EXCEPTIONS TO CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL MEDIATION: A COMPARATIVE STUDY

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ABSTRACT

This research paper explores the significance of confidentiality in mediation, and provides an overview of exceptions to confidentiality in the USA and EU. The research objectives and questions are clearly defined, and the methodology is outlined. The literature review explores previous research in the field. Chapter II delves into the need for exceptions to confidentiality, and looks at specific exceptions in India, the USA, the EU, and UNCITRAL. Finally, Chapter III provides a summary of the discussion and offers suggestions for further research. Overall, this paper provides a comprehensive look at confidentiality in mediation and the exceptions that exist in various jurisdictions.

CHAPTER- I

INTRODUCTION

Confidentiality is said to be an essential quality of mediation as it ensures the integrity of the process and protects the interests of all mediation participants. Sekolec and Getty refer to it as a safeguard which is 'the centrepiece of the conciliation [mediation] regime'.

Mediation is a process where parties work with a neutral third party, known as a mediator, to negotiate a resolution to a dispute. UNCITRAL defines mediation as "a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons ("the mediator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute."[1]Confidentiality is critical to the success of mediation, as it allows parties to communicate freely and without fear of reprisal.

Confidentiality is a critical element of mediation and essential for the advancement of this dispute-resolution method. According to Article 7 of the Directive, the mediator is not obligated to testify about the mediation process in subsequent legal proceedings between the parties, which guarantees the confidentiality of communications and documents associated with the process. However, two exceptions exist to this rule. The first exception is if there is a need for public policy consideration in each member state, specifically to protect the best interests of children or to prevent harm to an individual's physical or psychological integrity. The second exception is if it is necessary to disclose the content of the mediation agreement to implement or enforce it. The Directive does not prohibit member states from adopting more stringent measures to protect the confidentiality of mediation.[2]

It is further argued that the ability of mediators to uphold the appearance of objectivity in a procedure based on open and honest communication is largely attributable to the confidentiality obligation that all participants, including the mediators, are required to uphold as well as the

[1] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018.
[2] Thomas Gaultier, *Cross-Border Mediation: A New Solution for International Commercial Dispute Settlement?*, 26 NYSBA INTERNATIONAL LAW PRACTICUM 38 (2013).

fact that mediators are presumptively not allowed to testify in court regarding events that took place during their mediations.

The concept of confidentiality in mediation is multi-faceted and encompasses both internal and external dimensions. The internal dimension pertains to the regulation of information flows within mediation and becomes relevant when a mediator uses caucusing, which refers to private sessions with individual parties. Mediators can manage internal confidentiality in one of two ways: by adopting the "open communication" approach or the "in-confidence" approach. The former assumes that no information is confidential to other mediation participants unless restricted by the relevant parties, while the latter treats all information disclosed privately as confidential unless the disclosing party indicates otherwise. The external dimension relates to confidentiality towards third parties, forbidding participants from disclosing information from the mediation to non-participants, except in cases permitted under subjective or objective exceptions to the confidentiality principle.

A specific subcategory of the external dimension of confidentiality pertains to a court or an arbitral tribunal and the disclosing of mediation information in subsequent litigation or arbitration proceedings. The distinction between the internal and external dimensions of confidentiality is recognized in various regulations, including the European Code of Conduct for Mediators and the UNCITRAL Model Law. The regulation of confidentiality in the EU Directive is limited to the insider/court relationship only, as specified in Article 7, which provides that mediators and those involved in the administration of the mediation process cannot be compelled to give evidence in subsequent civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process. However, two exceptions to this principle exist: (i) where it is necessary for overriding considerations of public policy, particularly to ensure the protection of the best interest of children or to prevent harm to the physical or psychological integrity of a person, and (ii) where disclosure of the content of the agreement resulting from mediation is necessary to implement or enforce that agreement. The Directive allows Member States to enact stricter measures to protect the confidentiality of mediation. Although the Directive does not impose an express duty to keep mediation information confidential, such an obligation can be inferred from the

provisions of the Directive, particularly in relation to the mediator.[3]

Most literature and contemporary mediation practice agree with the confidentiality principle in mediation, but it is not universally accepted as essential and has limitations.

