



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

**EU General Part:** Juliane Hirsch, LL.M.,  
Consultant on Private International Law and  
International Family Law

**Polish National Part:** Dr. hab. Magdalena  
Tabernacka, Uniwersytet Wrocławski

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

Contact: [amicable@mikk-ev.de](mailto:amicable@mikk-ev.de)



Project Consortium:

 Universitat d'Alacant  
Universidad de Alicante

 UNIVERSITÀ DEGLI STUDI  
DI MILANO  
BICOCCA

 Uniwersytet  
Wrocławski

 **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-

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



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

### *Mediations Institutions and institutional issues*

7. In Poland, there is neither specialised institution nor non-governmental organisation that would ensure the organisation of bilingual and cross-cultural family mediation and at the same time offer free advice and assistance for families. Also, there are no public administrations or agencies with public law status that would offer this kind of mediation support. This institutional deficiency leads to a situation where parents initiate Hague proceedings before the court in the event of child abduction, even if mediation would be possible before they would benefit from judicial protection. In addition, due to the lack of a specialized institution supporting mediation in cross-border family disputes, both judges and potential participants in mediation who have decided to resolve the conflict amicably are forced to undertake a number of activities related to the preparation of mediation, which is a significant procedural and organizational burden. Mediators, to whom mediation in cases of parental child abduction will be directed by the court, also act in such cases without institutional support.

A mediator is usually appointed by the court but mediator can be also proposed by parties. The court may also agree with the parties at the first hearing on the mediator.

It should be noted that some institutional solutions were introduced over twenty years ago, which were initiated by the so-called Wrocław Card. This document was a kind of declaration specified the intentions of cross-border cooperation of mediators. In interviews with people involved in signing this document, we received information that it was a type of declaration that initiated the international cooperation of Polish mediators with German mediators. Thanks to this, several mediators received specialist training in MiKK.

Due to the fact that there is no formal procedure for organizational support for mediation in Hague cases at the level of public authority and there are no procedures carried out by specialized non-governmental or-

# Polish Law

## Mediators-in-Court-Model

ganizations, it is important to apply solutions that will ensure the participation of professional mediators in cross-border family mediation in cases concerning abduction a child abroad by a parent.

In practice, there are two solutions, which can be used with some modifications in order to ensure professional mediation by a mediator who is prepared for it. Below are the conditions and circumstances of their application and a proposal of possible actions to be taken. Proposals for legislative and organizational changes will also be presented that would allow for the efficient introduction of mediation into proceedings under the Hague Convention.

### *A Use of the list of permanent mediators and media institutions kept in Regional Courts*

Mediators in Poland may apply for an entry in the register of mediators and mediation institutions, which is kept by the Presidents of Regional Courts. This is not a type of marketing - this is the official<sup>2</sup> register including the list of mediators on which the contact details of mediators are given and mediators declare their specialization. Of course, mediators are also trying to spread information about their activities in a different way. However, our research has shown that mediators treat the list as a kind of official confirmation of their competences and a formal basis for “appearing” in the profession of mediator.

These registers are available on line and in the secretariats or on information boards in the Regional Courts.

### *Current situation:*

Judges thanks to these registers have the opportunity to obtain information about mediators specializing in family conflicts. Interviews conducted in the study showed that the relevant declaration of specialization in the register, as well as the very fact of the mediator's

<sup>2</sup> The legal basis for such lists is the REGULATION OF THE MINISTER OF JUSTICE of January 20, 2016 regarding the maintenance of a list of permanent mediators (ROZPORZĄDZENIE MINISTRA SPRAWIEDLIWOŚCI z dnia 20 stycznia 2016 r. w sprawie prowadzenia listy stałych mediatorów) issued on the basis of art. 157f of the Act of 27 July 2001 - Law on the structure of common courts (Journal of Laws of 2015, item 133, as amended).

## Mediators-in-Court Model - Polish Law

existence in the register was the basis of trust that the judges were able to give to the mediator. Practice also indicates that individual judges tend to refer cases to mediators with whom they have positive experiences in terms of the manner and results of their work.

### *Proposals:*

To implement the efficient model of mediation, a new procedure should be introduced or an appropriate practice of verifying the declared specialization should be established.

