

Kluwer Mediation Blog

Mandatory Family Mediation Schemes in the Context of the Istanbul Convention

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Mediation is well suited to resolving family disputes due to their personal nature and emotional context, as well as their complexity and the inability, or even futility, of deciding who is ‘right’ and who is ‘wrong’. Mediation is also recognized as an effective tool for solving family conflicts by improving communication between parties and lowering the socio-economic costs of separation and divorce.

EU institutions are demonstrating increasing institutional support for mediation in family matters. A [recent study](#) has established that 20 out of the 27 EU Member States already utilise one or several models of fostering family mediation in a mandatory form, while at least nine Member States are in the process of adopting some form of mandatory family mediation. These developments reflect a gradual shift towards referring family conflicts to mediation as a priority.

While such approaches may be beneficial in terms of saving time and money while improving parties’ communication, they do not address the question of how different ongoing forms of domestic violence may influence the decision to mediate and impact dynamics of family mediation (Murphy & Rubinson, 2005). Various mandatory mediation models provide victims of domestic violence with the right not to participate in the mediation process on the grounds of previous violence having been documented. Other models entrust the presiding judge with powers to decide whether to waive the obligation to mediate on grounds of evidence.

Some authors state that the element of domestic violence may be treated as an important predictor of failure to reach an agreement or reaching biased agreements that overly favour the aggressor (Ballard et al., 2011). Others point out that obligatory participation in mediation for victims of abuse causes them to experience intimidation and control to such an extent that they cannot safely participate (Cleak et al., 2018). At the same time, levels of domestic violence are increasing globally according to a report by the [World Health Organization et al. \(2014\)](#), becoming a serious social problem which often remains hidden. On an EU level, at least two women are killed every day in the EU as a result of this problem. At the same time, two in every 10 women have experienced physical and/or sexual violence committed by a partner or a friend, whereas three in 10 are victims of such violence perpetrated directly by a family member ([Report by the European Union Agency for Fundamental Rights \(2014\)](#)). These alarming numbers put forth in the context of mandatory mediation pose the question of how domestic violence concerns are addressed in mandatory mediation processes, the prime objective of which is to preserve and restore

communication between parties, while aiming to resolve the dispute in a manner that encompasses the interests of all family members.

Amidst this debate, the Convention on Preventing and Combating Violence against Women and Domestic Violence (**Istanbul Convention**) was adopted in 2011 as the first legally binding European regulation that creates a comprehensive framework of protection, which has been ratified by the EU and is in force as of 1 October 2023. Although the scope of the Istanbul Convention was the creation of a framework to protect women and children against domestic violence, Article 48 of the Istanbul Convention explicitly prohibits mandatory alternative dispute resolution methods, including mediation, in cases where abuse is reported by one of the partners. The rationale behind such a ban is elucidated further in para. 251 and 252 of the [Explanatory Report to the Convention \(2011\)](#), which stipulate that while the benefits of alternative methods are not in question, their application in cases of violence may have a negative effect, in particular if participation in such alternative dispute resolution methods is mandatory and replaces adversarial court proceedings.

This notion is rooted in the concept that *‘victims of such violence can never enter alternative dispute resolution processes on a level equal to that of the perpetrator’* (Explanatory Report to the Convention (2011)), thus arguing that in order to avoid the re-privatisation of domestic violence, it is the responsibility of the state to provide access to adversarial court proceedings presided over by a neutral judge. Consequently, Article 48(1) of the Istanbul Convention requires parties to prohibit mandatory participation in any alternative dispute resolution processes in domestic criminal and civil law. The importance of this provision as an integral part of the protection of victims of domestic violence has been reaffirmed by annual reports of the Council of Europe’s Group of Experts on Action against Violence against Women and Domestic Violence (**GREVIO**; Council of Europe, 2021).

GREVIO has expressed its concerns in its [3rd General report](#) with reference to Slovenia, where courts often encourage parties to conclude a settlement even if serious violence has occurred between them. Moreover, the report further found the system in Denmark to be inappropriate for couples whose relationships have been marred by violence with respect to decisions taken on custody and visitation, where it noted that family courts did not exist and that conflicts about custody and visitation were presided over through a system of joint meetings between the two parents, guided or mediated by the state administration.

