

# The EU Mediation Directive: The European encouragement to family law ADR

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## Summary

The Directive of the European Parliament and of the European Council of 21 May 2008 on Certain Aspects Of Mediation In Civil And Commercial Matters (2008/52) has been adopted by the UK government. It applies to family law. It has a three year timetable for implementation. It creates expectations that member states will encourage mediation wherever possible. It is an incredible opportunity for all family law professionals committed to ADR to bring about much-needed improvements and opportunities, both specifically in cross-border work but also in national family law work.

This article looks at the Directive, the background to ADR specifically mediation, and the opportunities for the future of cross-border ADR work against the very real difficulties created by other pieces of European legislation

## Summary assessment

- thorough support of, commitment to and rejoicing at the Directive by all ADR professionals and others working towards resolution of family law matters
- awareness that much needs to be accomplished within the three years of implementation
- increased awareness of the different forms and models of ADR including lawyer negotiation, and that each form has benefits and advantages for different clients at different stages of cases
- fundamental conflict between race to issue in Brussels II and mediation; this needs to be addressed if cross-border mediation is to have any real prospect of success
- cross-border mediation is a specialisation and should only be undertaken by cross-border family law specialists
- ensuring quality of mediation will need a much tougher approach to the use of public resources committed to the project than in the late 1990s
- introduce powers to refer cases into mediation akin to ss 13 and 14 FLA 1986
- the Australian model of compulsory mediation sessions before commencing proceedings should be examined, perhaps in the form of information provision
- English mediation outcomes are privileged until blessed by legal advice, in potential conflict with Article 6
- English family law cannot be bound in any way including by mediation outcomes, again in potential conflict with Article 6
- The opportunity should be taken to introduce binding family law arbitration
- mediation outcomes should enjoy the benefits of cross-border recognition and enforcement, with safeguards
- Reunite pilot project on child abduction should be thoroughly considered and the lessons learned and implemented, with proper funding to continue the project

## Introduction

The impetus given to the Mediation Directive by the Portuguese government whilst holding the presidency of the European Union is thoroughly welcomed, applauded and a wonderful opportunity within England and across Europe to promote alternative forms of resolution (ADR) of family matters outside of final court hearings. Mediation and other forms of ADR should be regarded as the primary dispute resolution process. Final court hearings should be regarded as matters of last resort for the very exceptional cases. This Mediation Directive should thoroughly endorse and encourage the commitment and movement towards ADR in many jurisdictions.

It is a EU Directive rather than a Regulation. A Regulation such as Brussels II has immediate force across the European Union, taking priority to domestic law and being strict substantive law. A Directive on the other hand sets out intentions, purposes and expectations within a specific time period, leaving the implementation to national member states. There is therefore very considerable scope and opportunity within national jurisdictions to expand the role of ADR within the general imperative of the terms of the Directive itself. It is the hope that there can be cross-border co-operation and communication in bringing forward ADR in all European jurisdictions. Specifically within England, mediation has had a very chequered history. Perhaps the impetus now coming from abroad will help overcome some of the internal problems within the mediation profession, at least with cross-border disputes. England faces some real challenges by the Directive including enforceability of mediation outcomes with the related question of binding agreements.

The three years before implementation will pass very quickly. The mediation profession doesn't move very quickly and certainly rarely moves all together. Much work will be needed and early planning will be essential.

This note deals exclusively with the family law context of the Directive.

## A short history

Family Mediation came to these shores in the 1980s, landing predictably in Bristol where many good family law enterprises have begun. For many years being a mediator was a very voluntary process and it stayed in the voluntary sector. In the early 1990s, the joint mediation model was successful, between specialist family lawyers and specialist mediators, primarily from the therapeutic professions. It combined the several strands of mediation; dispute resolution as an alternative to going to court with assistance to the parties of understanding why there had been a relationship dispute, how to resolve future disputes and better parenting. In the mid-1990s, the benefits of family mediation were fully accepted and given an incredible boost by the government in various elements of the Family Law Act 1996. Specifically, no one could obtain public funding without first having had a meeting with a mediator which in turn required considerable training of mediators to a high accreditation standard. In pilot projects, members of the public were informed about mediation at information meetings. In the late 1990s, it was very much felt that mediation had arrived.