The mediation process may not always need anonymity, according to Reich, who also claims that individuals don't always follow this rule.[4] Moreover, there are certain limitations to the extent of confidentiality in mediation. Once information is disclosed during mediation and becomes known to the opposing party, it cannot be retracted and may be used strategically. This false sense of confidentiality may even lead to unethical or illegal behavior and undermine the credibility of the mediation system. It is possible that a promise of confidentiality could encourage participants to engage in misleading or deceptive conduct. In such cases, courts have been willing to provide exceptions to the principle of confidentiality to prevent such behavior from being protected.

Balancing the public interest in maintaining mediation confidentiality with the principle of access to evidence in legal proceedings is important. The integrity of the mediation process should not be undermined by confidentiality provisions that provide a safe haven for participant wrongdoing or injustice. Despite confidentiality provisions, courts may grant interlocutory injunctions to protect fundamental rights and prevent abuse of the mediation process. In many jurisdictions, mediation disclosure is generally not ordered unless a court determines that a competing public interest outweighs the importance of maintaining the integrity of the mediation for participants and public confidence in the mediation process.

This principle is expressed in s 6(b) of the UMA which provides an exception to confidentiality protection where, "in relation to evidence sought to be admitted in criminal proceedings or in relation to a claim to set aside the mediated settlement, evidence is not otherwise available and the need for the evidence outweighs the interest in protecting confidentiality."[5] With this clause, privilege is being treated with caution, and it is intended to strike a balance between conflicting demands for public policy. In a similar vein, Article 7 of the European Directive on Mediation

[3] Rafal Morek, *Nihil silentio utilius: confidentiality in mediation and its legal safeguards in the EU Member States*, 14 ERA FORUM 421 (2013).
[4] J Reich, *A Call for Intellectual Honesty: a Response to the Uniform Mediation Act's Privilege Against Disclosure* 197, JOURNAL OF DISPUTE RESOLUTION (2001).
[5] S.6, Uniform Mediation Act, 2002 (USA).

states that confidentiality must be weighed against public policy considerations and the necessity to confirm the existence of a settlement agreement.[6]

This paper looks at the exceptions to confidentiality in mediation. The first part looks at the significance of confidentiality in mediation, overview of exceptions to confidentiality in the USA and EU, research objectives, research questions, research methodology and literature review. The second part looks at the need for exceptions to confidentiality and way in which exceptions to confidentiality have been carved out in India, USA and EU and UNCITRAL. The third part looks at balancing the public interest by favouring mediation versus exceptions to confidentiality. Finally, the last part of the paper concludes the entire discussion and suggestions have been provided in this regard.

RESEARCH OBJECTIVES

1. To assess and analyse the need for exceptions to confidentiality in International Commercial Mediation.

2. To compare and analyse the contours of exceptions to confidentiality in India, USA and the European Union.

3. To assess and anlyse balancing public interest in maintaining confidentiality versus availability of evidence.

RESEARCH QUESTIONS

1. What are the specific carve-outs for exceptions to confidentiality in the USA, European Union, and India with regards to International Commercial Mediation?

1.1. Why is there a need for exceptions to confidentiality in International Commercial Mediation?

1.2. How can confidentiality be balanced with the need for the availability of evidence in International Commercial Mediation?

[6] European Parliament and Council 2008/52/EC, art. 7, 2008 O.J. (L 136) 3,8.

RESEARCH METHODOLOGY

While undergoing the present research, I have resorted to 'doctrinal' methodology of research, as my research is mostly based on examination of theoretical aspects based analysis. Simultaneously, to have a better understanding of the concept, I have also referred comparative methodology.

CHAPTER: II

EXCEPTIONS TO CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL MEDIATION

This chapter begins with analysing the need for carving out exceptions to confidentiality in mediation. The next part deals with a comparative analysis of the way in which these exceptions have been carved out in USA, European Union and India.

The need for exceptions to confidentiality in mediation has been recognised in various situations, such as cases involving threats of harm or abuse, criminal activity, and public safety concerns. For instance, in cases where a mediator learns of ongoing abuse or neglect of a child[7], the mediator has a legal obligation to report the situation to the authorities. Similarly, suppose a mediator learns of a client's plans to commit a crime or harm others. In that case, the mediator may have a duty to disclose the information to the appropriate authorities to prevent harm.

