

Mediation in unlawful international child abduction cases – an amicable solution in the interest of children

Manual for mediators and other experts



MINISTRY OF JUSTICE
HUNGARY



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ORSZÁGOS BÍRÓSÁGI HIVATAL



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Introduction, presentation of the programme

At the international conference held on 23-24 June 2014 in Budapest, entitled “Mediation in unlawful international child abduction cases – an amicable solution in the interest of children”, the Minister of Justice of Hungary, Dr László Trócsányi told that according to his credo as a lawyer, law and justice are not just a matter of brain, not just a logical order of paragraphs, but also a matter of heart. At the beginning of his reign, King Solomon asked for an understanding heart rather than a brain (see 1 Kings 3:9). And the first lawsuit in which he ought to have taken a decision right after, was related to a child placement case. The second element of the Minister’s credo is dialogue that has so much to do with mediation and with the present Manual that they are almost synonyms.

Mediation, applicable in unlawful child abduction cases which this Manual deals with, is the focal point of all kinds of life relations, social and human phenomena.

This is on the one hand a reflection of the contradictions of our era. At the time of globalisation, State borders either disappear or lose their significance. Even flying over the oceans is just a matter of hours: the real problem is not

caused by the tiredness related to the trip, but by the jet lag. Migration makes as many persons move as maybe never before since the Migration Period. European nations are integrating. Under such circumstances it is a natural process that men and women of different linguistic and cultural background meet more and more frequently and in growing numbers: they found families, give birth to children.

This is of course a natural human and historic process which may enrich the mankind's present and future and may become a source of personal happiness for many. If, however, a family dissolves and the parties do not separate as friends, then there is a big problem afterwards which becomes a great challenge for the judiciary, operating mainly in a national framework, one judicial system differing from another.

The child's shock, which is significant anyway, is further aggravated by the fact that he finds himself in the middle of a cross-border or even intercontinental personal conflict or legal dispute, in some cases hiding together with his father or mother, living almost retreated to illegality. This may be further encumbered by the cultural differences between the parents which used to strengthen attraction between them

back then when they had lived together in harmony, but now only adds to the lack of understanding and to antipathy between them.

The life and the rights of the children may seriously be violated. He could only recover from his injuries if the family reunites, but law itself is unable to achieve this. The hardest of all unfairness is the one affecting the weak, the helpless. Law and justice cannot abolish the injustice brought about in this way, but they can (and must) attenuate the existing injustice and prevent further injustice arising therefrom.

States cannot find an adequate inner solution within the national framework to these cases. In the child's interest, we are obliged to cooperate in this field too, but this cooperation brings along numerous benefits.

The international and European legal backgrounds are available. As for the relevant conventions, the *Convention on the Civil Aspects of International Child Abduction*, concluded in 1980 and elaborated upon the initiative of the Hague Conference on Private International Law, with a view to provide an international protection for parental custody

rights over children has to be highlighted, to which 89 States have acceded so far.

In a narrower sense, solely in relation to Member States of the European Union (and with the exception of Denmark), the so-called Brussels IIbis Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, adopted by the Council of the European Union in 2003 is directly applicable. This laid new foundations for the conditions of the application of the Hague Convention. The Regulation abolished the exequatur procedure in access and child return matters, all Member States are obliged to recognise the relevant decisions directly and automatically; it introduced new rules for the prevention of child abduction and for the child's return ensuring a faster and more efficient return. The party requesting the child's return shall be heard during the proceedings and - if this has no other obstacle – the child as well.

Cooperation within the European Union in this field has a real added value at present, as according to estimates, seven million EU citizens live in a Member State other than the one of origin, and international marriages ending with

divorce make up for 16 per cent of divorces in the EU. Between 2010 and 2013, the number of newly initiated wrongful child abduction cases involving Hungarian citizens doubled, approaching one hundred.

The European Union is often accused of bureaucracy. In this area however, the aim and the result of EU law and cooperation is that proceedings are accelerated and made more efficient, in the child's interest. Our sensitivity and activity with regard to this topic also show that we are committed to integration, though not without critics.

2012 was declared by the predecessor of our Ministry, the Ministry of Public Administration and Justice the year of child-friendly justice. That year, the Ministry elaborated, under the professional guidance of the Department of Private International Law, the fundamental concept of mediation applicable in wrongful child abduction cases. The working group set up with the aim of elaborating the concept examined and processed the best practice of several EU Member States, including Germany, France, Austria and Belgium.

Following this work, we came to the conclusion that the Specific programme of the European Commission would

provide a great opportunity to get to know best practice of mediation applicable in wrongful child abduction cases already in place and to inform stakeholder experts about these practices.

The Ministry of Justice – via its Department of Private International Law – is the Central Authority for dealing with unlawful child abduction cases by virtue of the above mentioned Hague Convention on Child Abduction and of the Brussels IIbis Regulation. In the framework of our activity as a Central Authority, we try to solve these cases efficiently and in the best interest of the children concerned. We also endeavour to provide every help to parents so that they can settle the situation amicably, without the intervention of authorities and without a lawsuit, if possible.

On the basis of best practice which had come to light during this programme, a document was drawn up which may constitute a single foundation for the introduction of mediation in unlawful child abduction cases and for the creation of the framework of this service in a wider range, even in several Member States.

Hungary had to face an exponential increase in the number of unlawful child abduction cases over the past few years: between 2010 and 2013, the number of cases doubled and reached nearly one hundred. The introduction of alternative dispute resolution is therefore necessary. That is what clients addressing us and, first of all, the children concerned by these cases – and who are the most vulnerable – demand.

The approach of the programme elaborated by the Ministry and supported by the European Commission is that the child may not end up in the line of fire between the two parents because of the deterioration of their relationship. The parents shall be helped, by all means, to settle their dispute in an appropriate framework, with the assistance of adequate experts, even amicably.

Unlawful child abduction cases may be categorised as part of family law conflicts with an international aspect, the satisfactory solution of which imposes a serious burden on authorities, judiciary organs, experts and parents likewise.

The obvious advantages of mediation as compared to a traditional dispute resolution involving lawsuits and enforcement could be enumerated on a large list. Instead,

quoting one single data tells more than any words: 85-90 per cent of agreements reached during mediation are respected, i.e. an inappropriate fulfilment of the agreement only occurs in 10 per cent of the cases.

One of the greatest advantages of mediation is that its effects are favourable even when no agreement is reached at the end, as it has a beneficial impact on future communication between the parties. Mediation is able to resolve conflicts lasting over decades; a qualified mediator with appropriate practice is able to guide a conversation between the parties in a way that it becomes fruitful even in a seemingly hopeless situation.

The legal background of mediation in Hungary is sound and forward-looking, even in an international comparison. As for legislation, all conditions for mediation to be spread are provided for. The time of practical experts able to fill legal regulations with content due to their professional experience has now come.

In order for Hungary to become a pioneer in implementing mediation, new, audacious initiatives are very important, this programme being an example thereof. NGOs established with the purpose of providing a professional

background for mediators operating on the “market” have an important role to play. The Ministry of Justice is keen on accepting such initiatives.

Given that there is very little experience regarding mediation applicable in unlawful child abduction cases accumulated in Hungary so far, one of the programme’s main objectives is to learn from our partners. France and Germany already have good practices in place and this Manual provides a great opportunity to get to know them.

What plans do we have about the introduction of mediation in unlawful child abduction cases? The fundamental professional concept has already been elaborated by the Department of Private International Law; its main idea is to hold a separate training for experts already registered and already working. Registering mediators, keeping contact with them and asking them to handle a specific case would be the duty of the contact point to be designated at the Central Authority. Once such a contact point is established, the Central Authority shall offer the possibility of mediation to a client addressing them.

Obviously, an answer needs to be found to a number of questions not responded to yet. (Such a question arises with regard to the fact that though mediation is cheaper compared to the traditional procedure, and also incurs less cost on the parties and on the society as a whole, not everyone can afford it, given that parties concerned often find themselves in a desperate situation.)

The legal background is available at national, EU and international level too; and the missing elements may easily be supplemented. The framework has to be filled with professional and human quality.

What kind of profile is required for those who wish to successfully mediate in unlawful child abduction cases?

An ideal mediator shall feel a special empathy in this area. He is not allowed to make a premature moral judgment, as to which parent he considers guiltier, not even inside his mind. His task is to understand, not to judge – only in this way he will gain both parties' confidence. (Understanding is not identical with justifying and acquitting: these latter are not parts of his task either.)

A good knowledge of language is surely a necessary, but not a sufficient condition. The mediator shall understand the cultural differences separating the parties, he has to be able to conduct a dialogue not only with them, but also with the culture they are coming from and to which they may return.

Finally here we are again at the topic of the heart: the mediator shall be impartial, but shall not be indifferent.

There are complicated cases, where an exit from the maze of the complexity of the facts of the case and of the colliding human and professional arguments can only be found and shown to those who have put themselves and their child into a nearly unresolvable situation (maybe not even fully consciously), with the wisdom of the heart, at the light of passion.

