Family Mediation: The International Context

by
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Introduction

While there are many definitions of mediation, it is generally accepted to be a form of negotiation where a third-party neutral assists the parties to reach a mutually acceptable settlement of any issues in dispute, with the right of the parties to self-determine any outcome being a fundamental principle.³ At its heart, modern mediation is a continuation of ancient dispute resolution practices which vary greatly according to time, place, and cultural context, but all of which sought to restore individual and social harmony in situations of conflict and dispute. Mediation, as a local experience, is at the center of the growth in alternative dispute resolution, spreading the practice by word of mouth and supported by slowly building trust. Local courts are the forum from which mediation has emerged, the place of skill generation, of sharing and learning, and locations that reflect nuance and social norms or expectations. However, mediation is evolving from a movement that embodied a counter tradition to a set of structured legal forms, where practitioners look to law to access the benefits of regulation.⁴

The shift to legislate and regulate mediation on a national level is unsurprising in the context of mediation’s continuous expansion.

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³ Penelope McRedmond, Mediation Law 1 (2018).
The trend is reflected in Ireland with the passing of the Mediation Act 2017, which supports the creation of an emerging mediation profession and provides the framework for the intersection of mediation with the civil justice system. The Act enables the establishment of the Mediation Council of Ireland, which will set training standards for mediators, maintain a national register, prepare codes of practice for government-level approval, and promote public awareness of mediation. The law demonstrates a conception of mediation as a facilitative and voluntary process which is, at the same time, an alternative to court decisions and an intrinsic player in legal dispute resolution, with the hope that regulation will facilitate future growth. Significantly, mediated settlements in Ireland are legally enforceable at the instance of the parties. Law and mediation are not at war now, in this new accommodation; they are partners in the business of conflict resolution.

Legal regulation at a national level has not been an easy road in many jurisdictions. It may be controversial even within mediation, opposed by the legal profession or the judiciary, and even more likely, it may struggle to find space on a busy legislative agenda. It is by no means a completed project; yet another job of work is now pressing. Specifically, in the family context, increasing numbers of bi-national and bi-cultural relationships and marriages are a feature of globalisation; these families have a cosmopolitan identity that enriches the family, but when the relationship ends, matters may become legally complex because of multiple countries, norms, and sets of laws. Parties must not be discouraged from mediating, but facilitated to do so in an environment of legal clarity, in relation to enforceability of their agreement. In the absence of an international agreement or framework for family

5 Mediation Act § 12(4) (Act No. 27/2017) (Ir.).
6 Mediation Act § 11(1) (Act No. 27/2017) (Ir.) “The parties shall determine – (a) if and when a mediation settlement has been reached between them, and (b) whether the mediation settlement is to be enforceable between them.” This provision of the Act dealing with the enforceability of a mediation settlement was noted by Penelope McRedmond, “The Act states that in s 11 that the parties shall decide if and when a mediation settlement has been reached between them, and whether the mediation settlement is to be enforceable.” McRedmond, supra note 3 at 226.
mediation, mediators and their lawyers must, on a case-by-case basis, assist international families to navigate the complexities of dealing with more than one jurisdiction, more than one type of legal system, identifying applicable laws, and any supra-national or international conventions that may apply, and ultimately understanding where and how any mediated settlement might be enforced. The onset of COVID-19 in 2020 had an immediate and significant impact on family mediation, both nationally and internationally. Unprecedented restrictions and lack of access to the courts resulted in a global shift to on-line mediation for families seeking resolution of disputes. The reality is that international families were already seeking mediation; the onset of Covid-19 merely accelerated the need for an international approach to family mediation and placed it in the spotlight.

This article will examine the trend towards national legal regulation as a support for mediation growth, with particular emphasis on the European position, as well as the current international legal framework and developments in the facilitation of family mediation for cross border family disputes. Part I of this article examines national legal frameworks for mediation within Europe and North America, and Part II provides an overview of international and supra-national legal frameworks that aim to facilitate the resolution of cross border disputes using mediation. Part III looks at the work of International Social Service (ISS) between 2010 and 2018 where they conducted a global program focussing on international family mediation and includes a case study of a cross border family mediation. The conclusion highlights the need for an internationally agreed framework for family mediations that traverse legal borders to assist international families and their lawyers in navigating the complexities of dealing with more than one jurisdiction.

