



Promoting Voluntary Agreements in International Child Abduction Disputes: The Case of Brazil

Lalisa Froeder Dittrich*

Civil Service, Brazil

*Corresponding author. E-mail: lalifroeder@gmail.com

ABSTRACT

The objective of this article is to discuss and analyse the practice of Brazil in complying with the obligations imposed by articles 7 and 21 of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, in the light of the new recommendations of the Hague Conference regarding the use of mediation and other alternative dispute resolution (ADR) mechanisms. This work first presents an overview of this Hague treaty, explaining its mechanisms and objectives and briefly discussing some of the main problems regarding its implementation. It then analyses why and how the use of ADR in child abduction cases has been addressed by the Hague Conference and goes on to explain the implementation of the Convention in Brazil: main actors, procedures, and problems faced during the first 10 years of its application (2002–2012). Finally, it addresses the use of ADR in child abduction cases in Brazil, discussing its main advantages, disadvantages, limitations and conformity with the national legal framework and analysing the role of the Central Authority in promoting voluntary agreements. Based on statistics of the Brazilian Central Authority, which shows that a high number of international child abduction disputes are solved by agreements, either before or after adjudication, it is concluded that Brazil should invest on the improvement on the use of ADR in Hague cases.

I. INTRODUCTION

Marriages between citizens of different nationalities are common today, with international families being a reality in many countries (Van Loon, 2009). Predictably, family disputes involving more than one jurisdiction are now a global predicament, challenging the international community to find an effective means to protect the children of broken marriages (Galesloot, 1999). Among the consequences of the dissolution of these relationships is the increase in international child abduction,¹ ie, the relocation of children by one parent (or, sometimes, by a relative) from one jurisdiction to another without proper judicial or parental consent, usually with devastating effects on the welfare of the victims (Freeman, 2006). The most effective

international legal remedy for this problem is the 'Convention of 25 October 1980 on the Civil Aspects of International Child Abduction'² ('the Convention'), signed in The Hague, and which as of 2014 is in force in 91 countries.³

This 'unusual and creative' (Bruch, 1999) Convention has attracted a high number of Contracting States, being considered 'the most successful family law instrument' (Beaumont and McEleavy, 1999) in the history of the Hague Conference on Private International Law. Its main objectives are to provide the means of promptly returning an abducted child to her state of habitual residence and, indirectly, to produce a deterrent effect,⁴ discouraging parents from wrongfully relocating their children, while also preventing 'forum shopping' (Wolfe, 2000), the practice of initiating judicial procedures in a jurisdiction believed to be more favourable to one's plea, to the detriment of the right jurisdiction, which is the place of habitual residence of the child.

The Convention, although successful, has also attracted criticism as it became clear that concrete cases did not exactly match the predictions of its drafters, with most abductors being primary carer mothers (Lowe, 2011) and with many cases involving allegations of domestic violence. Moreover, given the delay in the resolution of disputes in many states due to lengthy judicial procedures, 'the very appropriateness of the Convention' (Lowe and Horosova, 2007) began to be questioned, challenging Contracting States to find solutions to improve its implementation while still safeguarding the rights of the children.

In this context, alternative dispute resolution (ADR) mechanisms, which have been considered a better quality solution for domestic family disputes in many countries, gained status within the Hague Conference. In fact, the promotion of amicable solutions as one of the obligations of Contracting States is prescribed in articles 7 and 21 of the Convention, but it was only recently that guidelines for the use of mediation and other ADR mechanisms in international child abduction were compiled and agreed on at the Hague Conference, resulting in the publication of the 'Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Mediation' ('The Guide'),⁵ which, hopefully, will encourage mediation in these disputes and result in better outcomes for the families involved. Among its advantages, amicable solutions are defended on the grounds that they are less financially and emotionally costly, and that they are more complied with for they have been mutually agreed on. However, mediation in Hague cases can be quite challenging due to cultural differences, time constraints, distance between parties, and enforcement of agreements in two (or more) jurisdictions. It also has to fit into different legal frameworks, which is why the Hague Conference opted for a broad definition of mediation.

In Brazil, whose experience will be the focus of this work and where the Hague Convention only entered into force in 2001, the use of ADR in civil cases is recent. The promotion of alternatives to adjudication in the country is mostly seen as a remedy to lengthy judicial procedures. When first introduced, in the late 1990s, ADR was received with distrust, especially in the judicial community (da Silva, 2000). However, things have been slowly changing since the Judicial Reform of 2004. The use of mediation and other forms of ADR in international child abduction disputes in Brazil is also rather experimental, and were introduced to avoid lengthy judicial

proceedings – a critical outcome in any dispute, but an even worse one in Hague cases, where time is crucial. Nonetheless, during the first 10 years of the implementation of the Convention in Brazil, the promotion of amicable settlements has proven to play an important role in solving these disputes. The objective of this article, therefore, is to discuss and analyse the practice of Brazil hitherto in complying with the obligations imposed by articles 7 and 21 of the Convention, in the light of the new recommendations of the Hague Conference. The main question is ‘why and how can ADR be used in the promotion of voluntary agreements in child abduction cases, considering Brazil’s legal framework?’

To answer it, the section II will present an overview of the 1980 Convention, explaining its mechanisms and objectives and briefly discussing some of the main problems regarding its implementation. Section III will analyse why and how the use of ADR in child abduction cases has been addressed by the Hague Conference. Section IV will explain the implementation of the Convention in Brazil: main actors, procedures, and problems faced during the first 10 years (2002–2012). Finally, section V will address the use of ADR in child abduction cases in Brazil, discussing its main advantages, disadvantages, limitations, and conformity with the national legal framework. Problems regarding the enforcement of agreements and the role of the Central Authority will also be analysed.⁶

II. THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

‘A’ was born in Germany, from a German mother and an English father. When A was 3 years old, her parents divorced, and her mother was awarded custody. The father, discontented with the judicial decision, took his daughter to live with him in the United Kingdom.

‘B’, six years old, is the child of two Spanish citizens living in Australia, where B was born and has always lived. Her parents separated when she was four, and although she lives with her mother, both parents have joint custody, in accordance with Australian Law. C’s mother wanted to go back to Spain, but could not get an authorization from her former husband nor from Australian courts. Unhappy, B’s mother illegally removed her daughter to Spain.

‘C’ is a ten-year-old boy who had always witnessed his father’s violence towards his mother, a French citizen living in the United States. Afraid of the consequences of filing for divorce, she decides to take C and move back to France. Questioned about whether he wants to move back to the USA, D, a very mature child for his age, states that he definitely wants to stay with his mother in France.

To provide a remedy for and especially to prevent child abductions like the ones described above, 91 countries are now members of the Convention on the Civil Aspects of International Child Abduction, an international treaty that has as one of its main goals the prompt return of any illegally-removed child to the place of her habitual residence, where all aspects involving custody must be decided before its natural judge. The Convention also provides a remedy for parents who are being

denied access rights in another jurisdiction (art. 1). To this effect, Contracting States have the obligation to take all appropriate measures to provide the location and expedite the return, either voluntarily or by administrative or judicial order, of any child who has been illegally removed to its territory (art. 2).

