International parental child abduction is a prevalent phenomenon that has aroused the anxious interest of most national governments. It usually arises out of a complex and extreme breakdown in the relationship between parents. It frequently causes acute emotional distress to both parents involved, and most importantly, to the abducted children.

Governments from many nations have been cooperating to seek a consistent approach, to discourage, and as far as possible, undo the effect of, international parental abductions. Most such abduction cases coming to our courts are considered under the provisions of the 1980 Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention). The basic premise is humanitarian - that it is normally in the best interest of an internationally abducted child to be returned as quickly as possible to the country from which he or she has been taken.

In England cases are tried by High Court Family Division judges and are heard in London. Applicant parents are entitled to mandatory non-means tested legal aid to pursue the application for the return of the child, (irrespective of their means). They are represented by lawyers on a direct lawyer-client basis. Cases are normally resolved
within six to eight 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.

There are now 64 member states to the Hague Convention.

When the Hague Convention came into law, it was expected that the majority of cases would be those in which parents have separated, and the parent with whom the children are not living snatches them and hides them, or refuses to send them back following an access visit. For such cases, the Hague Convention works well, and although mediation might allow scope for a voluntary arrangement, a speedy return is usually the inevitable answer.

The ‘face’ of International Child Abductions has however changed. Indeed the term “abduction” often sits uneasily with the factual background of many cases that come before the English Court.

Approximately 70% of Hague Convention applications that come before the English, and presumably the Courts of other member states, involve children removed, or retained by their primary carers, but without the permission of, and in breach of the legal rights of, the other parent. Frequently the primary carer is motivated in the removal or retention by a desire to return, to what is, for them, their home state. In many cases there will have been no proceedings in the state of habitual residence and no prior custody decision. Thus whatever the outcome of the Hague application there will be necessarily further hearings on the merits of the case in one or other jurisdiction. The frequent result, following the further dislocation and expense of a
return, is that the children and the primary carer, who originally abducted, return, legally to the requested state. The very process of highly charged litigation and a physical return will often put paid to any prospect of an amicable resolution of the issues. At the same time the children concerned suffer the trauma of at least three relocations in a short time. This unanticipated outcome of the Hague Convention has concerned judges, politicians, lawyers and non-government organisations.

In many of these cases, the central issue for the left behind parent is in fact contact or visitation and not the wish for a permanent return. The present ineffectiveness of Article 21, in securing adequate and enforceable Contact/Access Rights has been well documented.

The left behind parent, justifiably sees the removal or retention of the child as an attempt to “cut them out” of the child’s life. An application under the Hague for the pre-emptory return of the child appears to be the only option open to them and the only way to secure adequate contact rights. The abducting parent equally feels the need to defend the application for a return by every possible route and using every possible defence. The issue of whether or not there should be a return becomes the only issue that they as parents can focus upon and all energies are directed towards it. Both are often frightened to even commence negotiations relating to wider issues for fear of being seen as abandoning their respective positions.

**The Scope for Mediation**

The international removal or retention of children within the context of a relationship breakdown is, of course, a consequence that requires an immediate response and
resolution. It is however but one of the many issues that has to be addressed and resolved in the ordering of the future living arrangements of the family. Even without the “abduction” the result may be that the family members will live in different countries; indeed different continents; whether by agreement or following domestic family litigation.

If, before the court hears a Hague Convention application, the parties had the opportunity to consider all of the options open to the family, with the assistance of mediators familiar with international children’s cases, it is possible that a realistic practical solution could be achieved which would obviate the need for further litigation at whatever stage.

An agreement between parents arrived at through mediation could:

(1) avoid the stress of contentious litigation in two countries, the first stage being of high conflict and high trauma nature;

(2) avoid the uplifting of the children from the requested state to the home state, only for there to be a subsequent return following disputed custody proceedings with all the attendant stress and damage to the relationship between the parties and to the children;

(3) avoid a substantial delay in resolving the issues relating to the future of the family in their totality.

