MEDIATION IN INTERNATIONAL FAMILY DISPUTES

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Abstract

There is an increasing importance attached to use of methods to reach agreed solutions in national and international family law, both during the course of litigations involving children, and also in order to prevent such juridical disputes.

Among the different means of amicable dispute resolution (such as conciliation, counselling, arbitration, etc.), mediation remains just one of many possibilities, but still the most widely promoted method of alternative dispute settlement.

The purpose of the article is to identify the advantages and limits of mediation in comparison with court proceedings, and subsequently to highlight its particularities in the context of child abduction cases (which characteristically involve the highest levels of tension between the parties).

Hence, the objectives of the present study are to identify specific challenges of mediation in international chils abductions, such as object, timeframes, cooperation among mediators and administrative/judicial authorities, (non)ennforceability of the agreement in all jurisdictions concerned or language difficulties, associated with different cultural and religious backgrounds, geographical distance, visa and immigration issues.

Furthermore, the study aims to identify use of mediation in order to prevent child abductions, at an early stage of the break of the relationship between parents, where an amicable solution is still reachable and recommendable in the best interests of the child.

Keywords: *family law, alternative methods of amicable resolution, mediation, international abduction, prevention.*

1. Introduction

Use of alternative forms of dispute resolution instead taking the case all the way to a formal judgement demonstrated the beneficies of exploring amicable agreements.

Among a large number of possible agreed solutions, mediation is the most established method applied not only to solve litigations in different areas, but also to prevent them.

Promotion of dispute resolution by agreement has proved to be particularly helpful in family disputes concerning children, as the parents in conflict will usually need to cooperate with each other long after their separation.

The subject has great importance, as agreed solutions are more sustainable in time and establish a less conflictual framework, and therefore they strongly support the interests of the child.

Also, agreed solutions take better into account the special characteristics of family disputes (involvement of persons who, by definition, will continue to have interdependent relationships; increased distressing emotions; impact on other members of the family, especially children).

The study will start by analysing the question whether alternative dispute resolution mechanisms are meant to (and can) totally replace court litigations.

It will continue by identifying the place of mediation among the other amicable solutions, and also the advantages and risks of mediation compared to court proceedings.

Subsequently, the analysis will concentrate on the specificities of mediation in international family law (more precisely, international child abductions, the most disputed litigations in the family area).

Doctrinal opinions and case-law will also be identified and presented, with the necessary mention that in Romanian juridical literature the subject has scarcely been discussed.

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2. Content

2.1. Alternative methods of facilitating agreed resolutions of disputes

Alternative dispute resolution encompasses any methods of resolution taking place outside the courtroom and the traditional way of dispute solutions by litigation.

These alternative methods apply in a great variety of different domains of law, including family law.

In the area of international family law, conventions adopted by the Council of Europe make reference to mediation, conciliation and similar methods to dispute resolution involving children[1].

Recommendation Rec (98)1 of the Committee of Ministers related to family mediation[2] encourages the governments of contracting states to introduce or promote family mediation or, where necessary, strengthen existing family mediation[3].

Also, most of the modern Hague Family Conventions adopted by Hague Conference on Private International law explicitly encourage mediation and similar processes for finding appropriate solutions to cross-border family disputes[4].

In the line promoted by the other Hague Conventions, the Hague Convention of October 25, 1980 on the Civil Aspects of International Child Abduction[5] also encourages the amicable resolution of family disputes.

Similarly, in European law, Council Regulation (EC) no. 2201/2003 of November 27, 2003[6] promotes means of alternative dispute resolution[7], solution maintained by the new Council Regulation (EU) no. 2019/1111[8], which specifically makes reference to mediation (Article 26).

Also, Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters[9] promotes „further the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework”[10].

Finally, in the area of national law, states all over the world adopted domestic instruments on mediation and other alternative methods to solve disputes, including family law[11].

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[1] Art. 13 of European Convention on the Exercise of Children's Rights, adopted on 25.01.1996.

[2] Recommendation Rec (98)1 of the Committee of Ministers to Member States on family mediation, adopted by the Council of Europe, the Committee of Ministers on 21.01.1998 (it is available online at the following address: *https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804ecb6e*, last accession on 04.03.2023, 15:04).