GREVIO’s position is only strengthened by the conclusions of studies on the compliance of particular countries with the Istanbul Convention, where Italy was praised for the measures taken and progress achieved – in particular, the amendments made to family law proceedings within the civil procedure code to address cases of domestic and gender-based violence. This included the prohibition of mediation in cases of domestic violence and the requirement for family judges to request information on pending proceedings against the perpetrator or on previous convictions ([Conclusions on the implementation of Recommendations in respect of Italy, 2023](#)).

However, Norway and certain other countries were urged to take immediate action to recognise the power imbalances in relationships marred by violence and ensure that all offers of mediation are accepted entirely voluntarily and through all available means. These means include guidelines and training offered to mediators that focus on the gendered dynamics of domestic violence and its impact on the ability of victims to enter the mediation process on a par with the perpetrator ([Recommendation on the implementation of Istanbul Convention, 2021](#)).

Except for the above, however, no further references are made to the screening of domestic violence cases in the context of mandatory family mediation processes. This aspect is of particular importance in the context of the evolution of mandatory mediation models in Europe, which often take place with domestic violence in the background. Even if it is undeniable that the countries that ratified the Convention shall exempt cases where there are signs of domestic violence, the question remains as to how it is to be ensured that signs of domestic violence are acknowledged and addressed by a mediator or a judge hearing a family case in a manner that allows the mediation process to continue only if participants are willing, truly empowered, and self-determined in the procedure, and if it is possible to ensure the safety of such a process.

Analysis of Lithuanian mediation provisions provide victims of violence with the chance to avoid taking part in the mediation process alongside the perpetrator of the act of violence. This can occur at the victim's own initiative. A different approach has been adopted in Bulgaria, where according to the recently repealed mandatory mediation provisions a judge may refrain from ordering the disputants into mediation in case of evidence of domestic violence. Through effecting such waivers, victims are afforded a higher level of protection by not being coerced into a process that may endanger their physical or emotional well-being. While such an approach may be deemed positive, it also shares some downsides, as the existing legal framework does not apply a time limit for using domestic violence records as a waiver for this obligation. This may lead to a situation where domestic violence appeared much earlier and does not have any relevance to the current divorce or other family dispute for which mandatory mediation would otherwise apply. Thus, even if a past instance of domestic violence does not *per se* lead to a power imbalance between the parties in the present, the individual who experienced it is still entitled to opt for an exemption from mandatory mediation, thereby limiting the other party's opportunity to participate in this conciliatory process.

Elaborating on the above, the question of what type of screening is required for domestic violence protection measures should be considered and integrated as part of mandatory family mediation processes. However, the Istanbul Convention leaves this question without a clear solution, and it is for the national legislation and the practices that apply therein to handle this matter.

In addition, we must also acknowledge that a number of domestic violence victims do not identify themselves as such or prefer not to circumvent the mediation process. Moreover, some victims may not be aware of the existence of such an exception, particularly if they are not represented by a legal professional. Due to these circumstances, the presence of domestic violence may only become apparent during an ongoing mediation and particularly, if specific screening for domestic violence is conducted ahead of the procedure. Currently though, no unified methodology for addressing cases of domestic violence within mediation have been identified in the EU, which can result in victims being coerced into mediation without appropriate support and safety measures. This is further coupled with the notable lack of additional qualifications and multidisciplinary expertise requirements towards mediators tasked with mandatory family mediation, such as the need for a psychological background, expertise in child development, domestic violence power dynamics and mental health awareness.

In conclusion, there is a substantial gap between the different treatments of domestic violence cases in mediation across the European Union. This necessitates additional regulation, particularly in the context of mandatory mediation models in the presence of indicators of domestic violence. The compliance of the existing legal framework with Article 48 of the Istanbul Convention can be considered as an appropriate example and a significant first step towards ensuring the protection of

victims of domestic violence in the context of mediation.

However, this legislative setting is not sufficient to address the challenges that have emerged. Thus, it is advisable for the EU to consider the adoption of uniform screening tools developed specifically for mediation and based on the available best practices in the field. It would also be pertinent to consider the adoption of additional guidance, standards or protocols that govern the peculiarities of cases of this nature, which would enable mediators to identify domestic violence and adjust the mediation process in the context of different forms of domestic violence, particularly in relation to mandatory mediation.

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