Sadly, the 1996 legislation did not go ahead. Although not directly a victim, there was a sense that the initiative towards mediation stumbled. Despite the massive training of mediators and the legal aid imperative, the numbers going into mediation were not very high. The mediation organisations have always historically shown themselves better at fighting each other than fighting for mediation and they now found themselves each fighting over scarcer and scarcer resources. Some mediation organisations folded or greatly reduced their activities. Many lawyers who trained as mediators at some cost had simply no work. However those mediators with work were often exceptionally good, exceptionally proficient and successful with both private and public sector practices. Lawyer-mediators were largely mediating in finance cases. Non lawyer mediators, mostly in the not-for-profit sector, were largely mediating in children cases. There was and remains considerable anxiety by many lawyers about non lawyer mediators undertaking finance work.

A decade on from the height of activity after the 1996 the legislation, mediation is not in a very good shape. There are undoubtedly very many highly committed, highly motivated and highly trained mediators, both lawyer and non lawyer. There are mediations taking place, most regarding children and some involving finance. There is an impetus to directive mediation where the mediator, invariably a lawyer mediator, is empowered to give more direction and steer towards an outcome than in traditional, passive mediation. However and most crucially, mediation forms an incredibly small percentage of the cases which could benefit from mediation.

Instead as mediation has stumbled this decade, other forms of ADR have increased or have had calls for their introduction. Collaborative law arrived a few years ago as a anti-litigation form of dispute resolution against a backdrop, in California, of highly aggressive, relentless litigation. Despite England being probably the most conciliatory family law process in the world, collaborative law in England and elsewhere is occurring, and inevitably taking away from mediation. Some lawyers have a real unease about the requirement to change collaborative lawyers if there are proceedings commenced (perhaps entirely justifiably) by one party, perhaps for very good reasons. This is detracting from the referral into collaborative law. There is no independent third party and therefore it doesn't come within the strict criteria in the Directive. Nevertheless it should be fully embraced across Europe as a form of ADR. Another newcomer has been directive mediation, following an Australian model whereby the mediator is empowered to give direction and steer the couple towards an outcome if it appears they will not be reaching a settlement. It is used almost exclusively by experienced lawyer mediators and often in "hard to settle" cases. It is amenable to the parties' lawyers being present in the mediation sessions. Arbitration is not binding in English family law and there are calls for its introduction. In court mediation, more precisely early neutral evaluation, has proven very successful in financial cases. Par excellence, the best, most reliable and most commonly used ADR is negotiation and settlement by highly skilled and experienced accredited family lawyers. ADR is much more than traditional non directive mediation. Issue be recognised as the Directive is implemented.

The Directive can be found at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:HTML>. Denmark is again not included.

### Recitals

These speak of the hopes and expectations. At recital 6 it is said that "Mediation can provide a cost-effective and quick extra judicial resolution of disputes ... through processes tailored to the needs of the parties. Agreements for mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements." Many mediators and family lawyers would testify to this.

At recital 8 it says that the provisions of the Directive should apply only in mediation in cross-border disputes but nothing should prevent member states from applying such provisions also to internal mediation processes. It is very much to be hoped that this encouragement and concentration over these next three years will pay considerable dividend for purely national mediations and national mediation practice.

Recital 9 makes clear that the Directive should not in any way prevent the use of modern communication technologies in the mediation process. Unfortunately, perhaps because those most interested in mediation are not classically from the group of IT nerds, this has yet fully to develop. However in the context of cross-border ADR, there is limited prospects of any progress and development without mediators fully embracing electronic opportunities including remote mediation through video links and similar. This occurs already in Australia and America where distances demand. It has to happen across Europe.

