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abduction cases
iCare2

National Report on Italy



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1. Introduction

In an increasingly interconnected Europe, cross-border family disputes have become more frequent. In the context of separation, divorce and necessary arrangements concerning parental responsibility, the risk of international child abduction is still present¹. These complex situations often involve more than one legal system, face cultural differences, and, most importantly, affect the rights and well-being of children. International (or cross-border) family mediation has emerged as a valuable tool to address international child abduction disputes, offering a structured yet flexible process aimed at facilitating mutual understanding and sustainable agreements between parents residing in different countries².

The potential positive effects of international family mediation have been acknowledged by the EU lawmaker: the regulation (EU) No. 2019/1111 (Brussels II-ter), in its Article 25, has introduced the express obligation for the judge in child abduction proceedings to invite the parties to consider the possibility of undergoing mediation.

This report presents the result of the national research on the Italian legal system, undertaken within the activities of the EU co-funded project “iCare2”³. The research evaluates how the Brussels II-ter regulation has been applied in Italy, identifying challenges in its enforcement, and assessing its success in improving judicial cooperation, resolving international child abduction cases, and promoting family mediation.

International family mediation is still largely underdeveloped in Italy. While family mediation is slowly becoming a valid tool which parents and legal professionals acknowledge and activate with increasing frequency, there still is a relatively low number of cases which undergo this alternative dispute

¹ According to the statistics of the Italian Central Authority in the context of the application of the Hague Conference of 25 October 1980 on the civil aspects of international child abduction, in 2024 the Central Authority has received 204 applications, among which 170 concerning return proceedings. The full report is available here: https://www.giustizia.it/cmsresources/cms/documents/Rapporto_Sottrazione_internazionale_minori_2024_G.pdf.

² See S. VIGERS, *Mediating International Child Abduction Cases: The Hague Convention*, Oxford, 2011.

³ For more information see the official website of the project: <https://project-icare.eu/>.

resolution mechanism. It is only with the most recent legislative reforms⁴ – addressing the overall Italian justice system – that family mediation has found its way, as a structured instrument, in the civil code and in the code of civil procedure.

Those novelties are the last passage of a long and fragmented process, through which mediation is making its way in the national legal system and in the practice of the legal professionals involved in family conflicts and, ultimately, in the protection of children in those contexts. The development of a ‘culture’ of mediation, together with a consistent and concrete integration of the principle of the best interests of the child in the overall process, is being identified as a key need in order for mediation to be offered as an effective tool for the resolution of family conflicts, in line with international and EU standards.

As part of the methodology applied to the present research, interviews have been conducted to gather the perspective and experience of practitioners (judges, lawyers, certified mediators). The authors – who remain the only responsible for the content of this report – are grateful to the above professionals for their precious cooperation.

2. International family mediation in Italy: the legal framework

In the context of international child abductions, the 1980 Hague Convention promotes alternative methods of dispute resolutions to search an amicable solution⁵. This possibility has been valorized over time by different initiatives at the international level, and has found its way in other legislative instruments which, many years later, have introduced provisions aimed at encouraging the recourse to family mediation in cross-border disputes: at the EU level, reference is made to the Brussels II-ter regulation⁶, which – as it will be examined – has strengthened the role of family mediation in cross-border disputes and explicitly

⁴ D. Lgs. 10 October 2022, No. 149, the so-called “Cartabia reform”, whose impact on family mediation will be examined in the course of the present report.

⁵ Article 7 of the 1980 Hague Convention on the civil aspects of international child abduction establishes that Central Authorities “[s]hall take all appropriate measures ... c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues”.

⁶ Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (Brussels IIb regulation).

promotes it during proceedings for the return of a child in cases of international abduction.

Despite the momentum provided at supranational level⁷, the practical implementation of this instrument has been uneven across different national legal systems. In Italy, family mediation, although recognized in principle and sometimes encouraged, has encountered difficulties in establishing itself as an effective and widespread practice for the management of cross-border family disputes. Only in recent years has there been a partial change of course, with growing attention to mediation in national legislation.

It is barely worth noticing that one of the first centers offering family mediation services was created in 1987⁸. The very first normative references to family mediation are to be traced back to 1997, with the law No. 285: Article 4, para. 1, lett. i) instituted the financing and promotion of family mediation and consultancy services for families and children.

The first professional associations of family mediators were created in the 1990s: in particular, 1995 saw the birth of SIMeF (*Società Italiana Mediatori Familiari*) and AIMS (*Associazione Internazionale Mediatori Sistemici*); in 1999, AlMeF (*Associazione Italiana Mediatori Familiari*) was created. Those professional associations followed the development of a body of legislation which introduced a progressive regulation of the profession of family mediator, which remains, even today, a profession non organized in professional associations or boards, in the technical terms of Italian legislation: the mediators are under the management of voluntary private associations which are authorized by the Ministry of Enterprises and Made in Italy according to the Law No. 4/2013⁹.

The Law No. 328/2000 (on social services) and the Law No. 154/2001 (on family violence and protection orders) briefly mentioned the possibility to accede to family mediation centers to deal with family conflicts. These interventions merely arranged for the creation of public family mediation services, without, however, offering detailed regulations on the tasks and functioning of these figures.

⁷ See C.C. PAUL, S. KIESEWETTER, I. KHALAF-NEWSOME, *Cross-border Family Mediation. International Parental Child Abduction, Custody and Access Cases*, Frankfurt am Main, 2023; S. FENN, A.M. HUTCHINSON, A. LAKE-CARROL, *Mediation in children's cases with a cross-border element – in particular, international child abduction, leave to remove and international contact*, in M. ROBERTS, M. MOSCATI (eds), *Family Mediation. Contemporary Issues*, Dublin, 2020, p. 203.

⁸ Reference is made to the association "GeA" (*Genitori Ancora*), which created a public civic centre in collaboration with the municipality of Milan, offering mediation services.

⁹ The database is available at https://portaledati.mimit.gov.it/banca-dati/assoc_prof.

Family mediation found its way in the civil code through the Law No. 54/2006, which established the possibility for the parties in separation proceedings to attempt mediation “in order to reach an agreement, with particular reference to the protection of the moral and material interests of the children”. (Article 155 *sexies* c.c.). In that case, the judge could postpone the adoption of the measures on parental responsibility, but only if deemed advisable, after hearing the parties and having obtained their consent. This amendment was an indicator of the ongoing process of including family mediation as an instrument for the management of family conflicts in separation or divorce, probably inspired also by the recent ratification of the European Convention on the Exercise of Children's Rights of 25 January 1996¹⁰, which in Article 13 provides for mediation as a means of preventing and resolving conflicts and avoiding any court proceedings concerning the child.

2.1. The Brussels II-ter regulation and the Cartabia reform

The recent years have shown an accelerated effort for the strengthening of mediation within the proceedings dealing with any family conflict involving children¹¹.

At the EU level, the Brussels II-ter regulation (amending the precedent Brussels II-bis regulation), has introduced specific provisions dedicated to family mediation – other than registering a decisive attention towards the rights of children and their best interests¹². As known, the regulation operates in synergy with the 1980 Hague Convention on the civil aspects of international child abduction. In the Chapter dedicated to international child abduction¹³, the regulation confirms the immediate return principle (as well as the exceptions to this principle provided in Articles 12, 13 and 20 of the Convention). At the same

¹⁰ Law 20 March 2003, No 77.

¹¹ Reference should be made also to the Law 11 July 2011, No. 112, which instituted the Italian Authority for Children and Adolescents. Article 3, lett. o) attributed to AGIA the mandate to “Favour the development of the culture of mediation and of every institute for preventing and solving through an agreement any conflict involving children, fostering the training of legal professionals”.

¹² It is well known that international child abduction is regulated by different instruments of cross-border judicial cooperation, such as the 1980 Hague Convention on the Civil Aspects of International Child Abduction, the 1996 Hague Convention on parental responsibility and the protection of children, the regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (Brussels II-bis regulation), which as of 1 August 2022 has replaced the regulation (EC) No. 2201/2003 (Brussels II-ter regulation).

¹³ Articles from 22 to 29 Brussels II-ter regulation.

time, in line with the preceding Brussels II-bis regulation, the so-called “trumping order” is also maintained: a decision on the merits of the court of the State of the child’s former habitual residence is able to trump and, therefore, overturn the non-return order of the court of the State to which the child was wrongfully removed¹⁴.

The Brussels II-ter regulation has introduced a specific provision dedicated to family mediation¹⁵:

Article 25 “Alternative dispute resolution - As early as possible and at any stage of the proceedings, the court either directly or, where appropriate, with the assistance of the Central Authorities, shall invite the parties to consider whether they are willing to engage in mediation or other means of alternative dispute resolution, unless this is contrary to the best interests of the child, it is not appropriate in the particular case or would unduly delay the proceedings”¹⁶.

It should be highlighted that the Brussels II-ter regulation (in line with Article 2 of the 1980 Hague Convention) provides for a tight time-frame of six weeks¹⁷ for return proceedings, in which to concentrate the invite to undergo mediation as well.

¹⁴ Article 29, para. 6, Brussels II-ter regulation. The trumping order is immediately enforceable in the EU Member State in which the child is present.

¹⁵ See T. KRUGER, *Article 25*, in C. GONZÁLEZ BEILFUSS, L. CARPANETO, T. KRUGER, I. PRETELLI, M. ŽUPAN, *Jurisdiction, Recognition and Enforcement in Matrimonial and Parental Responsibility Matters. A Commentary on Regulation 2019/1111 (Brussels IIb)*, Cheltenham, 2023, p. 258.

¹⁶ Some guidance on the application of Article 25 is provided by Recital 43, stating that: “(I)n all cases concerning children, and in particular in cases of international child abduction, courts should consider the possibility of achieving solutions through mediation and other appropriate means, assisted, where appropriate, by existing networks and support structures for mediation in cross-border parental responsibility disputes. Such efforts should not, however, unduly prolong the return proceedings under the 1980 Hague Convention. Moreover, mediation might not always be appropriate, especially in cases of domestic violence. Where in the course of return proceedings under the 1980 Hague Convention, parents reach agreement on the return or non-return of the child, and also on matters of parental responsibility, this Regulation should, under certain circumstances, make it possible for them to agree that the court seised under the 1980 Hague Convention should have jurisdiction to give binding legal effect to their agreement, either by incorporating it into a decision, approving it or by using any other form provided by national law and procedure. Member States which have concentrated jurisdiction should therefore consider enabling the court seised with the return proceedings 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 those return proceedings”.

¹⁷ Article 24, para. 2 Brussels II-ter regulation.

At the national level, it was the so-called “Cartabia reform”, within a wide-ranging intervention on the Italian civil procedure, which effectively expanded the regulatory framework of family mediation¹⁸. More specifically, the Law No. 206 of 26 November 2021 delegated to the Government the adoption of measures for the revision of the civil procedure and of the alternative dispute resolution methods, as well as of urgent measures for the rationalization of proceedings in the area of the rights of individuals and families.

Accordingly, the Legislative Decree No. 149 of 10 October 2022¹⁹ has introduced a single procedure applicable to all proceedings relating to the status of persons, minors, and families, initiated from 28 February 2023²⁰. An important specification concerns the procedures disciplined by special laws, which will not be subject to the new procedure²¹: among those, the return proceedings in international child abduction cases²². Nevertheless – and despite the aforementioned exclusion – there are many aspects of the Reform which have an (at least indirect) impact over international child abduction proceedings, starting from mediation.

Among the measures of the Reform, the Decree modified Article 316 c.c., para. 3, which now recites that “The judge, having heard the parents and arranged for the minor child who has reached the age of twelve, or younger if capable of discernment, to be heard, shall attempt to reach an agreed solution and, where this is not possible, shall adopt the solution he or she considers most appropriate to the interests of the child”.

In the context of the new proceedings concerning persons, children and family matters (“*procedimento in materia di persone, minorenni e famiglie*”), the new Art. 473.bis.10 cpc provides that the judge may invite the parties to family mediation. In particular, “The judge may inform the parties of the possibility of family mediation and invite them to contact a mediator [...] in order to obtain information on the objectives, content and procedures of the process and to

¹⁸ F. Danovi, *Il presente e il futuro della mediazione familiare in Italia*, in *Giustizia consensuale*, 2024, p. 659 ff.

¹⁹ *Attuazione della legge 26 novembre 2021, n. 206, recante delega al Governo per l'efficienza del processo civile e per la revisione della disciplina degli strumenti di risoluzione alternativa delle controversie e misure urgenti di razionalizzazione dei procedimenti in materia di diritti delle persone e delle famiglie nonché in materia di esecuzione forzata*.

²⁰ The amendments have taken effect on 28 February 2023, and apply to proceedings initiated after that date: see Article 7, para. 1, of the Legislative Decree 31 October 2024, No. 164

²¹ Art. 473-bis code of civil procedure, as amended by Article 3, para. 33 of the Legislative Decree 149/2022. On the scope of application of the new rules, see G. Buffone, *Le nuove norme processuali in materia di persone, minorenni e famiglia (d.lgs. n. 149/2022): prime letture sintetiche*, in [Giustizia Insieme](#), 8 February 2023.

²² Those proceedings are disciplined in Italy by the Law 64 of 15 January 1994 (Article 7).

consider whether to undertake it". In the eventuality that the parents decide to pursue mediation, the judge ("if deemed appropriate") may postpone the adoption of the provisional and urgent measures on the regulation of parental responsibility, which would define the rights of children and parents during the course of the proceedings²³. The postponement is functional to allowing parents to effectively pursue mediation and reach an agreement, which (with a punctual specification) should be "in the moral and material interests of children".

A slightly different tone concerns Article 473-bis.14 c.p.c., which specifies that the information about the possibility to undergo mediation shall also be included in the decree fixing the date of the hearing: this means that the parties should receive those information already in the very first stage of the proceedings (provided that the judge may decide to come back to this possibility again at a later stage).

Importance should be given to the invite of the judge, which is in line with the universally accepted principle that family mediation should never be imposed on the parties²⁴. At the same time, the invite should not be reduced to an abstract and cold communication. The judge should take care of the credibility of its communication, which should also be tailored to the concrete case, other than informed by the necessary details. Since the invite of the judge intervenes in the course of a proceedings, the judge could also search for the collaboration of the lawyers of the parties, with whom the latter holds a relationship of trust. At the same time, following the inputs given by professionals and partially deviating from the provisions of the Law No. 206/2001, it has been provided that it would be the mediator (and not the judge) to provide the information on the objectives, content and procedures of family mediation²⁵.

Most importantly, the provision specifies that the mediators with which the parties may be put in contact should be one of the professionals included in a list formed according to Article 12-bis ff. of the implementing provisions to the code of civil procedure. The list is kept by the President of the Court and is

²³ Article 473-bis.22 cpc.

²⁴ It is interesting to notice that a current proposal for reform of Article 473-bis.10 c.p.c. (Article 13 of the D.d.L. No. 832 of 1 August 2023) aims at introducing a mandatory pre-mediation stage, providing that "In all cases of disagreement in the phase of elaborating a shared custody, the parties are obliged, before referring the matter to the judge and except in cases of urgency or of serious and imminent harm to the children, to turn to a public or private family mediation body or to a freelance family mediator to acquire information on the advisability of a possible family mediation path. The first meeting is in any case free of charge and may also be held individually at the request of even only one of the parties. If one of the parties fails to comply, the proceedings are started anyway at the initiative of the other party" (authors' translation).

²⁵ F. Scaparro, *La forza della mediazione familiare*, in C. Vendramini (ed), *La mediazione familiare nella Riforma Cartabia: comporre i conflitti e ritessere le relazioni*, Milano, 2022, p. 104.

formed by a committee chaired by him and composed of the Public Prosecutor and a family mediator. The committee decides on applications for registration and appeals against its decisions may be lodged within five days of notification. More specifically, the list may include those who have been registered for at least five years with one of the professional associations of mediators included in the list kept at the Ministry of Economic Development and who demonstrate adequate training and specific expertise in family matters, child protection, and violence.

Indeed, other than the aforementioned list, the implementing provisions to the code of civile procedure now contain a whole Chapter dedicated to family mediators (Title II, Chapter I-bis). Article 12-sexies has provided for the adoption of a comprehensive discipline on the professional activity of family mediators, including a better specification of rules of conduct, mandatory training and tariffs. The provision was implemented with the enactment of the Ministerial Decree No. 151 of 27 October 2023 (by the Italian Ministry of Enterprises and Made in Italy, in collaboration with the Ministries of Justice and Economy and Finance), which adopted the regulations on the professional conduct of family mediators.

2.2. The Ministerial Decree No. 151/2023

The Ministerial Decree No. 151/2023 introduced a new comprehensive discipline on professional family mediators. It represents a significant step in the formal recognition and standardization of family mediation within the Italian legal system.

It is worth mentioning that, despite the rationalization introduced by the recent legislative reforms, family mediators are under the management of voluntary private associations which are authorized by the Ministry of Enterprises and Made in Italy according to the Law No. 4/2013. Therefore, there is no public professional association for family mediators, nor do they have to pass a public exam to be registered: family mediators are members of private, voluntarily associations following the attendance of courses and the successful performance of a final exam, in accordance with the “*norma tecnica* UNI 11644/2016” and with the internal regulations of the aforementioned associations, on which the Ministerial Decree No. 151/2023 has introduced common standards.

The Decree contains a definition of “family mediator”, qualified as an impartial professional figure with specific training, who intervenes in cases of termination or objective relational difficulties in a couple’s relationship, before, during or

after the separation event. Hence, the mediator facilitates the parties involved in the elaboration of a pathway for the reorganization of the relationship, also by reaching a negotiated agreement. The final objective is the preservation of family and parental relations, where present: this means that – even if no direct reference is made to the best interests of the children involved – the separation of the couple should not impede the pacific continuation of their parental responsibility duties and rights.

Articles 3, 4 and 5 set specific requisites for the exercise of the profession of family mediator.

Other than specific requirements of integrity (Article 3), the acquisition of the professional title of family mediator is subject to the successful completion of a training course meeting the characteristics outlined in the Decree (Article 5)²⁶. The training programs are delivered by institutions recognized by professional associations in accordance with Law No. 4 of 2013. The decree also specifies the requirements that must be met by those who carry out training activities. The course must consist of no fewer than 240 hours, including both theoretical instruction and practical exercises, with at least 80 hours dedicated to guided practice with a trainer with many years' experiences as a family mediator, of which at least 40 hours of practical mediation activities under supervision.

The curriculum of the course must address psychological, legal, and communicative aspects pertinent to family relationships and conflict management. It is expressly provided that a specific training module must be dedicated to “the protection of persons of minor age” (Article 5, para. 5, lett. g)).

The final exam shall consist of i) a multiple choice written test; ii) a practical test carried out using the ‘role playing’ technique; iii) an oral colloquium consisting of an assessment interview, preceded by the presentation of a written paper relating to the training course undertaken and the guided practice. Article 6 establishes the ethical rules governing the professional conduct of family mediators, whose respect is necessary in order to exercise the profession. Family mediation must be carried out freely, based on autonomy, competence, and intellectual and technical independence. The family mediator must adhere to the principles of good faith, client trust, fairness, professional responsibility, and confidentiality. He or she is required to act impartially, neutrally, and

²⁶ Article 4, para. 2 provides that “the activity of family mediator is also permitted to those who, on the date of entry into force of this Decree, already hold the certificate of family mediator, obtained by attending a course of at least two hundred and twenty hours and passing the final examination, and document the performance of family mediation activities in the previous two years. This is without prejudice to the continuous training obligations referred to in Article 5, para. 6 to be fulfilled annually as from 31 December 2023”.

without judgment toward the parties, fostering a balanced process and encouraging constructive dialogue.

The mediator is prohibited from intervening in mediations where there are conflicts of interest, such as personal involvement or close relationships with the parties, or financial and legal ties. Mediators may not provide services outside the scope of family mediation, exert pressure to impose solutions, deliver professional services reserved for regulated professions during mediation, or accept or offer gifts and favors connected to the mediation process. The mediator is bound by confidentiality, regarding the mediation process and its outcomes. This obligation extends to anyone present during the mediation sessions, unless both parties expressly and in writing waive confidentiality, or in cases where the law provides exceptions.

In their interactions with clients, mediators must disclose their professional qualifications, insurance coverage if applicable, and provide clear information about the mediation process, its objectives, modalities, and costs. They must also ensure compliance with European and national data protection regulations and inform clients about the existence of consumer protection offices in professional associations.

When mediation occurs during pending judicial proceedings, mediators must preliminarily and free of charge inform the parties about the mediation's purpose, modalities, and costs. They must inform the parties of their right to choose a mediator listed in the court register and of their right to have legal assistance during mediation meetings, particularly regarding economic and financial issues. Family mediators must terminate the mediation process if requested by either party, if continuation is not feasible, or if neutrality or impartiality can no longer be guaranteed.

Regarding self-promotion, mediators must be truthful and correct, avoiding misleading advertising and refraining from claiming qualifications or competencies they do not possess. Deceptive commercial practices, as defined by legislative decree No. 206 of 2005, are strictly prohibited. The Ministerial Decree provides clear parameters for the definition of the fee for family mediation services. In particular, each party undertakes to pay the family mediator for each meeting actually held the sum of €40.00, plus statutory charges. This sum is multiplied according to coefficients (from 1 to 2) based on the complexity parameters communicated and predefined at the beginning of the assignment. While the fee includes activities "ancillary to the professional service", lump-sum expenses or charges and contributions due under any title are excluded. For unfinished assignments, the work actually performed is taken into account.

2.3. Domestic or gender-based violence

In introducing family mediation as a valid path in the resolution of family conflicts, the Cartabia Reform has also provided some specific measures for cases of family violence.

The general, well-known principle is that the presence of violence in a family relationship (as well as any circumstance which may induce at ascertaining a disparity of powers between the parties) precludes mediation. Those conflicts are considered “not mediable”, since any agreement eventually reached may not be the fruit of a co-decision, but may reflect a relationship of psychological subordination.

This approach partially derives from the international obligations to which Italy is bound following the ratification²⁷ of the Istanbul Convention of 2011²⁸. Indeed, the Convention does not prevent mediation *tour court*, but only mandatory mediation (Article 48) in cases involving violence, including domestic violence, to protect victims from secondary victimization.

The Cartabia Reform has introduced six specific provisions within the new proceedings concerning persons, children and family matters (from Article 473-*bis*.40 to Article 473-*bis*.46), which assign to the judge new powers aimed at protecting victims of violence. The scope of application of those discipline is indeed broad: it may be activated within any judicial proceedings in which family abuses, as well as domestic or gender-based violence allegations are presented (being it committed by one party against the other or against minor children). The term “party allegations” is not limited to situations in which a criminal proceedings has already been initiated, as it results from Article 473-*bis*.41.

In those cases, the judge has many instruments at disposal to protect the alleged victim during the course of the proceedings, such as those aiming at avoiding any direct contact with the alleged perpetrator. Among those, it is provided that the decree fixing the date of the hearing shall not contain the invite to undergo family mediation (which is obviously not formulated in any other stage or during the hearing).

Article 473-*bis*.43 introduces the prohibition to initiate family mediation in the following, specific circumstances: i) a conviction or sentence has already been

²⁷ Law 27 June 2013, No. 77.

²⁸ Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), 11 May 2011, entered into force on 1st August 2014, CETS No. 2010.

handed down for family abuses, domestic violence or gender-based violence; ii) criminal proceedings are pending for the aforementioned acts committed by one party against the other or against minor children; iii) conducts of family abuses, domestic violence or gender-based violence have been alleged during the proceedings. It is also provided that, if allegations or information concerning family abuses or domestic/gender-based violence emerge during a mediation that has already begun, the mediator must immediately terminate the process.

3. International family mediation in Italy: the practice

3.1. The lack of a specific legal framework and the persistent needs in practice

The role of international family mediation in Italy is still fragmented as concerns its practical implementation, with reference to both cases in which a judicial proceeding is ongoing and to out-of-court situations (including preventive mediation).

According to the statistical data available (and referring to the years 2019-2021) it results that married couples facing separation made recourse to family mediation in less than 10% of the cases. No data is available for non-married couples, which nevertheless represent a significant share in the overall picture.

Although not directly impacting proceedings which are disciplined by special laws (such as international child abduction), the Cartabia Reform may have the potential to indirectly affect the practice of mediation in return proceedings. This, in the light of the persisting importance of a specialized legal framework for international family mediation: as already highlighted by the legal literature, Article 25 of the Brussels II-ter regulation may be accompanied by a (not mandatory, but nevertheless) useful set of domestic rules aiming at recognizing the specificities of introducing family mediation in the context of cross-border proceedings, child abductions included²⁹.

²⁹ See E. di Napoli, *La mediazione familiare nel contesto transfrontaliero: uno sguardo d'insieme*, in C. Honorati, E. di Napoli, *Guida alla mediazione familiare internazionale*, Pisa, 2025, p. 7 ff.

In this context, the real impact of the Cartabia Reform, which is effectively applicable from 28 February 2023³⁰, is still to be appreciated, while the application of international family mediation in Italy is still quite rare.

In the Italian legal system, there is not consistent availability of mediation services in the country with the necessary expertise to manage the specificities of the concerned cases. On the other hand, as resulting from recent surveys, there is a nation-wide absence, in public services dedicated to the family, of specific operational and planning guidelines aimed at introducing family mediation as a possible tool. This results in an absence of protocols, guidelines or good practices which are consistent at the local level. Family mediation services are therefore available through public services (rarely) and provided by private operators (most frequently) only on an *ad hoc* basis, with no effective coordination between the professionals involved³¹. It has already been stressed the need of comprehensive protocols designing a common methodology on pre-mediation and mediation, including a coordination among all the professionals which may play a role, either because they are in contact with the family (e.g. family doctors, schools, educators) or by reason of the qualified role they may have in proceedings involving parental responsibility matters (lawyers, judges, social services).

The interviews with professionals (lawyers, family mediators and judges) have consistently shown the absence of an established prototype. There is no consolidated practice on how a dispute may find its way to international family mediation (with or without going through judicial proceedings). An interviewed judge has explained that, as concerns its professional experience, the parents may reach an agreement because of a proactive role of the judges and/or the lawyers and/or the social services involved³². In those cases, the social services may verify that parents may be open for an agreement, or – most frequently – the judge may try to conciliate the position of the parties during the first hearing. An interviewed judge has explained that the physical presence of the parties (hence, in most situations, both the abducting and the left-behind parents) is considered a very important element for this purpose. Given the geographical distance and the logistic problems which may be encountered, some judges use

³⁰ See above, subsection “The Brussels IIb regulation and the Cartabia reform”.

³¹ See the study of the Italian Authority for Children and Adolescents, *La mediazione familiare in Italia. Documento di Studio e di proposta*, 2025, which will be available in open access on <https://www.garanteinfanzia.org/pubblicazioni>.

³² In Italy, social services may be involved in “passive” child abduction cases (where the child is illicitly conducted or retained in Italy) to check and monitor the situation of the child.

video-conferences, with the understanding that it may not allow for the same involvement as an in-person meeting.

As an additional obstacle to the participation of the parents to the hearing, mention should be made to the fact that international child abduction is criminally sanctioned in Italy. Article 574-*bis* of the criminal code establishes the penalty of imprisonment from one to four years (or from six months to three years, if the minor has reached the age of 14 and has given his consent). The crime is prosecutable *ex officio*. This means that the abducting parent may refrain from participating to a hearing in the very same State in which he/she risks to be prosecuted. Most importantly, criminal proceedings may negatively impact over the return of the child in his/her habitual residence and even on the possibility itself to try cross-border family mediation.

An interviewed lawyer explained that the threat of criminal prosecution in practice has not worked as a real obstacle: if the parties to the dispute reach an agreement, it is likely that the crime is not prosecuted in the end.

It is worth noting that the above-mentioned examples do not derive from the application by judges of a specific regulatory framework, but rather from the proactivity of some of them in trying to channel the parties towards an amicable resolution of the dispute.

As it will be examined, the lack of consistent practice is not only due to the absence of a specific normative framework, but also to the subsequent lack of specialization as concerns the training requirements and qualifications to exercise the profession of international family mediator, in the light of the specificities of the situations characterized by cross-border elements.

Complexity requires a more articulated approach than 'classical' mediation, which usually takes place within a legally, linguistically and culturally homogeneous national context. The interaction between national legal systems, as well as the applicable supranational conventions and EU regulations, implies that the mediator must possess not only relational and psychological skills, but also a sound knowledge of private international law and the rules of jurisdiction and recognition of foreign decisions. This is the reason why most of the organisms specialized in international family mediation adopt co-mediation as the main method, with the presence of one mediator with a legal background and another mediator with psychological skills³³. This practice is not always

³³ Similarly, see the model contained in the Wroclaw Declaration of 8 October 2007 on Mediation of Bi-national Disputes over Parents' and Children's issues, available at https://www.europarl.europa.eu/pdf/agora/20071008_breslau_en.pdf.

shared by other models, which are also characterized by an approach to mediation which tends to exclude the legal side of the dispute, in order to concentrate on managing the conflict and re-building the relationship between the parties.

A further element of specificity is the management of linguistic and cultural diversity³⁴. The parties involved may express themselves in different languages and have divergent views on child rearing, parental roles, or family structure. The mediator, in these cases, has to ensure a communicative balance between the parties, fostering mutual understanding and ensuring that each can freely express their needs and expectations. This may require the assistance of interpreters or the presence of adjunct mediators with specific linguistic and cultural competences.

International child abduction cases, in particular, are also characterized by severe time constraints. The time factor is crucial in return proceedings and is reflected in the precise timeframes which characterize each procedural stage, as results both from the international and national legal instruments³⁵. This obviously impact the organization of mediation, since the mediator should be able to the procedural framework and should be aware of the impact of time over the wellbeing of the child and over the good outcome of the entire procedure³⁶.

Finally, cross-border mediation is distinguished by the particular sensitivity of the situations that often arise there, such as the transnational enforcement of agreements reached or the difficulty of maintaining family relationships at a distance. In this context, mediation assumes a fundamental role not only to prevent or resolve conflicts, but also to foster stable, sustainable solutions that respect the best interests of the child by enhancing cooperation between authorities and professionals from the different countries involved. As highlighted by one of the interviewed professionals, international child

³⁴ See M. Blasi, *La mediazione familiare internazionale: la ricerca del linguaggio universale nell'incontro tra culture*, in *Rivista AIAF*, 2015, available at https://www.aiafrivista.it/mediazione_familiare_internazionale_incontro_tra_culture.

³⁵ According to the 1980 Hague Convention, return proceedings should not last more than six weeks. The Regulation No. 2019/1111 has confirmed this, specifying the duration of each phase of the entire procedure up to return: six weeks for the first instance proceedings before the Juvenile Court (Article 24, para. 2), six weeks for the proceedings before the *Corte di cassazione* (Article 24, para. 3) and six weeks for the enforcement phase (Article 28).

³⁶ See E. di Napoli, C. Honorati, *Il procedimento di mediazione familiare nei casi di responsabilità genitoriale e di sottrazione internazionale*, in E. di Napoli, C. Honorati, *Guida alla mediazione familiare internazionale*, cit., p. 71 ff.

abductions are particularly characterized by a high degree of tension and conflict between the parties: being the abduction a usually unexpected event in the life of a parent, he or she may suddenly find himself/herself alone, “in an empty home”, facing a considerable amount of grief which may only be satisfied by the promise of a fast reaction by the competent judicial authorities. This is the reason why it may be very difficult to accompany both parents towards the possibility to voluntarily mediate their conflict.

A well-rounded and integrated legislative framework and methodology, aimed at integrating international family mediation with the needs and the timing of child abduction proceedings, is necessary in order to “build mediation around the case flow”³⁷. Any attempt to mediation should not prejudice the rights of the parties to access justice and to obtain a judicial remedy, if mediation fails³⁸.

3.2. The training and qualification standards for (international) family mediators in Italy

As mentioned, the Cartabia Reform and in particular the Presidential Decree No. 151/2023 have defined the requisites to exercise the profession of family mediator in Italy. The legal requirements are specified in Articles 3 (Requirements of integrity), 4 (Certified professionalism) and 5 (Initial and continuous training), as explained above³⁹.

The Decree does not contain any indication of certified specializations (such as international family mediation), which nevertheless form part of the training programmes of many schools which refer to the main professional associations of family mediators⁴⁰. However, despite this specialization being indicated in the

³⁷ T. Kruger, *Article 25*, cit., p. 262, citing as an example of good practice the Dutch Model.

³⁸ See the *Italian Best Practice Model: Specialised mediation in international child abduction cases in connection with return proceedings under the 1980 Hague Convention*, developed within the EU co-funded project AMICABLE, available at <https://amicable-eu.org/amicable-eng/mediation.html>.

³⁹ See above, subsection “The Ministerial Decree No. 151/2023”.

⁴⁰ On this aspect, there is a relevant difference with the discipline of the profession of civil and commercial mediator, regulated by the Ministerial Decree No. 150/2023: other than providing a specific subsection of the register of civil and commercial mediators, dedicated to mediators who are experts in international matters and cross-border disputes (Section B), the Decree defines the training requirements that must be met by those who wish to register in this special section (Article 25).

statute and regulations defining the educational offerings of the associations, in practice very few specialised courses have been activated in recent years⁴¹.

Compared to cross-border family mediation, the training offer on intercultural mediation is not particularly extensive in the Italian panorama, if one looks at the courses offered within the auspices of the main professional associations of mediators and affiliated schools⁴².

3.3. The key actors and the different approaches in the light of a persisting lack of specialization

While international family mediation is not subject to a specific regulation in Italy, the Cartabia Reform and in particular the application of Article 25 of the Brussels IIb regulation have raised the need to acknowledge the mediation services currently available.

An important part of the organization of the profession of family mediator is represented by the professional associations, who also play a relevant role in the monitoring and offering of specialization courses. As mentioned, family mediators are under the management of voluntary private associations which are authorized by the Ministry of Enterprises and Made in Italy according to the Law No. 4/2013 and whose role has been confirmed by the Ministerial Decree No. 151/2023.

Among the most representative associations there are:

- SIMeF (*Società Italiana Mediatori Familiari*)
- AIMS (*Associazione Internazionale Mediatori Sistemici*);
- AImeF (*Associazione Italiana Mediatori Familiari*)
- MEDEF (*Mediatori della Famiglia – Italia*).

⁴¹ See for instance the advanced training course on Cross-Border Family Mediation organized in 2023/2024 by International Child Abduction Lawyers Italy (ICALI), the International Child Abduction Centre (REUNITE), Defence for Children International Italy (DCI Italy), the University of Genova and the University of Milan in collaboration with the Italian Central Authority: <https://www.defenceforchildren.it/it/news-376/corso-di-alta-formazione-in-mediazione>.

⁴² See for instance the specialized courses in intercultural family mediation offered by SHINUI - Centro di Consulenza sulla Relazione (https://www.shinui.it/it/specialistica-in-mediazione-familiare-interculturale.html?utm_source=chatgpt.com). The Associazione Internazionale Mediatori Sistemici (AIMS) provides in its website the general requisites for the erogation of a specialized courses in intercultural family mediation under the auspices of the association <https://www.mediazionesistemica.it/Site/Page?plD=30&AspxAutoDetectCookieSupport=1>.

Other associations – limited to the ones resulting in the database of the Ministry of Enterprises and Made in Italy – are ENAMEF, AIMeA, ItaliaConcilia, MediaCoor, AssoMef, AEMEF.

The FIAMeF (*Federazione Italiana delle Associazioni di Mediatori Familiari*) is a federation who aggregates the abovementioned professional associations and has the role to collect the needs and requests of the professional category, to bring them before the competent institutions. In fact, FIAMeF has closely followed the legislative procedure which led to the adoption of the Cartabia Reform and has given its contribution to implementation.

While there are some family mediation services offered by Social Services, municipalities, sanitary services, etc., those experience reflect initiatives which do not seem to be rationalized and regulated at the national level. Even in that case, it is necessary to highlight that, even when the Social Service can assist the family in going through the conflict and “conduct” them towards family mediation, the mediator who takes up the case grants his or her service as a private professional. All in all, the efficiency and accessibility of those centres is jeopardized.

Some courts and municipalities have effectively played a role in its promotion by the institution of information desks, while the parties can gather information about the modalities and advantages of mediation. Those “information points” or “information spaces” on family mediation entrusted to volunteer mediators who explain to users all the information they need to know about family mediation and indicate to users the public and private centres dealing with family mediation existing in the metropolitan area, then freely chosen by the couples concerned⁴³.

In this context, it should be noted that, within the 1980 Hague Convention cooperation system, some countries have appointed a Central Contact Point for family mediation: this is not the case of Italy⁴⁴.

The Cartabia Reform has introduced an institutionalized list of qualified family mediators, to be instituted in each first instance court⁴⁵ in order to facilitate the

⁴³ Information points for family mediation exist, for instance, in the courts of Genova, Parma, Isernia, Torino, Milano, Paola, Ancona, Varese, Ascoli Piceno, Verona, Lecco, Trani, Imola, Trani, Brescia. Some information points are instituted in the municipalities or by the local Bar Associations.

⁴⁴ The list of the Central Contact Points for family mediation is available on the website of the Hague Conference on Private International Law: <https://www.hcch.net/en/publications-and-studies/details4/?pid=5360&dtid=52>.

⁴⁵ Article 12-bis ff. of the implementing provisions to the code of civil procedure.

families in search for a mediator. As mentioned, a committee chaired by the President of the Court and composed by the Public Prosecutor and a family mediator decides on applications for registration, which is open to family mediators who have been registered for at least five years with one of the professional associations of mediators and who demonstrate adequate training and specific expertise in family matters, child protection, and violence.

It should be highlighted that the existence of those registers does not result in the assimilation of the mediator with a court's consultant: even if the professionals in the list are subject to the same disciplinary proceedings applicable to a court-appointed technical advisor⁴⁶, the family mediators are chosen by the parties and do not have the duty to report the result of their work to the judge⁴⁷.

As concerns the effective implementation of the lists, it results from different sources that not all courts have effectively instituted the committees or adopted the necessary regulations⁴⁸. A recent study conducted by the Italian Authority for Children and Adolescents, with questionnaires submitted to first instance courts, has highlighted that 50 tribunals have declared the formal institution of the register of family mediators⁴⁹.

Being the family mediator a profession not organized in professional orders in Italy – although informed by clear requisites and rules provided by the law – an important role is played by the associations of family mediators, which also holds the responsibility for continuous training of professionals.

Since, as mentioned, there are many organizations and professionals involved in family mediation in Italy, a fully agreed approach does not always exist as concerns the operational models or specific technical procedures. These may differ in terms of the nature of the issues addressed and the approach and methodology used in planning and managing the intervention. An overview of the most diffused models is provided here⁵⁰:

- The first family mediation model (developed by Irving and Benjamin) is the one **centred on relational processes**, on the premise that the

⁴⁶ Article 12-ter of the implementing provisions to the code of civil procedure.

⁴⁷ See Article 473-bis.10 of the code of civil procedure.

⁴⁸ See also an interview to the presidents of AIMeF, MEDEF and SImEF of 17 April 2024: <https://www.istitutohfc.it/decreto-151-mediazione-familiare-bilancio>.

⁴⁹ Italian Authority for Children and Adolescents, *La mediazione familiare in Italia. Documento di Studio e di proposta*, cit.

⁵⁰ See I. Buzzi, J. Haynes, *Introduzione alla mediazione familiare*, Milano, 2012, p. 13 ff.

mediation process in certain situations can only have lasting effects over time if emotional and relational issues are resolved.

- **Negotiated mediation** is a model directed at facilitative agreement, which aims to achieve the best possible outcome in terms of the couple's self-determination. Its use is not only aimed at separation and divorce, but is open to various family issues.
- The **structured family mediation** model takes place according to a precise structuring of the negotiation process and uses a task-oriented methodology. The underlying assumption of the model is that only a well-defined framework protects against the irrationality of emotions. It is a model that aims to re-establish communication between the parties, leaving ample room for self-determination.
- The **transformative model** defines mediation as a process in which a third person helps the parties to redefine the quality of their relational dynamics by transforming conflict from negative and destructive to positive and constructive through the observation and discussion of issues and possible solutions. The two key objectives are empowerment (making the parties able to define their own issues and seek solutions by themselves) and recognition (making the parties able to see and understand the other person's point of view).
- **Intra-judicial mediation** occurs in the context of separation, divorce or parental responsibility proceedings, where the court suggests mediation to resolve disputes over custody and visitation rights. Mediators are mostly psychologists, psychiatrists and social workers.
- **Therapeutic family mediation** focuses on the emotional aspects of crises in emotional relationships, attempting to resolve the knots of communication digression and all the variations produced by the couple's possible interactions. The theoretical-methodological frame of reference is the clinical reading of the relationship within the parental couple. The mediator must neutralise or modify the dysfunctional models that are an obstacle, in order to lead the subjects to restructure their relational and communicative competences. The agreement is usually reached through the intervention of other professionals, i.e. the lawyer.
- The **systemic model** of family mediation, also called "family-centred mediation", aims to take into account the entire family system, adopting a complex reading of the relational dynamics that gravitate around the conflict, encouraging synergy between professional figures who operate in different fields: psychological, legal and social. It takes into account the entire family system and the broader context: the family, more than the couple, constitutes the pivot and is also taken into consideration in its intergenerational history (grandparents, children, extended families). Children are involved either directly or indirectly. The task of the mediator

is to re-establish a minimum of family harmony, to create a conflict-free atmosphere, to protect children from the disputes of the adults. Among the main tools are the genogram, reframing and circular questions.

- In **integrated mediation**, ample space is given to the emotional-affective dimension and mediation adapts to the needs of the couple: the parties themselves define the process. The focus is on the future and on redefining the relationship between the partners rather than obtaining agreements on legal rights. Different mediators with different backgrounds are usually involved. The term “integrated” refers to the relationship between the mediator and the legal consultant who collaborate in managing the conflict in the couple. Very close to the integrated model there is **interdisciplinary family mediation**, which provides for a synergic management between a lawyer and a social worker: the first deals with technical financial and legal issues, while the second with communication and conflict management and reduction. The difference compared to the integrated model is that both experts are present at the sessions.
- The **relational-symbolic model** of family mediation is particularly interested in the foundation of family relationships beyond historical changes, that is, it wants to recognize the value of the family bond. Family mediation is intended as a “ritualized” experience of transition from the crisis of the couple. The mediator plays the role of an equidistant professional who tries to promote the achievement of harmony between the parties and an agreement in the case of separation, but he/she may also offer the possibility of a reconsideration of the marital pact that goes beyond its term.
- The **eclectic model** of family mediation does not contain models that can be ascribed to clinical or therapeutic mediation: if specialist support is deemed appropriate, the work of a therapist will be referred to alongside the mediation process, which may continue in parallel or be temporarily suspended. The mediator will help the parties develop understanding, will let the parties own the conflict, will allow the necessary tension but only if it is bearable for the parties and will go below the apparent problem.

Among the various differences which characterize the different models, all approaches recognize the need for a pre-mediation stage, finalize to create the setting to the substantial work. While some models adhere to co-mediation, with two mediators are present in the room⁵¹, other models provide for one mediator. There are some systemic approaches in which one of the mediators

⁵¹ Often the two mediators have different backgrounds, legal and psychological.

observes the meetings through a one-way mirror (with the informed consent of the parties) and is consulted by the mediator effectively conducting the process.

Since **international family mediation** requires a specific expertise and should be structured according to the peculiarities of cross-border situations, the different methodologies are to be tailored on those needs. Mediation in international child abduction cases should be considered in its further specificities, at least for the high degree of tension and conflict which may characterize the situation and for the time constraints characterizing the procedures.

Cross-border disputes may obviously be characterized by geographical distance, which may require the use of videoconference instead of in-person meetings and may also require the condensation of mediation in a short timeframe, such as one or more weekends. According to some approaches, mediation could also be “indirect”, meaning that the parties do not participate together to the same session (in presence or online), but separate sessions are organized or the parties are in different rooms. This technique – which is particularly useful in high-tension scenarios – is also called “shuttle mediation”, since the mediator may hold separate meetings with the parents, going back and forth and conveying messages, proposals, and counterproposals⁵².

As mentioned, the lack of a consolidated practice in Italy has not made it possible to build a consistent, “national” methodology. While in some EU member States (such as Germany, The Netherlands and United Kingdom) best practices models are in force⁵³, there is no analogous instrument in Italy. At the same time, there has been an initiative aimed at disseminating and adapting those methodologies, to explore whether and how specialised mediation in international child abduction cases could be introduced in the course of return proceedings⁵⁴.

⁵² In systemic (traditional) family mediation, a similar technique is the one of “fluctuant therapies” which is also use in family therapy (G. Gaspari, L. Mastropaolo, *Le terapie individuali, le terapie “fluttuanti”. Riflessioni di due psicoterapeute sistemiche sulla loro pratica clinica*, in *Connessioni*, 2008, p. 107 ss.

⁵³ Reference is made to the so-called “*Mediators in Court Model*”: see the European Parliament resolution of 5 April 2022 on the protection of the rights of the child in civil, administrative and family law proceedings (2021/2060(INI)), P9_TA(2022)0104, p. 10, available at https://www.europarl.europa.eu/doceo/document/TA-9-2022-0104_EN.pdf.

⁵⁴ Reference is made to the EU co-funded project “AMICABLE”, which had the aim of improving the situation of children in cross-border parental responsibility disputes and child abduction cases within the EU, providing assistance for the cross-border recognition and enforceability of

Also in light of the recent novelties in the regulation of the profession of family mediator, the grounding principles and rules on family mediation apply *mutatis mutandis* to cross-border family mediation. This applies to the voluntary nature of the mediation process (also determining that parties should be aware that the mediation process can be interrupted at any time), as well as to the circumstance according to which the mediator is bound to confidentiality and cannot share anything about the content of the meetings, which may also not be shared within the judicial proceedings, unless both parties agree. As in purely internal family mediation, the mediator shall be independent, impartial and neutral. Accordingly, cross-border family mediation aims at managing the conflict and re-building the relationship between the parties in the light of the best interests of the children involved: the mediator does not suggest a solution to the parties, but facilitates the communication between them.

In Italy, there are no specific rules as concerns information and participation of children in the mediation process. As concerns the practice, the various mediation models differ. The large majority excludes direct participation of children, and therefore no contact is foreseen between them and the mediator. The reason is that children are seen as constantly “present” in the mediation room: the mediator actively contributes to recreating the virtual presence of the child⁵⁵.

Some models actually include children in mediation, at different stages. There are mediators adhering to the systemic model which invite the child at the first or second meeting, together with the parents. There are multiple reasons sustaining the opportunity of this participation⁵⁶: i) to let the parents acknowledge the resonance of the conflict on the children, with possible effects of mitigation of the tension between them; ii) to enable the mediator to gain a better knowledge of the family context; iii) to enable the children to listen to the story of their parents, acknowledging a “before” and “after” the crisis and acquiring a sense of evolution of the family; iv) most importantly, to give the children some information about the mediation and to relieve children from the role of third parties in the conflict between parents. For instance – as concerns this last aspect – the mediator may tell the child that the parents have decided

mediated family agreements in the EU and promoting a tried-and-tested model for incorporating mediation into international child abduction proceedings. The Best Practices Model is available at <https://www.amicable-eu.org/amicable-eng/mediation.html>.

⁵⁵ This may be supported by the use of techniques such as an empty chair present in the room.

⁵⁶ L. Mastropaolo, *Crisi e conflitto: mediazione familiare, “intervento per il cambiamento” e terapia. Percorsi differenti della Scuola Genovese*, in P. Chianura et al, *Manuale clinico di terapia familiare*, vol. II, Milano, 2010, p. 105 ss.

to address the disputes between them by undertaking a mediation process and that, from this moment on, the child does not have any responsibility in managing this conflict.

3.4. Access to information about international family mediation: a focus on the role of judges and of the Central Authority in cases of international child abduction

The way in which the parents may acknowledge the possibility to undergo mediation and the availability of IFM services in the territory may vary consistently, depending on the fact that the issue under consideration is brought to the attention of the judge or not.

In that case, Article 25 of the Brussels II-ter regulation has introduced a specific obligation for the judge, which must inform the parties about the possibility to undergo mediation⁵⁷. A joint reading of the provision, together with recital No. 43, suggests that this obligation is upon any judge of a Member State bound by the regulation and seized for the return of the child in international child abduction proceedings, but also in any case on parental responsibility (being it or not in the context of divorce, separation or marriage annulment)⁵⁸. Therefore, as concerns Italy, this obligation concerns not only juvenile courts, but also ordinary courts.

The obligation to inform the parties may be performed directly by the judge, or through the assistance of the Central Authorities: in Italy, it is the *Dipartimento per la Giustizia Minorile e di Comunità* within the Italian Ministry of Justice (Bureau II).

The Central Authority has recently published on its official website the Guidelines for the transmission of requests under Articles 25, 27, 29, 80 e 82 of the Brussels II-ter regulation⁵⁹. As concerns international family mediation, the Guidelines explain that Article 25 “is applicable at any stage - introductory, pre-trial, pre-trial, executive - of child return proceedings brought before the Juvenile

⁵⁷ T. KRUGER, *Article 25*, cit., p. 261: “Regulation 2019/1111 does not go as far as granting the power to judges do *order* litigants to mediation or even to a single information session on mediation (although this might exist under national law). The Regulation simply requires judges (by the use of the word ‘shall’) to *invite* the parties to consider ADR. This seems to mean that judges should always have the possibility of ADR at the back of their minds”.

⁵⁸ E. DI NAPOLI, *La mediazione familiare nel contesto transfrontaliero*, cit.

⁵⁹ https://www.giustizia.it/giustizia/page/it/richieste_alle_autorita_centrali.

Courts - in cases of intra-European international abduction - and, more generally, during any other proceedings concerning parental responsibility issues characterized by one or more cross-border elements”.

The Central Authority may, in particular, play a role in promoting “preventive” family mediation, before judicial proceedings are initiated and notwithstanding the possibility that an application for the return of the child may be presented before the competent authorities⁶⁰. The Central Authority may provide indications on the objectives and modalities of IFM, as well as on the legal effects of the agreement and on its enforcement. Nevertheless, the Guidelines provide that “Judges who see the preconditions for mediation may apply to the Central Authority to receive information to be forwarded to the parties and to request the availability of a cross-border family mediator who can facilitate the reaching of an agreement, even a partial one, on the disputed issues”, provided that the request may be supplemented by “any useful elements to identify the most suitable cross-border family mediator to deal with the case”.

The Brussels II-ter Regulation does not specify whether the Central Authority may also transmit to the parties the contact of a cross-border family mediator. The abovementioned Guidelines specify that “The peculiar figure of the cross-border family mediator, the bearer of a specific professionalism, is not yet contemplated by our legal system nor is it referred to by Ministerial Decree No. 151/2023, containing regulations on the professional discipline of family mediators”. Since there is no official register of certified cross-border family mediators in Italy (being this specific qualification not disciplined by the current normative framework), there are currently no official registers or lists of mediators, provided by the law, to be put at the disposal of the parties. At the same time, reference is made in the Guidelines to a first, recent initiative in the form of an advanced training course on Cross-Border Family Mediation organized under the auspices of the Central Authority itself. Currently, a protocol is under signature between the Central Authority, the Italian Federation of Family Mediators' Associations (FIAMEF – *Federazione Italiana delle Associazioni di Mediatori Familiari*), International Child Abduction Lawyers Italy (ICALI) and the charity REUNITE (International Child Abduction Centre).

⁶⁰ This notwithstanding the fact that the juvenile court may invite the parties to consider mediation even after a return order has been issued, in order for the parents to resolve for the future the conflict concerning the residence of the child and the associated exercise of parental responsibility: see, for instance, Corte di Cassazione, Sez. I, decision of 7 May 2025, No. 12035, reporting the Decree of the Juvenile Court of Venice of 3/6 May 2024, No. 1325.

According to the relevant supranational and national case law, mediation agreements do not rely on a comprehensive discipline. The new proceedings concerning persons, children and family matters, disciplined by the Italian civil code following the amendments introduced by the Cartabia Reform, provides that the judge shall acknowledge the agreements concluded by the parents, if their content is not contrary to the interests of the children, “in particular when reached as a result of a family mediation process”⁶¹. A similar provision is not to be found in the discipline of proceedings for the return of the child following an international child abduction, contained in Article 7 of the Law 64/1994.

Nevertheless – as mentioned by an interviewed judge – in practice the agreement concluded by the parties is taken into account in child abduction cases as well, by taking note of this circumstance in the decree which declares the “*non luogo a procedere*” (no case to answer). Therefore, the procedure is closed when left-behind parent and the abducting parents have found a common solution and, possibly, have provided enough guarantees on the effective respect of the agreement.

If the agreement provides for the return of the child (and the child effectively comes back to his/her habitual residence), it will be for the competent courts to define any aspect concerning the substance of parental responsibility.

If the agreement provides for the non-return of the child, it could be possible for the court to activate the monitoring of social services over the well-being of the child in the long term. In this case, there is nevertheless a substantial difference between “intra-EU” and “extra-EU” cases.

If the situation falls within the scope of application of the Regulation No. 2019/1111, the judicial authorities of the former habitual residence of the child may activate the so-called “trumping order”, overturning the decision of Italian courts within a ruling on the merits of parental responsibility⁶². It would therefore be necessary for the mediation agreement to reach the competent foreign court, in order for it to acknowledge the existence of the settlement.

⁶¹ Article 337-ter c.c.

⁶² Article 29 Regulation No. 2019/1111.

On the contrary, if the situation is not subject to EU law, the 1980 Hague Convention regime applies exclusively⁶³. The non-return of the child determines a shift in his/her habitual residence.

Nevertheless, the aforementioned scheme does not always reflect the reality of family mediation: in most cases, even when it occurs in the particular and difficult context of a child abduction, mediation represents the opportunity for the parents to address the overall family situation and all the aspects concerning their present and future lives (without limiting to the issue of return/non-return)⁶⁴. The various content of those “**package agreements**” may be subject to one or another applicable law, and its effects may depend on different rules. Moreover, those agreements would possibly include the regulation of rights and duties on parental responsibility, which are normally not at disposal of the parties and may need to be subject to a judicial control/homologation. On the other hand, agreements concerning patrimonial aspects (such as maintenance) would need to be enforceable. In the hypothesis of cross-border disputes, there is the additional issue of the recognition and enforcement abroad.

As concerns parental responsibility matters, Italy is bound both by the Regulation No. 2019/1111 – as concerns the relationships with other EU Member States (with the exception of Denmark) – and by the 1996 Hague Convention. Matters which do not fall within the scope of application of those instruments are subject to domestic private international law rules, contained in the Law No. 218/1995.

Regulation No. 2019/1111 does not allow for circulation of “private” agreements, different from authentic instruments and decisions (recital 44). For the agreement to be recognizable and enforceable in another Member State, it needs to be registered by a public authority. Member States shall communicate to the European Commission the list of public authorities with the competence to register private agreements (Article 103). Italy has provided a broad communication, stating that “public authorities holding the competence to register an agreement according to Article 2, para .2, No. 3) of the Regulation

⁶³ As it is known, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (eventually applicable between the ratifying countries), does not provide for a mechanism similar to the trumping order. Moreover, the third situation to be considered is the one in which the 1980 Hague Convention does not apply at all and recourse to diplomatic channels is necessary.

⁶⁴ For a in-depth analysis of the issue, see C. Honorati, *La circolazione dell'accordo di mediazione familiare negli Stati UE*, in E. di Napoli, C. Honorati, *Guida alla mediazione familiare internazionale*, cit., p. 83 ff.

are the civil status registrar or the judicial authority (Tribunal, Court of Appeal and *Corte di cassazione*)”⁶⁵. However, on the basis of the ambiguous distinction between decisions and agreements adopted by the Regulation, each time the public authority exercises a control on the merits, the registered agreement will be considered a “decision” for the purpose of the Regulation⁶⁶. According to Italian Law, a control by the judicial authority is necessary for agreements concerning parental responsibility, in order to be sure that the best interests of children are preserved. Therefore, any agreement of this kind would necessarily be incorporated in a judicial decision, which is recognised and enforced in all Member States (except Denmark) according to the regime of the Regulation No. 2019/1111.

In child abduction cases, it would be particularly advisable for the parties to incorporate the agreement in a judicial decision. Here, the choice is between the courts of the child’s habitual residence before the abduction, the courts of the State of refugee and/or the courts of a third State (for instance, the country in which the parents agree to transfer the child’s new habitual residence). Since, as mentioned, package agreements may define different issues – return, parental responsibility, maintenance, etc. ... – for the decision to circulate according to the relevant international or EU regime it would, in principle, be necessary for the court to have jurisdiction on all the matters included in the agreement.

4. Pre-mediation services in Italy

In Italy, there is no specific legislation dedicated to pre-mediation, whose definition is also not consistent in the general practice. Although most of the family mediation models⁶⁷ acknowledge the need for a pre-mediation stage, no formally recognized or legally codified stage of this kind exists within the Italian family mediation process.

⁶⁵ Information available at https://e-justice.europa.eu/topics/taking-legal-action/european-judicial-atlas-civil-matters/brussels-iib-regulation-matrimonial-matters-and-matters-parental-responsibility-recast/it_en.

⁶⁶ For an in-depth analysis, see S. Bernasconi, C. Honorati, *L’efficacia cross-border degli accordi stragiudiziali in materia familiare tra i regolamenti Bruxelles II-bis e Bruxelles II-ter*, in *Freedom, Security and Justice – European Legal Studies*, 2021, p. 1 ff.

⁶⁷ See above, para. 3.3 “The key actors and the different approaches in the light of a persisting lack of specialization”.

Pre-mediation should be defined as a preparatory phase where parties are informed and prepared for mediation. It precedes the opening of mediation and it may concur to the evaluation of possibility to mediate the case. It is also the phase in which a suitable mediator is identified for the specific case.

In practice, if there are services at disposal at the local level – such as informative points in courts or in municipalities – the parties may acquire information about family mediation and in this stage some first, preliminary steps to convey them to mediation may be performed.

When the judge invites the parties to consider the possibility to undergo mediation⁶⁸, it is possible that the judge may perform a first evaluation of the situation, other than providing information to the parties and assuming a proactive role in promoting mediation.

In general, this preliminary information and preparation phase differs from the introductory stage of mediation, where the mediation conducts a full evaluation on the possibility to mediate of the case.

A proposal for the introduction of a mandatory pre-mediation stage in family proceedings is currently ongoing, within a possible reform of Article 473-bis.10 c.p.c.⁶⁹. If approved, the new provision would provide that “In all cases of disagreement in the phase of elaborating a shared custody, the parties are obliged, before referring the matter to the judge and except in cases of urgency or of serious and imminent harm to the children, to turn to a public or private family mediation body or to a freelance family mediator to acquire information on the advisability of a possible family mediation path. The first meeting is in any case free of charge and may also be held individually at the request of even only one of the parties. If one of the parties fails to comply, the proceedings are started anyway at the initiative of the other party”.

This would represent a significant shift from the current framework, which merely requires the judge to inform the parties about the possibility of mediation. Instead, the bill introduces a binding obligation for the parties themselves, serving as a procedural prerequisite to the initiation of judicial proceedings.

Such a development warrants careful consideration. A core principle of mediation is the voluntary nature of participation, which underpins its

⁶⁸ Article 25 Regulation No. 2019/1111 and – albeit not in return proceedings following an international child abduction – Article 473-bis.10 c.p.c.

⁶⁹ Article 13 of the Draft Law No. 832 of 1 August 2023.

effectiveness and legitimacy. While the bill imposes an obligation only with respect to the preliminary pre-mediation phase—and not the mediation process in its entirety—it remains essential to ensure that the parties' freedom to choose whether to proceed with actual mediation is fully respected and preserved.



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1. Introduzione

In un'Europa sempre più interconnessa, le controversie familiari transfrontaliere sono diventate più frequenti. Nel contesto delle separazioni, dei divorzi e dei necessari accordi sulla responsabilità genitoriale, il rischio di sottrazione internazionale di minori è ancora presente¹. Queste situazioni complesse spesso coinvolgono più sistemi giuridici, differenze culturali e, soprattutto, i diritti e il benessere delle persone minorenni coinvolte. La mediazione familiare internazionale (o transfrontaliera) è emersa come uno strumento prezioso per affrontare le sottrazioni internazionali di persone minorenni, offrendo un processo strutturato ma flessibile volto a facilitare la comprensione reciproca e accordi sostenibili tra genitori residenti in Paesi diversi².

I potenziali effetti positivi della mediazione familiare internazionale sono stati riconosciuti dal legislatore dell'UE: il regolamento (UE) n. 2019/1111 (Bruxelles II-ter), all'art. 25, ha introdotto l'obbligo esplicito per il giudice nei procedimenti di sottrazione di minori di invitare le parti a considerare la possibilità di sottoporsi alla mediazione.

Questo rapporto presenta i risultati della ricerca nazionale sul sistema giuridico italiano, intrapresa nell'ambito delle attività del progetto cofinanziato dall'UE "iCare2"³. La ricerca valuta come il regolamento Bruxelles II-ter sia stato applicato in Italia, identificando le sfide nella sua applicazione e valutando il suo successo nel migliorare la cooperazione giudiziaria, nel risolvere i casi di sottrazione internazionale di minori e nel promuovere la mediazione familiare.

La mediazione familiare internazionale è ancora poco sviluppata in Italia. Sebbene la mediazione familiare stia lentamente diventando uno strumento valido che i genitori e gli operatori del diritto riconoscono e attivano con sempre maggiore frequenza, il numero di casi che si sottopongono a questo meccanismo alternativo di risoluzione delle controversie è ancora relativamente basso. Solo

¹ Secondo le statistiche dell'Autorità centrale italiana nell'ambito dell'applicazione della Conferenza dell'Aia del 25 ottobre 1980 sugli aspetti civili della sottrazione internazionale di minori, nel 2024 l'Autorità centrale ha ricevuto 204 domande, di cui 170 relative a procedure di rimpatrio. Il rapporto completo è disponibile qui: https://www.giustizia.it/cmsresources/cms/documents/Rapporto_Sottrazione_internazionale_minori_2024_G.pdf.

² S. VIGERS, *Mediating International Child Abduction Cases: The Hague Convention*, Oxford, 2011.

³ Si veda il sito ufficiale del progetto: <https://project-icare.eu/>.

con le più recenti riforme legislative⁴ - che riguardano il sistema giudiziario italiano nel suo complesso - la mediazione familiare ha trovato spazio, come strumento strutturato, nel codice civile e nel codice di procedura civile.

Queste novità sono l'ultimo passaggio di un processo lungo e frammentato, attraverso il quale la mediazione si sta facendo strada nell'ordinamento giuridico nazionale e nella pratica dei professionisti del diritto coinvolti nei conflitti familiari e, in ultima analisi, nella tutela dei minori in quei contesti. Lo sviluppo di una "cultura" della mediazione, insieme a un'integrazione coerente e concreta del principio dell'interesse superiore del minore nell'intero processo, viene identificato come una necessità fondamentale affinché la mediazione possa essere offerta come strumento efficace per la risoluzione dei conflitti familiari, in linea con gli standard internazionali e dell'UE.

Nell'ambito della metodologia applicata alla presente ricerca, sono state condotte interviste per raccogliere la prospettiva e l'esperienza degli operatori del settore (giudici, avvocati, mediatori certificati). Gli autori - che rimangono gli unici responsabili del contenuto di questo rapporto - sono grati ai suddetti professionisti per la loro preziosa collaborazione.

2. La mediazione familiare internazionale in Italia: il quadro giuridico di riferimento

Nel contesto delle sottrazioni internazionali di minori, la Convenzione dell'Aja del 1980 promuove metodi alternativi di risoluzione delle controversie per cercare una soluzione amichevole⁵. Questa possibilità è stata valorizzata nel tempo da diverse iniziative a livello internazionale e ha trovato spazio in altri strumenti legislativi che, a distanza di anni, hanno introdotto disposizioni volte a incoraggiare il ricorso alla mediazione familiare nelle controversie transfrontaliere: a livello europeo, si fa riferimento al regolamento Bruxelles II-ter⁶, che - come si vedrà - ha rafforzato il ruolo della mediazione familiare nelle

⁴ D. Lgs. 10 ottobre 2022, n. 149, la cosiddetta "riforma Cartabia", il cui impatto sulla mediazione familiare sarà esaminato nel corso di questo report.

⁵ L'art. 7 della Convenzione dell'Aia del 1980 sugli aspetti civili della sottrazione internazionale di minori stabilisce che le Autorità Centrali "*devono prendere tutte le misure appropriate [...] c) per assicurare il ritorno volontario del minore o per ottenere una soluzione amichevole delle questioni*".

⁶ Regolamento (UE) 2019/1111 relativo alla competenza, al riconoscimento e all'esecuzione delle decisioni in materia matrimoniale e in materia di responsabilità genitoriale, nonché alla sottrazione internazionale di minori (regolamento Bruxelles II-ter).

controversie transfrontaliere e la promuove esplicitamente durante i procedimenti per il ritorno di un minore nei casi di sottrazione internazionale. Nonostante l'impulso dato a livello sovranazionale⁷, l'attuazione pratica di questo strumento non è stata uniforme nei diversi ordinamenti giuridici nazionali. In Italia, la mediazione familiare, pur essendo riconosciuta in linea di principio e talvolta incoraggiata, ha incontrato difficoltà ad affermarsi come pratica efficace e diffusa per la gestione delle controversie familiari transfrontaliere. Solo negli ultimi anni si è assistito a un parziale cambiamento di rotta, con una crescente attenzione alla mediazione nella legislazione nazionale.

È appena il caso di notare che uno dei primi centri che offrono servizi di mediazione familiare è stato creato nel 1987⁸. I primi riferimenti normativi alla mediazione familiare risalgono al 1997, con la legge n. 285: l'art. 4, comma 1, lett. i) istituiva il finanziamento della mediazione familiare e dei servizi di consulenza per le famiglie e i minori. 1, lett. i) ha istituito il finanziamento e la promozione dei servizi di mediazione familiare e di consulenza per le famiglie e i minori.

Le prime associazioni professionali di mediatori familiari sono nate negli anni '90: in particolare, nel 1995 sono nate la SIMeF (*Società Italiana Mediatori Familiari*) e l'AIMS (*Associazione Internazionale Mediatori Sistemici*); nel 1999 è stata creata l'AIMeF (*Associazione Italiana Mediatori Familiari*). Queste associazioni professionali hanno seguito lo sviluppo di un corpus legislativo che ha introdotto una progressiva regolamentazione della professione di mediatore familiare, che rimane, ancora oggi, una professione non organizzata in associazioni o albi professionali, nei termini tecnici della legislazione italiana: i mediatori sono sotto la gestione di associazioni private volontarie che sono autorizzate dal Ministero delle Imprese e del Made in Italy secondo la legge n. 4/2013⁹.

La legge n. 328/2000 (sui servizi sociali) e la legge n. 154/2001 (sulla violenza familiare e gli ordini di protezione) hanno accennato brevemente alla possibilità di accedere a centri di mediazione familiare per affrontare i conflitti familiari. Questi interventi si sono limitati a prevedere la creazione di servizi pubblici di mediazione familiare, senza però offrire una regolamentazione dettagliata dei compiti e del funzionamento di queste figure.

⁷ Cfr. C.C. PAUL, S. Kiesewetter, I. KHALAF-NEWSOME, *Cross-border Family Mediation. International Parental Child Abduction, Custody and Access Cases*, Francoforte sul Meno, 2023; S. FENN, A.M. HUTCHINSON, A. LAKE-CARROL, *Mediation in children's cases with a cross-border element - in particular, international child abduction, leave to remove and international contact*, in M. ROBERTS, M. MOSCATI (eds), *Family Mediation. Contemporary Issues*, Dublino, 2020, p. 203.

⁸ Si fa riferimento all'associazione "GeA" (*Genitori Ancora*), che ha creato un centro civico pubblico in collaborazione con il Comune di Milano, offrendo servizi di mediazione.

⁹ Il database è disponibile all'indirizzo https://portaledati.mimit.gov.it/banca-dati/assoc_prof.

La mediazione familiare è entrata nel codice civile con la legge n. 54/2006, che ha stabilito la possibilità per le parti nei procedimenti di separazione di tentare la mediazione “al fine di raggiungere un accordo, con particolare riferimento alla tutela dell’interesse morale e materiale dei figli”. (art. 155 *sexies* c.c.). In tal caso, il giudice può rinviare l’adozione dei provvedimenti sulla responsabilità genitoriale, ma solo se lo ritiene opportuno, dopo aver sentito le parti e averne ottenuto il consenso. Questo emendamento è stato un indicatore del processo in atto di inclusione della mediazione familiare come strumento di gestione dei conflitti familiari in sede di separazione o divorzio, probabilmente ispirato anche dalla recente ratifica della Convenzione europea sull’esercizio dei diritti dei minori del 25 gennaio 1996¹⁰, che all’art. 13 prevede la mediazione come mezzo per prevenire e risolvere i conflitti ed evitare qualsiasi procedimento giudiziario riguardante il minore.

2.1. Il regolamento Bruxelles II-ter e la riforma Cartabia

Negli ultimi anni si è assistito a un’accelerazione dello sforzo di rafforzamento della mediazione all’interno dei procedimenti che trattano qualsiasi conflitto familiare che coinvolge persone minorenni¹¹.

A livello europeo, il regolamento Bruxelles II-ter (che modifica il precedente regolamento Bruxelles II-bis), ha introdotto disposizioni specifiche dedicate alla mediazione familiare - oltre a registrare una decisa attenzione verso i diritti dei minori e il loro interesse superiore¹². Come noto, il regolamento opera in sinergia con la Convenzione dell’Aia del 1980 sugli aspetti civili della sottrazione internazionale di minori. Nel capitolo dedicato alla sottrazione internazionale di minori¹³, il regolamento conferma il principio del ritorno immediato (nonché le eccezioni a tale principio previste dagli articoli 12, 13 e 20 della Convenzione).

¹⁰ Legge 20 marzo 2003, n. 77.

¹¹ Si rimanda anche alla Legge 11 luglio 2011, n. 112, che ha istituito l’Autorità Garante per l’Infanzia e l’Adolescenza. L’art. 3, lett. o), ha attribuito all’AGIA il mandato di favorire “lo sviluppo della cultura della mediazione e di ogni istituto atto a prevenire o risolvere con accordi conflitti che coinvolgano persone di minore età, stimolando la formazione degli operatori del settore”.

¹² È noto che la sottrazione internazionale di minori è regolata da diversi strumenti di cooperazione giudiziaria transfrontaliera, come la Convenzione dell’Aia del 1980 sugli aspetti civili della sottrazione internazionale di minori, la Convenzione dell’Aia del 1996 sulla responsabilità genitoriale e la tutela dei minori, oltre che il già citato regolamento (UE) 2019/1111 relativo alla competenza, al riconoscimento e all’esecuzione delle decisioni in materia matrimoniale e in materia di responsabilità genitoriale, nonché alla sottrazione internazionale di minori.

¹³ Articoli dal 22 al 29 Regolamento Bruxelles II-ter.

