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FOMENTO

FOSTERING MEDIATION IN CROSS-BORDER
CIVIL AND SUCCESSION MATTERS

GUIDELINES FOR PROFESSIONALS

Succession conflicts with a cross-border impact



In recent years, the increasing mobility among EU citizens has led to a growing number of cross-border inheritance cases. This created a growing public demand for support and legal advice in terms of inheritance matters. Also, possible succession conflicts have become more complex with cross-border implications. In addition, recent innovations in EU-legislation have brought along some fundamental shifts in mediation and inheritance law, especially regarding the implementation of the European Succession Regulation (No 650/2012). Thus, not only mediators but also many other legal professionals are facing a variety of new challenges¹.

These guidelines are intended to illustrate the most important steps which mediators should take in cross-border succession cases and to raise awareness about the legal framework and its innovations for professionals of all kinds.

Who is concerned?

- ✓ **Mediators** who want to handle **cross-border succession cases**.
- ✓ Mediators who want to do a **cross-border co-mediation**.
- ✓ Mediators who want to get **information on online-mediation**.
- ✓ **Lawyers / attorneys / judges** who need information on **cross-border mediation**.

What is the legal framework?

The EU [Succession Regulation](#) (No. 2012/650) is applicable in every European country except for United Kingdom, Ireland and Denmark. It regulates the applicable law in succession cases with a cross-border impact and which court or other authority has jurisdiction in these cases. However, the Succession Regulation does not affect the rules of

substantive inheritance law nor the inheritance tax law.

European Succession Regulation

Habitual Residence: The applicable law for a succession case is the national inheritance law of the country of permanent residence (Article 4 Succession Regulation) and not automatically the one of the country of citizenship.

Choice of law: However, citizens do have the right to choose the law of their country of citizenship (Article 22 Succession Regulation).

European Certificate of Succession: Along with the Succession Regulation, a European Certificate of Succession (ECS) has been introduced which, can be used to verify an heir's legal status. Once issued, it will be recognised in all Member States, except for Denmark, Ireland and United Kingdom (Article 62 et seq. of Succession Regulation).

To get informed about concrete provisions of the inheritance law in European Countries the following websites are recommended:

- [European e-Justice Portal](#) (available in many languages, it offers an overview of the legal situation in all Member States).
- [Successions in Europe](#) (information about inheritance law, inheritance tax law and rules about anticipated succession).

What are the necessary steps to take?

1. **Organisational tasks** – due to many different factors, the workload and time effort of a cross-border mediation can turn out to be significantly higher than usual. It

¹ To get to know the specific changes after the implementation of the Succession Regulation as well as of the Mediation Directive, see FOMENTO research report [Mediation in cross-border succession conflicts and the effects of the Succession Regulation](#) (2018).

is therefore necessary for mediators not to overlook important organisational tasks in preparation for their mediations, such as the following:

- **Bringing everybody together:** The first and in some cases the critical step (if mediation is not mandatory) is to include each party. Sometimes people have to be informed about the mediation process in general, because they are generally unaware of it.
- **Setting place:** The choice of place requires sensible considerations. Sometimes, clients live in different countries which *increases travel costs and distances*. Nonetheless it is important to find a *neutral place* where no party feels discriminated. This, among other factors, forms an indispensable basis for the successful outset of a mediation.
- **Setting time:** The more complex the case and the longer the travel distances, the more *long-term planning* is required. Setting up and following a concrete *schedule* with *fixed* deadlines can help the mediator not to lose the overview and the clients to plan better. In cross-border cases it is often advantageous to plan mediations lasting several days.
- **Overcoming language barriers:** Identifying possible language barriers and finding *individual solutions* such as translators, interpreters or co-mediators in advance are indispensable for the optimal implementation of mediation. Language is the basis of understanding.

