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A Critical Study of Mediation in Cross-Border Child-Custody Disputes: Analysing the Doctrinal Tension Between State Jurisdiction and the Best Interests of the Child

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ABSTRACT

Cross-border family disputes, particularly those involving the determination of child custody, occupy a sensitive place in global family law governance. Owing to the contentious nature of the disputes, traditionally rigid adversarial litigation often proves inadequate, making mediation a more constructive and humane dispute resolution method. This research focuses on analysing the efficacy of mediation in resolving cross-border family disputes surrounding child custody arrangements. Furthermore, it scrutinises the principles of confidentiality, neutrality and cultural sensitivity within cross border mediation practice. Complementing this the doctrine of 'best interest of the child' and its role in making the mediation 'child centric' is considered. In addition, this study analyses the relevance and applicability of various legal frameworks and its significance in upholding the validity of mediated settlements. In essence, the doctrinal conflict between child welfare, state jurisdiction, and public policy is critically examined. It critically appraises the advantages and the limitations of mediation in facilitating efficient and amicable dispute resolution. It further examines whether the legitimacy of such proceedings is undermined by jurisdictional and enforcement challenges. Additionally, it analyses the role of international instruments in facilitating and recognising mediated settlements. This research paper concludes by providing recommendations and asserting the importance of harmonised legal frameworks with appropriate child centric safeguards to enhance the effectiveness of mediation.

Keywords: Child-centric mediation, confidentiality, neutrality, 1980 Hague Child Abduction Convention, 2012 Hague Mediation Guide, child-custody, best interest of the child.

Introduction:

Transnational marriages and separations are the result of the expansion of human mobility across borders. When employment and education transcend a nation's boundary, so do family issues. Just in the European Union, around 1,70,000 cases or 19% of the total divorce cases filed, have an unresolved international element¹. One such point of contention between the disputing parties is the determination of child custody. Child welfare and custody occupy a sensitive domain that require dialogue and mutually acceptable agreements in the best interests of the child. Traditional adversarial dispute resolution often results in harsh and rigid judgements that not only aggravate parental conflict but also harm the mental well-being of the child.

Disputes over child custody, parental responsibility and cases of international parental child abduction after marital discord, underscore the need to address cross border family disputes through effective mechanisms. There are various international instruments that aid in the determination of child custody such as the Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996) and the 1980 Hague Child Abduction Convention which aim to protect children from wrongful detention or removal. Such conventions contain provisions for dispute resolution through mediation to prevent matters from becoming acrimonious. The cost-effectiveness, broad scope, flexibility, preservation of familial relationships and constructive nature of dispute resolution make mediation the most suitable method for cross-border child custody matters².

Despite the advantages, mediation operates within a fragmented legal framework due to sovereignty and public policy considerations. The lack of uniform international standards create ambiguity regarding the recognition and the validity of mediated settlements. Balancing parental autonomy with the best interests of the child require structured legal procedures that safeguard the child from manipulation or harm of any kinds and ensure that the neutrality and sensitivity inherent to such matters are preserved.

¹ *Cross Border Couples*, Family Law (LexisNexis UK), Feb. 6, 2007, https://www.familylaw.co.uk/news_and_comment/cross-border-couples.

² Joanne Brown & Phoebe Chan, *The Use of Mediation in International Child Abduction Cases*, Tanner De Witt (Apr. 26, 2024), <https://www.tannerdewitt.com/the-use-of-mediation-in-international-child-abduction-cases/>.