[3] Importance of family mediation and direct reference to Recommendation (98)1 appear in the case-law of the European Court of Human Rights. In this respect, see ECtHR dec. adopted on 06.12.2011, Application no. 16192/06, case *Cengiz Kılıç v. Turkey*, para. 132, where the Court notes „the absence of a civil mediation channel in the national judicial system, the existence of which would have been desirable as an aid to such cooperation for all the parties to the dispute". Similarly, see ECtHR dec. adopted on 08.10.2015, Application no. 56163/12, case *Vujica v. Croatia,* para. 90-92, where the Court stated that the national mandatory mediation procedure had not been followed.

[4] Art. 31 b) of the Hague Convention of 19.10.1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, adopted on 19.10.1996; art. 31 of the Hague Convention on the International Protection of Adults, adopted on 13.10.2000; art. 6 para. 2 d) and art. 34 para. 2 i) of the Hague Convention of 23.11.2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, adopted on 23.11.2007.

[5] Intergovernmental agreement concluded at The Hague on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law, which entered into force on December 1, 1983. Romania is a member state according to Law no. 100/1992 for Romania's accession to 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 243/30.09.1992. For the application of the Convention, Romania adopted Law no. 369/2004 on the application of 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 888/29.09.2004 and successively modified and republished, last republished in the Official Gazette of Romania no. 144/21.02.2023.

[6] Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no. 1347/2000, published in the OJ L 338/1/23.12.2003.

[7] Preamble, para. 25: „Central authorities should cooperate both in general matters and in specific cases, including for purposes of promoting the amicable resolution of family disputes, in matters of parental responsibility".

[8] Council Regulation (EU) 2019/1111 of 25.06.2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), published in the OJ L 178/1/02.07.2019.

[9] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, published in the OJ L 136/1/24.05.2008 (further on, Directive on mediation). The Directive is applicable only to cross-border disputes on civil and commercial matters (and not national disputes, which are governed by domestic law).

[10] Preamble, consideration 7.

[11] *E.g.*, in 2001, the National Conference of Commissioners of Uniform State Laws of the United States of America developed the Uniform Mediation Act as a model law to encourage the effective use of mediation. Romania adopted Law no. 192/2006 on mediation and the organization of the mediator profession, published in the Official Gazette of Romania no. 441/22.05.2006, successively modified.

As juridical literature pointed out, „mediation is now a permanent fixture on the dispute resolution landscape”[12].

2.1.1. Substitute or complement for judicial procedures?

Mediation and other means of amicable resolution have followers, but also opponents, because “these methods are sometimes perceived in a competitive way, as an infringement brought to the monopoly of law over social relations”[13].

Although they are strongly promoted, mediation and similar processes facilitating agreed solutions should not be seen as a substitute for judicial procedures, but rather as a complement[14].

Therefore, access to judicial proceedings must be available unconditionally, and not restricted as a second step after (compulsory) mediation[15].

In our opinion, as mediation operates on voluntary basis, courts cannot *impose* mediation against the will of the parties[16]. In agreement with juridical literature[17], we consider that such an approach might amount to a violation of the rights guaranteed by art. 6 para. (1) ECHR[18].

Mediation may take place within or outside court proceedings[19]; depending on domestic legislation, there are national systems where mediation and judicial procedures are independent, as well as some where they are closely connected (as it will be detailed further on for international abduction situations).

Moreover, complementary judicial measures will frequently be required in order to render an agreed solution legally binding and enforceable in all legal systems concerned (in other words, subsequent judicial steps are mandatory to this end).

In conclusion, we appreciate that there is a close link between judicial processes and mediation/other amicable methods, which cannot be but beneficial, as it may help to overcome certain shortcomings that exist in both proceedings.

Further on, we will try to sum up the main characteristics of the alternative methods most used in practice, mentioning at the same time that they make use of different methods to get the (extra-judicial) agreed result.

2.1.2. Mediation

Mediation was defined as a „voluntary, structured process whereby a *mediator* facilitates communication between the parties to a conflict, enabling them to take responsibility for finding a solution to their conflict.”[20]

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[12] M. Hanks, *Perspectives on mandatory mediation*, UNSW Law Journal, vol. 35 (3), 2012, pp. 929-952, p. 952, available online at *http://classic.austlii.edu.au/au/journals/UNSWLawJl/2012/39.pdf*, last accession 25.02.2023, 20,19.

[13] M. Avram, *Drept civil. Familia*, 3rd ed., revised and completed, Hamangiu Publishing House, Bucharest, 2022, p. 543.