Example of a Mediation in a succession conflict with cross-border impacts:

A couple, of which the husband is German and his wife is French, brought up their two joint children in France. For their retirement, the couple decide to sell their property in France and to move to a property in Germany, where the husband has got two further children from a previous marriage. Even though the couple has been in relatively good terms with all

four (by now grown up) children, the two children from the previous marriage seem to have resentments against the other two and vice versa. When the husband dies a conflict arises among the children over the division of the heritage. The wife proposes a mediation to avoid a legal proceeding. She finds a German mediator and he manages to obtain the consent for a mediation process from all four children. After weighing out the interests of all parties regarding the time and location (since three of the involved are living in Germany and two of them are living in France), the mediator suggests to set up a meeting in Germany in order to save travel costs. Yet, in order to grant neutrality, he chooses a location in Karlsruhe which is a city within easy reach for everyone. On the basis of their first contact and based on his experience, the mediator assumes that it will take at least three sessions of two days until an agreement can be found. Therefore, he sets up a plan with provisional dates for possible meetings and contacts all the involved, aiming to find matching dates. As soon as these dates are set, he is able to set up a concrete schedule that he can present to his clients. As it turns out, even though the wife is fluent in French and German, the children of her husband do not speak fluent French. The mediator thus weighs out his options: Should I search for a French co-mediator? Is it necessary to engage an interpreter?

2. **Finding a co-mediator** – Many of the experienced mediators in cross-border cases highly recommend to consult a co-mediator in order to *compensate differences* in culture, professional background, age or gender. Especially in transnational mediations, where *language barriers* might become an issue, a collaboration between mediators, where one of each is fluent in one of the clients'

language, can simplify procedures. It is also advisable to combine the knowledge of a mediator with a psychological/social background and of a mediator with a legal background. Thanks to the upcoming network of experts that FOMENTO will establish, mediators will be able to find possible co-mediators more easily.

The mediator is convinced that it is important to involve a co-mediator. Finding a French speaking co-mediator will solve their language issues. Besides, taking this step will emphasize the neutrality of mediation since the legitimate children might feel more recognized by the co-mediator speaking their mother tongue, while the illegitimate children might feel more recognized by the German mediator. (Although, of course, both mediators are equally neutral from an objective perspective.) After consultation with his clients, explaining them the advantages and disadvantages, they agree to get a co-mediator involved. Thanks to the expert network, the search for a matching co-mediator has proven not to be difficult. Having read the search request, another German mediator contacts him, telling him about his French colleague he has already cooperated with in several other cases. Their first contact proves that the French mediator meets all requirements. Not only does his co-mediator speak French and German fluently, she is also in contact with many French legal experts whom they could recommend their clients to in case of uncertainties. From now on, the two mediators start working together closely, exchanging their experiences and their opinions on this specific case in phone calls and e-mails on a regular basis.

- 3. Preliminary talk** – The preliminary talk in a cross-border succession mediation should be conducted with great care. In some countries (e.g. Austria, Germany)

mediators are legally bound to inform their clients about the differences between legal advisory and mediation. In countries where this preliminary mediation session is mandatory in succession conflicts (e.g. Italy), this meeting allows to find out if mediation is the suitable method for conflict resolution. It is important to clarify essential aspects in advance:

- What do clients expect from a mediation and what are their goals?
- Which basic rules are there that all parties must follow in order to make progress?
- What are the possibilities and what are the limits of mediation?
- What is the role of the mediator?
- Why are mediators not allowed to give legal advice, even if they are notaries or lawyers themselves?
- When and how is it necessary to involve external juridical experts?
- Are all relevant parties involved in the mediation process?

Although the wife has proactively contacted the mediator, it is nonetheless important for him to explain some basic aspects. Especially since the mediator came to know that his clients also have some concerns about the legal bases of their plans, it is important to highlight that he will be neutral and does not have any decision-making authority.

Prior to their meeting, he has already prepared a catalogue of questions that gives him guidance: What do they expect from their mediation? What are the basic rules to ensure mutual respect? Are there any circumstances and contexts that all parties and the mediator must be aware of in order to be able to respond sensitively and empathetically?

Besides, he asks the conflict parties to list their concerns clearly, distinguishing mere legal questions for which they need to

consult a lawyer from all other non-legal or inter-human concerns.

