



Best Practice Model

Mediators-in-Court-Model

Specialised mediation in international child abduction cases
in connection with return proceedings
under the 1980 Hague Convention



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German Best Practice Model: Specialised mediation in international child abduction cases in connection with return proceedings under the 1980 Hague Convention

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The AMICABLE Project is an EU co-funded project conceived by the project co-ordinator MiKK - International Mediation Centre for Family Conflict and Child Abduction. The project is conducted by a Consortium of Partners from four different EU countries: the University of Milano-Bicocca (Italy), the University of Wrocław (Poland), the University of Alicante (Spain) and MiKK (Germany). The Consortium Partners have developed four country-specific Best Practice Tools for their respective countries. For further details on the AMICABLE project please refer to the project website:

<https://www.amicable-eu.org/>

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

1. One important pillar of the Amicable Project is the exploration of how specialised mediation in international child abduction cases can be introduced in the course of return proceedings under the 1980 Hague Child Abduction Convention.
2. The so-called Mediators in Court Model (MiC Model) – promoted as “Best Practice Model” is currently operative in Germany, in the Netherlands and in The UK with some slight modifications. The Amicable Project aims to disseminate information on the positive experiences made with this model and to explore whether and how specialised mediation in international child abduction cases could be introduced in the course of return proceedings under the 1980 Hague Child Abduction Convention in other EU Member States.
3. National research on the possible introduction of such specialised mediation alongside Hague return proceedings has been undertaken and the feasibility of an implementation in the different national legal setting of Hague return proceedings is being explored in the National Seminars.
4. The aim of this document is to assist national stakeholders and policy makers in promoting specialised mediation in international child abduction cases in the course of return proceedings under the 1980 Hague Child Abduction Convention.
5. The Best Practice Model represents a practical procedure for the incorporation of mediation into the tight, six-week timeframe of child abduction proceedings. It involves the setting of two hearings, instead of one, in child abduction cases by the judge. The hearings are listed approximately 10 days apart. The first hearing is a short hearing (approx. 1 hour), to which a mediator is invited for the purpose of informing the parents about mediation and answering any questions they may have (in their mother-tongue/s). A co-mediator is ready on stand-by. If the parents are agreeable to mediation, a mediation process of 2-3 days takes place in between the two court hearings. The lawyers should be available by phone and e-mail throughout the mediation to answer any questions the parents may have. They will also check the mediation agreement (Memorandum of Understanding) before the parents sign this. In an ideal scenario, there will be an agreed solution presented to the court for the second (substantive) hearing. This mediation model requires the cooperation of all stakeholders in Hague cases: judges, cross-border mediators and mediation NGOs, Central Authorities and the parties’ lawyers. The mediation NGO is responsible for finding suitable mediators with availability and organizing the logistical side of the mediation.

Specialised mediation in international child abduction cases

5. Before introducing the Best Practice Model, a few words must be said on the particular character of mediation in international family disputes involving the wrongful removal or retention of a child. Mediation in international child abduction cases differs much from regular family mediation. It is imperative that such mediation be conducted by specialist mediators having received particular training for this type of mediation. Specialist knowledge on the legal particularities at stake is as much needed as a clear understanding that a delay in solving the conflict is likely to play into the hands of the taking parent by consolidating the unlawful situation. Fur-

¹ Available in all European languages at < <https://www.hcch.net/en/publications-and-studies/details4/?pid=6561> > (last consulted 8.6.2020).



German Law

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Germany: How to integrate the offer of specialised mediation in the setting of Hague return proceedings?

7. When a child has been taken from his/her State of habitual residence to another country in breach of the rights of custody of the other parent, the 1980 Hague Child Abduction Convention will be applicable together with Art. 11 Brussels IIa Regulation. A first contact person for everyone involved in such a highly emotional and difficult situation can be either the foreign or German Central Authority², the Central Contact Point for Cross-border Family Conflicts (Zentrale Anlaufstelle für grenzüberschreitende Kindschaftskonflikte/ ZAnK)³ in Germany which is a branch of International Social Services or MiKK e.V., International Mediation Centre for Family Conflict and Child Abduction.⁴ Parents can contact them easily by calling or sending an e-mail.
8. Parents who want to take back responsibility for their child and try mediation with the assistance of professionals, can make contact with or will be referred to MiKK - a specialised mediation service for international family disputes involving children and international child abduction cases. MiKK is a non-profit organization (NGO) based in Berlin but has an international scope. The organisation receives mediation requests from all over Germany, the EU and internationally. MiKK provides multi-lingual (EN, DE, SP, FR, PL) and free-of-charge support, advice and referrals to mediation for parents in cases of cross-border family conflicts. MiKK organizes bilingual and bi-cultural mediations for parents using qualified mediators from all over the world who have been trained by MiKK for this kind of specialized family mediation. Currently MiKK mediators are based in 30 countries and mediate in 30 languages. Every MiKK mediator, who is already a qualified mediator in her/his own country, has successfully completed the MiKK specialised 50-hour training course on international cross-border family mediation (CBFM). MiKK also co-operates with mediation services all over Europe and the rest of the world and is active in the field of research and promotion of cross-border family mediation with international stakeholders. MiKK assists parents in

finding sustainable and amicable solutions that are in the best interest of their children.

