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Confidentiality Principle in Consideration and Resolution of Collective Labor Dispute through Mediation

Collective labor disputes have become topical in Georgia since the introduction of amendments to the Labor Code of Georgia, which amendments provided for mandatory mediation for consideration and resolution of collective labor disputes. The paper below demonstrates that labor disputes differ from others by their nature. Respectively one of the core principles of mediation – confidentiality is not fully covered by effective legislation and this legislative gap creates serious problems in practice. The target of the research is finding out the peculiarities of confidentiality principle in the collective labor mediation process by comparative analysis of Georgian and foreign legislations and court decisions, research based recommendations will help to improve the legislation and mediation practice.
Keywords: *collective labor dispute, mediation, confidentiality, code.*

1. Introduction

The paper below discusses confidentiality principle in the course of consideration and resolution of collective labor disputes through mediation. The research contatins following issues: merits and demerits of confidentiality principle; legal and practical problems related to confidentiality in the course of consideration and resolution of collective labor disputes through mediation;

"The term 'collective bargaining' was first used in 1891 by Beatrice Webb, an economic theorist who was one of the founders of the industrial relations field in the UK. She and her partner Sidney Webb described collective bargaining as a process through which workers come together and send representatives to negotiate over their terms and conditions of employment. It was seen as a collective alternative to individual bargaining – or 'one of the methods used by trade unions to further their basic purpose of maintaining or improving the conditions of their [members'] working lives".[1]

Labor disputes can broadly be categorized in two ways - collective and individual Labor disputes. Furthermore, collective Labor disputes can be: a) interest disputes (about new entitlements) or b) rights disputes (about existing entitlements). Collective interest disputes are those disagreements where negotiating parties disagree over the determination of terms and conditions of employment to be set out by a new collective agreement or over the modification of those already laid down by the existing collective agreement. Commonly disputes in this category will arise in the context of collective bargaining during the negotiation or renegotiation of agreements. Examples of the issues arising in such disputes can include the attempt of the parties to agree pay rates to apply in the enterprise, working arrangements to apply or levels of productivity or output to be expected in the enterprise.[2]

The second type of collective dispute can arise in relation to the terms and conditions of work set out under law or in a collective agreement where that agreement carries the force of law. Such disputes commonly relate to situations which appear during the application of a collective agreement or when interpretation of an existing collective agreement is challenged by one of the parties. Common issues giving rise to such disputes include non-payment of wages, unilateral modification of working hours, non-observance of agreed rates of pay or holidays, anti-union practices or any of the broad range of existing rights and obliga-

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1 *Doellgast V., Benassi Ch.,* Collective Bargaining, London School of Economics and Political Science, Edward Elgar Handbook of Employee Voice, Forthcoming, 2014, 1.

2 *Foley K., Cronin M.,* Professional Conciliation in Collective Labor Disputes*,* A Practical Guide, ILO Decent Work Technical Team and Country Office for Central and Eastern Europe, International Labor Organization, Budapest, 2015, 12.

tions set out in applicable collective agreements. Collective disputes over rights can be around different interpretations by the parties to a collective agreement.[3]

Organic Law of July 4, 2013 introduced several amendments to the Labor Code of Georgia. Article 48^1 of the Labor Code became the core legislative basis for consideration and resolution of collective Labor disputes. Part 9 of Article 48^1 provides for confidentiality standard for a dispute mediator, according to which standard a dispute mediator is required not to disclose any information or document that became known to him/her in the capacity of a dispute mediator.[4] According to Paragraph 2(d) of Article 7 of Resolution N301 of the Government of Georgia on Approval of the Procedure of Consideration and Resolution of a Collective Dispute through Mediation Procedures, a mediator appointed with regard to a collective dispute is required not to disclose or/an use data containing commercial or trade secrets or otherwise confidential information, publicity of which is limited by effective law, and which became known to him/her in the course of mediation.[5]