- 4. Include external legal experts** - Because succession cases are characterized by many legal aspects, it is important to encourage the conflict parties to seek legal advice by their notary, lawyer or tax advisor. Every party should have the same information conditions. The involvement of legal advisors in the mediation process must be decided with everybody. In Italy it is mandatory for the parties to have legal assistance during the mediation session.

He asks the attended persons if they already have information about the legal situation. Or if they have contacts with legal experts. In this case it happens that parents already had a legal consultation regarding their future testament. All four children have not yet taken legal advice on inheritance law in advance. They agreed to contact a lawyer for the German children in Germany and the French children in France. The mediator is able to name possible experts from the FOMENTO network he has got access to.

- 5. Mediation and conflict resolution** – When all requirements are fulfilled, the core of the mediation process can take place. Especially in terms of cross-border mediation and succession mediation, several special features should find particular consideration:

- Succession cases can be highly emotional and influenced by the different stages of mourning for all parties and therefore require particularly highly distinct empathy on the part of the mediator.
- Even though financial aspects may seem in the foreground at first sight, the origin of a conflict may be lying on much deeper, emotional level. Identifying and solving issues on this

level may be considerably more effective and sustainable.

- In cross-border cases, cultural contexts may play a big role. It is important for a mediator to be aware that disputes may spring from cultural differences and therefore can be solved by fostering a better understanding of each other's background.

The mediation takes place according to the 'five phase model': 1. Introduction and commencement (here: Preliminary Talk); 2. Gathering information; 3. Clarifying interests and needs; 4. Developing solutions; 5. Conclusion by settlement).

- 6. Make use of online mediation tools** – Especially where long travel distances are involved and several mediation sessions are needed, online mediation can be a helpful *support device*. Even though most experts recommend face-to-face meetings, especially in early periods of process, *gaps* between sessions can be *bridged by online sessions* such as video conferences if necessary. Furthermore, if all involved parties agree on conducting a mediation online straight from the beginning this may turn out to be the most *time-saving and cost-effective method* of conflict resolution.

In this specific case, after dealing with the quarrel about the house by looking on the underlying conflicts and feelings, formulating needs and negotiating along the parties' interests, the mediator and his co-mediator have set the interim goal for all parties to seek legal advice about the future succession arrangement. After that each of them should make lists of their individual solution options. The mediators want their clients to share these lists with each other and then give them time to reflect on them until their next meeting. Since a personal meeting just to read out

these lists and without working on it would be too costly and time-consuming, the mediators have suggested to hold this particular meeting via videoconferencing. All parties agreed on their suggestion and therefore came together in a one-hour long video-conference which saved them valuable travel time and costs.

For their next meeting, however, the mediators consider the personal encounter to be essential in order to discuss the different propositions and come to a satisfying conclusion.

7. Legal review of mediation agreements –

It is always important to remember that, regardless of their professional and academic background, mediators are not in the position of giving legal advice for one of the parties. Therefore, it is crucial to consult a legal expert at any case if *legal questions* come up during the mediation. In some cases, legal experts are always present during a mediation (e.g. in Italy). In any case, when the mediation comes to an agreement, at the latest, the mediator should advise his clients to consult a *lawyer or notary to review their arrangement*. It is important to make sure all agreements are set and verbalized in a way in which they cannot be contested in a court trial.

All parties have come to a satisfactory conclusion: The legitimate children have understood that, by leaving their German estate to their father's illegitimate children in Germany, their mother does not intend to discriminate them. Quite the opposite – while the two siblings in Germany have declared that they could, indeed, want to use the property. Which means for their step-mother that she could stay there and the house would 'remain within family' after her death and will not be sold. Furthermore, the children in France would much rather prefer to receive their share in

other forms anyway. Since the parents did have other financial investments, that is possible. Also, the children from France understood that their mother didn't want to favor her stepchildren from Germany.

Although the mediation seems to be closed at this point, the mediator advises once more his clients to seek for legal advice. They talked to their notaries and lawyers and afterwards a contract has been set up about the division of the heritage according to the outcomes of the mediation process.