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Strengthening the Legal Guarantees of Mediation Confidentiality with Contractual Mechanisms

Confidentiality is a central essential feature¹ of mediation, a fundamental principle, and one of the most important ethical obligations² of a mediator which enhances open, honest communication³ between the parties and the self-expression of their interests, needs, and concerns in a safe environment.⁴ Confidentiality is often an incentive to initiate a mediation process because the interest of confidentiality can be realized from a continuum of dispute resolution systems through the use of the mediation process which ensures the non-disclosure of information. A special interest of a party in confidentiality may be driven by the desire to avoid the precedent of a court decision.

The article analyzes the importance of confidentiality in terms of privacy, the obligation of a mediator to inform the parties, and the standards for the safe sharing of confidential information. The article aims to explore the prominence of privacy and legal guarantees, identify possible challenges of implementing confidentiality, and indicate the need to strengthen protection through contractual mechanisms.

Keywords: *Mediation, Confidentiality, Confidentiality Agreement, Mediation Settlement, Burden of Proof, Safe Negotiation, Contractual Penalty, Individual Meeting, Breach of Confidentiality*

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¹ *Deason E.E.*, The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability, Vol. 85, Issue 1, 2001, 38; *Kirtley A.*, Mediation Privilege 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, Issue 1, 11; *Macturk Ch. H.*, Confidentiality in Mediation: The Best Protection Has Exceptions, 19 Am. J. Trial Advoc., 1995-1996, 424; *Harman J.*, Mediation Confidentiality: Origins, Application and Exceptions and Practice Implications, Australasian Dispute Resolution Journal, 28(2), 2017, 106; *Alexsander N., Chong S., Giorgadze V.*, The Singapore Convention on Mediation, A Commentary, Wolters Kluwer BV, The Netherlands, 2022, 5.97; *Schau J.F.*, View from the Middle of the Road, A mediator's Perspective on Life, Conflict and Human Interaction, AuthorHouse, 2013, xix.

² *Chen A. (ed.)*, Zhao Y., Mediation and Alternative Dispute Resolution in Modern China, Springer, Hong Kong, 2022, 63; *Turner C., Wählisch M.*, Rethinking Peace Mediation Challenges of Contemporary Peace-Making Practice, Bristol University Press, 2021, 310; *Garner B. (ed.)*, Black's Law Dictionary, 8th ed., Thomson West, 2004, 1315; *Wendel B. W.*, Professional Responsibility, Examples and Explanations, Aspen Publishers, United States of America, 2007, 138.

³ *Foster T.N., Prentice S.*, The Promise of Confidentiality in Mediation: Practitioners' Perceptions, Journal of Dispute Resolution, Vol. 2009, Issue 1, 164.

⁴ *Boulle L.*, Mediation, Principles, Process, Practice, LexisNexis Butterworths, 3rd edition, 2011, 673; *Leimguber D.*, Public Interest and Mediator's Ethical Dilemma, Australian Dispute Resolution Journal, 24 (3) 2013, 187; *Butler V.F.*, Mediation: Essentials and Expectations, Dorrance Publishing Co., Inc., 2004, 6.

1. Introduction

Mediation confidentiality is an expression of the fundamental, constitutional right to privacy.⁵ “Information privacy concerns the collection, use, and disclosure of personal information... Information privacy increasingly incorporates elements of decisional privacy as the use of data both expands and limits individual autonomy. Mediation Confidentiality protects the parties from intrusion by the state and gives parties control over what information they choose to share with others.”⁶ Confidentiality of personal life means “inviolability of personal dignity and autonomy”, it is a zone of prima facie autonomy, of presumptive immunity⁷ from regulation. The right to privacy is related to the principle of voluntariness of mediation and confidentiality at the basic stage. Mediation gets individuals to make their individual choices (safely, independently N.Ch.) that define who we are and how we live our daily lives.⁸

Confidentiality enjoys a wide range⁹ of cumulative protections.¹⁰ The regulatory provisions of confidentiality are met in the mediation laws,¹¹ codes of ethics, guidelines of professional organizations, rules of the mediation provider organization, and mediation agreements (expressed or implied).¹² Thus, the obligation of confidentiality has both a legal and contractual nature.¹³

Mediation is a safe space for negotiation¹⁴ where the parties are given the opportunity for emotional and legal self-determination (self-determination of the overriding personal and/or legal interest) in the environment free from the risks¹⁵ of disclosure. In the process of mediation, the negotiation

⁵ *Oberman S.*, Confidentiality in Mediation, An Application of the Right to Privacy, 27 Ohio St. J. on Disp. Resol. 539, 2012, 539-640.

⁶ *D.J., Rotenberg M.*, Information Privacy Law, Aspen Publishers, 2003, 1.

⁷ *Henkin L.*, Privacy and Autonomy, Colum. L. Rev., Vol. 74, 1974, 1425.

⁸ *Rubinfeld J.*, The Right of Privacy, Harv. L. Rev., Vol. 102, 1989, 802.

⁹ *Goldsmith J.-C., Ingen-Housz A., Pointon G.*, ADR in Business: Practice and Issues Across Countries and Cultures, Kluwer Law International, 2011, 652.

¹⁰ *Titi C., Gómez K.F.*, Mediation in International Commercial and Investment Disputes, Oxford University Press, 2019, 330.

¹¹ *Alfini J.J., Press Sh. B., Stulberg J.B.*, Mediation, Theory and Practice, Reporter’s Notes, 3rd ed., LexisNexis, 2013, 422.

¹² *Alexsander N., Chong S., Giorgadze V.*, The Singapore Convention on Mediation, A Commentary, Wolters Kluwer BV, The Netherlands, 2022, 5.98.

¹³ *Titi C., Gómez K.F.*, Mediation in International Commercial and Investment Disputes, Oxford University Press, 2019, 330.

¹⁴ *Collins P., Demeter D., Douglas S.*, Dispute Management, Cambridge University Press, 2021, 82, 180; *Maser Ch., Polio C.A.*, Resolving Environmental Conflicts, 2nd ed., Taylor and Francis Group, Boca Raton, London, New York, 2012, 154; *Regina W.F.*, Applying Family Systems Theory to Mediation, University Press of America, Lanham, Boulder, New York, Toronto, Plymouth, UL, 2011, 59; *Rue N.N.*, Everything You need to know about Peer Mediation, The Rosen Publishing Group, New York, 2001, 13. *Taylor A.*, The Handbook for Family Dispute Resolution, Mediation Theory and Practice, Jossey-Bass, 2002, Preface Xiii; Importance of Confidentiality Principle in the Mediation Process, Alternative Dispute Resolution Yearbook, 2013, 41-69, <<https://adryearbook.tsu.ge/index.php/ADR/issue/view/617/124>> [23.08.2023]; See also, Competency Framework for mediators, approved by Executive Council of LEPL Mediators Association of Georgia, <<https://mediators.ge/uploads/files/61b754d735a26.pdf>> [22.08.2023] (in Georgian).

