

The mediation landscape in the EU

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Statistical data –
200 000 international marriages break down annually

Number of children born out of marriage increases

Each 7th citizen in EU is involved
in a cross-border family case

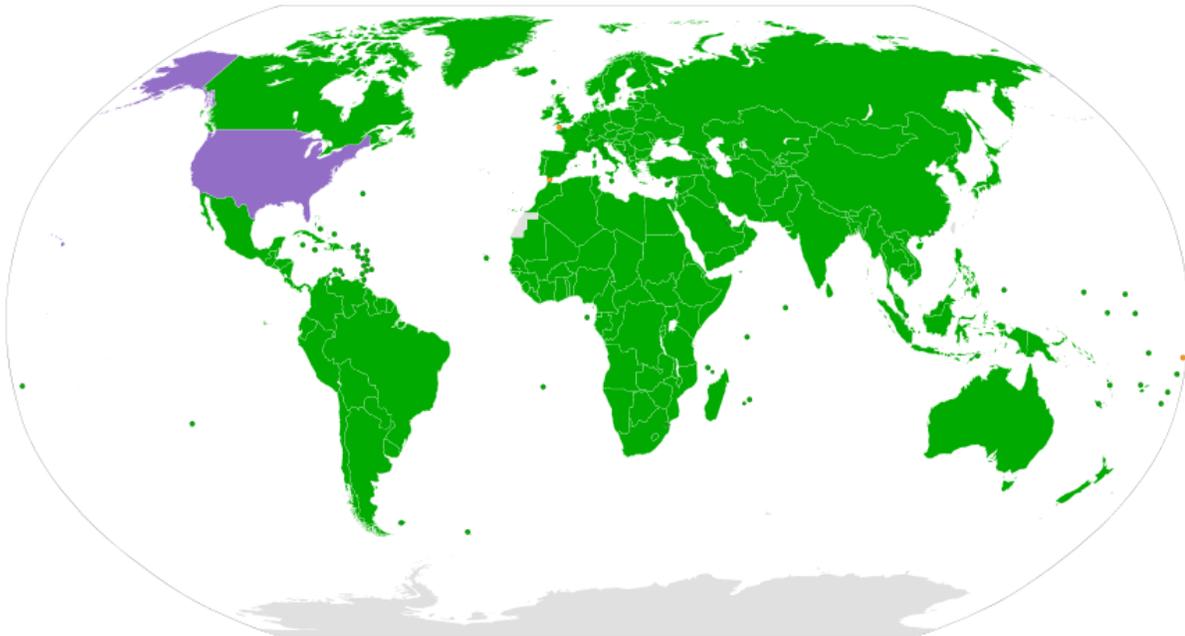


Key Legal Instruments in Cross-border family cases

- UN Convention on the rights of the child (1989)
- 1980 Hague Child Abduction Convention
- 1996 Hague Child Protection Convention
- Regulation Brussels II bis
- Bilateral agreements

UN Convention on the rights of the child (1989)

- Sets out fundamental principles for the protection of children`s rights including children`s rights in cross border family matters



- Most widely ratified HR treaty in the world - all members of UN except US, plus countries out of UN

