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IVANE JAVAKHISHVILI TBILISI STATE UNIVERSITY
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Specificity of Confidentiality Protection in Mediation Process

Mediation itself is a communication directed towards achieving an acceptable agreement for the parties. To the great extent, this process is promoted by the principle of confidentiality. It pushes the parties to disclose often undesirable information for them freely and without any obstacles. One of the aims of the present paper is to ascertain essence and its forms of demonstration of confidentiality in mediation process. With the rise of mediation practice, the necessity of reviewing the absolutism of the principle of confidentiality arises. Georgian legislation does not envisage grounds for limiting this principle and needs improvement in this direction. Therefore, the paper presents exceptions under EU Mediation Directive, Model Law on International Commercial Conciliation and Mediation Unified Act which to some extent will eradicate legislative gaps existing today.

Key Words: Confidentiality Principle, Mediation, Privilege, Regulation of Confidentiality, Limitations to Confidentiality principle, Exceptions to Confidentiality Principle.

1. Introduction

Protection of confidentiality is one of the most important problems as in theory and in practice as well. This matter is actual in different spheres out of which providing confidentiality in mediation process is no less important. The thing is that in mediation, its features and legislative grounds for protection are very specific. At the same time, from practical perspective, legal results for breaching the confidentiality are even more interesting.

It is significant that mediation passed through impressive evolution road from once practice causing skepticism to widely recognized their desired outcome believing that information disclosed during mediation process will

* BA Student of Ivane Javakhishvili Tbilisi State University, Faculty of Law.

not be later used against them.¹

Besides, in various states regulatory rules for confidentiality principle are different. This issue is even more actual for Georgia as mediation institute is new in Georgian legislation. Nowadays, Georgian legislative regulations are “episodic”. Therefore, it is important to discuss confidentiality principle related to this institute.²

The aim of the paper, on the one hand, is to determine concept of confidentiality and forms of its demonstration in mediation and, on the other hand, importance and specificity of its protection in mediation process. One of the outcomes caused by creation of mediation and other alternative dispute resolution tools is conflict between new alternatives, their values and interests of traditional court system. The main example may be conflict between desire to protect confidentiality in mediation process and emphasizing on the proper examination of all possible evidence by the court.³ Therefore, the values shall be outlined confrontation of which may allow violation of confidentiality principle in courts or other proceedings.

Hence, this paper is an attempt to determine main essence of the problems mentioned above and potential (desirable) proposals for achieving legislative regulations by using dogmatic, comparative, analytical and synthesis methods.

alternative dispute resolution tool and nowadays, it represents an independent, specific sphere. Its fundamentally important principles are: consensual nature of bilateral agreement, confidentiality of the process and replacement of a decision maker with third, neutral party (mediator)⁴ who

¹ *Macturk C.H.*, Confidentiality in Mediation: The Best Protection has Exception, American Journal of Trial Advocacy, Vol. 19, 1995, 412, <http://heinonline.org/HOL/Page?handle=hein.journals/amjtrad19&div=25&g_sent=1&casa_token=&collection=journals>, [07.11.2017].

² *Eloshvili N.*, Importance of Confidentiality Principle in Mediation Process, Journ. “Alternative Dispute Resolution – Annual”, 2013, 8 (in Georgian).

³ *Freedman R. L., Prigoff L.M.*, Confidentiality in Mediation: The Need For Protection, Journal On Dispute Resolution, Vol. 2:1, 1986, 37, <https://kb.osu.edu/dspace/bitstream/handle/1811/76172/OSJDR_V2N1_037.pdf?sequence=1>, [07.11.2017].

⁴ *Field R., Wood N.*, Marketing Mediation Ethically: The Case of Confidentiality, Field & Wood, 2005, 144, <<https://lr.law.qut.edu.au/article/download/210/204/>>, [06.11.2017].

helps the parties to reach a desirable, acceptable agreement regarding all or some problematic issues of the dispute.⁵ Considering these facts, with the principle of confidentiality non-existence of long-term court proceeding, stressful environment and court fees make mediation a very enchanting alternative.⁶

“Confidentiality” is considered as the privilege to refuse disclosing the facts and is created to maintain “the holiness” of those relationships that rely on trust and need protection.⁷ Significance of confidentiality principle in mediation process in axiomatic⁸ (it is important and inseparable element of the process) and assists to creation of necessary trustful atmosphere.⁹ In addition, confidentiality guarantee offers the parties the secret sphere of negotiations¹⁰ during which opportunity to thoroughly discuss all aspects of relationship existing between the parties and specific circumstances of the dispute is created. The opposing parties slowly reach

⁵ *Rufenacht D.M.*, The Concern over Confidentiality in Mediation - An in-Depth Look at The Protection Provided by the Proposed Uniform Mediation Act, *Journal of Dispute Resolution*, 2000, 113, <<http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1052&context=jdr>>, [06.11.2017].

