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DE DROIT INTERNATIONAL PRIVÉ

SUIVI DES ACTIVITÉS DE LA CONFÉRENCE EN MATIÈRE DE MÉDIATION

établi par le Bureau Permanent

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REVIEW OF THE ACTIVITIES OF THE CONFERENCE IN REGARD TO MEDIATION

drawn up by the Permanent Bureau

Document préliminaire No 10 de mars 2011 à l'intention
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of the Council of April 2011 on General Affairs and Policy of the Conference

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SUIVI DES ACTIVITÉS DE LA CONFÉRENCE EN MATIÈRE DE MÉDIATION

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REVIEW OF THE ACTIVITIES OF THE CONFERENCE IN REGARD TO MEDIATION

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PART I – DEVELOPMENT OF A GUIDE TO GOOD PRACTICE ON MEDIATION UNDER THE 1980 HAGUE CHILD ABDUCTION CONVENTION

1. Two studies have been prepared by the Permanent Bureau of the Hague Conference in the past years on cross-border family mediation: the "Note on the development of mediation, conciliation and similar means to facilitate agreed solutions in transfrontier family disputes concerning children especially in the context of the Hague Convention of 1980", drafted by Sarah Vigers, Former Legal Officer of the Permanent Bureau, Preliminary Document No 5 of October 2006[1] and the "Feasibility study on cross-border mediation in family matters", drawn up by the Permanent Bureau, Preliminary Document No 20 of March 2007.[2]

2. As a result of the consultations on the feasibility study, the Council on General Affairs and Policy of the Hague Conference asked the Permanent Bureau, as a first step, to commence work on a Guide to Good Practice on the use of mediation in the context of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.[3] In its Conclusions and Recommendations[4] of March / April 2009, the Council on General Affairs and Policy of the Conference reaffirmed this decision.[5]

3. A number of independent mediation experts[6] from different Contracting States to the 1980 Hague Child Abduction Convention were invited to assist in the preparation of the Guide to Good Practice. Following written consultations with the group of experts, a Preliminary Draft Guide was drawn up by the Permanent Bureau, which was discussed in detail at a two-day meeting with the group of experts in The Hague on 17 and 18 February 2011.

4. The revised Draft Guide to Good Practice on Mediation under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* is about to be finalised and will be circulated to the Hague Conference Members as well as the Contracting States to the 1980 Hague Child Abduction Convention in advance of the June 2011 meeting of the Special Commission to review the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and

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[1] See the website of the Hague Conference at < www.hcch.net > under "Child Abduction Section" then "Special Commission Documents" and then "Preliminary Documents".

[2] See the website of the Hague Conference at < www.hcch.net > under "Work in Progress" then "General Affairs".

[3] See the Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (1-3 April 2008), *Ibid.,* note 2, p. 1, para. 3.

[4] See, *loc. cit.* note 2, the Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (31 March – 2 April 2009): "The Council reaffirmed its decision taken at the meeting of April 2008 in relation to cross-border mediation in family matters. It approved the proposal of the Permanent Bureau that the Guide to Good Practice for Mediation in the context of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* be submitted for consultation to Members by the beginning of 2010 and then for approval to the Special Commission to review the practical operation of the 1980 Child Abduction Convention 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* at its next meeting in 2011".

[5] The 2010 Meeting of the Council on General Affairs and Policy of the Hague Conference "noted the progress made in the development of the Guide to Good Practice on Mediation under the 1980 Convention", see Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (7-9 April 2010), *loc. cit.*note 2, p. 1.

[6] Members of the group of experts: Ms Gladys Alvarez (Argentina), the Honourable Judge Peter F. Boshier (New Zealand), Ms Cilgia Caratsch (ISS), Mr Eberhard Carl (Germany), Ms Denise Carter (United Kingdom), Ms Sandra Fenn (Reunite), Mme Lorraine Filion (AIFI), Mme Danièle Ganancia (France), Mme Barbara Gayse (Belgium), Judge Wilney Magno de Azevedo Silva (Brazil), Mrs Ankeara Kaly (France), Mrs Robine G. de Lange-Tegelaar (Netherlands), Mrs Lisa Parkinson (United Kingdom), Mr Christoph C. Paul (Germany), Ms Toni Pirani (Australia), Ms Els Prins (IKO, Netherlands), Ms Kathleen S. Ruckman (United States of America), Mr Craig T. Schneider (South Africa), Ms Andrea Schulz (Germany), Mr Peretz Segal (Israel), Ms Sarah Vigers (United Kingdom), Ms Lisa Vogel (United States of America) and Ms Jennifer H. Zawid (United States of America).

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*, hereinafter the "Sixth Special Commission Meeting". Following the discussion at the meeting of the Special Commission, the work on the Guide will be finalised and, depending on the necessary changes, publication may be envisaged for early 2012.