The child is always the victim in these cases; therefore the mediator also takes care of a special kind of victim protection. But parents may also become victims – maybe the victims of their own mistakes and bad decisions, the consequences of which are borne by them and others as well. The late Péter Popper, psychologist reported about his conversation with the poet János Pilinszky who told

him: “You, experts, see problems, to which solutions are sought. Life is however a drama which requires mercy.” Mercy and, let’s add, confidence. If we manage to rebuild it both in the faulty and in the injured party, this will also strengthen public confidence in justice.

The concept of mediation, general issues of mediation

By: Márta dr. Gyengéné dr. Nagy

As opposed to the traditional dispute resolution mechanism, a judicial procedure (lawsuit), mediation may be defined as a specific dispute resolution process aimed at preventing a lawsuit and handling conflicts with a view to reach a written settlement containing the solution of the dispute between the parties on the basis of their mutual consent, with the involvement of a neutral third party whom the dispute does not concern.¹ Mediation preceding the lawsuit is typically an *out of court mediation* provided by organs or individuals not directly linked to the court administration. Another important characteristic is that the parties find a solution acceptable to both of them during a

¹ Act LV of 2012 on Mediation, Section 2

voluntary mediation, it is up to them how fast they do it and how and when they implement it. The other type of mediation is *court-annexed mediation* and *judicial mediation* itself.

One speaks about court-annexed mediation and court mediation when parties may mediate, upon the proposal of the court not only before the lawsuit, but also when the lawsuit is initiated, as well as during the lawsuit, or even later, after the lawsuit, in certain cases during the enforcement procedure, within the framework of court proceedings and in the timeframe set by the judge. The legislator has provided for this possibility to do so both in substantive and procedural acts, even in cases where there is a separate legal act regulating the mediation procedure. Mediation services provided by or through the court are conducted by organisations cooperating with the court or by mediators employed by these organisations or by court staff and judges trained to mediate. Depending on the intention of the legislator and on the extent of the State's involvement, this service is either free of charge for the parties or to be covered partially or full by them, including the fee of the mediator. The venue of mediation is often the court building. In Hungary, a separate chapter is

dedicated to court mediation in the *Act on mediation*; this activity is carried out by judges, judicial clerks and retired judges free of charge, inside the court building.

One of the most important areas of application of mediation is family mediation. It is known for reacting to conflicts arising in connection with divorce, parental custody rights and access. Its main objective is to avoid negative consequences of a lawsuit, to extenuate serious conflicts, to increase parents' responsibility when taking decisions concerning their children. The role of family mediation consists of the parties finding the best solution by reaching a viable settlement, in line with their individual needs and especially with regard to their children's interest. Viability means that the parents fulfil their obligations set out in the mediation settlement in the spirit of joint parental responsibility, mutually understanding each other, keeping in mind the other parent's place in the child's life. As for the implementation of mediation in family law litigation, legislation sets out, in some cases, the obligation for judges to provide information and either the right (*mandatory mediation*) or the obligation (*compulsory mediation*) for the parties to participate. In Hungary, according to

Book Four (family law) of the new Civil Code, before filing for divorce, or during the divorce action, the spouses shall have access to mediation - of their own accord or by recommendation of the court – in order to attempt to reconcile their differences or to settle any disputes they may have in connection with the divorce, by means of an agreement. The agreement reached in conclusion of the mediation process may be fixed in a court settlement². In lawsuits concerning parental custody, the court may oblige the parents, in duly justified cases, to have recourse to mediation in order to guarantee the appropriate exercise of custody rights and their cooperation (including contact between the parent living apart and separated and the child) which is necessary therefor³.

If so obliged by the court, the parties shall appear before the court mediator and participate at the first session, but the mediation process itself may only be launched upon the voluntary consent of both parties. The court, upon request of the parties, may pronounce the interruption of the court proceedings in lawsuits for dissolution of marriage while in

² Civil Code, Article 4:22.

³ Civil Code, Article 4:172.

actions for parental custody, it interrupts the hearing in order to avoid an overlap between the mediation process and the litigious proceedings

The concept and legal background of wrongful child abduction

Hungary acceded to the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter referred to as the 1980 Child Abduction Convention) in 1986 (Law-Decree Nr. 14. of 1986) and passed a Ministerial decree (Decree of the Ministry of Justice Nr. 7/1988. (VIII.1.)) aimed at its implementation, defining rules for the non-litigious procedure of children unlawfully abducted to or retained in Hungary. Our country, as Member State of the European Union since 1 May 2004, is also bound by the Brussels IIbis Regulation in relation with other Member States.

The concept of wrongful child abduction is interpreted by Hungarian judiciary according to the terms of the 1980

Child Abduction Convention and the Brussels IIbis Regulation.

The removal or the retention of a child is wrongful if it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention and at the time of removal or retention and those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention⁴.

According to the terms used by the Brussels IIbis Regulation, 'wrongful removal or retention' shall mean a child's removal or retention where it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention. As far as the question of jurisdiction in cross-border family disputes is concerned, international jurisdiction (i. e. which State is

⁴ Article 3 of the Convention

competent to proceed) has to be distinguished from internal jurisdiction (i. e. which court or authority of a Member State is competent to proceed in that particular issue). Multilateral treaties dealing with the jurisdiction rules usually only cover international jurisdiction and entrust the States with the regulation of internal jurisdiction themselves.

At first instance, one court has the exclusive competence to try an application for return of a child unlawfully abducted to or retained in Hungary, namely the Central District Court of Pest. In unlawful child abduction cases, the primordial question in the decision-making process on the merits is the determination of the place of habitual residence, because this is the main connecting factor in EU family law, both among provisions concerning jurisdiction and conflict-of-law. Hungarian case law follows European judicial practice as it considers that the place of habitual residence needs to be determined with individual discretion in each case. Hungarian judicial practice is characterized by the so-called “mixed approach” which means that beside the facts, the parents’ intention is assessed too. For the

place of habitual residence to change, the “loss“ of the former place of habitual residence and the “acquisition” of a new one are necessary. According to Hungarian judicial practice, no new place of habitual residence is acquired if the stay does not exceed a few months, if the financial background of the family has not been provided for and if the parents failed to create a common home in which the child’s calm and equilibrated development would have been guaranteed.

In connection with the determination of the place of habitual residence, problems deriving from the mobility of families arise in a way that in some cases it is either nearly impossible to determine the place of habitual residence, or one child has two of them, or they are alternative, competing places of residence could be determined.

Hungarian practice – in line with the approach of the European Court of Justice – considers that the child’s best interest as for the implementation of the Convention is the prompt re-establishment of the violated parental custody right. According to the guidelines of the Hungarian Curia,

if there is a pending Hague Convention return procedure, the court is not allowed to take any measure contradicting the objective of the Convention in an action concerning parental custody until a decision that the child shall not be returned is taken. In cases where, by virtue of Articles 11 (6) and (7) of the Brussels IIbis Regulation, the State where the child was habitually resident immediately before the wrongful removal or retention has jurisdiction, the court may take a provisional measure within a restricted scope (namely, in unlawful child abduction proceedings), applying Article 20 (1) of the Brussels IIbis Regulation. In Hungary, the court, proceeding in unlawful child abduction cases, takes provisional measures (including protective measures) as determined by Hungarian law in some of the cases, usually for the duration of the proceedings between the requesting parent and the child, as well as in connection with the regulation of contact until the enforcement of the child's return.

In order to facilitate the *respect of the deadline of six weeks* set out in Article 11 (3) of the Brussels IIbis Regulation, the court shall act expeditiously in proceedings on the

application, and shall fix the hearing date on the 8th day following the reception of the application at the court, at latest. There is no special provision as far as the appeal deadline is concerned (the general time limit of 15 day applies). In Hungary, in practice, witnesses may be heard only in a very limited number of cases. *Documents, e-mails, text messages, Skype conversations and audio recordings submitted by the parties are used as evidence.* Only seldom an expert is appointed or a social inquiry report is made, but the minor child is more and more frequently *heard directly by the judge* – in line with the usual European practice and of course also bearing in mind the requirement of taking an expeditious decision. The *hearing* takes place in the absence of the parties and usually in the presence of a guardian ad litem, an audio recording is carried out by the judge who informs the parties about it later on. Enforcement provisions allow enforcement at the child’s actual place of residence and the removal of the defendant and of other persons from the venue of the child’s handover, in case they hinder enforcement. In lack of a voluntary performance, the court orders the child’s handover with police intervention. In the

meantime, the guardianship authority takes care of the child's protection.