⁶ *Foster-Noble T., Prentice S.*, The Promise of Confidentiality in Mediation: Practitioners’ Perceptions, *Journal of Dispute Resolution*, 2009, 1, <<http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1568&context=jdr>>, [06.11.2017].

⁷ *Tsertsvadze G.*, Perspectives of Legal Regulations of Mediation in Georgia, National Center for Alternative Dispute Resolution, Tbilisi, 2013, 25 (in Georgian).

⁸ *Deason E.E.*, Predictable Mediation Confidentiality in the U.S. Federal System, *Ohio State Journal On Dispute Resolution*, 2002, 240, <<http://heinonline.org/HOL/LandingPage?handle=hein.journals/ohjdpr17&div=18&id=&page=>>, [10.11.2017].

⁹ Protecting Confidentiality in Mediation, *Harvard Law Review*, Vol. 98, no. 2, 1984, 441 (Published by: The Harvard Law Review Association), <www.jstor.org/stable/1340844>, [06.11.2017].

¹⁰ *Zhao Y., Koo A.K.C.*, The Development of Legal Protection for Mediation Confidentiality in Hog Kong, *Common Law World Review*, 2011, 264, <http://heinonline.org/HOL/Page?handle=hein.journals/comlwr40&div=17&g_sent=1&casa_token=&collection=journals>, [07.11.2017].

2. Confidentiality as a Mediation Principle

2.1. Essence and Signs of Confidentiality

Confidentiality is the primary and fundamental principle of mediation.¹¹ Joint, integrative (connecting) problem solving oriented mediation process depends on readiness of the parties to disclose their interests and needs, not presenting their position and claims. Identification of essential, procedural and physiological interests determine efficiency of the process. It is possible to reach bilateral agreement acceptable for the parties only after fundamental exploration of these interests. For this existence of some kind of sincerity and trust is mandatory¹² which itself confronts with the legitimate expectation of the parties to protect confidentiality.

This has big importance in legal and practical points of view¹³ as mediation would not be effective alternative dispute resolution tool without confidentiality guarantee. The parties would refrain from disclosing information before the person who could later be the witness or the opposing party in the court proceedings.¹⁴ The aim of confidentiality is to reduce fear of disclosing important information for the process as the parties fear their weaknesses and avoid disclosure. A way out shall be found in mediation in order for the parties to disclose confidential information as well. In other

¹¹ *Chitashvili N.*, Regulatory Limits of Mediation Ethics and Addressees Bound by Ethical Standards, "Law Journal", №1, 2016, 34 (in Georgian).

¹² *Hamilton W.J.*, Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan, Queen's Law Journal, Spring 1999, 569, <<http://heinonline.org/HOL/LandingPage?handle=hein.journals/queen24&div=19&id=&page=>>, [09.11.2017].

¹³ *Jr. Johnson D.P.*, Confidentiality in Mediation: What Can Florida Glean from the Uniform Mediation Act, Florida State University Law Review, Vol. 30, 2003, 489, <<http://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1586context=lr>>, [09.11.2017].

¹⁴ *Kentra A.P.*, Hear No Evil, See no Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct, BYU Law Review, 1997, 722, <<http://heinonline.org/HOL/LandingPage?handle=hein.journals/byulr1997&div=31&id=&page=>>, [11.11.2017].

cases, this may confront with the principle of good faith and informing. If the party cannot succeed in mediation process, the risk exists that the other party will maliciously use received information. It shall be taken into consideration that confidentiality does not refer to information known to the other party or may become known by other allowed ways.¹⁵ Almost absolute term for protection of confidentiality gives the parties the opportunity to disclose intimate details and information about very sensitive personal matters for them.¹⁶ In addition, confidentiality principle has the following characteristics:

a) **It strengthens trust in mediation process;**

At the beginning of the mediation process, according to the relevant rules, the mediator tells the parties terms and limits of protection of confidentiality. Such statement helps the parties to begin and develop the communication. It is common that confidentiality substantially strengthens trust between the parties and the mediators. Hence, non-disclosure of information by the other party and the mediator is not guaranteed, efficiency of mediation process will be decreased.¹⁷

b) **Confidentiality principle strengthens faith of impartiality of the mediator;**

