

Content

Introduction by the Editors 9

List of Contributors 14

Chapter 1: Cross-Border Family Mediation – An Innovative Approach to a Contemporary Issue 18

I. The Legal Framework for International Child Abduction Cases and International Proceedings concerning Custody and Access Rights 18

A. International Child Abduction 18

1. The legal framework of the Hague Convention on the Civil Aspects of International Child Abduction (1980 Hague Convention) 18
1. Scope 19
2. Substantive requirements for return 19
 - a) Wrongfulness of removal or retention 19
 - b) Effective exercise of rights of custody 20
 - c) Filing the application within one year 20
3. Ban on a decision on the merits of custody rights (article 16) 21
4. Exceptions from the obligation to return the child immediately 21
 - a) Non-exercise of custody rights/consent 21
 - b) Grave risk 21
 - c) Objections/wishes of the child 22
 - d) Social integration of the child 22
 - e) Violation of fundamental principles relating to the protection of human rights and fundamental freedoms (article 20) 22
5. Procedural steps 23
 - a) Requirements for making an application (article 8) 23
 - b) Legal costs 23
 - c) National procedural law 23
6. Special features of the Brussels II bis Regulation 24
7. De-escalation measures to end proceedings 25
- II. European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (European Custody Convention) 28

III. Abductions in contracting states not party to the 1980 Hague Convention	29
B. International rights of custody and access	29
I. Brussels II bis Regulation	29
1. Recognition and enforcement	30
2. Rights of Custody	30
3. Rights of Access	31
II. Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants (1961 Hague Convention)	32
III. Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Hague Child Protection Convention)	32
1. Jurisdiction	33
2. Applicable Law	34
3. Recognition and enforcement	35
4. Cooperation between courts and authorities	35
IV. Access rights under the 1980 Hague Convention	35
V. Rights of access under the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody and Children	36
VI. Convention on Contact Concerning Children (Contact Convention)	36
VII. Autonomous law	36
C. Conclusion	38
II. Family Mediation in an International Context: Cross-Border Parental Child Abduction, Custody and Access Conflicts: Traits and Guidelines	39
1. Putting mediation on the agenda	39
2. Suitability for mediation	40
3. Particularities of mediation in 1980 Hague Convention cases	40
4. Finding suitable mediators	42
5. Motivation / Motivating both parents and the attorneys	43
6. Preparing the mediation process	44
7. Time needed in the preparatory stage	46

8. Location of the mediation 46
9. Timeframe of the mediation 47
10. Particularities related to the stages of mediation 48
11. Who apart from the parents should be involved in the mediation? 49
12. Collaboration of the co-mediators 50
13. How should the attorneys of both parents be integrated? 51
14. How should the courts be integrated? 51
15. Particularities in relation to the mediation process 53
16. Language, communication, documents, resources 53
17. Working agreement / Initial agreement with the parents 54
18. Fees and expenses 54
19. Final agreement, Memorandum of Understanding, preparation of a court record 55
20. Post-mediation care and support 55

III. Integrating Mediation into Court Proceedings in Cross-Border Family Cases 59

- A. Court proceedings for return of the child 59
- B. Advantages to integrating mediation 62
- C. Integrating mediation into court proceedings 63
- D. Financing the mediation 68
 - I. Costs of adversarial proceedings in Germany and Sweden 69
 - II. Fictitious costs of court proceedings in the first instance in Germany and of a mediation process held in this context 70
- E. Integrating results of mediation into court proceedings 71
- F. Cross-border child custody and access proceedings 73
- G. Conclusion 74

IV. Mediation in action: challenges and case studies, bi-national projects and international cooperation 77

- A. Facing the challenge of mediating cross-border family conflicts 77
- B. Making the best of an "impossible" situation 78
- C. Methodology, dynamics and attitude 80
- D. Case studies 83

E. Bi-national projects and wider international cooperation	86
I. Developing professional mediation: The German-French project	86
II. Dealing with different legal cultures: The German-American project	88
III. Cooperation at all levels: The German-Polish project	91
IV. Towards broader international cooperation	92
V. Conclusion	93
V. Cross-Border Child Abduction Mediation in Cases concerning Non-Hague Convention Countries	96
A. Background to the problem	97
I. The 1980 Hague Convention	98
II. The 1980 Hague Convention – its principles and shortcomings	99
B. Mediation in different cultures and traditions	100
C. The Sharia position with regard to child abduction	101
D. Possible challenges	104
I. Attitude and structure	104
II. Making mediation an attractive and viable option	105
E. Auxiliary support mechanisms for effective mediation	106
I. The Malta Process	107
II. Need for Shared Understanding on an international level	108
1. Overriding principles	108
2. Methodology	108
3. Structure	109
F. Type of training required	110
I. Essential Elements	110
II. Culturally appropriate model	111
G. The reunite experience	112
I. The pilot project	112
II. The information base on Muslim countries	112
H. Incremental learning – a way forward	113