Proceedings related to the wrongful removal of children from Hungary are dealt with by the Department of Private International Law of the Ministry of Justice. The Decree Nr. 7/1988 (1 August) of the Ministry of Justice, currently in force covers the regulation of the tasks of the Hungarian Central Authority, in accordance with Article 7 of the Convention and with Article 55 of the Brussels IIbis Regulation. In case of applications directed abroad, the Hungarian Central Authority provides legal assistance for Hungarian applicants as early as during the preparation of the return application and provides for the translation of the documents into a foreign language free of charge. It forwards the application to the foreign Central Authority, attaching the certificate of law containing provisions of Hungarian law which are relevant in that particular case. Its task includes keeping continuous contact with the foreign Central Authority during the proceedings and forwarding information received from the latter to the applicant. The authority puts an emphasis on justifying before the foreign

court, with documents if possible, that the child's habitual place of residence was in Hungary before his abduction abroad. Our experience shows that evidence sent to the foreign court, proving that the child's habitual place of residence was in Hungary (e. g. kindergarten or school certificates, medical certificates) duly justifies, in most cases, the place of residence in Hungary.

Due to the former, complicated Hungarian provisions, foreign courts had a hard time establishing the wrongfulness of child abductions under Hungarian law. The special provisions of Hungarian law (namely that the parent was allowed to take the child who was placed at him lawfully abroad for a period of up to one year) left foreign authorities much room for the application of the Convention's grounds for refusal (Articles 12, 13 and 20 of the Convention) and also made the application of the Brussels IIbis Convention more difficult, because after a stay exceeding one year, the chances of the child wrongfully removed abroad returning decrease. Among the grounds of refusal, the most often referred to is the one set out in Article 13, i. e. the grave risk that the child's return would

expose him or her to physical or psychological harm. In relation to EU Member States, the Hungarian Central Authority – if child protection measures have already been taken – attests before the foreign authority that adequate measures have been taken in order to ensure the child's protection after his or her return by a certificate acquired from the authority that has taken those measures. If however no actual measures have been taken yet, it provides extensive information about the Hungarian child protection system (completed with e. g. the regulation of injunctions to stay away, if necessary). Foreign courts usually accept this piece of information and consider it satisfactory with regard to the risks the child is exposed to.

New Hungarian regulation⁵ now prescribes the requirement of the consent of the parent living separate and apart from the child depending on the purpose of the stay abroad (e. g. the child wishes to study in an English-speaking area during an academic year) which covers in every case a foreseeable

⁵Article 4:152, Paragraph 5 of the Civil Code: The agreement of both parents is required for the child's residence abroad for any extended period of time for the purpose of studies or work, or other similar reason, either by him/herself or together with one of the parents.

period of time (it may be six months or even two years) and which supposes a place of residence the parent living separate and apart from the child has the possibility to learn about and to verify. The point is that the stay abroad has to be of provisional character the child's habitual place of residence has to remain Hungary. Mentioning "leaving abroad with the aim of establishment"⁶ means that in such cases, the parent shall give his or her consent not only to a longer stay abroad of the child, but explicitly to establishment abroad. Thus, we talk about a "definitive" move abroad which occurs for example then when the parent looking after the child concludes a new marriage with a person living in a third state and intends to move there together with the child for the purpose of "family reunification". Retaining such information, abusing the relevant legal provision may imply the establishment of the wrongfulness of the child's abduction and the ordering of his or her return, in line with the provisions of the Brussels IIbis Regulation and the Hague Convention.⁷

⁶ Article 4:152., Paragraph 6 of the Civil Code: Parental authorization is required for the child's moving to another country

⁷ In: Zsuzsa Boros - Erika Katonáné Pehr - András Kőrös - Katalin Makai - Orsolya Szeibert: *Polgári jog Családjog Kommentár* p. 245

Experience of countries participating in the programme

France

By: Ute Briant, AMORIFE International

At the end of 2012, the BECCI (Bureau of International civil and Commercial Legal Assistance) created a structure called AMIF (International Family Mediation Support). In 2012, the BECCI was appointed by the French Ministry of Justice as French Central Authority. This service belongs to the DACS (Directorate for Civil and Justice Matters of the Ministry of Justice).

The task of the Central Authority includes the implementation of the following Conventions related to wrongful international child abduction cases:

- Convention on the Rights of the Child
- Hague Convention
- Brussels IIbis Regulation
- Luxembourg Convention
- Bilateral or multilateral agreements between France and other states (e. g. Lebanon, Morocco)

The authority acts as an applicant, it addresses its foreign homologue, with a view to reach the objectives of the above mentioned conventions (application for the child's return to France, application for access, if the child is abroad), or:

it acts as a requested authority when - also for the above mentioned purpose (application for the child's return abroad, application for access, if the child is in France) – it brings the relevant cases before the competent national court.

France does not provide any financial support for persons participating in international family mediation.

The AMIF publishes the national register of international family mediators. It organises a yearly conference for these mediators at its Paris headquarters. Beside this conference, there is no further contact between the bodies.

The AMIF is thus a point of reference for AMORIFE International, as well as for other organisations dealing with international family mediation. Shall our organisation ensure the French technical and legal background for mediation organisations or shall we keep conducting mediation ourselves?

There are two fundamental types of international family mediation:

1/ International family mediation according to Conventions

As for different French national structures, most cases dealt with in the framework of international family mediation belong to this category.

The client addresses either the Central Authority (dealing with the case) or chooses a mediator from the register of mediators. It also occurs that someone is directed to our office by a third party. An atypical example: a social worker gives the contact details of AMORIFE International to grandparents living in the province of Saône et Loire (France). They call us.

Their daughter married a Slovenian citizen; they live in Germany, in the region of Munich. Two children were born from their marriage; they are dual (Slovenian-German) citizens. The mother also acquired dual citizenship (French and German), just like the father (Slovenian and German). The mother dies of cancer in Munich. The father intends to terminate all contact with the family in France. The grandmother and the grandfather refer to French law which allows intergenerational contact. There is no such legal provision in force in Germany. We contact the father and launch a co-mediation, with the assistance of a French-German mediator living in Germany and of Claudio Jacob from AMORIFE International.

This co-mediation is launched for two reasons: the international family mediator of AMORIFE International does not speak German well enough to lead a mediation process, while the German mediator is there to facilitate establishing contact with a German citizen who wishes to break with everything that reminds him of France. The father fears that the grandparents might “kidnap” their grandchildren to France; therefore he only allows them access to the children in Germany. The grandparents are getting older and they are afraid that they will lose contact with their grandchildren who now only speak French during their visits. The mediation goes on and by the end of November solutions should be found which enable the children to move freely between Germany and France when there is school holiday in both countries so that they can establish a closer relationship with their cousins from France.

The above example illustrates that the majority of international family mediations do not handle wrongful child abduction cases; therefore we consider a differentiation among international family mediations on the basis of their grounds to be restrictive and inadequate. Wrongful child abductions are serious cases which ignore the child’s interest but what can one say about the child’s interest in our above mentioned example? Does the death of one of the parents for which of course no “wrongful parental abduction” can occur, decrease the importance of the child’s interests? Could a father or a mother be more

important than the family from the father's or from the mother's side?

AMORIFE International carries out between 5 and 10 international family mediations a year, the AMIF – as communicated by them – 20 to 30 international mediations. Some of the organisations listed in the French register do not implement any international mediation, the rest of them do 2 to 3 a year. We can therefore estimate that around fifty international family mediations related to the Convention take place every year, while there is a demand for twice or even three times more. The main obstacle here is the financial aspect. Although mediation sessions of the AMIF are free of charge, they are subject to a fee at other organisations, which can either be a flat fee (500 to 650 euros per person) or charged by session (70 to 150 euros per session per person), one session lasting approximately two hours. In case of a flat fee, there is an interest to finish mediation within two weekends, for instance. Mediation through Skype costs 70 euros per person, payable by credit card or PayPal to AMORIFE International. In case of a co-mediation with a foreign mediator, there are additional mediator costs arising, applicable in his or her home country. An international family mediation comprises of 2 to 9 sessions.

2/ International family mediation at courts

Following most of the court proceedings, the AMIF steps up. Some of the cases are dealt with by other structures. AMORIFE International participates in the legal assistance scheme, thus, those benefiting from this cost reduction may take part at the process without any problems. We accept payments with credit cards and with PayPal too, and organise conversations on Skype which also facilitates participation in the mediation process. The main obstacle here as well is the financial aspect (see previous paragraph).

AMORIFE International implements one or two court-annexed family mediations a year, whilst there is a demand for approximately twenty.

The AMIF implements approximately twenty, the rest of the organisations 0 to 2 or 3 international court-annexed mediations. These do not include requests of attorneys addressed to courts out of mediation.

“Distant mediations” (e. g. between France and the overseas territories) are also not considered here, these would double the number of “international” mediations carried out by the AMORIFE International. Their fee is the same as set out above. International mediations not involving children were not taken into account either.

Conclusions

International law and international family mediation should cooperate and contribute to the harmonisation of national legislation in order to create a regulatory framework at EU level, for example by adopting a European divorce procedure.