The mediator shall remain neutral in order to create a trustful atmosphere.¹⁸ The mediator somehow performs creative work and can successfully perform such work if the parties will be sure that information disclosed by them will not be divulged without their consent.¹⁹ According to *re Marriage of Kieturakisi* case, “confidentiality and neutrality are mandatory elements of mediation. Witnessing mediator equals to support of one party. Such support essentially violates trust and deceives conditions offered by mediation.”²⁰

¹⁵ *Rabe S., Wode M.*, Mediation, Heidelberg 2014, 19 [25.11.2017].

¹⁶ *Wykoff A.*, Mediation & Confidentiality, Bond University Student Law Review, Vol. 4, 2016, 2, <<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1006&context=buslr>>, [12.11.2017].

¹⁷ *Ibid*, 3.

¹⁸ *Macturk C.H.*, Confidentiality in Mediation: The Best Protection has Exception, American Journal of Trial Advocacy, 1995, 415, <http://heinonline.org/HOL/Page?handle=hein.journals/amjtrad19&div=25&g_sent=1&casa_token=&collection=journals>, [12.11.2017].

¹⁹ *Tvauri R.*, Standard of Limits of Confidentiality Principle in Mediation Process, Journ. “Alternative Dispute Resolution – Annual”, 2015, 27 (in Georgian).

²⁰ *Anna Kieturakis v. Maciej Jan Kieturkis*, (2006).

c) **Also, this principle guarantees protection of “secret sphere” unlike court proceedings;**

One of other encouraging reasons for choosing mediation process is secrecy of the process, contrary to public court hearings. This advantage is a direct outcome of confidentiality principle and gives big stimulus to business companies that may be damaged by long and widely known court proceedings.²¹

d) **It is oriented on maintaining ongoing relationships;**

Mediation supports preservation of relationship between the parties (family or business partners). On the contrary, in the court by its argumentation the party tries to weaken and object to the other party's claims. Confidentiality in mediation gives the parties possibility to objectively evaluate “less charming aspect of their situation” and negotiate with positive attitude which is substantially different from negative relationship of the parties densely linked with the court proceedings.²²

e) **In addition, the stated principle creates sense of “justice”;**

During the mediation process, the parties discuss more issues than it is generally discussed in usual court proceedings. So, if the information is in any form used against the party, “chances to damage the participants are relatively higher”.

Therefore, confidentiality deprives the participants of the dispute to use information acquired in the mediation process against the other party and by this way, creates relatively safe environment for the parties' interactive negotiations.²³

2.2 Confidentiality Demonstration Forms in Mediation

Confidentiality may spread on different aspects of mediation process, including:

²¹ *Wykoff A.*, Mediation & Confidentiality, Bond University Student Law Review, Vol. 4, 2016, 5, <<http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1006&context=buslr>>, [13.11.2017].

²² *Ibid*, 4-5.

²³ *Brown K.L.*, Confidentiality in Mediation: Status and Implications, Journal of Dispute Resolution, Vol. 1991, 4, <<http://heinonline.org/HOL/LandingPage?handle=hein.journals/jdisres1991&div=21&id=&page=>>>, [15.11.2017].

- Information created or shared during the meeting, for example, mediator's records, documents and visual materials prepared for mediation process purposes;
- Information disclosed to the mediator at the first meeting or by using electronic devices;
- Observations on behavior of participants of mediation process;
- Reasons why the parties could not agree;²⁴

Therefore, the following confidentiality types exist in mediation process:²⁵

1. Insider/Outsider Confidentiality;

Insider/outside confidentiality refers to general obligation to protect confidentiality with respect to third parties. It is prohibited for the participants of the mediation process to disclose protected information to external persons. This obligation refers to the parties, counsels, experts, translators, witnesses, mediator and other supporting staff. This type of confidentiality prohibits these persons to disclose information to non-participant or external persons. Obligations under the law often gets insider/outside confidentiality form.²⁶ For example, according to Article 18 of Austrian Mediation Act:

„The mediator is obliged to secrecy about the facts which he has become aware of in the course of the mediation or which have otherwise become known. He shall deal with documents provided or delivered to him in the course of the mediation confidentially. The same applies to the supporting staff of the mediator as well as to persons who act for a mediator“.²⁷

²⁴ Reichert K., Confidentiality in International Mediation, Dispute Resolution Journal, 2005, 62.

