CONFIDENTIALITY IN MEDIATION AND ARBITRATION

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ABSTRACT

Maintaining confidentiality is critical to the mediation process and reaching an agreement. Both parties must feel comfortable disclosing sensitive information in order to determine how to best meet their respective needs and interests for the session to be fruitful. This is true not only during sessions with all parties present, but also during any private caucuses between the mediator and one or more parties. A mediator will try to encourage openness and candour, especially in private caucuses, because information provided in confidence is often the most helpful in forming a settlement that meets the interests of all parties.

The purpose of this article is to examine the many facets of confidentiality in mediation and the concepts of mediation and arbitration confidentiality. The article describes in detail the numerous parties obligated to observe Confidentiality and the information that can be protected under the Confidentiality Principle. The paper also endeavours to comprehend the Confidentiality protection in other countries and institutional regulations. The author has finally described the circumstances under which the Confidentiality principle may be violated.

INTRODUCTION

When describing mediation to the general public, confidentiality is highlighted. Despite the fact that some mediators and arbitrators assume parties who choose mediation cherish privacy, others may question if it is in everyone's best interest to keep the process confidential. Frequently, secrets are kept in order to minimise tensions and find peaceful solutions to problems. Despite this, there are still many misunderstandings regarding what it takes to keep secrets. While there are certain privacy protections at the state and federal levels, they are not reflected in the legislation of individual states or municipalities. In addition, many statutes do not clearly grant the court the authority to override confidentiality.[1] Despite this, mediators commonly assert that all communications during mediation are private. This oversimplified promise of anonymity impedes the parties' freedom to self-determination by preventing them from collecting the legal information they require to make informed judgments. obtaining a patient's informed consent Like the practise of medicine, mediation is founded on the notion of patient autonomy. The concept of informed consent illustrates the overlap between "these two key elements" of mediation (confidentiality and autonomy).[2]

In arbitration, the terms "privacy" and "confidentiality" were used interchangeably until the middle of the twentieth century. Privacy refers to the fact that no one else is permitted to attend arbitral discussions or hearings, whereas confidentiality refers to the concealment of certain information. Due to the private nature of arbitration processes, parties are typically not obligated to maintain confidentiality. In recent years, the myth that arbitration sessions are strictly confidential has been discredited. Despite this, arbitration's confidentially is a major selling point for this method of resolving corporate disputes.[3]

PURPOSE AND FUNCTION OF PRINCIPLE OF CONFIDENTIALITY IN ARBITRATION& MEDIATION ELUCIDATE ITS ROLE IN MAINTAINING THE NON-

[1]CATHERINE A. ROGERS, ROGER P. ALFORD, THE FUTURE OF INVESTMENT ARBITRATION 11 (OUP, 2009).
[2]Id.
[3] Freedman "&Prigoff, Confidentiality in Mediation: The Need for Protection", 2 OHIO ST. J. DISP. RESOL 37, 37-39 (1986).

DISCLOSURE OF SENSITIVE INFORMATION DURING THE DISPUTE RESOLUTION PROCESS

Since mediation is a kind of out-of-court dispute resolution, it is built on the principle of confidentiality. The parties have chosen mediation as their preferred dispute resolution method for reasons of secrecy. Therefore, countries with laws protecting the confidentiality of the mediation process are more likely to use it to resolve disputes. Article 7 of the European Union Directive specifies expressly this privacy policy.[4]

Given that mediation is supposed to be confidential, Member States must ensure that neither mediators nor those involved in the administration of the mediation process are required to testify in civil and commercial judicial proceedings or arbitration about information arising out of or relating to a mediation process unless (a) it is required due to overriding public interests or (b) the parties agree to testify.[5]

Confidential information is information that is not generally known and that, if made public, would not significantly impair the owner's rights, business, or social life. When disputants consider the likelihood that the information they disclosed and the documents they supplied will be used against them in the future, they may have a negative opinion of the procedure.[6]Consequently, if the principle of confidentiality is firmly established, it will be possible to contact the parties and clear up any misunderstandings.[7]

FACETS OF CONFIDENTIALITY IN THE CONTEXT OF MEDIATION & ARBITRATION

What, does the word "mediation confidentiality" mean? The idea of confidentiality is multidimensional. From a structural aspect, it is possible to separate its internal (among mediators)

