

Parental responsibility in a cross-border context including child abduction



Thematic Unit 3

Family mediation

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1. Introduction

The search for cooperative as opposed to adversarial models of conflict settlement has led to a rise in alternative forms of dispute resolution. Alternative Dispute Resolution (ADR) refers to procedures aimed at settling disputes by means other than litigation. The most popular form of ADR is mediation. The [EU Directive on certain aspects of mediation in civil and commercial matters](#) from 21 May 2008 (hereafter referred to as the "EU Mediation Directive") defines mediation as

"...a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator" (Article 3 (a)).

Mediation is perceived to be quicker and less costly than litigation and in many cases more effective since it deals with the interpersonal aspects of conflict rather than just the legal aspects. This is especially important in family conflicts. The EU Mediation Directive states:

"Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements"(Preamble, Paragraph 6).

A number of EU Member States have now passed mediation laws regulating the use of internal and cross-border mediation. Already well-established in some countries, family mediation in the course of separation and divorce is used to regulate such issues as parental responsibility, access or visitation and financial matters such as spousal and child support, compensation and distribution of assets and debts. Family mediation is also very effective in settling cross-border conflicts relating to the exercise of access rights and child abduction.

The material developed here is based on the example of cross-border parental child abduction cases of which there is a growing number due to increased globalization and mobility. Here is one example:

Elisa is the young daughter of a married Italian-German couple living in Germany. Finding it hard to find a qualified job in Germany and feeling isolated, the Italian mother returns home for a summer visit and decides to stay and continue her studies in Italy. The German father is shocked and applies for the child's return to her country of habitual residence under the 1980 Hague Convention. The court recommends mediation and the mediation is scheduled on the weekend before the hearing with an Italian and a German mediator.

2. Potential “players” in a cross-border parental child abduction case

Cross-border child abduction cases involve a number of potential “**players**”. The main people involved are the **parents** and the **child or children**; here reference is made to the “taking parent” and the “left-behind parent”. The taking parent – who is usually the primary caregiver (in 70% of all cases the mother) – almost never feels that they have abducted the child, but rather says that she or he was just trying to get out of a difficult or impossible situation. Many abducting parents are either unaware of the fact that they are breaching international conventions by removing the child from the country without the consent of the other parent or they do know this but hope that the other parent will not take drastic measures to assure the child’s return. **Grandparents and other family members, friends or new partners** can take on an important role in the course of a child abduction case, e.g. by helping the abducting parent plan leaving the country of habitual residence and supporting them upon return or even hiding the child or children. The left-behind parent may be told, “don’t let her do this to you!” and encouraged to “go over there and get the child back”.

When a parent realises that a child has been taken he or she often contacts a local **lawyer** who may encourage the parent to initiate proceedings for attaining sole custody of the child in that country. If the abducting parent and child disappear unexpectedly the left-behind parent will often notify the **police** and ask them to initiate a border alert. The next step is to turn to the **Central Authority (CA)** in the country of habitual residence of the child, who will recommend contacting the Central Authority in the state to which the child has been abducted. This CA will have a central role in the return process, will be in contact with both parents and the lawyers concerned and is in a position to recommend and perhaps even to finance mediation. In some cases, the Central Authority will represent the left-behind parent but in other cases both parents will have their own lawyers representing them in the 1980 Hague Convention case.

The judge deciding on return or non-return of the child to its state of habitual residence may involve any of the following:

- social services
- a guardian ad litem
- an agency organising supervised visitation
- a psychologist as an expert
- an interpreter for the left-behind parent

The judge is in an excellent position to recommend mediation to the parties, especially as many judges are well aware of the fact that a legal decision on the question of return or no return will only provide a solution for this important question but will not solve the many other pressing issues facing the parents.

Finally, the left-behind parent who comes to the country of abduction for the trial may seek support from his or her **consulate**. If the case is appealed, the **appeals court** is

involved and finally, if the child is ordered to return and the abducting parent refuses to cooperate, the **police** and a **bailiff** may be called upon to transition the child from one parent to the other and transport him or her to the train station or airport.

So many people are involved in Hague Convention child abduction cases that it sometimes becomes overwhelming for the parents. At the outset, they had no idea what they were getting themselves into.