Our proposal is that the Presidents of Regional Courts should verify the number of hours completed in the field of cross-border mediation before entering an appropriate mediation specialization on such a register<sup>3</sup>.

In my opinion, this is possible because the entry in the register of mediators is discretionary and the president of the court assesses whether the person applying for entering it in the register guarantees the fulfilment of the mediator's function. Nevertheless, since the inclusion of a specific person in the register concerns their rights, and he or she is a person outside the organizational structure of the court, it is not possible to regulate his or her situation by internal regulations. However, to maintain transparency as to the conditions of practicing the profession of mediator, we would recommend introducing formal legal regulations specifying, among others, the requirements for inclusion on the list. This should occur either in an act or in an ordinance issued by the Minister.

For now, there are no such regulations

<sup>3</sup> Currently, on the basis of the Regulation, the applicant applying to the register, encloses to the application: copies of documents confirming knowledge and skills in the field of mediation, which are: information on the number of mediations carried out, a list of issued publications on mediation, opinions of mediation institutions or persons with knowledge and skills in the field of mediation, documents certifying education, mediation training and specialization. This regulation, of course, allows the President of the Court to check whether a person has the resources of knowledge and preparation to conduct mediation in cases of parental abduction, however, this provision is very discretionary, which may lead to the fact that the appropriate standard of credibility will not be maintained nationwide declarations of people struggling for an entry in the register.

## B.

*The second institution that is “ready” to apply is the support provided by mediation coordinators.*

It would be also worth using the strength of the mediation coordinator's institution.

The coordinator's role is to act in general for the development of mediation, ensuring efficient communication between mediators and judges.

Mediation coordinators operate on the basis of this regulation:

*Coordinators act in accordance with art. 16a. Acts of July 27, 2001 - Law on the structure of common courts (Journal of Laws, Dz.U.2020.2072 i.e.)*

*Coordinator § 1. There is a mediation coordinator in the regional court who performs mediation development activities, ensures efficient communication between judges and mediators and permanent mediators, and also cooperates in organizing information meetings.*

*§ 2. The mediation coordinator performs the tasks referred to in § 1 also in district courts within the area of jurisdiction of a given regional court.*

*§ 3. The mediation coordinator is appointed by the president of the regional court, by way of an order, from among the judges of the regional court.*

The role of coordinators can be describe as a specific contact point between mediators and judges. It can be seen that the coordinators have important functions when it comes to integrating mediation into the practice of justice. They enable efficient communication between judges and court secretariats on the one hand and mediators on the other. Coordinators organise regular meetings with mediators, during which important issues are considered, for example mediators' presence in courts during which parties can learn directly from mediators about the principles of mediation. Coordinators also perform a number of functions, which are aimed at improving the mediation of referrals and popularization of mediation among judges. The mediators I interviewed said it was a very effective way to support mediation in courts.

***Proposal:***

A good solution, partly compensating for the lack of appropriate legal safeguarding when entering mediators in the register, allowing for unambiguous confirmation of mediator's qualifications, would be the mediation coordinator's function of connecting judges adjudicating on Hague cases with mediators having relevant knowledge and experience.

In addition, a register containing contact details of mediators who declare their own competence to conduct family cross-border cases and knowledge of issues regulated by the Hague conventions would be very useful. This list should be kept as an internal document in court, coordinated by the mediation plenipotentiary and circulated among Hague judges. The list should include information on the Hague Convention and cross-border family conflicts training received by the mediators and the number of training hours. In addition, there should be information about the foreign language or languages spoken by the mediator.

***Political climate***

8. It can be noticed that in Poland there is an official friendly climate for the use of mediation - both in terms of political institution - such as the Minister of Justice and persons and institutions with real influence on the justice system.

However, the use of mediation is relatively low - research conducted in this area shows that it is caused by low public awareness of the nature and purpose of mediation, which results in the general lack of trust in this institution. The further reason is the lack of established practice of using mediation. An important reason is also the issue of financing mediation by the parties, in a situation where they obtain the court's judgment without these costs.

