

JURI Committee

Public Hearing

Child protection under EU law

Monday, 28 June 2021, 16.45 - 18.45

Searching for amicable solutions: Can mediation be the best option for children caught up in family disputes?

Juliane Hirsch, LL.M.

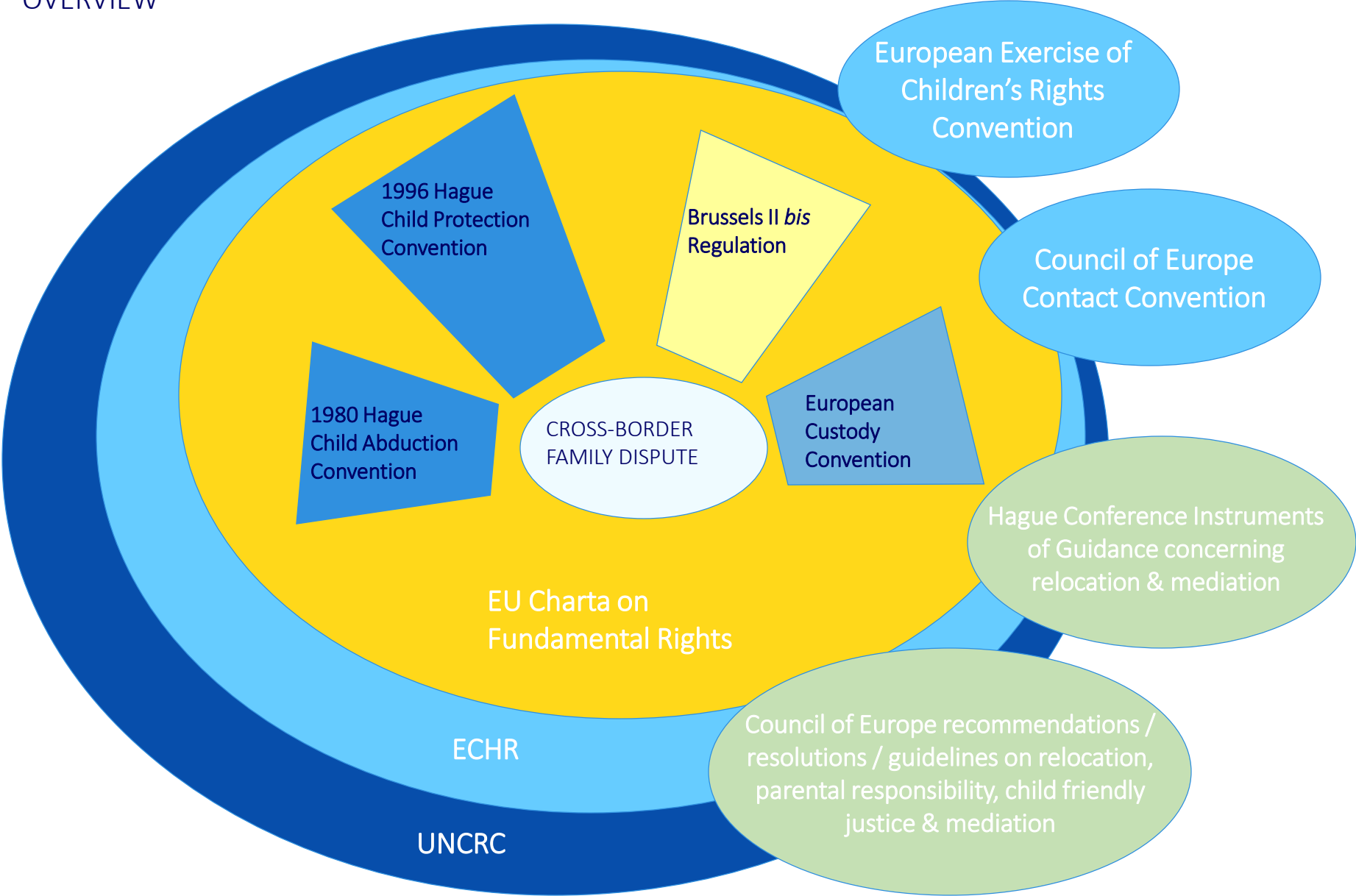
*Independent Expert on PIL
and International Family Law,
Family Mediator and Trainer,
Julianehirsch.jh@gmail.com*

A photograph of three children sitting on a grassy hillside, looking out over a landscape. The child on the left is a girl with long dark hair, wearing a light pink shirt and dark overalls, with her hand near her face. The child in the middle is a girl with dark hair in a bun, wearing a pink patterned tank top. The child on the right is a younger girl with dark hair in a ponytail, wearing a light pink tank top and colorful patterned shorts, with her hands clasped. The background is a blurred landscape with a dirt path and some vegetation.

