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Introduction to mediation.

- The principles of mediation
- Stages of the mediation process
- Agreement to mediate

The introduction to mediation

Introduction

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.

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.

The definition of mediation

- The definitions of 'mediation' that can be found in legal texts and publications vary significantly and often reflect certain minimum requirements regarding the mediation process and the person of the mediator in the relevant jurisdictions.
- Drawing together the common features in these various definitions, mediation can be defined as a voluntary, structured process whereby a 'mediator' facilitates communication between the parties to a conflict, enabling them to take responsibility for finding a solution to their conflict.
- Other commonly required but not uniformly applied principles that are sometimes incorporated in the definition of mediation, such as confidentiality, neutrality or impartiality.

The types of mediation

1. Collaborative law.

In the ‘collaborative law’ model, the parties are assisted by ‘collaborative lawyers’ who use interest based problem solving negotiation techniques to resolve the dispute without going to court.

2. Co-operative law.

The ‘co-operative law’ model follows the principles of the ‘collaborative law’ model, except that the representatives are not disqualified when the matter has to be brought before a court.

3. Direct or indirect mediation.

-‘direct mediation’ refers to mediation in which both parties directly and simultaneously participate in the mediation sessions with the mediator;

-‘indirect mediation’ refers to mediation in which the parties do not directly meet one another during the mediation but each meet with the mediator separately.

4. Court based / court annexed mediation

The terms ‘court based mediation’ or ‘court annexed mediation’ are used to refer to mediation services that are run by or through the court itself.

In these schemes mediation is offered either by:

- a) mediators working for the court or by
- b) judges with mediator training who can, of course, only ‘mediate’ in cases where they are not the judge seised.

The mediation venue is often somewhere in the court building itself.

5. Out of court mediation

The term ‘out of court mediation’ is used to refer to mediation operated by a body not directly linked to the court.

It may involve State run or State approved bodies and mediation services provided by individuals as well as private mediation organisations.

The mediated agreement.

The term ‘mediated agreement’ when referring to the outcome of mediation, i.e., the agreed solution reached by the parties in mediation.

It should be noted that in some jurisdictions the term ‘memorandum of understanding’ is preferred to refer to the immediate outcome of mediation, to avoid any assumption as to the legal nature of the mediated result.

The Principles of Mediation

- At the beginning of the mediation process the mediators should explain to the parties all main principles of mediation, which are set out in the Agreement to Mediate. The parties sign it before commencing the mediation process.
- All necessary information on mediation and connected issues should be provided to the parties in advance of the mediation process to allow the parties to make an informed decision about entering into mediation.²³⁰ This information should include: details on the mediation process and the principles determining that process, such as confidentiality; details on the method and model used, as well as information on the practical modalities; the possible costs involved for the parties. Furthermore, information should be given on the interrelation of mediation and judicial proceedings. The parties should be informed that mediation is only one option and that attempting mediation does not prejudice their access to judicial proceedings.

The Principles of Mediation continued

- With a view to guaranteeing the quality of mediation, several mediation principles have been developed, many of which can be found incorporated in mediation legislation, codes of conduct and other relevant instruments. Some of these principles, such as impartiality and neutrality, are often even featured in the definition of mediation itself.
- When it comes to mediation there are different models and methods employed in different States and by different mediation schemes.

- The most important principles of mediation are:

1. 'Voluntariness'

is a basic and undisputed principle of mediation. It is the very nature of mediation to engage the parties in a voluntary process of finding an amicable resolution to their dispute. The principle of 'voluntariness' is not contrary to the requirements in some jurisdictions of mandatory information meetings on mediation. Even in jurisdictions where it is compulsory for the parties to a dispute to attempt mediation, it can be argued that this is compatible with the voluntary nature of mediation as long as the parties are not forced to actually settle their dispute in mediation.

Both parents need to be informed that mediation is only an option, which exists in addition to family dispute.

2. 'Self-Empowered'

The mediators do not give advice or propose solutions to parents.

3. 'Neutrality'

Mediation should be neutral in relation to the outcome of the process.

4. 'Independence'

Mediation should be neutral in relation to the outcome of the process. The mediator needs to be independent as to the way in which he or she conducts mediation.

5. 'Impartiality'

At the same time, the mediator needs to be impartial towards the parties. They do not take sides.