So as to guarantee this goal, the drafters of the Convention included one of the most innovative institutions of the Hague Conference: the Central Authorities, focal institutions to be appointed by each Contracting State to receive and initiate requests (Bruch, 1994). Central Authorities must maintain direct and close cooperation with each other and are considered essential for the effective implementation of the treaty (Lowe and Horosova, 2007). Most importantly, the mechanisms of cooperation provided by the Convention were intentionally elaborated to suit different judicial systems, with a minimum of formalities. In fact, its main advantage, compared to traditional means of international cooperation, is its direct and straightforward procedures, which will be explained using the aforementioned examples.

In all cases, the children were wrongfully removed from their place of habitual residence without the consent of one of their custodial parents. According to the Convention, which uses habitual residence as a connecting factor to decide on the jurisdiction in which custody rights must be assessed, a wrongful removal occurs when it is in breach of the rights of custody awarded under the law of the state where the child was a habitual resident and provided these rights were being exercised before the removal (art. 3). All the children were under 16 years old at the time of their removal and all parents who were left behind (the *left-behind parents*) had exclusive or joint custody of their abducted children. Therefore, all would be entitled to initiate Hague procedures before the competent Central Authority of the state of removal (the *requesting state*) who would then send a request of return instructed with proof of custody and residence to the Central Authority of the state in which it is believed the child was removed to (the *requested state*). From then on, each state has its own procedures, but all basically check whether the requisites of the Convention are present; provide for the location of the child, when necessary; verify whether a voluntary return is possible; initiate or facilitate judicial or administrative proceedings and provide the left-behind parent with legal advice or assist in the obtainment of such counsel. When the matter goes to court, the merits of the case must be assessed only regarding the wrongful removal itself; rights of custody must be discussed before the courts of the requesting state. If a return order is issued or a voluntary return is agreed upon, the Central Authority must take all measures to facilitate the safe return of the child (art. 7). All of this should ideally take place within 6 weeks to avoid further harm to the child.

The reasons by which Central Authorities can refuse an application are limited, yet they are open to interpretation by each state, which may consider the application not to be well-founded (art. 27). The courts, in applying the Convention to a concrete case, should interpret its exceptions, prescribed in article 13, strictly. In the cases described herein, eg, the judge in charge of deciding on the return of child C could choose to reject the request based on article 13, b, paragraph 2 – grave risk for the child – and on his refusal to return, if he is considered mature enough to express his opinion. The request for return can also be refused when more than 1 year has elapsed since the abduction and it has been proven that the child has settled in his or her new environment.

1. Problems with the Implementation of the Convention

When the Convention was first drafted in 1980, it was believed that the majority of abduction cases were similar to the fictional case of Child A. At the time, the idea was that child abductions used to follow divorces in which the non-custodial parent (mainly the father), unhappy with visitation arrangements or with the loss of contact, would take the child to a country where the chances of getting custody rights were higher or where they could live in the hiding (Hutchison, 2001). Statistics show, however, that this is not the case in the majority of international abductions, in which neither is the father the abductor nor is the left-behind parent the primary carer of the child, as initially supposed. In 2008, 69 per cent of taking parents were mothers, while in 2003 this number was 68 per cent and in 1999, 69 per cent. On the other hand, 72 per cent of taking persons in 2008 were primary carers. When the two indicators were combined, the results showed that 88 per cent of abductor mothers were also the primary carers (Lowe, 2011).

Two main problems arise from this evidence: one is the possibility that, once returned to her country of habitual residence, usually following considerable time living in the requested state, the primary carer abductor could obtain judicial authorization in the requesting state to move with the child back to the requested state, forcing the child to face another relocation (Duncan, 2000). The other is the ever more common allegation by the abductor mother that the child would be exposed to a grave risk due to domestic violence in the country of habitual residence, which, in turn, could lead to a rejection of the petition based on the exception of article 13, b.

While there are claims that many women are being forced to return to a violent environment 'by coach and four' (Kaye, 1993), regardless of what the best interest of their children would be, there is also increasing concern about the liberal interpretation of the 'grave risk' exception. When an exception of violence or grave risk is raised, the judge can find himself in a conundrum: on the one hand, the return must be decided as quickly as possible to prevent the child from becoming attached to her new environment; on the other hand, it may not be possible to decide before investigating the possible ensuing risks for the child (Bruch, 2004). Consequently, some judges would rather take longer to rule on a case than risk exposing the child to an intolerable situation, justifying their decision on the grounds of the child's best interests (van Rossum, 2010), an abstract concept that can have many interpretations. According to Skoler (1998: 560),

Judges may be motivated to allow Hague's Article 13b psychological defences for noble-or not so noble-reasons: their own perceptions of the best interests of the child; their lack of psychological sophistication about the dynamics of such cases; and/or unconscious or conscious identifications with the abducting parent as the result of what might kindly be called 'nationalistic chauvinism' and what might unkindly be called 'nationalistic narcissism.'

This may lead to judicial procedures taking many months or even years (Lowe, 2011), to the detriment of the child's welfare. In this regard, Lowe and Horosova (2007: 70) alert that the very fact that the abductor may have caused harm to

the child by the abduction is not taken into consideration when the abductor is the primary carer, in a clear misunderstanding of the principles of the Convention:

In any event there surely remains the argument that it is basically wrong for children to be uprooted from their home by the unilateral act of either parent and taken to a foreign jurisdiction and thus be separated from the other parent and from their friends and familiar surroundings.

This is also the opinion of Skoler (1998: 560), for whom the exception of article 13 has been used to distort the reasons for the abduction:

The implication of such a carefully worded provision is that the child was ‘abducted’ in the first place for its own welfare, not the welfare of a bitter parent. Child abduction, however, is often more about the psychological fragility of the parent rather than the fragility of the child.

Moreover, depending on the requested state’s prevalent culture on family matters, it can be difficult to send a child back when it is not clear whether the mother will be granted the same rights in the requesting state. Claims that a domestic court could be deciding against its own national citizens put even more pressure on judges and Central Authorities.

According to Boskey (1998) ‘most courts tend to be “homers”’, meaning that judges usually represent the values of their countries and tend to view their practices as superior – even if unconsciously – and this in turn reflects in their decisions in favour of their nationals. This can result in the judge deciding, after many months or years, that a child has become too habituated to her new place of residence and that she would be exposed to a grave risk if the return were ordered. This kind of decision, however criticized (McMillan, 1997), is not uncommon, raising doubts about the effectiveness of the Convention not only in returning children but also in preventing abductions. Not surprisingly, few cases are resolved within the 6 weeks envisaged by the drafters of the Convention.⁷ To face these problems, many alternatives have been discussed within the Hague Conference. The ‘Guide of Good Practice’ is one of the instruments to help Central Authorities in the right implementation of the Convention. Despite having the status of a ‘soft law’ – a non-binding instrument – the Guide is helpful to create uniformity in the practice of Central Authorities as well as in the jurisprudence. The last part of this Guide was published in July 2012⁸ and presents the guidelines for the use of mediation and other ADRs as a means of reducing the problems discussed above.

