

Welcome to the seminar 10-13.12.2018

Cracow

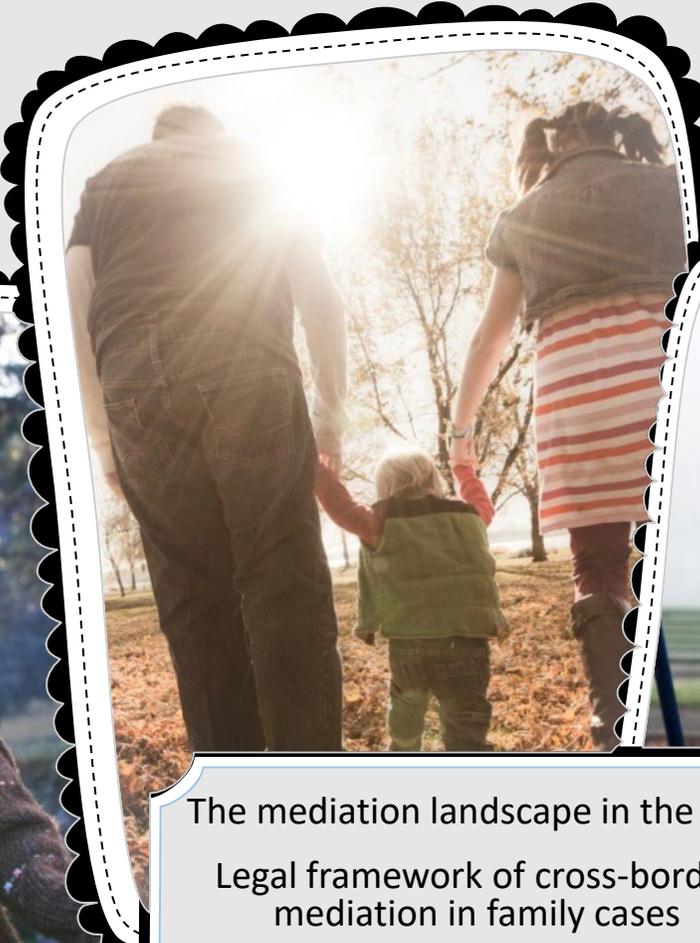
Sylwia Jastrzemska, PhD

SSO – judge

The Regional Court in Wroclaw



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The mediation landscape in the EU .

Legal framework of cross-border mediation in family cases

- Mediation Directive
- HCCH Guide to Good Practice
- Models of cross-border family mediation

The mediation landscape in the EU. Legal framework of cross-border mediation in family cases

Introduction

The EU has a limited role in family law matters. Each individual member state has its own rules about separation, divorce, maintenance of spouses and children, custody and guardianship and other family law matters.

The role of the EU is mainly concerned with ensuring that decisions made in one country can be implemented in another. It also has a role in trying to establish which country has jurisdiction to hear a particular case.

The EU offers the parties to litigation alternative dispute resolution , in particular mediation.

The amicable resolution of dispute has an extremely important meaning in family matters. The mediation as an art of communication is an opportunity for the protection of the right to family life, in particular the children's right to be brought up by both parents.

The mediation can help the parents in highly escalated conflicts in finding solutions that are likely to be more sustainable and more amicable - and thus ultimately in the best interest of the child.

The Advantages of amicable solutions

- All appropriate steps should be taken to encourage the parties to a cross-border family dispute concerning children to find an agreed solution to their dispute.
- The promotion of dispute resolution by agreement has proven to be particularly helpful in family disputes concerning children, where the parties to the conflict will usually need to co-operate with each other on a continuing basis. Hence, in a dispute arising out of a parental separation, an agreed solution can be particularly helpful to assist in securing the ‘child’s right to maintain on a regular basis (...) personal relations and direct contacts with both parents’ as guaranteed by the United Nations Convention on the Rights of the Child (UNCRC, 1989).

- Agreed solutions are more sustainable since they are more likely to be adhered to by the parties.
- At the same time, ‘they establish a less conflictual framework for the exercise of custody and contact and are therefore strongly in the interests of the child’.
- Agreed solutions are said to be more satisfactory for the parties; each can influence the result and engage in finding a solution considered ‘just’ for both parties. Solving disputes by agreement avoids the perception of one party ‘winning’ and one ‘losing’ as an outcome. In contrast, court proceedings concerning matters of custody and contact can worsen the relationship between the parents, as a result of which children are likely to suffer psychologically.