I. National Legal Frameworks for Mediation

A. England and Wales

In England and Wales, regulatory frameworks for mediation have been historically driven by the profession itself and since the

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In the early 2000s, self-regulation of mediation is split under two councils. The Civil Mediation Council\(^9\) deals with civil, commercial and workplace mediation and the Family Mediation Council\(^{10}\) holds itself out as the home of regulated family mediation. Family mediation in the United Kingdom is now an approved pathway for the resolution of family disputes, officially endorsed and funded by the government, representing a fundamental shift away from the family courts.\(^{11}\) It was this shift in government policy, emphasizing family mediation as an alternative to litigation, that resulted in the coming together of six organizations to establish in 2007 the Family Mediation Council (FMC), which set about creating a single, qualified status of accredited family mediator within the industry.\(^{12}\) By the end of 2018, the key elements of the regulatory project had been successfully implemented and 1,100 mediators were registered with the FMC.\(^{13}\)

B. European Union

Across European Member States, there is an emerging trend towards regulation.\(^{14}\) Twenty Member States have some form of professional framework for mediators, ranging from a national register to full legal regulation. In ten of those countries, the regulatory framework for mediators is located within or under the auspices of a government body.\(^{15}\) Three have Mediation Councils: Latvia, Romania and Slovenia. Poland has an ADR Council, and the Netherlands has the Mediators Federation of the Netherlands (MFN). Three countries\(^{16}\) have “Commissions” established by a Ministry of Justice, tasked for the most part with monitoring the development of mediation.


\(^{11}\) Marian Roberts & Maria Federica Moscati, Family Mediation: Contemporary Issues 1 (2020).

\(^{12}\) Id. at 43.

\(^{13}\) Id. at 45.

\(^{14}\) This trend is moving beyond Europe. See Mediation Act 2023 (Act No. 32/2023) in India which promotes mediation, ensures enforceability of settlements, and establishes a register for mediators.

\(^{15}\) Information on mediation in EU countries is available at the European Justice Portal, Mediation, https://e-justice.europa.eu/62/EN/mediation#:~:text=This%20process%20may%20be%20initiated,your%20own%20country%20or%20abroad (last visited Dec. 15, 2023).

\(^{16}\) Croatia, Belgium, and Czech Republic.
and advising government. Three Member States\textsuperscript{17} have established government bodies and five countries\textsuperscript{18} have direct oversight of, at least, some aspects of mediation at government level. In eight\textsuperscript{19} of the Member States, the Ministry of Justice maintains a national register of mediators. Regulatory and legislative developments across Europe, in recent years, indicate that mediation is no longer viewed solely as an additional skill set for those offering another service. It has evolved to become a professional activity, in its own right, with mediation codes of conduct, and complaints processed by mediation membership bodies, rather than any other professional body, of which a mediator may be a member.

Experience across Europe is fragmented, but moving towards the creation of a national, regulatory environment for family mediation. However, those systems will always be varied, and they pose a challenging work environment for a family mediator who works across them. Philosophically, European countries are going in the same direction, but this is unlikely to lead to the same rules on, for instance, enforceability of mediated agreements. International legal cooperation is required to address the issues of the cross-border family, in law and in mediation.

C. \textit{North America}

The United States of America has no governing or regulatory body for mediation; however, most states have developed individual laws. In an effort to create uniform, domestic mediation laws, two statutes have emerged. First, the Alternative Dispute Resolution Act of 1998 requires all federal trial courts to implement ADR and enables the court to direct a case to mediation.\textsuperscript{20} Second, the Uniform Mediation Act (UMA) of 2001 was developed to standardise the mediation process and to establish confidentiality on a statutory basis and it has been enacted by thirteen states to date.\textsuperscript{21} In Canada, like England and Wales,\textsuperscript{22} the profession itself has

\begin{itemize}
\item \textsuperscript{17} Malta, Portugal, and Greece.
\item \textsuperscript{18} Italy, Slovenia, Czech Republic, Slovakia, and Poland.
\item \textsuperscript{19} Austria, Czech Republic, Bulgaria, Greece, Croatia, Hungary, Italy, and Slovenia.
\item \textsuperscript{20} 28 U.S.C. §§ 651-71 (2000).
\item \textsuperscript{21} \textsc{Unif. Mediation Act}, 7A U.L.A. 146 (2006).
\item \textsuperscript{22} Rachel Blakely, \textit{‘Mediators’ Mediating Themselves’: Tensions Within the Family Mediator Profession}, 43 Legal Stud. 139 (Mar. 2023), https://
driven self-regulation, and the profession remains unregulated by
the State, with mediators electing to adopt codes of practice as may
be required by institutes such as the Canadian and Ontario ADR
Institutes and other mediation organizations and membership
bodies. The North American picture, like the European one, is
of gradual movement towards regulation without uniformity of
method. International regulation of family mediation will not
emerge organically from national processes.