Problematic is the definition of sub-paragraph VII, according to which the mediator is obliged to send the dispute-related report to the Minister in the case of his/her request. It shall be taken into account that the LCG doesn't specify the requisites and form of mediator's report. Consequently, the mediator shall determine the standard of equal observance of obligation of submission of report and preservation of confidential information.[6]

2. Confidentiality Principle in Mediation
(General Overview)

Confidentiality is often said to be a cornerstone of mediation, for reasons that highlight the uniqueness of mediation as a dispute resolution process. Recall that judges, arbitrators, and other adjudicators preside over the receipt of evidence that the parties present to them, and ultimately mad decisions on those cases. Mediators, however, work actively with the parties to help identify, understand, and assess the various underlying interests and concerns that are animating the dispute so that the parties can decide how to resolve the dispute themselves. For this reason, parties in adjudication are likely to guard sensitive information zealously, but in mediation they are encouraged to be more candid about underlying interests, concerns and other information that is relevant to the dispute.[7]

A mediator should encourage accurate definition of scope of confidentiality and beyond mediation process and its proper interpretation by parties.[8]

Efficient mediation requires candor. A mediator, not having coercive power, helps parties reach agreement by identifying issues, exploring possible bases for agreement, encouraging parties to accommodate each other's interest, and uncovering the underlying causes of conflict. Mediation often reveals deep-seated feelings on sensitive issues. Compromise negotiations often require the admission of facts which disputants would never otherwise concede. Confidentiality ensures that parties will fully participate. In mediation, unlike the traditional justice system, parties often make communications without the expectation that they will later be bound by them. subsequent use of information generated at these proceedings could be unfairly prejudicial, particularly if the parties' level of sophistication in unequal. Mediator's potential to be an adversary in subsequent legal proceedings would curtail the disputants' willingness to confide during mediation.

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3 Ibid, 12.

4 Organic Law of Georgia - Labor Code, Adopted by the Parliament of Georgia on 27.12.2010, Date of Publication: 27.12.2010.

5 Resolution N301 of the Government of Georgia on Approval of the Procedure of Trial and Resolution of a Collective Dispute through Mediation Procedures, Adopted by the Government of Georgia on 25.11.2013, Published on 27.11.2013.

6 *Iremasivili K.,* Challenges for mediators in collective Labor disputes, TSU Alternative Dispute Resolution Centre, University publishing-house, yearbook, 2015, 11.

7 *Riskins L.L., Westbrook E.J., Guthrie C., Reuben C.R., Robbennolt K.J., Welsh., N.,* Dispute Resolution and Lawyers, 4th ed., West Academic Publishing, 2009, 482.

8 *Chitashvili N.,* Scope of Regulation of Mediation Ethics and the Addresses of Binding by Ethics Standard, Law Journal, 2016 N1, University publishing-house, 2016, 35.

Court testimony by a mediator, no matter how carefully presented, will inevitably be characterized so as to favor one side or the other. This would destroy a mediator's efficacy as an impartial broker. Whether it be protection of trade secrets or simply a disinclination to "air one's dirty laundry in the neighborhood", the option presented by the mediator to settle disputed quietly and informally is often a primary motivator for parties choosing this process. Mediators, and mediation programs, need protection against distraction and harassment.[9]

Business engaged a commercial mediation may need to discuss trade secrets or other proprietary information, the wider dissemination of which could threaten their interests, in order to resolve their immediate dispute. And a participant in a mediation may want or need to disclose information in the mediation that he simply doesn't want to be made public for fear of stigmatization or reputation harm, such as a mental health condition or certain lifestyle issues.[10]