Recital 10 makes clear that the Directive does not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. This would include matters of status. Although the recital says that this is particularly frequent in family law, there are in reality relatively few disputes that are inappropriate in themselves for family law mediation.

Recital 19 states that mediation should not be regarded as a poorer alternative to judicial proceedings. Whilst this is in the context of compliance with agreements, more generally mediation should not be seen as the poor alternative to legal representation or indeed other forms of ADR. It is a perversity that forms of service gain more respect with the greater cost. Widespread availability of free or relatively cheap mediation from the excellent not-for-profit services has, probably unintentionally, sometimes had the effect that parties and potential parties to mediation have not given it the respect that it has warranted, and certainly not the respect by the training and skills of the mediator. Complex family law mediations, especially with lawyers in attendance, and charged at the normal charging rate of specialist family law solicitors or barristers commands respect and is certainly not regarded as the poorer alternative. Perhaps the next three years will allow an analysis of what is the appropriate charging for mediation services. It should never be considered as a poorer alternative to any other resolution process.

### Objective and scope, Article 1

The objective in paragraph 1 “is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings”. After referring to ADR, the paragraph then goes on to refer only to mediation. Within England, the perception of specialist family lawyers is that each client in each case demands individual consideration of what form and model of ADR is appropriate, including which form is appropriate at which stage of the case. No one form of ADR is appropriate across-the-board in family law. There are various attributes, advantages but also disadvantages of each, including at different stages of the case. It is the skill and experience of the family law solicitor to be able to identify the best form of ADR for the client at each stage of the case. It is crucial that there is proper awareness and openness about these attributes. This is part of the provision of information but requires a preliminary acceptance by those within the family law profession. Too often there has seemed a very sectarian attitude by some ADR organisations, intolerant of other forms of ADR.

### Collaborative law should be explicitly incorporated within the definition of ADR.

Crucially, the most important form of ADR historically, now and almost certainly in the future, is the negotiated settlement between specialist lawyers, knowledgeable of the law but also trained in skills of negotiation. This is the form of ADR by which the majority of family law cases are settled outside of court buildings. Whilst there is an anti lawyer feeling, and there may be forms of ADR which are more satisfactory in certain personal regards, the ADR of lawyer negotiation cannot be ignored nor can it be downplayed.

### Cross-border disputes, Article 2

Paragraph 1 of Article 2 states that the Directive applies in cross-border disputes. This was narrowed from the original intention. The definition of a cross-border dispute is one in which at least one of the parties is domiciled or habitually resident in a member state other than that of [the] other party, in other words where the parties are domiciled or habitual residence in separate member states. It also includes a dispute in one member state when the parties are domiciled or habitually resident in another member state (para 2). These definitions are satisfactory but narrower than would be defined in England where it would certainly include assets, perhaps the primary income or a pension, located in another member state. However this is not a crucial issue. Cross-border dispute should be construed widely in the implementation process as a case with any international element.

It should be noted immediately that just because the parties may be domiciled or habitually resident in two member states does not immediately mean that there are international family law issues. It may in practice be an entirely national case. It may be thoroughly suitable for a mediator or other ADR professional without specialisation or experience in cross-border work.

However the likelihood is that potentially at least there could be international issues and therefore this definition is helpful. The international element should always be taken into account at the outset of all instructions

### Brussels II and mediation

Immediately, a fundamental issue has to be addressed where the parties have separate domiciles or habitual residences. In this scenario, it is highly likely that two member states would have jurisdiction under Brussels II. One party may be highly advantaged or disadvantaged by the proceedings being in one particular jurisdiction. Despite comments from Brussels that statistics show that Brussels II has not introduced racing, the experience of specialist international family lawyers is the exact opposite. The reality is that every case involving two or more possible European Union jurisdictions involves a race. The lawyer losing the race looks immediately at his insurance policy. The client losing the race realises that they will face an outcome in a forum which is more favourable to the other spouse, perhaps because the other spouse broke up the marriage and took unilateral action or perhaps had the financial resources to obtain better and quicker legal advice or legal action. Perhaps the jurisdiction first seized may be contrary to a written marital agreement and/or perhaps a forum with which the parties do not have a close connection. There is a very strong feeling across the English family law and family mediation professions that mediation after a Brussels II forum race is very unlikely to be successful. Certainly it is good practice never to suggest mediation or indeed other forms of compromise until jurisdiction has been established by issuing first.

