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GROUPE DE TRAVAIL SUR LA MÉDIATION DANS LE CADRE DU PROCESSUS DE MALTE

**MÉMOIRE EXPLICATIF RELATIF AUX
PRINCIPES POUR LA MISE EN ŒUVRE DE STRUCTURES DE MÉDIATION
DANS LE CADRE DU PROCESSUS DE MALTE**

établi par le Groupe de travail avec l'assistance du Bureau Permanent

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WORKING PARTY ON MEDIATION IN THE CONTEXT OF THE MALTA PROCESS

**EXPLANATORY MEMORANDUM ON THE
PRINCIPLES FOR THE ESTABLISHMENT OF MEDIATION STRUCTURES
IN THE CONTEXT OF THE MALTA PROCESS**

drawn up by the Working Party with the assistance of the Permanent Bureau

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Background

At its meeting held on 31 March – 2 April 2009, the Council on General Affairs and Policy of the Hague Conference on Private International Law authorised, in the context of the Malta Process, the establishment of a Working Party to promote the development of mediation structures to help resolve cross-border family disputes concerning custody of, or contact with, children, including cases of unilateral removal of a child to another State, where the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the *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* do not apply.

The recommendation to establish such a Working Party derived from the Third Judicial Conference on Cross-Frontier Family Law Issues held in St. Julian's, Malta, 23–26 March 2009.

In June 2009, a small number of Contracting States to the 1980 Hague Child Abduction Convention and non-Contracting States, selected on the basis of demographic factors and differing legal traditions, were invited to designate an expert. These States were Australia, Canada, Egypt, France, Germany, India, Jordan, Malaysia, Morocco, Pakistan, the United Kingdom and the United States of America. In addition, a small number of independent mediation experts was invited to join the Working Party.

The Working Party held two telephone meetings, one on 30 July 2009 and one on 29 October 2009, as well as one in-person meeting on 11-12 May 2010 in Ottawa, Canada. The meetings were co-chaired by Ms Lillian Thomsen from Canada and Justice Tassaduq Hussain Jilani from Pakistan. At all these meetings simultaneous interpretation between English, French and Arabic was available. Two questionnaires on existing mediation structures and on enforceability of mediated agreements were circulated in preparation of the Working Party telephone meetings, responses to which are available on the Hague Conference website at < www.hcch.net > under "Work in progress" then "Child Abduction".

In the first telephone meeting, the Working Party concluded that the establishment of Central Contact Points in each country facilitating information on available mediation services in the respective jurisdictions would be important. Following the second telephone meeting, the Working Party commenced work on "Draft Principles" for the establishment of mediation structures which were concluded after an in depth discussion at the in-person meeting in Canada on 11-12 May 2010 and subsequent consultations with the experts who could not attend the meeting in Canada.

The Principles for the establishment of mediation structures in the context of the Malta Process

The “Principles” were drawn up to establish effective mediation structures for cross-border family disputes over children involving States that are not a party to the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention or other relevant instruments. In the absence of an applicable international or regional legal 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.

It has to be noted that the establishment of structures for cross-border family mediation will be equally relevant for cross border family disputes falling within the scope of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention. Both Conventions promote the amicable resolution of the family conflict through mediation or similar means. The Principles may therefore also be useful in supplementing the international legal framework established by the Conventions.

The “Principles”

The “Principles” call for the establishment of a Central Contact Point, which facilitates the provision of information, *inter alia*, on available mediation services in the respective jurisdictions, on access to mediation and on other important related issues, such as relevant legal information.

Part A

Part A of the “Principles” states which information should be provided and how the information should be made accessible through the Central Contact Points.

The information on mediation services in international family law should include, first of all, lists of mediators or mediation organisations providing such services. The lists should contain information on the mediator’s training, language skills and experience, as well as the contact details. The Central Contact Point should furthermore facilitate information on costs of mediation, which should include mediation fees as well as other connected costs. In addition the Central Contact Point should make information available on the mediation process itself, *i.e.* the mediation models used / available, how mediation is conducted and what topics may be covered in mediation. The information should be as detailed as possible; information on the availability of co-mediation, as well as that of specific forms of co-mediation, such as the bi-national mediation, should be included.

The Central Contact Point should further provide information to assist with locating the other parent / the child within the country concerned. Likewise information should be provided on where to obtain advice on family law and legal procedures, on how to render a mediated agreement binding and how to enforce it. In view of the often limited means of the parties to a family dispute, details on costs should be included; attention should be drawn to pro-bono services or services offering low cost specialist legal advice, where available. The Central Contact Point should also provide information about any support available to ensure the long-term viability of the mediated agreement.

The Central Contact Point should improve and consolidate cross-border co-operation regarding the amicable settlement of international family disputes by promoting co-operation between various experts through networking, training programmes and the exchange of best practices. Finally subject to the principle of confidentiality, the Central Contact Point should gather and make publicly available detailed statistics on the cases dealt with.

Part B

In Part B, the “Principles” refer to (1) certain standards regarding the identification of international mediation services by the Central Contact Points, (2) the mediation process and (3) the mediated agreement.

Under Point B (1) the “Principles” set out a number of characteristics of mediators or mediation organisations, which Central Contact Points should consider, when identifying and listing international mediation services. At the same time, the “Principles” recognise that many States are still in an early stage of the development of international mediation services in family matters and that some of the characteristics listed are aspirational. It is, however, hoped that the States implementing the “Principles” will encourage the incremental development of mediation services complying with these characteristics.

Point B (2) lists a number of broad general principles, which, subject to the laws applicable to the mediation process, should be adhered to in international family mediation. Recognising that these principles may have a slightly different interpretation in different legal systems and with a view to allowing for the development of good practices, the document refrains from attaching fixed definitions to these general principles. It should be noted that the Guide to Good Practice under the 1980 Hague Child Abduction Convention, which is currently being prepared, will deal in much greater detail with good practice regarding these general principles.

Point B (3) highlights certain important aspects to be taken into consideration, when it comes to the mediated agreement, in order to allow for it to be rendered binding in the legal systems concerned. For details on good practice regarding the drafting of mediated agreement reference is again made to the forthcoming the Guide to Good Practice on Mediation under the 1980 Hague Child Abduction Convention.

Part C

Part C recognises the importance of rendering a mediated agreement binding or enforceable in all the legal systems concerned before its implementation. It also highlights the need for close co-operation with the legal representatives of the parties. At the same time, the Central Contact Point is requested to support the parties with information on the relevant procedures.

Final Note

The Working Party wished to have included in this Explanatory Memorandum a statement of its view that Non-Party States should give careful consideration to the advantages of ratification of, or accession to, the *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* and the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.