

EUROMED JUSTICE PROJECT
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RESOLUTION OF CROSS-BORDER FAMILY CONFLICTS
3rd Training Seminar

“INTERNATIONAL FAMILY MEDIATION
IN
CROSS-BORDER FAMILY CONFLICTS (II)”

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Conflict management skills

1. Presentation of my person

Dear colleagues,

Let me please introduce myself: I began my professional career as a lawyer. From 1971 through 2002 I was a judge, from 1977 through 2002 a family judge. In 1995 I began a professional training in mediation. Since my retirement I am working as mediator.

2. A sad story

The subject I have been asked to speak about is “Conflict management skills”. Please let me extend the topic a bit. All skills or tools can be useful only if we know the purpose of their use. With respect to conflicts, this means that first we must dedicate some reflections to the conflicts themselves.

As a basis for our common reflections I begin with an experience that I had as a mediator. To protect confidentiality of mediation, I have modified the names of the persons and some details, but in principle the story is true:

Some years ago, I was asked to participate in a mediation of a bi-national French-German conflict: The protagonists were a mixed couple with two children. A French engineer named Albert, about 40 years old, and his German wife Susan, a fashion photographer, 35 years old, had two daughters: Dory, 12 years and Veronica, 8 years old. The family lived near Lyon in France.

After domestic conflicts, one day Susan left the house with the two daughters and returned to Germany where she found shelter in her parents’ house in Heidelberg.

Albert filed a lawsuit against her based on the Hague convention on child abduction from 25.10.1985. After having heard both parents and the children, the German court ruled that Susan had to bring the children back to Lyon because the French courts had jurisdiction for the question of parental custody. Susan obeyed and found a flat about 20 kilometres from the house in which Albert still was living. She refused contacts between the children and their father. Until then, the parents had joint custody for their daughters. Now Albert filed a suit at the local court in Lyon, demanding the parental custody over the children for him alone. Above this, he demanded a temporary injunction on his right to see the children. After a first hearing, the court interrupted the procedure and proposed mediation.

This proposal was submitted to the French ministry of justice. The ministry contacted a French institution that provides mediation and the German ministry of justice which contacted me. So, a French-German Co-mediation was arranged. My French partner was a lady who worked as a psychologist in a welfare centre; I was the male part with a judicial background.

We met in Lyon on a Friday afternoon. The meeting lasted from 7 pm until 10 pm, on Saturday we continued from 9 am until 6 pm.

At the beginning the atmosphere was rather tense. Susan was fearful, Albert was aggressive. Both expressed their feelings and described the development of the crisis as they saw it. Until Saturday evening they reached with the help of the mediators an agreement on the personal contacts between father and children for the time until the court would have taken a definite decision on the custody. As far as the main issue of the custody itself was concerned, none of them was able to make any concession. Both parents hoped the court would rule in their favour, both would rather accept a contrary decision than yield by themselves. They declared that after the decision of the court on the fundamental question of custody mediation might go on to find good regulations for the personal contact between the daughters and the parent who would not have custody.

That was the end of our mediation.

Later on, Susan informed me by e-mail about the further continuation:

The court ruled that Susan had the right to take the children with her to Germany and that she was obliged to grant contacts between them and their father in a schedule prescribed by the court.

Albert did not appeal this decision.

Susan returned to Germany with her daughters and allowed them to see the father in France. After such a visit, the younger daughter, Veronica, returned to Heidelberg, the older one, Dory, stayed in Lyon. She wrote she did not want to come to Heidelberg. Telephone calls were not possible. Albert said she refused them.

Apparently our mediation was only partly successful, namely as far as the personal contacts between father and daughters for a limited time were concerned. But there was no settlement on the main issue, the custody. So, mainly our mediation failed.

Why do I tell about mediation with an example that failed? I think that a realistic presentation should show mediation not as wonder-working, but as one among other techniques of conflict

management which despite its limits offers enormous chances. This example is suitable for a structural analysis of conflicts and forms of intervention.

