



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

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

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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. 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. Furthermore, the mediation process applied in such cases must be adapted to meet the particular requirements. The further details regarding the particular requirements for mediation in the context of international child abductions cases see the Hague Conference Guide to Good Practice under the 1980 Hague Child Abduction Convention.<sup>1</sup>
6. 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 take 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

<sup>1</sup> Available in all European languages at < <https://www.hcch.net/en/publications-and-studies/details4/?pid=6561> > (last consulted 30.8.2019).



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

7. In the case a child has been taken away from the State of habitual residence, the 1980 Hague Child Abduction convention, together with Article 11 Brussels II bis Regulation shall be applied. In the case of Italy, the legal proceedings is governed by law of consent and execution nr. 64/1994, which provides for a form of “voluntary” chamber proceedings, where time and evidence are strictly limited as a way to reach a quick and final decision on the return of the child.

More in detail, art. 7 of the abovementioned national law states that all the requests seeking for the return of the child made by the left behind parents must be filed with the Italian Central Authority – that is the Department of Juvenile Justice / a branch of the Ministry of Justice – which in turn devolves the case to the Public Prosecutor at the Juvenile Court, who seeks the Court with a recourse of urgency: on this regard please note that jurisdiction in return proceedings is concentrated in 24 Juvenile Courts, one for each Court of appeal district.

8. Necessary actors of the proceedings are the Public Prosecutor and the abducting parent only; nevertheless, according to the Italian case law, even the left behind parent should be invited, under penalty of nullity of the entire proceedings.
9. Once received the recourse, the President of the Juvenile Court set (usually) one hearing only, by way of a decree which is then notified to the Central Authority, to the abducting parent and to the left behind one, who can attend the hearing at his/her own costs. Lawyer’s assistance for both the parties is not mandatory, even though it seems quite rare, because of the subject matter involved, that parents would be willing to give up defending their interests renouncing to the technical assistance of a lawyer.

## Italian Law

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10. According to the law, the Court is expected to issue its judgement within 30 days; it is to say, however, that the time involved is usually greater, so that keeping the final decision within the six-week frame provided by the international conventions soon became a real challenge for the Italian judicial system.
11. As to the hearing of the abducted child, although this is a general duty under Italian Law (art. 315 bis c.c.), the Court of Cassation stated that in such particular situations this is not mandatory, provided the urgency and the limited object (that is, the return/non return decision) of the proceedings itself: according to the Court, for example, hearing of the child can be waived because of the age of the child or of his/her psychic situation; in any case, it is a discretionary decision which belongs to the presiding judge.
12. The decision is rendered by way of a judicial decree, which is immediately enforceable; the decision can be challenged in front of the Court of Cassation, even though such appeal does not have any suspensive effect on the enforceability of the decision.

### *Family Mediation in Italy*

13. Dissemination of mediation in Italy is not a straightforward phenomenon. In fact, as far as civil and commercial cases are concerned, since 2010 a specific regulation (d.lgs. n. 28/2010) – which in turn implemented the EU directive 2008/52/UE – provides not only for general mediation proceedings but, most of all, for a large amount of cases where an attempt at mediation must be fulfilled before commencing a litigation (s.c. mandatory mediation).

That is why, over the years, the “certified” mediation providers (that is, public and private organization recognized by the Ministry of Justice as providers meeting the minimum requirements as

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to offer mediation services to the citizens) have gained a significant expertise in managing the tool in civil matters, thus rendering the Italian experience in this field a sort of best-practice model for the entire EU zone.

14. On the contrary, despite some attempts, mediation in family law has never been regulated by law, apart from two generic references to the possibility of using a family mediation process: the first one in art. 342-ter of the Italian Civil Code, as amended by law April 4, 2001 n. 154, regarding measures against violence in family relationships, which states that the judge can order the intervention of social services or a mediation center following the issue of a protection order against family abuse; the second one was art. 155-sexies of the Italian Civil Code, introduced by Law n. 54/2006, containing provisions on the separation of parents and shared custody of children, now repealed and substantially transfused in art. 336-octies, of the Italian Civil Code: pursuant to this last provision, “if the opportunity arises, the judge, having heard the parties and obtained their consent, can postpone the adoption of the measures referred to in Article 337-ter of the Italian Civil Code to allow spouses, using experts, to attempt mediation to reach an agreement, with particular reference to the protection of the moral and material interest of their children”.
15. Of course, this does not mean that family mediation is not performed at all in the legal system but, more simply, that it completely relies on private mediation providers, each one with its own regulations, despite being inspired by principles developed by representative associations (such as A.I.Me.F – Associazione italiana mediatori familiari and SIMeF – Società italiana di mediatori familiari).
16. On this regard, it is important to recall that, over the years, some Courts played an important role in promoting family mediation in the Country: this is the case, for example, of the Tribunal of Milan, which in 2018 authorized the establishing – within the same Tribunal building – of a specific office, representing a number of regional mediation providers (s.c. “Spazio informativo Mediazione Familiare”), with the task to present the parties the advantages connected with family mediation as a tool to manage family crisis situations.
17. More in detail, according to the procedure followed by the court, when setting the hearing the judge, at a first stage, suggests the parties to consider family mediation; if, during the subsequent hearing, he realizes that litigants did not get any information on mediation, he suspends the same hearing so that the parties can move to the informational office where a representative of the mediation provider explain them how mediation works and its benefits; if the parties then decide to try to resolve in such a way their case it is up to them the selection of a specific mediation provider (within a list available at the office) and mediation takes place outside the court; finally, with regard to the costs of the proceedings, according to some specific agreement made with “Regione Lombardia”, from 8 to 10 mediation hearings are paid by the same Region (provided that the parties have chosen a public provider or a private/accredited one).
18. A similar experience is the one born in southern Italy thanks to an agreement between the Tribunal of Naples, the Juvenile Court of Naples and the Municipality of Naples: a specific office (“Punto di incontro per la mediazione familiare”) – managed by a public mediation provider (“Centro per le famiglie”) – has been established within the Tribunal of Naples, whose duty is to provide the essential information about family mediation to the parties of a dispute; more recently (2019), even the Bar Association of Rome has established an informative point on family mediation in the court (Tribunal) building with the same tasks of promoting the ADR proceedings among litigants.
19. In light of the above, integrate the offer of specialised mediation in the setting of Hague return proceedings appears, at glance, a matter of practice: at this stage, however, as long as two different hearings are set by the judge, there are no legal barriers that prevent the parties to (be suggested to) try to reach a “package agreement” outside the court.