**CHILDREN BENEFIT FROM
THE AMICABLE SOLUTION
OF PARENTAL CONFLICTS**

CROSS-BORDER PARENTAL RESPONSIBILITY CONFLICTS LEGAL FRAMEWORK

OVERVIEW



MEDIATION STANDARDS, PRINCIPLES & GUIDANCE

WITH RELEVANCE FOR FAMILY MEDIATION & INTERNATIONAL CASES



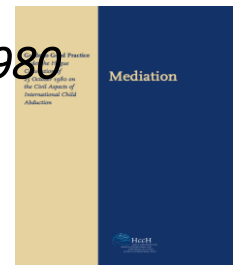
- *Recommendation No. R (98)1 of the committee of ministers to member States on family mediation*
- *Recommendation Rec (2002)10 of the Committee of Ministers to member States on mediation in civil matters*
- *Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters (2007)*



- *European Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters*



- *Guide to Good Practice on Mediation under the 1980 Hague Child Abduction Convention*
- *Principles for the establishment of mediation structures in the context of the Malta Process*



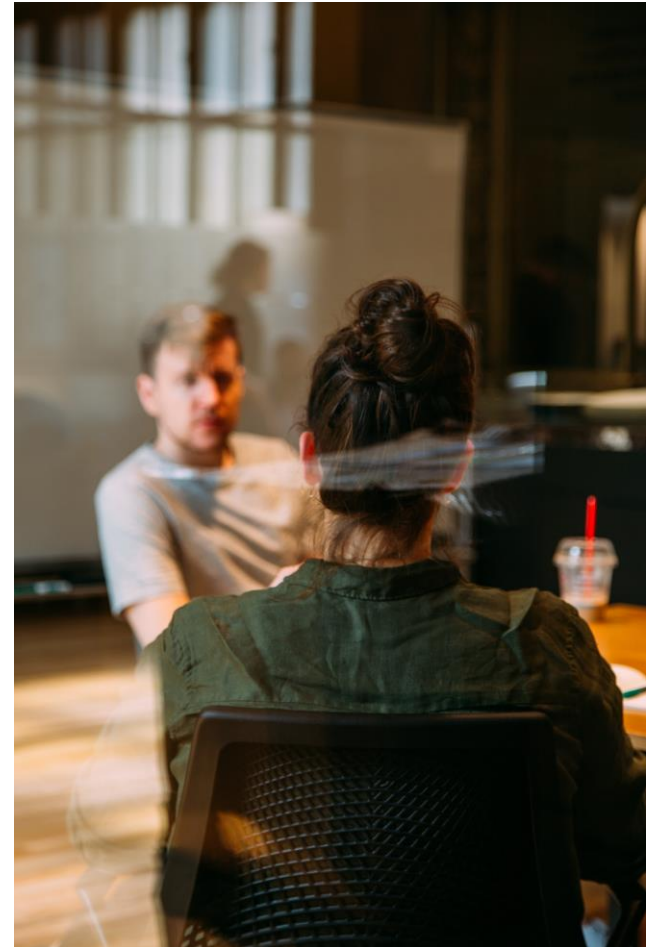
Others (Mediation Organisations, Associations etc.)

- *European Code of Conduct for Mediators (2004)*

All modern international family law instruments & EU-Regulations in the area of family law encourage amicable resolution of international family disputes

Family mediation = an effective means

- re-establishing communication between the parents & restore trust
- putting the child back into the parents' focus
- de-escalating the dispute
- assisting parents in obtaining an amicable dispute resolution
- allowing to elaborate flexible and adapted solutions for the individual family situation



Family mediation

How does it work?