More specifically for lawyers, confidentiality in mediation also implicates in a very direct way the often uneasy relationship between mediation and the law. Some participants in the mediation process like to think of mediation as removed from the law, and in many important respects it is. However, mediation is not wholly removed from the law. The results of a mediated settlement agreement are a contract that may be enforced in a court of law, and sometimes are. Moreover, mediations sometimes are unsuccessful, in which case the dispute can continue to formalize, perhaps ultimately requiring resolution in court. It's at that point were the tension between the public law and private mediation is most acute, because a cardinal value of the judicial process is the right of the parties to all of the relevant evidence available to prove their cases - evidence that could include admissions or other statements made during the mediation to prove, for example, that a witness is lying in a trial that follows an unsuccessful mediation.[11]

Uniform Mediation Act (UMA) emphasizes, that frank exchange of information can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.[12]

Abidance by confidentiality principle is not justified when public policy, the best interests of children are jeopardized, or when non-disclosure of confidential information harm physical or psychological integrity of a person. Disclosure of confidential information is also justified in cases, when it is necessary in order to implement or enforce an agreement resulting from mediation.[13]

According to UNCITRAL Conciliation Rules breach of confidentiality principle is also justified when this is necessary for the maintenance of human health or to save somebody's life, or when some facts are revealed during the process, which contain information about a criminal offence.[14]

There are also some negative arguments regarding confidentiality.

First, a basic rule of the information system operating in any mediated case is which there is caucusing[15] is that confidential information conveyed to the mediator by any party cannot be disclosed by the mediator to anyone. This means that: 1) each party in mediation rarely, if never, knows whether another party has disclosed confidential information to the mediator: and 2) if confidential information has been disclosed, the non-disclosing party never knows the specific content of that confidential information and

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9 *Alfini J., Press B.S., Stulberg B.J.*, Mediation Theory and Practice, 3rd ed., LexisNexis, 2013, 206-207.

10 *Riskins L.L., Westbrook E.J., Guthrie C., Reuben C.R., Robbennolt K.J., Welsh A.N.,* Dispute Resolution and Lawyers, 4th ed., West Academic Publishing, 2009, 482.

11 *ibid.*

12 *Casandra F.,* Mediation's Confidentiality Controversy, <http://www.dailyjournal.com/cle.cfm?show=C:-EDisplayArticle&VersionID=80&eid=872569&evid=1>. Referred to in: *Tsertsvadze G., (Edit.),* Perspectives of Legal Regulation of mediation in Georgia. National Centre for Alternative Dispute Resolution, Tb., 2013, 24.

13 Directive 2008/52/EC of the European Parliament and of the Council, 21 May 2008, on Certain Aspects of Mediation in Civil and Commercial Matters, in: *Tsertsvadze G., (Edit.),* Perspectives of Legal Regulation of mediation in Georgia. National Centre for Alternative Dispute Resolution, Tb., 2013, 27.

14 UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use, 2002, United Nations, New York, 2004, 27, in: *Tsertsvadze G., (Edit.),* Perspectives of Legal Regulation of mediation in Georgia, National Centre for Alternative Dispute Resolution, Tb., 2013, 27.

15 Caucusing - process when a mediator meets a party without presence of the other party, referred to in: <www.mediate.com/articles/israeIL13.cfm>.

whether any/or to what extent that confidential information has colored or otherwise affected communications coming to the non-disclosing party from the mediator. In this respect, each party in a mediation is an actual or potential victim of constant deception regarding confidential information – granted, agreed deception -but nonetheless deception, This is the central paradox of the caucused mediation process. The parties, and indeed even the mediator, agree to be deceived as a condition of participating in it in order to find a solution that the parties will find "valid" for their purposes.[16]