[4]FREEDMAN, Confidentiality: A Closer Look, in ABA SPECIAL COMM. ON DISPUTE RESOLUTION OF THE PUB. SERVS. DIV., ALTERNATIVE DISPUTE RESOLUTION: MEDIATION AND THE LAW 68, 72 (1983).
[5]Friedman, Protection of Confidentiality in the Mediation of Minor Disputes, II CAP. U.L. REV. 181, 196-213 (1981),
[6]Protecting Confidentiality in Mediation, 98 HARV. L. REV. 441 (1984).
[7]Id.

and external (towards third parties) elements.[8]

An internal dimension governs information flows within mediation. This is especially important if the mediation process includes caucusing, or private meetings between the mediator and the opposing parties. For "internal secrecy," a mediator has two options: "open communication" or "in confidence."[9] The first assumes that all mediators have access to all relevant information, whereas the second is adjustable at the discretion of the parties. Unless otherwise requested by the disclosing party, the receiving party will keep any sensitive information secret. Each strategy has its own set of advantages and disadvantages. Even if there is no reason to reject any of the models, it is critical for the mediator to choose which model will be used in any successful mediation early on.[10]

The impartial third party's secrecy is protected on the outside of mediation. It forbids anyone who took part in the mediation from disclosing any information about what was discussed with others who were not there. The disclosure of material from the mediation in a future litigation or arbitration procedure is of particular importance as a subset of the outer element of secrecy.[11]For example, the two sentences that follow Point 4 of the European Code of Conduct for Mediators explicitly distinguish between the internal and external components of confidentiality in mediation.[12]

Unless required by law or for reasons of public policy, the mediator is restricted from sharing any information regarding the mediation, including whether it is planned to occur or has already occurred. Unless required by law, mediators are barred from disclosing to the other parties any information revealed in confidence by any party to the mediation.The UNCITRAL Model Law

[8]"Folberg, A Mediation Overview: History and Dimensions of Practice, I MEDIATION Q. 3, 7 (I983)."
[9]"R.J.Matthews, Do I have to say more? When mediation confidentiality clashes with the duty to report, 34(1) Campbell Low Rev. 205–227 (2011)."(hereinafter "Matthews")
[10]Kevin Gibson, Confidentiality in Mediation: A Moral Reassessment, 1992 J. DISP. RESOL. 25 (1992).
[11]"A.L.H Peterson, When mediation confidentiality and substantive law clash: an inquiry into the impact of in re marriage of Kieturakis on California's confidentiality law, **8**(1) PEPPERDINE DISP. RESOLUT. LAW J. 199–219 (2008), http://digitalcommons.pepperdine.edu/drlj/vol8/iss1/7." (hereinafter "Peterson")((hereinafter
[12]Id.

takes into account both internal and external dimensions of secrecy, with a focus on "open communication."[13]

> "Article 8 (Disclosure of information)
>
> When the conciliator receives information concerning the dispute from a party, the conciliator may disclose the substance of that information to any other party to the conciliation. However, when a party gives any information to the conciliator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the conciliation."
>
> "Article 9 (Confidentiality)
>
> "Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement. (…)"

In terms of privacy, the EU Directive regulates only the "insider/court" interaction.[14]

> "Article 7 (Confidentiality of mediation)
>
> 1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:
>
> (a) 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; or

[13]Id.
[14]Id.

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation."

Dimensions on the inside and outside, that is, disclosures made in the absence of litigation or arbitration, are not addressed in the Directive. Each member state must come to its own conclusions about the matters raised above.[15]

This Directive's limited confidentiality provisions are best shown by the fact that it does not impose an express duty to protect the confidentiality of information relating to mediation. However, the duty of the mediator is implicit in the wording of the Directive.[16]

WHETHER THERE IS AN OBLIGATION TO RESPECT CONFIDENTIALITY IN MEDIATION? IF YES, WHO BEARS THE LEGAL OBLIGATION TO UPHOLD CONFIDENTIALITY IN THE MEDIATION PROCESS?

