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établie par le Bureau Permanent

Version provisoire en anglais seulement ;
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FEASIBILITY STUDY ON CROSS-BORDER MEDIATION IN FAMILY MATTERS

drawn up by the Permanent Bureau

Provisional version in English only;
pending translation in French

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Permanent Bureau | *Bureau Permanent*
6, Scheveningseweg 2517 KT The Hague | *La Haye* The Netherlands | *Pays-Bas*
telephone | *téléphone* +31 (70) 363 3303 fax | *télécopieur* +31 (70) 360 4867
e-mail | *courriel* secretariat@hcch.net website | *site internet* http://www.hcch.net

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1. INTRODUCTION

1.1 Mediation in international family matters

In many jurisdictions mediation is an increasingly popular means of dispute resolution in family matters. There are perhaps two main reasons for this: Firstly, it is seen as beneficial in situations where the parties intend to have an ongoing relationship,[1] which is often the case in family disputes, particularly those involving children; and secondly, it is seen as a way to relieve the workload of overburdened courts and tribunals.[2]

In some jurisdictions, notably in Africa and in the Far East, mediation has a long tradition in dispute resolution concerning family matters.[3] Conversely, in many Western jurisdictions mediation is a relatively new phenomenon and may be perceived, particularly in the more litigious cultures, as second-class justice[4] and therefore less preferable to court proceedings. At the outset it is important to stress that mediation is not to be viewed as usurping the role of the courts, but as offering an alternative and sometimes an adjunct to adjudication.

In order to promote the benefits of mediation and to control its development a plethora of statutes, professional codes of conduct and ethical standards is emerging in national systems. While these share many common elements it is true to say that there is great diversity in terms of the scope and structure of mediation in different jurisdictions, perhaps largely reflective of different cultural needs and perceptions, and the different legal systems in which the mediation is operating.[5]

The divergent development of domestic mediation in family matters poses challenges for the development of international mediation, both in terms of legal issues such as confidentiality and enforceability and practical issues such as costs and accommodating different styles and structures of mediation. Add to this the use of different languages and geographical distance, including potentially different time zones, and the challenges increase. Despite these challenges the importance of pursuing mediation in cross-border family matters is recognised in a number of international and regional instruments. For example, two Hague Family Law Conventions specifically refer to the use of mediation in cross-border disputes. The *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in matters of Parental Responsibility and Measures for the Protection of Children* (hereinafter, "the 1996 Hague Convention") a comprehensive instrument dealing with a broad range of parental responsibility and child protection issues contains the following provision at Article 31:

> "*The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to […] facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies*".

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[1] The Council of Europe Recommendation 1639 (2003) Family Mediation and Gender Equality states at point 7 that "[t]he primary aim of mediation is not to reduce congestion of the courts but to repair a breakdown in communication between the parties".

[2] Response of the International Social Service to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 for the Special Commission of 2006, report prepared and compiled by International Social Services Germany, Berlin, August 2006.

[3] See Fiadjoe, A., Alternative Dispute Resolution, London, Sydney, Portland 2004; for background on the system in Japan see: Taniguchi, Y., Mediation in Japan and Mediation's Cross-Cultural Viability. Paper presented at the Biennial IFCAI Conference, 24 October 1997, Geneva, Switzerland. See also J. Eckelaar and S.N. Katz, The Resolution of Family Conflicts – Comparative Legal Perspectives, Butterworths, Toronto (1984).

[4] Hutchinson, A., information taken from transcripts of presentations at the Second Malta Judicial Conference on Cross-Frontier Family Law Issues, March 2006.

[5] For a brief overview of mediation in national systems see chapter 2 and Appendix 3.

Additionally, the *Hague Convention of 13 January 2000 on the International Protection of Adults*, a sister Convention reflecting much of the 1996 Hague Convention in the context of vulnerable adults, contains a similar provision, also at Article 31:

> "*The competent authorities of a Contracting State may encourage, either directly or through other bodies, the use of mediation, conciliation or similar means to achieve agreed solutions for the protection of the person or property of the adult in situations to which the Convention applies*." Article 31

1.2 The Mandate for this Feasibility Study

The Special Commission on General Affairs and Policy of April 2006 made the following recommendation:

> "*The Special Commission invited the Permanent Bureau to prepare a feasibility study on cross-border mediation in family matters, including the possible development of an instrument on the subject. The Special Commission welcomed the research already being carried out in this area by the Permanent Bureau in preparation for the meeting of the Special Commission to review the practical operation of the Child Abduction Convention of 1980 and the implementation of the International Child Protection Convention of 1996, to be held in October / November 2006...*"[6]

On the basis of this Recommendation the Permanent Bureau has undertaken this study, the purpose of which is to provide relevant information to assist States in determining how the Hague Conference might continue to work in this field. This study provides an overview of the development of mediation in family matters in national systems and the current status of mediation in international family matters. It also discusses some of the legal and practical issues surrounding the development of international mediation in family matters, and finally concludes with some suggestions for possible future work for the Hague Conference in this field. The research on the use of mediation in the specific context of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter, "the 1980 Hague Convention"), which was presented as Preliminary Document No 5 for the attention of the Special Commission on that Convention held in October / November 2006, is attached as Annex 1.[7]

1.3 Terminology

Mediation does not have a single established definition and can mean different things in different jurisdictions and even different things within the same jurisdiction. This makes any analysis difficult and raises a note of caution when reviewing sources relating to mediation in different jurisdictions. For the purposes of this study, the term mediation is used to refer to a process in which a neutral third party (or third parties) seeks to assist the parties to reach their own agreement, whatever this procedure may be called in the jurisdiction. The aim of mediation and one of the fundamental principles recognised across the world, is to empower the parties to reach their own decisions about their own affairs without undue interference from the State.[8] Mediation is short-term and is focussed on resolving specific defined issues and can thus be differentiated from longer-term non-specific processes such as counselling. The above definition of mediation also distinguishes it from other forms of alternative dispute resolution such as arbitration where the arbitrator makes the decision to resolve the dispute and the parties are legally bound by the decision made.

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[6] Recommendation 3 of the Special Commission of April 2006.

[7] See Annex 1, S. Vigers "Note on the Development of Mediation, Conciliation and Similar Means to Facilitate Agreed Solutions in Transfrontier Family Disputes Concerning Children Especially in the Context of the Hague Convention of 1980", Preliminary Document No 5 for the attention of the Special Commission of October / November 2006. Also available at: < www.hcch.net >, under < Conventions >, < Convention 28 > and Practical operation documents >.

[8] Parkinson, L., Family Mediation in Europe – divided or united? (updated paper given at European Masters in Mediation Seminar), Institut Universitaire Kurt Boesch, Sion, Switzerland, March 2003, at p. 2.

2. COMPARATIVE OVERVIEW OF MEDIATION IN FAMILY MATTERS WITHIN NATIONAL SYSTEMS

2.1 Introduction

This chapter seeks to summarise the current status of mediation in family matters in national systems, including, the scope and the structure of mediation. The chapter also discusses how different jurisdictions deal with some of the legal and practical issues relevant to mediation including confidentiality; enforceability and enforcement of mediated agreements; the costs associated with mediation; the training, qualification and registration of mediators; and the role of the child in mediation.

2.2 Scope of mediation

The term "family matters" covers a broad range of disputes both purely private matters and those involving public authorities. Family matters include, *inter alia*, child custody or contact, the care of elderly or infirm relatives, maintenance of children or ex-partners, adoption, and consequences of divorce or separation such as financial and property division. The degree to which mediation is available in different jurisdictions in relation to each type of dispute which may fall under the umbrella of "family matters", is beyond the scope of this paper.

Many jurisdictions favour the use of mediation over court proceedings for disputes involving custody and contact of children. It is thought that where parents reach agreements regarding ongoing contact arrangements and are able to communicate effectively these arrangements are likely to be more successful than those imposed by a court. While parents are generally encouraged to make agreements, in many jurisdictions certain matters in family law may not be entirely subject to the disposition of the parties. For example, in some countries, in order to protect the child's interests, agreements concerning custody and contact have to be approved by a court. [9] Similarly, in some States, an agreement, for example on maintenance, has to fulfil certain legal requirements.[10] In addition to organising arrangements in relation to custody and contact, mediation in some States has other stated goals, such as improving parental communication,[11] or achieving balance in family life.[12]

2.3 Availability of mediation

Broadly speaking there are four different approaches to the availability of mediation in family matters in national systems: 1) Mediation is mandatory before[13] court proceedings can commence;[14] 2) attendance at a mediation information meeting is mandatory but there is no obligation to actually pursue mediation;[15] 3) mediation is voluntary and optional and, while courts or lawyers may be obligated to ensure the parties are aware of mediation services, it is up to the parties to decide whether to use these services or not;[16] and 4) mediation is not generally available.[17]

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[9] For example, in Germany.

[10] For example: the Finnish Child Maintenance Act requires that sufficient provision is made – according to § 7 and 8 of the Act an agreement on child maintenance has to be approved by the welfare committee, in Germany according to § 1614 of the Civil Code (BGB) it is not possible to renounce child maintenance for the future.

[11] For example, Sweden.

[12] For example, Finland.

[13] This includes instances where on initiation of proceedings the court stays those proceedings in order that mediation can take place and the court will only recommence proceedings once mediation has been attempted.

[14] In relation to certain family matters in, *inter alia*: Argentina, Australia, Japan, Malta, Norway.

[15] In relation to certain family matters in, *inter alia*: Bulgaria, France, UK – England and Wales.

[16] In relation to certain family matters in, *inter alia*: Austria, Canada, China, Ireland.

[17] In relation to certain family matters in, *inter alia*: Brazil, Czech Republic, UK – Gibraltar.

In many jurisdictions where court proceedings are under way, the court has an ongoing obligation to encourage the parties to reach an amicable settlement.[18] This obligation takes different forms in different jurisdictions and in some jurisdictions the court may adjourn proceedings at any point for mediation to take place if it appears to the court that mediation may be effective,[19] or in some circumstances the court can order the parties involved in litigation to attend mediation.[20]

Within a jurisdiction the availability of mediation may vary between these basic approaches depending on the particular subject-matter of the dispute in issue. For example mediation may be mandatory in family matters involving children, but not available at all to assist with the division of property on divorce.

2.4 Structure of Mediation

The structure of mediation in different jurisdictions can perhaps be categorised under two main headings: court-annexed mediation and out-of-court mediation. The latter can be further sub-categorised into mediation provided by State run or State approved bodies and mediation provided by individuals or organisations without State control.

2.4.1 Court-annexed mediation

Court-annexed / court-based mediation schemes have been introduced in many family courts.[21] There are several advantages to this type of structure. In some jurisdictions families in dispute may turn up to court having not pursued mediation, perhaps because they were unaware that mediation was available. A court-annexed scheme is then on hand to offer the disputants an opportunity to mediate. Alternatively, in jurisdictions where mediation is mandatory or attendance at a mediation meeting is obligatory before pursuing court proceedings, having a court-annexed mediation scheme allows easy access to this mediation. Another advantage of this type of scheme is that the court can dictate more easily how long it is prepared to delay proceedings for mediation to be attempted, which is perhaps particularly important where there is a need to act expeditiously for example where child protection is an issue. Additionally, court-annexed mediation may be subject to the same or similar rules as court proceedings, meaning

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[18] In custody and contact, *inter alia*: Austria, Germany. In divorce or separation, *inter alia*: Canada, Iceland.

[19] In custody and contact, *inter alia*: Ireland. In divorce or separation, *inter alia*: Canada, Germany.

[20] In custody and contact, *inter alia*: Canada – Quebec, South Africa. In divorce or separation, *inter alia*: France, Portugal.