III. THE CASE FOR THE USE OF ADR IN CHILD ABDUCTION DISPUTES

Even though there is no direct prescription in the Convention, the use of ADR is implicit in articles 7, c, and 21, which impose on the Central Authorities the obligation to take the appropriate measures to ‘secure the voluntary return of the child or to bring about an amicable resolution of the issues’ (art. 7) and ‘(. . .) to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the

exercise of those rights may be subject' (art. 21). The role of Central Authorities in enabling amicable settlements is further reinforced in the first part of the Guide of Good Practice, which states that:

Many Central Authorities may themselves be actively involved in voluntary return negotiations. The Central Authority is not obligated to negotiate a voluntary return, but in appropriate cases it should provide information to the applicant and the abductor, and their legal representatives, concerning the obligations of Article 7(c) and Article 10, and the advantages of a voluntary return.

It was only recently, however, that mediation and other forms of ADRs became a priority on the agenda of the Hague Conference (Kucinski, 2010). The increasing number of Contracting States, as well as the rise in the number of applications received by Central Authorities, has encouraged the search for speedy and efficient alternatives (Hutchinson, 2001; Vigers, 2011). The Conclusions of the latest Meetings ('Conclusions'), as well as the Responses to the Questionnaire sent by the Hague Conference in the context of the Working Party on Mediation in the Context of the Malta Process ('Questionnaire')⁹ about mediation, indicate that most Central Authorities consider the use of ADR helpful and take some kind of measure to encourage voluntary returns and agreements.¹⁰ In 2009, a Working Group was formed to draw some guidelines for the use of mediation in the context of the Hague Convention, resulting in the fifth part of the Guide of Good Practice, whose goal is to clarify the role of mediation in solving international disputes, an increasing demand of 'the international child welfare community' (Zawid, 2008).

Another objective of the Guide is to define the different ADR mechanisms and its specificities when used in cross-border abduction disputes. According to it, three main approaches to dispute resolution, other than adjudication, play a major role in the promotion of amicable agreements in international child abduction: negotiation, mediation, and conciliation. Although mediation is the most discussed in-depth, the Guide intentionally provided a broad definition for the term so as to accommodate different approaches (Vigers, 2011). The drafters explained that the 'Guide refers to "mediation" in this broad sense, without prejudice to the model and method applied'.¹¹

1. Negotiation, Mediation, Conciliation

The main differentiation between negotiation and mediation is the absence in the case of negotiation of a third neutral party. Negotiation is a dispute resolution that involves two or more parties working together to find a solution to a problem. Although a third party may help conduct the negotiation, it lacks the neutrality of a mediator, who 'has no stake in the dispute and is not identified with any of the competing interests involved' (Roberts, 2008). In Hague cases, negotiation usually occurs directly between parents or their lawyers. Central Authorities, in this regard, do not usually play an active role, being limited to the exchange of information between countries, when necessary.¹² Conciliation, in its turn, according to the Guide, refers to a more 'directive mediation'¹³ involving a third party who exercises power over

the parties, usually a judge. The conciliator is the same person who will later decide on the dispute if a settlement is not reached, and thus alters the dynamics of mediation. Given that conciliation does not occur in a neutral environment, parties may not feel comfortable to disclose information that could later be used against them.

Mediation, which is the main focus of the Guide, involves a third neutral party and is based on the principles of confidentiality, impartiality, voluntariness, and self-determination (Roberts and Palmer, 2008). The mediator is not directly involved in the dispute and its role is to facilitate communication between parties. Mediation may take many different forms, and, in Hague cases, must sometimes be adapted to fit the circumstances. For instance, the physical distance between parents may be an element that could frustrate direct mediation, and different means can be used to bypass this obstacle, such as conference calls and electronic messaging (Kucinski, 2009). In addition, the conduct of mediation may also vary depending on the mediator and on the kind of dispute. According to Roberts and Palmer (2008), it can range from facilitating the exchange of information to a more 'direct intervention'. When distance mediation occurs, with no face-to-face contact, the mediator may assume the role of a 'go-between', which is mostly what happens in Brazil, as it will be discussed later.

2. Advantages of Mediation

Mediation is considered a valuable approach in family disputes given that the parties involved will usually have to maintain a long-term relationship, for the child's sake. Many advantages are attributed to the use of mediation in Hague cases, some being the same as the ones in domestic family cases (Mantle, 1996) and others specific to cross-border disputes.

A. Agreements are Beneficial for Children

In divorce disputes, it is well known that an amicable agreement between parents is less harmful for children than adjudication is (Mnookin and Kornhauser, 1979). In fact, according to Elrod and Dale (2008: 388)

The level and intensity of parental conflict is now thought to be the most important factor in a child's post-divorce adjustment and is the single best predictor of a poor outcome.

High-conflict disputes in court, such as the ones involving cross-cultural relationships, may result in even greater distress for the abducted child.¹⁴ Roberts (2008) maintains that 'there has long been a consensus that mediation can enhance children's interests'. This is explained by the fact that mediation involves communication and collaboration between parties, which goes against the logic of 'winners and losers' on which adjudication is normally based. In the bargaining process, the goal is to find a good solution for both parties, and consequently, a 'win-win' situation. Although a win-win solution is rarely a reality in Hague cases, especially when one parent wants to relocate against the will of the other, a mutually agreed solution, even when not completely satisfying for both parents, is still preferable to a decision rendered after a high-conflict adjudication (Mnookin and Kornhauser, 1979).

Mediation, in this sense, may avoid further damage¹⁵ to the long-term relationship between parents after the end of the abduction, thereby promoting a peaceful environment for the child (Kucinski, 2009). Moreover, the agreement may better reflect the interest of the child – not always the case in adjudication.

B. Mutually Agreed Solutions Tend to be Self-enforced

Adherence to the terms of a voluntary amicable agreement (a reflex of mutual interests) tends to be higher (Roberts and Palmer, 2008), demonstrating yet another advantage of mediation in cross-border disputes – prevention of re-abductions (Mosten, 1993), a well-known problem in Hague cases.¹⁶ Notwithstanding this, as the autonomy of the parties in matters relating to custody rights is limited in most countries, the agreement must be validated before the courts in both jurisdictions to ensure legal enforcement in case of non-compliance.¹⁷

C. Agreements Can Save Time and Resources

Child abduction disputes should ideally be resolved within 6 weeks, though this is seldom the case in most states. Global statistics show that the mean time for resolution in 2008 was 166 days for a judicial return, 286 days for a judicial refusal, and 121 days for voluntary returns (Lowe, 2011). Although the time difference between voluntary returns and judicial orders is not very large, if all the advantages of mediation referred to here are added to the fact that mediation is usually less expensive surely makes this approach a more cost-beneficial option than adjudication, saving ‘time, money, and a lot of unhappiness’ (Waltjen, 2000).

