MEDIATION TO RESOLVE CHILD ABDUCTION ISSUES FOR HAGUE AND NON-HAGUE CONVENTION COUNTRIES

A Personal Account of the Author's Experience in Legal Practice

The conventional view was that mediation had no role in applications for a return order brought under the Convention on the Civil Aspects of International Child Abduction ("Hague Abduction Convention"). However, mediation has been carried out for Hague Abduction Convention cases in the past decades with some success and has gradually become a more common practice. In recognition of this, in 2011, the "Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Part V – Mediation" was published. This article discusses the work done by various international organisations and bodies to promote the use of mediation for international child abduction disputes, thus contributing to a shift in professional attitudes. There are still a significant number of countries which have not acceded to the Hague Abduction Convention. In such countries, there will be no available court or no remedy within the available court for a parent whose child has been abducted there. For such cases, the present author argues that mediation is a "front-runner" solution. It may be brokered by actors other than lawyers. The article gives an example where mediation had been successfully used to enable the return of children to the UK from such a country, namely, Pakistan. The author analyses the factors and conditions for the success of the mediation process, discusses various developments in international family mediation for child abduction cases, and shares his views on the challenges facing the development of a global network of international mediators.

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I. Abductions that engage Convention on the Civil Aspects of International Child Abduction[1]

1 The Convention on the Civil Aspects of International Child Abduction ("Hague Abduction Convention") will be very familiar to anyone with any experience of international family justice. For it is the corner stone of international family law. It was intended to put an end to the prevalent evil of child-kidnapping. It succeeded in that aim and has stood the test of time. A considerable body of case law has developed guiding the construction and application of the Convention. That case law is helpfully made available by the Hague Conference on Private International Law ("HCCH") on its INCADAT website tool.[2]

2 The conventional view was that mediation had no role in applications for a return order brought under the Hague Abduction Convention. For that now historic view, there were a number of plausible supporting arguments. First, the professional practice of mediation was still in a stage of relatively early development and such services as were available generally focused on litigation in domestic rather than in international child law. Second, given the general target of six weeks from issue to judgment, mediation was seen as a threat to the timetable and therefore not compatible with hot pursuit proceedings. Third, the limited nature of Hague Abduction Convention proceedings, namely, only to reverse the abduction by restoring the child to its country of residence, suggested that any mediation as well as any judicial investigation of wider welfare issues should be in that jurisdiction rather than in the jurisdiction determining the application for the return order. Fourth, a point connected to the last. What would be the scope and bounds of a projected mediation? Abductions do not come without a long and complicated history. They do not happen on a whim or on the spur of the moment. They are generally long premeditated and planned with much more care than a summer holiday. So, does the mediation encompass the relatively concise issue of return? Or, does it grapple with the long-standing, deep-seated problems in the parental relationship? The answer to that question will bear on the requisite skill and experience of the mediator. Further, if it is to be all-issues mediation, that would be even harder to fit within the six-week timetable. It is easy to predict that the mediation would become the tail wagging the dog. Fifth, in abduction cases, the parents often have different nationalities, different mother tongues and different faiths. A single mediator might not gain the confidence of both parents or not maintain it through a protracted and emotionally charged mediation. Reality might require two mediators – one matching the

1 Concluded 25 October 1980.
2 INCADAT website <https://www.incadat.com/en> (accessed 1 March 2018).

gender, language and faith of each parent. Two mediators are harder to identify, agree and fund than one. Sixth, who will provide whatever mediation service is required. There is no clear international service provider. However, in the UK, there is the charity, Reunite International Child Abduction Centre ("Reunite"); in Germany, there is a similar charity, MiKK; and in the Netherlands, there is International Child Abduction Center ("IKO"). These are well-known national resources that are experienced and expert in providing mediation in transnational abduction cases.[3] But they do not individually carry a global profile. At the end of such a succession of obstacles, it may be thought surprising that in the course of the last decade, the obstacles have either diminished or turned out to be illusory.