[21] For example:

England and Wales - the England/Wales Court of Appeal runs an alternative dispute resolution scheme, see Appendix 1, p. 3 of Prel. Doc. No 5 for the attention of the Special Commission of October / November 2006, *supra* Note 7;

France –court-annexed mediation is regulated since 1996 in the New Code of Civil Procedure (NCPC) in the Articles 131-1 to 131-15;

Japan – in disputes over parental rights of separating or divorcing parents the process of *Chotei*, a court mediation process, is compulsory, see Minamikata, S., Resolution of disputes over parental rights and duties in a marital dissolution case in Japan: A nonlitigious Approach in *Chotei* (Family Court Mediation), 39 Fam. L. Q. 489 (2005-2006);

the USA – many District Courts in the US offer court-connected mediation, see Kuhner, T., Court-connected mediation compared: The cases of Argentina and the United States, 11 ILSA J. Int. Comp. L. 519 (2004-2005);

Germany – court-connected mediation is for instance available by some courts in Lower Saxony (Lower Saxony established a project for court-based mediation in 2002, the model-project ended in 2005 but many courts in Lower Saxony still offer court-based mediation), see < http://www.mediation-in-niedersachsen.com/9220.html > (as per 22 March 2007) (English version); furthermore court-connected mediation schemes are running for instance in Bavaria, Baden-Württemberg, Berlin, Hamburg, Hessen, Mecklenburg-Vorpommern, Nordrhein-Westfalen and Rheinland-Pfalz, the latter offers court-connected mediation specifically in family law matters, see Trossen/Käppele, Gerichts-integrierte Mediation, ZRP 2006, p. 97, < http://www.centrale-fuer-mediation.de/index_gerichtsnahe_mediation.de > (as per 22 March 2007);

Canada – inter alia in Ontario and Saskatchewan, see MacFarlane/Keet, Civil Justice Reform and Madatory Civil Mediation in Saskatchewan, 42 Alta. L. Rev. 677 (2004-2005);

the Netherlands – court-connected meditation has been introduced by two large national mediation pilot schemes starting in 2000, see Niemeijer/Pel, Court-based mediation in the Netherlands, Evaluations and Future Expectations, 110 Penn St. L. Rev. 345 (2005-2006).

that rules relating to, i*nter alia*, confidentiality, may be clearer and better defined than in out-of-court systems of mediation.

Where mediation schemes are annexed to courts it is also likely that there is a certain amount of control over who can act as a mediator. Would-be mediators may need to attain particular qualifications, exhibit necessary competences, and be registered to mediate in such schemes. Mediators may also need to adhere to professional codes of conduct or ethical standards to participate in court-annexed schemes.[22] This can ensure not only a level of professionalism amongst mediators, but also a standard against which complaints can be made by disputants if a mediator is deemed to have acted inappropriately. In some court-annexed schemes it is the judge himself who acts as the mediator. If mediation fails and the case ends up in court the judge who acted as mediator may choose not to sit as a judge, keeping the two roles separate, or he may choose to adjudicate on the same case after mediation has failed.[23] Where a judge acts as a mediator and then a judge in the same case, this could raise difficulties in relation to the principle of the confidentiality of mediation and the inadmissibility of documents.[24]

Parties in mediation are usually encouraged to maintain legal representation to advise on any agreement before they commit to it. Where the parties have already initiated a court proceeding they are more likely to have already appointed lawyers, and if not, being involved in mediation annexed to the court might facilitate the appointment of a legal representative. Additionally, where legal aid is available for family law cases, it may equally be available for mediation where it is linked to a family court.[25] Conversely where mediation is seen as independent to the court system, legal aid boards are not usually able to offer public funding, (however, public funding for mediation may be available through another body).

An agreement reached in court-annexed mediation is often put before the court to be made into a consent order. A consent order, as well as carrying a certain level of authority which might aid compliance, is enforceable as a court order where voluntary compliance fails.[26]

2.4.2 Out-of-court mediation

Out-of-court mediation schemes also offer a number of advantages. Disputants who desire to avoid the court system altogether can proceed to mediation without the need to seise the court. This is also advantageous in reducing the number of cases before the courts, and may reduce the costs involved in resolving the dispute. However, following mediation parties may wish to take their agreement to court in order that the court can formulate it into a consent order to ensure enforceability. The parties are also likely to be advised to appoint lawyers to advise on the agreement and therefore, even mediation conducted out-of-court is usually closely connected to the court system.

Perhaps the main advantage of out-of-court mediation is that it may be perceived by the parties as being more independent and more neutral. This may be particularly important where one or both disputants have a negative view of courts, perhaps due to previous difficult litigation.

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[22] See *infra* at 2.7 on Training, qualifications and registration of mediators.

[23] Both of these scenarios are possible, for example, in New Zealand.

[24] See *infra* at 2.4 on Confidentiality.

[25] See *infra* at 2.6.2 on Publicly funded mediation.

[26] See *infra* at 2.5 on Enforcement and enforceability.

2.4.2.1 Out-of-court mediation (State regulated)

Some out-of-court mediation schemes are to a greater or lesser extent regulated by the State.[27] This may concern the training, qualifications and competence required of mediators, including adherence to professional codes of conduct or ethical standards, and a monitored complaints procedure. Equally, the style and methodologies of mediation may be regulated to an extent by the State including guidelines on how to mediate in particular situations. Having this type of public control over the mediation system might also mean that public funding is more readily available to disputants.

2.4.2.2 Out-of-court mediation (private)

Other out-of-court mediation schemes are run purely privately. The main advantage of such schemes is also their perceived neutrality and independence. However, the main disadvantage is the fact that it is difficult for disputants to be sure of the quality of either the scheme itself or the proposed mediator(s). Some private organisations may hold to levels of training, codes of conduct and ethical standards at least equal to those in the public sector and may offer a very high standard of mediation and mediators, and an adequate complaints procedure where necessary. Other private organisations may require no formal training or competency from those wishing to act as mediators and may provide little or no recourse for parties who are dissatisfied with the quality of the mediation they have received. In this regard quality control over mediators may be harder to establish in the private sector.

Privately run mediation schemes may be able to be more flexible in terms of the services they provide and disputants can therefore opt for mediation which is sensitive to their own circumstances, backgrounds or moral values. For example mediation providers may specialise in working with disputants from certain ethnic communities or adherents to various religions, and mediation conducted under these different frameworks may be more beneficial to the particular individuals involved.[28]

2.5 Confidentiality

It is a generally accepted principle that the contents of mediation, oral and written, should remain confidential in order that both the mediators and the parties have confidence to participate fully in the mediation. While this principle is fairly universal the scope of confidentiality rules and the way in which confidentiality rules are elaborated differs from one jurisdiction to another. In some jurisdictions confidentiality rules are laid down by statute and in others they are the subject of voluntary codes of conduct. In many jurisdictions, confidentiality rules are considered so important that they are both statutory and regulated by codes of conduct and ethical standards. Confidentiality rules usually apply to both communication and documentation and may be different in relation to the particular person or the particular document. The following is a brief overview of some issues relevant to confidentiality in mediation.

2.5.1 Mediator to parties

In many jurisdictions mediators are obliged to discuss confidentiality issues as soon as practicable with the parties. This may include making parties and their representatives aware of laws and regulations on confidentiality and non-disclosure and any exceptions

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[27] For example:

France – in 2003 the Diploma for mediators was created, which aims to install a certain state control in the field of mediation, see "Décret du 2 décembre 2003 portant du création du diplôme d'Etat de médiateur familial"; Austria – in 2003 a law regulation mediation in civil law matters was introduced accompanied by a directive governing training of mediators in 2004, see "Bundesgesetz über Mediation in Zivilrechtssachen" (Zivilrechts-Mediations-Gesetz – ZivMediatG), BGBl. I Nr. 29/2003, "Verordnung des Bundesministers für Justiz über die Ausbildung zum eingetragenen Mediator" (Zivilrechts-Mediations-Ausbildungsverordnung – ZivMediat-AV), BGBl. II Nr. 47/2004.

[28] For example, there are some mediation schemes operating in North America for indigenous peoples, and in some States there are specific schemes for ethnic minority groups living within the State.

to these rules.[29] Thus the emphasis is usually on the mediator to ensure that the parties are aware of confidentiality requirements at an early stage in mediation.

It may be the case, depending on the methodology of mediation used,[30] that a mediator meets individually with a party at some point during the course of the mediation. In such circumstances the mediator can usually share information obtained from one party with another party unless there has been an agreement not to disclose the particular information.

2.5.2 Mediator to third parties

Usually mediation is conducted privately between the parties and the mediators and generally information received from a party cannot be disclosed to a third party.[31] There are various exceptions to this general rule including the following:[32] 1) where all parties agree that information can be shared; 2) where it is required by law; 3) where it is required for the purposes of enforcing an agreement; 4) where it is required for the purposes of implementing an agreement; 5) where it is required for the mediator to be able to respond to a claim of misconduct; and 6) where it is necessary to prevent harm or abuse.

2.5.3 Inadmissibility of mediation documents and communications

Mediation documents and communications are privileged in many jurisdictions. As a general rule, mediators and parties cannot be compelled by a court to disclose documents or evidence of communications. There are a number of exceptions to this rule including[33]: 1) where there is consent in writing; 2) where the communication or document is already public; 3) where disclosure is required by law; 4) where disclosure is necessary to prevent manifest injustice or serious harm such as abuse or neglect; 5) where the communication or documentation relates to the commission of a criminal offence; 6) where disclosure is required for the mediator to be able to respond to a claim of misconduct; and 7) where disclosure is necessary for the purpose of establishing the validity of an agreement, the enforceability of an agreement or for the implementation of an agreement. Courts may convene *in camera* to decide whether certain documents or communications are admissible in court. In some situations there may be a requirement that documents be destroyed after mediation and that meetings are not recorded.[34]

2.5.4 Mediators as witnesses

Mediators generally cannot be compelled to appear as witnesses in court and may have a duty to seek to ensure that mediation documents and communications remain confidential. While mediators in general cannot be required to report on the mediation they may be asked by the court to state whether the parties attended the mediation and whether an agreement was reached. Usually such reporting is confined to these facts and other things even as basic as the conduct and demeanour of the parties during mediation has to remain confidential.[35] Alternatively, in some jurisdictions, notably in the United States, known as “reporting jurisdictions” mediators are invited to testify before the

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[29] See for example, the Oregon Mediation Association Core Standards of Mediation Practice, Revised 23 April 2005, Section IV, Confidentiality.

[30] For more information on methodologies of mediation see Annex 1 at Section 4.

[31] Conversely, in Japan mediators often work in committees and a mediation committee may allow an interested third party to actually participate in the mediation.

[32] See for example, ACT, Australia, s 10(2) of the Mediation Act 1997 as amended 17 September 2002. Nova Scotia, Canada, s 11(2) of the Commercial Mediation Act 2005, c. 36, s. 1.

[33] See for example, Nova Scotia, Canada, s 12(2) of the Commercial Mediation Act. 2005, c. 36, s. 1. Malta, s 27 Mediation Act, ACT XVI of 21 December 2004.

[34] See for example, the International Trademark Association Mediation Rules– South American Version, 2005, at Article 11, Confidentiality.

[35] See for example, the Model Standards of Conduct for Mediators 2005 adopted by the American Arbitration Association, the American Bar Association and the Association for Conflict Resolution. Standard V Confidentiality at para. A(2).

judge and to make a recommendation as to how the judge should rule, in the event that the parties do not reach a complete agreement.