Let's first have a look at the story behind the story:

3. The story behind the story

Although as mediators we were no therapists and although we decidedly limited our intervention on actual conflict managing, in about 10 hours of discussion and negotiation we perceived quite a lot about the nature of this marital conflict. These insights are not hard facts. They are interpretations of our observations and of remarks that the parties made during the sessions:

After the first harmonious period and after the birth of the children, the marital atmosphere changed gradually. Albert expected Susan to do the housekeeping and to look after the children. Above this she tried to work as a fashion photographer in a part time job. Consequently she was often very tired. This affected the sexual life of the couple. Sometimes Albert became angry and expressed his frustration. Susan withdrew herself even more and became depressive. Eventually, the situation escalated and Albert expressed his frustration and aggressiveness by physical violence. In this hopeless situation Susan fled with her children. When after her enforced return to Lyon in the mediation she allowed contacts between her daughters and the father, an important motive was her fear that otherwise he might do some harm to her and the children.

4. Transformation of conflicts

We can see that the conflict has undergone a series of transformations. First, there was frustration and sadness about the loss of magic and spontaneity in the marital relation. Frustration easily can turn into aggressiveness. That's what happened here. From aggressiveness it is not far to violence. Then, the next step will be either a further escalation or escape and avoidance.

Albert who had been left behind may have had the feeling that something has been taken away. He had been robbed somehow.

This view is paradigmatic. The loss of a personal relationship is perceived like a loss of a good.

To recover such a loss, the party left behind may demand her child back, perhaps her car, alimony or other material goods. So sadness and frustration are transformed in demands, an emotional desire is transformed in interests. When the other party does not fulfil the demand, the next step is to go to court. This requires a new transformation, namely from subjective interest to judicial terms. In this way, human desires are transformed into judicial claims.

The judges who have to decide are bound by the judicial rules. Is the claim legally founded? On which legal ground does one partner owe alimony to the other? Whose property is the car? Which criteria apply for the child? Has the court to follow formal rules or to find out what is the best interest of the child?

The answer of the court can always be a reply only to the question that has been submitted to it. The sentence of the court puts an end to the lawsuit, but not to the original conflict. The sentence will be an answer to the legal issue, but it will not offer a solution of the conflict. The winner may have won a lawsuit, but at the end there will still be the sadness and frustration which was the origin and had been transformed into a legal issue.

5. Conflict management and interventions

Certainly, judges cannot resolve all conflicts underlying the lawsuits that are brought to the courts. But on the other hand there is at least one type of conflicts in which their responsibility goes beyond the legal issue between two parties. When the best interest of a child is at stake, judges should be aware that children cannot defend themselves against the selfish interests of their parents. In such cases, judges will have to see which possibilities their professional role offers to them. When they arrive at their limits, they will have to look around for alternative and more adequate dispute resolution techniques.

When Albert and Susan became aware of their marital crisis, perhaps a marriage guidance counsel might have been able to help them. Thus, perhaps they might have avoided the escalation and transformation of their conflict that ended in court.

Between these both alternatives – psychological aid and judicial decision – there is a wide range of other possible interventions. For the resolution of family conflicts, the most interesting one is mediation. The mediator helps the parties to a better understanding of their conflict, to get aware of their desires, to define their interests and to look together for solutions which respect the needs of both of them as well as those of their children. In case of success, the result will be an agreement based on the understanding and the will of the parties, on their own interests instead of abstract judicial criteria.

6. The actors and their roles

6.1 Judges

The degree to which the judge can interfere in a conflict depends on two aspects:

One of them is material law, the other one is the legal and cultural role of the judge.