**Article 81 (TFUE) OF THE TREATY ON THE FUNCTIONING OF THE
EUROPEAN UNION (ex Article 65 TEC)**

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

- (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
- (b) the cross-border service of judicial and extrajudicial documents;
- (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
- (d) cooperation in the taking of evidence;
- (e) effective access to justice;
- (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
- (g) the development of alternative methods of dispute settlement;**
- (h) support for the training of the judiciary and judicial staff.

Mediation is a dynamic, structured, interactive process where a neutral third party assists disputing parties in resolving conflict through the use of specialized communication and negotiation techniques. All participants in mediation are encouraged to actively participate in the process. Mediation is a "party-centered" process in that it is focused primarily upon the needs, rights, and interests of the parties. The mediator uses a wide variety of techniques to guide the process in a constructive direction and to help the parties find their optimal solution. A mediator is facilitative in that she/he manages the interaction between parties and facilitates open communication. Mediation is also evaluative in that the mediator analyzes issues and relevant norms ("reality-testing"), while refraining from providing prescriptive advice to the parties (e.g., "You should do...").



Mediation, as used in law, is a form of [alternative dispute resolution](#) (ADR), a way of resolving disputes between two or more parties with concrete effects. Typically, a third party, the mediator, assists the parties to negotiate a settlement. Disputants may mediate disputes in a variety of domains, such as commercial, legal, diplomatic, workplace, community and family matters.

- The term "mediation" broadly refers to any instance in which a third party helps others reach agreement. More specifically, mediation has a structure, timetable and dynamics that "ordinary" negotiation lacks. The process is private and confidential, possibly enforced by law. Participation is typically voluntary. The mediator acts as a neutral third party and facilitates rather than directs the process. Mediation is becoming a more peaceful and internationally accepted solution in order to end conflict. Mediation can be used to resolve disputes of any magnitude.
- The term "mediation", however, due to language as well as national legal standards and regulations is not identical in content in all countries but rather has specific connotations and there are quite some differences between Anglo-Saxon definitions and other countries, especially countries with a civil, statutory law tradition like Germany or Austria. †
- Mediators use various techniques to open, or improve, [dialogue](#) and [empathy](#) between disputants, aiming to help the parties reach an agreement. Much depends on the mediator's skill and training. As the practice gained popularity, training programs, certifications and licensing followed, producing trained, professional mediators committed to the discipline.

The Legal Framework of Cross-border Family Mediation



The use of mediation in cross-border family disputes, such as in matters concerning parental responsibility and international parental child abduction cases, is recommended by a number of the key legal instruments applicable in cross-border children matters, such as:

I. The *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (<https://www.hcch.net/>) - **1980 Hague Convention on Child Abduction, Art.7 (c) provides that:**

“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;”

II. 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 - **Brussels II bis** – (<https://eur-lex.europa.eu>), **Art. 25 of preamble stipulates that:**

“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.”

The detailed answer can be found in the preamble of Regulation 2201/2003, which states among other things that:

„The European Community has set the objective of creating an area of freedom, security and justice, in which the free movement of persons is ensured. To this end, the Community is to adopt, among others, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.

In order to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding.”

Another of the key legal instruments applicable in cross-border children matters is:

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

“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;