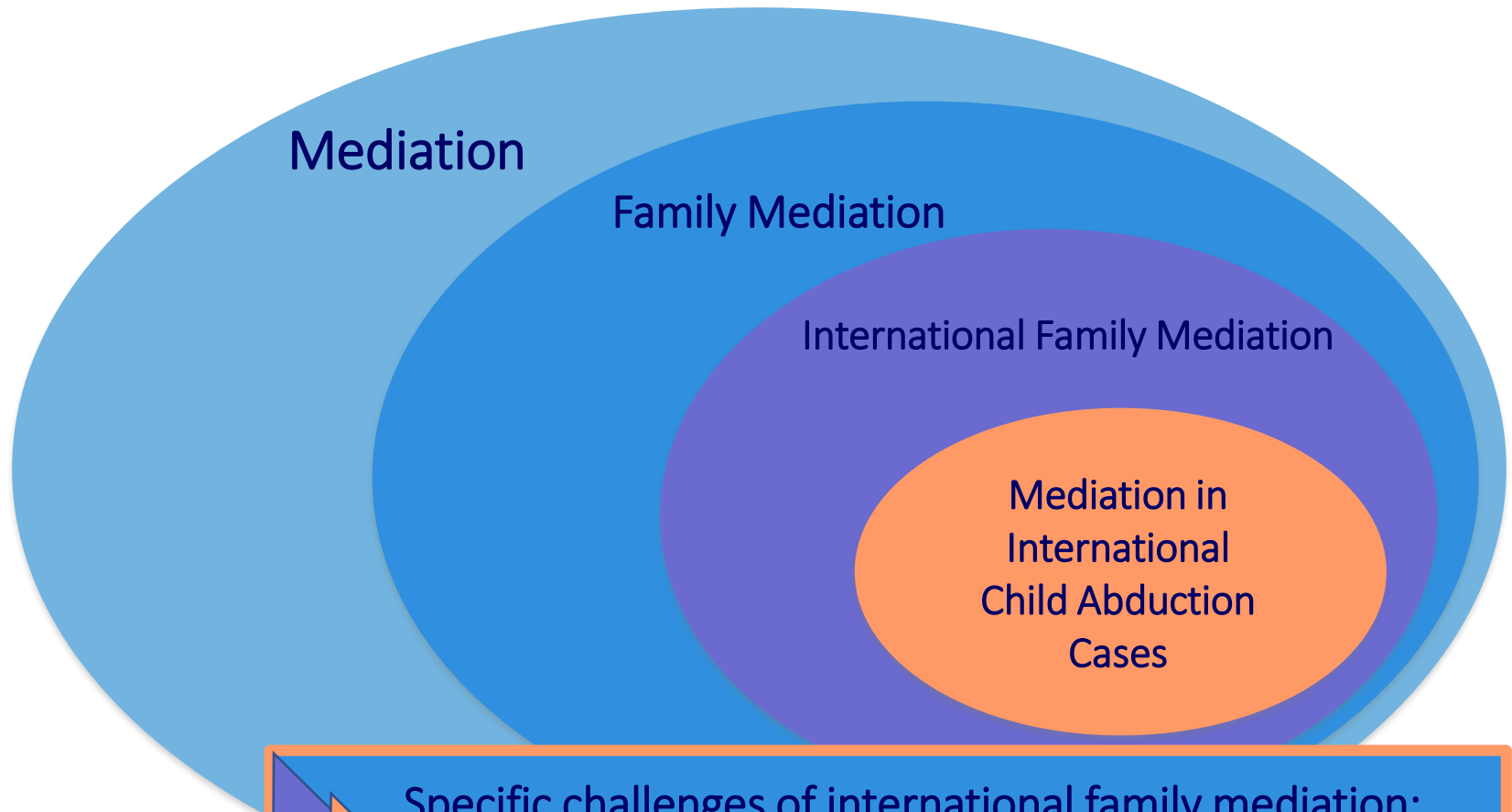
- Mediation is a **voluntary** and **confidential** process whereby a **neutral and impartial third party**, who has no decision making powers in the case, assists the parties in finding a solution of their dispute.

Must be conducted by trained family mediators!