Even if the mediation session is secret, the information communicated is not always off-limits to anybody who is not directly participating in the mediation. This comprises their support staff in addition to the parties, mediators, attorneys, consulted specialists, and judges (in judicial or court-annexed mediation).[17]

According to Article 7(1) of the EU Directive, only "mediators [and] those participating in the administration of the mediation process" are required to maintain confidentiality during the mediation. The parties to a mediation are not (at least not technically) required by the Directive to maintain confidentiality. This regulatory approach creates grave issues.[18] In terms of confidentiality issues, the parties themselves constitute the biggest threat, not the mediator (especially as a potential witness in legal proceedings). The majority of the time, they don't even

[15]"J. Sekolec& M. Getty, The UMA and the UNCITRAL model rule: an emerging consensus on mediation and conciliation, 1 J. DISP. RESOLUT. 175–196 (2003)."
[16]Id.
[17] K. Reichert, Confidentiality in international mediation, 59(4) DISPUTE. RESOLUT. 60 (2005).
[18]Id.

require a mediator, and they may use what they learned in mediation as evidence in court or arbitration.[19] The UNCITRAL Model Law has a far greater reach than the Directive. Article 10(1) stipulates that secrecy must be maintained between "a party to the conciliation proceedings, the conciliator, and any third party, including those administering the conciliation processes."[20]

It is important to note that mediation legislation has followed a consistent trend in several nations. In Bulgaria, for instance, "mediation proceeding participants" are required. Even if the primary regulation in Articles 14(1) and (2) is directed at the mediator, the requirements of Article 14(3) of the 2011 Croatian Mediation Law bind the parties and everyone who has participated in any capacity in mediation activities. However, this is not true in all EU member states. Both Polish and Czech regulations safeguard mediators' secrecy.[21]

WHETHER INFORMATION IS PROTECTED FROM DISCLOSURE PURSUANT TO THE PRINCIPLE OF CONFIDENTIALITY?

Notes, observations on participants' behaviour, and mediation-related documents may be protected. In a combined session, participants exchanged factual assertions, concessions, and offers.[22]

Article 9 (Confidentiality) of the UNCITRAL Model Law requires each party to maintain confidential "any conciliation-related information." Article 10(1) outlines which evidence cannot be used in later litigation or arbitration.[23]

In 2004, EU members proposed a rule to address many of the same problems.The Directive's requirements were weakened. Article 7(1) of the Directive protects "mediation-related content." Most national mediation laws in EU Member States do not provide a list of specific examples of protected communications, instead relying on broad terms such as "any and all data and information obtained in a mediation process" or "the facts disclosed during the mediation or

[19]"URY, W.L.: THE THIRD SIDE WHY WE FIGHT AND HOW WE CAN STOP (Penguin Books, New York, 2000)."
[20]Id.
[21]Id.
[22]"E. E. Deason, Enforcing mediated settlement agreements: contract law collides with confidentiality, **35**(1) UC DAVIS LAW REV. 33–102 (2001)."
[23]Id.

otherwise became known" (the facts that were disclosed or otherwise known during the mediation).[24]

The Directive also prohibits preserving mediation-related text. Several Member States have imposed an evidentiary restriction based on Article 7(1) ("Mediators should not be coerced to produce testimony"). Decree 28/2010 legal evidence includes security flaws.[25]

Legislators should keep two ideas in mind while regulating the release of sensitive information. There are various communication and data storage possibilities during mediation. This is conceivable with legal structures like those indicated above. It's important not to encourage one side for attending to mediation to prevent the other from exploiting information and evidence in litigation and arbitration.[26]

WHETHER CONFIDENTIALITY OF MEDIATION AND ARBITRATION IS PROTECTED? IF SO, HOW CONFIDENTIALITY IS BEING PROTECTED?

The principles of the organisations that handle mediation cases already have provisions in place with regards to confidentiality, but the parties are free to set their own requirements in a mediation agreement if they so choose. In general, the principles of the organisations that handle mediation cases already have provisions in place with regards to confidentiality. For example, according to the ICC Mediation Rules, the mediation process itself (but not the manner in which it is occurring, has occurred, or will occur) is confidential and private even if the parties have agreed otherwise or the applicable law requires it. This is the case even if the parties have not reached an agreement. Therefore, the notes from the mediation that were taken by the mediator or by the other party cannot be used as evidence in any later intervention, prosecution, or similar actions unless one of the parties independently acquires them. During the mediation process, any confirmations, recommendations, or other communications regarding the settlement that are made by any party should have the same amount of weight.[27]

[24]Peterson, supra note 11.
[25]Matthews, supra note 9.
[26]"Note, Protecting Confidentiality in Mediation, 98 HARV. L. REV.441,444- 45 (1984)."
[27]Id.

