

**GUIDE TO GOOD PRACTICE ON MEDIATION
UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE
CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION**

DRAFT OUTLINE

THE OBJECTIVES AND SCOPE

- *Encourage use of mediation and similar means to bring about amicable solutions in child-abduction cases, as promoted by Art. 7 of the 1980 Hague Child Abduction Convention*
- *Describe good practices for the use of mediation and similar means to promote objectives of the 1980 Hague Child Abduction Convention*

EXECUTIVE SUMMARY

INTRODUCTION

- A. Background work of the Hague Conference on international mediation in family matters and similar means of amicable dispute resolution
- B. Work by other bodies
- C. The context – some typical cases
- D. Terminology

THE GUIDE

- 1. The importance of promoting agreements in cross-border family disputes over custody and contact**
 - Advantages of agreed solutions
 - Limits and risks
 - General importance of linkage with relevant legal procedures
- 2. The use of mediation in the framework of the 1980 Hague Child Abduction Convention – an overview of specific challenges**
 - Challenges for the use of mediation in international child abduction cases
 - Time frames / expeditious procedure
 - Close co-operation with administrative / judicial authorities
 - More than one legal system involved; enforceability of the agreement in all / both jurisdictions concerned
 - Different cultural and religious backgrounds
 - Distance and language difficulties

- Criminal proceedings against abducting parent
- Impact of other international, regional instruments relevant in international child abduction cases (Brussels II a, Inter-American Convention, Council of Europe Convention concerning Custody of Children, 1996 Hague Child Protection Convention)

3. Access to mediation and similar means of amicable dispute resolution

- Availability of mediation - stage of Hague proceedings; Referral / self-referral to mediation
 - Role of Central Authority
 - Role of judges / courts
 - Role of lawyers and other professionals
- Cost of mediation
- Venue of mediation
- Initial screening
- Impact on / Linkage with Hague proceedings

4. Scope of mediation (and similar processes to bring about an amicable resolution) in international child abduction cases

- Focus on essential questions regarding return and contact
- Questions of jurisdiction

5. Mediation models / methods / international standards

- Development of international standards
 - Mediation principles, such as Independence, Impartiality, Fairness, Confidentiality, etc.
- Mediation procedure / mediation models
 - Direct or indirect mediation and single or co-mediation
 - Concept of bi-national mediation and others

6. Involvement of the child and possible involvement of third parties

- Involvement of the child in Hague proceedings
- Voice of the child in mediation
- Involvement of third parties

7. Arranging contact with the child during the process of mediation

- Safeguards / avoiding re-abduction

8. Mediation and accusations of domestic violence

- Accusations of domestic violence in Hague proceedings
- Safeguards in mediation / protection of vulnerable party

9. Enforcement of agreed solution under national law

- Close co-operation with administrative / judicial authorities

10. Other legal aspects

- The role of the legal adviser
- Issues of jurisdiction
- Applicable law issues
- Confidentiality

11. The use of mediation to prevent child abductions

- Cross-border family relocation
- Finding agreements for contact and travel arrangements

12. Special training for mediation in international child abduction cases

- Specific training in international family mediation
- Legal framework regarding mediator training

13. The use of mediation and similar processes to bring about an amicable resolution in non-Hague Convention cases

Commentary regarding the Draft Outline:

The main structure of the Draft Outline of the Guide to Good Practice on Mediation follows the examples of other Guides to Good Practice under the 1980 Hague Child Abduction Convention as well as the Guide to Good Practice on Transfrontier Contact.