Allo stesso tempo, in linea con il precedente regolamento Bruxelles IIa, viene mantenuto anche il cosiddetto “*trumping order*”: una decisione di merito adottata dal giudice dello Stato di precedente residenza abituale del minore è in grado di annullare e, quindi, ribaltare il provvedimento di non ritorno emesso dalle autorità dello Stato in cui il minore è stato illecitamente trasferito¹⁴.

Il regolamento Bruxelles II-ter ha introdotto una disposizione specifica dedicata alla mediazione familiare¹⁵:

*Art. 25 – “Risoluzione alternativa delle controversie - Il più presto possibile e in qualsiasi fase del procedimento, l'autorità giudiziaria, direttamente o, se del caso, con l'assistenza delle autorità centrali, invita le parti a valutare se sono disposte a impegnarsi in una mediazione o in altri mezzi di risoluzione alternativa delle controversie, a meno che ciò non sia contrario all'interesse superiore del minore, non sia appropriato nel caso specifico o ritardi indebitamente il procedimento”*¹⁶.

Va sottolineato che il regolamento Bruxelles II-ter (in linea con l'art. 2 della Convenzione dell'Aia del 1980) prevede tempi stretti di sei settimane¹⁷ per le

¹⁴ Art. 29, par. 6, regolamento Bruxelles II-ter. La decisione così emessa è immediatamente esecutiva nello Stato membro in cui si trova la persona minorenne.

¹⁵ Cfr. T. KRUGER, *Article 25*, in C. GONZÁLEZ BEILFUSS, L. CARPANETO, T. KRUGER, I. PRETELLI, M. ŽUPAN, *Jurisdiction, Recognition and Enforcement in Matrimonial and Parental Responsibility Matters. A Commentary on Regulation 2019/1111 (Brussels IIb)*, Cheltenham, 2023, p. 258.

¹⁶ Alcune indicazioni sull'applicazione dell'art. 25 sono fornite dal considerando 43, in cui si afferma che: “In tutti i casi riguardanti i minori, e in particolare nei casi di sottrazione internazionale di minori, i tribunali dovrebbero prendere in considerazione la possibilità di raggiungere soluzioni attraverso la mediazione e altri mezzi appropriati, assistiti, se del caso, dalle reti e dalle strutture di supporto esistenti per la mediazione nelle controversie transfrontaliere sulla responsabilità genitoriale. Tali sforzi, tuttavia, non dovrebbero prolungare indebitamente il procedimento di rimpatrio ai sensi della Convenzione dell'Aia del 1980. Inoltre, la mediazione potrebbe non essere sempre appropriata, soprattutto nei casi di violenza domestica. Se nel corso di un procedimento di rimpatrio ai sensi della Convenzione dell'Aia del 1980 i genitori raggiungono un accordo sul ritorno o sul mancato ritorno del minore, nonché su questioni relative alla responsabilità genitoriale, il presente regolamento dovrebbe consentire loro, in determinate circostanze, di concordare che l'autorità giudiziaria adita ai sensi della Convenzione dell'Aia del 1980 sia competente a conferire effetti giuridici vincolanti al loro accordo, incorporandolo in una decisione, approvandolo o utilizzando qualsiasi altra forma prevista dalla legge e dalla procedura nazionale. Gli Stati membri che hanno una competenza concentrata dovrebbero pertanto considerare la possibilità di consentire al giudice adito con il procedimento di rimpatrio ai sensi della Convenzione dell'Aia del 1980 di esercitare anche la competenza concordata o accettata dalle parti ai sensi del presente regolamento in materia di responsabilità genitoriale, qualora l'accordo tra le parti sia stato raggiunto nel corso di tale procedimento di rimpatrio”.

¹⁷ Art. 24, paragrafo 2 del regolamento Bruxelles II-ter.

procedure di rimpatrio, in cui concentrare anche l'invito a sottoporsi alla mediazione.

A livello nazionale, è stata la cosiddetta “riforma Cartabia”, nell’ambito di un ampio intervento sulla procedura civile italiana, ad ampliare di fatto il quadro normativo della mediazione familiare¹⁸. In particolare, la legge n. 206 del 26 novembre 2021 ha delegato al Governo l'adozione di misure per la revisione del processo civile e dei metodi alternativi di risoluzione delle controversie, nonché di misure urgenti per la razionalizzazione dei procedimenti in materia di diritti della persona e della famiglia.

Di conseguenza, il decreto legislativo 10 ottobre 2022, n. 149¹⁹ ha introdotto un procedimento unico applicabile a tutti i procedimenti in materia di status delle persone, dei minori e delle famiglie, avviati a partire dal 28 febbraio 2023²⁰. Un'importante precisazione riguarda i procedimenti disciplinati da leggi speciali, che non saranno soggetti alla nuova procedura²¹: tra questi, i procedimenti di rimpatrio nei casi di sottrazione internazionale di minori²². Tuttavia – e nonostante la suddetta esclusione – sono molti gli aspetti della riforma che hanno un impatto (almeno indiretto) sui procedimenti di sottrazione internazionale di minori, a partire dalla mediazione.

Tra le misure della riforma, vi è la modifica dell'art. 316 c.c., co. 3, che ora recita: “Il giudice, sentiti i genitori e disposto l'ascolto del figlio minore che abbia compiuto gli anni dodici e anche di età inferiore ove capace di discernimento, tenta di raggiungere una soluzione concordata e, ove questa non sia possibile, adotta la soluzione che ritiene più adeguata all'interesse del figlio”.

Nell'ambito del nuovo procedimento in materia di persone, minorenni e famiglia, il nuovo art. 473.bis.10 c.p.c. prevede che il giudice possa invitare le parti alla mediazione familiare. In particolare, “Il giudice può, in ogni momento, informare le parti della possibilità di avvalersi della mediazione familiare e invitarle a

¹⁸ F. Danovi, *Il presente e il futuro della mediazione familiare in Italia*, in *Giustizia consensuale*, 2024, p. 659 ss.

¹⁹ Attuazione della legge 26 novembre 2021, n. 206, recante delega al Governo per l'efficienza del processo civile e per la revisione della disciplina degli strumenti di risoluzione alternativa delle controversie e misure urgenti di razionalizzazione dei procedimenti in materia di diritti delle persone e delle famiglie nonché in materia di esecuzione forzata.

²⁰ Le modifiche sono entrate in vigore il 28 febbraio 2023 e si applicano ai procedimenti avviati dopo tale data: si veda l'art. 7, comma 1, del decreto legislativo 31 ottobre 2024, n. 164. 1, del decreto legislativo 31 ottobre 2024, n. 164.

²¹ Art. 473-bis c.p.c., così come modificato dall'art. 3, co. 33 del decreto legislativo 149/2022. Sull'ambito di applicazione delle nuove norme, si veda G. Buffone, *Le nuove norme processuali in materia di persone, minori e famiglia (d.lgs. n. 149/2022): prime letture sintetiche*, in [Giustizia Insieme](#), 8 febbraio 2023.

²² Tali procedimenti sono disciplinati in Italia dalla legge n. 64 del 15 gennaio 1994 (art. 7).

rivolgersi a un mediatore [...] per ricevere informazioni circa le finalità, i contenuti e le modalità del percorso e per valutare se intraprenderlo”. Nell’eventualità che i genitori decidano di intraprendere la mediazione, il giudice (“qualora ne ravvisi l’opportunità”) può rinviare l’adozione dei provvedimenti provvisori e urgenti sulla regolamentazione della responsabilità genitoriale, che definirebbero i diritti dei figli e dei genitori nel corso del procedimento²³. Il rinvio è funzionale a consentire ai genitori di portare avanti efficacemente la mediazione e raggiungere un accordo, che (con una puntuale precisazione) dovrebbe essere “nell’interesse morale e materiale dei figli”.

Un tono leggermente diverso riguarda l’art. 473-bis.14 c.p.c., che specifica che l’informazione sulla possibilità di sottoporsi alla mediazione deve essere inclusa anche nel decreto di fissazione dell’udienza: ciò significa che le parti dovrebbero ricevere tali informazioni già nella primissima fase del procedimento (fermo restando che il giudice può decidere di tornare su questa possibilità in una fase successiva).

È necessario dare importanza all’invito del giudice, che è in linea con il principio universalmente accettato secondo cui la mediazione familiare non dovrebbe mai essere imposta alle parti²⁴. Allo stesso tempo, l’invito non deve ridursi a una comunicazione astratta e fredda. Il giudice dovrebbe curare la credibilità della sua comunicazione, che dovrebbe anche essere adattata al caso concreto, oltre che informata dei dettagli necessari. Poiché l’invito del giudice interviene nel corso di un procedimento, il giudice potrebbe anche cercare la collaborazione degli avvocati delle parti, con i quali intrattiene un rapporto di fiducia. Allo stesso tempo, seguendo gli input forniti dai professionisti e discostandosi parzialmente dalle disposizioni della Legge n. 206/2001, è stato previsto che sia il mediatore (e non il giudice) a fornire le informazioni su obiettivi, contenuti e procedure della mediazione familiare.²⁵

Soprattutto, la norma specifica che i mediatori con cui le parti possono essere messe in contatto devono essere tra i professionisti inseriti in un elenco formato

²³ Art. 473-bis.22 cpc.

²⁴ È interessante notare che un’attuale proposta di riforma dell’art. 473-bis.10 c.p.c. (art. 13 del D.d.L. 1 agosto 2023, n. 832) mira a introdurre una fase di pre-mediazione obbligatoria, prevedendo che “In tutti i casi di disaccordo nella fase di elaborazione di un affidamento condiviso le parti hanno l’obbligo, prima di adire il giudice e salvi i casi di urgenza o di grave e imminente pregiudizio per i minori, di rivolgersi a un organismo di mediazione familiare, pubblico o privato, o a un mediatore familiare libero professionista per acquisire informazioni sull’opportunità di un eventuale percorso di mediazione familiare. Il primo incontro è in ogni caso gratuito e può svolgersi anche individualmente a richiesta anche di una sola delle parti. Se una delle parti non ottempera, il procedimento si avvia ugualmente per l’iniziativa dell’altra”.

²⁵ F. Scaparro, *La forza della mediazione familiare*, in C. Vendramini (a cura di), *La mediazione familiare nella Riforma Cartabia: comporre i conflitti e ritessere le relazioni*, Milano, 2022, p. 104.

ai sensi dell'art. 12-bis e seguenti delle disposizioni di attuazione del codice di procedura civile. L'elenco è tenuto dal Presidente del Tribunale ed è formato da una commissione da lui presieduta e composta dal Procuratore della Repubblica e da un mediatore familiare. La commissione decide sulle domande di iscrizione e i ricorsi contro le sue decisioni possono essere presentati entro cinque giorni dalla notifica. In particolare, possono iscriversi all'elenco coloro che sono iscritti da almeno cinque anni a una delle associazioni professionali di mediatori iscritte nell'elenco tenuto presso il Ministero dello Sviluppo Economico e che dimostrano un'adeguata formazione e una specifica competenza in materia di famiglia, tutela dei minori e violenza.

Infatti, oltre al suddetto elenco, le disposizioni di attuazione del codice di procedura civile contengono ora un intero capo dedicato ai mediatori familiari (Titolo II, Capo I-bis). L'art. 12-sexies ha previsto l'adozione di una disciplina organica dell'attività professionale dei mediatori familiari, che comprende una migliore specificazione delle regole di comportamento, della formazione obbligatoria e delle tariffe. La disposizione è stata attuata con l'emanazione del decreto ministeriale n. 151 del 27 ottobre 2023 (da parte del Ministero delle Imprese e del Made in Italy, in collaborazione con i Ministeri della Giustizia e dell'Economia e delle Finanze), che ha adottato il regolamento sulla condotta professionale dei mediatori familiari.

2.2. Il decreto ministeriale n. 151/2023

Il decreto ministeriale n. 151/2023 ha introdotto una nuova disciplina completa sui mediatori familiari professionisti. Esso rappresenta un passo significativo nel riconoscimento formale e nella standardizzazione della mediazione familiare all'interno dell'ordinamento giuridico italiano.

Vale la pena ricordare che, nonostante la razionalizzazione introdotta dalle recenti riforme legislative, i mediatori familiari sono gestiti da associazioni private volontarie autorizzate dal Ministero delle Imprese e del Made in Italy ai sensi della Legge n. 4/2013. Non esiste quindi un'associazione professionale pubblica per i mediatori familiari, né è previsto il superamento di un esame di Stato per l'iscrizione all'albo: i mediatori familiari sono iscritti ad associazioni private e volontarie a seguito della frequenza di corsi e del superamento di un esame finale, in conformità alla norma tecnica UNI 11644/2016 e ai regolamenti interni delle suddette associazioni, sui quali il decreto ministeriale n. 151/2023 ha introdotto standard comuni.

Il decreto contiene una definizione di "mediatore familiare", qualificato come una figura professionale imparziale e con formazione specifica, che interviene nei casi

di cessazione o di oggettiva difficoltà relazionale nella relazione di coppia, prima, durante o dopo l'evento separativo. Il mediatore, quindi, facilita le parti coinvolte nell'elaborazione di un percorso di riorganizzazione della relazione, anche attraverso il raggiungimento di un accordo negoziato. L'obiettivo finale è la conservazione delle relazioni familiari e genitoriali, laddove presenti: ciò significa che – anche se non si fa riferimento diretto all'interesse dei figli coinvolti – la separazione della coppia non deve impedire la prosecuzione pacifica dei doveri e dei diritti di responsabilità genitoriale.

Gli artt. 3, 4 e 5 stabiliscono i requisiti specifici per l'esercizio della professione di mediatore familiare.

Oltre ai requisiti specifici di onorabilità (art. 3), l'acquisizione del titolo professionale di mediatore familiare è subordinata al superamento di un corso di formazione che risponda alle caratteristiche delineate nel decreto (art. 5)²⁶. I programmi di formazione sono erogati da istituti riconosciuti dalle associazioni professionali ai sensi della legge n. 4 del 2013. Il decreto specifica anche i requisiti che devono possedere i soggetti che svolgono attività di formazione. Il corso deve consistere in non meno di 240 ore, comprendenti sia l'insegnamento teorico che le esercitazioni pratiche, con almeno 80 ore dedicate alla pratica guidata con un formatore con esperienza pluriennale come mediatore familiare, di cui almeno 40 ore di attività pratica di mediazione sotto supervisione.

Il programma del corso deve affrontare gli aspetti psicologici, legali e comunicativi relativi alle relazioni familiari e alla gestione dei conflitti. È espressamente previsto che un modulo formativo specifico sia dedicato alla "tutela delle persone di minore età" (art. 5, comma 5, lett. g)).

L'esame finale consisterà in i) una prova scritta a risposta multipla; ii) una prova pratica svolta con la tecnica del *role playing*; iii) un colloquio orale consistente in un colloquio di valutazione, preceduto dalla presentazione di un elaborato scritto relativo al percorso formativo svolto e alla pratica guidata. L'art. 6 stabilisce le norme etiche che regolano la condotta professionale dei mediatori familiari, il cui rispetto è necessario per l'esercizio della professione. La mediazione familiare deve essere svolta liberamente, sulla base di autonomia, competenza e indipendenza intellettuale e tecnica. Il mediatore familiare deve attenersi ai principi di buona fede, fiducia del cliente, correttezza,

²⁶ L'art. 4, comma 2, prevede che "l'attività di mediatore familiare è consentita anche a coloro che, alla data di entrata in vigore del presente decreto, siano già in possesso dell'attestato di mediatore familiare, conseguito mediante la frequenza di un corso di almeno duecentoventi ore e il superamento dell'esame finale, e documentino lo svolgimento di attività di mediazione familiare nei due anni precedenti. Sono fatti salvi gli obblighi di formazione continua di cui all'art. 5, comma 6, che devono essere assolti annualmente a partire dall'anno successivo. 6 da assolvere annualmente a partire dal 31 dicembre 2023".

responsabilità professionale e riservatezza. È tenuto ad agire in modo imparziale, neutrale e non giudicante nei confronti delle parti, favorendo un processo equilibrato e incoraggiando un dialogo costruttivo.

Al mediatore è vietato intervenire nelle mediazioni in cui vi siano conflitti di interesse, come il coinvolgimento personale o le relazioni strette con le parti, o i legami finanziari e legali. I mediatori non possono fornire servizi al di fuori dell'ambito della mediazione familiare, esercitare pressioni per imporre soluzioni, fornire servizi professionali riservati a professioni regolamentate durante la mediazione, o accettare o offrire doni e favori legati al processo di mediazione.

Il mediatore è tenuto alla riservatezza sul processo di mediazione e sui suoi risultati. Tale obbligo si estende a chiunque sia presente durante le sessioni di mediazione, a meno che entrambe le parti non rinuncino espressamente e per iscritto alla riservatezza, o nei casi in cui la legge preveda delle eccezioni.

Nelle loro interazioni con i clienti, i mediatori devono rendere note le loro qualifiche professionali, l'eventuale copertura assicurativa e fornire informazioni chiare sul processo di mediazione, i suoi obiettivi, le modalità e i costi. Devono inoltre garantire il rispetto delle normative europee e nazionali sulla protezione dei dati e informare i clienti dell'esistenza di uffici di tutela dei consumatori presso le associazioni professionali.

Quando la mediazione avviene durante un procedimento giudiziario in corso, i mediatori devono informare preliminarmente e gratuitamente le parti sullo scopo della mediazione, sulle modalità e sui costi. Devono informare le parti del loro diritto di scegliere un mediatore iscritto nel registro del tribunale e del loro diritto di avere assistenza legale durante gli incontri di mediazione, in particolare per quanto riguarda le questioni economiche e finanziarie. I mediatori familiari devono interrompere il processo di mediazione se richiesto da una delle parti, se la continuazione non è fattibile o se non è più possibile garantire la neutralità o l'imparzialità.

Per quanto riguarda l'autopromozione, i mediatori devono essere veritieri e corretti, evitando pubblicità ingannevole e astenendosi dal rivendicare qualifiche o competenze che non possiedono. Le pratiche commerciali ingannevoli, come definite dal decreto legislativo n. 206 del 2005, sono severamente vietate. Il decreto ministeriale fornisce chiari parametri per la definizione del compenso per i servizi di mediazione familiare. In particolare, ciascuna parte si impegna a corrispondere al mediatore familiare per ogni incontro effettivamente svolto la somma di 40,00 euro, oltre agli oneri di legge. Tale somma viene moltiplicata secondo coefficienti (da 1 a 2) in base ai parametri di complessità comunicati e predefiniti all'inizio dell'incarico. Mentre il compenso comprende le attività

accessorie alla prestazione professionale, sono escluse le spese o gli oneri forfettari e i contributi dovuti a qualsiasi titolo. Per gli incarichi non conclusi si tiene conto del lavoro effettivamente svolto.

2.3. Violenza domestica o di genere

Nell'introdurre la mediazione familiare come valido percorso per la risoluzione dei conflitti familiari, la riforma Cartabia ha previsto anche alcune misure specifiche per i casi di violenza familiare.

Il principio generale è noto è che la presenza di violenza in una relazione familiare (così come qualsiasi circostanza che possa indurre ad accertare una disparità di poteri tra le parti) preclude la mediazione. Tali conflitti sono considerati “non mediabili”, in quanto l'accordo eventualmente raggiunto potrebbe non essere il frutto di una codecisione, ma riflettere un rapporto di subordinazione psicologica.

Questo approccio deriva in parte dagli obblighi internazionali a cui l'Italia è vincolata a seguito della ratifica²⁷ della Convenzione di Istanbul del 2011²⁸. La Convenzione, infatti, non impedisce la mediazione *giudiziale*, ma solo quella obbligatoria (art. 48) nei casi di violenza, anche domestica, per proteggere le vittime dalla vittimizzazione secondaria.

La riforma ha introdotto sei disposizioni specifiche all'interno dei nuovi procedimenti in materia di persone, minori e famiglia (dall'art. 473-bis.40 all'art. 473-bis.46), che assegnano al giudice nuovi poteri finalizzati alla tutela delle vittime di violenza. L'ambito di applicazione di tale disciplina è infatti ampio: essa può essere attivata nell'ambito di qualsiasi procedimento giudiziario in cui siano presenti abusi familiari, nonché accuse di violenza domestica o di genere (sia essa commessa da una parte contro l'altra o contro i figli minori). L'espressione “denunce di parte” non è limitata alle situazioni in cui è già stato avviato un procedimento penale, come risulta dall'art. 473-bis.41.

In questi casi, il giudice ha a disposizione molti strumenti per tutelare la presunta vittima nel corso del procedimento, come quelli volti a evitare qualsiasi contatto diretto con il presunto autore del reato. Tra questi, è previsto che il decreto di fissazione dell'udienza non contenga l'invito a sottoporsi alla mediazione

²⁷ Legge 27 giugno 2013, n. 77.

²⁸ Convenzione del Consiglio d'Europa sulla prevenzione e la lotta alla violenza contro le donne e la violenza domestica (Convenzione di Istanbul), 11 maggio 2011, entrata in vigore il 1° agosto 2014, CETS n. 2010.

familiare (che ovviamente non viene formulato in nessun'altra fase o durante l'udienza).

L'art. 473-bis.43 introduce il divieto di avviare la mediazione familiare nelle seguenti, specifiche circostanze: i) sia già stata pronunciata una condanna o una pena per abusi familiari, violenza domestica o di genere; ii) sia pendente un procedimento penale per i suddetti fatti commessi da una parte nei confronti dell'altra o dei figli minori; iii) siano state ipotizzate condotte di abusi familiari, violenza domestica o di genere nel corso del procedimento. È inoltre previsto che, se durante una mediazione già avviata emergono accuse o informazioni riguardanti abusi familiari o violenza domestica/di genere, il mediatore deve interrompere immediatamente il processo.

3. La mediazione familiare internazionale in Italia: la prassi

3.1. La mancanza di un quadro giuridico specifico e le persistenti esigenze nella pratica

Il ruolo della mediazione familiare internazionale in Italia è ancora frammentato per quanto riguarda la sua attuazione pratica, con riferimento sia ai casi in cui è in corso un procedimento giudiziario sia alle situazioni extragiudiziali (compresa la mediazione preventiva).

Secondo i dati statistici disponibili (e riferiti agli anni 2019-2021) risulta che le coppie sposate che affrontano la separazione hanno fatto ricorso alla mediazione familiare in meno del 10% dei casi. Non sono disponibili dati per le coppie non sposate, che tuttavia rappresentano una quota significativa nel quadro generale.

Pur non avendo un impatto diretto sui procedimenti disciplinati da leggi speciali (come la sottrazione internazionale di minori), la Riforma Cartabia potrebbe avere il potenziale per influenzare indirettamente la pratica della mediazione nei procedimenti di rimpatrio. Ciò, alla luce della persistente importanza di un quadro giuridico specializzato per la mediazione familiare internazionale: come già evidenziato dalla letteratura giuridica, l'art. 25 del regolamento Bruxelles II-ter può essere accompagnato da un insieme (non obbligatorio, ma comunque) utile di norme nazionali volte a riconoscere le specificità dell'introduzione della

mediazione familiare nel contesto dei procedimenti transfrontalieri, rapimenti di minori inclusi.²⁹

In questo contesto, l'impatto reale della riforma Cartabia, effettivamente applicabile dal 28 febbraio 2023³⁰, è ancora da apprezzare, mentre l'applicazione della mediazione familiare internazionale in Italia è ancora piuttosto rara.

Nel sistema giuridico italiano non esiste una disponibilità consistente di servizi di mediazione sul territorio nazionale con le competenze necessarie a gestire le specificità dei casi in questione. D'altra parte, come risulta da recenti indagini, si registra un'assenza a livello nazionale, nei servizi pubblici dedicati alla famiglia, di specifiche linee guida operative e progettuali finalizzate all'introduzione della mediazione familiare come possibile strumento. Ne consegue l'assenza di protocolli, linee guida o buone prassi coerenti a livello locale. I servizi di mediazione familiare sono quindi disponibili attraverso i servizi pubblici (raramente) e forniti da operatori privati (più frequentemente) solo su base *ad hoc*, senza un efficace coordinamento tra i professionisti coinvolti³¹. È già stata sottolineata la necessità di protocolli completi che disegnino una metodologia comune sulla pre-mediazione e sulla mediazione, includendo un coordinamento tra tutti i professionisti che possono svolgere un ruolo, sia perché sono in contatto con la famiglia (ad esempio medici di famiglia, scuole, educatori), sia per il ruolo qualificato che possono avere nei procedimenti che riguardano la responsabilità genitoriale (avvocati, giudici, servizi sociali).

Le interviste con i professionisti (avvocati, mediatori familiari e giudici) hanno evidenziato l'assenza di un prototipo consolidato. Non esiste una prassi consolidata su come una controversia possa arrivare alla mediazione familiare internazionale (senza passare per un procedimento giudiziario). Un magistrato intervistato ha spiegato che, per quanto riguarda la sua esperienza professionale, i genitori possono raggiungere un accordo grazie al ruolo proattivo dei giudici e/o degli avvocati e/o dei servizi sociali coinvolti³². In questi

²⁹ Si veda E. di Napoli, *La mediazione familiare nel contesto transfrontaliero: uno sguardo d'insieme*, in C. Honorati, E. di Napoli, *Guida alla mediazione familiare internazionale*, Pisa, 2025, p. 7 ss.

³⁰ Si veda sopra, sottosezione "Il regolamento Bruxelles II-ter e la riforma Cartabia".

³¹ Si veda lo studio dell'Autorità Garante per l'Infanzia e l'Adolescenza, *La mediazione familiare in Italia. Documento di Studio e di proposta*, 2025, disponibile sul sito <https://www.garanteinfanzia.org/pubblicazioni>.

³² In Italia, i servizi sociali possono essere coinvolti nei casi di sottrazione "passiva" di minori (quando il minore viene condotto o trattenuto illecitamente in Italia) per controllare e monitorare la situazione del bambino.

casi, i servizi sociali possono verificare che i genitori siano aperti a un accordo, oppure – più frequentemente – il giudice può cercare di conciliare la posizione delle parti durante la prima udienza. Un giudice intervistato ha spiegato che la presenza fisica delle parti (quindi, nella maggior parte delle situazioni, sia dei genitori rapitori che di quelli abbandonati) è considerata molto importante a questo scopo. Data la distanza geografica e i problemi logistici che si possono incontrare, alcuni giudici ricorrono alle videoconferenze, con la consapevolezza che ciò potrebbe non consentire lo stesso coinvolgimento di un incontro di persona.

Come ulteriore ostacolo alla partecipazione dei genitori all'udienza, va ricordato che la sottrazione internazionale di minori è penalmente sanzionata in Italia. L'art. 574-bis del codice penale prevede la pena della reclusione da uno a quattro anni (o da sei mesi a tre anni, se il minore ha compiuto 14 anni e ha dato il suo consenso). Il reato è perseguibile d'ufficio. Ciò significa che il genitore rapitore può astenersi dal partecipare a un'udienza nello stesso Stato in cui rischia di essere perseguito. Soprattutto, il procedimento penale può avere un impatto negativo sul ritorno del minore nella sua residenza abituale e persino sulla possibilità stessa di tentare una mediazione familiare transfrontaliera.

Un avvocato intervistato ha riportato che la minaccia di un procedimento penale, nella pratica, non ha tuttavia rappresentato frequentemente un ostacolo pratico: se le parti raggiungono un accordo, è probabile che il reato non venga perseguito.

Vale la pena notare che gli esempi sopra citati non derivano dall'applicazione da parte dei giudici di uno specifico quadro normativo, ma piuttosto dalla proattività di alcuni di essi nel cercare di incanalare le parti verso una risoluzione amichevole della controversia.

Come si vedrà, la mancanza di una prassi coerente non è dovuta solo all'assenza di un quadro normativo specifico, ma anche alla conseguente mancanza di specializzazione per quanto riguarda i requisiti di formazione e le qualifiche per esercitare la professione di mediatore familiare internazionale, alla luce delle specificità delle situazioni caratterizzate da elementi transfrontalieri.

La complessità richiede un approccio più articolato rispetto alla mediazione "classica", che di solito si svolge in un contesto nazionale giuridicamente, linguisticamente e culturalmente omogeneo. L'interazione tra i sistemi giuridici nazionali, così come le convenzioni sovranazionali applicabili e i regolamenti dell'UE, implica che il mediatore debba possedere non solo competenze relazionali e psicologiche, ma anche una solida conoscenza del diritto

internazionale privato e delle regole di giurisdizione e riconoscimento delle decisioni straniere. Questo è il motivo per cui la maggior parte degli organismi specializzati in mediazione familiare internazionale adottano come metodo principale la co-mediazione, con la presenza di un mediatore con formazione giuridica e di un altro mediatore con competenze psicologiche³³. Questa prassi non è sempre condivisa da altri modelli, anch'essi caratterizzati da un approccio alla mediazione che tende a escludere l'aspetto legale della controversia, per concentrarsi sulla gestione del conflitto e sulla ricostruzione della relazione tra le parti.

Un ulteriore elemento di specificità è la gestione della diversità linguistica e culturale³⁴. Le parti coinvolte possono esprimersi in lingue diverse e avere opinioni divergenti sull'educazione dei figli, sui ruoli genitoriali o sulla struttura familiare. Il mediatore, in questi casi, deve garantire un equilibrio comunicativo tra le parti, promuovendo la comprensione reciproca e assicurando che ciascuno possa esprimere liberamente le proprie esigenze e aspettative. Ciò può richiedere l'assistenza di interpreti o la presenza di mediatori aggiunti con competenze linguistiche e culturali specifiche.

I casi di sottrazione internazionale di minori, in particolare, sono caratterizzati da forti vincoli temporali. Il fattore tempo è cruciale nei procedimenti di restituzione e si riflette nei tempi precisi che caratterizzano ogni fase procedurale, come risulta sia dagli strumenti giuridici internazionali che nazionali³⁵. Ciò ha ovviamente un impatto sull'organizzazione della mediazione, poiché il mediatore deve essere in grado di rispettare il quadro procedurale e deve essere

³³ Analogamente, si veda il modello contenuto nella Dichiarazione di Breslavia dell'8 ottobre 2007 sulla mediazione delle controversie binazionali in materia di genitori e figli, disponibile all'indirizzo https://www.europarl.europa.eu/pdf/agora/20071008_breslau_en.pdf. Questo modello prevede una co-mediazione caratterizzata dalla presenza di due mediatori con background professionali diversi (psicologico e giuridico), garantendo, ove possibile, anche la rappresentanza di genere.

³⁴ Si veda M. Blasi, *La mediazione familiare internazionale: la ricerca del linguaggio universale nell'incontro tra culture*, in *Rivista AIAF*, 2015, disponibile su https://www.aiafrivista.it/mediazione_familiare_internazionale_incontro_tra_culture.

³⁵ Secondo la Convenzione dell'Aia del 1980, il procedimento di rimpatrio non dovrebbe durare più di sei settimane. Il Regolamento Bruxelles II-ter ha confermato questa impostazione, specificando la durata di ciascuna fase dell'intera procedura fino al rimpatrio: sei settimane per il procedimento di primo grado davanti al Tribunale per i minorenni (art. 24, comma 2), sei settimane per il procedimento davanti alla Corte di cassazione (art. 24, comma 3) e sei settimane per la fase esecutiva (art. 28).

consapevole dell'impatto del tempo sul benessere del minore e sul buon esito dell'intera procedura³⁶.

Infine, la mediazione transfrontaliera si distingue per la particolare delicatezza delle situazioni che spesso vi si presentano, come l'esecuzione transnazionale degli accordi raggiunti o la difficoltà di mantenere le relazioni familiari a distanza. In questo contesto, la mediazione assume un ruolo fondamentale non solo per prevenire o risolvere i conflitti, ma anche per favorire soluzioni stabili e sostenibili che rispettino il miglior interesse del minore, migliorando la cooperazione tra autorità e professionisti dei diversi Paesi coinvolti. Come sottolineato da uno dei professionisti intervistati, i rapimenti internazionali di minori sono particolarmente caratterizzati da un alto grado di tensione e conflittualità tra le parti: essendo il rapimento un evento solitamente inaspettato nella vita di un genitore, questi può trovarsi improvvisamente solo, in una casa vuota, affrontando un notevole dolore che può essere soddisfatto solo dalla promessa di una rapida reazione da parte delle autorità giudiziarie competenti. Per questo motivo può essere molto difficile accompagnare entrambi i genitori verso la possibilità di mediare volontariamente il loro conflitto.

È necessario un quadro legislativo e una metodologia ben articolati e integrati, volti a integrare la mediazione familiare internazionale con le esigenze e i tempi dei procedimenti di sottrazione di minori, al fine di “costruire la mediazione intorno al flusso del caso”³⁷. Qualsiasi tentativo di mediazione non deve pregiudicare il diritto delle parti di accedere alla giustizia e di ottenere un rimedio giudiziario, se la mediazione fallisce³⁸.

3.2. Gli standard di formazione e qualificazione dei mediatori familiari (internazionali) in Italia

Come accennato, la Riforma Cartabia e in particolare il decreto ministeriale n. 151/2023 hanno definito i requisiti per esercitare la professione di mediatore familiare in Italia. Come già illustrato, requisiti legali sono specificati negli articoli

³⁶ Cfr. E. di Napoli, C. Honorati, *Il procedimento di mediazione familiare nei casi di responsabilità genitoriale e di sottrazione internazionale*, in E. di Napoli, C. Honorati, *Guida alla mediazione familiare internazionale*, cit., p. 71 ss.

³⁷ T. Kruger, *Article 25*, cit., p. 262, che cita come esempio di buona pratica il Modello olandese.

³⁸ Si veda il *Modello italiano di buone prassi: Mediazione specializzata nei casi di sottrazione internazionale di minori in relazione ai procedimenti di rimpatrio ai sensi della Convenzione dell'Aia del 1980*, sviluppato nell'ambito del progetto AMICABLE cofinanziato dall'UE, disponibile all'indirizzo <https://amicable-eu.org/amicable-eng/mediation.html>.

3 (Requisiti di onorabilità), 4 (Professionalità certificata) e 5 (Formazione iniziale e continua)³⁹.

Il decreto non contiene alcuna indicazione di specializzazioni certificate (come la mediazione familiare internazionale), che tuttavia fanno parte dei programmi formativi di molte scuole che fanno riferimento alle principali associazioni professionali di mediatori familiari⁴⁰. Tuttavia, nonostante questa specializzazione sia indicata nello statuto e nei regolamenti che definiscono l'offerta formativa delle associazioni, nella pratica sono pochissimi i corsi di specializzazione attivati negli ultimi anni.⁴¹

Rispetto alla mediazione familiare transfrontaliera, l'offerta formativa sulla mediazione interculturale non è particolarmente ampia nel panorama italiano, se si guarda ai corsi offerti sotto l'egida delle principali associazioni professionali di mediatori e delle scuole affiliate⁴².

3.3. Gli attori chiave e i diversi approcci alla luce della persistente mancanza di specializzazione

Sebbene la mediazione familiare internazionale non sia soggetta a una normativa specifica in Italia, la riforma Cartabia e in particolare l'applicazione

³⁹ Vedi sopra, sottosezione "Il decreto ministeriale n. 151/2023".

⁴⁰ Su questo aspetto, c'è una differenza rilevante con la disciplina della professione di mediatore civile e commerciale, regolata dal decreto ministeriale n. 150/2023: oltre a prevedere una specifica sottosezione dell'albo dei mediatori civili e commerciali, dedicata ai mediatori esperti in materia internazionale e di controversie transfrontaliere (Sezione B), il decreto definisce i requisiti formativi che devono essere posseduti da coloro che intendono iscriversi a questa sezione speciale (art. 25).

⁴¹ Si veda ad esempio il corso di formazione avanzata sulla mediazione familiare transfrontaliera organizzato nel 2023/2024 dall'associazione International Child Abduction Lawyers Italy (ICALI), dall'International Child Abduction Centre (REUNITE), da Defence for Children International Italy (DCI Italy), dall'Università di Genova e dall'Università di Milano in collaborazione con l'Autorità Centrale Italiana: <https://www.defenceforchildren.it/it/news-376/corso-di-alta-formazione-in-mediazione>.

⁴² Si vedano ad esempio i corsi di specializzazione in mediazione familiare interculturale offerti da SHINUI - Centro di Consulenza sulla Relazione (https://www.shinui.it/it/specialistica-in-mediazione-familiare-interculturale.html?utm_source=chatgpt.com). L'Associazione Internazionale Mediatori Sistemici (AIMS) fornisce nel suo sito web i requisiti generali per l'erogazione di un corso di specializzazione in mediazione familiare interculturale sotto l'egida dell'associazione

<https://www.mediazionesistemica.it/Site/Page?plD=30&AspxAutoDetectCookieSupport=1>.

dell'art. 25 del regolamento Bruxelles II-ter hanno sollevato la necessità di riconoscere i servizi di mediazione attualmente disponibili.

Una parte importante dell'organizzazione della professione di mediatore familiare è rappresentata dalle associazioni professionali, che svolgono un ruolo rilevante anche nel monitoraggio e nell'offerta di corsi di specializzazione. Come detto, i mediatori familiari sono gestiti da associazioni private volontarie che sono autorizzate dal Ministero delle Imprese e del Made in Italy ai sensi della Legge n. 4/2013 e il cui ruolo è stato confermato dal decreto Ministeriale n. 151/2023.

Tra le associazioni più rappresentative vi sono:

- SIMeF (*Società Italiana Mediatori Familiari*)
- AIMS (*Associazione Internazionale Mediatori Sistemici*);
- AImeF (*Associazione Italiana Mediatori Familiari*)
- MEDEF (*Mediatori della Famiglia - Italia*).

Altre associazioni - limitatamente a quelle risultanti nel database del Ministero delle Imprese e del Made in Italy - sono ENAMEF, AImeA, ItaliaConcilia, MediaCoor, AssoMef, AEMEF.

La FIAMeF (*Federazione Italiana delle Associazioni di Mediatori Familiari*) è una federazione che aggrega le suddette associazioni professionali e ha il ruolo di raccogliere le esigenze e le richieste della categoria professionale, per sottoporle alle istituzioni competenti. FIAMeF ha infatti seguito da vicino l'iter legislativo che ha portato all'adozione della Riforma Cartabia e ha dato il suo contributo all'attuazione.

Sebbene esistano alcuni servizi di mediazione familiare offerti dai servizi sociali, dai comuni, dai servizi sanitari, ecc. Anche in questo caso, è necessario sottolineare che, anche quando il Servizio sociale può assistere la famiglia nell'attraversamento del conflitto e "condurla" verso la mediazione familiare, il mediatore che prende in carico il caso presta il suo servizio come professionista privato. In definitiva, l'efficienza e l'accessibilità di questi centri è compromessa.

Alcuni tribunali e comuni hanno svolto un ruolo efficace nella sua promozione attraverso l'istituzione di sportelli informativi, dove le parti possono raccogliere informazioni sulle modalità e sui vantaggi della mediazione. Si tratta di spazi informativi sulla mediazione familiare affidati a mediatori volontari che illustrano agli utenti tutte le informazioni necessarie sulla mediazione familiare e indicano

agli utenti i centri pubblici e privati esistenti nell'area metropolitana e che erogano tale servizio, poi liberamente scelti dalle coppie interessate⁴³.

In questo contesto, va notato che, nell'ambito del sistema di cooperazione della Convenzione dell'Aia del 1980, alcuni Paesi hanno nominato un Punto di contatto centrale per la mediazione familiare: non è il caso dell'Italia⁴⁴.

La riforma Cartabia ha introdotto un elenco istituzionalizzato di mediatori familiari qualificati, da istituire in ogni tribunale⁴⁵ per facilitare le famiglie nella ricerca di un mediatore. Come accennato, una commissione presieduta dal Presidente del Tribunale e composta dal Procuratore della Repubblica e da un mediatore familiare decide sulle domande di iscrizione, che è aperta ai mediatori familiari iscritti da almeno cinque anni a una delle associazioni professionali di mediatori e che dimostrano di avere una formazione adeguata e competenze specifiche in materia di famiglia, protezione dei minori e violenza.

Va sottolineato che l'esistenza di tali albi non comporta l'assimilazione del mediatore al consulente del tribunale: anche se i professionisti iscritti nell'elenco sono soggetti allo stesso procedimento disciplinare applicabile al consulente tecnico d'ufficio⁴⁶, i mediatori familiari sono scelti dalle parti e non hanno l'obbligo di riferire al giudice il risultato del loro lavoro⁴⁷.

Per quanto riguarda l'effettiva implementazione degli elenchi, da diverse fonti risulta che non tutti i tribunali hanno effettivamente istituito le commissioni o adottato i regolamenti necessari⁴⁸. Un recente studio condotto dall'Autorità Garante per l'Infanzia e l'Adolescenza, con questionari sottoposti ai tribunali di primo grado, ha evidenziato che 50 tribunali hanno dichiarato l'istituzione formale del registro dei mediatori familiari⁴⁹.

⁴³ Punti informativi per la mediazione familiare esistono, ad esempio, nei tribunali di Genova, Parma, Isernia, Torino, Milano, Paola, Ancona, Varese, Ascoli Piceno, Verona, Lecco, Trani, Imola, Trani, Brescia. Alcuni punti informativi sono istituiti presso i Comuni o gli Ordini degli Avvocati locali.

⁴⁴ L'elenco dei Punti di contatto centrali per la mediazione familiare è disponibile sul sito web della Conferenza dell'Aia di diritto internazionale privato: <https://www.hcch.net/en/publications-and-studies/details4/?pid=5360&dtid=52>.

⁴⁵ Art. 12-bis ss. disp. att. c.p.c.

⁴⁶ Art. 12-ter disp. att. c.p.c.

⁴⁷ Si veda l'art. 473-bis.10 c.p.c.

⁴⁸ Si veda anche un'intervista ai presidenti di AIMeF, MEDEF e SImEF del 17 aprile 2024: <https://www.istitutohfc.it/decreto-151-mediazione-familiare-bilancio>.

⁴⁹ Autorità Garante per l'Infanzia e l'Adolescenza, *La mediazione familiare in Italia. Documento di Studio e di proposta*, cit.

Essendo quella del mediatore familiare una professione non organizzata in ordini professionali in Italia – sebbene informata da chiari requisiti e regole previste dalla legge – un ruolo importante è svolto dalle associazioni di mediatori familiari, che detengono anche la responsabilità della formazione continua dei professionisti.

Poiché, come accennato, sono molte le organizzazioni e i professionisti coinvolti nella mediazione familiare in Italia, non sempre esiste un approccio pienamente condiviso come riguarda i modelli operativi o le procedure tecniche specifiche. Questi possono differire in termini di natura delle questioni affrontate e di approccio e metodologia utilizzati nella pianificazione e gestione dell'intervento. Una panoramica dei modelli più diffusi è fornita qui⁵⁰:

- Il primo modello di mediazione familiare (sviluppato da Irving e Benjamin) è quello **incentrato sui processi relazionali**, con la premessa che il processo di mediazione in determinate situazioni può avere effetti duraturi nel tempo solo se vengono risolte le questioni emotive e relazionali.
- La **mediazione negoziale** è un modello orientato all'accordo facilitativo, che mira a raggiungere il miglior risultato possibile in termini di autodeterminazione della coppia. Il suo utilizzo non è rivolto solo alla separazione e al divorzio, ma è aperto a diverse problematiche familiari.
- Il modello di **mediazione familiare strutturata** si svolge secondo una precisa strutturazione del processo di negoziazione e utilizza una metodologia orientata al compito. L'assunto di fondo del modello è che solo un quadro ben definito protegge dall'irrazionalità delle emozioni. È un modello che mira a ristabilire la comunicazione tra le parti, lasciando ampio spazio all'autodeterminazione.
- Il **modello trasformativo** definisce la mediazione come un processo in cui una terza persona aiuta le parti a ridefinire la qualità delle loro dinamiche relazionali, trasformando il conflitto da negativo e distruttivo a positivo e costruttivo attraverso l'osservazione e la discussione dei problemi e delle possibili soluzioni. I due obiettivi chiave sono l'empowerment (rendere le parti in grado di definire i propri problemi e cercare soluzioni da sole) e il riconoscimento (rendere le parti in grado di vedere e comprendere il punto di vista dell'altro).
- La **mediazione intragiudiziale** avviene nel contesto di procedimenti di separazione, divorzio o responsabilità genitoriale, quando il tribunale suggerisce la mediazione per risolvere le controversie sui diritti di custodia e visita. I mediatori sono per lo più psicologi, psichiatri e assistenti sociali.

⁵⁰ Cfr. I. Buzzi, J. Haynes, *Introduzione alla mediazione familiare*, Milano, 2012, p. 13 ss.

- **La mediazione familiare terapeutica** si concentra sugli aspetti emotivi delle crisi nelle relazioni affettive, cercando di risolvere i nodi della digressione comunicativa e tutte le variazioni prodotte dalle possibili interazioni della coppia. La cornice teorico-metodologica di riferimento è la lettura clinica della relazione all'interno della coppia genitoriale. Il mediatore deve neutralizzare o modificare i modelli disfunzionali che costituiscono un ostacolo, per condurre i soggetti a ristrutturare le proprie competenze relazionali e comunicative. L'accordo viene solitamente raggiunto attraverso l'intervento di altri professionisti, ad esempio l'avvocato.
- Il **modello sistemico** di mediazione familiare, detto anche "mediazione centrata sulla famiglia", mira a prendere in considerazione l'intero sistema familiare, adottando una lettura complessa delle dinamiche relazionali che gravitano intorno al conflitto, favorendo la sinergia tra figure professionali che operano in ambiti diversi: psicologico, giuridico e sociale. Prende in considerazione l'intero sistema familiare e il contesto più ampio: la famiglia, più che la coppia, costituisce il perno e viene presa in considerazione anche nella sua storia intergenerazionale (nonni, figli, famiglie allargate). I bambini sono coinvolti direttamente o indirettamente. Il compito del mediatore è quello di ristabilire un minimo di armonia familiare, di creare un'atmosfera priva di conflitti, di proteggere i bambini dalle controversie degli adulti. Tra gli strumenti principali vi sono il genogramma, il *reframing* e le domande circolari.
- Nella **mediazione integrata** viene dato ampio spazio alla dimensione emotivo-affettiva e la mediazione si adatta alle esigenze della coppia: sono le parti stesse a definire il processo. L'attenzione si concentra sul futuro e sulla ridefinizione della relazione tra i partner piuttosto che sull'ottenimento di accordi sui diritti legali. Di solito vengono coinvolti diversi mediatori con background differenti. Il termine "integrato" si riferisce alla relazione tra il mediatore e il consulente legale che collaborano nella gestione del conflitto di coppia. Molto vicina al modello integrato è la **mediazione familiare interdisciplinare**, che prevede una gestione sinergica tra un avvocato e un assistente sociale: il primo si occupa di questioni tecniche finanziarie e legali, mentre il secondo della comunicazione e della gestione e riduzione dei conflitti. La differenza rispetto al modello integrato è che entrambi gli esperti sono presenti alle sessioni.
- Il **modello relazionale-simbolico** della mediazione familiare è particolarmente interessato al fondamento delle relazioni familiari al di là dei cambiamenti storici, cioè vuole riconoscere il valore del legame familiare. La mediazione familiare è intesa come un'esperienza "ritualizzata" di transizione dalla crisi della coppia. Il mediatore svolge il

ruolo di professionista equidistante che cerca di favorire il raggiungimento dell'armonia tra le parti e di un accordo in caso di separazione, ma può anche offrire la possibilità di una riconsiderazione del patto coniugale che vada oltre il suo termine.

- **Il modello eclettico** di mediazione familiare non contiene modelli riconducibili alla mediazione clinica o terapeutica: se si ritiene opportuno un supporto specialistico, si farà riferimento al lavoro di un terapeuta accanto al processo di mediazione, che potrà proseguire in parallelo o essere temporaneamente sospeso. Il mediatore aiuterà le parti a sviluppare la comprensione, lascerà che le parti siano proprietarie del conflitto, permetterà la necessaria tensione, ma solo se è sopportabile per le parti e andrà al di sotto del problema apparente.

Tra le varie differenze che caratterizzano i diversi modelli, tutti gli approcci riconoscono la necessità di una fase di pre-mediazione, finalizzata a creare il setting per il lavoro sostanziale. Mentre alcuni modelli aderiscono alla co-mediazione, con due mediatori presenti nella stanza⁵¹, altri modelli prevedono un solo mediatore. Esistono alcuni approcci sistemici in cui uno dei mediatori osserva gli incontri attraverso uno specchio unidirezionale (con il consenso informato delle parti) e viene consultato dal mediatore che effettivamente conduce il processo.

Poiché **la mediazione familiare internazionale** richiede una competenza specifica e deve essere strutturata in base alle peculiarità delle situazioni transfrontaliere, le diverse metodologie devono essere adattate a tali esigenze. La mediazione nei casi di sottrazione internazionale di minori deve essere considerata nelle sue ulteriori specificità, almeno per l'alto grado di tensione e conflitto che può caratterizzare la situazione e per i vincoli temporali che caratterizzano le procedure.

Le controversie transfrontaliere possono ovviamente essere caratterizzate dalla distanza geografica, che può richiedere l'uso di videoconferenze invece di incontri di persona e può anche richiedere la condensazione della mediazione in un breve lasso di tempo, come uno o più fine settimana. Secondo alcuni approcci, la mediazione potrebbe anche essere "indiretta", nel senso che le parti non partecipano insieme alla stessa sessione (in presenza o online), ma vengono organizzate sessioni separate o le parti si trovano in stanze diverse. Questa tecnica - particolarmente utile in scenari di alta tensione - è chiamata anche

⁵¹ Il valore aggiunto è dato dal fatto che i due mediatori hanno una formazione diversa, giuridica e psicologica.

shuttle mediation, poiché il mediatore può tenere incontri separati con i genitori, trasmettendo messaggi, proposte e controproposte⁵².

Come detto, la mancanza di una prassi consolidata in Italia non ha permesso di costruire una metodologia nazionale coerente. Mentre in alcuni Stati membri dell'UE (come Germania, Paesi Bassi e Regno Unito) sono in vigore modelli di buone pratiche⁵³, in Italia non esiste uno strumento analogo. Allo stesso tempo, è stata avviata un'iniziativa volta a diffondere e adattare tali metodologie, per esplorare se e come la mediazione specializzata nei casi di sottrazione internazionale di minori possa essere introdotta nel corso dei procedimenti di rimpatrio⁵⁴.

Anche alla luce delle recenti novità nella regolamentazione della professione di mediatore familiare, i principi e le regole di base della mediazione familiare si applicano *mutatis mutandis* alla mediazione familiare transfrontaliera. Ciò vale sia per la natura volontaria del processo di mediazione (stabilendo anche che le parti devono essere consapevoli che il processo di mediazione può essere interrotto in qualsiasi momento), sia per la circostanza secondo cui il mediatore è tenuto alla riservatezza e non può condividere nulla del contenuto degli incontri, che non possono essere condivisi nemmeno nell'ambito del procedimento giudiziario, a meno che entrambe le parti non siano d'accordo.

⁵² Nella mediazione familiare sistemica (tradizionale), una tecnica simile è quella delle "terapie fluttuanti" che viene utilizzata anche nella terapia familiare (G. Gaspari, L. Mastropaolo, *Le terapie individuali, le terapie "fluttuanti". Riflessioni di due psicoterapeute sistemiche sulla loro pratica clinica*, in *Connessioni*, 2008, p. 107 ss.).

⁵³ Si fa riferimento al cosiddetto "*Mediators in Court Model*", in cui la mediazione è inserita all'interno del procedimento giudiziario. Le parti sono invitate a prendere in considerazione la mediazione dal giudice entro la prima udienza, che di solito prevede la partecipazione dei mediatori (in linea con la prassi della mediazione familiare internazionale che deve essere condotta da due mediatori). La procedura di mediazione è solitamente inserita in un arco di tempo ristretto (ad esempio dieci giorni), durante il quale le parti possono cercare di raggiungere un accordo. I risultati della mediazione vengono portati davanti al giudice nella seconda udienza, durante la quale il giudice può esaminare l'accordo (se presente), proponendo eventualmente delle modifiche, soprattutto se richieste dall'interesse del minore. Soprattutto, il giudice può includere l'accordo in una decisione giudiziaria. Si veda la risoluzione del Parlamento europeo del 5 aprile 2022 sulla tutela dei diritti del minore nei procedimenti civili, amministrativi e di diritto di famiglia (2021/2060(INI)), P9_TA(2022)0104, pag. 10, disponibile su https://www.europarl.europa.eu/doceo/document/TA-9-2022-0104_EN.pdf.

⁵⁴ Si fa riferimento al progetto co-finanziato dall'UE "AMICABLE", con l'obiettivo di migliorare la situazione dei minori nelle controversie transfrontaliere in materia di responsabilità genitoriale e nei casi di sottrazione di minori all'interno dell'UE, fornendo assistenza per il riconoscimento transfrontaliero e l'esecutività degli accordi familiari mediati nell'UE e promuovendo un modello collaudato per incorporare la mediazione nei procedimenti internazionali di sottrazione di minori. Il Modello di buone prassi è disponibile all'indirizzo <https://www.amicable-eu.org/amicable-eng/mediation.html>.

Come nella mediazione familiare puramente interna, il mediatore deve essere indipendente, imparziale e neutrale. Di conseguenza, la mediazione familiare transfrontaliera mira a gestire il conflitto e a ricostruire la relazione tra le parti alla luce dell'interesse superiore dei bambini coinvolti: il mediatore non suggerisce una soluzione alle parti, ma facilita la comunicazione tra di esse.

In Italia non esistono regole specifiche per quanto riguarda l'informazione e la partecipazione dei minori al processo di mediazione. Per quanto riguarda la pratica, i vari modelli di mediazione differiscono. La stragrande maggioranza esclude la partecipazione diretta dei minori e quindi non è previsto alcun contatto tra loro e il mediatore. Il motivo è che i bambini sono visti come costantemente "presenti" nella stanza di mediazione: il mediatore contribuisce attivamente a ricreare la presenza virtuale del figlio⁵⁵.

Alcuni modelli includono effettivamente i figli nella mediazione, in diverse fasi. Ci sono mediatori che aderiscono al modello sistemico e che invitano il bambino al primo o al secondo incontro, insieme ai genitori. Le ragioni che sostengono l'opportunità di questa partecipazione sono molteplici⁵⁶: i) permettere ai genitori di riconoscere la risonanza del conflitto sui figli, con possibili effetti di attenuazione della tensione tra loro; ii) permettere al mediatore di acquisire una migliore conoscenza del contesto familiare; iii) permettere ai figli di ascoltare la storia dei genitori, riconoscendo un "prima" e un "dopo" la crisi e acquisendo un senso di evoluzione della famiglia; iv) soprattutto, dare ai figli alcune informazioni sulla mediazione e sollevare i figli dal ruolo di terzi nel conflitto tra i genitori. Ad esempio - per quanto riguarda quest'ultimo aspetto - il mediatore può dire al bambino che i genitori hanno deciso di affrontare le controversie tra loro intraprendendo un processo di mediazione e che, da questo momento in poi, il bambino non ha alcuna responsabilità nella gestione del conflitto.

⁵⁵ Questo può essere supportato dall'uso di tecniche come la presenza di una sedia vuota nella stanza.

⁵⁶ L. Mastropaolo, *Crisi e conflitto: mediazione familiare, "intervento per il cambiamento" e terapia. Percorsi differenti della Scuola Genovese*, in P. Chianura et al, *Manuale clinico di terapia familiare*, vol. II, Milano, 2010, p. 105 ss.

3.4. Accesso alle informazioni sulla mediazione familiare internazionale: un focus sul ruolo dei giudici e dell'Autorità centrale nei casi di sottrazione internazionale di minori

Le modalità con cui i genitori possono riconoscere la possibilità di sottoporsi alla mediazione e la disponibilità di servizi di mediazione familiare internazionale sul territorio possono variare coerentemente, a seconda che la questione in esame sia portata o meno all'attenzione del giudice.

In tal caso, l'art. 25 del Regolamento Bruxelles II-ter ha introdotto uno specifico obbligo per il giudice, che deve informare le parti della possibilità di sottoporsi alla mediazione⁵⁷. Da una lettura congiunta della norma, insieme al considerando n. 43, si evince che tale obbligo grava su qualsiasi giudice di uno Stato membro vincolato dal regolamento e adito per il ritorno del minore nei procedimenti di sottrazione internazionale di minori, ma anche in ogni caso di responsabilità genitoriale (sia essa o meno nell'ambito di divorzio, separazione o annullamento del matrimonio)⁵⁸. Pertanto, per quanto riguarda l'Italia, tale obbligo non riguarda solo i tribunali per i minorenni, ma anche i tribunali ordinari.

L'obbligo di informare le parti può essere assolto direttamente dal giudice, oppure attraverso l'assistenza delle Autorità centrali: in Italia, si tratta del Dipartimento per la Giustizia Minorile e di Comunità del Ministero della Giustizia (Ufficio II).

L'Autorità Centrale ha recentemente pubblicato sul proprio sito ufficiale le *Linee Guida per la trasmissione delle richieste ai sensi degli articoli 25, 27, 29, 80 e 82 del Regolamento Bruxelles II-ter*⁵⁹. Per quanto riguarda la mediazione familiare internazionale, le Linee guida spiegano che l'art. 25 è applicabile in qualsiasi fase - introduttiva, istruttoria, pre-processuale, esecutiva - dei procedimenti di rimpatrio dei minori portati avanti dai Tribunali per i minorenni - nei casi di sottrazione internazionale intraeuropea - e, più in generale, nel corso di qualsiasi altro procedimento relativo a questioni di responsabilità genitoriale caratterizzato da uno o più elementi transfrontalieri.

⁵⁷ T. KRUGER, *Article 25*, cit., p. 261: "Il regolamento 2019/1111 non si spinge fino a concedere ai giudici il potere di *ordinare alle parti* in causa di partecipare alla mediazione o anche a una singola sessione informativa sulla mediazione (anche se ciò potrebbe esistere nel diritto nazionale). Il regolamento si limita a richiedere ai giudici (con l'uso della parola 'devono') di *invitare* le parti a prendere in considerazione l'ADR. Ciò sembra significare che i giudici dovrebbero sempre avere in mente la possibilità di ricorrere all'ADR" (traduzione degli Autori).

⁵⁸ E. DI NAPOLI, *La mediazione familiare nel contesto transfrontaliero*, cit.

⁵⁹ https://www.giustizia.it/giustizia/page/it/richieste_alle_autorita_centrali.

L'Autorità centrale può, in particolare, svolgere un ruolo di promozione della mediazione familiare “preventiva”, prima dell'avvio di un procedimento giudiziario e nonostante la possibilità che una domanda di ritorno del minore possa essere presentata alle autorità competenti⁶⁰. L'Autorità centrale può fornire indicazioni sugli obiettivi e le modalità della mediazione familiare internazionale, nonché sugli effetti legali dell'accordo e sulla sua esecuzione. Tuttavia, le Linee guida prevedono che “i giudici che ravvisano i presupposti per la mediazione possono rivolgersi all'Autorità centrale per ricevere informazioni da trasmettere alle parti e per richiedere la disponibilità di un mediatore familiare transfrontaliero che possa facilitare il raggiungimento di un accordo, anche parziale, sulle questioni controverse”, a condizione che la richiesta possa essere integrata da “ogni elemento utile per individuare il mediatore familiare transfrontaliero più adatto a trattare il caso”.

Il Regolamento Bruxelles II-ter non specifica se l'Autorità Centrale abbia anche il compito di trasmettere alle parti il contatto di un mediatore familiare transfrontaliero. Le citate Linee Guida precisano che “La peculiare figura del mediatore familiare transfrontaliero, portatore di una specifica professionalità, non è ancora contemplata dal nostro ordinamento giuridico né è richiamata dal D.M. n. 151/2023, recante il regolamento sulla disciplina professionale dei mediatori familiari”. Non esistendo in Italia un registro ufficiale dei mediatori familiari transfrontalieri certificati (essendo questa specifica qualifica non disciplinata dall'attuale quadro normativo), non esistono attualmente registri o elenchi ufficiali di mediatori, previsti dalla legge, da mettere a disposizione delle parti. Allo stesso tempo, nelle Linee Guida si fa riferimento a una prima, recente iniziativa sotto forma di un corso di formazione avanzata sulla mediazione familiare transfrontaliera organizzato sotto gli auspici della stessa Autorità Centrale. Attualmente è in corso la firma di un protocollo tra l'Autorità Centrale, la *Federazione Italiana delle Associazioni di Mediatori Familiari* (FIAMEF), l'*International Child Abduction Lawyers Italy* (ICALI) e l'associazione REUNITE (*International Child Abduction Centre*).

Al momento non esiste un quadro normativo definito, a livello internazionale/europeo o nazionale, sugli effetti transfrontalieri degli accordi conclusi all'esito di un percorso di mediazione familiare. Il nuovo procedimento

⁶⁰ Ciò non toglie che il tribunale per i minorenni possa invitare le parti a prendere in considerazione una mediazione anche dopo l'emissione di un provvedimento di rimpatrio, affinché i genitori risolvano per il futuro il conflitto relativo alla residenza del minore e al connesso esercizio della responsabilità genitoriale: si veda, ad esempio, Corte di Cassazione, Sez. I, sentenza del 7 maggio 2025, n. 12035, che riporta il decreto del Tribunale per i minorenni di Venezia del 3/6 maggio 2024, n. 1325.

in materia di persone, minori e famiglia, disciplinato dal codice civile italiano a seguito delle modifiche introdotte dalla Riforma Cartabia, prevede che il giudice riconosca gli accordi conclusi dai genitori, se il loro contenuto non è contrario all'interesse dei figli, in particolare se raggiunti all'esito di un procedimento di mediazione familiare⁶¹. Una disposizione simile non si trova nella disciplina del procedimento per il ritorno del minore a seguito di sottrazione internazionale, contenuta nell'art. 7 della legge 64/1994.

Tuttavia – come ha riportato un magistrato intervistato – nella pratica si tiene conto dell'accordo concluso dalle parti anche nei casi di sottrazione internazionale di minori, prendendo atto di questa circostanza nel decreto che dichiara il non luogo a procedere. Pertanto, la procedura si chiude quando i genitori hanno trovato una soluzione comune e, possibilmente, hanno fornito sufficienti garanzie sull'effettivo rispetto dell'accordo.

Se l'accordo prevede il ritorno del minore (e il minore fa effettivamente ritorno nella propria residenza abituale), spetterà al giudice competente definire qualsiasi aspetto relativo agli aspetti materiali della responsabilità genitoriale.

Se l'accordo prevede il non ritorno del minore, potrebbe essere possibile per il tribunale attivare il monitoraggio dei servizi sociali sul benessere a lungo termine dello stesso. In questo caso, esiste comunque una differenza sostanziale tra i casi "intra-UE" e "extra-UE".

Se la situazione rientra nell'ambito di applicazione del regolamento n. 2019/1111, l'autorità giudiziaria della precedente residenza abituale del minore può attivare il cosiddetto *trumping order*, ribaltando la decisione dei giudici italiani nell'ambito di una pronuncia di merito sulla responsabilità genitoriale⁶². Sarebbe quindi necessario che l'accordo di mediazione raggiunga il tribunale straniero competente, affinché questo riconosca l'esistenza dell'accordo.

Al contrario, se la situazione non è soggetta al diritto dell'UE, si applica esclusivamente il regime della Convenzione dell'Aia del 1980⁶³. Il mancato ritorno del minore determina uno spostamento della sua residenza abituale.

⁶¹ Art. 337-ter c.c.

⁶² Art. 29 Regolamento Bruxelles II-ter.

⁶³ Come è noto, la Convenzione dell'Aia del 1996 sulla competenza, la legge applicabile, il riconoscimento, l'esecuzione e la cooperazione in materia di responsabilità genitoriale e di misure di protezione dei minori (eventualmente applicabile tra i Paesi che l'hanno ratificata), non prevede un meccanismo simile al *trumping order*. Inoltre, la terza situazione da considerare è quella in cui la Convenzione dell'Aia del 1980 non si applica affatto ed è necessario ricorrere ai canali diplomatici.

Tuttavia, il suddetto schema non sempre rispecchia la realtà della mediazione familiare: nella maggior parte dei casi, anche quando avviene nel particolare e difficile contesto di una sottrazione di minore, la mediazione rappresenta l'opportunità per i genitori di affrontare la situazione familiare complessiva e tutti gli aspetti che riguardano la loro vita presente e futura (senza limitarsi alla questione del ritorno/non ritorno)⁶⁴. I vari contenuti di questi **“accordi-pacchetto”** possono essere soggetti all'una o all'altra legge applicabile e i loro effetti possono dipendere da norme diverse. Inoltre, tali accordi potrebbero includere la regolamentazione dei diritti e dei doveri in materia di responsabilità genitoriale, che normalmente non sono a disposizione delle parti e potrebbero dover essere sottoposti a un controllo/omologazione giudiziaria. D'altra parte, gli accordi riguardanti gli aspetti patrimoniali (come le obbligazioni alimentari) dovrebbero essere esecutivi. Nell'ipotesi di controversie transfrontaliere, vi è l'ulteriore questione del riconoscimento e dell'esecuzione all'estero.

In materia di responsabilità genitoriale, l'Italia è vincolata sia dal Regolamento Bruxelles II-ter – per quanto riguarda i rapporti con gli altri Stati membri dell'UE (ad eccezione della Danimarca) – sia dalla Convenzione dell'Aia del 1996. Le questioni che non rientrano nell'ambito di applicazione di tali strumenti sono soggette alle norme di diritto internazionale privato interno, contenute nella legge n. 218/1995.

Il regolamento Bruxelles II-ter non consente la circolazione di accordi “privati”, diversi dagli atti pubblici e dalle decisioni (considerando 44). Affinché l'accordo sia riconoscibile ed esecutivo in un altro Stato membro, deve essere registrato da un'autorità pubblica. Gli Stati membri comunicano alla Commissione europea l'elenco delle autorità pubbliche competenti per la registrazione degli accordi privati (art. 103). L'Italia ha fornito una comunicazione ampia, affermando che “le autorità pubbliche competenti a registrare un accordo ai sensi dell'art. 2, paragrafo 2, n. 3) del Regolamento sono l'ufficiale dello stato civile o l'autorità giudiziaria (Tribunale, Corte d'appello e Corte di cassazione)”⁶⁵. Tuttavia, in base all'ambigua distinzione tra decisioni e accordi adottata dal regolamento, ogni volta che l'autorità pubblica esercita un controllo di merito, l'accordo registrato

⁶⁴ Per un'analisi approfondita della questione, si veda C. Honorati, *La circolazione dell'accordo di mediazione familiare negli Stati UE*, in E. di Napoli, C. Honorati, *Guida alla mediazione familiare internazionale*, cit., p. 83 ss.

⁶⁵ Le informazioni sono disponibili sul portale europeo della giustizia elettronica, all'indirizzo https://e-justice.europa.eu/topics/taking-legal-action/european-judicial-atlas-civil-matters/brussels-iib-regulation-matrimonial-matters-and-matters-parental-responsibility-recast/it_en.

sarà considerato una decisione⁶⁶. Secondo la legge italiana, il controllo da parte dell'autorità giudiziaria è necessario per gli accordi relativi alla responsabilità genitoriale, al fine di garantire che sia preservato l'interesse dei minori. Pertanto, qualsiasi accordo di questo tipo sarà necessariamente incorporato in una decisione giudiziaria, riconosciuta ed eseguita in tutti gli Stati membri di (ad eccezione della Danimarca) secondo il regime del regolamento.

Nei casi di sottrazione di minori, è particolarmente consigliabile che le parti incorporassero l'accordo in una decisione giudiziaria. In questo caso, la scelta è tra i tribunali della residenza abituale del minore prima della sottrazione, i tribunali dello Stato di rifugio e/o i tribunali di uno Stato terzo (ad esempio, il Paese in cui i genitori concordano di trasferire la nuova residenza abituale del minore). Dal momento che, come detto, gli accordi di pacchetto possono definire diverse questioni - rimpatrio, responsabilità genitoriale, mantenimento, ecc... - affinché la decisione circoli secondo il regime internazionale o europeo pertinente, in linea di principio è necessario che il giudice sia competente per tutte le questioni incluse nell'accordo.

4. Servizi di pre-mediazione in Italia

In Italia non esiste una legislazione specifica dedicata alla pre-mediazione, la cui definizione non è coerente nemmeno nella prassi generale. Sebbene la maggior parte dei modelli di mediazione familiare⁶⁷ riconosca la necessità di una fase di pre-mediazione, non esiste una fase di questo tipo formalmente riconosciuta o legalmente codificata all'interno del processo di mediazione familiare italiano.

La pre-mediazione deve essere definita come una fase preparatoria in cui le parti vengono informate e preparate alla mediazione. Essa precede l'avvio della mediazione e può concorrere alla valutazione della mediabilità del caso. È anche la fase in cui si individua il mediatore adatto al caso specifico.

In pratica, se esistono servizi a livello locale - come gli sportelli informativi presso i tribunali o i comuni - le parti possono acquisire informazioni sulla

⁶⁶ Per un approfondimento si vedano S. Bernasconi, C. Honorati, *L'efficacia transfrontaliera degli accordi stragiudiziali in materia familiare tra i regolamenti Bruxelles II-bis e Bruxelles II-ter, in Freedom, Security and Justice - European Legal Studies*, 2021, p. 1 ss.

⁶⁷ Vedi sopra, par. 3.3 "Gli attori chiave e i diversi approcci alla luce della persistente mancanza di specializzazione".

mediazione familiare e in questa fase si possono compiere alcuni primi passi preliminari per portarle alla mediazione.

Quando il giudice invita le parti a considerare la possibilità di sottoporsi alla mediazione⁶⁸, è possibile che il giudice effettui una prima valutazione della situazione, oltre a fornire informazioni alle parti e ad assumere un ruolo proattivo nel promuovere la mediazione.

In generale, questa fase preliminare di informazione e preparazione differisce dalla fase introduttiva della mediazione, in cui la mediazione effettua una valutazione completa sulla mediabilità del caso.

È in corso una proposta di introduzione di una fase di pre-mediazione obbligatoria nei procedimenti familiari, nell'ambito di una possibile riforma dell'art. 473-bis.10 c.p.c.⁶⁹. Se approvata, la nuova disposizione prevederebbe che "In tutti i casi di disaccordo nella fase di elaborazione di un affidamento condiviso le parti hanno l'obbligo, prima di adire il giudice e salvi i casi di urgenza o di grave e imminente pregiudizio per i minori, di rivolgersi a un organismo di mediazione familiare, pubblico o privato, o a un mediatore familiare libero professionista per acquisire informazioni sull'opportunità di un eventuale percorso di mediazione familiare. Il primo incontro è in ogni caso gratuito e può svolgersi anche individualmente a richiesta anche di una sola delle parti. Se una delle parti non ottempera, il procedimento si avvia ugualmente per l'iniziativa dell'altra".

Ciò rappresenterebbe un cambiamento significativo rispetto al quadro attuale, che prevede semplicemente che il giudice informi le parti sulla possibilità di ricorrere alla mediazione. Il disegno di legge introduce invece un obbligo vincolante per le parti stesse, che funge da prerequisito procedurale per l'avvio di un procedimento giudiziario.