²⁵ Hopt J.K., Steffek F., Mediation Principles and Regulation in Comparative Perspective, Oxford University Press, 2013, 180.

²⁶ Nadja M.A., International and Comparative Mediation: Legal Perspectives, Kluwer Law International, 2009, 248.

²⁷ Austrian Mediation Act (Law on Mediation in Civil Law Matters), 6 June 2003, <[http://www.arbiter.com.sg/pdf/laws/Austrian Mediation Act 2003. pdf](http://www.arbiter.com.sg/pdf/laws/Austrian%20Mediation%20Act%202003.pdf)>, [16.11.2017].

2. Insider/Insider Confidentiality;

Insider/insider confidentiality regulates information stream between participants of the mediation process. This is extremely important during caucus sessions; institutional rules of mediation often do not contain the mentioned aspect of confidentiality as it is considered to be a procedural issue settled by the mediator and the parties.

While using insider/insider confidentiality, the mediators use open communications approach or in-confidence approach methods. The first one does not consider information confidential which is disclosed at the meetings unless the party informs the mediator that he/she wants to keep confidential specific facts. The second method considers any disclosed information confidential and gives the mediator right to disclosure only if the parties agree so.²⁸

3. Insider/Court Confidentiality;

Possibility to use disclosed facts during the mediation process in civil and criminal proceedings against the party is one of the biggest problematic issues for mediation parties and their attorneys. The circle of relevant information is pretty broad and includes documents, records, observations of parties' behavior, reasons why the parties could not agree and offer made by the party to reach such agreement. Insider/court confidentiality protects mediation communication not to be presented as evidence before the court or other proceeding. This confidentiality type is a specific form of insider/outsider confidentiality which is enshrined in EU Mediation Directive regarding mediation,²⁹ Uniform Mediation Act and Model Law on International Commercial Conciliation.³⁰ This aspect of confidentiality caused the biggest confrontation as it will cross the existing boundary between the mediation process and the court system. The courts are not limited to

²⁸ Govori Z., Confidentiality under the ICC Mediation Rules compared to the LCIA Mediation Rules, International Hellenic University, 2016, 7.

²⁹ Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008, <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008L0052>>, [17.11.2017].

³⁰ Article 10 of MLICC (Model Law on International Commercial Conciliation), <https://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf>, [17.11.2017].

confidentiality agreement between the parties, therefore, protection of communications being presented at next court proceedings depends on to what extent do the exceptions from confidentiality protection extend on these issues.³¹ Subsequently, there is a need to discuss the problem regarding allowance/inadmissibility of potentially complex evidences.³²

3. Limits of Confidentiality Principle

Existence of a wide-scale confidentiality privilege is inevitable for effective protection of confidentiality principle in mediation process. All details of oral or written negotiations conducted to reach agreement between the parties shall not be used against the party in court proceedings.³³ In other words this is called “without prejudice rule”. In mediation it is often established in written agreement promising protection of confidentiality.³⁴ However, confidentiality privilege has exceptions as all general rules have which are important for encouraging using mediation. If the “blanket” rule does not have an exception, mediator or opposing parties or innocent third parties, for example, children in family law mediation would not be protected.³⁵

Limitation of the confidentiality principle is also inevitable in order to avoid transferring negotiations conducted for reaching bilateral mediation and agreement to “black hole” of evidence: privilege arising “without prejudice” rule cover cannot be used in bad faith in order to mistaken the court.³⁶ Therefore, protection of mediation process confidentiality cannot be

³¹ *Tvauri R.*, Standard of Limits of Confidentiality Principle in Mediation Process, Journ, “Alternative Dispute Resolution – Annual”, 2015, 33 (in Georgian).

³² *Nadja M.A.*, International and Comparative Mediation: Legal Perspectives, Kluwer Law International, 2009, 251.

³³ *Rush & Tompkins Ltd v. GLC* [1988] 3 All ER 737.

³⁴ *Aird v. Orime Meidian Ltd* [2006] EWCA Civ 1866.

³⁵ *Macturk C.H.*, Confidentiality in Mediation: The Best Protection has Exception, American Journal of Trial Advocacy, Vol. 19, 1995, 426-427, <http://heinonline.org/HOL/Page?handle=hein.journals/amjtrad19&div=25&g_sent=1&casa_token=&collection=journals>, [18.11.2017].