In some jurisdictions, mediators are afforded the same protection from defamation and the same protections and immunities which are afforded to a judge.[36] In another jurisdiction, mediators are only allowed to decline to answer questions put by a court if they belong to a professional group which is accorded a comprehensive right to decline to answer such as lawyers or notaries public.[37]

2.5.5 Education, research and performance monitoring

It is important that mediation models and structures are researched and reviewed to ensure their effectiveness and to recognise areas in need of improvement. It is generally agreed that researchers should be permitted access to individual case files, however, identifying factors will usually need to be omitted to maintain the privacy of the parties and the mediators and to adhere to rules on confidentiality.[38]

2.6 Enforcement and enforceability

It is important to stress that while the enforceability and enforcement of mediated settlements is the subject of much regulation and academic debate, in practice it is generally felt that as mediated agreements are reached voluntarily they are usually complied with and therefore enforcement is not an issue. Additionally, in many jurisdictions it is a policy of the courts to favour settlements and agreements over litigation.[39] Therefore, courts usually seek to do all in their power to ensure that agreements reached are enforceable and where called upon to enforce an agreement courts are likely to use all appropriate mechanisms to seek to ensure enforcement. On the other hand, sometimes parties in mediation do not wish to be bound by the mediated agreement. A reason for opting for mediation may have been a desire not to formalise the situation and not to be bound by any agreement reached. Rather than enforcing a mediated agreement in such situations a court may seek to honour the intent of the parties, provided such intent has been clearly stated. Additionally, where mediated agreements are intended to have an ongoing effect, such as the regulation of contact between a child and a non-resident parent, the degree of compliance may weaken as time goes by due to new sources of conflict or changes in circumstances. In such situations it may not be a matter of seeking enforcement of an old agreement which has clearly become unworkable, but rather re-negotiating the areas of difficulty or conflict through further mediation, recognising that even a good mediated settlement may have a natural shelf-life and need amendment with the passing of time.

2.6.1 Methods of enforcement

A mediated agreement may be a simple contract and enforced under the normal rules of contract law, perhaps with additional statutory provisions relating to mediated agreements. A mediated agreement may in some jurisdictions be embodied in a deed and enforced as such.[40] Additionally, a mediated agreement may in certain countries be drawn up as an authentic instrument making it enforceable under normal rules for authentic instruments.

Many mediated agreements are put before courts for approval, to be entered on the record of the court and / or to be made into some form of court order, such as a consent order, which is then enforceable as any other judgment.

2.6.2 Subject-matter of mediation

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[36] See for example, ACT, Australia, s 12 of the Mediation Act 1997 as amended 17 September 2002.

[37] For example, in Germany.

[38] See for example, Colorado Model Standards of Conduct for Mediators, Section IV Confidentiality at Part F.

[39] For example, in Texas where it is the express policy of the Texas Alternative Dispute Resolution Act, TEX. Civ. PRAC. & REM. CODE ANN. §§ 154.001-154.073 (Vernon Supp. 2000).

[40] This is possible in several common law jurisdictions. See also the New Hampshire Adoption Act.

The subject-matter of the mediated agreement may affect its enforceability. If the mediated agreement does not contain a significant issue or does not deal with the issue that was brought to mediation it may be unenforceable. Additionally, if the mediated agreement attempts to modify an existing temporary or final court order it may need itself to be registered as an order before it can take effect over existing court orders.[41] In some jurisdictions only the court can make decisions in certain areas and therefore any agreement may need to first be approved by a court.[42] For example, a court may refuse a mediated agreement on maintenance if the proposed award is not considered to be sufficient.[43]

2.6.3 Balancing confidentiality and enforcement

As mediated agreements tend to stay outside of the court process it is usually when a court has been asked to declare an agreement enforceable, or to enforce an agreement that the court must balance the needs of enforcement with the rules on confidentiality. This balance of maintaining confidentiality and ensuring enforceability can be a difficult one. For example, where an agreement can be considered as a contract a party seeking to oppose enforcement could raise doubts as to the validity of the contract, or rely upon normal contractual defences such as fraud, unconscionability and duress to defeat its enforcement. However where mediation communications and documentations are privileged it may be difficult if not impossible to prove either the validity of the contract or the validity of the defences raised. In some circumstances privileges may be waived if necessary to prove the validity of an agreement or to enforce a mediated agreement. Some courts are reluctant to enforce oral settlement agreements for lack of certainty and often mediated agreements will need to be written and signed in order to be enforceable. The balance of confidentiality provisions and enforcement is an area which poses a particular challenge at the international level.

2.7 Costs associated with mediation

Generally, mediators are required to inform parties at an early stage in discussion about the fees and costs associated with the mediation. It is often recommended that such information is put in writing before the mediation proper begins. Costs include travel to and from the mediation venue, including if necessary accommodation and subsistence. Costs also include the mediator's fees and there may be costs associated with formalising the agreement, for example turning it into a consent order, and costs associated with retaining a legal representative to advise on the agreement.

2.7.1 Borne by parties

In general the costs of mediation are borne by the parties and may be divided equally or into different proportions as decided by a court or by the individuals.

2.7.2 Publicly funded mediation

Some mediation is publicly funded and where mediation is annexed to court proceedings it may be funded through legal aid if the party is eligible.[44] In the United States the National Standards for Court-Connected Mediation Programs[45] suggest that where parties are required to participate in mediation, the costs of mediation should be publicly funded unless in the view of the court the case is an exceptional one.[46] It is further suggested

[41] For example, in Germany to alter joint parental custody.

[42] For example, in Germany agreements on contact rights cannot be legally binding and require implementation by a court.

[43] For example, Finnish Child Maintenance Act.

[44] In Germany where the court orders mediation to be held by a commissioned or requested judge in a court-annexed scheme, the costs are considered as court costs and are therefore assumed by the State if the party is being granted legal aid for the court procedure. Additionally, in England & Wales where parents are referred to mediation under the Court of Appeal's ADR Scheme, the Legal Services Commission will cover the cost for publicly funded litigants.

[45] National Standards for Court-Connected Mediation Programs, developed by the Center for Dispute Settlement, Washington, D.C., and the Institute of Judicial Administration, New York City.

[46] See *ibid.* at Section 13(1)(b).

that in allocating public funds to mediation, a court may give priority for funding to certain types of cases, such as family and minor criminal matters.[47]

Anyone seeking public funding for court proceedings in England and Wales must first be referred to mediation.[48] To facilitate this, the Legal Services Commission provides public funding to approved services that employ accredited mediators. The Commission undertakes regular audits of publicly funded family mediation services and reviews mediation records and files.

2.7.3 Reasonable fees

Mediators are often required by law or by codes of conduct to which they have adhered, to charge reasonable fees taking into account the type and complexity of the subject matter, the expected time the mediation will take and the relative expertise of the mediator.[49] Mediators usually charge an hourly or daily rate. In most codes of conduct it is stressed that the fees charged by a mediator should not be contingent on the outcome of the mediation.[50] It is also usually stated in codes of conduct that parties should not be awarded commission or rebates on referral of new parties for mediation.[51]

2.8 Training, qualifications and registration of mediators

In most jurisdictions some kind of formal mediation training is encouraged or required before a person can act as a mediator under a recognised mediation scheme. On the other hand, the fact that mediation is not seen as a profession in its own right means that in most jurisdictions any individual can set himself up privately as a mediator without any formal training.

There are perhaps three main issues relevant to training in national systems which merit discussion: 1) Persons who may become mediators; 2) the type of training; 3) registration as a mediator.

2.8.1 Persons who may become mediators

Many people wishing to become mediators come from legal or psycho-social backgrounds. In many jurisdictions the training is the same regardless of the background of the would-be mediator and the role on completion of training is the same, although different mediators may bring different expertise depending on their backgrounds. However, in some States, some lawyers train as lawyer-mediators, which may have a slightly different role to a non-lawyer mediator. In some jurisdictions judges can also act as mediators. In Japan mediation is usually undertaken by a committee comprising a judge and two lay-mediators. Usually these lay mediators are lawyers, housewives or retired persons.

In many jurisdictions the personal qualities of a person wanting to become a mediator are as important as the professional training. As a result certain persons may be prohibited from becoming mediators such as a person with a criminal record or a person who is bankrupt.[52] Some statutes or organisations state that a person who wishes to become a mediator should have a reputation for impartiality and integrity and have a

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[47] See *Ibid.* at Section 13(2).

[48] See Family Law Act 1996 section 29 and Access to Justice Act 1999.

[49] See for example, the Oregon Mediation Association Core Standards of Mediation Practice, Revised 23 April 2005 at VII Fees.

[50] See for example, the Model Standards of Conduct for Mediators 2005 adopted by the American Arbitration Association, the American Bar Association and the Association for Conflict Resolution. Standard VIII Fees and Other Charges, at para. B(1).

[51] See for example, Model Standards of Practice for Family and Divorce Mediation, drawn up by the Association of Family and Conciliation Courts (AFCC) August 2000, Standard V, at para. D.

[52] See for example, the Arbitration Law of the Republic of China, as amended on 24 June 1998 and effective on 24 December 1998, Articles 8, 54, and 56 as amended and effective on 10 July 2002, at Article 7; see for France Articles 131-5 of the New Code of Civil Procedure (NCPC) that states certain requirements as to the person of a mediator participating in a court-annexed mediation..

personal aptitude including personal qualities, skills, capacity and ethical behaviour. Indeed in some cultures the role of mediator is seen as a position of honour and mediators must therefore be of a certain age and civil status.[53]

2.8.2 The type of training

In some jurisdictions training is organised and monitored by the State[54], while in others mediation organisations have developed their own training packages.[55] In some jurisdictions even where there are statutory or professional rules relating to mediation training, mediation organisations may retain the right to register as mediators other persons who have not gone through the usual training.

Training usually comprises an academic and a practical element – usually involving observing mediation and acting as a mediator under supervision. In some jurisdictions mediator training is very general and allows the candidate to mediate in a variety of fields. To train as a family mediator it is often necessary to do further specialist training in addition to general mediation training. In some jurisdictions there is also further training available to those wishing to work in international family mediation.[56]

In order to be registered as a mediator in some jurisdictions or with some organisations, it is necessary not just to undergo initial training to reach qualification, but also to participate in continued professional development.[57] In some jurisdictions there is also an advanced qualification for experienced mediators to continue their development[58] and to allow prospective parties to choose a more experienced mediator if they so wish. Sometimes depending on the complexity of the dispute parties may wish to engage a specialist mediator or two co-mediators one specialised in the subject-matter and one specialised in the mediation process. In some jurisdictions mediators are required to decline to mediate if they do not have the necessary skills to mediate the specific dispute.[59] Alternatively, they might be required to request a co-mediator with expertise in the subject matter or to seek assistance from a technical expert. In some jurisdictions it is required that information on the relevant training, qualifications and experience of a proposed mediator is made available to parties.[60] In other jurisdictions, mediators are not required to disclose their training and experience unless specifically asked by a party to mediation.[61]

2.8.3 Registration as a mediator

In many jurisdictions family mediators are required to join professional mediation organisations or be registered as a mediator.[62] This usually requires appropriate training and qualification, adherence to the organisation's codes of conduct and ethical standards,

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[53] For example, in Japan mediators must be between 40 and 70 years of age.

[54] For example:

France – since 2003 training for mediators in family law matters is regulated, see “Décret du 2 decémbre 2003 portant du création du diplôme d’Etat de médiateur familial” and “Arrêté du 12 février 2004 relatif au diplôme d’Etat de médiateur familial”;

Austria – in 2004 training for mediators in civil law matters is regulate, see “Verordnung des Bundesministers für Justiz über die Ausbildung zum eingetragenen Mediator” (Zivilrechts-Mediations-Ausbildungsverordnung – ZivMediat-AV), BGBl. II Nr. 47/2004.

[55] See for example, Germany, Switzerland and England.

[56] For example, in France training as an international mediator can be followed through a university masters degree or at seminars for mediators working in the international field.

[57] See for example, the UK College of Family Mediators - Code of Practice - effective from January 2000, at Section 5.

[58] For example, in the United Kingdom.

[59] See for example, the Colorado Model Standards of Conduct for Mediators, III Competence, at para. B.

[60] See for example, the Mediation Act, 2004 (Trinidad and Tobago) First Schedule - Code of Ethics at 5(3).

[61] See for example, the United States Uniform Mediation Act 2001 (Last Revised or Amended in 2003), drafted by the National Conference of Commissioners on Uniform State Laws, at Section 9(c).