6. 'Fairness'

The mediation must be conducted fairly. The latter implies that the parties need to be given equal opportunity to participate in the mediation process.

The principles of neutrality, independence, impartiality and fairness are crucial to mediation.²³² They are closely linked although they address different aspects of the mediation process.



7.' Confidentiality'

All communications in the course of, and in the context of, mediation should, subject to the applicable law, be confidential, unless otherwise agreed by the parties. Confidentiality of communications related to the mediation helps to create the atmosphere of trust needed for the parties to engage in an open discussion on a whole range of possible solutions to their dispute. The parties may be less willing to consider different options if they fear that their proposals may be taken as a concession and held against them in legal proceedings.

The Stages of the Mediation Process



Mediation is much less formal than going to court, but the conflict resolution process does involve distinct stages designed to lead to a mutually beneficial compromise.

The Five Stages Of Mediation:

- **Stage 1: Introductions and Mediation Agreement.** It is important to select a mediator who is suitable for a particular case. The parties are taken through the Agreement to Mediate. The mediators should explain the mediation process and set out any ground rules. The Agreement is signed by the parties and the mediators.
- **Stage 2: Information Exchange.** The parties are encouraged to engage in a voluntary exchange of information and documents necessary to sufficiently identify the areas of dispute. The mediators' role here is to listen actively, trying not to interrupt the parties, although the mediators should acknowledge both parties' feelings and concerns and reframe if necessary. Prior to the first session of mediation, each party or representative is instructed to submit to the mediator a **Case Overview or Position Statement** which should include a summary of their claims.

Stage 3: Defining the Issues and Interests. The Negotiation.

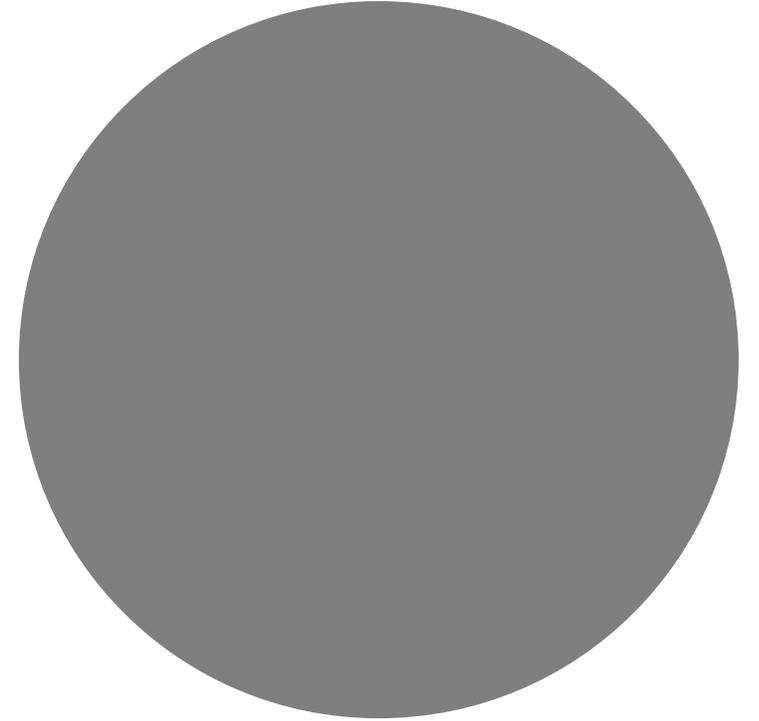
The task at this stage is to allow the parties an opportunity to explain their positions both in front of each other and in private meetings with mediator to explore their needs and interests as well as the needs and interests of their child/ren. The parties are encouraged to speak directly to each other.

Stage 4: Examining and Clarifying Options. The task at this stage is to finalize the agreement. Different solutions and options are explored by the parties. The mediators help the parties to reach the compromise and concessions on both sides leading towards reaching a final settlement.

Stage 5: Closure.(Memorandum of Understanding). This is the end of the mediation. If an agreement has been reached, the mediator may put its main provisions in writing as the parties listen. The mediator may ask each side to sign the written summary of agreement or suggest they take it to lawyers for review.