In addition, exceptions to confidentiality may be necessary to address situations where the integrity of the mediation process is compromised. For instance, if one party engages in fraudulent or deceptive conduct during the mediation, the other party may need to seek judicial intervention to invalidate the agreement. In such cases, the court may require the mediator to testify or produce records related to the mediation process to determine the validity of the agreement.

Moreover, exceptions to confidentiality may be necessary to protect the public interest in certain cases. For instance, if a dispute involves matters of public safety or national security, the mediator may need to disclose relevant information to the authorities to prevent harm to

[7] Rama Aggarwal vs. PIO, Delhi State Legal Service Authority, CIC/SA/A/2015/000305.

the public. Similarly, if a dispute involves environmental or health hazards, the mediator may need to disclose relevant information to the appropriate agencies to protect the public.

The need for exceptions to confidentiality in mediation is recognized by many state laws and codes of ethics for mediators. For instance, the Model Standards of Conduct for Mediators adopted by the American Bar Association provide that "a mediator may reveal confidential information when permitted or required by law or when necessary to prevent physical or emotional harm to any person or to prevent a crime." Similarly, many states have enacted laws that provide for exceptions to confidentiality in cases involving threats of harm, abuse, or criminal activity.[8]

UNCITRAL MODEL

Article 9 of the UNCITRAL Model Law requires confidentiality for all information related to conciliation proceedings.[9] Article 9 says “If a party to a mediation provides the mediator with information about the dispute, the mediator is allowed to share the details of that information with other parties involved in the mediation. However, if a party specifically asks the mediator to keep certain information confidential, then the mediator is not allowed to share that information with any other party.”

Article 10(1) further elaborates on the inadmissibility of evidence in subsequent litigation or arbitration by detailing the following categories of communication: (a) invitations to engage in conciliation or a party's willingness to participate, (b) views or suggestions made by a party regarding settling the dispute, (c) statements or admissions made by a party during the conciliation process, (d) proposals made by the conciliator, (e) a party's indication of willingness to accept a settlement proposal from the conciliator, and (f) documents prepared solely for the purpose of the conciliation proceedings.[10] This article is to be read with article 7 of UNCITRAL mediation rules which provides for “the parties must not rely on or introduce as evidence in arbitral or judicial proceedings:

[8]American Bar Association Model, Standards of Conduct for Mediators(2005).
[9] Art. 9, UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018.
[10] Art. 10, UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018.

(a) An invitation by a party to engage in mediation or the fact that a party was willing to participate in mediation;

(b) Views expressed, or suggestions made by a party in the mediation in respect of a possible settlement of the dispute;

(c) Statements or admissions made by a party in the course of the mediation;

(d) Proposals made by the mediator or the parties;

(e) The fact that a party had indicated its willingness to accept a proposal (or parts thereof) for settlement made by the mediator or the parties; and

(f) A document prepared primarily for purposes of the mediation."

The commentary provides that there are exceptions to article 11 even if its construed narrowly to mean legislation. However, such orders by a court (potentially combined with a threat of sanctions, including criminal sanctions, directed to a party or another person who could give evidence referred to in paragraph 1), are normally based on legislation, and certain types of such orders are exceptions to the rule.

INSTITUTIONAL RULES

The Mediation Rules of the International Chamber of Commerce (MLICC), 2014

Article 9(1)(b) provides exception to confidentiality. *"Parties can disclose information to the extent that is required by applicable law or necessary for purpose of its implementation or enforcement."*[11]

Article 10(5) of MLICC lays down exception regarding pre- existing information. It provides immunity to the mediators and the institution for any act or omission in relation to the proceedings to the extent of applicable law.[12]

[11] Art.9(1), The Mediation Rules of International Chamber of Commerce.
[12] Art.10(5), The Mediation Rules of International Chamber of Commerce.

