



Institut suisse de droit comparé
Schweizerisches Institut für Rechtsvergleichung
Istituto svizzero di diritto comparato
Swiss Institute of Comparative Law

27 January 2022, 12:00
Zoom video conference

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Confidentiality in International Commercial Mediation:

Exceptions to Principle, Principle to Exceptions

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The **confidentiality principle** emphasizes that communications in the course of mediation should be kept among a specific group of people and should not be disclosed to outsiders. In other words, “keep it a secret”. The Values behind confidentiality are respect for parties’ autonomy in good faith and sincerity, protection of the integrity and informality of mediation and encouragement of standardization of subsequent adjudication procedures. The Requirements include at least the following three procedural dimensions: (1) mediation should be conducted behind closed doors, it shall not be open to the public; (2) communication during mediation should not be disclosed to anyone who is not the intended receiver; (3) the mediator shall not serve as the judge or the arbitrator in subsequent proceedings in respect of the same dispute.

Relevant legislation in various jurisdictions takes divergent approaches to the questions of **who is bound by Confidentiality** and **what is protected by Confidentiality**. There are three main statutory models in respect of the first issue of designating the subjects of the confidentiality obligation: (1) only the mediator; (2) the mediator and the parties to the dispute; (3) all parties to the mediation process. As for the protected objects, “mediation communications” are generally defined as either communications made “during a mediation process” or communications “for the purpose of mediation”. In practical application, the difference between those two formulations is important. Some jurisdictions add further requirements, for example that only a communication made in the presence of the mediator can be protected by confidentiality.

In order to respond flexibly to the demands of practice and balance competing elements of public interest, it is necessary to provide a limited number of **exceptions to confidentiality**. There are four main grounds for lifting the veil of confidentiality of mediation: (1) the information provided in confidence can be obtained independently; (2) consent of the provider or the producer of the communication; (3) necessary for performance or enforcement of the agreement to mediate or the mediated settlement agreement; (4) necessary in the interests of public policy, such as the best interests of children, control of foreign exchange, prevention and detection of crime. These four categories are the ones currently recognized by legislation.

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