PART II – WORKING PARTY ON MEDIATION IN THE CONTEXT OF THE MALTA PROCESS

A. Background

5. Following the Conclusions and Recommendations[7] of the 2009 Council on General Affairs and Policy of the Conference, the Working Party on Mediation in the context of the Malta Process was established to promote the development of mediation structures to help resolve cross-border disputes concerning custody of or contact with children, which involve State Parties to the 1980 Hague Child Abduction Convention, as well as non-State Parties.

6. The recommendation to establish such a Working Party derived from a proposal made by Canada discussed and approved at the Third Judicial Conference on Cross-Frontier Family Law Issuesheld in St. Julian's, Malta in March 2009.[8]

7. In June 2009 co-ordination talks between the Permanent Bureau of the Hague Conference and Canada, who agreed to take a leading role in the Working Party's establishment, had brought about the identification, based on demographic factors, of a small group of States to participate in the project. The States invited to designate an expert, partly Contracting States to the 1980 Hague Child Abduction Convention and partly non-Contracting States, were: Australia, Canada, Egypt, France, Germany, India, Jordan, Malaysia, Morocco, Pakistan, the United Kingdom and the United States of America. In addition to the experts designated by States, a small number of independent mediation experts were invited to join the Working Party.

8. The Working Party, co-chaired by Ms Lillian Thomsen, Canada and Mr Justice Jillani, Pakistan, worked initially via conference calls and e-mail exchanges on the development of mediation structures to assist parents in cross-border family disputes. Two questionnaires were circulated in preparation of the Working Party conference calls, responses to which are available on the Hague Conference website.[9]

9. During one such conference call on 29 October 2009, the Working Party decided that principles on mediation structures including, *inter alia,* access to mediation, the establishment of entry points and the enforceability of mediated agreements should be developed. Following further written exchange, the Working Party met on 11 and 12 May 2010 in Ottawa, Canada to discuss the draft principles. Finalised in November 2010, the

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[7] See, *loc. cit*. note 2, the Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (31 March – 2 April 2009): "In the context of the Malta Process, and subject to the availability of the necessary resources, the Council authorised the establishment of a Working Party to promote the development of mediation structures to help resolve cross-border disputes concerning custody of or contact with children. The Working Party would comprise experts from a number of States involved in the Malta Process, including both States Parties to the 1980 Child Abduction Convention and non-States Parties. It would also include independent experts. The Permanent Bureau will keep Members informed on progress".

[8] See the website of the Hague Conference at < www.hcch.net > under "Child Abduction Section" then "Judicial Seminars".

[9] See the website of the Hague Conference at < www.hcch.net > under "Child Abduction Section" then "Cross-border family mediation".

Principles for the Establishment of Mediation Structures in the context of the Malta Process were together with the *Explanatory Memorandum* circulated to the Hague Conference's Members and the participants of the Malta Conference, who had been updated on the progress made by the Working Party on a regular basis.

B. Presentation of the Principles for the Establishment of Mediation Structures in the context of the Malta Process

10. The Permanent Bureau on behalf of the Working Party is pleased to submit to the Council on General Affairs and Policy, the *Principles for the Establishment of Mediation Structures in the context of the Malta Process* as well as an *Explanatory Memorandum* on the Principles. Both documents (attached as Annex) have already been circulated to the Hague Conference's Members in December 2010 in English, French and Arabic.

11. The Principles call for the establishment of a Central Contact Point in each State facilitating the provision of information on available mediation services in the respective jurisdictions, on access to mediation and on other important related issues, such as relevant legal information. They further refer to certain standards regarding the identification of international mediation services by the Central Contact Points as well as certain standards regarding the mediation process and the mediated agreement. They also highlight the importance of rendering a mediated agreement, binding or enforceable, in all the legal systems concerned before its implementation.

12. It is with great satisfaction that the Permanent Bureau on behalf of the Working Party can report, that some of the participating States have already taken measures to implement the Principles in their jurisdictions. These States include Australia, Canada, France and Pakistan, who have already designated or are in the process of designating Central Contact Points.

C. Proposals to the Council on General Affairs and Policy

13. The Coucil is invited:

(a) to receive the Principles as a basic framework for future work in the area;

(b) to agree that the Principles be presented for discussion at the Sixth Special Commission Meeting, with a view to encouraging acceptance of this basic framework by a broader range of States;

(c) to request the Working Party to continue work on the development of mediation structures in the context of the Malta Process and in particular, with the support of the Permanent Bureau, and in light of discussions to take place at the Sixth Special Commission Meeting,

- to facilitate wider acceptance and implementation of the Principles as a basic framework for progress;
- to consider further elaboration of the Principles, as well as practical measures by which the Principles may be implemented;
- to report to the Council on General Affairs and Policy in 2012 on progress.

14. The Permanent Bureau would like to renew its appreciation of support for this project by Canada and Australia, without whose funding and in-kind contributions the Working Party meetings would not have been possible.