¹⁵ *Gill P.*, When Confidentiality Is Not Essential to Mediation and Competing Interests Necessitate Disclosure, Journal of Dispute Resolution, 2006, Vol. 2006, Issue 1, 292,

often goes beyond the legal conditions of the dispute during the court proceedings, because the participants of the conciliation process need to find out the real reason for disagreement including not only the legal interest but also the expansion of the area of exchange resources/goods and provide a comparison of overlapping and mutually beneficial interests that ensures their coexistence.

Considering the conceptual nature and essential purpose of mediation, it is natural that the idea of communication with legal issues refers to many emotional, and personal interests and makes the inevitable need to share confidential information between the mediator and the parties. The legal guarantees of confidentiality are a fundamental element of building trust in the process and the mediator as well, and “the incentive to participate in the mediation process.”¹⁶ “Confidentiality protects the process, participants and public interest”¹⁷, also “the integrity of the mediation ethics in the process”.¹⁸ Without trust, the parties cannot participate in the voluntary agreement process, cooperate actively, unify for common interests, and achieve an openness with the mediator and self-determination of the parties.

Confidentiality often “replaces the mutual trust of the parties” in the mediation process which assists the strongly conflicting parties in finding some form of communication¹⁹ with each other. The capacity to make decisions independently and free²⁰ from any influence, in mediation among other multifaceted aspects, also means having a “guarantee²¹ of the confidentiality at a mediation session and negotiation consequences”,²² the mediation participant should be protected from the pressure of public opinion or expected social censure because fear often leads people to make decisions in the way of having the desire to present themselves with a strong personality and identity in the society to “keep their faces”.²³ In addition, “confidentiality also serves the principle of increasing the effectiveness of

¹⁶ *Alexsander N., Chong S., Giorgadze V.*, The Singapore Convention on Mediation, A Commentary, Wolters Kluwer BV, The Netherlands, 2022, 5.97.

¹⁷ *Shapira O.*, A Theory of Mediators’ Ethics, Foundations, Rationale and Application, Cambridge University Press, 2016, 274; *Kirtley A.*, Mediation Privilege 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, Issue 1, 1-54; *Brooker P.*, Mediation Law, Journey Through Institutionalism to Juridification, Taylor & Francis, 2013, 109.

¹⁸ *Lee J.A., Giesler C.*, Confidentiality in Mediation, *Harv. Negot. L. Rev.*, Vol. 3, 1998, 290. Confidentiality encourages neutral facilitators as mediators cannot be required to testify or disclose information excluding legitimate exceptions provided by law (in Georgian). The Hong Kong Civil Procedure „White Book” in *Moscato M.F., Palmer M., Roberts M.*, Comparative Dispute Resolution, Edward Elgar Publishing, 2020, 234.

¹⁹ *Gill P.*, When Confidentiality Is Not Essential to Mediation and Competing Interests Necessitate Disclosure, *Journal of Dispute Resolution*, 2006, Vol. 2006, Issue 1, 294; Regarding the lack of trust between the parties in the mediation process and, accordingly, the need for confidentiality, see: *Brown K.L.*, Confidentiality in Mediation: Status and Implications, *Journal of Dispute Resolution*, Vol. 1991, Issue 2, 310.

²⁰ *Butler V.F.*, *Mediation: Essentials and Expectations*, Dorrance Publishing Co., Inc., 2004, 6.

²¹ See Paragraph 9 of Article 8 of the Law of Georgia “On Mediation”: on the principle of free, independent and informed decision-making by the parties.

²² Patent Mediation Guide, Federal Judicial Center, lulu.com publisher, 2020, 7.

²³ *Bader E.E.*, The Psychology of Mediation: Issues of Self and Identity and the IDR Cycle, *Pepp. Disp. Resol. L. J.*, Vol. 10, Iss. 2, 2010, 1, and fully 183-214. See also, *Bader E.*, The Psychology of Mediation: (Part I) Issues of Self and Identity, Translator *Burduli L.*, TSU “Alternative Dispute Resolution –

the process because the production of formal documentation, and accounting [protocol, track-records, N.Ch.] is not required²⁴ considering the need for dynamic self-determination of the parties, the informal and flexible nature of mediation.”²⁵ To ensure the safety of the parties during the mediation process, and make the public (including the legal community) perceive the ethical integrity of mediation, it is essential to have legal guarantees of mediation in court referred to mediation cases and the correct definition of their use in science and practice.²⁶ So, “the set of rules regulating mediation as a conciliation shall furnish sustainable guarantees for protecting against harmful disclosure of confidential facts and information.” These guarantees are a core part of the mediation institution and a particularly important reason why the relevant legislation needs to be properly applied.²⁷

Guarantee of confidentiality. “Achieving a mutually acceptable agreement requires sharing the sensitive information between the parties. Determining the scope of information disclosure, the party may raise doubt regarding the protection of confidentiality of the information and its applicability in court-connected processes. Confidentiality also has a deterrent function²⁸ against the use of information in bad faith and even in the case of disagreement, protects the parties from harm in the process of dispute resolution.²⁹ The procedural advantage of private mediation is also the confidentiality of the mediation process as a fact,³⁰ which ensures the closure of the process and the content of the negotiation to competitors, customers, and suppliers.”³¹

Yearbook” 2020, 212 and ff. (in Georgian) <<https://adryearbook.tsu.ge/index.php/ADR/article/view/3002/3186>> [22.08.2023].

²⁴ *Butler V.F.*, Mediation: Essentials and Expectations, Dorrance Publishing Co., Inc., 2004, 6.

²⁵ The Hong Kong Civil Procedure „White Book” in *Moscato M.F., Palmer M., Roberts M.*, Comparative Dispute Resolution, Edward Elgar Publishing, 2020, 234; *Chen A. (ed.), Zhao Y.*, Mediation and Alternative Dispute Resolution in Modern China, Springer, Hong Kong, 2022, 28.

²⁶ *Alexander N., Chong S., Giorgadze V.*, The Singapore Convention on Mediation, A Commentary, Wolters Kluwer BV, The Netherlands, 2022, 5.97; *Lee J.A., Giesler C.*, Confidentiality in Mediation, Harv. Negot. L. Rev., Vol. 3, 1998, 292.

²⁷ On the importance of open communication between the mediator and the parties, see UNCITRAL Model Law on International Commercial Conciliation, with Guide to Enactment and Use 2022, United Nations Publication, New York, 2004, para. 58, 39, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/03-90953_ebook.pdf> [21.08.2023]. see Also, Reich J.B., A Call for Intellectual Honesty: A Response to the Uniform Mediation Act's Privilege Against Disclosure, J. Disp. Resol., 2001, 213-15.