3. Models of mediation in cross-border child abduction cases

Mediation usually takes place in the same country as the court case and is scheduled several days before the court hearing. As cross-border child abduction cases are always high conflict and take place under pressure and within a tight judicial and time framework it is generally agreed that co-mediation is essential. The [Guide to Good Practice on Mediation states in Chapter 6.2.3](#):

“Where appropriate and feasible, the use of bi-cultural, bilingual co-mediation should be encouraged in cross-border child abduction cases”.

Based on experience gained with cross-border family cases in the German-French and German-American mediation projects, the [Wroclaw Declaration on Mediation of Bi-national Disputes over Parents’ and Children’s Issues](#) from 2007 recommends the following model of co-mediation:

- **bi-national**: one mediator from each of the parents’ home countries
- **bi-lingual**: both mediators should speak both languages
- **bi-gender**: a man and a woman
- **bi-professional**: one mediator with a psychosocial or educational and the other with a legal professional background.

This model is beneficial to the parties in that both cultural backgrounds are reflected in the mediation process and their language, attitudes, values and priorities will be understood. It is also beneficial to the mediators as they can be confident of grasping the highly complex and intense emotional and legal situation at hand and dealing with it in the most constructive way possible by giving each other mutual support, all the while modeling cross-border cooperation. Their impartiality is not affected.

This basic model of cross-border child abduction mediation is practiced to different extents by the three European organisations that organise cross-border family child abduction mediations on a regular basis: [the British charity Reunite International Child Abduction Centre](#) , [the Dutch International Child Abduction Centre / IKO](#) and [the German non-profit NGO MiKK / Mediation in International Cases involving Parents and Children](#). All three organisations use co-mediation and work with specially trained mediators who are willing to take on cases at short notice and work closely with the competent 1980 Hague Convention court.

- Reunite has a pool of 7 mediators who conduct three 3-hour sessions with couples on two days. The mediation is prepared by Reunite, deals with any topic except full matrimonial or joint finances and property and is paid for by the parents or by legal aid if they are eligible.

- IKO operates a pool of 18 mediators who work in co-mediation on a bi-professional basis and conduct three 3-hour sessions with couples on two days. The mediation is prepared by IKO's Mediation Bureau, deals solely with the issues of abduction, return or no return, relocation and contact and is paid for by the Ministry of Security and Justice and the parents or by the Legal Aid Board if parents qualify.
- MiKK has a network of 140 mediators who can work in 28 languages. MiKK organises the mediation, putting together a co-mediator team consisting of a man and a woman, one from each party's own country or at least with the ability to speak their mother tongue and one with a legal, one with a psychosocial background – thus adhering to the model of mediation propagated in the Wroclaw Declaration. The timeframe of MiKK mediations is dependent on the parents, but sessions usually take place on two or three days and deal with any topic the parents wish to settle. The mediation is financed by the parties themselves or in some special cases by the German Central Authority.

4. Advantages of mediation

While the [1980 Hague Convention on the Civil Aspects of International Child Abduction](#) and the [Brussels IIbis Regulation](#) provide a legal framework for cross-border conflicts involving children, taking legal recourse leaves many questions and issues facing families involved in cross-border disputes open. All these issues relating not only to the short-term question as to where the child should reside, but also to questions such as possible relocation of the child and/or one or both parents, long-term living arrangements, support and contact to the absent parent can be resolved in mediation. In addition, mediation provides a forum for parents to express and explore their feelings of anger and fear as well as their own needs and the needs of the child. As the [EU Directive on certain aspects of mediation in civil and commercial matters](#) in paragraph (6) of the preamble states,

“Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements”.

Since successful mediation can also spare the parties from the uncertainty and expense of further litigation in one or both countries, cross-border family mediation is not only quicker and potentially more effective than court proceedings, it is also more cost effective. Even a mediation that does not end in an agreement opens the lines of communication between the parents, thus deescalating their conflict and enabling them to deal more effectively with each other in the future, e.g. by concentrating on just a few important controversial issues – to the benefit of their child or children.