Agreement to mediate -The terms of the mediated agreement – Reality check

The terms of the mediated agreement need to be drafted realistically and to take into consideration all related practical issues, especially concerning the arrangement of contact and visitation.



The mediated agreement

- Once an agreed solution is in sight, the mediator has to assist the parties with working out the details of their agreement. The mediator will in many cases be the one who drafts the actual ‘agreement’ or ‘memorandum of understanding’ in accordance with the parties’ wishes.
- It is important that the mediated agreement be drawn up in compliance with the applicable legal framework, so that it is capable of obtaining legal effect in both (all) jurisdictions concerned. In this respect, although it is clearly not the mediator’s role to give legal advice, he or she can refer the parties to the relevant national or international legal framework. In any case, the mediator should draw the parties’ attention to the importance of consulting their specialised legal representatives in this regard, or of otherwise obtaining specialist legal advice on the legal situation in their case. Once the agreement has been drafted, it may be advisable to allow ‘a limited time for reflection.

- Once the agreement has been drafted, it may be advisable to allow ‘a limited time for reflection (...) before signing’. This time should also be used to make necessary legal inquiries.
- The mediated agreement needs to be realistic and as detailed as possible regarding all the obligations and rights to which it refers. This is not only important for a problem-free implementation of the agreement but also with regard to the agreement’s capability of becoming enforceable.
- It is important to eliminate, in so far as possible, any possible source of misunderstandings and practical obstacles in the use of the contact arrangement.
- Caution is necessary with regard to conditions that go beyond the sphere of influence of the parties. For example, an agreement should not task one of the parties with the withdrawal of criminal proceedings, if, in the relevant legal system concerned, criminal proceedings, once initiated, can only be dismissed by the prosecutor or the court

- The terms of the mediated agreement need to be drafted in such a manner as to allow for the agreement to obtain legal effect and become enforceable in the relevant jurisdictions.
- It is highly recommended that, before the agreement is finalised, a limited time for reflection be given to the parties to enable them to obtain specialist legal advice on the full legal consequences and on whether the content of their ‘provisional agreement’ complies with the law applicable in the different legal systems concerned.
- The measures necessary to give legal effect to the agreement and render it enforceable in the relevant jurisdictions should be taken with due speed and before the agreement’s implementation.
- Access to information on the relevant procedures in the jurisdictions concerned should be facilitated by Central Authorities or Central Contact Points for international family mediation.
- Co-operation among administrative / judicial authorities may be needed to help facilitate the enforceability of the agreement in all the States concerned.

- With a view to its serving as a basis for a sustainable dispute resolution, the agreed solution reached in mediation should meet the requirements for obtaining legal effect in the States concerned and should be rendered legally binding and enforceable in these States before commencing with its practical implementation. The enforceability in both (all) legal systems concerned is particularly crucial where the agreed solution involves the cross-border exercise of parental responsibility.
- To start with, the solution reached in mediation should be documented in writing and signed by both parties. Depending on the matters dealt with in the parties' agreement and depending on the applicable law, an agreement might constitute a legally binding contract between the parties from the moment of its conclusion. Many legal systems, however, restrict party autonomy in family law to a certain extent, particularly when it comes to parental responsibility.

Many States consider that the rights and welfare of the child concerned need to be safeguarded through the involvement of judicial or administrative authorities. Agreements concerning the exercise of parental responsibilities, which are nonetheless encouraged by most of these systems, might, for example, need court approval verifying that they comply with ‘the best interests of the child’ to obtain legal effect.

- Furthermore, there may be restrictions to party autonomy regarding other family law matters such as child support. Some legal systems, for example, limit the ability of the parents to contract out of child support obligations arising under the applicable law.
- It should also be noted that a situation may arise where among the different matters dealt with in the mediated agreement some are at the free disposal of the parties and some are not, and that according to the applicable law, the agreement becomes immediately binding on the parties in relation to the former matters, while the latter part of the agreement depends on court approval.
- This can be an unfortunate situation if the court approval is not obtained (or obtainable) for the remainder of the agreement, since the parties will usually agree on a whole ‘package’ and the partially binding agreement might favour one of the parties.

