROCESS

novembre / November 2010

HccH
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ

PRINCIPES POUR LA MISE EN ŒUVRE DE STRUCTURES DE MÉDIATION DANS LE CADRE DU PROCESSUS DE MALTE

établis par le Groupe de travail avec l'assistance du Bureau Permanent

* * *

PRINCIPLES FOR THE ESTABLISHMENT OF MEDIATION STRUCTURES IN THE CONTEXT OF THE MALTA PROCESS

drawn up by the Working Party with the assistance of the Permanent Bureau

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PRINCIPLES FOR THE ESTABLISHMENT OF MEDIATION STRUCTURES IN THE CONTEXT OF THE MALTA PROCESS

A. CENTRAL CONTACT POINT

States should establish / designate a Central Contact Point for international family mediation which should undertake, either directly or through an intermediary, the following tasks,

- Serve as contact point for individuals and at the same time as network point for mediators working in cross-border family disputes.

- Provide information about family mediation services available in that country, such as:

  - List of family mediators, including contact details and information about their training, language skills and experiences;
  - List of organisations providing mediation services in international family disputes;
  - Information on costs of mediation;
  - Information on the mediation models used / available; and
  - Information on how mediation is conducted and what topics may be covered in mediation.

- Provide information to assist with locating the other parent / the child within the country concerned.

- Provide information on where to obtain advice on family law and legal procedures.

- Provide information on how to give the mediated agreement binding effect.

- Provide information on the enforcement of the mediated agreement.

- Provide information about any support available to ensure the long-term viability of the mediated agreement

- Promote cooperation between various experts by promoting networking, training programmes and the exchange of best practices.

- Subject to the principle of confidentiality, gather and make publicly available on a periodic basis information on the number and nature of cases dealt with by central contact points, actions taken and outcomes including results of mediation where known.

The information should be provided in the official language of that State as well as in either English or French.

The Permanent Bureau of the Hague Conference should be informed of the relevant contact details of the Central Contact Point, including postal address, telephone-number, e-mail address and names of responsible person(s) as well as information on what languages they speak.

Requests for information or assistance addressed to the Central Contact Point should be processed expeditiously.

Where feasible, the Central Contact Point should display relevant information on mediation services on a website in the official language and in either English or French. Where a Contact Point cannot provide this service, the Permanent Bureau could make the information received by the Central Contact Point available online.

B. MEDIATION

1. Characteristics of Mediators / Mediation Organisations identified by Central Contact Points

The following are among the characteristics the Central Contact Point should take into account when identifying and listing international family mediators or mediation organisations:

- A professional approach to and suitable training in family mediation (including international family mediation).
- Significant experience in cross-cultural international family disputes.
- Knowledge and understanding of relevant international and regional legal instruments.
- Access to a relevant network of contacts (both domestic and international).
- Knowledge of various legal systems and how mediated agreements can be made enforceable or binding in the relevant jurisdictions.
- Access to administrative and professional support.
- A structured and professional approach to administration, record keeping, and evaluation of services.
- Access to the relevant resources (material / communications, etc) in the context of international family mediation.
- The mediation service is legally recognized by the State in which it operates, *i.e.* if there is such a system.
- Language competency.

It is recognized that, in States where the development of international mediation services is at an early stage, many of the characteristics listed above are aspirational and can not, at this point, be realistically insisted upon.

2. Mediation Process

It is recognised that a great variety of procedures and methodology are used in different countries in family mediation. However, there are general principles, which, subject to the laws applicable to the mediation process, should inform mediation:

- Screening for suitability of mediation in the particular case
- Informed consent

- Voluntary participation
- Helping the parents to reach agreement that takes into consideration the interests and welfare of the child
- Neutrality
- Fairness
- Use of mother tongue or language(s) with which the participants are comfortable
- Confidentiality
- Impartiality
- Intercultural competence
- Informed decision making and appropriate access to legal advice

3. Mediated Agreement

When assisting the drafting of the agreements the mediators in cross-border family disputes, should always have the actual exercise of the agreement in mind. The agreement needs to be compatible with the relevant legal systems. Agreements concerning custody and contact should be as concrete as possible and take into consideration the relevant practicalities. Where the agreement is connected to two jurisdictions with different languages, the agreement should be drafted in the two languages, if that simplifies the process of rendering it legally binding.