As regards the order of the content, the Draft Outline suggest starting the Guide to Good Practice on Mediation (after the introductory chapters: Objectives and Scope, Introduction below) with a general note on the importance of mediation in cross-border family disputes (see heading 1.). The subsequent overview of the specific challenges regarding the use of mediation in child abduction cases under the 1980 Hague Child Abduction Convention (see heading 2.) is then followed by a detailed description of the use of mediation in Hague child abduction cases in an almost

chronological order from the access to mediation (see heading 3.) to the enforcement of the mediated agreements (see under heading 9.). Then the important role that mediation can play in preventing child abductions is highlighted (see heading 10.). Finally, the need for specific mediator training for mediation in child abduction cases under the 1980 Hague Child Abduction Convention is dealt with in view of the particular characteristics of mediation in Hague child abduction cases (see heading 11.). At the very end, the Guide points out the main differences between mediation in child abduction cases processed under the 1980 Hague Child Abduction Convention and those under the 1996 Hague Child Protection Convention, and mediation in non-Hague Convention abduction cases (see heading 12.).

See further details in the annotated version of the Draft Outline below, including references to the two studies prepared by the Hague Conference in the past years on cross-border family mediation, which can provide a basis for the work on the Draft Guide:

- *“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”, drafted by Sarah Vigers, Former Legal Officer of the Permanent Bureau, Prel. Doc. No 5 of October 2006 (hereinafter Prel.Doc 5/2006) and*
- *“Feasibility Study on Cross-Border Mediation in Family Matters”, drawn up by the Permanent Bureau, Prel. Doc. No 20 of March 2007 (hereinafter Prel.Doc. 20/2007).*

The annotated draft outline also contains cross-references to other Guides to Good Practice (GGPs).

DRAFT OUTLINE - ANNOTATED

THE OBJECTIVES AND SCOPE

- *Encourage use of mediation and similar means to bring about amicable solutions in child abduction cases, as promoted by Art. 7 of the 1980 Hague Child Abduction Convention*
- *Describe good practices for the use of mediation and similar means to promote objectives of the 1980 Hague Child Abduction Convention*

EXECUTIVE SUMMARY

INTRODUCTION

- A. Background work of the Hague Conference on international mediation in family matters and similar means of amicable dispute resolution
 - *Summary of the Hague Conference's work in the field of cross-border mediation*
 - *Drawing attention to the promotion of mediation and similar means of amicable dispute resolution by Hague Conventions and by accompanying materials, such as GGPs, etc. (Reference to GGP on Transfrontier Contact, Chapter 2, pp. 6 et seq.; GGP Central Authority, 4.12 Voluntary return, pp. 49 et seq.; GGP Preventive Measures, 2.1.1. Voluntary agreement and mediations, pp. 15-16)*
- B. Work by other bodies
- C. The context – some typical cases
 - *Description of some typical situations of child abduction, for example:*
 - *Where left-behind parent might be willing to accept relocation, if the exercise of contact with the child is guaranteed; or*
 - *Where the return of the child together with the abducting parent is facilitated by an agreement, etc.**(see also Prel.Doc. 5/2006, 2.1, p. 8)*
- D. Terminology
 - *Summary of existing definitions of "mediation" and clarification that the Guide will, unless otherwise stated, refer to "mediation" in a very wide sense (see Prel.Doc. 5/2006, 1.3, p. 7; see also Prel.Doc. 20/2007, 1.3, p. 4)*
 - *Explanation that the Guide will also deal with other means of amicable dispute resolution, followed by definition of some other commonly used means of amicable dispute resolution*

THE GUIDE

1. The importance of promoting agreements in cross-border family disputes over custody and contact

- *Reference to the Increasing use of mediation in many States as reflected in international and national law (see Prel.Doc. 5/2006, 1.1, pp. 5-6)*
 - Advantages of agreed solutions
- *Advantages: sustainable solutions for family conflicts; avoiding sometimes cumbersome proceedings; cost-effectiveness (depends on legal system and height of mediation fee) (see also Prel.Doc. 5/2006, 1.1, p.5)*
 - Limits and risks
- *Limits and risks: Drawing attention to the fact that it will depend on the parties and the nature and circumstances of the dispute whether mediation or other means of alternative dispute resolution are appropriate; referring to the usefulness of initial screening; drawing attention to the possible misuse of mediation by one party in order to win time and to delay the proceedings, etc.*
 - General importance of linkage with relevant legal procedures
- *Drawing attention to the importance of viewing mediation as a complement and not a substitute for legal procedures*