The AMORIFE International operates as a worldwide network and we believe that our service, just like in case of other bodies, ought to be commissioned directly by the Central Authority which in turn, could undertake the supervision of persons and entities carrying out family mediation. We plan to start promoting international mediation with the support of the twinning associations of European cities.

There is already a European Code of Conduct for Mediators; the Hague Conference on Private International Law published its Guide to Good Practice... Maybe the time has come to draft a European Code of Ethics concerning international family mediation?

Finally, uniform criteria should be set in order to prevent “famuli” not respecting any ethics from operating.

International family mediation trainings shall be harmonised and a qualified training at European level should be required: such are the DEMFI provided by the

AMORIFE International or the training of the MiKK. A European financial instrument should be created for the benefit of persons intending to have recourse to international family mediation.

Germany

By: Mary Carroll , MiKK, Germany

International child abduction and mediation in Germany

The Central Authority is the first port of call for many parents who realise their child has been taken unlawfully to another country, in particular when the two countries involved are signatories to the Hague Convention of 25 October 1980. In 2013, 167 incoming cases and 189 outgoing cases of international child abduction as well as 76 access cases were filed with the German Central Authority, the Federal Office of Justice⁸ in Bonn. Return applications may of course also be filed directly with one of the 22

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www.bundesjustizamt.de/EN/Topics/citizen_services/HKUE/HKUE_node.html

German Family Courts authorised to handle return cases of a child unlawfully abducted to Germany. It can be assumed that this number approximates the number of cases lodged directly with the Central Authority.

When responding to return applications, the German Central Authority includes information on mediation with its letters to both parents. This is an active step on the part of the Federal Office of Justice to encourage parents to find an amicable solution in the best interest of their child or children. The German Central Authority takes this initiative even further: At its six-monthly specialised three-day seminars for Hague Convention judges, it invariably includes a session on the possibilities and potential benefits of mediation in cross-border child abduction cases and invites the NGO MiKK, which is specialised in international mediation involving parents and children, to play an active role in the seminars and inform Germany's Hague Convention judges about the ways in which mediation can be conducted in conjunction with the court proceedings.

Thus, the majority of family judges dealing with child abduction cases in Germany are well informed about mediation and appreciate that mediation can be a viable option for many of the conflicting parents. Optimally mediation will enable them to arrive at a solution jointly that takes not only the best interest of their child into consideration but also reflects their own particular circumstances and interests. Even if the parents do not manage to culminate the mediation with a written agreement that they can submit to the judge presiding at the hearing, it is consistently the case that the parents' communication has improved, which can be considered a positive step in determining the future of the child or children involved. The close cooperation between the German Central Authority, many German Family Court judges dealing with child abduction cases, and MiKK has been instrumental in helping to establish mediation in these cases as an option worth considering for many parents.

MiKK started as an initiative of the German Family Mediators Working Group in 2002 to develop and implement mediation in highly complex and emotionally

charged international child abduction cases. By 2008 MiKK had grown substantially and was officially launched as a non-profitmaking NGO dealing with mediation in cross-border child abduction and related cases. Since then MiKK has become increasingly established and recognised with its network of multilingual, specialised mediators and its international training programmes in this area.

MiKK has a membership of well over 100 trained mediators within Germany and a network of over 500 mediators worldwide who are qualified to mediate in international child abduction cases. As established in the Wroclaw Declaration of 2007⁹, MiKK propagates for these complex and emotionally challenging cases a mediation model with two co-mediators for each mediation, one with a legal professional background and substantiated knowledge of the legal aspects of these cases, the other with a psychology/social sciences background. Together the mediators should reflect the cultural and linguistic background as well as the gender of the parents. Further,

⁹ www.mikk-ev.de/english/codex-and-declarations/wroclaw-declaration

advanced professional training for the qualified family mediators mediating these cases is considered essential.

In 2013, MiKK received just less than 160 enquiries regarding mediation in parental child abduction cases, which reflected the yearly steady increase in enquiries since the 40 cases it dealt with in 2008. The enquiries are invariably connected to mediation. They are the first step in an often lengthy thread of subsequent national and international telephone calls, emails, research, and contact with the parents, their lawyers, the Central Authorities, judges, youth services and other relevant bodies and institutions. It is not unusual for MiKK consultants to spend up to 40 hours on an individual case.

The enquiries can be grouped into Hague Convention cases (48 cases; at the time of the enquiry a Hague Convention application had already been lodged in 40 cases) and non-Hague Convention cases (8 enquiries), abduction prevention cases (24 cases), international custody, parental responsibility and access cases (45 cases) and other enquiries related to child abduction and mediation (39

cases). In 2013, 69 enquiries were directly related to a filed parental child abduction. In 77% of the cases the mother was the abducting parent (69 cases), in the remaining 23% (15 cases) the father. The above distribution was in keeping with the trend of recent years. In 43 cases it was one of the parents who first contacted MiKK. In a further 27 cases it was either a Central Authority from Germany or elsewhere, a judge from a German Family Court, a lawyer, a guardian ad litem or a mediator. In the remaining 38 cases, family or friends of one of the parents, a member of staff of the youth services or other authorities or an institution took the initiative.

The increasing globalisation of relationships was reflected in the wide range of the countries of origin of the mother (45 different countries) in these almost 160 cases MiKK dealt with in 2013, with mothers of German origin comprising the biggest group (56 cases), followed by mothers from the USA (11 cases), the United Kingdom (6 cases), Poland (5 cases), Hungary (4 cases) and France (3 cases). In 2013 the fathers involved in the enquiries to MiKK regarding mediation in relation to child abduction

cases came from 37 different countries including Hungary and France.

MiKK organized mediation with a co-mediator team in 29 cases in 2013 (see details of MiKK's mediation model above). Although the communication between the parents improved substantially in the process of and as a result of the mediation, a phenomenon which was corroborated by the judges involved in the cases or by the conflicting parents' own feedback, a written agreement was reached in the mediation in five cases only. For various reasons the parents involved in the remaining cases did not engage in a mediation. This was usually due to a lack of funding for the mediation and/or the unwillingness of one or both of the parents to commit to mediation. In three cases in 2013, the German Central Authority funded a mediation for couples who had applied for financial support. No statistics exist for the mediations that took place when mediators were accessed directly from the MiKK online mediator list, although it can be assumed that this number approximates the number of mediations organized directly by MiKK.

Currently MiKK is testing a concept it co-developed in 2012 with Berlin Family Judge Sabine Brieger for Hague Convention child abduction cases which as we know must be concluded within six weeks of the application being filed. The judge sets two hearing dates and requests both parents to attend. A MiKK mediator attends the first, short court hearing to give information about mediation to the parents and to meet them personally, thus “giving mediation a face”. The judge, too, personally speaks out at this hearing in favour of mediation and sets a date for a second and final hearing a few days later, leaving time in between the proceedings for mediation if the parents so desire. With the judge personally advising mediation and a mediator willing to take on the case with a co-mediator at short notice, the parents are encouraged to try in this way to find an amicable solution that centres on the best interest of their child.

Mediation in these and other child abduction cases is invariably short-term and intense; desperate not to lose their child, both parents are under enormous pressure to find a solution when their communication has frequently

become gravely impaired. For the mediator it demands special skills, the ability to handle highly escalated and extremely emotionalised conflict as well as detailed knowledge of the legal constrictions and tight timeframe of child abduction cases.

Despite its demands and challenges, mediation is proving to be a feasible option that respects and protects the needs of abducted children in Germany and is helping some parents to reach an amicable resolution in cross-border child abduction cases. In the interests of abducted children, it is to be hoped that mediation will become more and more established worldwide as an alternative to the adversarial win or lose approaches of many embittered parents.

Characteristics of mediation in wrongful child abduction cases – what the mediator shall be aware of and what kind of mediation is recommended (on-line solutions)

By: Ute Briant, AMORIFE International

First of all, we need to indicate that many wrongful child abduction cases do not reach us because some families do not know what to do or how to do it, and because information concerning this method is not available for everyone, especially when the child has not reached school age yet.

Behind every child abduction, one may find persons in a complex situation. Many times fear, anger, sadness or despair prompts them to act, which leads to an insurmountable conflict.

During mediation process, the situation may change or ease up thanks to conflict management.

In France, school education is compulsory for minors from 6 to 16 years of age.

Therefore, the following three cases have to be distinguished:

A/ Child under 6

B/ Child above 16

C/ Child between 6 and 16

International family mediation always takes place in the following cases:

1/ Upon the initiative of one of the parties to the proceedings (the „abductor” or the „victim” parent)

2/ Upon justice initiative (by a prosecutor, attorney-at-law, court, appeal court or the Central Authority)

A/ Child under 6

From 0 to 6 years of age: parents are often confused and encounter situations where the stakeholders do not dare take steps because of the child’s age, e. g. fathers who know their child is still breastfed by the mother.

Accordingly, we have already been asked several times to carry out mediation when more than one year has already elapsed since the child’s abduction and the only “evidence” was that the parent has had an address abroad for a while.

