



Best Practice Model

Mediators-in-Court-Model

Mediación especializada en casos de sustracción internacional de menores en relación con los procedimientos de restitución en el marco del Convenio de La Haya de 1980



This project was funded by the European Union's Justice Program (2014-2020)

Best Practice Model Español: Mediación especializada en casos de sustracción internacional de menores en relación con los procedimientos de restitución en el marco del Convenio de La Haya de 1980

Parte general de la UE: Juliane Hirsch, LL.M.,
Consultant on Private International Law and
International Family Law

Parte nacional española:
Prof. Soledad Ruiz de la Cuesta Fernández,
Universidad de Alicante

I. Edition 2021
Berlin

(c) J. Hirsch & S. Ruiz de la Cuesta Fernández, all rights reserved

El proyecto AMICABLE es un proyecto cofinanciado por la UE concebido por el coordinador del proyecto MiKK - Centro Internacional de Mediación para Conflictos Familiares y Secuestro de Niños. El proyecto lo lleva a cabo un consorcio de socios de cuatro países diferentes de la UE: la Universidad de Milán-Bicocca (Italia), la Universidad de Wrocław (Polonia), la Universidad de Alicante (España) y MiKK (Alemania). Los asociados del Consorcio han elaborado cuatro instrumentos de mejores prácticas específicos para sus respectivos países. Para obtener más detalles sobre el proyecto AMICABLE, por favor consulte el sitio web del proyecto:

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

Contacto: amicable@mikk-ev.de



Consorcio:



1. Un pilar importante del Proyecto Amicable es la exploración de cómo puede introducirse la mediación especializada en los casos de sustracción internacional de menores en el curso de los procedimientos de restitución en virtud del Convenio de La Haya de 1980 sobre Sustracción de Menores.
2. El llamado Modelo de Mediadores en el Tribunal (Modelo MiC - Mediators-in-Court) - promocionado como "Modelo de Mejores Prácticas" está actualmente operativo en Alemania, en los Países Bajos y en el Reino Unido con algunas ligeras modificaciones. El Proyecto Amicable tiene como objetivo difundir información sobre las experiencias positivas realizadas con este modelo y explorar si la mediación especializada en casos de sustracción internacional de menores podría introducirse, y de qué manera, en el curso de los procedimientos de restitución en virtud del Convenio de La Haya de 1980 sobre Sustracción de Menores en otros Estados miembros de la UE.
3. Se ha llevado a cabo una investigación nacional sobre la posible introducción de dicha mediación especializada junto con los procedimientos de restitución de La Haya y se está explorando en los Seminarios Nacionales la viabilidad de una implementación en el diferente marco jurídico nacional de los procedimientos de restitución de La Haya.
4. El objetivo de este documento es ayudar a las partes interesadas nacionales y a los responsables políticos a promover la mediación especializada en los casos de sustracción internacional de menores en el curso de los procedimientos de restitución en virtud del Convenio de La Haya de 1980 sobre Sustracción de Menores.
5. El Modelo de Buenas Prácticas representa un procedimiento práctico para la incorporación de la mediación en el apretado calendario de seis semanas de los procedimientos de sustracción de menores. Implica la fijación de dos audiencias, en lugar de una, en los casos de sustracción de menores por parte del juez. Las audiencias se programan con un intervalo de aproximadamente 10 días. La primera audiencia es una audiencia breve (aproximadamente 1 hora), a la que se invita a un mediador con el fin de informar a los padres sobre la mediación y responder a las preguntas que puedan tener (en su/s lengua/s materna/s). Un co-mediador está preparado en espera. Si los padres están de acuerdo con la mediación, se lleva a cabo un proceso de mediación de 2-3 días entre las dos audiencias judiciales. Los abogados deben estar disponibles por teléfono y correo electrónico a lo largo de la mediación para responder a cualquier pregunta de los padres. También revisarán el acuerdo de mediación (Memorandum of Understanding) antes de que los padres lo firmen. En un escenario ideal, se presentará una solución acordada al tribunal para la segunda audiencia (sustantiva). Este modelo de mediación requiere la cooperación de todas las partes interesadas en los casos de La Haya: los jueces, los mediadores transfronterizos y las ONG de mediación, las Autoridades Centrales y los abogados de las partes. La ONG de mediación es responsable de encontrar mediadores adecuados con disponibilidad y de organizar la parte logística de la mediación.