3. Analysis of Confidentiality Principle Based on Labor Code of Georgia and Resolution N301 of the Government of Georgia

The Labor Code of Georgia regulates the question of confidentiality in mediation on collective dispute very broadly and focuses only on a dispute mediator. According to paragraph 9 of Article 48^1 a mediator is required not to disclose information or document, which became known to him/her in the capacity of a mediator. This stipulation is noteworthy and poses many questions: what happens when such information or document is disclosed by the party himself, or an employer or employee. As already mentioned in this paper, following the adoption of the Organic Law of Georgia on Amendment to the Organic Law of Georgia - Labor Code of Georgia (June 12, 2013 N729-IIS), the Resolution N301 of the Government of Georgia on Approval of the Procedure of Consideration and Resolution of a Collective Dispute through Mediation Procedures was approved on November 25, 2013, which was to specify and regulate the regulations contained in Article 48^1 and ff. of Labor Code about resolution of collective labor disputes through mediation. Unfortunately, it should be said that neither this Resolution succeeded with regulation of confidentiality issue. According to Paragraph 2(d) of Article 7 of the Resolution, a mediator appointed for a collective dispute is required not to disclose or/an use data containing commercial or trade secrets or otherwise confidential information, publicity of which is limited by effective law and which became known to him/her in the course of mediation. Consequently, unlike stipulation of Labor Code the Resolution introduced the notion of commercial or trade secret or otherwise confidential information, thus making mediator's duty to abide by confidentiality principle even more obscure. The existence of the abovementioned scarce and almost unenforceable provisions generates following legal problems: 1) should the same duty apply to the parties; 2) what information can be made public by a mediation; 3) is the mediator himself protected when parties have no statutory duty not to disclose information, received through mediation; 4) the existing regulation is not aware of the liability for the breach of confidentiality duty; 5) the term of maintenance of confidentiality duty is not clear from effective legal framework – is it valid only during the mediation process or after its completion as well; 6) the law does not define, whether what is covered by mediation process, what is considered as mediation; does confidentiality rule apply only to joint sessions of mediation or any communication of the parties/representatives with the mediator; 7) if there is high public interest in a dispute, who is communicating with media, should the parties/representatives be restricted from communication with media without agreement/consultations with a mediator in the best interests of the process; 8) if given the subject matter of a labor dispute the party/parties have the exchange information about third persons (be it legal entities or natural persons) should these third persons be entitled to claim partial or full closure of the proceedings; 9) does confidentiality duty extend to persons, who become aware of information disclosed through mediation owing to their official duties, e.g.: an assistant mediator, trainee, Ministry personnel, master's degree course student of street-law clinic, etc.; 10) cases, occurrence of which will not result in granting right to the mediator to violate confidentiality duty, as a result of what the mediator will be entitled to appear before the Prosecutor's office and testify at the court of law; these cases may imply information about the existence of the elements of offence, prescribed by Criminal Code, which will protect a specific person of state from potential harm. According to Article 141 (d) of the Code of Criminal Procedure of Georgia, a mediator cannot be summoned and question in any case with regard to circumstances, that became known to him/her in the course of discharge of the

[16] *Cooley W.J.,* Defining the Ethical Limits of Acceptable Deception in Mediation, Pepperdine Dispute Resolution Law Journal, Vol.4, 2004, 264-265.

functions of a mediator. [17] Article 141 (d) of the Code of Criminal Procedure of Georgia does not provide for circumstances, in the case of occurrence of which a mediator can be questioned in the capacity of a witness, this can be the information, non-disclosure of which may actually harm the interests of state or local governance authorities or private law entities. On the contrary, the mediator is equalized to persons, who cannot be summoned and questioned in any case; 11) if parties fail to come to an agreement, should the dispute mediator be restricted (on the basis of law or agreement of the parties) from acting in the capacity of a representative of one of the parties during court proceedings.

To answer these question, for the purposes of comparative analysis, it is important to know what is offered both by domestic legislation and that of foreign countries.

