

Août / August 2009



**Groupe de travail sur la médiation dans le cadre du processus de Malte
Questionnaire II**

établi par le Bureau Permanent

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**Working Party on Mediation in the Context of the Malta Process
Questionnaire II**

drawn up by the Permanent Bureau

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Identification

State: UK – response solely with regard to the Jurisdiction of England & Wales

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The Permanent Bureau kindly requests responses to the Questionnaire to be sent to < secretariat@hcch.net > by 25 September 2009 at the latest.

ENFORCEABILITY OF MEDIATED AGREEMENTS

1. Are there legal restrictions on the content of mediated agreements regarding family law matters in your country?

No

Yes. Please specify:

Questions of Status (including whether at law a person is divorced, married, in a civil partnership, or whether a person has parental responsibility and so on) are not open to mediation as these are exclusively dealt with via the judicial/court process.

Non-status issues are open to mediation, but agreements cannot run counter to public policy and must be fair in the circumstances.

2. Are mediated agreements in a family dispute involving children enforceable in your country without any additional formalities such as notarisations or approval by court?

No – see comments

Yes

Parties that wish their mediated agreements to become binding, may take steps to convert these into legally binding documents either via the court process by obtaining a court 'consent' order (providing the terms are fair and not contrary to public policy) or by asking their legal advisors to draft a legally binding document of a contractual nature.

Either route would then enable an aggrieved party to seek enforcement by issuing court proceedings either to enforce the court 'consent' order, or to rectify the breach of the legal agreement.

<p>3. Can agreements mediated in your country in a family dispute involving children be approved by or registered with a court? (If the answer is "No" please continue with question 4.)</p>	<p><input type="checkbox"/> No <input checked="" type="checkbox"/> Yes <input type="checkbox"/> Other. Please specify: Yes – please see our response to Question 2.</p>
<p>3. a) Is the agreement once approved by or registered with a court treated as a decision of that court?</p>	<p><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Other. Please specify: Yes – but it would be known as a court 'consent' order suggesting that its terms - albeit sanctioned by the court - were not a product of judicial determination but of the mutual consent of both parties to the dispute in question.</p>
<p>3. b) What exact steps are needed to make a mediated agreement into a court order?</p>	<p>Please specify: Active steps by both parties must be taken for a mediation agreement to be made enforceable, otherwise it will lack any legal effect. Please refer to our response to Question 2 with regard to the exact steps.</p>
<p>3. c) Which court would be competent?</p>	<p>Please specify: Court competence to make 'consent' orders reflects the position with regard to court powers to hear certain cases. For instance, the Family Proceedings Courts may be approached to convert an agreement over child contact and/or residence into a court 'consent' order, but may not do so with regard to proceedings to make financial arrangements following relationship breakdown as it has no powers to hear such cases. The County Courts and the High Court may deal with mediation agreements over child contact/residence/maintenance, and over financial arrangements on divorce, separation and annulment as these courts have powers to hear all types of family dispute. However, all such disputes that are connected to the dissolution of a civil partnership (a civil partnership is a registration process open to same-sex couples to formalise their relationship) may only be heard by the Principal Registry of the Family Division of the High Court, and an additional nine County Courts. Similarly, only those designated courts may be approached to convert into 'consent' orders any mediation agreements that relate to the dissolution of a civil partnership.</p>

<p>3. d) What are the costs for having a mediated agreement made into a court order in your country?</p>	<p>Please specify: We are unable to offer precise figures as solicitors' fees do vary. The court application fee for a consent order is in the region of £40.</p> <p>In other cases where proceedings have been issued but a 'consent' order has been proposed by the parties to the court at least 14 days before the hearing date, no additional fee is payable for the 'consent' order further to the initial fee which was paid when proceedings were issued.</p>
<p>4. Are there any other method(s) by which a mediated agreement can be rendered enforceable in your country (e.g. by being notarised)</p>	<p>Please specify: It is possible for parties not to opt for a court 'consent' order, and to seek to give their agreement legal effect by asking their legal advisors to draft a legally binding document of a contractual nature. Please refer to our response to Question 2.</p>
<p>4. a) What are the possible costs for this other method(s)?</p>	<p>Please specify: Again, costs do vary as these depend on the fees that the legal advisors of the parties charge.</p>
<p>5. Can agreements mediated in another country in a family dispute involving children be approved by a court or otherwise formalised in your country?</p>	<p><input type="checkbox"/> No</p> <p><input checked="" type="checkbox"/> Yes – please see comments.</p> <p><input type="checkbox"/> Other. Please specify:</p> <p>We understand that you may be receiving a separate submission from 'Reunite' who we believe is better placed to respond to this question.</p>
<p>5. a) If so, will the agreement mediated abroad be treated exactly as an agreement mediated in your country?</p>	<p><input type="checkbox"/> No</p> <p><input type="checkbox"/> Yes</p> <p><input type="checkbox"/> Other. Please specify: Possibly - please refer to our response to Question 5.</p>
<p>6. In what circumstances, if any, can an agreement which has been approved by or registered with a court abroad, be recognised and enforced in your country?</p>	<p>Please specify:</p> <p>It is possible for this to happen if the mediation agreement has been converted into a court order. It would then be a matter of recognition of a foreign judgment that would be subject to the UK's 'Conflict of Laws' rules (i.e., private international law rules). Different regimes of Conflict of Laws rules apply according to the originating country (where the judgment was made) and the content of that judgment.</p>
<p>7. What specific measures are available in your country for enforcing an agreement on child custody or contact?</p>	<p>Please specify:</p> <p>A mediation agreement that has been converted into a court 'consent' order may be enforced by the courts.</p> <p>It would be open to the party who seeks to rely</p>

	<p>on the order to approach the court to either vary or to enforce the terms of that order.</p> <p>It is possible to apply to the court for an enforcement order requiring the person who has failed to comply with the contact order to carry out unpaid work. It is also possible to apply for financial compensation for losses incurred as a result of the failure to comply with the contact order (for example the cost of a holiday which was lost).</p> <p>It also remains open to the court to treat non-compliance with a contact order as a contempt of court, punishable by a fine or imprisonment. The use of both of these remedies, however, is most infrequent as the impact of these would often be held to be contrary to the welfare of the child concerned.</p>
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Thank you.