6.1.1 Let us begin with **material law**.

When the judge in Heidelberg had to decide on the base of the Hague Convention on child abduction, the main criterion was a formal one: If the move from Lyon to Heidelberg was a breach of the father's right of custody, the mother had to return to Lyon where the local court had exclusive jurisdiction, because Lyon was the residence of the family. Only in case of an absolutely unsupportable situation there would be an exception. After having heard Dory and Veronica, the judge saw that this was not the case. The German judge was not entitled to take in consideration general aspects of the best interest of the children. They said they wanted to

stay in Germany. He replied that a decision about this desire had to be taken by the court in Lyon.

It is not obvious that the best interest of children is the legal criterion for the decision of the court. There are legal systems in which more formal criteria are prevailing, for instance that at the beginning of their life children have to live with their mother and at a certain age with the father.

Apparently, strict legal rules give less space for the judges' interference than open criteria like the best interest of the child.

6.1.2 The other aspect that determines the interference of the court is the **role of the judge** as defined by law and culture.

In German procedural law, the judge has to discuss with the parties all facts and legal aspects of the case in the court hearing. Above this, the law obliges him to look at any moment for a peaceful settlement. This implies the necessity of going in the discussion beyond the mere legal aspects and sometimes to have a look also on the underlying conflict.

This is not obvious, either. In other countries the role of the judge is more restrained. He listens to the pleadings of the lawyers and refrains from showing his own view which will only be expressed in his sentence.

The narrower these limits are, the more an alternative will be required to get an access to the conflict and to its solution.

As a matter of fact, this incapacity of courts to cope with conflicts gave rise to mediation as an "alternative dispute resolution", nowadays we prefer the notion "adequate dispute resolution".

6.2 Mediators

Although mediation is focused on desires, needs and interest of the parties, the role of the mediator is not that of a therapist. He encourages the parties to define their own goals, wishes and interests. That enables them to understand and to respect better those of the other side. He moderates the discussion between the parties and gives a structure to it. When in such a discussion the parties find points in which they agree, he will help them to integrate their agreement into a settlement of their dispute. The essential point is that the mediator does not interfere in the matter itself. The solution is an autonomous decision of the parties.

Albert and Susan could agree only on discussing the issue of personal contacts for a certain period. Albert was not ready to talk about the fundamental issue of custody. Both were free to stop at that point and to delegate the farther going decision on the court.

7. Conflict management: Principles of intervention

The criteria for the intervention of a third person in a conflict depend on her role.

7.1. A **judge**, for instance, has to take a decision that binds the parties. They are subject to his authority that is based on the law. The law contains the criteria for his decision. Perhaps he can make proposals to the parties; but they must always be aware that in case of denial he can and will decide.

7.2 Of course, parties also can look for an **advisor**; he, however, would rather not be regarded as a conflict manager.

7.3 Now let us focus our attention on the **mediator** and on principles that apply for his intervention:

A solution of a conflict can be sustainable only if it is accepted by the parties. The more the agreement is based on common convictions of the parties, the greater will be the chance of sustainability.

Hence, the mediator will conduct the discussion in a way that **supports the capacity of the parties to make autonomous decisions**.

7.3.1 The mediator should give a **transparent structure to the discussion**. Thus he enables the parties to concentrate on the respective topics, knowing that the others will be discussed too. Above this, the parties can observe the progress – and implicitly the success – of the discussion. This gives confidence that the negotiations are on a good way. The schedule will depend from the topics the parties have to discuss and the problems they have to resolve.

7.3.2 At every moment the mediator should take care for the **esteem of the parties**. His esteem for both of them in every situation strengthens their self-esteem und mutual esteem for each other.

7.3.3 The mediator has to **restrain from judging** the behaviour of the parties, their ideas, their values and goals, even if he fundamentally agrees or disagrees. Expressing judgments explicitly or implicitly would change his role into that of a judge and block the search for common convictions and common ideas.

7.3.4 The mediator also should **not make suggestions**. This prevents the parties from having the respective ideas as their own ones. I will come back to this point.