- Since the legal situation in international family disputes is often complex, it is strongly recommended that, before the mediated agreement is finalised, there be a ‘time-out’ for the parties to obtain specialist legal advice regarding the full legal consequences of what they are about to agree on and whether the content of their ‘provisional agreement’ complies with the law applicable to these matters in the different legal systems concerned. It might be that a parent is not aware that he or she is agreeing to relinquish certain rights, or that the agreement or its practical implementation may lead to a (long-term) change in jurisdiction and the law applicable to certain matters.
- If all or part of the agreement’s validity depends on court approval, the terms of the agreement should include that its entry into force will be conditional upon the court’s approval being successfully obtained. In these cases it may be advisable to refer to the outcome of mediation as a ‘provisional agreement’ and to reflect this in the title and wording of the document recording the agreed solution.

- It should be emphasised that not every agreement which is legally binding on the parties in one legal system is also automatically enforceable in that legal system. However, in those legal systems where agreements relating to parental responsibility require the approval of judicial or administrative authorities to become legally binding, the measure granting the approval (for example, the inclusion of the terms of the agreement in a court order) will often be at the same time the measure rendering the agreement enforceable in that jurisdiction.
- The ideal situation is one where an international, regional or bi-lateral instrument provides for simplified recognition and enforcement of court orders from one State to the other. The 1996 Hague Child Protection Convention and Brussels II bis are such instruments.

Case nr 1



The spouses Ewa Kowalska and Al Benguin married in London. Together, they lived and worked there. Two children were born from the marriage: Adam, born on 01/02/2011 in London and Joanna, born on 14/03/2014 in London. Over time, the parties' marriage began to deteriorate. Ewa has Polish citizenship. Her husband is from India. Ewa asked the court in London to entrust her with authority over the children. Al demanded that he be entrusted with authority over the minors. The court agreed to the departure of the mother and children to Poland for Christmas 2016, from 22/12. 2016 to 07/01/2017. Ewa, did not return to London after 07.01.2017 and remained in her mother's flat in Poland.

Al appealed to the District Court in Wroclaw, competent for the place where the children were, to order their return. He filled out the application. He stated in the justification that he had full parental authority and the children were habitually resident in London, and that the mother, without his consent and against the court's decision, had not returned to London. The participant requested the dismissal of the application, arguing that the children were Polish citizens, that they went to school and kindergarten in Wroclaw, that the applicant threw her out of the house and that he used violence.

The questions:

1. What are the advantages of mediation in this particular case ?

2. Does the Polish court have jurisdiction? What decision should the Court take? On what basis?

Answers to question 2:

The Polish court has no jurisdiction for parental responsibility , but has for the case of the children returned according with Hague Convention 1980.

The Polish court should order the children return to London.

Case nr II



Joanna left for Italy to work, where her mother and sister already worked. The women lived together. Joanna met Adriano. Karol was born from this relationship. Adriano's behaviour changed after the birth of his son. He became very possessive. He used financial, mental and physical violence against his partner and also with his son. Joanna, following another beating during an argument, called the police who reported the situation to social welfare. Joanna and her son were placed in the House for Women affected by Violence in Perugia.

Fearing her partner, she asked that the address remain confidential. Karol was 3 years old at the time. During the hearing in the court in Perugia, Adriano threatened to kill Joanna, her mother and sister. Even in court, he did not want to calm down and was very aggressive. The Italian court decided to place the child with the mother at the House for Women affected by Violence, without giving the address to the files, limited the power of the father, forbade the father from contacting the mother and the child. Unfortunately, Adriano found the place where Joanna and her son were staying and tried to intimidate her there, threatening to take her son away. Joanna was moved to a different place.

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Full of fear, she took her son without informing anyone and returned to Poland in January 2018. The Italian court decided that she failed to be credible. By virtue of a decision of February 2, 2018, it suspended parental authority by temporary order, entrusting the exercise of power to the father.

On February 4, 2018, Adriano filed an application for the surrender of the son under the 1980 Hague Convention, indicating that the mother had illegally abducted his son and moved with him from Italy.

In response to the request, the mother demanded its dismissal citing violence and threat to the life and health of her son on the part of his father, as well as irreparable mental damage in the event of a return to Italy, especially in the separation of such a small child from his mother who had previously been the primary parent to him. She pointed out that her father is a member of the mafia, repeatedly punished, including for murder and a very aggressive man, which was confirmed during court trial in Perugia.

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.