CONFIDENTIALITY IN OVERSEAS JURISDICTIONS

While researching the major nations might provide insight into the nature and breadth of secret arbitration, it can also reveal the diverse solutions each country has taken to this issue. Through an examination of key jurisdictions such as the United States, the United Kingdom, and Singapore, the present trend will be demonstrated along with the anticipated convergence or, at the very least, a perspective on the subject of secret arbitration. This part will begin with a review of statutory provisions pertinent to secrecy protection, followed by a consideration of the comparable judicial pronouncements of the eight key nations listed before.[28]

The United States America

The Federal Arbitration Act (1925)[29] and the Uniform Arbitration Act (1958) are the US federal statutes that regulate arbitration in the United States (2000).20 The former is a federal statute that regulates interstate and international trade, while the latter acts as a model for local governments implementing their own arbitration regulations. However, the two aforementioned Acts do not address arbitration confidentially in considerable detail. Other nations, though, have taken a more thorough approach. According to the revised Florida Arbitration Code,[30] an arbitrator may issue a protective order to prevent the disclosure of privileged information, trade secrets, and other information protected from disclosure to the same extent that a court could if the dispute were the subject of a civil action in Florida. In many instances, the American judicial system adopts a similar, if not harsher, stance. There is no necessity under U.S. law or the arbitration procedures and problems that arise within them that the parties keep them confidential, unless otherwise stipulated in the parties' agreement or the applicable arbitration rules. In light of the fact that neither the Federal Arbitration Act nor the Uniform Arbitration Act impose a secrecy requirement on parties in the United States, the Court's perspective on confidentiality becomes crucial.[31]

[28]Ali Khaled Qtaishat, Legal Protection of Arbitration Confidentiality: Mapping the Approaches of Prominent Jurisdictions, 147(3) EUROPEAN JORURNAL OF SCIENTIFIC RESEARCH 358, 359 (2017), https://www.europeanjournalofscientificresearch.com/issues/PDF/EJSR_147_3_10.pdf.
[29]Id.
[30] AAA, Statement of Ethical Principles 2012, https://www.adr.org/StatementofEthicalPrinciples(last accessed Nov. 22, 2022).
[31]"Lawrence E. Jaffee Pension Plan v. Household International, Inc[2004 WL 1821968 (D Colo Aug 13, 2004)]."

United Kingdom

Only England has made this requirement public. The 1996 US Arbitration Act doesn't restrict secrecy. This doesn't mean secrecy wasn't vital. Because secrecy has so many exceptions and conditions, the drafters reasoned courts should continue figuring out its effects case-by-case.[32] Lack of governmental confidentiality in the UK hasn't stopped courts from making precedents. Oxford Shipping Co. Ltd. v. Nippon YusenKaisha (The Eastern Saga)[33] established arbitration confidentiality. The judge said neither side can discuss it publicly. This article summarises three English court criteria specified in judicial pronouncements. Arbitrators can't hear similar disputes with different parties unless all parties agree. The second principle states that using arbitration to resolve a dispute imposes an implicit duty of secrecy on the parties. The 1990 Court of Appeal ruling is now binding because of arbitration.[34]

Singapore

In recent years, Singapore has heard more international arbitration disputes. 2002 saw Singapore's International Arbitration Act. Sections 22 and 23 of the 74th state's Act include vital information but don't define the secrecy duty.[35] Section 22 of the Act allows a party to request that a court case be heard in private. Section 23 restricts media coverage of some occurrences. Singapore's courts have handled cases like English courts. In MyanmaYaung Chi Oo Co Ltd v. Win Win Nu,[36] the High Court ruled that parties to arbitration have an implied responsibility of confidentiality; but, disclosure may be authorised without court permission in urgent cases. The court recognised an implied term after considering the parties' wish for confidentiality. The court found that "reasonably required" information might change throughout a lawsuit. In AAY and others v. AAZ (AAY),[37] the Court acknowledged an implied confidentiality responsibility in arbitration but ruled that the disclosure of specific arbitration-related information did not breach this duty. The court

[32] ADAM ROBB, Confidentiality and Arbitration, presentation given at 39 Essex Chamber, London (May 5, 2004), www.39essex.co.uk/docs/articles/ARO_Confidentiality_and_arbitration_talk_050504.pdf (last accessed Nov. 22, 2022).
[33] [1984] 2 Lloyd's Rep. 373.
[34] Dolling-Baker v. Merrett (CA 1990) [1991] 2 All ER 890, per Parker LJ
[35] Robert Merkin, Johanna Hjalmarsson, SINGAPORE ARBITRATION LEGISLATION: ANNOTATED (CRC Press, 2016) 187, 188.
[36] 5[2003] 2 SLR 547.
[37] 6[2011] 1 SLR 1093

agreed with the English Court of Appeal's ruling in Emmott v. Michael Wilson & Partners Ltd (Emmott),[38] noting that the ratios in the case should serve as the foundation for future growth in this field of law. The Court created two secrecy exceptions: If public interest demands it and all parties agree.[39]