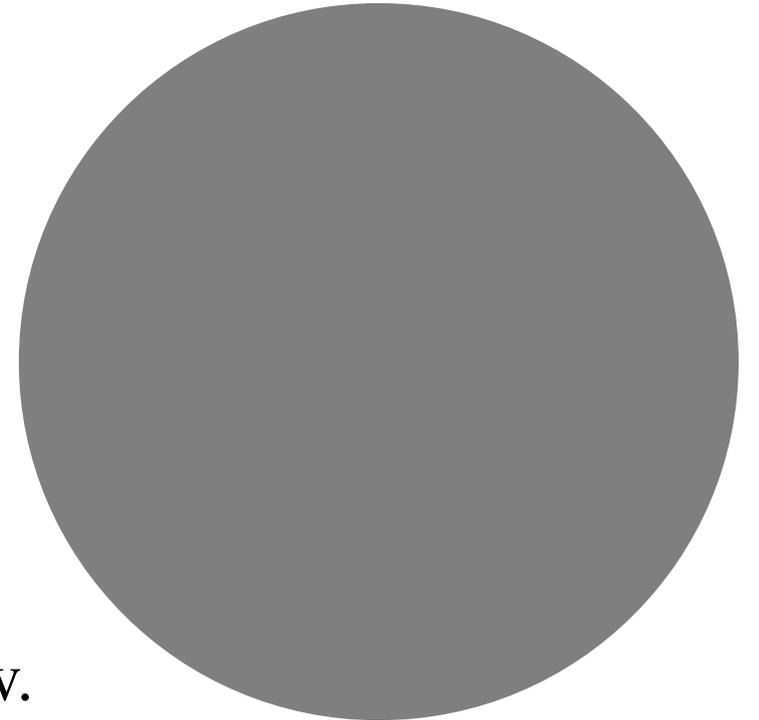


The Mediation Directive

In the system of sources of EU's law there are:

1. treaties as primary sources of law, and
2. regulations and directives as a secondary sources of law.
which both play an important role in accordance with the disposition of art. 288 TFEU.
3. The ECJU case law is at the top of the sources of EU law.

The directives shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.



- The “**EU Mediation Directive**” (*Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters*) was an important step in assisting the promotion of the use of mediation within the EU.
- The Directive **came into force in June 2008** requiring all EU Member States (except Denmark) **to comply with it before 21st May 2011** through the implementation of national legislation and provisions.
- It applies in cross-border family matters and provides a framework for cross-border mediation, although under the Directive the Member States are not prevented from enacting legislation that will cover domestic cases also.
- Another aim of the Directive, in addition to the promotion of mediation, is to ensure the enforceability of cross-border mediated agreements within the EU.

The aims of EU Mediation Directive:

- It applies in cross-border family matters and provides a framework for cross-border mediation, although under the Directive the Member States are not prevented from enacting legislation that will cover domestic cases also.
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Art. 1 and Art. 2, EU Mediation Directive stipulates that:

- *1. The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.*
- *2. This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. (...)*

- However in cross-border children matters and child abduction proceedings the applicable international legal framework needs to be taken into account. The issue of jurisdiction is particularly complex in such cases and specialist legal advice should be sought concerning the question of enforceability. Steps are usually required to give legal effect of the mediation agreement in the other jurisdiction.
- The Directive emphasizes the need for training of mediators as well as a code of conduct to ensure quality of mediation (Art.4).

The definition of “mediation” in accordance with **EU Mediation Directive**

The Directive also provides a helpful definition of “mediation” - as opposed to other forms of Alternative Dispute Resolution, such as arbitration, negotiation and conciliation, as well as a definition of “mediator”:

- **Art. 3(a), EU Mediation Directive:**

“[Mediation is] 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.”

- **Art. 3(b), EU Mediation Directive:**

A mediator is defined as “any third person who is asked to conduct a mediation in an effective, impartial and competent way”.

Case nr 1



In 2012, Anna and John, unmarried and both nationals of Poland, move from Poland to the distant Chile together with their 2-year-old daughter, for whom they have joint custody according to the laws of both Poland and Chile.

The reason for their relocation is the employment of the father - John by a firm in Chile. In the following years the family settles in Chile, although the mother - Anna finds it difficult to adapt to the new environment due to language and cultural differences. Since Chile is several thousand kilometres away, family visits are rare; the maternal grandparents therefore put pressure on Anna to return to Poland.

Following relationship problems, Anna finally decides to move back to Poland in 2017. She secretly makes preparations and, following the Christmas holidays of 2017 which she spends at her parents' home in Poland together with the child, she informs her husband that she and the child will not return to Chile.

John was shocked and, having found out about the 1980 Hague Child Abduction Convention which is in force between Poland and Chile, he lodges a return application and return proceedings are initiated in Poland. At the same time, John applies to the courts in Chile for provisional sole custody of his daughter.