2. The use of mediation in the framework of the 1980 Hague Child Abduction Convention – an overview of specific challenges

- *Starting point: promotion of amicable solutions by Art. 7 of the 1980 Hague Child Abduction*
 - Challenges for the use of mediation in international child abduction cases
- *Explanation of special challenges for mediation in international child abduction cases; point out the difference between national family mediation and regular international family mediation*
 - Time frames / expeditious procedure
- *Highlighting the importance of expeditious dealing with the matter, that mediation should not delay the proceedings and that tight time frames are necessary*
 - Close co-operation with administrative / judicial authorities

- *Highlighting the necessity of close co-operation with the competent administrative / judicial authorities*
 - o More than one legal system involved; enforceability of the agreement in all / both jurisdictions concerned
- *Highlighting the essential importance of taking international law and the national law of the jurisdictions involved into consideration*
- *Drawing attention to risks of mediated agreements, which might be invalid and / or unenforceable and the severe consequences this might have for the child concerned, including the risk of a re-abduction, etc.*
 - o Different cultural and religious backgrounds
- *Brief description of special challenges for mediation between parties from different cultural and religious backgrounds;*
 - o Distance and language difficulties
- *Brief description of special challenges for mediation where at least one party has to undertake long journeys to attend an “in person” mediation session*
- *Highlighting of difficulties that may arise if the parties speak different languages and do not feel comfortable speaking a particular language during the mediation session*
 - o Criminal proceedings against abducting parent
- *Drawing attention to the specific implications of criminal proceedings regarding the abducting parent in the country of the child’s habitual residence*
 - Impact of other international, regional instruments relevant in international child abduction cases (Brussels II a, Inter-American Convention, Council of Europe Convention concerning Custody of Children, 1996 Hague Child Protection Convention)
- *Pointing out the position of these instruments regarding mediation (Art. 55 (e) Brussels II bis – Promotion of mediation and similar means; Art. 10 Inter-American Convention – Promotion of voluntary return, etc.)*

3. Access to mediation and similar means of amicable dispute resolution

- Availability of mediation - stage of Hague proceedings; Referral / self-referral to mediation
- *Stating good practices on the use of mediation before / in the course of Hague proceedings; describing access to mediation in Contracting States (regarding availability of mediation see Prel.Doc. 20/2007, 2.3, pp. 5,6); regarding referral see also Prel.Doc. 5/2006, 2.4, p.10; regarding access to mediation see Prel.Doc. 5/2006, 5, pp. 17-18; regarding court-annexed*

mediation/out of court mediation see Prel.Doc. 20/2007, 2.4., pp. 6 et sec.)

- Role of Central Authority
- Role of judges / courts
- Role of lawyers and other professionals
- Cost of mediation
- *Describing good practices, such as the possibility of using the legal aid system for mediation, etc. (see Prel.Doc. 5/2006, 5.3, pp. 19-20; Prel.Doc 20/2007, 2.7, pp. 12,13)*
- Venue of mediation
- *Explaining which aspects might influence the decision on the mediation venue*
- Initial screening
- *Highlighting usefulness of an initial screening to select without delay cases in which mediation will not work*
- Impact on / Linkage with Hague proceedings
- *Good practices on the use of mediation before / in the course of Hague proceedings*

4. Scope of mediation (and similar processes to bring about an amicable resolution) in international child abduction cases

- *Discussing limitations on the scope of mediation in order to allow for it being conducted within a short time-frame (see Prel.Doc. 5/2006, 3.1, pp.10,11)*
- *Highlighting that where mediation engages in finding solutions for custody disputes, two important issues have to be kept in mind: (1) agreements on custody might not be enforceable unless approved by a court; (2) the court in the State to which the child was abducted, which is regularly the State where mediation occurs, may not have jurisdiction on the matter of custody*
- Focus on essential questions regarding return and contact
- Questions of jurisdiction