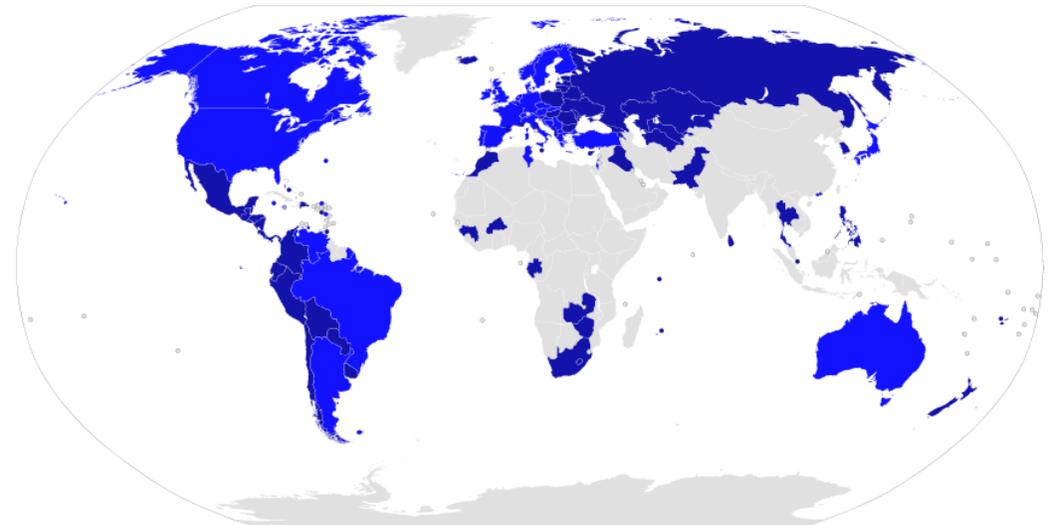
Parties - Green

Signed, but not ratified - Purple

1980 Hague Child Abduction Convention

Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

- Procedural Convention which seeks to protect children (up to the age of 16) from the harmful effects of being wrongfully retained or removed from their country of habitual residence
- Applicable between contracting parties, 98 countries currently, including all EU MS – always check



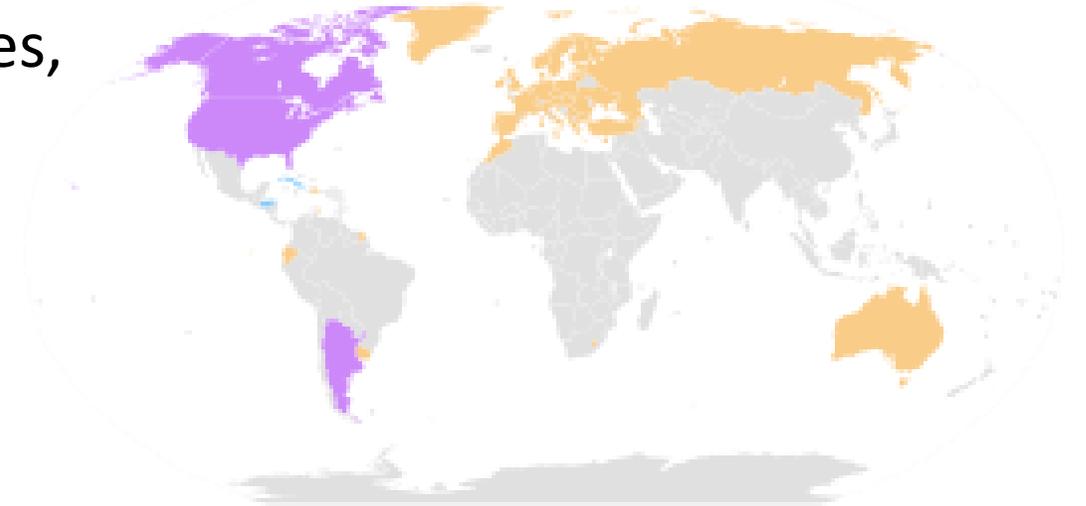
Blue - states that signed and ratified the Convention

Dark blue- states that acceded to the Convention

1996 Hague Child Protection Convention

Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

- The Convention seeks to improve the protection of children (up to the age of 18) in international situations by providing for common rules on jurisdiction, applicable law, recognition and enforcement in parental responsibility matters. Establishes system of cooperation between signatory states through their Central authorities.
- Applicable between contracting parties, 48 countries currently– always check



Parties (Orange) and Signatories (Purple)

Parties, not yet in force (Blue)

Regulation Brussels II bis

COUNCIL REGULATION (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

- Creates common rules on jurisdiction and recognition and enforceability of decisions and enforceable agreements in the field of parental responsibility within the EU.
- Establishes a system of administrative State cooperation of the EU MS Central authorities which assists parents in cross border family disputes concerning parental responsibility.
- Applicable within EU MS except Denmark, faster procedures than 1980 HC
- *Practice Guide for the application of the new Brussels II Regulation*

Council of Europe instruments

- 1996 European Convention on the Exercise of Children's Rights (art.13)
- Recommendation (98) 1 of the Committee of the Ministers to member states on family mediation of 21 January 1998
- Guidelines for a better implementation of the existing recommendation concerning family and civil mediation (CEPEJ , 2007)
- Mediation development Toolkit (to ensure implementation of the CEPEJ Guidelines on mediation), June 2018

Why mediation?