³⁶ *Limbury L.A.*, Should Mediation Be An Evidentiary ‘Black Hole’?, UNSW Law Journal, Vol. 35(3), 2012, 917, <<http://www.austlii.edu.au/journals/UNSWLawJl/2012/38.pdf>>, [18.11.2017].

absolute. However, the process shall not become “shelter” of the party who committed crime or other wrong.³⁷

Valid exceptions may exist, however they shall be determined clearly and distinctly by court practice or legislation.³⁸ Several limitation grounds may be named:

1. Potential Threat;

Obligation of warning the person about the threat was outlined in case of *Tarasoff v. Regents*. According to this case, the client disclosed to his psychologist his desire to kill the third party, however, due to confidential nature of the meetings, the psychologist did not warn the third party about the potential threat. The client killed the threat addressee. The court established obligation of warning identifying person regarding physical violence or murder. The important fact of the case was that in the present case psychotherapist-patient privilege and standards of professional ethics gave the psychologist the opportunity to disclose information. In order to avoid such outcome, it was inevitable to spread the case argumentation on mediation process. Considering this, several mediation acts allow limiting confidentiality in the situation of existing serious physical violence and threat.³⁹

Unified Mediation Act allows violation of confidentiality by the mediation in order to avoid murder and other serious threat. However, in several instances disclosure of information becomes mandatory, for example, while domestic violence on children or existence of specific and unavoidable threat.⁴⁰

³⁷ *Morek R.*, Nihil silentio utilius: Confidentiality In Mediation And Its Legal Safeguards In The EU Member States, 2013, 432, <<https://link.springer.com/content/pdf/10.1007%2Fs12027-013-0317-9.pdf>>, [18.11.2017].

³⁸ *Tvauri R.*, Standard of Limits of Confidentiality Principle in Mediation Process, Journal “Alternative Dispute Resolution – Annual”, 2015, 24 (in Georgian).

³⁹ *Kirtley A.*, The Mediation Privilege’s Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest, Journal of Dispute Resolution, Vol. 1995, 48, <<http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1291&context=jdr>>, [19.11.2017].

⁴⁰ *Burnley R., Lascelles G.*, Mediator Confidentiality – Conduct and Communications, Arbitration, 2004, 8, <https://www.cedr.com/library/articles/Mediator_confidentiality_SJBerwin.pdf>, [19.11.2017].

2. Information About Existence or Potentially Commitment of Crime;

Exceptional limitation to confidentiality is mediation communication “advisedly used to plan, commit or attempt committing the crime, to hide ongoing criminal actions or threat of violence”.⁴¹ Obligation to inform may derive only from reasonable suspicion regarding crime of threat.⁴²

3. Aim of Reaching, Confirming or Denying the Agreement;

Exceptions to confidentiality are often caused by actions afterwards the mediation process aiming to confirm or refuse the reached agreement or to create sanction ground for the other party. For example, Article 10(3) of the Model Law on International Commercial Conciliation provides for disclosure of confidential information and its recognition as an evidence “for implementation and compulsory enforcement”. EU Mediation Directive about mediation contains the same grounds for limitation. In one of the cases, Supreme Court of Canada stated that negotiation privilege “supports sincere discussion between the parties which facilitates reaching the agreement” and also, “supporting such agreements consequent to loaded court system is a priority. Agreement privilege is truly recognized for this reason”. The court explained that “communication existing before reaching the agreement loses confidentiality privilege if it inevitable to prove existence of the agreement or its limits. As soon as the parties agree on some terms, general interest of encouraging alternative dispute resolution tools will require real opportunity to prove terms of such agreement. The rule is permissible as long as it serves the aim as confidentiality principle does: encouraging such negotiations”.⁴³

4. Information About Violation of Professional Behavior Rules;

In mediation process the mediator may find out about violation of professional behavior rules by the attorney (or by other professional). The mediator may have the discretion to inform about such violation to the competent authority due to social role or degree of violation. Permissibility

⁴¹ *Tetunic L.F.*, Act Deux: Confidentiality Adter the Florida Mediation Confidentiality and Privacy Act, *Nova Law Review*, Vol. 36, Issue1, 2011, 83, <<http://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1061&context=nlr>>, [21.17.2017].

