

INTRODUCTION TO INTERNATIONAL ADR

David Hodson

“A divorcing couple that has to litigate the consequences of the marital breakdown is not blessed. The couple that first litigates where to litigate might be said to be cursed. In reality it is a curse restricted to the rich. Only they can afford such folly.” Thorpe LJ

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David Hodson
The International Family Law Group LLP
8 Tavistock Street
Covent Garden
London WC2E 7PP
07973 890648
www.iflg.uk.com
dh@iflg.uk.com
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David Hodson acknowledges the assistance of Denise Carter OBE in preparation of some of these notes

ABOUT THE SPEAKER

David Hodson is a family law dispute resolution specialist. He is a English solicitor (1978 and accredited 1996), mediator (1997), family arbitrator (2002), Deputy District Judge at the Principal Registry of the Family Division, High Court, London (1995) and an Australian (NSW) solicitor (2003) and mediator. He deals with complex family law cases, and with an international element.

He is practising in London and Surrey, England and Sydney, Australia. He is a partner at and co-founder of The International Family Law Group LLP, www.iflg.uk.com.

He was joint founder in 1995 of probably the world's first metropolitan practice to combine family lawyers, mediators and counsellors and with an emphasis on a conciliatory and holistic approach. It was subsequently copied in many practices across the world. He is past chairman of the resolution/Solicitors Family Law Association's Financial Provision Reform Committee, Training Committee and Good Practice Committee and member of its International Committee. He is a member of The President's International Committee. He is past vice chair of the UK College of Family Mediators, the umbrella organisation for family mediation. He is a member of the Chartered Institute of Arbitrators. He is co-author of "Divorce Reform: a Guide for Lawyers and Mediators", "The Business of Family Law" "Guide to International Family Law" and consulting editor of "Family Law in Europe". He is an Accredited Specialist (with portfolios in Substantial Assets and International Cases), a Fellow of the International Academy of Matrimonial Lawyers, a past trustee of Marriage Resource and member of the Family Law Section of the Law Council of Australia and a member of the Lawyers Christian Fellowship. He is chair of the Family Law Reform Group of the Centre for Social Justice

He has written and spoken extensively on family law including many conferences abroad. Some papers and articles can be found at his web site below.

He is the author of "A Practical Guide to International Family Law", (Jordans July 2008), probably the leading textbook on international family law, of which part of this is an extract.

The International Family Law Group LLP www.iflg.uk.com is a specialist law firm providing services to the international community as well as purely national clients. It acts for international families, ex pats and others in respect of financial implications of relationship breakdown including forum shopping and international enforcement of orders. It receives instructions from foreign lawyers and, as accredited specialists, acts for clients of other law firms seeking their specialist experience. iFLG has a special contract with the Legal Services Commission for child abduction work and is regularly instructed by the UK Government (Central Authority).

iFLG is situated in Covent Garden near the Law Courts. Its mobile telephone accessible website includes valuable information, podcasts, a government approved child abduction questionnaire and formulae as a starting point for calculating fair financial settlements. It has an association with Watts McCray, Australia. It has emergency 24 hour contact arrangements.

Introduction to International Family Law ADR

“A divorcing couple that has to litigate the consequences of the marital breakdown is not blessed. The couple that first litigates where to litigate might be said to be cursed. In reality it is a curse restricted to the rich. Only they can afford such folly.”

These words by Lord Justice Thorpe of the English Court of Appeal sums up the dreadful plight of many international families. On relationship break-down, many complex issues of law, practice and enforcement arise, including where any court proceedings should take place

Yet whereas international family law work is properly recognised as a specialisation, this may not (yet) be the case where the international family considers resolving their dispute out of court through mediation or other ADR. In fact, conducting ADR for international families is arguably even more complex, problematical and requiring (at least) specialist skills, specialist knowledge and good experience than undertaking the law work.

These notes set out some current issues and developments in law and practice. Reference in these notes for convenience to mediation and mediator, the primary ADR model, should be extended to other ADR models and professionals.

