

Cross Border Family Mediation



**Mediation in Hague Convention
cases: the EU rules and the
Portuguese legal framework**



First steps (after Millet) – 1890 – Vincent van Gogh – Work in the public domain

DIRECTIVE 2008/52/EC OF 21/5/2008

MEDIATION DIRECTIVE

The objectives of the Directive



Article 1(1)

- **Encourage** the use of mediation.
- **Ensure** a balanced relationship between mediation and judicial proceedings.
- **Promote** amicable settlement of disputes.
- **Facilitate** access to alternative dispute resolution.

The Directive does not make the use of mediation compulsory or subject to sanctions.

The scope of the Directive



Article 1(2)

The Directive applies to cross border disputes in civil and commercial matters **except** as regards rights and obligations which are not at the parties' disposal.

Recital 8

However, MSs (Member-States) **can apply the Directive to internal mediation processes.**

In Portugal, family disputes were included within the scope of the national legislation transposing the Mediation Directive.

Definition of cross border dispute



Article 2

At least one of the parties is domiciled or habitually resident in a MS other than that of any other party in the dispute **on the date on which**

- Parties agree to use mediation
- Mediation is ordered by a Court
- An obligation to use mediation arises from national law or
- Parties are invited by the Court to use mediation

Or

Judicial proceedings or arbitration following mediation are initiated in a MS other than that in which the parties were domiciled or habitually resident on the date mentioned above.

Definition of domicile



Article 2(3) of the Directive refers to Articles 59 and 60 of Brussels I Regulation, currently Articles 62 and 63 of Brussels I Recast.

For natural persons domicile is determined according to the national law.

Quality of Mediation



Article 4

- Adherence to voluntary **codes of conduct** by mediators and organizations providing mediation services.

- Initial and further **training** of mediators to ensure that mediation is conducted in an
 - ✓ Effective
 - ✓ Impartial and
 - ✓ Competent way

Information



Article 9

- Information on how to contact mediators shall be available to the general public on the internet.

Article 5(1)

- The Court may invite the parties to attend information sessions on mediation if such sessions are easily available.

Effect on limitation periods



Article 5(2)

- ✧ The recourse to mediation shall not prevent the parties from exercising their right of access to the judicial system.
- ✧ Accordingly, prescription and limitation periods shall be suspended during the mediation process.

Confidentiality of Mediation



Article 7

Mediators and those involved in the administration of the mediation process:

- ⌘ Shall not be compelled to give evidence **in civil and commercial judicial proceedings or in arbitration**, regarding information arising from or in connection with a mediation process.
- ⌘ This rule does not apply in criminal matters.
- ⌘ However, MSs may enact stricter measures to protect confidentiality.

Exceptions to the principle of confidentiality



- ❧ The parties agree on disclosing information.
- ❧ Overriding public policy of the MS concerned, e.g.:
 - protecting the best interest of the child
 - prevent harm to the physical or psychological integrity of a person.
- ❧ Disclosure of the content of the agreement is necessary to implement or to enforce that agreement.

Enforceability of mediation agreements



Article 6

- ✧ The mediation agreement may be made enforceable by the Courts or by other authorities, in a **judgment** or in an **authentic instrument**.

Exceptions to enforceability

- ✧ The content of the agreement is contrary to the law of the MS where the request is made.
- ✧ MSs shall ensure the enforceability of mediation agreements.
- ✧ The law of that MS does not provide for enforceability.



Aube the Sculptor and his son - 1882 - Paul Gauguin - Work in the public domain

REGULATION (EC) N° 2201/2003 of 27/11/2003

Brussels IIa Regulation

Article 11 of Brussels IIa



Article 11 of Brussels IIa applies to all MSs of the European Union except for Denmark:

Where a person, institution or other body having rights of custody applies to the competent authorities in a MS to obtain **the return of a child** that has been wrongfully removed or retained in a MS other than the MS where the child was habitually resident, **on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction - the 1980 Hague Convention.**

Recognition and enforcement in other MSs



- ⌘ **Recital 20 of the Mediation Directive refers to the EU rules** applicable to the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility **laid down in Brussels IIa Regulation.**
- ⌘ **A mediation agreement ratified by a judgment, decree, order or decision, pronounced by a Court or issued by another authority with jurisdiction in family matters in the MSs, falls in the scope of Brussels IIa Regulation** – Article 2 (1) and (4) of Brussels IIa.

Recognition

Article 21 of Brussels IIa



- ⌘ A judgment given in a MS is to be recognized in the other MSs without any special procedure being required.
- ⌘ This rule applies to mediation agreements on family matters and parental responsibilities ratified by a judgment or by an equivalent decision pronounced in a MS - Article 2 of Brussels IIa.