7.4 A last remark on principles of intervention: Although we agree that autonomy of the parties is a crucial value for all conflict solution, we must acknowledge the existence of a phenomenon that I use to call the “**autonomy paradox**”: Sometimes a person is not able to cope with the burden of a conflict and the responsibility for its outcome. In such a situation it can be a reasonable choice to delegate the decision on an authority. That’s what Albert and Susan did when they refused further mediation on the fundamental issue of custody. In full autonomy they decided not to decide by themselves.

8. Some remarks on skills and specific aspects of mediation

Skills and techniques of conflict management do not have any value for themselves. Their value and legitimacy is determined by their aptitude to reduce fear and aggressiveness and to

favour mutual understanding. The basic aim of all interventions must be to mitigate for both parties the feeling of threat which can concern the loss of goods or relationships as well as a diminution of their (self-) esteem.

8.1 The mediator must be able to **lead the parties, limiting his interference on the communicative aspects of the discussion** and leaving for the parties all freedom in the matter itself.

- Therefore at first his **role must be cleared**. It is different from that of an adviser or even a judge.
- It has shown useful to **gather at first the topics to be discussed and to find out the needs, wishes and interests of the parties**. This brings forth a common base of mutual understanding.
- On this basis it will be useful to **discuss concepts of equity and fairness** which may be important for the parties and can deliver criteria for the sustainability of solutions.
- Then, parties can make a **brain-storming to look for possible solutions**. In this phase everything goes, no idea is forbidden. That is a dangerous phase, because proposals can evoke uncertainty and fear. Here the moderator or mediator has the responsibility to prevent a derailment of the discussion.
- When the proposals are on the table, the parties can begin to **evaluate the proposals** and see which of them contain realistic elements.
- Eventually, if there are sufficient sustainable elements, they can be integrated into an **agreement**.

8.2 A crucial skill for all conflict management, successful negotiation and especially for mediation is **active listening**. To find out what someone wants, he must be encouraged to express his goals and desires. Attention and empathy of the listener will give him the feeling of being understood. If this happens to both parties of a conflict, it can influence the atmosphere in a positive sense. In a conflict the parties often feel threatened and incline to defend themselves. The more someone feels estimated, the less he needs defence or even counter-attack.

8.3 In his reactions and commentaries on what the partners say, the mediator will **avoid any moral or judicial appraisal**. His job is not to judge, but to further mutual understanding on the basis of the situation as it is and not of how he thinks it should be. Especially when the parties represent fundamentally different views or cultures and defend different values, the mediator has to maintain an atmosphere of mutual understanding and acceptance. This is the only way to create a base on which the partners can develop together their ideas about fairness and other criteria that shall rule their further conflict management. If such an understanding cannot be reached, perhaps the mediator and the parties will have to accept that the case is not apt for mediation.

This self-restraint, however, is no contradiction to **inspirations** that he may contribute to the reflections of the parties.

8.4 The mediator can inspire the partners not to look at what the other one should do, but **what each of them can do by himself**. A constructive pair of questions is:

- **How can I make** it easier for my partner to accept and perhaps fulfil my wishes?
- **What can I do** without unacceptable sacrifices to fulfil at least some of the wishes of my partner?

8.5 In the discussion of the partners, inspirations can come from **attention to what they say**.

I remember a couple living in a painful separation, the conflict included custody on the children and alimony. When I asked how the wider family reacted on the situation, the wife said that her father was missing his son-in-law. I focussed the attention of the couple on these words which, then, became a key to a bundle of solutions. The parents of the wife could look after the children and grant access of the father to them, this relaxed the question of custody and subsequently some economic aspects of the separation.

8.6 Another aspect of communication that may attract attention of the mediator is the **multiple meanings** that a statement can have.