II. International Legal Framework

A. Singapore Convention

There are existing supra-national and international legal
frameworks that aim to facilitate the resolution of cross border
disputes using mediation. Perhaps the best known is the
Singapore Convention on Mediation, which is a framework for
international settlement agreements resulting from mediation.
However, the focus of this Convention is on commercial matters,
and it specifically excludes family, inheritance, and employment
disputes. This exclusion represents the conventional wisdom that


In Ontario family mediators who provide court connected services must meet minimum qualifications and be accredited by one of the following four entities; ADR Institute of Canada, Family Dispute Resolution of Ontario, Family Mediation Canada, or Ontario Association for Family Mediation, Family Mediation, Ontario,

family disputes involve complex and diverse questions of special sensitivity and family law varies widely between jurisdictions, in a way that represents unique cultural approaches to family life. It is an entrenched idea that ensures that cross border family mediation is addressed separately from other forms of civil mediation.\textsuperscript{25}

B. \textit{EU Cross Border Directive}

The European Union (EU) Cross Border Directive on Mediation\textsuperscript{26} provides high level principles and recognizes that mediation can provide a cost-effective and timely resolution of disputes in civil and commercial matters.\textsuperscript{27} The Directive, which must be transposed into national law, envisions that Member States will create their own mediation guidelines, in accordance with each Member’s statutory or regulatory framework. This Directive applies to civil and commercial matters, involving at least one party domiciled or habitually resident in a Member State. The range of disputes is broad, and significantly, includes cross-border family law matters. The European Commission’s Justice e-portal\textsuperscript{28} provides information on cross-border family mediation between Member States. The Directive allows the parties to request that the mediated settlement be made enforceable as a court judgment or enforceable instrument and provides a mechanism for cross-border enforceability within the EU.\textsuperscript{29} The Directive provides that the court may order that the proceedings be adjourned, wherever initiated within the European Union, and may invite the parties to use mediation to settle the issues in dispute. A stated objective in the 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.”\textsuperscript{30} Within

\begin{itemize}
\item[\textsuperscript{25}] The recent Mediation Act 2023 in India states that where a dispute requires international mediation, the Act will only apply to commercial disputes and not to family disputes. The Mediation Act, 2023, Bill No. 32 of 2023, § 3(g) (Sept. 14, 2023).
\item[\textsuperscript{27}] Id. pmbl. (6).
\item[\textsuperscript{29}] Directive 2008/52/EC supra note 26, pmbl. (19).
\item[\textsuperscript{30}] Id. art. 1.
\end{itemize}
sion years of entering into a mediation settlement, the parties may apply to the court concerned for an order making the agreement a rule of court, and enforceable against either of them. It also provides that, even where litigation was not initiated, a mediation settlement can be brought before court authorities to be enforced, unless contrary to national law. This Directive represents a great deal of progress towards achieving cross border enforceability of mediated agreements in the family sphere, from a European perspective.\footnote{31} Where the mediating parties are in the European Union, the mediator is on solid ground. However, there are 16 million couples from non-EU countries living in the European Union, and this is why an international approach is also required.\footnote{32}

C. The Hague Convention

The legal context of child abduction cases is the 1980 Hague Convention,\footnote{33} a multi-lateral procedural convention, with 103 contracting states,\footnote{34} that seeks to protect children from the harmful effects of wrongful removal and retention across international boundaries. The Convention provides that Hague countries shall take all appropriate measures to obtain the voluntary return of the child, with a clear direction in relation to the use of mediation.\footnote{35} The 1996 Hague Child Protection Convention\footnote{36} seeks to improve the protection of children in international situations, providing common rules on jurisdiction, applicable law, and recognition and enforcement on parental responsibility matters. It also establishes a system of cooperation between signatory States through their Central Authorities, to assist parents in resolving cross-border family disputes. Signatory