The answers to our question (why they did not address the court or brought charges?) fall into the two following categories:

- “I thought it would be solved, he promised me I would see him again, I even received a photo from him, I could hear him on the phone...”
- “She is still small and as she does not attend school yet, I did not want a scandal...”

These are often sensitive situations because the “abducting” parent integrates the child into the host country’s environment (medical care, nursery etc.) and the “victim” parent is unable to perceive the real situation, not knowing what he actually wants. In the majority of the cases we handle, mothers are the abducting, while fathers are the “victim” parents.

Our recommendation is to advertise preventive family mediation at the beginning of family conflicts at an international level too. The EU should make an advertisement spot translated into every language and screened in cinemas and on TV channels. Information should be disseminated in waiting rooms of doctor’s offices and hospitals, in schools, high schools and universities, this opportunity should be indicated in the “*livret de famille*”¹⁰ and in health leaflets etc.

How could Central Authorities help when the deadline of one year has elapsed and thus international law may not be referred to? There is still of course the Convention on the

¹⁰ A family register in France containing the birth certificate

Rights of the Child, but how shall we assist mediators if there is a time constraint for negotiations?

In the framework of a court mediation, the problem of hearing the child also arises: would not there be a need for a European legal instrument binding all States to hear the child in appropriate circumstances everywhere and more importantly, from the same age, uniformly?

The international family mediator could be appointed by the judicial authority to hear the child and to submit a report of the hearing. Who could be in a better situation than the mediator to conduct a structured conversation and then to make use of it at discussions with the parents? To this end, appropriate trainings and discussions about the professional statute are needed. Opportunities shall be harmonised: an international family mediator or an attorney specialised in cases involving children are maybe in a better position than a judge. And although we believe that the same mediator may hear the child during the process that he is accomplishing with the parents' participation, we do not exclude the possibility of the hearing and the mediation being done by two different mediators.

A link shall be established between attorneys and mediators as well. Respecting the confidentiality of the content of the discussions, they could talk about the modalities and the number of the sessions or about how to reach settlements.

Telecommunication software like Skype is indispensable for international family mediators.

As for the legal background of communication through e-mails, the EU could introduce provisions applicable by all Member States.

Is it opportune to record mediation sessions? A related example is Québec: Aldo MORRONE, the well-known and accredited international family mediator has almost always used his video recorder to shoot discussions and to record Skype conversations, enabling him to carry out a supervised work afterwards and to get back to certain issues with people having difficulties.

B/ Child above 16

The child's point of view is decisive in these cases and no international family mediation should be carried out without the compulsory hearing of any child above the age of 16 at the beginning of the procedure.

In one specific case, there is a delicate situation between France and Switzerland (a part of the father's family being in Spain). The 15-year-old minor is in Switzerland with her mother after a dispute in Spain with her father living in France and exercising an exclusive parental custody. He brought a charge in France for child abduction. The mother and the daughter have both been heard in Switzerland. They brought charges against the father in

Switzerland and the Swiss authorities recently told the mother and the child that charges have been forwarded to the French authorities. The child does not attend school. Due to mediation, a third way could be found, namely a French boarding-school until the court takes a decision.

The international family mediator has to be very careful however, as he may become just another “social assistant” if he undertakes education supervision tasks not related at all to mediation. He is at the same time very busy dealing with the attorneys and he has to be increasingly aware of the content of his conversations with lawyers as he is not sufficiently “armed” to face the attorneys’ strategies, he cannot however remain completely silent with the pretext of confidentiality either.

How can one assist a mediator if the signs of “adolescent crisis” manifestly appear in a case implying a breakup between the parents? Law provides for the settlement of the dispute on paper, but what happens in reality?

In our example, the situation is complex:

- the mother proceeds wrongfully if she accommodates the child without the father’s consent
- the father makes use of his legal status to attack the mother
- the mother declares that she has no other option than to accommodate the child who shows up at her home

- the mother is left by her boyfriend because the situation becomes unmanageable
- the adolescent starts exaggerating the difficulties of her relationship with the father and attacks her stepmother
- the adolescent makes an attempt of suicide because of the incapacity of the police and justice which demonstrates real despair
- doctors (psychologist, general practitioner and psychiatrist) confirm the almightiness of the “royal baby”
- the mother asks the help of a mediator in order to find a solution
- the father does the same
- the adolescent is “offered asylum” in Switzerland has a boyfriend in France
- attorneys of both parties prepare a strong material with a number of accumulated witness confessions
- the adolescent falls into a crisis during Skype mediation and says: “if I need to accuse my father of harassment in order to speed up things, I will do it”.
- the international family mediator navigates amidst guided conversation and hidden or implicit advices in order to avoid irreparable lies
- work under supervision shows the limits of mediation

There are “rules of conduct”, legal instruments are useful as for the procedural framework of mediation but prove to be unfruitful against psychical problems. The attorney advises his client to respect international conventions for

the child's sake. It is however a proven fact that the wrongful abduction of a child is the consequence of a complicated situation which requires an extraordinary attention and carefulness.

C/ Child between 6 and 16

That is where the problem of schooling arises, as well as the question whether the child has to be heard or not, the issue of identifying the child's real interest, taking into consideration the interests of everyone and not just of the persons exercising parental custody, but also of those supposed to have an effective positive impact on the minor's development.

The choice of language is an equally important issue: how can one demand that children suffering from a parental separation learn both the paternal and the maternal language? We could easily imagine multilingual families too: how to avoid unavoidable clichés, how to let the child decide on his own as soon as he reaches an age when he is able to choose? The same goes for religious, cultural differences or any other differences in customs: is it reasonable to oblige a child whose parents are separated by religion to atheism? And most importantly, how to prevent irreversible acts from leaving undeletable traces throughout the child's life?

Beyond a methodology (Daniele GANANCIA wrote a remarkable book about international family mediation) and the discussions on supervision and accompaniment, shall co-mediation made compulsory in cross-border cases? Shall there be a dual co-mediation (i. e. two mediators in each country)? Shall the professional attribution of mediators be made obligatory (e. g. associating a psychologist mediator with a mediator graduated in law)? Shall the sex ratio be obligatorily equal (one male and one female mediator)? All this is briefly the concealing of the substance, which is nothing else than mediation culture.

Although training is significant, there is the threat of dogmatism all over Europe nowadays and AMORIFE International pays special attention to the preservation of universality, in favour of human rights.

It does not matter whether someone is black, white or something else. It does not matter if someone is originally a psychologist, a lawyer, an educator, a teacher or an architect. It does not matter whether someone is heterosexual, bisexual, homosexual or transsexual. Mediation – be it national or international – may not accept restrictive or even dangerous principles carrying the risk of transforming mediation culture into a culture of a dominant model, ignoring the particularities of different situations, the individuality of the persons and the impossibility of creating uniform supervision rules, as although certain situations may have similarities, one has to accept, above all, the principle that every situation is unique.

This one and only principle governs the work of the international family mediator, whichever country, culture, language or custom we talk about. The international family mediator becomes a universal expert who has to be open to the reality of all kinds of situations he or she faces, in order to be efficient and high-performing.

Conclusion

Nowadays, there is no good or bad model any more, there is only a vague wish for peace, dispersed all around the world. Beyond dissension, practices in Europe shall urgently be aligned; the concept of universalism shall be integrated into the culture of mediation. Law should only be a benchmark, without becoming the basis of negotiations.

A broken and disappointed heart has no superior, no God, moreover, mediation space, if accepted and recognised by social norms, will not become a space for moralising , but a space of humanisation.

The child's interest should not let us forget the interests of all persons who are necessary for the child's development, and once we talk about the best interests of the child, it is reasonable to prevent this interest from becoming the target of experts with no future.

The basis for an international family mediator is first of all the acquaintance of mediation culture. Without understanding and internalising this mediation culture, every expert, no matter how good he is in his own field of expertise, may only become a pathetic mediator.

Mediation from different aspects – judge, Central Authority, mediator, attorney-at-law

By: Dr. Virág Vajna, mediator

Dispute resolution by means of mediation shall be encouraged in cases concerning families, future family relationships and cooperation.

It is important to stress that the way mediation is being offered to the parties has a decisive influence on the success of the mediation procedure. This is important because mediation process is still less known among the public, parents are often uncertain and unconfident about the efficiency of this method. Therefore, parents need to be given fully-fledged and honest information on what mediation process is and what it is not, what its advantages are.

Parents need to be informed about the fact that the possibility to mediate is without prejudice to the parent's right to initiate litigation. Experience shows that settlements reached as a result of an amicable process, based on a compromise are more sustainable, as they reflect the will and the real needs of the parties. Mediation leads to a sustainable solution with greater probability and is therefore likely to prevent legal procedures frequently lasting several years.

Several experts appear in unlawful child abduction cases, hence it is important to make their role in the mediation process clear.