### *Family Mediation and Child Abduction Proceedings in Italy*

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20. Indeed, many benefits are connected with such case-management: on the one hand, when dealing in mediation with all the aspects of their present and future lives (and not only with the return-non return issue), parents can avoid children all the damages connected with a long-lasting judicial procedure on custody/contact; on the other hand, and apart from the specific result mediation can led to, with this tool parties become able to restore the communication process, thus establishing a new relationship based on the shared value of collaboration.
21. On this regard, the case law reports at least one situation where the Juvenile Court suggested the parents to take advantage from a mediation proceedings (Juv. Court Bologna, 5 march 2015), having stated that “the decision would settle the dispute but would not end the conflict”, while “mediation as an alternative means of resolving this dispute does not set aside the conflict, but treats it as a resource”, and that mediators will “accompany the parents in the definition of a shared agreement (...) all with the aim of promoting the maintenance of parental responsibility for both the spouses and preventing future conflicts that may affect minors”.
22. Finally, it should be remarked that during the national seminar all the participants welcomed very well the idea of introducing the model within the Hague return proceedings. On this regard, it came up the practice, promoted by some Juvenile Courts, of delegating the mediation task to a honorary member of the judges’ panel (and, in this case, he/she of course will not rejoin the other colleagues for the final decision should mediation failed).
23. Still, there are some aspects, connected with the specific characters of the Italian legal system, which should be taken into account when combining family mediation and the Hague proceedings, since they can raise some concerns.
24. The first one is related to the same availability of mediation providers which can effectively manage the mediation proceedings: in fact, while there are some professionals well trained in dealing with international-family conflicts, not all the mediation providers offering mediation services in family law – which, it is worthy to recall, are private organizations – have the resources and the skills to approach a specific conflict as the one connected with the child abduction; moreover, the same distribution of providers among the different Italian regions is far from being homogeneous, thus rendering the option for a renewed provider somehow complicated.
25. The second concern is the time-frame of the mediation when combined with the time-limits of the Hague proceedings: time, in fact, is of the essence in mediation, since it is needed to the parties not only to negotiate each single aspect of their future agreement, but also to reflecting on the different proposals that have been advanced before the mediator. Put in other way, every agreement is a combination of proposals, will and time. In light of the above, it could be problematic to imagine a mediation – on every aspect of the children-parents’ relationship – where the (passing of the) time stands not as a resource, but as an obstacle to the parties’ autonomy; however, it is true that, as seen before, one of the mediation task is to restore the communication process, so that – at least for that purpose – the tool can play an important role in the future lives of the parties.
26. Another aspect which should be considered is the relationship between the judge, on the one side, and the mediator, on the other side: while it is out of the question that the mediator does not stand as a personal assistant of the judge, neither as his/her auxiliary, the two paths – judicial proceedings and mediation – must proceed without any connection. During the national seminar, the representative of mediation providers stressed this point, that is there should not be any direct contact between judges and mediators, who should physically stay in another court room. Unfortunately, this is not the case in the civil and commercial mediation, where reported national case law allowed the judge to evaluate the behaviour of the parties in mediation when ruling on court fees. It is important to avoid such risk in family matters and keep all the information arose during the mediation strictly privileged as a way to promote parties’ confidence and availability towards the tool.

### *Current issues*

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27. Finally, the costs of mediation can become an issue for parents: in fact, when dealing with ADR tools, and apart from some special experiences of family mediation such as the one supported by Regione Lombardia, the Italian legal system does not allow parties to take advantage of the s.c. legal aid, except in those situations where mediation stands as a precondition for the admissibility of the legal action; although a relevant debate is undergoing among academics on a possible extension, by way of interpretation, of the law providing the legal aid (“patrocinio a spese dello Stato”) (d.P.R. n. 115/2002) to those situations, at this time any voluntary ADR tool fees – which means not only the providers’ fees, but also the lawyers’ ones – must be paid by the parties.