The advantages of mediation in this particular case:

1. the child can maintaining personal relations and direct contact with both parents,
2. an amicable resolution can help the parties to avoid a cumbersome and lengthy judicial resolution of the matter in the courts of the two States, for example, there are a huge number of cases that parents can bring before a court :
 - return proceedings in Poland, which, if none of the restricted exceptions to return apply, will lead to an expeditious return of the child to Chile
 - the ongoing custody proceedings in Chile, which may possibly be followed by proceedings for relocation from Chile to Poland initiated by the mother.

The advantages of mediation in this particular case continued

The lengthy judicial resolution of the parental dispute will not only deplete the financial resources of the parties but will most probably deepen the parents' conflict.

Also, if the return proceedings in Poland should end with a refusal to return, further proceedings (namely custody and contact proceedings) are likely to follow if the parental conflict is not settled. Should the parents be able to find an agreed solution, they can both 'move on' and concentrate on exercising their parental responsibilities amicably.

The advantages of mediation in this particular case continued

Mediation is flexible and can adapt to the needs of the specific case. For example, the mediation process could, if both parties agree and it is considered appropriate and feasible, include discussions with the maternal grandparents, who would not have legal standing in the judicial proceedings to the conflict but who have a strong influence on one of the parties. Ensuring their support for the resolution of the conflict can make the solution more sustainable.

Mediation can also be advantageous at the organisational level, since it can be organised cross-border with mediation sessions taking place through video link, for example, if the parties' participation in an in-person meeting is not feasible.

The Hague Conference *Guide to Good Practice on Mediation in Child Abduction Cases*

This Guide represents a comprehensive and essential guidebook for mediation in international family cases and child abduction cases in particular. The Guide to Good Practice 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 MiKK Co-Mediation Model

The Guide to Good Practice for mediation in international family cases recommends “bi-cultural, bi-lingual Co-mediators” (HCCH, Mediation Guide to Good Practice, pp.64-65) making specific reference to the “4 B” mediation model developed and practiced by MiKK e.V. – *International Centre for Family Conflict and Child Abduction*.

Accordingly a Co-Mediator Team is matched specifically to suit the cultural and linguistic backgrounds of the parents and, in addition, the team usually consists of a male and a female mediator from a legal and a psycho-social background.

The MiKK mediation model of bi-lingual, bi-cultural, bi-gender and bi-professional Co-mediation was laid down **in the Wroclaw Declaration of 2007** resulting from a German-Polish mediation project (MiKK/DOM).

German-Polish mediation project (MiKK/DOM)

- The topic of a seminar of German-Polish mediation project (MiKK/DOM), in addition to an exchange of views and an opportunity to get to know each other, was the preparation of basic principles for resolving binational disputes over parents' and children's issues through mediation.
- In doing so, particular attention was paid to making mediation proceedings conform to the framework of international agreements and conventions such as:
 - 1. the Hague Child Abduction Convention and**
 - 2. the Brussels II bis Regulation.**

Based on the German experiences gained from German-French and German-American mediation projects on the implementation of such bi-national mediations, we, the participants of this seminar, make 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 each party** in the mediation(in this way mediators reflect the different cultural backgrounds of the parents).
3. One mediator should **be female and the other should be male** (in this way the genders of both the mother and father are represented by the two mediators).
4. One mediator should have a **psychological/pedagogical professional background** and the other should have a **legal background**.
5. In abduction proceedings, both mediators should be available to conduct mediation **preferably within one to two weeks** of the assignment.

The “4 B” mediation model continued:

- Based on this mediation model a Training for Mediators from all EU member States was developed as part the EU co-financed TIM Project by Childfocus, MiKK and the Katholieke Universiteit Leuven in 2011.
- MiKK provides regular Cross-border Family Mediation Trainings in Berlin and abroad. Its International Network of Cross-border Family Mediators comprises more than 150 Mediators worldwide who mediate in 30 languages.

However, the 1980 Hague Convention is supplemented by certain provisions of the Regulation, which come into play in such cases. Thus, as regards the operation of the 1980 Hague Convention in relations between Member States, the rules of the Regulation prevail over the rules of the Convention in so far as it concerns matters governed by the Regulation.

Which children are covered by the Regulation?

The Hague Child Abduction Convention applies to children up to the age of 16.