²⁸ In the absence of a guarantee of the inadmissibility of applying confidential information as evidence, the parties would certainly, have an aspiration to use the confidential information of the other party in their confrontational proceedings before the proceedings. See *McIssac H.*, Confidentiality Revisited California Style, 39 Fam. Ct. Rev. 405, 2001, 406-407, cited in *Bostinelos T.*, A Happier Ending for Everyone: Resolving Adoption Disputes Between Putative Fathers and Adoptive Parents Through Clinical Mediation, 15 Pepp. Disp. Resol. L.J., Vol.15, 435, <https://digitalcommons.pepperdine.edu/drlj/vol15/iss2/6> [30.08.2023].

²⁹ *Rufenacht M.D.*, Concern over Confidentiality in Mediation – An In-Depth Look at the Protection Provided by the Proposed Uniform Mediation Act, Journal of Dispute Resolution, Vol. 2000, Issue 1, 114.

³⁰ Excluding the exceptions provided by law: Article 7, paragraph 3, Article 9, paragraph 4 of the Law “On Mediation”.

³¹ *Abramson H. I.*, Mediation Representation, Advocating as a Problem-solver in any country or Culture, 2nd ed., National Institute for Trial Advocacy, 2010, 146-147.

Without solid guarantees of the confidentiality of mediation communication, private mediation cannot develop in the state because it requires voluntary initiation of mediation by the parties. Also, during the process of mandatory mediation, the requirement of compulsory attendance is limited to a few sessions which is not a sufficient condition to reach a voluntary and desirable agreement for the parties imbued with distrust towards mediation. In the end, court-mandated mediation cannot contribute to strengthening private mediation³², getting mediation established in the system of social values of the nation, and leading a community-inspired approach to dispute resolution.

2. The Standard of Informing the Participants about the Scope of Mediation Confidentiality

2.1. The Obligation to Inform Parties and Representatives

The guarantees of confidentiality significantly shape the confidence of parties in the security and safety³³ of the mediation process and assist the parties make an informed decision³⁴ about participating in the mediation process. The legal order of both Georgia, EU countries, and the USA³⁵ stipulates the obligation of the mediator to inform the parties about the mentioned principle before starting the mediation process. The obligation to inform generally applies to all principles of mediation,³⁶ however, due to the special importance of confidentiality, the requirement to inform about the scope of the mentioned principle is also supported by an independent legal provision: "Before the initiation of mediation, the mediator shall be obliged to inform the parties about confidentiality and its scope."³⁷ Despite the numerous exceptions to the principle of confidentiality

³² "Privatization" of mediation.

³³ *Roberts M.*, *Mediation in Family Disputes, Principles of Practice*, 4th ed., Ashgate, 2014, 121.

³⁴ Paragraph 9 of Article 8 of the Law of Georgia "On Mediation": The mediator helps the parties to reach an agreement to resolve the dispute taking into account the principle of free, independent, and informed decision-making by the parties regarding both the mediation process and its final result. According to Article 4, Part 3 of the Code of Ethics of Georgian Mediators, the promotion of the principle of self-determination means that the parties shall be allowed to make a voluntary and informed decision by their interests on both the content of the dispute and procedural issues of mediation.

³⁵ In the German doctrine, there is an opinion that by participating in the mediation process, the parties implicitly agree to all the principles applicable in the mediation process (including confidentiality) and the obligations arising from it. When evaluating the consent expressed by the parties to confidentiality, the court must take into consideration the circumstances of the case and the intended purposes of the parties. See §§133, 157 of the German Civil Code on the manifestation of will. However, following the prevailing opinion after being expressly informed about confidentiality, the parties must give written or, oral consent to the obligation of confidentiality. *Nadja M.A.*, *International and Comparative Mediation, Legal Perspectives*, Kluwer Law International, 2009, 288. See Also, *Rufenacht M.D.*, *Concern over Confidentiality in Mediation – An In-Depth Look at the Protection Provided by the Proposed Uniform Mediation Act*, *Journal of Dispute Resolution*, Vol. 2000, Issue 1, 115; *On the binding nature of the confidentiality agreement*, see Also, *Patent Mediation Guide*, Federal Judicial Center, lulu.com publisher, 2020.

³⁶ The first paragraph of Article 8 of the Law "On Mediation": (Article 8. Conducting mediation): 1. Before starting the mediation, the mediator must inform the parties about the principles of mediation process...

³⁷ Paragraph 6 of Article 10 of the Law of Georgia "On Mediation".

and the legal nature of the issue, the mediator should explain the mentioned issue to the parties clearly and completely. Explaining confidentiality is essential even when the parties are accompanied by legal representatives. Awareness of legal representatives about mediation does not eliminate the obligation of the mediator to inform because the person in charge of the process should be the warrantor of safety and the source of information about the substantive-procedural advantages of mediation. Since the processes are removed from a public witness, negating any possibility the dispute's resolution will have any public educational or deterrent value.³⁸ That is why confidentiality is not an absolute obligation³⁹ and it is subject to exceptions established by the law to protect a legitimate purpose and legitimate interest (life, health, prevention of illegal actions/damage, protection of the best interest of minors⁴⁰).⁴¹ Before initiating mediation the fulfillment of the obligation to disclose general information as well as the information about individual meetings means interpreting⁴² the limit of providing information to the maximum extent considering exceptional circumstances⁴³ in accordance with the principles and rules determined by the law. The mentioned rule is applied for keeping safety of the parties and advance procedural information.

Before initiating the mediation (at the opening stage) full information about the confidentiality standard (general rule and exceptions) also means that if during the process of mediation there is revealed a need to protect a person's life, health, freedom, and/or the best interests of a minor, the mediator is required to notify the appropriate bodies and agencies instead of providing the parties with the information about the expected disclosure. The necessity to inform about confidentiality in advance is supported by the fact that (before disclosure) informing the parties about the expected disclosure of information for the second time can hinder or make the main purpose to protect the good (e.g. life, health, freedom, interest of a minor) impossible.⁴⁴

Since trust in the mediator and open communication is a requirement for the continuous self-determination of the party, the clarification of the confidentiality standard to the individual meeting should also be carried out by the mediator at the beginning of each private session (individual meeting).⁴⁵ The mediator shall obtain permission to write notes for the accuracy of the information and

³⁸ Zekoll J., Bälz M., Amelung I. (eds.), *Formalisation and Flexibilisation in Dispute Resolution*, Brill Nijhoff, Lei-den/Boston, 2014, 65-66.

³⁹ *Atlihan M.E.*, A New Suggestion on the American Experience of the Limits of Mediation Confidentiality, *Law and Justice Review*, Issue 23, 2022, 47.

⁴⁰ The public interest in protecting the best interests of a child outweighs the interest in ensuring privacy. *Roberts M.*, *Mediation in Family Disputes, Principles of Practice*, 4th ed., Ashgate, 2014, 219.

⁴¹ *Alexsander N., Chong S., Giorgadze V.*, *The Singapore Convention on Mediation, A Commentary*, Wolters Kluwer BV, The Netherlands, 2022, 5.98.