Tale sviluppo merita un'attenta considerazione. Un principio fondamentale della mediazione è la natura volontaria della partecipazione, che è alla base della sua efficacia e legittimità. Sebbene la proposta di legge imponga un obbligo solo per quanto riguarda la fase preliminare di mediazione - e non il processo di mediazione nella sua interezza - rimane essenziale garantire che la libertà delle parti di scegliere se procedere con la mediazione vera e propria sia pienamente rispettata e preservata.

⁶⁸ Art. 25 Regolamento n. 2019/1111 e - anche se non nei procedimenti di rimpatrio a seguito di sottrazione internazionale di minori - art. 473-bis.10 c.p.c.

⁶⁹ Art. 13 del progetto di legge n. 832 del 1° agosto 2023.



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Introduction

For the past twenty years, and even more so since the early 2020s, mediation has been strongly encouraged in France by the Ministry of Justice. This proactive policy is reflected in an apparently solid legal framework, including in family matters. Family mediation, as defined by the former *Conseil consultatif de la médiation familiale*¹ in 2002, refers to “a process for building or rebuilding the family bond, based on the autonomy and responsibility of the people involved in situations of break-up or separation, in which an impartial, independent, qualified third party with no decision-making power, the family mediator, helps them to communicate and manage their conflict in the family sphere, in all its diversity and evolution, through the organisation of confidential meeting ”².

While this framework may have appeared sufficiently robust for France to be cited by the European Commission for its actions in the field of cross-border family mediation³, we must remain lucid. The results are far from satisfactory.

First of all, while French law regulates mediation, including family mediation, in some detail, there are no specific provisions for cross-border family mediation. The question of adapting the legal system to the specificities of cross-border family mediation must therefore be raised. Secondly, practice seems to be much less keen on mediation than the country's political authorities are: in family matters at least, feedback from the judiciary is reserved, if not hostile. Finally, the effectiveness of the legal provisions and public policies deployed to encourage mediation is virtually impossible to assess. Indeed, this is an important observation to make at the outset: the judicial players met by the authors of this Report, in particular institutional players and magistrates, stressed the cruel lack of statistical tools to accurately assess the use of mediation in France, including in a judicial context, and the results of such use.

¹ Created by *Arrêté du 8 octobre 2001 portant création du Conseil national consultatif de la médiation familiale*.

² M. Savourey, « La médiation familiale », *Journal du droit des jeunes*, 2007/8, n° 268, p. 15.

³ Report of the Commission on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, 15 April 2014, COM (2014) 255 final. See also : F. Monéger, “Article 25. Modes alternatifs de règlement des différends », in S. Corneloup, E. Gallant, V. Egéa, F. Jault-Seseke (dir.), *Divorce, responsabilité parentale, enlèvement international. Commentaire du règlement 2019/111 du 25 juin 2019 (Bruxelles II ter)*, Bruylant, 2023, p. 343, at p. 345.

Since 2025, the “Winci TJ” tool has been recording orders to meet with a mediator. But there are no statistics on the appointment of mediators, on any mediation agreements reached and approved, and even less on their enforcement. Statistics do exist on the discontinuation of proceedings, but they do not specify the cause of discontinuance, so they cannot be used to determine whether discontinuance may be the result of an out-of-court settlement, in mediation. The inadequacy, or even obsolescence, of the tools used by the courts is regularly pointed out.

Almost by contrast, the number of international parental abductions is fairly well documented: in its 2024 [Report on the disappearance of minors in France](#), the “116000 Enfants disparus” service notes that the number of reported abductions remains stable, with 665 reports made, after a marked increase between 2022 and 2023 (+21.5%). The majority of these abductions concern very young children⁴, in 50 countries on five continents. The same report notes that only 19% of the cases handled by the service are resolved by the courts, and 12% by amicable agreement. The very respectable results of amicable settlements are noted, while very few parents resort to mediation processes.

This report therefore sets out to present the legal framework for international family mediation in France (I), and to compare it with actual practice, which shows that it has not been sufficiently adopted in practice (II).

I- International family mediation in France: The legal framework

As a result of the proactive policy pursued by the French Ministry of Justice over the last few years, France now has a solid legal framework for mediation, including family mediation (1). Nevertheless, there are no specific provisions for international family mediation: the specific features of international family mediation are not taken into account, and the mechanisms that can be called upon are not really articulated with the procedural rules set out for international abductions (2).

1. An institutional and regulatory context favorable to family mediation

In France, the Ministry of Justice has pushed legislative and regulatory initiatives to convince parties to use family mediation, and to encourage judges to “order”

⁴ About 49% of children abducted by a parent in 2024 were under 5 years old.

mediation. Testifying to this interest, a national body, le **Conseil national de la Médiation**, placed alongside the Minister of Justice, was created in 2021 by the *loi n° 2021-1729 du 22 décembre 2021 pour la confiance dans l'institution judiciaire* ([art. 45](#)). This administrative body, tasked with issuing opinions, proposals and recommendations in the field of mediation, delivered its first progress report for the period June 2023 - November 2024 in February 2025⁵. Further changes to the legal framework are therefore likely. A circular and a decree are said to be in preparation to extend the “double summons” system (*système de la double convocation*), to which we'll return later, and make it more effective. Family mediation is a well-regulated practice (1), complemented by other amicable arrangements that have met with some success (2).

1.1. Family Mediation, a well-regulated practice

Mediation is defined in French law as “*any structured process, whatever its name, by which two or more parties attempt to reach an agreement for the amicable resolution of their disputes, with the help of a third party, the mediator, chosen by them or designated, with their agreement, by the judge hearing the dispute*”⁶ ([article 21, loi n° 95-125 du 8 février 1995](#)). Family mediation, on the other hand, has no legal definition, although the definition proposed by the former Conseil national consultatif de la médiation familiale (National Advisory Council on Family Mediation), referred to in the introduction, is regularly put forward in public institutional communications.

Mediation can be judicial or extrajudicial (also known as conventional mediation). Mediation is said to be judicial whenever it takes place in the context of legal proceedings that have already been initiated, and at any stage of the proceedings. In both cases, it is crucial that the parties, and their lawyers if they are accompanied by counsel, are familiar with the practice of mediation.

Extrajudicial or conventional family mediation is governed by [articles 1530](#) et seq. of the *Code de procédure civile* (hereinafter “CPC”), which are not provisions specific to family matters, but are nonetheless applicable to them.

Judicial family mediation, on the other hand, is the subject of specific provisions in both the *Code civil* (hereinafter “C. Civ.”) and the *Code de procédure civile*

⁵ <https://www.justice.gouv.fr/documentation/ressources/rapport-detape-du-conseil-national-mediation>

⁶ Official French version : “*tout processus structuré, quelle qu'en soit la dénomination, par lequel deux ou plusieurs parties tentent de parvenir à un accord en vue de la résolution amiable de leurs différends, avec l'aide d'un tiers, le médiateur, choisi par elles ou désigné, avec leur accord, par le juge saisi du litige* ».

("CPC"). Recourse to judicial mediation is expressly provided for in all family matters (a), while the rules governing such mediation are carefully defined (b).

a) Recourse to judicial family mediation

Generally speaking, [article 1071 CPC](#) (paragraphs 1 and 2) states that, in family proceedings, *"The family judge's mission is to attempt to reconcile the parties. When a dispute is referred to him, he may propose a mediation measure and, after obtaining the agreement of the parties, appoint a family mediator to carry it out"*⁷.

More specifically, mediation may be proposed by the family judge in *divorce proceedings*, as a provisional measure (C. civ. Art. [Art. 255](#), since loi n° 2004-439 du 26 mai 2004).

It is also provided for in matters concerning the *exercise of parental authority* (C. civ., [art. 373-2-10](#), as of loi n° 2002-305). In this area, Law n° 2019-222 of March 23, 2019 introduced post-sentence mediation: "the judge may propose a mediation measure [...] including in the final decision on the terms of exercise of parental authority"⁸ (C. civ., art. 373-2-10, para. 2). This type of mediation should be encouraged, as the judge's role is not to go into the details of the family's day-to-day life. It would be particularly useful, as we shall come back to, in cases where both parents do not live in the same country.

Since Law no. 2022-140 of February 7, 2022, mediation can also be proposed by the children's judge as part of an *educational assistance procedure* (C. civ. [Art. 375-4-1](#)) (on which see below).

In order to implement Article 48 of the Istanbul Convention, these various texts exclude any recourse to judicial mediation when violence against the other parent or the child is alleged by one of the parents, or in cases of manifest control within the couple. The addition of the expression "manifest control" (« *emprise manifeste* ») by Law no. 2020-936 of July 30, 2020 aimed at protecting victims of domestic violence is the subject of debate⁹. The legislator did not define the notion, in order to leave the judge greater freedom of appreciation, but this term,

⁷ Original French version : « Le juge aux affaires familiales a pour mission de tenter de concilier les parties. Saisi d'un litige, il peut proposer une mesure de médiation et, après avoir recueilli l'accord des parties, désigner un médiateur familial pour y procéder ».

⁸ Original French version : « « le juge peut proposer une mesure de médiation [...] y compris dans la décision statuant définitivement sur les modalités d'exercice de l'autorité parentale ».

⁹ See : A. DARSONVILLE, Comment décrire un processus d'assujettissement? *Libération*, fév. 2020. https://www.liberation.fr/debats/2020/02/04/comment-decrire-un-processus-d-assujettissement_1777182

which comes from the vocabulary of psychology, is difficult to define by the judge, who tends to prefer it to that of *coercive control* (in French : “contrôle coercitif”) ¹⁰.

For a number of years, a mechanism of mandatory mediation attempt prior to referral to the judge (en French, “**tentative de médiation préalable obligatoire**” also known by the acronym “TMFPO”) was experimented in certain pilot jurisdictions (Loi n° 2016-1547 du 18 nov. 2016 de modernisation de la justice du XXI^e siècle); it excluded from its scope, like the provisions mentioned above, situations of violence “committed” against the other parent or the children. It was stipulated that, subject to inadmissibility of the claim, which the judge could raise ex officio, the parent(s) had to try to resolve their dispute through family mediation before bringing the case before the judge. The results of this experiment were mixed. One report concludes that TMFPO produces “a paradoxical diversion from the courts: it increases the time taken to settle disputes for most litigants, without necessarily helping them to reach agreement or increase their sense of justice” ¹¹. In fact, few TMFPOs actually led to mediation. The experiment was terminated on December 31, 2024.

b) Rules governing judicial family mediation

With the exception of special provisions for child protection (ii), the organisation of judicial family mediation is governed by articles 131-1 to 131-15 of the CPC, which constitute a kind of common law regime (i).

i) Common law regime for judicial family mediation

Articles 131-1 et seq. of the CPC, which were largely amended by decree no. 2022-245 of Feb. 25, 2022 (decree issued in application of the law of December 22, 2021 “pour la confiance dans l’institution judiciaire”), are designed to promote the use of judicial mediation and secure mediation agreements. It is specified that the mediator appointed by the judge has the task of hearing the

¹⁰ Court of Appeal, Poitiers, ch. corr., 31 Jan. 2024, 5 decision ; Y. Mayaud, « « Contrôle coerciti » et expérimentation d’une « chambre des violences intrafamiliales » à la cour d’appel de Poitiers », *Revue de science criminelle et de droit pénal comparé*, 2024, vol. 4, p. 819-820 ; O. Mahuzier, « Regard pratique sur la définition du contrôle coercitif en droit pénal », *JCP G*, n° 13, p. 593-599 ; See also the law proposal « Proposition de loi n° 669 du 3 décembre 2024 visant à renforcer la lutte contre les violences faites aux femmes et aux enfants » (art. 3).

¹¹ In French : la TMFPO produit « une déjudiciarisation paradoxale : elle augmente les délais de règlement des litiges pour la plupart des justiciables, sans les avoir nécessairement aidés à se mettre d’accord ou à augmenter leur sentiment de justice ». in V. Boussard, [*L’évaluation de la tentative de médiation familiale préalable obligatoire \(TMFPO\). Quand médier n’est pas remédier*](#), Research Report, IERDJ, 2020.

parties and comparing their points of view to enable them to find a solution to the conflict between them ([CPC, art. 131-1](#)).

In France, although article 131-1 CPC seems to provide for the possibility of the judge “ordering” mediation, **mediation is never compulsory**. In any event, the parties' agreement is essential¹². Neither the judge nor the lawyer can force them to resort to mediation.

On the other hand, **information on mediation can be imposed**: the judge can order the parties to meet with a mediator appointed by him or her, who will provide information on mediation¹³. This **injunction to meet with a mediator**, which is a measure of judicial administration, was enshrined in law no. 2019-222 of March 23, 2019 (CPC, art. 127-1). In practice, the use of this measure depends on each judge's interest in mediation. Practice varies from one judge to another, from one tribunal to another, from one court to another. Moreover, it would appear that some parties are reluctant to submit to mediation. This is why a decree amending the CPC has been announced, the purpose of which should be to subject to sanction (civil fine) the party failing to comply with the injunction to appear before a mediator, unless there is a legitimate reason.

Referral of the parties to a mediator with their agreement, within the meaning of article 131-1 CPC, as well as an injunction to meet with a mediator for information purposes, can take place **at any time**, before or during the hearing. Mediation may also be ordered during the course of proceedings by the interim relief judge (CPC, art. 131-1), at any stage of the proceedings and even before the Court of Cassation. It is specified that mediation concerns all or part of the dispute (CPC, art. 131-2 al. 1) and that “in no case does it relieve the judge, who may at any time take any other measures he deems necessary” (CPC, art. 131-2 al. 2). Its initial duration may not exceed three months from the date on which the mediator receives the advance on his or her fees, with a possible renewal at the mediator's request (CPC, art. 131-3). The CPC also specifies who may be a mediator (art. 131-4 et seq.).

The decision ordering mediation is a simple **measure of judicial administration** (CPC, art. 131-15). It must contain a number of compulsory details (agreement of the parties, duration of the mediation, financial provision for the mediation,

¹² Art. 131-1, CPC : « le juge saisi d'un litige peut, après avoir recueilli l'accord des parties, ordonner une médiation ».

¹³ Art. 127-1, al. 1 CPC : « A défaut d'avoir recueilli l'accord des parties prévu à l'article 131-1, le juge peut leur enjoindre de rencontrer, dans un délai qu'il détermine, un médiateur chargé de les informer de l'objet et du déroulement d'une mesure de médiation. Cette décision est une mesure d'administration judiciaire ».

etc.). If the advance is not paid in full within the prescribed period, the mediation becomes null and void and the proceedings continue.

Mediation is eligible for **legal aid**. The **cost of mediation** is a recurring issue. The work of approved mediators is partly financed by the Caisses d'allocations familiales (family allowance funds, or "CAF") according to a scale that was revised in 2023¹⁴. The fee for the first mediation meeting depends on income, and in any case does not exceed 131 euros. Private mediators offer variable rates. However, the question of whether **legal protection insurance** can cover mediation is still open: discussions are underway in this regard.

The parties may be assisted before the mediator by any person entitled to do so before the court which ordered the mediation (CPC, art. 131-7). The mediator may, with the agreement of the parties and for the purposes of the mediation, hear third parties who consent (CPC, art. 131-8).

The judge may terminate the mediation at any time, at the request of one of the parties or on the mediator's initiative, and even ex officio (CPC, art. 131-10).

If they reach an agreement, the parties, or the most diligent of them, may submit it **to the judge for approval at any time**. The judge rules on the petition presented to him without debate, unless he deems it necessary to hear the parties at the hearing. In this case, the decision is non-contentious ("decision gracieuse", CPC, art. 131-12). The same applies to conventional mediation. Approval confers enforceability on the mediation agreement.

ii) Special provisions for child protection.

Special provision. For the application of article 375-4-1 of the French Civil Code, which allows the children's judge ("juge des enfants") to order family mediation in matters of educational assistance, decree no. 2023-914 of October 2, 2023, supplemented by a circular from the directorate of the *Protection Judiciaire de la jeunesse* (judicial youth protection or "PJJ") dated January 8, 2024, introduces [article 1189-1 du code de procédure civile](#) (CPC). This provision first specifies the purpose of family mediation in educational assistance: "*family mediation ordered by the children's judge (...) is intended to help parents put an end to their conflict, which is contributing to a situation of danger for the child*"¹⁵. The aim of family mediation is therefore to restore dialogue between the parents in order to protect the child from conflict. The provision also defines the conditions for

¹⁴ See. The Report published by the CAF, [L'atlas de la médiation familiale, Exercice 2023](#).

¹⁵ Original French version : « la médiation familiale ordonnée par le juge des enfants (...) a pour objet d'aider les parents à mettre fin à leur conflit concourant à la situation de danger pour l'enfant ».

appointing a family mediator, the procedures for implementing family mediation in educational assistance cases, and the conditions for approving the agreement resulting from this mediation.

The circular of January 8, 2024 highlights the specific features of mediation in the field of child protection: “Family mediation ordered by the juvenile court judge, while constituting a tool for restoring dialogue between the parents in the interests of the child, can also enable them to find common ground on the terms of exercising parental authority (setting the habitual residence, visiting and accommodation rights, etc.)”¹⁶.

Articulation with the common law regime. The ordinary law provisions of articles 131-1 to 131-15 of the CPC (see above) remain applicable to mediation ordered by the children's judge in the context of educational assistance. Thus, the principle of confidentiality applies to mediation¹⁷, so that the drafting of an educational report is excluded (see above). However, article 1189-1 of the CPC derogates from some of these provisions.

Exceptions. Firstly, this article allows the mediator **to hear a child** who consents, subject to the parents' agreement and the child's best interests¹⁸.

Another derogation concerns the approval or “homologation” of the agreement: notwithstanding article 131-12 of the CPC, the parents may refer the matter not to the children's judge (“juge des enfants” or JE), but to the family affairs judge (“juge aux affaires familiales” or JAF), in application of article 373-2-7 of the Civil Code, for approval of their agreement on the terms and conditions for exercising parental authority. Before approving the agreement, the family affairs judge (JAF) must ensure that it has been freely entered into by the parents, and that it “sufficiently safeguards the interests of the child”. If the minor is the subject of an educational assistance procedure, the JAF may ask the children's judge (JE) to communicate the documents relating to the said

¹⁶ Original French version: « La médiation familiale ordonnée par le juge des enfants, si elle constitue un outil de restauration du dialogue entre les parents dans l'intérêt de l'enfant, peut également permettre à ces derniers de trouver des terrains d'entente sur les modalités d'exercice de l'autorité parentale (fixation de la résidence habituelle, droits de visite et d'hébergement, etc.) ».

¹⁷ See. art. 131-14 du CPC : « Les constatations du médiateur et les déclarations qu'il recueille ne peuvent être ni produites ni invoquées dans la suite de la procédure sans l'accord des parties, ni en tout état de cause dans le cadre d'une autre instance ».

¹⁸ CPC, art. 1189-1, al. 3.

procedure¹⁹, and in return the JAF will then forward his or her decision to the children's judge²⁰.

Another important point is that the decree of October 2, 2023 provides a specific **framework for the appointment of family mediators in matters of educational assistance**. In addition to the conditions laid down in article 131-5 of the CPC²¹, which apply to all mediation procedures, the family mediator appointed in the context of educational assistance must hold the State diploma mentioned in article R. 451-66 of the *Code de l'action sociale et des familles* (CASF) or, failing this, training in the practice of mediation relating to parental conflict involving danger for the child²². Family mediators involved in educational assistance proceedings must therefore have knowledge of child protection issues, as evidenced by a specific State diploma or by specific training at the discretion of the general assembly of magistrates of the court of appeal that draws up the list of mediators. Consequently, the appeal courts should specify, within the list of family mediators, those who have the training required to intervene in educational assistance cases (V. circ. January 8, 2024).

1.2. Other amicable arrangements regarding family matters

Two main mechanisms complete the legal arsenal available to parties and/or judges for the amicable settlement of family disputes, but their scope of application remains limited: "l'audience de règlement amiable" (amicable settlement hearing) (a) and "la convention de procédure participative" (participatory procedure agreement) (b).

a) « Audience de règlement amiable » (ARA)

Presentation. The « audience de règlement amiable » (ARA) is an amicable dispute resolution procedure introduced in France in 2023 (Decree no. 2023-

¹⁹ CPC, art. 1072-1.

²⁰ CPC, art. 1187-1.

²¹ CPC, art. 131-5: « La personne physique qui assure l'exécution de la mesure de médiation doit satisfaire aux conditions suivantes: 1° Ne pas avoir fait l'objet d'une condamnation, d'une incapacité ou d'une déchéance mentionnées sur le bulletin n° 2 du casier judiciaire; 2° N'avoir pas été l'auteur de faits contraires à l'honneur, à la probité et aux bonnes mœurs ayant donné lieu à une sanction disciplinaire ou administrative de destitution, radiation, révocation, de retrait d'agrément ou d'autorisation; 3° Posséder, par l'exercice présent ou passé d'une activité, la qualification requise eu égard à la nature du litige; 4° Justifier, selon le cas, d'une formation ou d'une expérience adaptée à la pratique de la médiation; 5° Présenter les garanties d'indépendance nécessaires à l'exercice de la médiation ».

²² CPC, art. 1189-1, al. 2.

686 of July 23, 2023), which enables an attempt to be made to find a negotiated solution to a dispute during legal proceedings, under the aegis of a judge specially appointed for this purpose (CPC, art. 774-1). According to article 774-2 al. 1 of the CPC, “The purpose of the amicable settlement hearing is to achieve an amicable resolution of the dispute between the parties, through a balanced confrontation of their points of view, an assessment of their respective needs, positions and interests, and an understanding of the legal principles applicable to the dispute”²³.

The judge hearing the case (judge hearing the merits, summary proceedings judge, or pre-trial judge) may decide, at the request of a party or ex officio after consulting the parties, to convene them to an ARA. The “amicable” hearing is then held by another judge, who is not a member of the panel hearing the case on the merits. This judge does not have the power to rule on the merits of the case, but acts as a facilitator and conciliator, which is why ARA can be likened to mediation.

The ARA takes place in chambers, in a confidential setting: anything said there cannot be used later if the dispute returns to court. The parties must appear in person. They are assisted by their lawyers. If the parties reach an agreement, the ARA judge can draw up minutes, which can then be homologated and made enforceable. If no agreement is reached, legal proceedings resume before the judge initially seized.

Application to family matters. ARA is only available for disputes concerning rights that are freely alienable or available (“droits disponibles”) to the parties. It can therefore be used in family matters, except where unalienable or unavailable rights (“droits indisponibles”) are at issue. In French law, however, the distinction between alienable and unalienable rights is far from clear, which leaves room for debate as to the scope of the ARA: while international abductions, for example, are clearly outside its scope, certain aspects relating to parental responsibility could fall within it.

b) « Convention de procédure participative »

Presentation. Article 2062 of the French Civil Code defines a “convention de procédure participative” or participatory procedure agreement as “an agreement by which the parties to a dispute undertake to work jointly and in good faith

²³ Original French version : « L’audience de règlement amiable a pour finalité la résolution amiable du différend entre les parties, par la confrontation équilibrée de leurs points de vue, l’évaluation de leurs besoins, positions et intérêts respectifs, ainsi que la compréhension des principes juridiques applicables au litige ».

towards the amicable resolution of their dispute or the settlement of their litigation”²⁴. It specifies that this agreement is concluded for a fixed term. The content of the agreement is prescribed by article 2063 of the same Code, under penalty of nullity.

If the agreement was entered into before the dispute was referred to a judge, and for as long as it is in force, it "renders inadmissible any recourse to the judge for a ruling on the dispute. However, non-performance of the agreement by one of the parties authorizes another party to refer the dispute to the court for a ruling"²⁵ (C. civ., art. 2065). Furthermore, it does not prevent the parties from requesting provisional or conservatory measures in urgent cases.

The participatory procedure itself is governed by articles 1542 et seq. of the French Code of Civil Procedure. Article 1543 sets out the specific nature of the procedure: “It is conducted in accordance with a conventional procedure for seeking agreement, followed, where appropriate, by a procedure for judgment”²⁶.

Any agreement reached by the parties is homologated by the judge (C. civ., art. 2066), but this provision does not apply to divorce (C. civ., art. 2067).

Application to family matters. Like the ARA, the participatory procedure agreement has a limited scope of application. It can be concluded by any person “concerning rights of which he has free disposal” (« sur les droits dont elle a la libre disposition », C. civ. art. 2064). It can therefore be used in family matters, but with this proviso. This is confirmed by article 2067 of the Civil Code, which states: "A participatory procedure agreement may be concluded by spouses with a view to seeking a consensual solution in matters of divorce or legal separation. Article 2066 does not apply in this case. An application for divorce or legal separation submitted following a participatory procedure agreement is formed and judged in accordance with the rules set out in Title VI of Book I relating to divorce"²⁷. Here again, the persistent vagueness of the concepts of available and

²⁴ In French : « une convention par laquelle les parties à un différend s'engagent à œuvrer conjointement et de bonne foi à la résolution amiable de leur différend ou à la mise en état de leur litige ».

²⁵ In French : la convention « rend irrecevable tout recours au juge pour qu'il statue sur le litige. Toutefois, l'inexécution de la convention par l'une des parties autorise une autre partie à saisir le juge pour qu'il statue sur le litige »

²⁶ In French : « Elle se déroule selon une procédure conventionnelle de recherche d'un accord, suivie, le cas échéant, par une procédure aux fins de jugement ».

²⁷ In French : « Une convention de procédure participative peut être conclue par des époux en vue de rechercher une solution consensuelle en matière de divorce ou de séparation de corps.

unavailable rights raises questions, but it is clear that certain disputes specific to family matters, such as those relating to the child abduction, are excluded from the scope of the participatory procedure agreement.

It is now necessary to analyse in greater detail how the legal framework described above deals with the specific case of international child abduction.

2. Mediation et child abductions : an (almost) blind spot

With the exception of article 1210-4 of the CPC concerning the missions of the public prosecutor (see below), there is no specific provision in French law for mediation in the context of international child abduction. It is nevertheless possible, as we have seen, since mediation is open to all family matters.

On the other hand, it does not seem possible to extend to international abductions the provisions specific to family mediation in educational assistance (see above), even though a certain analogy is possible, particularly in view of the concern to protect the child. However, in addition to the fact that this analogy is not provided for in the texts, they seem to prevent in practice mediation in abduction cases from being treated as mediation in educational assistance cases, insofar as the competent judges - the family affairs judge (JAF) there, the children's judge (JE) here - are not the same. Here we see the disadvantages of the division of roles between the JAF and the “juge des enfants” (JE). The difficulties of coordination that exist in domestic situations are exacerbated in international matters.

The procedure for international abductions is described in articles 1210-4 et seq. of the CPC. In the many cases where the 1980 Hague Convention is applicable²⁸, the central authority (2.1), in conjunction with the public prosecutor (2.2.), plays an important role, with mediation possible at both level.

2.1. Mediation and Central Authority

Unsurprisingly, the role of the central authority is not detailed in the CPC. It derives directly from the 1980 Hague Convention and the Brussels II ter Regulation. Information on its role is provided by the Ministry of Justice website²⁹. Under these conditions, it is hardly surprising that French law

L'article 2066 n'est pas applicable en la matière. La demande en divorce ou en séparation de corps présentée à la suite d'une convention de procédure participative est formée et jugée suivant les règles prévues au titre VI du livre Ier relatif au divorce ».

²⁸ That is, when the removal took place from one contracting country to another contracting country.

²⁹ [https://www.justice.fr/enlevements-internationaux-enfants-droits-visite-transfrontieres#:~:text=Qu'est%2Dce%20qu'.\)%20de%20l'autre%20parent.](https://www.justice.fr/enlevements-internationaux-enfants-droits-visite-transfrontieres#:~:text=Qu'est%2Dce%20qu'.)%20de%20l'autre%20parent.)

contains no formal legal provisions concerning the implementation of mediation by the central authority: it is only the practice developed by the French central authority, namely “Département de l'entraide, du droit international privé et européen (DEDIPE)”, attached to the “Direction des affaires civiles et du Sceau” (DACS) of the Ministry of Justice which enables us to understand the place reserved for mediation (on this practice, see Part II below).

In the case of international abductions not covered by an international convention, the central authority has no jurisdiction, and the parent must therefore refer the request for return of the child directly to the judge. There is no specific provision encouraging the family court hearing a request for return to order the parties to meet a mediator. Furthermore, even when the Hague Convention is applicable, the parent is not obliged to go through the cooperation mechanism of the central authorities. He or she can refer the matter directly to the court. Here again, there is no specific rule encouraging mediation.

2.2. Mediation et Public Prosecution

When the displaced child is on French territory, the central authority shall forward the request for return to the public prosecutor at the court with territorial jurisdiction pursuant to Article [L. 211-12](#) of the CPC. It is the responsibility of the public prosecutor to locate the child or confirm his or her location and to inform the court that would have been seised of the merits of the case of the arrangements for the exercise of parental authority and of the request for return. It is also the responsibility of the public prosecutor to “take all measures to **ensure the voluntary return** of the child, in particular by hearing the person alleged to have removed or retained the child and inviting them to return the child voluntarily, or to **facilitate an amicable solution**”³⁰. He may, but is not obliged, to propose mediation. It is again the responsibility of the public prosecutor to initiate legal proceedings to obtain the return of the child by referring the matter to the **family court judge (JAF)** of the specially designated court within whose jurisdiction the child is located³¹. He is therefore the main party in proceedings for the return of a child who has been removed or retained in France.

³⁰ In French : « prendre toute mesure en vue d'assurer la remise volontaire de l'enfant, notamment en faisant procéder à l'audition de la personne dont il est allégué qu'elle a déplacé ou retenu l'enfant et en l'invitant à un retour volontaire de l'enfant, ou de faciliter une solution amiable ».

³¹ Art. 1210-7, CPC. There is only one court with jurisdiction per court of appeal to hear requests for return in cases of international abduction. See the [list](#).

If the child is moved or retained abroad, the public prosecutor may order any investigative measures to gather information about the child and his or her material, family, and social environment that has been requested by the foreign central authority. Amicable methods of dispute resolution are not mentioned in this scenario.

Conclusion. Even if it still seems possible and even desirable, in some cases, to strengthen the legal provisions enabling the use of family mediation in France, particularly to ensure that they are better adapted to international matters, the French legal framework appears to be relatively robust. However, the concrete results of family mediation in international matters are very disappointing, as these provisions are still insufficiently applied in practice.

II- International family mediation in France: still insufficiently adopted in practice

The authors of this report met with numerous professionals³² —judges from courts of first instance, appeal courts, and courts of cassation; academics specializing in mediation; lawyers; mediators; and ministerial services—in an attempt to identify, beyond the formal legal framework described in the first part of this report, the state of international family mediation practice in France, particularly in cases of international child abduction. The feeling that emerged from these hearings, reinforced by the authors' personal knowledge of judicial practice in this area, is that despite a relatively favorable regulatory environment, mediation is not yet well developed in international family disputes in general, and in child abduction cases in particular. However, the advantages of this method of dispute resolution in international family matters, including in cases of child abduction, are generally recognized by practitioners, even if some doubts have been expressed (1). According to a paradox that is only apparent, since there are still significant obstacles to the efficient practical implementation of international family mediation, mediation remains nevertheless very little used (2).

³² See the Appendix

1. A dispute resolution method whose benefits are widely recognized

The value of mediation in international family matters is generally recognized by judicial actors: particularly suited to family disputes (1.1.), mediation or similar methods of dispute resolution also have the advantage of being potentially and usefully applicable at all levels of dispute resolution (1.2.). While the use of mediation is questioned in cases involving allegations of domestic violence, practitioners seem to consider that it is still relevant, even in these circumstances (1.3).

1.1. A method of settlement particularly suited to international family disputes

Several arguments are put forward to argue that international family disputes, including those relating to child abduction, should be dealt with through mediation.

The best interests of the child. When children are involved in family disputes, their interests must be at the heart of the conflict resolution process. The general feeling is that children never emerge unscathed from parental conflict, and that parental conflict is fueled or even reinforced by litigation. Mediation, by promoting dialogue between parents and, where appropriate, a peaceful resolution of the conflict, is therefore an interesting tool for protecting the interests of the child as far as possible. Many judges consider that they are not best placed to assess the interests of the child. The legal debate is also biased: once the child is habitually resident in France, the judge will, in the absence of parental agreement, be reluctant to authorize the child's move abroad. The parent who intends to settle outside France (e.g., return to their country of origin) is thus placed in a position of weakness.

Importance of maintaining family ties: In line with issues relating to the best interests of the child, family disputes, perhaps even more so than economic disputes, call for a method of resolution that can guarantee the continuity of the relationship between the parties, beyond the settlement of parental separation or parental authority. Particularly when children are involved, maintaining a cordial or at least neutral relationship between parents is essential to protect the best interests of the children. In this regard, mediation offers a decisive advantage over litigation, provided, however, that its implementation promotes the pacification of relations, as we will return to later.

Need for creative solutions. International family disputes are particularly complex to resolve because they pit sometimes equally legitimate aspirations against each other: the desire of both parents to maintain a strong bond with their children; the need felt by one or both parents from different countries, in the event of separation, to return to their country of origin to benefit from a more favorable social, economic, and family environment. Legal solutions, which are often abrupt (fixing residence in one country, obligation to return, etc.), therefore appear unsatisfactory, whereas agreements negotiated by the parties can offer original and functional alternatives (e.g., a mediation agreement providing for alternating residence in France and England on an original shared basis (two quarters in France, one quarter in England), concluded with the agreement of the children's schools).

Cultural dimension. Beyond personal aspects, mediation is also the appropriate way to overcome differences in legal cultures that judicial proceedings do not necessarily address: the solution adopted by a court in one country may not be acceptable in another. Mediation also offers families the opportunity to use the services of a third party with qualities that correspond to their specific cultural characteristics.

Effectiveness of the settlement: In some respects, a mediation agreement may prove more effective in an international context than a court decision. Because it is agreed upon by both parties, a mediation agreement is more readily accepted, which promotes its voluntary enforcement. Furthermore, it appears that the enforcement authorities (civil prosecutors, law enforcement agencies) are reluctant, except in return proceedings, to enforce by force court decisions in family matters (e.g. those relating to the determination of the residence of children). Being the beneficiary of a judgment is therefore not an absolute guarantee of a successful outcome.

It should be noted, however, that a certain reluctance has been expressed about mediation, mainly by some lawyers. Their doubts seem to be less related to a belief that mediation is not an appropriate means of resolving international family disputes than to the practical difficulties that these professionals have encountered in their experience of implementing mediation (see *below* the obstacles to the development of mediation).

1.2. A settlement method appropriate at any stage of the dispute

The potential of mediation is all the greater given that, in the opinion of professionals, this method of dispute resolution can be used at any stage of the proceedings. Although **out-of-court mediation** is legally possible, as we have

seen, in practice it seems that in family matters, the parties, who are unaccustomed to litigation, tend to go to court very quickly. This observation makes it particularly **important to develop visible and effective pre-mediation services** to encourage the parties to resort to mediation before taking legal action.

For the time being, therefore, mediation in family matters is mainly used **in the context of legal proceedings**. While mediation would seem, at first glance, to be something that should be encouraged at an early stage of the proceedings, before the first instance trial judges and ideally even before the day of the hearing, its relevance in appeal proceedings has been highlighted by judicial actors: on appeal, some parties lose their fighting spirit, particularly when the decision leads them to lower their expectations. Sometimes, interpersonal tensions begin to ease. Above all, in the French system, the time limits for appeals are much longer than in the first instance, which may lead the parties to seek quicker solutions. We will see that, even in the context of an appeal to the Court of Cassation, mediation can prove to be relevant.

It should be borne in mind that mediation may have the same subject matter as a dispute that is or may be the subject of litigation – in which case mediation is, at some stage, a **substitute for court proceedings** – but the subject matter of mediation may also be different from that of court proceedings, in which case mediation is **complementary to court proceedings**. This may occur, for example, when a judge rules on the merits of a claim (e.g., a divorce) but refers the parties to mediation to determine the consequences of that decision (alimony, visitation rights); or when a court decision is rendered but mediation is organized on the terms of enforcement of that decision. Before the Court of Cassation, if the subject matter of an appeal (“pourvoi”)—generally a pure question of law—is not amenable to mediation in itself, the time taken by the cassation proceedings may nevertheless be a useful opportunity to encourage the parties, faced with the risk of further delays in the proceedings, to agree to mediation on the substance of their dispute.

1.3. A settlement method questioned when domestic violence is alleged

French law excludes mediation in family matters as a matter of principle whenever allegations of domestic violence are made (see above, Part I). Practitioners tend to be critical of this categorical exclusion. Provided that significant precautions are taken to protect the vulnerable party, mediation is seen as a mechanism that can have positive effects, even in cases of domestic violence. Conducted by experienced professionals, ideally assisted by

psychologists, it can help the vulnerable party to escape from their position as a victim and make the other party aware of the pathological nature of their behavior.

2. A paradoxically little-used method of dispute resolution

Given the lack of official statistical tools already noted (see general introduction), it is difficult to objectively assess certain findings that are based on the experience or personal impressions of the people interviewed. Empirical observation of court practice reveals that, although a number of mechanisms are in place to promote international family mediation in practice, they remain underutilized (2.1.), as significant obstacles hinder the development of international family mediation (2.2.).

2.1. Tools are in place, but are underutilized

The French system relies heavily on judges to encourage parties to use alternative dispute resolution methods, making mediation easier to implement in ongoing legal proceedings (b). However, outside the judicial framework *strictly speaking*, support mechanisms for mediation do exist (a).

a) Support mechanisms for mediation outside the judicial system (pre-mediation)

The parties are always free to choose an amicable settlement of their family dispute, without involving a judge. However, experience shows that individuals involved in international family disputes, who are unfamiliar with dispute resolution methods, do not spontaneously consider mediation. Yet, as long as the matter has not been officially brought before a court, there are few official and public³³ information mechanisms on mediation, which could be described as “pre-mediation.” They do exist, however, and are provided by the International Social Service (SSI France) (i), the “Caisse d’allocations familiales” (Family Allowance Fund) (ii) and, in the specific case of international abduction, by the Ministry of Justice and the central authority attached to it (iii).

(i) International Social Service in France (SSI France)

The International Social Service (ISS) is a non-governmental organization (NGO) that intervenes in situations involving cross-border social issues. It is part of a global network present in more than 120 countries, with a general secretariat

³³ The work carried out by the many associations working in this field is not analyzed here.

based in Geneva and branches in several countries, including the International Social Service - France (ISS France), registered as an association under the French law of 1901.

Offering social support to families in cross-border situations, SSI France is ideally placed to provide them with information on the possibility of using mediation to resolve their transnational disputes. Although it does not offer mediation services itself, SSI France already provides a service that could be described as “pre-mediation”: in addition to providing information on the advantages of mediation, SSI France, as part of an international network, is able to refer families or professionals to specialized and certified mediators in France and in several other countries. It also sometimes facilitates the logistical conditions for international mediation (translation, coordination between countries, etc.).

SSI France is also responsible for managing “116 000 Enfants disparus,” the toll-free number in France dedicated to missing children and parental abductions.

(ii) Family mediation services offered by the « CAF »

In France, as mentioned above (*supra* I), the “Caisses d’allocations familiales” (family allowance funds) strive to promote access to mediation in cases of family disputes. They provide information to families, but also offer practical services to facilitate families' access to mediation.

Information on the possibility of resorting to family mediation. The CAF publish information on family mediation on their websites and in the documentation made available to their beneficiaries³⁴, highlighting the advantages of this method of resolving family disputes.

Free initial consultation with a mediator. When families consider mediation under the auspices of the CAF, they are entitled to an initial session (lasting 45 minutes to 1 hour) with a mediator, completely free of charge. This session is an opportunity for the mediator to explain the advantages and terms of mediation to the parties and to check whether the conditions are right for mediation.

“Médiation conventionnée”. The decision to proceed with mediation is up to the parties. If they decide to proceed and wish to do so, they may use mediators approved by the CAF to try to resolve their family dispute. The approval process allows the mediator's services to be standardized for the parties: the parties pay

³⁴ See, for example: *Guide de prestations CAF* (CAF benefits guide)

according to their family income (from 2 euros to 131 euros per session of one to two hours).

Mediation in international matters. According to the CAF website, nearly 43,000 people benefited from mediation in 2022. However, there are no official statistics identifying which of these mediation measures were international in nature. This is because the mediations recorded by the CAF are based on data collected from “services conventionnés”. At present, the software used to collect this data does not allow for the direct or indirect indication or determination of whether mediation is international or national: a change could be desirable to facilitate the compilation of reliable statistics. As far as can be judged, international family mediation seems to account for a very small proportion of mediation measures, although it does exist. For example, the association Parenthèse Médiation, approved by the CAF, reports 19 international cases for the years 2023/2024.

(iii) The role played by the Ministry of Justice and the French central authority (DEDIPE) in cases of parental abduction

As the proponent of a public policy that is generally favorable to mediation, the French Ministry of Justice naturally supports the use of mediation, including in cases of parental abduction. Its website states that mediation can help restore contact with the other parent and find a solution that is in the best interests of the child. It outlines the main features of mediation. In addition, the website invites users to contact one of the **international family mediators listed by the French central authority** ([List of international family mediators](#)). It specifies that these mediators are qualified, have specific expertise in international parental conflict situations, and speak several languages. The website also lists the information that mediators will need.

In implementing this general policy, the French central authority responsible for return (le Département de l'entraide, du droit international privé et européen (DEDIPE) of the Ministry of Justice)³⁵ is committed to developing mediation, both prior to any referral to the courts and after a return decision has been made, in the post-sentence phase. The central authority may therefore support mediation outside any judicial framework, as well as within a judicial framework, while proceedings are ongoing or even after they have been completed.

³⁵ It should be noted, as mentioned in the first part, that the request for return may also be made directly to a judge, in which case the DEDIPE is rarely informed or consulted and cannot therefore play this information role.

The results of this policy are difficult to assess. Over a period and for a total number of return requests that have not been precisely defined, the DEDIPE has recorded just under 50 international family mediation measures carried out in France or abroad, including 20 within Europe, in the cases referred to it. It also sent a questionnaire to the mediators on its list, mainly for statistical purposes. Seven mediators/mediation associations (out of the 18 on the list) responded to the questionnaire. They reported that they had been contacted six times through the DEDIPE list and had carried out 42 international family mediations in 2023, although the nature of the disputes and therefore the proportion of disputes relating to parental abduction is not known.

To encourage mediation in cases of international child abduction, the DEDIPE has set up a special information system. For the sake of clarity, a distinction must be made between cases where the parent has applied to the French central authority for the return of a child unlawfully removed from France (Art. 8, Hague Convention) or whether the French central authority has been asked by a foreign authority to organize the return of a child who has been illegally taken to France (Articles 9 and 10 of the Hague Convention). However, in both cases, this only involves providing information, as the DEDIPE does not offer a “mediation service” as such.

***Information provided in response to a direct referral to the DEDIPE by a parent due to the unlawful removal of a child from France.**

When a request for return is made directly by a parent to the French central authority (DEDIPE) with a view to securing the return of a child who has been unlawfully removed to another country, the DEDIPE systematically suggests to the applicant, before forwarding the file to the relevant foreign central authority and thus officially initiating the return procedure, that mediation be considered. Moreover, the return request form includes a question asking the applicant whether they would be open to international family mediation. If the applicant expresses interest in such a process, the defendant's agreement to this method of settlement must also be sought and obtained, where necessary with the assistance of the central authority of the State in which the defendant is located.

In this context, the DEDIPE also strives to develop mediation in its exchanges with other central authorities: the referral letter it sends them is accompanied by a brochure on mediation and a list of international family mediators (see below).

***Information provided in connection with a referral to the DEDIPE by a foreign central authority concerning the unlawful removal of a child to France**

When referred to by a foreign central authority that has itself received a request for the return of a child unlawfully removed to France, the DEDIPE must “take urgent action to secure the return of the child” (Art. 11, Hague Convention). However, Article 10 of the Convention also provides that “The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child”. The practice of the French DEDIPE is then to contact the abducting parent, asking them to respond with reasons within 10 days. At this time, they are informed of the possibility of mediation. If no satisfactory response is received within the specified time limit, the DEDIPE refers the matter to the courts through the public prosecutor's office in order to initiate the return procedure (see the procedure described above in Part I).

***Absence of a genuine international “mediation service” within the DEDIPE**

The DEDIPE only plays an informational and advisory role vis-à-vis the parties. It provides a list of mediators (already mentioned above), available on its website, whom the parties may contact if necessary, but it does not accompany or supervise the mediation if the parties decide to resort to it.

This has not always been the case: a mediation unit, composed of two mediators whom the parties could choose to contact, was at one time directly attached to the DEDIPE. This service was abolished in 2020, on the official grounds that it was problematic, from the point of view of impartiality, for the DEDIPE to be both the central authority responsible for return requests and the authority organizing any mediation between the parties. This argument is not entirely convincing. In any case, we will come back to this point later, but the main criticism here is that the solution chosen as an alternative to this service (providing a list of mediators) is proving unsatisfactory in practice.

b) Support mechanisms for mediation in a judicial context

The initiation of family court proceedings appears to be potentially more conducive to the implementation of an amicable settlement, provided, however, that judges make proactive use of this tool. The French public authorities are well aware of this and have both incorporated mediation training into the **training of French judges** (modules offered at the “Ecole Nationale de la Magistrature (ENM), both in initial and continuing training) and provided them with tools enabling them to **integrate mediation into the judicial process**.

In French court practice, there are therefore relatively many opportunities to use mediation or similar methods of amicable settlement, which are spread throughout the proceedings.

(i) **Trial judges at first instance**

As we have seen (*supra Part I*), several options are available to trial judges in family mediation in general.

-Order to meet with a mediator (double summons procedure). The practitioners interviewed seem to feel that courts of first instance make relatively little use of this option. In Paris, for example, the practice was fairly widespread in domestic cases before 2020 but has since been abandoned. Furthermore, defendants are not always inclined to comply with the order. These limitations could be remedied by the expected legislation, namely the circular on the practice of double summons and the new decree introducing a civil fine for non-compliance with the order by the parties.

-On the day of the hearing, the JAF may propose to the parties that they **resort to mediation** and obtain their agreement. To facilitate the use of mediation in this context, some courts—in any case the “Tribunal judiciaire” in Paris—have mediators on site (including a psychologist from the “Protection Judiciaire de la Jeunesse” (PJJ)), whom the parties can contact immediately. However, the **Audience de règlement amiable** (ARA - amicable settlement hearing) remains of limited application in family disputes largely involving unavailable rights (“droits indisponibles” - see above Part I).

-When handing down the decision, the JAF may choose to issue a decision (e.g., a divorce decree or a ruling on parental authority) and accompany it with an order requiring the parties to seek family mediation to organize the consequences of the decision (residence, visitation rights, child support, etc.). The judges interviewed were in favor of this practice, but no data allowed us to objectively assess its practical use in international family mediation.

It is also important to highlight the existence of highly experimental measures that have been implemented in certain jurisdictions. The “**coordination parentale**” (parental coordination) measure, which has been trialed in the Paris “Tribunal judiciaire”, is particularly noteworthy. This is a structured process, often implemented following a court decision (divorce decree, custody order, etc.), in which a qualified professional (parental coordinator) helps parents to implement the judge's decisions, resolve disagreements relating to the exercise

of parental authority, and communicate more effectively in the interests of the children and thus reduce the level of conflict and avoid constant back-and-forth trips to court. The parental coordinator plays a more active role than the mediator, and the coordination process is generally longer than mediation. The system has no specific legal framework in France, but it can nevertheless be implemented under the applicable provisions. The obstacles are related to its duration and, where applicable, its cost (see *below*).

In general, it can be observed that in France, the practice of mediation in family matters seems to be mainly linked to the awareness of judges of this method of dispute resolution. This is one of the obstacles to its permanent establishment in judicial practice, as will be discussed below.

(ii) Appeal Courts

For the reasons already outlined, particularly the length of the appeal process, recourse to mediation at the appeal stage is clearly beneficial. Discussions have revealed that the Paris Court of Appeal has a team of mediators attached to the family division. However, this is not the case for the Court's chamber responsible for child abduction cases. There is a desire within the chamber to have such a team, which would be made up of mediators who are immediately available and competent to deal with transnational mediation, but its implementation is hampered by difficulties in financing and identifying suitable candidates.

(iii) Cour de cassation (French Supreme Court)

In 2021, at the instigation of its First President, the Court of Cassation set up a Working Group on Mediation. This group has achieved concrete results, both in terms of the legislative framework (decree of February 2022 establishing the conditions for recourse to mediation before the Court of Cassation) and in terms of the practices of the chambers. Practices vary from one chamber to another. The First Civil Chamber, which deals more specifically with international family matters, has mainly used the “injunction to meet with a mediator” tool: in a number of pending international family cases, at an early stage of the proceedings (after the case has been registered), a letter has been sent to the “avocats aux conseils” (lawyers specially authorized to appear before the Court of Cassation) instructing them to contact a mediator appointed by the Court for a preliminary meeting. The results of this approach have been mixed: the Court considers that even if the parties did not reach an agreement, the measure has positive effects (partial resumption of dialogue between the parties); the lawyers concerned are much more ambivalent—it is the quality of the mediation that is mainly called into question, as we shall see below.

In any event, the Court of Cassation is discussing the possibility of extending the experiment: a mechanism for recourse to mediation could thus be provided for in the new edition of the Weber³⁶. This would obviously not be a question of systematizing mediation, but of using it in cases, including transnational cases, where it is appropriate.

The tools are therefore in place, but for reasons that we will now analyze, they still seem to be used relatively little in domestic cases and even less in international cases.

2.2. Barriers to the development of international family mediation

Despite a relatively favorable regulatory framework and proactive public policies, international family mediation appears to be still relatively uncommon in France. The explanation for this paradox lies in the fact that significant obstacles still hinder the development of this practice. It is essential to clearly conceptualize these obstacles, which are institutional (a), cultural (b), and financial (c), if we are to find effective solutions.

a) Institutional obstacles

Procedural obstacles. With regard to international child abductions, Article 24 of the Brussels II ter Regulation provides that a court of first instance seized of an application for return “shall give its decision within six weeks of the date of the application, unless exceptional circumstances make this impossible.” The vast majority of those interviewed argued that this time limit makes it impossible in practice to organize mediation, at least mediation aimed at resolving the dispute relating to the wrongful removal, especially since, as will be discussed below, judges currently have few tools at their disposal to facilitate the rapid establishment of an international mediation mechanism. A very small number of them observed that mediation could be initiated notwithstanding this strict time limit, on the understanding that the settlement of the dispute on its merits should be considered beyond the sole issue of the return of the child.

Organizational obstacles. Some of the obstacles mentioned by those consulted are related to the functioning of the courts: overcrowding in some courts, lack of court clerks (“greffiers”), turnover of judges, and inadequate tools. Others, concerning mediators, refer to the difficulties for judges, lawyers, or parties in finding mediators who are both available and have the necessary qualities to

³⁶ J.F. Weber, *La Cour de cassation*, La documentation française, 2006 – new edition in preparation.

carry out international family mediation (culture, language) within very tight deadlines. Identifying these mediators is considered difficult: the DEDIPE list is often deemed unsatisfactory, while the lists of mediators approved by the courts of appeal do not include information on the qualities required for international mediation (languages spoken, familiarity with the culture of certain countries).

Limits of international cooperation. It is regularly pointed out that, even between Member States, there is cultural and legal heterogeneity with regard to family mediation, which can pose significant difficulties (e.g., despite a mediation agreement, one party may remain subject to criminal proceedings in another Member State). **Co-mediation**, which seems to be unanimously regarded as a mechanism to be encouraged, is perceived as difficult to implement due to the lack of effective links abroad.

b) Cultural obstacles

Courts. Despite initial and continuing training at the ENM and a few judges who are strongly committed to mediation, French judges still seem to lack sufficient familiarity with mediation. A certain “rigidity” is sometimes criticized as an obstacle to the approval of mediation agreements. The institutional obstacles mentioned above may also discourage judges from encouraging mediation.

Lawyers. A number of lawyers seem unconvinced by the use of mediation, citing their clients' psychology, the time wasted on procedures doomed to failure, and the poor quality of mediators. A certain “litigation culture” is sometimes highlighted in the discourse of their legal partners or even by some lawyers when referring to their colleagues. A kind of unhealthy competition between lawyers and mediators seems to be developing.

Parties. The heightened family tensions in some cases are seen as a difficult obstacle to overcome in certain mediations. Failure to comply with orders to meet with a mediator reinforces the idea that many parties are not open to mediation.

c) Financial Obstacles

Cost of the procedure. The mediation procedure entails additional costs (mediators' and lawyers' fees, possible travel expenses), which are all the more unpopular given that a favorable outcome is not guaranteed. Mediators listed as “approved” on the DEDIPE (“tarif conventionné”) list do not always charge fees that are actually agreed upon.

Limited coverage. Although legal aid for mediation has been improved, this only applies to court-referred mediation (and participatory proceedings). Furthermore, as mentioned above, the possibility of obtaining legal protection from insurers to use mediation remains highly controversial. Mediation is perceived by many legal professionals as “justice for the rich.”

3. A dispute resolution process that could be improved

A few practical developments could strengthen the use of mediation in international family matters. First and foremost, **effective monitoring tools** should be put in place to provide **reliable statistics**: if the development of mediation in family matters in general, and in international family matters in particular, is a genuine public policy objective, it must, like any public policy, be subject to proper evaluation. At present, however, it is difficult to see how such an **evaluation of public policy** could be carried out. Next, a number of measures could be adopted to enable the parties to resort to and accept mediation (3.1), improve the quality of mediation (3.2) and facilitate recourse to mediation in the context of court proceedings (3.3).

3.1. Enabling the parties to resort to mediation

Four types of measures, in ascending order of difficulty, could be considered to put the parties in the best possible position to use mediation in international matters.

- **Strengthen information on mediation outside the judicial context: pre-mediation**

At present, pre-mediation is mainly handled by SSI France, with limited resources.

Strengthening information, guidance, and support mechanisms for parties to international family mediation, outside of any judicial proceedings, can only encourage and facilitate the use of mediation.

- **Rethinking the time limits for return proceedings**

As the short time limits for return proceedings are perceived as a deterrent to the use of mediation in international family matters, adjustments could be considered. This does not obviously mean extending the time limits, but consideration could be given, for example, to making recourse to mediation suspensive of these time limits.

- **Make mediation mandatory before return proceedings**

In order to protect the best interests of the child, consideration could be given to making recourse to mediation mandatory before any return proceedings.

- **Rethinking mediation to take into account the psychology of the parties**

The state of mind of the parties to a family conflict, *ab initio*, makes them unlikely to resort to a peaceful means of resolution such as mediation. Mediation practitioners insist on the accompanying measures that should be deployed, in parallel with mediation or ideally prior to it, to “put the parties in a position” to accept and succeed in their international family mediation: enhanced mediation, parental coordination, etc. These measures require time and significant resources, which are not always compatible with the perception sometimes held of mediation as a means of reducing legal costs.

3.2. Improving the quality of mediation

The mistrust of international mediation expressed by some judicial actors is often justified by the insufficient “quality” of mediation.

The authors of this report are obviously unable to determine whether this feeling is justified, but even if it were only a subjective perception, it would nonetheless constitute a significant obstacle to the development of mediation, an obstacle that should therefore be removed. To this end, various avenues could be explored.

- **Review the list of international mediators proposed by the DEDIPE.**

This list is currently perceived as insufficiently reliable: the mediators on the list are not always available or do not always comply with the announced agreement; above all, the information on the list does not always allow for a proper assessment of the mediators’ suitability for the mediation in question.

- **Rethink the lists of mediators approved by the Court of Appeal.**

At present, these lists do not contain the necessary information (dual culture, language skills, training in international mediation) to enable the parties/lawyers/judges to identify one or more mediators who are well suited to the international family mediations envisaged.

- **Strengthen the place of training in international mediation in the training framework for family mediators in France.**

The current training framework for family mediators, as provided for in the decree of March 19, 2012, relating to the state diploma for family mediators, recently amended by the decree of June 4, 2024, does not completely ignore international mediation, since Annex III of the decree includes, in the content of

the “Main training unit on the mediation process and the integration of mediation techniques,” “international and intercultural family mediation.” However, it should be noted that this is only one of 13 items to which the framework requires a total of 210 hours of training. There is therefore no guarantee that real training in international mediation will be provided. While international family mediation diplomas are available on the market, a **genuine reference framework specific to international family mediation**, possibly designed at European level, could be developed.

- **Consider tools to facilitate the establishment of co-mediation.**

While co-mediation has been unanimously presented as a relevant solution for ensuring high-quality international family mediation, judicial actors feel ill-equipped to implement it effectively. The main challenge would be to enable judges or parties and their counsel to easily identify mediators in both countries concerned. The circulation of information on mediators qualified in international family matters in each Member State would therefore be particularly useful.

3.3. Facilitating the use of mediation in judicial proceedings

This would involve recognizing the central role that judges can and must play in the use of mediation, which would include:

- **Conceptualizing and formalizing the appropriate moments for considering mediation in legal proceedings**, and widely disseminating this information to judges.

In particular, mediation should not necessarily be seen as an “alternative” to judicial proceedings, but rather as a “complement” to them. Mediation could thus be organized after a legal claim has been filed, where possible to settle the dispute before the judge intervenes, or at a *minimum* to organize provisional measures to prevent the child from being separated from one of its parents.

- **Strengthening judges' acculturation to mediation**

Training could be further developed and should also be considered in conjunction with other actors (lawyers, mediators) to facilitate their cooperation.

- **Providing courts with the means to enable them to deploy international family mediation**

International family mediation is a complex mechanism that requires human resources (judges and court clerks), but not only that; judges need effective tools if they are to be able to use it. The idea of a “kit” for judges has been raised on several occasions by judicial actors: there should be, if not within the DEDIPE, then at least within the Ministry of Foreign Affairs or a “central” court, a pool of mediators who are properly trained in international family mediation and to

whom judges can quickly turn when needed. Statistical monitoring tools are also needed to ensure proper management and to measure the effectiveness of the system.

- **Strengthening international judicial cooperation to promote mediation.**

The diversity of legislation and cultures in the field of mediation, including between EU Member States, makes it difficult to develop international mediation in family matters. While standardization still seems a long way off, mechanisms to strengthen international cooperation should, at the very least, be considered.

APPENDIX

List of people interviewed

Frédérique Agostini

Conseillère à la 1^{re} Chambre civile de la Cour de cassation, Présidente du Conseil national de la médiation, Présidente du Groupement européen des magistrats pour la médiation (GEMME).

Gulnar Amengual

Médiatrice, Parenthèse Médiation

Agathe Beaupère

Avocate au barreau de Paris, médiatrice en formation

Alexandre Boiché

Avocat à la Cour d'appel de Paris.

Amélie Demange

Magistrate, DEDIPE (avec Adeline Jauneau, auditrice de justice, DEDIPE)

Anne Dupuy

Présidente de Chambre, Cour d'appel de Paris

Maximin de Fontmichel

Professeur de droit privé, Université Paris Saclay, UVSQ, spécialiste des modes alternatifs de règlement des litiges

Natalie Fricero

Professeur émérite de l'Université Nice Côte d'Azur, Doyenne du Pôle Justice à l'ENM, membre du Conseil national de la médiation, ambassadrice de l'amiable (juin 2023-2024), ancien membre du CSM.

Coralie Gaffinel

Avocate, cabinet Accordance (avec Appoline Duclos-Piette, avocate stagiaire, ancienne stagiaire de la DEDIPE)

Danièle Ganancia

Médiatrice, ancienne magistrate, médiatrice rattachée à la DEDIPE jusqu'en 2006.

Stéphanie Hébrard

Vice-Présidente du Tribunal judiciaire de Paris

Florence Hermitte

Conseillère à la Cour d'appel de Paris

Nancy Khawan

Ancienne barrister spécialisée en droit de la famille internationale ; médiatrice en GB depuis 2015, future médiatrice en France.

Marie Lambling

Conseillère à la Cour d'appel de Paris

Jacqueline Lesbros

Présidente de Chambre, Cour d'appel de Versailles

Alice Meier Bourdeau

Avocate au Conseil d'Etat et à la Cour de cassation

Sandrine Pepit

Directrice DU SSI France, assistée d'Amine Doumi, chargée de mission, et Noa Laguerre, stagiaire, SSI International (Droit d'enfance, 116000 enfants disparus)



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Introduction

Depuis une vingtaine d'années, et plus encore depuis le début des années 2020, la médiation est fortement encouragée en France par le ministère de la Justice. Cette politique volontariste se traduit par un cadre juridique en apparence solide, y compris en matière familiale. La médiation familiale renvoie, par référence à la définition qu'en avait proposée l'ancien Conseil consultatif de la médiation familiale¹ en 2002, à « un processus de construction ou de reconstruction du lien familial axé sur l'autonomie et la responsabilité des personnes concernées par des situations de rupture ou de séparation dans lequel un tiers impartial indépendant, qualifié et sans pouvoir de décision, le médiateur familial, favorise, à travers l'organisation d'entretiens confidentiels, leur communication, la gestion de leur conflit dans le domaine familial entendu dans sa diversité et son évolution »².

Si ce cadre a pu paraître suffisamment robuste pour que la France soit citée par la Commission européenne pour ses actions en matière de médiation familiale transfrontière³, il faut rester lucide. Le bilan n'est pas totalement satisfaisant, loin s'en faut.

Tout d'abord, si le droit français régleme nte assez précisément la médiation, y compris familiale, il ne comporte aucune disposition propre à la médiation familiale transfrontière. La question de l'adaptation du dispositif juridique aux spécificités de celle-ci doit donc être posée. Ensuite, la pratique semble beaucoup moins friande de médiation que ne le sont les autorités politiques du pays : en matière familiale tout au moins, les retours d'expérience des acteurs judiciaires sont réservés, voire hostiles. Enfin, l'efficacité des dispositions juridiques et des politiques publiques déployées pour encourager la médiation est pour ainsi dire impossible à évaluer. C'est en effet une observation importante qui doit être faite en préambule : les acteurs judiciaires rencontrés par les auteures de ce Rapport, notamment les acteurs institutionnels et les magistrats, ont insisté sur le cruel manque d'outils statistiques pour évaluer

¹ Arrêté du 8 octobre 2001 portant création du Conseil national consultatif de la médiation familiale

² M. Savourey, « La médiation familiale », *Journal du droit des jeunes*, 2007/8, n° 268, p. 15.

³ Rapport de la Commission sur l'évaluation du règlement Bruxelles II bis, 15 avril 2014, COM (2014) 255 final. V. aussi: F. Monéger, « article 25. Modes alternatifs de règlement des différends », in S. Corneloup, E. Gallant, V. Egéa, F. Jault-Seseke (dir.), *Divorce, responsabilité parentale, enlèvement international. Commentaire du règlement 2019/111 du 25 juin 2019 (Bruxelles II ter)*, Bruylant, 2023, p. 343, spéc. p. 345.

précisément les recours à la médiation en France, y compris dans un contexte judiciaire, et les résultats de ces recours. Depuis 2025, l'outil « Winci TJ » enregistre certes les ordonnances enjoignant de rencontrer un médiateur. Mais il n'existe aucune statistique sur la désignation de médiateurs, sur les accords de médiation éventuellement conclus et homologués, et encore moins sur leur exécution. Des statistiques sur les désistements d'instance existent, mais elles ne précisent pas la cause du désistement, en sorte qu'elles ne peuvent être exploitées pour savoir si celui-ci peut être le résultat d'un règlement extra-judiciaire, en médiation. Le caractère inadapté, voire obsolète, des outils-métiers des juridictions judiciaires est régulièrement pointé du doigt.

Presque par contraste, le nombre d'enlèvements parentaux internationaux s'avère assez bien documenté : dans son [Rapport 2024 sur les disparitions de mineurs en France](#), le service « 116000 Enfants disparus » note que le nombre d'enlèvements signalés reste stable, avec 665 signalements effectués, après une nette augmentation enregistrée entre 2022 et 2023 (+21,5%). Ces enlèvements concernent pour la majorité de très jeunes enfants⁴, en lien avec 50 pays répartis sur les cinq continents. Ce même rapport observe que seulement 19% des dossiers suivis par le service trouvent une issue favorable suite à une décision de justice, et 12% pour des décisions amiables. Les résultats très honorables de l'amiable sont relevés, alors que très peu de parents recourent aux processus de médiation.

Le présent rapport s'attachera donc à présenter le cadre juridique de la médiation familiale internationale en France (I), pour le confronter à ses usages effectifs qui révèlent une insuffisante appropriation par la pratique (II).

I- Médiation familiale internationale en France : Le cadre juridique

Conséquence de la politique volontariste déployée de façon continue par la Ministère de la Justice depuis plusieurs années, la France dispose aujourd'hui d'un dispositif juridique solide en matière de médiation, y compris familiale (1). Néanmoins il n'existe pas de dispositions propres à la médiation familiale internationale : les spécificités de la médiation familiale internationale ne sont pas prises en compte, et les mécanismes pouvant être sollicités ne sont pas véritablement articulés avec les règles procédurales énoncées en matière d'enlèvements internationaux (2).

⁴ Près de 49% des mineurs enlevés par un parent en 2024 avaient moins de 5 ans.

1. Un contexte institutionnel et réglementaire favorable à la médiation familiale

En France, le ministère de la Justice a multiplié les initiatives législatives comme réglementaires pour convaincre les parties de recourir à la médiation familiale, et pour inciter les juges à « ordonner » des médiations. Témoinant de cet intérêt, un **Conseil national de la médiation**, placé aux côtés du Garde des Sceaux, Ministre de la Justice, a été créé en 2021 par la loi n° 2021-1729 du 22 décembre 2021 pour la confiance dans l'institution judiciaire ([art. 45](#)). Cette instance administrative chargée de rendre des avis, de formuler des propositions et des recommandations dans le domaine de la médiation, a rendu son premier rapport d'étape pour la période juin 2023 - novembre 2024 en février 2025⁵. De nouvelles évolutions du cadre juridique sont donc probables. Une circulaire et un décret seraient ainsi en préparation pour étendre le dispositif dit de la « double convocation », sur lequel nous reviendrons, et en renforcer l'effectivité. Pratique bien encadrée juridiquement (1), la médiation familiale est en outre complétée par d'autres dispositifs amiables qui rencontrent un certain succès (2).

1.1. La médiation familiale, une pratique bien encadrée juridiquement

La médiation est définie en droit français comme *“tout processus structuré, quelle qu'en soit la dénomination, par lequel deux ou plusieurs parties tentent de parvenir à un accord en vue de la résolution amiable de leurs différends, avec l'aide d'un tiers, le médiateur, choisi par elles ou désigné, avec leur accord, par le juge saisi du litige”* ([article 21 de la loi n° 95-125 du 8 février 1995](#)). La médiation familiale ne fait en revanche pas l'objet d'une définition légale, même si la définition proposée par l'ancien Conseil national consultatif de la médiation familiale, rappelée en introduction, est régulièrement mise en avant dans les communications institutionnelles publiques.

La médiation peut être judiciaire ou extrajudiciaire (aussi appelée médiation conventionnelle). La médiation est dite judiciaire chaque fois qu'elle intervient dans le contexte d'une procédure judiciaire déjà initiée, et ce à un stade quelconque de la procédure. Dans les deux hypothèses, il est crucial que les

⁵ <https://www.justice.gouv.fr/documentation/ressources/rapport-detape-du-conseil-national-mediation>

parties, mais aussi leurs avocats lorsqu'elles sont accompagnées d'un conseil, soient sensibilisés à la pratique de la médiation.

La médiation familiale extrajudiciaire ou conventionnelle est soumise aux [articles 1530](#) et suivants du CPC, qui ne sont pas des dispositions propres à la matière familiale mais y sont néanmoins applicables.

La médiation familiale judiciaire fait en revanche l'objet de dispositions spécifiques, dans le Code civil comme dans le code de procédure civile. Le recours à la médiation judiciaire est ainsi expressément prévu dans tout le champ de la matière familiale (a), tandis que le régime de cette médiation est soigneusement défini (b).

a) Le recours à la médiation familiale judiciaire

D'une façon générale, [l'article 1071 CPC](#) (al. 1 et 2) prévoit que, dans les procédures en matière familiale, « Le juge aux affaires familiales a pour mission de tenter de concilier les parties. Saisi d'un litige, il peut proposer une mesure de médiation et, après avoir recueilli l'accord des parties, désigner un médiateur familial pour y procéder ».

De façon plus spécifique, le recours à la médiation peut être proposé par le juge aux affaires familiales *en matière de divorce*, au titre des mesures provisoires (C. civ. [Art. 255](#), depuis la loi n° 2004-439 du 26 mai 2004).

Il est également prévu *en matière d'exercice de l'autorité parentale* (C. civ., [art. 373-2-10](#), à compter de la loi n° 2002-305). Dans ce domaine, la loi n° 2019-222 du 23 mars 2019 a introduit la médiation post-sentencielle : « le juge peut proposer une mesure de médiation [...] y compris dans la décision statuant définitivement sur les modalités d'exercice de l'autorité parentale » (C. civ., art. 373-2-10, al. 2). Cette médiation devrait être encouragée dans la mesure où l'office du juge n'est pas de rentrer dans les détails de la vie quotidienne de la famille. Elle serait particulièrement utile, nous y reviendrons, dans les hypothèses où les deux parents ne résident pas dans le même pays.

Depuis la loi n° 2022-140 du 7 février 2022, la médiation peut également être proposée par le juge des enfants *dans le cadre d'une procédure d'assistance éducative* (C. civ. [Art. 375-4-1](#)) (sur laquelle v. *infra*).

Afin de mettre en œuvre l'article 48 de la Convention d'Istanbul, ces différents textes excluent tout recours à la médiation judiciaire lorsque des violences sur l'autre parent ou sur l'enfant sont alléguées par l'un des parents, ou en cas d'emprise manifeste au sein du couple. L'ajout de l'expression « *emprise*

manifeste » par la loi n° 2020-936 du 30 juillet 2020 visant à protéger les victimes de violences conjugales fait l'objet de débats⁶. Le législateur n'a pas défini la notion, afin de laisser au juge une plus grande liberté d'appréciation, mais ce terme issu du vocabulaire de la psychologie est difficile à cerner par le juge qui tend à lui préférer celui de *contrôle coercitif*⁷.