D. The Scope of Negotiation is Broader

In handling Hague cases, the judge is limited by the Convention to deciding whether the removal was illegal or not, or whether there is ground to enforce access rights; any aspect relating to custody rights must be decided in the jurisdiction of the requesting state. In this sense, although controversy exists about the validity of an agreement involving custody-rights arrangements made in the jurisdiction of the requested state, it seems reasonable that, once the party requesting the return agrees to negotiate the change of residence, an agreement may be confirmed in the new state of residence, which will then have jurisdiction on custody matters. However, it is important to emphasize that the mere willingness to negotiate arrangements for the child’s future cannot be interpreted as acquiescence to the change of residence until an actual agreement is deemed valid by the court, thus gaining the status of a consent order (in common law countries) or a judicial order (in civil law countries) (Hutchinson, 2001). Otherwise, left-behind parents would probably avoid negotiation in fear of this being used as a defence for non-return under article 13 (a) of the Convention (acquiescence on the changing of residence).

When an agreement is made for the child to return in the company of the abductor, things can get more complicated as no legal change of residence occurs and custody matters will still be decided in the jurisdiction of the requesting state. One possible solution is the provision of ‘mirror orders’: the agreement is validated before the court of the requested state and ‘mirrored’ in the requesting state, becoming valid in

both territories. This way it is possible to discuss custody within the context of a Hague case. The chance of guaranteeing beforehand the conditions in which the child will live upon her return could mean the difference between obtaining a voluntary return or not. It is also a viable solution to the dilemma of the judge who has to decide whether the best interests of the child will be protected once she returns.

It must be stressed, however, that there is no consensus among Contracting States on the fairness of negotiating custody before a child has actually returned, as there is concern over the fact that the taking party could use the negotiation to gain time, thereby perpetuating the abduction. Some Central Authorities, in their responses to the Questionnaire,¹⁸ pointed to the fact that regularizing the abduction by agreement (eg legalizing the relocation) sends the wrong message to prospective taking parents, who may feel encouraged to abduct their child to convince the other parent to agree to relocation.¹⁹

3. Negotiating in the Shadow of the Convention

An analysis of the responses to the Questionnaire shows that, although variations occur among Contracting States, mediation is mostly considered helpful. Some concerns, however, are shared by many states: scope of agreements, time spent with mediation, recognition and enforcement, conformity with the obligations imposed by the Convention, and equality of power between parties in mediation.

A. Time Constraints

Mediation and negotiation in cross-border child abduction disputes must be adapted to fit into the constraints of the Convention, the most crucial of which is time. As the ultimate goal of the Convention is to provide the means to promptly return a child, mediation must be time-limited, and must not be used as a justification to procrastinate. Finding the right balance between promoting agreements, as per articles 7 and 21 of the Convention, and not causing delay in the procedures can prove a challenge to many Central Authorities. In some states, mediation comes before judicial procedures, regardless of the Guide's warning that the eagerness to get a voluntary return cannot compromise the objectives of the Convention, and that it is preferable to initiate judicial procedure before trying mediation, and after certain undertakings are in place (eg the Court has retained the passports).²⁰ Where judicial procedures take a long time, mediation may be an attractive alternative to speed the resolution of disputes and avoid even initiating litigation, thereby saving resources. In this respect, institutionalization (or not) of ADR in the legal system of the state also influences its practices (Vigers, 2011). The drafters of the Guide seem to have considered this when they defined mediation broadly, allowing states to be creative in applying different techniques. However, depending on the context in which mediation occurs, imbalances of power may occur, hence raising concerns about fairness.

4. Fairness and Power in Mediation

According to Mnookin and Kornhauser (1979), 'divorcing parents do not bargain over the division of family wealth and custodial prerogatives in a vacuum; they bargain in the shadow of the law'. The same can be said of parties in child abduction disputes, in

the sense that rather 'than imposing order from above' the Convention provides the legal framework within which bargaining in child abduction disputes occurs. More than discouraging parents from abducting their children, the *shadow* of the Convention, ie, the prospect for the abductor of being forced to return after costly judicial proceedings may be enough to encourage a voluntary return. In the words of William Duncan, in his introduction to the report of a pilot-mediation scheme conducted by Reunite²¹ in the UK, this was 'a classic example of the advantages of bargaining "in the shadow of the law", in this case a law which carries a very clear message as to what will happen if agreement is not reached'. Under Reunite's pilot-scheme, it could be expected that taking parents would have motivation to attempt mediation, since the other alternative (litigation) might not look as advantageous as the possible results of negotiation. As Duncan wrote in his introduction:

For a left-behind parent who does not want primary care of the child, there is the prospect of a secure agreed visitation regime. For the taking parent there is the possibility that what originally was a unilateral and unwise act may be re-characterised as an agreed relocation.

In such cases, it was unlikely that adjudication could be the 'best alternative to a negotiated agreement' (Fisher and Ury, 1991) for taking parents, considering the precedents of English courts, which are known for their strict application of the Convention.²² Chances were that a return would be ordered if an agreement were not possible. Notwithstanding this, the taking parent could still see adjudication as the best alternative when a defence under article 13 existed; those cases, however, were most probably considered unsuitable for mediation.

Does this mean that equilibrium of power in child abduction cases does not exist? In Reunite's pilot-scheme, where cases were mediated in the context of a legal system with a record of applying the Convention strictly, it seems that the left-behind parent was in a better position to negotiate, unless a strong defence could be raised in courts. The fact that the left-behind parent still agreed to mediate suggests that the prospect of facing adjudication, even when chances of winning were higher, was not considered a better alternative.²³ It stands to reason, then, that avoiding judicial battle and improving the relationship were factors considered, resulting in a successful experience: an agreement was reached in 75 per cent of 28 cases.²⁴ The experience of Reunite, however, might not have had the same results were it replicated in other Contracting States, as the 'shadow of the Convention' depends on each country's legal development. While the shadow is strong in England, in other countries, depending on the stage of implementation of the Convention, cultural factors and the functioning of the judiciary, the 'shadow of the law' can be quite weak (Crespo, 2008), favouring the taking parent, who may not have enough incentive to negotiate. This is the opinion of Freeman (2006: 42) for whom:

Notwithstanding the excellent record that the jurisdiction of England and Wales enjoys in dealing with Hague applications, this is not reflected in all Hague jurisdictions and the unevenness of the playing field continues to be felt by many of those involved in the process.