3.1. Regulation of Confidentiality in the United States of America

The Uniform Mediation Act (UMA) was enacted by the National Conference of Commissioners on Uniform State Laws in 2001, endorsed by the American Bar Association in 2002, and amended by the NCCUSL[18] in 2003 To include a provision on international commercial mediation. The UMA was the results of four-year national drafting effort by dispute resolution scholars, practitioners, and lawyers from a variety of practice areas, led by NCCUSL and the ABA, to provide states with a uniform law for certain aspects of mediation, especially confidentiality. Candor during mediation is encouraged by maintaining the parties' and mediators' expectations regarding confidentiality of mediation communications. Virtually all state legislatures have recognized the necessity of protecting mediation confidentiality to encourage the effective use of mediation to resolve disputes. Indeed, state legislatures have enacted more than 250 mediation privilege statutes. Approximately half of the States have enacted privilege statutes that apply generally to mediations in the State, while the other half include privileges within the provisions of statutes establishing mediation programs for specific substantive legal issues, such as employment or human rights. The Drafters recognize that mediators typically promote a candid and informal exchange regarding events in the past, as well as the parties' perceptions of and attitudes toward these events, and that mediators encourage parties to thing constructively and creatively about ways in which their differences might be resolved. This frank exchanges can be achieved only if the participants know that what is said in mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.[19]

According to UMA Section 4 the following privileges apply in a proceeding: 1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication; 2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator; 3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant; 4) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

According to Section 5 a privilege under Section 4 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and: 1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and 2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant. A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under Section 4, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure. A person that intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under Section 4.

Under Section 6 there is no privilege under Section 4 for a mediation communication that is:

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[17] Code of Civil Procedure of Georgia, Adopted by the Parliament of Georgia on 14.11.1997, Published on 31.12.1997.

[18] National Conference of Commissioners on Uniform State Laws.

[19] *Riskins L.L., Westbrook E.J., Guthrie C., Reuben C.R., Robbennolt K.J., Welsh A.N.*, Dispute Resolution and Lawyers, 4th ed., West Academic Publishing, 2009, 484-485.

1) in an agreement evidenced by a record signed by all parties to the agreement;

2) available to the public under or made during a session of a mediation which is open, or is required by law to be open, to the public;

3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

4) intentionally used to plan a crime, attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;

6) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or

7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party.[20]

National Labor Relation Board (NLRB)[21] VS Macaluso

United States Court of Appeals, Ninth Circuit

618 F.2d 51 (1980)

Wallace, Circuit Judge

In early 1976 Retail Store Employees Union Local 1001 (Union) waged a successful campaign to organize the employees of Joseph Macaluso, Inc. (Company) at its four retail stores in Tacoma and Seattle, Washington. The Union was elected the collective bargaining representative of the Company's employees, was certified as such by the NLRB, and the Company and Union commenced negotiating a collective bargaining agreement. Several months of bargaining between Company and Union negotiators failed to produce an agreement, and the parties decided to enlist the assistance of a mediator from the FMCS. Mediator Douglas Hammond consequently attended the three meetings between the Company and Union from which arised the issue before the courtp

During the spring and summer of 1976 the Company engaged in conduct which led the NLRB to charge it with unfair labor practices. Proceedings were held and the NLRB ruled that the Company and Union had finalized a collective bargaining agreement at the three meetings with Hammond, and that the Company had violated NLRA[22] sections 8(a)(5) and (1) by failing to execute the written contract incorporating the final agreement negotiated with the Union. The NLRB ordered the Company to execute the contract and pay back-compensation with interest, and seeks enforcement of that order in this court. In response, the Company contends that the parties have never reached agreement, and certainly did not do so at the meetings with Hammond.

The testimony of the Union before the NLRB directly contradicted that of the Company. The two Union negotiators testified that during the first meeting with Hammond the parties succeeded in reducing to six the number of disputed issues, and that the second meeting began with Company acceptance of a Union proposal resolving five of those six remaining issues. The Union negotiators further testified that the sixth issue was resolved with the close of the second meeting, and that in response to a Union negotiator's statement "Well, I think that wraps it up," the Company president said, "Yes, I guess it does". The third meeting with Hammond, accordance to the Union, was held only hours before the Company's employees ratified the agreement, was called solely for the purpose of explaining the agreement to the Company accountant who had not attended the first two meetings, and was an amicable discussion involving no negotiation.