⁴² *Burnley R., Lascelles G.*, *Mediator Confidentiality – Conduct and Communications, Arbitration*, 2004, 9.

⁴³ *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35.

of such information is even more debatable when it comes to negligent advice. On the one hand, this will be a mechanism to protect the interests of the parties, however grounds for such limits are subjective and may cast doubts on the reputation of the mediator regarding his impartiality. In order to solve such problem, it is recommended for the mediator to use usual methods in mediation process.⁴⁴

4. Georgian Legislative Reality

Mediation has several advantages compared to usual court proceedings. Court proceedings create stressful, expensive and unpredictable environment where the judge unilaterally decides the case. Contrary to this, mediation is a communication lead by the neutral person. The parties have objective opportunity to effect reaching the final decision. Mediation is significantly cheap and effective; however, it is connected to disclosure of information undesirable and potentially containing danger for the parties. Therefore, it is very important to protect the confidentiality principle. Even though confidentiality has a fundamental importance in mediation process, Georgian legislative regulations nowadays are very general and dry.⁴⁵ In addition, problems in practice arise if the parties have not contractually agreed everything in order to ensure confidentiality. Besides, thematical limits of confidentiality agreement, it is hard to determine sanctions for violations while using information disclosed at the process against the agreement.⁴⁶ Even though, it is forbidden to broadly overregulate confidentiality, legislation shall create grounds for its appropriate protection which will be practical and underline important issues of the process.

Who Shall Protect Confidentiality?

Even though mediation process is not public, discerned group of persons have the opportunity to find out the substance of current discussions. This group contains: the parties, mediators, counsels, experts, judges

⁴⁴ *Burnley R., Lascelles G., Mediator Confidentiality – Conduct and Communications, Arbitration, 2004, 12.*

⁴⁵ *Tsertsvadze G., Perspectives of Legal Regulations of Mediation in Georgia, National Center for Alternative Dispute Resolution, Tbilisi, 2013, 32 (in Georgian).*

⁴⁶ *Masser K., Engewald B., Scharpf L., Ziekow J., Evaluierung des Mediationsgesetzes, Rechtstatsachliche Untersuchung im Auftrag des Bundesministeriums der Justiz und für Verbraucherschutz, Speyer, 2017, 35.*

(in case of court mediation or disclosure of mediation information in courts), also, additional personnel (assistants, translators and etc.). According to the EU Mediation Directive, number of persons who shall protect confidentiality is less and applies only to “mediators and other persons participating in mediation administration”. According to the direct understanding of the directive, the parties of mediation process are not bound to protect confidentiality. Such regulation creates important doubt. The most relevant threat for confidentiality does not derive from the mediator (he/she is not the potential witness in later court proceeding), it derives from the parties. In most cases, they would not need a mediator at all and could present confidential information on their own in court, arbitration or other type of proceedings.

Unlike the directive, UNCITRAL Model Law establishes broader approach. It sets not only parties’ obligation to protect confidentiality,⁴⁷ but puts them before mediation in the list.

In Georgia, the legislator introduced legal regulation of court mediation confidentiality under Article 187⁸ of the Georgian Civil Procedure Code. According to this article, the participants of the mediation process and leading mediators of the mediation shall protect confidentiality. It is desirable from the legislation to specifically determine conditions for using information disclosed during the mediation process: parties participating in mediation, mediators, also persons who received information and/or circumstance due to their work in mediation, shall not be entitled to disclose or testify about this issue in court, arbitration or any other proceeding.⁴⁸ This will increase trust factors towards mediation institute in the society and, at the same time, will firm mechanism for protecting confidentiality principle.

Which Information is Protected by Confidentiality Principles?

During the mediation process, confidentiality may cover different types of communication and information, including, factual applications, offers and details disclosed by the parties during the meeting.⁴⁹ While determining

⁴⁷ Article 10 part 1 of UNCITRAL Model Law: “Party, mediator and any third party participating in process administration”.

⁴⁸ *Tsertsvadze G.*, Perspectives of Legal Regulations of Mediation in Georgia, National Center for Alternative Dispute Resolution, Tbilisi, 2013, 33 (in Georgian).