3 In summary, it is very clear that mediation was never in the contemplation of the drafters of the Hague Abduction Convention. Nigel Lowe, in the second edition of his magisterial authority, *The International Movement of Children: Law Practice and Procedure*, offered a salutary historical perspective. When he completed the first edition in 2003, mediation was unknown in Hague Abduction Convention proceedings. He reminded us that it was the UK charity, Reunite, that proved its conviction that mediation should be the norm in abduction cases.[4] In 2003, Reunite obtained a grant from the Nuffield Foundation to conduct research into the mediation of abduction cases. Some of the cases within the survey were face to face, some were with parents continents apart and conducted by telephone. Even in such cases, a successful, or partially successful, outcome was achieved. On a small sample of just over 40 cases, a surprisingly high percentage of success was achieved. Of the 41 cases referred, 28 proceeded to mediation, of which 21 concluded with a memorandum of understanding. Marilyn Freeman was commissioned by Reunite to carry out this research and her reports were available by 2006.[5] It is important to reckon partial success in any analysis of outcome since any issue converted from contentious to agreed is a gain, the scale of which depends on the scale of the issue or issues agreed. Freeman's publication was available in time for the Fifth Special Commission, also held in 2006. The Commission welcomed the work of Reunite and requested the Permanent Bureau "to

3 See Reunite International Child Abduction Centre website <http://www.reunite.org/> (accessed 1 March 2018), MiKK website <https://www.mikk-ev.de/en/> (accessed 1 March 2018) and International Child Abduction Center website <http://www.kinderontvoering.org/> (accessed 1 March 2018) for more details as to the respective organisations.

4 Mark Everall, Michael Nicholls & Nigel Lowe, *International Movement of Children: Law Practice and Procedure* (LexisNexis, 2nd Ed, 2016) at paras 17.102–17.106.

5 See Reunite International Child Abduction Centre, *Mediation in International Parental Child Abduction: The Reunite Mediation Pilot Scheme* (October 2006).

keep States informed of developments in the mediation of cross-border disputes concerning contact and abduction".

4 Then, in 2008, the growing international enthusiasm for mediation found expression in the decision of the Council on General Affairs and Policy of HCCH to direct the Permanent Bureau to prepare a guide on mediation to be considered at the Sixth Meeting of the Special Commission. With the approval of the Commission, the "Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Part V – Mediation"[6] was published in 2011. It is a substantial and authoritative text running to just over 100 pages. With that, mediation in abduction cases had truly come of age.

5 A number of other influences have contributed to the good work that has achieved this change. HCCH itself has seen its Convention in a wider context. It is better to work on preventing abductions than on providing tools to reverse them. Prevention can be achieved by public education as to the consequences of abduction, as well as by the provision of counselling and other services to support parental relationships in stress. If an application under the Hague Abduction Convention is issued, it is best resolved by a consent order and the chances of consent will generally be enhanced by a skilful mediator.

6 In a similar way, the European Union ("EU") has worked consistently to prevent child abduction. For informing the public, it has produced educational videos available in most European languages. Then, it has enacted its Mediation Directive[7] providing for mediation in European cross-border cases. The Mediation Directive applies only to cross-border civil and commercial disputes. It has five key rules which the present author summarises as follows:

(a) It obliges Member States to develop mediation services.

(b) It empowers judges to suggest mediation to the parties at any stage in the proceedings.

(c) It obliges Member States to create mechanisms to ensure that concluded agreements are enforceable.

(d) It ensures confidentiality in mediation.

6 Hague Conference on Private International Law, "Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Part V – Mediation" (May 2011).

7 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.

(e) It ensures that limitation periods are suspended during mediation.

7 The operation of the Directive has been supported by training programmes and by regular review at meetings of the European Judicial Network ("EJN"). In the author's experience, however, this Directive has had very little, if any, impact in European family proceedings. It aspired only to write lowest common denomination rules.

8 Another international organisation that has been active in the promotion of mediation of disputes involving the international movement of children is International Social Service ("ISS") from their headquarters in Geneva. In 2014, they published their guide: "Resolving Family Conflicts: A Guide to International Family Mediation".[8] This runs to 98 pages and is referenced on the HCCH website.[9] It is largely the work of three acknowledged experts who have written for everyman and eschewed technical jargon. The text is illuminated with sketches and quotations from notional parents. Since 2010, ISS has run a global programme to support access to international family mediation. The programme is directed by an Advisory Board of international experts. The guide is a product of the Advisory Board. It is available in nine languages and has been distributed globally. ISS aspires to draft a Charter for International Mediation and to create a global network of international mediators. This last aspiration would be potentially of great practical utility.

9 Other international bodies with an interest in international child mediation include UNICEF, the Commonwealth, and on a narrower base, the Council of Europe.