Pendant quelques années, une expérimentation de **tentative de médiation préalable obligatoire** à la saisine du juge (connue sous l'acronyme de « TMFPO ») a été mise en place dans certaines juridictions pilotes (Loi n° 2016-1547 du 18 nov. 2016 de modernisation de la justice du XXI^e siècle) ; elle excluait de son champ, comme les dispositions susmentionnées, les situations de violences « *commises* » sur l'autre parent ou les enfants. Il était prévu qu'à peine d'irrecevabilité que le juge pouvait soulever d'office, le ou les parents devaient avant de saisir le juge tenter de résoudre leur différend par la voie de la médiation familiale. Cette expérimentation a fait l'objet d'appréciations contrastées. Un rapport conclut que la TMFPO produit « une déjudiciarisation paradoxale : elle augmente les délais de règlement des litiges pour la plupart des justiciables, sans les avoir nécessairement aidés à se mettre d'accord ou à augmenter leur sentiment de justice »⁸. De fait, peu de TMFPO débouchaient effectivement sur une médiation. Il a été mis fin à l'expérimentation à compter du 31 décembre 2024.

b) Le régime de la médiation familiale judiciaire

Sauf dispositions spéciales prises pour la protection de l'enfant (ii), la médiation judiciaire familiale est soumise, pour son organisation, aux articles 131-1 à 131-15 que le CPC consacre à la médiation, qui constituent une sorte de régime de droit commun (i).

⁶ V. : A. DARSONVILLE, Comment décrire un processus d'assujettissement? *Libération*, fév. 2020. https://www.liberation.fr/debats/2020/02/04/comment-decrire-un-processus-d-assujettissement_1777182

⁷ CA Poitiers, ch. corr., 31 janv. 2024, 5 arrêts, [réf](#) ; Y. Mayaud, « « Contrôle coercitif » et expérimentation d'une « chambre des violences intrafamiliales » à la cour d'appel de Poitiers », *Revue de science criminelle et de droit pénal comparé*, 2024, vol. 4, p. 819-820 ; O. Mahuzier, « Regard pratique sur la définition du contrôle coercitif en droit pénal », *JCP G*, n° 13, p. 593-599 ; v. aussi la proposition de loi n° 669 du 3 décembre 2024 visant à renforcer la lutte contre les violences faites aux femmes et aux enfants (art. 3).

⁸ V. Boussard, *L'évaluation de la tentative de médiation familiale préalable obligatoire (TMFPO). Quand médier n'est pas remédier*, Rapport de recherche, IERDJ, 2020.

i) Régime de droit commun de la médiation familiale judiciaire

Les articles 131-1 et suivants du CPC, qui ont été en grande partie modifiés par le décret n° 2022-245 du 25 févr. 2022 (décret pris en application de la loi pour la confiance dans l'institution judiciaire du 22 décembre 2021), entendent favoriser le recours à la médiation judiciaire et sécuriser les accords. Il est précisé que le médiateur désigné par le juge a pour mission d'entendre les parties et de confronter leurs points de vue pour leur permettre de trouver une solution au conflit qui les oppose ([CPC, art. 131-1](#)).

En France, même si l'article 131-1 CPC semble prévoir la possibilité pour le juge « d'ordonner » une médiation, **la médiation n'est jamais obligatoire**. En effet, l'accord des parties reste en toute hypothèse indispensable⁹. Ni le juge ni l'avocat ne peuvent leur imposer d'y recourir.

En revanche, **l'information sur la médiation peut être imposée** : le juge peut enjoindre aux parties de rencontrer un médiateur qu'il leur désigne et qui leur proposera une information sur la médiation¹⁰. Cette **injonction de rencontrer un médiateur**, qui est une mesure d'administration judiciaire, a été consacrée dans la loi n° 2019-222 du 23 mars 2019 (CPC, art. 127-1). En pratique, le recours à cette mesure dépend de l'intérêt que chaque juge porte à la médiation. La pratique varie d'un juge à l'autre, d'un tribunal à l'autre, d'une cour à l'autre. En outre, il semblerait que certaines parties soient peu enclines à s'y soumettre. C'est pourquoi un décret modifiant le CPC est annoncé, dont l'objet devrait être de soumettre à sanction (amende civile) la partie ne déférant pas à l'injonction de se présenter devant un médiateur, sauf motif légitime.

Le renvoi des parties devant un médiateur avec leur accord, au sens de l'article 131-1 CPC, tout comme l'injonction de rencontrer un médiateur à fin d'information, peuvent intervenir **à tout moment**, en amont de l'audience ou au cours de l'audience. La médiation peut également être ordonnée en cours d'instance par le juge des référés (CPC, art. 131-1), à tout stade de la procédure et même devant la Cour de cassation. Il est précisé que la médiation porte sur tout ou partie du litige (CPC, art. 131-2 al. 1) et que « en aucun cas elle ne dessaisit le juge, qui peut prendre à tout moment les autres mesures qui lui paraissent nécessaires » (CPC, art. 131-2 al. 2). Sa durée initiale ne peut excéder

⁹ Art. 131-1, CPC : « le juge saisi d'un litige peut, après avoir recueilli l'accord des parties, ordonner une médiation. ».

¹⁰ Art. 127-1, al. 1 CPC : « A défaut d'avoir recueilli l'accord des parties prévu à l'article 131-1, le juge peut leur enjoindre de rencontrer, dans un délai qu'il détermine, un médiateur chargé de les informer de l'objet et du déroulement d'une mesure de médiation. Cette décision est une mesure d'administration judiciaire ».

trois mois à compter du jour où le médiateur reçoit la provision à valoir sur sa rémunération, avec un renouvellement possible à la demande du médiateur (CPC, art. 131-3). Le CPC précise également qui peut être médiateur (art. 131-4 et s.).

La décision ordonnant la médiation est une simple mesure d'administration judiciaire (CPC, art. 131-15). Elle doit comporter différentes mentions obligatoires (accord des parties, durée de la médiation, prise en charge financière de la médiation; ...). L'absence de versement intégral de la provision dans le délai prescrit rend le recours à la médiation caduc et l'instance se poursuit.

La médiation est éligible à **l'aide juridictionnelle**. La question du **coût** de la médiation revient de façon récurrente. L'activité des médiateurs conventionnés est pour partie financée par les Caisses d'allocations familiales suivant un barème qui a été revalorisé en 2023¹¹. Dans le cadre de la médiation conventionnée, la réunion d'information est gratuite, le tarif de la première réunion de médiation dépend des revenus et n'excède pas 131 euros. Les médiateurs libéraux proposent des tarifs variables. En revanche, la question de savoir si l'assurance de protection juridique peut couvrir la médiation est en suspens : des discussions existent en ce sens.

Les parties peuvent être assistées devant le médiateur par toute personne ayant qualité pour le faire devant la juridiction qui a ordonné la médiation (CPC, art. 131-7). Le médiateur peut, avec l'accord des parties et pour les besoins de la médiation, entendre les tiers qui y consentent (CPC, art. 131-8).

Le juge peut mettre fin, à tout moment, à la médiation sur demande d'une partie ou à l'initiative du médiateur, et même d'office (CPC, art. 131-10).

Si elles parviennent à un accord, les parties, ou la plus diligente d'entre elles, peuvent le soumettre à **l'homologation** du juge **à tout moment**. Le juge statue sur la requête qui lui est présentée sans débat, sauf s'il estime nécessaire d'entendre les parties à l'audience. On est alors en matière gracieuse (CPC, art. 131-12). Cela vaut également en cas de médiation conventionnelle. L'homologation permet de conférer force exécutoire à l'accord issu de la médiation.

ii) Dispositions spécifiques prises pour la protection de l'enfant.

Disposition spéciale. Pour l'application de l'article 375-4-1 du code civil qui permet au juge des enfants d'ordonner une médiation familiale en matière d'assistance éducative, le décret n° 2023-914 du 2 octobre 2023, complété par

¹¹ V. le rapport établi par la CAF, [L'atlas de la médiation familiale, Exercice 2023](#).

une circulaire de la direction de la protection judiciaire de la jeunesse du 8 janvier 2024, instaure un [article 1189-1 du code de procédure civile](#) (CPC). Cette disposition précise tout d'abord l'objet de la médiation familiale en assistance éducative : « *la médiation familiale ordonnée par le juge des enfants (...) a pour objet d'aider les parents à mettre fin à leur conflit concourant à la situation de danger pour l'enfant* ». Cette mesure de médiation familiale tend donc à la restauration du dialogue entre les parents afin de préserver l'enfant du conflit. La disposition définit également les conditions de désignation du médiateur familial, les modalités de mise en œuvre de la médiation familiale en assistance éducative ainsi que les conditions d'homologation de l'accord issu de cette médiation.

La circulaire du 8 janvier 2024 met en avant les spécificités de la médiation dans le champ de la protection de l'enfance : « La médiation familiale ordonnée par le juge des enfants, si elle constitue un outil de restauration du dialogue entre les parents dans l'intérêt de l'enfant, peut également permettre à ces derniers de trouver des terrains d'entente sur les modalités d'exercice de l'autorité parentale (fixation de la résidence habituelle, droits de visite et d'hébergement, etc.) ».

Articulation avec le régime de droit commun. Les dispositions de droit commun des articles 131-1 à 131-15 du CPC (v. *supra*) restent cependant applicables à la médiation ordonnée par le juge des enfants dans le cadre de l'assistance éducative. Ainsi le principe de confidentialité de la médiation¹² joue de telle sorte que la rédaction d'un rapport éducatif est exclue (V. circ. préc.). Toutefois, l'article 1189-1 du CPC déroge à certaines de ces dispositions.

Régime dérogatoire. Ce texte prévoit tout d'abord la possibilité pour le médiateur **d'entendre l'enfant** qui y consent, sous réserve de l'accord des parents et de l'intérêt de celui-ci¹³.

Une autre dérogation concerne l'homologation de l'accord : par dérogation à l'article 131-12 du CPC, les parents ont la possibilité de saisir non pas le juge des enfants mais le juge aux affaires familiales en application de l'article 373-2-7 du code civil, aux fins d'homologation de leur accord relatif aux modalités d'exercice de l'autorité parentale. Le juge aux affaires familiales doit alors s'assurer, avant d'homologuer la convention, que celle-ci a été librement consentie par les parents, et qu'elle préserve « *suffisamment l'intérêt de*

¹² V. art. 131-14 du CPC : Les constatations du médiateur et les déclarations qu'il recueille ne peuvent être ni produites ni invoquées dans la suite de la procédure sans l'accord des parties, ni en tout état de cause dans le cadre d'une autre instance.

¹³ CPC, art. 1189-1, al. 3.

l'enfant ». Si une procédure d'assistance éducative est ouverte à l'égard du mineur, il peut solliciter du juge des enfants la communication des pièces de ladite procédure¹⁴ et il lui transmettra ensuite sa décision¹⁵.

Autre point d'importance, le décret du 2 octobre 2023 encadre **la désignation du médiateur en matière d'assistance éducative** familiale de manière spécifique. Outre les conditions prévues par l'article 131-5 du CPC¹⁶ qui s'appliquent à toutes les procédures de médiation, le médiateur familial désigné dans le cadre de l'assistance éducative doit être titulaire du diplôme d'État mentionné à l'article R. 451-66 du Code de l'action sociale et des familles (CASF) ou, à défaut, d'une formation à la pratique de la médiation relative au conflit parental emportant danger pour l'enfant¹⁷. Ainsi le médiateur familial intervenant dans le cadre d'une procédure d'assistance éducative doit nécessairement avoir des connaissances en matière de protection de l'enfance, sanctionnées par un diplôme d'État spécifique ou par une formation spécifique laissée à l'appréciation de l'assemblée générale des magistrats de la cour d'appel qui dresse la liste des médiateurs. En conséquence, les cours d'appel devraient spécifier, au sein de la liste des médiateurs familiaux, ceux d'entre eux qui disposent de la formation requise pour intervenir dans le cadre de l'assistance éducative (V. circ. 8 janvier 2024).

1.2. Les autres voies pour l'amiabie en matière familiale

Deux principaux dispositifs complètent l'arsenal juridique mis à la disposition des parties et/ou des juges pour régler de façon amiable les différends familiaux, mais leur champ d'application reste limité : l'audience de règlement amiable (a) et la convention de procédure participative (b).

¹⁴ CPC, art. 1072-1.

¹⁵ CPC, art. 1187-1.

¹⁶ CPC, art. 131-5: « La personne physique qui assure l'exécution de la mesure de médiation doit satisfaire aux conditions suivantes: 1° Ne pas avoir fait l'objet d'une condamnation, d'une incapacité ou d'une déchéance mentionnées sur le bulletin n° 2 du casier judiciaire; 2° N'avoir pas été l'auteur de faits contraires à l'honneur, à la probité et aux bonnes mœurs ayant donné lieu à une sanction disciplinaire ou administrative de destitution, radiation, révocation, de retrait d'agrément ou d'autorisation; 3° Posséder, par l'exercice présent ou passé d'une activité, la qualification requise eu égard à la nature du litige; 4° Justifier, selon le cas, d'une formation ou d'une expérience adaptée à la pratique de la médiation; 5° Présenter les garanties d'indépendance nécessaires à l'exercice de la médiation ».

¹⁷ CPC, art. 1189-1, al. 2.

a) L'audience de règlement amiable (ARA)

Dispositif. L'audience de règlement amiable (ARA) est un mode amiable de résolution des différends introduit en France en 2023 (Décret n° 2023-686 du 23 juillet 2023), qui permet de tenter de trouver une solution négociée à un litige pendant une procédure judiciaire, sous l'égide d'un juge spécialement désigné pour cette mission (CPC, art. 774-1). Selon l'article 774-2 al. 1 du CPC, « L'audience de règlement amiable a pour finalité la résolution amiable du différend entre les parties, par la confrontation équilibrée de leurs points de vue, l'évaluation de leurs besoins, positions et intérêts respectifs, ainsi que la compréhension des principes juridiques applicables au litige ».

Le juge saisi du dossier (juge du fond, juge des référés, ou juge de la mise en état) peut décider, à la demande d'une partie ou d'office après avis des parties, de convoquer celles-ci à une ARA. L'audience est alors tenue par un autre juge, qui n'appartient pas à la formation de jugement du litige. Ce juge n'a pas le pouvoir de trancher le fond du dossier mais agit comme facilitateur et conciliateur ; c'est pourquoi il est permis de rapprocher l'ARA des dispositifs de médiation.

L'ARA se déroule en chambre du conseil, dans un cadre confidentiel : tout ce qui s'y dit ne peut pas être utilisé ultérieurement si le litige revient devant le tribunal. Les parties doivent comparaître personnellement. Elles sont assistées de leurs avocats. Si les parties trouvent un accord, le juge de l'ARA peut dresser un procès-verbal, qui pourra être homologué afin d'avoir force exécutoire. Si aucun accord n'est trouvé, la procédure judiciaire reprend devant le juge initialement saisi.

Application à la matière familiale. L'ARA n'est possible que pour les litiges portant sur des droits dont les parties ont la libre disposition. Elle est donc susceptible d'être mise en œuvre en matière familiale, sauf lorsque sont en cause des droits indisponibles. En droit français, la distinction entre les droits disponibles et les droits indisponibles est cependant loin d'être claire, ce qui laisse subsister des discussions sur le champ d'application de l'ARA : si les enlèvements internationaux sont, par exemple, clairement hors de son spectre, certains aspects liés à la responsabilité parentale pourraient en relever.

b) La convention de procédure participative

Dispositif. L'article 2062 du code civil définit la convention de procédure participative comme « une convention par laquelle les parties à un différend s'engagent à œuvrer conjointement et de bonne foi à la résolution amiable de leur différend ou à la mise en état de leur litige ». Il précise que cette convention

est conclue pour une durée déterminée. Sa teneur est prescrite à peine de nullité par l'article 2063 du même Code.

Si elle a été conclue avant la saisine d'un juge, et tant qu'elle est en cours, la convention « rend irrecevable tout recours au juge pour qu'il statue sur le litige. Toutefois, l'inexécution de la convention par l'une des parties autorise une autre partie à saisir le juge pour qu'il statue sur le litige » (C. civ., art. 2065). En outre, elle ne fait pas obstacle à ce que des mesures provisoires ou conservatoires soient demandées par les parties, en cas d'urgence.

La procédure participative elle-même est organisée par les articles 1542 et suivants du Code de procédure civile. Sa spécificité ressort de l'article 1543 : « Elle se déroule selon une procédure conventionnelle de recherche d'un accord, suivie, le cas échéant, par une procédure aux fins de jugement ».

L'accord auquel les parties parviennent, le cas échéant, est homologué par le juge (C. civ., art. 2066), mais cette disposition n'est pas applicable en matière de divorce (C. civ., art. 2067).

Application à la matière familiale. Comme l'ARA, la convention de procédure participative a un champ d'application limité. Elle peut être conclue par toute personne « sur les droits dont elle a la libre disposition » (C. civ. art. 2064). Elle peut donc l'être en matière familiale, mais sous cette réserve. Cela est d'ailleurs confirmé par l'article 2067 du Code civil, qui dispose : « Une convention de procédure participative peut être conclue par des époux en vue de rechercher une solution consensuelle en matière de divorce ou de séparation de corps. L'article 2066 n'est pas applicable en la matière. La demande en divorce ou en séparation de corps présentée à la suite d'une convention de procédure participative est formée et jugée suivant les règles prévues au titre VI du livre Ier relatif au divorce ». Là encore, le flou persistant sur les concepts de droits disponibles et droits indisponibles suscite des interrogations, mais il est évident que certains litiges propres à la matière familiale, comme ceux relatifs aux déplacements illicites d'enfants, sont exclus du champ de la convention de procédure participative.

Il faut à présent analyser plus précisément comment le cadre juridique qui vient d'être décrit appréhende le cas particulier des enlèvements internationaux.

2. Médiation et enlèvements internationaux : un angle (presque) mort

A l'exception de l'article 1210-4 du CPC relatif aux missions du procureur de la République (v. *infra*), aucune disposition particulière en droit français n'envisage la médiation dans le contexte des déplacements illicites d'enfants. Elle est néanmoins possible, puisqu'on l'a vu la médiation est ouverte à l'ensemble de la matière familiale.

Il n'apparaît en revanche pas possible d'étendre aux enlèvements internationaux les dispositions propres à la médiation familiale en assistance éducative (v. *supra*), alors même qu'une certaine analogie est permise, en particulier eu égard au souci de protection de l'enfant. Néanmoins, outre que cette analogie n'est pas prévue par les textes, ceux-ci empêchent *a priori* de traiter la médiation en matière d'enlèvement comme une médiation en assistance éducative dans la mesure où les juges spécialement compétents, le juge aux affaires familiales (JAF) là, le juge des enfants ici, ne sont pas les mêmes. On voit ici les inconvénients liés à la répartition des rôles entre le JAF et le juge des enfants. Les difficultés d'articulation qui existent dans les situations internes sont exacerbées en matière internationale.

La procédure en matière d'enlèvements internationaux est décrite dans le CPC aux articles 1210-4 et suivants. Elle accorde, dans les nombreuses hypothèses où la Convention de la Haye de 1980 est applicable¹⁸, la première place à l'autorité centrale, en lien avec le procureur de la République, la médiation étant envisageable au niveau de l'une (2.1), comme de l'autre (2.2).

2.1. Médiation et autorité centrale

Sans surprise, le rôle de l'autorité centrale n'est pas détaillé dans le CPC. Il découle directement de la Convention de la Haye de 1980 et du règlement Bruxelles II ter. L'information sur son rôle est assurée via le site du ministère de la justice¹⁹. Dans ces conditions, il n'est guère étonnant que le droit français ne comporte pas de dispositions juridiques formelles concernant la mise en œuvre de la médiation par l'autorité centrale : c'est la seule pratique développée par l'autorité centrale française, à savoir le département de l'entraide, du droit international privé et européen (DEDIPE) de la direction des affaires civiles et du

¹⁸ C'est-à-dire lorsque l'enlèvement a eu lieu d'un pays contractant vers un autre État contractant.

¹⁹ <https://www.justice.fr/enlevements-internationaux-enfants-droits-visite-transfrontieres#:~:text=Qu'est%2Dce%20qu%20l'autre%20parent.>

Sceau du ministère de la Justice, qui permet de comprendre la place réservée à la médiation (sur cette pratique, v. *infra* Partie II).

Dans les hypothèses d'enlèvements internationaux non couverts par une convention internationale, l'autorité centrale n'a pas compétence et le parent doit donc directement saisir le juge de la demande de retour. Aucune disposition particulière n'incite le JAF saisi d'une demande de retour d'enjoindre aux parties de rencontrer un médiateur. Par ailleurs, même lorsque la convention de la Haye est applicable, le parent n'a pas l'obligation de passer par le mécanisme de coopération des autorités centrales. Il peut directement saisir le juge. Ici encore, aucune règle particulière n'incite à la médiation.

2.2. Médiation et Procureur de la République

Lorsque l'enfant déplacé se trouve sur le territoire français, l'autorité centrale transmet au procureur de la République près le tribunal judiciaire territorialement compétent en application de l'article [L. 211-12](#) du code de l'organisation judiciaire la demande de retour dont elle a été saisie. Il appartient au procureur de la République de localiser l'enfant ou de confirmer sa localisation et d'informer la juridiction qui aurait été saisie au fond sur les modalités de l'exercice de l'autorité parentale, de la demande de retour. C'est également au procureur de la République de "prendre toute mesure en vue d'assurer la remise volontaire de l'enfant, notamment en faisant procéder à l'audition de la personne dont il est allégué qu'elle a déplacé ou retenu l'enfant et en l'invitant à un retour volontaire de l'enfant, ou de **faciliter une solution amiable**". Il peut mais il n'a pas l'obligation de proposer la médiation. C'est encore au procureur de la République d'introduire une procédure judiciaire afin d'obtenir le retour de l'enfant en saisissant le **juge aux affaires familiales** du tribunal judiciaire spécialement désigné, dans le ressort duquel se trouve l'enfant²⁰. Il est donc partie principale à la procédure de demande de retour d'un enfant déplacé ou retenu en France.

Si l'enfant est déplacé ou retenu à l'étranger, le procureur de la République peut ordonner toute mesure d'investigation afin de recueillir les informations sur l'enfant et son environnement matériel, familial et social qui ont été sollicitées par l'autorité centrale étrangère. Les modes amiables de règlement du différend ne sont pas mentionnés dans cette hypothèse.

²⁰ article 1210-7, CPC. Il n'y a qu'un tribunal judiciaire compétent par ressort de cour d'appel pour connaître des demandes de retour en cas d'enlèvement international. V. la [liste](#).

Conclusion. Même s'il apparaît encore possible et même souhaitable, ça ou là, de renforcer les dispositifs textuels permettant de déployer la médiation familiale en France, tout particulièrement pour permettre leur meilleure adaptation à la matière internationale, le cadre juridique français apparaît relativement robuste. Le bilan concret de la médiation familiale en matière internationale s'avère cependant très décevant, en l'état d'une appropriation encore insuffisante de ces dispositifs en pratique.

II- Médiation familiale internationale en France : une appropriation encore insuffisante en pratique

Les auteures de ce rapport ont rencontré de nombreux professionnels²¹ – juges de juridictions de première instance, d'appel, de cassation ; universitaires spécialistes de la médiation ; avocats ; médiateurs ; services ministériels – pour tenter de cerner, au-delà du cadre juridique formel qui a été décrit en première partie ; l'état de la pratique de la médiation familiale internationale en France, plus particulièrement en matière d'enlèvements internationaux d'enfants. Le sentiment qui se dégage de ces auditions, conforté par la connaissance personnelle qu'ont les auteures de la pratique judiciaire en la matière, est que nonobstant un contexte réglementaire relativement favorable, la pratique de la médiation n'est pas encore bien développée dans les litiges familiaux internationaux en général, et en matière d'enlèvements d'enfants en particulier. Pourtant, l'intérêt que présente ce mode de règlement des différends en matière familiale internationale, y compris en cas de déplacement illicite d'un enfant, est généralement reconnu par les praticiens, même si quelques réserves ont pu s'exprimer (1). Selon un paradoxe qui n'est qu'apparent, car il subsiste en réalité d'importants obstacles à une mise en œuvre pratique efficiente de la médiation familiale internationale, elle reste néanmoins très peu utilisée (2).

1. Un mode de règlement dont l'intérêt est généralement reconnu

L'intérêt de la médiation en matière familiale internationale est généralement reconnu par les acteurs judiciaires : particulièrement adaptés aux contentieux familiaux (1.1.), la médiation ou les modes de règlement assimilables présentent en outre l'avantage de pouvoir être, potentiellement et utilement, mobilisés à tous les niveaux du contentieux (1.2.). Si le recours à la médiation est questionné

²¹ V. l'annexe

en présence d'allégations de violences intra-familiales, les praticiens ne semblent cependant pas considérer qu'il doive être formellement exclu (1.3).

1.1. Un mode de règlement particulièrement adapté aux contentieux familiaux internationaux

Plusieurs arguments sont avancés pour faire valoir que les contentieux familiaux internationaux, y compris ceux relatifs aux enlèvements d'enfants, devraient être appréhendés via la médiation.

Intérêt de l'enfant. Lorsque des enfants sont impliqués dans les contentieux familiaux, leur intérêt doit être au cœur du règlement des conflits. Le sentiment général est que l'enfant ne sort jamais indemne d'un conflit parental, et que le conflit parental est alimenté voire renforcé par les procédures contentieuses. La médiation, en favorisant le dialogue entre les parents et le cas échéant un règlement pacifié du conflit, présente donc un outil intéressant pour protéger autant que faire se peut l'intérêt de l'enfant. Nombreux sont les juges qui considèrent qu'ils ne sont pas les mieux placés pour apprécier l'intérêt de l'enfant. Le débat judiciaire est d'ailleurs biaisé : dès lors que l'enfant a sa résidence habituelle en France, le juge va, en l'absence d'accord des parents, hésiter à autoriser son déménagement à l'étranger. Le parent qui entend s'installer hors de France (rentrer dans son pays d'origine, par exemple) se trouve ainsi placé en situation de faiblesse.

Importance du maintien du lien familial: Dans la continuité des enjeux relatifs à l'intérêt de l'enfant, les litiges familiaux appellent, sans doute plus encore que les litiges économiques, un mode de règlement capable de garantir la pérennité du lien entre les parties, au-delà du règlement de la séparation parentale ou de l'autorité parentale. Particulièrement en présence d'enfants, le maintien d'un lien cordial ou à tout le moins neutre entre les parents est un facteur essentiel pour protéger au mieux l'intérêt des enfants. La médiation présente à cet égard un avantage décisif par rapport au contentieux judiciaire, à la condition toutefois, nous y reviendrons, que ses modalités de mise en œuvre favorisent la pacification des relations.

Besoin de solutions créatives. Les conflits familiaux internationaux sont particulièrement complexes à régler, car ils mettent face-à-face des aspirations parfois également légitimes : la volonté de chacun des deux parents de conserver un lien fort avec les enfants ; le besoin ressenti par l'un et/ou l'autre des parents originaires de pays différents, en cas de séparation, de rejoindre son pays d'origine pour y bénéficier d'un contexte social, économique et familial plus favorable. Les solutions judiciaires, souvent abruptes (fixation de la résidence

dans un pays, obligation de retour...) apparaissent dès lors peu satisfaisantes tandis que des accords négociés par les parties peuvent offrir des alternatives originales, et pour autant fonctionnelles (ex. d'un accord de médiation prévoyant une résidence alternée respectivement en France et en Angleterre selon des modalités trimestrielles (2 trimestres en France, 1 an Angleterre), conclu avec l'accord des établissements de scolarisation des enfants).

Dimension culturelle. Au-delà des aspects personnels, la médiation est aussi la voie adaptée pour surmonter une différence de cultures juridiques que la procédure judiciaire ne parvient pas nécessairement à appréhender : la solution adoptée judiciairement dans un État peut ne pas être acceptable dans un autre. La médiation offre en outre à la famille l'opportunité de recourir aux services d'un tiers présentant des qualités correspondant à leurs spécificités culturelles.

Effectivité du règlement : Par certains aspects, l'accord de médiation peut s'avérer plus efficace, dans un contexte international, qu'une décision de justice. Parce qu'il est consenti par les deux parties, l'accord de médiation bénéficie d'une meilleure acceptabilité, qui favorise son exécution spontanée. En outre, il apparaît que les autorités d'exécution (parquets civils, forces de l'ordre) sont, sauf en matière de procédures de retour, réticentes à exécuter par la force les décisions de justice en matière familiale (par exemple celles relatives à la fixation de la résidence des enfants). Être le bénéficiaire d'un jugement n'est donc pas une garantie absolue.

Il faut cependant observer que des réserves ont pu être émises à l'encontre de la médiation, principalement par certains avocats. Ces réserves semblent moins liées à une conviction que la médiation ne serait pas un mode de règlement approprié des litiges familiaux internationaux, qu'aux difficultés pratiques que ces professionnels ont pu rencontrer dans leurs expériences de mise en œuvre de la médiation (v. *infra* les freins au développement de la médiation).

1.2. Un mode de règlement pertinent à tout stade du contentieux

Le potentiel de la médiation est d'autant plus important que ce mode de règlement est, de l'avis des professionnels, susceptible d'être mobilisé à n'importe quel stade du contentieux. Si une **médiation extra-judiciaire** est, on l'a vu, juridiquement possible, en pratique il semble cependant qu'en matière familiale, les parties, peu habituées au contentieux, ont tendance à saisir très rapidement le juge. Cette observation rend particulièrement **pertinent le développement de services, visibles et efficaces, de pré-médiation** pour inciter les parties à recourir à la médiation avant toute saisine judiciaire.

Pour l'heure, c'est donc principalement **dans le contexte des procédures judiciaires** que la médiation vient s'insérer. Si la médiation paraît de prime abord devoir être encouragée à un stade précoce de la procédure, devant les juges de première instance et idéalement avant même le jour de l'audience, sa pertinence en cause d'appel a pu être soulignée par les acteurs judiciaires : en appel, certaines parties perdent de leur pugnacité, en particulier lorsque la décision rendue les conduit à réévaluer à la baisse leurs aspirations. Parfois, les tensions interpersonnelles commencent à s'émousser. Surtout, dans le système français, les délais en appel sont beaucoup plus longs qu'en première instance, ce qui peut conduire les parties à rechercher des solutions plus rapides. On verra que, même dans le cadre d'un pourvoi en cassation, la pertinence d'une médiation peut être avérée.

Il faut en effet garder à l'esprit que la médiation peut avoir un objet identique à celui faisant l'objet, ou susceptible de faire l'objet, d'un contentieux - la médiation se présente alors, à un stade quelconque, comme un **substitut à la procédure judiciaire** - ; mais l'objet de la médiation peut aussi être différent de celui de la procédure judiciaire : la médiation vient alors comme un **complément de la procédure judiciaire**. Cela peut se produire par exemple lorsque le juge prononce une décision sur le principe d'une demande (ex. un divorce), mais renvoie les parties à la médiation pour définir les conséquences de cette décision (pension alimentaire, droits de visite) ; ou lorsqu'une décision judiciaire est rendue mais qu'une médiation est organisée sur les modalités d'exécution de cette décision. Devant la Cour de cassation, si l'objet d'un pourvoi – en général une pure question de droit – se prête mal à une médiation en lui-même, le temps de la procédure de cassation peut néanmoins constituer un moment utile pour conduire les parties, confrontées au risque d'un nouvel allongement de la procédure, à accepter une médiation sur le fond de leur litige.

1.3. Un mode de règlement questionné en présence d'allégation de violences intra-familiales

Le droit français exclut par principe le recours à la médiation dans les affaires familiales dès lors que des allégations de violences intra-familiales sont formées (v. partie I). Les praticiens sont plutôt critiques à l'égard de cette exclusion catégorique. Sous réserve que d'importantes précautions soient prises pour protéger la partie vulnérable, la médiation est regardée comme un dispositif pouvant produire des effets favorables y compris en cas de violence intra-familiales. Menée par des professionnels chevronnés, idéalement assistés de psychologues, elle peut conduire la partie vulnérable à sortir de sa position

de victime, et induire chez l'autre partie une prise de conscience du caractère pathologique de son attitude.

2. Un mode de règlement paradoxalement peu utilisé

En l'état du manque d'outils statistiques officiels déjà relevé (v. l'introduction générale), il est délicat d'objectiver certains constats qui résultent de l'expérience ou des impressions personnelles des personnes auditionnées. L'observation empirique de la pratique des juridictions révèle que, si un certain nombre de dispositifs sont en place pour favoriser en pratique la médiation familiale internationale, ils restent peu investis (2.1.), car d'importants obstacles freinent le développement de la médiation familiale internationale (2.2.).

2.1. Des dispositifs en place, mais peu investis

Le système français s'appuie assez largement sur le juge pour inciter les parties à recourir aux modes alternatifs de règlement des différends, en sorte que la médiation apparaît plus facile à mettre en œuvre dans le cadre de procédures judiciaires en cours (b). Pour autant, en dehors du cadre judiciaire *stricto sensu*, des dispositifs de soutien à la médiation existent (a).

a) Les dispositifs de soutien à la médiation en dehors du cadre judiciaire (pré-médiation)

Les parties sont toujours libres de choisir un règlement amiable de leur différend familial, en dehors de toute saisine d'un juge. Les retours d'expérience révèlent toutefois que, peu rodés aux modes de règlement des litiges, les particuliers impliqués dans des litiges familiaux internationaux ne songent pas spontanément à la médiation. Or tant que le juge n'est pas officiellement saisi, les dispositifs officiels et publics²² d'information sur la médiation, que l'on pourrait qualifier de « pré-médiation », sont peu nombreux. Ils ne sont pas pour autant inexistantes, portés par le service social international (SSI France) (i), la Caisse d'allocations familiales (ii) et, dans le cas particulier des enlèvements parentaux internationaux, par le Ministère de la justice et l'autorité centrale qui lui est attachée (iii)

(i) Le service social international en France (SSI France)

Le Service social international (SSI) est une organisation non gouvernementale (ONG) qui intervient dans des situations liées à problématiques sociales transfrontalières. Il fait partie d'un réseau mondial présent dans plus de 120

²² Le travail réalisé par les nombreuses associations œuvrant dans ce domaine n'est pas ici analysé.

pays, avec un secrétariat général basé à Genève, et des branches dans plusieurs pays, dont le Service social international - France (SSI France), enregistré comme Association « Loi 1901 ».

Offrant un accompagnement social aux familles dans les situations transfrontières, SSI France est idéalement placé pour leur délivrer une information sur la possibilité de recourir à la médiation pour régler leurs différends transnationaux. Sans offrir lui-même un service de médiation, SSI France déploie déjà un service pouvant être qualifié de « pré-médiation » : au-delà de la seule information sur les avantages de la médiation, SSI France, parce qu'il participe d'un réseau international, est en situation d'orienter les familles ou les professionnels vers des médiateurs spécialisés et certifiés en France mais aussi dans plusieurs pays. Il facilite en outre parfois les conditions logistiques d'une médiation internationale (traduction, coordination entre pays, etc.).

SSI France est également en charge de la gestion du « 116 000 Enfants disparus », le numéro gratuit dédié en France à la disparition d'enfants et aux enlèvements parentaux.

(ii) Les services de médiation familiale de la CAF

En France, on l'a signalé (*supra* I), les Caisses d'allocations familiales s'efforcent de favoriser l'accès à la médiation en cas de conflits familiaux. Elles délivrent une information aux familles, mais elles offrent également de véritables services pour faciliter l'accès des familles à la médiation.

Information sur la possibilité de recourir à la médiation familiale. Les caisses d'allocations familiales déploient sur leurs sites et sur la documentation mise à la disposition de leurs allocataires²³ des informations relatives au dispositif de médiation familiale, en mettant en évidence les avantages de ce mode de règlement des différends familiaux.

Première consultation gratuite avec un médiateur. Lorsque les familles envisagent une médiation sous l'égide de la CAF, elles bénéficient d'une première séance (d'une durée de 45mn à 1h) avec un médiateur, totalement gratuite. Cette séance est l'occasion pour le médiateur d'expliquer aux parties les avantages et les modalités de la médiation, et de vérifier le cas échéant si les conditions sont réunies pour envisager une médiation.

Médiation conventionnée. La décision de poursuivre dans le cadre d'une véritable médiation appartient aux parties. Celles-ci peuvent, si elles décident de poursuivre et si elles le souhaitent, recourir à des médiateurs conventionnés

²³ V. par ex. : Guide de prestations CAF

par la CAF pour tenter de résoudre leur différend familial. Le conventionnement permet de barémiser les services du médiateur pour les parties : les parties paient en fonction de leur quotient familial (de 2 euros à 131 euros la session d'une à deux heures).

Médiation en matière internationale. Selon le site de la CAF, près de 43 000 personnes ont bénéficié d'une mesure de médiation en 2022. Il n'existe cependant aucune statistique officielle permettant d'identifier, parmi ces mesures de médiation, celles qui relèvent d'une médiation internationale. En effet, les médiations recensées par la CAF le sont à partir de données recueillies auprès des services conventionnés. A l'heure actuelle, le logiciel employé pour recueillir ces données ne permet pas d'indiquer ni de déterminer, ni directement ni indirectement, si la médiation est internationale ou nationale : une modification pourrait être souhaitable pour favoriser l'établissement de statistiques fiables. Pour autant que l'on puisse en juger, les médiations familiales internationales semblent constituer une très faible part des mesures de médiation, sans être toutefois inexistantes. A titre d'exemple, l'association Parenthèse Médiation, conventionnée par la CAF, signale 19 cas internationaux pour les années 2023/2024.

(iii) Le rôle joué par le Ministère de la justice et l'autorité centrale française (DEDIPE) en matière d'enlèvement parentaux

Porteur d'une politique publique globalement favorable à la médiation, le ministère de la justice français soutient naturellement le recours à la médiation, également en matière d'enlèvements parentaux. Son site internet indique que la médiation peut permettre de reprendre contact avec l'autre parent et de trouver une solution allant dans l'intérêt de l'enfant. Il en donne les principales caractéristiques. Au-delà, le site invite à contacter l'un des médiateurs familiaux internationaux inscrits sur la **liste de l'autorité centrale française** : [Liste des médiateurs familiaux internationaux](#). Il précise qu'il s'agit de médiateurs diplômés, avec une compétence spécifique dans les situations de conflit parental à l'international, et parlant plusieurs langues. Le site mentionne aussi les éléments dont le médiateur aura besoin.

Mettant en œuvre cette politique générale, l'autorité centrale française compétente en matière de retour (le Département de l'entraide, du droit international privé et européen ou DEDIPE du Ministère de la Justice)²⁴ s'affirme

²⁴ Il faut rappeler, comme signalé en première partie, que la demande de retour peut aussi être formée directement auprès d'un juge, auquel cas le DEDIPE est rarement informé et saisi et ne peut donc jouer ce rôle d'information.

soucieuse de développer la médiation, tant en amont d'une éventuelle saisine du juge qu'en aval d'une décision de retour, dans la phase post-sentencielle. L'autorité centrale peut donc soutenir tout aussi bien une médiation en dehors de tout cadre judiciaire, que dans un cadre judiciaire, alors qu'une procédure est en cours ou même achevée.

Les résultats de cette politique sont délicats à évaluer. Sur une période et un nombre total de demandes de retour non précisément définis, le DEDIPE a recensé dans les dossiers dont il a été saisi un peu moins de 50 mesures de médiation familiale internationale, réalisées en France ou à l'étranger, dont 20 intra-européennes. Il a en outre adressé un questionnaire aux médiateurs inscrits sur sa liste, à des fins notamment statistiques. 7 médiateurs/associations de médiation (sur les 18 de la liste) ont répondu au questionnaire. Ils indiquent avoir été contactés 6 fois grâce à la liste du DEDIPE, et avoir réalisé pour l'année 2023 42 médiations familiales internationales, sans que l'on sache précisément quelle était la nature du litige et donc la part de litiges relatifs à des déplacements illicites d'enfants.

Pour encourager la médiation en matière d'enlèvements internationaux d'enfants, le DEDIPE met en œuvre un dispositif particulier d'information. Par souci de clarté, il faut distinguer selon que le parent a saisi l'autorité centrale française d'une demande de retour d'un enfant illicitement déplacé hors de France (art. 8, Conv. La Haye) ou que l'autorité centrale française est saisie par une autorité étrangère, parce qu'un enfant a été déplacé illégalement vers la France, en vue d'organiser son retour (art. 9 et 10 de la Conv. La Haye). Mais dans les deux cas, il ne s'agit que de délivrer une information, le DEDIPE ne proposant pas de « service de médiation » à proprement parler.

***Information délivrée dans le cadre d'une saisine directe du DEDIPE par un parent en raison du déplacement illicite d'un enfant hors de France**

Lorsque la demande de retour est formée directement par un parent auprès de l'autorité centrale française (DEDIPE) en vue d'assurer le retour d'un enfant déplacé illicitement vers un autre pays, le DEDIPE propose systématiquement au demandeur, avant de transmettre le dossier à l'autorité centrale étrangère concernée et de lancer donc officiellement la procédure de retour, d'envisager une médiation. D'ailleurs, le formulaire de demande de retour comporte une question interrogeant le demandeur sur son ouverture éventuelle à une médiation familiale internationale. Si le demandeur manifeste son intérêt pour un tel processus, il convient encore de susciter et recueillir l'adhésion du

défendeur à ce mode de règlement, le cas échéant en s'appuyant sur l'autorité centrale de l'État dans lequel se trouve le défendeur.

Dans ce contexte, le DEDIPE s'efforce aussi de développer la médiation dans ses échanges avec les autres autorités centrales : le courrier de saisine qu'il leur adresse est accompagné d'une brochure sur la médiation et de la liste des médiateurs familiaux internationaux (v. infra).

***Information délivrée dans le cadre d'une saisine du DEDIPE par une autorité centrale étrangère à raison du déplacement illicite d'un enfant vers la France**

Lorsqu'il est saisi par une autorité centrale étrangère elle-même saisie d'une demande de retour d'un enfant illicitement déplacé en France, le DEDIPE doit « procéder d'urgence en vue du retour de l'enfant » (art. 11, Conv. La Haye). Mais l'article 10 de la Convention prévoit également que « l'autorité centrale de l'État où se trouve l'enfant prendra ou fera prendre toute mesure propre à assurer sa remise *volontaire* ». La pratique du DEDIPE français est alors de se mettre en relation avec le parent rapté, en lui demandant de répondre de façon motivée dans un délai de 10 jours. A cette occasion, il est porté à sa connaissance la possibilité d'envisager une médiation. A défaut de réponse satisfaisante dans le délai imparti, le DEDIPE saisit les juridictions par l'intermédiaire du parquet pour mettre en œuvre la procédure de retour (v. la procédure décrite *supra* en partie I).

***Absence de véritable « service de médiation » internationale du DEDIPE**

Le DEDIPE ne joue qu'un rôle d'information et de proposition à l'égard des parties. Il fournit une liste de médiateurs (déjà mentionnée *supra*), accessible sur son site interne, auxquels les parties peuvent le cas échéant s'adresser, mais il n'accompagne pas ni ne supervise la médiation si les parties décident d'y recourir.

Il n'en a pas toujours été ainsi : une cellule de médiation, composée de deux médiateurs auxquels les parties pouvaient choisir de s'adresser, a un temps été directement rattachée au DEDIPE. Ce service a été supprimé en 2020, pour la raison officielle qu'il était problématique, sous l'angle de l'impartialité, que le DEDIPE puisse tout à la fois être l'autorité centrale en charge des demandes de retour et l'autorité organisant d'éventuelles médiations entre les parties. On peut se montrer peu convaincu par cet argument. En tout état de cause, on y reviendra, la principale critique tient ici au fait que la solution retenue comme

alternative à ce service (mise à disposition d'une liste de médiateurs) s'avère en pratique peu satisfaisante en l'état.

b) Les dispositifs de soutien à la médiation dans un contexte judiciaire

Le déclenchement de la procédure judiciaire familiale apparaît potentiellement plus propice à la mise en œuvre d'un règlement amiable, à la condition toutefois que les juges s'emparent de cet outil de façon volontariste. Les autorités publiques françaises en sont bien conscientes, et elles ont tout à la fois intégré l'acculturation à la médiation dans la **formation des juges français** (modules proposés à l'ENM, en formation initiale comme en formation continue) et mis à leur disposition des outils leur permettant **d'intégrer la médiation dans la procédure judiciaire**.

Dans la pratique juridictionnelle française, les opportunités d'un recours à la médiation ou à un mode de règlement amiable assimilables sont ainsi relativement nombreuses, et se distillent tout au long de la procédure.

(i) Juridictions de première instance

On l'a vu (*supra* Partie I), plusieurs options s'offrent, en médiation familiale en général, aux juges de première instance.

-Injonction de rencontrer un médiateur (pratique de la double convocation).

Le sentiment des praticiens auditionnés semble être que les juridictions de première instance utilisent relativement peu cette possibilité ; à titre d'exemple, à Paris, la pratique était assez développée avant 2020 en matière interne, mais a été abandonnée depuis. En outre, les défendeurs ne sont pas toujours enclins à répondre à l'injonction. Ces limitations pourraient être corrigées par les textes attendus, à savoir la circulaire relative à la pratique de la double convocation, et le nouveau décret devant instaurer une amende civile en cas de non-respect de l'injonction par les parties.

-Le **jour de l'audience**, le JAF peut proposer aux parties de **recourir à une médiation** et recueillir leur accord. Pour faciliter le recours à la médiation dans ce contexte, certaines juridictions – en tout cas le TJ de Paris – disposent d'une permanence de médiateurs sur site (incluant une psychologue de la Protection judiciaire de la jeunesse (PJJ)), auxquels les parties peuvent s'adresser immédiatement. En revanche, l'**audience de règlement amiable** (ARA) reste d'application limitée dans des contentieux familiaux relevant largement des droits indisponibles (V. *supra* partie I).

-Lors du **prononcé de la décision**, le JAF peut choisir de rendre une décision (par exemple un jugement de divorce ou de fixation de l'autorité parentale) et

l'assortir d'une injonction faite aux parties de recourir à une médiation familiale pour organiser les conséquences de cette décision (résidence, droits de visite, pension alimentaire...). Les juges interrogés se sont montrés favorables à cette pratique, mais aucune donnée ne nous a permis d'objectiver son utilisation pratique en matière de médiation familiale internationale.

Il faut également souligner l'existence de dispositifs très expérimentaux, déployés dans certaines juridictions. Le dispositif de la **coordination parentale**, qui a été expérimenté au TJ de Paris, mérite notamment l'attention. Il s'agit d'un processus structuré, souvent mis en œuvre après une décision judiciaire (jugement de divorce, ordonnance sur la garde, etc.), dans lequel un professionnel qualifié (coordinateur parental) aide les parents à appliquer les décisions du juge, résoudre les désaccords liés à l'exercice de l'autorité parentale, communiquer de manière plus efficace dans l'intérêt des enfants et ainsi réduire le niveau de conflit et éviter des allers-retours incessants devant le juge. Le coordinateur parental a un rôle plus actif que le médiateur, et le processus de coordination s'inscrit en principe dans un temps plus long que celui de la médiation. Le dispositif n'a pas de cadre légal spécifique en France, mais il peut néanmoins être mis en œuvre en l'état des dispositions applicables. Les obstacles sont ceux liés à sa durée, et le cas échéant à son coût (v. *infra*).

D'une façon générale, on peut observer qu'en France, la pratique de la médiation en matière familiale semble essentiellement liée à la sensibilisation du juge à ce mode de règlement des différends. C'est, on y reviendra, l'un des freins à son inscription pérenne dans la pratique judiciaire.

(ii) Cour d'appel

Pour les raisons déjà exposées, notamment la durée de la procédure d'appel, le recours à la médiation à hauteur d'appel présente un intérêt certain. Il ressort des entretiens que la Cour d'appel de Paris bénéficie d'un pôle de médiateurs placés auprès de la chambre de la famille. En revanche, ce n'est pas le cas pour la chambre en charge des enlèvements d'enfants. La volonté de bénéficier d'un tel pôle auprès de la chambre, qui serait composé de médiateurs immédiatement disponibles et compétents pour traiter de médiations transnationales, existe au niveau de la chambre, mais sa mise en œuvre concrète se heurte à des difficultés de financement et d'identification des profils idoines.

(iii) Cour de cassation

La Cour de cassation a mis en place en 2021, sous l'impulsion de sa Première Présidente, un Groupe de travail sur la médiation. Ce groupe a abouti à des résultats concrets, au regard tant du cadre législatif (décret de février 2022

mettant en place les conditions d'un recours à la médiation devant la Cour de cassation) qu'au regard des pratiques des chambres. Les pratiques varient dans leurs modalités d'une chambre à l'autre. La Première chambre civile, qui traite plus particulièrement des questions en matière familiale internationale, s'est pour sa part principalement emparée de l'outil « injonction de rencontrer un médiateur » : dans un certain nombre de dossiers pendants en matière familiale internationale, à un stade précoce de la procédure (après l'enrôlement du dossier), un courrier a été adressé aux avocats aux Conseils pour leur prescrire de s'adresser à un médiateur désigné par la Cour en vue d'un entretien préalable. Les résultats de cette démarche sont diversement appréciés : la Cour considère que même si les parties ne sont pas parvenues à un accord, la mesure a eu des effets positifs (reprise de dialogue partiel entre les parties) ; les avocats aux conseils concernés sont beaucoup plus mitigés – c'est la qualité de la médiation qui est principalement mise en cause, on y reviendra.

Quoiqu'il en soit, la Cour de cassation discute d'une éventuelle généralisation de l'expérimentation : un dispositif de recours à la médiation pourrait ainsi être prévu dans la nouvelle édition du Weber²⁵. Il ne s'agirait évidemment pas de systématiser la médiation, mais d'y recourir dans les affaires, y compris transnationales, qui s'y prêtent.

Des outils sont donc en place, mais pour des raisons que nous allons à présent analyser, ils semblent en pratique encore assez peu utilisés en matière interne et encore moins en matière internationale.

2.2. Les freins au développement de la médiation familiale internationale

Malgré un cadre réglementaire relativement favorable et des politiques publiques volontaristes, la médiation familiale internationale apparaît on l'a vu encore assez peu utilisée en France. L'explication de ce paradoxe réside dans le fait que d'importants obstacles freinent encore le développement de cette pratique. Il est essentiel de bien conceptualiser ces obstacles, qui sont à la fois institutionnels (a), culturels (b) et financiers (c), si l'on entend leur apporter des réponses efficaces.

a) Obstacles institutionnels

Obstacles processuels. En matière d'enlèvements internationaux d'enfants, le règlement Bruxelles II ter prévoit, en son article 24, qu'une juridiction de

²⁵ J.F. Weber, *La Cour de cassation*, La documentation française, 2006 – nouvelle édition en préparation.

première instance saisie d'une demande de retour « sauf si cela se révèle impossible en raison de circonstances exceptionnelles, rend sa décision six semaines au plus tard après sa saisine ». Les personnes auditionnées ont dans leur immense majorité fait valoir que ce délai rend en pratique illusoire l'organisation d'une médiation, en tout cas d'une médiation destinée à régler le différend lié au déplacement illicite, et ce d'autant plus, on y reviendra, que les juges ont à l'heure actuelle peu d'outils pour favoriser la mise en place rapide d'un dispositif de médiation internationale. Un nombre infime d'entre elles a observé qu'une médiation pouvait être déclenchée nonobstant ce délai strict, avec l'idée que le règlement du différend au fond devait être envisagé au-delà de la seule question du retour de l'enfant.

Obstacles organisationnels. Certains obstacles mentionnés par les personnes entendues sont liés au fonctionnement des juridictions : encombrement de certaines d'entre elles, manque de greffiers, turnover des magistrats, outils peu adaptés. D'autres, concernant les médiateurs, font état des difficultés, pour les juges, les avocats ou les parties, à trouver dans des délais très contraints des médiateurs qui soient à la fois disponibles, présentant les qualités requises pour réaliser des médiations familiales internationales (culture, langue). L'identification de ces médiateurs est considérée comme difficile : la liste du DEDIPE est souvent jugée insatisfaisante ; quant aux listes des médiateurs agréés par les Cours d'appel, elles ne comportent pas d'informations sur les qualités nécessaires pour une médiation internationale (langues parlées, familiarité avec la culture de certains pays).

Limites de la coopération internationale. Il est régulièrement souligné qu'il subsiste, même entre États membres, une hétérogénéité culturelle et juridique relativement à la médiation en matière familiale, ce qui peut poser des difficultés importantes (ex. : malgré un accord de médiation, une partie peut rester soumise à des poursuites pénales dans un autre État membre) ; la **co-médiation**, qui semble unanimement regardée comme un dispositif à encourager, est perçue difficile à mettre en place faute de relais efficaces à l'étranger.

b) Obstacles culturels

Juridictions. Malgré les formations – initiale et continue - mises en place à l'ENM, et quelques juges très engagés en faveur de la médiation, l'acculturation des juges français à la médiation semble encore insuffisante. Une certaine « rigidité », pouvant faire obstacle à l'homologation des accords de médiation, est parfois dénoncée. Les obstacles institutionnels mentionnés plus haut peuvent en outre dissuader les juges d'encourager des médiations.

Avocats. Un certain nombre d'avocats semblent peu convaincus par le recours à la médiation, évoquant la psychologie de leurs clients, la perte de temps induite par des procédures vouées à l'échec, la faible qualité des médiateurs. Une certaine « culture du contentieux » est parfois soulignée, dans le discours de leurs partenaires de justice ou même de certains avocats évoquant leurs confrères/consoeurs. Une sorte de concurrence de mauvais aloi entre avocats et médiateurs semble s'établir.

Parties. Les tensions familiales exacerbées dans certaines affaires sont regardées comme constitutives d'un obstacle difficilement surmontable pour certaines médiations. Le non-respect des injonctions de rencontrer un médiateur accrédite l'idée que nombre de parties ne sont pas ouvertes à la médiation.

c) Obstacles financiers

Coût de la procédure. La procédure de médiation induit des frais supplémentaires (rémunération des médiateurs et des avocats, frais éventuels de déplacement) d'autant mal perçus qu'une issue favorable n'est pas assurée. Les médiateurs présentés comme « conventionnés » sur la liste du DEDIPE ne pratiquent en réalité pas toujours des honoraires réellement conventionnés.

Prise en charge limitée. Si l'aide juridictionnelle en matière médiation a été revalorisée, cela ne concerne que la médiation judiciaire (ainsi que la procédure participative). De plus, on l'a signalé, la possibilité de mobiliser la protection juridique des assureurs pour recourir à la médiation reste fort débattue. La médiation est perçue par nombre d'acteurs judiciaires comme « une justice de riches ».

3. Un mode de règlement perfectible

Quelques évolutions d'ordre pratique pourraient renforcer le recours à la médiation en matière familiale internationale. Avant toute chose, il faudrait mettre en place des **outils de suivi suffisamment performants**, de façon à disposer de **statistiques fiables** : si le développement de la médiation en matière familiale en général, et en matière familiale internationale en particulier, constitue une véritable politique publique, il doit pouvoir, comme toute politique publique, faire l'objet d'une véritable évaluation. Or à l'heure actuelle, on voit mal comment cette **évaluation de politique publique** pourrait être réalisée. Ensuite, un certain nombre de mesures pourraient être adoptées pour mettre les parties en situation de recourir à, et d'accepter, la médiation (3.1), améliorer la qualité de la médiation (3.2) ou encore faciliter le recours à la médiation dans le cadre de la procédure judiciaire (3.3).

3.1. Mettre les parties en situation de recourir à la médiation

Quatre types de mesures, par ordre croissant de difficulté, pourraient être envisagées pour mettre les parties en situation optimale pour recourir à la médiation en matière internationale.

➤ **Renforcer l'information à la médiation en dehors du contexte judiciaire : la pré-médiation**

A l'heure actuelle, la pré-médiation est principalement prise en charge par SSI France, avec des moyens limités. Renforcer les dispositifs d'information, d'orientation et d'accompagnement des parties à la médiation familiale internationale, en dehors de toute procédure judiciaire, ne pourrait que favoriser et faciliter le recours à la médiation.

➤ **Repenser les délais de la procédure de retour**

Les brefs délais encadrant les procédures de retour étant perçus comme dissuasifs du recours à la médiation en matière familiale internationale, des aménagements pourraient être envisagés. Il ne s'agit à l'évidence pas de rallonger les délais, mais l'on pourrait par exemple songer à rendre le recours à la médiation suspensif de ces délais.

➤ **Rendre la médiation obligatoire avant une procédure de retour**

Dans un souci de protéger l'intérêt supérieur de l'enfant, il pourrait être envisagé d'instituer un recours obligatoire à la médiation avant toute procédure de retour.

➤ **Repenser la médiation en tenant compte de la psychologie des parties**

L'état d'esprit dans lequel se trouvent les parties à un conflit familial, *ab initio*, les dispose peu à recourir à un mode apaisé de règlement tel la médiation. Les acteurs de la médiation insistent sur les mesures d'accompagnement qui devraient être déployées, en parallèle de la médiation ou idéalement en amont de celle-ci, pour « mettre les parties en situation » d'accepter et de réussir leur médiation familiale internationale : médiation renforcée, coordination parentale... Ces dispositifs nécessitent du temps, et d'importants moyens, qui ne sont pas toujours compatibles avec la perception parfois véhiculée de la médiation comme moyen de réduire les coûts de la justice.

3.2. Améliorer la qualité de la médiation

La défiance vis-à-vis de la médiation internationale exprimée par certains acteurs judiciaires est souvent justifiée par une insuffisante « qualité » de la médiation. Les auteures de ce rapport ne peuvent à l'évidence déterminer si ce sentiment est fondé, mais même s'il ne s'agissait que d'une perception

subjective, elle n'en constituerait pas moins un frein important au développement de la médiation, frein qu'il faudrait donc lever. Pour cela, différentes pistes pourraient être explorées.

➤ **Revoir la liste des médiateurs internationaux proposée par le DEDIPE.**

Cette liste est actuellement perçue comme insuffisamment fiable : les médiateurs inscrits ne seraient pas toujours disponibles ni ne respecteraient toujours le conventionnement annoncé ; surtout, les informations portées sur la liste ne permettent pas toujours de bien mesurer leur adaptation à la médiation envisagée.

➤ **Repenser les listes de médiateurs agréés par la Cour d'appel.**

A l'heure actuelle, ces listes ne comportent pas les indications nécessaires (double culture, maîtrise linguistique, formation à la médiation internationale) pour permettre aux parties/avocats/juges d'identifier un ou des médiateurs bien profilés pour les médiations familiales internationales envisagées.

➤ **Renforcer la place de la formation à la médiation internationale dans le référentiel de formation des médiateurs familiaux en France.**

L'actuel référentiel de formation des médiateurs familiaux, tel que prévu par l'arrêté du 19 mars 2012 relatif au diplôme d'État de médiateur familial, récemment modifié par arrêté du 4 juin 2024, n'ignore pas totalement la médiation internationale puisque l'annexe III de l'arrêté intègre, dans le contenu de l'« Unité de formation principale portant sur le processus de médiation et l'intégration des techniques de médiation », la « médiation familiale internationale et interculturelle ». On peut toutefois observer qu'il ne s'agit que d'un, parmi 13 items auxquels le référentiel impose de consacrer globalement 210h de formation. Rien ne permet donc d'assurer la délivrance d'une réelle formation à la médiation internationale. Si des diplômes de médiation familiale internationale sont proposés sur le marché, un **véritable référentiel propre à la médiation familiale internationale**, le cas échéant pensé au niveau européen, pourrait être conceptualisé.

➤ **Envisager des outils permettant de faciliter la mise en place de co-médiation.**

Si le recours à la co-médiation a été unanimement présenté comme une solution pertinente pour garantir une médiation familiale internationale de qualité, les acteurs judiciaires s'estiment démunis lorsqu'il est question de la mettre en œuvre de façon effective. L'enjeu serait principalement de permettre aux juges ou aux parties et à leurs conseils d'identifier facilement des médiateurs dans les deux pays concernés. Une circulation d'informations quant aux médiateurs

qualifiés en matière familiale internationale, dans chaque État membre, serait donc particulièrement utile.

3.3. Faciliter le recours à la médiation dans le cadre de la procédure judiciaire

Il s'agirait ici de reconnaître la place centrale que peut et doit jouer le juge dans le recours à la médiation, impliquant notamment de :

- **Conceptualiser et ritualiser les moments pertinents pour envisager une médiation dans une procédure judiciaire**, et diffuser largement cette information auprès des juges.

En particulier, la médiation ne devrait pas nécessairement être perçue comme une « alternative », mais bien comme un « complément » à la procédure judiciaire. La médiation pourrait ainsi être organisée postérieurement au dépôt d'une requête judiciaire, si possible pour régler le différend avant même l'intervention du juge, et *a minima* pour organiser les mesures provisoires afin d'éviter les ruptures de lien entre l'enfant et l'un de ses parents.

- **Renforcer l'acculturation des juges à la médiation**

La formation peut être encore plus investie ; elle devrait aussi être envisagée de façon conjointe avec les autres acteurs (avocats, médiateurs) pour fluidifier leur coopération.

- **Donner aux juridictions des moyens pour leur permettre de déployer la médiation familiale internationale**

Dispositif complexe, la médiation familiale internationale nécessite des moyens humains (juges et greffiers), mais pas seulement ; les juges ont besoin de disposer d'outils efficaces s'ils veulent pouvoir y recourir. À plusieurs reprises, l'idée d'un « kit » à destination des juges a été évoquée par les acteurs judiciaires : il faudrait qu'il existe, sinon auprès du DEDIPE, du moins auprès du Ministère des affaires étrangères ou d'un tribunal judiciaire « central », un vivier de médiateurs vraiment formés à la médiation familiale internationale, auquel les juges pourraient avoir rapidement accès en cas de besoin. Des outils de suivi statistiques sont également nécessaires pour assurer un bon pilotage mais aussi mesurer l'efficacité du dispositif.

- **Renforcer la coopération judiciaire internationale en vue de favoriser la médiation.**

L'hétérogénéité des législations et des cultures en matière de médiation, y compris entre États membres de l'Union, rend encore difficile le déploiement de la médiation internationale en matière familiale. Si l'homogénéisation semble encore appartenir à un horizon lointain, des mécanismes de renforcement de la coopération internationale devraient *a minima* être envisagés.

ANNEXE

Liste des personnes auditionnées

Frédérique Agostini

Conseillère à la 1^{re} Chambre civile de la Cour de cassation, Présidente du Conseil national de la médiation, Présidente du Groupement européen des magistrats pour la médiation (GEMME).

Gulnar Amengual

Médiatrice, Parenthèse Médiation

Agathe Beaupère

Avocate au barreau de Paris, médiatrice en formation

Alexandre Boiché

Avocat à la Cour d'appel de Paris.

Amélie Demange

Magistrate, DEDIPE (avec Adeline Jauneau, auditrice de justice, DEDIPE)

Anne Dupuy

Présidente de Chambre, Cour d'appel de Paris

Maximin de Fontmichel

Professeur de droit privé, Université Paris Saclay, UVSQ, spécialiste des modes alternatifs de règlement des litiges

Natalie Fricero

Professeur émérite de l'Université Nice Côte d'Azur, Doyenne du Pôle Justice à l'ENM, membre du Conseil national de la médiation, ambassadrice de l'amiable (juin 2023-2024), ancien membre du CSM.

Coralie Gaffinel

Avocate, cabinet Accordance (avec Appoline Duclos-Piette, avocate stagiaire, ancienne stagiaire de la DEDIPE)

Danièle Ganancia

Médiatrice, ancienne magistrate, médiatrice rattachée à la DEDIPE jusqu'en 2006.

Stéphanie Hébrard

Vice-Présidente du Tribunal judiciaire de Paris

Florence Hermitte

Conseillère à la Cour d'appel de Paris

Nancy Khawan

Ancienne barrister spécialisée en droit de la famille internationale ; médiatrice en GB depuis 2015, future médiatrice en France.

Marie Lambling

Conseillère à la Cour d'appel de Paris

Jacqueline Lesbros

Présidente de Chambre, Cour d'appel de Versailles

Alice Meier Bourdeau

Avocate au Conseil d'Etat et à la Cour de cassation

Sandrine Pepit

Directrice DU SSI France, assistée d'Amine Doumi, chargée de mission, et Noa Laguerre, stagiaire, SSI International (Droit d'enfance, 116000 enfants disparus)



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Acronyms

Alternative Dispute Resolution	ADR
Council of Europe European Commission for the Efficiency of Justice	CEPEJ
Child Protection Act	CPA
Civil Procedure Code	CPC
European Union	EU
Family Code	FC
International Family Mediation	IFM
International Social Service	ISS
Mediation Act	MA
Member States	MSs
Non-governmental organisation	NGO
United Nations	UN
United Nations Convention on the Rights of the Child	UNCRC

1 Introduction

According to a 2022 report by the European Youth Forum, over 100,000 children and adolescents go missing annually in the European Union (EU) - a figure that is likely much higher due to under-registration and inconsistent reporting across Member States (MSs)¹. Of these cases, international child abductions represent the second largest group of missing children in the EU². Although in Bulgaria, there is currently no official national database or systematically collected statistics on international child abduction cases³, available figures, drawn from informal sources⁴, suggest that in 2023, the Ministry of Justice received 23 applications for the return of abducted children under the Hague Convention on the Civil Aspects of International Child Abduction⁵.

Given the growing number of international families and the high divorce rates within the EU, national courts are increasingly overburdened, making Alternative Dispute Resolution (ADR) mechanisms more vital than ever⁶. Research consistently demonstrates that cross-border family mediation offers a faster, more cost-effective, and highly efficient method for resolving international child abduction cases, with the majority resulting in either a full or partial agreement⁷. Nevertheless, its practical implementation remains limited. According to 2024 Report from the 116 000 Missing Children hotlines, a greater number of parental abduction cases were resolved through court decisions than through mediation or amicable agreements, underscoring the underutilisation of mediation in this area⁸.

¹ European Youth Forum, *Missing Children: International Child Abduction and the Role of Mediation* (2022) https://www.youthforum.org/files/241122_M-child-abduction.pdf.

² Missing Children Europe. "International Child Abduction." *Missing Children Europe*, available at: <https://missingchildreneurope.eu/international-child-abduction/>.

³ iCare2 questionnaire responses.

⁴ Snezina Kovacheva, 'International Child Abduction' (Advokat Kovacheva, 2024), available at: <https://advokatkovacheva.bg/mezhdunarodno-otvlichane-na-dete1/>.

⁵ Convention on the Civil Aspects of International Child Abduction, 25 October 1980, 1343 U.N.T.S. 89.

⁶ Micheva-Ruseva, Virginia. *The Mediation Landscape in the EU*. Co-funded by the European Union, available at: https://era-comm.eu/Language_Mediation/wp-content/uploads/2018/10/118DT102_Micheva_Ruseva_1.pdf.

⁷ Missing Children Europe. *Figures and Trends 2020: From Hotlines for Missing Children and Cross-Border Family Mediators*. Missing Children Europe, 2021, available at: <https://missingchildreneurope.eu/?wpdmdl=2558>.

⁸ Missing Children Europe. *Figures & Trends 2024*, available at: <https://missingchildreneurope.eu/download/figures-and-trends-2024/?ind=1748435480512&filename=MCE-Figures-Trends-2024.pdf&wpdmdl=6719&refresh=68370221901d71748435489>.

The situation in Bulgaria reflects similar challenges. While mediation is increasingly promoted in domestic family matters, the use of International Family Mediation (IFM) in cross-border disputes, including those involving international child abductions, remains limited and lacks systematic integration into practice⁹. This gap is attributed to a combination of factors, including a lack of awareness among legal and social professionals, insufficient specialised training, and the absence of formalised procedures and institutional support¹⁰. As a result of these challenges, families facing cross-border conflicts often resort to lengthy judicial proceedings rather than exploring mediation as an alternative.

This national report explores the current state of IFM in international child abduction cases in Bulgaria, examining the legislative framework, institutional infrastructure, practical implementation, and challenges to broader adoption. It explores key obstacles such as gaps in legislation, limited awareness, inconsistent application, and a lack of specialised training for mediators. Emphasis is placed on the child's role in the mediation process, the handling of cases involving domestic violence, and the degree to which Bulgarian practices align with European and international standards. The report concludes with recommendations to strengthen the system and promote more effective, child-centered cross-border mediation.

To support this analysis, input was gathered through questionnaires distributed to mediators and experts in international law, hereafter referred to as “the questionnaires” or the “iCare2 questionnaires”. The questionnaires covered both national and international aspects of family mediation, including the national legal framework, the application of EU and international standards, practical challenges, training and qualification requirements, child participation and the involvement of key institutions. The information obtained from their responses is reflected throughout the report.

⁹ iCare2 questionnaires

¹⁰ Ibid.

2 International Family Mediation in Bulgaria: The Legal Framework

As a party to the 1980¹¹ *Hague Convention*, Bulgaria is committed to promoting the peaceful resolution of cross-border family disputes, including those involving international child abductions. The Bulgarian Ministry of Justice, designated under Article 6 of the 1980 Hague Convention as the Central Authority, plays a central role in encouraging the voluntary return of children and supporting the use of mediation to achieve amicable, child-focused solutions¹². In addition, Bulgaria is subject to EU regulations such as the *Brussels II-ter Regulation*¹³, which reinforces the role of mediation in cross-border family cases and introduces obligations for courts and authorities to actively promote its use¹⁴.

This section examines the transition from *Brussels II-bis*¹⁵ to *Brussels II-ter*, alongside domestic legislation, including the *Mediation Act* (MA)¹⁶, the *Civil Procedure Code* (CPC)¹⁷, the *Child Protection Act* (CPA)¹⁸, and the *Family Code* (FC)¹⁹, which together support the development and practice of IFM in Bulgaria. Particular focus is given to current proposals for the amendment of mediation legislation and the ongoing debates around them, as well as concerns about the suitability of mediation in cases involving domestic violence and the evolving role of the child in the mediation process.

¹¹ Supra note 5.

¹² Supra note 5, Article 7(c).

¹³ Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) ST/8214/2019/INIT.

¹⁴ Article 25.

¹⁵ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 OJ L 338, 23.12.2003, p. 1-29.

¹⁶ Mediation Act, promulgated in State Gazette No. 110 of 17 December 2004, last amended in SG No. 57 of 5 July 2024.

¹⁷ Civil Procedure Code, promulgated in State Gazette No. 59 of 20 July 2007, last amended in SG No. 26 of 27 March 2025.

¹⁸ Child Protection Act, promulgated in State Gazette No. 48 of 13 June 2000, last amended in SG No. 79 of 17 September 2024.

¹⁹ Family Code, promulgated in State Gazette No. 47 of 23 June 2009, last amended in SG No. 26 of 27 March 2025.

2.1 International Legal Framework

2.1.1 Brussels II-ter (Regulation (EU) 2019/1111)

The Brussels II-bis Regulation (Council Regulation (EC) No 2201/2003)²⁰ constituted the cornerstone of the EU's legal framework concerning jurisdiction, recognition, and enforcement of judgments in matrimonial matters and matters of parental responsibility, including international child abduction. However, despite its broad scope, the Regulation omitted to establish a substantive framework for mediation, offering only a procedural reference through assigning Central Authorities the role of promoting mediation in cross-border family disputes²¹. This reference to ADR was limited, lacking binding obligations on courts or comprehensive safeguards for vulnerable parties such as children or victims of domestic violence.

