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Confidentiality in mediation

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Confidentiality of mediation is the basic mediation pillar, as parties present information within mediation proceedings they would never provide within public judicial proceedings. In such case resolution possibilities exist that could never be applied, if the parties would not be sure that the information communicated within mediation proceedings may not be publicly provided within potential judicial proceedings.

The substantive law level of confidentiality exists that includes a group of addressees to whom it is determined: parties, mediators, parties' legal counsels, supporting staff (translators, secretaries, ...), but also judges (in case of court mediations).

And further procedural law level exists that further differentiates whether restrictions prohibiting one party to refer to a certain fact or whether restrictions in respect of use of certain evidence or their prohibition in potential judicial proceedings respectively, are involved.

In addition to the above two restriction levels, regulation governing maintenance of confidentiality by witnesses, e.g. mediators, legal counsels and participating third persons, exists.

As for this issue, the European Code of Conduct for Mediators stipulates that a mediator considers all information relating to mediation or ensuing therefrom, including information that mediation will be held or was held, a confidential information, unless such information is contrary to law or public order. Any information provided to a mediator by one of the parties may not be provided to the other party, except if approved by the providing party or if the law imposes such obligation.

Member states should consider whether they will determine the scope of confidentiality of mediation by legislative means or whether it will be up to the parties to agree on the scope, or whether the combination of the above would be chosen.

The source of confidentiality in mediation is, in particular, its legal regulation, a contract on mediation, regulation stipulated by professional rules (e.g. the legal profession's regulations), case law (inapplicable in the Czech Republic), or Codes of Ethics of another institution selected by the parties. It is obvious that issues concerning conflict of law may appear here – e.g. conflicts between the rules stipulated in Codes of Ethics of the quoted institutions; and also conflicts between distant attitudes applied by countries with common law tradition and civil-law-focused countries.

Contract on mediation itself is not subject to confidentiality, unless the parties agree so. Similarly, the final agreement resulting from mediation is not subject to confidentiality.

What is subject to confidentiality? First, all written documents on carried out mediation, all oral communication in the course of mediation. There is also prohibition applicable to a mediator to testify as a witness during possible judicial proceedings; a court may not require submission of documents used within mediation.

In Czech law, the obligation to maintain confidentiality under the law concerns all facts a mediator learned in connection with mediation. Only all parties to the dispute may release a mediator of the obligation to maintain confidentiality. The obligation to maintain confidentiality under the law applies to a mediator only, it does not apply to parties. It is recommended to bind parties by a confidentiality clause included in a contract on mediation, e.g. by determining a sanction – contractual fine. Under the law, mediator's confidentiality obligation may be breached only in the case of a mediator's self-defence at a court (or another authority) or in the case of disciplinary

proceedings (conducted by the Czech Bar Association – in case of lawyers). In case of lawyers – mediators, confidentiality may be breached in relation to the Criminal Code (No. 40/2009 Coll.) and the Act on Measures against Legalization of the Proceeds of Criminal Activity and Financing Terrorism (No. 253/2008 Coll., in the wording of subsequent legal regulations), as in the case of lawyers – non-mediators per analogiam. In the Czech Republic, a sanction for failure to comply with the confidentiality obligation may comprise possible damage compensation, and concurrently it is an administrative delict; in the case of a lawyer, it is not classified as an administrative delict, but such behaviour is subject to disciplinary proceedings conducted by the Czech Bar Association.