⁴² *Ibid.*, paragraph 3 of Article 10. The confidentiality standard for individual meetings refers to the 'in-confidence approach' (as opposed to the 'Open Communication Approach'), which means that the individual session is completely confidential unless the party specifically indicates the exceptions to the other party to the mediator. (in Georgian) see *Titi C., Gómez K.F.*, *Mediation in International Commercial and Investment Disputes*, Oxford University Press, 2019, 330.

⁴³ *Ibid.*, paragraph 4 of Article 10.

⁴⁴ The threat of abduction of a child in a family dispute, the discovery of expected violence against a child or a family member, etc. (in Georgian)

⁴⁵ *Stitt A.*, *Mediation: A Practical Guide*, Routledge-Cavendish; 1st edition, Routledge-Cavendish, 2004, 1-166.

define the autonomy of the party while determining the scope of information to be transferred to another party.⁴⁶

The correct definition of considering information as confidential is necessary for the parties to discern that through mediation they cannot “close” non-confidential information in its nature to make it inadmissible evidence.⁴⁷ “If it was possible to obtain the evidence from another source outside the space of mediation, then it cannot benefit from the qualified privilege⁴⁸ of the inadmissible evidence and confidentiality”. Misconceptions about the nature of confidential information can lead to applying for mediation in bad faith.

2.2. The Obligation to Inform Third Parties

The obligation of confidentiality is multi-layered and addressed by both third parties outside the process (external confidentiality) and the participants in the process (internal confidentiality)⁴⁹ which binds all participants⁵⁰ in the process. Informing about the obligation to protect confidentiality shall also be carried out by third parties participating in the mediation. It is recognized in legal doctrine and practice that a lot of participants in the mediation process make it more difficult and may even become impossible to maintain confidentiality.⁵¹ Nevertheless, the mediator should provide procedural guarantees to protect confidentiality taking into account the necessities of the parties.⁵²

⁴⁶ See also, *Collins P., Demeter D., Douglas S.*, Dispute Management, Cambridge University Press, 2021, 200.

⁴⁷ *Hopt K.J., Steffel F.*, Mediation – Principles and Regulation in Comparative Perspective, Oxford University Press, 2013, 50.

⁴⁸ *Feehily R.*, International Commercial Mediation, Law and Regulation in Comparative Context, Cambridge University Press, 2022, 281.

⁴⁹ *Titi C., Gómez K.F.*, Mediation in International Commercial and Investment Disputes, Oxford University Press, 2019, 330; *Kiser R.*, Professional Judgement for Lawyers, Edward Elgar Publishing, 2023, 209-210.

⁵⁰ *Hardy S., Rundle O.*, Mediation for Lawyers, CCH Wolters Kluwer Business, 2010, 481. Mediation provider organizations are also bound by confidentiality standards. For details, see: *Chitashvili N.*, Framework for Regulation of Mediation Ethics and Targets of Ethical Binding TSU Law Faculty “Journal of Law”, #1, 2016, 39-47.

⁵¹ *Collins P., Demeter D., Douglas S.*, Dispute Management, Cambridge University Press, 2021, 249.

⁵² In Georgia, the mediator faces a particularly big challenge in collective labor conflicts when the number of mediation participants is often several hundred or thousands, and the parties have an interest to participate in the mediation process due to the lack of trust in their representatives. (Generalized mediation practice of Natia Chitashvili as a collective labor conflict mediator for 2017-2023). In this case, the mediator must balance the principle of self-determination and informed decision-making of the parties with the obligation to conduct a due, effective process. In particular, the results of the flexible negotiations conducted through the representatives should be gradually agreed with the parties in the way of constant communication with them. In the practice of collective labor mediation, there are many cases when the parties requested to make a video recording or, moreover, to broadcast it live, subsequently, in case of non-fulfillment of the terms of the settlement, the legitimacy of making the recording to apply the recording in this case can lose the importance to the mediation, it will no longer be recognized as inadmissible evidence, it can harm the trust of the society as a mediation institution, as well as the quality of the process, because it makes impossible to provide mutual sharing of useful confidential information, self-determination of the parties and open, reliable communication. In general, in a collective dispute, if no confidentiality guarantees are specifically agreed upon confidentiality agreement, the parties have the right to share information used in mediation. So,

When a party initiates the involvement of a family member or other third party in a joint/individual meeting, the mediator shall explain to a third party the content and scope of the obligation of confidentiality. Also, if the parties have concluded (or intend to conclude) an independent agreement on confidentiality with a defined contractual penalty for a breach of confidentiality, a third party must understand that he/she will also have to join the sanctions by signing the agreement. Considering the mentioned risks, third parties may prefer to attend only the individual meeting of that party which invited them to be involved in the process to manage the disruptive threat of self-determination of another party, open communication, or breach of confidentiality caused by another participant in the negotiation and, what is most important for them, to limit the scope of received confidential information.

Attending an individual meeting with a third party, the obligation of confidentiality remains within the scope of the information shared at the private meeting, and in the case of making an independent contract on confidentiality, the third party is required in advance to concur with participating in the mediation process and sign the contract. When a third party takes part in an individual mediation session, it is also essential for the mediator to clarify with the other participant of mediation whether the information is allowed to be shared only with the party or it can also be shared with the certain third-party invited by that party. Thus, the participation of third parties in the process gets the mediator to make a special effort to ensure confidentiality.

After realizing the risks of duties, third parties may refuse to participate in the process and be bound by confidentiality obligations. If third parties are supposed to hinder the process, elucidating the risks can be considered an important strategy of mediation to remove them from the process. The basic rule of mediation is that parties and third parties together with the mediator are subject to a single legal order of protecting confidentiality, including the mechanisms of liability provided by law or the contractual agreement of the parties.⁵³

The issue of third-party confidentiality is particularly challenging concerning an online mediation process which may be attended off-camera by third parties who have not consented to perform the obligation of confidentiality. In this case, there can be two solutions, arranging the camera with full-room coverage, and secondly, considering a special contractual reservation in the mediation agreement,⁵⁴ following which the parties shall perform the obligation not to make the confidential

in collective disputes, the parties often resort to the mechanism of publicizing the result of the mediation profession (for example, holding press conferences and publicizing the details of the agreement) to subsequently make the breach of the obligation by one party the basis for considering him as a dishonest party in the eyes of society and social partners. Strict enforcement of confidentiality guarantees against the will of the parties would undermine the parties' confidence in the mediation and would substantially undermine the ethical integrity of the process. *Lee J.A., Giesler C., Confidentiality in Mediation, Harv. Negot. L. Rev., Vol. 3, 1998, 286.*)

⁵³ See: *Foster T.N., Prentice S., The Promise of Confidentiality in Mediation: Practitioners' Perceptions, Journal of Dispute Resolution, Vol. 2009, Issue 1, 165.*

⁵⁴ Regarding the convenience of considering a special confidentiality clause/agreement which third parties see: *Hardy S., Rundle O., Mediation for Lawyers, CCH Wolters Kluwer Business, 2010, 481. Esplugues C., Marquis L., New Developments in Civil and Commercial Mediation, Global Comparative Perspectives, Springer, 2015, 282; de Palo G., Trevor MB. (eds.), EU Mediation, Law and Practice, Oxford University Press, 2012, 101, Rn. 9.26.*

communication of the mediation available to third parties. Disobeying this stipulation shall be interpreted as a violation of the mediation settlement or a breach of the agreement on mediation which will lead to the application of contractual sanctions of a specific amount (a breach of contract). In addition, at the beginning session of the mediation, special emphasis shall be placed on protecting confidentiality and prohibiting recording of the session.⁵⁵ An important content element of the definition may be a normative rule on the prohibition of using confidential information as a piece of evidence in court⁵⁶ or other⁵⁷ (arbitration, disciplinary⁵⁸) proceedings. Interpreting the rule of the prohibition of applying confidential information as evidence, it is important to get the participants aware of the qualification of information as confidential.⁵⁹ In particular, for the information to be considered confidential, it is essential to take the mediation process as a main source of information that enables one to obtain the mentioned information. The scope of confidential information may also be determined by the agreement of confidentiality.