When the husband says that “there are no eggs in the refrigerator”, these words can contain quite different messages. Their meaning depends from the social relation between sender and receiver of the information as well as from the actual circumstances. The words can mean

- “I am sorry. This morning I cannot prepare a boiled egg for you.”
- “Next time when we go shopping, we should not forget to buy eggs.”
- “Again you have forgotten to buy eggs!”
- “I am angry about you!”

8.6.1 This example shows that **every statement contains (at least) two messages**: The first one is its **content**. The mere fact that there are no eggs in the refrigerator is irrelevant. The second message contains the important information, namely the **meaning** of the statement. It can be revealed only out of the **context** in which it is made and is interrelated with the **motives** of the speaker.

8.6.2 Such ambiguity is evident when children make statements and the parents discuss if these statements are true or lies. So it was with Dory and Veronica, the daughters of Albert and Susan. Living with their mother in Lyon, after their return from a week-end with their father

- they said according to Susan “We dislike these week-ends”,
- according to Albert they had told him that they were looking forward to the next week-end with him.

Here we see **two levels of reality**:

- The first one is **what the girls said**. At least one of their statements was not true.
- The other level of reality is **the wish of the girls** to say what they thought their parents would like to hear.

It would not be adequate to say the children are lying. In this context, the relevant reality is that they did not want to hurt the feelings of their parents.

This example shows us that evidence in court about truth or falsehood of the statements would not deliver a base for a judicial decision; for the discussion, however, it can be helpful to acknowledge the desire of the children to live in harmony with both parents.

8.7 It may occur that the mediator with his professional experience has an idea that the parties cannot have. Now he is in the dilemma between the wish to introduce the good idea and the need to restrain from making suggestions. A classical solution of this dilemma is **insinuation and story-telling**: Not only as a mediator, but also as a judge sometimes I had a theory about the situation or an idea for a possible solution of a problem. Then I briefly told a story about another case with similar elements. This focussed the attention of the parties on those aspects

that were important for me and enabled them to develop their own ideas which often led in the direction that I had intended to indicate.

8.8 Anyway, the mediator has the right to ask the parties what they think about the **consequences** if they do not reach an agreement and if one of them or the other one wins. The child will have parents who are not equivalent and who don't have a common responsibility. For their child there will be the risk that it loses one of them.

8.9 One more point – and that may be sufficient for this occasion – is the **horizon of time**: The uncertainties of future can be somewhat threatening. A long term ruling has more definite implications than a short term agreement. Often the long term future may be difficult to rule, whilst it can be easier to find a solution for some weeks or months. So it was with Albert and Susan. They could not reach a long term settlement, but at least a short term arrangement was possible. Unfortunately, that was all. But often such short term regulations can mitigate the tension, fear and aggressiveness and prepare the base for long term solutions.

9. The courts and the mediation

9.1 This is a point in which often the courts can contribute very much to conflict management: I remember many cases in which I calmed down a dramatic situation by a temporary injunction which gave some rules and set some limits to the conflict parties.

9.2 By the way: What I said about mediation and negotiation contains many elements that can be useful for the judge as well, if the procedural culture of his system allows this sort of commitment.

9.3 On the other hand, courts and mediators should be aware that mediation can be useful only if both parties want peace and mutual understanding. Mediation should not be abused to delay the procedure and the decision and thus to establish facts that are detrimental for the weaker part or for the child.

Workshop

For the workshop I propose the following topics, the participants will decide:

1. Discussion about details of my paper
2. Exchange of information and experiences from the various countries:
 - 2.1 Which are the criteria for decisions on parental custody?
 - 2.2 Which are the criteria for decisions on personal contacts between the child and the absent parent?
 - 2.3 In most cases, the essential needs of the parties and their children go beyond the answers that law provides for them. How far can the judge discuss the underlying conflicts - -
 - 2.3.1 in terms of material law?
 - 2.3.2 according to the cultural and legal role of courts?
 - 2.4 Are there other conflict management institutions? How does cooperation work between them and the courts?
3. What can be done to establish effective conflict management in the best interest of partners and their children?