The Company testimony did not dispute that the first meeting reduced the number of unsettled issues to six, but its version of the last two meetings contrasts sharply with the Union's account. The Company representatives testified that the second meeting closed without the parties having reached any semblance

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[20] *Riskins L.L., Westbrook E.J., Guthrie C., Reuben C.R., Robbennolt K.J., Welsh A.N.*, Dispute Resolution and Lawyers, 4th ed., West Academic Publishing, 2009, 493-495.

[21] National Labor Relation Board, <www.nlrb.gov>.

[22] National Labor Relations Act, 49 stat. 449 (1935), as Amended by Pub. L. No. 101, 80th Cong., 1st Sess., 1974, and Pub. L. No 257, 86th Cong., 1st Sess., 1959.

of an agreement, and that the third meeting was not only inconclusive but stridently divisive. While the Union representatives testified that the third meeting was an amicable explanatory discussion, the Company negotiators both asserted that their refusal to give in to Union demands caused the Union negotiators to burst into anger, threaten lawsuits, and leave the room at the suggestion of Hammond, who was thereafter unable to bring the parties together.

In an effort to support its version of the facts, the Company requested that the administrative law judge (ALJ) subpoena Hammond and obtain his testimonial description of the last two bargaining sessions. The subpoena was granted, but was later revoked upon motion of the FMCS. Absent Hammond's tie-breaking testimony, the ALJ decided that the Union witnesses were more credible and ruled that an agreement had been reached. The Company's sole contention in response to this request for enforcement of the resulting order to execute the contract is that the ALJ and NLRB erred in revoking the subpoena of Hammond, the one person whose testimony could have resolved the factual dispute.

Revocation of the subpoena was based upon a long-standing policy that mediators, if they are to maintain the appearance of neutrality essential to successful performance of their task, may not testify about the bargaining sessions they attend. Both the NLRB and the FMCS (as amicus curiae) defend that policy. The Court of Appeals presented the following questions of first impression: can the NLRB revoke the subpoena of a mediator capable of providing information crucial to resolution of a factual dispute solely for the purpose of preserving mediator effectiveness?.. We must determinep whether preservation of mediator effectiveness by protection of mediator neutrality is a ground for revocation consistent with the power and duties of the NLRB under the NLRA.

The NLRB's revocation of Hammond's subpoena conflicts with the fundamental principle of Anglo-American law that the public is entitled to every person's evidence... The above facts present a classic illustration of the need for every person's evidence: the trier of fact is faced with directly conflicting testimony from two adverse sources, and a third objective source is capable of presenting evidence that would, in all probability, resolve the dispute by revealing the truth. Under such circumstances, the NLRB's revocation of Hammond's subpoena can be permitted only if denial of his testimony "has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."

The Court concluded that the public interest in maintaining the perceived and actual impartiality of federal mediators does out-weigh the benefits derivable from Hammond's testimony. This public interest was clearly stated by Congress when it created the FMCS: It is the policy of the United States that a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees; b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputesp 29 U.S.C. paragraph 171. Federal mediation has become a substantial contributor to industrial peace in the United States. The FMCS, as amicus curiae, has informed us that it participated in mediation of 23,450 labor disputes in fiscal year 1977, with approximately 325 federal mediators stationed in 80 field offices around the country. Any activity that would significantly decrease the effectiveness of this mediation service could threaten the industrial stability of the nation. The importance of Hammond's testimony in this case is not so great as to justify such a threat. Moreover, the loss of that testimony did not cripple the fact-finding process. The ALJ resolved the dispute by making a credibility determination[23], a function routinely entrusted to triers of fact throughout our judicial system.

[23] Credibility determination - is the situation when a judge decides on the compatibility of witnesses' testimony with truth based on inner faith and only then makes a decision, <https://definitions.uslegal.com/c/credibility/>.