Mediación especializada en casos de sustracción internacional de niños

5. Antes de presentar el Modelo de Buenas Prácticas, hay que decir unas palabras sobre el carácter particular de la mediación en los litigios familiares internacionales que implican el traslado o la retención ilícita de un niño. La mediación en casos de sustracción internacional de menores difiere mucho de la mediación familiar habitual. Es imperativo que dicha mediación sea conducida por mediadores especializados que hayan recibido una formación particular para este tipo de mediación. Los



Ley Nacional Española

Mediators-in-Court-Model

How to integrate the offer of specialised mediation in the setting of Hague return proceedings? Organization of Hague proceedings in Spain

Mediation in family conflicts in Spain

The general framework for mediation in disputes related to Family Law in Spain is established by Law 5/2012 of 6 July, on mediation in civil and commercial matters. While this Law does not specifically target family mediation, it does provide a general framework for the unfolding of mediation in conflicts based on Private Law. It is a State law which is, in principle, applicable nationwide. However, Spain's territorial model allows the Autonomous Communities to regulate family mediation, within certain limits, based on regional laws that are only applicable to the territory of each Autonomous Region. In any event, these rules must complement the provisions of State law and not contradict them, nor can they interfere with competences that belong exclusively to the Spanish State, including those of a procedural nature.

For its part, the Spanish Civil Procedure Law (*Ley de Enjuiciamiento Civil*) has gradually incorporated provisions relating to mediation, both following the amendments brought about by Law 5/2012 on Mediation, and through subsequent amendments. Thus, among other precepts, and complying with the rules generally applicable to all civil proceedings, Article 19 enshrines the right of litigants to dispose of the subject of the proceedings (understood to be related to matters of a freely disposable nature) and Article 39 establishes the courts' lack of jurisdiction when the parties have previously agreed to resolve the conflict through mediation.

Specifically, in relation to family procedures (and others of a similar nature), including Internationally Abducted Child Return Proceedings, the general rule is that the subject is not freely disposable (because it concerns certain matters affecting the

public order), although it is specified that "... *the claims formulated in the proceedings referred to under this Heading which target matters that the parties may freely dispose of, according to the applicable civil legislation, may be subject to renunciation, search order, settlement or withdrawal ...*" (Article 751 LEC).

Despite the procedural rules contained in the LEC, intra-judicial mediation models have been mainly implemented based on Pilot Projects of different origin and nature, as well as through Good Practice Guides published by the General Council of the Judiciary (the latest edition dates back to 2016).

The Guide includes advice and recommendations on how to implement an effective Intra-judicial Mediation system, providing a highly detailed Family Mediation Protocol and a number of useful Annexes: on the benefits of mediation (I), on the applicable supranational and national framework (II), on the types of cases subject to mediation (III), on information about the derivation circuit (IV), while incorporating a number of recommended forms (documents) (V). It also provides templates of evaluation sheets, derivation records, and records of follow-up and incorporation of the agreement in the procedure. It is, in short, a useful model which has been designed taking into account all aspects of intra-judicial mediation, particularly from the perspective of the courts.

Regarding the subject matter of the present report, when adopting a specific model of intra-judicial mediation in the field of international child abduction, the provisions of the CGPJ (Judiciary Branch) Family Mediation Protocol help to better manage the model and should be taken into account.

Mediators-in-Court Model - Ley Nacional Española

Mediation regulations in the field of international child abduction

Regarding specific procedural regulations in the field of international child abduction, it is worth noting that the regulation prior to the 2015 reform channelled the return of minors – who had been held in Spain or who were illegally relocated – into voluntary jurisdiction proceedings. In addition to criticisms raised by the nature of the proceedings, the regulations included certain dysfunctions that have been corrected by the new regulation. The previous regulation made no reference to mediation, but the Spanish doctrine nevertheless analysed the viability of this tool and its virtues within the framework of international child abduction, despite the lawmakers' silence. The context that allowed defending mediation to solve this specific family conflict was created by supranational law and soft law instruments that, based on different domains, have outlined the use of mediation, in these cases.