In contrast, the Brussels II-ter Regulation (Regulation (EU) 2019/1111)²² takes a more proactive stance by recognising the growing importance of mediation and other ADR mechanisms in cross-border family disputes²³ and incorporating them into its framework. It expressly encourages courts, in all child-related proceedings (an exception is made in cases of domestic violence) to consider the possibility of resolving disputes through mediation or other appropriate means, with the assistance, where relevant, of existing cross-border mediation networks²⁴. Article 25 of the Regulation requires not only Central Authorities but also courts and other competent bodies to actively promote mediation, unless doing so would be contrary to the best interests of the child. This further reflects evolving international standards, particularly those found in the United Nations Convention on the Rights of the Child (UNCRC)²⁵, which emphasises the importance of resolving disputes affecting children in a peaceful and timely manner that prioritises the child's best interests²⁶. However, the Regulation's lack of a standardised procedure or minimum age definition for hearing the child may lead to non-recognition of agreements in other MSs, as failure to ensure the

²⁰ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 *OJ L 338*, 23.12.2003, p. 1–29.

²¹ Art. 55(e) Regulation 2201/2003

²² Supra note 13.

²³ Para 35.

²⁴ Recital 43.

²⁵ Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3

²⁶ Art. 21 Regulation 2019/1111

child's participation can be grounds for refusal of recognition or enforcement under Articles 39 and 68.

To balance ADR with procedural efficiency, the Regulation cautions that efforts to reach an agreement through ADR must not unduly delay return proceedings under the 1980 Hague Convention²⁷. For example, in return proceedings under the 1980 Hague Convention, courts are required to issue a decision within six weeks, unless exceptional circumstances justify a delay²⁸. The mere use of mediation does not in itself qualify as such a circumstance. However, delays arising as a result of the mediation process, for example, if complexities emerge during discussions, may constitute valid exceptions. Furthermore, it recommends that Member States allow courts seised under the Hague Convention to also exercise jurisdiction over matters of parental responsibility where the parents have reached an agreement during return proceedings. This recommendation has not been adopted in Bulgaria²⁹.

In response to the obligations under *Brussels II-ter*, Bulgarian judges must ensure that parties understand mediation as a viable option and encourage its use both before and during proceedings, especially where it supports the child's best interests and may lead to faster, less adversarial outcomes. However, although the Brussels II-ter Regulation is directly applicable and does not require transposition into Bulgarian law, this has led to its entry into force receiving little attention, and its practical implementation remains inconsistent due to the absence of accompanying national measures or guidance³⁰.

2.2 IFM within the National Legal Framework

2.2.1 Mediation Act

The Mediation Act establishes the legal basis for mediation in Bulgaria, defining it as a voluntary and confidential process, facilitated by a neutral third party who assists the parties in reaching a settlement³¹. Crucially, in Article 3³², the Act explicitly recognises cross-border disputes as falling within its scope³³. This inclusion is further elaborated in an additional provision³⁴, which defines a

²⁷ Ibid.

²⁸ Brussels II-ter Regulation, Recital (42).

²⁹ Judge Svetlana Micheva, 'New Developments in the Field of Family Law in the EU' (Lex.bg, 15 March 2023), available at: <https://news.lex.bg/нови-моменти-в-областта-на-семејното-п/>.

³⁰ Ibid.

³¹ Art. 2 Mediation Act

³² Art 3 Mediation Act

³³ Art. 3(1) Mediation Act

³⁴ § 1 of the Supplementary Provisions of the Mediation Act

"cross-border dispute" as a dispute in which at least one of the parties is domiciled or habitually resident in a Member State of the EU other than that of any of the other parties at the time they agree to participate in mediation or are invited to do so by a court. Furthermore, a dispute also qualifies as cross-border if subsequent judicial or arbitral proceedings are initiated in a Member State different from the one in which the parties were domiciled or habitually resident at the relevant time. Accordingly, this provision, together with the express reference to cross-border disputes in Article 3, places IFM within the scope and applicability of the relevant legislative framework. However, the framework applies exclusively to cross-border disputes within the EU.

The incorporation of the cross-border dimension in the Mediation Act has both legal and systemic significance. From a legal standpoint, it ensures that international family disputes are not treated differently from domestic ones when it comes to access to mediation. Systemically, it embeds IFM within the dispute resolution infrastructure, opening the door for the development of specialised training for mediators in cross-border issues, as well as institutional cooperation between the national and international mediation centres. Nevertheless, while international family mediation is clearly defined within the Act's scope, it is not accompanied by specific provisions or procedures that distinguish it from national mediation.

Beyond its recognition of cross-border disputes, *the Mediation Act* lays out the core principles governing the mediation process in Bulgaria. A key element is its voluntary nature: parties may enter into or withdraw from the process at any time, and while courts may recommend or encourage mediation, they cannot compel parties to reach a settlement. This, however, is currently under review with a proposed legislative amendment³⁵ aimed at introducing a mandatory information session on mediation for the parties (see Section 2.2.1.2). Furthermore, the Act imposes strict rules to ensure that all information exchanged during mediation remains protected, not only by the mediator and the parties, but also by any third parties involved³⁶. The principle of confidentiality continues to apply even if the dispute proceeds to court. Procedurally, the Act provides a flexible framework within certain limits. According to Article 15(1)³⁷ the mediation process is automatically terminated upon the expiration of six months from its commencement. However, if the first mediation procedure is not successful, parties who wish to initiate a new one after this period may do so, with no legal restriction on the number of renewals.

³⁵ Proposal for legislative amendment of the Civil Procedural Code, published for public consultation on April 3rd, 2025 to the Council of Ministers' Public Consultations Portal

³⁶ Article 7.

³⁷ Art. 15(1)6 Mediation Act

Within this timeframe, mediators may conduct both joint sessions and separate meetings with each party, depending on the nature and complexity of the issues. Importantly, Article 11a stipulates that the statute of limitations is suspended during the mediation process, safeguarding the parties' legal rights while they attempt to reach an amicable resolution.

2.2.1.1 Ordinance No. 2 of 2007

In Bulgaria, to qualify as a family mediator, candidates are required to complete a general mediation training course in accordance with Ordinance No. 2 of 2007³⁸. The course is delivered by various mediation associations and comprises a minimum of 60 hours of training approved by the Ministry of Justice. It includes both theoretical and practical components, a minimum of 30 hours each, and covers subjects such as conflict resolution techniques, communication skills, legal principles relevant to mediation, and core ethical standards. The content applies across a range of practice areas, including family, commercial, and other types of disputes. The training concludes with an examination conducted by a commission of the respective training organisation and includes a test to assess the acquired knowledge, participation in a simulated mediation procedure, and an oral exam. Upon successful completion of the training, individuals become eligible for entry into the Unified Register of Mediators - an essential legal requirement for practicing mediation in Bulgaria, after which mediators are permitted to practice immediately, without the need for further specialisation in any specific area, such as family mediation.

This lack of mandatory additional specialisation presents a significant shortcoming in the current legal framework. It raises serious concerns about the quality of mediation services when mediators lack the proper training to handle sensitive issues, particularly those arising international family disputes such as international child abduction. As highlighted by the European Commission for the Efficiency of Justice (CEPEJ), specialised training in family mediation is of critical importance, with particular emphasis on the need for mediators to be trained to uphold the best interests of the child³⁹. Such training is deemed essential to ensure that mediators are adequately prepared to assess the

³⁸ Ordinance No. 2 of 15 March 2007 on the Conditions and Procedure for the Approval of Organizations Conducting Mediator Training, the Requirements for the Training, and the Procedure for Entry, Removal, and Deletion from the Unified Register of Mediators, available at: [Regulation No. 2 to the Mediation Act - ACADEMY MEDIATE](#).

³⁹ Congress of Deputies, *Evaluation of Directive 2008/52/EC on Mediation in Civil and Commercial Matters* (Legislative Session 14, SPL 49, 2016), available at: https://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura_14/spl_49/pdfs/63.pdf.

suitability of cases and to manage the complexities of international family disputes effectively. Although recent amendments to *the Mediation Act* and *the Civil Procedure Code* have been proposed, they only partially address the issue. Moreover, it remains unclear whether, if enacted, these amendments would apply directly to mediators involved in international child abduction cases.

Another serious gap in the legal framework is the absence of clear qualification standards for mediator trainers. While Ordinance No. 2 outlines quality requirements for institutions offering mediation training, such as curriculum development, instructor credentials, teaching methods, and training facilities, it does not go far enough in setting specific standards for the trainers themselves. As it currently stands, the only requirement is that mediation training can be delivered by organisations employing specialists with experience and qualifications in mediation, and who are approved by an order of the Minister of Justice⁴⁰.

2.2.1.2 National debate on mandatory mediation

In Bulgaria and across the EU, the role of mandatory mediation in civil justice systems has become an increasingly important topic of legal and policy debate. The Mediation Directive explicitly leaves it to the discretion of MSs whether or not to implement mandatory mediation⁴¹. The goal is to encourage early resolution of disputes and reduce pressure on overburdened judicial systems. The core issue lies in finding the right balance between promoting mediation as a quicker, less adversarial alternative to litigation, while also respecting fundamental rights such as access to justice and the voluntary nature of dispute resolution. Across the EU, no country forces parties to reach a settlement through mediation, as this would conflict with the principle of voluntariness that lies at the heart of mediation.⁴² However a number of countries have introduced different models for mandatory involving of the parties in a mediation process.

For instance, Italy uses a “soft mandatory” model in some civil cases where parties must attend at least one mediation session before filing a lawsuit, though

⁴⁰ Article 2 of Ordinance 2 of 2007.

⁴¹ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters *OJ L 136, 24.5.2008, p. 3–8*, Art. 5(2).

⁴² Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, *OJ L 136, 24.5.2008, p. 3*

they can choose not to continue with mediation afterward⁴³. Similarly, in England and Wales, parties involved in family disputes are generally required to attend a Mediation Information and Assessment Meeting (MIAM), and courts may impose cost penalties on those who refuse to participate without a valid reason⁴⁴.

In 2023 Bulgaria also proposed amendments to the Mediation Act and the Civil Procedure Code aimed at introducing reforms in this area⁴⁵. These changes aimed to introduce mandatory initial mediation sessions in specific civil disputes, such as certain family law cases, and establish court-based mediation centres staffed by specially trained mediators. However, the Bulgarian Constitutional Court ruled these amendments unconstitutional in 2024⁴⁶. The Court found that forcing parties to participate in mediation, even if only initially, violated their right to free access to the courts, legal equality, and imposed an unfair financial burden, especially in sensitive disputes like family cases.

In response, a new legislative proposal was introduced in 2025⁴⁷. This proposal seeks to carefully redesign the framework for court-connected mediation in a way that addresses the Constitutional Court's concerns. The revised draft aims to align with Bulgaria's commitments under the National Recovery and Resilience Plan⁴⁸ and supports the EU-wide goal of expanding alternative dispute resolution mechanisms. It introduces more flexible provisions that

⁴³ Leonardo D'Urso, Julia Radanova and Constantin Adi Gavrilă, 'The Italian Opt-Out Model: A Soft Mandatory Mediation Approach in Light of the Recent CJEU Decision' (Kluwer Mediation Blog, 14 October 2024), available at: <https://mediationblog.kluwerarbitration.com/2024/10/14/the-italian-opt-out-model-a-soft-mandatory-mediation-approach-in-light-of-the-recent-cjue-decision/The Italian Opt-Out Model: A Soft Mandatory Mediation Approach in Light of the Recent CJUE Decision - Kluwer Mediation Blog>

⁴⁴ Stevensdrake Solicitors, 'Changes to the Family Law Rules on Non-Court Dispute Resolution/ADR' (7 May 2024), available at: <https://www.stevensdrake.com/articles/changes-to-the-family-law-rules-on-non-court-dispute-resolution-adr?>

⁴⁵ Sections 19-25 Mediation Act

⁴⁶ Tsvetelina Koleva, 'Mandatory Mediation Has Been Declared Unconstitutional' (In: Arbitration Bulgaria, 15 July 2024), available at: <https://arbitrationbulgaria.com/2024/07/15/mandatory-mediation-has-been-declared-unconstitutional/>

⁴⁷ Ministry of Justice of the Republic of Bulgaria, "Public Consultation on the Draft Law Amending and Supplementing the Civil Procedure Code", available at: <https://strategy.bg/PublicConsultations/View.aspx?lang=bg-BG&Id=9020>

⁴⁸ Council of Ministers of the Republic of Bulgaria, National Recovery and Resilience Plan of the Republic of Bulgaria, November 2024, available at: <https://www.mtc.government.bg/sites/default/files/documents/2024-11/BG%20RRP%20EN.pdf>

encourage mediation without making it coercive, ensures adequate protections for vulnerable parties (particularly in family matters), and places stronger emphasis on mediator qualifications and institutional accountability. Mediation associations submitted various official opinions in support of these amendments⁴⁹, and currently, there are ongoing discussions at the national level on the topic.

However, despite Bulgaria's attempt to promote mediation in family matters, the matter of international family mediation, particularly in child abduction cases, is not clearly included in the scope of the proposed amendments. The draft legislation on mandatory mediation explicitly limits its application to certain family disputes⁵⁰ governed by the Family Code, such as divorce, child residence, and parental rights, but makes no mention of cross-border child abduction. This omission is significant, as it reflects the broader absence of any reference to international family disputes within the Family Code itself, including cases under the Hague Convention. As a result, mediation remains legally and procedurally disconnected from this sensitive and complex area, despite its recognised importance in international practice.

2.2.2 Civil Procedure Code

In addition to the provisions in the MA, the *Civil Procedure Code* provides a mechanism for the judicial recognition of settlement agreements reached through mediation. Article 234⁵¹ allows parties who reach a mediated agreement during litigation to submit it to the court for approval. Once confirmed, the agreement carries the legal weight of a court judgment and is directly enforceable. The court must ensure that the agreement does not contravene mandatory legal norms or public policy⁵². In addition to this post-mediation recognition, the CPC also encourages the use of mediation at an earlier stage. Article 140(3)⁵³ of the CPC empowers judges, at the initial hearing, to suggest mediation or an amicable settlement and to temporarily suspend proceedings to allow for it. However, this is purely discretionary, as there is no legal obligation for judges to make such a referral. As a result, the uptake of mediation often depends on judicial culture and the willingness of the parties involved.

⁴⁹ Ministry of Justice of the Republic of Bulgaria, "Public Consultation on the Draft Law Amending and Supplementing the Civil Procedure Code"

⁵⁰ § 8 of the Act for the Amendment and Supplementation of the Civil Procedure Code

⁵¹ Art. 234 Civil Procedure Code.

⁵² Ibid.

⁵³ Art. 140(3) Civil Procedure Code.

2.2.3 Child Protection Act and Family Code

The *Child Protection Act*, enacted in 2000 and last amended in 2024, establishes the key legal framework for safeguarding the rights and welfare of children in Bulgaria. It affirms the primacy of the child's best interests and outlines the responsibilities of parents, guardians, and public authorities in safeguarding these interests. Significantly, the CPA also addresses the resolution of disputes involving children, not only in domestic contexts but also in international settings. Of particular relevance to international family mediation is Article 22c⁵⁴, which regulates proceedings for the return of a child or the exercise of rights of access. Under this provision, the court is encouraged to assist parties in voluntarily resolving their dispute. The court may refer parties to mediation at any stage of the proceedings, provided this does not delay the case and remains consistent with the time limits set out in Article 24(2) of the *Brussels II-ter*.

In addition to the provisions of the CPA, the *Family Code* recognises and facilitates extrajudicial settlements, particularly in matters of divorce, child custody, visitation rights, and parental authority⁵⁵. For instance, when disputes over parental responsibility occur, the Code enables the parties to reach an agreement through mediation⁵⁶, which once approved by the court, becomes legally binding. However, although the Code allows courts to approve agreements on matters such as child custody, visitation, and support, thereby giving legal effect to mediated outcomes - it treats all such agreements as purely domestic in nature and makes no reference to family disputes involving international child abduction or cross-border parental conflicts. The only such reference is found in Article 127b, which allows a regional court in Bulgaria to impose a travel ban on a child if there is a clear and specific risk of unlawful removal from the country, particularly where such removal would violate parental rights established by law, court decision, or agreement. Furthermore, there is no guidance on cooperation with foreign courts or central authorities under the 1980 Hague Convention, nor any procedural guidance on handling such sensitive disputes through mediation. This leaves a significant gap in the legal structure, limiting the Code's ability to support IFM in situations where cross-border cooperation is essential to protecting the child's best interests.

2.2.1 Legal Framework on Child Participation in Mediation

Children, under both international and national law, have the right to be heard and informed and have their best interests duly considered in all matters

⁵⁴ Art. 22c Child Protection Code.

⁵⁵ Article 49 and Article 123 of the Family Code.

⁵⁶ Article 59.

affecting them. While these rights are formally recognised in Bulgarian legislation, the analysis below explores whether the existing legal provisions provide sufficient clarity, procedural safeguards, and practical mechanisms to ensure meaningful and consistent child participation, particularly in the context of family mediation in cross-border disputes.

2.2.1.1 The Best Interest of the Child

The UNCRC adopted by the UN General Assembly in 1989, and ratified by Bulgaria in 1991⁵⁷, defines the "best interests of the child" as a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies⁵⁸. According to the UNCRC, determining the best interests of the child requires consideration of the child's well-being and holistic development, taking into account the child's own views in accordance with their age and maturity, as well as their right to protection, provision, and participation. Furthermore, the principle's inclusion in *Brussels II-ter* reaffirms that the best interests of the child must be a primary consideration in international family mediation⁵⁹.

In Bulgaria, the principle of the best interests of the child is embedded in family law and child protection legislation. The Family Code mandates that courts prioritise it in matters of custody, visitation, and parental rights⁶⁰. Similarly, the *Child Protection Act* in Bulgaria is founded on several core principles, one of which is the fundamental principle of ensuring the child's best interests. The Act defines the "best interests of the child" as an assessment that considers various important factors⁶¹. These include the child's wishes and feelings, their physical, psychological, and emotional needs, as well as their age, gender, past experiences, and other individual characteristics. The assessment also takes into account various relevant factors impacting the child, among which are the danger or harm that the child has experienced or may experience, the parents' ability to care for the child, and the potential consequences for the child if the circumstances change. While the Act clearly establishes the best interests of the child as a central guiding principle in child protection, it is framed within the

⁵⁷ United Nations Office of the High Commissioner for Human Rights (OHCHR). *Ratification Status for CRC – Convention on the Rights of the Child*, UN Treaty Body Database, available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC.

⁵⁸ Article 3(1) Convention on the Rights of the Child

⁵⁹ Article 25.

⁶⁰ Art. 123(1) Family Code.

⁶¹ § 1(5) Child Protection Act.

context of procedural and decision-making guidelines, rather than being enshrined as an independent, enforceable substantive right.

2.2.1.2 The Right of the Child to be Heard

Article 12 of the UNCRC guarantees that children capable of forming their own views have the right to express them freely in all matters affecting them, with those views given due weight according to their age and maturity⁶². This right is further enshrined in *the Charter of Fundamental Rights of the EU*⁶³, hereafter referred to as “the Charter” and the *Brussels II-ter Regulation*⁶⁴.

As a party to the abovementioned treaties, Bulgaria is obliged to ensure the right of the child to be heard in all matters affecting them. On a national level, the right of the child to be heard is enshrined in Bulgarian laws, such as *the Child Protection Act* and *the Family Code*. However, it is currently framed exclusively within the context of judicial and administrative proceedings, with no explicit extension to alternative dispute resolution mechanisms such as mediation. Under the *Child Protection Act*, children over the age of 10 must be heard in any administrative or judicial proceeding affecting their interests, unless it is determined that such participation would be contrary to their best interests⁶⁵. For children under the age of 10, participation is permitted based on their developmental stage, although the decision is left to the discretion of the competent authority⁶⁶. However, the Act does not provide clear guidance on the role or weight of the child's opinion within the litigation process, which continues to hinder how professionals approach hearing children in practice. The Act does not make any mention of the child's role in mediation. Similarly, *the Family Code* mandates that the court must take into account the child's views in decisions concerning parental rights and responsibilities⁶⁷ referring to the Child Protection Act, but .

Furthermore, *the Mediation Act* does not specifically address the involvement of children in the mediation process, and as a result, the age limit for child participation in mediation is typically aligned with the Child Protection Act, which sets the threshold at 10 years of age.

⁶² UNCRC, Article 12(1).

⁶³ Article 24(1).

⁶⁴ Article 21 & Article 26 Regulation 2019/1111.

⁶⁵ Article 15(1) of the CPA.

⁶⁶ Ibid, Article 15(2).

⁶⁷ Article 59(6) of the Family Code.

2.2.2 Domestic and Gender-Based Violence

Domestic violence frequently plays a critical role in international child abduction cases, with many parents crossing borders to escape abusive situations⁶⁸. There are various complexities of international child abduction cases involving domestic violence with some related to the legal framework governing the safe return of the child and other concerning the role of mediation in such cases. For instance, while Article 13(1)(b) of the 1980 Hague Convention allows courts to refuse the return of a child if there is a grave risk of physical or psychological harm, it focuses exclusively on risks to the child and does not consider the safety of the abducting parent⁶⁹. Since the Convention does not explicitly address domestic violence, Article 13(1)(b) remains the main legal basis for courts to weigh such risks.

The debate around the Convention highlights the tension between its goal of promptly returning abducted children and the realities of domestic abuse that force parents to flee. The 2020 Guide to Good Practice⁷⁰ attempted to clarify this but faced criticism for implying that domestic violence alone may not justify refusing return, potentially weakening protections for affected children⁷¹.

Meanwhile, mediation, although beneficial in many family law disputes, including international child abductions, is often restricted or prohibited in cases involving domestic and gender-based violence due to concerns about power imbalances and safety, further complicating efforts to resolve disputes amicably. International and regional frameworks increasingly acknowledge this danger. For instance, the *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* (Istanbul Convention)⁷² prohibits the use of mandatory alternative dispute resolution mechanisms in such cases⁷³. Similarly, EU instruments such as the *Brussels II-ter Regulation* permit courts to refuse mediation when it would not be appropriate due to the

⁶⁸ Marilyn Freeman and Nicola Taylor, *Where International Child Abduction Occurs Against a Background of Violence and/or Abuse* (The International Centre for Family Law Policy and Practice April 2024), p.15, available at:

⁶⁹ Ibid.

⁷⁰ Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part VI, Article 13(1)(b) (HCCH, The Hague, 2020), available at: <https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf>.

⁷¹ Marilyn Freeman and Nicola Taylor, *Where International Child Abduction Occurs Against a Background of Violence and/or Abuse* (The International Centre for Family Law Policy and Practice April 2024), p.4.

⁷² Council of Europe (2011). Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Istanbul, 11 May 2011, CETS No. 210.

⁷³ Ibid, art. 48.

presence of domestic violence⁷⁴. These provisions reflect a growing consensus that mediation may be unsuitable and potentially harmful where abuse is present. However, no such provisions have been established in the newly adopted EU Directive 2024/1385⁷⁵ on combating violence against women and domestic violence.

This concern is also echoed in national legislation, such as Bulgaria's Law on Protection Against Domestic Violence⁷⁶, which prohibits the court from encouraging mediation or settlement in cases of domestic violence⁷⁷. However, the law does not explicitly prohibit the use of mediation in such cases. Its use is permitted only under strict conditions - namely, when both parties explicitly agree to it, when the violence has not prevented either party from freely expressing their will, and when adequate safeguards are in place to protect their rights and freedom of choice (including those of their children), such as the involvement of lawyers, psychologists, child protection professionals, or trusted individuals⁷⁸. The proposed amendments to the mediation framework, which sought to introduce mandatory mediation, but were subsequently declared unconstitutional, included an exception stipulating that where there is compelling evidence of domestic violence, an initial mandatory mediation session should not be conducted⁷⁹. Following the annulment of these amendments, there remains an absence of a clear legislative framework governing the application of mediation in cases involving indications of domestic violence.

2.2.3 Recommendations for Strengthening the National Legal Framework

As mentioned, the legal framework governing national family mediation in Bulgaria also extends to international family mediation. However, the direct application of these domestic rules to cross-border cases fails to adequately

⁷⁴ Recital 43.

⁷⁵ Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence PE/33/2024/REV/1 OJ L, 2024/1385, 24.5.2024, ELI: <http://data.europa.eu/eli/dir/2024/1385/oj>

⁷⁶ Law on Protection Against Domestic Violence (Promulgated SG No. 102/2009, effective 22 December 2009).

⁷⁷ Ibid, Article 15(1).

⁷⁸ Sporazumenia, 'Медиация при развод и домашно насилие – кога да, кога не', available at: <https://www.sporazumenia.com/post/медиация-при-развод-и-домашно-насилие-кога-да-кога-не-1>

⁷⁹ Article 140a (4) of the CPC.

address their distinct challenges. In order to improve this, a targeted and thoughtful reform is required.

2.2.3.1 Mandatory training for family mediation in the Mediation Act

As noted above, the issue of adequate training in Bulgaria affects both international and domestic family mediation, as there is currently no mandatory requirement for mediators to specialise after completing the general mediation course. Therefore, before addressing proper training for international family mediation, it is necessary first to introduce mandatory specialisation in family mediation in general. This legal reform should explicitly include international family mediation within the curriculum, given the legal complexity and sensitivity of cross-border family disputes - particularly those involving children, who are considered a vulnerable group. Cases such as international child abduction, cross-jurisdictional custody conflicts, and the enforcement of multinational family agreements require mediators to have specific knowledge of international legal instruments (e.g., the Brussels II-ter Regulation and the 1980 Hague Convention), as well as a high level of intercultural competence, child-sensitive communication skills, and the ability to manage emotionally charged dynamics. EU guidance, including the Council of Europe's Guidelines on Child-Friendly Justice⁸⁰ and various recommendations by the European Commission, underscore the importance of specialised training for professionals working in contexts where children's rights and well-being are at stake. As such, integrating these standards into the training framework is essential to ensure that mediators are adequately prepared to handle the unique challenges posed by international family disputes, especially those involving children.

2.2.3.2 Formal referral of mediation in accordance with the Brussels II-ter (in the MA)

In line with Article 25 of *Brussels II-ter*⁸¹, Bulgarian legislation, specifically the *Mediation Act*, should explicitly provide for mandatory judicial referral to mediation in cross-border parental responsibility cases. Incorporating such referral mechanisms into the *Mediation Act* would promote greater use of mediation in international child custody disputes, particularly where cooperation with foreign central authorities is required. This would align national law with

⁸⁰ Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, available at: <https://www.coe.int/en/web/children/child-friendly-justice>

⁸¹ Art. 25 Regulation 2019/1111

EU standards and help operationalise the principles of cooperation, mutual trust, and the best interests of the child.

3 International Family Mediation in Bulgaria: The Practice

While Bulgaria has taken important steps to integrate mediation into its legal system, findings from the national questionnaire reveal that the number of IFM in international child abduction cases remains low due to a number of structural and practical challenges hindering its effective implementation in practice. This section, based on responses from the national questionnaire and desk research, provides an overview of how IFM operates in Bulgaria. It outlines existing practices and key challenges and offers recommendations for addressing these issues and enhancing the effectiveness of IFM.

3.1 Overview of National Questionnaires' Responses

One of the core issues highlighted in the survey is the lack of trained mediators specialised in cross-border family disputes, as well as the absence of training on how to include and work with children in the mediation process - an essential component of child-sensitive dispute resolution. Furthermore, in Bulgaria, public funding for IFM is also unavailable, which poses an additional barrier for families already burdened by the financial costs of international litigation. Moreover, there are no clear institutional mechanisms or formal protocols for cooperation between the Central Authority, courts, and mediation organisations, leading to poor coordination and limited referrals to mediation in relevant cases.

In addition to these systemic obstacles, awareness of IFM remains low among key stakeholders, including legal professionals, judges, and social workers, as well as the general public. Many parents involved in cross-border family disputes are not informed about mediation as an option and often default to adversarial legal proceedings, particularly in emotionally charged cases such as international child abduction. Respondents to the national questionnaire also emphasised that cultural sensitivity - crucial for the success of international mediation, is entirely absent from existing mediator training programmes in Bulgaria, thus limiting the ability of mediators to manage diverse and complex family dynamics effectively.

Finally, the lack of official data or evaluation reports on the outcomes and effectiveness of IFM further undermines its credibility and limits opportunities for evidence-based policy development. Without reliable statistics or feedback mechanisms, it is difficult to demonstrate the value of mediation, assess its

success rates, or advocate for the reforms needed to improve its use in cross-border family disputes.

3.2 Key Actors and Available Services

3.2.1 Public vs. Private Mediation Services

The landscape of international family mediation in Bulgaria involves a range of actors across both the public and private sectors, although the availability and specialisation of services remain limited, particularly in cross-border cases. In the public sector, courts play a central role in promoting mediation by referring parties to recognised mediation centres, especially in family disputes involving custody, visitation, or child support. However, as mentioned above, referrals to mediation by the courts are not mandatory and depend largely on the discretion of individual judges. Additionally, while court-connected mediation centres exist, they are generally limited to handling domestic cases. Furthermore, there are conflicting opinions in Bulgaria on the active involvement of the Central Authority in encouraging and referring parties to mediation. While some experts argue that the Central Authority plays an active role in assisting and promoting mediation services, others view its function as primarily administrative in nature.

The private sector, by contrast, has been more proactive in developing mediation services, particularly through the efforts of non-governmental organisations, private mediation centres, and legal professionals who specialise in family law. These actors often offer more tailored services, including bilingual mediators and procedures designed to accommodate the cross-border nature of international family conflicts.

One example is the International Social Service Bulgaria (ISS Bulgaria)⁸², which forms part of the global ISS network. The organisation supports families involved in complex international child and family protection cases and offers specialised services that directly contribute to international family mediation. These include cross-border mediation, preparation of social reports for court proceedings, and coordination with foreign social services and legal authorities. ISS Bulgaria also acts as an intermediary in cases where cooperation is required between Bulgarian and foreign institutions. However, despite its wide range of specialised services related to IFM, ISS Bulgaria has not yet handled any international child abduction cases.

⁸² Social Service Bulgaria (ISS Bulgaria), available at: <https://www.iss-bg.org/bg/home/>

3.3 Training and Qualifications for IFM in Bulgaria

As discussed in Section 2.2.1.1 above, the lack of specific training requirements in the legal framework results in inconsistencies in the practice of international family mediation, as well as a general lack of awareness regarding this specialised field. The analysed questionnaires confirm that mediators working on cross-border family disputes are often expected to demonstrate higher levels of competence than those required for domestic cases, however, training in this area remains entirely voluntary. Hence, any person having completed the required basic 60-hour mediation training in the country is eligible to undertake international family mediations without supervision or limitations.

Although some specialised training in international family mediation is available in Bulgaria, such as previous initiatives by the National Institute of Justice⁸³ and an ongoing online course by the ITERA Institute⁸⁴ that addresses issues like cross-border disputes and child abduction under the Hague Convention, such options remain limited in scope and availability. Consequently, mediators who wish to acquire the necessary expertise in this field often resort to international training programs, which are typically less accessible due to factors such as cost, language barriers, and limited availability of places.

3.4 Recognition and enforcement of mediation agreements

In Bulgaria, the recognition and enforcement of mediation agreements is primarily governed by the Mediation Act, which explicitly includes cross-border disputes. As discussed in Section 2.2.1, a dispute is considered cross-border when at least one party is domiciled or habitually resident in another EU Member State at the time of the mediation agreement. However, this framework applies only within the EU. For international family mediation involving non-EU countries, the situation is more complex, as national courts cannot rely on EU instruments to recognise and enforce mediated settlements.

The enforcement of such agreements in non-EU contexts largely depends on the existence of bilateral or multilateral treaties between the countries involved. The 1980 Hague Convention,⁸⁵ while central to addressing cross-border child

⁸³ National Institute of Justice (NIJ), "In-person language training of ERA on family mediation," available at: <https://nij.bg/новини/присъствено-езиково-обучение-на-ера-по-семејна-медиация-10289>.

⁸⁴ Itera Institute, "Advanced training in family mediation," available at: <https://itera.bg/courses/1680-2/>.

⁸⁵ Supra note 5.

abduction and protecting custody and access rights, does not provide a direct mechanism for the enforcement of mediation agreements. Its focus is on the prompt return of wrongfully removed children and the protection of parental rights, not on the recognition of settlements reached through mediation. This gap highlights the need for Bulgaria to enter into more bilateral agreements to ensure that outcomes of international family mediation are legally recognised and enforceable beyond the EU framework.

As for the enforcement procedure set out in the Mediation Act, once a settlement is reached, it must be in writing and signed by all parties⁸⁶. For such an agreement to become enforceable, it must be submitted to a Bulgarian court for approval. The court examines whether the content of the agreement complies with Bulgarian law and with the principles of public order. Once approved, the agreement is recognised as a court settlement and is enforceable in the same manner as a court judgment⁸⁷. This allows parties to request enforcement through a bailiff if necessary.

In cases that involve children, the court should only approve a mediation agreement if it fully respects the best interests of the child.⁸⁸ Although not explicitly stated, this principle is indirectly reflected in Article 18(3) of the Mediation Act, which provides that: *"The court shall approve the agreement after it has been confirmed by the parties, provided that it does not contradict the law and good morals."* This general clause implies that agreements contrary to the child's best interests and therefore being inconsistent with legal norms or ethical standards, should not be approved. In practice, however, due to the limited participation of children in family mediation and the inconsistent approach among courts in assessing what constitutes the child's best interests, it remains unclear how effectively this standard is applied.

3.5 Ethical and Professional Standards for IFM

Although Bulgaria does not have a single, unified code of conduct for mediators, ethical and professional standards are formally upheld through a combination of national legislation and soft law instruments. Certified mediators are bound by the mandatory ethical rules set out in Ordinance No. 2 of 2007, which establishes core principles such as neutrality, confidentiality, and impartiality⁸⁹. In addition, various professional mediation associations in Bulgaria have

⁸⁶ Art. 16(1) Mediation Act

⁸⁷ Ibid, Art. 18.

⁸⁸ Ibid, Article 18(3).

⁸⁹ Art. 30 Ordinance No. 2 of 2007

adopted their own codes of conduct, generally based on Ordinance No. 2 and aligned with the European Code of Conduct for Mediators⁹⁰ - a voluntary, non-binding instrument that provides ethical guidance aligned with EU values.

However, although these association codes reinforce essential ethical standards and encourage consistency among mediators, their provisions remain general and are not specifically tailored to address the complexities of cross-border family disputes. The current ethical framework, both statutory and voluntary, lacks specific guidance on several essential aspects of international family mediation. These include the role of the child in mediation, safeguards in cases involving domestic or gender-based violence, and standards for mediator competence in cross-cultural or multilingual settings. The absence of enforceable, context-specific ethical standards in these areas represents a significant gap, particularly given the vulnerable position of children in cross-border disputes. A more robust and harmonised framework, incorporating binding standards for IFM and specific provisions for child protection and participation, would strengthen both the quality and legitimacy of mediation outcomes in such cases.

3.6 Child Participation in IFM

Despite the legal protection of children's right to be heard and have their best interests duly considered, child participation in family mediation in Bulgaria is still rare and marked by a lack of clear, consistent practice, as reported by the experts who participated in the national questionnaire. Mediators generally express hesitation about involving children directly, citing concerns about adding emotional stress to an already difficult situation and acknowledging their own limited training in working with children. Mediators in Bulgaria generally avoid individual sessions with children, with some using indirect methods to reflect the child's views in the process - through the support of psychologists. A few mediators noted that even when the child's involvement is considered, there are no shared standards for how to approach them, what information to provide, or how to balance their voice with the overall mediation process.

Furthermore, although the law requires that children over the age of 10 are heard in court proceedings and allows for younger children to be heard at a judge's discretion⁹¹, there are no equivalent guidelines when it comes to mediation. In practice, this legal framework is sometimes used by analogy, but

⁹⁰ European Commission, *European Code of Conduct for Mediators* (EU Justice Portal, July 2004, updated 2020), available at: https://e-justice.europa.eu/sites/default/files/2020-12/Code_of_conduct_EU_EN.pdf.

⁹¹ Supra note 65 & 66.

child participation in mediation remains more an exception than a rule. Institutions such as the Centre for Conciliation and Mediation at the Sofia District and City Courts do not actively support the involvement of children. Therefore, the feedback from mediators' points to an urgent need for clearer regulations, accessible training, and shared standards to support meaningful and safe child participation in mediation when appropriate.

To fill these gaps, the National Network for Children in Bulgaria, in collaboration with the Professional Association of Mediators in Bulgaria, the Institute for Social Activities and Practices, the Parents Association, and the "For Our Children" Foundation, developed and published a Unified Methodology for Assessing the Best Interests of the Child⁹². The methodology is targeted at judges, lawyers, and mediators, providing approaches for examining and evaluating the best interests of children in cases of parental conflict. A key part of the methodology is a standardised model for interviewing children, which is used as part of the process for resolving parental disputes⁹³.

The methodology highlights the importance of child participation in the mediation process, stressing the fact that in Bulgaria this is an exception⁹⁴. It discusses the consequences of decisions based only on the information provided by the parents who are often unable to rationalise their emotions during this process. On the other hand, the Methodology highlights the psychological burden placed on children when their views are sought in divorce proceedings. While recognising the importance of hearing the child's voice, the methodology underscores the risk of placing excessive weight on the child's opinion in matters where they are emotionally bonded to both parents. When asked to express a preference, the child may feel compelled to choose between two people to whom they are naturally attached, which can create a conflict of loyalty. This internal conflict, where a child feels guilty or disloyal for expressing preference for one parent over the other, can lead to significant emotional distress and even trauma. This raises critical concerns about respecting the child's emotional well-being and fundamental rights, emphasising that participation must be carefully balanced with protection from harmful psychological pressure⁹⁵.

⁹² "Unified Methodology for Assessing the Best Interests of the Child", January 2020, available at: <https://nmd.bg/wp-content/uploads/2020/01/Методология-за-обследване-най-добрия-интерес-на-децето.pdf>.

⁹³ Ibid.

⁹⁴ Ibid, p.49.

⁹⁵ Ibid, p. 72.

Furthermore, in 2021, the Supreme Court of Cassation provided clarifications⁹⁶ on what should be considered when determining the best interests of children. In making decisions about which parent should exercise parental rights over minor children and the regime of personal relationships with the other parent, the court evaluates the best interests of the child by comparing the conditions provided by both parents, based on the criteria outlined in Article 59(4) of the Family Code and the Additional Provisions of the Child Protection Act⁹⁷, as well as the clarifications in Supreme Court Plenary Decision No. 1/1974⁹⁸, which remain relevant under the current Family Code.

3.7 Recommendations

3.7.1 Mandatory family mediation training

In addition to introducing a legislative reform for additional mandatory training for family mediators after the completion of the 60-hour-course, training in practice should include:

- Development of a unified national course for mediators specialising in family mediation, incorporating international family mediation and addressing key issues such as international child abduction.
- Establishment of unified ethical standards for both national and international family mediation, focused on the best interests of the child and providing clear guidelines for working with children in mediation settings.
- Expansion of multilingual training programs to support effective cross-border communication between parties.
- Specialised training for mediators in child-inclusive practices, enabling them to engage appropriately and effectively with children involved in mediation processes.

3.7.2 Public awareness and accessibility

Since there is a lack of awareness among both professionals and the general public, as mentioned above, it is essential to implement targeted information campaigns, public outreach initiatives, and accessible resources on international family mediation. These efforts should focus on promoting a better understanding of international family mediation, its benefits in cross-border disputes, and the mechanisms available for accessing such services. Increasing

⁹⁶ Решение № 60208 от 03.12.2021 г. по гр. д. № 3523/2020 г., IV гр. о., ГК на ВКС

⁹⁷ § 1(5) Child Protection Act.

⁹⁸ Supreme Court Plenary Decision No. 1/1974

awareness is a critical step toward encouraging wider use of IFM and ensuring that it is seen as a viable, effective alternative to litigation in international family conflicts.

3.7.3 Up to date national statistics on international family mediation

National statistics on international family mediation should be systematically maintained and regularly updated to support informed policymaking and track progress in the field. This includes collecting data on the number and types of cases, mediation outcomes, timelines, the use of child-inclusive practices, and the prevalence of online and multilingual mediation.

4 Pre-mediation Services in *Bulgaria*

Although the concept of pre-mediation is gaining currency in European and international practice, in the Bulgarian context it remains undefined and inconsistently understood. Expert responses gathered through the national questionnaire confirm that no formally recognised or legally codified stage termed pre-mediation exists within the Bulgarian family-mediation process. This absence of definition gives rise to varied interpretations and practices.

While some professionals state unequivocally that pre-mediation is absent from the national framework, others describe the first information session, where families are introduced to the principles and procedures of mediation, as a functional equivalent of pre-mediation, even if it is not labelled as such. In addition, voluntary services offered by NGOs prior to any formal referral are occasionally said to fulfil a similar preparatory role. Yet these services are not standardised, not universally available, and lack legal status. Their quality, content and accessibility vary considerably according to the organisation or professionals delivering them. Consequently, although elements resembling pre-mediation are present in practice, they occur in a fragmented and informal manner.

The absence of a shared understanding or legal foundation for pre-mediation creates several difficulties. It hampers the assurance of consistent service quality, the development of unified professional training, and the systematic monitoring and evaluation of this early stage. Several respondents therefore emphasised the need for a clear and operational definition of pre-mediation, observing that the current gap impedes the coherent development of family-mediation practice. This observation aligns closely with one of the core aims of the iCare2 project: to clarify and reinforce the role of pre-mediation within the broader mediation framework.

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Секретно		
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Версия	Автор	Дата
Версия 1	Рада Стоилова Мира Иванчева	
Версия 1.1		
Версия 2	Рада Стоилова	

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Списък на използваните съкращения

Алтернативно решаване на спорове	АРС
Граждански процесуален кодекс	ГПК
Държави-членки	ДЧ
Европейски съюз	ЕС
Европейска Комисия за Ефективност на Правосъдието към Съвета на Европа	СЕРЕЈ
Закон за закрила на детето	ЗЗД
Закон за медиацията	ЗМ
Конвенция на ООН за правата на детето	КООНПД
Международна семейна медиация	МСМ
Международна социална служба	МСС
Неправителствена организация	НПО
Организация на Обединените Нации	ООН
Семеен кодекс	СК

2 Въведение

Над 100 000 деца и младежи изчезват на годишна база в Европейския съюз (ЕС) съгласно доклад на Европейския младежки форум от 2022 г. – число, което вероятно е дори по-високо в действителност поради занижената регистрация на случаите и непоследователното им докладване в държавите-членки (ДЧ)¹. Международното отвличане на деца представлява втората по-големина група сред случаите на изчезнали деца в ЕС². Въпреки че в България към момента не съществува единна база данни или систематично събирана статистика за случаите на международно отвличане на деца³, данни от неофициални източници сочат⁴, че за 2023 г. Министерството на правосъдието е получило 23 молби за връщане на отвлечени деца по реда на Хагската конвенция за гражданските аспекти на международното отвличане на деца⁵.

Нарастващият брой на браковете с чужди граждани, както и високият процент на разводите в ЕС, допринасят за все по-голямото натоварване на националните съдилища, но и правят механизмите за алтернативно решаване на спорове (АРС) по-важни от всякога⁶. Проучванията трайно показват, че презграничната семейна медиация предлага по-бърз, по-икономичен и по-високо ефективен метод за решаване на случаи на международно отвличане на деца, като в по-голямата част от случаите се стига или до пълно, или до частично споразумение⁷. Въпреки това практическото ѝ прилагане остава ограничено. Съгласно доклада за 2024 г. на горещата линия „116 000“ на Missing Children, по-големият брой от случаите на родителско отвличане на деца са били разрешение посредством съдебен процес и решение, а не по пътя на медиацията или

¹ Европейски Младежки Форум, *Изчезнали деца: Международното отвличане на деца и ролята на медиацията* (2022) https://www.youthforum.org/files/241122_M-child-abduction.pdf.

² Missing Children Europe. “Международно отвличане на деца.” *Missing Children Europe*, Достъпно на: <https://missingchildreneurope.eu/international-child-abduction/>.

³ Информация получена посредством разпространени въпросници в рамките на проект iCare2 към група практикуващи медиатори и юристи.

⁴ Снежина Ковачева, ‘Международно отвличане на деца’ (Адвокат Ковачева, 2024), Достъпно на: <https://advokatkovacheva.bg/mezhdunarodno-otvlichane-na-dete1/>.

⁵ Конвенция за гражданските аспекти на международното отвличане на деца, 25 Октомври 1980, 1343 U.N.T.S. 89.

⁶ Мичева-Русева, Вергиния. *Състоянието на медиацията в ЕС*. Съ-финансирано от Европейския съюз. Достъпно на: https://era-comm.eu/Language_Mediation/wp-content/uploads/2018/10/118DT102_Micheva_Ruseva_1.pdf.

⁷ Missing Children Europe. *Данни и прогнози 2020: От горещите линии за изчезнали деца и медиаторите по презгранични семейни спорове*. Missing Children Europe, 2021. Достъпно на: <https://missingchildreneurope.eu/?wpdmdl=2558>.

друго споразумение по взаимно съгласие на страните, което подчертава недостатъчното използване на медиацията в тази област⁸.

Ситуацията в България също свидетелства за подобни предизвикателства. Въпреки все по-честото насърчаване на използването на способите на медиацията по семейни дела, използването на международна семейна медиация (MCM) в презгранични спорове, включително в такива, включващи отвлечане на деца, остава ограничено и липсва системно прилагане в практиката⁹. Тази празнота се дължи на редица причини, сред които са липсата на осведоменост сред практикуващите юристи и социални работници, недостатъчните специализирани обучения и липсата на утвърдени процедури и институционална подкрепа¹⁰. В следствие на тези предизвикателства, семействата, изправени пред презгранични спорове, често прибегват до продължителни съдебни производства, вместо да потърсят алтернатива в медиацията.

Настоящият доклад изследва състоянието на MCM в случаите на международно отвлечане на деца, като разглежда правната рамка, институционалната инфраструктура, практическото приложение и предизвикателствата пред по-всеобхватното възприемане на този способ. В доклада се разглеждат също ключови предизвикателства като законодателни пропуски, ограничена информираност, непоследователно приложение и липса на специализирани обучения за медиатори. Акцентираща се върху ролята на детето в процеса на медиация, разглеждането на случаи на домашно насилие, и степента, в която практиките на приложение в България съответстват на европейските и международни стандарти. Докладът завършва с препоръки за усъвършенстване на системата и насърчаване на по-ефективна презгранична медиация, фокусирана върху детето.

В подкрепа на този анализ бяха събрани данни посредством въпросници, разпространени сред медиатори и експерти в областта на международното право, наричани по-нататък „въпросниците“ или „въпросниците в рамките на проект iCare2“. Въпросниците обхващаха както национални, така и международни аспекти на семейната медиация, включително националната нормативна уредба, прилагането на приложимите европейски и международни стандарти, практическите предизвикателства, изискванията за обучение и квалификация, участието

⁸ Missing Children Europe. *Данни и прогнози 2024*. Достъпно на: <https://missingchildreneurope.eu/wp-content/uploads/2025/05/Figures-Trends.pdf>.

⁹ Информация получена посредством разпространени въпросници в рамките на проект iCare2 към група практикуващи медиатори и юристи.

¹⁰ Пак там.

на децата и участието на ключови институции в процедурата по медиация. Информацията, събрана чрез отговорите, е използвана за съставянето на различни секции в рамките на целия доклад.

3 Международната семейна медиация в България: Нормативна уредба

Като страна по *Хагската конвенция* от 1980¹¹ г. Република България е поела ангажимент да насърчава приятелското разрешаване на презгранични семейни спорове, включително такива, свързани с международно отвлечение на деца. В тази връзка Министерството на правосъдието изпълнява функцията на „централен орган“ по смисъла на чл. 6 от *Хагската конвенция* от 1980 и като такъв има ключова роля при насърчаването на доброволното връщане на деца и подпомагането на използването на медиацията за постигане на решения по взаимно съгласие, ориентирани към най-добрия интерес на децата¹². Република България също така е задължена да прилага вторичното право на ЕС, в рамките на което попада и Регламентът *Брюксел II-б*¹³, който затвърждава ролята на медиацията в презгранични семейни случаи и въвежда задължение за съдилищата и държавните органи активно да насърчават нейното използване¹⁴.

Настоящата глава изследва развитието на правната рамка - от *Брюксел II-a*¹⁵ до *Брюксел II-б*; на националното законодателство, сред което попадат *Законът за медиацията (ЗМ)*¹⁶, *Гражданският процесуален кодекс (ГПК)*¹⁷, *Законът за закрила на детето (ЗЗД)*¹⁸, и *Семейният кодекс (СК)*¹⁹, които в своята съвкупност представляват основата за развитието и практикуването на МСМ в България. Предложенията за изменения в

¹¹ Цит. изт. [5].

¹² Цит. изт. [5], Член 7(с).

¹³ Регламент (ЕС) 2019/1111 на Съвета от 25 юни 2019 години относно компетентността, признаването и изпълнението на решения по брачни въпроси и въпроси, свързани с родителската отговорност, и относно международното отвлечение на деца (преработен текст), ST/8214/2019/INIT, ОВ L 178, 2.7.2019, стр. 1–115, ELI: <http://data.europa.eu/eli/reg/2019/1111/oj>.

¹⁴ Член 25 Регламент (ЕС) 2019/1111.

¹⁵ Регламент (ЕО) № 2201/2003 на Съвета от 27 ноември 2003 година относно компетентността, признаването и изпълнението на съдебни решения по брачни дела и делата, свързани с родителската отговорност, с който се отменя Регламент (ЕО) № 1347/2000, ОВ L 338, 23.12.2003, стр. 1–29.

¹⁶ Закон за медиацията, Обн. ДВ бр. 110 от 17 Декември 2004 г., посл. Изм. ДВ бр. 57 от 5 Юли 2024 г.

¹⁷ Граждански процесуален кодекс, Обн. ДВ бр. 59 от 20 Юли 2007 г., посл. Изм. ДВ бр. 26 от 27 Март 2025 г.

¹⁸ Закон за закрила на детето, Обн. ДВ бр. 48 от 13 Юни 2000 г., посл. изм. и доп. ДВ бр. 79 от 17 Септември 2024 г.

¹⁹ Семейен кодекс, Обн. ДВ бр. 47 от 23 Юни 2009 г., посл. изм. ДВ бр. 26 от 27 Март 2025 г.

правната рамка на медиацията, представени за обществено обсъждане към момента на съставяне на настоящия доклад, са изрично обхванати от анализа, както и съображенията относно прилагането на процедурата по медиация в случаи на домашно насилие и развиващата се роля на детето в процедурата по медиация.

3.1 Международна нормативна уредба

3.1.1 Брюксел II-6 (Регламент (ЕС) 2019/1111)

Регламентът *Брюксел II-а* (Регламент No 2201/2003 на Съвета)²⁰ е основният нормативен акт в ЕС уреждащ подсъдността, признаването и изпълнението на съдебните решения по брачни въпроси и въпроси за родителската отговорност, включително в случаи на отвлечение на деца. Въпреки широкия му обхват, обаче, той не създава същинска нормативна уредба за медиацията, а единствено закрепва задължение за централните органи да насърчават използването на медиация в презгранични семейни спорове²¹. Така единственото позоваване на APC остава ограничено, като не биват включени нито задължения за съдилищата, нито всеобхватни процесуални гаранции за страните в процеса, принадлежащи към уязвими групи, каквито са децата или жертвите на домашно насилие.

Напротив, Регламентът *Брюксел II-б* (Регламент (ЕС) 2019/1111)²² припознава нарастващата роля на медиацията и другите методи за алтернативно решаване на презгранични семейни спорове²³ и създава необходимата нормативна уредба за тях. Текстът му изрично насърчава съдилищата да обмислят възможността за решаване на спорове, касаещи деца (с изключение на случаите на домашно насилие), чрез медиация или други възможни методи и с помощта, доколкото е приложимо, на съществуващи презгранични мрежи за медиация²⁴. Член 25 от Регламента въвежда ангажимент не само за централните органи, но и за съдилищата и другите компетентни органи активно да насърчават медиацията, освен ако това не противоречи на най-добрите интереси на детето. Така въведената проактивна позиция е в съответствие и с развиващите се международни стандарти, и по-специално – с практиката по Конвенцията на ООН за правата на детето²⁵, която подчертава значението на

²⁰ Цит. изт. [15].

²¹ Чл. 55(д) Регламент 2201/2003

²² Цит. изт. [13].

²³ Параграф 35.

²⁴ Параграф 43.

²⁵ Конвенция на ООН за правата на детето, 20 Ноември 1989, 1577 U.N.T.S. 3

приятелското и своевременно разрешаване на спорове по начин, който дава предимство на най-добрия интерес на детето, когато същото е засегнато²⁶. Въпреки това, липсата на установени уеднаквени процедури или минимална възраст за изслушване на детето в Регламента може да доведе до непризнаването на споразумения в други държави-членки, доколкото неспазването на гаранциите за участието на детето в процеса съставляват основание за отказ на признаване или на изпълнение, съгласно членове 39 и 68.

С оглед постигането на разумен баланс между APC и процесуалната ефективност, Регламентът изрично посочва, че усилията за постигане на съгласие чрез APC следва да не забавят неоправдано производството по Хагската конвенция от 1980 г.²⁷. Така например, в производствата за връщане по Хагската конвенция от 1980 г., съдилищата следва да вземат решение в рамките на шест седмици, освен ако изключителни обстоятелства не налагат забавяне²⁸. Прибягването до медиация само по себе си не би могло да се квалифицира като такова, но забавяния, възникнали в резултат на процедурата по медиация или усложнения по време на съдебните прения, биха могли да съставляват изключителни обстоятелства. Още повече, текстовете на Регламента насърчават държавите-членки да определят като компетентни съдилищата, сезирани по реда на Хагската конвенция, да разглеждат също и въпроси за родителската отговорност, когато родителите са постигнали съгласие в рамките на производството за връщане. Тази препоръка не е имплементирана в Република България.²⁹

В изпълнение на задълженията си по *Регламента Брюксел II-б*, българските съдии следва да се уверят, че страните разглеждат процедурата по медиация като реална възможност и да насърчат нейното използване както преди, така и по време на производството, особено когато тя е в подкрепа на най-добрите интереси на детето и би могла да доведе до по-бързо правораздаване и по-малка състезателност в процеса.

²⁶ Чл. 21 Регламент 2019/1111

²⁷ Пак там.

²⁸ Регламент 2019/1111, Параграф 42 от Преамбюла.

²⁹ Мичева, Вергиния. Нови моменти в областта на семейното право в ЕС. В: Lex.bg, ISSN 2682-9606 (2022) Достъпно на: <https://news.lex.bg/%D0%BD%D0%BE%D0%B2%D0%B8-%D0%BC%D0%BE%D0%BC%D0%B5%D0%BD%D1%82%D0%B8-%D0%B2-%D0%BE%D0%B1%D0%BB%D0%B0%D1%81%D1%82%D1%82%D0%B0-%D0%BD%D0%B0-%D1%81%D0%B5%D0%BC%D0%B5%D0%B9%D0%BD%D0%BE%D1%82%D0%BE-%D0%BF/>

Въпреки че Регламентът е пряко приложим и не се изисква неговото транспониране в българското законодателство, липсата на такова доведе до факта, че не бе обърнато достатъчно внимание на влизането му в сила, а практиката по прилагането му остава непоследователна поради липсата на придружаващи национални мерки или насоки³⁰.

3.2 МСМ в националната нормативна уредба

3.2.1 Законът за медиацията

Медиацията в България е уредена със *Закона за медиацията*, който я определя като доброволна и поверителна процедура, при която неутрално трето лице - медиатор, подпомага страните да постигнат споразумение³¹. От изключителна важност е да се посочи, че чрез своя чл. 3³² Законът изрично включва презграничните спорове в своя обхват³³. Допълнителните разпоредби на ЗМ³⁴ предоставят и дефиницията на „презграничен спор“ като спор, при който поне една от страните е с местоживеене или обичайно местопребиваване в държава-членка, различна от тази на която и да е от другите страни по производството към момента, в който те се съгласят да участват в процедура по медиация или бъдат поканени за това от съда. Спорът се счита за презграничен и когато последващо съдебно или арбитражно производство е образувано в държава-членка, различна от тази, в която страните са имали местоживеене или обичайно местопребиваване в съответния момент. Съответно, приложимостта на българския закон и към МСМ се извежда от едновременния прочит на §1 от ДР към ЗМ във връзка с изричното позоваване на трансграничните спорове в чл. 3 ЗМ. Тази нормативна уредба, обаче, остава приложима изключително за презгранични спорове в рамките на ЕС.

Включването на презграничните спорове в обхвата на *Закона за медиацията* има както правно, така и системно значение. От юридическа гледна точка, то гарантира, че международните семейни спорове не се третират по-различно от националните, когато става въпрос за достъп до процедурата по медиация. От системна гледна точка, това вписва МСМ в инфраструктурата за алтернативно решаване на спорове, отваряйки вратата за развитието на специализирани обучения за медиатори по презгранични въпроси, както и за междуинституционално сътрудничество

³⁰ Пак там.

³¹ Чл. 2 Закон за медиацията

³² Чл. 3 Закон за медиацията

³³ Чл. 3(1) Закон за медиацията

³⁴ § 1 от Допълнителните разпоредби към Закона за медиацията

между националните и международните центрове по медиация. Въпреки това, макар и международната семейна медиация нееднозначно да попада в обхвата на закона, не са установени специфични разпоредби или процедури за нея, които да я отличат от националната медиация.

Освен включването на презграничните спорове, Законът за медиацията определя също и основните принципи, които ръководят процедурата по медиация. Ключов е доброволният характер на процедурата – страните могат да решат да участват в нея или да се оттеглят по всяко време и въпреки че съдилищата могат да препоръчат нейното започване, те не могат да обвържат страните с постигането на споразумение. Това, обаче, понастоящем се преразглежда с предложението за изменение и допълнение на закона³⁵, целящо въвеждането на задължителна информационна сесия за страните относно медиацията (виж Раздел 2.2.1.2). Още повече, законът създава стриктни гаранции за това, че цялата информация, обменена по време на процедурата по медиация, ще остане поверителна не само от медиатора и страните по спора, но и от всички участващи трети страни³⁶. Принципът на поверителност продължава да се прилага и когато спорът продължи да се разглежда пред съд. В процедурно отношение, ЗМ предоставя гъвкава рамка, но с определени ограничения. Съгласно чл. 15, ал. 1, т. 6³⁷ процедурата по медиация се прекратява автоматично след изтичането на шест месеца от нейното започване. Въпреки неуспеха на първата процедура по медиация, ако страните желаят да започнат нова процедура след този период, могат да го направят без ограничение по отношение на броя подновявания. В рамките на така установения шестмесечен срок медиаторите могат да провеждат както съвместни сесии със страните по спора, така и отделни срещи с всяка от тях, в зависимост от естеството и сложността на въпросите. Важно е да се отбележи, че съгласно чл. 11а давност не тече докато трае процедурата по медиация, като така гарантира правата и законните интереси на страните, докато се опитват да достигнат до решение по взаимно съгласие.

3.2.1.1 Наредба № 2 от 2007 г.

За получаването на квалификация като семеен медиатор в България, лицата следва да преминат общо обучение по медиация в съответствие с

³⁵ Проект на Закон за изменение и допълнение на Гражданския процесуален кодекс, публикуван за обществено обсъждане на 03.04.2025 г. на Портала за обществени консултации на Министерски съвет

³⁶ Член 7.

³⁷ Чл. 15, ал. 1, т. 6 Закон за медиацията

Наредба № 2 от 2007 г.³⁸. Обучението се провежда от различни асоциации по медиация, като се състои от минимум 60 учебни часа, съгласно програма, одобрена от министерството на правосъдието. То включва както теоретични, така и практически елементи, всеки от които е с минимална продължителност от 30 учебни часа и обхваща теми като техниките за разрешаване на конфликти, комуникационни умения, правни принципи, свързани с медиацията и основни етични стандарти. Съдържанието на обучението следва да бъде приложимо към различните отрасли, в които се практикува медиация – семейни, търговски и други видове спорове. Курсът завършва с изпит, който се провежда от комисия на съответната обучителна организация и включва тест за оценка на придобитите знания, участие в симулирана процедура по медиация и устен изпит. След успешното завършване на обучението, лицата получават правото да бъдат вписани в Единния регистър на медиаторите – задължителна предпоставка за практикуване на медиация в България, след което могат да започнат да водят процедури по медиация незабавно, без да е необходима допълнителна специализация в конкретна област като семейната медиация, например.

Липсата на задължителна допълнителна специализация е съществен недостатък на действащата нормативна уредба. Тя поражда сериозни опасения относно качеството на предоставяните услуги по медиация, когато медиаторите не разполагат с подходящото обучение за работа по чувствителни теми, особено такива възникващи в рамките на презгранични семейни спорове като международното отвлечение на деца. Както бе подчертано и от Европейската комисия за ефективност на правосъдието (CEPEJ), специализираното обучение по семейна медиация е от решаващо значение, като се обръща особено внимание на необходимостта медиаторите да бъдат обучени да отстояват най-добрите интереси на детето³⁹. Подобно обучение се счита за ключово за

³⁸ Наредба № 2 от 15 март 2007 г. за условията и реда за одобряване на организациите, които обучават медиатори; за изискванията за обучение на медиатори; за реда за вписване, отписване и заличаване на медиатори от единния регистър на медиаторите и за процедурните и етични правила за поведение на медиатора, издадена от министъра на правосъдието (Обн. ДВ бр. 26 от 27 март 2007 г., посл. изм. и доп. ДВ бр. 51 от 21 февруари 2020 г.). Достъпна на: <https://mediate.bg/normativna-baza/naredba-%e2%84%96-2-kam-zakon-za-mediaczivata/>

³⁹ Congress of Deputies, *Evaluation of Directive 2008/52/EC on Mediation in Civil and Commercial Matters* (Legislative Session 14, SPL 49, 2016), available at: https://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura_14/spl_49/pdfs/63.pdf.

осигуряването на адекватна подготовка на медиаторите, така че същите да могат да оценят пригодността на конкретния случай да подлежи на процедура по медиация и да направляват ефективно сложността на международните семейни спорове. Въпреки предложенията за изменения на Закона за медиацията и Гражданския процесуален кодекс от 2023-2025, те само частично биха решили въпроса. Остава неясно, също така, дали, ако бъдат приети, тези изменения ще бъдат пряко приложими и за медиаторите, участващи в дела за международно отвлечане на деца.

Друг сериозен пропуск в правната рамка е липсата на ясни стандарти за квалификация на обучителите на медиатори. Въпреки че Наредба № 2 от 2007 г. очертава изискванията към качеството на институциите, предоставящи обучения по медиация, като например относно разработването на учебния план, списъка на специалистите, които ще извършват обучението, методите на преподаване и учебните зали, тя не закрепва детайлни изисквания към квалификацията на самите обучители. Понастоящем, единственото изискване е обучението по медиация да може да се предоставя от организации, в които работят специалисти с опит и квалификация в областта на медиацията и които са одобрени със заповед на министъра на правосъдието⁴⁰.

3.2.1.2 Национален дебат относно задължителната медиация

Ролята на задължителната медиация става все по-важна в системите на гражданското правораздаване, както в България, така и в ЕС, което я превръща и във все по-важна тема за правни и политически дебати. Директивата за медиацията изрично оставя в рамките на преценката на държавите-членки възможността да имплементират, или не, задължителната медиация⁴¹. Целта е да се насърчи ранното решаване на спорове и да се намали натискът върху претоварените съдебни системи. Основният проблем, обаче, се състои в намирането на баланс между насърчаването на медиацията като по-бърза, по-малко състезателна алтернатива на съдебния процес и в същото време гарантирането на основните права на страните, сред които е и правото на достъп до правосъдие, както и принципът на доброволност при алтернативното решаване на спорове. В рамките на ЕС нито една държава не принуждава

⁴⁰ Член 2 Наредба №2 от 2007 г.

⁴¹ Директива 2008/52/ЕО на Европейския парламент и на Съвета от 21 май 2008 година относно някои аспекти на медиацията по гражданскоправни и търговскоправни въпроси, ОВ L 136, 24.5.2008, стр. 3–8, ЕЛ: <http://data.europa.eu/eli/dir/2008/52/oj>, Чл. 5(2).

страните по спора да постигнат споразумение чрез медиация, тъй като това би противоречало тъкмо на основните принципи на процедурата⁴². При все това редица държави-членки са въвели различни модели за задължително включване на страните в процедурата по медиация.

Така например Италия е избрала лек режим на задължителност по някои граждански дела, при които страните са длъжни да участват в поне една медиационна сесия преди да подадат иск пред съда, въпреки че имат пълното право да не продължат процедурата по медиация след това⁴³. По подобен начин и в Англия и Уелс страните по семейни спорове следва да участват в информационна среща за процедурата по медиация и оценка на пригодността (MIAM), като съдилищата са овластени да налагат глоби на лицата, които отказват да участват без да имат основателна причина за това⁴⁴.

През 2023 г. България също предложи изменения и допълнения в Закона за медиацията и Гражданския процесуален кодекс, с които следваше да се въведе реформа в областта⁴⁵. Тези промени имаха за цел да въведат задължителни първоначални медиационни сесии при конкретни гражданскоправни спорове, сред които попадат някои семейни спорове, както и да се създадат центрове за медиация към съдилищата, в които да работят специално обучени медиатори. През 2024 г., обаче, Конституционният съд на Република България обяви поправката за противоконституционна⁴⁶. Съдът установи, че принуждаването на страните да участват в медиация, дори и само първоначално, нарушава правото им на свободен достъп до правосъдие, принципа на равенство и

⁴² Пак там.

⁴³ Леонардо д'Урсо, Юлия Раданова, Константин Ади Гаврила, „Италианският Opt-out модел: Мек подход към задължителната медиация в светлината на скорошното решение на Съда на ЕС“ (Kluwer Mediation Blog, 14 октомври 2024), Достъпно на: <https://mediationblog.kluwerarbitration.com/2024/10/14/the-italian-opt-out-model-a-soft-mandatory-mediation-approach-in-light-of-the-recent-cjue-decision/>

⁴⁴ Stevensdrake Solicitors, 'Промените в правилата за извънсъдебното/ алтернативното решаване на спорове по семейно правни въпроси' (7 май 2024), Достъпно на: <https://www.stevensdrake.com/articles/changes-to-the-family-law-rules-on-non-court-dispute-resolution-adr?>

⁴⁵ Глава шеста, членове 19-25 Закон за медиацията

⁴⁶ Цветелина Колева, 'Задължителната медиация бе обявена за противоконституционна' (B: Arbitration Bulgaria, 15 юли 2024), Достъпно на: <https://arbitrationbulgaria.com/2024/07/15/mandatory-mediation-has-been-declared-unconstitutional/>

налага несправедлива финансова тежест, особено при чувствителни спорове каквито са семейните.

Ново предложение за законодателно изменение бе представено за обществено обсъждане през 2025 г.⁴⁷ в отговор на решението на Конституционния съд. То цели да преработи правната рамка на медиацията по такъв начин, че да адресира съображенията за противоконституционност, когато процедурата е тясно свързана със съдебните производства. Преработеният проект има за цел да се изпълнят поетите от България ангажменти по Националния план за възстановяване⁴⁸ и да се подкрепи общоевропейската цел за разширяване на приложението на механизмите за алтернативно решаване на спорове. Въвеждат се по-гъвкави разпоредби, които насърчават медиацията, без да я превръщат в задължителна, осигурява се адекватна защита на страните по спора в уязвима ситуация (и по-специално в рамките на семейноправни спорове) и се акцентира върху квалификацията на медиаторите и институционалната отговорност. Различни асоциации на медиаторите представиха становища в подкрепа на така предложеното изменение и допълнение⁴⁹, а публичното обсъждане на национално ниво продължава към момента на съставяне на настоящия доклад.

Въпреки опита на България да насърчи медиацията при семейни спорове, въпросът относно приложението на международната семейна медиация, в частност по отношение на случаите на международно отвлечение на деца, не е включен в обхвата на предложените промени. Проектът за изменение и допълнение на закона изрично ограничава приложението на задължителната медиация само до някои семейни спорове⁵⁰, уредени в Семейния кодекс, като развод, определяне на местоживее на детето и родителски права, но не споменава нищо за презграничните отвлечения. Този пропуск е съществен и отразява общата липса на каквото и да било позоваване на международни семейни спорове в самия Семейен кодекс,

⁴⁷ Министерство на правосъдието на Република България, Публична консултация за Предложението за изменение и допълнение на Гражданския процесуален кодекс, Достъпно на: <https://strategy.bg/PublicConsultations/View.aspx?lang=bg-BG&Id=9020>

⁴⁸ Министерски съвет на Република България, Национален план за възстановяване и устойчивост на Република България, 2022, Достъпен на: <https://www.mlsp.government.bg/uploads/3/baneri/natsionalen-plan-za-vzstanovyavane-i-ustoychivost-na-republika-blgariya/bg-finalrrp-2022-04-06-08-30-tca.pdf>

⁴⁹ Цит. изт. [47]

⁵⁰ § 8 от Предложението за изменение и допълнение на Гражданския процесуален кодекс, цит. изт. [47]

включително в случаите по Хагската конвенция. В резултат на това медиацията остава юридически и процедурно откъсната от тези чувствителни и сложни случаи, въпреки голямото им значение за международната практика.

3.2.2 Граждански процесуален кодекс

Гражданският процесуален кодекс допълва разпоредбите на ЗМ, като предвижда възможността съдът да признава споразуменията, резултат от процедура по медиация. Член 234⁵¹ допуска страните, постигнали споразумение чрез медиация по време на съдебен процес, да го представят на съда за одобрение. След като бъде одобрено като съдебна спогодба, споразумението има значението на влязло в сила решение и подлежи на пряко изпълнение. Съдът следва да се увери, че споразумението не противоречи на закона и на добрите нрави⁵². Освен това, ГПК насърчава и инициирането на процедура по медиация в поранен етап на производството. Член 140, ал. 3 ГПК⁵³ оправомощава съдиите в рамките на първото открито заседание да напътят страните към медиация или друг способ за доброволно уреждане на спора, като процесуалните срокове спират да текат за времето на процедурата по APC. Това, обаче, попада изцяло в рамките на правото им на преценка и съдиите не са длъжни да направят подобно предложение. В резултат на това прибягването до медиация често зависи от съдебната култура и желанието на страните по делото.

3.2.3 Законът за закрила на детето и Семейният кодекс

Законът за закрила на детето, приет през 2000 г. и последно изменен през 2024 г., закрепва правната рамка, гарантираща правата и благосъстоянието на децата в България. Той утвърждава водещото значение на най-добрия интерес на детето и очертава отговорностите на родителите, другите носители на родителска отговорност и институциите по отношение опазването на този интерес. Важно е да се отбележи, че Законът за закрила на детето изрично споменава решаването на спорове, свързани с деца, както в национален, така и в трансграничен контекст.

От особено значение за международната семейна медиация е Член 22в⁵⁴, който урежда производствата за връщане на деца или за упражняване на

⁵¹ Чл. 234 Граждански процесуален кодекс.

⁵² Пак там.

