

PROPOSED COMMON PROCEDURE FOR DEALING WITH CROSS-BORDER DISPUTES INVOLVING CHILDREN WITHIN ASEAN

Introduction:

This Common Procedure sets out how mediation can be used by the different jurisdictions in ASEAN as a pre-cursor or complement to court cases **relating to cross-border disputes involving children**. It is aspirational in nature, and the intent is to establish a non-binding protocol for communications between CACJ Working Group Points of Liaison (“POL”) with regard to arranging for mediation between the disputing parties and other interventions to safeguard the welfare of child involved, in preparation for or during court proceedings and eventual orders disposing of the case. Each ASEAN Judiciary, in the manner consistent with its national laws and context, can adopt the Common Procedure.

Definitions of Terms used in the Common Procedure:

“**Cross-border**” refers to the interactions between different countries, or involving people from different countries. In the Common Procedure, this specifically refers to disputes involving children between countries within ASEAN, whether the affected countries share a geographical boundary or border.

“**Disputes involving children**” refers to civil disputes involving children, such as those relating to custody, guardianship, parent-child relationships, return of a child, visitation rights and financial support. It does not include criminal matters.

“**Mediation**” is the conduct of discussions between disputing parties with the assistance of one or more mediators for the purposes of amicably resolving a cross-border dispute involving children. The mediator is a third party who is independent, neutral and impartial. He / She does not have a vested interest in the outcome of the conflict. Mediation may be conducted by a private professional body, or may be court-annexed mediation. Page 2 of the Common Procedure explains what mediation is, its scope and the role of the mediator.

“**Parties**” refers to the disputants in a cross-border dispute involving children. Generally, the disputants would be the child(ren)’s parents.

The Role of the POL:

Paragraphs 1.1 to 1.6 of the Common Procedure and its diagram describes how POL can co-operate to arrange mediation sessions. For illustration purposes, a fictional scenario of POL from two ASEAN countries arranging mediation using the Common Procedure is drawn up in *Annex A*.

1 **Does mediation affect on-going court proceedings?**

- Mediation does not fetter the judge's discretion and determination of court proceedings. It is the court's choice whether to adjourn on-going court proceedings for parties to attempt mediation. All discussions during the mediation are confidential and without prejudice to either party choosing to terminate the mediation at any time and proceed for court adjudication. The content of parties' discussion cannot be used as evidence during the hearing. The mediator will not inform the judge conducting the hearing of the contents of parties' discussions during mediation.

2 **What is the mediator's role during the mediation?**

The mediator guides the mediation process and ensures that all parties have adequate opportunities to be heard and be involved in the mediation process. He / She controls the process, not the parties, and seeks to de-escalate any conflict or hostile behaviour so that parties can discuss matters in a safe environment.

3 **The mediator is not:**

- the adjudicator. He / She will not behave like a judge and decide the outcome of the mediation or the terms of the settlement between disputants.
- a lawyer representing either or both disputants. The mediator guides the mediation process so that parties negotiate in good faith and with mutual respect and courtesy. The mediator does not give legal advice or representation to either disputant. He / She does not advance the case of one disputant against the other.

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1.1 Communication will be via the CACJ WG Points of Liaison (“POL”). Communication could be for points of general information about each country’s legal system, as well as administrative information regarding cases involving both countries.

1.2 Each POL should contact the other country’s POL using the contact information as per the ASEAN Judiciaries Portal members-only section for the CACJ WG on Cross-Border Disputes Involving Children.

The role of the POLs in cases

1.3 Each POL should check the Country Profile of the other country to ascertain if there are any bilateral or multilateral instruments available between the two AMS (see Background Paper).

1.4 Both POL would establish with each other if parties consent to mediation, or such other modes of alternative dispute resolution as may be available. Where the parties consent to mediation, both POL could facilitate and co-ordinate arrangements for the mediation to take place, subject to the extent allowed by each country’s applicable laws and context. Relevant issues to consider include:

a) consider whether a single/joint mediator could be appointed or if co-mediators (ie: one each from the two AMS countries) could be involved.

b) consider using agencies where mediation could be provided without cost or at low cost to parties, unless parties are able to afford more expensive options. If private mediation is chosen, then it would be useful to discuss payment options upfront.

