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Introduction

I. Aim and Purpose

There is growing enthusiasm for the use of mediation to seek to resolve cases arising under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the Convention).¹ However, despite being endorsed by the conclusions of meetings of experts,² judicial comment³ and even legislative changes,⁴ there have been relatively few cases where mediation has played a significant role.⁵ It is suggested that the reason underlying this dichotomy

* This book is based on a thesis entitled, 'From Enthusiasm to Action: Mediating Return Applications Arising Under the Hague Child Abduction Convention' which was written in 2008/09 and submitted for the award of LLM at the University of Aberdeen, United Kingdom.

¹ Convention on the Civil Aspects of International Child Abduction (adopted 25 October 1980, entered into force 1 December 1983) 1343 UNTS 89 [The Convention].

² eg 'Conclusions and Recommendations of the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (October–November 2006) www.hcch.net/upload/concl28sc5_e.pdf [2006 Conclusions].

³ eg *Re H and Others (Minors) (Abduction: Acquiescence)* [1998] AC 72 quoting Waite LJ [footnote]: 'the role in these international cases of priest and mullah, mediator and elder, can often be invaluable in bringing about through parental conciliation the harmony in the lives of children which it is the express purpose of the Convention to achieve'.

⁴ Arrêté fédéral portant mise en œuvre des conventions sur l'enlèvement international d'enfants et portant approbation et mise en œuvre des Conventions de La Haye sur la protection des enfants et des adultes du 21 décembre 2007, Feuille Fédérale No 1 (2008) 33–40 RS 211.222.32 www.admin.ch/ch/f/ff/2008/33.pdf [Swiss legislation]. For discussion see A Bucher, 'The New Swiss Federal Act on International Child Abduction' (2008) 4 *Journal of Private International Law* 139 [Bucher 2008]; A Bucher, 'l'intérêt de l'enfant pénètre la convention sur l'enlèvement' in *Vers de nouveaux équilibres entre ordres juridiques, Liber amicorum Hélène Gaudemet-Tallon*, (Paris, Dalloz, 2008) 683. In February 2009 the Ministry of Justice of Serbia formed a working group to draft a new law implementing the Convention which will 'include provisions supporting the use of mediation in child abduction cases where appropriate', J Arsić, 'Family Mediation Concerning Couples of Different Ethnic Origin in the Region of the Former Yugoslavia' [Arsić 2009] (7th European Conference on Family Law on International Family Mediation, Strasbourg, France, March 2009) www.coe.int/t/e/legal_affairs/legal_cooperation/family_law_and_childrens_rights/Conferences/7th%20European%20Conference%20on%20Family%20Law%20on%20international%20family%20mediation.asp [2009 Strasbourg Conference].

⁵ S Vigers, 'Note on the Development of Mediation, Conciliation and Similar Means to Facilitate Agreed Solutions in Transfrontier Family Disputes Concerning Children especially in the context of the Hague Convention of 1980' Prel. Doc. No 5/2006 http://hcch.e-vision.nl/upload/wop/abd_pd05e2006.pdf [Note on the Development of Mediation]. Interestingly, there has been little progress in terms of new initiatives since this document was drafted.

between the widespread support for the use of mediation and the current limited practice is that there are several key questions regarding the use of mediation in the context of the Convention which remain to be answered. Specifically: What is meant by Convention mediation? How can a mediation process fit within the constraints of the Convention? And why offer mediation in Convention cases given the existing legal framework? This book aims to address these preliminary questions and in so doing to encourage a movement from enthusiasm about the use of mediation in the Convention context, to greater practice.

Discussion of mediation in the context of the Convention is timely. Some notable initiatives are taking place and several States have expressed intention to (further) develop mediation in the Convention context.⁶ As a result of increased discussion and action in the field, the topic was placed on the agenda of the meeting of the fifth Special Commission to review the operation of the instrument held in 2006.⁷ A preliminary document was prepared on the subject⁸ and a half-day set aside for discussion. This meeting welcomed the 'mediation initiatives and projects which are taking place in Contracting States'⁹ and invited the Permanent Bureau of the Hague Conference on Private International Law (Permanent Bureau) to 'continue to keep States informed of developments in the mediation of cross-border disputes concerning contact and abduction'.¹⁰ Furthermore, in 2008 the Council of the Hague Conference asked the Permanent Bureau to prepare a Guide to Good Practice on the use of mediation in the context of the Convention,¹¹ to be submitted for consideration at the next meeting of the Special Commission, which is likely to be held in 2011.¹²

The development of Convention mediation has also been the subject of discussion at other international conferences.¹³ Additionally, other international and

⁶ *ibid.*

⁷ Convened by the Secretary General of the Hague Conference, a Special Commission meeting to review the practical operation of the Convention takes place every four or five years. There have been five such meetings, held in October 1989, January 1993, March 1997, March 2001 and October/November 2006. Additionally, there was a specific Special Commission held in September 2002 to review the first two parts of the Guide to Good Practice. Special Commission meetings involve experts from Members of the Hague Conference; States Parties to the relevant Convention and invited international governmental and non-governmental organisations.

