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Meeting of the Working Party on Mediation Embassy of Canada, The Hague Monday, 4 March 2019

Background

On the margins of the annual meeting of the Council on General Affairs and Policy of the Hague Conference on Private International Law (HCCH), the Working Party on Mediation held the sixth in-person meeting in The Hague on 4 March 2019. Co-Chaired by Canada and Jordan, this year's meeting marked ten years of the establishment of the Working Party by the HCCH and also featured two expert presentations' from Japan and Germany. The objective of the meeting was to discuss the past and future activities of the Working Party. The list of participants at the meeting is at Appendix A. The agenda of the meeting is at Appendix B.

Summary of discussions

Dr Christophe Bernasconi, Secretary General of the HCCH, gave the introductory remarks, reminding participants of the broader context of the Malta Process under the auspices of which the Working Party had been initiated, as well as the pivotal role of these two initiatives in successfully promoting a dialogue between Contracting States to the 1980 Child Abduction Convention¹ and the 1996 Child Protection Convention² and non-Contracting States with Shari'a-based or -influenced legal systems. He underscored that the 1980 and 1996 Conventions gives effect to the best interests of the child principle of the UN Convention on the Rights of the Child. Highlighting some recent developments of the Working Party, Dr. Bernasconi welcomed Qatar and Lebanon for joining the Working Party. Referring to the accessions to the 1980 Hague Convention by Pakistan and Tunisia following the 2016 Fourth Malta Conference, Dr Bernasconi suggested that Indonesia's potential accession to the Child Abduction Convention and Lebanon's possible membership of the HCCH may warrant a consideration to organizing the Fifth Malta Conference.

Mr Mark Berman (Canada), co-Chair of the Working Party, underscored the importance of promoting cooperation with non-Contracting Muslim majority countries to the 1980 Hague Child Abduction Convention and the need for solutions to cross-border parental child custody and access disputes. Referring to the developments since the 2017 Working Party meeting, Mr. Berman welcomed the nomination of Judge Kamal Al Smadi of the Supreme Judges' Department by the Prime Minister of The Hashemite Kingdom of Jordan to co-Chair the Working Party with Canada. In recognizing the new co-Chair, CPD noted Judge Al Smadi's judicial background and expertise in Islamic family law will further strengthen the Working Party's ongoing engagement with stakeholders on cross-border child custody and access disputes in Muslim majority countries. On new memberships, he welcomed Lebanon and Qatar for joining the Working Party and also thanked the Japanese Ministry of Foreign for nominating Professor Yuko Nishitani of Kyoto University to participate in this years' meeting. Mr. Berman informed members of his statement to the Seventh Special Commission on the Practical Operation of the 1980 and 1996 Hague

¹ HCCH Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

² HCCH 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.

Conventions held in October 2017. The Commission endorsed the general continuation of the Malta Process, including the Working Party on Mediation and possible organization of Fifth Malta Conference.

Judge Kamal Al Smadi (Jordan) thanked the Canadian co-Chair, the Secretary General of the HCCH and the Members of the Working Party. He gave some insights on the Jordanian legal system, stressing the crucial role of mediation as a core social value in Shari'a law. He reported on a recent initiative of the Supreme Judge Department to set up an office for mediation in most family courts in Jordan, including in Syrian refugee camps. In 2017, out of 38.000 family disputes that were brought to court, 26.000 were solved through mediation (68%), thus allowing for significant cost savings. Among other initiatives to promote mediation, he described a recent co-operation between universities in Jordan and the judiciary with a view to developing a training programme on mediation. Judge Al Smadi indicated that the Judicial Council of Jordan was, under his supervision, in the midst of reviewing all domestic regulations concerning the child; he stressed the need to ensure that the best interests of the child remain a primary consideration throughout the review, noting that regulations contrary to the best interests of the child are contrary to the best interests of society as a whole. Finally, he detailed some of the recent family disputes with cross-border elements, noting that these cases were usually resolved through mediation and very rarely through adjudication in court.

After Judge Al Smadi's presentation, Justice Hassan Brahimi (Morocco) enquired about the possibility of Jordan joining the 1980 Child Abduction Convention, having regard in particular to the interplay - and possible contradictions - between domestic and international norms. Justice Brahimi observed that, from the Moroccan perspective, the objective of the 1980 Child Abduction Convention to restore the *statu quo ante* did not contradict the domestic Shari'a provisions. Jordan indicated an interest in learning more from the Moroccan experience in the implementation of the 1996 and 1980 Hague Conventions and an exchange between the judges of the two countries would be useful next step.