Confidentiality in institutional rules

Many arbitration organisations mandate secrecy, but arbitrators and administrative employees must preserve it. Even if the regulations are precise or the arbitrator follows an ethical code, this is not always the case. Article 22.3 of the ICC Rules authorises the Arbitral Tribunal to issue protective orders at any party's request, although Appendices I and II impose requirements solely on arbitrators and ICC personnel, not on parties. The AAA's Code of Ethics for Arbitrators includes confidentiality provisions that apply to both domestic and international arbitrations, but the ICDR rules only impose confidentiality duties on arbitrators and the Administrator, and Article 37.2 states that the tribunal may make confidentiality orders.[40]

Article 30 of the LCIA Rules outlines parties' confidentiality obligation. Article 34.5 of the UNCITRAL Arbitration Rules specifies that a ruling cannot be made public without both parties' consent.[41]

Institutional Rules of the Delhi International Arbitration Centre[42] and the Mumbai Centre for International Arbitration19 establish when a party or arbitrator may divulge secret material. Outside of these restricted instances, distribution is absolutely banned without all parties' prior authorization.

SIAC Rule 24.4[43] requires that all arbitration processes and documents be kept confidential unless both parties agree otherwise. "Emergency Arbitrator" is equally secret. Any disclosure to a third

[38] [2009] 1 Lloyd's Rep 233.
[39] Id.
[40] Marlon Meza Salas, Confidentiality in International Commercial Arbitration: Truth or Fiction, KLUWER ARBITRATION BLOG (Sept. 23, 2018), http://arbitrationblog.kluwerarbitration.com/2018/09/23/confidentiality-in-international-commercial-arbitration-truth-or-fiction/.
[41] Id.
[42] Delhi International Arbitration Centre (Arbitration Proceedings) Rules, 2018, R. 36.2., Mumbai Centre for International Arbitration Rules, 2016, R. 35.2,
[43] Singapore International Arbitration Centre Rules, 2016, R. 24.4.

party requires the parties' prior consent and is restricted to problems such an enforcement application, award challenge, subpoena, etc. The Tribunal can impose fines and costs for any offence it finds.

Third Party Funding

Third-party financing agreements are contracts between the funder and the funded party, and as such, they should be kept confidential from all parties with an interest in the arbitration proceedings. In addition, the arbitral processes are confidential, but the supported party is required to inform the funder if the funder is participating. It would be immoral to release the confidential documents of the opposing side in this manner.[44]

Although confidentiality clauses in the Arbitration Rules of certain centres may allow exemptions from disclosure obligations, significant progress will not be observed until donors agree to respect the confidentiality rights of the opposing party. Experts recommend that the future Rules for Disclosure Responsibilities include exceptions to the general rule in order to address this confidentiality issue. Singapore, for instance, has mandated that attorneys report TPF agreements, even if the information they receive from clients is confidential. To protect the interests of the parties and ensure that arbitrators do not have a conflict of interest with the funders, Singapore has established an exception to the customary obligation of confidentiality and mandated disclosure.[45]

Exceptions To The Principle Of Confidentiality - The Public Interest Exception

The secrecy of all parties is crucial to the effectiveness of mediation. In Re: Teligent, Inc., 640 F.3d at 57-58. (2d Cir. 2011). It facilitates open communication, which provides the mediator with insight into possible issues. The Model Standards of Conduct for Mediators published in August 2005 by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution make confidentiality a pillar of the mediation process.[46]

[44]R. Morek,Nihilsilentioutilius: confidentiality in mediation and its legal safeguards in the EU Member States, 14 ERA FORUM 421–435 (2013), https://doi.org/10.1007/s12027-013-0317-9.
[45]Id.
[46]Id.

As with all laws and ideals, significant competing interests demand exceptions to the confidentiality norm. The bulk of these restrictions are codified in law, but the law also weighs the mediation process's protections against other, more urgent issues.[47]

First, if disclosure is imperative for criminal prosecution; second, to illustrate instances of coercion or fraud that precipitated the mediated settlement; third, to confirm the presence or particulars of a settlement agreement; and fourth, to impose sanctions or penalties upon legal counsel involved in a mediation case. In November/December 2006, the CPR periodical "Alternatives" published a two-part essay on this topic.