[62] For example, in Austria, the registration of mediators in family law matters has been introduced by the Mediation Act in 2003, see “Bundesgesetz über Mediation in Zivilrechtssachen” (Zivilrechts-Mediations-Gesetz – ZivMediatG), BGBl. I Nr 29/2003.

commitment to ongoing professional development and payment of a fee. Mediation organisations may organise and run the training that is required to qualify as a mediator in their organisation, or they may accredit training programmes organised by other bodies. In the United Kingdom registered family mediators are members of the UK College of Family Mediators and there are five training providers whose training is recognised by this organisation. Being a member of a mediation organisation is often seen to legitimate the qualification of the mediator in the eyes of the parties and to ensure a certain standard of professionalism.

In some jurisdictions legislation has established national mediation Boards or Centres[63] responsible for monitoring and assessing the development of mediation and mediation training including establishing and ensuring compliance with codes of conduct. These Boards or Centres may also be given authority to disqualify certain persons from becoming mediators or from continuing as mediators in certain circumstances. Mediation Boards or Centres may also be required to deal with complaints procedures and discipline where necessary.

2.9 Involvement of children

In some jurisdictions a child might be a participant in mediation.[64] In such cases mediators may have to undergo special training in order to mediate with children. Generally the parents and the mediator must agree to the participation of the child, and the child must be of a particular age or level of maturity. However, in Denmark, in cases concerning contact and parental authority the parties must be offered counselling, which includes mediation, and this offer is also directed towards the child who may accept the offer even if the parents refuse.[65] Some international instruments also provide that a child has the right to be heard in matters concerning him, such as the United Nations Convention on the Rights of the Child.[66] Additionally, Article 11(2) of the Brussels II *bis* Regulation provides that if the child is of a suitable age and maturity he / she should be given the opportunity to be heard in proceedings under Article 12 and 13 of the 1980 Hague Convention. It has been suggested that mediators should ensure the child recognises that his or her opinions are important but that the issues in dispute must ultimately be decided by the parents and the child should not be made to feel responsible for the adult's decisions.[67] The involvement of children in mediation also raises questions as to the legal representation which should be accorded to such children.

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[63] For example, the Mediation Act, ACT XVI of 21 December 2004 (Malta) and the Mediation Act, 2004 (Trinidad and Tobago).

[64] For example:

New Zealand, see The Roy McKenzie Centre for the Study of Families < http://www.vuw.ac.nz/mckenzie-centre/news/pastevents/involvement.aspx > (as per 22 March 2007);

the UK, see, for instance, the Policy and Practice Guidelines for Children, Young People and Family Mediation of the UK College of Family Mediators < http://www.ukcfm.co.uk/uploads/documents/childrens%20policy%200902.doc > (as per 22 March 2007) ; Germany, see Diez/Krabbe/Thomsen, Familien-Mediation und Kinder, 2nd ed., Bundesanzeiger-Verlag, Köln 2005.

[65] Article 28(1) of the Danish Act on Parental Authority and Contact.

[66] Convention on the Rights of the Child. Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989. Article 12: "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

[67] The German Federal Ministry of Justice in response to the Mediation Note sent out to gather information on mediation in the context of the 1980 and 1996 Hague Conventions.

3. CURRENT STATUS OF INTERNATIONAL MEDIATION IN FAMILY MATTERS

3.1 International mediation in family matters

While many jurisdictions have legislated upon or regulated issues relating to confidentiality, enforcement, costs, training and the structure and scope of mediation within their own systems, the question of how these issues might be tackled in international mediation remains largely unanswered.[68] As a result there are very few examples of international mediation in family matters. The closest many families come to assistance with out-of-court dispute resolution across borders is through the good offices of consular staff working in embassies in foreign States.

Before looking at those examples of international family mediation that are available it is important to bear in mind that international mediation in family matters may be defined in two distinct ways. Firstly, it may be used to refer to mediation involving parties who live in different jurisdictions and want their mediated agreement to be recognised and enforced in both jurisdictions, but who participate in mediation within the national system in one of the jurisdictions. Secondly, international mediation may refer to mediation involving parties who live in different jurisdictions and want their mediated agreement to be recognised and enforced in both jurisdictions, and who participate in mediation not under the laws or regulations of either State involved but under a specially constructed international system. This chapter will consider international mediation in family matters under both these definitions.

3.1.1 The 1980 Hague Convention

Mediation is fast developing as an important mechanism for dealing with applications under the 1980 Hague Convention. In this regard research was carried out by the Permanent Bureau on various mediation projects in the context of this Convention. As this research is available at Appendix 1 to this report, the following is only a very brief overview. Interestingly, even in this very narrow field, under the tight framework and time limits of an international instrument, there are distinct differences in both the philosophy and the methodology of the mediation used.

3.1.1.1 Mediation within a national system

Some mediation in international child abduction cases is provided within the jurisdiction to which the child has been abducted as part of the procedure for applying the Convention, and therefore the mediation follows the laws and procedures of that jurisdiction. There will inevitably be some slight modifications to take account of the international nature of the case and the restrictions placed on the procedure by the international Convention. In relation to the 1980 Hague Convention the time frame of the Convention necessitates that mediation might have to occur in a more contracted time period than would be the case for purely domestic mediation, and the mediators may require specialist training. Other differences include practicalities such as costs, which may be greater where one parent is based in another State and may need to travel to the State where the child is to participate in the mediation, the possible need for interpreters if parties both wish to communicate in their mother-tongue, and utilising mechanisms to seek to ensure that any agreement made can be recognised and enforced in the other State.

[68] Some of the legal and practical issues surrounding international mediation in family matters are discussed *infra* at chapters 4 and 5.

An example of this type of mediation is the pilot project run by Reunite, a leading non-governmental organisation based in the United Kingdom. Other examples of this type of mediation can be found in Appendix 1. Under the Reunite scheme where a child was abducted to or retained in England or Wales, mediation took place in that jurisdiction as part of the procedure for handling the Convention application. For the purposes of the mediation the left-behind parent was brought over to the United Kingdom, where possible, to participate in the mediation directly. Reunite received a grant to cover the travel, accommodation and subsistence costs of the parents and the mediators. Before mediation began the court was seised of the case and adjourned proceedings for a limited period to allow mediation to take place. To fit within the tight framework of the Convention the mediation was contracted taking the form of three sessions of up to three hours over a two-day period. The mediators participating in this pilot project where from the United Kingdom and were trained as mediators in that jurisdiction. Additionally, the mediators were experts in the field. Where a mediated agreement was reached it was set down in writing in the form of a Memorandum of Understanding (MOU) and both parents were encouraged to discuss the agreement with their legal representative in the United Kingdom and in the foreign State. The United Kingdom lawyers then reduced the MOU to a lawfully binding consent order, which was placed before the court. The foreign lawyers were asked to register / mirror the consent order in the overseas jurisdiction. This pilot project proved very successful and analysis of the project showed a high degree of satisfaction from parents and mediators alike.[69]

3.1.1.2 Mediation within a specially constructed system

Usually where mediation takes place under a specially constructed system two mediators will be involved, one from each jurisdiction. Where possible mediators and parties will meet together in one jurisdiction for the purposes of mediation though the mediation will proceed under the arrangements laid down in the scheme not under the national law of the State in which the mediation is taking place. Where this is not possible, perhaps due to more limited resources or the geographical distance between the two jurisdictions, mediation may proceed with a mediator and / or a party entering the mediation through teleconferencing facilities or by means of the Internet using instant messenger programmes or web cams. Training for mediators working in these systems may differ slightly from mediators working in a purely domestic setting. The system under which the mediation is established might also provide a framework for training. These types of systems lend themselves to bi-national models where both States' legal systems can be taken into account in establishing the scheme, and we are not aware of projects operating this type of system where more than two jurisdictions are involved.

Germany has been involved in two systems, which followed this model. One in cases involving France, which has recently come to an end, and the other in cases involving the United States which has yet to formally begin. The United States / German proposed mediation system will involve two mediators, one of German origin and one of American origin. It is hoped that in each case one mediator will be male and one female, one from a psycho-social background and one from a legal background. In addition to being trained as mediators in their own jurisdictions, mediators will undergo some further training in the international aspects of mediation including the particular framework of the mediation system. Mediation will take place in the State where the child is, where possible, although it is expected that due to the limited resources of most parents involved in these disputes, most mediation will proceed across both States by way of teleconferencing or by means of the Internet using instant messenger programmes or web cams. The mediation will take place in a contracted period of time to reflect the framework of the Convention.[70]

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[69] Reunite International Child Abduction Centre, “Mediation In International Parental Child Abduction - The Reunite Mediation Pilot Scheme”. Funded by The Nuffield Foundation, October 2006.

[70] For more information on this project see Annex 1, particularly at its Appendix 1, Page 5.

3.1.2 The 1996 Hague Convention

The 1996 Hague Convention contains a provision requiring States' Parties to take all appropriate steps to "facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies". The International Social Service is in the process of developing training programmes to assist local affiliates to mediate in cases falling under this Convention. Some States have designated a specific organisation as the competent authority for facilitating mediation and conciliation for cases arising under this Convention.[71] To date we are not aware of particular mediation opportunities, which are taking place in the context of this Convention.

3.1.3 The Brussels II *bis* Regulation

The European Union instrument, Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter, "the Brussels II *bis* Regulation") contains the following provision:

> "*The central authorities shall, upon request from a central authority of another Member State of from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to: […] facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end*." Article 55

The Brussels II *bis* Regulation impacts upon the operation of the 1980 Hague Convention in the European Union States and therefore this provision also gives weight to the use of mediation in the context of that Convention. Additionally, the European Union has been active in developing a voluntary Code of Conduct for mediators,[72] which over 100 mediation organisations have signed up to.[73] Additionally, a draft directive is being developed on certain aspects of mediation in civil and commercial matters.[74] It is envisaged that this directive will only apply to cross-border cases and not to domestic mediation in the now 27 EU Member States.

3.2 International alternative dispute resolution in other matters

While this feasibility study is concerned with mediation in family matters, it is useful to briefly outline certain other types of cross-border alternative dispute resolution in other fields, which may provide some assistance in terms of legal and practical issues concerned with alternative dispute resolution at an international level.[75]

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[71] In Monaco the *Direction des Services judiciaires* has been designated as the competent authority.

[72] The scope of this Code of Conduct is broader than family matters applying to all civil and commercial matters. It is intended to apply in both cross-border and domestic cases.

[73] Most of these signatories are mediation organisations operating in the commercial field.

[74] Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters {SEC(2004) 1314} Brussels, 22.10.2004 COM(2004) 718 final.

[75] In this regard attention should be drawn once again to Annex 1.

3.2.1 The United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards

Arguably the most effective international regime of alternative dispute resolution is in the field of arbitration. The *United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards* (hereinafter the "New York Convention") is in force in 142 States and is generally considered to be a successful instrument, dealing with the two key areas of recognition and enforcement of foreign arbitral awards. Indeed despite its age, its success as a Convention is clear from the ever-increasing number of Contracting States, three new States having acceded to the Convention in December 2006.[76] According to Kofi Annan, former Secretary General of the United Nations: "the Convention is one of the most successful treaties in the area of commercial law ... [and] has served as a model for many subsequent international legislative texts on arbitration."[77]

The Convention reduces barriers to the recognition and enforcement of foreign arbitral awards thus creating confidence in the parties and the arbitrators that awards produced in one jurisdiction will not be set aside unduly in other jurisdictions.

3.2.2 The UNCITRAL Model Law on International Commercial Conciliation (2002)

Another example of alternative dispute resolution at the international level is the UNCITRAL Model Law on International Commercial Conciliation. Unlike the New York Convention, which allows jurisdictions to make arbitral awards under their own regimes and then requires Contracting States to recognise and enforce these arbitral awards, the Model Law seeks to harmonise the way in which commercial conciliation is undertaken in States which enact it. The perceived benefits of a Model Law are highlighted by UNCITRAL in the following statement:

> "*the Model Law provides uniform rules in respect of the conciliation process to encourage the use of conciliation and ensure greater predictability and certainty in its use. To avoid uncertainty resulting from an absence of statutory provisions, the Model Law addresses procedural aspects of conciliation, including appointment of conciliators, commencement and termination of conciliation, conduct of the conciliation, communication between the conciliator and other parties, confidentiality and admissibility of evidence in other proceedings as well as post-conciliation issues, such as the conciliator acting as arbitrator and enforceability of settlement agreements*."[78]

To date, Canada, Croatia, Hungary and Nicaragua have enacted legislation based on the UNCITRAL Model Law. Uniform legislation influenced by the Model Law and the principles on which it is based has also been prepared in the United States in the form of the Uniform Mediation Act 2001, drawn up by the National Conference of Commissioners on Uniform State Laws, and last revised in 2003 to take account of the UNCITRAL Model Law.