- The growing mobility of citizens within the Union has led to an increasing number of families with an international dimension, notably families whose members are of different nationalities, live in different Member States or live in a Member State of which one or more of them are not nationals. Of the approximately 122 million marriages in the Union, around 16 million (13%) have a cross-border dimension .
- Statistical data – Increasing amount of international couples and high divorce rate in the Union - increased number of cases, backlog in the courts, slow procedures in some countries, high costs, problems with exequatur
- Commissions Proposal for amendment of Brussels II bis in 2016 in the sphere of parental responsibility- work on the amendments still ongoing

Legal Framework of Cross –border Family mediation

- **1980 Hague Child Abduction Convention**, Art.7 (c)

„Central Authorities shall ... take all appropriate measures (...)

c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;“

- **Regulation Brussels II bis** , (25)

Central authorities should cooperate both in general matter and in specific cases, including for purposes of promoting the amicable resolution of family disputes, in matters of parental responsibility.

- **1996 Hague Child Protection Convention**, Art.31 (b):

„The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to (...)

b) facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies;“

The EU Mediation Directive

Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters

- Significant step to promote mediation within EU – committed MS to provide a number of procedural principles regarding mediation in their national laws, at least for cross-border cases. The Directive is recognition that mediation can deliver cost-effective and swift extra-judicial resolution of disputes in civil and commercial matters. It acknowledges that mediation may also contribute to maintaining good relationship between the parties as, contrary to judicial proceedings there is no ‘winning’ or ‘losing’ party, which is particularly important, e.g. in family law cases.
- In force since June 2008. The transposition date was set for 21st May 2011. Most MS fulfilled this obligation within the deadline.
- Applicable in cross border family matters and provides a framework for cross border mediation.

Aims:

- To promote mediation;
- To ensure the enforceability of cross border mediated agreements within the EU;
- To stop limitation and prescription periods from expiring;
- To ensure quality of mediation - Emphasizes the need for initial and further training of mediators, quality control mechanisms concerning the provision of mediation services, promotes European code of conduct for Mediators, use modern communication technologies
- To ensure confidentiality of mediation
- To ensure balanced relationship between mediation and judicial proceedings
- To ensure that parties having recourse to mediation can rely on a predictable legal framework.

Definition of mediation

- Art.3 (a) “Mediation” means a structured process ... whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.
- Mediation can be conducted by a judge who is not responsible to resolve the dispute.
- Mediation is not the attempts made by the court or by a judge seized to settle a dispute in the course of judicial proceedings.

Definition of a mediator

- Art.3 (b) “Mediator” means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation
- Several studies and impact report on the implementation of the Mediation Directive –three major problems identified with the practical functioning of national mediation systems: the adversarial tradition of many MS, low level of awareness of mediation and the functioning of the quality control mechanism.
- Mediation is used in less than 1 % of the cases in court on average in the majority of Member States

European Parliament resolution of 12 September 2017 on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the 'Mediation Directive'): Calls on the Member States:

- to step up their efforts to encourage the use of mediation – through information campaigns, comprehensive information regarding the thrust of the procedure and its advantages in terms of economising time and money, improved cooperation between legal professionals;
- to develop EU-wide quality standards for the provision of mediation services;
- to create and maintain national registers of mediated proceedings;
- undertake a detailed study on the obstacles to the free circulation of foreign mediation agreements in the Union;
- apply and implement appropriate safeguards in mediation processes to limit the risks for weaker parties and to protect them against any possible abuse of process or position by the more powerful parties, and to provide relevant comprehensive statistical data; underlines also the importance of ensuring that fair criteria are complied with in terms of costs, especially in order to protect the interests of disadvantaged groups