The 1980 Hague Convention and the Regulation share the aim of deterring parental child abduction between Member States. However if this nevertheless takes place, both the Convention and the Regulation seek to ensure the prompt return of the child to her or his Member State of origin.

- Where a child is abducted from one Member State (“the Member State of origin”) to another Member State (“the requested Member State”), the Regulation ensures that the courts of the Member State of origin retain jurisdiction to decide on the question of custody notwithstanding the abduction.
- Once an application for the return of the child is lodged before a court in the requested Member State, this court applies the 1980 Hague Convention as complemented by the Regulation.

- If the court of the requested Member State decides not to order the return of the child on the grounds set out in Article 13 of the Convention, it shall immediately transmit a copy of its decision to the competent court of the Member State of origin (“the court of origin”) which may then examine a question of custody at the request of a party, if it has not already been seised of the question.
- If the court of origin takes a decision entailing the return of the child, this decision is directly recognised and enforceable in the requested Member State without the need for exequatur.

- In cases of **wrongful removal or retention of a child**, the return of the child should be obtained without delay, and to this end **the Hague Convention of 25 October 1980** would continue to apply as complemented by the provisions of this Regulation, in particular Article 11.
- The courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases.
- However, such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention.
- Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained.

Article 2 regulation 2201/2003. Definitions.

The term "**wrongful removal or retention**" shall mean a child's removal or retention where:

- (a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention;

and

- (b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility (paragraph 11 art.2).

Procedure applicable in a non return proceeding.

- Where a court has decided not to return a child on the basis of Article 13 of the 1980 Hague Convention, it should inform the court having jurisdiction or central authority in the Member State where the child was habitually resident prior to the wrongful removal or retention.
- Unless the court in the latter Member State has been seised, this court or the central authority should notify the parties. This obligation should not prevent the central authority from also notifying the relevant public authorities in accordance with national law.

The instruments helpful for the judges and others.

The judge may find it useful to consult the relevant case-law under this Convention which is available in the INCADAT database set up by the Hague Conference on Private International Law (www.incadat.com), the INCADAT database now also includes cases under the Regulation and also in the CJEU and ECtHR).

The Explanatory Report and the Practice Guides concerning this Convention can also be of use (see website of the Hague Conference on Private International Law-www.hcch.net).

Also the European Judicial Network in Civil Matters has prepared a practice guide giving information about the methods for processing and hearing of the return cases (www.e-justice.europa.eu, content_parental_child_abduction).

Enforceability and Recognition of Mediated Agreements

- The Memorandum of Understanding is drafted by the Mediators together with the parties (in both languages). It should be checked by the parties' respective lawyers and it is then signed by the parties.
- The advantage of mediation is that a whole range of issues (financial, custody, contact) can be resolved in together in a so called "package agreement".

Guide to Good Practice under the Hague Convention of 1980

This Guide promotes good practices in mediation and other processes to bring about the agreed resolution of international family disputes concerning children which fall within the scope of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter, ‘the 1980 Hague Child Abduction Convention’ or ‘the 1980 Convention’).

Hague Child Abduction Convention encourages the amicable resolution of family disputes.

Among the different means of amicable dispute resolution, this Guide primarily addresses ‘mediation’ as one of the most widely promoted methods of alternative dispute resolution in family law.

Guide to Good Practice under the Hague Convention of 1980 continued

While highlighting the particularities of amicable dispute resolution in the context of child abductions and disputes over access / contact under the 1980 Hague Convention, this Guide outlines principles and good practices which, it is hoped, will be valuable in the use of mediation and similar processes in cross-border family disputes in general.

As such, the Guide is meant to be of assistance to States Parties to the 1980 Convention, but also to States Parties to other Hague Conventions that promote the use of mediation or similar means to facilitate agreed solutions in international family disputes.

These Conventions include:

1. the Hague 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 (hereinafter, ‘the 1996 Hague Child Protection Convention’ or ‘the 1996 Convention’),
2. the Hague Convention of 13 January 2000 on the International Protection of Adults and
3. the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.

The Guide is addressed to governments and Central Authorities appointed under the 1980 Convention and under other relevant Hague Conventions, as well as judges, lawyers, mediators, parties to cross-border family disputes and other interested individuals.