EXCEPTIONS TO CONFIDENTIALITY: STUDY OF USA

In numerous legal systems, the general rule is that disclosure of mediation communications is not permitted unless a court determines that there is a competing public interest that is significant enough to outweigh the preservation of the mediation's integrity for participants and public trust in the confidentiality of mediation communications. Section 6(b) of the Uniform Mediation Act (UMA) reflects this principle by providing an exemption to confidentiality protection when evidence sought to be presented in criminal proceedings or in a claim to overturn the mediated settlement is not available by other means and the need for the evidence surpasses the interest in protecting confidentiality. This provision indicates a conditional approach to privilege and the intention to balance competing public policy demands.[13]

In general, exceptions to confidentiality are interpreted narrowly to ensure that any disclosure is proportional to the exception. This means that only the part of the mediation communication that is necessary for applying the exception is disclosed or admitted as evidence. The principle of proportionality is emphasised in section 6(d) of the UMA. According to section 6(b) of the UMA, in-camera hearings are available for a party to establish the basis for certain exceptions. This approach tries to maintain confidentiality initially while also preventing parties from misusing it.

The exception to confidentiality in mediation regarding pre-existing information is based on the principle that such evidence should not be excluded from admissibility just because it is disclosed during mediation. This means that parties cannot use mediation as a means to hide discoverable information, as doing so would amount to misusing the mediation process.[14]

This has been recognised in UMA as well as MLICC.[15]

Model Standard of Conduct for Mediators

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association’s Section of Dispute Resolution, and the Association for Conflict Resolution.

[13] S. 6, Uniform Mediation Act, 2005.
[14] S. 5, Uniform Mediation Act, 2005.
[15] Art.10(5), The Mediation Rules of International Chamber of Commerce.

The preamble of the code recognises impartiality in the following words *"Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision-making by the parties to the dispute."*

It provides two exceptions: One is agreement by the parties and the other is the application of law.

Standard V on confidentiality says: *"A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law."*[16]

GROUNDS FOR EXCEPTIONS TO CONFIDENTIALITY IN USA

1. Necessary for a criminal Proceeding:

S. 6(b)(1) of UMA says about losing the privilege against disclosure in a court proceeding where evidence is to be adduced in felony proceedings.

The circuit US Court of appeal held that confidentiality attached to a mediation based in Texas "will have to give way to the public interest in the administration of criminal justice."[17]

Similarly, in Rinaker v. Superior Court[18], the necessity of evidence for defense of a criminal matter was given way over a mediation communication.

2. When there was a coercion or fraud in reaching a settlement

This has been laid out in section 6(b)(2) of UMA in implied terms that a mediation communication could be admitted to "prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation close."[19]

In the in the scenarios the court is delicately balancing the rights to confidentiality versus the need to protect the process of mediation and to ensure that it is fair and credible.

[16] *Supra* note 14.
[17] In Re Grand Jury Subpoena Dated December 17,1996, 148 F.3d 487.
[18] Rinaker v. Superior Court, 62 Cal.App. 4th 155.
[19] S. 6(2)(b), Uniform Mediation Act, 2005.

The first case with respect to this is Princeton insurance company v. Vergano,[20] In this particular case, the plaintiff accused the surgeon and the hospital of improper surgery that caused pain and impairment. The defendants sought to revoke a mediated settlement agreement, alleging fraud by the plaintiff. Moreover, the defendants demanded the mediator to testify as a witness about the statements made by the plaintiff and her counsel at the mediation regarding her pain and impairment. However, the court rejected the defendant's request to call the mediator as a witness based on the parties' agreement to maintain confidentiality. The agreement clearly stated that neither party would attempt to compel the mediator's testimony against the other. The court emphasized that upholding mediation confidentiality was of paramount public policy interest, which outweighed the need to prevent fraud.

Re Hillard Development Corp v. Griswold.[21]

This case pertained to a bankruptcy issue, wherein the court held that despite the defendant's unethical conduct, according to a rule of the local Bankruptcy Code, the statements made by the defendant's attorney during the mediation were admissible. Even though the defendant's dishonest behavior went against the principles of good faith resolution of disputes, the court did not allow the admission of any communication made during the mediation.

Federal Deposit Insurance Corporation v. White[22]

The defendants in this case sought to nullify a mediated settlement agreement, claiming that they were coerced into it by the plaintiff's threats of criminal prosecution. The magistrate allowed the defendants to present evidence of statements made during mediation, as the court found that there was no mediation privilege under federal law, citing the case of In Re Grand Jury Subponea. Although the court admitted the mediation communications into evidence, it ultimately rejected the defendants' argument and upheld the settlement agreement, finding that their claims of coercion were not credible.