(4) empower parents to actively and purposefully address the issues affecting the future of their family and children;

(5) provide an opportunity for the parents to negotiate a return, in an orderly and unhurried manner. Most consent orders for voluntary returns are made at the door of the Court;
avoid the cost to public funds of the Hague Convention proceedings, and the costs of proceedings in the other country - although a consent order would still be required.

If this result is achieved in even a small proportion of cases, the saving in human and financial terms would be significant.

Reunite believes that it is also consistent with the aspirations of the Hague Convention itself, which provides at Article 7:-

‘Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

‘In particular, either directly or through any intermediary, they shall take all appropriate measures—’

‘(c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues.

Mediation is now established as an important part of the process of resolving domestic family disputes as an alternative to litigation. Governments have endorsed and encouraged it. It not only has the potential to avoid litigation, with its attendant stresses, where this can do further harm to delicate and fraught personal relationships but it may also save public (and sometimes private) money. The English Court of Appeal, which by definition deals with particularly intractable and entrenched
disputes of considerable legal and factual complexity, has now developed its own voluntary mediation facility.

Despite the significant progress made in the role and recognition of mediation in a wide range of domestic disputes, it has not as yet been adopted for cases involving international parental child abduction. The reason such an approach has not been adopted to date is due to the particularly large number, and complexity, of barriers that need overcoming if mediation is to become a realistic option.

The barriers to overcome are as follows:-

1. **Personal**

   The tensions and conflict that the removal or retention causes the very act itself forces both parties to take up entrenched positions.

   Any mediation scheme must be voluntary and run parallel to the request for a Hague return.

2. **Speed**

   Hague Convention applications are treated as emergency business by the court, with a statutory objective of final resolution within 6 weeks of commencement. Consequently any mediation has to be organised, conducted and concluded within a lesser period. To mediate after the final hearing is plainly too late. Delaying the Hague process in any substantial way is likely to be unacceptable to the authorities; and is not suggested by Reunite. Thus unlike domestic cases, mediation will have to take place, at a fairly intense level over a contracted period of times.
3. **International Acceptability**

The importance of the member states reputation as enthusiastic and reliable upholders of the Hague Convention must not be undermined, and any mediation scheme will only work if foreign governments and litigants have confidence in it. Mediation, although accepted in England, has a controversial reputation in some other countries. In the United States, it is sometimes seen as second-class justice imposed on those who cannot afford Court proceedings. The conciliation scheme in the German Amstgeriche, which tries Hague cases, appears to dilute the ostensible objective of the Hague proceedings ie to secure the return of the children and has given rise to some disquiet among ‘left behind’ parents.

4. **Accessibility**

In abduction cases one of the parents may not speak the language of the country hearing the Hague application, and will be living abroad. The way he (or she) is introduced to the scheme will be critical to its prospects of success. They must not feel that they are being talked out of their right to pursue an application for a return. As stated above the object of the process is to reach a parent led solution, be that for a return or an agreement that the child may remain.

5. **Acquiescence**

The Court must look at the subjective state of mind of the wronged parent; has he/she “in fact consented to the continued presence of the children in the jurisdiction to which he has been abducted”. Re: H (Minors) (Abduction : Acquiescence) [1997] 2 All ER 225.
Giving a ‘left behind’ parent a real incentive to look to the future and negotiate, without derogating from, or suggesting derogation from, his (or her) right to seek a return is a delicate exercise. In particular “left behind” parents are often advised not to talk to, or negotiate with, the abducting parent about the future of their child in case the court interprets this as acquiescence. Thus any mediation scheme must be tightly structured. In entering the process the left behind parent must be seen only as willing to explore the issues and no further, unless a concluded agreement is reached.

However, parents should not be deterred from seeking to negotiate sensible arrangements for the future of their child and the fact that negotiations have occurred should not of itself lead to the conclusion that there has been acquiescence. See P v P (Abduction : Acquiescence) [1998] 2 FLR 835 (CA).