Enforcement

Articles 28 and 40 of Brussels IIa



- ⌘ There are only two categories of judgments on parental **responsibilities** that may be enforced in another MS without having been declared enforceable in that MS: **rights of access** and **return of the child pursuant to Article 11(8)** - the return ordered by the Court having jurisdiction according to Brussels IIa, after a decision of non-return pursuant Article 13 of the 1980 Hague Convention.
- ⌘ In these two cases, a **certificate** issued by the Court or by the competent authority in the MS where the decision was pronounced is sufficient.
- ⌘ **The procedure for seeking enforcement must be adopted for any other judgments on parental responsibility** - see ECJ ruling C-92/12 PPU.

Grounds for non recognition, non enforceability and non issuing of the certificate: **the hearing of the child**



Articles 11 (2), 23, 31(2) and 42 of Brussels IIa

- ∞ They apply also in case of a mediation agreement ratified by a Court or competent authority: **in order to enforce the agreement in another MS it is important to give the child the opportunity to be heard either during the mediation procedure or by the Judge/authority competent to ratify the agreement.**
- ∞ Exceptions:
 - Urgency
 - In case of return of the child, if the hearing was considered inappropriate to the age or degree of maturity of the child.

Mediation agreements regarding custody and rights of access



In case a mediation agreement regarding parental responsibilities, namely custody and rights of access, is reached, **the procedure for seeking its ratification** by the Court or other authority having jurisdiction in matters of parental responsibility in the MSs will have to be introduced **with the Court/authority having jurisdiction pursuant to Articles 8, 9, 10, 12, 13 or 14 of Brussels IIa.**

Jurisdiction in cases of parental responsibility



Articles 8 to 12 of Brussels IIa

- ✧ **General jurisdiction** - Article 8(1): lies with the Courts of the MS where the child is habitually resident.
- ✧ **In cases of child abduction:** the Courts of the MS where the child was habitually resident immediately before the wrong removal or retention retains jurisdiction until the child has acquired habitual residence in another MS **and** one of the conditions laid down in Article 10 (a) or (b) are met.

Prorogation of Jurisdiction



Article 12 (1) and (3) of Brussels IIa

Article 12 establishes two cases in which, exceptionally, jurisdiction on parental responsibilities may belong to the Courts of a MS other than the MS of the habitual residence of the child.

Conditions for prorogation of jurisdiction pursuant to Article 12(1) of Brussels IIa



- ⌘ An application for divorce, legal separation or marriage annulment is pending in a MS exercising jurisdiction by virtue of Article 3 of Brussels IIa
- ⌘ The matter relating to parental responsibility is connected with that application
- ⌘ At least one of the spouses has parental responsibility
- ⌘ Jurisdiction of the Courts is accepted by the spouses and by the holders of parental responsibility by the time the Court is seised **and**
- ⌘ It is in the superior interest of the child.

Conditions for prorogation of jurisdiction pursuant to Article 12(3) of Brussels IIa



- ∞ The child has a substantial connection with a MS other than the MS of habitual residence, e.g.: the child is national of that MS or one of the holders of parental responsibility is habitually resident in that MS
- ∞ The jurisdiction of the Courts is accepted by all the parties to the proceeding at the time the Court is seised **and**
- ∞ It is in the best interest of the child.

The jurisdiction of a court of a MS which is not that of the child's habitual residence may be established pursuant to **Article 12(3) even where no other proceedings are pending before the court chosen** - ECJ ruling C-656/13.



Le Berceau - 1872 - Berthe Morisot - Work in the public domain

Cross Border Family Mediation in Portugal

The Portuguese legal framework

The Portuguese Mediation Law



- ⌘ **Law N° 29/2013 of 19/4/2013 – the Portuguese Mediation Law** – establishes the national legal framework for mediation, including for the existing public systems of mediation and, in particular, for mediation in civil and commercial matters.
- ⌘ The Portuguese Mediation Law **transposes the Mediation Directive.**
- ⌘ It includes the **System of Family Mediation (SMF)** in its scope.

The legislative acts implementing the Portuguese Mediation Law



- ⌘ Portaria N° 344/2013 of 27/11 (national registers of mediators)
- ⌘ Portaria N° 345/2013 of 27/11 (certified training for mediators).

According to the Portuguese legal framework on mediation, the public system of family mediation (managed by the Ministry of Justice) co-exists with private mediation on family disputes.

Both private and public mediators are listed in public registries that may be consulted on the website of the Ministry of Justice.