Research Objectives –

- 1) To critically examine the effectiveness of mediation as a method of dispute resolution in cross-border child custody matters.
 - 2) To undertake a comparative study of the role of the international law framework in promoting coherence and reconciliation of parental rights, best interest of the child and state jurisdiction.
 - 3) To evaluate the significance of the core mediation principles of voluntariness, confidentiality and neutrality in ensuring the integrity and legitimacy of the dispute resolution process.
 - 4) To investigate the validity and the enforcement of cross-border mediated settlements.
 - 5) To examine the applicability and integration of the ‘best interests of the child’ doctrine in guiding the mediation process.
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Research Objectives –

This research paper adopts a doctrinal methodology that aims at evaluating the effectiveness of mediation as a method of dispute resolution in cross-border child custody disputes. It outlines the relevant principles governing the mediation proceedings such as confidentiality, neutrality and cultural sensitivity. Further it explores the tensions between state jurisdiction and parental authority while trying to ensure that the best interests of the child are prioritised.

Review of Literature –

- 1) The Pitfalls and Possibilities of Using Technology in Mediating Cross Border Child Custody Cases³ –

Author: Melissa A. Kucinski

Journal: Journal of Dispute Resolution

This research paper focuses on the efficacy and the influence of technology in facilitating mediation in cross border child custody disputes. It examines the role of various international instruments such as the Hague Convention and the Malta Conference. Further, it provides a comparative perspective on the frameworks governing mediation across countries such as Germany, Australia and France. The author elucidates on the key considerations in cross-border mediation. Although the paper provides a comparative and doctrinal analysis, it does not propose any recommendations regarding the standardisation of international protocols. A deeper evaluation into the privacy and associated concerns with the use of technology in mediation proceedings. Moreover, considering the rapidly evolving technological landscape, an assessment of the long-term implications is needed.

- 2) The Recognition of Internal Decisions of Adoption and Cross-Border Family Mediation⁴ –

Authors: Carmen Ion & Lenuța Giurgea

Journal: Journal of Danubius Studies and Research

This paper focuses on the importance of comity of courts and the interaction of national legal framework and international family mediation. The author discusses the various regulations. It also lays emphasis on the principles of neutrality, confidentiality and best interest of the child. This paper also provides insights into the recognition and the validity of mediated settlements. The author has also identified the challenges pertaining to lack of awareness and inadequate enforcement mechanism. The paper however, does not explore the post-mediation monitoring phase. It does not examine a discussion on the clauses of mediated settlements, enforcement mechanisms and mediation institutions. Further, including a comparative analysis would expand the understanding of the international challenges.

Best Interests of the Child –

Best interests of the child doctrine is a fundamental principle of family law. Its emphasis is that it is the child’s welfare that takes precedence over parental or state interest. The said principle is codified in the United Nations Convention on the Rights of the Child (UNCRC), 1989. It identifies three pivotal aspects of the doctrine - a substantive right, a rule of procedure and a principle guiding the interpretation of the principle. There are numerous aspects to the concept of ‘best interests of the child’ including the preservation of the child’s identity, adequate standard of living, education and upbringing according to the child’s background.⁵ The UNCRC is on the top of the legal hierarchy of child law. The phrase “primary consideration” in Article 3 of the statute, asserts the importance and primacy given to the protection of child rights.

³ Melissa A. Kucinski, *The Pitfalls and Possibilities of Using Technology in Mediating Cross-Border Child Custody Cases*, 2010 J. Disp. Resol. 297 (2010).

⁴ Carmen Ion & Lenuța Giurgea, *The Recognition of Internal Decisions of Adoption and Cross-Border Family Mediation*, 11(1) J. Danubius Stud. & Res. 35 (2021).

⁵ Guidelines Promoting the Human Rights and the Best Interests of the Child in Transnational Child Protection Cases

The courts have offered multiple interpretations to the concept of best interest of a child. In *X. v. Latvia*⁶, the court held that in cross border child custody issues the interests of the child and those of the parents must be balanced. However, the interests of the child may override those of the parent, since the child is given primary importance. Further in another case⁷, the court discussed on the benefits of referring a dispute to mediation. The court observed that considering the sensitive nature of family and custody disputes, the breakdown of relationship occurs during the phase of personal upheaval. Mediation as a method of dispute resolution offers certain safeguards such as confidentiality and impartiality offering the disputing parties a sense of protection against their vulnerabilities.