[14] Recommendation Rec. (2002)10 of the Committee of Ministers to Member States on mediation in civil matters, adopted by the Council of Europe, the Committee of Ministers on 18 September 2002 (further on, Recommendation on mediation), available at *https://rm.coe.int/16805e1f76* (last accession on 22.02.2023, 12:09): „although mediation may help to reduce conflicts and the workload of courts, it cannot be a substitute for an efficient, fair and easily accessible judicial system”.

[15] Art. 3 of Recommendation on mediation, already cited: „access to the court should be available as it constitutes the ultimate guarantee for the protection of the rights of the parties”.

[16] See CCR dec. no. 266/07.03.2014, published in the Official Gazette of Romania no. 464/25.06.2014, which declared unconstitutional para. (1) and (1^2) of art. 2 from Law no. 192/2006 (in infringement of art. 21 of Romanian Constitution). The text declared unconstitutional stipulated that the parties were *obliged* to participate in the information session regarding the advantages of mediation (under penalty of inadmissibility of the summons request). The Court concluded that participation in the information meeting will no longer represent an obligation for the parties, but a voluntary option for those interested to resort to such alternative.

[17] For the same opinion, see V. Popova, *The Mediation in the Bulgarian and European Law, Bulgarian, European and International Civil Process,* in Civil Procedure Review, vol. 9/2018, pp. 43-72, p. 46, available online at file: *///C:/kits/159-Texto%20do%20Artigo-297-1-10-20210617.pdf*, last accession on 25.02.2023, 20:10 (the author makes an exhaustive presentation of mediation in Bulgaria).

[18] European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), adopted by the Council of Europe in Rome, on November 4, 1950. Romania is part to the Convention, according to Law no. 30/18.05.1994 for the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the additional Protocols, published in the Official Gazette of Romania no. 135/31.05.1994.

[19] CJEU, dec. adopted on 14.05.2020, C-667/18, case *Orde van Vlaamse Balies,* para. 41 and 42: „(…) EU law itself encourages the use of mediation proceedings (...) in the context of judicial cooperation in civil matters, the Union legislature is called upon to adopt measures aimed at ensuring the development of alternative methods of dispute settlement (...) *the term 'proceedings' referred to in that provision includes judicial and extrajudicial mediation proceedings* in which a court is involved or is capable of being involved, whether when those proceedings are initiated or after they are concluded.” (s.n.)

[20] *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Mediation*, (Hague: Hague Conference on Private International Law – HCCH, Permanent Bureau, 2012), available online at the following link: *https://assets.hcch.net/docs/d09b5e94-64b4-4afe-8ee1-ab97c98daa33.pdf,* last accession on 10.02.2023, 17:50 (further on „*Guide to Good Practice*”), p. 7.

By means of mediation, parties obtain help from a third person (the mediator) to solve the dispute and work out a solution which is their own.

Mediation is based on the trust that the parties place in the mediator, as a neutral person capable of facilitating discussions, in order to obtain a mutually convenient, efficient and sustainable solution.

2.1.3. Conciliation

Conciliation was referred to as „a dispute resolution mechanism in which an impartial third party takes an active and directive role in helping the parties find an agreed solution to their dispute"[21].

The conciliator can therefore *direct* the parties towards a concrete solution (still, the parties are the ones who agree upon the proposed solution).

By contrast, in case of mediation, emphasis is placed on the fact that the mediator only *assists* them in finding their own solution.

The conciliator is therefore more active than the mediator and oriented to a particular solution, but in both cases the decision belongs to the parties involved.

2.1.4. Counselling

In contrast to mediation (and conciliation), counselling does not generally focus on the particular solution of a specific dispute.

It is rather a process that can be used to assist couples or families in dealing with relationship problems in general.

2.1.5. Arbitration

Arbitration is more formal than mediation and it is the arbitrator who (similar to a judge) *solves* the dispute by making a decision.

Similar to a trial, only one of the parties will prevail (it is a win-lose situation). Unlike a trial, appeal rights are limited.

Arbitration process does not therefore imply an agreed outcome (but the parties must nevertheless agree to use arbitration).

2.2. Advantages and risks of mediation

As already pointed out, mediation or other amicable methods are complementary to judicial proceedings and present both advantages and risks, carefully to be considered before choosing one way or another.

Concentrating on the subject of the article, we will further present the most relevant „pros" and „cons" for mediation (and not for all the other alternative methods) in the family law area, with focus on international child abductions.