Brussels II is one of the most anti-mediation pieces of legislation in the canon of family law. This mediation Directive is welcome but it is sitting on a barbed wire fence called Brussels II. It is good practice for family law solicitors to issue first to secure jurisdiction and only then to negotiate including by ADR. Whereas it is good practice to try to agree the contents of the divorce petition in advance of filing it, this specifically does not apply in an international case. This is the only way to secure the best interests of the client. It is paramount to address this. The prospects of real success in cross-border cases of this Directive lays in finding a way to overcome the mediation disincentive of Brussels II.

### Specialisation

The Law Society and the SFLA agree that international family law work is a specialisation. International family law work is one of the areas of the SFLA accreditation scheme, the leading scheme within England. The Law Society Family Law Protocol describes child abduction work as a particular specialisation, within the international family law specialisation.

In the autumn of 2007, as a consequence of the GEMME project to draw up a list of cross-border mediators, the SFLA agreed as a policy that cross border mediation is a specialisation within mediation just as international family law is a specialisation. It should only be undertaken by mediators experienced in the various complexities of international family law work. There are very many excellent family lawyers across the country with very little understanding of international issues. During the next three years, it is to be hoped and expected that many more family law solicitors will become familiar and experienced in international family law work. The consequence is that there will be more available cross-border mediation specialists. Nevertheless it is important in the future training and accreditation for cross-border mediation that there should be a high standard including of legal knowledge and expertise.

Under the auspices of Lord Justice Thorpe as international liaison judge for England and Wales, an initial list of cross-border mediation specialists has been drawn up for the use of GEMME and others across Europe.

### Definitions, Article 3

The definition in paragraph (a) of mediation is a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of the mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a member state. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question.

This might cover early neutral evaluation such as the FDR process on the basis that the FDR judge is and will not afterwards be responsible for judicial proceedings concerning the dispute in question. The FDR is entirely privileged. The FDR judge is prevented from having any further dealings with open matters. It would almost certainly include the conciliation process in children matters operated by the PRFD and some other courts.

Mediator means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the member state concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

### Ensuring the quality of mediation, Article 4

Member states shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services. Member states shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.

This is thoroughly to be commended and supported. Nevertheless the review of the history of mediation from the 1996 legislation onwards shows very considerable public resources given to the mediation industry for training, accreditation, standards and similar. Yet the mediation industry is not thriving 10 years on. Relatively little can be shown for very considerable public resources. In the relatively fast three-year timetable, there cannot be a repeat of those years in the late 1990s when different mediation organisations successively trooped into government departments and the LSC each begging for funds. Yet mediation constantly shows itself capable of infighting and self-destruction. It may be that some very unpalatable medicine is needed but history must not be allowed to repeat itself as England tries to gear itself up over the next three years for the implementation of this Directive and especially in Article 4

As mediation has slowed over the last few years, so have been the mediation courses perceived as directly applicable for specialist family lawyers with a mediation practice. Too often the perception has been that the only way to make any profit out of mediation is to train other mediators! Whilst certainly there may be some mediators devoted to the whole concept of mediation, most of us just view it as one part of our professional practice. A day spent training on mediation sometimes carries the same appeal as training on pension sharing! Training has to be very focused, very practical and realistic and very aware of the real issues that arise. Certainly training in mediation skills, including updated training, is important but so are some of the other aspects which confront the specialist family lawyer in dealing with the more complex mediation cases. There is still a lot to be done to produce attractive and cost-justifiable worthwhile mediation training.