Hence, in a state in which the procedures take many years, or where there are precedents indicating a greater probability of the return being refused because the child has become habituated to her new environment, the taking parent's best alternative to a negotiated agreement (BATNA) would be to insist on adjudication, while the left-behind parent could feel coerced to agree with the relocation in exchange for contact with the child (Zawid, 2008). Such unequal distribution of power between parties raises concerns about fairness in states where the standards for mediation are not well established, as well as in states where the implementation of the Convention is still incipient. In these cases, the mediator must be highly sensitive to cultural aspects and to the context of the mediation (Shapira, 2009). Where evidence of disequilibrium of power between parties exists, adjudication may be a wiser choice.

Another challenge in Hague cases is the assessment of the dispute for mediation. Adjudication should be preferred in cases involving allegations of domestic violence, in which the mother may be in a less powerful position to decide or where the left-behind parent may want the opportunity to contradict the allegations against him. Furthermore, in any case involving risks for the child, the careful examination by a judge is probably the best option (Hunter, 2003).

5. Scope and Enforcement of Agreements

As seen earlier, there is controversy on the suitability of negotiating custody rights in Hague cases. The argument against it is that it may be dangerous to 'open' the scope of the discussion in the wrong jurisdiction and while the abduction is still in place.²⁵ Also, although in theory any arrangement favouring the future of the child can be negotiated, the judge may not feel competent to validate an agreement regarding custody rights. While this does not appear to have been a problem in England under the Reunite scheme, the Guide stresses the importance of considering this legal matter carefully.²⁶ One possible solution would be to 'mirror' agreements in both states: the agreement would be first approved by the courts of the requesting state (the right jurisdiction) and then 'mirrored' in the requested state, becoming binding in both territories.

In any case, there is evidence to support the need for getting consent orders in both jurisdictions, thus avoiding further risks for the child should one of the parents violate the agreement.²⁷ Depending on the state, the autonomy of the parties to make agreements on family matters may be limited, and enforcement may depend on the approval of the courts. In others, international child abduction is considered a crime and may result in criminal charges against the taking parent. The negotiation of agreements, therefore, must always take into account all the legal consequences of the abduction in both states, and it is recommended that all measures to safeguard parent and child be taken before the return. Legal advice during mediation is recommended in this regard (Kucinski, 2010).

6. Conformity to the Objectives of the Convention

Some Central Authorities²⁸ have expressed concern regarding agreements that may result in acquiescence to relocation, and as to whether member states would be in

compliance with the Convention.²⁹ Considering that the key objective of the Convention is the protection of children, however, any agreement that truly reflects the desire of both parents should not only be considered in compliance with the obligations assumed by Contracting States but also seen as a preferable solution towards the best interests of the child. In this sense, the self-determination of the parties should be respected and voluntary settlements should not be classified as 'good' when the child returns and 'bad' when the child stays. Both are valid results when parents reach a consensus.

IV. THE HAGUE CONVENTION IN BRAZIL

Brazil is a relatively recent member of the Convention, having joined on 1 January 2001 and promulgated it by the Decree no. 3.413, of 14 April 2000. After 10 years, the Convention, although still not widely known in the country, is better understood and there is considerable jurisprudence available. The most common difficulties for its correct application are being gradually solved, with, for example, fewer petitions being denied on the grounds of the risk of the child being separated from her mother (or, less commonly, father), as usually happened during the first years of the implementation of the treaty in Brazil.³⁰ However, lengthy procedures are still a significant challenge to its correct application.³¹ It was not until the end of 2002 when the current structure of the Brazilian Central Authority (hereinafter 'BCA'), the Secretariat of Human Rights of the Presidency of Brazil,³² was completed and when the implementation of the Convention as it stands today started in full.³³ The main role of the BCA is to handle return or access rights applications.³⁴

When the left-behind parent believes the child was removed to Brazil, and provided the country of habitual residence is a Contracting State of the Convention, an application is made before the Central Authority of the requesting state, which in turn sends it to the BCA. The first step is to locate the child, a job carried out by Interpol after receiving a request from the BCA. Considering the vast territorial extent of Brazil, this can take days or months; in a few cases, the child is never located or it is confirmed that she did not enter the country, in which case the application is dismissed.³⁵ Once the child is located, the BCA sends a notification letter to the abducting parent informing him or her of the pending accusations and offering the opportunity to return the child amicably with the support of the BCA. The BCA may also try to intermediate an agreement so that a solution contemplating the best interests of the child is reached. The taking-parent has 5 days to contact the BCA regarding arrangements for an amicable settlement or to present a defence, if any of the exceptions in article 13 exist.³⁶ The BCA, however, cannot assess the merits of the allegations unless there is proof that the application lacks fundamental requirements – eg, there is a legal document proving the left-behind parent's acquiescence to the relocation. Thus, the BCA has to exercise strict discretion before dismissing a case, which is a relevant fact, given that the BCA sometimes acts as a mediator.

After this first contact, should both parents agree to try an amicable settlement, the BCA may act in different ways: from helping the parents exchange proposals and safeguards to directly mediating the dispute if the parties can meet in Brazil, or by shuttle mediation.³⁷ If an agreement is reached, the case is closed; otherwise, the file

is sent to the Office of the Attorney General³⁸ ('OAG'), which will assess the suitability of representing the case before a Federal Judge. The OAG may also dismiss an application if it is concluded that the application is not legally grounded, but with no assessment on the merits of the case. Once a case is assessed, the request is presented before a Federal Judge³⁹ of the city in which the taking-parent is currently living with the child.⁴⁰ Usually, the judge will first take all appropriate measures to prevent the taking-parent from fleeing with the child (eg taking passports, informing the police) and will then set a date for a conciliatory hearing, in which he will try to reach an amicable agreement.⁴¹ If an agreement is reached, the judge approves it, giving it the same effects as a decision.⁴² If not, the judge assesses the proof and takes any other possible measures, such as hearing the child or requesting a psychological report. The decision of the Federal Judge can be reviewed by the Justices of Regional Federal Courts, and, depending on the case, by the Superior and/or Supreme Courts.⁴³ Predictably, this can take many months or years; however, the court may order that the decision be immediately enforced before an appeal is filed, through an order of injunction.⁴⁴

Because of many problems faced by left-behind parents and the BCA during the first years of the Convention in Brazil, in which the application was directly sent to the OAG, sometimes with no previous contact with the taking parent, procedures were modified to promote communication between parties before the case reached the courts.⁴⁵ This decision proved right in many cases, for different reasons: sometimes the taking parent did not know she or he was doing something wrong and has returned as soon as the BCA letter was received; in other cases, it became clear that the left-behind parent did not necessarily want the return, but rather the right to visit the child, and arrangements for visitation were provided, with the taking parent being granted consent to relocate. Even when the solution was not so simple, it was sometimes possible to promote communication and help parents to better understand the consequences of the abduction. In some cases, arrangements for visitation during judicial procedures were negotiated to the child's benefit.