10 Supported with EU funding is another regional resource, LEPCA, which is the acronym for Lawyers in Europe on Parental Child Abduction. It launched at a conference in The Hague in 2014. Its co-partners are the German non-profit organisation ("NGO"), MiKK, and the Dutch NGO, IKO, both the leading child abduction services in their respective countries. In the UK, the NGO, Reunite, holds a similar function and standing.

11 The ability for a family justice system to transform the approach to mediation in proceedings brought under the Hague Abduction Convention is proved by the Netherlands. For applications under the

8 International Social Service, "Resolving Family Conflicts: A Guide to International Family Mediation" (2014).

9 Hague Conference on Private International Law website <https://www.hcch.net/en/home> (accessed 3 May 2018).

Convention, there is the single centralised court in The Hague. There, a novel procedure was introduced. As soon as an incoming application is accepted by the Central Authority, a letter is sent to the parties inviting them to a carefully controlled pre-court mediation. It is the Central Authority for the Netherlands in The Hague that ensures that neither party procrastinates. If the invitation is not accepted or if, after acceptance, the mediation fails, once proceedings are issued in the court, the court again invites the parties to participate in a strictly controlled mediation. It is the court that will supervise the appointment of the mediator and impose a strict timetable for the ensuing meetings. This procedure does not compromise an equally original interpretation of the requirement in Art 11 of the Regulation, Brussels II bis,[10] to complete the proceedings within 42 days. The Dutch interpretation is to say 42 days for the Central Authorities' administrative function, 42 days for the trial in the first instance court and 42 days for any appeal. That this is a permissible interpretation is clear from its adoption by the European Commission in its proposal for recasting the Brussels IIa Regulation published in June 2016 and currently under negotiation.

12 All the developments which the present author has sought to record above have contributed to a remarkable shift in professional attitudes. What was once regarded as inappropriate is now regarded as the desirable norm, at least for exploration.

II. Abductions that do not involve Convention on the Civil Aspects of International Child Abduction

13 In family justice, there are few cases more poignant than that of the parent who has lost his child to abduction behind the frontier of a nation that has not ratified or acceded to the Hague Abduction Convention. The frontier becomes a prison wall that not only prevents the child's return but is also often a barrier to meetings. Even if the parent has freedom of movement, if there is no court to order and enforce access, the journey-in-vain only heightens the suffering. Whilst half the countries of the world support the Convention, the other half do not. Most acute is the parent's suffering where the country of abduction and flight is a Muslim state without a secular justice system for family applications and/or a state that gives particular protection to nationals of that state.

10 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.

14 In such cases where there is no available court, or no remedy within the available court, diplomacy or political pressure becomes the parent's only hope. Logically, therefore, abductions wherever the Hague Abduction Convention is available to provide a remedy are, in the UK, the province of the Ministry of Justice, whereas in those cases where there is no Hague Abduction Convention remedy, they are the province of the Foreign & Commonwealth Office ("Foreign Office"). Within the consular division of the Foreign Office is a small but important department, the child abduction department. The London department works closely with the Consul and his staff in the capital of the country to which the child has been taken. Additionally, a visiting Foreign Office minister may be briefed to raise with his counterpart the plight of the separated parent and child.

15 In such situations, what tactics are open to the Consul in the foreign capital? The answer depends on accumulated experience of what works and what does not. It is difficult to take a broad view since there is much diversity between nations. But in the majority, mediation will be a front-runner. This is unlikely to be direct or even brokered by lawyers. It may be within the realm of the religious court or a state body, such as the Conciliation and Good Offices Commission in Egypt. It may even be in the state from which the child was abducted if the abductor is caught in continuing financial proceedings and has assets within the jurisdiction against which financial orders can be enforced.

16 Enforceability is the key to power. If the abductor has left no assets behind him, then an order for the immediate return of the abducted child will be valueless since, despite all the doctrines of comity, it is unlikely to be enforceable in the foreign court. But if the abductor left assets behind then he may be faced with the choice of returning his abducted child or losing his assets. To avoid the choice, he may be willing to engage in mediation.