2.2.1. Advantages

It is most important that mediation **facilitates communication** between the parties in an informal context, and thus allows them to develop their own solution to overcome the dispute, outside the rather rigid framework of legal proceedings.

Mediation is also a **flexible process**, which can easily be adapted to the needs of the individual case and deals better with all the facets of a conflict.

In comparison, the limits imposed in case of litigations cannot include topics that are not legally relevant and which would therefore have no place in a court hearing. For example, the mediation process could include discussions with grandparents, who generally would not have legal standing in judicial proceedings.

At the same time, mediation **reduces the stress** experienced by the parents and the child in the context of a judicial resolution of the conflict.

[21] *Guide to Good Practice, op. cit.,* p. 8.

Attention should also be paid to the certain fact that mediation at an early stage **prevents escaladation of the conflict and might provide a prompt solution** (it is time-effective), whereas the length itself of judicial resolution will most probably deepen the parties' conflict.

Mediation is a **private** procedure which guarantees **confidentiality**, and therefore participants can be reassured that, should the mediation fail, what was said within the mediation will remain confidential and cannot be used in any present/future litigation.

Most relevant, mediation allows parties to keep **control over the outcome** and is more likely to lead to a long-time sustainable solution.

This results in **prevention of future legal proceedings** between the same parties, possible due to the particularity that decisions in family law are always revisable[22].

At the same time, mediation may **avoid costly legal proceedings** both for the parties, and also for the state.

This is particularly advantageous in cross-border family disputes, where legal proceedings in one country generally are followed/accompanied by litigations in another country, concerning different aspects of the same dispute.

In this context, overall costs connected with mediation are important[23], and they should encourage parties to try mediation, rather than become an obstacle[24].

In the context of **international child abduction**, free legal aid for mediation is available for the applicant parents in 1980 Hague Convention abduction cases in some states, such as Great Britain. There are nevertheless jurisdictions offering legal aid only for judicial proceedings, but not for mediation (such as Romania).

Also, mediation between the left-behind parent and the taking parent may facilitate the contact between the left-behind parent and the child during the proceedings or even the voluntary return of the child or an agreed outcome of the whole family conflict.

2.2.2. Risks

Although it might appear quite clear, we nevertheless underline that not all cases may be solved by means of mediation.

Non-mediation cases should be examined from the very beginning and may depend on various aspects, such as the nature of the conflict[25], the specific needs of the parties[26], or the particular circumstances of the case[27].

These are the cases which clearly require the intervention of a judicial authority, or otherwise precious time can be lost in attempting mediation.

Also, there may be a risk that **the agreed solution will not have legal effect** and thus may not safeguard the parties' rights in case of further dispute.

Such are the cases where the mediated agreement (or part of it) may be in conflict with the applicable law or not legally binding and enforceable (*e.g.*, in states where this is required, the agreement has not been registered or court approved).

Moreover, the law of certain states does not even provide for the enforceability of mediated agreements.

In the same line, it should be stressed that there are jurisdictions which **restrict the parties' autonomy** in regard to certain aspects of family law; *e.g.*, such are cases related to „the ability of a parent to limit the amount

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[22] They have but relative *res judicata* authority.

[23] Such as the mediator's fee, travel expenses, costs for interpretation and legal representation in mediation.

[24] „States that have not yet done so should consider the desirability of making legal aid available for mediation, or otherwise ensure that mediation services can be made available either cost-free or at a reasonable price for parties with limited means." (*Guide to Good Practice, op. cit.,* p. 50).

[25] „Potential mediation cases should be screened for the presence of domestic violence, as well as drug and alcohol abuse and other circumstances that may affect the suitability of the case for mediation." (*Guide to Good Practice, op. cit.,* p. 23).

[26] For a discussion of mediation in case of imbalanced powers of parties, who are "consequently denied procedural protections and ultimately perhaps forced to accept inexpensive and ill-informed outcomes", see R. Field, *Family Law Mediation: Process Imbalances Women Should be Aware of Before They Take Part*, QUT Law Review, vol. 14, 1998, available online at *https://lr.law.qut.edu.au/article/download/453/440/453-1-886-1-10-20121004.pdf*, last accession 24.02.2023, 21:34, pp. 23-39.

[27] *E.g.*, cases where one party is not willing to engage in a mediation process or cases where the position of the parties are completely „polarised".

of payable child support by agreement"[28], or agreements concerning the exercise of parental responsibilities (which might need court approval verifying that they comply with the best interests of the child[29]).

