MEDIATION IN THE EU: LANGUAGE, LAW & PRACTICE

- Language training for judges, lawyers and mediators
- Focus on family mediation

Trier, 11th - 14th March 2019
Academy of European Law (ERA)

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Key International Legal Instruments in Cross-Border Children Cases

- Brussels IIa Regulation
- European Convention on Human Rights (ECHR)
- 1996 Hague Child Protection Convention
- **1980 Hague Convention on Child Abduction**
- UN Convention on the Rights of the Child (UNCRC), 1989

„... is a multilateral treaty, which seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return. “

Source: https://www hcch net/de/instruments/conventions/specialised-sections/child-abduction
Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

- Legal Mechanism for a prompt return of the child (6 weeks)
- Courts in state of habitual residence are the appropriate courts to decide on
- Secures child’s right to contact with both parents
- Wrongful removal/retention is not in the best interest of the child
- Deterrant to child abductions and wrongful removals

- “The Hague Child Abduction Convention”

100 signatory states to date

Source: https://www.hcch.net/de/instruments/conventions/specialised-sections/child-abduction

Source: HCCH, Hague Conference on Private International Law

Source: https://assets.hcch.net/docs/62b28229-4cec-4a93-a7d0-241b9ef3507e.pdf
Spreadsheet showing acceptances of accessions to the Child Abduction Convention


<table>
<thead>
<tr>
<th>Contracting States</th>
<th>Accessing States to the Convention</th>
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<tbody>
<tr>
<td>Albania</td>
<td>A</td>
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<tr>
<td>Andorra</td>
<td>A</td>
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<td>Argentina</td>
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<td>Armenia</td>
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<td>Austria</td>
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<td>Belgium</td>
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<td>Bosnia &amp; Herzegovina</td>
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<td>Brazil</td>
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<tr>
<td>Bulgaria</td>
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<tr>
<td>Burkina Faso</td>
<td>A</td>
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</tbody>
</table>

Source: https://assets.hcch.net/docs/62b28229-4cec-4a93-a7d0-241b9ef3507e.pdf
Can an Application for Return Be Made under the 1980 Hague Convention?

- Child is **below the age of 16** (<16)? (Art.4)

- Child was removed **across an international border** to a **contracting state or retained** in another Contracting State? (Art.1)

- Child was removed **from the place of the child’s habitual residence**? (Art.4)

- Was it in **breach of the rights of custody** of the other parent (or other person or institution)? (Art.3)

- Were rights of **custody actually exercised** at the time? (Art.3)

- Have less than 12 months elapsed since wrongful removal/retention? (Art.12)
Mediation is encouraged by the relevant legal instruments in cross-border children matters

1980 Hague Convention on Child Abduction
Article 7
“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;”

Brussels IIA
“(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.”
Mediation is encouraged by the relevant legal instruments in cross-border children matters

Brussels Recast

(28) In all cases concerning children, and in particular in cases of international child abduction, judicial and administrative authorities should consider the possibility of achieving amicable solutions through mediation and other appropriate means, assisted, where appropriate, by existing networks and support structures for mediation in crossborder parental responsibility disputes. Such efforts should not, however, unduly prolong the return proceedings under the 1980 Hague Convention.
Mediation Is In The Best Interest Of The Child....

✓ **Avoids** future lengthy litigation on custody matters after the Hague Court Process

✓ **Strengthens** parents ability to **co-parent** in the future years to come

✓ **VOICE (EU) Project Findings: Mediation** strengthens resilience of the parents/family
What is Mediation / a Mediator?
What is Mediation?

Definition

“[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.”

What Is a Mediator

Definition

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

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. (…)

Models of International Family Mediation
Who...are the Cross-border Mediators?

8 specialised Mediators
Mediators based in UK

Network of 150+ specialised Mediators
Mediators based worldwide (27 countries)

Pool of 18 specialised Mediators
Mediators based in the Netherlands

All Mediators are prepared to take on mediations at very short notice!
Co-mediation
In English

28 different languages
Available in the MiKK Mediators Network

Co-mediation
bi-cultural
bi-lingual
bi-professional
bi-gender

Co-mediation
bi-professional
in English, Dutch

www.mikk-ev.de
Cross-Border Family Mediation is Usually...

✓ Bi-national
✓ Bi-cultural
✓ Bilingual
✓ High escalation
✓ Usually long distances involved
MiKKs Co-Mediation Model = 4 x B

- Enshrined in the **Wroclaw Declaration 2007** (MiKK/DOM)
- Recommended by the **Hague Conference on Private International Law (HCCH) Mediation Guide to Good Practice** for international family cases and child abduction cases
- MiKK Mediators have all completed the **50-hour Advanced Cross-border Family Mediation Training** in Berlin or abroad (in EN or DE)
MiKK Co-Mediation Model

➢ Bi-lingual

The Mediators speak the common language of the parents **and** their mother tongue(s)
MiKK Co-Mediation Model

➢ Bi-cultural

The mediators are familiar with cultural differences in communication and conflict resolution
MiKK Co-Mediation Model

Bi-professional

The Co-mediators have different professional backgrounds (legal & psycho-social)
MiKK Co-Mediation Model

➤ Both Genders
A Glimpse into MiKK Cases Statistics...