When never to engage in ADR in an international case

Until jurisdiction for the dispute has been established. It must be known which country, and which country's laws, will be dealing with the dispute. (It might then be that mediation is conducted with reference to a hybrid of national laws, or none at all, or produce an outcome which is somewhere between the outcomes in the respective countries involved. This is the significant benefit and flexibility of ADR for an international family.)

Until jurisdiction has been established in law, the mediator should exceptionally carefully inform each party they should take immediate, urgent and specialist law advice and representation. This applies when the countries involved operate a discretionary basis for forum disputes. It is paramount between countries which operate *lis pendens*, first to issue, principally the European Union where the first party to issue proceedings secures jurisdiction. Until then, ADR should not commence.

Cynically in the opinion of most mediators, the prospects of ADR once one party has tactically issued first reduces dramatically. However this is fundamental.

Where there is a discretionary forum dispute, a matter is appropriate for ADR, although the mediator will need to be aware of the court timetable and of the likely outcomes in each relevant jurisdiction.

In respect of which country's laws will be applied, see below

It may also be thoroughly inappropriate to engage in ADR in an international case without securing the assets which may be the subject of distribution in the final financial settlement.

Spouses with international connections are particularly adept at moving assets worldwide very fast. This immediately raises issues as it may be very wise practice for the mediator to inform the relevant applicant party to obtain specialist and urgent advice about freezing assets before commencing any discussions. Some may consider this puts the mediator in a difficult position, being close to giving unilateral advice. However the simple reality is that an increasing number of people are acting without legal advice. Moreover governments of many countries are deliberately encouraging people to go direct to ADR and not via lawyers and therefore the incidence of people presenting in ADR with such situations will only increase. Moreover and in any event, the prospects of a successful mediation or other ADR outcome are dramatically reduced if one party has immediately put assets out of reach on being told of the prospect of family law proceedings. This is a difficult professional issue but must be faced at the outset

Models of ADR

Cross Border mediation.

Although traditional, national mediation involves one mediator, experience has shown that cross border disputes often benefit from a specialist lawyer-mediator in each of the relevant jurisdictions. This is especially so where the dispute is about the appropriate country in which any proceedings will go ahead or outcomes in those countries. One mediator cannot alone bring the knowledge of the separate national laws. The model pioneered by iFLG and Watts McCray provides a specialist mediator experienced in cross border work in each jurisdiction to co-mediate.

Such mediations are more likely to be directive rather than passive, with the experienced mediators giving a privileged consideration of the best ways forward to achieve a fair settlement.

The mediation itself may be conducted via international video link or by other electronic means, bringing in both parties and both mediators, see below.

This model is also suitable for the direct involvement of the parties' lawyers within the mediation process itself, as and when necessary. The outcome is then more cost effective, quicker and more satisfactory than traditional cross border litigation

Another variation when each party is in separate countries is for a mediator to be with each party during the mediation sessions, invariably conducted by video link or conference telephone. The mediator of course is neutral and not representing either party. However each party has the benefit of a mediator at hand. To conduct cross border mediation with the mediator alongside one party in one country and the other party on their own abroad creates real imbalances in perception

Cross border collaborative law

Instead of the involvement of a neutral mediator, collaborative law proceeds on the basis of consensual negotiations with disclosure and discussions at meetings. In this method of collaborative law, each party commits not to commence proceedings unless by agreement. The parties are represented by their lawyer who has been specially trained in collaborative law.

Clients cannot retain their own lawyer if they depart from the collaborative style process and decide to seek the intervention of the courts. As with cross-border mediation, video links and other electronic resources enable good dialogue and good progress even though the parties may be in separate countries.

Because of the continued risk of commencement of proceedings for unilateral gain and positioning in international cases, some consider collaborative law to be much more risky, at least until jurisdiction and forum has been established and accepted.

See below for principles of a international collaborative law model

Cross border arbitration.

Family law arbitration is binding in Australia and has been strongly encouraged by senior judges in England. A model of cross border ADR set up by iFLG and Watts McCray provides qualified arbitrators in both jurisdictions to adjudicate (together as needed) in respect of on cross border family law issues.

The arbitrators will have much experience of international family law work as well as their considerable judicial and/or arbitral experience. The arbitration award could then be upheld in each country. Alternatively, lawyers in each firm are able jointly to represent clients in cross border cases before a single chosen Arbitrator.