Mediation also differs substantially from court proceedings when it comes to introducing **the child's views and opinions** into the process.

A judge may hear the child in person or have the child interviewed by a specialist, with the appropriate safeguards to protect the child's psychological welfare (decision to hear the child generally depends on the age and maturity of the child).

By contrast, the powers of a mediator are limited, as she/he lacks the possibility to summon the child to a hearing or order an expert to interview the child.

As pointed out in juridical literature, direct participation of children in mediation „remains a rarity", situation based on the unjustified assumption that „an adequate representation of their views can be expressed through their parents"[30].

Finally, there is a clear risk that mediation might sometimes be **used just in order to delay judicial proceedings**.

As much as it is in everybody's interest that an amicable resolution should be attempted, the use of mediation by one party as a delaying tactic must be prevented.

This is the reason why, in particular for **international child abduction cases**, initiating return proceedings before commencing mediation should be considered.

This proposal in indeed in the spirit of Regulation no. 2019/111, respectively consideration 42 of the preamble, which stipulates that: „the fact that means of alternative dispute resolution are used should not as such be considered an exceptional circumstance allowing the timeframe to be exceeded".

2.3. Specific challenges for mediation in international child abduction cases

It cannot be emphasized strongly enough that there is a major difference between national and international family mediation.

All considerations presented above remain valid in case of international mediation, but there are also specific aspects which impose particular approaches and skills on mediators.

Mediation in international family disputes is much more complex and requires mediators to have relevant additional training[31], mainly due (but not restricted) to interconnection of two/more different legal systems, different cultures and languages, geographical distance, visa and immigration issues.

In this context, a careful balance must be kept between the general celerity condition associated to all child related proceedings (which is even more strict in international child abductions), and need to allow enough time for communication between parties in the mediation process.

In particular for international child abductions, it should be reminded that the 1980 Hague Convention promotes the search for amicable solutions in art. 7[32] and 10[33], when referring to Central Authorities[34].

Similarly, Regulation no. 2019/1111 makes reference to mediation „as early as possible"[35], either by Central Authorities or the courts.

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[28] *Guide to Good Practice, op. cit.,* p. 24.

[29] Art. 376 and 373-2-7 of the German Civil Code, according to *Guide to Good Practice, op. cit.,* p. 79. Similarly, art. 8 of Law no. 272/2004 concerning protection and promotion of children's rights, published in the Official Gazette of Romania no. 557/23.06.2004, successively modified.

[30] G. Mantle, *The nature and significance of agreement in family court mediation*, Social Work and Social Sciences Review no. 11/2004, pp. 19-35, p. 29 (available online at file*:///C:/kits/430-Article%20Text-466-1-10-20150219%20(1).pdf*, last accession on 24.02.2023, 21:44).

[31] According to *Guide to Good Practice, op. cit.,* p. 36, the following states indicated in the Country Profiles under the 1980 Hague Convention promoted legislation on mediation (and sometimes even specific legislation on family mediation) addressing the issue of necessary qualifications and experience of mediators: Argentina, Belgium, Finland, France, Greece, Hungary, Norway, Panama, Paraguay, Poland, Romania, Slovenia, Spain, Switzerland and the United States of America.

[32] Central Authorities „(…) shall take all appropriate measures (…) c) to secure the voluntary return of the child or to bring about an *amicable resolution* of the issues." (s.n.)

[33] „The Central Authority of the State where the child is shall take or cause to be taken *all appropriate measures* in order to obtain the voluntary return of the child." (s.n.)

[34] Para. 92 of Explanatory Report on the 1980 Hague Child Abduction Convention drafted by Eliza Pérez-Vera, Madrid, April 1981, published in 1982 makes reference to „the duty of Central Authorities to try to find an *extrajudicial solution*". (s.n.)

[35] Art. 26: „As early as possible and at any stage of the proceedings, *the court either directly or, where appropriate, with the assistance of the Central Authorities*, shall invite the parties to consider whether they are willing to engage in mediation or other means of alternative

In conclusion, the possibility of using mediation should be introduced to the parties to an international abduction as early as possible, even before pre-trial stage, from the very beginning of report of this situation to the Central Authorities[36].

We also consider that access to mediation should also be available throughout the proceedings, including the enforcement stage[37].