Following the 2015 reform, the current regulation included in Articles 778c and 778d of the LEC, provides for the development of mediation within the framework of the special proceedings for the return of internationally abducted children. Specifically, number 12d of Article 778d LEC regulates mediation flexibly and openly:

“At any time during the proceedings, both parties may request the proceedings to be suspended in accordance with Article 19.4 to engage in mediation. The Judge may also, at any time, ex officio or at the request of either party, propose a mediation solution if, in the light of the concurrent circumstances, he or she considers it possible for them to reach an agreement, without this leading to an unjustified delay. In such cases, the Justice Administration Lawyer shall agree to suspend the proceedings for the necessary duration to process the mediation. The Public Entity responsible for protecting the child may act as a mediator if requested ex officio by the parties or by the Public Prosecutor.”

The duration of the mediation procedure shall be as short as possible and proceedings shall be concentrated within the minimum number of sessions. The suspension of the proceedings for mediation shall not, in any event, be allowed to exceed the legal deadline defined in this Chapter.

The judicial proceedings shall be summarised if requested by either party or, if an agreement is reached through mediation, must be approved by the Judge in accordance with the current regulations and in the best interests of the child.”

In the light of this regulation, structures and systems should be created within the competent Courts permitting an efficient use of mediation in these cases. The circumstances surrounding international child abduction require a high level of specialisation in different domains. Therefore, in view of the conflict's characteristics, it is necessary to develop a specific model of mediation in the procedure for the return of internationally abducted children.

In this context, the *MIC Model*, whose efficiency has been proven in Germany and the Netherlands, can be a protocol of reference and an ideal system of intra-judicial mediation in such conflicts.

Regulation of the Spanish proceedings for the return of internationally abducted children

Before analysing below the possibilities of implementing the *MIC Model* in the Spanish proceedings for the return of minors, I believe it is of interest to first transcribe the Law on Civil Procedure by which it is regulated.

Before doing so, however, I consider it necessary to define certain legal figures that form part of Spanish procedural law in general and of the procedure for the return of minors in particular. These are the figures of the *Abogado del Estado* (State Attorney) and the *Letrado de la Administración de Justicia* (Legal Officer of the Justice Administration). Each of them performs a different function from each other and from that performed by courts and judges.

Mediators-in-Court Model - Ley Nacional Española

The *Abogado del Estado* (State Attorney) is a public official who represents the Spanish State, exercising the functions assigned to them by Law 52/1997, of 27 November, on Legal Assistance to the State and Public Institutions. In cases concerning the international return of children, when Spain is the country that receives the request for return, the *Abogado del Estado* legally represents the claimant parent, on behalf of the Spanish Central Authority. Only if the applicant parent attends the return proceedings with his or her own lawyer, the *Abogado del Estado* will cease to represent.

The *Letrado de la Administración de Justicia* (Legal Officer) is a public official who is an indispensable part of the courts and tribunals. They are regulated by Organic Law 6/1985 of 1 July 1985 on the Judiciary and Royal Decree 1608/2005 of 30 December 2005, which approves the Organic Regulations of the Corps of Legal Officers. They are the depositaries of judicial public faith in order to guarantee the veracity of judicial proceedings, playing a fundamental role in the Administration of Justice within the Judicial Office. They also perform procedural functions, issuing Decrees and Ordering Diligences in the different procedures, directing the technical-procedural aspect of the staff of the Judicial Office, ordering their activity and issuing the orders and instructions that they deem appropriate in the exercise of this function.

The functions performed by both the State Attorney and the Legal Officer for the Administration of Justice are, as can be seen, very different from those of the judge. Only the judge and the courts have the capacity to judge and execute what has been judged, in the terms set out in Article 117, point 3, of the Spanish Constitution.