Reunite suggests that the provision of a structured, court approved, scheme would avoid the dangers and pitfalls of negotiations, directly between the parties, or the overly cautious and reticent exploration of the issues between their respective Hague lawyers.

6. **Expertise**

To be effective any mediation scheme must have the endorsement and support of the parties and their lawyers. Reunite believes that it is essential that any mediation model be delivered by co-mediators, one lawyer and one non-lawyer mediator. They would require familiarity with international children’s cases, and the ability to liaise effectively with foreign lawyers and governments. Complex questions of fact and law relating to at least two countries will almost always have to be considered by the parties and great care will have to be taken to get it right if a scheme is not to fail. In
particular the design of a scheme would have to be such that there was a complete assurance that the mediation could not be construed as acquiescence taking the full cognizance of the decision of the House of Lords in Re. H (see above).

7. **Confidentiality**

All that takes place in mediation must remain absolutely confidential, unless and until a fully concluded agreement is reached. The fact that a party declines or agrees to enter the mediation process must have no bearing on the application before the court.

Unlike most domestic disputes, international child abductions can achieve international notoriety. Quite apart from the distress caused to parents and children, any mediated agreement not to seek a Hague return which was founded on a mistaken premise of law or fact would blight any future confidence in such a process. Thus within the scheme both parties must have access to their respective legal representatives.

8. **Parallel proceedings**

It is essential that any scheme takes place against the backdrop of an existing Court application for a return. Thus a mediation scheme, will fundamentally differ from the procedures that exist in some member states, whereby the Court process is commenced by the request for a voluntary return. Mediation cannot be invoked until a Hague Summons, has been issued and the Court is satisfied that all necessary provisional measures have been taken, to secure the location of the child and to prevent onward movement – see Article 7(a) and (b). This would almost always include the securing of passports and travel documents.
9. **Enforceability**

Once an agreement has been reached, there must be no difficulty in ensuring that the court hearing the Hague application will accept it, and if appropriate enshrine its terms in an order. Particular attention needs to be paid to ensure the agreement or order is sufficiently formed and understood to prevent it being ignored in the other jurisdiction. Thus the use of mirror orders, and reciprocal registrations (if appropriate) is anticipated. What is clear is that parties must not be allowed to renege on the agreement after what they perceive to be an “acceptable” time period.

**The Scheme**

In England and Wales, Reunite are undertaking a mediation pilot scheme. It is the first of its kind. It will be limited initially to England, Ireland and France.

The mediation scheme will take place in England and Wales. The parents concerned in pursuing orders for the return of their children will in all cases be entitled to non-means tested legal aid. Mediation will be offered as a means of resolving the dispute, but not as a prerequisite to bringing proceedings under the Hague Convention. The mediation will take place during the course of a court endorsed adjournment of the proceedings.

The costs of mediation during the pilot scheme will be met from the Reunite Project Funds.

The Scheme will only come into play once it has been endorsed by the Hague Secretariat, the English Central Authority and the Central Authorities of the other project states. It is envisaged that there will be a means of the court being aware that
parents are in mediation but with a specific direction to ensure that the willingness of parents to go to mediation is not taken or treated as an indication of acquiescence. At present we are looking at offering intense mediation over a period of a maximum of 5 days. The travel and accommodation costs of the left behind parent will be met. The scheme will commence in early 2002 and run for a 12 month period.

A report of the steering group on the pilot scheme will be produced to show:-

- whether mediation can work in legal conformity with the principles of the Hague Convention;
- whether it is possible to develop a mediation structure that would fit in practically with the legal and procedural structure of Hague Convention cases;
- whether such a model could be effective in practice and be built into Hague Convention proceedings on a wider scale; and
- whether it is possible, in appropriate child objection cases to involve children in the mediation process.