3. Handling and Applying the Confidential Information in Negotiation Process

3.1. Categorization of Confidential Information in Mediation Representation Plan

Even in the presence of guarantees, the realization of the interest in protecting confidential information may meet certain challenges, which raises the need to strengthen guarantees to protect confidentiality through contractual mechanisms.

The construction of the representation plan in mediation is created by (1) investigation and configuration of the client's interests, (2) identification and minimization of the factors hindering their implementation, considering expected risks, and (3) classification of information to be applied in the mediation process.⁶⁰ Information is the foundational element of the Mediation Representation Tri-

⁵⁵ Lee J., Lim M., Hadikusumo J. (eds.), *Contemporary Issues in Mediation*, Vol.7, Singapore International Mediation Institute, 2022, 96.

⁵⁶ Article 104 (1¹) of the Civil Procedure Code of Georgia: The court shall not accept as evidence information or documents disclosed under the terms of confidentiality in a judicial mediation process unless otherwise agreed between parties 1² The procedure under paragraph 1¹ of this Article shall not apply if the information and document disclosed under the terms of confidentiality in the judicial mediation process is submitted to a court by the party who disclosed it, or if the other party kept this information and/or document or obtained it and submitted it to the court using other means determined by law.

⁵⁷ Paragraph 2 of Article 10 of the Law of Georgia “On Mediation”: the participant of Mediation shall not use the information determined by this article during court or arbitration proceedings or in the process of review of a dispute by any other means unless otherwise provided for by law.

⁵⁸ 24/04/2021, Article 13.1.5 of “Regulations on Disciplinary Proceedings of Mediators of Mediators Association of Georgia”: The investigative panel will not take into account the evidence obtained in violation of law, the hidden video/audio recording of the mediation process. Regarding the inadmissibility of recording the mediation process. *Jasper M.C.*, *You've Been Fired: Your Rights and Remedies*, Oceana Publications, 2005, 46; *Butler V.F.*, *Mediation: Essentials and Expectations*, Dorrance Publishing Co., Inc., 2004, 6; *Patent Mediation Guide*, Federal Judicial Center, lulu.com publisher, 2020, 7.

⁵⁹ Paragraph 1 of Article 10 of the Law of Georgia “On Mediation”.

⁶⁰ *Abramson H.I.*, *Mediation Representation, Advocating as a Problem-solver in any country or Culture*, Second Edition, National Institute for Trial Advocacy, 2010, 10.

gul, on which the component of interests and constraints is based.⁶¹ A safe mediation process also means sorting information by a lawyer or a participant party at the stage of preparation for the mediation process which includes drawing up the plan of representation in the mediation or the strategy for participation in it. The information can be shared only with the mediator at an individual meeting but it is expected to be safe for being disclosed at the general meeting. Structuring the information related to the mediation process also implies the information that may be inappropriate to be shared with any participants of the mediation process. This provides the party with an opportunity to prevent or reduce the risks of breaching confidentiality which means completing the mediation process without going the sensitive information beyond the scope of an individual meeting with an impartial and independent mediator. As ensuring the protection of confidential information is the main professional obligation of a mediator and the existential basis for maintaining his/her professional reputation, the mediator is interested in fortifying professional ethics and personal reputation. As “the mediator has an independent institutional interest in the protection of confidentiality”,⁶² the risk of a breach of confidentiality⁶³ can come from the parties who may hypothetically need to apply confidential information to the detriment of the adversary. However, the viability of such a mutual interest in damage in a collaborative process is less realistic, even if it is unreasonable to completely exclude the existence of unscrupulous participants.

3.2. The Danger of Entrusting Confidential Information and the Strategic-procedural Need for Disclosure

Information, on the one hand, helps the parties to define mutual interests, and the factors hindering their implementation and develop smooth implementation of interest-based cooperation. On the other hand, disclosing information about one's interests can make unfavorable conditions for arranging negotiations and trade – for an exchange to take place, another party⁶⁴ or participant can present hard conditions to fulfill, for example, a high contractual price or the demand for an interest concession. In this case, finding out more information about the interests of the party drives the negotiator to manipulate this information, especially if the party is not focused on reaching an agreement. When a party acts in bad faith, it can bring the negotiation to a dead-end. It is very important to rationally analyze the associated risks of sharing information while providing consultation with the client by a mediator or a representative and agree on the platform – personal or joint meeting, the stage of the process, or circumstances when information of interest may be shared. Along with determining the scope of information sharing, the party should concur on applying the authority of a mediator to share the information acquired during the private meeting with another party

⁶¹ Ibid.

⁶² *Reuben R.C.*, Court Issues Major Ruling on Mediation Confidentiality, University of Missouri School of Law Scholarship Repository, Faculty Publications, Dispute Resolution Magazine, Vol. 6, 1999, 25, <<https://scholarship.law.missouri.edu/facpubs/812>> [30.08.2023].

⁶³ *Henke E.-M.*, Confidentiality in the Model Law and the European Mediation Directive, GRIN Verlag, 2011.

⁶⁴ Ibid. See also, *Brown K.L.*, Confidentiality in Mediation: Status and Implications, Journal of Dispute Resolution, Vol. 1991, Issue 2, 310.

in a certain approach and with specific preconditions. Although the parties have the opportunity to manage the exchange of information during joint and individual meetings, in the mediation process it is possible to change the initial strategy of the party regarding the addressee of the information sharing. Sharing confidential information with the opposite negotiator may be necessary to process objective data, gain the confidence of another party, prepare it for reality, and arrange for the mediator to effectively perform the reality testing. “The disclosure of confidential information may become necessary for one party to gain the trust of another party and obtain the opportunity to explain the importance of its objective need and the reason for the unchanged position during the mediation process.”⁶⁵

The party can review the initial strategy with the assistance of the mediator, according to which the party did not plan to disclose specific confidential information to the other party, but in the process, the party, with the help of the mediator or independently, realized that sharing confidential information could be more useful for the agreement.

To illustrate the mentioned case, it is possible to specify many examples applied in practice.