Advantages of (cross-border) family mediation

- Resolution of issues relating to
 - the child's residence
 - possible relocation of the child and/or one or both parents
 - long-term living arrangements
 - support and contact to the absent parent, etc.
- Forum for parents to express and explore
 - their feelings
 - their own needs
 - the needs of the child
- Fast and flexible procedure
- Cost effectiveness
- De-escalation of conflict

5. Case studies

Case study "Benedict"

Benedict is the 3-year-old son of Kristine, a 32-year old Latvian nurse and Brian, a 34-year-old Irish engineer. Kristine and Brian met five years ago at a pub in Dublin where Kristine had just arrived to start a new job in a university hospital. They had an on-and-off relationship for over a year until Kristine got pregnant. They tried living together for awhile during the pregnancy but things did not work out. However, they were both very committed to being active parents and when their son Benedict was born in September 2009 they agreed that Brian should be appointed guardian of Benedict and signed the necessary paperwork for this. Benedict lived with his mother and spent Wednesday afternoons and every other weekend from Saturday morning to Sunday afternoon with his father. At first his mother was hesitant to let him spend the night with his father but eventually she consented. As long as she had a job, she was happy enough with this arrangement and with living in Ireland, although she was homesick for her family and friends. In the course of the financial crisis, however, both Kristine and Brian lost their jobs. Brian was able to get a less qualified position helping out in his brother's business, but Kristine was left high and dry, forced to survive on welfare and felt more and more uncomfortable living abroad – especially since she knew she could get a job back in Riga, so even if it wouldn't pay well, at least she would be back home. She tried to talk to Brian about this possibility but he was absolutely opposed to it, saying he was afraid to lose Benedict. After all, what would keep Kristine from finding a Latvian husband, marrying and having another child and Brian would be left with nothing and no one – and maybe even have to pay child support for a child he never saw? But Kristine could not get the idea out of her mind and finally moved out of the blue one week in July when she knew Brian would have to work all week and was not scheduled to take Benedict for another 10 days. Brian was very upset by the

fact that he was unable to reach Kristine by phone for over a week and when he went to her apartment to pick up Benedict for the weekend he discovered that they were both gone and the apartment was empty. He was so hurt, angry and desperate that he applied for Benedict's return under the 1980 Hague Convention and also reported the matter to the police with a view to criminal charges being brought against Kristine for child abduction. Kristine was terrified to return for fear that she would be arrested and lose her child forever. The Hague proceedings are to take place in Riga in early November and the mediation is scheduled for a weekend in late October. The Latvian (female) mediator has a psychosocial background and speaks fluent English while the Irish (male) mediator has a legal background but does not speak Latvian.

Case study "Elisa"

Elisa is the 4 ½ year-old daughter of Carla (27) and Thomas (35), a married Italian-German couple who have been living in Rostock since they met six years ago. Thomas is a mathematician and has a PhD and a tenured position at the Max Planck Institute for Demographic Research in Rostock. Carla came to the Institute as a student intern and stayed in Germany because she got pregnant with Elisa; she has been teaching Italian but she would like to go back to university to get her Master's degree in sociology so she can finally find a qualified job. The marriage has not been going well (Thomas is very tied up with his job) and Carla is really starting to feel isolated and to miss her family, friends and culture. She is unsure if her German is good enough to study in Rostock. In the summer of 2012 and with Thomas' consent she takes Elisa on an extended visit to her family's place in Milan and spontaneously decides to stay. She runs into her old Sociology professor who says she can start right away with the Master's program in October. Her parents are willing to help her financially and she enrolls Elisa at the university daycare centre. Everything is falling into place but Thomas doesn't seem willing to go along with her plan. He is shocked that Carla would take such radical steps without consulting him and cannot agree to what she has proposed and seems determined to follow through with. He sees no alternative but to apply for Elisa's return to Germany under the 1980 Hague Convention. The court encouraged the couple to try mediation. The court hearing is scheduled for September 25, 2012 in Milan and the mediation is to take place on Sept. 20 – 22, 2012 with an Italian female mediator with a legal background and a German male mediator with a psychosocial background, both of whom are fluent in German, Italian and English.

6. Differences between domestic family mediation and mediation in cross-border child abduction cases

Cross-border child abduction mediation cases differ from “regular” domestic family mediation cases in relation to the:

6.1. Level of conflict

While parties in domestic cases are also struggling with the hurt, anger and insecurity that inevitably follow separation and divorce, the parties in child abduction cases are experiencing a level of conflict that they feel threatens their (active) role as a parent and in some cases their livelihood and future plans. Both parents are terrified of losing their child or children for good and saddened at the prospect of no longer being able to play a role in the child’s day-to-day life and/or living so far apart that they will not be able to see each other very often and only at great trouble and expense. The taking parent – usually the mother – often has resorted to drastic measures to escape from a situation she or he felt to be untenable or even unbearable and may be feeling guilty but wrongly accused of abduction since she or he saw no other alternative (“He never would have let me go!”). In some cases, the left-behind parent failed to realise how desperate and trapped the other parent was feeling but in no way feels that she or he deserves to have her or his children taken away (“How could she have done this to me and to our child?”). Especially when the child or children were abducted from a situation which the left-behind parent experienced as intact, this partner is dealing with the perspective of having lost not only the child but also the relationship and/or marriage. This can cause extreme feelings of having been treated unfairly and even revenge. Both parents feel overwhelmed facing an unfamiliar and from their perspective unpredictable judicial system, operating for the one party in a foreign country and in a foreign language which she or he may not be fluent in. Typically, communication between the parents has broken down altogether and all trust has been lost. At the outset of the mediation the parties may see absolutely no way out of this intractable situation: How can conflicts that built up over months and years be resolved in a matter of days?

6.2. Issues covered

As a rule, child abduction cases deal first and foremost with the issue of “return or no return” since this is the issue that will be decided by the court if no agreement is reached in mediation. If the parents can come to an agreement around this issue they usually move on to resolve other related issues such as:

- relocation or return of the child and/or abducting parent
- future living arrangements
- custody, visitation, contact to the absent parent
- holidays and travel, including financial arrangements
- religious and cultural / bi-lingual upbringing
- child and spousal support.

As the [Guide to Good Practice on Mediation](#) states: "When it comes to deciding exactly which issues can be covered in the mediation sessions in the individual international child abduction case, a good balance has to be struck between addressing the topics necessary to work out a sustainable agreed solution and complying with rigid time requirements (Chapter 5.1)."

If the abduction occurred out of the relationship the couple may want to discuss to what extent the relationship still exists. Similarly, if criminal charges have been pressed or threatened this must be put on the agenda (see also the [Guide to Good Practice on Mediation, Chapter 2.8](#)) Often the mediators facilitate contact between the child and the left-behind parent between mediation sessions as a trust-building measure. Experience shows that re-establishing parent-child contact has a very positive effect on the mediation process.

6.3. Tight judicial and time framework

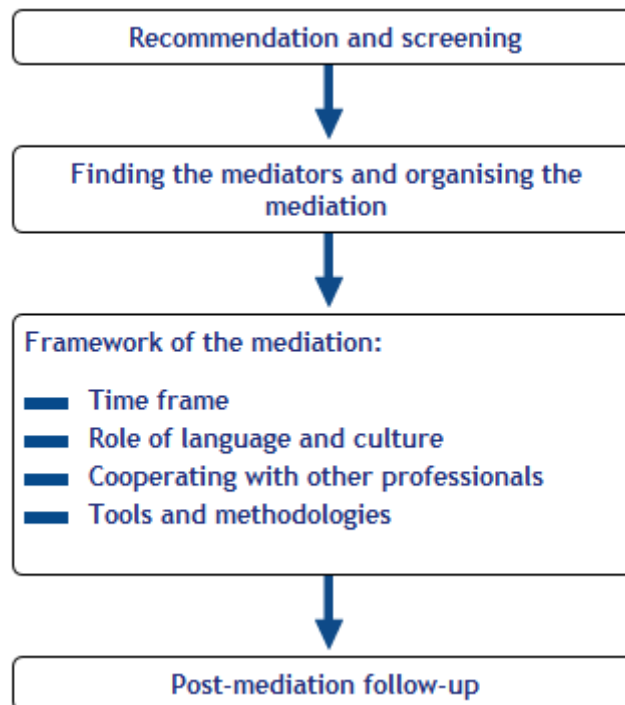
The tight judicial and time framework influences the dynamics of the mediation. Parents and mediators alike are under pressure to achieve but must free themselves of this pressure if they are to have any chance of success. The many hours spent together grappling with life-changing issues in a situation demanding far-reaching decisions brings parties and mediators together in a very special way. This is a very intense and challenging experience for all involved. (See also [Chapter 2 of the Guide to Good Practice on Mediation](#) .)

Interestingly, the [Guide to Good Practice on Mediation](#) advocates the use of mediation even in cases outside the jurisdiction of the 1980 or 1996 Conventions:

"In the absence of an applicable international or regional framework, mediation or similar means of consensual dispute resolution are often the only way of finding a solution enabling the children concerned to maintain continuing contact with both their parents" (Annex 2).