Up to 1 June 2012, Brazil has received 439 applications for return or visitation of children wrongfully retained in the country, with a 37 per cent increase in cases in 2010–2011 (134) when compared to 2008–2009 (91),⁴⁶ especially from countries where there are a large number of Brazilian migrants, such as Spain and Portugal.⁴⁷ Moreover, 318 cases were concluded between 2002 and 2012, with 32 returns by judicial order and 109 agreements: 69 contemplating returns, 26 relocations to Brazil and 11 arranging visitation rights, which represent 34 per cent of the overall number of closed files.⁴⁸ However, considering only 'valid cases', ie, excluding petitions dismissed by the BCA, those in which the child was not located in Brazil and those in which the applicant withdrew the application, the result is that 64 per cent of cases already resolved were closed after amicable agreements were reached.⁴⁹ It is clear, then, that amicable resolution of disputes plays an important role in the application of the Convention in Brazil. Truly, many disputes were solved through negotiation directly between parents and lawyers, and others were settled during conciliation hearings in courts. Still, the BCA played an effective role in the remaining 33 cases. The legal framework in which voluntary agreements in Hague cases occur in Brazil and the problems arising from this context will now be discussed.

V. PROMOTING VOLUNTARY AGREEMENTS IN INTERNATIONAL CHILD ABDUCTION DISPUTES IN BRAZIL

The implementation of the Convention in Brazil was not uneventful, especially in its first years. Some of the first applications for returns received by the BCA and sent to courts took a long time to be resolved, and 118 were still pending as of July 2012. Moreover, the first decisions were based on a liberal interpretation of the exceptions.

Given the legal possibility of a judge ordering the return without a hearing or before the respondent has been summoned,⁵⁰ it was established that the first step to be taken by the BCA after locating the child would be to provide the taking parent with a chance to voluntarily return the child or to discuss the possibility of an agreement, as stated earlier. Hence, unless there is strong evidence that the child is at risk or that the taking-parent may leave the country, a communication is sent to the taking parent inquiring about the possibility of a negotiated agreement. A response to that letter is expected within 5 days, and the BCA team then helps parents to discuss safeguards, exchange proposals of agreements and clarify the consequences of the abduction for all parties involved. This phase results in an increase in voluntary returns and consents to relocation, with only one existing case⁵¹ of non-compliance with the terms of the agreement after the return being registered among the ones in which the BCA helped to amicably settle the disputes.⁵²

Among the cases that ended in conciliation before a judge, there was only one case containing a complaint of non-compliance, even though the order was deemed legally valid and had the effects of a decision in Brazil.⁵³ This case confirmed the importance of ‘mirroring’ the order in the requesting state, even though the majority of agreements had been respected that far. Currently, all parents are encouraged to validate any agreements in both states.⁵⁴ Finally, in 2011, the first two cases were mediated with the help of OAG’s team of mediators, composed of professionals who work in intra-governmental disputes. One case ended with an agreement and the father consenting to the permanency of the child in Brazil; the other resulted in an agreement in court after a failed mediation.⁵⁵

In spite of the positive outcomes of the majority of agreements obtained by negotiation, mediation, and conciliation in the last 10 years, many problems can be found in the use of these procedures in Hague cases in Brazil. The role of the BCA as a mediator, eg, may be questioned in terms of impartiality and confidentiality. The fact that mediations mostly occur at a distance and that the team is not trained in mediation are also problematic. And, in view of the legal scenario described earlier, it is questionable whether the negotiation of agreements, privately, by mediation or conciliation, is really occurring under a fair environment – or, conversely, under a ‘pale shadow of the law’ (Crespo, 2008).

1. Is There a Place for the BCA in Mediating Voluntary Returns?

According to the responses to the Questionnaire, the Brazilian Central Authority is one of the few to directly mediate Hague disputes.⁵⁶ The fact that mediation is not institutionalized in Brazil, with not many mediators available outside the judicial system, imposes limitations on the use of this procedure without the help of the BCA. One of the concerns about mediation being directly conducted by Central Authorities is partiality.

It can be argued that the BCA position inside the structure of the Secretariat of Human Rights means that the protection of children's rights is always the primary objective of any procedure. Hence, it is always made clear to parents that the BCA cannot defend either of the parties, and is impartial in the dispute, unless there is clear evidence that the child may be at risk, in which case mediation is no longer considered an option, and the files are sent to a judge. As a result, the focus of the mediation process is always to find a mutually construed solution that considers what is best for the child. A voluntary return is as good an outcome as is an agreement to relocation, and the BCA is not in a position to pressure parents to opt for a return, even though the procedure could be defined as a more proactive mediation, since it is constrained by the specificities of the Convention; for instance, the BCA has to inform the parents about the possible legal consequences of their choices and to ensure that mediation is not being used as an excuse to postpone legal procedures.

Once the case is accepted in its essential requisites and is considered suitable for mediation,⁵⁷ the BCA does not have discretionary power to dismiss an application nor to impose a solution to the parties, being thus neutral in the dispute.⁵⁸ Provided the parties are well informed about the role of the BCA, impartiality is not necessarily compromised. Regarding confidentiality, the problem with shuttle mediation is that proposals are exchanged mostly by email and telephone, with a risk of being improperly disclosed.⁵⁹ Moreover, all documents are usually attached to the files that will later be sent to the judge.⁶⁰ In order not to compromise confidentiality and ensure that parties will feel comfortable to disclose information that may be helpful to an agreement, it would be advisable, in this sense, that all documents exchanged during the mediation remain confidential and not be part of the files. Shuttle mediation in Hague cases may be advantageous when a high level of animosity exists; in these cases, the mediator can 'reframe' the message before transmitting it to the other party (Hoffman, 2011).

Concerning the role of the BCA, on one hand, the team is qualified in terms of cultural sensitivity and expertise in the functioning of the Convention; on the other, there is no cost to the parties, since mediators are not paid to provide this service. However, specific training in mediation is considered a fundamental quality of mediators not only by the Guide, but also by most Codes of Practice worldwide and investment in training of the staff is essential to ensure the quality of mediation.

Recently, an alternative was tried with the use of the mediators from the Chamber of Conciliation of the OAG, whose main function is to mediate intra-government disputes. Whether there is a role for this body in mediating Hague disputes, however, is questionable, as this exceeds its legal competency. Furthermore, the participation of OAG's attorneys in the mediation procedure may compromise impartiality, as in case of non-agreement they are precisely the ones responsible for litigating against the taking-parent. If the use of OAG-trained mediators is considered, the attorneys responsible for petitioning the return in case of non-agreement must not participate in the mediation and should not have any access to information exchanged during this procedure.

Finally, another issue is whether the Federal Justice would have jurisdiction to validate the agreements when they involve matters relating to custody rights. In favour of this solution, precedent exists in cases in which an agreement was reached before

the Federal Courts during conciliation hearings and later confirmed by a judge. In fact, this is prescribed by the Code of Civil Procedures in its 449, which allows the judge to broaden the scope of the petition in conciliation cases. In applying this legal device, the judge would be legally authorized to confirm agreements involving the regulation of custody rights. To be legally binding in another state, however, this decision must be 'mirrored', which could be done in collaboration with the requesting Central Authority or with the help of lawyers in the country of habitual residence of the child. If the dispute ends in acquiescence to the relocation, the parties may validate the agreement directly before Family State Courts, which have the competence to decide on all matters of Family Law. In this case, in which Brazil, as the new country of habitual residence, becomes the jurisdiction for deciding on family matters, validating the agreement before State Courts seems the logical answer. However, as OAG's attorneys cannot litigate before these courts, the parties would have to use the services of either a private lawyer or a public defender.