***Real possibilities of using mediation in cases in the Hague Conventions******Information***

9.1 Knowledge about mediation - the aims and legal effects of this procedure is not particularly widespread in Polish society. This is indicated by the results of the research, but also noted with interviews conducted with judges in connection with the AMICABLE project.<sup>4</sup>

<sup>4</sup> See: M. Abramowicz, T. Salwa, M. Tabernacka, *Co o mediacji i rozwiązywaniu konfliktów według dzieci. Publikacja wyników badań*, pp: 41-49; K. Pilarz, Ł. Piecuch, *Mediacje okiem studentów*, pp.51-66, in: M. Tabernacka

**Mediators-in-Court Model - Polish Law**

It can also be considered that the activity of public authorities in providing information on the possibility of using mediation is not sufficient.

In our opinion the current regulations regarding the Central Authority are insufficient to.

The Polish Central Authority only inform about the possibility of using mediation.

We must also remember the social situation of parents who are in conflict. People are more in the mood for quarrels and fights and not for conversation and reconciliation.

First of all, the information should be more "intrusive". If the parties at this stage are not interested in mediation, it is should be a Hague judge's role to recommended mediation.

There are solutions in the world that could be successfully copied here.

***Proposals:***

Information on mediation should be easily disseminated and available in various places. Practice shows that often one of the first places to which a parent staying in the country from which the child was abducted is the prosecutor's office or police station. Information on the possibility of using mediation in cases of parental abductions should therefore be disseminated by both, prosecutors or the police. Similarly, social welfare officials should have knowledge on this topic and disseminate it. Currently the Central Authority carries out its legal obligation and informs parents of the possibility of mediation. Nevertheless, it would be good if the Central Authority had the appropriate tools at its disposal. This should be a brochure with contact details of mediators dealing with such matters.

Leaflets with information and information on the websites of the Central Authority and the courts as well as the prosecutor's office and the police should be prepared in many languages and not only in the languages of the countries belonging to the European Union. In view of current directions of emigration from Poland and to Poland, we suggested the following languages: German, English, Spanish, Italian, Czech, Dutch, French, Greek, Arabic, Danish, Swedish, Norwegian, Korean, Ukrainian, Belarusian and Romanian.

Finally, it seems advisable to apply solutions that are successfully applied in Berlin, i.e. two court hearings, introducing and advising mediation in the first hearing, ka(red.) *Antropologia mediacji*, Wrocław 2015,

## Mediators-in-Court Model - Polish Law

the mediation taking place in the period between these hearings.

During the first hearing, the parties and their lawyers should be informed by the court about the principles and consequences of mediation.

It seems necessary for the central authority to set up a highly-positioned website containing practical information about the possibility of using mediation by parents in cases of parental abduction. It is also necessary to develop information leaflets. These may be leaflets similar to those distributed by the Ministry of Justice a few years ago. The leaflet should contain:

- clarification of the term “mediation”,
- explanation of the role of mediation and the role of mediator, including their rights and obligations,
- description of the effects of mediation between parents in the event of child abduction,
- website addresses and other sources of information about mediators.

Such early information would be important because at least in some cases it would avoid parents going to court, as they could instead use mediation.

Gdyby sprawa była już zawista przed sądem, rodzice mogliby uzyskać dodatkowe informacje przydatne do polubownego rozwiązania konfliktu

### Financing

9.2 One of the main obstacles are the costs of mediation that would have to be borne by both parties. In comparison with other UE countries, these costs in Poland are relatively low, but as practice shows, they can be a kind of “mental obstacle” for parties who can get court decision “for free”. In practice, however, there is a chance to obtain free mediation by referral if the parties benefit from free legal assistance. Mediation in Poland is not financed or co-financed by the Central Authority, although such a practice could be postulated.

There used to be a fund in Poland from which cross-border mediation was financed. If it still does not work, then a fund should be created in a similar way to the Justice Fund - or the funds from the Justice Fund should be divided so that some of them could be allocated for co-financing, preferably total financing of the mediation between parents. Par-

ticularly recommendable would be funding from this fund for mediation between parents before submitting a formal application for the return of the child. Funds from this fund could be disposed of by the Central Authority

The cost of participation in mediation may differ depending on whether or not the party will receive free legal assistance.

At present, mediation costs are as follows:

*For the first meeting PLN 150, and for each subsequent one - PLN 100, in total not more than PLN 450+ PLN 70 for one meeting; + 30 zlotys for correspondence.*

Practice shows that mediation in Hague matters involves at least 3 meetings, and usually 4 or 5, so the work of a mediator costs PLN 550, which is currently ( May 2020) around EUR 125.