Consider this Southern District of New York decision from December 2019 to illustrate the necessity for investigation and prudence while considering whether to penalise lawyers under the final exception. Summary: Bandshell Artist Management v. Arthur Usherson (S.D.N.Y. December 9, 2019).[48]

After an unsuccessful mediation, the court questioned the legitimacy of the plaintiff's counsel in that case. The respondent sued the plaintiff and its attorneys for inappropriate involvement in mediation. As required by the Mediation Referral Order and Mediation Rules of the Southern District of New York, plaintiff and its counsel did not attend mediation "in person." All parties and counsel are required by regulation to attend the trial.[49]

Due to the fact that the defendant could only participate by phone, the lead attorney for the plaintiff dispatched two staff. According to the plaintiff's attorney, the mediator let the plaintiff and coworkers to arrive early. The defendant's motion for sanctions refuted both accusations and asserted that the mediator would attest to their dishonesty if given the opportunity.[50]

The court authorised a "limited review" of plaintiff's counsel and the mediator's correspondence to assess whether or not the mediator given approval in advance to deviate from the regulations.

[47]Id.
[48]Id.
[49]Stuart Widman, Confidentiality and Its Exceptions in Mediation, ABA GROUPS (Nov. 24, 2020), https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2020/confidentiality-and-its-exceptions-in-mediation/.
[50]Id.

This tightening of the secrecy rule was necessary to determine if the plaintiff's attorney committed perjury and if the plaintiff complied with court rules and directions (his statements to the court were both on the record and in a sworn declaration).[51]

Due to "exceptional circumstances," the court issued a confidentiality waiver. The court was slow and restricted the mediator's testimony.The mediator had to disclose his conversations with the plaintiff's attorneys, including when and how he purportedly consented. The judgement did not define what would occur next, although the plaintiff would have to appear in person if he questioned the mediator's honesty. The court would make a decision after considering the mediator's views.[52]

This restricted sharing of information was conducted to prevent a repeat of the acrimonious mediation. These reports focused on the procedural issues of the caucus rather than the parties' efforts to reach a compromise. The court stated that little interference was required to safeguard the defendant's rights and the legitimacy of the proceedings. The court's interests and "careful restrictions" were more essential than the fundamental requirement of confidentiality.

The court established a balance between the public's right to access court documents and the requirement to keep sensitive information confidential. Despite insufficient reasons against publishing, the court ruled that the public was interested in whether or not the plaintiff's attorney was honest (he had been sanctioned by other courts before).

In public court documents, only redacted versions of the parties' submissions were made available. Details regarding the parties' conduct during mediation, as well as the mediator and court personnel participating in the court's mediation programme, have been withheld (including their substantive conversations). If future filings exclude the removed information, they will be made public.This scenario illustrates how mediation confidentiality must yield to a greater good. Furthermore, it illustrates that where a carve-out is necessary, courts must adopt the least level of secrecy possible. Justice and privacy may coexist if executed properly.[53]

[51]Id.
[52]Id.
[53]Kent L. Brown, Confidentiality in Mediation: Status and Implications, 1991 J. DISP. RESOL. 307 (1991).

Conclusion

How crucial are privilege rules in safeguarding mediating parties' interests in open speech and equal treatment, as well as the mediator's impartiality, given the rising use of mediation to resolve civil disputes? To ensure the safety of the process, successful mediation privileges include the following. First, it must maintain the confidentiality of all communications made during mediation shall remain confidential, except when disclosure becomes necessary for the enforcement of a mediated agreement or the establishment of a party`s legal obligation. Conversations conducted during a private caucus with the mediator should be preserved unless a party authorises the mediator to reveal specific information to another party; in this situation, the disclosure should be considered a communication between the parties. Second, a privilege act should make it unlawful for a mediator to testify in court without the cooperation of all parties; even then, the mediator's testimony should not be necessary if it would compromise his future effectiveness. These standards apply to a variety of mediation scenarios. According to the proposed rules, mediators may warn each participant in a mediation session that, if an agreement is not reached, no statement would be issued. This is effective in fundamental situations when other responsibilities (such as the requirement to negotiate in good faith with labour unions) are immaterial. If these standards are followed, parties to a mediated settlement will not forfeit their right to judicial review of the agreement nor their capacity to fully appreciate its provisions. The proposed legislation would let parties to settle their differences outside of court.