3.2.3 The United States Uniform Mediation Act 2001

In the United States mediation is often subject to state law as opposed to federal law (this is certainly the case in family matters), and this can mean that there are huge divergences within the United States with regard to rules and regulations on the subject. Indeed there are over 2500 state statutes affecting mediation. The Uniform Mediation Act

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[76] Gabon, the Bahamas and the Marshall Islands.

[77] Opening Address at the Colloquium "Enforcing Arbitration Awards under the New York Convention: Experience and Prospects". That colloquium was held in the Trusteeship Council Chamber of the United Nations Headquarters, New York on 10 June 1998 to celebrate the 40th anniversary of the Convention. Subsequent international legislative texts on arbitration include the UNCITRAL Arbitration Rules of 1976 and the UNCITRAL Model Law on Internationa Commercial Arbitration of 1985.

[78] See UNCITRAL at: www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html (as per 22 March 2007).

has attempted to provide some assistance to the question of how to deal with the challenges posed by different laws on mediation in different jurisdictions, particularly in relation to confidentiality. States within the United States are encouraged to enact the provisions of the Uniform Mediation Act[79] in order to improve uniformity in mediation across the United States. Part of the reason for this is to assist parties who wish to have a mediated agreement recognised in another state of the United States. The Uniform Mediation Act, like the UNCITRAL Model Law is an attempt to harmonise legislation in different jurisdictions for the benefit of cross-border cases. The Uniform Mediation Act as currently approved, applies to both domestic and international mediation.

3.3 Some of the bodies involved in promoting international mediation in family matters

A number of national, regional and international organisations are involved in the promotion of mediation at the international level. These organisations include, the International Social Service, The *Association Internationale Francophone des Intervenants auprès des familles séparées* (AIFI), The European Forum for Family Mediation Training and Research, *Médiation familiale binationale en Europe* (MFBE), the *Mission d'aide à la médiation internationale pour les familles* (MAMIF) and the *Bundesarbeitsgemeinschaft für Familienmediation* (BAFM). A brief description of these organisations is given at Annex 2.

4. PRACTICAL ISSUES SURROUNDING THE DEVELOPMENT OF INTERNATIONAL MEDIATION IN FAMILY MATTERS

4.1 Introduction

The aim of this chapter is merely to list some of the practical issues which need to be considered when discussing the development of international mediation in family matters. Many of these practical issues are further discussed in Annex 1 in relation to the 1980 Hague Convention. There is also some overlap between this chapter and the previous one, as some practical issues also raise legal questions, and some legal issues raise practical questions.

4.2 Costs

The costs associated with international mediation are likely to be higher than in domestic cases. Such additional costs might include, translation, interpretation, the use of teleconferencing facilities, and travel, accommodation and subsistence in the State where the mediation is to be conducted. Additionally, mediators may charge higher fees due to the complexities of international cases or to reflect the extra training that they may have been required to undertake. At the international level the questions of who is responsible for setting the costs and who is liable for paying them need to be considered. Where mediation is being developed under, for example a bi-national system, who should be responsible for setting the costs, such as the fees of the mediator, and informing the parties what the expected costs will be? Additionally, should parties and mediators be given an upper limit on how much they can charge, for example for travel and accommodation in the foreign State, if they are required to travel there for the purposes of mediation?

In some jurisdictions all costs must be borne by the parties to mediation while in others some or all of the costs associated with the mediation may be covered by public funds. Where mediation would be borne by the parties in one jurisdiction but publicly funded in another, how would it be established whether international mediation was publicly funded or not? If mediation is to take place under the national system in one State, would the same system of legal aid be made available to the foreign party as to the resident party? Additionally, if the parties are remaining in their own States and mediation is being

[79] As at March 2006, the Act has been adopted in Iowa, Illinois, Nebraska, Ohio, New Jersey, Utah, Washington D.C. and Washington state. Legislation to adopt the Act was pending in Massachusetts, New York, Vermont, Connecticut and Minnesota.

conducted by distance should the parties only pay for the costs in their own system or should the overall costs be apportioned? This might be particularly important where the costs differ significantly between the relevant States.

4.3 Means of communication and language of communication

If the mediation is to take place with the parties in different States teleconferencing facilities may be made available or mediation may proceed by means of the Internet using instant messenger programmes and web cams. The use of such equipment raises various practical difficulties such as whether a mediator should be present with each party, or whether mediation can proceed with all mediators and one party in one State and the other party in another State. Another difficulty concerns how to ensure that third parties are not listening in to the conversations without the permission of one of the parties or the mediators. This could raise difficulties in terms of confidentiality rules. Using private networks or virtual private networks over the Internet to ensure confidentiality of the communications will result in extra costs.

Where mediation is taking place cross-culturally language can also be an issue. Parties and mediators may not share a common language, or even if they do it may not be their mother tongue. It has been suggested that the ability to communicate in a mother tongue or preferred language can assist mediation.[80] This may therefore lead to the necessity of using interpreters and / or bilingual mediators who can act as interpreters. The use of interpreters can lead to practical difficulties with confidentiality rules as it is important to ensure that interpreters will neither breach these rules, nor be unprotected by these rules such that they can be compelled as a witness in later litigation.

4.4 Different models of mediation

As discussed *supra* at 2.2 and 2.3 the scope, availability and structure of mediation differs from one national system to another. In order for an international system to develop States either need to seek more harmonisation in the systems that they are operating, or develop a system to recognise and enforce agreements stemming from a diversity of systems. An example of the former is the Uniform Mediation Act in the United States, which seeks to bring greater harmony to state laws and regulations, and an example of the latter is in the Reunite pilot project where the mediated agreements were turned into consent orders in the jurisdiction in which they were made and were subsequently mirrored or registered in the foreign jurisdiction.

Some practical issues relevant to the diversity of models of mediation include the fact that in some States mediation generally proceeds through court-annexed schemes while in others mediation tends to be conducted by private individuals or organisations. In some jurisdictions mediation is mandatory before court proceedings can take place on a particular issue, while in other jurisdictions mediation may not be available at all for the same issue. Some issues can be mediated on but the court retains the power to reject the agreement if it sees fit. In some jurisdictions judges can mediate in cases and then adjudicate if no agreement is reached and the case ends up in court. In other jurisdictions judges who have acted as mediators are not able to act as a judge in the same case.[81] The extent to which States are willing to accommodate these differences is important in establishing an international system.

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[80] Carl, E., Copin, J., and Ripke, L., "*Le project pilote franco-allemand de médiation familiale professionnelle, Un modèle de collaboration internationale dans le cadre de conflits familiaux"* in *Kind-Prax* Special 2004, pp. 25-28.

[81] For example, the Uniform Mediation Act in the United States specifically applies to domestic and international mediation. However, there are certain types of mediation to which the Act does not apply, including a mediation "conducted by a judge who might make a ruling on the case". Section 3(b)(3).

4.5 Training, qualification and registration of mediators

Section 2.7 discusses some of the similarities and differences in training and registration requirements in different jurisdictions. For a mediation system to operate at an international level it may be necessary to have an agreed level of training and qualification for mediators intending to practice in cases with an international element. There are perhaps two main reasons why this is important: Firstly, in order to satisfy parties and States that the mediators have achieved a certain level of qualification, such that parties are willing to enter mediation and States are willing to recognise and enforce mediated agreements stemming from the mediation; and secondly, in order to satisfy the parties and States that the mediator is equipped to deal with the international element of the particular case. For example, where the mediation is to take place under a particular Conventional system, knowledge of the workings and subject matter of the Convention would be highly desirable, if not essential.

To achieve an internationally acceptable standard training for mediators could take two forms: 1) domestic training procedures could be recognised internationally as meeting the appropriate criteria; 2) an international training system could be established to harmonise training at the international level, probably for individuals who have already passed some form of mediation training in their home State.

The first option is to a certain extent already taking place within Europe under the auspices of the European Forum Training and Research in Family Mediation. This Forum accredits interdisciplinary training programmes, which are open to candidates from legal and psycho-social backgrounds. To date the Forum has accredited training programmes in 14 European States: Austria, Belgium, England, France, Germany, Ireland, Italy, Malta, Poland, Portugal, Scotland, Sweden, Spain and Switzerland and in one non-European State, namely, Israel. The Forum also emphasises that it is important to distinguish between mediation awareness training and a full course of training leading to a recognised qualification to practice family mediation. The International Social Service is also intending to provide training to its affiliates in order that they could offer mediation, particularly in the context of the 1996 Hague Convention.

5. CONCLUSIONS – PRIVATE INTERNATIONAL LAW AND FUTURE DIRECTIONS

5.1 Definition of cross-border mediation

For the purposes of this study, cross-border family mediation has been taken to mean mediation in family disputes (concerning maintenance, family assets or matters of parent responsibility) where the parties have or are about to have their normal residences in different countries. This working definition includes cross-border mediation in the literal sense of being conducted across borders (for example bi-national mediation involving parties and mediators located in two countries), as well as mediation occurring in one country, but involving parties and / or mediators from two countries. The definition also covers the situation in which two parties resident in the same country enter mediation in order to resolve the problems surrounding the intended relocation by one party with a child to another country.

The reason for adopting this rather broad definition is to encompass all cases in which issues of private international law and the need for cross-border co-operation may arise.

Mediation in disputes concerning the protection of vulnerable adults has also been alluded to, but is not a main focus of these conclusions.

5.2 The importance of mediation

These conclusions begin with the assumption that all measures to promote agreed outcomes to cross-border family disputes should be encouraged. This applies not only to mediation, but to other means, including conciliation, as well as negotiation involving lawyers or other intermediaries.

The advantages of mediation include:

- that it enables the parties to craft solutions tailored to their particular needs;
- that it places responsibility for decision-making on the parties and may help to lay some foundations for future co-operation (for example in relation to the continuing responsibilities in respect of children);
- that it may help to reduce the level of conflict between the parties;
- that it may reduce the caseload on courts;
- that it may in some instances reduce costs.

Mediation is not a substitute for adjudication in family matters. It is rather an alternative and sometimes an accessory to adjudication.

5.3 Different models of mediation

Just as various models of mediation operate at national level, so also in cross-border mediation a variety of models already operate and this diversity is likely to continue. The development of international mediation schemes is occurring mainly at national level or through bilateral or regional arrangements. The scope as well as the form of mediation differs in the different schemes. A number of mediation schemes are geared towards achieving agreement on particular matters such as parent / child contact, and some operate in specific circumstances, such as in the context of return proceedings under the 1980 Convention. Nevertheless, there seems to be a tendency even in such focused mediation for related issues to be brought within the scope of mediation (for example child support where contact is the focus).

There appears at this stage to be little value in promoting a particular model of cross-border mediation as standard or uniform, although there clearly is value in gathering and circulating information about the availability and development of new international mediation schemes as they arise.

5.4 The role of law

Party autonomy is a central value in mediation. The parties are not to be rule-bound in devising the solutions and arrangements that suit their own individual circumstances. Nevertheless, mediation requires to be supported, and to a limited extent regulated, by law for a number of reasons. The general structure of the applicable rules of family and child law provides the background against which negotiations take place. This general structure of family and child law defines the boundaries of party autonomy, protects third parties especially children, provides a yardstick against which the outcome of mediation may be measured, helps to ensure fairness within the negotiating process, provides the structure within which agreements may be given effect, and offers an alternative (usually in the form of adjudication) in the event of mediation not being successful.