The court has concluded, therefore, that the complete exclusion of mediator testimony is necessary to the preservation of an effective system of labor mediation, and that labor mediation is essential to continued industrial stability, a public interest sufficiently great to outweigh the interest in obtaining every person's evidence. No party is required to use the FMCS; once having voluntarily agreed to do so, however, that party must be charged with acceptance of the restriction on the subsequent testimonial use of the mediator. We thus answer the question presented by this case in the affirmative: the NLRB can revoke the subpoena of a mediator capable of providing information crucial to resolution of a factual dispute solely for the purpose of preserving mediator effectiveness. Such revocation is consonant with the overall powers and duties of the NLRB, a body created to implement the NLRA goals of ~promoting the flow of commerce by removing certain recognized sources of industrial strife and unrest" and "encouraging practices fundamental to the friendly adjustment of industrial disputes..."[24]

4. Conclusion

Based on above deliberations, analysis, critical and comparative law analysis it can be said as a recommendation, that it is necessary to regulate confidentiality issue at the legislative level and to make the following steps:

1. Mediation should be recognized as a confidential process. This should apply both to the parties and mediators and any third person (trainee, intern, Ministry personnel, etc), who has access to information, exchanged through mediation, given their official duties. According to national legislation a party may state any time, that agreement failed due to faulty action of the mediator, who influenced the party, and the existing regulations the mediators are not allowed to make a statement about a declaration impairing his reputation in any place other than the court of law. It should as well be mentioned, that a collective dispute may have an impact on other entities as well, and when exchanging information about them, the third persons should have the right to demand non-dissemination of such information, amongst them, irrespective of party agreement.

2. It should be defined, whether what kind of information can be made public by a mediator. To this end the EU Directive and UNCITRAL Conciliation Rules can be employed, according to which the parties, including mediators, are required to keep confidential information and are banned from using information, obtained through mediation, as an evidence at the court of law. However, abidance by confidentiality principle is not justified, when public policy, the best interests of children are jeopardized, or when non-disclosure of confidential information harms physical or psychological integrity of a person. Disclosure of confidential information is also justified in cases, when it is necessary in order to implement or enforce an agreement resulting from mediation.[25] It will be reasonable to take account of the privilege, envisaged by the USA Uniform Mediation Act and circumstances, excluding this privilege.

3. It is important to introduce a sanction, providing for liability for the breach of confidentiality duty, or provision for the foregoing should become subject to agreement between the parties before the initiation of mediation and in the case of failure to come to an agreement the preference should be given to statutory stipulation. Otherwise any stipulation about confidentiality will remain unenforceable.

4. Legislative regulation of confidentiality duty will also remain unenforceable if the legislator does not define the scope of mediation process. Consequently, it is recommended to redraft Paragraph 6 of Article 3 of Resolution N301 of the Government of Georgia on Approval of the Procedure of Consideration and Resolution of a Collective Dispute through Mediation Procedures. Worth mentioning is the mediation process includes not only mediator's meeting with a party/representative either individually or together, but any form of communication as well, which should also be subject to confidentiality duty.

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[24] *Alfini J., Press B.S., Stulberg B.J.,* Mediation Theory and Practice, 3rd ed., LexisNexis, 2013, 207-210.

[25] Directive 2008/52/EC of the European Parliament and of the Council, 21 May 2008, on certain aspects of mediation in civil and commercial matters, in *Tsertsvadze G., (Edit.),* Perspectives of Legal Regulation of mediation in Georgia. National Centre for Alternative Dispute Resolution, Tb., 2013, 27.

5. The does law not prescribe the exact validity period for confidentiality duty and when does it expire, consequently, both the Labor Code and Governmental Resolution should specify this issue. It is also important to regulate the aspects of mediator's ethics. A mediator, who received confidential information during the process, should be act as a representative of the persons who are in a way connected with held proceedings of the case, essentially, actually related thereto.[26]

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