Examples from MS

- Mediation is compulsory in specific cases in 5 MS (like Italy, Hungary, and Croatia)
- 13 Member States provide financial incentives for mediation through reductions or a full reimbursement of the fees and costs of court proceedings if an agreement is reached through mediation during suspended court proceedings. For instance, in Slovakia 30%, 50% or 90% of court fees are refunded, depending on at what stage of the proceedings a mediated settlement is reached. In some Member States, mediation itself is offered free of charge or at low costs, according to the economic situation of the parties.
- Some MS provide financial incentives in the form of legal aid. For example, in Germany, legal aid always applies to court mediation, but is limited with regard to out-of-court mediation. In Slovenia, it applies only to court mediation. In Luxembourg, legal aid is available for court mediation and family mediation conducted by a certified mediator. In Italy, legal aid is available for compulsory mediation. Article 10 of Directive 2003/8/EC extends the right to legal aid in cross-border disputes to extrajudicial procedures, including mediation, if the law requires the parties to use them, or if the parties to the dispute are ordered by the court to have recourse to them.

Examples from MS

- 5 Member States impose sanctions as a means to promote the use of mediation. In Hungary, there are sanctions for parties which after having concluded a mediation agreement, go to court nevertheless or do not fulfil the obligations assumed under a mediation agreement. In Ireland, sanctions apply for an unjustified refusal to consider mediation. In Italy, the successful party in litigation proceedings cannot recover costs if it has before rejected a mediation proposal that had the same terms as the court judgment. Sanctions exist also in cases where mediation is compulsory and the parties do not make use of it, but go to court instead. In Poland, if a party which had previously agreed to mediation without justification refuses to participate in it, the court may order it to pay the costs of the proceedings, irrespective of the outcome of the case. In Slovenia, the court may order a party which without justification rejects the referral of the case to a court-annexed mediation to pay all or part of the judicial expenses of the opposing party.

Additional sources of information:

- Section in the European e-Justice Portal:

https://e-justice.europa.eu/content_crossborder_family_mediation-372-en.do

- European Parliament Mediator for International Parental Child Abduction - office created in 1987

<http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20100618STO76330>

- EU network in cross- border family mediators

<http://crossbordermediator.eu/>

The HCCH Guide to Good Practice

- *The Hague Conference Guide to Good Practice on Mediation in Child Abduction cases* represents a comprehensive and essential guidebook for mediation in international family cases and child abduction cases in particular. The guide is purely advisory in nature.
- It recognizes the special characteristics of cross-border family matters and child abduction cases and the importance of specialist training for mediation in this field. The guide recommends “bi-cultural, bi-lingual Co-mediators” making specific reference to the “4B” mediation model developed and practiced by MIKK e. V. – International Centre for Family Conflict and Child Abduction.

Models of cross-border family mediation

- Direct or indirect mediation or a combination of the two – depends on the circumstances of the case;
- Single or co-mediation – in highly conflictual international child abduction cases the use of co-mediation should be encouraged
- Bi-cultural or bilingual mediation – balance the gender and professional expertise of the mediators.
- Bi-cultural, bi-lingual, bi-gender, bi-professional mediation model – originated in 1998 to assist particularly difficult cases between Germany and France. Later bi-national mediation projects were initiated in Germany by the non-profit organization MiKK e.V. founded in 2008. Mediation services are currently available under four bi-national co-mediation programmes: the German – Polish project, the German-American project, the German – British project and the German –French project. A fifth mediation scheme involving German and Spanish mediators is in preparation.

Co-mediation was laid down in the **Wroclaw Declaration of 2007** resulting from the German – Polish mediation project. The Declaration contains the following recommendations:

1. The mediation should be conducted as a bi-national co-mediation.
2. The mediators should have the same national origin as both parties to the mediation. Thus, in the case of a German-Polish abduction there should be one mediator from Poland and one mediator from Germany. In this way both mediators reflect the very different cultural backgrounds of the parents.
3. One mediator should be female and one mediator should be male. In this way the genders of both the mother and the father are represented by the two mediators.
4. One mediator should have a psychological/pedagogical professional background and the other mediator should have a legal professional background. Based on its high conflict dynamic, such proceedings require that one mediator has particular psychological-communicative abilities. The other mediator should have additional training in the legal particularities of international child abduction proceedings and other international parents' and children's issues (e.g., custody and visitation rights proceedings).
5. In abduction proceedings, both mediators should be prepared to be available to conduct a mediation within one to two weeks of the assignment.

Thank You for Your Attention!