Child focused and child inclusive family mediation techniques are among the recent developments in the field of non-adversarial dispute resolution. Facilitative and evaluative mediation are two such methods⁸. Facilitative mediation provides for a structured process and a constructive dialogue environment. The focus is to allow parents to make informed decisions that are in the best interests of the child. The mediator plays a vital role as a neutral and objective party who informs the parents if their decisions affecting the child's life are against the law. In the case of evaluative mediation, the parties' claims are reviewed, with the mediator driving the parties to arrive at an agreement on the solutions.

The advantages of mediation are far-reaching and multi-faceted. Mediation offers procedural advantages, is cost-effective, ensures confidentiality and transparency and a method that can re-establish dialogue and communication over arguments and confrontation. It is because of these reasons that mediation emerges as an effective tool in ensuring the preservation of the best interest of the child during the dispute resolution phase.

Determination Of State jurisdiction -

There have been a number of foundational judgements affirming the view that the interests of the child and the amicable resolution of disputes always take precedence over conflict between the states regarding their right to assert jurisdiction and control over a certain case. In a landmark case⁹ on transnational child removal, the court upheld the principle of closest concern, as in the state that has the most intimate contact with the child has the jurisdiction over the case. The child's welfare is of paramount importance in such cases.

It is not always that the courts are in conflict with each other. At times, comity of the courts and harmonisation of the legal frameworks has smoothened the dispute resolution process. Where respecting foreign judgement ensures the welfare of the child, the same ought to be encouraged. However, it is to be noted that a child cannot be treated as a property and the focus cannot be shifted from the well-being of the child to jurisdictional conflict.¹⁰ In the case of *Dhanwanti Joshi v Madhav Unde*¹¹ the court held that cases involving the determination of child custody, the issue is to be settled not on the legal issue but on the sole criterion of the interest of the child. Through this judgement the court emphasised a child centric dispute resolution process like mediation is to be encouraged over the traditional win or loss adversarial mechanism that ends up operating in the interests of none.

Ultimately, the courts stress upon the notion that child's welfare and interest override any concern pertaining to the maintenance of international comity or jurisdictional conflicts¹².

Mediation Process –

The pre-mediation stage usually includes the referral. This marks the initiation of the mediation proceedings. The parties can either mutually agree to refer the dispute to a mediator or the court may require the mediation to be conducted. The 1980 Hague Child Abduction Convention presses for the voluntary initiation of mediation proceedings. However, the requirement of voluntariness should not compromise the need to ensure expeditious disposal of the cases.

Once a case is referred to mediation a detailed screening process is conducted¹³. This procedure helps in ensuring the informed consent of the parties. This stage maintains the procedural safeguards by assessing the power imbalance between the parties, undertaking a coercive control assessment, to understand the cultural backgrounds, maintain confidentiality, uphold the best interests of the child and assure the ethical integrity of the process. After the preliminary assessment is undertaken, the mediators are appointed. The mediator ought to be specially qualified to undertake such cases. This is particularly due to the inherent sensitivity of the dispute. The mediator ought to receive training and must possess adequate psychological and legal knowledge and cultural competence. Further, the mediator is required to ensure the confidentiality and neutrality of the process. The integrity of the mediation process directly correlates to the integrity of the mediator. The European Union issued a directive on the conduction of mediation proceedings¹⁴. Article 4 of the directive requires the mediator to be effective, impartial and competent and imposes a duty on the states to provide for the requisite training for the mediators.

⁶ *X v. Latvia*, App. No. 27853/09, 2013-V Eur. Ct. H.R. 1 (Grand Chamber).

⁷ *Ass'n de médiation familiale du Québec v. Bouvier*, 2021 SCC 54 (Can.).

⁸ Mediation and the Best Interests of the Child from the Child Law Perspective

⁹ *Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu & Anr.*, (1984) 3 SCC 698 (India).