As regards the development of the Spanish restitution procedure, its regulation is found in the Spanish Civil Procedure Act, specifically in Articles 778 quater to sexies. Its content is transcribed below:

Article 778 quater. General rules and scope of application

1. The provisions in this Chapter shall apply when the objective is to return a minor to his or her place of origin, the minor being in Spain and having been illegally removed or retained, and where an international convention or the provisions of the European Union are applicable. The proceedings included in this Chapter will not apply to cases in which the child does not originate from a State that is not part of the European Union or is not part of any international convention.
2. The competent court will be the Court of First Instance **of the capital of the province**, Ceuta or Melilla, responsible for family law matters, whose jurisdiction the illegally removed or retained child belongs to. Failing that, the Court whose duty it is according to the established rota will be competent. The Court will examine the jurisdiction *ex officio*.
3. The person, institution or body to whom the minor's guardianship, custody or regime of stay, visits, relationship or communication is attributed may pursue the proceedings. The Spanish Central Authority in charge of fulfilling the obligations imposed by the applicable convention, and where appropriate, the person designated by said authority to act on its behalf may also engage the proceedings.
4. The parties must be assisted by a Lawyer and be represented by an Attorney. The State legal Adviser, when applicable at the request of the **Spanish Central Authority**, shall cease to intervene from the moment the plaintiff claiming the return appears with her or his own **Lawyer and Attorney**.
5. The proceedings shall be **preferential and urgent**. They must be settled, in both instances should the case arise, **within a mandatory period of no more than six weeks** from the date the request to return the child is submitted, unless impossible due to exceptional circumstances.
6. Under no circumstances shall the civil proceedings be suspended due to a preliminary criminal ruling driven by criminal proceedings in matters of child abduction.
7. In such proceedings, in order to facilitate direct judicial communications between courts of different countries, recourse may be made, where possible and deemed necessary by the Judge, to the Central Authorities concerned, to the existing International Judicial Cooperation Networks, to the members of the International Hague Network of Judges and to liaison Judges.
8. The Judge may enforce, throughout the process, *ex officio*, at the request of the person pursuing the proceed-

Mediators-in-Court Model - Ley Nacional Española

ings or the Public Prosecutor, **precautionary and safety measures for the child**, deemed appropriate according to Article 773, in addition to those provided for in Article 158 of the Civil Code.

In the same way, during the proceedings, the Judge may agree to guarantee **the plaintiff's rights regarding the minor's stay, visits, relationship and communication**, including under supervision, if in the interest of the child

Article 778d. Proceedings.

1. The proceedings will **be initiated by means of a lawsuit** requesting the minor's return to his or her place of origin. The lawsuit shall include all the information required by the applicable international regulations and, in all cases, information relating to the plaintiff's identity, that of the minor and that of the person who is believed to have abducted or retained the child, as well as the reasons supporting the return request. It must also provide all available information regarding the location of the child and the identity of the person the child is assumed to be with.

The request must be accompanied, where appropriate, by the documentation required by the corresponding international convention or standard, and any other documents supporting the plaintiff's request.

2. The Justice Administration Lawyer shall **decide on the admission** of the claim within the following 24 hours and, if deemed inadmissible, he or she will inform the Judge so that the Judge may resolve the appropriate course of action within said period.

The Justice Administration Lawyer, in the same resolution admitting the lawsuit, **will require the person charged with the abduction or wrongful retaining of the child to appear with the minor** on the determined date, which must be fixed no later than within the three following days, and to make known whether he or she agrees with or opposes the child's return. If the Justice Administration Lawyer opposes the return, he or she must invoke any cause among those established in the corresponding applicable international convention or standard.

The injunction shall be conducted giving the defendant the legal warnings and the text of the applicable international convention or standard.

3. Should the child not be found at the location indicated in the lawsuit and should corresponding inquiries led by the Justice Administration Lawyer at his or her domicile or residence be unsuccessful, the proceedings shall be postponed until the child is found.

If the child is found in another province, the Justice Administration Lawyer, after conducting, within a day, a hearing before the Prosecuting Authority and the parties, shall inform the Judge so that the latter may resolve what is appropriate the following day by issuing an order and

sending, where appropriate, the proceedings to the Court deemed territorially competent, calling on the parties to appear before it within the following three days.

4. **On the given day**, if the defendant appears and proceeds to handing over the child or returning the child to the place of origin, the Justice Administration Lawyer shall draw up a record and the Judge shall issue an order on the same day, agreeing to the completion of the proceedings and the child's return, ruling on the costs, including travel expenses, and the costs of the proceedings. **The defendant may appear at any time**, before the completion of the proceedings, and proceed to handing over the child, or to returning the child to the place of origin, applying the provisions included in this section.