⁵³ Чл. 140, ал. 3 Граждански процесуален кодекс.

⁵⁴ Чл. 22в във връзка с чл. 22а Закон за закрила на детето.

правото на лични отношения. Съгласно тази разпоредба съдът подпомага страните за доброволното уреждане на спора. Съдът може да насочи страните към медиация във всеки един момент от производството, при условие че това няма да доведе до забавяне на делото и че ще се осъществи в рамките на сроковете, определени с член 24(2) от Регламента Брюксел II-б.

В допълнение на разпоредбите на ЗЗД, Семейният кодекс признава и улеснява постигането на извънсъдебни споразумения по въпроси, свързани с развода, попечителството, режима на личните отношения и родителските права⁵⁵. Така например, когато възникнат спорове относно родителската отговорност, кодексът дава възможност страните да постигнат споразумение чрез медиация⁵⁶, което след като бъде одобрено от съда, става правно обвързващо.

Въпреки че СК оправомощава съдилищата да одобряват споразумения по въпросите на попечителството, режима на личните отношения и издръжката, като по този начин легитимира резултатите от медиацията, той разглежда всички споразумения като единствено национални по своя характер и не урежда изрично аналогичната хипотеза спрямо семейните спорове, свързани с международно отвлечение на деца или презгранични родителски конфликти. Единственото подобно позоваване е в член 127б, който позволява на районните съдилища в България да наложат забрана за извеждане от страната на дете, ако съществува явен и конкретен риск от незаконно извеждане от страната, особено когато такова извеждане би нарушило родителски права, установени със закон, съдебно решение или споразумение. Липсват и указания относно сътрудничеството с чуждестранни съдилища или централни органи по смисъла на Хагската конвенция от 1980 г., както и процедурни указания за разглеждане на чувствителни спорове чрез медиация. Това оставя значителна празнота в правната структура, която ограничава способността на СК да подкрепя МСМ в ситуации, в които презграничното сътрудничество е от съществено значение за защитата на висшите интереси на детето.

3.2.1 Нормативна уредба за участието на детето в процедурата по медиация

Съгласно международното и националното право децата имат правото да бъдат изслушани в рамките на съдебния процес и информирани относно неговото развитие и резултати, като бъдат зачитани техните най-добри

⁵⁵ Член 49 и член 123 Семейен кодекс.

⁵⁶ Член 59.

интереси по всички въпроси, които ги засягат. Въпреки че тези права са формално закрепени в българското законодателство, анализът в следващите параграфи цели да обследва дали съществуващите разпоредби осигуряват достатъчна яснота, процесуални гаранции и механизми за осигуряване на смислено и последователно участие на децата, особено в контекста на семейната медиация при презгранични спорове.

3.2.1.1 Най-добрият интерес на детето

Конвенцията на ООН за правата на детето (КООНПД), приета от Общото събрание на ООН през 1989 г. и ратифицирана от Република България през 1991 г.⁵⁷, определя „най-добрия интерес на детето“ като първостепенно съображение при всички действия, отнасящи се до децата, независимо дали те са предприети от публични или частни институции, осъществяващи функцията по социално подпомагане, създадените със закон съдилища, административните или законодателните органи⁵⁸. Съгласно КООНПД, за определянето на най-добрия интерес на детето следва да бъдат взети предвид цялостното благосъстояние и развитие на детето, да бъдат зачетени неговите собствени възгледи – в съответствие с възрастта и зрелостта му, както и правото му на закрила, грижи и участие. Още повече, включването на принципа в текста на Регламента Брюксел II-б затвърждава тезата, че най-добрият интерес на детето трябва да бъде винаги първостепенно съображение в рамките на международната семейна медиация⁵⁹.

В България принципът за най-добрия интерес на детето е застъпен в семейното право и законодателството за закрила на детето. Семейният кодекс задължава съдилищата да го вземат предвид в рамките на производствата, свързани с попечителството, режима на личните отношения и родителските права⁶⁰. Така и в Закона за закрила на детето един от основополагащите принципи е този за най-добрия интерес на детето. ЗЗД дефинира понятието като преценка, при която се вземат предвид различни фактори⁶¹. Сред тях са желанията и чувствата на детето,

⁵⁷ Служба на Върховния комисар по правата на човека на ООН (ВКПЧООН). Статус на ратификациите по Конвенцията за правата на детето на ООН, База данни на Договорните органи на ООН, проверено на 16 юни 2025. Достъпно на: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC.

⁵⁸ Член 3(1) Конвенция на ООН за правата на детето

⁵⁹ Член 25.

⁶⁰ Член 123, ал. 1 Семейен кодекс.

⁶¹ § 1, т. 5 от Допълнителните разпоредби към Закона за закрила на детето.

неговите физически, психически и емоционални потребности, възрастта, пола, миналото и други индивидуални характеристики на детето. Преценката взема предвид също и други обстоятелства, оказващи влияние върху детето като например, опасността или вредата, която е причинена на детето или е вероятно да му бъде причинена, способността на родителите да се грижат за детето и последиците, които биха настъпили за детето при промяна на обстоятелствата. Макар и законът да закрепва най-добрия интерес на детето като основен ръководен принцип за осъществяване на закрилата на детето, той е формулиран в контекста на процедурни насоки и насоки за вземане на решения, а не е залегнал като самостоятелно, изпълнимо материално право.

3.2.1.2 Правото на детето да бъде изслушвано

Член 12 КООНПД посочва, че децата, които са способни да формират собствени възгледи, имат право да ги изразяват свободно по всички въпроси, които се отнасят до тях, като на тези възгледи следва да бъде придавано значение, съответстващо на възрастта и зрелостта на детето⁶². Това право е застъпено също и в *Хартата за основните права на ЕС*⁶³, оттук насетне наричана - “Хартата”, и в Регламента *Брюксел II-б*⁶⁴.

Като страна по гореспоменатите международни договори, Република България е задължена да гарантира правото на детето да бъде изслушвано по всички въпроси, отнасящи се до него. На национално ниво правото на детето да бъде изслушвано е закрепено в закони като *Закона за закрила на детето* и *Семейния кодекс*. То, обаче, е формулирано изключително в контекста на съдебните и административните производства, без да има изрично разширяване на обхвата спрямо алтернативните механизми за решаване на спорове, какъвто е например медиацията. Съгласно *Закона за закрила на детето* децата над 10-годишна възраст следва да бъдат изслушвани във всяко едно административно или съдебно производство, касаещо техните права и законни интереси, освен ако не се установи, че подобно участие би било в противоречие на най-добрия интерес на детето⁶⁵. Децата под 10-годишна възраст могат да бъдат изслушвани, ако решаващият орган прецени, че са достигнали

⁶² Конвенция на ООН за правата на детето, Член 12(1).

⁶³ Член 24(1), Харта на основните права на Европейския съюз, ОВ С 326, 26.10.2012, стр. 391–407, ELI: http://data.europa.eu/eli/treaty/char_2012/oj.

⁶⁴ Член 21 и член 26 Регламент 2019/1111.

⁶⁵ Член 15, ал. 1 от Закона за закрила на детето.

достатъчен етап от своето развитие⁶⁶. При все това, законът не дава ясни насоки за ролята и тежестта на становището на детето в рамките на съдебното производство, което продължава да затруднява специалистите в случаите на изслушване на деца в практиката. ЗЗД не споменава и ролята на детето в процедурата по медиация. Аналогично, Семейният кодекс постановява, че съдът следва да вземе предвид становището на детето в случаите, в които се решават въпроси за родителските права и отговорност, като препраща към разпоредбите на Закона за закрила на детето.

Законът за медиацията също не адресира включването на деца в процедурата по медиация, в следствие на което се счита, че пределната възраст, при която това може да бъде осъществено, е 10-годишната възраст, установена със Закона за закрила на детето.

3.2.2 Домашно насилие и насилие, основано на пола

Домашното насилие обичайно има решаваща роля в случаите на международно отвлечение на деца, тъй като много родители заминават извън границите на страната, за да избягат от ситуация на насилие⁶⁷. Съществуват различни усложнения около разрешаването на случаи на международно отвлечение на деца, когато е налице и домашно насилие, като някои от тях са свързани с разпоредбите за връщане на детето, а други – във връзка с осъществяването на процедури по медиация в такива случаи. Така например, член 13(1)(b) от Хагската конвенция от 1980 г. допуска съдилищата да откажат да разпоредят връщането на дете, ако съществува сериозен риск от неговото физическо или психическо увреждане⁶⁸. Фокусът е изцяло върху риска за детето и не се съобразява риска за отвлечащия родител. Тъй като Конвенцията не урежда изрично случаите на домашно насилие, член 13(1)(b) се прилага като общо правно основание и за тях.

Дебатите около Конвенцията извеждат наяве противоречието между целта за бързо връщане на отвлеченото дете и обстоятелствата на домашното насилие, принудили някои родители да избягат от страната. В

⁶⁶ Пак там, Член 15, ал. 2.

⁶⁷ Мерилин Фрийман и Никола Тейлър, Кога международното отвлечение на деца се случва в контекста на насилие или малтретиране (Международен център за семейноправни политики и практика, Април 2024), стр.15, Достъпно на: <https://www.icflpp.com/wp-content/uploads/2024/04/ICFLPP-International-Child-Abduction-Research-Report-April-2024.pdf>

⁶⁸ Пак там.

Ръководството за добри практики от 2020 г.⁶⁹ бе направен опит за адресиране на този проблем, но същият бе критикуван за това, че предполага домашното насилие да не бъде достатъчно основание за отказ за разпореждане на връщането на детето и по този начин отслабва закрилата на засегнатите деца⁷⁰.

Медияцията, макар и да е ефективна в много семейноправни спорове, включително такива за международни отвлечения на деца, често е ограничена или забранена като процедура по дела, включващи домашно насилие или насилие, основано на пола, поради съображения за неравнопоставеност на страните и тяхната безопасност, което и възпрепятства усилията по разрешаване на спора по взаимно съгласие. Международните и регионални инструменти все по-често вземат предвид тази опасност. Така например, *Конвенцията на Съвета на Европа за предотвратяване и борба с насилието над жени и домашното насилие (Истанбулската конвенция)*⁷¹ забранява закрепването на задължително алтернативно решаване на спорове в подобни дела⁷². Инструменти от правото на ЕС, като *Регламента Брюксел II-б* допускат съдилищата да откажат страните да участват в процедура по медияция, когато същата няма да бъде подходяща поради установено наличие на домашно насилие⁷³. Тези разпоредби отразяват нарастващият консенсус, че медияцията не е подходяща и може да бъде неблагоприятна за страните, когато е налице насилие между тях. Въпреки това, новоприетата Директива на ЕС 2024/1385⁷⁴ относно борбата с насилието над жени и домашното насилие не установява подобни забрани.

Подобно съображение е налице и в националното ни законодателство – в *Закона за защита от домашното насилие*⁷⁵, който забранява на съда да

⁶⁹ Наръчник за добрите практики по Хaгската конвенция от 25 октомври 1980 г. за гражданските аспекти на международното отвлечение на деца, Част VI, Член 13(1)(b) (HCCH, The Hague, 2020), Достъпно на: <https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf>.

⁷⁰ Цит. съч. [67], р.4.

⁷¹ Съвет на Европа (2011). *Конвенция на Съвета на Европа за предотвратяване и борба с насилието над жени и домашното насилие*, Истанбул, 11 май 2011, CETS No. 210.

⁷² Пак там., Член 48

⁷³ Параграф 43 от Преамбюла.

⁷⁴ Директива (ЕС) 2024/1385 на Европейския Парламент и на Съвета от 14 май 2024 относно борбата с насилието над жени и домашното насилие, PE/33/2024/REV/1, OВ L, 2024/1385, 24.5.2024, ELI: <http://data.europa.eu/eli/dir/2024/1385/oj>

⁷⁵ Закон за защита от домашното насилие (Обн. ДВ бр. 102/2009, влязъл в сила 22 декември 2009).

насърчава страните да участват в процедура по медиация или съдебна спогодба в случаи на домашно насилие⁷⁶. Въпреки това, законът не забранява изрично прибягването до медиация в подобни случаи. Нейното използване е разрешено само при строго определени условия – и двете страни да са изразили съгласие да встъпят в процедурата и насилието да не е попречило на нито една от страните да изрази свободно волята си, както и да са налице подходящи гаранции за опазване на правата и законните интереси на страните (включително тези на децата), като например чрез включването на адвокати, психолози, специалисти по закрила на детето или други доверени лица⁷⁷. Въведените през 2023 г. изменения в правната рамка на медиацията, които въведоха задължителната медиация и впоследствие бяха обявени за противоконституционни, изрично изключваха от обхвата на задължителната първоначална сесия за медиация случаите, при които са налице убедителни доказателства за домашно насилие⁷⁸. След отмяната на тази поправка в ЗМ продължава да липсва изрична законодателна рамка за прилагането на медиация в случаи, включващи признаци на домашно насилие.

3.2.3 Препоръки за подобрене на националната нормативна уредба

Както бе споменато, националното ни законодателство за медиацията обхваща както вътрешната за страната, така и международната семейна медиация. Въпреки това, прякото прилагане на разпоредбите към случаите на презгранични семейни спорове невинаги отговаря адекватно на техните специфики. В тази връзка е необходима целенасочена и внимателна реформа.

3.2.3.1 Задължително обучение за семейна медиация в Закона за медиацията

Както бе отбелязано и по-горе, въпросът за адекватното обучение в България е относим както към международната, така и към вътрешната семейна медиация, доколкото понастоящем не е закрепено изискване към медиаторите да преминават допълнителни курсове за повишаване на квалификацията след успешното завършване на общото обучение по

⁷⁶ Пак там, Член 15, ал. 1.

⁷⁷ Севдалина Александрова, 'Медиация при развод и домашно насилие – кога да, кога не', Достъпно на: <https://www.sporazumenia.com/post/медиация-при-развод-и-домашно-насилие-кога-да-кога-не-1>

⁷⁸ Член 140а, чл. 4 ГПК.

медиация. В тази връзка въвеждането на задължителни специализации за практикуващите медиатори е важна първа стъпка, още преди залагането на подходящо обучение по международна семейна медиация. Реформата следва задължително да включи и обучение по международна семейна медиация в рамките на учебния план, предвид сложността на така възникващите презгранични семейни спорове – и най-вече тези включващи деца (считани за уязвима група), и тяхната чувствителност. Случаите на международно отвлечение на деца, презграничните спорове за определяне на родителски права и изпълнението на споразумения по международни семейни спорове изискват специфични знания от заетите по спора медиатори като добро познаване на приложимата международноправна рамка (например, Регламента Брюксел II-б и Хагската конвенция от 1980 г.), както и високо ниво на межкултурна компетентност, умения за общуване с деца и способност за направляване на емоционално натоварена среда. Насоките на ЕС, както и Насоките на Съвета на Европа за Правосъдие, съобразено с интересите на детето⁷⁹, както и редица други препоръки на Европейската комисия, подчертават значението и важността на специализираните обучения за практиците, работещи в среда, в която правата и благосъстоянието на децата са застрашени. С оглед на това, включването на подобно съдържание в учебната рамка е от съществено значение, за да се гарантира, че медиаторите са адекватно подготвени да се справят с предизвикателствата, породени от спецификите на международните семейни спорове, най-вече когато в тях участват деца.

3.2.3.2 Насочване към медиация съгласно Регламента Брюксел II-б (в Закона за медиацията)

Съгласно член 25 от Регламента Брюксел II-б⁸⁰, Българското законодателство и в частност – Законът за медиацията, следва изрично да предвиди задължителното насочване от съда към медиация в случаите на презгранични дела за определяне на родителска отговорност. Подобен механизъм за насочване би насърчил по-широкото използване на медиация в международни спорове за родителски права, особено когато се изисква сътрудничество и с чуждестранни държавни органи. Това би хармонизирало националното ни законодателство със стандартите на ЕС и

⁷⁹ Съвет на Европа, Насоки от Съвета на министрите към Съвета на Европа за Правосъдие, съобразено с интересите на детето. Достъпно на: <https://www.coe.int/en/web/children/child-friendly-justice>

⁸⁰ Чл. 25 Регламент 2019/1111

би спомогнало за прилагането на принципите на сътрудничество, взаимно доверие и опазване на най-добрия интерес на детето на практика.

4 Международната семейна медиация в България: Практиката

Въпреки че България е предприела стъпки за въвеждането на медиацията в правната си система, заключенията от въпросниците, разпространени в рамките на проекта, показват, че броят на МСМ в случаи на международни отвлечения на деца остава нисък поради редица структурни и практически проблеми, които възпрепятстват ефективното ѝ прилагане на практика. В настоящия раздел е обхванато практическото приложение на МСМ в България, въз основа на получените отговори на разпространения въпросник в рамките на проекта и осъщественото самостоятелно проучване. Анализът очертава съществуващите практики и основните предизвикателства, като предлага препоръки за решаването на някои от наблюдаваните проблеми и повишаването на ефективността на МСМ.

4.1 Преглед на въпросниците, разпространени в рамките на проекта, в България

Един от водещите проблеми, подчертан сред отговорите на въпросниците, е липсата на обучени медиатори в специфичната материя на международните семейни спорове, както и липсата на обучения за работа с деца и тяхното включване в процедурата по медиация – основно изискване към разрешаването на спорове, съобразено с интересите на детето. Бе отбелязано, също така, че не съществува публично бюджетно перо за МСМ, което поставя допълнителни бариери пред семействата, които вече са обременени от разходите за водене на международно производство. Още повече, не са създадени механизми или процедури за сътрудничество между централните органи по смисъла на Хагската конвенция, съдилищата и центровете по медиация, което води до слаба координация и ограничено препращане по компетентност при комуникирани спорове.

В допълнение към тези системни трудности, информираността за МСМ остава ниска сред заинтересованите страни, включително сред практикуващите юристи, магистрати, социални работници и въобще в обществото. Много родители, страни по международни семейни спорове, не са информирани за възможността да участват в процедура по медиация и прибегват по подразбиране към подаването на иск пред съд, особено в емоционално натоварени случаи, каквито са тези на международни отвлечения на деца. Анкетираните професионалисти подчертаха, че чувствителността към межкултурните особености е от съществено

значение за успеха на процедурата по международна медиация, а подобен елемент напълно отсъства от съществуващите учебни планове за обучение на медиатори в България. По този начин се ограничава способността на практикуващите медиатори да направляват ефективно разнообразната и сложна семейна динамика при международни спорове.

Липсата на официални данни и доклади за оценка на въздействието и ефективността на МСМ в България допълнително подкопава доверието в тази процедура и ограничава възможностите за разработване на обосновани политики. Без надеждни статистически данни или механизми за обратна връзка е трудно да се докаже ползата от медиацията, да се оцени нейната ефективност и да се въведат реформи, необходими за подобряването на нейното приложение в презгранични семейни спорове.

4.2 Ключови участници и Налични услуги

4.2.1 Публични и частни услуги за медиация

Международната семейна медиация в България включва редица участници както от публичния, така и от частния сектор и въпреки това наличието на достатъчни и нарочни услуги остава ограничено, особено при презгранични случаи. Съдилищата имат водеща роля по отношение на насърчаването на медиацията, като същите насочват страните към центрове за медиация, най-вече в случаите на семейни спорове относно родителските права, правото на лични отношения или издръжката на децата. Въпреки това, както беше споменато и по-горе, насочването към медиация от страна на съда не е задължително и в голяма степен зависи от индивидуалната преценка на съдията. Също така, въпреки че са създадени центрове за медиация към районните и окръжните съдилища, те обичайно са ограничени до разглеждането на семейни спорове без международен елемент. В България се споделят и противоречиви становища относно активното участие на централния орган по смисъла на Хагската конвенция в насърчаването и насочването на страните към медиация. Някои експерти считат, че централният орган има ключова роля в това отношение, докато други смятат, че функцията му е с предимно административен характер.

Частният сектор, от друга страна, е по-активен в развитието на услугите по медиация, най-вече чрез усилията на различни неправителствени организации, частни центрове за медиация и юристи, специализирали в областта на семейното право. Те често предлагат насочени услуги за нуждите на конкретния случай, като например осигуряването на

медиатори, владеещи чужди езици и процедури, пригодени към презграничния характер на международните семейни конфликти.

Като пример може да бъде посочена Международната социална служба в България (МСС България)⁸¹, която е част от глобалната мрежа на МСС. Организацията подкрепя семейства, участващи в сложни случаи, изискващи международната закрила на деца и семейства, като предлага специализирани услуги, които подпомагат МСМ. Сред тях са презграничната медиация, изготвянето на социални оценки за нуждите на съдебните производства и координация с чуждестранни социални служби и публични органи. МСС България действа и като посредник в случаите, в които е необходимо осъществяването на посредничество между български и чуждестранни институции. Въпреки широкия спектър от специализирани услуги, обаче, МСС България все още не е разглеждала случаи на международно отвличане на деца.

4.3 Обучение и специализация за МСМ в България

Както бе посочено и в Раздел 2.2.1.1 по-горе, липсата на конкретни изисквания към квалификацията на медиаторите в нормативната уредба води до непоследователно прилагане на МСМ, както и до обща липса на информираност относно този аспект на медиацията. Анализът на въпросниците потвърждава, че от медиаторите, работещи по презгранични семейни спорове, често се очаква да демонстрират по-високи нива на компетентност от тези, които се изискват за изцяло вътрешните случаи, а обучението е изцяло доброволно. Тоест, всяко лице, което е преминало изискуемото по закон обучение от 60 учебни часа по медиация, би имало правото да практикува международна семейна медиация без надзор и ограничения.

Въпреки че в страната ни са провеждани отделни обучения за МСМ, като например предишни инициативи на Националния институт по правосъдие⁸² и текущо онлайн обучение на института ИТЕРА⁸³, което разглежда въпроси като презграничните спорове и отвличането на деца по смисъла на Хагската конвенция, подобни възможности остават

⁸¹ Международна Социална служба България (МСС България), Достъпно на: <https://www.iss-bg.org/bg/home/>

⁸² Национален институт по правосъдие (НИП), 'Присъствено езиково обучение на ера по семейна медиация', Достъпно на: <https://nij.bg/новини/присъствено-езиково-обучение-на-ера-по-семейна-медиация-10289>

⁸³ Институт ИТЕРА, 'Надграждащо обучение по семейна медиация', Достъпно на: <https://itera.bg/courses/1680-2/>

ограничени по обхват и достъпност. Вследствие на това медиаторите, които желаят да придобият необходимия опит в областта, прибягват до международни програми за обучение, които често са по-трудно достъпни финансово, поради езикови бариери и/или ограничена наличност на места..

4.4 Признаване и изпълнение на споразуменията от процедурата по медиация

Признаването и изпълнението на споразуменията от процедурата по медиация е уредено със Закона за медиацията, който изрично включва и презграничните спороде. Както бе посочено и в Раздел 2.2.1., един спор се счита за презграничен, когато поне една от страните има местоживеене или обичайно пребиваване в държава-членка, различна от тази на другата страна, към момента на сключване на споразумението. Така, обаче, нормативната уредба остава с ограничен обхват единствено за Европейския съюз. При международната семейна медиация, в която една от страните е в държава извън ЕС, националните съдилища не могат да разчитат на правните инструменти на ЕС, за да признаят и изпълнят постигнатите чрез медиация споразумения.

Изпълнението на подобни споразумения извън ЕС в голяма степен зависи от наличието на двустранни или многостранни договори, сключени между държавите, имащи юрисдикция по спора. Хагската конвенция от 1980 г.⁸⁴, макар и да има водещо значение за въпросите на международните отвлечения на деца, запазването на родителските права и правото на лични отношения, не предвижда механизъм за изпълнение на споразуменията, постигнати в резултат на медиация. Този пропуск подчертава необходимостта България да се ангажира с повече двустранни споразумения, които да гарантират, че резултатите от международната семейна медиация ще бъдат признати и изпълними и извън създадения режим за ЕС.

Що се отнася до процедурата за изпълнение, съгласно Закона за медиацията, постигнатото споразумение следва да бъде съставено в писмен вид и да бъде подписано от всички страни⁸⁵. За да бъде изпълнимо, то следва да бъде представено в съда за одобрение. Съдът проверява дали

⁸⁴ Цит. изт. [5]..

⁸⁵ Чл. 16, ал. 1 Закон за медиацията

съдържанието на споразумението е в съответствие със закона и добрите нрави. След като бъде одобрено, споразумението се приравнява на съдебна спогодба и подлежи на изпълнение по същия начин като влязло в сила съдебно решение⁸⁶. Това позволява на страните да потърсят принудително изпълнение чрез съдебен изпълнител, в случай че е необходимо.

По дела, в които са засегнати и деца, съдът може да одобри споразумението в следствие на процедура по медиация единствено ако същото не противоречи на най-добрия интерес на детето⁸⁷. Макар и да няма подобно изрично посочване, същото се извежда от разпоредбата чл. 18, ал. 3, изр. 1 ЗМ, която указва, че: „одобрява споразумението след потвърждаването му от страните, ако не противоречи на закона и добрите нрави“. В следствие на това споразуменията, които противоречат на най-добрия интерес на детето, следва да се считат за противоречащи на закони и на етичните стандарти и не следва да бъдат одобрявани. На практика, обаче, поради ограниченото участие на деца в процедурата по семейна медиация и непоследователната практика на съдилищата при преценката на най-добрия интерес на детето, остава неясно доколко ефективно е защитен този принцип.

4.5 Етични и професионални стандарти за МСМ

Въпреки че в България не е приет единен кодекс за поведението на медиаторите, гаранции за етичните и професионални стандарти са въведени чрез нормативната уредба и някои източници на „мекото право“. Така например, сертифицираните медиатори са обвързани със задължителни етични правила, определени в Наредба № 2 от 2007 г., която закрепва основни принципи като неутралност, поверителност и безпристрастност⁸⁸. Освен това различните професионални асоциации на медиаторите в България са приели свои собствени етични кодекси, които се основават обичайно както на Наредба № 2 от 2007 г., така и на Европейския кодекс за поведение на медиаторите⁸⁹ - доброволен,

⁸⁶ Пак там, Чл. 18.

⁸⁷ Пак там, Чл. 18, ал. 3.

⁸⁸ Чл. 21 и сл. от Наредба № 2 от 2007

⁸⁹ Европейска комисия, *Европейски кодекс за поведението на медиаторите* (Портал за правосъдие на ЕС, юли 2004, изм. 2020), Достъпен на: https://e-justice.europa.eu/sites/default/files/2020-12/Code_of_conduct_EU_EN.pdf.

необвързващ инструмент, който закрепва етични правила, съобразени с ценностите на ЕС.

Въпреки че етичните кодекси на асоциациите на медиаторите насърчават последователната и съответна с принципите практика, те остават общи и не съдържат специални изисквания, пригодени към сложността на презграничните семейни спорове. Настоящата етична рамка, както създадена в рамките на „мекото право“, така и нормативно закрепената, не предоставя насоки относно няколко съществени аспекта на МСМ. Сред тях са ролята на детето в медиацията, предпазните мерки в случаи на домашно насилие и насилие, основано на пола, и стандартите за межкултурна и езикова компетентност на медиатора. Липсата на приложими, специфични стандарти, представлява значителен пропуск, особено като се има предвид уязвимото положение на децата при презгранични спорове. По-категоричната и балансирана рамка, включваща задължителни стандарти, относими към МСМ, както и разпоредби за закрила и включване на децата в процедурата, би повишила както качеството, така и легитимността на резултатите от процедурата по медиация в подобни случаи.

4.6 Участие на детето в МСМ

Въпреки че правото на децата да бъдат изслушвани и техния най-добър интерес да бъде взет предвид са закрепени нормативно, включването на деца в процедурите по семейна медиация в България все още е рядкост и се характеризира с липсата на последователна практика, както споделят експертите, попълнили въпросниците, разпространени в рамките на проекта. Медиаторите често се колебаят дали да включат децата в процедурата, като се позовават на опасения за допълнителното им емоционално натоварване в и без това трудната ситуация, но също така признават и ограничената си подготовка за работа с деца. В цялост практикуващите в България избягват индивидуалните сесии с деца, а някои използват косвени методи за отразяване на мнението на детето, като например чрез подкрепата на психолози. Няколко медиатора отбелязаха, че дори когато се обмисля участието на детето, не са установени общи стандарти за това как да се подходи към него, каква информация да му бъде представена или как да бъде балансирано становището му в цялостната процедура по медиация.

Въпреки че законът изисква децата над 10-годишна възраст да бъдат изслушани в рамките на съдебното производство, както и по-малки деца -

по преценка на съдията⁹⁰, няма съответстващи насоки относно включването на децата в процедурата по медиация. На практика тези разпоредби рядко се използват по аналогия, а участието на децата в процедурата е по-скоро по изключение, отколкото по правило. Институции като Центъра за спогодби и медиация към Софийския районен и Софийския градски съд не подкрепят активното участие на деца. Ето защо обратната връзка от медиаторите сочи за необходимостта от приемането на по-ясни разпоредби, провеждането на достъпни обучения и въвеждането на общи стандарти, така че да бъде защитено пълноценното и безопасно участие на децата в процедурата по медиация, когато това е подходящо.

За да запълни тези пропуски Националната мрежи за децата, в сътрудничество с Професионалната асоциация на медиаторите в България, Института за социални дейности и практики, Асоциация „Родители“ и Фондация „За нашите деца“, разработиха и публикуваха „Единна методология за обследване на най-добрия интерес на детето“⁹¹. Методологията е насочена към съдии, адвокати и медиатори, като представя различни подходи за обследване и преценка на най-добрия интерес на детето в случай на родителски конфликт. Ключов елемент от методологията е стандартизирания модел за интервюиране на деца, който следва да се използва като част от процеса по разрешаване на родителски спорове⁹².

Методологията подчертава значението на участието на детето в процедурата по медиация, като подчертава и че в България това е изключение⁹³. Обсъждат се също последиците от решенията, основани единствено на становищата на родителите, които често не са в състояние да изразят емоциите си по логичен път по време на процеса. От друга страна, Методологията разглежда и негативите от психологическата тежест, която децата понасят, докато тяхното мнение се търси в рамките на едно бракоразводно производство. Макар и да се признава важността детето да бъде изслушано, Методологията подчертава риска от прекомерното налагане на мнението му по въпроси, по които то е емоционално обвързано и с двамата родители. Когато бъде помолено да

⁹⁰ Цит. изт. [64, 65].

⁹¹ "Единна методология за обследване на най-добрия интерес на детето", Януари 2020, Достъпно на: <https://nmd.bg/wp-content/uploads/2020/01/Методология-за-обследване-най-добрия-интерес-на-детето.pdf>.

⁹² Пак там.

⁹³ Пак там, стр.49.

изрази предпочитание, то може да се почувства принудено да избира между двама души, към които е естествено привързано и това да създаде конфликт на лоялност. Този вътрешен конфликт, при който детето се чувства виновно или нелоялно, изразявайки предпочитание към единия си родител, може да доведе до значителен емоционален стрес и дори травма. Това повдига критични опасения относно зачитането на емоционалното благополучие и основните права на детето, като се подчертава, че участието следва да бъде внимателно преценено с оглед защитата от психологически натиск⁹⁴.

През 2021 г. Върховният касационен съд разясни също така кои са елементите, които следва да се вземат предвид, при преценка на най-добрия интерес на детето⁹⁵. Когато се определя кой родител ще носи родителската отговорност над малолетните деца, както и режимът на личните отношения с другия родител, следва да бъде преценен най-добрият интерес на детето, като бъдат сравнени условията, които биха предоставили двамата родители, въз основа на критериите, закрепени в чл. 59, ал. 4 на Семейния кодекс и в допълнителните разпоредби на Закона за закрила на детето⁹⁶, във връзка с Постановление № 1/1974 г. на Пленума на Върховния съд⁹⁷, което остава приложимо и до днес.

4.7 Препоръки

4.7.1 Задължително обучение по семейна медиация

С оглед провеждането на законодателна реформа за допълнително задължително обучение на семейните медиатори след завършване на основното обучение от 60 учебни часа, основни препоръки са:

- Разработването на единен държавен обучителен план за медиатори, специализиращи в областта на семейната медиация, който включва теми за международната семейна медиация и международното отвличане на деца.
- Утвърждаване на единни етични стандарти, обхващащи медиацията както по национални, така и по международни семейни спорове, фокусирани върху най-добрия интерес на детето и предоставящи ясни насоки за работа с деца в процедурата по медиация.

⁹⁴ Пак там, стр. 72.

⁹⁵ Решение № 60208 от 03.12.2021 г. по гр. д. № 3523/2020 г., IV гр. о., ГК на ВКС

⁹⁶ § 1, т.5 от Допълнителните разпоредби към Закона за закрила на детето.

⁹⁷ Постановление No. 1/1974 на Пленума на Върховния съд

- Разширяване на многоезичните програми за обучение в подкрепа на ефективната презгранична комуникация между страните.
- Специализирани обучения за медиатори за практики, насочени към децата, които им позволяват да бъдат включени по подходящ и ефективен начин в процедурата по медиация.

4.7.2 Обществена информираност и достъпност

Доколкото липсва осведоменост както сред практикуващите, така и сред обществото, относно възможността за провеждане на процедури по международна семейна медиация, следва да се проведат целенасочени информационни кампании и инициативи за популяризиране на темата чрез достъпни ресурси. Тези усилия следва да се съсредоточат върху насърчаване на по-доброто разбиране за ползите от МСМ при трансгранични спорове и наличните механизми за достъп до подобни услуги. Повишаването на информираността е ключова стъпка към по-широкото използване на МСМ и гарантиране, че тя ще се възприеме като реална и ефективна алтернатива на съдебните производства по международни семейни спорове.

4.7.3 Актуална национална статистика за международната семейна медиация

Националната статистика за международната семейна медиация следва да се поддържа систематично и да бъде актуализирана така, че да служи на информираното разработване на политики и проследяването на напредъка в областта. Това включва събирането на данни за броя и видовете на делата, резултатите от процедурата по медиацията, сроковете, в които са разглеждани, използването на практики, насочени към децата, и провеждането на медиация онлайн и на повече от един език.

5 Услуги за „предварителна медиация“ в България

Въпреки че концепцията за „предварителна медиация“ все още набира популярност в европейската и международна практика, в българския контекст тя не е дефинирана, съответно и остава неразбрана. Отговорите на въпросника, разпространен в рамките на проекта, потвърждават, че в рамките на процедурите по семейна медиация в България не съществува официално признат и нормативно закрепен етап, наречен „предварителна медиация“. Липсата на определение води и до различни тълкувания и практики.

Някои експерти еднозначно заявяват, че подобно явление не присъства в нормативната ни уредба, докато други разпознават като „предварителна медиация“ първата информационна среща, в която страните следва да бъдат запознати с принципите и процедурите на медиацията, дори и тя да не е обозначена като такава. Също така, понякога се твърди, че доброволческите услуги, предоставяни от неправителствените организации преди официалното встъпване в процедурата по медиация имат подобна подготвителна роля. Доколкото, обаче, тези услуги не са стандартизирани, общодостъпни и официално признати, тяхното качество, съдържание и достъпност за страните могат да варират значително в зависимост от конкретната организация и специалистите, които ги предоставят. Следователно, макар и на практика да са налице някои елементи, наподобяващи „предварителна медиация“, те се срещат фрагментирано и неформално.

Липсата на общо разбиране и нормативна основа за „предварителната медиация“ създава редица трудности. Това възпрепятства осигуряването на последователност и качество на услугите, разработването на уеднаквени професионални обучения и систематичното наблюдение и оценка на този ранен етап. Именно поради това някои от анкетираните експерти подчертаха необходимостта от ясно определяне на съдържанието на „предварителната медиация“, отбелязвайки, че настоящата „празнина“ в законодателството възпрепятства последователното развитие на практиката по семейна медиация. Това наблюдение е в тясно съответствие с една от основните цели на проекта iCare2 – да се изясни и затвърди ролята на „предварителната медиация“ в по-общата рамка на медиацията.



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Better judicial cooperation and family mediation in international child
abduction cases

iCare2

National Report on Poland



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1. Introduction

In an increasingly interconnected Europe, cross-border family disputes have become more frequent. In the context of separation, divorce and necessary arrangements concerning parental responsibility, the risk of international child abduction is still present. These complex situations often involve multiple legal systems, cultural differences, and, most importantly, the rights and well-being of children. International (or cross-border) family mediation slowly becomes a valuable tool to address such disputes, offering a structured yet flexible process aimed at facilitating mutual understanding and sustainable agreements between parents residing in different countries.

The potential positive effects of international family mediation have been acknowledged by the EU lawmaker: the regulation (EU) No. 2019/1111 (Brussels IIb), in its Article 25, has introduced the express obligation for the judge in child abduction proceedings to invite the parties to consider the possibility of making recourse to mediation.

This report presents the result of the national research on the Polish legal system, undertaken within the activities of the EU co-funded project “iCare2”. The research evaluates if and how the Brussels IIb regulation has been applied in Poland, identifying challenges in its enforcement, and assessing its success in improving judicial cooperation, resolving international child abduction cases, and promoting family mediation.

International family mediation is still making its way in the national legal system in Poland. While family mediation is slowly becoming a valid tool which parents and legal professionals acknowledge and activate with increasing frequency, its full potential is still not being used. The development of a ‘culture’ of mediation, together with a consistent and concrete integration of the principle of the best interests of the child in the overall process, is being identified as a key need in order for mediation to be offered as an effective tool for the resolution of family conflicts, in line with international and EU standards.

As part of the methodology applied to the present research, interviews have been conducted to gather the perspective and experience of practitioners. The authors – who remain the only responsible for the content of this report – are grateful to the above professionals for their precious cooperation.

2. International family mediation in Poland: the legal framework

2.1. The Code of Civil Procedure

In Poland, mediation in civil matters is **regulated in the Code of Civil Procedure**.¹ Provisions regulating mediation in civil matters were introduced to the Code of Civil Procedure (which dates back to 1964) by an amendment of 2005 (2005 Amendment).² These provisions do not distinguish between mediation, family mediation or international mediation, and therefore, **they apply equally to international family mediation**.³

The justification of 2005 Amendment explained that:

The proposed regulations aim to introduce mediation into our civil procedural law and thus establish an alternative to court proceedings aimed at resolving disputes in civil matters. In accordance with the assumptions underlying the proposal, mediation in civil matters should be attractive enough for the parties to a civil law relationship to use them.

Hence, it was assumed that the solutions concerning mediation should be simple and uncomplicated. Mediation is intended to facilitate the pursuit of claims in civil cases and, at the same time, to effectively provide legal protection to parties making use of this method of dispute resolution.

Based on these assumptions, it was decided that civil law disputes could be resolved through mediation by concluding a settlement before a mediator. Such

¹ Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego, Dz. U. 2024, poz. 1568. Original and consolidated version (in Polish language) is available online at: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19640430296>.

² Ustawa z dnia 28 lipca 2005 r. o zmianie ustawy - Kodeks postępowania cywilnego oraz niektórych innych ustaw, Dz. U. 2005, nr 172, poz. 1438. Available online (in Polish language) at: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20051721438>

³ See also: NAPIERALSKA A., *Mediacja transgraniczna – charakterystyka postępowania na przykładzie sporów rodzinnych i gospodarczych* in ROMANOWSKI M. (ed), *Mediacja – od rozmowy do porozumienia*, Instytut Wymiaru Sprawiedliwości, Warszawa 2022, p 34.

*a settlement will have the legal force of a court settlement after it has been approved by the court (...).*⁴

Pursuant to Article 10 of the Code of Civil Procedure (as modified by 2005 Amendment): *'in cases in which settlement is permissible, the court shall seek, in any state of proceedings, to settle them amicably, in particular by inviting the parties to mediation.'*

Settlement and therefore mediation is possible in all kinds of civil law cases, including family law. Examples of matters which might be mediated include child support, exercising of parental responsibility after divorce, access rights, and property matters between spouses.⁵ There are some family law cases in which settlement and consequently also mediation is not admissible, for example cases concerning determination of paternity, determination of maternity, denial of paternity, adoption, annulment of marriage, termination or restriction of parental responsibility.

Mediation in civil matters is specifically regulated in Articles 183¹-183¹⁵ of the Code of Civil Procedure (added by the 2005 Amendment). These provisions constitute a further development of a general provision of Article 10.

The very first provision devoted to mediation, namely Article 183¹ § 1 of the Code of Civil Procedure provides that mediation is voluntary. Mediation may be conducted prior to the initiation of the proceedings and also during the course of the proceeding if the parties consented to it (183¹ § 4 of the Code of Civil Procedure). If, however, parties do not consent to mediation, it will not be initiated (Article 183⁶ § 2(1) of the Code of Civil Procedure and Article 183⁸ § 2 of the Code of Civil Procedure).

In accordance with Article 183¹ § 2 of the Code of Civil Procedure mediation might be initiated on the basis of:

- **a mediation agreement** or
- **a court order directing the parties to mediation.**

Pursuant to Article 183¹ § 3 of the Code of Civil Procedure a mediation agreement should indicate the subject of mediation, the person of the mediator or the method of selection of the mediator. A mediation agreement may be

⁴ Sejm Rzeczypospolitej Polskiej, IV Kadencja, Druk nr 3213. Available at: <https://orka.sejm.gov.pl/proc4.nsf/opisy/3213.htm>

⁵ GÓJSKA A., *Mediacja w sprawach rodzinnych*, Ministerstwo Sprawiedliwości: Warszawa 2011, p. 6.

concluded also by consenting to mediation for which the other party has applied for (Article 183¹ § 2 of the Code of Civil Procedure). The law does not require a specific form of the mediation agreement.⁶

When it comes to the referral by the court to the mediation, it might be done “at any stage of the proceedings” (Article 183⁸ § 1 of the Code of Civil Procedure. Article 183⁸ § 5 of the Code of Civil Procedure provides that before the first hearing scheduled for the hearing, the presiding judge shall **assess whether to refer the parties to mediation**. For this purpose, if it is necessary to hear the parties, the presiding judge may summon them to appear in person at a closed session. The presiding judge may also summon the parties to participate in **an information meeting** on amicable dispute resolution methods, in particular mediation. The information meeting may be conducted by a judge, court clerk, court official, judge's assistant or permanent mediator (Article 183⁸ § 4 of the Code of Civil Procedure). An information meeting is additionally regulated in the regulation of the Ministry of Justice.⁷ It explains that the purpose of the information meeting is to familiarize the parties with the possibilities and benefits of amicable dispute resolution, in particular mediation. If a party fails to appear at the information meeting or closed session without justification, the court may charge them with the costs of the ordered appearance incurred by the opposing party (Article 183⁸ § 6 of the Code of Civil Procedure).

The court sets the duration of the mediation at **up to three months**. This deadline may be extended, at the request of the parties or for other important reasons, if this would serve an amicable settlement of the case (Art. 183¹⁰ § 1 of the Code of Civil Procedure). The presiding judge sets a hearing after the expiry of the above period (Art. 183¹⁰ § 2 of the Code of Civil Procedure).

As mediation is voluntary, it cannot be conducted if a party has **not consented to mediation** within one week of the date of announcement or delivery of the decision referring the parties to mediation (Article 183⁸ § 2 of the Code of Civil Procedure).

If the parties have not selected a mediator, the court while referring the parties to mediation, appoints a mediator **with appropriate knowledge and skills in**

⁶ ERECIŃSKI T. in: ERECIŃSKI T. (ed.), Kodeks postępowania cywilnego. Komentarz. Tom II. Postępowanie rozpoznawcze, Wolters Kluwer 2016, p. 30

⁷ Rozporządzenie Ministra Sprawiedliwości z dnia 18 czerwca 2019 r. Regulamin urzędowania sądów powszechnych, Dz.U. 2024 r, poz. 867. Available online (in Polish language): <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20190001141>

conducting mediation in cases of this type, giving priority to permanent mediators (Article 183⁹ § 1 of the Code of Civil Procedure).

The mediator has the right to **review the case files**, unless a party objects to it. (Article 183⁹ § 2 of the Code of Civil Procedure). After referring the parties to mediation, the court provides the mediator with the contact details of the parties and their representatives (Article 183⁹ § 3 of the Code of Civil Procedure).

The mediator immediately sets **the date and place of the mediation meeting**. It is not necessary to set a mediation meeting if the parties agree to conduct mediation without a mediation meeting. The mediator may conduct a mediation meeting using technical devices enabling it to be conducted **remotely**, if the parties agree (Article 183¹¹ of the Code of Civil Procedure).

The mediator conducts the mediation using **various methods aimed at an amicable resolution of the dispute**, including by assisting the parties in formulating their settlement proposals, or at the request of the parties may indicate ways to resolve the disputes that are not binding on the parties (Article 183^{3a} of the Code of Civil Procedure). The mediator must be **impartial** when conducting mediation (Article 183³ § 1 of the Code of Civil Procedure) and that the mediator should **immediately disclose to the parties any circumstances that could raise doubts about their impartiality** (Article 183³ § 2 of the Code of Civil Procedure). The mediation proceedings are **closed to the public** (Article 183⁴ § 1 of the Code of Civil Procedure). The mediator, the parties and other persons participating in the mediation proceedings are obliged to keep secret of the facts of which they became aware in connection with the mediation. However, the parties may exempt the mediator and other persons participating in the mediation proceedings from this obligation (Article 183⁴ § 2 of the Code of Civil Procedure). None of the provisions of the Code of Civil Procedure regulates the **presence of a lawyers** representing parties in the course of mediation proceeding. Hence, such presence is not mandatory but not excluded either.

In accordance with Article 183¹² § 1 of the Code of Civil Procedure, **a protocol** is drawn up, in which the place and time of the mediation is marked, as well as the name, surname and addresses of the parties, the name and address of the mediator, and furthermore the result of the mediation. The protocol is signed by the mediator. If the parties have reached **a settlement** before the mediator, the settlement is included in the protocol or attached to it. The parties sign the settlement agreement (Article 183¹² § 2 of the Code of Civil Procedure). By signing the settlement agreement, **the parties agree to apply to the court for**

its approval, of which the mediator informs the parties (Article 183¹² § 2¹ of the Code of Civil Procedure). The mediator serves the parties with a copy of the protocol (Article 183¹² § 3 of the Code of Civil Procedure). (See also answer to the question on the subsequent steps when an agreement is reached – below).

Based on the Amendment of 2015, Article 187 § 1 of the Code of Civil Procedure, which lists information to be included in the claim, requires additionally “**whether the parties have attempted mediation or some other out-of-court means of dispute resolution and, where such attempts have not been made, an explanation of the reasons for not doing so**”.

2.2. Family and Guardianship Code

In 2008 the provisions on divorce of the Family and Guardianship Code were amended. Article 58 § 1 was amended by referring to the **agreement between spouses on parental responsibility**. It reads as follows:

*„In the judgment pronouncing divorce, the court shall decide on the parental authority over the joint minor child of both spouses and the parents' contact with the child and shall rule on the amount by which each spouse is obliged to bear the costs of the child's maintenance and upbringing. The court shall consider **the agreement of the spouses on how to exercise parental authority and maintain contact with the child after the divorce** if it is in the child's **best interests**. Siblings shall be brought up together, unless the best interests of the child require otherwise.”*

The **agreement between spouses on parental responsibility** may be reached through mediation.⁸

2.3. Brussels II-ter Regulation

In **Brussels II-bis**⁹ there was no specific article mandated mediation or detailed procedural standards. According to Recital 25 “amicable resolution of family disputes” in matters of parental responsibility, **was encouraged**. In practice,

⁸ See the list of issues that should be included in the agreement compiled by the Association of Family Mediators: http://smr.org.pl/doc/plan_opieki_rodzicielskiej.doc.

⁹ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003.

mediation was considered a tool to prevent or resolve parental conflicts, including abduction cases.

The Regulation entered into force when Poland already was a member of the EU. However, Polish law did not undergo specific amendments to introduce mediation in response to Brussels II-bis - rather, the practice began shifting gradually, laying the groundwork for later changes under Brussels II-ter. Back then mediation in cross-border cases was rare but became more visible in response to EU emphasis on amicable resolution. This leads to increasing awareness, especially in cooperation with the Central Authority and some pilot programs (e.g., with Reunite or International Mediation Centre for Family Conflict and Child Abduction - MIKK).

Brussels II-ter¹⁰ brings significant changes and explicitly strengthens the role of mediation, stating in Article 25 that “As early as possible and at any stage of the proceedings, the court (...) shall invite the parties to consider whether they are willing to engage in mediation or other means of alternative dispute resolution, unless this is contrary to the best interests of the child, it is not appropriate in the particular case or would unduly delay the proceedings.” Therefore, Brussels II-ter, compared to Brussels II-bis, contains a clear and binding obligation for Member States to promote mediation in cross-border cases. The Regulation also comprehensively regulates cross-border recognition and enforcement of mediation settlements and strengthens role of central authorities in promoting mediation. The Regulation also promotes the creation of cooperation networks between mediation institutions and authorities in different Member States.

When Brussels II-ter Regulation entered into force, on 1 August 2022, Poland already had a legal basis for court-referred mediation (in Articles 183¹-183¹⁵ of the Code of Civil Procedure), therefore no major legislative reform was needed. International cooperation has been conducted as well through the Ministry of Justice as the Central Authority, which can assist in referring cases to mediation under the Hague Convention and Brussels II-ter. However, there was an **indirect impact – strengthening the role of mediation in practice**. Brussels II ter, and in particular its Article 25, has had a real impact on the way Polish institutions treat mediation in an international context, which includes: increased role of

¹⁰ Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, OJ L 178, 02/07/2019.

mediation in cross-border cases; Central Authority is increasingly proposing mediation in child abduction cases; courts are more likely to consider suspending proceedings in order to undertake mediation, especially when the case involves parents living in different EU countries. Guidelines and training materials for mediators and judges (e.g. publications by the Polish Mediation Centre or the Association of Family Judges) have begun to place greater emphasis on the cross-border aspects of mediation and compliance with Article 25 of Brussels II-ter.

Also, according to Articles 65–67 of the Brussels II-ter Regulation, settlements reached before a mediator in one Member State may be recognised and enforced in another Member State if they are enforceable in the country of origin. This legal solution has forced greater procedural awareness in Poland: mediators must inform the parties of the need for court approval of the settlement if it is to be enforceable abroad and courts have begun to analyse the cross-border effects of settlements more carefully, particularly in the context of contact with children.

The principle of the best interest of the child can be found in numerous international instruments to which Poland is party to, for instance in the European Convention on the Exercise of the Rights of the Child, UN Convention on the Rights of the Child or 1980 HCCH Child Abduction Convention. This principle is also embedded in Article 72 of the Constitution. Also, the Act on Support for the Family and Foster Care emphasizes its special importance in decision-making concerning the child and family. The provisions of the Family and Guardianship Code in relation to matters concerning the child emphasize the need to consider the best interest of the child in numerous instances, for example Article 58 § 1 of the Family and Guardianship Code provides that the court should consider *the agreement on the exercise of parental authority drafted by the parents*, if it is in the child's **best interests**. The principle plays a fundamental role in the interpretation of all substantive as well as procedural law provisions concerning the child.¹¹

There is no statutory definition of the notion of “the best interests of the child”. Fulfilling it with certain meaning should be made in the specific factual circumstances. Circumstances which might be mentioned include **entitlement**

¹¹ J. ZAJĄCZKOWSKA-BURTOWY, *Dobro dziecka jako wartość podlegająca szczególnej ochronie w sprawach dotyczących wykonywania władzy rodzicielskiej i kontaktów z dzieckiem* w J. MUCHA (red) *Realizacja zasady dobra dziecka w mediacji w sprawach dotyczących wykonywania władzy rodzicielskiej i kontaktów*, Wolters Kluwer, Warszawa 2021, pp. 141 – 151.

to the protection of life and health and to any action on the part of others, which should ensure the conditions for calm, proper, undisturbed development, respect for dignity and participation in the process of deciding his or her situation.¹² This list is not exhaustive.

As mentioned, the Code of Civil Procedure regulates mediation in general in Articles 183¹–183¹⁵ but **does not provide detailed rules on the involvement of children in mediation and does not mention the best interest of the child in that respect**. The law allows the court to refer the parties to mediation but remains silent about whether and how the child's views or interests should be actively represented or included in the process (see also the answer to question below: Is the child heard and informed in the mediation process? Is there a common practice on this?).

3. International family mediation in Poland: the practice

3.1. Practical use of (international) family mediation

In Poland, mediation in parental responsibility cases, including cases of international child abduction, is **increasingly being used** as an alternative dispute resolution (ADR) method.

Despite the introduction of mediation regulations in 2005, it did not initially enjoy much interest. In 2006, only 270 mediation proceedings in family matters were registered throughout Poland.¹³ The importance of mediation increased after the amendment of the Family and Guardianship Code in 2008, when courts began to refer parties to mediation more often in divorce and child contact cases.

¹² See, among others: Postanowienie Sądu Najwyższego z 24.11. 2016, sygnatura akt: II CA 1/16.

¹³ The Ministry of Justice provides detailed statistical data on family mediation in the Statistical Guide to the Justice System. The section 'Long-term studies' contains summaries covering the years 2006–2024, including: the number of family cases referred to mediation, the number of settlements reached, the mediation success rate. These data are available at: <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie>.

Further legal changes, such as the introduction of the obligation to inform about mediation attempts in divorce proceedings under the 2015 amendment, contributed to a significant increase in the number of family mediations – 4,316 cases in 2016 and 6,575 cases in 2017.

Practitioners, including judges, lawyers and mediators, emphasise the growing role of mediation in family matters. They point to the benefits of mediation, such as faster dispute resolution, less emotional stress for the child and greater flexibility in determining the terms of the agreement. Mediation allows parents to focus on the welfare of the child, which increases the chance of reaching a lasting agreement on issues concerning the child's upbringing and contact with both parents.

Based on the data presented for 2018–2024 concerning mediation proceedings in family matters in Poland, the following key conclusions and trends can be identified:

1. Increase in the number of cases referred to (court) mediation – from 6,933 cases (in 2018) to 10,956 cases (in 2024).

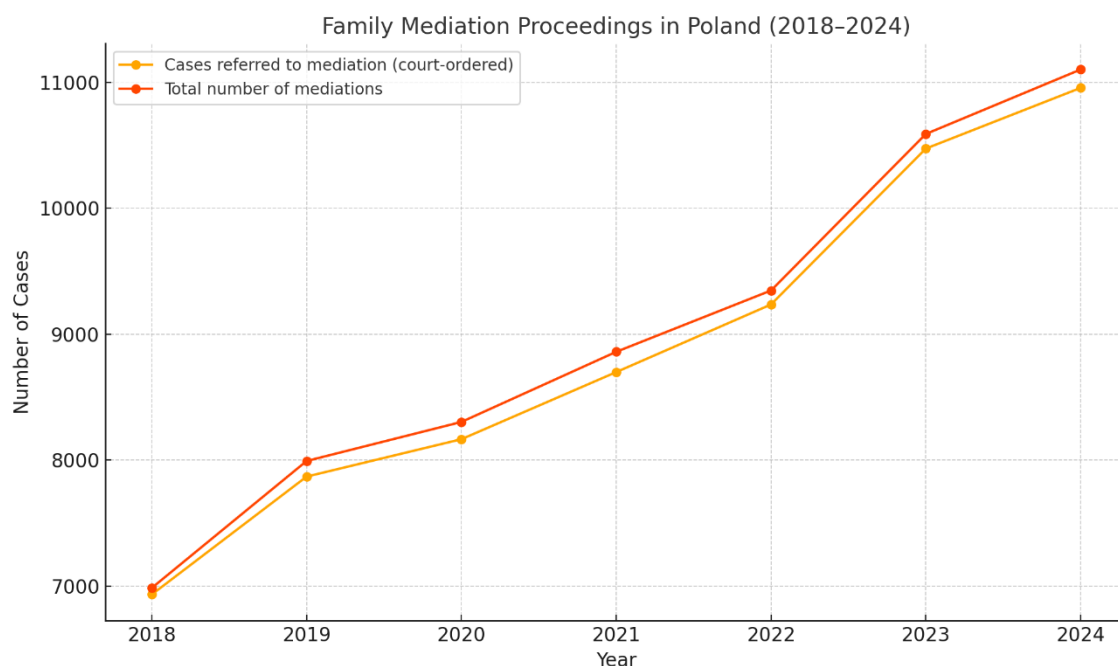


Table: prepared based on statistical data.

This is an increase of over 57% in 7 years, which demonstrates the growing confidence of courts in mediation as an effective tool for resolving family conflicts.

2. Discontinuation of proceedings rate based on settlements reached: from 2,409 (approx. 37% effectiveness in relation to protocols) in 2018 to 3,881 (approx. 47% effectiveness in relation to protocols) in 2024.

The increase in the number of discontinuations confirms the effectiveness of court mediation and the improvement in the quality of mediation – more cases concluded with a settlement result in a lasting agreement.

3. Number of applications for approval of out-of-court settlements: decrease from 4,974 (in 2018) to 2,926 (in 2024), i.e. decrease by 41% and number of approved out-of-court settlements: decrease from 4,869 (in 2018) to 2,971 (in 2024), but the approval rate remains very high (~98%).

It can be assumed that more and more family mediations are taking place within the framework of court proceedings rather than entirely out of court.

4. Marginal cases of refusals to approve settlements: in both court and out-of-court mediation, the percentage of refusals to approve settlements is less than 1%, which testifies to the high quality of the mediators' work and the formal correctness of the settlements.

To sum it up, the growing number of cases referred to court mediation indicates that **this institution is becoming increasingly widespread and effective** in the family court system. The effectiveness of mediation is steadily increasing, with mediation ending in settlement in an increasing percentage of cases. **Out-of-court mediation accounts for a smaller share**, but still plays an important role – its effectiveness remains very high. It is worth continuing to promote mediation in family matters, especially as a tool in cases with a cross-border element (e.g. child abduction), where it can shorten the duration of proceedings and reduce conflict.

In proceedings for the return of a child, mediation and voluntary return are recommended at every stage of the proceedings, especially at the beginning. In practice, mediation in such cases may be conducted by mediators specializing in international matters, often in a co-mediation model, where two mediators from different countries participate, which facilitates communication and takes cultural differences into account.

The data¹⁴ shows that in 2019-2024 there were 843 return order cases in the courts of first instance. Only 5 of them ended via mediation. In the courts of second instance there were 443 cases and none of them involved mediation.

In accordance to enforcement (compulsory taking) cases – there were 61 cases in first instance courts and 87 in second instance courts – none of them involved mediation.

Above data shows that **mediation in child abduction cases under the Hague Convention in Poland is still not the norm**, especially in the decision phase (return orders). However, there are signs of small progress, particularly in enforcement cases. This may reflect the growing influence of transformative or trauma-informed mediation models, promoted by NGOs and child welfare organizations.

1.1. The training and qualification standards for (international) family mediators

It should be explained that currently in Poland there are no separate rules or provisions applicable to international family mediators or even more generally mediators specializing in international (cross-border) cases.¹⁵ Consequently, the rules which concern mediators in general apply equally to international family mediators.

Certain aspects of the qualities of the mediators and the conduct of the mediator are regulated in the Code of Civil Procedure. Article 183² § 1 of the Code of Civil Procedure states that mediator may be **a natural person who has full legal capacity and enjoys full public rights**. A judge cannot be a mediator, except for a **retired judge** (Article 183² § 2 of the Code of Civil Procedure).

Pursuant to Article 183² § 2 of the Code of Civil Procedure **non-governmental organizations and universities may maintain lists of mediators and establish**

¹⁴ The Ministry of Justice provides detailed statistical data on the number of cases under the Hague Convention and the manner in which they were resolved in the Statistical Guide to the Justice System, covering the years 2006–2024. These data are available at: <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie>.

¹⁵ NAPIERALSKA A., *Mediacja transgraniczna – charakterystyka postępowania na przykładzie sporów rodzinnych i gospodarczych* in ROMANOWSKI M. (red), *Mediacja – od rozmowy do porozumienia*, Instytut Wymiaru Sprawiedliwości: Warszawa 2022, p 34.

mediation centers. Entry on the list requires a written consent of the mediator. Information on lists of mediators and mediation centers shall be provided to the president of the district court.

Additionally, the Law on the system of common courts¹⁶ provides for the institution of a **permanent mediator**, namely a mediator, who is entered on the lists held by the court. A permanent mediator may be a natural person who meets the following conditions listed in Article 157a point 1 – 6 the Law on the system of common courts, which are as follows: 1) these set forth in Article 183² § 1 and 2 of the Code of Civil Procedure (mentioned above); 2) **has knowledge and skills in mediation**; 3) is at least 26 years old; 4) knows the Polish language; 5) has not been validly convicted of an intentional crime or an intentional fiscal crime; 6) has been entered in the list of permanent mediators kept by the President of the Regional Court.

As explained in the case law of administrative courts, which are competent to hear appeals from decisions refusing entry on the list of permanent arbitrators, *“(...) the legislator also provided for the ‘position’ of a permanent mediator. Given its place in the legal system, it should be considered that it **has a special, trusted position among mediators**. This is evidenced by the additional requirements imposed (...), including the need to be entered on a list kept by the President of the Regional Court. It also requires a decision to be issued in this regard by that authority (...).* The obligation to issue a decision also means that the authority must verify that the candidate for permanent mediator meets the conditions laid down by law, including **an assessment of whether the candidate has the knowledge and skills specified (...).**”¹⁷

The case law suggests that the *“knowledge must be at a level that distinguishes the candidate for permanent mediator from other mediators, while mediation skills should be understood as proven experience that the current mediator should have. By deciding to enter a person on the list of permanent mediators, the President of the Regional Court confirms to the parties to the proceedings that the person in question not only has the knowledge and skills necessary to reach a settlement between the parties but also enjoys the social trust necessary to resolve their disputes (...) the role of mediator requires diverse and high personal, professional and moral qualifications. A mediator must have the ability*

¹⁶ Ustawa z dnia 27 lipca 2001 r. Prawo o ustroju sądów powszechnych, Dz. U. Dz.U. 2024, poz. 334. Original and consolidated version (in Polish language) is available online at: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20010981070>.

¹⁷ Wyrok Wojewódzkiego Sądu Administracyjnego w Poznaniu z dnia 25 stycznia 2018 r., signature: III SA/Po 634/17.

to assess the situation correctly and behave appropriately. Standing between the parties in a dispute, they should have the predisposition to become an authority figure for them.”¹⁸

A special regulation¹⁹ governs the creation of **list of permanent mediators** held by regional courts. The list of permanent arbitrators should, among others, include the information on education and trainings completed by the mediator and information on their field of specialization (for instance, family law). Please note that there is no separate list of permanent mediators specializing in international family mediation.²⁰ Some of mediators, while providing information to be included in the list of permanent mediators, do indicate that they specialize in cross-border cases, including cross-border family cases.²¹

Pursuant to Article Art. 157c § 1(5) of the Law on the system of common courts, the president of the regional court, by way of a decision, removes a permanent mediator from the list in the event of, among others, **improper performance of duties by the permanent mediator**.

The Ministry of Justice instituted an advisory body **Social Council for Alternative Dispute Resolution by the Minister of Justice** (*Spółeczna Rada do spraw Alternatywnych Metod Rozwiązywania Sporów przy Ministrze Sprawiedliwości*). This body prepares guidelines and recommendations in the form of **resolutions** (*uchwała*) on topics related to mediation. These resolutions are not legal acts, and therefore they do not have a general binding effect.

Some of the resolutions prepared by the Social Council for Alternative Dispute Resolution by the Minister of Justice concern training and qualifications standards for mediators. The **Resolution No 1/2023 of 23 March 2023 r. on Standards of Training of Mediators**²² explains in its introductory part that there

¹⁸ Wyrok Wojewódzkiego Sądu Administracyjnego w Poznaniu z dnia 25 stycznia 2018 r., signature: III SA/Po 634/17.

¹⁹ Rozporządzenie Ministra Sprawiedliwości z dnia 20 stycznia 2016 r. w sprawie prowadzenia listy stałych mediatorów, Dz.U.2016, poz. 122.

²⁰ NAPIERALSKA A., *Mediacja transgraniczna – charakterystyka postępowania na przykładzie sporów rodzinnych i gospodarczych* in ROMANOWSKI M. (red), *Mediacja – od rozmowy do porozumienia*, Instytut Wymiaru Sprawiedliwości: Warszawa 2022, p 34.

²¹ The example of such list can be consulted at the website of the Regional Court in Kraków at [https://www.krakow.so.gov.pl/container/menu-glowne/informacje-dla-interesantow/mediacje/lista-stalych-mediatorow/2025/Lista_stalych_mediatorow_%2030-05-2025%20r%20\(1\).pdf](https://www.krakow.so.gov.pl/container/menu-glowne/informacje-dla-interesantow/mediacje/lista-stalych-mediatorow/2025/Lista_stalych_mediatorow_%2030-05-2025%20r%20(1).pdf)

²² Uchwała nr 1/2023 Społecznej Rady do spraw Alternatywnych Metod Rozwiązywania Sporów przy Ministrze Sprawiedliwości z dnia 23 marca 2023. w sprawie przyjęcia standardów

is “the lack of legally defined standards for mediator training”, and therefore, the resolution is needed to “ensure a high level of education for mediators and to professionalise the profession”. The resolution foresees a **basic training** (of 40 teaching hours) providing fundamental knowledge and skills in mediation and a **specialized training**. The resolution provides that the **specialized training in mediation in family matters** (of 60 teaching hours) should include, among others, the following aspects: family psychology, the perspective of children in mediation, techniques for identifying the needs of the parties to the mediation and other persons affected by the conflict, techniques supporting the identification of needs, court proceedings in family matters, including: rights and obligations of spouses, dissolution of marriage by divorce, formal separation, rules for the division of joint property, child support, parental responsibility, types of family mediation, models of conducting mediation in family matters, mediation documents, costs of mediation. The resolution also governs who can be the trainer within the basic and specialized training, how the training should be help, the recommended form of training (for example, lectures should not exceed 10% of the time of the training) and recommended didactic methods (for example, simulations of mediations).

There are also mediation centers, which provide for their **own rules on training and qualifications standards for family mediators**, which might be more demanding than these recommended by the Social Council for Alternative Dispute Resolution by the Minister of Justice.²³ Such mediation centers also offer such trainings. Some mediators participate in **trainings organized by International Mediation Centre for Family Conflict and Child Abduction (MIKK)**.

There are **no state-imposed ethical standards for mediation providers** in Poland, however such standards exist in the form of *soft law*. The Social Council for Alternative Dispute Resolution by the Minister of Justice in its resolution of

szkolenia mediatorów. This resolution is available online (in Polish language) at <https://www.gov.pl/attachment/c16bfe07-e2c5-4f50-8467-ba16d98b06d8>

²³ See, for example, the rules of Association of Family Mediators (*Stowarzyszenie Mediatorów Rodziny*) at <https://smr.org.pl/standardy/standardy-szkolenia-mediatorow/>

May 2008 introduced the **Code of Ethics of Polish Mediators**.²⁴ Some mediation centers provide for their **own codes of conduct for mediators**.²⁵

3.2. The key actors in (international) family mediation and the services they provide

As mentioned above, the **Ministry of Justice** promotes mediation in Poland, among others, through its advisory body - **Social Council for Alternative Dispute Resolution by the Minister of Justice** (*Spółeczna Rada do spraw Alternatywnych Metod Rozwiązywania Sporów przy Ministrze Sprawiedliwości*). This body prepares guidelines and recommendations in the form of **resolutions** (*uchwała*) on topics related to mediation. One of the important achievements of this Council are the standards on the trainings of mediators, including these specializing in family matters. Please note however that none of the resolutions relates specifically to international family mediation.

Pursuant to Article 183² § 2 of the Code of Civil Procedure **non-governmental organizations and universities** may maintain **lists of mediators** and establish mediation centers. Hence, such **mediation centers** having their own lists of

²⁴ The Code reads as follows: I. The mediator should conduct the mediation proceedings based on the principle of independence and autonomy of the parties in conflict. II. The mediator should be guided primarily by the welfare and interests of the parties. III. The mediator should ensure the voluntary participation of the parties in the mediation proceeding. IV. The mediator should act in such a way that all parties to the dispute know and understand the nature of the mediation process, the role of the mediator and the terms of potential agreement. V. A mediator should not undertake to assist in resolving a conflict when he does not have full confidence in his competence to conduct the proceedings fairly. VI. A mediator should not conduct mediation proceedings if he is not able to remain impartial or remove doubts about his impartiality. VII. The mediator should maintain the confidentiality of the mediation proceedings, both before, during and after the mediation. VIII. The mediator should avoid conflicts of interest with the parties and remove any doubts about this without delay. IX. The mediator should not accept any benefit from the parties except the agreed remuneration. Nor should he benefit from referring the parties to other professionals. X. The mediator, in his information and marketing activities, should not mislead the parties or the general public about his qualifications, competence, experience, scope of services and fees. XI. The mediator should provide the parties with clear and unambiguous information as to his fee and any costs associated with the proceedings in which they are involved. XII. The mediator should develop his or her professional competence in order to best serve the participants in the mediation.

Available (in Polish) at: <https://www.gov.pl/attachment/24d7098a-6fd8-425b-a995-1976676edc9b>

²⁵ Code of conduct of the Polish Center of Mediation (*Polskie Centrum Mediacji*) is available at: <https://mediator.org.pl/baza-wiedzy/kodeks-etyki-mediatora/>

mediators are created. Some of these centers focus on civil and commercial law (for example, Centrum Mediacji Lewiatan²⁶), some provide for mediation in different kind of disputes, including family law (for example, Polskie Centrum Mediacji²⁷), other focus on family mediation only (for example, Stowarzyszenie Mediatorów Rodzinnych²⁸). On their websites these organizations provide more or less detailed information about mediation.

In accordance with Article 16a § 1 of the Law on the system of common courts, in each regional court (*sąd okręgowy*) in Poland a **mediation coordinator** operates performing activities aimed at developing mediation, ensuring efficient communication between judges and mediators and permanent mediators, and cooperating in the organization of information meetings.²⁹ The mediation coordinator is appointed from among the judges of the given regional court (Article 16a § 3 of the Law on the system of common courts).

Another institution active in promoting mediation in Poland is the national section of **GEMME: European Judges Group for Mediation**.³⁰ National section of GEMME takes different initiatives aimed at promoting mediation, for instance it provides trainings for judges made by judges. It offers on their website many documents which a judge may use while contemplating to refer parties to mediation (e.g. a diagnosis of a case, a letter to the parties informing about mediation, a letter to professional representatives informing about mediation, a template of a questionnaire to help parties assess if mediation is possible in their case and set of good practices for judges).³¹

Also, **International Mediation Centre for Family Conflict and Child Abduction – MIKK** should be mentioned. One of MIKK's initiatives was so called *Wrocław Declaration on Mediation of Bi-national Disputes over Parents' and Children's Issues*³², which includes 4B Mediation Model.³³ Wrocław Declaration is an outcome of cooperation between German and Polish mediators.