¹⁰ *Surya Vadanam v. State of Tamil Nadu & Ors.*, (2015) 5 SCC 450 (India).

¹¹ *Dhanwanti Joshi v. Madhav Unde*, (1998) 1 SCC 112 (India).

¹² *Nithya Anand Raghavan v. State (NCT of Delhi) & Anr.*, (2017) 8 SCC 454 (India).

¹³ Hague Conference on Private International Law, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — Part V: Mediation* (2012).

¹⁴ 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, art. 4, 2008 O.J. (L 136) 3 (EU), <https://eur-lex.europa.eu/eli/dir/2008/52/oj>.

The mediation then enters the stage of preparation which involves the collection of information. The mediator would explain the basic principles governing the mediation process.

During the mediation process, the mediator ensures that the best interests of the child are prioritised. On the identification of issues, all possible remedial options are examined to determine the appropriate course of action. The issues to be determined are the place of residence, relocation, financial aspects and parental responsibility. The mediator has to take into consideration the influence of environmental factors such as type of conflict, culture, ethos of the society and the available mediation institutions¹⁵.

Once the parties arrive at an agreement, a mediated settlement is drafted based on the issues and proposed arrangements. Thereafter, the agreement is reviewed and the parties may express their views on the same. In the implementation phase, a regular review and monitoring is undertaken in certain cases to ensure that the terms of the mediated settlement are adhered to and the best interests of the child are not compromised.

Key Principles –

In cross-border child custody disputes, the mediator is expected to adhere to certain principles to ensure that the mediation process is efficient, legally and ethically sound. The notion of voluntariness refers to the freedom of the disputing parties to refer the dispute to mediation, absence of coercion, informed consent and the right of self-determination to continue the mediation proceedings. The Hague Convention, provides the legal foundation for the principle of voluntariness. In child custody disputes, the parents must have the right to withdraw their consent in cases where they think that the mediation is not operating in the interests of the child¹⁶.

Adherence to the requirement of the maintenance of neutrality is a pivotal component in any mediation proceeding. The mediator ought to be aware of the background and be culturally sensitive, yet not engage in impartial conduct towards either of the parties. The goal is not detachment but to ensure that both the parties are entitled to equal opportunities.

The sensitive nature of the child-custody matters requires strict compliance with the confidentiality terms. It helps in encouraging truthful communication, protects the child's privacy and creates a safe environment. Confidentiality requires that the mediator not to reveal any information relating to the parties or the dispute. Where there is any kind of disclosure the consent of the parties should be taken. The information should be securely stored and destroyed after the matter is disposed.

The mediator has the obligation to obtain the informed consent of the disputing parties. Informed consent requires the mediator to inform the parties regarding the nature of the dispute resolution process, the confidentiality rules, voluntary participation and the right to withdraw. With regard to the procedure, the mediator is expected to inform the parties, the stages of the process, the recognition and validity of the mediated settlement. Further, the mediator should also inform the parents that the dispute resolution process is non-adversarial and the focus is on the best interests of the child.

The principle of cultural sensitivity is essential. In child custody issues, parents tend to have different cultural backgrounds, parenting values and norms. Cultural sensitivity ensures that the cultural identity of the child is preserved. It allows both the parents to equally participate in the mediation process. When both cultures are respected, it promotes fairness and inclusion and encourages cooperation between the parents. Cultural factors influence interpersonal relations in contemporary communities. The mediator is expected to modify his approach according to the cultural identity of the parties.¹⁷

The mediator should ensure the fairness of the proceedings and comply with the due process obligations. This requires the mediator to maintain transparency, provide for a review mechanism and ensure that the final settlement is reasoned and legitimate. In child custody disputes, the mediator ought to ensure that neither of the parties is disadvantaged due to the cultural, financial or linguistic background.