5. If the defendant does not appear, or if the defendant appears but not in due form, nor lodges an opposition, the Justice Administration Lawyer shall declare him or her in contempt of court and continue the proceedings **in absentia**, summoning only the plaintiff and the Public Prosecutor to a hearing before the Judge which shall take place within the following five days, to be concluded in accordance with the provisions of paragraph 6 of this article. Such a decision, however, must be notified to the defendant, after which no other decision shall be made, except that of the decision of terminating the proceedings. The Judge may ordain the precautionary measures deemed relevant in relation to the child, if not already previously adopted, in accordance with Article 773.

6. If, **during the first hearing**, the defendant opposes the handing over or return of the child on the grounds set out in the corresponding convention or applicable international standard, which must be laid down in writing, the Justice Administration Lawyer shall lodge an opposition on the same day and summon all interested parties and the Public Prosecutor **to a second hearing** to be held within the mandatory period of the following five days.

7. The second hearing shall not be suspended due to the plaintiff's non-appearance. If the defendant having lodged an opposition does not appear, such a person will be deemed by the judge to have withdrawn the opposition and the hearing will continue.

During the proceedings, the appearing parties shall expound what they consider appropriate, addressing, in practice, the person who requested the child's return, the Public Prosecutor and the defendant even if the latter is appearing for the first time.

Where appropriate, useful and relevant evidence and the measures ruled by the Judge will be presented within the non-extendable period of six day. This evidence shall be that proposed by the parties or the Public Prosecutor, as well as that agreed to ex officio by the Judge regarding the facts relevant to the decision on the possible unlawfulness of the minor's transfer or retaining. The Judge may also, ex officio, at the request of a party or the Public Prosecutor, obtain any reports deemed relevant, the exe-

cution of which will be urgent and have priority over any other process.

8. Before adopting any decision concerning the propriety or impropriety of the handing over or return of the child to his or her place of origin, the Judge shall, at any time during the proceedings and in the presence of the Public Prosecutor, **hear the child separately, unless the hearing of the child is deemed inappropriate in the light of the child's age or degree of maturity, which shall be recorded in a reasoned decision.**

The child's examination shall take place ensuring that the child is heard under suitable conditions that safeguard the minor's interests, protected from the interference of other persons, and, exceptionally, seeking the assistance of specialists where necessary. This process may be conducted via videoconferencing or another similar system.

9. **Having held the hearing** and, where appropriate, produced the relevant evidence, the Judge, within three days of its completion, **shall rule solely on whether the transfer or retention are unlawful and whether the child should be returned** to the person, institution or body having custody of the child or the child's return to the place of origin to enable the plaintiff to exercise the regime of stay, communication or relationship with the minor, taking into account the superiority of the child's interest and the terms of the relevant Convention or the provisions of the European Union in this matter, as the case may be. The decision agreeing to the child's return shall establish a detailed description of the form and execution time of the return, with the right to adopt any necessary measures to prevent an additional transfer or unlawful retaining of the child after notification of the judgment.

10. If the return of the child is agreed upon, the person who has transferred or retained the child shall be required to pay the legal costs, including those incurred by the plaintiff, the travel costs and the costs of the child's return to the country of habitual residence before the abduction. In the rest of the cases, the costs of the proceedings shall be disclosed ex officio.

11. It will only be possible to lodge an appeal with suspensive effect against the adopted decision which will be treated preferentially and must be concluded within the non-extendable period of twenty days.

The appeal will be conducted following the specific conditions below:

a) The appeal will be lodged within three days following the day the resolution is notified and the judicial body must agree or not to its admission within the 24 hours following its presentation.

b) Once the appeal has been admitted, the other parties will dispose of three days to file a statement of opposition to the appeal or, as the case may be, a legal challenge. In the latter case, the main appellant shall also dispose of a period of three days to expound what is deemed appropriate.

c) Subsequently, on the same day, the Justice Administration Lawyer will order the transfer of the edicts to the competent Court to resolve the appeal, before which the parties must appear within 24 hours.

d) Upon receipt of the edicts, the Court shall decide on admission within 24 hours. If evidence must be produced or if a hearing is agreed upon, the Justice Administration Lawyer will indicate a day within the three consecutive days.

e) The ruling must be issued within three days after the end of the hearing or, failing that, as from the day following that on which the edicts were received in the competent appeal Court.