7. The mediation procedure

Mediation is a voluntary process that can be interrupted or terminated whenever one or both parties decide to do so or when and if the mediator or mediators determine that mediation is not appropriate under the given circumstances. The mediators are impartial, i.e. they do not take sides or pass judgment but rather act as a bridge in the communication between the parties, helping them to clarify the issues they need to settle in a fair and balanced manner. Mediators do not suggest solutions or give legal advice – for this the parties consult with their attorneys. The mediators keep all information they gain confidential and only communicate with the parties' lawyers or pass on information such as a draft agreement at the request of the parties. Family mediation focuses on cooperating to reach solutions based on the best interests of the child or children. Mediation may make judicial proceedings unnecessary or simplify them by facilitating agreement between the parties before a judgment has been pronounced (see also [Articles 1 and 3 of the EU Mediation Directive](#)).



7.1. Recommendation and screening

Parties can be made aware of mediation as an option by judges, lawyers, the Central Authority, the ministry of justice, youth welfare services, the guardian ad litem involved in the case or foreign consulates. It is essential that a screening process take place to determine whether or not the case is suitable and in many cases to motivate both parents and attorneys. It is very helpful when the screening and organisation process is conducted by an independent body but it also may be done by the Central Authority.

7.2. Finding the mediators and organising the mediation

In the preparatory stage, time is needed for phone calls and email correspondence with the parties and their attorneys. In some cases, support must be provided for the left-behind parent who is travelling to the site of the mediation and court proceedings. A very important task is finding two qualified mediators representing both cultures, languages and professions, a man and a woman, who are able to take on the case at short notice, travel if necessary and work together constructively and in unity. The mediators will need to consult with each other extensively, speak with the parents and possibly the lawyers and make travel and procedural preparations.

The parents may be asked to fill out a [questionnaire](#) and they will need to decide who will pay for the mediation and consent to an [Agreement to Mediate](#) ahead of time.

This agreement emphasizes the **voluntary nature of mediation**, the **confidentiality of the process** and the **impartiality of the mediators**. Parents agree to work together towards a common solution to the good of their child or children with the support of the mediators. The agreement also regulates the fees and expenses. Aside from the actual time spent in mediation, the mediators may charge for preparation time, travel expenses and accommodation, room rental and the participation of interpreters.

The mediation is usually held in a neutral place in the city where the child is currently residing which is also usually near the presiding court. In some rare cases where parties are unable to travel to attend the court hearing and mediation it is necessary to conduct the mediation online.

Anyone who desires can seek support via the newly-formed [European Network of Cross-Border Family Mediators](#) with over 70 highly-qualified mediators in 28 countries. All of the mediators used by these organisations are specially trained as recommended in the [EU Mediation Directive](#) paragraph (16) of the preamble and described in [Annex 1 of the Guide to Good Practice on Mediation](#) .

It is also important to know that the Hague Conference has encouraged the Contracting States to the 1980 Hague Convention “to establish a Central Contact Point for international family mediation to facilitate access to information on available mediation services and related issues for cross-border family disputes involving children, or to entrust this task to their Central Authorities” ([Guide to Good Practice on Mediation, Chapter 4](#)).

7.3. Time frame

The sooner the mediation begins the better; normally sessions take place on **two or three days shortly before the court hearing**.

The [Guide to Good Practice on Mediation](#) emphasises in Chapter 4.1 that

"Access to mediation and other processes to bring about agreed solutions should not be restricted to the pre-trial stage, but should be available throughout the proceedings, including at the enforcement stage."

It is essential that there is at least one night in between sessions so that parties can reflect on the ideas proposed in the mediation before making decisions. Also, they must ensure that their lawyers are available to provide legal counsel outside of normal working hours, as the mediation often takes place on a weekend. If the child or children is nearby, contact meetings between sessions can be arranged. The parents may also find it helpful to have their own parents, friends or new partners available to support them during the mediation (but not present at the sessions).

7.4. The role of language and culture

While it has proven extremely helpful for the mediators to be from the same culture and speak the same languages as their clients, this does not mean that "their" mediator is on "their" side. However, when parties get upset they tend to express their emotions in their mother tongue and it is important that they are understood in the mediation. Even though it is assumed that they had a common language during the relationship and the mediation is normally conducted in this language, it is necessary in some cases to employ the **services of an interpreter**. Cultural differences that may not have played a significant role in a functioning relationship become all the more important in a conflict situation. In particular, this can pertain to norms and values in relation to the role of the parents and the extended family, upbringing and education and how future conflicts are to be dealt with.