Members of the Working Party were then invited to report on any recent domestic developments on family mediation, central contact points and the 1980 Child Abduction and 1996 Child Protection Conventions. Ms Marie Riendeau (Canada) reported on the designation of a Central Contact Point for mediation for Canada and the signature by Canada of the 1996 Child Protection Convention and the 2007 Child Support Convention³. Ms Riendeau indicated that Canada was actively working towards ratifying these two Conventions which required amendments to its domestic legislation. As was the case with the 1980 Child Abduction Convention and the 1993 Inter-country Adoption Convention⁴, these Conventions would be progressively implemented, province by province.

Ms Suzanne Lawrence (United States of America) recalled that the U.S. Department of State was still the Central Contact Point for international family mediation. She mentioned the continuous efforts of the Department of State to promote mediation, notably via its referral programme.

Justice Hassan Brahimi (Morocco) reported on the separation since 2011 of the judiciary and the Office of the Public Prosecutor. He mentioned that Morocco was engaged in efforts to mediate child abduction cases with France and Canada.

Mr Salah-Eddin Shwayyat (Jordan) reported that 21 offices for mediation have been set up in Jordan as of 2018, covering most of the provinces in Jordan, including remote rural areas. He noted that, with the assistance of these offices, 60% of the family disputes had been resolved

³ HCCH Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.

⁴ HCCH Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

through mediation and had sometimes resulted in the conclusion of family agreements. He also pointed out a recent increase in the number of cross-border family disputes in Jordan.

Ms Eva Entenmann (Australia) indicated that the contact details of the Australian Central Contact Point for international family mediation had been updated on the HCCH website.

After the update from the members of the Working Party, Professor Yuko Nishitani (Japan) gave a presentation on "Mediation in cross-border child abduction – The experience in East Asia". Elaborating on why few East Asian countries have become party to the 1980 Child Abduction Convention, she highlighted the many legal and cultural differences that exist between these countries, such as the differences between monogamist and polygamist systems, as well as civil law and common law countries. Professor Nishitani also underlined some commonalities as regards the various East Asian family law systems, noting in particular the statutory distinction that exists in most countries between children within or outside of a marriage, as well as the prohibition on marriage between people of the same gender. Professor Nishitani stressed the prevalence of "agreements" over "rights and obligations" in the marital relationship in East Asian legal systems, noting that most divorces (70 to 87%) are consensual with limited to no involvement of the judicial authorities. She cited the example of South Korea, where the role of the judge is usually to ensure that the parents agree and that the child's best interests are taken into consideration, rather than to adjudicate on the respective rights and obligations of the spouses. This specificity made it more difficult for East Asian States to accept the idea of a breach of rights of custody as laid out under the 1980 Child Abduction Convention.

Professor Nishitani then introduced the topic of mediation, noting that many western States had opted for alternative dispute resolution mechanisms where any agreement concluded by parents was usually not binding, generally requiring a court to render it enforceable. This fact differentiated mediation in western countries from those in East Asian States, in that they differed from in-court mediation systems in most East Asian countries, where the agreement is built into the court decision. She indicated that private mediation was also used in Hague abduction cases in Japan, thus highlighting that the Convention allowed for each State to decide on the most appropriate way in which to achieve the return of the child.

Speaking to the Japanese experience in implementing the 1980 Child Abduction Convention, Professor Nishitani noted the benefits of having concentrated jurisdiction in Hague cases with the Tokyo and Osaka courts, which allows for prompt return proceedings. With respect to the issue of enforcement, she mentioned that the Japanese legal framework as regards enforcement was currently being reviewed by the Legislative Council of Japan. Professor Nishitani provided some statistics concerning child abductions in Japan, noting in particular that 70% of Hague cases were resolved through mediation in Japan, a stark difference from other Contracting Parties, which have an average of 30% of cases resolved through mediation.

Professor Nishitani gave some insights on private mediation in Japan. Where parents opt for private mediation, the Japanese Central Authority would refer them to professional mediators, which are selected having regard to their gender (one male and one female), professional background (lawyer and psychology counsellor), as well as language skills. She noted that, while private mediation is more expensive, it provides for greater flexibility, allowing for example the use of videoconferencing technologies, which is not allowed in family court proceedings. She then emphasised that progress had been made regarding the co-ordination between private mediators and courts, since the former were not always well aware of the six-week deadline for the judicial authority to reach a decision under Article 11 of the 1980 Child Abduction Convention, which sometimes resulted in protracted mediations.