17 A rare but potent example of such a case is provided by the reported case of *Al-Khatib v Masry*.[11] The very rich Saudi husband had abducted his children to Arabia. The wife then brought her financial claims on divorce and obtained an order that he pay her over £20m by way of lump sum. Some £13m was enforceable against his English assets. He appealed to the Court of Appeal. At the time the present author was responsible for the court's alternative dispute resolution scheme, he was able to secure the parents' agreement to a joint mediation conducted by the leader of the Muslim Council of Britain (based in London) and a retired judge who had specialised in family proceedings. After seven days of mediation, not consecutive, a settlement resulted. The

11 [2002] EWHC 108 (Fam).

father agreed that the children might return to London and the mother agreed to abandon her lump sum order above the portion that was enforceable against his English assets.

18 The UK judiciary has played a special role in seeking to negotiate procedures to provide some justice where no international law is available. In 2002, the President of the Family Division, with the support of the Lord Chancellor, invited the Chief Justice of Pakistan to lead a judicial delegation to London to negotiate an agreement as to jurisdiction and good practice to combat child abduction between our respective jurisdictions. The resulting agreement became known as the "Pakistan Protocol".[12] The essence of this practical mechanism was always to recognise and respect the jurisdiction of the child's habitual residence. Thus, if a child habitually resident in England were abducted to Pakistan, the Pakistan court would order summary return to enable the English court to exercise its jurisdiction on all areas effecting the child's welfare: and, of course, *vice versa*. This, in Pakistan, was a more contentious mechanism than it was in England because its critics did not regard it as compliant with Sharia law. So, its application in Pakistan sometimes appeared covert.

19 In England, the practice was the subject of a President's direction. Any order made under the Pakistan Protocol had to be copied both to the Foreign Office and to the present author's office, the Office of the Head of International Family Justice for England and Wales. There is no doubt that the existence of the Pakistan Protocol and the wide publicity surrounding it acted to deter selfish parental acts and encouraged due observance of court orders. It had a particular utility where a judge had granted permission for a child habitually resident in England to pay an extended visit to Pakistan to attend some family event or simply to stay with the extended family. The order sent to the author's office would then be sent to the EJN judge for Pakistan. The author thinks it is right to say that not once was such a visitation order breached by a failure to return on the due date.

20 Now that Pakistan has acceded to the Hague Abduction Convention, once that accession has been recognised by the EU on behalf of the UK, the Pakistan Protocol will be subsumed in a much greater international commitment and will be of historic note only.

21 Pakistan had been a challenge given that, in England, there are nearly a million citizens of Pakistani race and Muslim faith. Another challenging jurisdiction was Egypt, which more or less topped the Foreign Office chart of problem cases. Accordingly, the London

12 UK–Pakistan Judicial Protocol on Children Matters.

judiciary made overtures to the Supreme Constitutional Court in Cairo. After two meetings and much diplomacy, the parties completed an agreement following the precedent of the Pakistan Protocol. It was signed in January 2004 and entitled, "Cairo Declaration Resulting from Anglo–Egyptian Meetings on Judicial Co-operation in International Child Abduction Matters between Egypt and the United Kingdom". The Cairo court published a hardback illustrated volume to record what had been achieved. Sadly, it proved quite ineffective in operation and the present author does not think a single child was recovered in reliance on the Declaration. Diplomacy then switched to efforts, in partnership with HCCH, to persuade the relevant Egyptian ministries to accede to the Hague Abduction Convention. Despite at least two bright dawns, nothing was in the end achieved before turbulence and unrest swept through Egypt and neighbouring North African countries.

III. The way ahead

22 So what do we know of the present state of international family mediation in parental child abduction cases and what can we surmise as to its future? In the present author's experience, the biggest obstacle to the smooth and steady development of international family mediation is the absence of an international resource. A number of state parties to the Hague Abduction Convention have a mediation service experienced and expert in abduction mediation. If that state is the chosen destination of the abductor, the service is available to take a referral which may be initiated by the lawyers in the case or by the court.

23 There are also bi-national co-mediation schemes, often between neighbouring states and generally brought into being by the prevalence of abduction or the movement of children between the two states. An example of this development is the sophisticated Franco–German model in which there are co-mediators: one from each country; one male, one female; one a lawyer; and one a mental health professional.

24 But a few leading lights do not illuminate the world. They provide ideals, aspirations or examples to be followed. For most of the world, there is no universally recognised and respected service provider. There is no regulated profession of international family mediator. There is no disciplinary body and no accrediting body. The person or body in need of an experienced reliable mediator is more often than not blindfolded when choosing.