²⁶ Website at: <https://lewiatan.org/centrum-mediacji-lewiatan/>

²⁷ Website at: <https://mediator.org.pl>

²⁸ Website at: <https://smr.org.pl>

²⁹ On different ways coordinators perform their tasks see: BODYS T., *Funkcja koordynatora do spraw mediacji w sądach powszechnych* in ROMANOWSKI M. (ed) *Mediacja: w kierunku ugody*, Warszawa 2021, p. 83-91.

³⁰ Website at: <https://polska.gemmeeurope.org/sedziowie-sedziom-o-mediacji>

³¹ Available at: <https://polska.gemmeeurope.org/wzory-dokumentow>.

³² Available at: <https://mikk-ev.org/wp-content/uploads/2023/06/Wroclaw-Declaration-en-pol-ger.pdf>

³³ Available at: <https://mikk-ev.org/4-bs-mediation-model/>

Another initiative that should be mentioned is the activity of the **ITAKA Foundation's Missing Persons Search Centre** and its **Support and Mediation Centre for families at risk of parental abduction situations**.³⁴ One of the Centre's tasks is to “aim at an amicable settlement of the dispute that has arisen between the parents and, in particular, to refer conflicting parents to mediation”.

In Poland, there is **no single state-imposed approach to mediation**. The Ministry of Justice registers mediators but does not dictate a uniform practice model beyond legal requirements (e.g. neutrality, confidentiality, voluntariness). The **approaches** therefore may vary in practice depending on the mediator's educational background (law, psychology, sociology), professional training (certified mediation programs, family therapy etc.), and affiliation (e.g. NGO vs court-assigned mediator).

While there is no single mandated methodology, **several distinct approaches** (or "schools of thought") are present in the scholarship. The **main approaches used by mediation services in Poland**, particularly in **family and parental responsibility cases**.

The most commonly practiced form of mediation, particularly in family cases referred by the courts, is **facilitative mediation** (*mediacja facylitatywna*). This approach emphasizes the role of the mediator as a neutral facilitator who guides the dialogue between the parties without imposing any solutions. The core of this methodology lies in active listening, helping the parties to articulate their interests, and creating a space for constructive communication. The mediator does not evaluate the case or provide legal advice, instead encouraging the participants to develop their own mutually acceptable solutions. This model is widely used in matters involving parental authority, contact arrangements, and property division between family members.³⁵

A less frequently employed approach is **evaluative mediation** (*mediacja ewaluatywna* or *ocenna*). In this model, the mediator may suggest possible outcomes or offer legal opinions, especially when the dispute has a strong legal or financial dimension. This form of mediation is often chosen when the mediator has a legal background—such as being a retired judge or a practicing lawyer. Evaluative mediation is sometimes used in family cases involving property settlements or alimony, where knowledge of legal standards can be helpful.

³⁴ Available at: <https://porwaniarodzicielskie.pl>

³⁵ DANISZEWSKA-ZUJKO A., Część II. Rozdział 1. Rodzaje mediacji. Charakterystyka i zastosowanie, in ROGULA C., ZEMKE-GÓRECKA A. (eds), *Mediacja w praktyce mediatora i pełnomocnika*, Wolters Kluwer, Warszawa, 2021, pp. 114-115.

However, this approach is viewed by some practitioners as controversial, particularly by those who emphasize the importance of strict neutrality and non-directiveness in mediation.³⁶

An emerging and increasingly recognized model is **transformative mediation** (*mediacja transformatywna*). This approach focuses not merely on reaching agreement, but on transforming the relationship between the parties. The key goals are empowerment of each party and fostering mutual recognition. Transformative mediation is particularly relevant in high-conflict family situations, including international child abduction cases, where emotional dynamics are complex and long-term cooperation between parents is essential. This method is often promoted by non-governmental organizations and child protection advocates, and tends to be favored by mediators with backgrounds in psychology or therapy.³⁷

Finally, a more specialized and less widely practiced method is **narrative mediation** (*mediacja narratywna*). This approach encourages parties to reflect on and reframe the stories they tell about their conflict. The goal is to construct a new, shared narrative that allows for a different perspective and improved future interactions. Narrative mediation is typically applied in deeply entrenched family disputes—such as ongoing conflicts between former partners or intergenerational tensions—and is usually conducted by professionals with psychosocial training, such as family therapists or social workers.³⁸

The participation of the child in the mediation process, particularly in IFM cases, is **not regulated in detail** by binding national law, and **common practice varies**. However, there are important legal principles and evolving professional standards that shape how and whether children are heard or informed in mediation.

Polish law, while not specifying the child's role in mediation itself, emphasizes **the right of the child to be heard in proceedings affecting them**, which indirectly applies to mediation:

³⁶ DANISZEWSKA-ZUJKO A., *Część II. Rozdział 1. Rodzaje mediacji. Charakterystyka i zastosowanie*, cit., pp. 115-116.

³⁷ GMURZYŃSKA E., *Rozdział 9. Rodzaje mediacji*, in MOREK R., GMURZYŃSKA E. (eds) *Mediacje: Teoria i praktyka*, Warszawa 2024, pp. 184-187.

³⁸ DANISZEWSKA-ZUJKO A., *Część II. Rozdział 1. Rodzaje mediacji. Charakterystyka i zastosowanie*, cit., pp. 117-118.

- Article 72(3) of **the Polish Constitution**³⁹ guarantees the child's right to be heard in all matters concerning them:

“Art. 72. Principle of the best interests of the child

*(3) In the course of determining the rights of the child, public authorities and persons responsible for the child shall be obliged to hear and, as far as possible, take into account the views of the child.”*⁴⁰

- Articles 216¹ and 216² of **the Code of Civil Procedure** regulate the court's obligation and procedure for hearing a child in civil cases concerning the child, particularly in family matters such as custody, contact, and parental authority:

“Article 216¹ [Hearing of the child].

§ 1. The court in matters concerning the person of a minor child shall hear the child if his/her mental development, state of health and degree of maturity allow it. If before the court the child refuses to participate in the hearing, the court shall refrain from this action.

§ 2. The court shall, according to the circumstances, the child's mental development, state of health and degree of maturity, take into account the child's opinion and reasonable wishes.

§ 3. The child may be heard only once during the proceedings, unless the welfare of the child requires that this act be carried out again or the need for a new hearing is raised by the child. The re-hearing of the child shall be conducted by the same court, unless this is impossible or is prevented by the best interests of the child.

§ 4. If the court has refrained from hearing the child, it shall, at the latest before the conclusion of the proceedings, indicate in the minutes of the meeting or hearing the reasons for which this activity was not carried out.”

“Article 216² [Conduct of the hearing of the child].

³⁹ Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Dz.U. 1997 nr 78, poz. 483. Original and consolidated version (in Polish language) is available online at <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdm19970780483>.

⁴⁰ Translation: EK.

§ 1. *The hearing of the child shall be held in closed session, which shall take place in suitably adapted premises at the seat of the court or, if the welfare of the child so requires, outside the seat of the court.*

§ 2. *The child's hearing may be attended, in addition to the judge, only by an expert psychologist if, due to the child's state of health, mental development or age, it is necessary to provide psychological assistance to the child during the hearing or it is necessary to assist the judge in identifying the child's needs during the hearing.*

§ 3. *An official note shall be made of the conduct of the child's hearing. The course of the hearing of the child shall not be recorded by means of a sound or image and sound recording device. (...)*⁴¹

- Under Brussels II-ter (Regulation 2019/1111, Article 21), children must be given the opportunity to express their views in cross-border custody and abduction proceedings.

However, none of these provisions impose a duty to hear the child within mediation itself – only in court proceedings.⁴²

The Polish Code of Civil Procedure (Articles 183¹–183¹⁵) regulates mediation in general but **does not provide detailed rules on the involvement of children**. The law allows the court to refer the parties to mediation but remains silent about whether and how the child's views or interests should be actively represented or included in the process.

In practice, whether and how children are involved in family mediation, especially IFM, **depends on the mediator's training and approach**. Mediators trained in international family mediation are more likely to include the child's perspective, either indirectly (through parental reflection exercises or child-focused methods), or via child-inclusive mediation models, involving a trained child consultant who speaks with the child and conveys their views.⁴³

⁴¹ Translation: EK.

⁴² See: ARKUSZEWSKA A., *Rozdział IX. Udział dziecka w mediacji w sprawach dotyczących wykonywania władzy rodzicielskiej i kontaktów oraz jego reprezentacja*, in MUCHA J. (ed) *Realizacja zasady dobra dziecka w mediacji w sprawach dotyczących wykonywania władzy rodzicielskiej i kontaktów*, Wolters Kluwer, Warszawa 2021, pp. 321-324.

⁴³ See: GRĘDZIŃSKA J., *Część V. Rozdział 5. Mediacja w sprawach rodzinnych*, in ROGULA C., ZEMKE-GÓRCEKA A. (eds), *Mediacja w praktyce mediatora i pełnomocnika*, Warszawa 2021, pp. 417-418.

The age and maturity of the child also plays a role. Children younger than 6 years should not participate in mediation. As far as school children are concerned, this should depend on the child's individual predispositions of the child, while in accordance to teenagers, it is pointed out that their need to listen should always be considered during mediation⁴⁴, with parental consent, especially in cross-border disputes, though this remains rare in Poland compared to other countries (e.g. the UK or Netherlands).

In cross-border mediation, particularly where one party resides in another EU country, **mediators often align with international guidelines**, such as: The Council of Europe's Recommendation on Family Mediation⁴⁵, which encourages considering the child's views or MiKK's Standards for Cross-border Family Mediation⁴⁶, promoting child-sensitive procedures.

There is also **no legal obligation to inform the child about the mediation or its outcome**. Mediators may, on a case-by-case basis, encourage parents to discuss the process with the child in an age-appropriate way or/and involve child psychologists or counselors if needed.

Studies and reports show that in Polish practice **mediation remains parent-centered, children's voices are usually considered indirectly, and there is limited experience and infrastructure for child-inclusive or child-directed mediation in cross-border cases**. Children are not routinely heard or informed in mediation, their participation is rather rare and informal, though international training and standards are influencing change, especially in cross-border family mediation.⁴⁷

⁴⁴ GRĘDZIŃSKA J., Część V. Rozdział 5. Mediacja w sprawach rodzinnych, cit., p. 422.

⁴⁵ Recommendation No. R (98)1 on family mediation, adopted in Strasbourg, 11 January 2006, CEPEJ-GT-MED (2006) 1.

⁴⁶ In many different documents prepared by MiKK, e.g. ALLPORT L., *The Voice of the Child in International Family Mediation*, in: PAUL C. Ch., KIESEWETTER S., KHALAF-NEWSOME I. (eds.), *Cross-border Family Mediation. International Parental Child Abduction. Custody and Access Cases*, 3rd ed., Wolfgang Metzner Publishing, Frankfurt am Main, 2023.

⁴⁷ See: CYBULKO A., MUCHA J., *Rozdział XII. Badania ankietowe*, in Joanna Mucha (ed) *Realizacja zasady dobra dziecka w mediacji w sprawach dotyczących wykonywania władzy rodzicielskiej i kontaktów*, Wolters Kluwer, Warszawa 2021, pp. 431-438.

3.3. Access to information about international family mediation

In Poland, parents can become aware of the availability of international family mediation (IFM) services and enter into contact with them **through several legal, institutional, and practical channels**, although **there is no single, centralized mechanism for this purpose**.

Firstly, they can be informed **by Central Authority and courts**. Under Article 25 of the Brussels II-ter Regulation (Regulation (EU) 2019/1111), Member States are obliged to encourage the use of mediation and alternative dispute resolution in family matters. In Poland, this obligation is operationalized primarily through:

The Central Authority under the 1980 Hague Convention and Brussels II-ter (i.e., the Ministry of Justice – Department of International Cooperation and Human Rights), which provides information to parents involved in cross-border child abduction or custody disputes, as well as may suggest mediation and offer contact with mediation institutions or mediators, especially in cooperation with NGOs such as *Polskie Centrum Mediacji* (the Polish Mediation Centre) or *Stowarzyszenie Mediatorów Rodzinnych* (the Association of Family Mediators).

Family courts, which under Polish procedural law (Article 183⁸ of the Code of Civil Procedure) may inform or refer parties to mediation, especially where parental conflict is high and a consensual solution may be in the child's best interest.

Art. 183⁸. [Referral to mediation]

§ 1. The court may refer the parties to mediation at any stage of the proceedings.

§ 2. Mediation shall not be conducted if a party has not consented to mediation within one week of the date of announcement or delivery of the decision referring the parties to mediation. (...)

§ 4. The presiding judge may summon the parties to participate in an information meeting on amicable dispute resolution methods, in particular mediation. The information meeting may be conducted by a judge, court clerk, court official, judge's assistant or permanent mediator.

§ 5. Before the first hearing scheduled for the trial, the presiding judge shall assess whether to refer the parties to mediation. To this end, if it is necessary to hear the parties, the presiding judge may summon them to appear in person at a closed hearing.

§ 6. If a party fails to appear at the information meeting or closed session without justification, the court may charge them with the costs of the ordered appearance incurred by the opposing party.⁴⁸

In cases involving international child abduction (under the 1980 Hague Convention), the competent Polish court (typically regional courts) may suspend proceedings to allow for mediation if this could serve the best interests of the child (based on the jurisprudence aligned with Brussels II-ter Article 25).

Secondly, the access to mediation is possible through **NGOs and mediation networks**. Several NGOs and networks provide IFM-related information, especially in cross-border contexts. The Polish Mediation Centre, and other organizations maintain websites with guidance, contact forms, and often multilingual (with knowledge of Polish, English and German) mediators for international cases. These organizations often provide free or low-cost initial consultations, lists of trained mediators specialized in international family conflicts and access to online mediation platforms and support for communication between parents abroad.

Thirdly, it is possible to be informed about IMF via **legal professionals**. Lawyers, notaries, and legal aid centers often inform clients about mediation as a possible alternative, especially when litigation is costly, cross-border, or emotionally charged. Bar associations and legal aid offices sometimes maintain directories of certified mediators, including those trained in international family law and intercultural communication.⁴⁹

There is also a possibility to use **EU networks and on-line platforms**. The European e-Justice Portal offers a “Find a mediator” function and national pages with information about how and where to access IFM in Poland.⁵⁰ EU-funded training networks and online directories (e.g., Cross-border Family Mediators Network⁵¹) list professionals working across EU countries, including Polish mediators.

⁴⁸ Translation: EK.

⁴⁹ ZAGÓRSKA K., *Rozdział szósty. Mediacje transgraniczne w sprawach rodzinnych*, in TABERNACKA M. (ed) *Mediacje ponad podziałami*, Wrocław 2013, p. 114.

⁵⁰ See: https://e-justice.europa.eu/topics/find-legal-professional/mediators_en.

⁵¹ See: <https://crossbordermediator.eu/>.

Research confirms that while the Polish legal framework allows and encourages mediation, practical access to international mediation often depends on the initiative of judges, central authorities, or NGOs, and is not always systematic.⁵²

In conclusion, Polish parents may access IFM services through courts, central authorities, NGOs, legal professionals, and online platforms. Although Brussels II-ter strengthened the obligation to promote mediation, a centralized referral system does not yet exist, and contact often depends on the knowledge and willingness of involved institutions or individuals.

In Poland, the Central Authority for the purpose of 1980 HCCH Child Abduction Convention, 1996 HCCH Child Protection Convention and Brussels II ter Regulation is **Minister of Justice**. In 2018, new Law on the Functions of the Central Authority was enacted.⁵³ It does not however mention specifically the role of the Central Authority in the context of mediation.

When contacted by iCARE2 team in Poland, the Central Authority underlined that it does not conduct international family mediation. At the same time, the Central Authority underlined its interest in international family mediation stating that in February 2025 it acceded to the Working Party on Mediation in the Context of the Malta Process. Please note however that there is still no information on the website of the Hague Conference on Private International Law on the creation of the potential **Central Contact Points for international family mediation in Poland**⁵⁴ envisaged in the Principles for the establishment of mediation structures in the context of the Malta Process.⁵⁵

The **Country Profile**⁵⁶ available at the website of the Hague Conference on Private International Law might serve as the first, introductory source on

⁵² CYBULKO A., *Rozdział 18. Mediacja w sprawach rodzinnych*, in MOREK R., GMURZYŃSKA E. (eds.) *Mediacje: Teoria i praktyka*, Wolters Kluwer, Warszawa 2024, pp. 361-364.

⁵³ Ustawa z dnia 26 stycznia 2018 r. o wykonywaniu niektórych czynności organu centralnego w sprawach rodzinnych z zakresu obrotu prawnego na podstawie prawa Unii Europejskiej i umów międzynarodowych, Dz. U. 2023 r. poz. 1236. Original and consolidated version available at: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20180000416>

⁵⁴ See the list of Central Contact Points for international family mediation at <https://www.hcch.net/en/publications-and-studies/details4/?pid=5360&dtid=52>

⁵⁵ See: *Working Party on Mediation - Principles for the establishment of mediation structures in the context of the Malta Process* available at the website of the Hague Conference on Private International Law at

<https://www.hcch.net/en/publications-and-studies/details4/?pid=5317&dtid=52>.

⁵⁶ 1980 Child Abduction Convention. *Country Profile: Poland* (13 February 2023) available at: <https://assets.hcch.net/docs/92c816f6-8a1c-409f-bd9c-10be23ae48bc.pdf> ('Country Profile').

information on mediation in Poland. It also gives some insight on the **duties of the Central Authority in informing parties about the availability of mediation.**

The Country Profile explains that matters of custody, access rights, as well as return of a child following an alleged wrongful removal can be dealt with by mediation in Poland.⁵⁷ In case of an incoming application has been received for the return of a child or for access / contact with a child, the recourse to mediation is possible. The Country Profile informs that there are 'numerous bodies who provide mediation services across Poland. Lists of mediators are available at each regional court.'⁵⁸ The answer 'No' is given to the question whether the co-mediation (i.e. mediation involving two mediators – one from each State) is available for the mediation of international family disputes which are within the scope of the 1980 Hague Child Abduction Convention.⁵⁹

Further, in response to the question whether the mediation in family matters is regulated in Poland, the general information on the Code of Civil Procedure with respect to mediation is provided and indicated that it covers the following aspects: formal accreditation of mediators, the necessary qualifications / experience of mediators, the process of mediation, confidentiality of mediation and the status and enforceability of mediated agreements.⁶⁰ In response to the question on how individuals can obtain information identifying suitable mediators, it is explained that lists of mediators are available through the Central Authority or through other sources, namely from the website of each of Regional Courts.⁶¹

As concerns the questions on what role, if any, does the Central Authority play in facilitating mediation where an incoming application for the return of a child or access / contact with a child has been received, the Country Profile explains that the Central Authority **provides information about mediation to the parties.**⁶² Further information is provided in the answer the question on measures taken by the Central Authority (directly, or through an intermediary) to attempt to secure the voluntary return of a child allegedly wrongfully removed or retained. As explained that in "the vast majority of cases, legal proceedings are initiated, although the alleged abduction party may agree to a voluntary return at any stage of the legal proceedings". The Central Authority

⁵⁷ Country Profile, Question 19.1.a

⁵⁸ Country Profile, Question 19.1.b and Question 19.1.c.

⁵⁹ Country Profile, Question 19.1.d.

⁶⁰ Country Profile, Question 19.2.a. and Question 19.2.b.

⁶¹ Country Profile, Question 19.3.a.

⁶² Country Profile, Question 19.3.b. and Question 19.3.c.

“takes steps to make both parties aware of the possibility of voluntary return by including information about voluntary return in the referral letter to the alleged abduction party. In addition, a leaflet containing information about mediation is attached to the referral letter.”⁶³

It is explained that mediation is available at all stages of proceedings. Cases are assessed to determine their suitability for mediation by the judge.⁶⁴ In response to the question on how, if at all, are the views of the subject child(ren) considered in mediation, it is provided that is within the discretion of the particular mediator.⁶⁵ Where allegations of domestic violence and / or other forms of abuse exist, the mediator should notify the court in order to assess the eligibility of the mediation and to decide on further measures.⁶⁶ It is also explained that the court shall refuse to make the settlement agreement enforceable or to approve all or part of the settlement agreement concluded before the mediator if the agreement is contrary to the law or principles of community life, or if it seeks to circumvent the law, or if it is incomprehensible or contradictory.⁶⁷ In order to make mediated agreements in a family dispute involving children enforceable court approval of the mediated agreement is need.⁶⁸

In response to question concerning costs of mediation, it is underlined that these costs “must be borne by the parties”.⁶⁹ Agreement mediated in another State in a family dispute involving children cannot be approved by a court or otherwise formalized in Poland in the same manner as an agreement mediated in Poland.⁷⁰

If court proceedings have been initiated in a family matter, the parties may be referred to mediation by the court. The court may issue a decision to refer the case to mediation on its own initiative or at the joint request of the parties. The judge may also summon the parties to attend a mandatory **information meeting** on amicable dispute resolution methods. Hence, neither organization of information meeting nor referral to mediation is mandatory.

The team of iCARE2 was informed about attempts to make the information meeting and referral to mediation more frequent. For example, in one of the courts in Kraków a **pilot project of referring certain types of family matters to**

⁶³ Country Profile, Question 6.2.h.

⁶⁴ Country Profile, Question 19.4.d.

⁶⁵ Country Profile, Question 19.4.f

⁶⁶ Country Profile, Question 19.4.d.

⁶⁷ Country Profile, Question 19.5.a.

⁶⁸ Country Profile, Question 19.5.a.

⁶⁹ Country Profile, Question 19.3.d. and Question 19.3.e.

⁷⁰ Country Profile, Question 19.6.a.

mediation was introduced.⁷¹ In accordance with the order of the president of this court, all cases concerning maintenance payments, their reduction and modification, as well as matters concerning the satisfaction of family needs and cases concerning the determination of the place of residence of a minor, visiting rights, changes to visiting right, and permission to issue a passport for a minor will be first referred to mediation. The programme aims to promote alternative dispute resolution methods in family matters. The programme will be implemented for a period of two years, with evaluations conducted every six months.

As mentioned above, in accordance with Article 183¹² § 1 of the Code of Civil Procedure, **a protocol** is drawn up, in which, among others, the outcome of the mediation is described. The protocol is signed by the mediator. If the parties have reached **a settlement** before the mediator, the settlement is included in the protocol or attached to it. The parties sign the settlement agreement (Article 183¹² § 2 of the Code of Civil Procedure). By signing the settlement agreement, **the parties agree to apply to the court for its approval** (Article 183¹² § 2¹ of the Code of Civil Procedure).

If a party applies to the court for approval of the settlement reached within a mediation carried based on mediation agreement, the mediator files the protocol with the court (Article 183¹³ § 1 Code of Civil Procedure). If the court referred the case to mediation, the mediator files the protocol with the competent court (Article 183¹³ § 2 Code of Civil Procedure). The parties may also include in the settlement agreement claims not covered by the statement of claim (Article 183¹³ § 2).

Pursuant to Article 183¹⁴ § 1 Code of Civil Procedure if a settlement has been reached before a mediator, at the request of a party, **the competent court approves such settlement**. If the settlement agreement is enforceable by way of execution, **the court approves it by giving it an enforceability clause** (Article 183¹⁴ § 2 Code of Civil Procedure). The court refuses to grant an enforceability clause if the settlement agreement is contrary to the law or the principles of social co-existence or is aimed at circumventing the law, as well as if it is incomprehensible or contains contradictions (Article 183¹⁴ § 3 Code of Civil

⁷¹ See: Zarządzenie nr 2/25 Prezesa Sądu Rejonowego dla Krakowa – Krowodrzy w Krakowie z dnia 30 maja 2025r. w sprawie wprowadzenia w Sądzie Rejonowym dla Krakowa – Krowodrzy w Krakowie pilotażowego programu kierowania spraw do mediacji. Available at: <https://krakow-krowodrza.sr.gov.pl/zarzadzenie-nr-225-z-dnia-30-maja-2025-prezesa-sadu-rejonowego-dla-krakowa-krowodrzy-w-krakowie-w-sprawie-wprowadzenia-pilotazowego-programu-kierowania-spraw-do-mediacji,new,m1,356.html,2246>

Procedure). A copy of the order granting an enforceability clause to the settlement is the basis for discontinuing the proceedings insofar as it concerns the claims covered by the settlement. (Article 183¹⁴ § 2¹ Code of Civil Procedure). A settlement concluded before a mediator, once approved by the court, **has the legal force of a settlement concluded before a court**. A settlement concluded before a mediator, which has been approved by granting of an enforceability clause, is **an enforceable title** (Article 183¹⁵ § 1 Code of Civil Procedure). Hence, the party may proceed with enforcement by execution based on such enforceable title (Article 776 Code of Civil Procedure).

In Poland, the institutional framework for family mediation is still developing, and while **there is no comprehensive national system of standardized tools or protocols**, some methods and good practices are gradually emerging—particularly in cases concerning the best interests of the child (BIC), risk assessment, and suitability for mediation.

In accordance with the best interests of the child (BIC) determination, Polish law, including the Constitution (art. 72), the Family and Guardianship Code, and procedural norms in the Code of Civil Procedure (art. 216¹–216²), places the best interests of the child at the center of judicial and mediation procedures. However, there are no nationally adopted guidelines or structured tools specifically for determining BIC in mediation.

In practice mediators often rely on general legal principles and their professional judgment. Some mediators may refer to UN General Comment No. 14 to the Convention on the Rights of the Child⁷² as a soft-law interpretive aid. Courts increasingly expect mediators to consider BIC, especially when validating mediated agreements involving minors (e.g. parental plans), but do not impose a uniform standard for assessing it.

Then it comes to risk assessment tools (e.g. for domestic violence or power imbalance), Polish legislation **does not mandate formal risk assessment tools** to screen for domestic violence or coercive control prior to mediation. However certain courts and mediation centers implement **informal screening practices**, often based on checklists or structured interviews developed by NGOs or international partners (e.g. the Polish Mediation Centre has developed pilot practices). In **cases involving suspected violence**, Polish mediators are instructed by law (see art. 183¹ and 183² of the Code of Civil Procedure) to

⁷² General comment to the Convention on the Rights of the Child No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), adopted by UN Committee on the Rights of the Children on 29 May 2013, CRC/C/GC/14.

terminate mediation if parties are unable to participate voluntarily and equally. “The Blue Card” (“*Niebieska karta*”) procedure under Polish administrative and police law provides a separate route for detecting domestic violence, but it is not automatically integrated with the mediation system.

There is **no unified national screening protocol** to determine the suitability of family cases for mediation. Mediation is generally encouraged, but the decision to mediate is voluntary. Judges may suggest mediation but do not conduct formal assessments of its appropriateness and mediators are expected to assess suitability on a case-by-case basis, particularly regarding the ability of the parties to negotiate freely and safely.⁷³

In cross-border abduction or relocation cases under the 1980 Hague Convention, Polish courts occasionally appoint mediators, but the assessment of mediation's suitability depends entirely on judicial discretion and the mediators' own ethical evaluation.

The **Polish Code of Ethics for Mediators** (*Kodeks Etyczny Mediatora*)⁷⁴ provides general standards, including impartiality, confidentiality, and attention to the well-being of children. Some court mediation centers and family mediation associations (e.g. Polskie Centrum Mediacji – *Polish Center of Mediation*) have developed **internal training programs** touching on BIC, conflict dynamics, and family systems, but there is no official accreditation scheme that mandates specialized training in child or trauma-informed mediation. Tools such as **parental plans** are sometimes used to structure agreements, especially in custody and contact matters, and these increasingly incorporate child-focused language.⁷⁵ Other important source is the Standards for the Conduct of Mediation and Mediator's Conduct (*Standardy prowadzenia mediacji i postępowania mediatora*) adopted by the Social Council for Alternative Dispute and Conflict Resolution (*Spółeczna Rada do spraw Alternatywnych Metod Rozwiązywania Konfliktów i Sporów*).⁷⁶ The document describes the mediator's duties, such as: providing the parties with reliable information on the nature and conduct of the mediation; ensuring a high level of professional qualification; cooperating with other professionals for the benefit of the ongoing mediation;

⁷³ CYBULKO A., *Rozdział 18. Mediacja w sprawach rodzinnych*, cit., pp. 368-369.

⁷⁴ The text, in Polish, available on the site of Polish Center of Mediation: <https://mediator.org.pl/baza-wiedzy/kodeks-etyki-mediatora/>.

⁷⁵ CYBULKO A., *Rozdział 18. Mediacja w sprawach rodzinnych*, cit., pp. 375-379.

⁷⁶ The text, in Polish, available on the site of Spółeczna Rada do spraw Alternatywnych Metod Rozwiązywania Konfliktów i Sporów przy Ministrze Sprawiedliwości: <http://ms.gov.pl/pl/dzialalnosc/mediacje/spoleczna-rada-ds-alternatywnych-metod-rozwiazywania-konfliktow-i-sporow/dokumenty-deklaracje/>

providing the parties with a suitable place to conduct the mediation; providing reliable information about their services; discontinuing mediation early in certain situations.

In conclusion, Poland lacks a unified, institutionalized framework for structured tools in family mediation regarding BIC determination, risk screening, and suitability assessment. While **principles of child protection and voluntariness are embedded in legislation**, much depends on the individual mediator's training and the culture of the local mediation center or court.

In Poland, international family mediation (IFM) in cases involving domestic violence is **legally permissible**, yet in practice it is approached with significant caution. Although there are **no explicit statutory prohibitions** against mediation in situations where domestic abuse is alleged or established, the general legal and ethical framework governing mediation in Poland imposes **safeguards** that are intended to **protect vulnerable parties** and **uphold the principles of voluntariness and equality**.

The Polish Code of Civil Procedure (Articles 183¹–183¹⁵) provides the overarching legal basis for mediation in civil matters, including family disputes of both domestic and cross-border character. According to these provisions, **mediation must be voluntary at every stage of the process**. Parties **may withdraw from mediation at any time**, and the **mediator is obliged to terminate proceedings if the conditions of fairness and free participation are not met**. This includes situations where power imbalances or coercion – very often existing in domestic violence cases – are present. In such situation mediation, as a way of resolving the conflict, is not recommended.⁷⁷ While this offers a basic safeguard, the Code does not contain specific procedures for screening domestic violence before mediation begins.

In practice, the approach to mediation in cases involving violence varies considerably across jurisdictions in Poland, largely because **there is no nationally standardized protocol for identifying and assessing risk**. It is also worth to mention that many of the domestic violence cases are dealt with by the criminal courts, which use mediation to this end. Formally these are criminal proceedings, but because of the type of relationship between the parties, they also resemble family mediation.⁷⁸

⁷⁷ GÓJSKA A., *Mediacja w sprawach rodzinnych*, Ministerstwo Sprawiedliwości, Warszawa 2011, p. 8.

⁷⁸ TROJANOWSKA E., *Gotowość do zadośćuczynienia sprawców przemocy w rodzinie jako podstawa do udziału w mediacjach po wyroku*, PROBACJA, nr 1/2020, pp. 124-128.

Some mediators conduct informal intake interviews or use internal checklists to assess whether violence or coercive control might compromise the fairness of the mediation process.⁷⁹ However, these practices are not uniformly adopted, and courts often refer cases to mediation without verifying the presence or history of abuse.

International obligations, particularly those arising from European and human rights law, also influence the handling of domestic violence in IFM. Poland is a party to the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (the Istanbul Convention)⁸⁰, which **requires that alternative dispute resolution methods, such as mediation, not be mandated in cases of domestic violence**.⁸¹ Article 48 of the Convention warns against subjecting victims to mandatory reconciliation procedures.⁸² Additionally, **the Brussels II-ter Regulation** emphasizes that such proceeding must respect fundamental rights, including the safety and equality of the parties. Mediation under Brussels II-ter is encouraged, but only where appropriate and safe – particularly in high-conflict or violent contexts.

In the Polish IFM landscape, cross-border cases are occasionally managed through cooperation with **international mediation networks and NGOs**, such as MiKK in Germany, which specialize in safe, bilingual, and culturally sensitive mediation processes.⁸³ These organizations tend to apply stricter ethical standards and protocols, including initial risk assessments and, when needed, separate mediation (sometimes called “shuttle mediation”) where parties do not meet directly. While some Polish mediators adopt these best practices,

⁷⁹ See: recommendations on the site of “Blue Line” - Polish National Referral Service for Victims of Family Violence (“Niebieska Linia” - *Ogólnopolskie Pogotowie dla Ofiar Przemocy w Rodzinie*): <https://www.niebieskalinia.pl/aktualnosci/aktualnosci/mediacja-dla-rodziny-w-kryzysie>; or on the site of the Centre for Judicial Mediation (*Centrum Mediacji Sądowych*): <https://www.centrummediacjisadowych.pl/wpis/54,przemoc-i-uzaleznienia-w-rodzinie-a-mediacje>

⁸⁰ Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, adopted in Istanbul on 11 May 2011, CETS No. 210. Poland ratified the Convention on 27 April 2015; the Convention entered into force on 1 August 2015. Published in the Polish Journal of Laws: Dz.U. 2015, poz. 961.

⁸¹ See: SITARZ O., BEK D., *Zasadność zakazu obowiązkowej mediacji w sprawach przemocy domowej: krytyczna analiza przepisu art. 48 ust. 1 tzw. konwencji stambulskiej*, *Studia Prawnicze* (PAN) 2018, p. 105-129.

⁸² See: Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, Council of Europe Treaty Series - No. 210, p. 42.

⁸³ E.g. German-Polish AMICABLE Project (EC co-financed), Development of Best Practice Tools, Enforceability and Recognition of Mediated Family Agreements (2018-2021), see: <https://mikk-ev.org/projects/project-poland/>.

especially those trained in international settings or working with foreign institutions, the absence of national regulation or guidance means such practices are far from universal.

Despite the safeguards offered by ethical codes and the general legal framework, **mediation in domestic violence cases in Poland remains controversial**.⁸⁴ The lack of a coordinated inter-institutional response – particularly between family courts, mediation centers, and social support services – limits the system’s ability to identify and adequately respond to abusive dynamics before and during the mediation process. There are also concerns that victims may feel pressured to participate in mediation, either by the courts or by social expectations to “settle” disputes out of court, particularly in cross-border child abduction cases where rapid resolution is often prioritized.⁸⁵

In conclusion, while **Polish law formally allows for international family mediation even in cases involving violence**, it imposes important ethical conditions that presume voluntariness, safety, and informed participation. Some scholars and practitioners **exclude the possibility of using mediation in cases of domestic violence**, stressing that mediation cannot be carried out when one of the parties approaching the mediator is a person experiencing violence from the other person involved in the dispute. In the case of a person who has experienced any form of violence for a longer or shorter period of time, the principles of mediation cannot be upheld.⁸⁶ Others stress that an analysis of the literature on the use of mediation in this type of case and the experience of mediators and those working with victims of domestic violence indicate that mediation should be carried out here only in exceptional cases and under specific rules.⁸⁷

Nevertheless, **the lack of specific, enforceable standards or systematic screening practices** leads to **inconsistent application of these protections in**

⁸⁴ See: ZIELIŃSKA E., *Mediacja w sprawach karnych o przemoc w rodzinie – skala i efektywność w praktyce polskiego wymiaru sprawiedliwości*, Instytut Wymiaru Sprawiedliwości, Warszawa 2017, pp. 10-15.

⁸⁵ WASZKIEWICZ P., *Rozdział 8. Zasady mediacji*, in MOREK R., GMURZYŃSKA E. (eds) *Mediacje: Teoria i praktyka*, Wolters Kluwer, Warszawa 2024, pp. 165-166.

⁸⁶ ZAGÓRSKA K., *Rozdział szósty. Mediacje transgraniczne w sprawach rodzinnych*, cit., pp. 109-110; MAZUREK A., *Podejrzanie stosowania przemocy a mediacja*, Infor.pl, 29 sierpnia 2022, <https://www.infor.pl/prawo/rozwoy/mediacja/5566094,Przemoc-a-mediacja.html>

⁸⁷ SIEDLECKA-ANDRYCHOWICZ A., *Rozdział 19. Mediacja w sprawach karnych i w sprawach o wykroczenia*, in MOREK R., GMURZYŃSKA E. (eds.), *Mediacje: Teoria i praktyka*, Warszawa 2024, p. 405.

practice. Ensuring genuine safety and equality in IFM requires more structured screening tools, specialized training for mediators, and a stronger institutional framework to align national practices with international human rights and child protection standards.

4. Pre-mediation services in Poland

Within the iCare2 Project pre-mediation is conceived as:

*‘a service, accessible through phone and/or email and/or mail, which is at disposal of family members (but also to lawyers, and central authorities’ staff), with the following functions: a) **give reliable information on international family mediation**; b) make a first, preliminary **assessment on whether the family’s situation is suitable for a mediation**, c) **orient families suitable for mediation to mediators – using the already established contacts** that partners have with the professional category in each Member State involved; d) **find temporary agreements while waiting for mediation to start focusing on the need and the rights of children**; e) **give guidance in organizing the mediation on the basis of the services at disposal at the national level** [emphasis added].’*

An institution of “pre-mediation” within iCARE2 understanding neither regulated in the Code of Civil Procedure nor another statute.

As mentioned, the notion of “pre-mediation” is not included in the Code of Civil Procedure and therefore not specifically regulated. This notion is used in the legal literature, however not necessarily in the same way as in iCARE2. For example, the notion of pre-mediation is used to describe the following stage of the mediation:

*“Even before the mediation session begins, once the case has been referred to mediation, the mediator and the mediation center have many responsibilities. Preparing for mediation is a very important stage of the mediation process for many reasons. This stage is sometimes referred to as **pre-mediation**. It is often **the moment of first contact between the center and the mediator and the parties**. This contact usually takes the **form of a telephone conversation** [emphasis added].”⁸⁸*

The above description reveals that “pre-mediation” might have different meanings and might be perceived as a stage of mediation, which takes place

⁸⁸ GMURZYŃSKA E., *Rozdział 11. Etapy mediacji* in MOREK R., GMURZYŃSKA E. (eds) *Mediacje: Teoria i praktyka*, Wolters Kluwer, Warszawa 2024, p. 216.

once the case was already referred by the judge to mediation, and not a service at the disposal of families and their lawyers aimed at, among others, providing the very first information on mediation and an assessment of suitability of mediation in a given case, before the case is referred to mediation.

(Regarding the services offered by the various institutions promoting and offering mediation in Poland, see the answer to the question on key players in international family mediation)



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1. Wprowadzenie

W coraz bardziej połączonej Europie transgraniczne spory rodzinne stają się coraz częstsze. W kontekście separacji, rozvodu i niezbędnych ustaleń dotyczących odpowiedzialności rodzicielskiej, ryzyko uprowadzenia dziecka za granicę jest nadal obecne. Te złożone sytuacje często powiązane są z wieloma systemami prawnymi, różnicami kulturowymi i, co najważniejsze, prawami i dobrem dzieci. Międzynarodowa (lub transgraniczna) mediacja rodzinna powoli staje się cennym narzędziem do rozwiązywania takich sporów, oferując ustrukturyzowany, ale elastyczny proces mający na celu ułatwienie wzajemnego zrozumienia i trwałych porozumień między rodzicami mieszkającymi w różnych krajach.

Potencjalne pozytywne skutki międzynarodowej mediacji rodzinnej zostały uznane przez prawodawcę UE: rozporządzenie (UE) nr 2019/1111 (Bruksela IIb) w artykule 25 wprowadziło wyraźny obowiązek sędziego w postępowaniu w sprawie uprowadzenia dziecka, aby zaprosić strony do rozważenia możliwości skorzystania z mediacji.

Niniejszy raport przedstawia wyniki krajowych badań nad polskim systemem prawnym, podjętych w ramach projektu „iCare2” współfinansowanym przez UE. Badania mają na celu ocenę, czy i w jaki sposób rozporządzenie Bruksela IIb jest „implementowane” w Polsce, identyfikując wyzwania związane z jego stosowaniem oraz oceniając na ile przyczyniło się do poprawy współpracy sądowej, rozwiązywania spraw dotyczących uprowadzenia dziecka za granicę i promowania mediacji rodzinnych.

Międzynarodowa mediacja rodzinna wkracza do polskiego systemu prawnego. Podczas gdy mediacja rodzinna powoli staje się ważnym narzędziem, o którym rodzice i prawnicy wiedzą i które stosują coraz częściej, jej potencjał wciąż nie jest w pełni wykorzystywany. Rozwój „kultury” mediacji, wraz z konsekwentną i konkretną integracją zasady najlepszego interesu dziecka w całym procesie, jest identyfikowany jako kluczowa potrzeba, aby mediacja była oferowana jako skuteczne narzędzie rozwiązywania konfliktów rodzinnych, zgodnie ze standardami międzynarodowymi i unijnymi.

W ramach metodologii zastosowanej w niniejszym badaniu przeprowadzono wywiady w celu zebrania perspektywy i doświadczenia praktyków. Autorzy -

którzy pozostają jedynymi odpowiedzialnymi za treść niniejszego raportu - są wdzięczni praktykom za cenną współpracę.

2. Międzynarodowa mediacja rodzinna w Polsce: stan prawny

2.1. Kodeks postępowania cywilnego

W Polsce, mediacja w sprawach cywilnych jest **uregulowana w Kodeksie Postępowania Cywilnego (k.p.c.)**.¹ Przepisy regulujące mediację w sprawach cywilnych zostały wprowadzone do Kodeksu postępowania cywilnego (pochodzącego z 1964 r.) nowelizacją z 2005 r. (Nowelizacja z 2005 r.).² Przepisy te nie wprowadzają rozróżnienia między mediacją, mediacją rodzinną lub mediacją międzynarodową, a zatem **mają zastosowanie również do międzynarodowej mediacji rodzinnej**.³

W uzasadnieniu Nowelizacji z 2005 r. wyjaśniono, że:

Projektowane przepisy mają na celu wprowadzenie do naszego prawa procesowego cywilnego instytucji mediacji i w ten sposób ustanowienie alternatywnego do sądowego postępowania cywilnego sposobu rozstrzygania spraw cywilnych. Według założeń, które legły u podstaw projektowanych przepisów, postępowanie mediacyjne w sprawach cywilnych powinno być na tyle atrakcyjne dla stron stosunku cywilnoprawnego, aby strony z niego korzystały.

Dlatego też przyjęto jako założenie, aby rozwiązania dotyczące mediacji były proste i nieskomplikowane. Mediacja ma ułatwić dochodzenie roszczeń w sprawach cywilnych, a jednocześnie skutecznie udzielać ochrony prawnej podmiotom, które wybrały ten tryb dochodzenia roszczeń.

¹ Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego, Dz. U. 2024, poz. 1568. Original and consolidated version (in Polish language) is available online at: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19640430296>.

² Ustawa z dnia 28 lipca 2005 r. o zmianie ustawy - Kodeks postępowania cywilnego oraz niektórych innych ustaw, Dz. U. 2005, nr 172, poz. 1438. Available online (in Polish language) at: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20051721438>

³ Zob.: NAPIERALSKA A., *Mediacja transgraniczna – charakterystyka postępowania na przykładzie sporów rodzinnych i gospodarczych* in ROMANOWSKI M. (ed), *Mediacja – od rozmowy do porozumienia*, Instytut Wymiaru Sprawiedliwości, Warszawa 2022, p 34.

*Kierując się tymi założeniami przyjęto, że w drodze mediacji można będzie rozstrzygnąć spór cywilnoprawny poprzez zawarcie ugody przed mediatorem. Ugoda taka będzie miała moc prawną ugody sądowej po zatwierdzeniu jej przez sąd (...).*⁴

Zgodnie z artykułem 10 k.p.c. (w brzmieniu nadanym Nowelizacją z 2005): *‘W sprawach, w których zawarcie ugody jest dopuszczalne, sąd dąży w każdym stanie postępowania do ich ugodowego załatwienia, w szczególności przez nakłanianie stron do mediacji.’*

Ugoda, a tym samym mediacja, jest możliwa we wszystkich rodzajach spraw z zakresu prawa cywilnego, w tym prawa rodzinnego. Przykłady spraw, które mogą być przedmiotem mediacji, obejmują alimenty na dzieci, sprawowanie władzy rodzicielskiej po rozwodzie, prawa do kontaktów z dzieckiem oraz sprawy majątkowe między małżonkami.⁵ Istnieją pewne sprawy z zakresu prawa rodzinnego, w których ugoda, a w konsekwencji również mediacja, nie są dopuszczalne, np. sprawy o ustalenie ojcostwa, ustalenie macierzyństwa, zaprzeczenie ojcostwa, przysposobienie, unieważnienie małżeństwa, pozbawienie lub ograniczenie władzy rodzicielskiej.

Mediacja w sprawach cywilnych jest uregulowana w artykułach 183¹-183¹⁵ k.p.c. (dodanego Nowelizacją z 2005). Postanowienia te stanowią dalsze rozwinięcie ogólnego postanowienia zawartego w artykule 10.

Już pierwszy przepis poświęcony mediacji, a mianowicie art. 183¹ § 1 k.p.c. stanowi, że mediacja jest dobrowolna. Mediacja może być przeprowadzona przed wszczęciem postępowania, a także w jego toku, jeżeli strony wyrażą na nią zgodę (art. 183¹ § 4 k.p.c.). Jeżeli natomiast strony nie wyrażą zgody na mediację, nie zostanie ona wszczęta (art. 183⁶ § 2 pkt 1 k.p.c. i art. 183⁸ § 2 k.p.c.).

Zgodnie z art. 183¹ § 2 k.p.c. mediacja może zostać wszczęta na podstawie:

- **umowy o mediację lub**
- **postanowienia sądu kierującego strony do mediacji.**

Zgodnie z art. 183¹ § 3 k.p.c. umowa o mediację powinna wskazywać przedmiot mediacji, osobę mediatora lub sposób wyboru mediatora. Umowa o mediację

⁴ Sejm Rzeczypospolitej Polskiej, IV Kadencja, Druk nr 3213. Available at: <https://orka.sejm.gov.pl/proc4.nsf/opisy/3213.htm>

⁵ GÓJSKA A., *Mediacja w sprawach rodzinnych*, Ministerstwo Sprawiedliwości: Warszawa 2011, p. 6.

może być zawarta także przez wyrażenie zgody na mediację, o którą wystąpiła druga strona (art. 183¹ § 2 k.p.c.). Przepisy nie wymagają szczególnej formy umowy o mediację.⁶

Jeśli chodzi o skierowanie przez sąd do mediacji, to może ono nastąpić „w każdym stadium postępowania” (art. 183⁸ § 1 k.p.c.). Art. 183⁸ § 5 k.p.c. stanowi, że przed pierwszym posiedzeniem wyznaczonym na rozprawę przewodniczący **ocenia, czy skierować strony do mediacji**. W tym celu, jeżeli konieczne jest wysłuchanie stron, przewodniczący może wezwać je do osobistego stawienia na posiedzeniu niejawnym. Przewodniczący składu orzekającego może również wezwać strony do udziału w **spotkaniu informacyjnym** na temat polubownych metod rozwiązywania sporów, w szczególności mediacji. Spotkanie informacyjne może być prowadzone przez sędziego, referendarza sądowego, urzędnika sądowego, asystenta sędziego lub stałego mediatora (art. 183⁸ § 4 k.p.c.). Spotkanie informacyjne jest dodatkowo uregulowane w rozporządzeniu Ministra Sprawiedliwości.⁷ Wyjaśnia, że celem spotkania informacyjnego jest zapoznanie stron z możliwościami i korzyściami płynącymi z polubownego rozwiązywania sporów, w szczególności mediacji. Jeżeli strona bez usprawiedliwienia nie stawia się na spotkanie informacyjne lub posiedzenie niejawne, sąd może obciążyć ją kosztami nakazanego stawienia na posiedzeniu niejawnym przez stronę przeciwną (art. 183⁸ § 6 k.p.c.).

Sąd wyznacza czas trwania mediacji na okres **do trzech miesięcy**. Termin ten może być przedłużony na wniosek stron lub z innych ważnych powodów, jeżeli służyłoby to ugodowemu załatwieniu sprawy (art. 183¹⁰ § 1 k.p.c.). Po upływie powyższego terminu przewodniczący wyznacza rozprawę (art. 183¹⁰ § 2 k.p.c.).

Ponieważ mediacja jest dobrowolna, nie może być prowadzona, jeżeli strona **nie wyraziła zgody na mediację** w terminie tygodnia od dnia ogłoszenia lub doręczenia postanowienia o skierowaniu stron do mediacji (art. 183⁸ § 2 k.p.c.).

Jeżeli strony nie dokonały wyboru mediatora, sąd kierując strony do mediacji wyznacza mediatora **posiadającego odpowiednią wiedzę i umiejętności w zakresie prowadzenia mediacji w tego typu sprawach, dając pierwszeństwo mediatorom stałym** (art. 183⁹ § 1 k.p.c.).

⁶ ERECIŃSKI T. in ERECIŃSKI T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom II. Postępowanie rozpoznawcze*, Wolters Kluwer 2016, p. 30

⁷ Rozporządzenie Ministra Sprawiedliwości z dnia 18 czerwca 2019 r. Regulamin urzędowania sądów powszechnych, Dz.U. 2024 r, poz. 867. Dostępne online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20190001141>

Mediator ma prawo **przeglądać akta sprawy**, chyba że strona się temu sprzeciwi. (art. 183⁹ § 2 k.p.c.). Po skierowaniu stron do mediacji sąd przekazuje mediatorowi dane kontaktowe stron i ich pełnomocników (art. 183⁹ § 3 k.p.c.).

Mediator niezwłocznie wyznacza **termin i miejsce spotkania mediacyjnego**. Wyznaczenie posiedzenia mediacyjnego nie jest konieczne, jeżeli strony wyrażą zgodę na przeprowadzenie mediacji bez posiedzenia mediacyjnego. Mediator może przeprowadzić posiedzenie mediacyjne przy użyciu urządzeń technicznych umożliwiających przeprowadzenie go na odległość, jeżeli strony wyrażą na to zgodę (art. 183¹¹ k.p.c.).

Mediator prowadzi mediację, stosując **różne metody zmierzające do polubownego rozwiązania sporu**, w tym pomagając stronom w formułowaniu propozycji ugodowych lub na wniosek stron może wskazać sposoby rozwiązania sporu, które nie są wiążące dla stron (art. 183^{3a} k.p.c.). Prowadząc mediację, mediator musi zachować **bezstronność** (art. 183³ § 1 k.p.c.) oraz że mediator powinien niezwłocznie ujawnić stronom wszelkie **okoliczności, które mogłyby wywołać wątpliwości co do jego bezstronności** (art. 183³ § 2 k.p.c.). Postępowanie mediacyjne jest **niejawne** (art. 183⁴ § 1 k.p.c.). Mediator, strony oraz inne osoby uczestniczące w postępowaniu mediacyjnym są obowiązane do zachowania w tajemnicy faktów, o których dowiedziały się w związku z prowadzeniem mediacji. Strony mogą jednak zwolnić mediatora i inne osoby uczestniczące w postępowaniu mediacyjnym z tego obowiązku (art. 183⁴ § 2 k.p.c.). Żaden z przepisów k.p.c. nie reguluje obecności prawnika reprezentującego strony w toku postępowania mediacyjnego. Obecność taka nie jest więc obowiązkowa, ale też nie jest wykluczona.

Zgodnie z art. 183¹² § 1 k.p.c. sporządza się **protokół**, w którym oznacza się miejsce i czas przeprowadzenia mediacji, a także imię, nazwisko i adresy stron, imię i nazwisko oraz adres mediatora, a ponadto wynik mediacji. Protokół podpisywany jest przez mediatora. Jeżeli strony zawarły **ugodę** przed mediatorem, ugodę włącza się do protokołu lub dołącza do niego. Strony podpisują ugodę (art. 183¹² § 2 k.p.c.). Podpisując ugodę, **strony wyrażają zgodę na wystąpienie do sądu o jej zatwierdzenie**, o czym mediator informuje strony (art. 183¹² § 21 k.p.c.). Mediator doręcza stronom odpis protokołu (art. 183¹² § 3 k.p.c.). (Zob. też odpowiedź na pytanie o dalsze kroki po osiągnięciu porozumienia - poniżej).

Na podstawie Nowelizacji z 2015 r. art. 187 § 1 k.p.c. wymieniający informacje, które należy zawrzeć w pozwie, wymaga dodatkowo podania informacji: „**czy strony podjęły próbę mediacji** lub innego pozasądowego sposobu rozwiązania

sporu, a w przypadku gdy takich prób nie podjęto, wyjaśnienie przyczyn ich niepodjęcia”.

2.2. Kodeks rodzinny i opiekuńczy

In 2008 the provisions on divorce of the Family and Guardianship Code was amended. Artykuł 58 § 1 został zmieniony poprzez odniesienie do **porozumienia między małżonkami w sprawie władzy rodzicielskiej**. Otrzymuje on następujące brzmienie: „W wyroku orzekającym rozwód sąd rozstrzyga o władzy rodzicielskiej nad wspólnym małoletnim dzieckiem obojga małżonków i o kontaktach rodziców z dzieckiem oraz orzeka, w jakiej wysokości każdy z małżonków jest obowiązany do ponoszenia kosztów utrzymania i wychowania dziecka. **Sąd uwzględnia porozumienie małżonków o sposobie wykonywania władzy rodzicielskiej i utrzymywaniu kontaktów z dzieckiem po rozwodzie, jeżeli jest ono zgodne z dobrem dziecka.** Rodzeństwo powinno wychowywać się wspólnie, chyba że dobro dziecka wymaga innego rozstrzygnięcia.”

Porozumienie między małżonkami w sprawie odpowiedzialności rodzicielskiej może zostać osiągnięte w drodze mediacji.⁸

2.3. Rozporządzenie Bruksela II-ter

Rozporządzenie Bruksela II bis⁹ nie zawierało żadnego konkretnego artykułu nakazującego mediację ani szczegółowe standardy proceduralne. Zgodnie z motywem 25 preambuły **zachęcano** do „polubownego rozwiązywania sporów rodzinnych” w sprawach dotyczących odpowiedzialności rodzicielskiej. W praktyce mediacja była uważana za narzędzie zapobiegania konfliktom między rodzicami lub sposób ich rozwiązywania, w tym w sprawach dotyczących uprowadzenia dziecka.

⁸ Zob. listę zagadnień, które powinny być uwzględnione w porozumieniu opracowaną przez Stowarzyszenie Mediatorów Rodzinnych: http://smr.org.pl/doc/plan_opieki_rodzicielskiej.doc.

⁹ Rozporządzenie Rady (WE) Nr 2201/2003 z dnia 27 listopada 2003 r. dotyczące jurysdykcji oraz uznawania i wykonywania orzeczeń w sprawach małżeńskich oraz w sprawach dotyczących odpowiedzialności rodzicielskiej, uchylające rozporządzenie (WE) Nr 1347/2000, Dz.U. L 338 z 23.12.2003, p. 1–29.

Rozporządzenie weszło w życie, gdy Polska była już członkiem UE. Jednak prawo polskie nie zostało poddane konkretnym zmianom w celu wprowadzenia mediacji w kształcie przewidzianym przez Rozporządzenie Bruksela II bis – to raczej praktyka zaczęła się stopniowo zmieniać, tworząc podstawy dla późniejszych zmian wprowadzonych rozporządzeniem Bruksela II ter. W tamtym czasie mediacja w sprawach transgranicznych była rzadkością, ale stała się bardziej widoczna w odpowiedzi na nacisk UE na polubowne rozwiązywanie sporów. Skutkiem tego nastąpił wzrost świadomości, zwłaszcza we współpracy z Organem Centralnym i niektórymi programami pilotażowymi (np. z *Reunite* lub *International Mediation Centre for Family Conflict and Child Abduction* – MIKK).

Rozporządzenie Bruksela II ter¹⁰ wprowadza istotne zmiany i wyraźnie wzmacnia rolę mediacji, stwierdzając w art. 25, że „jak najwcześniej to możliwe i na każdym etapie postępowania, sąd zwraca się (...) do stron, aby rozważyły, czy są gotowe podjąć mediację lub zastosować inne alternatywne metody rozwiązywania sporów, chyba że jest to sprzeczne z dobrem dziecka, nie jest to stosowne w danej sprawie lub nadmiernie opóźniłoby to postępowanie.” W związku z tym rozporządzenie Bruksela II-ter, w porównaniu z rozporządzeniem Bruksela II-bis, zawiera jasny i wiążący obowiązek promowania mediacji w sprawach transgranicznych przez państwa członkowskie. Rozporządzenie reguluje również w sposób kompleksowy transgraniczne uznawanie i wykonywanie ugód mediacyjnych oraz wzmacnia rolę organów centralnych w promowaniu mediacji. Rozporządzenie promuje również tworzenie sieci współpracy między instytucjami mediacyjnymi i organami w różnych państwach członkowskich

Kiedy rozporządzenie Bruksela II-ter weszło w życie 1 sierpnia 2022 r., Polska miała już podstawę prawną dla mediacji sądowej (w art. 183¹–183¹⁵ Kodeksu postępowania cywilnego), więc nie było potrzeby wprowadzania większych zmian w prawie. Współpraca międzynarodowa była również prowadzona za pośrednictwem Ministerstwa Sprawiedliwości jako organu centralnego, który może pomagać w kierowaniu spraw do mediacji na podstawie Konwencji haskiej i Rozporządzenia Bruksela II ter. Jego wejście w życie miało jednak istotny pośredni wpływ – prowadziło do wzmocnienia roli mediacji w praktyce. Rozporządzenie Bruksela II ter, a w szczególności jego art. 25, przekłada się na

¹⁰ Rozporządzenie Rady (UE) 2019/1111 z dnia 25 czerwca 2019 r. w sprawie jurysdykcji, uznawania i wykonywania orzeczeń w sprawach małżeńskich i w sprawach dotyczących odpowiedzialności rodzicielskiej oraz w sprawie uprowadzenia dziecka za granicę, Dz.U. L 178 z 2.7.2019, p. 1–115.

sposób, w jaki polskie instytucje traktują mediację w kontekście międzynarodowym, co obejmuje: zwiększoną rolę mediacji w sprawach transgranicznych; organ centralny coraz częściej proponuje mediację w sprawach dotyczących uprowadzenia dziecka; sądy są bardziej skłonne do rozważenia zawieszenia postępowania w celu podjęcia mediacji, zwłaszcza gdy sprawa dotyczy rodziców mieszkających w różnych krajach UE. Wytyczne i materiały szkoleniowe dla mediatorów i sędziów (np. publikacje Polskiego Centrum Mediacji lub Stowarzyszenia Sędziów Rodzinnych) zaczęły kłaść większy nacisk na transgraniczne aspekty mediacji i zgodność z art. 25 Rozporządzenia Bruksela II ter.

Ponadto zgodnie z art. 65–67 Rozporządzenia Bruksela II ter ugody zawarte przed mediatorem w jednym państwie członkowskim mogą być uznawane i wykonywane w innym państwie członkowskim, jeżeli są one wykonalne w kraju pochodzenia. To rozwiązanie prawne wymusiło większą świadomość proceduralną w Polsce: mediatorzy muszą informować strony o konieczności zatwierdzenia ugody przez sąd, jeśli ma ona być wykonalna za granicą, a sądy zaczęły dokładniej analizować transgraniczne skutki ugód, szczególnie w kontekście kontaktów z dziećmi.

Zasadę dobra dziecka można odnaleźć w licznych aktach międzynarodowych, których Polska jest stroną, np. w Europejskiej Konwencji o Wykonywaniu Praw Dziecka, Konwencji ONZ o Prawach Dziecka czy Konwencji haskiej o uprowadzeniu dziecka z 1980 roku. Zasada ta jest również zawarta w art. 72 Konstytucji. Również ustawa o wspieraniu rodziny i systemie pieczy zastępczej podkreśla jej szczególne znaczenie w podejmowaniu decyzji dotyczących dziecka i rodziny. Przepisy Kodeksu rodzinnego i opiekuńczego w odniesieniu do spraw dotyczących dziecka podkreślają konieczność uwzględnienia dobra dziecka w wielu przypadkach, np. art. 58 § 1 Kodeksu rodzinnego i opiekuńczego stanowi, że sąd powinien uwzględnić porozumienie o wykonywaniu władzy rodzicielskiej sporządzone przez rodziców, jeżeli jest ono **zgodne z dobrem dziecka**. Zasada ta odgrywa fundamentalną rolę przy interpretacji wszystkich przepisów prawa materialnego i procesowego dotyczących dziecka.¹¹

Brak jest ustawowej definicji pojęcia „dobro dziecka”. Nadanie mu określonego znaczenia powinno być dokonywane w konkretnych okolicznościach

¹¹ ZAJĄCZKOWSKA-BURTOWY J., *Dobro dziecka jako wartość podlegająca szczególnej ochronie w sprawach dotyczących wykonywania władzy rodzicielskiej i kontaktów z dzieckiem* w J. MUCHA (red) *Realizacja zasady dobra dziecka w mediacji w sprawach dotyczących wykonywania władzy rodzicielskiej i kontaktów*, Wolters Kluwer, Warszawa 2021, pp. 141-151.

faktycznych. Przesłanki które można wymienić, to m.in. **prawo do ochrony życia i zdrowia oraz do wszelkich działań ze strony innych osób, które powinny zapewnić dziecku warunki do spokojnego, prawidłowego, niezakłóconego rozwoju, poszanowania godności i udziału w procesie decydowania o jego sytuacji.**¹² Lista ta nie jest wyczerpująca.

Jak już wspomniano, kodeks postępowania cywilnego ogólnie reguluje mediację w art. 183¹-183¹⁵, ale **nie zawiera szczegółowych zasad dotyczących udziału dzieci w mediacji i nie wspomina o dobru dziecka w tym zakresie.** Prawo zezwala sądowi na skierowanie stron do mediacji, ale milczy na temat tego, czy i w jaki sposób poglądy lub interesy dziecka powinny być aktywnie reprezentowane lub uwzględniane w procesie (zob. również odpowiedź na poniższe pytanie: Czy dziecko jest wystuchiwane i informowane w procesie mediacji? Czy istnieje powszechna praktyka w tym zakresie?)

3. Międzynarodowa mediacja rodzinna w Polsce: praktyka

3.1. Praktyczne zastosowanie (międzynarodowej) mediacji rodzinnej

W Polsce mediacja w sprawach dotyczących odpowiedzialności rodzicielskiej, w tym w sprawach dotyczących międzynarodowego uprowadzenia dziecka, jest coraz częściej stosowana jako alternatywna metoda rozwiązywania sporów (ADR).

Pomimo wprowadzenia przepisów dotyczących mediacji w 2005 r., początkowo nie cieszyła się ona dużym zainteresowaniem. W 2006 r. w całej Polsce zarejestrowano jedynie 270 postępowań mediacyjnych w sprawach rodzinnych.¹³ Znaczenie mediacji wzrosło po nowelizacji Kodeksu rodzinnego i

¹² Zob. między innymi: Postanowienie Sądu Najwyższego z 24.11.2016, sygnatura akt: II CA 1/16.

¹³ Ministerstwo Sprawiedliwości udostępnia szczegółowe dane statystyczne dotyczące mediacji rodzinnej w Informatorze Statystycznym Wymiaru Sprawiedliwości. Sekcja „Opracowania wieloletnie” zawiera podsumowania obejmujące lata 2006–2024, w tym: liczbę spraw rodzinnych skierowanych do mediacji, liczbę osiągniętych ugód, wskaźnik skuteczności mediacji.

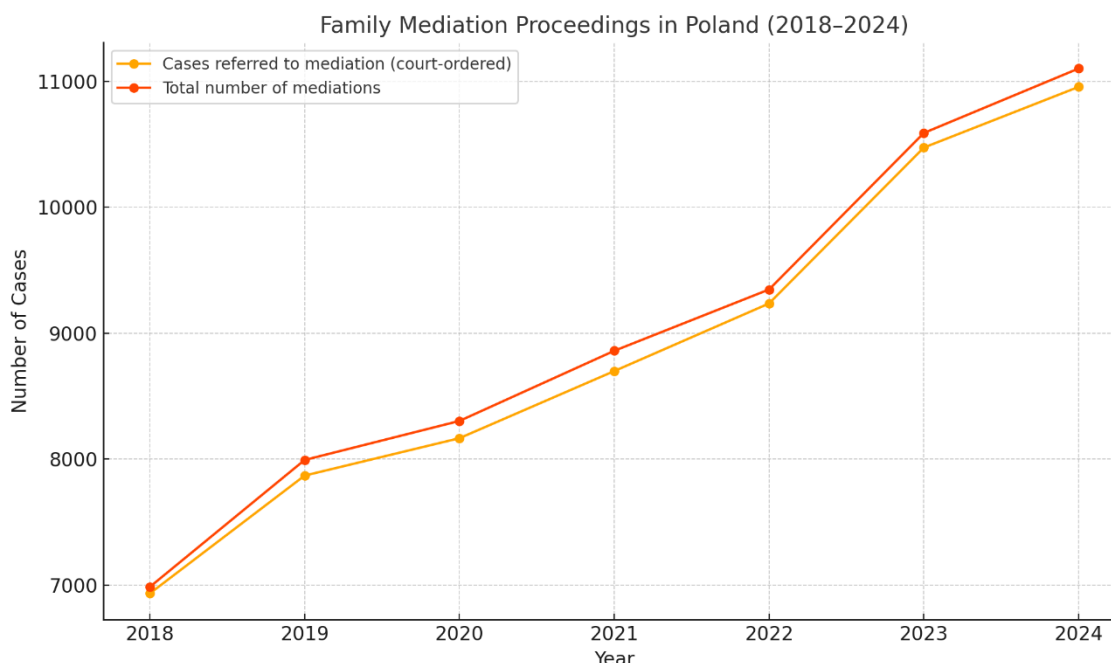
opiekuńczego w 2008 r., kiedy to sądy zaczęły częściej kierować strony do mediacji w sprawach rozwodowych i dotyczących kontaktów z dziećmi.

Kolejne zmiany prawne, takie jak wprowadzenie obowiązku informowania o próbach mediacji w postępowaniach rozwodowych na mocy nowelizacji z 2015 r., przyczyniły się do znacznego wzrostu liczby mediacji rodzinnych – 4316 spraw w 2016 r. i 6575 spraw w 2017 r.

Praktycy, w tym sędziowie, prawnicy i mediatorzy, podkreślają rosnącą rolę mediacji w sprawach rodzinnych. Wskazują oni na korzyści płynące z mediacji, takie jak szybsze rozstrzyganie sporów, mniejszy stres emocjonalny dla dziecka oraz większa elastyczność w ustalaniu warunków porozumienia. Mediacja pozwala rodzicom skupić się na dobru dziecka, co zwiększa szansę na osiągnięcie trwałego porozumienia w kwestiach dotyczących wychowania dziecka i kontaktów z obojgiem rodziców.

Na podstawie danych za lata 2018–2024 dotyczących postępowań mediacyjnych w sprawach rodzinnych w Polsce można sformułować następujące kluczowe wnioski i trendy:

1. Wzrost liczby spraw kierowanych do mediacji (sądowej) – z 6933 spraw (w 2018 r.) do 10 956 spraw (w 2024 r.).



Dane te są dostępne pod adresem: <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie>.

To wzrost o ponad 57% w ciągu 7 lat, co świadczy o rosnącym zaufaniu sądów do mediacji jako skutecznego narzędzia rozwiązywania konfliktów rodzinnych.

2. Liczba umorzeń postępowań z powodu zawarcia ugody: z 2409 (ok. 37% skuteczności w stosunku do ogółu spraw) w 2018 r. do 3881 (ok. 47% skuteczności w stosunku do ogółu spraw) w 2024 r.

Wzrost liczby umorzeń potwierdza skuteczność mediacji sądowej i poprawę jakości mediacji – więcej spraw zakończonych ugodą skutkuje trwałym porozumieniem.

3. Liczba wniosków o zatwierdzenie ugód pozasądowych: spadek z 4974 (w 2018 r.) do 2926 (w 2024 r.), tj. spadek o 41%, oraz liczba zatwierdzonych ugód pozasądowych: spadek z 4869 (w 2018 r.) do 2971 (w 2024 r.), ale wskaźnik zatwierdzeń pozostaje bardzo wysoki (~98%).

Można założyć, że coraz więcej mediacji rodzinnych odbywa się w ramach postępowania sądowego, a nie całkowicie poza sądem.

4. Marginalne przypadki odmowy zatwierdzenia ugody: zarówno w mediacji sądowej, jak i pozasądowej odsetek odmów zatwierdzenia ugody wynosi mniej niż 1%, co świadczy o wysokiej jakości pracy mediatorów i formalnej poprawności zawieranych ugód.

Podsumowując, rosnąca liczba spraw kierowanych do mediacji sądowej wskazuje, że **instytucja ta staje się coraz bardziej powszechna i skuteczna** w systemie sądów rodzinnych. Skuteczność mediacji stale rośnie, a coraz większy odsetek spraw kończy się zawarciem ugody. **Mediacja pozasądowa ma mniejszy udział**, ale nadal odgrywa ważną rolę – jej skuteczność pozostaje bardzo wysoka. Warto nadal promować mediację w sprawach rodzinnych, zwłaszcza jako narzędzie w sprawach o charakterze transgranicznym (np. uprowadzenie dziecka), gdzie może skrócić czas trwania postępowania i zmniejszyć konflikt.

W sprawach dotyczących uprowadzenia dziecka za granicę mediacja i dobrowolny powrót są zalecane na każdym etapie postępowania, zwłaszcza na początku postępowania. W praktyce mediacja w takich sprawach może być prowadzona przez mediatorów specjalizujących się w sprawach międzynarodowych, często w modelu współmediacji w którym uczestniczy

dwóch mediatorów z różnych krajów, co ułatwia komunikację i uwzględnia różnice kulturowe.

Dane¹⁴ pokazują, że w latach 2019–2024 w sądach pierwszej instancji rozpatrzono 843 sprawy dotyczące nakazów zwrotu. Tylko 5 z nich zakończyło się mediacją. W sądach drugiej instancji rozpatrzono 443 sprawy i w żadnej z nich nie była prowadzona mediacja.

W 61 sprawach rozstrzyganych przez sądy pierwszej instancji, w których zarządzono wydanie dziecka, i w 87 sprawach w sądach drugiej instancji – żadna z nie zakończyła się mediacją.

Powyższe dane pokazują, że **mediacja w sprawach dotyczących uprowadzenia dziecka na mocy konwencji haskiej w Polsce nadal nie jest normą**, zwłaszcza na etapie podejmowania decyzji (zarządzenie powrotu dziecka). Widoczne są jednak niewielkie postępy, szczególnie w sprawach dotyczących egzekwowania prawa. Może to odzwierciedlać rosnący wpływ transformacyjnych lub opartych na traumie modeli mediacji, promowanych przez organizacje pozarządowe i organizacje zajmujące się ochroną dzieci.

3.2. Standardy szkolenia i kwalifikacji (międzynarodowych) mediatorów rodzinnych

Należy wyjaśnić, że obecnie w Polsce nie ma odrębnych zasad lub przepisów mających zastosowanie do międzynarodowych mediatorów rodzinnych lub nawet bardziej ogólnie mediatorów specjalizujących się w sprawach międzynarodowych (transgranicznych).¹⁵ W związku z tym zasady dotyczące mediatorów w ogóle mają zastosowanie również do międzynarodowych mediatorów rodzinnych.