If a supporting structure of legal norms and procedures is absent, there is a real danger of imbalance or even abuse of the bargaining process. If there are no alternatives to mediation, the balance strongly favours the status quo and the party who benefits under it.[82]

[82] See “Transfrontier Access / Contact General Principles and Good Practice”, drawn up by William Duncan, Deputy Secretary General, Prel. Doc. No 4 of October 2006 for the attention of the Fifth meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* in November 2006, p. 13; see Malta Declarations of 17 March 2004, First Malta Declaration, para. 3 and Second Malta Declaration, para. 3.

5.5 The role of private international law

The rules of private international law constitute an important part of the legal fabric which supports mediation. Private international law rules may have importance in relation to the following matters:

a) The question of the law applicable to certain aspects of agreements made in the context of divorce or the breakdown of a relationship concerning such matters as child custody and contact, maintenance and child support, and the distribution of family assets (see 5.5.1);

b) The question of the circumstances in which a mediated agreement made in one jurisdiction may be recognised and enforced in another (see 5.5.2);

c) The question of the jurisdiction of courts or other authorities to review, approve, register, place on the record of the Court, or otherwise formalise mediated agreements (see 5.5.3).

It may be helpful to begin by reviewing briefly the extent to which existing Hague Conventions provide answers to these questions. It will be noted from the outset that the relevant Hague Conventions are distinguished on the basis of the substantive issues with which they deal. There is no single Hague Convention, which deals in a general way with agreements in the area of family law.

5.5.1 Agreements concerning child support and other forms of family maintenance

Despite hopes that case law would resolve the matter, there is continuing uncertainty as to whether the Hague Convention of 1973 on the Law Applicable to Maintenance Obligations determines the law applicable to maintenance agreements and, if so, to which aspects of their validity.[83] The current draft[84] on applicable law, which is being considered in the context of the negotiations on the new Convention on International Recovery of child Support and other Forms of Family Maintenance,[85] throws no further light on the matter.

With regard to recognition and enforcement of maintenance agreements, the 1973 Convention on recognition and enforcement will apply if the agreement has been made part of a "decision" rendered by a judicial or administrative authority, or if the agreement is part of a settlement made before such an authority. Otherwise agreements, even if made in the form of a deed or an authentic instrument, do not come within the scope of the Convention.

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[83] See Explanatory Report by M. Verwilghen, Acts and Documents of the Twelfth Session (1972) Tome IV, Maintenance Obligations, para. 120 and "Note on the Desirability of Revising the Hague Convention on Maintenance Obligations", drawn up by William Duncan, First Secretary, Prel. Doc. No 2 of January 1999 for the Attention of the Special Commission of April 1999, paragraphs 37-41.

[84] Working Draft on Applicable Law prepared by the Working Group on Law Applicable to Maintenance Obligations which met on 17-18 November 2006 in The Hague, Prel. Doc. No 24 of January 2007 for the attention of the Special Commission of May 2007 on the International Recovery of Child Support and other Forms of Family Maintenance.

[85] Preliminary Draft Convention on the International Recovery of Child Support and Other Forms of Family Maintenance drawn up by the Drafting Committee under the authority of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance, Prel. Doc. No 25 of January 2007 for the attention of the Twenty-first Session of November 2007.

In the new Convention, private agreements (as well as authentic instruments) are tentatively included within the scope of Chapter V, which deals with recognition and enforcement. Under Article 26 a private agreement would be entitled to be recognised and enforced in all Contracting States as a decision provided that it is enforceable as a decision in the State of origin. It would be possible for recognition to be refused only on the grounds of public policy or fraud or if the agreement is incompatible with a decision rendered or recognised in the State addressed. In addition, and similar to the situation under the 1973 Convention, a settlement or agreement concluded before or approved by a judicial or administrative authority will be entitled to be recognised and enforced under Chapter V of the new Convention.

With regard to the competence of the courts or other authorities to approve or register or otherwise formalise maintenance agreements, the Hague Conventions (including the new Convention) contain no rules of direct jurisdiction. This may not, however, constitute a practical problem because in most countries the courts or authorities will be able to exercise jurisdiction on several alternative bases, including in some cases agreement between the parties or submission to the jurisdiction.[86]

5.5.2 Agreements concerning child custody and contact or access

There is no Hague Convention, which expressly specifies the law applicable to agreements concerning custody or contact, save in the limited case where the agreement involves the attribution or extinction of parental responsibility. In that case, Article 16, paragraph 2, of the 1996 Convention provides that the law of the child's habitual residence applies at the time when the agreement takes effect. However, it is probable that an agreement concerning custody or contact made between holders of parental responsibility would constitute an "exercise of parental responsibility" and would therefore be captured by Article 17 of the 1996 Convention, which submits such matters to the law of the State of the child's habitual residence. There is no jurisdiction within the 1996 Convention based on parental agreement or submission by a parent to the jurisdiction.

With regard to the question of the jurisdiction of a Court or other authority to approve or register or otherwise formalise an agreement on custody or contact, the rules of the 1996 Convention apply giving primary jurisdiction to the authorities of the country of the child's habitual residence. There is no consent jurisdiction. Concerning the recognition and enforcement of agreements concerning custody or contact, there is no provision within the 1996 Convention except in the case where an agreement becomes a "decision" (for example, where it is approved by a court), in which case it will be recognised and enforced under the 1996 Convention in all other Contracting States.

5.5.3 Agreements concerning property and other assets

Agreements by which spouses subject their matrimonial property regime to a particular law, as well as agreements affecting that regime which contain no choice of law, come within the scope of *Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*. In limited circumstances an agreement involving the transfer of a monetary lump sum or property may be regarded as provision for maintenance (see 5.5.1 above) where its purpose is to provide for the continuing support of a dependent.[87] Otherwise there are no Hague Conventions concerning such agreements.[88] In some domestic systems such agreements may be treated under the ordinary law of contract and made subject to the private international law rules

[86] See Article 17 b) and e) of the "Preliminary Draft Convention on the International Recovery of the Child Support and Other Forms of Family Maintenance", at < www.hcch.net >, under < Work in Progress>, < Maintenance Obligations >.

[87] See Towards a New Global Instrument on the International Recovery of Child Support and Other Forms of Family Maintenance, drawn up by William Duncan, Deputy Secretary General, Prel. Doc. No 3 of April 2003 for the attention of the Special Commission of May 2003 on the International Recovery of Child Support and Other Forms of Family Maintenance, at paragraphs 180-182.

[88] With the exception of agreements as to succession (see the Hague Convention of 1989 on the Law Applicable to Succession to the Estates of Deceased Persons, Ch. 3).

governing contract. But regional and multilateral instruments concerning contract generally exclude contractual obligations concerning rights of property arising out of a matrimonial relationship or relating to rights and duties arising out of a family relationship.

5.6 Practical Considerations

This very brief overview reveals some gaps in the treatment of mediated agreements in family matters within the overall regime established by the Hague Conventions. But are these omissions of practical importance to the practice of mediation in the international sphere? To give one example, it is easy to imagine some uncertainty arising within cross-border mediation on a matter of spousal maintenance where the two legal systems concerned have very different approaches to party autonomy.

> *W and H have had their matrimonial home in State A. The marriage has broken down and W has moved to State B which is her country of origin. Cross-border mediation concerning financial matters is underway. The parties want to make a final settlement of all issues, including a provision waiving all rights to bring maintenance proceedings against one another in the future. Such an agreement is possible under the law of State A but prohibited under the law of State B which regards such an agreement as void. Moreover, the rule in State B is mandatory in the sense that the parties are not allowed to avoid its application by choosing the law of country A as the governing law.*

Even in this very clear case of a conflict of laws, it is not easy to see how an applicable law regime will help. Limits on autonomy within family law tend to have a strong public policy base to such an extent often that the States whose laws contain such restrictions may be less than willing to allow the application of foreign law. In the above example, if the agreement were to be concluded and W were subsequently, following a serious deterioration in her circumstances, to bring maintenance proceedings against H in State B, it is unlikely that the authorities would accept the agreement as barring her rights to proceed for maintenance. Perhaps the best that the parties can expect in this situation is to know how exactly their agreement is likely to be treated within each of the legal systems concerned.

This is not to argue that uniform applicable law rules would not have some advantages. Differences between legal systems in the treatment of family law agreements do not always arise from deep-rooted considerations of public policy, and certainly the absence of uniform rules concerning the law to govern the validity of agreements on the division of matrimonial property and other assets would appear on the face of it to be unfortunate. In this context it is possible that most uncertainties could in practice be avoided by the parties agreeing on the applicable law, at least in so far as their ability to choose a governing law is not itself constrained by mandatory rules.

With regard to rules of jurisdiction, the provisions of the 1996 Convention offer a very attractive regime for issues of child custody and contact. It might be argued that the absence of a jurisdiction based on agreement between the parties or submission to the jurisdiction by one of them would act as an impediment. What could be easier than for the parties themselves within their agreement to specify the country to whose courts the agreement would be submitted for approval? In fact, there are arguments against allowing the exercise of this form of autonomy in child-related matters. In any case, the application of the rules of the 1996 Convention offer the mediating couple practical and clear solutions. The following case illustrates:

A child has been abducted by its mother from State A to State B. The left-behind father institutes proceedings in State B under the 1980 Convention for the return of the child. It appears that the father might be willing to agree to the mother relocating to State B with the child provided that he has cast iron guarantees concerning his rights of contact with the child. In the context of the Hague return proceedings, and without their suspension, the mother and father enter mediation. The mediation leads to an agreement that the child may relocate to country B in the custody of the mother and it includes detailed provisions for contact between the father and the child.

The mother and father obviously must be sure that the agreement is respected in both countries. One way of achieving this is to have the agreement approved or otherwise formalised by a court or authority. But in which country? It might be thought that, because the return proceedings and the mediation have been conducted in State B, the easiest solution is for the authorities in State B, with the consent of the parties, to deal with the agreement. However, under the 1996 Convention it is the authorities of State A, where the child still has its habitual residence that have general jurisdiction to take measures of protection in respect of the child. The agreement should therefore be submitted to the authorities of State A and a decision by those authorities to approve or otherwise formalise the mediated agreement would be entitled to be recognised and enforced in State B. It might be expected also that the Central Authorities appointed under the 1996 Convention in States A and B would co-operate in helping the parties to complete these arrangements.

With regard to the question of which country's authorities are competent to approve or otherwise formalise an agreement concerning child support or other forms of family maintenance, there exist no uniform direct rules of jurisdiction within the Hague Conventions. This gap will not be filled by the new Hague Convention on the International Recovery of Child Support, which sets out only indirect rules of jurisdiction for the purpose of recognition and enforcement. However, as indicated above, rules of jurisdiction usually operate at national or regional levels which tend generally to be flexible and to offer the parties a choice of jurisdictions in which they may seek approval for or otherwise formalise their agreement.

In this very brief overview, it has been possible only to make a partial survey and analysis of the private international law aspects of mediated agreements. However, this brief survey is sufficient to be able to suggest that, before embarking on a private international law instrument that would ensure a comprehensive treatment of mediated agreements, careful consideration should be given to whether there is indeed a practical need for such an instrument.

5.7 Cross-border administrative co-operation

To what extent can structures for inter-State administrative co-operation (in particular based on Central Authorities) provide support or assistance for cross-border mediation? One clear need is for the provision of information concerning the opportunities for mediation and the laws and procedures relevant to mediation in each State. More specifically, the information concerning national systems that would be valuable includes the following:

a) the current opportunities for mediation, including a description of any in-court or out of court mediation schemes whether voluntary or mandatory and the associated costs and any special provisions for mediation in relation to international cases;

b) the laws relevant to mediation, including those (if any) which regulate the mediation process itself, which define the limits of party autonomy and which regulate matters of capacity and voluntariness;

c) a list of persons qualified in that country to mediate including in cross-border cases (see further below);

d) the procedures by which an agreement may be approved, registered, recorded or otherwise formalised by a judicial or administrative authority or by any other means, including a description of the effects of such procedures, especially with regard to the enforceability of the agreement;

e) the procedures whereby an agreement may otherwise be formalised, for example by an authentic instrument or by deed;

f) procedures for the recognition and enforcement of agreements mediated abroad;

g) relevant laws concerning the confidentiality attaching to statements made within mediation.