7.5. Cooperating with other professionals

Attorneys, courts and Central Authorities can play a central role in motivating parents to attempt mediation. The [EU Mediation Directive](#) requests that "Member States ... encourage legal practitioners to inform their clients of the possibility of mediation" (paragraph (25) of the preamble) and Article 5 of the Directive states that

"A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute".

As no final mediation agreement is to be signed without both parties consulting their legal advisors, there may be direct contact between the (legal) mediator and the parties' attorneys. The [Guide to Good Practice on Mediation](#) emphasises the role of the Central Authority and the judge or court in encouraging and facilitating access to

mediation (Chapter 4.1.1 and 4.1.2). The court can further cooperate by coordinating the court proceedings with the mediation and suspending them temporarily if the parties need more time to reach agreement in the mediation.

7.6. Tools and methodologies

The dramatic nature of child abduction cases leads mediators to allow time for the parties to describe the ordeal they have recently been through at the outset of the mediation before going on to list the issues they wish to settle. At the same time, the restricted timeframe and legal concentration on the question of "return or no return" means that this is usually the most pressing issue to be dealt with. Usually towards the end of the first day of the mediation parties are asked to brainstorm options and reveal how they feel about these. Further on in the process they are encouraged to develop possible scenarios and test to what extent these meet their needs and those of their children. A helpful tool is the use of separate sessions, whereby both mediators speak with each party together. Often, homework is given between sessions to "reality test" the viability of the possible solutions developed. The outcome of the mediation depends largely on the flexibility and open-mindedness of the parties.

7.8. Post-mediation follow-up

Because child abduction mediations are carried out within tight time limits it is often not possible to settle all relevant issues. Also, as the agreement is enacted new issues arise. The mediators can carry out follow-up sessions via internet or the parties can continue the mediation with new mediators at their final place of residence.

8. The mediation agreement

In relation to the enforceability of agreements resulting from mediation, the [EU Mediation Directive](#) states the following

“1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. (...)
2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.”

(See also [Annex 1 of the Guide to Good Practice on Mediation, “Rendering Mediated Agreement Binding”](#))

The mediation agreement or memorandum of understanding potentially covers the following issues:

- return
- habitual residence of the child and parents
- living arrangements
- support
- custody and visitation
- travel and passports
- bilingual and bicultural upbringing
- repeal of the 1980 Hague Case and/or criminal charges
- legal status of the agreement
- mediation clause

The agreement is written by the mediators in collaboration with the parties in both languages, checked by and approved of by the parties’ attorneys and signed by the parties.

On its own, the agreement is not binding or enforceable.

With the parties’ consent, the attorneys pass it on to the court to ensure its registration or the preparation of a court record. An undertaking (binding declaration made by one of both of the parents to the court of the state of abduction) must be declared binding by the authorities or court in that state; it is not binding in the other state. The agreement can then be made legally binding in the state of the child’s habitual residence by one or both of the following:

- A **mirror order**: either an order from the court in the state of habitual residence of the child mirroring the content of an undertaking made in the state of abduction and rendering it enforceable in the state of the habitual residence or identical orders from courts in the two states involved in the case
- A **safe harbor order** imposing obligations on the left-behind parent by the competent court in the state of habitual residence with the purpose of securing the child’s return to and subsequent residence in its state of habitual residence is enforceable in the state of habitual residence.

In case of complications (e.g. if criminal charges have been threatened or pressed) it could be very helpful for the attorneys to request that the judge contact the liaison judge in the state of habitual residence. Cautionary measures can then be taken to ensure the safe return of the abducting parent, e.g. via a safe harbor order. In some cases only a partial agreement is reached, but even in cases where no agreement was reached in mediation, judges competent for Hague cases report that the parties are in a much better position to communicate with each other and to cooperate with the court than before the mediation.

Conclusion

Mediation is an excellent way to resolve cross-border parental child abduction cases in the interest of the parties involved and most of all in the interest of their children. While mediation in this field faces special challenges, it has much potential and there is a growing need as well as a growing number of highly-qualified cross-border family mediators.