The general principles laid down in the Portuguese Mediation Law



- ⌘ Voluntary nature of mediation.
- ⌘ Confidentiality of mediation.
- ⌘ Equal treatment of the parties in the dispute.
- ⌘ Impartiality, independency, competency and responsibility of the mediator.
- ⌘ Enforceability of mediation agreements.
- ⌘ Mandatory adherence to both National and European Codes of Conduct for Mediation.

Cross border family mediation in light of the Portuguese Mediation Law



- ⌘ Article 9(4) of the Portuguese Mediation Law provides for enforceability of mediation agreements reached in another MS in case of cross border disputes, in line with Article 1(2) of the Mediation Directive.
- ⌘ Article 24(6) allows for recognition of professional qualifications of mediators originating from other MSs in case they wish to practice their profession in Portugal.
- ⌘ Article 40(2) entails the entry in the national registry of mediators originating from other MSs.
- ⌘ Article 26(j) provides for co-mediation.

Enforceability of family mediation agreements in Portugal



In proceedings related to parental responsibilities and matrimonial matters, mediation agreements (reached in Portugal) have to be ratified to be enforceable at national level.

- ✧ Either by a Family Court
- ✧ Or by the Civil Registry Officer (in cases of divorce/separation by mutual consent where spouses agree on parental responsibilities).
- ✧ In either case, the mediation agreement on parental responsibilities shall be ratified only if it is in the best interest of the child.
- ✧ Accordingly, a mediation agreement regarding an application introduced before the Portuguese Court for the return of the child under the 1980 Hague Convention has to be ratified by the Court in order to be enforceable at national level.

How to introduce mediation in family disputes in general



In national judicial proceedings concerning matrimonial matters:

- ✧ **The Judge can refer the parties to mediation** at any stage of the judicial procedure, unless one of the parties opposes
- ✧ **The parties may agree to resort to mediation** – article 273 of the Portuguese Code of Civil Procedure.

In proceedings concerning matrimonial matters and related parental responsibilities, introduced before the Civil Registry Office:

- ✧ **The Civil Registry Officer shall inform the parties about the available mediation services** – Article 14 n° 3 of Law Decree N° 272/2001 de 13/1.

How to introduce mediation in disputes related to parental responsibilities and applications for return of the child



In Portugal, in proceedings related to parental responsibilities and applications for return of the child:

- ∞ At any stage of the procedure, the Judge may refer the parties, with their consent, either to public or to private services of mediation
- ∞ The parties may agree to resort to mediation
- ∞ The mediation agreement shall be ratified by the Judge as long as it is in the best interest of the child - Article 147-D of the Portuguese OTM (Law Decree N° 314/78 of 27/10/1978, last amended by Law n° 31/2003 of 22/8/2003).

National rules of procedure applicable to a request for return of the child - Articles 73 and 84 of Law N° 147/99 of 1/9/1999 and Articles 148, 151 and 210 of the Portuguese OTM



- ❑ The **Public Prosecutor** represents the interests of the child, receives the application for return through the **Central Authority** and introduces the request before the Portuguese Family Court.
- ❑ It is a **tutelary common procedure** of voluntary jurisdiction.
- ❑ The Court will take the evidences it deems necessary and then will decide.
- ❑ It is not mandatory for the parties to have a lawyer but they can have one.
- ❑ To ensure **contradictory**, the parties may have access to the file and provide the Court with information about the evidence collected.
- ❑ The Court shall give the parents and the child the opportunity to be heard.

The hearing of the child in Portugal



Articles 84 and 86 of Law 147/99 of 1/9/1999

- It is mandatory for children who are 12 or more years old.
- It is mandatory for younger children if it appears that they have a sufficient degree of maturity.
- The hearing is carried out by the Judge or by the child protection committees.
- The child has the right to be heard either singly or in the company of his/her parents, a lawyer or any other person the child can trust.
- The judge may order the assistance or even the intervention of doctors, psychologists, other specialists or of a person the child can trust.
- The Judge may order the use of any technical means he deems appropriate.

Data concerning requests for return in Portugal

Source - Portuguese Central Authority (Directorate-General of Reintegration and Prison Services - DGRSP)



International child abduction						
Years	1. Requests for return addressed to other countries		Total	2. Requests for return received from other countries		Total
	R. 2201	H80		R. 2201	H80	
2010	24	11	35	17	11	28
2011	31	22	53	25	11	36
2012	28	43	71	8	8	16
2013	36	30	66	19	7	26
2014	36	19	55	15	11	26
R. 2201 – Regulation Brussels IIa						
H80 – 1980 Hague Convention						



**THANK YOU
SO MUCH
FOR YOUR
ATTENTION**

Paula Pott - 2015

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