## Recourse to mediation, Article 5

The first part of Paragraph 1 of Article 5 was in terms before Parliament in 1995 and thoroughly endorsed in the FLA 1996. It says a court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute.

The first part of Paragraph 1 of Article 5 was in terms before Parliament in 1995 and thoroughly endorsed in the FLA 1996. It says a court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute.

This judicial encouragement was brought forth in sections 13 and 14 FLA 1996, with specific powers and duties on the courts to refer into mediation. These sections were innocent victims who fell with the no-fault divorce. A number of us have subsequently called for them to be reinstated. They will now need slightly different wording but the power to refer into mediation directly from court proceedings including to adjourn for this purpose, section 14 FLA, is still vitally needed and now endorsed in this EU Mediation Directive. It is urged that these sections, duly improved and brought up-to-date, should be introduced into primary legislation early in this three year time frame.

The second sentence of paragraph 1 of Article 4 says The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and easily available. This related in England to the information meetings which were anticipated by the 1996 legislation but failed at the pilot stage. FAINS failed. There is no immediate anticipation of their reintroduction. Nevertheless there have been considerable discussions and debates about requirements to take part in mediation in advance of the commencement of proceedings, and specifically not just for those seeking public funding. This requirement has come about in Australia in the last couple of years and seems to be working successfully. It is very much to be hoped that over these three years of implementation, there can be a realistic appraisal of the Australian model which requires an attempt at mediation before proceedings can be issued, saving emergencies, risk, harm and similar. This might involve some sort of information provision but matters have moved on significantly in the past 10 years. Many members of our society would expect to receive information in 2008 very differently to 1998.

See also recital 13

## Enforceability of agreements resulting from mediation, Article 6.

This Article creates real problems within England of several kinds. It has been watered down from the original versions but still raises issues.

It provides that member states shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to law of the member state where the request is made or the law of that member state does not provide for its enforceability. This follows a recital 20.

In summary, the outcome from family mediation in England remains privileged until the parties have taken legal advice and that legal advice has supported the mediation outcome or the parties have each confirmed that they have chosen not to take legal advice. Orthodox mediation practice within England and Wales is that the outcome remains privileged until either of these events. The outcome document is specifically referred to as being privileged. This is a safeguard for the mediator and especially a

safeguard for the couple. It is only when they have taken legal advice, or knowing that they should do so but have chosen not to do so, and then they have indicated that they wish to proceed with the mediation outcome that it can be considered as open. This needs dramatically to be addressed because at present English family mediation practice is wholly at odds with the open element expected in the first sentence of paragraph 1 of this Article. A solution is set out below.

Of course there is the provision in Article 6 if that the law of the member state does not provide for its enforceability. This was included after UK government representations. Nevertheless, it is beneficial if there is a harmonisation of mediation practice across Europe. Whilst there are some incredible, dynamic and imaginative solutions coming out of mediation, family lawyers also testify to the most disastrous mediated outcomes which are considerably against the best interests of one party and indeed sometimes well outside the range which will be acceptable to a court. It would be wrong for those outcomes to be enforceable. Nevertheless the Directive looks forward towards mediation outcomes being directly enforceable across Europe as with certain family court orders. This needs careful work over the next three years.

Next and in any event, English family law, increasingly isolated across the discretionary common law world and certainly across the civil law world, will not allow itself to be bound in any way by any agreement of the parties or similar. This includes mediation outcomes, separation agreements, pre-marriage agreements, arbitration awards. It has been many times stated by the higher courts that the negotiation process by lawyers and in ADR is only to shorten the discretionary exercise of the judge. In a series of reported decisions, higher court judges have felt complete freedom to interfere with agreements reached between parties, perhaps only a couple of years before and/or with the benefit of specialist legal representation and disclosure. The perception therefore is that under English family law at present there is no prospect of mediated outcomes, even if open as above, becoming immediately enforceable. It is simply impossible under English law. Recital 21 recognises this problem.