5. Mediation models / methods / international standards

- Development of international standards

- *Explaining that approaches to mediation vary but that certain minimum standards have been defined; referring to Codes of Conduct (see also Prel.Doc. 5/2006, 3.2-3.4, pp.11-13)*
 - o Mediation principles, such as Independence, Impartiality, Fairness, Confidentiality, etc.
- Mediation procedure / mediation models
- *Briefly introducing common mediation methodology / procedures / models*
- *Highlighting that the Guide only provides examples of certain good practices and will not choose one of these models over another*
- *Pointing out the linkage between certain mediation methods / models and the selection of the mediator(s) in view of professional background as well as in regard to gender, connection to a certain cultural, religious group or nation (see also Prel.Doc. 5/2006, 4, pp.14-17)*
 - o Direct or indirect mediation and single or co-mediation
 - o Concept of bi-national mediation and others

6. Involvement of the child and possible involvement of third parties

- *Pointing out that the involvement of the child in court proceedings / mediation may serve different purposes (1) granting the child the right to be heard (2) considering the point of view of the child*
- *Giving examples of how the child can be involved and how his / her views can be introduced; referring to the status quo in regard to the involvement of the child in Hague proceedings and pointing out good practices for taking the child's voice into consideration in mediation; explaining the difficult balance in the mediators role between non-interference and allowing for links to the best interest of the child approach that will have to be taken into account, where a court approval of the mediated agreement is necessary to render the agreement legally binding (regarding involvement of children in mediation see also Prel.Doc. 5/2006, 6.2, pp. 20-21)*
 - Involvement of the child in Hague proceedings
 - Voice of the child in mediation
 - Involvement of third parties
- *Explain under which circumstances the direct or indirect involvement of third parties in the mediation process might be useful*

7. Arranging contact with the child during the process of mediation

- Safeguards / avoiding re-abduction
- *Pointing out the importance of avoiding an alienation between child and left-behind parent; highlighting the importance of working closely with administrative / judicial authorities in this regard (see Prel.Doc. 5/2006, 6.1, p. 20)*

8. Mediation and accusations of domestic violence

- Accusations of domestic violence in Hague proceedings
- Safeguards in mediation / protection of vulnerable party
- *Pointing out how accusations of domestic violence are dealt with in Hague proceedings and which safeguards are taken to avoid any harm to the child or other parent*
- *Drawing conclusions for dealing with accusations of domestic violence in mediation; highlighting the importance of working closely with administrative / judicial authorities regarding protective measures, etc.*

9. Enforcement of agreed solution under national law

- Close co-operation with administrative / judicial authorities
- *Highlighting that mediation agreement needs to be drafted with a view to its legal validity, to its practicability and with a view to its enforceability (see also Prel.Doc. 5/2006, 3.5, pp.13-14)*

10. Other legal aspects

- The role of the legal adviser
- Issues of jurisdiction
- Applicable law issues
- Confidentiality

11. The use of mediation to prevent child abductions

- *Drawing attention to the use of mediation in order to prevent child abductions; making cross-references to the GGP on Preventive Measures*
 - Cross-border family relocation
 - Finding agreements for contact and travel arrangements

12. Special training for mediation in international child abduction cases

- *Pointing out the need for specific mediator training for mediation in child abduction cases under the 1980 Hague Child Abduction Convention (see also Prel.Doc. 5/2006, 7, pp.21-23); drawing attention to national / regional / international law referring to mediator training / mediator lists, etc.*
 - Specific training in international family mediation
 - Legal framework regarding mediator training

13. The use of mediation and similar processes to bring about an amicable resolution in non-Hague Convention cases

- *Pointing out the main differences between mediation in child abduction cases which fall within the geographical scope of the 1980 Hague Child Abduction Convention or the 1996 Hague Child Protection Convention and mediation in child abduction cases that do not*