In Olam v. Congress mortgage company [23], According to the court's decision, the mediator was required to provide testimony about the mediation session, particularly about the plaintiff's ability to understand the settlement agreement terms. Although California law established a

[20] Princeton insurance company v. Vergano, 883 A.2d 44 (Del. Ch 2005).
[21] Re Hillard Development Corp v. Griswold[21], 221 B.R.282 (S.D. Fla. 1998).
[22] Federal Deposit Insurance Corporation v. White, 1999 W.L. 1201793 (N.D. Tex. 1999).
[23] Olam v. Congress mortgage company, F.Supp. 2d at 1131-1132.

mediator's privilege, the court conducted a balancing analysis to determine whether there were circumstances that should compel the mediator to testify. The court used a two-stage analysis based on the Rinaker case, which involved determining the nature of the mediation communication testimony in an in-camera proceeding and assessing whether the testimony's importance and benefit outweighed the confidentiality protections. The court concluded that admitting the mediator's testimony would not significantly harm confidentiality protections since the mediator would not reveal specific words used during the mediation. The court also found that the mediator's testimony would be of sufficient value to justify the potential harm caused by its use and disclosure. As a result, the court unsealed the mediator's in-camera testimony.

In a subsequent case of Eisendrath[24], the court distinguished the Olam Case. The court said that because they oleum mediator was asked to testify on an issue deemed peripheral to the agreement the participants competence on the other hand is Eisendrath. testimony was specifically about what was said about the agreement terms reached in mediation.

3. In order to establish the existence or terms of a settlement agreement:

Section 4(c) of UMA[25] talks about privilege against disclosure. States that "evidence of information that is otherwise admissible or subject to discovery does not become inadmissible of protected from discovery solely by reason of its disclosure or use in a mediation.

There are two cases in this regard:

Rojas v. Superior Court[26]

The California Supreme Court interpreted the California Evidence Code broadly and concluded that any materials produced or created during or in preparation for mediation are shielded from disclosure or discovery. In a case where two lawsuits were involved and the first one was settled through mediation, several documents, reports, and photographs were submitted during mediation. The plaintiff in the second lawsuit requested access to these materials, but the defendant argued that they were privileged under the California Evidence Code. The California Supreme Court disagreed and held that any writing that is produced exclusively for mediation

[24] Eisendrath v. Superior Court, 109 Cal. App 4th 351 (2nd Dist. 2003)
[25] S. 4, Uniform Mediation Act, 2005.
[26] Rojas v. Superior Court, 33 Cal 4th 407 (S. Ct. Cal. 2004).

is protected and confidential. The court stated that other evidence, such as witness statements, would not be protected, but only the record that is produced or created particularly for the mediation. The court's decision was not based on the Uniform Mediation Act.

In Doe One v. Superior Court,[27]

The court in this case upheld the principle of mediation confidentiality and prohibited the public disclosure of information related to threads accused of child sexual molestation. The court upheld the strong legislative policy of protecting mediation confidentiality, which was established in the Rogers case. It did not matter that the archdiocese was attempting to disclose its own records prepared for the mediation, as the court concluded that the evidence code prevented any party from disclosing such records. However, the court explicitly stated that its decision did not prevent the archdiocese from releasing the underlying personal information about the priests to the public, in accordance with Section 4(c) of the UMA.

4. When necessary to impose sanctions or discipline counsel in connection with a mediation proceeding:

Section 6(a)(6) of UMA[28] provides where mediation communication is "offered to prove or disprove a claim or complaint of professional misconduct for malpractice" filed against the party representative and based upon conduct occurring during the meditation.

In this context the code must balance 2 important values protecting the confidentiality of mediation communication verses ensuring that council complied with standards of conduct and ethical strictures.

In Re Daley[29], In a personal injury case that was mediated, the court ruled that the issue of attendance of an insurance company employee at the mediation, which remained unresolved, could be presented as evidence and taken into account when deciding whether to impose contempt sanctions.

[27] Doe One v. Superior Court, 132 Cal. App. 4th 1160(Ct. App. 2005).
[28] S. 6(a)(6), Uniform Mediation Act, 2005.
[29] In Re Daley, 29 S.W.3d 915 (Ct.App. Tex 2000).