How precisely this information should be made available by national authorities - through Central Authorities or by other means - may be discussed. However, there is no doubt that the ready availability of information of this kind (perhaps on the Hague Conference website) would constitute a significant resource and support for cross-border mediation in family matters.

One might also envisage a Central Authority having a more pro-active role in promoting mediation, for example by facilitating mediation in individual cases and perhaps by being involved in the development of special mediation schemes in co-operation with other Central Authorities or competent bodies.

Would an instrument be needed to provide the basis for the kind of co-operation that is outlined here? Experience with other Hague Conventions involving systems of co-operation through Central Authorities suggest that, in order to ensure a certain level of reciprocity and mutual confidence, it is helpful if the functions of States or their Central Authorities are spelled out as clearly as possible, allowing at the same time some flexibility both to accommodate inevitable differences in the capacities and powers of different Central Authorities and to allow for the incremental development of services.

In short, rather broad statements such as that to be found in Article 31, paragraph *b)* of the 1996 Convention, which requires a Central Authority "to take all appropriate steps … to facilitate, by mediation, conciliation or similar means, agreed solutions …," are probably not sufficient.

5.8 Accreditation of mediators or organisations providing mediation services

The development of systems of training and accreditation for mediators or organisations providing mediation services is ongoing in many countries. The question arises whether at the multilateral level anything can be done to assist progress in this area. One possibility is the establishment of a central register or list of persons or organisations qualified or accredited to act as mediators or to provide mediation services in cross-border situations. The question of whether a person is qualified to mediate, in which countries and in what categories of cases is probably at this stage best left to national authorities. Indeed national systems of accreditation are still at a relatively early stage of development. The idea of the centralised register would probably at this stage have the purpose of information exchange rather than the control of standards. However, in the long term it may not be unrealistic to think of a system of national accreditation being supported by basic standards and requirements agreed at the international level, combined with a system of accreditation somewhat like the accreditation provisions of the 1993 Hague Convention on Intercountry Adoption.[89]

[89] Articles 10-13.

5.9 The development of a code of conduct relating to cross-border mediation

Much work has already been carried out nationally and regionally on the development of codes of practice which set out general principles concerning the competence, independence and appointment of mediators, as well as standards to be applied in the mediation process itself. There may be advantages in considering the development of such a code to address the particular features of cross-border mediation.

5.10 The issue of confidentiality

A code of conduct or of good practices might also address issues of confidentiality. However, the general principle of confidentiality within a code of conduct would probably have to be subject to any legal obligations of disclosure at the national level. A code of conduct would probably not be able to overcome the difficulties arising from different national rules relating to disclosure or compellability. One approach might be the development of a model law on the subject similar to that adopted in the United States.[90]

5.11 Possible directions

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

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

3. Consultations could be carried out with Member States to explore the desirability of developing an instrument designed to improve the flow of information and to provide for closer co-operation between States in facilitating the use of mediation and in giving effect to mediated agreements.

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

[90] The United States Uniform Mediation Act 2001, see above 3.2.3. See also, in relation to commercial matters, the UNCITRAL Model Law on Commercial Conciliation of 2002, see above 3.2.2, and the UNCITRAL Conciliation Rules of 1980.

A N N E X E S

ANNEXE 1

Document préliminaire No 5 d'octobre 2006
à l'intention de la Cinquième réunion de la Commission spéciale
sur le fonctionnement de la Convention de La Haye du 25 octobre 1980
sur les aspects civils de l'enlèvement international d'enfants
(La Haye, 30 octobre – 9 novembre 2006)

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ANNEX 1

Preliminary Document No 5 of October 2006
for the attention of the Fifth meeting of the Special Commission
to review the operation of the Hague Convention of 25 October 1980
on the Civil Aspects of International Child Abduction
(The Hague, 30 October – 9 November 2006)

ENLEVEMENT INTERNATIONAL D'ENFANTS
INTERNATIONAL CHILD ABDUCTION

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Prel. Doc. No 5

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HccH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

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

établie par Sarah Vigers, ancienne Collaboratrice juridique au Bureau Permanent

* * *

NOTE ON THE DEVELOPMENT OF MEDIATION, CONCILIATION AND SIMILAR MEANS TO FACILITATE AGREED SOLUTIONS IN TRANSFRONTIER FAMILY DISPUTES CONCERNING CHILDREN ESPECIALLY IN THE CONTEXT OF THE HAGUE CONVENTION OF 1980

drawn up by Sarah Vigers, Former Legal Officer of the Permanent Bureau

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Permanent Bureau | *Bureau Permanent*
6, Scheveningseweg 2517 KT The Hague | *La Haye* The Netherlands | *Pays-Bas*
telephone | *téléphone* +31 (70) 363 3303 fax | *télécopieur* +31 (70) 360 4867
e-mail | *courriel* secretariat@hcch.net website | *site internet* http://www.hcch.net

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

établi par Sarah Vigers, ancienne Collaboratrice juridique au Bureau Permanent

* * *

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APPENDICES

Appendix 1 A Brief Description of Some Mediation Initiatives in the Context of the Hague Child Abduction Convention.

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

1. INTRODUCTION

1.1 Mediation in International Child Custody and Contact Disputes

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

States Parties to certain international and regional family law instruments find themselves obligated to the use of mediation in certain contexts. The *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* (hereinafter, "the Hague Child Protection Convention") is a comprehensive instrument dealing with a broad range of parental responsibility and child protection issues. This Convention contains the following provision:

> "*The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to […] facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies*". Article 31

The European Union instrument, Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter, "the Brussels II *bis* Regulation") contains the following similar provision:

> "*The central authorities shall, upon request from a central authority of another Member State of from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to: […] facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end*." Article 55

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

The *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (*hereinafter "The Hague Child Abduction Convention" or "the Hague Convention") although containing no specific mention of mediation, requires Central Authorities to take all appropriate measures "to secure the voluntary return of the child or to bring about an amicable resolution of the issues".[2]

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

1.2 The Scope and Purpose of this Note

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

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

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

[3] See the Guide to Good Practice – Part III – Preventive Measures at pp. 15-16.

[4] For some examples, see Appendix 1.

[5] See *infra* at Section 2.

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

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

1.3 Terminology

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

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

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

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[8] See Vonfelt, G., "International Mediation for Families and the Hague Convention of 25 October 1980" in *The Judges Newsletter on International Family Law*, Volume XI, 2006 at p. 55.

[9] ISS Family Mediation Trainers Group, Geneva, 2005. Taken from Parkinson, L., Definitions of International Family Mediation, 2005.

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

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

[12] Parkinson, L., Young People and Family Mediation, January 2002.

[13] See *ibid*.

[14] Parkinson, L., s*upra* note 10 at p. 6.

1. MEDIATION IN THE CONTEXT OF THE HAGUE CHILD ABDUCTION CONVENTION

1.1 The Background

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

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

The positive benefits, in certain cases, of mediated agreements over judicial decisions have been widely voiced. According to the French organisation MAMIF[16], "mediation does not seek to avoid international instruments or national laws and in principle has longer lasting effects, is quicker, calmer and less expensive than the judicial process. It can better take into account the emotions of the parents and the interests of the child."[17] The United Kingdom based organisation reunite has stated that the benefits include:

"1) avoiding the cost to public funds of the Hague Convention proceedings, and the costs of proceedings in the other country (although a consent order would still be required); 2) avoiding the stress of contentious litigation in two countries; 3) avoiding the uplifting of the children from the requesting State to the home State, only for there to be a return later following disputed custody proceedings with all the attendant stress and further damage to the relationship between the parties; 4) avoiding a substantial delay in resolving the future of the family in its totality; 5) obligating and empowering parents to actively and purposefully address the issues affecting the future of their family".[18]

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[15] See Prel. Doc. No 3.

[16] *Mission d'aide à la médiation internationale pour les familles*.

[17] MAMIF response to Mediation Note. [Translation by the Permanent Bureau]

[18] Reunite – International Child Abduction Centre, Mediation in International Parental Child Abduction – Draft Report 2006. Hereinafter, "rReunite Draft Report".

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

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

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

2.3 Time Frames

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

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

[19] US State Department response to Mediation Note.

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

[21] Reunite Draft Report.

[22] ICMEC / NCMEC response to Mediation Note.

initiative the mediation take place in the form of "block-mediation" where possible, for example, over a weekend from Friday afternoon until Sunday.[23]

1.2 Referral to Mediation

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

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

2. LINKAGE WITH THE LEGAL SYSTEM AND LEGAL ASPECTS OF MEDIATION

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

3.1 The Scope of the Mediation

An application under the Convention is primarily concerned with seeking the return of a child habitually resident in one Contracting State who has been wrongfully removed to or retained in another Contracting State or to make arrangements to secure the effective exercise of rights of contact. The basic premise of the Convention is that the State of the child's habitual residence retains jurisdiction to decide on issues of custody / contact and that prompt return of the child to that State will enable such decisions to be made expeditiously in the interests of the child without the child having the time to become settled in another State. Consequently, the primary issue to be addressed in mediation is

[23] German Federal Ministry of Justice response to Mediation Note.

[24] See the description of mediation provided by the Argentine Central Authority in Appendix 1.

[25] Articles 7 *c*) and 10

[26] See *infra* at Section 5.3.

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

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

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

3.2 Independence

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

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

[28] German Federal Ministry of Justice response to Mediation Note.

[29] MAMIF response to Mediation Note.

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

2.1 Impartiality

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

3.4 Confidentiality

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

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

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[30] ISS Switzerland s*upra* note 20.

[31] See < www.enlevement-parental.justice.gouv.fr/mamif.html >.

[32] For further discussion see *infra* at Section 4.3.2.

[33] See RReunite Draft Report.

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

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

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

3.5 Enforceability

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

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

[34] Article 24 of Act NE 95-125 of 8 February 1995, as cited in MAMIF response to Mediation Note.

[35] German Federal Ministry of Justice response to Mediation Note.

[36] ICMEC / NCMEC response to Mediation Note.

[37] ICMEC / NCMEC response to Mediation Note.

[38] Hutchinson, A., *supra* at note 27.

[39] MAMIF response to Mediation Note.

covered by mediation agreements, these arrangements need to be approved by a ruling of the family court. This ruling makes the agreed arrangements enforceable.[40]

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

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

4. MEDIATION METHODOLOGY

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

4.1 Direct or Indirect Mediation

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

[40] German Federal Ministry of Justice response to Mediation Note.

[41] See rReunite Draft Report.

[42] UCCJEA is in force in 45 US states and the District of Columbia and is pending adoption in 5 other states.

[43] ICMEC / NCMEC response to Mediation Note.

[44] For example the Reunite pilot project.

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

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

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

4.2 Single State or Bi-national Mediation

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

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

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

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[46] These definitions and examples are taken from Parkinson, L., Reduction and Resolution of Cross-Border Disputes.

[47] MAMIF response to Mediation Note.

[48] Liaison judges from foreign States who are based in France.

4.3 Selection of Mediators

4.3.1 Single or Co-mediators

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

4.3.2 Gender and Culture

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

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

4.3.3 Language

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

[49] For example the proposed US-German mediation initiative.

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

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

4.3.4 Professional Background of the Mediators

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

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

5. ACCESS TO MEDIATION

5.1 Introducing Parents to Mediation

How parents are approached to consider mediation is very important. According to the draft report on the reunite pilot project, "[i]t was recognised that the manner in which both parents were introduced to the scheme was critical to its prospects of success."[54] As stated above at 2.2 in the context of an application under the Convention parents need to be informed that mediation is on offer but is not the only recourse the parents have and that the availability of mediation does not affect a parent's right to litigate if they prefer. A parent's willingness or lack of willingness to enter into mediation should not be

[51] German Federal Ministry of Justice response to Mediation Note.