9. When parents are unable to find an amicable solution by themselves or through mediation, the left behind parent tends to take the judicial path. A parent who wants to bring an application for return under the 1980 Hague Child Abduction Convention to a German court will do this either with the assistance of the German Central Authority⁵ (Bundesamt für Justiz) or directly by mandating a lawyer. When an application for intervention by the German Central Authority is filed, the parents are normally informed about the option of mediation. Assistance is offered to find a bi-lingual Co-mediator team.
10. If no mediation takes place at this preliminary stage, a return application can be filed with one of the specialized German family courts⁶. That court is competent for the Hague return proceedings and will – again or for the first time - recommend mediation as soon as an application for return is filed. The court will send information sheets about mediation to all parties, i.e the parents, their lawyers, the guardian ad litem/ Verfahrensbeistand⁷ who will be appointed for the child and the Youth Welfare Office/ Jugendamt which has to be heard by the court. These information sheets which have been developed by an expert group of specialised family judges are at present available in eleven different languages⁸ for the parents. Thus, the parents will receive the leaflet in their mother tongue/s if available. The legal representatives will receive slightly different information⁹. In spite of this, in the past only relatively few parents decided to enter the mediation process. This unsatisfactory result called for a re-thinking.

⁵ https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/HKUE/HKUE_node.html

⁶ See German National Best Practice Tool under IV and the heading "Options available should Germany be the State of Hague return proceedings"

⁷ The guardian ad litem for minors shall determine the interests of the child and shall assert these in the court proceedings. He or she shall inform the child of the object, course, and potential result of the proceedings in a suitable manner. As additional duty she or he shall help facilitating an agreed settlement, sec. 158(4) FamFG

⁸ German, English, French, Italian, Japanese, Polish, Romanian, Russian, Spanish, Turkish, Ukrainian

⁹ <https://www.mikk-ev.de/en/informations/court-information-about-mediation/>

² [Bundesjustizamt.de/sorgerecht](https://www.bundesjustizamt.de/sorgerecht)

³ [zank.de](https://www.zank.de)

⁴ [mikk-ev.de](https://www.mikk-ev.de)

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Recommendation of mediation by the court- Mediators in Court (MiC)

11. To change this unsatisfactory situation a new project was introduced in Germany, at first in Berlin. An in-court mediation model called MiC/ Mediators in Court, inspired by a model practised in The Netherlands was developed by the author together with MiKK several years ago. With this model mediation can be embedded in the Hague Child Abduction proceedings despite the narrow timeframe of 6 weeks prescribed in such proceedings. At the first court hearing which is held within 3- 4 weeks after the application has been received by the court, the parents and other participants are informed by a mediator face-to-face about the advantages of mediation. All parties are summoned - the parents are required to attend in person - for this and for a second and final hearing. Under German law it is up to the judge to decide if one or more hearings will be listed in proceedings. During the first court hearing the possibility of cross-border mediation is explored and the mediator is introduced. With the consent of the parties the mediator will attend the hearing, introduce him- or herself and give an overview how mediation can assist the parties in finding an amicable solution. All this is done in the presence of not only the parents, but also their lawyers, the guardian ad litem and maybe an interpreter. This ensures that the parents and their lawyers can ask questions which will be answered by the mediator or the judge and that all participants have all relevant information. During this first court hearing which is limited to one hour, not only information about mediation is given, but other issues can also be dealt with: Are there documents to be procured before the final hearing? Is there other essential information required? A very important issue beyond this is the arrangement of contact between the left-behind parent and the child for the period until the conclusion of the court proceedings. This can be discussed and if necessary regulated by an interim court order. The date for the second and final court hearing will already have been fixed for a date about 10 days after the first hearing; it will take place irrespective of the outcome of the mediation. Since mediation becomes a concrete and realistic option during this first court hearing and in the emotionally charged and challenging situation, the access to mediation becomes smooth and relatively easy. Especially the left-behind parent realizes that she or he or does not have to fear any delay. Since the child's best interest is paramount also in

international child abduction cases, most parents take this opportunity offered by the Hague Judge and seek to resolve their dispute through mediation.

Organisation of mediation

12. The date and time for the mediation can be arranged immediately after the court hearing between the parents and the mediator while all parties are present in court. Mediation will take place usually over 10 hours on 2 or 3 days during the weekends between the first and second court hearing. In accordance with the MiKK mediation model two mediators usually cooperate, ideally male and female (adapted accordingly for same-sex partners), in order to provide both parents with a counterpart of his/her own gender, representing the cultural and linguistic background of both parents. In addition, one of the mediators has a legal, the other a psychological/ social sciences professional background. With regards to the place for the mediation, here - following the recommendation of the Hague Guide to Good Practice for Mediation – the mediation will take place where the child currently resides. This means that contact between the left-behind parent and the child can and should be re-established around or between the mediation sessions.
13. All organisational efforts concerning the mediation are handled by MiKK and the respective mediators. The only effort for the court is a first call to the MiKK office, transmitting the dates of the first hearing and the relevant languages of the parents and of course the necessity of holding two hearings rather than only one, providing the date of the second hearing. The first hearing is quite short, however.
14. During the mediation process the lawyers of the parents should be available to be contacted by e-mail or phone in order to answer legal questions, if so required.