Let's examine a case when a mediator has to discuss the legal risks of proceeding in court and the strong and weak (including legal) positions of the parties during personal meetings.⁶⁶ At the meeting with the mediator, a party can share the information about the evidence that another party is not aware of (e. g. the party assumes that an authorized video recording that proves that another party did not show up at work, has already been deleted). According to its initial strategy, the party does not present this information in court and in mediation to submit it in the court at a certain stage of the proceedings and increase the chances of the case being resolved in its favor. The motivation for not sharing information at an early stage may also be the intention to prevent another party from developing a different defense strategy or creating rebuttal evidence. After receiving the mentioned confidential information, the mediator finds out the legal position of the party, which provides him/her with the confidence to resolve the dispute and gain an emotional concept of legal advantage. However, the mediator analyzes simultaneously that the confidential information can prepare the other party for concurring as it accelerates the awareness of the risks of starting or continuing court proceedings.⁶⁷

Naturally, in this case, the obligation of the mediator confidentiality implies that the mentioned information should not be disclosed without the permission of the information holder party, even with the motivation to facilitate the agreement. Also, there is a procedural chance of a real arrangement of the agreement between the parties and a rational understanding of the evidence capabilities of another party. The mediator does not have the right to interfere with the autonomy of a party in providing direct advice on sharing specific information with the other party. Nevertheless, one of the sub-

⁶⁵ Orme -Johnson C., Cason-Snow M., Basic Mediation Training Trainer's Manual, 2002.

⁶⁶ The so-called “Legal Reality Test”, which involves the process of identifying the Best Alternative to Mediation Settlement (BATNA), the Worst Alternative to Mediation Settlement (WATNA) and the Possible Area of Negotiation (ZOPA). See one of the sub-competencies of content management skills from the framework system of mediators' competencies: mediator shall encourage the objective assessment of the legal perspective of the case by legal representatives to define the area of negotiation and make an informed decision by the parties. Mediator shall effectively use of the techniques of Reality Tests.

⁶⁷ It depends on whether the case involves private or judicial mediation.

competencies of mediator management suggests that the mediator should take the initiative to obtain permission for the disclosure of ideas or proposals to the other party and transmit the permitted information in an acceptable form⁶⁸ if the mediator believes that the transmission of specific information with the consent of the party may serve the purpose of a reasonable agreement. In the mentioned casus the mediator makes the party think about the necessity of keeping the information confidential from the other party, the risks associated with the transfer of information, or on the contrary, refuses to provide information if it can accelerate the maturity of the party to perceive the legal reality and considering the increased risks of litigation get another negotiator to be more motivated for the achievement of agreement.⁶⁹

The party, after examining its interests and strategy, is allowed to choose between sharing the information with the other party. If the intention of keeping information confidential is to win the case in court, is it possible to get a result that is substantially close to the desired one in a short time? i.e. In mediation, the interest of “winning” should be realized by timely agreement of reasonable and useful accord (“develop options for mutual gains”).

The disclosure of confidential information may be impartially necessary to manage the joint sessions and analysis of objective data (for example, the value of property, expertise, cadastral survey drawing, and analysis of the organization's budget). For instance, during a collective dispute about increasing wages, it may be vital for employees to be aware of the amount of managers' salaries or company profits to make a rational decision on a fair and realistic rise in wages. Considering the objective capabilities of the enterprise can guide the employees in avoiding asking for such a wage increase in the absence of objective data that exceeds the company's financial opportunities. If the objective data is not integral to research and apply rationally, positioning with unrealistic requirements always leads the process to a dead-end.

Thus, during the mediation process, a party may have to alter the status of confidential information as initially intended only for the mediator and decide to share specific data not only with the mediator but also with another party. The mentioned change of strategy may be followed by the risks of expected violation of confidential information which can prevent the party from providing the information. And withholding useful information can prevent the process of collaboration and achievement of mutual benefits. To share information safely and securely, additional mechanisms of protecting confidentiality need to be created which will be talked about below in the context of contractual guarantees.

⁶⁸ The mediator's competence framework, approved by LEPLthe Mediators Council of Georgia the Council of Mediators of the State Council of Georgia, <<https://mediators.ge/uploads/files/61b754d735a26.pdf>> [22.08.2023].

⁶⁹ In general, the mediator has an important role in determining and making the parties think about what information to convey and at what stage can be useful for an agreement or, on the contrary, hamper negotiation. One of the most important functions of a mediator is to use information strategically and to withhold sensitive information [subject to the will of the parties] until trust is still established between the parties. See *Richbell D.*, *Mediation in Construction Disputes*, Blackwell Publishing, 2008, 76. The prerequisite for the success of mediation is the formation of trust between the parties and the mediator. See *Betancourt J.C., Crook J.A.*, *ADR, Arbitration and Mediation, A Collection of Essays*, Author House Publishing, 2014, 118.

4. The Fragility of Confidentiality Guarantees Considering the Gravity of Burden of Proof

A significant obstacle to the application of confidentiality guarantees can be created by the complexity of the burden of proof of the confidentiality of information and the amount of damage caused by the breach.

Although confidentiality in the principle of mediation provides the guarantee of disusing the information as an evidence in court, the disclosure of sensitive information may still be related with certain risks. First of all, the confidential information can be applied to figure out the strong and weak legal positions of a negotiator, interests and strategy to manage the dispute in court. Also, the receiving party may use it to form a new strategy, gain a dominant influence in the negotiation process, and deal with legal risks in court. The mentioned danger is especially real when the receiving party does not willingly participate in making agreements and conducts deceptive negotiations. The legal guarantee of confidentiality can be weakened by the heavy burden of proof and the possibility-based fragility for damages in case of non-pecuniary damages or loss of income. If the party applied the information disclosed under the term of confidentiality during the mediation process as evidence or disclosed it to third parties, the legal mechanism of confidentiality protection naturally comes into effect, although its implementation can often be associated with an unrealistically big effort for the party bearing the burden of proof. First of all, the party providing the information has to assert the confidential nature of the information which could become available to the party violating the confidentiality only during the mediation process. The scope of the allegation of a defendant also includes alleging the fact of a breach of confidentiality and the extent of his/her actions.

Referring to the confidentiality claim, it is essential to determine the damages caused by the breach of confidentiality. Considering the legal nature of the obligation to protect confidentiality, damage may not be material, or destruction to property or contents. The breach of confidentiality may adversely affect the non-property interests, honor, dignity, personal business, or organizational reputation and lead to client attrition. In the case of reputational infringement, the consequences of an unlawful act may materialize in the long term, and in the case of a breach of confidentiality, it cannot result in material loss. In this case, it may be extremely difficult or even impossible to compensate for moral damages or unearned revenue due to the strict standard of proof and the normative requirement of substantiating complex legal prerequisites. The difficulty in measuring the amount of damage may lead the party to the impossibility of realizing the right to compensation for damage. Thus, for the guarantee of confidentiality protection not to lose its legal force, it is important to reinforce the normative regime of confidentiality protection with contractual mechanisms. In particular, the parties should use the opportunity to sign an independent agreement on confidentiality to regulate the scope of confidential information and possible actions. This contributes to be considered/or not considered a breach of confidentiality and a violation of the abovementioned contractual obligation.

