

Confidentiality in Mediation

Mag. iur. Marina Kamenecka-Usova

University of Latvia

Abstract

Article 7 of the Mediation Directive sets a confidentiality rule, provides minimum regulation regarding it and urges Member States to tolerate it and create a set of national rules in order to protect confidentiality in mediation. The aim of this article is to analyse the principle of confidentiality in mediation, to explain its particular qualities and assess the importance of it.

Keywords: mediation, confidentiality rule, Mediation Directive, mediation privilege, without prejudice rule.

Recital 23 of the Directive [2008/52/EC](#) of the European Parliament and of the Council of May 21, 2008 on certain aspects of mediation in civil and commercial matters (hereinafter referred to as Mediation Directive) states that confidentiality in the mediation process is important and this Directive should therefore provide for a minimum degree of compatibility of civil procedural rules with regard on how to protect the confidentiality of mediation in any subsequent civil and commercial judicial proceedings or arbitration. Further Article 7 of the same document explicitly indicates:

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
 - 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.

Therefore, we see that Mediation Directive provides only the minimum regulation regarding the confidentiality rule, giving the Member States an opportunity to set a stricter set of rules.

The same policy was initiated 6 years earlier by the United Nations General Assembly in year 2002 in the document “UNCITRAL Model Law on International Commercial Conciliation”, where Article 9 provides that 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 purpose of implementation or enforcement of a settlement agreement.

European Code of Conduct of Mediators which, according to its first paragraph sets out a number of principles to which individual mediators may voluntarily decide to commit themselves, under their own responsibility and which may be used by mediators involved in all kinds of mediation in civil and commercial matters, points out that the mediator must keep all information confidential arising out of or in connection with the mediation, including the fact that the mediation is to take place or has taken place, unless compelled by law or grounds of public policy to disclose it. Any information disclosed in confidence to mediators by one of the parties must not be disclosed to the other parties without permission, unless compelled by law.

Summarizing all three sources quoted above, the main rule can be highlighted.

Neither mediators nor those involved in the mediation process are compelled to give evidence in judicial proceedings regarding information obtained during the mediation process. This is permissible only:

- where necessary for overriding considerations of public policy, particularly to protect the physical integrity of a person, etc.;
- where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement [5].

In legal literature, there are two types of research papers regarding the confidentiality rule in mediation, the first one addresses confidentiality of the information discovered during the mediation process if the process has failed, no agreement has been reached and the dispute goes to court trial or arbitration. In this case, as Rau, Sherman and Peppet stress out, someone can attempt to discover what was said in mediation and use it as a testimony in future proceedings [1, 135]. The second one addresses confidentiality of the information disclosed by one party to the mediator, which was said to be confidential and should not be disclosed to the other party in dispute without permission.

Before analysing what confidentiality in mediation constitutes itself it is important to understand why parties choose mediation for resolving their conflicts.

It is said that one of the main reasons why parties opt for mediation is because they want to avoid publicity that is typical for litigation, which makes confidentiality a very essential element of mediation. Rau, Sherman and Peppet also say that

many proponents of mediation claim that confidentiality is critical to the success of the process. They maintain that parties will not speak freely if confidentiality is not guaranteed and that the ability to get to the heart of dispute will be jeopardised. They also argue that the independence of the mediator would be undermined if one should be required to testify about the mediation at some future time [1, 135]. In other words, confidentiality allows a mediator to stay independent and neutral, which is one of the most important prerequisites for successful dispute resolution.

Another reason why mediation is chosen is because parties have faith and trust in it. They may choose an alternative mechanism, which assists resolution of disputes, since they decided to ignore the court of law. As a result, according to Alrashdan, the mediation should provide whatever is acknowledged and expected for the success of such a process. Likewise, the parties are anticipating a fair, acceptable outcome for the current dispute, which means that an unacceptable, unfair end and outcome would destroy the idea of mediation as a successful alternative to litigation. [2]

In some jurisdictions in the context of confidentiality in mediation, there are such terms used: “mediation privilege” and “without prejudice rule”. Both terms are very closely connected and stem from each other.