In this context, in several states, „mediation schemes specifically developed for international child abduction cases are already successfully providing such services"[38] (*e.g.*, the United Kingdom[39] or the Netherlands[40]).

To the same end, contracting states to the 1980 Hague Child Abduction Convention were „encouraged 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"[41].

Finally, it should be mentioned that mediation may be an (only) option in cases involving children abducted to countries not party to the 1980 Hague Convention, where no legal framework exists and therefore a judicial return is not possible.

2.3.1. Object of mediation

The first challenging question is whether mediation in child abduction cases should be restricted only to modalities of the immediate return of the child, since the principle of the 1980 Hague Convention is the return of the child to the state of origin.

We consider that mediation can also discuss the possibility of non-return, such as the decision of the child's relocation and its implications (personal ties program, etc.), and also longer-term issues affecting the parental responsibility or child support arrangements.

Appreciating that those issues can be addressed in mediation is not, in our opinion, in contradiction with the 1980 Hague Convention, because mediation is a much more flexible process than return proceedings.

This aspect should nevertheless be also considered from a procedural perspective, as there are states where agreed solutions cannot be validated in court if they exceed the object of the litigation (the abduction)[42].

A future amendment of Regulation no. 1111/2019 and 1980 Hague Convention on child abduction might consider specific provisions, *expressly* allowing judges in international abduction cases to validate agreements (concluded in or extra mediation procedures), where the agreement refers not only to abduction, but also to other aspects related to the child (*e.g.*, parental authority, domicile of the child, personal ties program, etc.).

This is particularly relevant as, in practice, parties of such extended agreements do not accept partial validation, related only to the abduction (arguing that the agreements were concluded as a whole, encompassing interdependent clauses and intending to solve the entire familial conflict).

We appreciate that this is also the option of the EU legislator, based on consideration 43 of the preamble of Regulation no. 1111/2019, which appears to favour this solution.

The above-mentioned consideration is worded as follows: „Where in the course of return proceedings under the 1980 Hague Convention, *parents reach agreement on the return or non-return of the child, and also on matters of parental responsibility*, this Regulation should, under certain circumstances, make it *possible for*

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dispute resolution, unless this is contrary to the best interests of the child, it is not appropriate in the particular case or would unduly delay the proceedings." (s.n.)

[36] In Switzerland, the legislation implementing the 1980 Convention provides for an explicit possibility for the Central Authority to initiate conciliation or mediation procedures (See art. 4 of the Swiss Federal Act of December 21, 2007 on International Child Abduction and the Hague Conventions on the Protection of Children and Adults, which entered into force on July 1, 2009 (Bundesgesetz über internationale Kindesentführung und die Haager Übereinkommen zum Schutz von Kindern und Erwachsenen (BG-KKE) vom 21 Dezember 2007), available at *http://www.admin.ch/ch/d/sr/2/211.222.32.de.pdf*, last accession 22.02.2023, 13:38.

[37] For the same opinion, see *Guide to Good Practice, op. cit.,* p. 41.

[38] *Idem, op. cit.,* p. 28.

[39] The non-governmental organisation Reunite - International Child Abduction Centre offers mediation services in cases of international child abduction (see the Reunite website at www.reunite.org). With effect from 16 April 2018, a Child Abduction Mediation Scheme is in place in England and Wales.

[40] The nongovernmental organisation Centrum Internationale Kinderontvoering (IKO) offers specialist mediation services in Hague child abduction cases, organised through its Mediation Bureau since November 1, 2009 (see *www.kinderontvoering.org*).

[41] *Guide to Good Practice, op. cit.,* p. 40.

[42] Such is the case of Romania.

them to agree that the court seized under the 1980 Hague Convention should have jurisdiction to give binding legal effect to their agreement, either by incorporating it into a decision, approving it or by using any other form provided by national law and procedure (…) *Member States* which have concentrated jurisdiction *should therefore consider enabling the court seized with the return proceedings under the 1980 Hague Convention to exercise also the jurisdiction* agreed upon or accepted by the parties pursuant to this Regulation in matters of parental responsibility *where agreement of the parties was reached in the course of those return proceedings*." (s.n.).

Nevertheless, we do not appreciate that this consideration is legally binding and directly applicable in member states, as it makes reference to the national laws and procedures. It is therefore rather a recommendation, than an obligation.

This is the reason why a clear and binding provision in the Regulation would be useful, and also in the interest of both the parents and the child/children involved.