Professor Nishitani finally spoke to the topic of family court conciliation in Japan as a cost-free alternative to private mediation. She noted that conciliation allowed for the possibility to cover a

broad range of issues: parents turning to conciliation on the return of the child can also discuss issues such as housing costs upon return, provisional care of the child, or maintenance obligations.

Ms Ischtar Khalaf-Newsome, Head of Advisory Services and Family Mediator for MiKK e.V. (International Mediation Centre for Family Conflict and Child Abduction) gave a presentation on "International Family Mediation Training in Islamic Countries". She briefly recalled the history of MiKK e.V., an organisation that dates back to 2002 and was set up as an independent non-governmental organisation in 2008. Since 2007, MiKK e.V. has fallen under the umbrella of the *Bundes-Arbeitsgemeinschaft für Familien-Mediation*, a network of mediators.

MiKK e.V.'s main areas of work are: providing free-of-charge multilingual advice, setting up cross-border family mediations, organising training and workshops on cross-border family mediation, and research and development. Ms Khalaf-Newsome emphasised that mediators do not provide legal advice but simply inform parents of the existing legal framework. Regarding the mediation requests received by MiKK e.V., she noted an increasing number of inquiries, in vast majority concerning child abduction cases (close to 90% of which are Hague cases), with custody and relocation cases representing a minority of the mediation cases referred. Ms Khalaf-Newsome highlighted the various advantages of mediation, noting that it is child-focussed and future-oriented, allowing for the possibility of re-establishing contact as between estranged parents and promoting direct communication between the parents rather than through their lawyers.

Ms Khalaf-Newsome went on to present the co-mediation model as developed by MiKK e.V. Mediators from different professions work together, particularly in cases of international conflicts involving parents and children, in order to ensure adequate consideration of both the psycho-social and the legal elements typical of family-related conflicts. Also, a male and a female mediator usually co-operate in order to provide both parents with a counterpart of his/her own gender. The MiKK co-mediation model is supported by a large network of 150 mediators established in 27 countries and offering mediation services in 30 countries, with every mediator having completed a 50-hour training course over six days.

Ms Khalaf-Newsome presented the in-court mediation model as developed by MiKK e.V. and the former Hague Network Judge for Germany, Judge Sabine Brieger. With this model, mediation is embedded in the Hague Child Abduction proceedings and the MiKK mediator attends the first hearing in order to advise parents on mediation and answer any questions they might have. If parents agree to mediation, MiKK e.V. organises mediation sessions over two to three days, a method largely inspired by the Dutch "pressure cooker" model. The final hearing takes place after the conclusion of the mediation. She highlighted the positive results achieved with this mediation model, noting that approximately 80 to 90% of cases mediated by MiKK e.V. result in a memorandum of understanding being signed by the parties.

Ms Khalaf-Newsome reported on a project funded by the German Ministry of Justice concerning mediation in non-Hague cases, the findings of which were presented at a conference that took place in Berlin in June 2017. The findings indicate that, in such cases, the uptake of mediation is significantly lower (approximately only 30% of those cases are mediated). The majority of cases involve countries from the Middle East and North Africa (MENA) region, where alternative dispute resolution is usually favoured. The Experts' findings highlighted that the MiKK mediation model is ideally suited for international child abduction and custody dispute cases within the MENA context. In particular, the fact that mediators have familiarity with Muslim culture, knowledge of Islamic family law, and a good command of the relevant languages is essential both to encouraging parents to agree to mediation, and to finding a solution that takes the best interests of the child into consideration.

Turning to the future activities of the Working Party in 2019-2020, members' exchanged views on the proposal to organize in-country or regional Working Party symposiums, taking into consideration the outcomes of the past similar activities. There was a general consensus among members to organize one or two family mediation themed events in the Middle East and Asia-Pacific regions. Judge Al Smadi indicated that Jordan may co-host such an event in partnership with another Working Party member. He underscored the need for raising awareness of the negative impact and consequences for the child from parental child abductions in the non-Contracting States. Dr Gérardine Goh Escolar (Permanent Bureau) noted in that respect the benefit of exploring the use of promotional tools with a view to increasing outreach beyond the traditional legal audience.

Professor Nishitani indicated that the organisation of a family mediation themed symposium of the Working Party could be explored with the Japanese Government. Members were also informed of international family mediation seminar co-hosted by the Permanent Bureau of the Hague Conference and Singapore in March 2019.