⁸ Note on the Development of Mediation (n 5).

⁹ 2006 Conclusions (n 2) [1.3.2].

¹⁰ *ibid* [1.3.3].

¹¹ The Permanent Bureau has established a Group of Experts to assist with the development of this Guide to Good Practice. There are four published parts of the Guide to Good Practice: *Part I on Central Authority Practice* (Bristol, Family Law, 2003); *Part II on Implementing Measures* (Bristol, Family Law, 2003) [Guide on Implementing Measures]; *Part III on Preventive Measures* (Bristol, Family Law, 2005) [Guide on Preventive Measures]; *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children* (Bristol, Family Law, 2008) [Guide on Transfrontier Contact] www.hcch.net/index_en.php?act=text.display&tid=21#pgg.

¹² 'Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference' (April 2008) www.hcch.net/upload/wop/genaff_concl08e.pdf [2008 Conclusions].

¹³ 'Cross-Border Family Mediation with an Emphasis on the 1980 Hague Convention on the Civil Aspects of International Child Abduction' (University of Miami, School of Law, 22–24 February 2008) www.law.miami.edu/cle/pdf/Mediation_Training_Feb2208_v3.pdf. Some of the papers presented at this conference have been published in (2008) 40 *University of Miami Inter-American Law Review*. The

regional family law instruments specifically advocate for the promotion of mediation and some of these interact with the application of the Convention, notably the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention)¹⁴ and Council Regulation (EC) 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 [2003] (the Brussels II *bis* Regulation).¹⁵ The use of mediation to handle Convention cases is also specifically endorsed in the Practice Guide to the Brussels II *bis* Regulation.¹⁶ There is thus impetus to move forward and the time is ripe to seek to contribute to the discussion, with the aim of informing further development.

The primary purpose of this book is to offer a response to some of the perceived barriers to the use of mediation in the Convention context. However, analysing the use of mediation in the context of the Convention has important broader implications. Firstly, it is recognised that mediation or similar processes are particularly useful where the Convention is not applicable,¹⁷ either because the instrument is not in force between the relevant States or because the factual circumstances of the case fall outside the instrument's scope. Focus is on Convention applications as these sit within a firm legal framework which forms the backdrop to mediation and offers a context within which to assess the usefulness of the discipline. However, mechanisms established for the purposes of Convention mediation could potentially be adapted to provide a process to handle these cases which might otherwise fall outside an adequate framework and where mediation may be particularly useful.¹⁸

Secondly, discussion of Convention mediation will influence the development of cross-border family mediation more generally. This subject is being discussed within several international and regional organisations including the Council of

author is grateful to Jennifer Zawid for providing a copy of her article. In October 2008 there was a session on 'mediation in international child abduction cases' at the International Bar Association's annual conference www.int-bar.org/images/downloads/confs/finalprog.pdf.

¹⁴ Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (adopted 19 October 1996, entered into force 1 January 2002) 35 ILM 1391 [1996 Hague Convention] Art 31.

¹⁵ Council Regulation (EC) 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 [2003] OJ338/2 [Brussels II *bis* Regulation] Art 55.

¹⁶ 'Practice Guide for the application of the new Brussels II Regulation' http://ec.europa.eu/justice_home/doc_centre/civil/doc/parental_resp_ec_vdm_en.pdf [Practice Guide].

¹⁷ See the non-Convention case of *Al-Khatib v Masry* [2004] EWCA 1353 per Thorpe LJ [17]: '[t]here is no case, however conflicted, which is not potentially open to successful mediation' [*Al-Khatib* [2004]].

¹⁸ Third Malta Judicial Conference on Cross-Frontier Family Law Issues, hosted by the Government of Malta in collaboration with the Hague Conference on Private International Law www.hcch.net/upload/maltadecl09_e.pdf [Malta Declaration] [7]. Additionally, the Permanent Bureau has established a Working Party on mediation in the context of the Malta Process www.hcch.net/index_en?act=progress.listing&cat=7.