English family law should be asking itself in this three year implementation whether it wants to continue along the road of allowing greater opportunity for certain forms of ADR to be more directly enforceable towards an order of the court. Supreme amongst these is of course arbitration which right across the international civil litigation world is the ADR of choice of many commercial organisations and many litigation lawyers. Family arbitration has recently been commended by Lord Justice Thorpe in his article in the January edition of Family Law magazine. The SFLA Directive ADR working party has resolved that there should be the opportunity of binding family arbitration within England. The Chartered Institute of Arbitrators are fully supportive. The rules of family arbitration have been written. The arbitrators, specialist family lawyers with an arbitration qualification, will be in position when it becomes binding in law. This three year period of implementation of this European Directive on ADR should be the opportunity for the introduction of binding family arbitration. All that is awaited is a few short words in primary legislation to bring family law within the Arbitration Acts.

The contents of Article 6 are very important in the cross-border context. One of the biggest problems of the international family where the relationship has broken down is the enforcement of national decisions across borders. It is hard for these family members to pursue claims initially where the other party or the assets are abroad. However having at last obtained a judgment or order, whether in matters of divorce or more usually finance or children, the family member then has had colossal procedural difficulties in the enforcement abroad. Brussels II revised made improvements. It is only the stumbling block of applicable law that has prevented even more beneficial subsequent improvements. The importance of cross-border mediated outcomes or other settlements from ADR is that they too should enjoy the benefits of cross-border recognition and enforcement, perhaps even the automatic benefits now attributable to access and return orders, provided appropriate safeguards were in place.

Perhaps the solution is that mediation outcomes have no validity, specifically are not open and enforceable, until specialist legal advice has been taken within a specified and short duration after the

mediation outcome. If at the conclusion of that period a party has not indicated that they oppose the mediated outcome deriving from a specialist accredited mediator then perhaps in those circumstances the mediated outcome could be open, and then enforceable nationally and abroad.

#### Confidentiality of mediation, Article 7,

This Article expresses what many English family lawyer mediators believe should be the position. Given that mediation is intended to take place in a manner which respects confidentiality, member state shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process should be compelled to give evidence in ... judicial proceedings or arbitration regarding information arising out of or in connection with the mediation process, except where this is necessary for overriding considerations of public policy of the member state concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person or where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce the agreement. See also recital 23

However in England the position is more uncertain as a consequence of the decision in *Tim Brown v Stephen Rice* (2007) EWHC 625, also dealing with the question of privilege and openness as above. The implementation of the EU Directive should be taken as an opportunity to consider this particular case law.

It is envisaged that as the family courts are opened up to the public and the media in some way in the future, forms of ADR such as mediation and arbitration will become much more attractive. They have a confidentiality which the public courts will no longer provide. In some jurisdictions, where family law proceedings are public, ADR is particularly selected by those with any public profile. This element of mediation should be actively marketed.

#### Mediation and limitation periods, Article 8

Member states shall ensure that the parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to their dispute by the expiry of limitation or prescription periods during the mediation process.

In the context of this Article, member states are strongly urged to consider what is probably the leading worldwide project on cross-border mediation namely the Reunite mediation project concluded in early 2007. This was a series of about 20 child abduction cases in the English High Court which ran in parallel in mediation. Child abduction has historically been perceived as the most difficult area for mediation because of the feelings aroused and the black-and-white outcomes namely return or non return. Nevertheless under the auspices of reunite, the world's leading child abduction charity, these mediations had considerable success. Crucially for Article 8 they worked within the limitation periods of both the Hague Convention and specifically Brussels II six-week finalisation period. They used the joint mediation model with a specialist child abduction lawyer who was also qualified as a mediator and a specialist non lawyer mediator from the therapeutic professions able to help an understanding of why the abduction had occurred and what could be done to overcome the consequential issues arising. The report is very comprehensive. It is only a lack of funding which has prevented it being continued extensively. The higher courts have very helpfully said on a number of occasions that there should be much more reference to mediation in the hard to settle cases. The reunite project, working alongside the limitations and prescriptions of the child abduction law and timetable, shows what can be accomplished. It should be, in many respects, the role model for cross-border mediation.