C. RENDERING MEDIATED AGREEMENT BINDING

Mediators dealing with international family disputes over custody and contact should work closely together with the legal representatives of the parties.

Before starting the implementation of the agreement, the agreement should be made enforceable or binding in the relevant jurisdictions.

The Central Contact Points in the jurisdictions concerned should assist the parties with information on the relevant procedures.

Where needed, countries may examine the desirability of introducing regulatory or legislative provisions for the enforcement of mediated agreements.

GROUPE DE TRAVAIL SUR LA MÉDIATION DANS LE CADRE DU PROCESSUS DE MALTE
WORKING PARTY ON MEDIATION IN THE CONTEXT OF THE MALTA PROCESS

novembre / November 2010

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MÉMOIRE EXPLICATIF RELATIF AUX PRINCIPES POUR LA MISE EN ŒUVRE DE STRUCTURES DE MÉDIATION DANS LE CADRE DU PROCESSUS DE MALTE

établi par le Groupe de travail avec l'assistance du Bureau Permanent

* * *

EXPLANATORY MEMORANDUM ON THE PRINCIPLES FOR THE ESTABLISHMENT OF MEDIATION STRUCTURES IN THE CONTEXT OF THE MALTA PROCESS

drawn up by the Working Party with the assistance of the Permanent Bureau

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EXPLANATORY MEMORANDUM ON THE PRINCIPLES FOR THE ESTABLISHMENT OF MEDIATION STRUCTURES IN THE CONTEXT OF THE MALTA PROCESS

BACKGROUND

At its meeting held on 31 March – 2 April 2009, the Council on General Affairs and Policy of the Hague Conference on Private International Law authorised, in the context of the Malta Process, the establishment of a Working Party to promote the development of mediation structures to help resolve cross-border family disputes concerning custody of, or contact with, children, including cases of unilateral removal of a child to another State, where the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* do not apply.

The recommendation to establish such a Working Party derived from the Third Judicial Conference on Cross-Frontier Family Law Issues held in St. Julian's, Malta, 23–26 March 2009.

In June 2009, a small number of Contracting States to the 1980 Hague Child Abduction Convention and non-Contracting States, selected on the basis of demographic factors and differing legal traditions, were invited to designate an expert. These States were Australia, Canada, Egypt, France, Germany, India, Jordan, Malaysia, Morocco, Pakistan, the United Kingdom and the United States of America. In addition, a small number of independent mediation experts was invited to join the Working Party.

The Working Party held two telephone meetings, one on 30 July 2009 and one on 29 October 2009, as well as one in-person meeting on 11-12 May 2010 in Ottawa, Canada. The meetings were co-chaired by Ms Lillian Thomsen from Canada and Justice Tassaduq Hussain Jillani from Pakistan. At all these meetings simultaneous interpretation between English, French and Arabic was available. Two questionnaires on existing mediation structures and on enforceability of mediated agreements were circulated in preparation of the Working Party telephone meetings, responses to which are available on the Hague Conference website at < www.hcch.net > under "Work in progress" then "Child Abduction".

In the first telephone meeting, the Working Party concluded that the establishment of Central Contact Points in each country facilitating information on available mediation services in the respective jurisdictions would be important. Following the second telephone meeting, the Working Party commenced work on "Draft Principles" for the establishment of mediation structures which were concluded after an in depth discussion at the in-person meeting in Canada on 11-12 May 2010 and subsequent consultations with the experts who could not attend the meeting in Canada.