Europe,¹⁹ the European Union²⁰ and the Hague Conference.²¹ Members of the latter organisation have expressly decided to follow developments primarily in relation to the use of mediation in the Convention context before proceeding to more formal debate on the broader subject.²² Indeed although practice is limited in the Convention context there is more experience of cross-border family mediation in this specific area than in the broader field.²³ The importance of the subject matter of this book therefore goes beyond the immediate context and may act as a catalyst for the further development of cross-border family mediation more generally.

II. Structure and Scope

As there is currently little practice of Convention mediation it was not possible to undertake detailed empirical work. However, a Questionnaire was sent to 60 Central Authorities and to a number of other experts in the field, including mediators and judges.²⁴ This Questionnaire is attached as an appendix. A series of meetings was also held in person and by telephone with a view to gaining contemporaneous information on the current situation in different Contracting States,

¹⁹ 2009 Strasbourg Conference (n 4).

²⁰ Code of Conduct for Mediators (Brussels, July 2004) [European Code of Conduct]; 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 [Mediation Directive]; the transposition date is 21 May 2011.

²¹ In 2006 the Permanent Bureau was asked to draw up a Feasibility Study on Cross Border Mediation in Family Matters, 'Conclusions of the Special Commission of 3 – 5 April 2006 on General Affairs and Policy of the Conference' www.hcch.net/upload/wop/genaff_pd11e2007.pdf. This Study was presented to Members in 2007: 'Feasibility Study on Cross-Border Mediation in Family Matters' Prel. Doc. No 20/2007 www.hcch.net/upload/wop/genaff_pd20e2007.pdf [2007 Feasibility Study].

²² 2008 Conclusions (n 12).

²³ Council of Europe Working Group on Mediation, 'Analysis on assessment of the impact of Council of Europe recommendations concerning mediation' CEPEJ (2007) 12 (Strasbourg, 3 May 2007) 61. Only two respondent States had specific mechanisms for international mediation both of which were in the child abduction context.

²⁴ The Questionnaire was distributed from May 2008. Responses are on file with the author [Questionnaire Responses]. To gain a broad overview the Questionnaire was sent to all Central Authorities which have published an email address. The author is grateful to the following Central Authorities for their responses: Argentina, Australia, Austria, Belgium, Canada, China (Hong Kong Special Administrative Region), Denmark, England and Wales, Finland, France, Germany, Italy, Malta, Monaco, Montserrat, New Zealand, Norway, Poland, Portugal, Scotland, Slovenia, South Africa, Sweden, Switzerland, United States of America. The author would also like to thank the following individuals and organisations: Judge Peter Boshier (New Zealand), Judge Eberhard Carl (Germany), Ms Denise Carter (reunite – International Child Abduction Centre), Judge Martina Erb-Klünemann (Germany), Ms Lorraine Filion (*Association internationale francophone des intervenants auprès des familles séparées* (AIFI)), Judge Annette Olland (Netherlands), Judge Astrid Schwichtenberg (Germany), Judge Øyvind Smukkestad (Norway), Lord Justice Mathew Thorpe (England and Wales), Mr Christoph Paul and Ms Sybille Kiesewetter (German Federal Association of Family Mediators (BAFM)), Ms Helga Krueger-Pompl, Ms Alison Hulstine, Ms Tessa Lehman and Ms Felicitas Lauer (American Consulate in Germany), International Social Service (ISS) (German and Swiss Branches).

and views on how Convention mediation might further develop.²⁵ Two other sources in particular deserve prominent mention: firstly, responses to questionnaires sent out by the Permanent Bureau of the Hague Conference;²⁶ and, secondly, the report of a mediation pilot project undertaken by reunite – International Child Abduction Centre in England, which details the only current empirical research on mediation in the context of the Convention.²⁷

Drawing from this research it is submitted that there are three broad questions which require to be answered if Convention mediation is to be used more widely: What is Convention mediation? How can a mediation process fit within the constraints of the Convention? And, why offer mediation in Convention cases? Each of the first three substantive chapters seeks to respond to one of these questions. As the use of mediation in the Convention context remains novel in most States these questions are intentionally broad with the aim of providing an overview of how the mediation process can operate in the Convention context.