Final court hearing

15. The final court hearing will take place as planned within the 6- week time frame. Before or at the latest at the beginning of that second hearing the judge will be informed whether the parents have concluded an agreement. Following the result of the mediation, the court hearing will go ahead

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making the agreement legally binding and enforceable¹⁰ as far as possible. The result will be a court documented settlement and/or a court decision based on the agreement. If the parents have not managed to reach an agreement by the end of the mediation, the hearing will go ahead as normal in such cases, dealing with the issue of return/no return: the circumstances of the case have to be clarified by the court, the onus of proof can become important and the focus will be placed on the child. But negotiations continue until a mutual resolution or a final court decision has been pronounced, resulting from these adversarial proceedings. In either case the communication between the parents will usually have improved.

16. The possibility of further mediation is given until a final decision is enforced, either by the first or by second instance (appeal). Mediation can go on between the two instances, during appeal or to avoid enforcement of the return order.
17. Approximately 80-90% of cases mediated by MiKK that are based on the MiC model result in a Memorandum of Understanding being signed by the parties.

Costs of mediation

18. Specialised mediation during Hague return proceedings takes on average about 10 -12 hours plus 3-5 hours for each mediator pre- and post preparation of the mediation. The average hourly rate is 100 € per mediator: 15 hours à 100 € = 1500 €. The cost for two mediators comes to 3000 € therefore, on average. Travel costs and expenses for overnight accommodation are not included here and may arise depending on the concrete situation.

Legal aid

19. Legal aid can be granted to both parents for the court proceedings subject to a means and merits test. If the applicant benefits from legal aid not only the fee of the lawyer but also his/ her travel and accommodation costs for travelling to the hearing(s) can on special application be paid by the court. The court process of granting legal aid will take at least 3 weeks. Problems often arise when a parent from abroad does not submit sufficient documents. This may lead to delays.

20. Legal aid does not include the costs of mediation. In case a parent – or both- is/are granted legal aid for the court proceedings it may be possible, depending on the budget, that his or her part of the mediation costs are financed by the German Central Authority at a rate of 80 € per hour. Usually 10 hours of mediation are granted with an additional 5 hours for pre-and post preparation, making this a total of around 1200 €/ parent.

Result

21. After the promising experiences in Berlin, which are similar to the slightly different model practised and regulated by law in The Netherlands, the model project is now being tested in other specialised German Hague courts. The invaluable advantages of this approach lie not only in the fact that the parents have the chance to take responsibility for their children's lives and can focus on the child again, but also in the fact that the procedure can be completed speedily within the required 6 weeks. Until now the practice has shown that no appeals have been made, which usually lead to a continuation of the uncertain state about return or non- return and therefore about the future habitual residence of the child. The MiC procedure thus serves the well-being of the affected children in a special way.

¹⁰ See German National Best Practice Tool (1)

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Perspective

The Mediators-in-Court model, MiC, is not yet legally regulated in Germany and is not applied by all courts. Those who practise it, taking advantage of the freedoms offered by German procedural law, have achieved convincing success. Nevertheless, and despite the fact that it has been presented for several years at the regular training sessions for specialised courts, it has not yet been possible to find a majority among specialised courts that actually implements it.

Various reasons could play a role.

When a return application is received by the court, there is a lot of time pressure for the responsible judges. The procedure has to be carefully structured from the beginning, it is often complicated from a legal and factual point of view, the pleadings submitted are voluminous, the diary is well filled in the next six weeks in which the Hague return proceedings are to be settled, and frequent telephone calls have to be made anyway in order to find a suitable guardian ad litem and an interpreter who are available at short notice. It is conceivable that in this situation many family court judges are afraid to try out a new procedure.

Not all family court judges have completed further training in mediation and may therefore not feel confident enough to answer questions that arise.

Funding for mediation is often described as a major problem by those involved. Financial support from the Federal Office of Justice as the German Central Authority is not reliably available; mediation cost assistance does not exist.

The legal problem of making a settlement reached through mediation legally binding, which is described in detail in the Best Practice Tool, may also be an obstacle.

De lege ferenda and also in view of the Brussels IIb Regulation, which will be applicable from 2022 onwards and which assigns an even stronger role to mediation, it would therefore be desirable for the integration of mediation into the Hague return procedure to be regulated by law in the International Family Law Procedure Act (IntFamRVG), similar to the model that has been successfully practised in the Netherlands for about ten years. At the same time, further training in mediation

should be made obligatory for all family court judges.

This should also be linked to the introduction of mediation cost assistance or subsidies for mediation. In view of the experience gained so far with the MiC model, mediation generally leads to an amicable settlement in the first instance, which saves both the costs of an appeal instance and the imponderables of enforcing the court return decision; this includes the saved costs for legal aid for this.