The Principles for the establishment of mediation structures in the context of the Malta Process

The "Principles" were drawn up to establish effective mediation structures for cross-border family disputes over children involving States that are not a party to the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention or other relevant instruments. In the absence of an applicable international or regional legal framework, mediation or similar means of consensual dispute resolution are often the only way of finding a solution enabling the children concerned to maintain continuing contact with both their parents.

It has to be noted that the establishment of structures for cross-border family mediation will be equally relevant for cross border family disputes falling within the scope of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention. Both Conventions promote the amicable resolution of the family conflict through mediation or similar means. The Principles may therefore also be useful in supplementing the international legal framework established by the Conventions.

The "Principles"

The "Principles" call for the establishment of a Central Contact Point, which facilitates the provision of information, *inter alia*, on available mediation services in the respective jurisdictions, on access to mediation and on other important related issues, such as relevant legal information.

Part A

Part A of the "Principles" states which information should be provided and how the information should be made accessible through the Central Contact Points.

The information on mediation services in international family law should include, first of all, lists of mediators or mediation organisations providing such services. The lists should contain information on the mediator's training, language skills and experience, as well as the contact details. The Central Contact Point should furthermore facilitate information on costs of mediation, which should include mediation fees as well as other connected costs. In addition the Central Contact Point should make information available on the mediation process itself, *i.e.,* the mediation models used / available, how mediation is conducted and what topics may be covered in mediation. The information should be as detailed as possible; information on the availability of co-mediation, as well as that of specific forms of co-mediation, such as the bi-national mediation, should be included.

The Central Contact Point should further provide information to assist with locating the other parent / the child within the country concerned. Likewise information should be provided on where to obtain advice on family law and legal procedures, on how to render a mediated agreement binding and how to enforce it. In view of the often limited means of the parties to a family dispute, details on costs should be included; attention should be drawn to pro-bono services or services offering low cost specialist legal advice, where available. The Central Contact Point should also provide information about any support available to ensure the long-term viability of the mediated agreement.

The Central Contact Point should improve and consolidate cross-border co-operation regarding the amicable settlement of international family disputes by promoting co-operation between various experts through networking, training programmes and the exchange of best practices. Finally subject to the principle of confidentiality, the Central Contact Point should gather and make publicly available detailed statistics on the cases dealt with.

Part B

In Part B, the "Principles" refer to (1) certain standards regarding the identification of international mediation services by the Central Contact Points, (2) the mediation process and (3) the mediated agreement.

Under Point B (1) the "Principles" set out a number of characteristics of mediators or mediation organisations, which Central Contact Points should consider, when identifying and listing international mediation services. At the same time, the "Principles" recognise that many States are still in an early stage of the development of international mediation services in family matters and that some of the characteristics listed are aspirational. It is, however, hoped that the States implementing the "Principles" will encourage the incremental development of mediation services complying with these characteristics.

Point B (2) lists a number of broad general principles, which, subject to the laws applicable to the mediation process, should be adhered to in international family mediation. Recognising that these principles may have a slightly different interpretation in different legal systems and with a view to allowing for the development of good practices, the document refrains from attaching fixed definitions to these general principles. It should be noted that the Guide to Good Practice under the 1980 Hague Child Abduction Convention, which is currently being prepared, will deal in much greater detail with good practice regarding these general principles.

Point B (3) highlights certain important aspects to be taken into consideration, when it comes to the mediated agreement, in order to allow for it to be rendered binding in the legal systems concerned. For details on good practice regarding the drafting of mediated agreement reference is again made to the forthcoming the Guide to Good Practice on Mediation under the 1980 Hague Child Abduction Convention.

Part C

Part C recognises the importance of rendering a mediated agreement binding or enforceable in all the legal systems concerned before its implementation. It also highlights the need for close co-operation with the legal representatives of the parties. At the same time, the Central Contact Point is requested to support the parties with information on the relevant procedures.

Final Note

The Working Party wished to have included in this Explanatory Memorandum a statement of its view that Non-Party States should give careful consideration to the advantages of ratification of, or accession to, the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* and the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.