The matter of mediation costs in terms of the mediator’s remuneration is regulated by Article 183<sup>5</sup>, in accordance with which:

§ 1. The mediator has the right to remuneration and reimbursement of expenses related to mediation, unless he has agreed to conduct mediation without remuneration. Remuneration and reimbursement are borne by the parties.

§ 2. The claims referred to in § 1 are collected directly by the mediator from the parties. The court determines them and awards them to the mediator only if at least one of the parties referred to mediation by the court was exempted from court costs in the scope including the mediator’s receivables and the other parties did not pay the mediator these debts in full.

If the parties benefit from free legal assistance, in practice they do not pay for mediations if they are referred by court. If the parties use mediation before submitting the application under the Hague Convention procedure, of course they cover the cost of mediation themselves and the cost has to be agreed with the mediator.

The parties have the option of taking advantage of free mediation, but in a situation where the Hague proceedings link has not been launched. In cases where no formal Hague proceedings have yet been initiated and the court has not referred parents for mediation, they can take advantage of free mediation guaranteed by the provisions of the Act of 5 August 2015 on free legal assistance, free civic counselling and legal education (Journal of Laws 2019.294 i.e.). One or both parents,

## Mediators-in-Court Model - Polish Law

in a situation where their financing situation does not allow covering the costs of mediation, may request mediation. However, free mediation is only possible if there is no suspected use of violence in the parties' relations.

If interpreters participate in mediation, which is a common practice, parties must also cover the cost of their participation. The interviews show that the cost of interpreting is PLN 400 per session for up to 4 hours.

There is also the additional costs of a lawyer who could participate in the case and would substantively assist in the mediation process. This cost is from a few to several thousand PLN.

This is the cost that parents may need to take into account because, according to art. 578<sup>2</sup> of the Polish civil procedure (KPC), a parent in proceedings regarding the removal of a person subject to parental authority or under the care of persons conducted under the 1980 Hague Convention, substitution of participants of the proceedings by lawyers or legal advisers is obligatory. The groups of professionals specified in the Act are exempt from mandatory representation by a lawyer (these are: judges, prosecutors, notaries, professors or habilitated doctors of legal sciences, lawyers, legal advisers and advisers of the General Counsel to the Republic of Poland (Prokuratoria Generalna Rzeczypospolitej Polskiej)). It should also be noted that the compulsory representation by a lawyer in legal proceedings does not apply to the submission of an application for the initiation of proceedings in cases of removal of a person subject to parental authority or custody under the 1980 Hague Convention, as well as proceedings for exemption from court fees and for the appointment of a lawyer as legal aid.

The cost of a lawyer's participation in mediation need to be agreed with the parties.

Since the parties involved in the Hague cases should be represented by lawyers, the first activity of the court, if the party is not acting through a lawyer, is to appoint an attorney in office for both parties.

It is a pragmatic procedure that allows actual closing of the case in six-week time frame. In practice, a proxy is also appointed for the other participant in the proceedings.

Added to this is the cost of travel and potentially accommodation to attend mediation.

However, it follows from the above that the parties may not bear the costs of mediation by referring the court. The only cost that charges them is the cost of travel and accommodation in a place where mediation will take place and the cost of translation if it is necessary in such mediation.

### *Organisational issues*

9.3 The main organisational problem is to fit all activities into a limited time frame. The six-week deadline requires a very good organization to fit in the time for mediation. For example, an interviews with the mediators showed that in their opinion the parties have "too little time to think". In practice, the point is that without organisational support from outside, they have to devote a lot of time to activities related to the preparation of mediation. Among others they need to find interpreters who could take part in mediation and to organise and agree time and venue for meetings etc. There is no established practice according to which the mediator deals with these organisational matters, and interviews conducted in the AMICABLE project have shown that mediators often expect from parties that they will find, for example, properly qualified interpreters, because they do not have such possibilities themselves.