Chapter two answers the question, ‘what is Convention mediation?’ Firstly, by distinguishing mediation from other processes and proposing a working description. Secondly, by explaining the mediation process and outlining its place within the procedure for handling a Convention application. Devoting an entire chapter to issues that might be considered merely introductory is justified because there is widespread confusion surrounding terminology and practice,²⁸ which if left unaddressed could hinder the development of Convention mediation and cross-border mediation more generally.

The third chapter addresses the question, ‘how can a mediation process fit within the constraints of the Convention?’ As Convention mediation is significantly different to domestic (and even more general cross-border) family mediation it is suggested in the first part of the chapter that it should be viewed as a distinct discipline. The second part of the chapter highlights specific legal, procedural and practical challenges raised by mediating in Convention cases which illustrate the advantages of this approach. These issues are intentionally discussed broadly as at this early stage of development a broad general overview was considered important. It is assumed that many of these issues are likely to form the basis of the Guide to Good Practice.²⁹

²⁵ The author is grateful to: Ms Julia Alanen (23 April 2009); Justice Victoria Bennett (1 December 2008); Judge Eberhard Carl (24 June 2008); Ms Denise Carter (19 September 2008 and 4-5 December 2008) and the team at reunite (4-5 December 2008); Mr Doug Frenkel (17 April 2009); Ms Lisa Parkinson (12 January 2009); Lord Justice Mathew Thorpe (24 November 2008); Ms Jennifer Zawid (19 and 23 September 2008); and to Mr Ignacio Goicoechea and Ms Melissa Kucinski.

²⁶ ‘Collated Responses to the Questionnaire concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction’ Prel. Doc. No 2/2006 http://hcch.e-vision.nl/upload/wop/abd_pd02efs2006.pdf [2006 Responses]; ‘Feasibility Study on Cross-border Mediation in Family Matters – Responses to the Questionnaire’ Prel. Doc. No 10/2008 www.hcch.net/upload/wop/genaff_pd10_2008.pdf [Feasibility Study Responses].

²⁷ reunite, ‘Mediation in International Parental Child Abduction: The reunite Mediation Pilot Scheme’ (October 2006) www.reunite.org/edit/files/Mediation%20Report.pdf [reunite Report].

²⁸ 2006 Responses (n 26) 44–54, 264–89.

²⁹ n 11.

Chapter four responds to the question, ‘why offer mediation in Convention cases?’ This chapter primarily focuses on the fact that mediation has the potential to address many of the concerns regarding the operation of the Convention in the present day. The second and smaller part of the chapter examines additional wider benefits offered by mediation as opposed to court-based solutions.

The final substantive chapter focuses on the voice of the child. This issue has been chosen for more detailed discussion for three reasons. Firstly, there have been some interesting dicta in recent Convention cases outlining the changing role of the voice of the child in court proceedings, which has implications for hearing the child in mediation. Secondly, the suggested approach to the voice of the child in Convention mediation serves as an illustration of how mediation is viewed in this book. Thirdly, it is a subject which has not been discussed in any detail elsewhere.

The general scope of this book is further limited in two broad respects. Firstly, discussion is restricted to mediation in the context of handling return applications. Consequently, the issue of mediating applications for contact is not directly addressed. The rationale for this omission is, firstly, because there are specific challenges to mediation raised by the return mechanism which require discussion. Secondly, because the Convention provides a specific and distinct legal framework for return applications within which mediation must operate and against which analysis and evaluation can therefore take place. Conversely, with regard to applications for contact the only substantive provision is interpreted differently in different States such that in some States contact applications are handled under the instrument while in other States they fall to be resolved under domestic law.³⁰ The consequent absence of a coherent legal framework to support cross-border contact under the Convention makes the development of mediation in these cases more vulnerable.³¹ It is therefore proposed that pioneering mediation in the context of applications for return is a better first step, which it is hoped will lead to further discussion and development of mediation to handle applications for contact, where mediation may be particularly useful.

Secondly, the scope of this book is restricted to the use of mediation to handle applications arising under the Convention. Mediation at a domestic level has value in preventing abduction,³² enforcing orders³³ and dealing with the substantive issues of the dispute after a Convention application has been dealt with. The

³⁰ Art 21. For detailed analysis see W Duncan, ‘Transfrontier Access/Contact General Principles and Good Practice’ Prel. Doc. No 4/2006 http://hcch.e-vision.nl/upload/wop/abd_pd04e2006.pdf [Duncan 2006] and Guide on Transfrontier Contact (n 11).

³¹ However, the development of mediation to resolve return cases could be a useful first step towards the development of cross-border mediation to resolve contact cases, see ch 4, III.C.