12. At any time during the proceedings, both parties may request the proceedings to be suspended in accordance with Article 19.4 to engage in mediation. The Judge may also, at any time, ex officio or at the request of either party, propose a mediation solution if, in the light of the concurrent circumstances, he or she considers it possible for them to reach an agreement, without this leading to an unjustified delay. In such cases, the Justice Administration Lawyer shall agree to suspend the proceedings for the duration necessary to process the mediation. The Public Entity responsible for protecting the child may act as a mediator if requested ex officio by the parties or by the Public Prosecutor.

The duration of the mediation procedure shall be as short as possible and proceedings shall be concentrated within the minimum number of sessions. The suspension of the proceedings for mediation shall not, in any event, be allowed to exceed the legal deadline defined in this Chapter.

The judicial proceedings shall be resumed if requested by either party or, if an agreement is reached through mediation, must be approved by the Judge in accordance with the current regulations and in the best interests of the child.

13. When executing the judgment agreeing to the child's handing over or return to the State of origin, the Central Authority shall provide any necessary assistance to the Court to ensure that the execution unfolds without danger, adopting specific administrative measures in each case.

If the parent who has been sentenced to the handing over or return of the child opposes, obstructs or impedes its enforcement, the Judge shall take the necessary measures to execute the sentence immediately, and may be assisted by social services and the Security Forces."

Mediators-in-Court Model - Ley Nacional Española

Analysis of the implementation of the MIC Model in Spanish proceedings

The possible implementation of the *MIC Model* in Spanish proceedings for the return of minors are examined below, in the same order as that followed by BRIEGER, S., in the document *The Best Practice Model (Specialised mediation in international child abduction cases in connection with return proceedings under the 1980 Hague Convention)*.

Regarding the first (extrajudicial) contacts and the assistance offered in Spain to the parent who has suffered the abduction, it is worth noting the following:

- Central Authority: In the case of Spain, the Central Authority is the Sub-Directorate-General for International Legal Cooperation of the Ministry of Justice: Sub-Directorate-General for International Legal Cooperation, located at calle San Bernardo, 62, 28071 Madrid, Email: sustraccionmenores@mjusticia.es

As is known, Article 7 of the 1980 Hague Convention makes impositions on the Central Authority: *“In particular, either directly or through any intermediary, they shall take all appropriate measures: (...) (c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues “.*

- Associations of professionals that aim, among other objectives, at preventing and solving international child abduction cases. The latter include ASIME (Association of Professionals Against International Child Abduction in Spain); CLAMS (International Association for Family Mediation and International Child Abduction); ANAR (Foundation for the Assistance of Children and Adolescents at Risk) or AEF (European Association of Family Lawyers).

- Lawyers specialised in International Family Law and, specifically, in the international abduction of minors.

The beginning of judicial proceedings.

Written information on the possibility of mediation.

The competent court is in the obligation, once the claim has been accepted, to require the person responsible for the abduction to appear in court within three days. The court must accompany that request with the text of the applicable convention or supranational law.

In this respect, no Spanish regulation provides that prior information on the possibility of mediation should be given.

Nor is the applicant expected to be summoned on the same date and time as the abductor.

In this sense, the following is proposed:

- The resolution by which the request is made to the abductor must also be accompanied by an informative document explaining the possibility of mediation, its advantages and its characteristics. All competent courts should have this document available in different languages.

- The decision notifying the plaintiff of the admission of the claim must also be accompanied by that written information.

- The plaintiff must also be summoned so that both parties be present together at the first hearing, which is initially intended, according to the LEC, to hear the abductor only.

Communications between the competent court and the mediation team

Spanish regulations do not provide that the Court should contact possible mediators at the beginning of the return proceedings.

In this sense, it is necessary to act differently and to activate a request for specialised mediators im-

Mediators-in-Court Model - Ley Nacional Española

mediately after the acceptance of the claim. They will be summoned on the same day and time as the parties to the proceedings.

First hearing

In Spanish return proceedings, the first hearing must be held within three days of the acceptance of the claim, provided, naturally, that the abductor is notified on time.