2. Fairness in Mediation and Conciliation in Hague Cases in Brazil

Although the statistics of the BCA show that the majority of Hague disputes in Brazil were concluded with an amicable agreement as a result of negotiation, mediation, or conciliation, either privately, with the help of the BCA or during court procedures, the data provided also reveal that some agreements were made many months or years after the BCA received the application. There remains the question as to the motivation behind these agreements: were they agreed upon as a last recourse when a return order was imminent or after considering that there was no alternative but to agree with the relocation, securing visitation rights?

There is no way to confirm this hypothesis within the limited scope of this research, but the rise in the number of agreements for return over the last 3 years is noticeable, coinciding with the rise in returns being judicially ordered, and leading to speculation regarding the 'darkening' of the shadow of the Hague Convention in Brazil. More recent jurisprudence seems to confirm that the interpretation of the Convention has improved, resulting in procedures taking less time to conclude, exceptions being more strictly applied and cases being rightly assessed as Hague cases.⁶¹

In some of the longest pending cases, however, in face of the probability of a refusal, or even considering that the best for the child should be to remain in Brazil, it is possible that for left-behind parents there was no better alternative than to agree with the relocation in exchange for visitation rights. Nonetheless, it seems that, given the progress in the implementation of the Convention in the country, as well as the recent (albeit slow) changes in the legal culture that conferred on the mother all the rights over the children, the context for negotiation⁶² in Brazil is becoming fairer for both parties, but especially for the left-behind parents, who now have better chances of having their children returned to them.

VI. CONCLUSION

This article discussed the use of ADR in Hague cases in Brazil in order to assess its advantages and limitations. It was concluded that resolving these high-conflict cases through amicable agreements offers several advantages over adjudication: better

cost-benefit; improvement of the communication between parties, resulting in better long-term outcomes for the child; the possibility of discussing arrangements for the child's future and the higher adherence to agreements when both parents are satisfied with the solution produced. However, extra care must be taken to protect the child, especially when domestic violence is alleged.

In Hague cases, time is crucial. Mediation cannot cause delays to the procedures, which ideally should be initiated before (or at the same time as) a voluntary solution is negotiated. The definition of mediation in international child abduction disputes, as well as its conduct, is far from being uniform in the context of the Hague Convention and its success will mostly depend on the legal framework within different Contracting States. In this sense, Central Authorities can choose to directly mediate or negotiate voluntary agreements or to refer parents to public or private bodies.

In Brazil, the promotion of alternatives to adjudication had recently been included on the agenda of the Executive, Judiciary, and Legislature. Lengthy procedures and a lack of confidence in the judiciary are the main obstacles to the fair and efficient resolution of disputes, with obvious implications for the correct implementation of the Hague Convention in the country. Difficulties in enforcing decisions also persist, as Brazilian Law provides for countless possibilities for appeal, which may result in years of litigation before the child is returned – which in the end may not occur due to the understanding that she has already adapted to her life in Brazil. In this context, the resolution of Hague disputes by mutual agreement allows for the compliance with the objective of promptly returning the child to her state of habitual residence, which, if not the only reason to promote voluntary agreements, is certainly a very strong one when the alternative is to face months or years of litigation.

Finally, the work of the BCA in promoting voluntary agreements, notwithstanding its limitations, plays an important role in promoting amicable solutions, with most cases being solved by voluntary return after the use of negotiation, conciliation, and mediation. And, although ideally mediation should be conducted by a well-trained professional who does not work directly for the Central Authorities, the results of the BCA confirm [Roberts and Palmer's \(2008\)](#) statement: 'sometimes anyone is better than no one at all.'

**Table Statistics of the Brazilian Central Authority
(January 2002 to July 2012)**

YEAR/OUTCOME	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	Total	%
Dismissed	1	3	5	4	7	6	7	8	4	8	2	55	13%
Not found in Brazil	1	3	4	5	4	2	6	2	2	5	3	37	8%
Withdrawn		2	10	8	4	9	7	5	8	6		59	13%
Return by judicial order	2	2	5	2	1	3	6	4	5	1	1	32	7%
Return by agreement (conciliation hearing)			2			1	3	5	10	1		22	5%
Return by private negotiation	2	1		1	2	2	3	3	6	7	2	29	6.5%

(Continued)

Table (continued)

YEAR/OUTCOME	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	Total	%
Return by agreement promoted by the BCA				3	3	2	2	2	3	1		17	4%
Judicial order for visitation		2		1								3	1%
Visitation granted by voluntary agreement		2	2	2	1	1	4		2			14	3%
Consent for relocation (private/BCA)	1		2	2		1	1	4	2	3		16	4%
Consent for relocation during Court procedures		2		2	2	1	2	1	1			11	2.5%
Return denied by Courts		8	2	2	3	6	3		2			26	6%
Pending		1	2	1	5	3	7	6	32	24	38	118	27%
RESULTS	7	26	34	33	32	37	51	40	78	56	46	439	100%

Forthcoming at <http://www.sdh.gov.br>.

NOTES

- 1 The term 'child abduction' used here does not correspond to the concept of kidnapping, usually perpetrated by a stranger (Beaumont and McElevay, 1999).
- 2 Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Available at <<http://www.hcch.net>>.
- 3 For the complete list of member states, see <http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=24>.
- 4 According to Beaumont and McElevay (1999), the Convention 'places emphasis on the good of children generally by seeking to deter people from unlawfully changing the habitual residence of a child'.
- 5 'Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Mediation' (The Hague Conference on International Private Law, 2012).
- 6 The author's access to the files of the disputes occurred in the context of professional activities, and its use for the purposes of this work has been duly authorized.
- 7 According to Lowe and Horosova (2007) 'in 2003 in only three States (Germany, Italy, and Portugal) was a judicial refusal made in under six weeks. All this raises the question about whether the six-week obligation imposed by the Regulation is realistic or sensible'.
- 8 This article was based on the first drafts of the Guide, which was published in July 2012.
- 9 Permanent Bureau, Hague Conference, 'Conclusions and Recommendations of Part I and Part II of the Special Commission', April 2012, 'Responses to Questionnaire I and II', 2009, available at <<http://www.hcch.net>>.
- 10 This is reflected in the statistics: in 2008, 22 per cent of applications resulted in voluntary returns (Lowe, 2011).
- 11 Ibidem.
- 12 For Roberts and Palmer (2008), however, the mere presence of a third-party exchanging information may change the negotiation.
- 13 See n 5.
- 14 According to Skoler (1998), 'the research literature supports the notion that when cross-cultural custody disputes polarize, they tend to polarize bitterly and quickly'.
- 15 One interesting result on the effects of abduction is that for some parents the child was more affected by the never-ending court cases after the return and the continuing conflict between parents than by the abduction per se (Freeman, 2006).
- 16 In his research on the long-term effects of abduction, Greif (1998) found that a high number of parents who had their children abducted keep worrying about re-abduction many years after the return of the child.
- 17 See n 5.