In order for a mediation process to be child-centric, participation of the child is essential. A child is capable of expressing their views.¹⁸ The participation of the child ensures that the autonomy of the child is maintained, identity of the child is preserved and that the child is not subject to parental manipulation. The mediator can provide for the direct participation to make it child focused and child inclusive. In the *Re D (A child)* case¹⁹, the court reaffirmed the view that the child's voice ought to be heard. Any objections raised by the child are to be considered seriously. The child should be allowed to express his/her opinion on certain matters and their views should be given weight according to the age and maturity of the child.

¹⁵ James A. Wall & Timothy C. Dunne, *Mediation Research: A Current Review*, 28 Negotiation J. 217 (2012).

¹⁶ Code of Ethics for Mediators in Cross-Border Disputes Involving Children Within ASEAN, CBDIC Working Group (Oct. 2022), <https://cacj-ajp.org/web/wp-content/uploads/2022/10/Code-of-Ethics-for-Mediation-CBDIC-WG.pdf>.

¹⁷ B. Alankritaa, *Cultural Sensitivity in Family Law Dispute Resolution: ADR Approaches in Multicultural Societies*, 7 Indian J.L. & Legal Rsch. 5328 (2025), <https://www.ijlrr.com/post/cultural-sensitivity-in-family-law-dispute-resolution-adr-approaches-in-multicultural-societies>.

¹⁸ United Nations Convention on the Rights of the Child art. 12, Nov. 20, 1989, 1577 U.N.T.S. 3.

¹⁹ *Re D (A Child) (Abduction: Rights of Custody)*, [2006] UKHL 51

Comparative Perspectives –

The United Nations Convention on International Settlement Agreements Resulting from Mediation²⁰ aimed at providing recognition and enforcement to mediated settlements. The goal of the convention was to ensure that the mediated settlement is accepted by countries across the globe irrespective of their social, economic and legal systems²¹. It also urged the governments their legal frameworks governing international mediation. The convention contains provisions regarding the terms of the settlement agreements, reservations, grounds for refusal to grant relief and other procedural requirements. This convention provides for the appropriate framework to govern cross-border mediation. It proves as a significant instrument in promoting legal certainty, encouraging the use of mediation as a method of alternate dispute resolution in transnational disputes, facilitates cross-border cooperation promotes efficiency and underscores the importance of ethical safeguards like fairness and neutrality in family mediation settings. However, this convention does not apply to any family matters. This constitutes a major limitation, as it restricts the practical utility of the convention, since cross-border family and child custody related disputes occupy a substantial portion of transnational conflicts.

The cornerstone of the mediation framework in the European Union is the mediation directive²². The scope of this mediation directive extends to civil, commercial and family related disputes. It upholds the core principles of voluntariness, confidentiality and recognition to mediated settlements. A landmark case²³ where the European Court of Human Rights resolved a cross-border child custody dispute encouraged amicable settlement of such disputes through a mediation-based approach. The court also explained the interaction and the harmonious relationship between the Hague Convention and the applicable laws in the European Union. The core principles of mediation, cooperation and understanding and non-adversarial dispute resolution were emphasised. The procedural obligations are not to be given importance over the child's welfare. Besides this the Brussels II ter Regulation²⁴ and the European Network for Family Mediation (ENFM) strongly promotes mediation in resolving cross-border disputes.

The Hague Convention on the Civil Aspects of International Child Abduction²⁵ is a significant instrument governing international child abduction and child-custody related cases. The core objective of the convention is to promote the amicable resolution of disputes, providing for a prompt dispute resolution mechanism and to foster cooperation between the governmental authorities of different countries. The essence of a mediation proceeding is to ensure the amicable settlement of disputes²⁶. The convention directs the countries to provide for the same. The phrase "measures appropriate measures" can be interpreted to mean that in order to facilitate the voluntary return of children, the states are empowered to rely on judicial and non-judicial measures (methods of alternate dispute resolution like mediation)²⁷.