THE MEDIATOR'S ROLE IN THE MEDIATION PROCESS

Preparing the mediation session

In the preparatory phase of mediation, the mediator takes special care to examine whether the case underlying the mediation process is *suitable for mediation*.

NOT EVERY FAMILY CONFLICT CAN BE RESOLVED BY MEDIATION!

The examination of suitability is of utmost importance, both from the point of view of the case and of the parties and it is mainly the duty of the mediator. During the preparatory phase, the mediator has to be aware that *cross-border cases are subject to a complex legal status*.

A *preparatory discussion with the parties* is an important part of the preparation. In the framework of this discussion, the mediator gives detailed information to the parties on the mediation process and on the mediator's role in it. During

the preparatory discussion, the parties have the opportunity to ask questions and to share their eventual concerns. *The mediator may involve a person in the proceedings who, although not directly concerned by the case, legally speaking, can have a positive impact on the course of the procedure.* Of course, the consent of both parties is necessary for this involvement. This third person can be the new companion of one of the parents or a grandparent. The closing stage of the preparatory phase is the designation of the venue and the tie of the mediation session, depending on the circumstances.

The mediation session

The method of mediation depends on whether there is a possibility for a personal encounter or not (due to a large geographical distance or for other reasons), in the latter case the mediation session shall be carried out otherwise (e. g. through Skype).

If the parties personally attend the session, the mediator's tasks during the sessions include:

- Creating an atmosphere of confidentiality for the mediation session, acknowledging that the parties make efforts to settle their conflict amicably.
- Giving information during the session about the mediator's role: namely, the mediator does not make decisions, recommendations or judgments; he

is responsible for the procedure and not for its outcome.

- Ensuring the parties that mediation procedure is not one brought before an authority, but the settlement reached here can be used before the authority, it can be made approved by the authority.
- Listening to the parties with an understanding mind and active attention, guaranteeing a balance of power between the parties during the procedure.
- Gaining control over the content and the emotional aspects of the discussion during the mediation session.
- Encouraging and supporting the parties to express their own feelings and thoughts and to display their needs and pretensions.
- Cooperating with Central Authorities and courts in unlawful child abduction cases during his or her work.
- Being aware that legal background in these cases is determined by an interaction between several legal systems.
- Being aware that the Central Authorities may help organising the establishment of temporary contact between the left-behind parent and the abducted child.
- Taking care that the parties have access to legal information throughout the whole procedure; it is important to note that the mediator cannot give any legal advice during the mediation procedure!
- If needed in the particular case, considering and respecting the different cultural and religious background of the parties.

- Ensuring, if possible, that each party involved may speak his or her own mother tongue.
- Considering during mediation whether criminal proceedings have been initiated against the abducting parent.
- Helping the parties to elaborate a detailed settlement but without giving ideas!
- Working in pair, if possible, with regard to the complexity and the sensibility of the cases.

How can States help the mediators' work and make it more efficient?

- By ensuring an appropriate training for future mediators (A training enabling the participant to find out for himself whether he is capable of working as a mediator. An interactive training including self-recognition, conflict management skills, simulated case studies, learning and practicing mediation techniques.)
- By providing the possibility of vocational training, the opportunity of developing professional knowledge and tools.
- By providing information on mediators who possess special skills in unlawful child abduction cases and on the languages in which they assume mediation. Creating a register of mediators.
- By providing the mediators concerned with the opportunity of professional development at workshops, case discussions.

- By ensuring a regular supervision, both individually and in a group.
- By supporting the elaboration of requirements for the evaluation of mediation activity, including the possibility for the parties to give feedback on the mediation process.

THE ATTORNEY-AT-LAW'S ROLE IN MEDIATION PROCESS

The attorney-at-law's primordial interest is that the parties involved in the case duly settle their family relations as soon as possible. The attorney has to provide assistance to reach this objective, first of all. It can also occur that the mediator's intervention becomes unnecessary, because the attorney succeeds in helping the parties by means of negotiations to amicably settle their future family relationship.

In case the negotiation led by one or more attorneys turns out to be unfruitful, the attorney may *advise* the parties to have resort to mediation, in this case he informs them about the advantages and the course of mediation, about his own role in the mediation process. The attorney shall foster the amicable settlement of the disputes at any stage of the process.

The attorney's tasks during the mediation process:

- Encouraging the parties to find an amicable solution, drawing their attention to children's interest and right to keep contact with both parents.
- Informing the parties about the possibility and the advantages of mediation, the process itself, the modalities of participation at mediation and on his status in the context of mediation.
- Providing legal information to the parties with a view to ensure the legal effect of the settlement reached during the mediation in all jurisdictions concerned.
- Possessing the necessary legal knowledge concerning cases of children abducted unlawfully abroad (special regulations, legal effect, best interest of the child)
- In case he is present at the mediation, HIS ROLE CHANGES, *he is not present as an adviser, but as a support*, thus providing great help for reaching a settlement between the parties, and, indirectly, for the mediator's work.
- *In case the attorney-at-law acts also works as a mediator, he may not act as a mediator in case in which he represents one of the parties.*

How can States help the attorneys' work and make it more efficient?

- By including training of conflict management and alternative dispute resolution techniques in university curricula.

- By providing an opportunity for attorneys dealing with such cases to professional development with participation at workshops, case discussions, trainings, during an experience-based learning.
- Special courses, trainings for attorney-mediators.
- By ensuring individual and group supervision, if needed.

THE ROLE OF THE CENTRAL AUTHORITY IN THE MEDIATION PROCESS

By virtue of the 1980 Hague Convention and the 1996 Hague Convention on Child Protection, Central Authorities play a key role in promoting and fostering the amicable settlement of international family disputes.

The tasks of the Central Authority during mediation:

- Facilitating access to mediation
- When addressed, the Authority shall inform the requesting parent as soon as possible about the Hague procedure on the one hand and about the possibility and the modalities of the mediation procedure on the other hand.
- Contacting the abducting parent, informing him about the Hague procedure, trying to convince him of voluntary return and giving detailed information about the possibility and the modalities of the mediation procedure.

- Informing the parties that mediation may be carried out simultaneously with the court proceedings.
- Operating, when this is possible, an own mediation service handling such cases or running a register of mediators whom the Authority can recommend to the parties for the amicable settlement to their dispute.

How can States help the Central Authority and make its work more efficient?

- By ensuring an appropriate training for the staff of the Central Authority which makes clear what mediation is, who the mediator is and what the substance and the advantages of the procedure are.
- By providing a communication training for the staff of the Authority, teaching them first of all how to contact clients and how to offer them the possibility to mediate.
- By ensuring individual and group supervision, if needed

THE ROLE OF THE JUDICIARY IN THE MEDIATION PROCESS

In wrongful child abduction cases the judiciary can do a lot for mediation procedures to come about. Irrespective of whether the Central Authority has offered the parties the possibility of mediation beforehand, the judge may decide

to order the use of mediation proceedings if it is reasonable.

The tasks of the judiciary during the mediation procedure:

- If the case is referred to mediation by the judge, he is still in control of its scheduling.
- Once mediation ordered, the judge informs the parties about the course of mediation, its advantages and the legal effect of the settlement reached during the sessions.
- It is up to the judge to determine a deadline for mediation to be implemented, if necessary, he may opt for adjourning the hearing, in view of mediation.
- If the case is referred to mediation by the judge, he is still in full control of the case.
- If mediation is ordered by a judge, the mediation can be either court mediation or out of court mediation (in most countries, out of court mediators proceed in such cases).
- In case the parties reach a settlement, the court proceeding in a Hague Convention return procedure may be requested to fix the settlement in a court decision, depending on the content of the settlement and on the relevant competence of the court.

How can States help the judiciary and make its work more efficient

- include in the training of judges the functioning of mediation procedures and their possible joint application with judicial proceedings
- By ensuring individual and group supervision, if needed

Presentation of particular cases solved by means of mediation

FRANCE/MOROCCO

By: Ute Briant, AMORIFE International

AMORIFE International was addressed by the Court of Appeal of Aix-en-Provence. We accept this assignment and decide to conduct mediation proceedings in co-mediation: with Claudio JACOB and Pascale SOUSSAN-DEBRIEN.

STATE OF PLAY: The woman K.H., the man B-H-S.M. and the two children: K, the son, living in Morocco with his father, not involved in the mediation. S., the daughter is in Aix-en-Provence (France) with her mother since September, without the father's consent.

Ms. K.H. is a dual, French-Moroccan citizen who immigrated with her daughter to Aix-en-Provence. She used to work as an advertisement expert in Morocco, she has not found any job in France. Her attorney-at-law in Paris is Mr. C.

Mr. B-H-S.M. is a dual, French-Moroccan citizen, living in the house of the family in Rabat (Morocco), works as a general practitioner, also acts as a substitute doctor from time to time in France. His parents live in Morocco. His attorney-at-law in Paris is B.