\footnote{31} Absent Britain which, since Brexit, may adopt European law but is under no obligation to do so.
\footnote{32} Irish mediators are particularly impacted since the Irish diaspora tends to move within the English-speaking world; Britain, America, Australia, Canada and New Zealand, all non-EU countries.
\footnote{34} PAUL ET AL., supra note 7, at 16.
\footnote{35} Hague Convention art. 10.
countries operate various forms of a child abduction mediation scheme, with mediators drawn from a wide range of ethnic and cultural communities, often conducted with the assistance of interpreters.\(^\text{37}\) Although the Child Protection Convention is narrow in focus, experience of the operation of Hague in this area is encouraging and illustrates the power and necessity of international co-operation. Use of mediation in the context of international child abduction demonstrates the breadth of family mediation’s offering, its versatility and usefulness.

D. Broader Framework

Mediation in the shadow of the law could be problematic in European cross border cases since family law remains within the exclusive legal purview of the Member States, but the European Union can legislate on family matters where there are cross-border implications. The legal context for cross border family mediation in the EU also includes: Council Regulation (EU) 2019/1111\(^\text{38}\) dealing with jurisdiction, recognition and enforcement of decisions in matrimonial matters, parental responsibility and child abduction; and Council Regulation (EC) No 4/2009, as amended,\(^\text{39}\) which covers all maintenance arrangements arising from a family relationship, parentage, and marriage. The European Commission has assisted stakeholders to develop a voluntary European Code of Conduct for Mediators in 2004\(^\text{40}\) and in 2018, the European Commission for the Efficiency of Justice (CEPEJ) adopted a voluntary European Code of Conduct for Mediation Providers.\(^\text{41}\)

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37 Roberts & Moscati, supra note 11, at 207-08.
both codes to be used alongside CEPEJ recommendations, guidelines and other instruments on mediation.

A convention with broader international applicability is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, more commonly known as the “New York Arbitration Convention,” which, unlike the Singapore Convention, does not exclude family law disputes. Finally, Article 12 of the United Nations Convention of the Rights of the Child (UNCRC, 1989) is of key importance in any cross-border family mediation, setting out the rights of a child to express their views on any matter that affects them.

III. International Family Mediation

A family conflict becomes international when more than one country is involved. Those in dispute may be of different nationalities, the family may no longer be living in its country of origin, and the assets of the marriage may be located in different jurisdictions.

A. ISS Program

In 1924, International Social Service (ISS) was established and it has a presence in more than 120 countries. Between 2010 and 2018, ISS conducted a global program focusing on international family mediation, to facilitate access to competent and qualified international family mediators for families across national borders. An International Charter comprised of ten core principles was developed and the program hosted a website and offered a multilingual Guide to International Family Mediation, intended to be a reliable resource for families and professionals worldwide. The overall objective of the program was to highlight the legal complexity of cross border situations and to highlight the benefits

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of mediation as a clear professional means to resolve conflict and protect children, which can accompany, or be the alternative to, legal proceedings.\textsuperscript{46}

The ISS General Secretariat published a Final Report in December 2018.\textsuperscript{47} The initiative involved consultations with 55 mediation practitioners from 23 countries. Feedback from this collaborative process indicated that, while most of those consulted see professionalisation and certification of international family mediators as important in the medium to long-term, it was premature to start work, ahead of professionalisation of mediators at the national level. Key issues identified included the inconsistency of training and qualification standards across the world and regions with low knowledge and practice of mediation. Solutions discussed were the development of a harmonized training model and the establishment of working groups, the inclusion of organizations from Muslim countries, and the promotion of adoption of culturally appropriate family mediation.\textsuperscript{48} A Review Board, comprised of six international organizations\textsuperscript{49} provided feedback, supporting the concept of a global family mediation network. The Review Board also saw merit in using such a network to find qualified mediation professionals, access resource documentation, and develop a charter or a model law on international family mediation.\textsuperscript{50} The Final Report concluded that, while it was too soon to start work on a formalised certification for international family mediation, a network serving the needs of mediators would provide the foundations needed for the work ahead. Appropriate funding to enable the project to continue was not secured and work was suspended.\textsuperscript{51}


\textsuperscript{48} Id. at 9.