As stated, it is necessary that the summons to this first hearing, even if not provided for in the legislation, be extended also to the plaintiff: the possibility for the abductor to appear for a short while alone should be respected (to fulfil the objectives established in the regulation). The rest of the hearing will then unfold in the presence of both parties (so that they be informed in person of the possibility and advantages of undertaking mediation).

The mediators will attend the hearing. The one, among them, who will conduct the briefing before the Judge as well as the parties will join the hearing at the same time as the plaintiff, after the abductor has appeared alone.

If the parties have decided to resort to mediation, its date and place should be fixed at the end of the hearing.

How the mediation unfolds

Suspension of the proceedings and duration of the suspension

If the parties decide to resort to mediation during the first hearing, Spanish law provides that the proceedings be suspended. The provision reads that the suspension may not exceed the legally envisaged period for the entire process, i.e. six weeks.

- Regarding the need for suspension:

Although the law indicates that the proceedings will be suspended for mediation, it is perfectly possible that the suspension will not be effective. The latter is recommended by different supranational

regulations. According to the deadlines fixed in Spanish law, the period between the first and second hearings can last up to five days, a period of time that could be sufficient for the mediation to unfold without requiring the proceedings to be suspended. The proceedings could be suspended in the event that the mediators communicate the need for additional time.

- Regarding the time limit for the suspension of the proceedings:

A literal interpretation of the law suggests that the proceedings may be suspended for six weeks to allow the mediation to take place: “The suspension of the proceedings for mediation shall not, in any event, be allowed to exceed the legal deadline defined in this Chapter [Six weeks]”.

However, I consider that Judges should adopt a corrective interpretation allowing, on the one hand, and only if necessary, to apply that maximum period, but on the other, encouraging the stakeholders to complete the mediation within a much shorter period of time: ideally, that recommended in the MIC Model (10 hours, concentrated over two to three days).

Duration of the mediation process

As indicated, despite the long suspension period provided for, the mediation process should be concentrated within two to three days. If the date for the first hearing were set on a Friday, the weekend would be available for mediation. The Court would probably know whether the parties have reached an agreement by the following Monday, and whether they need more time to mediate, or whether the second hearing will directly be held to solve the litigation.

Second hearing

The second hearing shall, in principle, (except if a suspension has been requested to obtain additional mediation time) take place on the date originally scheduled: let us remember, this is within five days of the first hearing.

Mediators-in-Court Model - Ley Nacional Española

It would begin with the judge's question about whether an agreement has been reached. If the answer is no, the hearing shall be pursued to fulfil the purpose laid down in the law and the judge shall pass a judgment within three days.

If the parties have reached an agreement during the mediation process, the Judge shall approve the agreement, provided its contents respect the child's best interests. The approval decision shall take the form of "Record", not a judgment.

The Judge's approval of the agreement's entire contents presents some problems. The wording of the law insists that the ruling of the Judge competent to hear the child's return proceedings **will be limited** to deciding on whether the child shall stay or return, as well as the travel expenses and the costs of the proceedings. If the Judge decides to return the child, he or she will establish the manner and timing of the return in detail and may take appropriate measures to prevent a second unlawful displacement or retention of the child upon notification of the judgment.

Again, a literal interpretation of the law leads us to conclude that the Judge has no power to approve the parts of the agreement relating to aspects other than the child's return or stay. However, there are reasons to argue otherwise, as detailed below.

Mediation in international child abduction is completely ineffective if the agreement does not include key aspects of the negotiation between the parents: decisions on custody; visiting arrangements; maintenance amounts; decisions regarding common property; the extended family's participation; the manner in which to make decisions affecting the child's life, etc. It is only when an agreement has been reached regarding these issues that it is possible to achieve a consensus on whether the child returns or remains at the location to which he or she has been transferred.

The supranational framework governing or recommending mediation in international child abduction encourages the competent judge to have powers including over the content of agreements relating to parental responsibility, for the purposes of validation or approval.

When the Spanish legislator, driven by the existing supranational framework, decides to incorporate mediation into the new child return proceedings, it is reasonable to conclude that it is doing so first, expecting that it will be useful, and second, in the knowledge that naturally, its utility will depend on the scope of the negotiation and the subsequent judicial approval granted to the parents, beyond the final decision regarding the child's return or stay. This decision will ultimately be conditioned by the rest of the terms of the agreement.