There are no regulations or guidelines specifying how many hours of Hague mediation should last. The provisions cited above determine the briefing for the meeting, but the regulations do not specify how many hours are to be devoted to each meeting. Interviews with mediators showed the following practice: first, the mediator meets the parties in personality for an hour-long meeting. Then at the third joint meeting, which lasts about 2 hours, there is already a chance to define the framework of the agreement. However, the agreement is rarely concluded, as the parties would often like to consult or re-think important issues. An agreement can be reached at the 4th meeting, which usually lasts about two hours.

The issue of simultaneous interpretation is a serious organizational problem. In practice, the interpretation is necessary because it is not always possible to find a mediator or mediators who speaks both languages to the expected extent. In addition, in a number of conflicts, communication between the parties also requires translation. Although bilingual mediators are active, information about them is not always widespread enough for judges to be able to refer a case to such mediators. In practice, the parties may either offer the mediator



## Mediators-in-Court Model - Polish Law

the participation of an interpreter whom they have decided to engage in this matter, or they ask the mediator for help in finding an interpreter. The mediators I interviewed claimed that although they had contact with the translators I had previously worked with, but they are not always available at the moment, so finding an interpreter is a considerable organisational challenge.

The main organizational problems identified by us are:

- Lack of organisational support that parents could receive, which MiKK provides in Germany. It is about helping to find interpreters and relevant bilingual mediators with the right qualifications in the event that co-mediations turns out to be the best solution.
- Lack of sufficient organizational support for judges who could refer cases to mediation. It regards, among others for full information about mediators and mediation institutions who could lead such mediation.
- Lack of adequate support for a child participating in mediation in Hague cases and in any court proceedings.

Therefore, we have identified the following needs:

- information easily available to judges about mediators and mediation institutions properly prepared to handle Hague cases
- an institution (public or NGO) offering parents support in mediation, by contacting them with a mediator or providing assistance in translation, and offering comprehensive information on mediation and the legal situation of the family in cross-border family conflict.
- institutional and psychological support for children whose parents are participants in proceedings under the Hague Convention.

### *Proposals:*

We propose to introduce a special communication practice in which mediation coordinators will be involved. Maybe it would be better if the mediation coordinator appointed in court had a technical person to help. It may also be a person who is already working as a secretary in court.

Easily accessible information for parties and lawyers is also needed. Information should be not only on web-

sites, but above all should be provided by public officers and prosecutors and lawyers.

A very recommended matter would be to provide assistance to the child who would participate in mediation. We propose to use the functioning solution, i.e. to provide psychological help provided by psychologists who, in accordance with the provisions of Polish national law, accompany interviews with children by judicial authorities.

### *The Model*

10. Based on the above-mentioned conditions and in view of the current legal status in Poland, we propose an outline of the model for introducing mediation in the Hague proceedings in court.

Therefore, we recommend conducting two court hearings.

The first should take place early enough to manage to carry out effective mediation and above all to prepare it. At the first hearing, parents and other participants should be informed about the principles and benefits of mediation. The judge should choose the mediator, unless the parties make their own choice.

The wide participation of entities that could support the reconciliation process should be ensured - if possible, a mediator and of course the parties and the lawyers of the parties could already be involved. In some cases, also social officials and psychologists and, if necessary, translators.

The first hearing is also often the moment when it is possible to determine the issue of contacts between the parent and child left until the end of court proceedings.

It is important that the parties and other participants get to know the date of the second at the first hearing and thus be able to plan mediation. The second hearing takes place regardless of whether the parties reach an agreement during mediation.

The date of mediation should be set immediately after the first hearing, similar to the place where it will take place. In the interests of the parties, consideration should be given to conducting mediation as soon as possible or to allow the parties and the mediator to prepare for it.

## Mediators-in-Court Model - Polish Law

It would be recommended to direct mediation to an institution providing the possibility of using co-mediation, in which mediation is conducted by a woman and a man, in the case of formal parents of the same sex, it would not matter, but in each case it is important that both comediators should communicate both languages and at least one of them should have knowledge of international private law and family law and the other should have appropriate knowledge in the field of psychology and sociology and conflict resolution.

11. Regardless of the result of mediation, i.e. whether the parties reach a settlement at this stage, the positive side of introducing mediation is establishing communication between parents, which is a good prognosis for the child's interest. Mediation can also be continued after the second hearing, for example at the appeal stage or even after the Hague proceedings, because experience teaches that court decision is not the final stage of conflict between parents.