³² Guide on Preventive Measures (n 11) 15–16. In Quebec, Canada mediators requested and were given special training on the Convention to assist them in working with couples in Canada where abduction was a threat, 2006 Responses (n 26) 284–9.

³³ A Schulz, ‘Enforcement of Orders made under the 1980 Convention – A Comparative Legal Study’ Prel. Doc. No 6/2006 http://hcch.e-vision.nl/upload/wop/abd_pd06e2006.pdf; A Schulz, ‘Enforcement of Orders made under the 1980 Convention – Towards Principles of Good Practice’ Prel. Doc. No 7/2006 http://hcch.e-vision.nl/upload/wop/abd_pd07e2006.pdf [Enforcement Reports].

further development of mediation at a domestic level will have a positive impact on the operation of Convention mediation but is not discussed.

III. Background and Context

The stated aims of the Convention are found in Article 1:

to secure the prompt return of children wrongfully removed to or retained in any Contracting State and to ensure that rights of custody or of access under the law of one Contracting State are effectively respected in the other Contracting States.

For the Convention to apply the child in question must be under 16 and have been habitually resident in a Contracting State prior to the removal or retention.³⁴ The Convention must be in force between the relevant Contracting States³⁵ and the removal or retention must be 'wrongful', that is in breach of rights of custody which were being exercised prior to the abduction.³⁶ Each Contracting State is required to designate a Central Authority 'to discharge the duties which are imposed by the Convention'.³⁷ Where less than one year has elapsed between the date of the wrongful removal or retention and the commencement of proceedings in the State of refuge, the judicial or administrative authorities must order the return of the child forthwith,³⁸ unless one of the exceptions is made out.³⁹

The exceptions are listed exhaustively in Articles 12, 13 and 20 and where an Article 13 exception is made out the authorities have discretion nevertheless to order return.⁴⁰ Exceptions are intended to be applied narrowly,⁴¹ and to a large extent judges in Contracting States have upheld a strict interpretation, such that in the majority of litigated cases the court orders the return of the child. Two

³⁴ Art 4.

³⁵ All Member States of the Hague Conference at the time of its Fourteenth Session are entitled to ratify the Convention (Art 37), and any other State may accede (Art 38). The Convention enters into force for a Contracting State on the first day of the third calendar month following the deposit of its instrument of ratification or accession (Art 43). A State which ratifies the Convention has treaty relations with every other ratifying State from the moment the Convention enters into force for that State. However, where a State accedes to the Convention existing Contracting States have to declare their acceptance of the accession and treaty relations commence on the first day of the third calendar month following the deposit of the declaration of acceptance (Art 38). As a result of this procedure not all Contracting States enjoy treaty relations with each other.

³⁶ Rights of custody may 'arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State' (Art 3). 'Rights of custody shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence' (Art 5a).

³⁷ Art 6.

³⁸ Art 12.

³⁹ Arts 12, 13 and 20.

⁴⁰ Arts 13 and 18.

⁴¹ E Pérez-Vera, 'Explanatory Report' in *Actes et documents de la quatorzième session, Tome III, Enlèvement d'enfants* (Hague Conference, The Hague, 1982) 426 [Explanatory Report] [34], [Actes et documents 1982].

global studies of cases commenced in 1999 and 2003 revealed that in the respective years 74 per cent and 79 per cent of cases going to court resulted in a return order being made.⁴² The Convention is premised on the notion that the *status quo* should be restored to enable the authorities in the State of habitual residence to make any necessary orders in relation to the substantive issues of the dispute, in the best interests of the child.⁴³ Thus speed is important to minimise disruption and to this end Contracting States are mandated to use the most expeditious procedures available and authorities can be asked to account for any delay of longer than six weeks.⁴⁴

The Convention is widely deemed to be an enduring and successful instrument which has stood the test of time. 30 years after it was drafted it continues to attract new States, and with currently 84 Contracting States,⁴⁵ it is one of the most adhered to Hague Conventions.⁴⁶ Significantly, 60 per cent of Contracting States were not Members of the Hague Conference at the time the Convention was drafted,⁴⁷ demonstrating that its appeal goes far beyond the traditional Hague community. The Convention has been declared compatible with national constitutions,⁴⁸ and human rights instruments, notably the United Nations Convention on the Rights of the Child (United Nations Convention)⁴⁹ and the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).⁵⁰ Additionally, the Convention withstood a

⁴² N Lowe, S Armstrong and A Mathias 'A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction' Prel. Doc. No 3/2001 (Revised version, November 2001) <http://hcch.e-vision.nl/upload/abd2001pd3e.pdf> [1999 Study]; N Lowe, 'A Statistical Analysis of Applications made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part I: Overall Report' Prel. Doc. No 3/2006 (2007 update) http://hcch.e-vision.nl/upload/wop/abd_pd03e1_2007.pdf 2008 [2003 Study].