\textsuperscript{49} The European Commission for the Efficiency of Justice of the Council of Europe, the European Parliament Coordinator on Children's Rights, the Hague Conference on Private International Law, the International Academy of Family Lawyers, the International Hague Network of Judges, the United Nations Committee on the Right of the Child, as well as the University Integrated Center for Health and Social Services (CIUSSS Canada).

\textsuperscript{50} ISS General Secretariat, supra note 47, at 10.

\textsuperscript{51} Id. at 11.
B. Case Study

The author’s experience of mediating international family disputes is reflected in the following case study, which highlights the questions that must be considered, including:

- The jurisdiction of the Agreement to Mediate?
- Where does each party reside?
- Where do the children reside, and is the Hague Convention applicable?
- Where are the assets of the marriage, including property, savings, pensions?
- Where the parties intend that the mediation settlement is enforceable between them, is that possible under the relevant national/international legal systems?

The spouses were residing for the last eight years in Switzerland. The parties were in agreement that the marriage had ended and wanted to agree to the terms of their divorce in mediation. Both spouses intended to leave Switzerland after the children finished primary school, the following year. The husband was from a non-European Union country and intended to return to live there. The wife was from Ireland and intended to return to live there. Her solicitor proposed mediation. The two children had been born in England and attended schools in Switzerland. The spouses did not own any property in Switzerland, but jointly owned a property in England, and the wife held an interest in a property in the EU with her brother. The wife had an English pension and the husband had pensions through his employer in Switzerland, and savings in a non-EU country. It was agreed that the laws of Ireland governed the Agreement to Mediate, and the mediation was conducted on-line. The parties each secured a legal adviser in Switzerland and the wife had a legal adviser in Ireland. With the assistance of the mediators, a comprehensive mediation settlement was agreed, which was translated into German. The parties agreed that they would seek a divorce in Switzerland, which has a civil law legal system, with the applicable law being Swiss law. They filed a joint application, using the mediation settlement as the basis for that application.

The property in England was sold and the proceeds divided equally between them, the pensions and savings were equalized with funds transferred from the husband to the wife, and the wife
retained her interest in the Irish property which had been acquired before the marriage. The mediation settlement also set out that the children would reside in Ireland with their mother, their schools were mutually agreed, and child maintenance was agreed. The parties agreed that the children would be with their father in the non-EU country during summer holidays and they would spend other school holidays with him in England, with extended family members. The parties agreed to first return to mediation should any dispute arise, with the Irish courts having jurisdiction in relation to any dispute about parenting or child maintenance that could not be resolved between them. The court in Switzerland adopted the terms of the agreement reached between the parties and granted a divorce within two months of the joint application.

The case study illustrates the complexity that may be involved when dealing with an international family, including assets spread across several jurisdictions, child arrangements providing for visitation in more than one country, and choice of forum for divorce proceedings. Yet, it also shows that family mediation has huge potential to alleviate the complexity for international families, clarifying their plans, and providing pathways to enforceability in the event of future disagreement.

**Conclusion**

The world is getting smaller; globalization, international travel, instant communication and social media are bringing the human family together in new ways. One’s life partner may not have been born within walking distance of the home, as they would have been in the past, and people are all enriched by the ways that international families break down racial, cultural, and religious barriers. However, when families in conflict find themselves traversing legal borders, they encounter impediments to private ordering. Family law continues to be seen as embodying the distinctive culture of each society in a way that makes global harmonization an insurmountable goal. Progress has been made within regions, and on specific, pressing issues such as child abduction, but the shadow of the law will continue to be long for an international family mediator.

Progress has also been made in recognizing, supporting, regulating, and incorporating family mediation into national civil
justice systems, but not in a way that is likely to lead to global consensus, and it is taking time. In late 2022, an international family mediation initiative commenced, with international experts coming together to form a working group, with the aim of creating a form of international family mediation profession, dealing with international family law issues, creating good practices, and developing a protocol for more of this work internationally.

Mediation across borders can work with the cultural, linguistic, and geographical realities of international families, but they need to know that their mediation is located within a recognized framework that offers them security of outcome. This framework should be capable of adoption in any geographical location and adapted to the needs of national family law. The story of family mediation is one of dynamic change at local, national, and international levels, which gives every reason to be hopeful that this day will come.

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