5. Strengthening the Guarantees of Confidentiality through Contractual Mechanisms

5.1. Contents/Scope of a stand-alone Confidentiality Agreement

Signing a stand-alone confidentiality agreement the parties manage the legal consequences of a breach of confidentiality with a contractual autonomy beyond the arrangement of legal protection which is supported by normative regulation.⁷⁰ According to the Unified Mediation Act⁷¹ adopted in the USA in 2003, the parties are given the authority to independently determine the scope of confidentiality considering the mandatory requirements established by law. The same privilege of the parties is enshrined in the Model Standards of Conduct for Mediators.⁷²

An independent agreement on the scope of confidentiality means concurring on the content of confidentiality and the introduction of compensation mechanisms in case of its violation before starting the mediation process.⁷³ Also, the mentioned agreement includes the determination of content/category of information to be protected by confidentiality⁷⁴ – for example, information related to the method of distribution of profits, health conditions, etc. The confidentiality agreement defines the violation of confidentiality, the binding period for the parties, applying legal remedies, and others. The agreement relieves a party of bearing the burden of proof in the event of litigation. Concurring on the scope of a breach of confidentiality makes it easier to prove an intentional unlawful act in court.

The confidentiality agreement should indicate that confidentiality applies not only to the specific content of the mediation communication but also to any dispute that may arise from the confidential content of the mediation communication.⁷⁵

The parties should concur on the contractual penalty for a breach of confidentiality which in case of complication of proving the damage can provide the opportunity to compensate the party for “minimum damage” or serve as a restraining function to the breach of obligation.⁷⁶ Determining contractual penalty naturally does not deprive the party of the right to pursue a claim for damages, but often the damage is not specified in an actual property loss and contractual penalty appears as the only mechanism to compensate the violated property/non-property interests. “The purpose of contract law

⁷⁰ Patent Mediation Guide, Federal Judicial Center, lulu.com publisher, 2020, 7.

⁷¹ Uniform Mediation Act, 2003.

⁷² Model Standards of Conduct for Mediators, 2005, Standard V(D).

⁷³ In Ireland, most mediation agreements (where the parties agree to use mediation) contain confidentiality clauses. *Goldsmith J.-C., Ingen-Housz A., Pointon G.*, ADR in Business: Practice and Issues Across Countries and Cultures, Kluwer Law International, 2011, 652.

⁷⁴ *Foster T.N., Prentice S.*, The Promise of Confidentiality in Mediation: Practitioners' Perceptions, Journal of Dispute Resolution, Vol. 2009, Issue 1, 164, For further reference: Uniform Mediation Act, Wash. Rev. Code § 7.07.070 (2006).

⁷⁵ *Roberts M.*, Mediation in Family Disputes, Principles of Practice, 4th ed., Ashgate, 2014, 216.

⁷⁶ About the function of restraining from a breach of obligation and the compensation for minimal damage of the contractual penalty, see: *Chitashvili N.*, The Function of Penalty to Ensure the Performance Interest and Compensation of Damages, Journal of Comparative Law, 2/2020, 7-24, <<http://lawjournal.ge/5164115661615-2/>> [30.08.2023] (in Georgian).

is not to protect only the financial interests of the parties”,⁷⁷ because the good to be protected by the law is often the implementation of non-property interests stipulated by the contract.⁷⁸

Contractual penalty can be defined⁷⁹ by the rate of damages stated in a mediation agreement which estimates anticipated actual damages. That does not create a paradigmatic contradiction with the essence of a breach of contract. In particular, the agreement on a higher penalty can be made with an assumption of the extent of the expected damage that may be related to the failure of the contractual interest in case of a breach of the obligation.⁸⁰ Considering a higher penalty, the parties often express their desire to assert heavy contractual liability for a breach of an important contractual interest. As one of the main factors to select the mediation process is to ensure confidentiality, determining the amount of damages it should be taken into account that confidentiality reveals a significant breach and ratifies a contractual interest of a party. Defining contractual penalties for failure to perform confidentiality obligations is already an initial indicator of the importance of fulfilling the obligation. By establishing a contractual penalty for a breach of confidentiality, the creditor indicates the expectation of timely fulfillment of a specific condition. The creditor bears the burden of proof for a written agreement on contractual penalty⁸¹ and a breach of obligation.⁸² The amount of penalty does not need to be proven⁸³ which is agreed by doctrine and law. However, it is necessary to analyze the content and elements of the burden of proof⁸⁴ for the breach of obligation.

In the process of proving the breach of confidentiality obligation, a creditor must demonstrate not only the breach as an objective fact,⁸⁵ the extent of the action, but also the impact of the breach on the violation of the contractual interest, which in fact, implies an assessment of the importance and

⁷⁷ *Hachem P.*, Agreed Sums Payable upon Breach of an Obligation, International Commerce and Arbitration (Book 7), Eleven International Publishing, *Schwenzer I.* (Series Editor), 2011, 91.

⁷⁸ *Chitashvili N.*, The Function of Penalty to Ensure the Performance Interest and Compensation of Damages, Journal of Comparative Law, 2/2020, 10 <<http://lawjournal.ge/5164115661615-2/>> [30.08.2023] (in Georgian).

⁷⁹ *Carter J.W., Peden E.*, A Good Faith Perspective on Liquidated Damages, The University of Sydney Law School, 2007, 1; *Jajodia G.*, Remedies for Breach of Contract, April 2012, 8.

⁸⁰ *Chitashvili N.*, The Function of Penalty to Ensure the Performance Interest and Compensation of Damages, Journal of Comparative Law, 2/2020, 7-24, <<http://lawjournal.ge/5164115661615-2/>> [30.08.2023] (in Georgian).

⁸¹ About the mandatoty form of the contractual penalty. *Dzlierishvili Z., Tsertsvadze G., Robakidze I., Svanadze G., Tsertsvadze L., Janashia L.*, Contract Law, Tbilisi, 2014, 594 (in Georgian); *Chanturia L., Zoidze B.*, Commentary to the Civil Code of Georgia, Book 3, General part of Obligatory Law, Tbilisi, 2001, 491 (in Georgian).

⁸² Regarding the precondition of guilt to compensate the penalty, see: Decision #26/3112-14 of Chamber of Civil Disputes of the Tbilisi Court of Appeal of February 24, 2015; Janoschek, Beck'scher Online-Kommentar, BGB Stand, 01.05.2014, Edition 31, &339, Rn.3-6, cited by *Meskishvili K.*, The Contractual Penalty (theoretical aspects, judicial practice), Journal. “Review of Georgian Business Law”, 3rd edition, Tbilisi, 2014, 20 (in Georgian).