Family law arbitration is still in its early days in Australia and is only just about to be launched in England. The scope for cross border arbitration still needs further examination

Cross border early neutral evaluation.

Sometimes in international cases, parties and their lawyers find there is an impasse on an issue or dispute, perhaps not necessarily the whole case, and seek an early case evaluation of what would be likely to happen if the matter litigated including in either jurisdiction.

Specialist international family lawyers, including part time and retired judges and special counsel, can provide such an evaluation. This evaluation can remain privileged if the parties prefer. Experience shows that such an opinion often removes the “log jam” of one issue and allows the parties and their lawyers to move on to resolve all other issues

Child abduction mediation.

The experience of the reunite project was that mediation can work successfully even against the back drop of an international child abduction and fast parallel proceedings. It requires specialist child abduction lawyers and mediators. See below for more details

There will always be some cases which require a court to make findings of fact and decide an outcome. There are in reality relatively few, and much less than those which presently go to trial on international issues. Nevertheless, the law, practice and procedure facing international families is complex, often alien to concepts of national law and can be very fast or very slow.

Lawyers experienced in these issues with ADR qualifications and experience can best represent clients in each country and work together on cross border cases.

Features of cross border ADR

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

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

- Cross-border ADR will classically take account of outcomes in each of the relevant possible jurisdictions
- Cross-border ADR often requires a lateral approach, with different expectations and ways of working. Sometimes the parties will be in separate countries and ADR will have to take place electronically by video link or telephone.
- Cross-border ADR is probably only suitable for specialist international family lawyers who are also experienced ADR professionals and for mediators with acknowledged experience in these international cases. Possibly even more than the specialism required to undertake the law work, mediation and other ADR in international cases requires very good experience, skills, awareness of the interchange between litigation and mediation and of the possible outcomes abroad

Whose law?

Although a thoroughly alien concept in family law in common law countries such as England and Australia, it is commonplace in many civil law countries including the majority of member states of the European Union to apply the law not necessarily of the locality or forum, *lex forum*, but the law of the country with which the couple have the closest connection, as so defined. This may well be the country where they got married or they were first habitually resident together, even though this may be years, even decades, earlier and they have no ongoing close connection.

Across the European Union, the majority of countries which operate this so-called applicable law have entered into their own Enhanced Cooperation Regulation to set out guidance on which country's law would be applied in which circumstances. Its full title is Council Regulation 2010/0067(CNS) - COM(2010)0105

Mediators and other ADR professionals in these countries will be just as familiar as lawyers in those countries in dealing with cases by reference to the law of another country.

Therefore in any cross border ADR involving a country which operates applicable law, it will be fundamental to ascertain the law by which the ADR will be conducted. If it will be the law of the country with which the ADR professional (from a common-law jurisdiction) is not familiar, this issue should be tackled at the outset.

This also has wider implications when dealing with what might seem to be an entirely national ADR case yet with a couple from a country which operates applicable law and where it is entirely part of the local culture. They may expect the ADR professional to be applying the law of their home country rather than local law. The mediator should be aware of this.

This situation is accentuated when the couple have entered into a marital agreement, binding under the law of their own country although without separate representation and disclosure, and which has a choice of law clause. This couple may very strongly expect the ADR to be conducted according to that choice of law. Where mediation is in a common law country, each should obtain specialist international family law advice including reference to the fact that the

local courts will only apply local law. This is yet another instance where forum (and choice of law) must be ascertained before mediation can reasonably commence

Although English courts will only ever apply English law, they will in particular circumstances take into account what might have happened if the law of another jurisdiction had applied e.g. if the proceedings had been in another country with a close connection to the family. This is exceptional but increasing. The mediator must operate in the shadow of the law and therefore must be aware of this possibility.

Use of IT

Where it is the case with cross-border features but the couple are in the same country where the ADR dispute is being resolved and without reference to the laws of any other country, then it is in almost all respects similar to a local national ADR case.

However where one party is abroad or it is necessary to consult in the ADR process with a lawyer abroad, then some use of IT will be inevitable.