The Guide to Good practice on mediation²⁸ under the Hague convention stands as a cornerstone instrument in promoting the use of mediation as a method of resolving cross border child-custody related. The goal is to encourage and guide the authorities by sharing the best practices and creating a cross-border mediation network and facilitating institutional partnership. The guide is a comprehensive note on the advantages and disadvantages of using mediation and other forms of alternate dispute resolution in cross border family child custody matters. It provides the legal framework for the initiation, conduct of mediation proceedings, the terms of the settlement agreements, principles of mediation, training and standards of the mediators, cooperation between authorities and the recognition and enforcement of mediated settlements. The guide safeguards the child's best interests, due process obligations and fosters international comity.

Besides the aforementioned mechanism, the Malta Process, the United Nations Convention on the Rights of the Child and the ASEAN (Association of South East Asian Nations) framework also provide for institutional support and the operational structure that adhere to the principles of mediation and explicitly endorse mediation as a preferred means of achieving voluntary and child-centred solutions to cross border child custody disputes.

Conclusion -

Transnational relationships and disputes are inevitable considering the rise of globalisation. The determination of child custody occupies a sensitive position in the legal arena. In cross-border disputes mediation is recognised as an efficient and optimal method of alternate dispute resolution. The fundamental principles governing mediation in cross-border child custody are neutrality, best interest of the child, confidentiality and voluntariness. There are numerous conventions such as the Hague Convention and the Malta Conference, however, they remain inconsistent with significant variations and limitations. Mediation is a better option in such cases as it follows a child-centric and welfare oriented, is non-adversarial and cooperative in nature, it offers flexibility and cultural sensitivity and preserves the confidentiality and privacy of the parties.

²⁰ United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation), Dec. 20, 2018, U.N. Doc. A/RES/73/198, 58 I.L.M. 1322 (2019).

²¹ Shagun Sharma, *Scrutinizing the Scope of the Singapore Mediation Convention as a Foundation for Cross-Border Settlements and Its Effect on the Indian Lawscape*, 3 Int'l J. Law Mgmt. & Humanities III (2020).

²² 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, 2008 O.J. (L 136) 3.

²³ Neulinger & Shuruk v. Switzerland, App. No. 41615/07, 2010-V Eur. Ct. H.R. 381 (Grand Chamber).

²⁴ 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), 2019 O.J. (L 178) 1.

²⁵ Hague Conference on Private International Law, *Convention on the Civil Aspects of International Child Abduction*, Oct. 25, 1980, 1343 U.N.T.S. 89.

²⁶ *Hague Child Abduction Convention*, art. 7(c).

²⁷ *Hague Child Abduction Convention*, art. 10.

²⁸ Hague Conference on Private International Law, *Revised Draft: Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Part V: Mediation* (2012).

Conflicts with jurisdiction remains a fundamental issue in cross border child custody matters. These disputes are frequently complicated due to the initiation of parallel proceedings in multiple jurisdictions. The determination of habitual residence, non-recognition of foreign awards and conflicting legal basis for the jurisdiction as asserted by the states remain a contentious issue. It is due to the delay and procedural fragmentation and limited coordination between the judicial authorities that child custody disputes often loose coherence and efficiency, ultimately undermining the welfare of the child.

Despite the advantages associated with using mediation, such form of dispute resolution encounters unique challenges such as the lack of legal certainty, lack of harmonious legal framework, imbalance of power, child participation issues, cultural barriers and the lack of specialised instruments governing the training of mediators. Inadequate mediators may risk procedural unfairness and non-compliance of essential principles thereby compromising on the ethical integrity of the mediation proceedings.

Given the limitations, it becomes imperative to introduce reforms in legislative, procedural and institutional arenas. The need for the creation of a harmonised legal framework that ensures the assured enforceability of the mediated settlements. Further, prescribing legal standards that ensures that the mediation process is child-centric and fair. The establishment of specialised training and accreditation for cross-border mediators would equip the mediators with the requisite linguistic, legal and psychological skills

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