- Mediation must be conducted by trained family mediators who secure the **mediation process** and **adherence to the central mediation principles**.

Participation in this process should be based on **informed consent** and the amicable outcome should be the result of **informed decision making** following **appropriate access to legal advice**.

Mediation process must be adapted to the type of dispute



Specific challenges of international family mediation:
geographic distance, different languages,
cultures & nationalities, complex legal situation
SPECIAL TRAINING AND ADAPTED PROCESSES REQUIRED

Attention: Not all cases are suitable for mediation!

Caution with “mandatory” mediation

Dangers exist not only in cases of **domestic violence** but also with regard to

- **unnecessary prolongation** of the dispute resolution & **access to justice**,
- **one party taking advantage** of the continuation of the status quo while mediation is consciously delayed by that party,
- **unavailability of qualified family mediators and specific processes**

MEDIATION
IS NOT
ALWAYS
THE RIGHT
PATH TO TAKE



Where is the child in this process?



Protecting children's rights in the process of mediation

Central provision Art. 3 UNCRC:
best interests of the child primary consideration

Council of Europe Recommendation No. R (98)1 of the committee of ministers to member States on family mediation

“III. viii. the mediator should have a special concern for the welfare and best interests of the children, should encourage parents to focus on the needs of children and should remind parents of their prime responsibility relating to the welfare of their children and the need for them to inform and consult their children...”



**CHILDREN ARE AT THE HEART OF FAMILY
MEDIATION**

Protecting children’s “procedural” rights

- **Art. 12(2) UNCRC** - child shall be provided the **opportunity to be heard** in any judicial and administrative proceedings affecting the child, **either directly, or through a representative or an appropriate body**, in a manner consistent with the procedural rules of national law
- **Art. 12(1) UNCRC** – **views of the child given due weight** in accordance with the age and maturity of the child
- **Art. 3, 6 European Convention on the Exercise of Children's Rights** – **children’s right to be informed**

The Committee on the Rights of the Child noted in General Comment No 12 (2009) that the **right of the child to be heard** in any judicial and administrative proceedings in accordance with Art. 12 UNCRC also **should be respected where those proceedings involve alternative dispute resolution mechanisms such as mediation**, see paras 32, 51, 52 and 59

<https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

Hearing the voice of the child alongside / in mediation?

Family judge: *I interview the child to get an impression of the child and to understand the child's views and wishes in order to be able to render a decision in the child's best interests*



Parents: *Of course we explain our decisions to our children but we are not going to consult with them on whether we are going to move to a new city for professional reasons*



How to hear the voice of the child alongside / in mediation?

- **NO STEREOTYPE SOLUTIONS!**
- **Best interests of the individual child** should always be the **paramount consideration**
- Providing an opportunity to express his / her views does **not** imply **an obligation to speak up**
- There are many **different ways** to involve the **child's voice in mediation – indirectly or directly**
- **Interviews with the child** (by a third party / the mediator) must be **conducted by a person specifically trained for this purpose** and should take place in a **child-adapted/-friendly setting** : the child should not feel under pressure and must be reassured that the **adults be responsible for the decision making**
- **Hearing the child \neq letting the child decide**



Use the process of family mediation:



to strengthen
parents' capacity
to listen to their
children &
to let their
children
participate in
shaping the
implementation
of the parental
decisions



Way forward? Tasks for legislators!

To make mediation the best option for children caught up in family disputes, we need to:

- further **safeguard** the **quality of family mediation**
- support a **qualified mediator profession & specialisation**
- **encourage mediation while safeguarding that mediation does not become a “2nd class access to justice”**
- safeguard that parties - independent of their financial capacity - have **access to all necessary legal information for an informed decision making** (see also the presenter’s assessment in IFL 2016, 137 et seq.)
- **provide simple, speedy and affordable means to render the amicable solution resulting from mediation legally binding and enforceable in all legal system concerned by the dispute**



Hague Conference Experts’ Group: Exploratory work regarding a possible instrument on family agreements, see

<https://www.hcch.net/en/projects/legislative-projects/recognition-and-enforcement-of-agreements>



EU-funded project initiated by MiKK.eV: creation of Best Practice Tools for Germany, Italy, Poland & Spain, see <https://www.amicable-eu.org>