Whilst a lawyer can conduct a conference telephone call with another lawyer or with the client abroad, one of the chief features of mediation is the use of body language and other similar messages to overcome what might otherwise be perceived as aggressiveness, polarity and reasons to create distrust. Continued experience is that this involves video link.

This immediately creates increased cost which has to be taken into account.

Video link may not be possible from many law firms and mediation practices.

Video link may not be available to the other party abroad especially if unrepresented.

Video link will be of a special importance in the co-mediation model where one party and one mediator is in one country and the other party and one mediator is in another country. This will be very important to use video link.

Beware of imbalances in the mediation process where one spouse (normally although certainly not always the man) is very comfortable with techie-ness including use of IT, Skype etc and the other spouse is unfamiliar, uncomfortable and feels much less at ease in any negotiations.

Experience from child abduction ADR

ADR such as mediation is exceptionally difficult in the arena of international child abduction. However, a pilot project run by Reunite under the auspices of their then Director, Denise Carter OBE, in 28 cases recently proved successful. As a result of this pilot project it found that:

- there was a benefit in the co-mediation model bringing together a specialist child abduction lawyer mediator and a non-lawyer mediator; the non-lawyer mediator having acknowledged

- communication and other therapeutic skills to help the parties understand why the abduction had occurred and the separate issues faced by each parent;
- the lawyer mediator should be a specialist in child abduction law;
 - the mediation had to be undertaken quickly and in parallel with the court proceedings;
 - the final mediation outcome document, sometimes called a memorandum of understanding, should be converted into an order of the court and perhaps a mirror order of the relevant foreign court; and
 - even when it does not produce a settlement, experience was often that the understandings reached or created in mediation made future contact arrangements work better.

Lawyers should consider ADR including mediation in child abduction cases to be run in parallel with the proceedings.

There have been following developments in the use of mediation in international children's cases

- 1) Mediation remains high on the agenda of the Hague Conference Permanent Bureau, who have conducted research into the use of mediation in child abduction cases, covering both Hague and non-Hague States.
- 2) Working groups have been established through the Permanent Bureau who have considered:
 - Common ground between States regarding the use of mediation
 - What mediation services are already established, either through the court service, non – governmental organisations and specialist law firms.
- 3) Drafting of the Guide to Good Practice on Mediation which will be put before the 6th Special Commission in June 2011. This Guide will help those States who wish to use mediation, and assist with the development of a uniformed approach to mediation in this high conflict international children's cases.

The work undertaken by the Permanent Bureau has certainly help raise the profile of specialist mediation in international children's cases, and has ensured mediation remains on the agenda for the forthcoming Special Commission.

iFLG have established specialist international mediation services, headed by Denise Carter OBE, a highly experienced mediator who has worked with the Permanent Bureau for a number of years on the use of mediation in both Hague and non-Hague States. It is anticipated in the future iFLG will continue to develop specialist mediation and other ADR services in the international arena, working with others in not-for-profit and private practice, and undertake the necessary monitoring and evaluation so to monitor the effectiveness of various forms of mediation in these high conflict international cases which will assist in future developments.

iFLG is running a specialist training course for experienced mediators who wish to develop their skills in international cases in late 2011

Protocol for international collaborative law cases

The Central London Collaborative Forum is a group of IAML Fellows in London who practice as collaborative lawyers. They have created an invaluable protocol for working in international cases. Set out below with acknowledgement.

In its preliminary note it says the protocol is deliberately a statement of principles which all practitioners should be able to agree apply to all international collaborative family cases regardless of the territories involved. The protocol does not presume or purport to give guidance to practitioners as to how they should conduct themselves in relation to their clients, the spouse(s) of the client(s), or third parties including professional insurers.