⁴³ Explanatory Report (n 41) [16].

⁴⁴ Arts 2 and 11.

⁴⁵ Since 2006 the following States have ratified or acceded to the Convention: San Marino (2006); Ukraine (2006); Albania (2007); The Seychelles (2008); Morocco (2010); Gabon (2010) and Singapore (2010). For up to date information on the number of Contracting States see www.hcch.net/index_en.php?act=conventions.status&cid=24.

⁴⁶ At the time of writing the Convention is the second most adhered to Hague Convention behind the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (adopted 5 October 1961, entered into force 24 January 1965) 527 UNTS 189 which had 99 Contracting States (at 1 January 2011).

⁴⁷ Over half of these States have gone on to become Members of the Hague Conference, while 27 per cent of all Contracting States remain non-Members of the Organisation.

⁴⁸ For an overview see W Duncan, 'Action In Support of the Hague Child Abduction Convention: A View from the Permanent Bureau' (2000) 33 *New York University Journal of International Law & Politics* 103, 122.

⁴⁹ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 [United Nations Convention]. The Committee on the Rights of the Child has encouraged States Parties to ratify the Hague Convention as a way of fulfilling their obligations under Art 11 [General Observations No 5 (2003)].

⁵⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5 [European Convention]. The European Court of Human Rights has held that the positive obligations flowing from Art 8 of the European Convention regarding reuniting a parent and a child must be interpreted in the light of the Hague Convention. See, inter alia, *Ignaccolo-Zenide v Romania* [2000] ECHR no 31679/96. For

challenge from the European Community which ultimately opted to maintain the Convention regime, albeit with the addition of certain elements to be applied in the intra-European Union context.⁵¹ Importantly, the Contracting States to the Convention have also acknowledged that it is generally functioning well and meeting the needs for which it was drafted.⁵² Indeed the Convention ‘remains an extremely valuable instrument’, which is ‘alive, well and capable of living in the twenty-first century world community’.⁵³

Notwithstanding this widespread support there are a number of concerns regarding the operation of the Convention in the present day. Discussion of Convention mediation must take place cognisant of these concerns and conscious of the fact that abduction is not merely a legal problem but it also has a human face. If Convention mediation is to add value to the current Convention regime it must offer some additional advantage to the parties, and the child. Concerns regarding the operation of the instrument largely stem from the fact that the Convention essentially envisages a two-step process. First there is the Convention case, which effectively establishes the correct forum for the second case on the substantive issues of the dispute. The principal advantage of Convention mediation is that parties in mediation are free to devise their own solutions and are not restricted to the application of the relevant law. They can thus negotiate the place of the child’s residence in one-step, taking account of relevant substantive issues. If mediation can address real and important concerns it could add great value to the current regime.

IV. Conclusion

While it is generally acknowledged that mediation could add value to the current Convention regime, there is little established practice as questions remain to be answered. This book seeks to offer some response to these questions in the hope of encouraging a movement from enthusiasm about mediation to a greater use of the discipline.

discussion see P Beaumont, ‘European Court of Human Rights Cases Concerning The Hague Convention on International Child Abduction’ in *The Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction* (Leiden, Martinus Nijhoff Publishers, 2009) [Beaumont 2009].

⁵¹ Brussels II *bis* Regulation (n 14) Art 60 and Recital 17. The Regulation applies in all intra-European Union cases (except those involving Denmark, Art 2(3)). For analysis of the interaction between the Convention and the Brussels II *bis* Regulation see D Hodson, *A Practical Guide to International Family Law* (Wiltshire, Family Law, 2008) 269–75.

⁵² ‘Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction’ (March 2001) http://hcch.evision.nl/upload/concl28sc4_e.pdf [2001 Conclusions].

⁵³ M Freeman and H Setright, ‘The Hague Child Abduction Convention: Current Developments in Hague Convention Jurisprudence or a Universal Vaccine for a Mutating Virus?’ [2002 2003] 6 *Contemporary Issues in Law* 279, 279–80.