Niektóre aspekty kwalifikacji mediatorów i postępowania mediatora zostały uregulowane w Kodeksie postępowania cywilnego. Art. 183² § 1 k.p.c. stanowi, że mediatorem może być **osoba fizyczna mająca pełną zdolność do czynności**

¹⁴ Ministerstwo Sprawiedliwości udostępnia szczegółowe dane statystyczne dotyczące liczby spraw rozpatrywanych na podstawie Konwencji haskiej oraz sposobu ich rozstrzygnięcia w Informatorze Statystycznym Wymiaru Sprawiedliwości obejmującym lata 2006–2024. Dane te są dostępne pod adresem: <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie>.

¹⁵ NAPIERALSKA A., *Mediacja transgraniczna – charakterystyka postępowania na przykładzie sporów rodzinnych i gospodarczych* in ROMANOWSKI M (ed), *Mediacja – od rozmowy do porozumienia*, Instytut Wymiaru Sprawiedliwości: Warszawa 2022, p 34.

prawnych oraz korzystająca z pełni praw publicznych. Mediatorem nie może być sędzia, z wyjątkiem **sędziego w stanie spoczynku** (art. 183² § 2 k.p.c.).

Zgodnie z art. 183² § 2 k.p.c. **organizacje pozarządowe i uczelnie mogą prowadzić listy mediatorów oraz tworzyć ośrodki mediacyjne.** Wpis na listę wymaga pisemnej zgody mediatora. Informację o listach mediatorów i ośrodkach mediacyjnych przekazuje się prezesowi sądu okręgowego.

Dodatkowo, Prawo o ustroju sądów powszechnych¹⁶ przewiduje instytucję stałego mediatora, czyli mediatora, który jest wpisany na listy prowadzone przez sąd. Mediatorem stałym może być osoba fizyczna, która spełnia następujące warunki wymienione w art. 157a pkt 1 - 6 Prawa o ustroju sądów powszechnych: 1) te określone w art. 183² § 1 i 2 k.p.c. (wskazany powyżej); 2) **posiada wiedzę i umiejętności z zakresu mediacji**; 3) ukończyła 26 lat; 4) zna język polski; 5) nie była prawomocnie skazana za umyślne przestępstwo lub umyślne przestępstwo skarbowe; 6) została wpisana na listę stałych mediatorów prowadzoną przez prezesa sądu okręgowego.

Jak wyjaśniono w orzecznictwie sądów administracyjnych, które są właściwe do rozpoznawania skarg na decyzje odmawiające wpisu na listę stałych arbitrów, "(...) ustawodawca przewidział także "stanowisko" mediatora stałego. Z usytuowaniu go systemie prawnym należy uznać, że stanowi ono **szczególną, zaufaną pozycję wśród mediatorów.** Świadczą o tym dodatkowe wymagania mu stawiane (...) w tym konieczność wpisania na listę prowadzoną przez Prezesa Sądu Okręgowego. Wymaga także wydania w tym zakresie decyzji przez ten organ (...). Obowiązek wydania decyzji oznacza jednocześnie dla organu obowiązek weryfikacji spełnienia przez kandydata na stałego mediatora warunków przewidzianych przez prawo, w tym także **ocenę, czy kandydat ma (...) wiedzę i umiejętności.**"¹⁷

Orzecznictwo wskazuje, że "wiedza" muszą być na poziomie wyróżniającym kandydata na mediatora stałego spośród innych mediatorów. Natomiast "umiejętności w zakresie mediacji" należy rozumieć jako potwierdzone doświadczenie, którym dotychczasowy mediator powinien się legitymować. Swoją decyzją bowiem o wpisie na listę stałych mediatorów Prezes Sądu Okręgowego własnym autorytetem potwierdza wobec stron postępowania, że dana osoba ma nie tylko wiedzę i umiejętności potrzebne dla osiągnięcia ugody

¹⁶ Ustawa z dnia 27 lipca 2001 r. Prawo o ustroju sądów powszechnych, Dz. U. Dz.U. 2024, poz. 334. Dostępna online pod adresem: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20010981070>.

¹⁷ Wyrok Wojewódzkiego Sądu Administracyjnego w Poznaniu z dnia 25 stycznia 2018 r., sygnatura akt: III SA/Po 634/17.

przez strony, lecz także społeczne zaufanie do rozwiązywania ich sporów (...) funkcja mediatora wymaga zróżnicowanych i wysokich kwalifikacji osobowościowych, merytorycznych i moralnych. Mediator musi mieć zdolność właściwej oceny sytuacji i adekwatnych do niej zachowań. Stając między stronami w sporze powinien mieć predyspozycje do tego, aby stać się dla nich autorytetem.”¹⁸

Rozporządzenie¹⁹ reguluje tworzenie list stałych mediatorów prowadzonych przez sądy okręgowe. Lista stałych mediatorów powinna zawierać m.in. informacje o wykształceniu i odbytych przez mediatora szkoleniach oraz informacje o jego specjalizacji (np. prawo rodzinne). Należy zwrócić uwagę, że nie istnieje odrębna lista stałych mediatorów specjalizujących się w międzynarodowej mediacji rodzinnej.²⁰ Niektórzy z mediatorów, podając informacje, które powinny znaleźć się na liście stałych mediatorów, wskazują, że specjalizują się w sprawach transgranicznych, w tym w transgranicznych sprawach rodzinnych.²¹

Zgodnie z art. 157c § 1 pkt 5 Prawa o ustroju sądów powszechnych, prezes sądu okręgowego, w drodze decyzji, skreśla stałego mediatora z listy w przypadku m.in. **nienależytego wykonywania obowiązków przez stałego mediatora**.

Ministerstwo Sprawiedliwości powołało organ doradczy - **Spółeczną Radę do Spraw Alternatywnych Metod Rozwiązywania Sporów przy Ministrze Sprawiedliwości**. Organ ten przygotowuje wytyczne i zalecenia w formie **uchwał** na tematy związane z mediacją. Uchwały te nie są aktami prawnymi, a zatem nie mają mocy powszechnie obowiązującej.

Część uchwał przygotowanych przez Spółeczną Radę ds. Alternatywnych Metod Rozwiązywania Konfliktów i Sporów przy Ministrze Sprawiedliwości dotyczy standardów szkolenia i kwalifikacji mediatorów. **Uchwała nr 1/2023 z**

¹⁸ Wyrok Wojewódzkiego Sądu Administracyjnego w Poznaniu z dnia 25 stycznia 2018 r., sygnatura akt: III SA/Po 634/17.

¹⁹ Rozporządzenie Ministra Sprawiedliwości z dnia 20 stycznia 2016 r. w sprawie prowadzenia listy stałych mediatorów, Dz.U.2016, poz. 122. Dostępne online: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20160000122>.

²⁰ NAPIERALSKA A, *Mediacja transgraniczna – charakterystyka postępowania na przykładzie sporów rodzinnych i gospodarczych* in ROMANOWSKI M. (ed), *Mediacja – od rozmowy do porozumienia*, Instytut Wymiaru Sprawiedliwości: Warszawa 2022, p 34.

²¹ Przykład takiej listy na stronie internetowej Sądu Okręgowego w Krakowie: [https://www.krakow.so.gov.pl/container/menu-glowne/informacje-dla-interesantow/mediacje/lista-stalych-mediatorow/2025/Lista_stalych_mediatorow_%2030-05-2025%20r%20\(1\).pdf](https://www.krakow.so.gov.pl/container/menu-glowne/informacje-dla-interesantow/mediacje/lista-stalych-mediatorow/2025/Lista_stalych_mediatorow_%2030-05-2025%20r%20(1).pdf)

dnia 23 marca 2023 r. w sprawie standardów szkolenia mediatorów²² W części wstępnej wyjaśniono, że *‘brakuje prawnie określonych standardów szkolenia mediatorów’*, a zatem rezolucja jest potrzebna, aby *„zapewnić wysoki poziom edukacji mediatorów i profesjonalizację zawodu”*. Rezolucja przewiduje **szkolenie podstawowe** (40 godzin dydaktycznych) zapewniające podstawową wiedzę i umiejętności w zakresie mediacji oraz **szkolenie specjalistyczne**. Uchwała przewiduje, że **szkolenie specjalistyczne z zakresu mediacji w sprawach rodzinnych** (w wymiarze 60 godzin dydaktycznych) powinno obejmować m.in. następujące aspekty: psychologia rodziny, perspektywa dzieci w mediacji, techniki identyfikacji potrzeb stron mediacji i innych osób dotkniętych konfliktem, techniki wspierające identyfikację potrzeb, postępowanie sądowe w sprawach rodzinnych, w tym: prawa i obowiązki małżonków, rozwiązanie małżeństwa przez rozwód, separacja formalna, zasady podziału majątku wspólnego, alimenty, władza rodzicielska, rodzaje mediacji rodzinnych, modele prowadzenia mediacji w sprawach rodzinnych, dokumenty mediacyjne, koszty mediacji. Uchwała reguluje również kto może być trenerem w ramach szkolenia podstawowego i specjalistycznego, w jaki sposób szkolenie powinno wyglądać, zalecaną formę szkolenia (np. wykłady nie powinny przekraczać 10% czasu szkolenia) oraz zalecane metody dydaktyczne (np. symulacje mediacji).

Istnieją również ośrodki mediacyjne, które określają **własne zasady szkolenia i standardy kwalifikacji mediatorów rodzinnych**, które mogą być bardziej wymagające niż te rekomendowane przez Społeczną Radę ds. Alternatywnych Metod Rozwiązywania Konfliktów i Sporów przy Ministrze Sprawiedliwości.²³ Takie szkolenia oferują również ośrodki mediacyjne. Niektórzy mediatorzy uczestniczą w **szkoleniach organizowanych przez Międzynarodowe Centrum Mediacji ds. Konfliktów Rodzinnych i Uprowadzeń Dzieci** (*International Mediation Centre for Family Conflict and Child Abduction* - MIKK).

W Polsce **nie ma narzuconych przez państwo standardów etycznych dla mediatorów**, jednak takie standardy istnieją w formie *soft law*. Społeczna Rada ds. Alternatywnych Metod Rozwiązywania Konfliktów i Sporów przy Ministrze Sprawiedliwości w uchwale z maja 2008 r. wprowadziła **Kodeks Etyki**

²² Uchwała nr 1/2023 Społecznej Rady do spraw Alternatywnych Metod Rozwiązywania Sporów przy Ministrze Sprawiedliwości z dnia 23 marca 2023. w sprawie przyjęcia standardów szkolenia mediatorów. Uchwała jest dostępna pod adresem: <https://www.gov.pl/attachment/c16bfe07-e2c5-4f50-8467-ba16d98b06d8>

²³ Zob. na przykład, Standardy Szkolenia Mediatorów Stowarzyszenie Mediatorów Rodzinnych dostępny pod adresem: <https://smr.org.pl/standardy/standardy-szkolenia-mediatorow/>.

Mediatorów Polskich²⁴ Niektóre ośrodki medacyjne opracowują **własne kodeksy postępowania dla mediatorów**.²⁵

3.3. Kluczowi uczestnicy (międzynarodowej) mediacji rodzinnej i świadczone przez nich usługi

Jak wspomniano powyżej, **Ministerstwo Sprawiedliwości** promuje mediację w Polsce m.in. poprzez swój organ doradczy - **Spółeczną Radę do Spraw Alternatywnych Metod Rozwiązywania Sporów przy Ministrze Sprawiedliwości**. Organ ten przygotowuje wytyczne i rekomendacje w formie **uchwał** na tematy związane z mediacją. Jednym z ważnych osiągnięć tej Rady są standardy dotyczące szkoleń mediatorów, w tym tych specjalizujących się w sprawach rodzinnych. Należy jednak pamiętać, że żadna z uchwał nie odnosi się konkretnie do międzynarodowej mediacji rodzinnej.

Zgodnie z art. 183² § 2 k.p.c. **organizacje pozarządowe i uczelnie mogą prowadzić listy mediatorów i tworzyć ośrodki medacyjne**. W związku z tym powstają **ośrodki medacyjne** prowadzące własne listy mediatorów. Niektóre z

²⁴ Kodeks stanowi: : I. Mediator powinien prowadzić postępowanie medacyjne w oparciu o zasadę samodzielności i autonomii stron konfliktu. II. Mediator powinien w swym postępowaniu kierować się przede wszystkim dobrem i interesami stron. III. Mediator powinien dbać o zapewnienie dobrowolności udziału stron w postępowaniu medacyjnym. IV. Mediator powinien tak postępować, aby wszystkie strony sporu znały i rozumiały istotę procesu mediacji, rolę mediatora i warunki ewentualnego porozumienia. V. Mediator nie powinien podejmować się pomocy w rozwiązywaniu konfliktu, gdy nie ma pełnego przekonania o swoich kompetencjach, które pozwolą mu prowadzić postępowanie rzetelnie. VI. Mediator nie powinien prowadzić postępowania medacyjnego, jeśli nie jest w stanie zachować bezstronności lub usunąć wątpliwości co do swojej bezstronności. VII. Mediator powinien zachowywać poufność postępowania medacyjnego, zarówno przed jego rozpoczęciem, w trakcie, jak i po jego zakończeniu. VIII. Mediator powinien unikać konfliktu interesów ze stronami i bezzwłocznie rozwiewać wszelkie wątpliwości co do tej kwestii. IX. Mediator nie powinien przyjmować żadnych korzyści od stron z wyjątkiem uzgodnionego wynagrodzenia. Nie powinien też czerpać korzyści z kierowania stron do innych specjalistów. X. Mediator w swojej działalności informacyjnej i marketingowej nie powinien wprowadzać w błąd stron i opinii publicznej co do swoich kwalifikacji, kompetencji, doświadczenia, zakresu usług i opłat. XI. Mediator powinien dostarczać stronom jasnych i jednoznacznych informacji co do swojego wynagrodzenia i wszelkich kosztów związanych z postępowaniem, w którym uczestniczą. XII. Mediator powinien pogłębiać swoje kompetencje zawodowe w celu jak najlepszego służenia uczestnikom mediacji. Dostępne na stronie: <https://www.gov.pl/attachment/24d7098a-6fd8-425b-a995-1976676edc9b>

²⁵ Kodeks etyki mediatora *Polskiego Centrum Mediacji* jest dostępny na stronie: <https://mediator.org.pl/baza-wiedzy/kodeks-etyki-mediatora/>

tych ośrodków koncentrują się na prawie cywilnym i handlowym (np. Centrum Mediacji Lewiatan²⁶), niektóre przewidują mediację w różnego rodzaju sporach, w tym z zakresu prawa rodzinnego (np. Polskie Centrum Mediacji²⁷), inne koncentrują się wyłącznie na mediacjach rodzinnych (na przykład Stowarzyszenie Mediatorów Rodzinnych²⁸). Na swoich stronach internetowych organizacje te udostępniają mniej lub bardziej szczegółowe informacje na temat mediacji.

Zgodnie z art. 16a § 1 ustawy Prawo o ustroju sądów powszechnych, w każdym sądzie okręgowym w Polsce działa **koordynator ds. mediacji**, który prowadzi działania mające na celu rozwój mediacji, zapewnienie sprawnej komunikacji między sędziami a mediatorami i stałymi mediatorami oraz współdziałanie w organizacji spotkań informacyjnych.²⁹ Koordynator ds. mediacji powoływany jest spośród sędziów danego sądu okręgowego (art. 16a § 3 Prawa o ustroju sądów powszechnych).

Kolejną instytucją aktywnie działającą na rzecz promocji mediacji w Polsce jest krajowa sekcja **GEMME: European Judges Group for Mediation**.³⁰ Krajowa sekcja GEMME podejmuje różne inicjatywy mające na celu promowanie mediacji, na przykład zapewnia szkolenia dla sędziów prowadzone przez sędziów. Oferuje na swojej stronie internetowej wiele dokumentów, które sędzia może wykorzystać rozważając skierowanie stron do mediacji (np. diagnozę sprawy, list do stron informujący o mediacji, list do profesjonalnych pełnomocników informujący o mediacji, wzór kwestionariusza pomagającego stronom ocenić, czy mediacja jest możliwa w ich sprawie oraz zestaw dobrych praktyk dla sędziów).³¹

Należy również wspomnieć o **Międzynarodowym Centrum Mediacji ds. Konfliktów Rodzinnych i Uprowadzeń Dzieci - MIKK**.³² Jedną z inicjatyw MIKK była tzw. Wrocławska Deklaracja w sprawie Mediacji w Dwunarodowych Sporach o Sprawy Rodzicielskie i dotyczące Dzieci³³, która zawiera Model

²⁶ Strona internetowa dostępna pod adresem: <https://lewiatan.org/centrum-mediacji-lewiatan/>

²⁷ Strona internetowa dostępna pod adresem: <https://mediator.org.pl>

²⁸ Strona internetowa dostępna pod adresem: <https://smr.org.pl>

²⁹ Na temat pełnienia funkcji koordynatora ds. mediacji zob.: BODYS T., *Funkcja koordynatora do spraw mediacji w sądach powszechnych* in ROMANOWSKI M. (ed) *Mediacja: w kierunku ugody*, Warszawa 2021, p. 83-91.

³⁰ Strona internetowa dostępna pod adresem: <https://polska.gemmeeurope.org/sedziowie-sedziom-o-mediacji>

³¹ Dostępne pod adresem: <https://polska.gemmeeurope.org/wzory-dokumentow>.

³² Dostępna pod adresem: <https://mikk-ev.org/wp-content/uploads/2023/06/Wroclaw-Declaration-en-pol-ger.pdf>.

³³ Dostępna pod adresem: <https://mikk-ev.org/4-bs-mediation-model/>.

Mediacji 4B. Deklaracja Wrocławska jest wynikiem współpracy polskich i niemieckich mediatorów.

Kolejną inicjatywą, którą należy wymienić jest działalność **Fundacji ITAKA Centrum Poszukiwań Ludzi Zaginionych** oraz prowadzone przez nią **Centrum Wsparcia i Mediacji dla rodzin zagrożonych sytuacją porwania rodzicielskiego**.³⁴ Jednym z zadań Centrum jest „ukierunkowane na polubowne zakończenie powstałego między rodzicami sporu, a w szczególności skierowanie skonfliktowanych rodziców na mediację”.

W Polsce **nie ma jednego, określonego przez państwo podejścia do mediacji**. Ministerstwo Sprawiedliwości rejestruje mediatorów, ale nie narzuca jednolitego modelu postępowania wykraczającego poza wymogi prawne (takie jak neutralność, poufność i dobrowolność). W praktyce **podejście** może się zatem różnić w zależności od wykształcenia mediatora (prawo, psychologia, socjologia), szkolenia zawodowego (certyfikowane programy mediacyjne, terapia rodzinna itp.) oraz przynależności (np. mediator z organizacji pozarządowej lub mediator wyznaczony przez sąd).

Chociaż nie ma jednej obowiązkowej metodologii, w literaturze naukowej istnieje **kilka różnych podejść** (lub „szkół”). Można więc wyróżnić **główne podejścia** stosowane przez służby mediacyjne w Polsce, szczególnie **w sprawach rodzinnych i dotyczących odpowiedzialności rodzicielskiej**.

Najczęściej stosowaną formą mediacji, szczególnie w sprawach rodzinnych kierowanych przez sądy, jest **mediacja facylitatywna**. Podejście to kładzie nacisk na rolę mediatora jako neutralnego facylitatora, który kieruje dialogiem między stronami, nie narzucając żadnych rozwiązań. Istotą tej metodologii jest aktywne słuchanie, pomaganie stronom w wyrażaniu ich interesów oraz tworzenie przestrzeni dla konstruktywnej komunikacji. Mediator nie ocenia sprawy ani nie udziela porad prawnych, zamiast tego zachęca uczestników do wypracowania własnych, wzajemnie akceptowalnych rozwiązań. Model ten jest szeroko stosowany w sprawach dotyczących władzy rodzicielskiej, ustaleń dotyczących kontaktów z dziećmi oraz podziału majątku między członków rodziny.³⁵

Rzadziej stosowanym podejściem jest **mediacja ewaluatywna** lub **ocenna**. W tym modelu mediator może sugerować możliwe rozwiązania lub oferować

³⁴ Dostępne pod adresem: <https://porwaniarodzicielskie.pl>.

³⁵ DANISZEWSKA-ZUJKO A., Część II. Rozdział 1. Rodzaje mediacji. Charakterystyka i zastosowanie, w ROGULA C., ZEMKE-GÓRECKA A. (red.), *Mediacja w praktyce mediatora i pełnomocnika*, Wolters Kluwer, Warszawa, 2021, s. 114-115.

opinie prawne, zwłaszcza gdy spór ma silny wymiar prawny lub finansowy. Ta forma mediacji jest często wybierana, gdy mediator ma wykształcenie prawnicze - np. jest emerytowanym sędzią lub praktykującym prawnikiem. Mediacja ocenna jest czasami stosowana w sprawach rodzinnych dotyczących rozliczeń majątkowych lub alimentów, w których znajomość standardów prawnych może być pomocna. Podejście to jest jednak postrzegane przez niektórych praktyków jako kontrowersyjne, szczególnie przez tych, którzy podkreślają znaczenie ścisłej neutralności i powstrzymywania się od wpływania na decyzje stron w mediacji.³⁶

Znajdującym coraz szersze zastosowanie modelem jest **mediacja transformatywna**. Podejście to koncentruje się nie tylko na osiągnięciu porozumienia, ale także na przekształceniu relacji między stronami. Kluczowymi celami są wzmocnienie pozycji każdej ze stron i wspieranie wzajemnego uznania interesów. Mediacja transformatywna jest szczególnie istotna w sytuacjach rodzinnych o wysokim stopniu konfliktu, w tym w sprawach o uprowadzenie dziecka za granicę, gdzie dynamika emocjonalna jest złożona, a długoterminowa współpraca między rodzicami jest niezbędna. Metoda ta jest często promowana przez organizacje pozarządowe i rzeczników ochrony dzieci, a także jest preferowana przez mediatorów z doświadczeniem w psychologii lub terapii.³⁷

Wreszcie, bardziej wyspecjalizowaną i rzadziej stosowaną metodą jest **mediacja narracyjna**. Podejście to zachęca strony do refleksji i przeformułowania historii, które opowiadają o swoim konflikcie. Celem jest skonstruowanie nowej, wspólnej narracji, która pozwoli na inną perspektywę i poprawę przyszłych interakcji. Mediacja narracyjna jest zwykle stosowana w głęboko zakorzenionych sporach rodzinnych - takich jak trwające konflikty między byłymi partnerami lub napięcia międzypokoleniowe - i jest zwykle prowadzona przez profesjonalistów z wykształceniem psychospołecznym, takich jak terapeuci rodzinni lub pracownicy socjalni.³⁸

Udział dziecka w procesie mediacji, w szczególności w transgranicznych sprawach rodzinnych, **nie jest szczegółowo regulowany** przez wiążące prawo krajowe, a **powszechna praktyka jest zróżnicowana**. Istnieją jednak ważne zasady prawne i ewoluujące standardy zawodowe, które kształtują sposób i to, czy dzieci są wysłuchiwane lub informowane w mediacji.

³⁶ DANISZEWSKA-ZUJKO A., *Część II. Rozdział 1. Rodzaje mediacji. Charakterystyka i zastosowanie*, cit., s. 115-116.

³⁷ GMURZYŃSKA E., *Rozdział 9. Rodzaje mediacji* w MOREK R., GMURZYŃSKA E. (red.) *Mediacje: Teoria i praktyka*, Warszawa 2024, s. 184-187.

³⁸ DANISZEWSKA-ZUJKO A., *Część II. Rozdział 1. Rodzaje mediacji. Charakterystyka i zastosowanie*, cit., s. 117-118.

Polskie prawo, choć nie określa roli dziecka w samej mediacji, podkreśla **prawo dziecka do bycia wysłuchanym w postępowaniu, które go dotyczy**, co pośrednio odnosi się do mediacji:

- Artykuł 72 ust. 3 **Konstytucji RP**³⁹ gwarantuje dziecku prawo do bycia wysłuchanym we wszystkich sprawach, które go dotyczą:

“Art. 72. Zasada dobra dziecka

3. W toku ustalania praw dziecka organy władzy publicznej oraz osoby odpowiedzialne za dziecko są obowiązane do wysłuchania i w miarę możliwości uwzględnienia zdania dziecka.

- Artykuły 216¹ i 216² Kodeksu postępowania cywilnego regulują obowiązek i procedurę wysłuchania dziecka przez sąd w sprawach cywilnych dotyczących go, w szczególności w sprawach rodzinnych, takich jak opieka, kontakty i władza rodzicielska:

“Art. 216¹. [Wysłuchanie dziecka]

§ 1. Sąd w sprawach dotyczących osoby małoletniego dziecka wysłucha je, jeżeli jego rozwój umysłowy, stan zdrowia i stopień dojrzałości na to pozwala. Jeżeli przed sądem dziecko odmawia udziału w wysłuchaniu, sąd odstępuje od tej czynności.

§ 2. Sąd stosownie do okoliczności, rozwoju umysłowego, stanu zdrowia i stopnia dojrzałości dziecka uwzględni jego zdanie i rozsądne życzenia.

§ 3. Wysłuchanie dziecka może nastąpić tylko raz w toku postępowania, chyba że dobro dziecka wymaga ponownego przeprowadzenia tej czynności lub potrzebę ponownego wysłuchania zgłasza dziecko. Ponowne wysłuchanie dziecka przeprowadza ten sam sąd, chyba że jest to niemożliwe lub stoi temu na przeszkodzie dobro dziecka.

§ 4. Jeżeli sąd odstąpił od wysłuchania dziecka, najpóźniej przed zakończeniem postępowania, wskazuje w protokole posiedzenia lub rozprawy, z jakich przyczyn czynność ta nie została przeprowadzona.

“Art. 216². [Przebieg wysłuchania dziecka]

³⁹ Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Dz.U. 1997 nr 78, poz. 483, <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19970780483>.

§ 1. Wystuchanie dziecka następuje na posiedzeniu niejawnym, które odbywa się w odpowiednio przystosowanych pomieszczeniach w siedzibie sądu lub, jeżeli dobro dziecka tego wymaga, poza jego siedzibą.

§ 2. W wystuchaniu dziecka, oprócz sędziego, może brać udział wyłącznie biegły psycholog, jeżeli z uwagi na stan zdrowia, rozwój umysłowy lub wiek dziecka niezbędne jest zapewnienie mu pomocy psychologicznej podczas wystuchania lub zachodzi konieczność udzielenia pomocy sędziemu w zakresie rozpoznania potrzeb dziecka podczas wystuchania.

§ 3. Z przebiegu wystuchania dziecka sporządza się notatkę urzędową. Przebiegu wystuchania dziecka nie utrzuca się za pomocą urządzenia rejestrującego dźwięk albo obraz i dźwięk.

§ 4. Minister Sprawiedliwości określi, w drodze rozporządzenia, sposób przygotowania i przeprowadzenia wystuchania dziecka oraz warunki, jakim mają odpowiadać pomieszczenia przeznaczone do przeprowadzania takich wystuchań, mając na względzie konieczność zapewnienia swobody wypowiedzi i poczucia bezpieczeństwa wystuchiwanym dzieci.

- Zgodnie z Rozporządzeniem Bruksela II-ter (Rozporządzenie 2019/1111, art. 21) dzieci muszą mieć możliwość wyrażenia swoich poglądów w transgranicznych postępowaniach dotyczących pieczy nad dzieckiem i uprowadzenia dziecka.

Żaden z tych przepisów nie nakłada jednak obowiązku wystuchania dziecka w ramach samej mediacji - jedynie w postępowaniu sądowym.⁴⁰

Polski Kodeks postępowania cywilnego (art. 183¹-183¹⁵) ogólnie reguluje mediację, ale **nie zawiera szczegółowych zasad dotyczących udziału dzieci**. Prawo zezwala sądowi na skierowanie stron do mediacji, ale milczy na temat tego, czy i w jaki sposób poglądy lub interesy dziecka powinny być aktywnie reprezentowane lub uwzględniane w procesie.

W praktyce to, czy i w jaki sposób dzieci są angażowane w mediacje rodzinne, w szczególności w transgranicznych sprawach rodzinnych, **zależy od szkolenia i podejścia mediatora**. Mediatorzy przeszkoleni w zakresie międzynarodowych

⁴⁰ Zob.: ARKUSZEWSKA A., Rozdział IX. Udział dziecka w mediacji w sprawach dotyczących wykonywania władzy rodzicielskiej i kontaktów oraz jego reprezentacja, in: MUCHA J. (red.) Realizacja zasady dobra dziecka w mediacji w sprawach dotyczących wykonywania władzy rodzicielskiej i kontaktów, Wolters Kluwer, Warszawa 2021, s. 321-324.

mediacji rodzinnych częściej uwzględniają perspektywę dziecka, albo pośrednio (poprzez ćwiczenia refleksji rodzicielskiej lub metody skoncentrowane na dziecku), albo poprzez modele mediacji z udziałem dzieci, obejmujące przeszkolonego konsultanta dziecięcego, który rozmawia z dzieckiem i przekazuje jego poglądy.⁴¹

Istotną rolę odgrywa również **wiek i dojrzałość dziecka**. Dzieci poniżej 6 roku życia nie powinny uczestniczyć w mediacjach. Jeśli chodzi o dzieci w wieku szkolnym, powinno to zależeć od indywidualnych predyspozycji dziecka, natomiast w odniesieniu do nastolatków wskazuje się, że ich potrzeba bycia wysłuchanym powinna być zawsze brana pod uwagę podczas mediacji⁴², za zgodą rodziców, zwłaszcza w sporach transgranicznych, choć w Polsce pozostaje to rzadkością w porównaniu z innymi krajami (np. Wielką Brytanią czy Holandią).

W przypadku mediacji transgranicznych, zwłaszcza gdy jedna ze stron mieszka w innym kraju UE, **mediatorzy często stosują się do międzynarodowych wytycznych**, takich jak: Zalecenie Rady Europy w sprawie mediacji rodzinnej⁴³, które zachęca do uwzględniania poglądów dziecka lub Standardy MiKK dotyczące transgranicznej mediacji rodzinnej⁴⁴, promujące procedury uwzględniające potrzeby dzieci.

Nie ma również prawnego obowiązku informowania dziecka o mediacji lub jej wyniku. Mediatorzy mogą, w indywidualnych przypadkach, zachęcać rodziców do omówienia procesu z dzieckiem w sposób dostosowany do jego wieku lub/i w razie potrzeby zaangażować psychologów dziecięcych lub doradców.

Badania i raporty pokazują, że w polskiej praktyce mediacja pozostaje **skoncentrowana na rodzicach, głosy dzieci są zwykle uwzględniane pośrednio, a doświadczenie i organizacja** w odniesieniu do mediacji z udziałem

⁴¹ Zob.: GRĘDZIŃSKA J., Część V. Rozdział 5. Mediacja w sprawach rodzinnych, in ROGULA C., ZEMKE-GÓRECKA A. (red.), *Mediacja w praktyce mediatora i pełnomocnika*, Warszawa 2021, s. 417-418.

⁴² GRĘDZIŃSKA J., Część V. Rozdział 5. Mediacja w sprawach rodzinnych, cit., p. 422.

⁴³ Recommendation No. R (98)1 on family mediation, adopted in Strasbourg, 11 January 2006, CEPEJ-GT-MED (2006) 1.

⁴⁴ W wielu dokumentach przygotowanych przez MiKK, np. ALLPORT L., *The Voice of the Child in International Family Mediation*, w: PAUL C. Ch., KIESEWETTER S., KHALAF-NEWSOME I. (red.), *Cross-border Family Mediation. International Parental Child Abduction. Custody and Access Cases*, 3rd red., Wolfgang Metzner Publishing, Frankfurt am Main, 2023.

dzieci lub mediacji kierowanej przez dzieci w sprawach transgranicznych są ograniczone.⁴⁵

3.4. Dostęp do informacji o międzynarodowej mediacji rodzinnej

W Polsce rodzice mogą dowiedzieć się o dostępności usług międzynarodowej mediacji rodzinnej i nawiązać z nimi kontakt **za pośrednictwem kilku kanałów prawnych, instytucjonalnych i praktycznych**, chociaż **nie ma jednego, scentralizowanego mechanizmu** stworzonego w tym celu.

Po pierwsze, mogą być informowani przez **Organ centralny i sądy**. Zgodnie z art. 25 rozporządzenia Bruksela II-ter (Rozporządzenie 2019/1111) państwa członkowskie są zobowiązane do zachęcania do korzystania z mediacji i alternatywnych metod rozwiązywania sporów w sprawach rodzinnych. W Polsce obowiązek ten jest realizowany przede wszystkim poprzez:

Organ centralny Konwencji haskiej z 1980 r. i Rozporządzenia Bruksela II (tj. Ministerstwo Sprawiedliwości - Departament Współpracy Międzynarodowej i Praw Człowieka), który udziela informacji rodzicom zaangażowanym w transgraniczne spory dotyczące uprowadzenia dziecka lub opieki nad nim, a także może sugerować mediację i oferować kontakt z instytucjami mediacyjnymi lub mediatorami, zwłaszcza we współpracy z organizacjami pozarządowymi, takimi jak Polskie Centrum Mediacji lub Stowarzyszenie Mediatorów Rodzinnych.

Sądy rodzinne, które zgodnie z polskim prawem procesowym (art. 183⁸ Kodeksu postępowania cywilnego) mogą informować lub kierować strony do mediacji, zwłaszcza gdy konflikt między rodzicami jest duży, a ugodowe rozwiązanie może leżeć w najlepszym interesie dziecka.

Art. 183⁸. *[Skierowanie do mediacji]*

§ 1. *Sąd może skierować strony do mediacji na każdym etapie postępowania.*

⁴⁵ Zob.: CYBULKO A., MUCHA J., *Rozdział XII. Badania ankietowe*, in Joanna Mucha (red.) *Realizacja zasady dobra dziecka w mediacji w sprawach dotyczących wykonywania władzy rodzicielskiej i kontaktów*, Wolters Kluwer, Warszawa 2021, s. 431-438.

§ 2. Mediacji nie prowadzi się, jeżeli strona w terminie tygodnia od dnia ogłoszenia lub doręczenia jej postanowienia kierującego strony do mediacji nie wyraziła zgody na mediację.

§ 3. Przepisu § 1 nie stosuje się w sprawach rozpoznawanych w postępowaniach upominawczym oraz nakazowym, chyba że doszło do skutecznego wniesienia zarzutów.

§ 4. Przewodniczący może wezwać strony do udziału w spotkaniu informacyjnym dotyczącym polubownych metod rozwiązywania sporów, w szczególności mediacji. Spotkanie informacyjne może prowadzić sędzia, referendarz sądowy, urzędnik sądowy, asystent sędziego lub stały mediator.

§ 5. Przed pierwszym posiedzeniem wyznaczonym na rozprawę przewodniczący dokonuje oceny, czy skierować strony do mediacji. W tym celu przewodniczący, jeżeli zachodzi potrzeba wysłuchania stron, może wezwać je do osobistego stawiennictwa na posiedzeniu niejawnym.

§ 6. Jeżeli strona bez uzasadnienia nie stawia się na spotkanie informacyjne lub posiedzenie niejawne, sąd może obciążyć ją kosztami nakazanego stawiennictwa poniesionymi przez stronę przeciwną.

W sprawach dotyczących uprowadzenia dziecka za granicę (na mocy Konwencji haskiej z 1980 r.) właściwy polski sąd (zazwyczaj sądy rejonowe) może zawiesić postępowanie w celu umożliwienia mediacji, jeżeli może to służyć dobru dziecka (w oparciu o orzecznictwo dostosowane do art. 25 Rozporządzenia Bruksela II-ter).

Po drugie, dostęp do mediacji jest możliwy za pośrednictwem **organizacji pozarządowych i sieci mediacyjnych**. Kilka organizacji pozarządowych i sieci dostarcza informacji związanych z mediacją rodzinną, zwłaszcza w kontekście transgranicznym. Polskie Centrum Mediacji i inne organizacje prowadzą strony internetowe ze wskazówkami, formularzami kontaktowymi i są w kontakcie z wielojęzycznymi (ze znajomością języka polskiego, angielskiego i niemieckiego) mediatorami działającymi w sprawach międzynarodowych. Organizacje te często zapewniają bezpłatne lub tanie wstępne konsultacje, listy przeszkolonych mediatorów specjalizujących się w międzynarodowych konfliktach rodzinnych oraz dostęp do internetowych platform mediacyjnych i wsparcie w komunikacji między rodzicami za granicą.

Po trzecie, możliwe jest uzyskanie informacji o międzynarodowej mediacji rodzinnej za pośrednictwem **prawników**. Radcy prawni i adwokaci oraz ośrodki

pomocy prawnej często informują klientów o mediacji jako możliwej alternatywie, zwłaszcza gdy postępowanie sądowe jest kosztowne, transgraniczne lub obciążone emocjonalnie. Stowarzyszenia adwokackie i biura pomocy prawnej czasami prowadzą katalogi certyfikowanych mediatorów, w tym tych przeszkolonych w zakresie międzynarodowego prawa rodzinnego i komunikacji międzykulturowej.⁴⁶

Istnieje również możliwość korzystania z **sieci UE i unijnych platform internetowych**. Europejski portal „e-Sprawiedliwość” oferuje funkcję „Znajdź mediatora” oraz krajowe strony z informacjami o tym, jak i gdzie uzyskać dostęp do IFM w Polsce.⁴⁷ Finansowane przez UE sieci szkoleniowe i bazy danych (np. Transgraniczna Sieć Mediatorów Rodzinnych⁴⁸) zawierają listę specjalistów pracujących w krajach UE, w tym polskich mediatorów.

Badania potwierdzają, że podczas gdy polskie ramy prawne dopuszczają i zachęcają do mediacji, praktyczny dostęp do mediacji międzynarodowej często zależy od inicjatywy sędziów, władz centralnych lub organizacji pozarządowych i nie zawsze jest systematyczny.⁴⁹

Podsumowując, polscy rodzice mogą uzyskać dostęp do usług IFM za pośrednictwem sądów, organów centralnych, organizacji pozarządowych, prawników i platform internetowych. Chociaż Bruksela II-ter wzmocniła obowiązek promowania mediacji, scentralizowany system skierowań jeszcze nie istnieje, a kontakt często zależy od wiedzy i chęci zaangażowanych instytucji lub osób.

W Polsce organem centralnym na potrzeby konwencji o uprowadzeniu dziecka z 1980 r., konwencji o ochronie dzieci z 1996 r. oraz rozporządzenia Bruksela II ter jest Minister Sprawiedliwości. W 2018 r. uchwalono nową ustawę o funkcjach organu centralnego.⁵⁰ Nie wspomina jednak konkretnie o roli organu centralnego w kontekście mediacji.

⁴⁶ ZAGÓRSKA K., *Rozdział szósty. Mediacje transgraniczne w sprawach rodzinnych*, in TABERNACKA M. (ed) *Mediacje ponad podziałami*, Wrocław 2013, p. 114.

⁴⁷ Zob.: https://e-justice.europa.eu/topics/find-legal-professional/mediators_en.

⁴⁸ Zob.: <https://crossbordermediator.eu/>.

⁴⁹ CYBULKO A., *Rozdział 18. Mediacja w sprawach rodzinnych*, in MOREK R., GMURZYŃSKA E. (red.) *Mediacje: Teoria i praktyka*, Wolters Kluwer, Warszawa 2024, s. 361-364.

⁵⁰ Ustawa z dnia 26 stycznia 2018 r. o wykonywaniu niektórych czynności organu centralnego w sprawach rodzinnych z zakresu obrotu prawnego na podstawie prawa Unii Europejskiej i umów międzynarodowych, Dz. U. 2023 r. poz. 1236. Dostępna online pod adresem: <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20180000416>

Po skontaktowaniu się z zespołem iCARE2 w Polsce, organ centralny podkreślił, że nie prowadzi międzynarodowej mediacji rodzinnej. Jednocześnie organ centralny podkreślił swoje zainteresowanie międzynarodową mediacją rodzinną, stwierdzając, że w lutym 2025 r. przystąpił do Grupy Roboczej ds. mediacji w kontekście procesu maltańskiego. Należy jednak zauważyć, że na stronie internetowej Haskiej Konferencji Prawa Prywatnego Międzynarodowego nadal nie ma informacji o utworzeniu potencjalnych **Centralnych Punktów Kontaktowych ds. Międzynarodowej Mediacji Rodzinnej** w Polsce⁵¹ przewidziane w Zasadach ustanawiania struktur mediacyjnych w kontekście Procesu Maltańskiego.⁵²

Profil państwa (**Country Profile**)⁵³ dostępny na stronie Haskiej Konferencji Prawa Prywatnego Międzynarodowego może służyć jako pierwsze, wprowadzające źródło informacji na temat mediacji w Polsce. Daje również pewien wgląd **w obowiązki organu centralnego w zakresie informowania stron o dostępności mediacji.**

Profil krajowy wyjaśnia, że sprawy dotyczące opieki nad dzieckiem, prawa do kontaktów z dzieckiem, a także powrotu dziecka po domniemanym bezprawnym uprowadzeniu mogą być rozstrzygane w drodze mediacji w Polsce.⁵⁴ W przypadku otrzymania wniosku o powrót dziecka lub o dostęp / kontakt z dzieckiem, możliwe jest skorzystanie z mediacji. Profil krajowy informuje, że "istnieje wiele podmiotów świadczących usługi mediacyjne w całej Polsce. Listy mediatorów są dostępne w każdym sądzie okręgowym".⁵⁵ Odpowiedź „Nie” została udzielona na pytanie, czy komediacja (tj. mediacja z udziałem dwóch mediatorów - po jednym z każdego państwa) jest dostępna w przypadku mediacji w międzynarodowych sporach rodzinnych, które wchodzą w zakres konwencji haskiej z 1980 r. dotyczącej uprowadzenia dziecka.⁵⁶

Ponadto, w odpowiedzi na pytanie, czy mediacja w sprawach rodzinnych jest uregulowana w Polsce, przedstawiono ogólne informacje na temat Kodeksu

⁵¹ Zob. listę punktów kontaktowych ds. międzynarodowej mediacji rodzinnej pod adresem: <https://www.hcch.net/en/publications-and-studies/details4/?pid=5360&dtid=52>

⁵² Zob.: *Working Party on Mediation - Principles for the establishment of mediation structures in the context of the Malta Process available at the website of the Hague Conference on Private International Law* pod adresem: <https://www.hcch.net/en/publications-and-studies/details4/?pid=5317&dtid=52>.

⁵³ Dokument "1980 Child Abduction Convention. Country Profile: Poland (13 February 2023)" dostępny pod adresem: <https://assets.hcch.net/docs/92c816f6-8a1c-409f-bd9c-10be23ae48bc.pdf>.

⁵⁴ Country Profile, pytanie 19.1.a

⁵⁵ Country Profile, pytanie 19.1.b, pytanie 19.1.c.

⁵⁶ Country Profile, pytanie 19.1.d.

postępowania cywilnego w odniesieniu do mediacji i wskazano, że obejmuje ona następujące aspekty: formalną akredytację mediatorów, niezbędne kwalifikacje / doświadczenie mediatorów, proces mediacji, poufność mediacji oraz status i wykonalność ugód zawartych w drodze mediacji.⁵⁷ W odpowiedzi na pytanie, w jaki sposób osoby fizyczne mogą uzyskać informacje identyfikujące odpowiednich mediatorów, wyjaśniono, że listy mediatorów są dostępne za pośrednictwem organu centralnego lub z innych źródeł, a mianowicie ze strony internetowej każdego z sądów okręgowych.⁵⁸

W odniesieniu do pytań dotyczących roli, jaką organ centralny odgrywa w ułatwianiu mediacji w przypadku otrzymania wniosku o powrót dziecka lub dostęp / kontakt z dzieckiem, profil krajowy wyjaśnia, że organ centralny udziela stronom informacji na temat mediacji.⁵⁹ Dalsze informacje przedstawiono w odpowiedzi na pytanie dotyczące środków podejmowanych przez organ centralny (bezpośrednio lub przez pośrednika) w celu zapewnienia dobrowolnego powrotu dziecka, które rzekomo zostało bezprawnie uprowadzone lub zatrzymane. Jak wyjaśniono, w „zdecydowanej większości przypadków wszczynane jest postępowanie sądowe, chociaż strona, której zarzuca się uprowadzenie, może zgodzić się na dobrowolny powrót na dowolnym etapie postępowania sądowego”. Organ centralny **"podejmuje kroki w celu uświadomienia obu stronom możliwości dobrowolnego powrotu poprzez zawarcie informacji o dobrowolnym powrocie w piśmie skierowanym do domniemanej strony uprowadzenia**. Ponadto do pisma odsyłającego dołączana jest ulotka zawierająca **informacje na temat mediacji**".⁶⁰

Wyjaśniono, że mediacja jest dostępna na wszystkich etapach postępowania. Sprawy są oceniane przez sędziego pod kątem ich przydatności do mediacji.⁶¹ W odpowiedzi na pytanie, w jaki sposób, jeśli w ogóle, opinie dziecka (dzieci) są brane pod uwagę podczas mediacji, przewidziano, że leży to w gestii danego mediatora.⁶² W przypadku zarzutów dotyczących przemocy domowej i/lub innych form znęcania się, mediator powinien powiadomić sąd w celu oceny kwalifikowalności mediacji i podjęcia decyzji o dalszych środkach.⁶³ Wyjaśniono również, że sąd odmawia nadania ugodzie klauzuli wykonalności albo zatwierdzenia w całości lub w części ugody zawartej przed mediatorem, jeżeli

⁵⁷ Country Profile, pytanie 19.2.a., pytanie 19.2.b.

⁵⁸ Country Profile, pytanie 19.3.a.

⁵⁹ Country Profile, pytanie 19.3.b., pytanie 19.3.c.

⁶⁰ Country Profile, pytanie 6.2.h.

⁶¹ Country Profile, pytanie 19.4.d.

⁶² Country Profile, pytanie 19.4.f

⁶³ Country Profile, pytanie 19.4.d.

ugoda jest sprzeczna z prawem lub zasadami współżycia społecznego albo zmierza do obejścia prawa, albo jest niezrozumiała lub wewnętrznie sprzeczna.⁶⁴ W celu zapewnienia wykonalności ugody zawartej w drodze mediacji w sporze rodzinnym z udziałem dzieci, konieczne jest zatwierdzenie ugody przez sąd.⁶⁵

W odpowiedzi na pytanie dotyczące kosztów mediacji podkreślono, że koszty te „muszą być ponoszone przez strony”.⁶⁶ Porozumienie zawarte w drodze mediacji w innym państwie w sporze rodzinnym z udziałem dzieci nie może zostać zatwierdzone przez sąd lub w inny sposób sformalizowane w Polsce w taki sam sposób, jak porozumienie zawarte w drodze mediacji w Polsce.⁶⁷

W przypadku wszczęcia postępowania sądowego w sprawie rodzinnej, strony mogą zostać skierowane przez sąd do mediacji. Sąd może wydać postanowienie o skierowaniu sprawy do mediacji z własnej inicjatywy lub na zgodny wniosek stron. Sędzia może również wezwać strony do udziału w obowiązkowym **spotkaniu informacyjnym** na temat polubownych metod rozwiązywania sporów. W związku z tym ani organizacja spotkania informacyjnego, ani skierowanie sprawy do mediacji nie są obowiązkowe.

Zespół iCARE2 został poinformowany o próbach częstszego organizowania spotkań informacyjnych i kierowania spraw do mediacji. Przykładowo, w jednym z sądów w Krakowie wprowadzono **pilotażowy projekt kierowania niektórych rodzajów spraw rodzinnych do mediacji**.⁶⁸ Zgodnie z zarządzeniem prezesa tego sądu, wszystkie sprawy dotyczące świadczeń alimentacyjnych, ich obniżenia i zmiany, a także sprawy dotyczące zaspokajania potrzeb rodziny oraz sprawy dotyczące ustalenia miejsca zamieszkania małoletniego, prawa do odwiedzin, zmiany prawa do odwiedzin oraz zgody na wydanie paszportu dla małoletniego będą w pierwszej kolejności kierowane do mediacji. Program ma na celu promowanie alternatywnych metod rozwiązywania sporów w sprawach rodzinnych. Program będzie realizowany przez okres dwóch lat, z ewaluacją przeprowadzaną co sześć miesięcy.

⁶⁴ Country Profile, pytanie 19.5.a.

⁶⁵ Country Profile, pytanie 19.5.a.

⁶⁶ Country Profile, pytanie 19.3.d. pytanie 19.3.e.

⁶⁷ Country Profile, pytanie 19.6.a.

⁶⁸ Zob.: Zarządzenie nr 2/25 Prezesa Sądu Rejonowego dla Krakowa – Krowodrzy w Krakowie z dnia 30 maja 2025r. w sprawie wprowadzenia w Sądzie Rejonowym dla Krakowa – Krowodrzy w Krakowie pilotażowego programu kierowania spraw do mediacji. Available at: <https://krakow-krowodrza.sr.gov.pl/zarzadzenie-nr-225-z-dnia-30-maja-2025-prezesa-sadu-rejonowego-dla-krakowa-krowodrzy-w-krakowie-w-sprawie-wprowadzenia-pilotazowego-programu-kierowania-spraw-do-mediacji,new,m1,356.html,2246>

Jak wspomniano powyżej, zgodnie z art. 183¹² § 1 k.p.c. z przebiegu mediacji sporządza się **protokół**, w którym m.in. opisuje się jej wynik. Protokół podpisany jest przez mediatora. Jeżeli strony zawarły ugodę przed mediatorem, **ugodę** zamieszcza się w protokole lub dołącza do niego. Strony podpisują ugodę (art. 183¹² § 2 k.p.c.). Podpisując ugodę, **strony wyrażają zgodę na wystąpienie do sądu o jej zatwierdzenie** (art. 183¹² § 2¹ k.p.c.).

Jeżeli strona wystąpi do sądu z wnioskiem o zatwierdzenie ugody zawartej w postępowaniu mediacyjnym na podstawie umowy o mediację, mediator składa protokół do sądu (art. 183¹³ § 1 k.p.c.). Jeżeli sąd skierował sprawę do mediacji, mediator składa protokół we właściwym sądzie (art. 183¹³ § 2 k.p.c.). Strony mogą zawrzeć w ugodzie także roszczenia nieobjęte pozwem (art. 183¹³ § 2).

Zgodnie z art. 183¹⁴ § 1 k.p.c. w razie zawarcia ugody przed mediatorem, na wniosek strony, **właściwy sąd zatwierdza tę ugodę**. Jeżeli uгода podlega wykonaniu w drodze egzekucji, **sąd zatwierdza ją przez nadanie jej klauzuli wykonalności** (art. 183¹⁴ § 2 k.p.c.). Sąd odmawia nadania klauzuli wykonalności, jeżeli uгода jest sprzeczna z prawem lub zasadami współżycia społecznego albo zmierza do obejścia prawa, a także gdy jest niezrozumiała lub zawiera sprzeczności (art. 183¹⁴ § 3 k.p.c.). Odpis postanowienia o nadaniu ugodzie klauzuli wykonalności stanowi podstawę do umorzenia postępowania w zakresie dotyczącym roszczeń objętych ugodą. (art. 183¹⁴ § 21 k.p.c.). **Uгода zawarta przed mediatorem, po jej zatwierdzeniu przez sąd, ma moc prawną ugody zawartej przed sądem**. Uгода zawarta przed mediatorem, która została zatwierdzona przez nadanie jej klauzuli wykonalności, jest **tytułem wykonawczym** (art. 183¹⁵ § 1 k.p.c.). Strona może zatem prowadzić egzekucję na podstawie takiego tytułu wykonawczego (art. 776 k.p.c.).

W Polsce ramy instytucjonalne mediacji rodzinnej wciąż się rozwijają i choć **nie istnieje kompleksowy krajowy system ustandaryzowanych narzędzi lub protokołów**, stopniowo pojawiają się pewne metody i dobre praktyki - w szczególności w sprawach dotyczących dobra dziecka, oceny ryzyka i przydatności do mediacji.

Zgodnie z zasadą dobra dziecka, polskie prawo, w tym Konstytucja (art. 72), Kodeks rodzinny i opiekuńczy oraz normy proceduralne zawarte w Kodeksie postępowania cywilnego (art. 216¹-216²), stawia dobro dziecka w centrum procedur sądowych i mediacyjnych. Nie istnieją jednak przyjęte na szczeblu krajowym wytyczne ani ustrukturyzowane narzędzia służące do określania najlepszego interesu dziecka w mediacji.

W praktyce mediatorzy często opierają się na ogólnych zasadach prawnych i swoim profesjonalnym osądzie. Niektórzy mediatorzy mogą odwoływać się do Komentarza Ogólnego ONZ nr 14 do Konwencji o prawach dziecka⁶⁹ jako miękkiej pomocy interpretacyjnej. Sądy coraz częściej oczekują od mediatorów uwzględnienia najlepszego interesu dziecka, zwłaszcza przy zatwierdzaniu porozumień mediacyjnych z udziałem małoletnich (np. planów rodzicielskich), ale nie narzucają jednolitego standardu oceny.

Jeśli chodzi o narzędzia oceny ryzyka (np. pod kątem przemocy domowej lub nierównowagi sił), polskie ustawodawstwo **nie narzuca formalnych narzędzi oceny ryzyka** w celu zbadania przypadków przemocy domowej lub przymusowej kontroli przed mediacją. Jednakże niektóre sądy i ośrodki mediacyjne wdrażają **nieformalne praktyki w zakresie wstępnej oceny**, często oparte na listach kontrolnych lub ustrukturyzowanych wywiadach opracowanych przez organizacje pozarządowe lub partnerów międzynarodowych (np. Polskie Centrum Mediacji opracowało takie praktyki pilotażowe). W sprawach, w których istnieje **podejrzenie przemocy domowej**, polscy mediatorzy są prawnie zobowiązani (zob. art. 183¹ i 183² Kodeksu postępowania cywilnego) do zakończenia mediacji, jeśli strony nie są w stanie uczestniczyć w niej dobrowolnie i na równych zasadach. Procedura „Niebieskiej Karty” na mocy polskiego prawa administracyjnego i karnego stanowi odrębną ścieżkę wykrywania przemocy domowej, ale nie jest automatycznie zintegrowana z systemem mediacji.

Nie istnieje ujednolicony krajowy protokół wstępnej oceny w celu określenia, czy sprawy rodzinne nadają się do mediacji. Mediacja jest ogólnie zalecana, ale decyzja o jej podjęciu jest dobrowolna. Sądy mogą zasugerować mediację, ale nie przeprowadzają formalnej oceny jej stosowności, a od mediatorów oczekuje się oceny przydatności w poszczególnych przypadkach, w szczególności w odniesieniu do zdolności stron do swobodnego i bezpiecznego negocjowania.⁷⁰

W sprawach dotyczących uprowadzenia lub przeniesienia dziecka za granicę na podstawie Konwencji haskiej z 1980 r. polskie sądy czasami wyznaczają mediatorów, ale ocena przydatności mediacji zależy wyłącznie od uznania sądu i własnej oceny etycznej mediatorów.

⁶⁹ General comment to the Convention on the Rights of the Child No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), adopted by UN Committee on the Rights of the Children on 29 May 2013, CRC/C/GC/14.

⁷⁰ CYBULKO A., *Rozdział 18. Mediacja w sprawach rodzinnych*, cit., s. 368-369.

Polski **Kodeks Etyczny Mediatora**⁷¹ określa ogólne standardy, w tym bezstronność, poufność i dbałość o dobro dziecka. Niektóre ośrodki mediacji sądowej i stowarzyszenia mediacji rodzinnych (np. Polskie Centrum Mediacji) opracowały **wewnętrzne programy szkoleniowe** dotyczące najlepszego interesu dziecka, dynamiki konfliktu i systemów rodzinnych, ale nie ma oficjalnego systemu akredytacji, który nakazywałby specjalistyczne szkolenie w zakresie mediacji z udziałem dzieci lub mediacji w sprawach, w których strony doświadczyły traumy. Narzędzia takie jak **plany rodzicielskie** są czasami wykorzystywane do strukturyzowania porozumień, zwłaszcza w sprawach dotyczących opieki i kontaktów, i coraz częściej koncentrują się one na dziecku.⁷² Innym ważnym źródłem są „Standardy prowadzenia mediacji i postępowania mediatora” przyjęte przez Społeczną Radę do spraw Alternatywnych Metod Rozwiązywania Konfliktów i Sporów.⁷³ Dokument ten opisuje obowiązki mediatora, takie jak: rzetelne informowanie stron o charakterze i przebiegu mediacji; dbanie o wysoki poziom kwalifikacji zawodowych; współpraca z innymi profesjonalistami na rzecz prowadzonej mediacji; zapewnienie stronom odpowiedniego miejsca do prowadzenia mediacji; rzetelne informowanie o swoich usługach; wcześniejsze przerwanie mediacji w określonych sytuacjach.

Podsumowując, w Polsce brakuje ujednoliconych, zinstytucjonalizowanych ram dla ustrukturyzowanych narzędzi w mediacji rodzinnej w zakresie ustalania najlepszego interesu dziecka, badania ryzyka i oceny przydatności mediacji. Podczas gdy **zasada dobra dziecka i dobrowolności mediacji mają swoje podstawy w przepisach**, pozostałe aspekty zależą od indywidualnego szkolenia mediatora i kultury lokalnego ośrodka mediacji lub sądu.

W Polsce międzynarodowa mediacja rodzinna w sprawach dotyczących przemocy domowej jest **prawnie dopuszczalna**, jednak w praktyce podchodzi się do niej z dużą ostrożnością. Chociaż **nie ma wyraźnych ustawowych zakazów** mediacji w sytuacjach, w których domniemana lub stwierdzona jest przemoc domowa, ogólne ramy prawne i etyczne regulujące mediację w Polsce nakładają **zabezpieczenia**, które mają na celu **ochronę wrażliwych stron oraz utrzymanie zasad dobrowolności i równości**.

⁷¹ Tekst dostępny na stronie Polskiego Centrum Mediacji: <https://mediator.org.pl/baza-wiedzy/kodeks-etyki-mediatora/>.

⁷² CYBULKO A., *Rozdział 18. Mediacja w sprawach rodzinnych*, cit., s. 375-379.

⁷³ Tekst dostępny na stronie Społecznej Rady do spraw Alternatywnych Metod Rozwiązywania Konfliktów i Sporów przy Ministrze Sprawiedliwości: <http://ms.gov.pl/pl/dzialalnosc/mediacje/spoleczna-rada-ds-alternatywnych-metod-rozwiazywania-konfliktow-i-sporow/dokumenty-deklaracje/>

Kodeks postępowania cywilnego (art. 183¹-183¹⁵) stanowi nadrzędną podstawę prawną mediacji w sprawach cywilnych, w tym w sprawach rodzinnych zarówno o charakterze krajowym, jak i transgranicznym. Zgodnie z tymi przepisami **mediacja musi być dobrowolna na każdym etapie procesu. Strony mogą wycofać się z mediacji w dowolnym momencie, a mediator jest zobowiązany do zakończenia postępowania, jeśli warunki uczciwości i swobodnego uczestnictwa nie są spełnione.** Obejmuje to sytuacje, w których występuje nierównowaga sił lub przymus - bardzo często występujące w przypadkach przemocy domowej. W takiej sytuacji mediacja jako sposób rozwiązywania konfliktu nie jest zalecana.⁷⁴ Chociaż stanowi to podstawowe zabezpieczenie, Kodeks nie zawiera szczegółowych procedur sprawdzania przemocy domowej przed rozpoczęciem mediacji.

W praktyce podejście do mediacji w sprawach związanych z przemocą różni się znacznie w zależności od tego, jaki sąd rozpatruje sprawę, głównie dlatego, że **nie ma ogólnokrajowego znormalizowanego protokołu identyfikacji i oceny ryzyka.** Warto również wspomnieć, że wiele spraw dotyczących przemocy domowej jest rozpatrywanych przez sądy karne, które w tym celu korzystają z mediacji. Formalnie są to postępowania karne, ale ze względu na rodzaj relacji między stronami przypominają one również mediacje rodzinne.⁷⁵

Niektórzy mediatorzy przeprowadzają nieformalne rozmowy wstępne lub korzystają z wewnętrznych „list kontrolnych”, aby ocenić, czy przemoc lub przymus mogą zagrozić uczciwości procesu mediacji.⁷⁶ Praktyki te nie są jednak przyjęte jednolicie, a sądy często kierują sprawy do mediacji bez weryfikacji czy w stosunkach rodzinnych występuje lub występowała przemoc.

Normy prawa międzynarodowego, w szczególności te będące częścią prawa europejskiego i praw człowieka, również wpływają na postępowanie w przypadku przemocy domowej w sprawach międzynarodowej mediacji rodzinnej. Polska jest stroną Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej (Konwencja

⁷⁴ GÓJSKA A., *Mediacja w sprawach rodzinnych*, Ministerstwo Sprawiedliwości, Warszawa 2011, s. 8.

⁷⁵ TROJANOWSKA E., *Gotowość do zadośćuczynienia sprawców przemocy w rodzinie jako podstawa do udziału w mediacjach po wyroku*, PROBACJA, nr 1/2020, s. 124-128.

⁷⁶ Zob.: zalecenia na stronie „Niebieska Linia” - Ogólnopolskie Pogotowie dla Ofiar Przemocy w Rodzinie :<https://www.niebieskalinia.pl/aktualnosci/aktualnosci/mediacja-dla-rodziny-w-kryzysie>; lub na stronie Centrum Mediacji Sądowych: <https://www.centrummediacjisadowych.pl/wpis/54,przemoc-i-uzaleznienia-w-rodzinie-a-mediacje>

Stambulska)⁷⁷, która **wymaga, aby alternatywne metody rozwiązywania sporów, takie jak mediacja, nie były zlecane w przypadkach przemocy domowej.**⁷⁸ Artykuł 48 Konwencji ostrzega przed poddawaniem ofiar obowiązkowym procedurom pojednawczym.⁷⁹ Ponadto rozporządzenie **Bruksela II-ter** podkreśla, że takie postępowanie musi odbywać się z poszanowaniem praw podstawowych, w tym bezpieczeństwa i równości stron. Zachęca się do mediacji, ale tylko tam, gdzie jest to właściwe i bezpieczne - szczególnie w sytuacjach konfliktu lub przemocy.

W polskim realiach funkcjonowania międzynarodowej mediacji rodzinnej sprawy transgraniczne są czasami rozwiązywane we współpracy z **międzynarodowymi sieciami mediacji i organizacjami pozarządowymi**, takimi jak MiKK w Niemczech, które specjalizują się w bezpiecznych, dwujęzycznych i wrażliwych kulturowo procesach mediacji.⁸⁰ Organizacje te najczęściej stosują bardziej rygorystyczne standardy etycznych i protokoły, w tym wstępnej oceny ryzyka i, w razie potrzeby, oddzielnej mediacji (czasami nazywanej „mediacją wahadłową”), w której strony nie spotykają się bezpośrednio. Podczas gdy niektórzy polscy mediatorzy przyjmują te najlepsze praktyki, zwłaszcza ci przeszkoleni w środowisku międzynarodowym lub współpracujący z zagranicznymi instytucjami, brak krajowych regulacji lub wytycznych oznacza, że takie praktyki są dalekie od powszechnych.

Pomimo zabezpieczeń oferowanych przez kodeksy etyczne i ogólne ramy prawne, **mediacja w sprawach dotyczących przemocy domowej w Polsce pozostaje kontrowersyjna.**⁸¹ Brak skoordynowania działań na poziomie reakcji międzyinstytucjonalnym - w szczególności między sądami rodzinnymi, ośrodkami mediacyjnymi i służbami wsparcia społecznego - ogranicza zdolność systemu do identyfikowania i odpowiedniego reagowania na dynamikę nadużyć

⁷⁷ Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, adopted in Istanbul on 11 May 2011, CETS No. 210. Polska ratyfikowała Konwencję w dniu 27 kwietnia 2015 r.; Konwencja weszła w życie w dniu 1 sierpnia 2015 r. Publikacja w Dzienniku Ustaw: Dz.U. 2015, poz. 961.

⁷⁸ Zob.: SITARZ O., BEK D., *Zasadność zakazu obowiązkowej mediacji w sprawach przemocy domowej: krytyczna analiza przepisu art. 48 ust. 1 tzw. konwencji stambulskiej*, Studia Prawnicze (PAN) 2018, s. 105-129.

⁷⁹ Zob.: Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, Council of Europe Treaty Series - No. 210, s. 42.

⁸⁰ Np. Polsko-niemiecki projekt „AMICABLE” (współfinansowany przez KE), Opracowanie narzędzi najlepszych praktyk, egzekwowalność i uznawanie wynegocjowanych umów rodzinnych w drodze mediacji (2018-2021), see: <https://mikk-ev.org/projects/project-poland/>.

⁸¹ Zob.: ZIELIŃSKA E., *Mediacja w sprawach karnych o przemoc w rodzinie – skala i efektywność w praktyce polskiego wymiaru sprawiedliwości*, Instytut Wymiaru Sprawiedliwości, Warszawa 2017, s. 10-15.

przed i w trakcie procesu mediacji. Istnieją również obawy, że ofiary mogą czuć się zmuszane do udziału w mediacji, zarówno przez sądy, jak i przez oczekiwania społeczne, aby „rozstrzygać” spory poza sądem, szczególnie w sprawach transgranicznych uprowadzeń dzieci, w których szybkie rozwiązanie jest często priorytetem.⁸²

Podsumowując, choć **polskie prawo formalnie dopuszcza międzynarodową mediację rodzinną nawet w sprawach związanych z przemocą**, to nakłada istotne warunki etyczne, które zakładają dobrowolność, bezpieczeństwo i świadome uczestnictwo. Niektórzy badacze i praktycy **wykluczają możliwość stosowania mediacji w sprawach dotyczących przemocy w rodzinie**, podkreślając, że mediacja nie może być prowadzona, gdy jedną ze stron zwracających się do mediatora jest osoba doświadczająca przemocy ze strony drugiej osoby zaangażowanej w spór. W przypadku osoby, która przez dłuższy lub krótszy czas doświadczała jakiegokolwiek formy przemocy, zasady mediacji nie mogą być zachowane.⁸³ Inni podkreślają, że analiza literatury dotyczącej stosowania mediacji w tego typu sprawach oraz doświadczenia mediatorów i osób pracujących z ofiarami przemocy domowej wskazują, że mediacja powinna być tu prowadzona tylko w wyjątkowych przypadkach i na określonych zasadach.⁸⁴

Niemniej jednak **brak konkretnych, egzekwowalnych standardów lub systematycznych praktyk kontrolnych prowadzi do niespójnego stosowania tych zabezpieczeń w praktyce**. Zapewnienie rzeczywistego bezpieczeństwa i równości w ramach międzynarodowej mediacji rodzinnej wymaga bardziej ustrukturyzowanych narzędzi przesiewowych, specjalistycznych szkoleń dla mediatorów oraz silniejszych ram instytucjonalnych w celu dostosowania krajowych praktyk do międzynarodowych standardów praw człowieka i ochrony dzieci.

⁸² WASZKIEWICZ P., *Rozdział 8. Zasady mediacji*, in MOREK R., GMURZYŃSKA E. (red.) *Mediacje: Teoria i praktyka*, Wolters Kluwer, Warszawa 2024, s. 165-166.

⁸³ ZAGÓRSKA K., *Rozdział szósty. Mediacje transgraniczne w sprawach rodzinnych*, cit., s. 109-110; MAZUREK A., *Podejrzanie stosowania przemocy a mediacja*, Infor.pl, 29 sierpnia 2022, <https://www.infor.pl/prawo/rozwoy/mediacja/5566094,Przemoc-a-mediacja.html>

⁸⁴ SIEDLECKA-ANDRYCHOWICZ A., *Rozdział 19. Mediacja w sprawach karnych i w sprawach o wykroczenia*, in MOREK R., GMURZYŃSKA E. (red.), *Mediacje: Teoria i praktyka*, Warszawa 2024, s. 405.

4. Usługi premediacyjne w Polsce

W ramach projektu iCare2 premediacja jest rozumiana jako:

"**usługa**, dostępna za pośrednictwem telefonu i/lub poczty elektronicznej i/lub poczty tradycyjnej, **która jest do dyspozycji członków rodziny** (ale także prawników i pracowników władz centralnych), posiadająca następujące funkcje: a) **udzielanie wiarygodnych informacji na temat międzynarodowej mediacji rodzinnej**; b) dokonywanie pierwszej, **wstępnej oceny, czy sytuacja rodziny nadaje się do mediacji**; c) **kierowanie rodzin nadających się do mediacji do mediatorów - z wykorzystaniem już nawiązanych kontaktów**, które partnerzy mają z kategorią zawodową w każdym zaangażowanym państwie członkowskim; d) **znajdowanie tymczasowych porozumień w oczekiwaniu na rozpoczęcie mediacji**, koncentrując się na potrzebach i prawach dzieci; e) **udzielanie wskazówek dotyczących organizacji mediacji** w oparciu o usługi dostępne na poziomie krajowym [podkreślenie dodano]."

Instytucja „pre-mediacji” w rozumieniu iCARE2 nie została uwzględniona i uregulowana ani w Kodeksie postępowania cywilnego, ani innej ustawie.

Jak wspomniano, pojęcie premediacji nie jest zawarte w Kodeksie postępowania cywilnego, a zatem nie jest szczegółowo uregulowane. Pojęcie to jest używane w literaturze prawniczej, jednak niekoniecznie w taki sam sposób jak w iCARE2. Na przykład, pojęcie premediacji jest używane do opisania następującego etapu mediacji:

*„Jeszcze przed rozpoczęciem posiedzenia mediacyjnego, po wpłynięciu sprawy do mediacji, na mediatorze i ośrodku mediacyjnym spoczywa wiele obowiązków. Przygotowanie mediacji stanowi z wielu względów bardzo istotny etap mediacji. Czasami etap ten określany jest jako **premediacja**. Jest to często **moment pierwszego kontaktu ośrodka i mediatora ze stronami**. Kontakt ten najczęściej **ma charakter rozmowy telefonicznej** [podkreślenie dodane] ”.*⁸⁵

Powyższy opis pokazuje, że „premediacja” może mieć różne znaczenie i może być postrzegana jako etap mediacji, który ma miejsce, gdy sprawa została już skierowana przez sędziego do mediacji, a nie jako usługa do dyspozycji rodzin i ich prawników, mająca na celu m.in. dostarczenie pierwszych informacji na temat

⁸⁵ GMURZYŃSKA E., *Rozdział 11. Etapy mediacji* in MOREK R., GMURZYŃSKA E. (red) *Mediacje: Teoria i praktyka*, Wolters Kluwer, Warszawa 2024, p. 216.

mediacji i ocenę przydatności mediacji w danej sprawie, zanim sprawa zostanie skierowana do mediacji.

(Odnosnie do usług oferowanych przez różne instytucje promujące i oferujące mediację w Polsce zob. odpowiedź na pytanie dotyczące kluczowe podmioty zajmujące się międzynarodową mediacją rodzinną)