STUDY OF EUROPEAN UNION (EU)

Confidentiality in the mediation process can cover various types of information, such as factual statements, concessions, offers, and other details shared by parties in a joint session. It can also include information provided to the mediator privately through phone calls, emails, or private sessions, documents created for the mediation, the mediator's notes, observations about participants' behaviour and conduct during mediation, as well as reasons for failing to reach an agreement.[30]

The 2004 draft EU Directive had a similar list of protected communications but the final version of the Directive had its provisions significantly shortened and weakened. The confidentiality rule in Article 7(1) of the Directive only covers "information arising out of or in connection with a mediation process". Many national mediation laws in EU Member States also have broad terms, such as "any and all data and information obtained in a mediation process", and do not provide specific examples of what communications are protected under the mediation privilege.[31]

Moreover, the EU Directive does not clearly safeguard written evidence connected to the mediation process. In some EU Member States, the Directive's Article 7(1), which states that "mediators shall not be compelled to give evidence," has been incorporated as a rule against forcing mediators to testify as witnesses. However, this does not address the protection of documentary evidence. In Italy, the lack of clarity about the protection of such evidence has been identified as a problematic matter.

Policymakers must consider two premises when deciding the extent of confidential information in mediation regulations. Firstly, they need to encompass the various means of storing and communicating information in the mediation process. This can be achieved by utilizing broad legal phrases like those mentioned earlier. Secondly, policymakers should avoid creating an incentive for a party to use mediation solely to block information and evidence in later arbitration or litigation. The UNCITRAL Model Law addressed this issue in Article 10(5), which specifies that evidence admissible in judicial or arbitral proceedings remains admissible

[30] Confidentiality in International Mediation - ProQuest, https://www.proquest.com/openview/75dd60a6be109b61e770f9927a595fea/1?cbl=25210&pq-origsite=gscholar&parentSessionId=Vml2MO0fhSpZ8r5ELghGAFu1hQ0cFXAq9AMjA9Kd6wk%3D (last visited May 12, 2023).
[31] European Parliament and Council 2008/52/EC, art. 7, 2008 O.J. (L 136) 3,8.

even if it was used in conciliation.[32] However, the Directive and most national mediation laws in the Member States do not address this matter.

Many countries have a rule that parties can jointly waive confidentiality in mediation proceedings. The EU Directive also allows this, stating that confidentiality can be waived "unless the parties agree otherwise."[33] This means that even if a mediator objects to giving evidence in subsequent legal proceedings if the parties agree that the mediator should testify, the mediator has no grounds to refuse to give evidence under the Directive.

Enforcement of Mediation Agreement: There are controversies related to the exception that confidentiality must be relieved to the extent necessary to enforce a mediation settlement. The UNCITRAL Model Law allows for this exception, stating that confidential information "may be disclosed or admitted in evidence for the purposes of implementation or enforcement of a settlement agreement."[34] The EU Directive has a similar exception, allowing disclosure "where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement."[35]

Public Policy Exception: The most problematic and needed exception to the confidentiality principle relates to the overriding interest of public policy. Confidentiality must be weighed against the needs of public safety and security and the protection of the most vital interests of individuals. The EU Directive allows for this exception, stating that confidentiality is relieved "where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person."[36] However, several EU Member States have decided not to include this exception or to replace it with other narrowed down exceptions. The UNCITRAL Model Law leaves it to individual states to determine acceptable exceptions to the confidentiality principle.

[32] Art. 10(5), UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018.
[33] Art. 7(1), European Parliament and Council 2008/52/EC, art. 7, 2008 O.J. (L 136) 3,8.
[34] Art. 10(3), UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018.
[35] Art. 7(2), European Parliament and Council 2008/52/EC, art. 7, 2008 O.J. (L 136) 3,8.
[36] *Id.*

STUDY OF INDIA

In India, the Arbitration and Conciliation Act of 1996 was enacted in accordance with the UNCITRAL Model Law. Section 75 of this Act mandates that the conciliator and the parties involved must maintain the confidentiality of all matters related to the conciliation process, including the settlement agreement. Disclosure is permitted only if it is necessary for the purpose of implementation and enforcement. In India, the terms "mediation" and "conciliation" are often used interchangeably.[37]

Indian courts and quasi-judicial bodies have emphasized the crucial role that confidentiality plays in mediation. The case of Moti Ram (D) Thr. L.Rs. and Anr. vs. Ashok Kumar and Anr[38]. is an interesting example of this. In this case, the Supreme Court of India referred the matter for mediation to a Mediation Centre in an attempt to resolve the dispute between the parties. The mediator's report, which mentioned the various settlement proposals made by the parties, was subsequently presented to the court. The Supreme Court stressed that mediation proceedings are strictly confidential and observed that if successful, the mediator should send the settlement agreement signed by the parties to the court without revealing what transpired during the mediation process. If unsuccessful, the mediator should simply state that mediation has been unsuccessful. The Supreme Court believed that any disclosure of the proceedings would destroy the confidentiality of the mediation process.