25 In 2016, the present author undertook a canvas of a number of institutions, associations and professionals with specialist experience in mediation ranging from UNICEF to a self-employed mediator. Whilst all his respondents were generous in sharing their information and their

aspirations, he was left contemplating a void. This view was the common view, as was the conclusion that the obstacles to creating a global service were formidable and that those best placed to achieving progress had not the resources to move forward.

26 Over the last 18 months, the present author has kept watch as best he can without deliberate investigation. It appears to him that it is ISS that is now making the running. In 2015, perhaps tentatively, ISS convened a meeting in Geneva of a number of international mediation professionals and labelled the meeting, "the Collaborative Process". The group adopted core principles for the conduct of international family mediation to be recorded as an international charter for global reference. During 2016, the charter was drafted and launched in January 2017.

27 From 7 to 9 May 2017, ISS convened a second meeting of the Collaborative Process attended by 27 specialists from 18 jurisdictions. There were present mediators, representatives of institutions specialising in cross-border conflicts and experts in private international law. The topic for debate was the feasibility of creating one global but centralised network of mediators specialising in transnational family conflicts. At the closing session of this second meeting, the following were agreed:

(a) A global network of competent international mediators is to be created.

(b) An interim steering committee is to be appointed to draft terms of reference for the global network and an action plan for the next two to three years.

(c) A supportive hub – composed of the steering committee, an advisory board and thematic sub-groups from the Collaborative Process – is to be created.

28 All this formative work is very time-consuming and it is not envisaged that a global network of international mediators will be launched before 2020. It remains to be seen whether the ISS initiative will succeed in achieving the launch and then whether the Net will attract referrals. But it is admirable that an international body has taken up the challenge. The existence of a global network with required minimum qualification and proper regulation should enhance the use of mediation wherever conflict surrounds the international movement of children, whether or not the movement is unlawful and whether or not an international treaty provides a legal remedy. ISS is keen to register and to explain its commitment to international family mediation and, to

that end, in October 2016, launched its website dedicated to international mediation.[13]

29 What relevance has all the foregoing to Singapore? European developments are probably of only indirect relevance. Global evolutions, such as the work of ISS, are clearly directly relevant. But in the mediation field, the present author regards Singapore as a world leader rather than follower. Singapore actively promotes and provides for mediation in international commercial disputes. In the Family Court, judges dedicated to and practising only mediation symbolise a level of development that the author has not seen matched elsewhere. So, it would be the author's hope that experts in Singaporean mediation, judges, practitioners and academics will share their experience and ideas for future developments in available international forums. Perhaps, in time to come, Singapore can play a significant part in resolving international child abduction disputes through cross-border mediation rather than cross-border litigation.

30 The latest development in mediation in International Child Abduction Proceedings is, in effect, limited to England and Wales but is important both domestically and beyond in so far as it can be said to be indicative of a global trend. On 13 March 2018, the President of the Family Division of the High Court published his "Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings"[14] ("Practice Guidance"). The case management provisions are detailed and the present author does not seek to review them but only to emphasise the extent to which they show that transnational proceedings must receive special treatment.

31 Paragraph 3.1 of the Practice Guidance states clearly that the general FPR 1.4 favouring non-court dispute resolution also applies to international child abduction proceedings and that public funding has expressly been provided for such mediation.

32 Paragraphs 3.2 and 3.3 then together gather any such mediation into the Child Abduction Mediation Scheme. The detailed account of the scheme and its operation are contained in the substantial Appendix to the Practice Guidance.

33 The introduction to the Appendix sets out the developments since 2006. Then comes the essential mission statement:

13 International Family Mediation website <www.ifm-mfi.org> (accessed 3 May 2018).

14 James Munby, "Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings" (13 March 2018).

> The … Scheme … aims to achieve … that parties engaged in child abduction proceedings are able … to access a mediation service as an integral part of the court process and in parallel with, but independent from, the proceedings. Whilst mediation will not be appropriate … in every case it is an option that should be explored by the court in all cases of alleged international child abduction.

34 The scheme is run with the assistance of the charity, Reunite, who will effectively provide the service. It will operate under stated key principles familiar to all trained mediators. It will also operate three key stages: (a) identification; (b) screening; and (c) mediation.

35 This brief summary shows that the Practice Guidance constitutes a milestone in the development of mediation in child abduction proceedings. Now, it has been adopted as a full member of the family justice system, with the President as its father and to be the judicially considered preferred option in all cases.