2.3.2. Timeframes

Time is crucial in international child abduction cases and it always plays on the side of the "taking parent". The longer the child stays in the country of abduction without the family dispute being resolved, the more it becomes difficult to restore the relationship between the child and the left-behind parent.

Although these considerations should not prevent use of mediation, particular attention should be paid to specific timeframes (already referred to) related to the return proceedings in the framework of the 1980 Hague Child Abduction Convention.

To be compatible with the above-mentioned convention, mediation must comply with quite rigid time limitations. They clearly result from art. 11 para. (2) of the convention, which makes reference to a period of six weeks during which a decision should be reached, starting from the date of commencement of the proceedings.

As already indicated, Central Authorities under the 1980 Hague Child Abduction Convention will, as soon as the whereabouts of the child are known and before court proceedings, generally try to bring about an agreed voluntary return of the child.

The same celerity principle applies to court proceedings, although the states' approach is different as far as mediation is concerned.

We can distinguish two main types of mediation, respectively "court based or annexed mediation" and "out of court mediation".

In states such as Romania, Great Britain or France, mediation is conducted as a parallel and independent process to the Hague return proceedings (an amicable mediation result reached in the parallel process can be introduced into the return proceedings at any time).

By contrast, in Germany and the Netherlands, mediation in international abduction cases is integrated into the schedule of the court proceedings (mediation takes place within the short period of 2-3 weeks before court hearings).

Particular importance attached to timeframes relates also to art. 12 para. (2) of the afore-mentioned Convention.

The said provision stipulates that, when return judicial or administrative proceedings are commenced more than one year after the abduction, the court has discretion to refuse the return, provided that the child has settled into his/her new environment.

Therefore, specific sanctions are imposed in case of exceedment of timeframes, and they might result in non-return of the child in the state of habitual residence.

2.3.3. Cooperation among mediators and administrative/judicial authorities

Consequent to timeframes already referred to, it is advisable in international child abduction cases that mediators should maintain close links with Central Authorities and/or the courts on an administrative level.

Although this recommendation applies in all abduction cases, it is of outmost importance when mediation is integrated into the judicial return proceedings.

Also, close cooperation between mediators and legal representatives of the parties/Central Authorities may be very helpful, with regard to relevant information on legal effect in the relevant jurisdictions of mediated agreements.

It is indeed not the mediator's role to give legal advice, still basic legal knowledge is important for mediators in cross-border family cases.

This will enable them to understand the greater picture and conduct mediation in a responsible manner (for example, refusing mediation when the agreement cannot be valued in the states involved, as we will detail further on).

2.3.4. (In)compatibility of the agreement with national law or (non)enforceability of the agreement in all jurisdictions concerned

Specific difficulties for mediation in international child abduction disputes also result from the fact that more than one legal system is involved.

It is thus important to take into consideration the laws of all legal systems, such as an agreed solution should have legal effect in all jurisdictions concerned[43].

Mediators should thus draw the parties' attention to the importance of obtaining the relevant legal information (as they are not themselves in a position to give legal advice to the parties).

We appreciate that legal information is relevant at least with respect to two closely linked aspects (both substantial and procedural).

First, the substantial content of the mediated agreement needs to be compatible with legal requirements in national laws involved.

Secondly, there is the procedural question of how to give legal effect to the mediated agreement in the legal systems concerned.

These are aspects on which legal representatives of the parties or Central Authorities may offer valuable information and prove once more the importance of a cooperation between them and the mediators[44].

2.3.5. Language difficulties, different cultural and religious backgrounds

Another particular challenge in mediating international abductions is the fact that the parties often have different mother tongues, and also different cultural and religious backgrounds.

This might affect the result of the mediation, caused either by risk of misunderstandings as a result of language difficulties, or the way parties communicate with each other (and with the mediator) in the context of each other's personal background.

Bi-national mediation is sometimes seen as an advantage in this situation (two mediators from the two states involved, versed in the cultural and religious backgrounds of the parties, and at the same time in their mother tongues).

Use of a translator assisting parties in the mediation may also be another option.

Nevertheless, both options will increase the overall costs of mediation.

2.3.6. Geographical distance, visa and immigration issues

Distance between the state of the child's habitual residence (where the left-behind parent is located) and the state to which the child was taken (where the abducting parent lives) may also increase the difficulty of mediation in abduction cases.

Distance may on the one hand overload practical arrangements and also travel costs for mediation sessions (modern means of communication may be considered as an alternative to face-to-face communication).

