

Mediation in child abduction cases

-Making it work-

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• Legal scope

Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters

Brussels II bis (25)

Central authorities should cooperate both in general matter and in specific cases, including for purposes of promoting the amicable resolution of family disputes, in matters of parental responsibility

1980 Hague Convention on Child Abduction, Art.7 (c)

Central Authorities shall take all appropriate measures (...) to secure the voluntary return of the child or to bring about an amicable resolution of the issues

1996 Hague Convention, Art.31 (b)

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

- **ACCES TO MEDIATION – PREVENTIVE MEASURE**

- **Who should refer to mediation?**

Central Contact Points for international family mediation

establishment of Central Contact Points in each country facilitating information on available mediation services in the respective jurisdictions would be important

Courts:

* Divorce case

* Family violence, inequality of power and how to prevent child abduction?

Istanbul Convention, Art. 48 – Prohibition of mandatory alternative dispute resolution processes or Sentencing

Center for social work

Center for Mediation and *Dialogue*

• **LIMIT OF SIX WEEKS PERIOD**

How to incorporate mediation into the tight timeframe of child abduction proceedings?

Suggests:

- *Two, instead of one hearing in child abduction cases*
- *A mediator is invited to attend the first hearing for the purpose of informing the parents about mediation*
- *Mediation process will take place in between the two court hearings*
- *Cooperation of all stakeholders (Courts and Central Authority, mediators, lawyers)*

**some EU countries successfully apply this model in different variants*

• VOICE OF THE CHILD

Best interests of a child - the core principle

United Nations Convention on the Rights of the Child 1989 (UNCRC):

- *'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'*
- Children have a basic right to participate and to be heard
- The biggest challenges and serious risk to involve children in a dispute between their parents
- Mediator should have a special concern for the welfare and best interests of the children
- Child's statement/best interest, how to evaluate?
- The weight given to the wishes of children must be canalized from case to case

- **Who can be a mediator in cases of child abduction?**

- Mediator's role is not to give legal advice
- Can refer the parties to the relevant national or international legal framework
- Draw the parties' attention to the importance of consulting their specialized legal representatives
- Legal representatives must also have very specialized knowledge in the field of international child abduction

Crucial questions:

- *What kind of training and education should a person who wants to deal with mediation in cases of child abduction actually have to go through?*
- *Professional mediators in CA cases?*

- **NON HAGUE CASES**

- *Non-Hague require much greater support*
- *Central contact point/accrediting body*
- *Bilateral agreements/Judicial Protocols*
(UK–Pakistan Judicial Protocol on Children Matters)
- *Mediation could be the only solution*
- *Specialized mediators*
- *Need to rendering the agreement enforceable in the relevant legal systems before commencing with its practical implementation*

- **RECOGNITION AND ENFORCEABILITY OF AGREEMENTS**
- **The EU Mediation Directive 2008/52/EC, Article 6**
Enforceability of agreements resulting from mediation
- **Council of Europe Recommendation No R (98) 1 on family mediation (supra note 52), IV (The status of mediated agreements):**

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

- **The Hague Guide to Good Practice on Mediation**

Risk when parties rely on mediated agreements that have no legal effect in the relevant jurisdictions.

✓ *It is necessary to find a sustainable solution for the parties that can have legal effect*

✓ *To take into consideration the laws of both legal systems, as well as regional or international law applicable in the case.*

How to give legal effect to the mediated agreement in the two or more legal systems concerned?

"The judicial and administrative authorities of the requested State and the requesting State should co-operate with each other as far as possible to overcome possible difficulties in rendering an agreement that amicably settles an international child abduction dispute legally binding and enforceable in both States".

The use of direct judicial communications may be particularly helpful in this regard".

• **Conclusion**

- *Possibility of introducing mandatory mediation in CA cases*
- *Professional mediators/specialized trainings*
- *Active role of judges/direct judicial communication*
- *Encourage states to appoint judges*
- *Promotion of HCCH/IHNJ in the countries of the Western Balkans*
- *Cooperation of all mediation participants (Central Authority, judges, lawyers, mediators, Center for Social Work, NGO...)*



THANK YOU FOR YOUR ATTENTION