⁴⁹ *Reichert K.*, Confidentiality in International Mediation, Dispute Resolution Journal, Vol. 59, 2004, 60.

limits of confidential information, it is desirable for the legislator to take into consideration following two issues: 1. Firstly, there is a necessity to consider different types of information and communication disclosed during the mediation process. This aim may be reached by establishing broad formulation;⁵⁰ 2. Simultaneously, the participant may disclose the information at the mediation process in order to avoid creating evidence for court or other types of proceedings (due to specificity of protecting confidentiality principle). Article 10(5) discusses this issue: “evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a conciliation”.⁵¹ EU Mediation Directive and majority of national legislation of the contracting parties do not contain such compact. Therefore, it is desirable to consider such compact in Georgian legislation.

Regulating Grounds for Limiting Confidentiality;

Protection of confidentiality is one of the main supports of confidentiality principle and it is unimaginable to conduct due mediation process without its protection. This issue was considered by the Georgian legislator as it is enshrined in Articles 104, 141 and 187⁸ of the Georgian Civil Procedure Code. Specifically, according to Article 104 of the Georgian Civil Procedure Code, the court shall not except as evidence information or documents disclosed under the terms of confidentiality in a judicial mediation process, unless otherwise agreed by the parties. Article 187⁸ prohibits the parties and the mediator in mediation process to disclose the information. And according to Article 141, mediator may not be questioned about the circumstances she/he found out while being the mediator.⁵² However, Georgian legislation does not envisage exceptions that may allow limiting confidentiality protection if special circumstances exist. Such compact is established in Article 7 of the EU Mediation Directive which states that confidentiality of the

⁵⁰ Such broad formulation is enshrined in Article 7(1) of European Directive according to which “information that comes from or relates to mediation process” is confidential.

⁵¹ *Morek R.*, *Nihil silentio utilius: Confidentiality In Mediation And Its Legal Safeguards In The EU Member States*, Academy of European Law, 2013, 428-429.

⁵² *Tsuladze A.*, *Georgian Model of Court Mediation in European-American Prisma*, Tbilisi, 2016, 132 (in Georgian).

mediation process shall be protected unless 1. superior social interest exists; 2. disclosure of information is inevitable for compulsory enforcement of terms of the agreement; 3. information is disclosed by the agreement of the parties.

Therefore, the main difficulty while regulating confidentiality is keeping the balance. On the one hand, it is inevitable to protect confidentiality for the mediation process and on the other hand, the society may need information disclosed at the mediation process. Hence, the legislation shall find the golden interim in a way not to damage any party.⁵³ In Georgia, introducing the law alike the EU Mediation Directive will guarantee protection and justice of the interests of the parties participating in mediation process.

5. Conclusion

Mediation is a unique process of alternative dispute resolution when the parties participate in the process oriented to reach the agreement considering bilateral interests and the parties themselves determine the terms of such agreement. Unlike the court proceedings, mediation is not stretched in time and creates relatively cheap, calm and effective environment. Reaching effective agreement is often linked to disclosing undesirable, confidential information for them. This itself confronts to the legitimate expectation of the parties to protect confidentiality of such information. Therefore, confidentiality is inseparable and inevitable element of the mediation process strengthening the trust factor and belief of impartiality. It also guarantees protection of “secret sphere” typical to mediation process and preserving existing relationships between the parties. However, at the same time several mediation acts state that absolute confidentiality may become a heavy burden for the society and cause problematic results.

Additionally, it is inevitable to find “golden interval” between protection of mediation confidentiality and interests of disclosing such information in the court. This may be reached very easily at the legislative stage. Georgian legislator shall share practice of foreign legislation and courts and consider specific grounds for limitation including: obligation to disclose information if potential threat and crime or its potential commitment,

⁵³ Ibid, 19.

violation of professional behavior rules exist, also limiting confidentiality in order to reach, confirm or deny the agreement. Several acts establish exception for the judge to determine in its discretion whether or not need for presenting the evidence prevails over confidentiality protection principle. Such exception refers to individual occasions which is not included in general list of limitations, however, obvious and inevitable interest exists for limiting protection of confidentiality. Hence, this approach gives opportunity to compare two opposing interests and on the grounds of their balance, to decide the issue of protecting or limiting confidentiality. It is true that the parties may agree on protection of confidentiality, however, if the parties' agreement has a gap, there is an objective threat that the party will not be protected due to the bad faith action of the other party which in general will influence and form negative attitude of the society towards mediation. Therefore, it is inevitable to have legislative regulation regarding specifics of confidentiality protection in mediation process. With rational consideration of opposing interests, this will simplify balancing protection of mediation confidentiality and using protected information as the evidence in court.

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