Protocol for international collaborative law cases-divorce/money/children (financial claims)

1. “Screening clients for suitability for the collaborative process is important in any collaborative case. In an international collaborative case it is even more important because of the implications of the differential court outcomes in different jurisdictions and the possibility of the client changing their mind about the decision not to invoke court process. This is especially so in circumstances where either a juridical disadvantage has already been suffered or where time is absolutely of the essence in order to secure a juridical advantage by means of court proceedings as distinct from the collaborative process.
2. Regardless of whether or not it is proposed that the matter should be dealt with collaboratively, it is the duty of the solicitor to advise the client at the earliest possible opportunity whether it is in the client’s interest to issue proceedings in one or other jurisdiction, with or without reference to his or her spouse/civil partner. There are clear negligence/insurance implications of failing so to advise and/or of deciding not to issue first in order to secure jurisdiction, especially in (but not limited to) cases falling within Brussels II Revised.
3. In terms of the collaborative process the starting point, and presumption, is that the question of jurisdiction will be resolved before the collaborative process begins. Any agreement not to issue proceedings will not be enforceable, as between the parties, and will not invalidate any proceedings so issued (including proceedings issued in direct breach of such an agreement). If the client countermands the Participation Agreement and instructs the solicitor to issue proceedings the lawyer will refer the client to the Participation Agreement (and in particular to the disqualification clause in relation to lawyers not litigating a collaborative matter), and will seek to dissuade the client from this course, but ultimately will not accept instructions to breach the Participation Agreement, this position having been made clear in advance and expressly agreed in writing between client and lawyer at the outset of the retainer.
4. The issuing of family proceedings by one party shall not prevent the lawyer acting for the applicant from acting in the case on a collaborative basis, provided that the proceedings are issued before the signing of the Participation Agreement.
5. The consideration of the question whether to issue proceedings in an international case is bound to involve at least some level of comparative advice as to the differing outcomes of

Court-litigation in the respective territories involved. This necessary preliminary in the international arena should not be seen or interpreted as inconsistent with the collaborative goal.

6. The Participation Agreement should be translated into the languages of both parties unless one party is sufficiently fluent in the language proposed for the Participation Agreement as to be able effectively to waive the need for such translation.
7. At an early stage a decision should be reached as to which language will be used in meetings or correspondence and consideration given as to the practicalities of how meetings will take place, e.g. Skype, video-link, etc.”

The EU mediation directive

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

A summary assessment is as follows

- Thorough support of and commitment to the Directive by all mediators and other ADR professionals and others working towards resolution of family law matters
- Awareness that much needs to be accomplished within the three years of implementation
- Increased awareness of the different forms and models of ADR including lawyer negotiation, and that each form has benefits and advantages for different clients at different stages of cases
- Fundamental conflict between race to issue in Brussels II and mediation; this needs to be addressed if cross-border mediation is to have any real prospect of success
- Cross-border mediation is a specialisation and should only be undertaken by cross-border specialists
- Ensuring quality of mediation will need a much tougher approach to the use of public resources committed to the project than in the late 1990s
- English mediation outcomes are privileged until blessed by legal advice, in potential conflict with Article 6
- English family law cannot be bound in any way including by mediation outcomes, again in potential conflict with Article 6
- The opportunity should be taken to introduce binding family law arbitration
- Mediation outcomes should enjoy the benefits of cross-border recognition and enforcement, with safeguards
- Child abduction mediation pilot project should be thoroughly considered and the lessons learned and implemented, with proper funding to continue the project

CONCLUSION

International family law is still in its relative infancy. After having lived for many years almost exclusively in the big money community, it has in the past decade expanded into all communities across all countries and therefore involving all lawyers. The very fact that it involves such harsh, polarised and seemingly unfair outcomes dependent for example on who was first by a matter of minutes to issue the divorce petition and who may have been acting in a perceived fair fashion in agreeing to trial relocations etc only makes resolution by the legal process an unsatisfactory one.

Arguably outcomes in international cases are in certain respects materially less satisfactory than in national cases.

If international family law is in its relative infancy, international family mediation and ADR is barely yet standing on its own professional two feet! There is a huge amount of work to be undertaken in understanding when it is appropriate, the particular skills needed, the safeguards and cautions, and the international co-working. But there are pockets of real progress being made in professional practice. There is already globally recognised specialists in international mediation and other ADR. This will only increase.

Perhaps this is classically an area where private practice lawyers and mediators, accustomed to working together on international family law cases, can create the practice of ADR in international work, highlight through experience the possible pitfalls and necessary skills, and thereby create ourselves the new international ADR profession. It is crucially needed by international families and their children

David Hodson
dh@davidhodson.com
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