The “without prejudice rule” renders inter-party communications made in aid of settlement both inadmissible in evidence and immune from disclosure, but the court may, however, deviate from this rule in exceptional circumstances. Once the parties have agreed to negotiate on a without prejudice basis, elementary justice requires the law to uphold the consensus that their communications should be inadmissible and privileged. [2]

As to the “mediation privilege”, Koo mentions the US Uniform Mediation Act that in its clauses s.2–s.6 creates a mediation communication privilege, where communications to initiate and participate in a mediation are protected, because they are considered essential for promoting candour of parties and public confidence, and for balancing the interests of justice against the private needs for confidentiality. Privileged communications are immune from compulsory disclosure and inadmissible in evidence in subsequent court proceedings or other adjudicative processes. Mediators and the parties are eligible to assert the privilege attached to the mediation communication. In addition, mediators and non-party participants are entitled to protect their own communications in the mediation. Under the same Act, the privilege applies unless waived, precluded by reason of prejudicing another party in a proceeding or if it falls within one of the exceptions. The exceptions may be classified in two groups: where societal interest in mediation communication outweighs the private interest in confidentiality; and where the relative strengths of societal and private interests are left for the court to determine on a case by case basis. [4]

Therefore, we can see that, although the Mediation Directive does not use the assessed above terms, still Article 7 refers to “without prejudice rule”, and European Code of Conduct of Mediators creates the “mediation privilege”. However, it should be noted that European Code of Conduct of Mediators has a non-obligatory nature and to which mediators “may voluntarily decide to commit themselves”. [8]

In common law there was a series of cases that argued the scope of confidentiality in mediation and settlement negotiations. Thus, as Koo indicates, Hoffmann L. J. in case *Muller v Linsley & Mortimer* stated that the “without prejudice rule” only prevented the use of settlement negotiations to prove the truth of the facts admitted. He applied this line of reasoning in *Bradford & Bingley Plc v Rashid*, distinguishing acknowledgments from inadmissible admissions [4].

Yet, Robert Walker L. J. took a different view in the case of *Unilever Plc v Procter & Gamble Co* [11]:

“...they make clear that the Without Prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties to speak freely about all the issues in the litigation both factual and legal when seeking compromise and for the purpose of establishing a basis for compromise admitting certain facts. Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence with lawyers at their shoulders as minders.”

The author of this article agrees with the reasoning given by Robert Walker L. J. also considering that “without prejudice rule” should be bountiful in application, although it can bring certain difficulties to later litigation process if mediation does not succeed.

In fine, the principle of confidentiality in mediation is deemed to be one of the cornerstones of a successful mediation. If evaluating all pros and cons, still beyond controversy, there are more advantages. Parties will open up only if they are sure that it will not be used against them. Therefore, as at the heart of successful mediation rests the will of the parties to voluntarily reach a binding agreement, the sense of comfort and the opportunity to talk openly and honestly should be guaranteed to the parties.

Konfidencialitātes princips mediācijā

Kopsavilkums

Mediācijas direktīvas 7. pants nosaka konfidencialitātes principu, nodrošina tā obligāto regulējumu un mudina dalībvalstis to pieļaut un cienīt, kā arī izveidot nacionālus likumus, lai aizsargātu konfidencialitātes principu mediācijā. Šā raksta mērķis ir izvērtēt konfidencialitātes principu mediācijā, noskaidrot tā specifiku un novērtēt nozīmi.

Atslēgvārdi: mediācija, konfidencialitātes princips, Mediācijas direktīva, “mediācijas privilēģija”, “bezaizsprieduma princips”.

References

Bibliography

1. Rau A. S., Sherman E. F., Peppet S. R. *Mediation and other non-binding ADR processes*. 2nd ed. New York: Foundation Press, 2002, p. 135.

Internet sources

2. Alrashdan A. M. *The success of mediation: Neutrality, confidentiality, and mediators' conduct*. Available at: <http://ssrn.com/abstract=2152072> (accessed on 10.06.2015).
3. Comasters. *Without prejudice communications*. Available at: <http://www.comasters.com.au/Articles.htm> (accessed on 12.06.2015).
4. Koo A. K. C. *Confidentiality of mediation communications*. Available at: <http://ssrn.com/abstract=17389077> (accessed on 7.06.2015).
5. *The summary of the Mediation Directive*. Available at: http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/133251_en.htm on 9.06.2015 (accessed on 5.06.2015).

Laws and Case law

6. *Bradford & Bingley Plc v Rashid* [2006] UKHL 37; [2006] 1 W.L.R. 2066.
7. *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters*.
8. *European Code of Conduct of Mediators*.
9. *Muller v Linsley & Mortimer* [1996] P.N.L.R. 74 at 79.
10. *UNCITRAL Model Law on International Commercial Conciliation*.
11. *Unilever Plc v Procter & Gamble Co* [2000] 1 W.L.R. 2436 at 2448-2449.
12. *US Uniform Mediation Act*.