A N N E X E S

GROUPE DE TRAVAIL SUR LA MÉDIATION DANS LE CADRE DU PROCESSUS DE MALTE
WORKING PARTY ON MEDIATION IN THE CONTEXT OF THE MALTA PROCESS

HccH
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ

Novembre / November 2010

PRINCIPES POUR LA MISE EN ŒUVRE DE STRUCTURES DE MÉDIATION DANS LE CADRE DU PROCESSUS DE MALTE

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

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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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PRINCIPLES FOR THE ESTABLISHMENT OF MEDIATION STRUCTURES IN THE CONTEXT OF THE MALTA PROCESS

A. CENTRAL CONTACT POINT

States should establish / designate a Central Contact Point for international family mediation which should undertake, either directly or through an intermediary, the following tasks,

- Serve as contact point for individuals and at the same time as network point for mediators working in cross-border family disputes.

- Provide information about family mediation services available in that country, such as:

  - List of family mediators, including contact details and information about their training, language skills and experiences;
  - List of organisations providing mediation services in international family disputes;
  - Information on costs of mediation;
  - Information on the mediation models used / available; and
  - Information on how mediation is conducted and what topics may be covered in mediation.

- Provide information to assist with locating the other parent / the child within the country concerned.

- Provide information on where to obtain advice on family law and legal procedures.

- Provide information on how to give the mediated agreement binding effect.

- Provide information on the enforcement of the mediated agreement.

- Provide information about any support available to ensure the long-term viability of the mediated agreement

- Promote cooperation between various experts by promoting networking, training programmes and the exchange of best practices.

- Subject to the principle of confidentiality, gather and make publicly available on a periodic basis information on the number and nature of cases dealt with by central contact points, actions taken and outcomes including results of mediation where known.

The information should be provided in the official language of that State as well as in either English or French.

The Permanent Bureau of the Hague Conference should be informed of the relevant contact details of the Central Contact Point, including postal address, telephone-number, e-mail address and names of responsible person(s) as well as information on what languages they speak.

Requests for information or assistance addressed to the Central Contact Point should be processed expeditiously.

Where feasible, the Central Contact Point should display relevant information on mediation services on a website in the official language and in either English or French. Where a Contact Point cannot provide this service, the Permanent Bureau could make the information received by the Central Contact Point available online.

B. MEDIATION

1. Characteristics of Mediators / Mediation Organisations identified by Central Contact Points

The following are among the characteristics the Central Contact Point should take into account when identifying and listing international family mediators or mediation organisations:

- A professional approach to and suitable training in family mediation (including international family mediation).
- Significant experience in cross-cultural international family disputes.
- Knowledge and understanding of relevant international and regional legal instruments.
- Access to a relevant network of contacts (both domestic and international).
- Knowledge of various legal systems and how mediated agreements can be made enforceable or binding in the relevant jurisdictions.
- Access to administrative and professional support.
- A structured and professional approach to administration, record keeping, and evaluation of services.
- Access to the relevant resources (material / communications, etc) in the context of international family mediation.
- The mediation service is legally recognized by the State in which it operates, *i.e.* if there is such a system.
- Language competency.

It is recognized that, in States where the development of international mediation services is at an early stage, many of the characteristics listed above are aspirational and can not, at this point, be realistically insisted upon.

2. Mediation Process

It is recognised that a great variety of procedures and methodology are used in different countries in family mediation. However, there are general principles, which, subject to the laws applicable to the mediation process, should inform mediation:

- Screening for suitability of mediation in the particular case
- Informed consent

- Voluntary participation
- Helping the parents to reach agreement that takes into consideration the interests and welfare of the child
- Neutrality
- Fairness
- Use of mother tongue or language(s) with which the participants are comfortable
- Confidentiality
- Impartiality
- Intercultural competence
- Informed decision making and appropriate access to legal advice

3. Mediated Agreement

When assisting the drafting of the agreements the mediators in cross-border family disputes, should always have the actual exercise of the agreement in mind. The agreement needs to be compatible with the relevant legal systems. Agreements concerning custody and contact should be as concrete as possible and take into consideration the relevant practicalities. Where the agreement is connected to two jurisdictions with different languages, the agreement should be drafted in the two languages, if that simplifies the process of rendering it legally binding.

C. RENDERING MEDIATED AGREEMENT BINDING

Mediators dealing with international family disputes over custody and contact should work closely together with the legal representatives of the parties.

Before starting the implementation of the agreement, the agreement should be made enforceable or binding in the relevant jurisdictions.

The Central Contact Points in the jurisdictions concerned should assist the parties with information on the relevant procedures.

Where needed, countries may examine the desirability of introducing regulatory or legislative provisions for the enforcement of mediated agreements.

GROUPE DE TRAVAIL SUR LA MÉDIATION DANS LE CADRE DU PROCESSUS DE MALTE
WORKING PARTY ON MEDIATION IN THE CONTEXT OF THE MALTA PROCESS

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Novembre / November 2010

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

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 Jillani 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*.