On the other hand, Regulation (EU) 2019/1111 of 25 June puts forward a strong argument in its "Whereas 22":

"Member States which have concentrated jurisdiction should consider enabling the court seized with the return application under the 1980 Hague Convention to exercise also the jurisdiction agreed upon or accepted by the parties pursuant to this Regulation in matters of parental responsibility where agreement of the parties was reached in the course of the return proceedings. Such agreements should include agreements both on the return and the non-return of the child. If non-return is agreed, the child should remain in the Member State of the new habitual residence and jurisdiction for any future custody proceedings there should be determined on the basis of the new habitual residence of the child."

However, if a formalistic position is upheld, concluding that it is not possible for the competent judge to approve aspects of the agreement which go beyond the question of the child's return or stay, other ways of giving that part of the agreement a public nature should be sought. In Spain, the Notary may be the alternative, drawing up a notarial deed regarding that part of the agreement, in line with the new Regulation (EU) 2019/1111 ("Whereas 14").

Mediators-in-Court Model - Ley Nacional Española

Possibility to request mediation or a judge's decision on mediation at any other time during the proceedings

It should be remembered that Spanish legislation allows mediation to be agreed at any time during the proceedings, either during the first hearing, either during the appeal phase or even during the execution.

If, as a result of the first hearing, the parties have not agreed to engage in mediation, but do so at a later date or, in the light of the circumstances, the Judge decides to invite them back to mediate and the parties agree, mediation must take place at that time, applying the provisions described herein as soon as they are compatible with the procedural timing during which they unfold.

Mediation costs:

State mediation regulations and the LEC do not determine the costs of intra-judicial mediation. However, certain Autonomous Communities, exercising their powers in the field of Administration of Justice, have regulated the possibility that intra-judicial mediation may be free for those granted the benefit of free legal assistance. This is done, for example, by the Free Mediation and Justice Service of the Autonomous Community of Cantabria, or the Family Mediation Service of the Basque Country, or the corresponding services of the Regional Government of Andalusia. Likewise, the Laws of Catalonia and the Valencian Community provide for free intra-judicial mediation in the same cases as those already described for extrajudicial mediation.

Conclusions

The Spanish proceedings for the return of minors is flexible regarding mediation possibilities and allows adopting the *MIC Model* without any major misalignments.

However, it is necessary to modify certain aspects or procedural dynamics to favour a more fluid and efficient mediation within the process. And, on the other hand, there are also some serious obstacles to the effective application of the MIC Model. Two in particular stand out, but they are essential:

1. A lack of specialised training of Spanish mediators in this area.

At this point it would be essential for the judiciary and the competent public administrations to increase the offer of training for mediators specialised in this area. In my opinion, this is a very favourable scenario for the training of mediators in the MIC Model, taking advantage of the training structures and professionals with accredited experience in institutions such as, for example, MiKK.

2. The competence of the Judge to approve the agreement regarding certain aspects of parental responsibility: I believe it is essential that the Hague Judge be authorised to approve the agreement in its entirety. Indeed, our efforts to encourage the use of mediation in cases of child abduction in Spain will be fruitless without the necessary reform to Spanish law allowing judges to validate the agreement as a whole, i.e. taking into account not only the decision of the child's return or non-return, but also the rest of the issues relating to the family relationship. Or else, the current regulation should at least be allowed to be interpreted in a sense that is favourable to judicial approval of the entire agreement (however, this option presents obvious legal security issues).

This last issue should, of course, be the subject of legislative amendment in view of the imminent implementation of COUNCIL REGULATION (EU) 2019/1111 of 25 June 2019 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility and international child abduction.

Mediators-in-Court Model - Ley Nacional Española

In short, the MIC MODEL adjusts, with minor variations, to the Spanish child return process and, in what is currently a drawback or a problem for its full implementation, it is to be hoped that, with the push in the training of specialised mediators and with an adaptation of the procedural rule to the requirements of the new European rule, these obstacles will be overcome and the MIC MODEL can become, without major difficulties, the basic model or protocol of action in the mediation carried out in the Spanish proceedings for the return of internationally abducted children.