Mr Berman (Canada) stressed that there was a need to better advertise the advantages of participation by States in the Working Party. Judge Al Smadi (Jordan) reiterated the importance Islam attaches to the protection of minors and their rights vis-à-vis their parents. He recognized that at times children are unwitting victims in parental disputes and noted the need for broader societal awareness, including through media campaigns, in highlighting the negative consequences of parental child abductions.

In closing the co-Chairs thanked members for their participation. The meeting report and the draft proposal of the regional seminar of the Working Party will be shared with members' for their inputs and comments. Participants thanked the co-Chairs and the staff at the Embassy of Canada for hosting the Working Party meeting.

Agenda of the meeting

Meeting of the Working Party on Mediation of the "Malta Process"*Embassy of Canada, Sophialaan 7, The Hague**Monday, 4 March 2019***DRAFT PROGRAM**

9.00-9.15	Arrival and Registration
9.15-10.00	<p>Introductions and Welcome Remarks</p> <p>Dr. Christophe Bernasconi, Secretary General, Hague Conference on Private International Law</p> <p>Mr. Mark Berman, Director General, Consular Policy Bureau, Global Affairs Canada (Co-Chair, Working Party on Mediation)</p> <p>His Eminence Judge Kamal Ali Saleh Al Smadi, Supreme Judge Department, The Hashemite Kingdom of Jordan (Co-Chair, Working Party on Mediation)</p>
10.15-10.30	Coffee Break
10.30-11.15	Update from Members of the Working Party on domestic developments in family mediation, central contact points and the 1980 and 1996 Hague Conventions
11.15-12.00	<p>Expert Presentation and Q&A</p> <p>"Mediation in Cross-Border Child Abduction: Experience in East-Asia"</p> <p>Professor Dr. Yuko Nishitani Kyoto University Graduate School of Law, Japan</p> <p><i>Designated expert to the Working Party by the Ministry of Foreign Affairs, Government of Japan</i></p>
12.00-13.00	Lunch
13.00-13.45	<p>Expert Presentation and Q&A</p> <p>"International Family Mediation Training in Islamic Countries"</p> <p>Ms. Ishtar Khalaf-Newsome Head of Advisory Services/Family Mediator</p> <p>MiKK e.V.(International Mediation Centre for Family Conflict and Child Abduction), Berlin Germany</p>
13.45-14.30	Discussion on future activities of the Working Party for 2019-2020
14.30-15.00	Next Steps and Closing Remarks

Appendix B

List of Participants***Australia**

Ms. Eva Entenmann, Policy and Research officer, Embassy of Australia, The Hague

Canada

Mr. Mark Berman, Director General, Consular Policy and Programs, Global Affairs Canada (Working Party co-Chair)

Ms. Marie Riendeau, Counsel, Constitutional, Administrative and International Law Section, Department of Justice

Mr. Ajmal Pashtoonyar, Policy Advisor, Consular Policy Bureau, Global Affairs Canada

France

Ms. Erica Rigal, Cllule de Médiation Familiale Internationale, Direction des Affaires Civiles et du Sceau, Bureau du droit de l'Union, du droit international privt et de l'entraide civile, Ministère de la Justice

Germany

Mrs Katharina Rodenbach, Federal Ministry of Justice

Japan

Professor Dr. Yuko Nishintani, Kyoto University Graduate School of Law (designated expert to the Working Party, Ministry of Foreign Affairs, Government of Japan)

Jordan

H.E. Judge Kamal AL Smadi, Chief Judge, Supreme Judge Department, (Working Party co-Chair)
Judge Salah-Eddin Shwayyat, Director of Family Mediation & Reconciliation, Supreme Judge Dept

Morocco

Judge Hassan Brahimi, Magistrat détaché à la Direction des affaires civiles, Ministère de la justice et des libertés

South Africa

Mr. Andre Stemmet, Legal Officer, Embassy of South Africa, The Hague

United States of America

Ms. Suzanne Lawrence, Special Advisor for Children's Issues, US Department of State

Ms. Monica Gaw, Senior Policy Analyst, Office of Legal Affairs, U.S. Department of State

Permanent Bureau of the Hague Conference (HCCH)

Dr. Christophe Bernasconi, Secretary General

Dr. Gérardine Goh Escolar, First Secretary

Mr. Frédéric Breger, Legal Officer

MiKK e.V. (International Mediation Centre for Family Conflict and Child Abduction)

Ms. Ishtar Khalaf-Newsome, Head of Advisory Services, Family Lawyer & Mediator

**Note: The Working Party members from Lebanon, Malaysia, Pakistan, Qatar, Senegal and the United Kingdom did not attend the meeting.*