[52] ISS report *supra* at note 1.

[53] See *infra* at Section 7.

[54] Reunite Draft Report.

influential in any court decision. When potential participants for the reunite pilot project were approached it was emphasised to both parents that mediation could only be undertaken with the full consent of both parties and an unwillingness to enter mediation would have no effect on the outcome of the Hague application.

Additionally, mediation is to many people a relatively new concept unlike a judicial process which is likely to be something more familiar. Consequently, parents need full and frank explanations as to what mediation is and what mediation is not, so that they can come to mediation with appropriate expectations. It has been suggested that for some people the notion of mediation has a negative connotation and may be seen as second-class justice,[55] and such notions need to be countered if mediation is to be successful. Mediation should be introduced to parents as a positive alternative to the court process which if unsuccessful has not negated the possibility of having a judge decide the case in court.

5.2 Pathways to Mediation

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

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

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

[56] For example the Central Authority of Argentina.

[57] For example the rReunite pilot project.

[58] Articles 373-2-10 and 255 of the French Civil Code.

[59] For example many of the cases addressed by the Franco-German Parliamentary Mediation Commission.

[60] German Federal Ministry of Justice response to Mediation Note.

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

5.3 Costs and Sources of Funding

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

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

To undertake its pilot project Reunite was awarded a research grant by the Nuffield Foundation. All costs associated with the mediation, including travel to and from the UK were fully funded for the applicant parent up to an upper limit. Hotel accommodation and additional travel and subsistence costs were also fully funded. The mediators' fees, administration fees and interpreters' fees were also covered by the grant. The UK based parent was also reimbursed for all travel and subsistence costs and provided with accommodation where necessary. This compares with the court process in the UK where full legal aid is given to all applicant parents regardless or means or merits, while abducting parents are eligible for legal aid on a means and merits test.

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

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[62] Reunite Draft Report.

[63] German Federal Ministry of Justice response to Mediation Note.

[64] Information received from Lord Justice Mathew Thorpe.

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

[66] MAMIF response to Mediation Note.

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

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

6. INVOLVEMENT OF THE CHILD IN MEDIATION

6.1 Arrangements for Contact with the Child During Mediation

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

6.2 Listening to the Child in Mediation

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

[67] For example, mediation by the German courts, see Appendix 1.

[68] MAMIF response to Mediation Note.

[69] German Federal Ministry of Justice response to Mediation Note.

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

[71] ICMEC / NCMEC response to Mediation Note.

[72] German Federal Ministry of Justice response to Mediation Note and MAMIF response to Mediation Note.

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

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

7. TRAINING FOR MEDIATORS

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

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

7.1 Training in Family Mediation

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

[73] German Federal Ministry of Justice response to Mediation Note.

[74] Child and Family Court Advisory and Support Service.

[75] Parkinson, L., Training and Assessment of Family Mediators in the U.K., 2005.

[76] Parkinson, L., s*upra* note 11, at p. 2.

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

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

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

7.2 Specific Training in International Family Mediation

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

[77] Parkinson, L., *supra* note 11, at p. 11.

[78] Parkinson, L., *supra* note 11 at p. 5.

[79] Parkinson, L., *supra* note 11 at p. 11.

[80] MAMIF response to Mediation Note.

[81] Federal Working Group for Family Mediation.

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

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

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

7.3 Some International and Regional Associations and Organisations Offering Mediation

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

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

International Social Service (ISS)

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

The European Forum for Family Mediation Training and Research

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

[82] Parkinson, L., *supra* note 11 at p. 11. See also <www.bafm-mediation.de>.

Médiation familiale binationale en Europe (MFBE)

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

ANNEX 1

A N N E X E S / A P P E N D I C E S

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

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

Argentine Central Authority[2]

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

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

Mission d'aide à la médiation internationale pour les familles (MAMIF)[3]

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

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[1] Some of these initiatives may be described in more detail by participants at the Special Commission.

[2] Information provided by the Argentine Central Authority.

[3] Information provided by MAMIF. For more information see:

< www.enlevement-parental.justice.gouv.fr/mamif.html >

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

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

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

Reunite Pilot Project[4]

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

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

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

[4] Information provided by Reunite. For more information see < www.Reunite.org >.

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

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

England & Wales Court of Appeal Alternative Dispute Resolution Scheme[5]

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

German Federal Ministry of Justice[6]

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

[5] Information provided by Lord Justice Mathew Thorpe, Head of International Family Law for England and Wales.

[6] Information provided by the German Federal Ministry of Justice.

Franco-German Parliamentary Mediation Commission[7]

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

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

Franco-German Project of Bi-national Professional Mediation[9]

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

The German Ministry of Justice estimates that around 30 cases of mediation have been or are being handled by this group for the period from its establishment in October 2003 until its termination in March 2006. To a limited extent the professional mediation project was subject to academic study and a major finding of this research was that the overwhelming majority of both parents and mediators assessed the system positively. There was increased willingness of both parents to undertake mediation and the level of

[7] Information provided by the German Federal Ministry of Justice.

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

[9] Information provided by the German Federal Ministry of Justice. For more information see:

< http://pageperso.aol.fr/frdemed/index.html >

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

Proposed US-German Mediation Project[10]

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

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

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

The International Social Service (ISS)

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

[10] Information provided by the German Federal Ministry of Justice and ICMEC / NCMEC.

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

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

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

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

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

Malta Declaration, March 2006:

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

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

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

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

Latin American Judges' Seminar, November-December 2005:

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

Malta Declaration, March 2004:

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

Noordwijk Seminar, October 2003:

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

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

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

Securing the voluntary return of the child

1.10 Contracting States should encourage voluntary return where possible. It is proposed that Central Authorities should as a matter of practice seek to achieve voluntary return, as intended by Article 7 c) of the Convention, where possible and appropriate by instructing to this end legal agents involved, whether state attorneys or private practitioners, or by referral of parties to a specialist organisation providing an appropriate mediation service. The role played by the courts in this regard is also recognised.

1.11 Measures employed to assist in securing the voluntary return of the child or to bring about an amicable resolution of the issues should not result in any undue delay in return proceedings.

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

Common Law Judicial Conference, September 2000:

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

ANNEXE 2

QUELQUES ORGANISMES ŒUVRANT EN FAVEUR DE LA MEDIATION FAMILIALE INTERNATIONALE

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ANNEX 2

SOME OF THE BODIES INVOLVED IN PROMOTING INTERNATIONAL MEDIATION IN FAMILY MATTERS

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1. The International Social Service (ISS)

The International Social Service is planning a training programme to help to promote the 1996 Hague Convention and the 1980 Hague Convention including the use of mediation and conciliation. The ISS intends to organise ten regional seminars which would involve professionals from 80 to 100 States. The seminars will focus on raising awareness and the practice of conciliation and mediation as well as a better understanding of the international conventions. The seminars aim to target specifically professionals in the ISS network but will also be open to other professionals such as Central Authorities, NGOs and other competent authorities. The ISS also hopes to be able to publish a regular Newsletter similar to the Newsletter it produces in the context of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption*. The Newsletter will be a regular periodical which will ensure a follow up for those professionals who have benefited from the training programmes. The Newsletter would also be sent to all NGOs and authorities that work in the field of international family conflicts.

2. The *Association Internationale Francophone des Intervenants auprès des familles séparées* (AIFI)

The *Association internationale francophone des intervenants auprès des familles séparées* (AIFI) has its headquarters in Quebec, Canada. Since the autumn of 2005, the AIFI has been working to set up a specific training programme for long-distance and international family mediation. To this end, the AIFI is currently collaborating with the *Institut Universitaire Kurt Bösch* (IUKB) in Sion in Switzerland, which started the innovative CEMFI programme (*Certificat européen en médiation familiale internationale*) in Europe.

A short family mediation course is to be developed and provided within the Conflict Prevention and Settlement Programme (*Programme de prévention et règlement des différends* – PRD) of the Faculty of Law, at the University of Sherbrooke in Quebec. This short course should be available from September 2007. It may be supplemented with a course on long-distance and international family mediation at a later date. To meet the needs of Canadian and foreign mediators, online training might be offered, which would include a practical week to take place in Quebec.

Together with the *Association de médiation familiale du Québec* (AMFQ) and Family Mediation Canada (FMC), the AIFI is to develop a long-distance mediation practical experience project for mediators in Canada. The possibility of organising a seminar in English for mediators from the different Canadian provinces will also form part of the discussions.

3. The European Forum for Family Mediation Training and Research

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

The European Forum only accredits training programmes that are open to candidates from legal *and* psycho-social backgrounds, not one *or* the other. There are now 14 European countries with one or more family mediation training programmes accredited by the European Forum: Austria, Belgium, England, France, Germany, Ireland, Israel, Italy, Malta, Poland, Portugal, Scotland, Spain and Switzerland. The European Forum also emphasises that it is important to distinguish between mediation awareness training and a full course of training leading to a recognised qualification to practice family mediation.[1]

4. The *Médiation familiale binationale en Europe* (MFBE)

The Ministers of Justice of France and Germany resolved in December 1998 to establish a group of Parliamentarian mediators for international child abduction cases. The group was established in October 1999 comprising three French and three German Parliamentarians of whom one French and one German were Members of the European Parliament. The respective Ministries of Justice covered the costs of this scheme. Up until 2002 the group intervened in 50 cases. Two mediators, one German and one French were involved in each case. Most cases, which the group addressed, involved contact disputes.

It has been stated that while commencing under political auspices was initially considered helpful, it meant that to an extent private family disputes became politicised and nationalised.[8] Perhaps partly for this reason, the Ministers of Justice agreed in February 2003 that the parliamentary scheme should be abandoned and replaced by a temporary scheme involving professional mediators from the two States. This scheme was established in February 2003 and ran until 1 March 2006 when it was terminated. Mediation under the scheme involved one German and one French mediator, one male and one female, one from a psycho-social background and one from a legal background. In 2005 the professional mediators involved in this initiative established this association for bi-national family mediation in Europe in 2005.

5. The *Mission d'aide à la médiation internationale pour les familles* (MAMIF)

The French organisation MAMIF was created in 2001 within the Ministry of Justice of France. MAMIF has a juridical and a social arm and its aim is to help to provide parents with assistance to appease family conflicts. MAMIF can intervene in disputes involving France and another State outside of the European Union (also including Denmark). Specifically MAMIF can intervene in international child abduction and contact disputes either pursuant to the 1980 Hague Convention or outside its scope. MAMIF has been involved in both single State mediation in Convention cases where MAMIF mediators work together to mediate, and in bi-national mediation involving one MAMIF mediator and one mediator from the other State. According to MAMIF, bi-national mediation has been used particularly in cases concerning the American and Asian continents. MAMIF also relies on *magistrats de liaison*,[2] French consular officers and local authorities in the other State where necessary. Since 2001 MAMIF has processed 454 cases, most of these relating to international child abduction, concerning 77 different States. According to MAMIF the rate of successful mediation is about 86%.

6. *Bundesarbeitsgemeinschaft für Familienmediation* (BAFM)

A national German association *Bundesarbeitsgemeinschaft für Familienmediation* (BAFM) was founded in 1992 to establish and maintain standards in family mediation practice and mediators' training. 50% of BAFM members come from psycho-social backgrounds and 50% from legal backgrounds. BAFM handles the training for family mediators in bi-national cases and will handle training for mediators in the proposed US / German mediation scheme under the 1980 Hague Convention.

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[1] Information in this paragraph is taken from Parkinson, L., Family Mediation in Europe – divided or united? (updated paper given at European Masters in Mediation Seminar), Institut Universitaire Kurt Boesch, Sion, Switzerland, March 2003, at p. 2.

[2] Liaison judges from foreign States who are based in France, and liaison judges from France who are based in foreign States.