JUSTICE: PROCEEDINGS: There are two proceedings pending before the Tribunal of Aix-en-Provence, one for dissolution of marriage before a family judge and another for child protection before a juvenile judge. The proceedings were initiated by K.H.

In France, the decision of a juvenile judge prevails over that of a family judge.

At the Tribunal of Marseille civil and criminal proceedings took place, the case was tried by the juvenile judge of Marseille. These proceedings were initiated by the father, B-H-S. M.

The Moroccan Central Authority asked the French Central Authority to launch a procedure aimed at the child's return to Morocco. This procedure was launched upon the request of the father, submitted to Moroccan authorities.

There is a bilateral agreement in force between France and Morocco. According to this agreement, parents shall find the best possible solution within six weeks before the organs of Interpol would take actions for the daughter's (S.) return to Morocco with coercive measures (Article 23

of the bilateral agreement between France and Morocco, signed in 1983: Decree 83-435 (27 May 1983)).

The judgment of the Minors' Court in Aix-en-Provence on education support measures in favour of the daughter, S. and of her mother K.H.

The decision of the Court of Marseille, ruling that the child, S. shall be returned to Morocco.

Child protection measure in France concerning a minor child at risk. This procedure was initiated by the father against the mother's friend who allegedly lured the child and the mother into a sect.

Appeal proceedings launched by the mother with the aim of keeping the child with herself in France, accusing the father of paedophilic behaviour.

FAMILY LAW DISPUTE: Both parents agree to divorce but the father wishes to live in Morocco while the mother in France. The mother had taken advantage from school holidays to travel to France with her daughter and did not return to Morocco from there. She would like to stay in France with her daughter and she wishes the father to stay with the son in Morocco.

The mother fears for herself and for her daughter because of the extensive media coverage of the issue in Morocco where fundamentalist thrust themselves upon the case. The mother wishes to raise the child by herself.

The father agrees but the situation is complicated because he had an intimate relation with the girlfriend of his wife's friend. The father wishes to raise the two children by himself.

The mother has a friend who is called "Guru" by the court. He is Éric X, a former adept of the MANDAROM¹¹ who is fond of all kind of spirituality.

The child, S. allegedly watched porn movies with her father, the drawings of the child, acquired by the court are very embarrassing, according to experts, the child S. took part in sexual relations but no one knows if these events occurred with the mother or the father. K. H. accuses the father of being aberrant and perverted. Meanwhile, Mr B-H-S.M accuses the mother's friend, Éric X. of paedophilia and the mother as well as her friend of being members of a sect and luring the child into this sect.

CONTEXT: The Moroccan Central Authority is located in Rabat, the capital of Morocco. Rabat is a provincial, civic and "sound-thinking" city, unlike Casablanca which is more open and cosmopolitan. The father, Mr B-H-S.M. lives in Rabat and is a somewhat well-known personality there.

CONCLUSION: Both parents agree to launch an international family court mediation.

¹¹ A French religious sect

The mother agrees to return to Morocco with her daughter, S., under certain conditions, notably if acquitted of the charges brought against her in Rabat, as they have an influence on her job: all her contracts have been terminated by Moroccan clients, she intends to regain her “honour” as a mother and woman and wishes S. to be able to go back to school in Rabat without any media coverage (tabloids brought the story and the mother’s friend, Éric X on their front pages., associating this sect with paedophile acts). This man has been declared *persona non grata* on Moroccan soil.

The father alleges doing everything in order to protect her daughter, S. from the pressure of media, it is the mother who went too far and now he cannot do anything for her. He does not intend to let fundamentalists down either by revoking his statements concerning the mother and the child.

This case shows, even at several levels, the importance of international family mediation: it is in fact the only place remaining hidden from media, from police, from the public and, most importantly, international family mediators are the only persons not making any value-based declaration, they settle with guiding the dialogue towards reality (judgments, expert reports, legal texts), they allow both parents to meet and mediation space becomes a “separate world” in which emotions, anger and needs can be expressed without fear.

5 international family mediation sessions took place in France as well as numerous phone conversations with the French and the Moroccan Central Authorities, with the prosecutors, the parties' attorneys and even with the Cabinet of the French Prime Minister.

The venue of mediation allowed a decrease of the extent to which the situation is dramatized and the revelation of the harmful influence of media. In case there are emotional and attachment conflicts, journalists tend to write lurid articles in order to increase the number of issues sold.

The mother, H. K. and the father, B-H-S.M. could express their feelings, anger, harms and fears with experienced experts (the family mediators), these eruptions made the ease-up of the pressure as well as the expression of the needs and finally of the children's interests possible.

The placement and the interest of the child has finally only been addressed from the fourth session on, before that reference to the children had only been made when it was needed to justify the point of view of either the mother or the father. We have succeeded in establishing phone contact between their daughter, S. and the father, in the presence of the mother and of the mediators. We would have liked to arrange a personal meeting too, but this has ultimately failed.

The diplomacy of emotions against the force of money, power and fame. The road is not evident: we have to lead people to the way of humanism and fraternity and provide for a universal freedom with equality of law and treatment for men and women likewise.

Mediation allowed the child and the mother to return to Morocco. Unfortunately, as the family's reconciliation was too fragile, not confirmed by a "post-mediation" work, things took a wrong direction back in Morocco.

Despite the results of mediation, the mother, surprised by Interpol intervention, did not understand the legal requirement of respecting deadlines with the accuracy of a day: according to law, six weeks are not equivalent with 43 days. That is why settlements have to be customized in the universal world of law!

The mother felt "encircled" in Morocco, and started a long fight with her daughter before reality put things back to where they belong.

Here is an e-mail sent by the father after the end of mediation and closing this case full of difficulties:

„Dear Pascale, dear Claudio,

Finally some good news after a chase of 14 months!

Last week H. K. was arrested when he tried to leave Morocco in the north, at Sebta (I do not know whether S. was with her or not).

The police took the case before the Prosecutor of Rabat where she was obliged to present S. We are currently negotiating with the attorneys and with the court with a view to enable S. to gradually return to normal life with the least possible damage for H.K. This is not simple, because I have the impression that that the parquet has not fully understood that H.K. is under a psychological pressure. Her behaviour is self-explanatory...

To put it briefly, it is a good news I could see S. who was very happy to see her brother, K. again. This was a moving moment. Her meeting me again was more disaffected, just as I have expected it, but not as bad as I thought it would be. She has been told horror stories about me for 14 months but I do trust that as time goes by and due to her relationship with K., she will once be able to take an own opinion about the situation.

Waiting for the dissolution of marriage and child placement, S. will stay with H. K. while H. K. will have to respect my access and schooling rights.

Unfortunately, the French judgment is not enforceable at the moment in Morocco, as H.K. has still filed an appeal in Paris. I am glad S. is fine, even if she is still being manipulated by H.K. and her environment, but not for a long time any more.

Yours sincerely,

M.”

CONCLUSION:

You would believe this was an unsuccessful mediation, wouldn't you? For us, this was just a procedure which has started and which will ripen with the time and improve.

Mediation made expression and liberation possible. Law did not intend to provide some additional time, despite the request of the two mediators and this has remained an unfinished work, the effect of which will only show up later. This e-mail is a proof thereof; let us take a glance at

the change of tone, the lack of resentment and the acceptance of respecting the law. Without mediation, this awakening and attitude would undoubtedly not have been possible.

The speech, in order to pour out the words filling and captivating the head and the whole body and imprisoning the heart. After that, the flood of words and pains and finally the first hidden, or even shy silence, then the listening is enlarged, expanding until finally being able to listen to itself. This evolution from the speech till the listening allows the reversal of the look: headed towards the other at the peak of the conflict, this truncated look shows me an enemy: the other one! The other one, the cause of my misfortune, my fears, even my faults. Slowly, the calm allows me to listen to this other one and it is exactly this listening of the other that will allow me to redirect my look towards my interior.

This is the way of success which begins with incomprehension and accusation and then slowly the understanding and then the acceptance of the fact that understanding is not resolving and finally finding the solution inside oneself, leaving behind this terrible force which would like to make us believe everything has an explanation, everything is justifiable, everything can be proven.

Love, disenchantment, the illusion of believing that happiness derives from the other party, and thus misfortune only can from him. When the way of speech and listening raises our conscience towards reality which

wants that only we alone can contribute to our happiness and thus to or misfortune too.

Accepting the responsibility of one's own life is an initiation towards one's own light. This is the difficult, sometimes misunderstood way of success of a mediation process. Nothing belongs to us, but we belong to the world.