Generally within England, family law is not very prescriptive on time limits. Provided both parties feel they are not being prejudiced by ongoing mediation, judges will happily adjourn most proceedings to allow the opportunity for mediation.

## Information for the general public, Article 9

This requires member states to encourage by any means which they consider appropriate the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services.

Information on how to find a mediator is not the problem. Information on good reasons to go into mediation as distinct from either litigation or other forms of ADR is neither widespread nor objectively often very reliable. Some family lawyers have themselves lost confidence in mediation, preferring to recommend collaborative law which is undertaken by fellow family lawyers. Directive mediation in which the mediator is empowered to give a steer towards the outcome, and often takes place in the presence of the parties lawyers, has had very little promotion from lawyer and mediation organisations despite its considerable success in Australia and elsewhere and by those successfully practising directive mediation in England. Considerable public resources have already been put into promoting mediation. The government will have to grasp this particular nettle and do so in fresh, innovative but also strong armed ways.

## Cross-border ADR

In the arena of international family law work, there had been very little progress with cross-border ADR in practice despite the best intentions of law reformers and professional organisations. Cross-border mediation and other ADR is not the same as in purely national cases. A number of characteristics arise with cross-border ADR

- Cross-border ADR has some very distinctive issues which require consideration before either the lawyer recommends ADR or the ADR professional starts to undertake a case. These elements should be part of the practice management and case management of international family law work.
- Cross-border ADR should properly be understood to mean family law cases involving more than one jurisdiction, whether forum, finance, children, location of assets, enforceability and/or choice of law (applicable law). Specifically it is not purely national family law disputes when one or both of the couple does not have English as their understandable or first language.
- Cross-border ADR has a dramatic scope for hugely increased amount of work. At present, very little is presently happening. One distinctive exception and a real ADR success was the pilot mediation project of Reunite, within child abduction. See the above
- Cross-border ADR has in contrast had a significant impetus from organisations such as the European Judicial Network, GEMME, International Academy of Collaborative Professionals, the European Union Directive as above, and other similar initiatives.
- Cross-border ADR involves some very difficult issues, primarily of law and practice rather than mediation/ADR, and these need to be carefully considered before ADR is contemplated.
- Cross-border ADR should not be undertaken, and probably not even discussed with the other party, until each party has taken specialist legal advice. The risks and dangers, especially within the European Union because of the race to issue under Brussels II, of a disadvantageous outcome are too great.
- Cross-border ADR may often take place against the backdrop of one party having already issued proceedings to establish, in law at least, jurisdiction. Conventional wisdom is that ADR is then either very difficult or perhaps impossible. This highlights the complexity, specialisation and importance of careful analysis of this subject
- Cross-border ADR is particularly suitable for a variation of the joint mediation model, with a lawyer mediator from each relevant jurisdiction.
- Cross-border ADR will classically take account of outcomes in each of the relevant possible jurisdictions
- Cross-border ADR often requires a lateral approach, with different expectations and ways

of working. Sometimes the parties will be in separate countries and ADR will have to take place electronically by video link or telephone.

- Cross-border ADR is probably only suitable for specialist international family lawyers who are also experienced ADR professionals. It is SFLA policy that cross-border ADR is a specialisation and should only be undertaken by ADR professionals who are also specialist international family lawyers.

## Conclusion

The EU Directive has quite rightly allowed itself three years for local and cross-border implementation. This three year period will be fully needed. This impetus to mediation from the European Union is much needed, very timely and should be seized by all friends of family mediation as an opportunity to improve greatly the practice and use of family mediation both in purely national cases and specifically in cross-border work.

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