The Central Information Commission (CIC) ruled in the case of Rama Aggarwal vs. PIO[39], Delhi State Legal Service Authority that information related to mediation proceedings cannot be obtained under the Right to Information Act, 2005. The CIC explained that information related to negotiation, mediation, conciliation, and counseling is exempt from disclosure under the Act because it is personal and given in a fiduciary capacity. Furthermore, no public interest is established in disclosing such information, while protecting confidentiality helps to promote mediation.

Several High Courts in India have also established rules that apply to their jurisdictions. The Delhi High Court's Mediation and Conciliation Rules, 2004, for example, mandate that parties maintain confidentiality regarding events that occur during the mediation process and prohibit

[37] S. 75, The Arbitration and Conciliation Act, 1996.
[38] Moti Ram v. Ashok Kumar and anr. [2010] 14 (ADDL.) SCR 809.
[39] Rama Aggarwal vs. PIO, Delhi State Legal Service Authority, CIC/SA/A/2015/000305.

parties from relying on or introducing such information in other proceedings.

Overall, India's laws adequately ensure confidentiality in mediation in accordance with international standards. It is particularly encouraging that the Indian judiciary has bolstered the role of confidentiality in mediation. This development is likely to foster the growth of mediation in India.

CHAPTER- III

CONCLUSION

While confidentiality is an essential principle of mediation, there are situations where exceptions to confidentiality may be necessary to protect the interests of the parties, the mediator, and the public. The need for exceptions to confidentiality in mediation is recognized by many state laws and codes of ethics for mediators, and the balancing of confidentiality and exceptions is an ongoing process in the development of mediation law and practice in the USA.

There are many tensions created when mediation competes with other vital interests and justify disclosures or use of mediation communications. While the uniform mediation act could add some consistency and predictability in judicial decisions on those disputes, few states have adopted it thus far. As a result, outcomes vary between jurisdictions because residential rules are in the root of the rings. Since mediation confidentiality disputes are relatively new mediators council and clients can expect fuller development of the case law in this area overtime. Whenever and under whatever statutory schemes they arise full, however the courts will continue to be faced with findings the right balance between core issue of mediation and public policy.

In conclusion, confidentiality is a cornerstone of mediation and plays a crucial role in the success of the process. However, there are certain exceptions to confidentiality that need to be taken into consideration. The exceptions to confidentiality in mediation are broadly categorized into legal and ethical exceptions, which include mandatory reporting requirements, prevention of harm, and public policy considerations.

These exceptions are typically justified on the basis of public policy, the protection of human rights, or the need to enforce settlement agreements. Understanding these exceptions is crucial for mediators, parties, and practitioners alike, as it can help them navigate the complexities of

mediation and ensure that confidentiality is respected to the fullest extent possible. Overall, it is important for jurisdictions to strike a balance between the need for confidentiality and the need for transparency and accountability in order to maintain the integrity and effectiveness of the mediation process. Through careful consideration and implementation of appropriate measures, mediation can continue to serve as a valuable tool for resolving disputes and promoting peaceful resolution of conflicts. It is essential for mediators and parties to understand these exceptions and ensure that they comply with the relevant laws and ethical guidelines. In practice, the use of exceptions to confidentiality should be limited to situations where there is a clear need to protect the parties or the public interest. Furthermore, it is imperative that these exceptions are applied in a way that minimizes the impact on the integrity and effectiveness of the mediation process. As the field of mediation continues to evolve and expand, it is important for mediators and policymakers to work together to develop clear guidelines and standards for handling exceptions to confidentiality in mediation. By doing so, we can ensure that mediation remains a trusted and effective means of resolving disputes in a confidential and respectful manner.