*“The world and me, we only make up for a single book;
We have to live in order to write it well”*
Robert SABATIER

*“In scientific thinking, the mediation of the object by the subject
always takes the form of a project”*
Gaston BACHELARD

Germany - Baby Claire caught between Aberdeen, Toulouse and Hanover

By: Mary Caroll, MiKK, Germany

Living happily in Aberdeen

Yves and Lara met in Aberdeen, Scotland. Yves came from Toulouse, France. He was studying business administration and went to the UK to improve his English on an Erasmus

scholarship. Lara was from Hanover, Germany. She had passed her final law examination at Göttingen University in Germany and went to Aberdeen to do an LLM before starting her internship as a trainee lawyer (*Referendarin*) at the court of appeal in Celle, Germany. The two fell in love in Aberdeen and after four months Lara was pregnant. They decided together to have their child and rented an apartment where they could live as a family. Moving together to either France or Germany was not an option at the time. Yves decided to complete his MBA studies in Aberdeen and Lara decided to take the time until their child was born to finish her LLM.

In October 2012 their daughter Claire was born. The young family was very happy. Lara stayed at home and cared for their daughter and Yves had plenty of time alongside his studies to develop a close relationship with his daughter. In the summer of 2014 Yves finished his MBA with brilliant results. In September the family travelled to Toulouse in France and with the help of his family Yves found a job, starting in the following November. They looked for a house to rent and signed a lease from December 2014.

Yves and Lara invited her parents from Hanover to spend Christmas with them in the new home in Toulouse. At the end of October they left Aberdeen. Yves' brother helped Yves to take all their belongings to France in a van. At the same time Lara flew with Claire to Hanover to spend a few weeks at her parents' home before joining Yves in Toulouse.

Problems arise and a Hague Convention application is filed

Back in Germany Lara had time to think and reflect on her situation: she realised that she would have much better professional qualifications - not only in Germany but also in France – if she completed her internship and the second state examination in law. Her French was still quite poor. After all, she and Yves communicated with each other in English. The chances of her being able to establish a career as a lawyer in Toulouse seemed quite unlikely. She saw fellow students who were doing very well and, after consulting with her family in Hanover, she decided it would be better for her to stay in Germany, at least until she

finished her internship and the second state examination which she could complete in about two years' time.

Lara phoned Yves to tell him that she wanted to stay in Germany with Claire, at least for the next two years. She had no clear ideas about their proposed marriage. She offered to visit Yves with Claire over Christmas.

Yves was shocked. He accused Lara of wanting to abduct Claire against his will. He contacted the French Central Authority and they recommended initiating proceedings under the 1980 Hague Convention via the German Central Authority to have Claire returned to France. The German Central Authority wrote a letter to Claire requesting that she return voluntarily – otherwise they would file an application with the family court in Celle. In this letter they informed Lara of the possibility of organising mediation as an amicable means of finding a solution. At the same time they sent a letter with similar information to Yves in France.

Yves insisted on going ahead with the court proceedings because that gave him a better sense of security with regard to his daughter and his relationship. The Central Authority proceeded with the application to the family court in Celle. At the same time Yves and Lara agreed that a mediation should be organised for a few days prior to the court hearing. MiKK organised qualified co-mediators for Lara and Yves and the mediation was scheduled for early December on the weekend before the court hearing.

Mediation and Outcome

The mediation took place in Celle. Yves travelled to Germany and was able to spend time with his daughter before, during and after the mediation. Yves and Lara financed the mediation themselves with the help of their parents. After 14 hours of mediation, the couple had worked out an amicable agreement which they put in writing. The agreement addressed their circumstances and the needs of both Lara and Yves. Since neither of the parents wished to continue living in Aberdeen, returning Claire to the country in which she had lived since her birth was not an option.

In the mediation both Lara and Yves confirmed their desire that Claire should have an ongoing, close relationship with both her mother and her father. They also expressed the wish to continue their own relationship. The agreement they made ensured that Claire would spend time with both her parents on a regular basis. They decided that Lara should stay in Germany with Claire for the two years Lara needed to complete her studies, that Lara would travel to Toulouse with Claire during all holidays and that the family would spend Christmas together in Toulouse. Further, Lara and Yves agreed that they would seek counselling together as a couple and would meet for follow-up mediation again in six months' time. They agreed to reassess the situation and their plans before the two years that Lara needed to complete her qualifications had expired.

Résumé – the importance and the future of mediation (who should do what, new initiatives, importance of prevention, promotion of mediation)

By: Dr. Zoltán Németh, Ministry of Justice, Hungary

The importance of mediation implemented in wrongful child abduction cases reaches far beyond itself as mediation in these cases does not only provide a solution in case of an unlawful child abduction, but it also enables the parties to settle the rest of their future relationship.

International child abduction is a growing phenomenon that has particularly traumatic consequences: children are forced to leave their family environment and also, sometimes forcibly, their country of birth or residence.

These children are not only contended for by two parents but also by two different states and two different legal systems.

The free movement of people and increasing migration have progressively implied the formation of a growing number of international couples.

There are many aspects (legal, psychological and sociological) related to situations of separation and divorce in families in which diversity of nationality and residence constitute grounds for conflicts that are very complex to settle.

International family mediation is an area that is assuming ever greater importance, not only a useful tool in cases of serious conflicts that have already arisen and which have led to international child abductions, but also as a method of prevention and a way of safeguarding children against the risks of undergoing the trauma of breaking the bond with one of their parents or, worse, being subjected to abduction.

In fact, despite the existence of international instruments that should facilitate the fastest possible return of the child to the country of habitual residence, without prejudicing the best interests of the child, it is not always easy or quick to apply these tools to the case in question.

Many problems arise from the uncertainty of the applicable law, conflicts of jurisdiction and insufficient knowledge and awareness of the rights and obligations of international couples.

For this reason, on April 15th in Strasbourg, a European-wide information campaign was launched, concerning children contended for by international couples after separation or divorce.

It involves a multimedia campaign focused on two issues: first, child custody and access rights, and, second, child abduction by one parent.

The initiative aims to provide international couples with information on EU legislation, raise awareness about

parental responsibility and prevent international abductions, with the ultimate goal of always protecting the best interests of the child who has the right to maintain on a regular basis a personal relationship and direct contact with both parents, as enshrined the Charter of Fundamental Rights of the European Union.

Wrongful child abduction cases – as elaborated above – deserve particular attention in each Member State of the European Union and it is very important that the application of mediation gains appropriately ground in this field too.

This publication puts forward the following recommendations related to mediation applicable in unlawful child abduction cases intended for future use by experts in this area:

1/ The field of mediation is free of politics and religion, it is independent, recognised and professionally identifiable.

This means the person or entity carrying out mediation should be recognised all over Europe, by implementing a European Charter of Ethics for International Family Mediators to be supervised by either a European association of mediators or by the European Commission.

2/ A special international family mediation training should be made compulsory for someone to get a

licence of „international family mediator” and to carry out such activity

This means the EU would accredit one or several special trainings (for instance, the training of the MiKK, the DEMFI of AMORIFE International or the relevant training of the Central European Mediation Institute which is also under preparation) or create a training at EU level to be specified by each Member State.

3/ The EU shall align regional family law systems

Creating a „European divorce” or a „European adoption procedure” or a “European domestic partnership”, as well as the right of access to an EU-level international family mediation could be examples thereof.

4/ A European green number shall be set up, allowing everyone to collect information on a family law dispute of international dimension, be it a party of the dispute, or an expert proceeding in an international case.

This would mean that the Central Authority of each and every European country would provide technical support for international family law disputes through a single phone number. Central Authorities would only support, but not themselves provide mediation.

5/ Applicants or other persons concerned by international family mediation shall be entitled to a financial support: legal assistance, social assistance, support of insurance companies, health funds.

The regulation at the EU level of fees of mediation proceedings would belong here: creating a table of fees and aligning practices (fee charged per session or per hour, number of hours or sessions undertaken, additional fees to be paid by the clients, interpretation fees, co-mediator fees, paying travel costs etc.)

6/ Recording the child's hearing

Hearing may only take place where audio and video recording is possible.

7/ Communication of international children's law mediators with other experts concerned

This suggests that the mediator's position is equivalent with the position of other experts (attorneys, judges, police officers, detectives etc.). As law constitutes the basis of the work, the international family mediator, respecting ethical standards, may communicate with other experts in order to solve the current case.

8/ The international family mediator signs the settlements together with the persons who reached them and with those who assisted in drafting.

This means that the international family mediator should be entitled to draft public documents. The mediator should guarantee the legal feasibility of settlements, but would not have to provide for the feasibility of settlements concerning duration. Protocols including the settlement could be finalised together with the parties' attorneys.

9/ International family mediation tasks should only be carried out by persons previously accredited for or implementing family mediation

This means we have to differentiate between international commercial or probate mediation on the one hand and family or marital mediation on the other hand. There could be a common training fundament with specialisation later on. It is important to stress that for example an attorney specialised in private international law may not become a mediator without mediation training.

10/ Supervision and/or analysis of professional practice should be compulsory for international family mediators.

This means the mediator should demonstrate he participated at a training of supervision or analysis of professional practice, held by an acknowledged expert.

We, authors of the study sincerely hope that our experience described, the cases we elaborated and the recommendations we made will help the work of mediators acting in unlawful child abduction cases and that this publication also contains information that might be useful for other experts as well.