- 18 See n 9.
- 19 Ibidem.
- 20 See n 5.
- 21 'The reunite Mediation Pilot Scheme', reunite International Child Abduction Centre, London, October 2006, available at <<http://www.reunite.org>>.
- 22 According to the report of Reunite (2006) '[in England and Wales] cases are normally resolved within six weeks, and, unless the abducting parent can show a technical failure to meet the Hague Convention criteria or unless the case comes within one of the strict defences, the application will result in an immediate return of the abducted child'.
- 23 In all, 90 per cent of parents who sent feedback on the scheme (70 per cent of the participants) considered that they were treated fairly during mediation, and 92 per cent felt the needs of their children were the focus of the process.
- 24 See n 22.
- 25 See n 9.
- 26 See n 5.
- 27 Freeman (2006) reveals that under the Reunite scheme the breach of undertakings was a recurrent complaint of abducting parents following the return: 'one abducting parent described how the left-behind parent referred to the undertakings he had given to the English court as "toilet paper".'
- 28 In a communication with the Central Authority of Austria, it was expressed that 'some provisions may be useful to clarify that amicably solving the custody or access issues in the proceedings in the state of abduction instead of the state of origin will not violate the spirit of the 1980 Convention'.
- 29 According to the Guide (n 5), 'mediation can also discuss the possibility of a non-return, its conditions, modalities and connected issues, i.e., the long-term decision of the child's relocation. Dealing with those issues in mediation is not, in principle, in contradiction with the 1980 Convention and other relevant instruments'.
- 30 Research conducted on the files of the Brazilian Central Authority, Secretariat of Human Rights, Brasília in June 2012.
- 31 According to the statistics of the BCA, the longest pending Hague case in Brazil was initiated in 2003. See Table.
- 32 Among the functions of the Secretariat of Human Rights are the elaboration and execution of human rights' policies in Brazil, including programmes related to the protection of the rights of children. See <<http://www.sdh.gov.br>>.
- 33 Information obtained in an interview with P. Soares, coordinator of the BCA, June 2012.
- 34 For the purposes of this work, only the procedures regarding the receipt of applications will be discussed.
- 35 From January 2002 to July 2012, 37 cases were dismissed because the child had not been found in Brazil. See Table.
- 36 For an explanation about the work of the different actors involved in the implementation of the Convention in Brazil, see: <<http://www.stf.jus.br>>.
- 37 Shuttle mediation occurs when the parties are not face-to-face, and the mediator transmits the message from one party to another (Roberts, 2008).
- 38 The Brazilian Government provides legal assistance to the applicant through the Office of the Attorney General, the body in charge of internally representing the state, according to article 131 of the Brazilian Constitution.
- 39 There are two Judiciary spheres in Brazil: State and Federal. Family matters are presented before State Courts; disputes grounded on the Hague Convention, however, must be presented before Federal Courts, which are the competent courts to decide on matters involving international treaties, in conformity with article 109 of the Brazilian Constitution.
- 40 As an alternative to the procedure explained above, the left-behind parent may always hire a private attorney or require the assistance of a Public Defender to present the case without the help of the Central Authorities.
- 41 Brazilian Code of Civil Procedures, Article 447.
- 42 Ibid., Article 475.
- 43 In Brazil, the Superior Court of Justice is in charge of reviewing lower Court decisions regarding their accordance to the law, but without assessing the merit of the petition. The Supreme Federal Court, on the other hand, is responsible for reviewing decisions in which a violation of Constitutional Rights may have occurred.

- 44 However, once the child is returned, it may not be easy to enforce an appeal that reversed the first decision.
- 45 Interview with P. Soares, coordinator of the BCA, June 2012.
- 46 See Table.
- 47 It is interesting to note that, in the same period, Brazil registered, for the first time in 20 years a higher number of immigrants entering the country than of Brazilians leaving the country. Information available at <<http://portal.mj.gov.br/data/Pages/MJASF5S0ASITEMIDF7B2EE1D60D4405F80C9C91D4EA12FC3PTBRNN.htm>>.
- 48 According to the statistics of the BCA, 118 cases were still pending in July 2012.
- 49 See Table.
- 50 Article 273 of the Brazilian Code of Civil Procedures.
- 51 In this case, the father decided to return the children before criminal charges were dismissed in the requesting state, which resulted in him being retained upon arrival. The mother restricted access to the children. Application for the return of children T., 2005, BCA files.
- 52 This seems to be in keep with the opinion of Roberts and Palmer (2008) for whom the difficulties of enforcement of agreements are overestimated, since 'freely agreed solutions have something in them for all negotiating parties and should therefore be self-enforcing'.
- 53 Case of child F., decided before a Federal Court in 2009. This order was not mirrored in Germany, which was the requesting state.
- 54 In one case from Canada, this was done after a conciliation hearing before the Superior Court in Brazil. The child was returned 6 years after the receipt of the application, once safeguards were in place and the terms of the agreement were homologated before the Canadian Court.
- 55 Files of the BCA. In both cases, the left-behind parents came to Brazil and mediation occurred in strict co-operation with the Central Authorities and Embassies of the requesting states.
- 56 Only the Central Authority of the Czech Republic has similar procedures, mediating Hague disputes with the help of their own team.
- 57 The assessment of the suitability of the case for mediation is based on the willingness of parties to negotiate and the lack of allegations of violence or evidence that the child could be at risk, since only a judge can take measures to safeguard the child and to hear her or his opinion, usually by appointed psychologists.
- 58 This is in keep with the definition of Roberts (2008) who states that 'what distinguishes mediation from other forms of dispute settlement is, as we have seen, the location of decision-making authority. In mediation, authority for decision-making lies with the parties themselves'.
- 59 Ibid.
- 60 Information provided by P. Soares, coordinator of the BCA, June 2012.
- 61 In fact, recent decisions resulted in children being returned even after many years had passed since the abduction, with the disregarding of the exception of the children being adapted to their new environment, in sharp contrast with the first decisions in which some months were considered enough to apply the exception. Compare, eg, two decisions of the Federal Regional Court of the 2nd Region (TRF-2): AG/130432 of 14/02/2006 and AC/497870 of 04/05/2011. Available at <<http://www.trf2.jus.br>>.
- 62 Some elements that could be considered during negotiation are as follows: length of judicial procedures, effects of litigation on children, recent jurisprudence, possible outcomes of custody procedures in another country, children's perception of the abduction in years to come (Mnookin and Kornhauser, 1979).

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