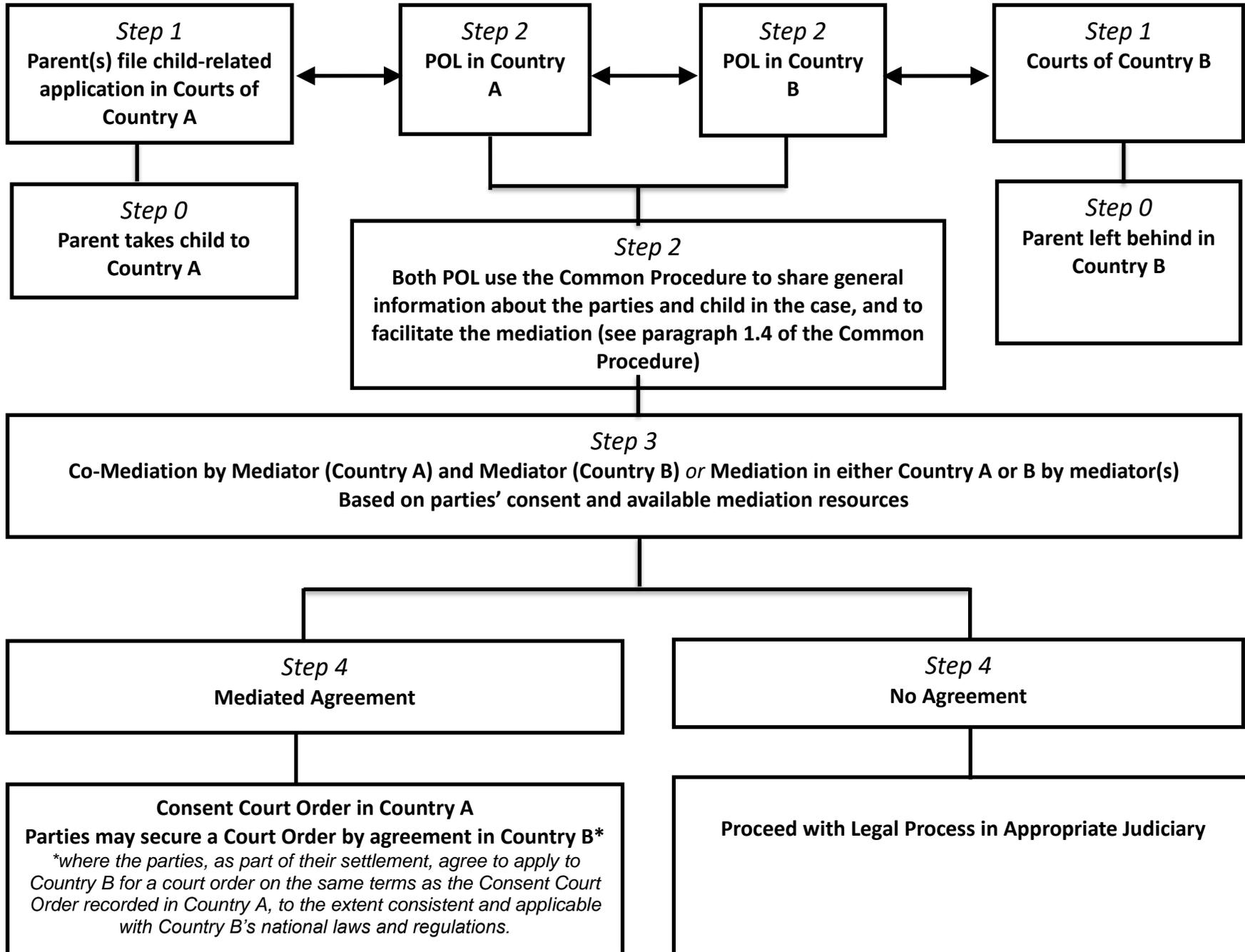
c) consider the mode and manner of mediation, whether single / joint / co-mediators; the profession(s) and identity of mediators. Whether there will be physical or virtual meetings, and modalities of the mediation, are to be left to the mediators to discuss and co-ordinate.

d) consider whether the mediation occurs with both parties present in one location with mediators physically present, or be conducted by video conference.

1.5 Both POL may consider judicial communication based on the margins/parameters to be defined by both countries and to explore any other possibilities of communication.

1.6 The POLs do **not** interfere in the conduct, progress and determination of ongoing court proceedings (if any), in either of the two AMS countries. If the POL and the hearing judge in a particular case are the same person, another person can be appointed as the temporary POL to handle the administrative arrangements stated above.

PROPOSED COMMON PROCEDURE - DIAGRAM ON POINTS OF LIAISON (POL) IN CROSS-BORDER MEDIATION



Annex A

FICTIONAL ILLUSTRATION: POINTS OF LIAISON (POL) IN CROSS-BORDER MEDIATION – COUNTRY A AND COUNTRY B

Alan (from Country B) met Emily (from Country A) in 2005 on an online dating application. They would travel between Country A and Country B to meet with each other and after dating for 2 years, Alan found a job in Country A. He and Emily solemnised and registered their marriage in Country A in 2007. Their son, Charlie, was born in Country A in 2009. In 2012, Alan received a lucrative job offer in Country B and the family of 3 relocated to Country B's capital city.

Unfortunately, Alan was retrenched in late 2018. For the next few months he went on numerous interviews, but was unable to secure a job. Worried about the family finances and whether they would be able to keep their expatriate lifestyle in Country B, Alan and Emily had many quarrels. In June 2019 after a particularly ugly argument, Emily packed her bags and without informing Alan, returned to Country A with Charlie.

A frantic Alan lodged a police report with Country B's authorities and approached a lawyer for help. The lawyer advised him to file a court application in Country A, and to arrange for a mediation session before the court hearing, for parties to try to resolve the dispute amicably. Shortly thereafter, Alan engages a lawyer in Country A to file an application in the Country A's courts for the relocation / return of Charlie to Country B. In response, Emily's lawyer in Country A files an application for custody of Charlie.

At the pre-trial conference, the court in Country A is informed by parties' lawyers that Alan and Emily would like to attempt private mediation. The court directs that the session must take place before the court hearing date, and gives strict timelines as to when the parties have to update the court on the mediation as well as timelines for the filing of affidavits in the event parties do not reach a settlement at mediation.

To assist parties, the court in Country A informs Country A's Point of Liaison (POL) that a court application has been filed, and parties request mediation. The Country A's POL gets in touch with the POL from Country B. Please see diagram illustration below.

FICTIONAL ILLUSTRATION: POINTS OF LIAISON (POL) IN CROSS-BORDER MEDIATION –COUNTRY A AND COUNTRY B