This pie chart shows how much pie I ate while making this chart.
Number of Enquiries Received 2008-2018

- 2008: 39
- 2009: 59
- 2010: 79
- 2011: 140
- 2012: 143
- 2013: 159
- 2014: 142
- 2015: 165
- 2016: 181
- 2017: 213
- 2018: 213
MiKK Cases: 65 Countries Involved (2017)

- USA 9%
- England 7%
- France 6%
- Poland 6%
- Italy 5%
- Turkey 5%
- Spain 4%
- Australia 3%
- Belgium 2%
- Hungary 2%
- South Africa 2%
- Greece 2%

- Ukraine 2%
- Singapore 2%
- Sweden 2%
- Peru 2%
- Netherlands 2%
- Mexico 2%
- Jordan 2%
- Poland
- Belgium
- Jordan
- Singapore
- Canada
- Algeria
- Lebanon
- Tunisia
- Bolivia
- Finland
- Kenya
- Thailand
- Sri Lanka
- Italy
- Greece
- Netherlands
- Brazil
- Portugal
- Indonesia
- Saudi Arabia
- Egypt
- Ecuador
- Guatemala
- Latvia
- Morocco
- El Salvador
- Cyprus
MiKK Cases: 61 Countries Involved (2018)

Top 10 (No of Cases)
- USA: 30
- Spain: 13
- France: 13
- Italy: 12
- UK: 11
- Switzerland: 11
- Poland: 11
- Turkey: 7
- Mexico: 6
- Australia: 6
- Brazil: 6

Other countries involved: Israel, Indonesia, Columbia, Norway, Paraguay, Slovenia, Taiwan, Chechnya, Croatia, Georgia, Saudi Arabia, Togo, India, Venezuela, Iraq, Finland, Panama, Peru, Ecuador, Egypt, Slovakia, Luxembourg, Papua New Guinea, Iceland
Enquiry by Category in 2018

Total of 213 enquiries

- Child Abduction: 31%
- Contact/Custody: 39%
- Prevention/Relocation: 23%
- Other: 7%

Total of 213 enquiries
MiKK Co-Mediation Model

Recommended by the Hague Conference on Private International Law (HCCH) Mediation Guide to Good Practice for international family cases and child abduction cases

https://www.hcch.net/en/publications-and-studies/details4/?pid=6561
The Mediation Agreement - Memorandum of Understanding (MOU)
“Package Agreements“: In the best interest of the child

Wide scope of issues can be negotiated in a Hague Convention child abduction case = a “package agreement”

- Return of the child or not
- Future living arrangements
- Custody arrangements
- Contact with non-resident parent: holiday contact, birthdays, religious holidays
- Cultural and religious upbringing
- Bilingual language upbringing
- Finances: child support, spousal support, asset division
- Criminal proceedings

Expert Group of HCCH: “Package agreements should be promoted because they serve the best interest of the child”
Outcome of MiKK Mediations in 2015-2017

(Child Abduction Cases Only)

Agreements/ Memorandum of Understanding (MOUs) concluded (partial and full):

2015: 67%
2016: 90%
2017: 83%
Mediators in Court Model

- Proceedings under the 1980 Hague Child Abduction Convention

- Operated in the specialized Hague Courts in the Netherlands (IKO), England & Wales (reunite) and Germany (MiKK)

- A mediator attends 1st hearing to talk to parents about mediation

- Mediation takes place before 2nd hearing

- 10 days in between hearing 1 & hearing 2

- No delay of Hague Proceedings!
Enforceability of Mediated Agreements
Enforceability

The EU Mediation Directive: Article 6

Enforceability of agreements resulting from mediation

1. **Member States shall ensure** that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable **unless**, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.

2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.
Enforceability

“Specific difficulties for the mediation process itself may result from the fact that more than one legal system is involved. To find a sustainable solution for the parties that can have legal effect, it is therefore important to take the laws of both (all) legal systems concerned into consideration, as well as regional or international law applicable in the case.

(...)

The parties should be made aware of the fact that specialist legal advice may be needed with regard to the relevant legal systems’ approaches to the law applicable to the matters discussed in the mediation. The parents’ autonomy regarding agreements on custody and contact in respect of their child may be restricted in that the law may provide for mandatory court approval of any such agreement to ensure that the best interests of the child are secured.

At the same time, the parents should understand that, once a mediated agreement has legal effect in one jurisdiction, further steps might be necessary to give it legal effect in the other legal system(s) concerned in their case.

The parties should ideally have access to pertinent legal information throughout the mediation process. (...)

The Hague Guide to Good Practice on Mediation (HCCH, pp.30-31)
The Lawyer’s Role in Mediation
The Lawyer’s Role in Mediation

• For parents opting for mediation, the lawyer continues to play a vital role

• Mediation *complements* legal procedures in most cross-border family disputes:

  • **It is not** a substitute for them!
Lawyers are Involved Throughout The Mediation Process

Prior
• Specialist Legal Advice

During
• Consultation & Advice

At the End
• Checking and Advising on MOU

1. Agreement to Mediate
2. Identifying the Issues
3. Defining the issues and interests
5. Negotiating towards agreement
6. Memorandum of Understanding (MOU)

AND
Assistance with recognition and enforceability of mediated “package agreements” in the other jurisdiction
Enabling Parents to Remain Partners!

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Thank You!

Thank you

Gracias

Vielen Dank

Merci

Arigato

Thank you

ευχαριστώ

tack

شكرًا

teşekkür

Ευχαριστώ

dziękuję

Vielen Dank

Grazie

Thank you

תְּאֵסְקָקָר

/do jeh/

Thank you

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Благодаря

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