⁸³ Judgment of Tbilisi Court of Appeal, March 4, 2014 #2b/5911-13, 4.1 (in Georgian).

⁸⁴ *Meskishvili K.*, The Contractual Penalty (theoretical aspects, judicial practice), Journal. “Review of Georgian Business Law”, III edition, Tbilisi, 2014, 6.

⁸⁵ Regarding recognition of the breach of obligation as an objective fact, see: *Markesinis S.B., Unberath H., Johnston A.*, The German Law of Contract – A Comparative Treatise, 2nd ed., Hart Publishing, Oxford and Portland, Oregon, 2006, 387.

level of the breach of confidentiality obligation from the creditor. Thus, the burden of proof for a breach of obligation must combine the objective preconditions with subjective elements⁸⁶ (the importance of the breach of obligation, severity, and relation to the degree of violation of the contractual interest). The subjective prerequisites for imposing the contractual penalty influence the extent of applying legal remedies – in particular, the amount of penalty for a breach of the obligation of confidentiality should be imposed following a confidential process.

By vesting the burden of proof for determining the scope of the contractual interest in the creditor, and rescinding the amount of the penalty by the debtor, the court has the guidance to identify the degree of non-fulfillment of the obligation and the significance of the violation in terms of non-performance of the contractual interest. Naturally, the court interprets the contract without assessing the level of a breach of obligation by the party and tries to evaluate the breach of obligation by weighing it against the contractual interest, however, to maximize the principle of contractual freedom, the party should present indicators of contractual expectation, interest and its breach, which makes the court orientate on the process of defining the purpose of the contract to determine the amount of the penalty. In particular, to identify the extent of compensating the interest of the violated performance by the contractual penalty. As the debtor is given the right to a qualified decrease in the amount of penalty,⁸⁷ and the court can be provided with the authority to reduce it – it is important to evaluate the obligation of a creditor about the significance of the violation and the violated contractual interest, which will furnish the creditor with an opportunity to diminish the prospect of reducing the amount of the contractual penalty set by the court to enhance the protection of the confidentiality interest.⁸⁸

So, the proper implementation of the burden of proof for imposing the contractual penalty strengthens the idea of agreeing to confidentiality and reduces the likelihood of decreasing the amount of penalty determined by the court.

5.2. The Advantage of Having a Written Confidentiality Agreement Deperate from a Mediated Dettlement

The agreement of confidentiality can be made in the form of a textually independent agreement or integrated into the mediation settlement. Concluding a confidentiality agreement as a separate document may be appropriate for keeping the contents of the mediation settlement confidential. If a dispute about the violation of confidentiality is dealt with by the court under the conditions of an independent contract on confidentiality, there cannot be a chance to submit and disclose other terms of

⁸⁶ *Todua M. (ed.), Gagua I.*, Business Disputes and Court practice, Tbilisi, 2017, 55 (in Georgian).

⁸⁷ *Meskishvili K.*, The Contractual Penalty (theoretical aspects, judicial practice), Journal. “Review of Georgian Business Law”, III edition, Tbilisi, 2014, 6, 20, 23 (in Georgian); *Ioseliani N.*, Inappropriateness of Strict Contractual Penalty and the Role of the Court to Protect Civil Interests, Faculty of Law, Tbilisi State University, Law Journal, #1, 2016, 63 (in Georgian).

⁸⁸ About the restraining function for a breach of obligation and the compensation for minimal damage of the contractual penalty, see: *Chitashvili N.*, The Function of Penalty to Ensure the Performance Interest and Compensation of Damages, Journal of Comparative Law, 2/2020, 16-17 <<http://lawjournal.ge/5164115661615-2/>> [30.08.2023] (in Georgian).

the mediation settlement to the court. However, the content of the mediation settlement may be applied to interpret a separate provision of the confidentiality agreement, and the court can need to acknowledge the terms of the mediation settlement to determine the implied intent or general contractual interest of the parties. Accordingly, a separate confidentiality agreement can be defined as a clause about the interpretation of the same agreement: the court shall be allowed to use the text of the mediation settlement which with the agreement of confidentiality will be interpreted as two textually different but content-unified agreements forming a general contractual interest.

The convenience of signing an agreement on confidentiality as an independent act can also be stated by the fact that the parties may not reach a mediation settlement, but only agree to settle the issues of confidentiality.

5.3. Procedural stage of signing a confidentiality agreement and participating entities

It is important to define the procedural stage of signing an independent confidentiality agreement. At the beginning of the mediation, the parties must give their informed consent to the validity of the legal standard of confidentiality, and at the end of the mediation process, agree on special conditions for confidentiality. However, if the parties fail to reach a mediated settlement, the receiving party who does not need confidentiality, can lose motivation to pledge to an agreement of confidentiality. In the event of failure to concur, the unscrupulous party may refuse to sign an additional agreement of confidentiality with malicious intent. Considering the mentioned risks, it is prudent for the mediator to provide the parties with information about the opportunity of making a special agreement of confidentiality at the beginning of the mediation process, especially if the necessity of protection of confidentiality with the parties is extremely evident. If the parties agree on special reservations about confidentiality at the beginning of the process or sign a separate, special agreement on confidentiality, it will drive the mentioned parties to conduct open communication and effectively lead the process of self-determination and cooperation.

The contract of confidentiality can be signed with a separate mediator (regarding confidential information disclosed at an individual meeting), and between the participants of the negotiation and/or third parties and parties involved in the process. The role of a lawyer to inform the client about the mentioned opportunity is very important. The lawyer-representative should perform his/her duty from the stage of developing the representation plan. The parties need to be properly informed about the advantages of the confidentiality agreement not only by the legal representatives but also by the mediator even at the preparatory stage of the process. This contributes to devising the strategy of the parties and exchanging information securely.

So, the agreement on mechanisms of protection of confidentiality should further strengthen and expand the regime of confidentiality for the parties.

6. Conclusion

The research has highlighted the importance of informing the parties before the extent of confidentiality. Indeed, informing the parties before the exceptions to confidentiality in the short term

may hinder the level of sincerity of the participants of mediation and the effectiveness of the process, but in the long term, this is the only viable solution to protect the parties and the institution of mediation.⁸⁹ Informing prior also ensures the smooth performance of the obligation of legitimate disclosure of information to protect the public interest.

The essential finding of the research is the necessity to strengthen the fragile legal guarantees of protecting confidentiality with contractual mechanisms. By signing an independent confidentiality agreement, regulating the scope of confidential information, and defining sanctions for its violation, the potential of mediation as a process is expanded.

The mentioned potential considering the strengthening of protecting contractual regime includes the implementation of such rights (loss of income, compensation for moral and reputational damage) and content-procedural resources that are often unrealistic to be implemented by the court rules, taking into account the heavy burden of proof, strict legal guidelines, which are the main preconditions for executing similar requirements by the Georgian legal order

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⁸⁹ *Brown K.L.*, Confidentiality in Mediation: Status and Implications, Journal of Dispute Resolution, Vol. 1991, Issue 2, 334.

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