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[43] Art. 6 of the European Directive on mediation (Enforceability of agreements resulting from mediation): „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*. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability. 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." (s.n.).

[44] Country Profiles under the 1980 Hague Convention may serve as a useful source of information related to formalities required to render mediated agreements enforceable in contracting states (available at *https://www.hcch.net/en/publications-and-studies/details4/?pid=5289&dtid=42*, last accession 24.02.2023, 21:00).

On the other hand, distance may also affect the substantial content of an eventual agreement (which needs to be realistic in terms of time and expenses allocated to travel costs related to possible relocation of the child, personal ties programs, etc.).

Moreover, geographical distance implies provision of travel documents, so that the parents may participate in mediation (or legal proceedings).

As „The Central Authority should take all appropriate steps to assist the parents with obtaining the necessary documents through provision of information and advice, or by facilitating specific services”[45], this is another argument recommending cooperation between mediators and Central Authorities.

2.3.7. Criminal proceedings

Although the 1980 Hague Convention deals only with the civil aspects of international child abduction, criminal proceedings against the taking parent in the country of the child's habitual residence rise enormous difficulties in mediation/return proceedings.

Criminal proceedings initiated by the left-behind parent in the state of origin are in fact a „double-edged sword”, as in particular circumstances they may result in non-agreement in mediation/denial of the return request.

This is the situation when the return would result in separation of the actual carer and child as a result of detention/incarceration of the abducting parent, which might constitute a grave risk of physical or psychological harm in the sense of art. 13 para. (1)b) of the 1980 Hague Convention.

In view of the possible implications shortly pointed out before, it is indeed important to address the issue in the mediation/judicial process.

As mediators themselves cannot prevent or stop such criminal proceedings[46], „co-operation among the relevant judicial and administrative authorities may be necessary to ensure that criminal proceedings are not, or are no longer pending before a mediated agreement (…), or that no such proceedings can be initiated following the return of the taking parent and child”[47].

2.4. Use of mediation in order to prevent child abductions

At a very early stage in a family dispute with extraneous elements concerning children, mediation may be of assistance in preventing abduction.

When the relationship of the parents breaks down and one of them wishes to leave the country with the minor, mediation can assist the parents in considering a possible relocation of the child, or help them to find whatever agreed solution, thus finally avoiding abduction and its consequences.

3. Conclusions

Mediation is the most promoted among processes facilitating the amicable resolution of dispute and presents an undeniable interest throughout the EU and the world.

Although in general advantages of mediation outweigh the risks, whether mediation or litigation serves better the needs of the parties depends on each case and should carefully be considered from the very beginning (not all the cases can be mediated).

The same tendency of growing use of mediation in solving disputes as an alternative to judicial decisions appears also in national and international family law, especially in the context of the increasing internationalisation of family relationships and the very particular problems associated with this phenomenon.

Nevertheless, while mediation in national family cases has substantial results, it does not happen with the same frequency in the international cases related to child abduction[48].

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[45] *Guide to Good Practice, op. cit.,* p. 33.

[46] And in some cases (depending on domestic legislation) not even the parent who initiated the criminal proceedings may dispose of them.

[47] *Guide to Good Practice, op. cit.,* p. 35.

[48] „In Romanian legal practice we could not identify relevant cases in cross-border mediation” (D.-A. Popescu, *Mediation in matters concerning parental responsibilities and international child abduction. Recognition and enforcement of agreements concluded during return proceedings*, 2019, available online at *https://law.ubbcluj.ro/ojs/index.php/iurisprudentia/article/view/29/46*, last accession 24.02.2023, 21:25).

There are significant challenges related to the specificities of international abductions, such as rigid timeframes, different laws/languages/cultures geographic distance, criminal proceedings, immigration issues.

All of them constitute limitative elements, testing the abilities of mediators and the outcome of mediation, which may be exceeded only by increase of specialization of all actors involved in this particular area of law.

In this context, adoption of national legislation specific for mediation in international law, including child abductions, would be helpful (such is the case of Romania, where specific legislation does not exist).

Also, specific training in mediation of judges involved in international abductions would be beneficial, doubled by the legal possibility to validate agreed solutions even where they exceed the limits of the abduction litigations.

Although exploration of new frontiers is always a challenge, „mediation is emerging as an important and viable alternative for families facing the crisis of international child abduction."[49]

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