Chapter 2: Case Studies and articles 118

I. Case study: Mediation in Cross-Border, Cross-Cultural Child Abduction 118

1. Necessary Stakeholders 118
2. Necessary Institutions 119
3. The choice of mediators 120
4. Resolution of the matter 121

II. Mediation within the framework of a German-English child abduction 123

1. Preparation 123
2. Sunday afternoon – Mediation phases I and II 124
3. Monday morning – Mediation phase III 126
4. Monday afternoon – Mediation phases IV and V 127
5. Conclusion 131

III. Family Mediation in International Child Custody Conflicts: The Role of the Consulting Attorneys 133

1. An interim solution 134
2. Case study 134
3. Preparation and framework for the proceedings 135
4. Dynamics, interventions and turning points in the process 136
5. The attitude of the mediators 137
6. The role of the consulting attorneys 138
7. Conclusion and results of the proceedings 138

IV. An International Mediation: From Child Abduction to Property Distribution 140

1. Adam between Los Angeles and Berlin 141
2. From the beginning of mediation to an intermediate agreement 142
3. The Second Session 143
4. The Third Session 144
5. Intermediate Mediation Agreement 144
6. The Fourth Session 145
7. The Fifth Session 146
8. Mediation Agreement 146
 - a) Return to the United States 146
 - b) Residence 147
 - c) Joint custody 147

- d) Child support/expenses for Adam 147
 - e) Bicultural upbringing 147
 - f) Parenting class 147
 - g) Divorce 147
 - h) Travel with Adam 147
 - i) Holidays and birthdays 148
 - j) Dealing with each other 148
 - k) Extenuating circumstances 148
 - l) Assets 148
 - m) Legal status of this agreement 149
 - n) Mediation clause 149
 - o) Information 149
9. Conclusion 150

Chapter 3: Appendix 151

I. Contact Addresses 151

II. Legal texts, acts, guidelines and declarations 153

- A. Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction 153
- B. COUNCIL REGULATION (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 – Brussels II bis regulation 167
- C. Wrocław Declaration on Mediation of Bi-national Disputes over Parents' and Children's Issues 197
- D. Hague Conference on Private International Law 199
 - I. Declaration of the Third Malta Judicial Conference on Cross-Frontier Family Law Issues from March, 26th 2009 hosted by the Government of Malta in Collaboration with the Hague Conference on Private International Law 199
 - II. Guides to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction issued by the Hague Conference on Private International Law 199

III. Draft Guide to Good Practice on Mediation issued by the Hague Conference on Private International Law	199
E. European Guidelines	199
I. 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	199
II. European Commission for the Efficiency of Justice: Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters, 7 December 2007	200
F. Prevention guides	200
I. Child Focus Prevention guide	200
II. MiKK Prevention Guide (in German)	200
G. Reunite Prevention Guide	200
I. Mediation laws worldwide	200
III. Supplementary materials	201
A. Checklist for judges concerning the Hague Convention on the Civil Aspects of International Child Abduction of October 25, 1980 ("1980 Hague Convention")	201
B. Procedural Checklist-Initial order for an application under the 1980 Hague Convention, articles 12 and 3	203
C. Information for parties in proceedings under the Hague Convention on the Civil Aspects of International Child Abduction of October 25, 1980 (hereafter: "1980 Hague Convention") – an example from Germany	205
D. Information for Attorneys in proceedings under the Hague Convention on the Civil Aspects of International Child Abduction of October 25, 1980 (hereafter: "1980 Hague Convention") – an example from Germany	207
E. Agreement to Mediate	210
I. Our role as mediators	210
II. Willingness to take part in mediation	211
III. Full financial information	211

IV. Confidentiality	211
V. No prejudice	212
VI. Mediation appointments and fees	212
F. The 6 steps of mediation	214
G. Sample mediated parental settlement certified by the 1980 Hague Convention Court and mirror order	214
I. Excerpt from a German court record: Parental settlement and decision certified by the court (return of the child to the country of origin with the abductor until the conclusion of legal proceedings there)	214
II. Example of settlement agreement in USA (country of origin) with mirror order (Transcript from a US Court)	217
1. Attorney petition	217
2. United States court decision	218
III. Additional Agreed Temporary Orders	218
1. Appearances	218
2. Jurisdiction	219
3. Findings	219
4. Access	219
5. Mutual Agreement or Specified Terms for Access	219
6. Order	220
7. Other Provisions	220
8. Other Agreed Provisions	220
9. Maintenance	221
10. Duration	221
IV. Subsequently attached German Mirror Order	221
Index	222