

Construction of China Commercial Mediation Confidential System under the Singapore Mediation Convention

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ABSTRACT. Under the realistic premises that lack of relevant commercial mediation researches and the basic laws on commercial mediation, we should combine with the legal regulations in the relevant field of mediation, such as the mediation of the courts at home and abroad, the field of people's mediation, etc. At the same time, refers to the legislative norms of "confidentiality system" in the field of arbitration at home and abroad, which have many common points and similarities with mediation, besides, we should also refer to the relevant legal precedents and international conventions, and focusing on "non-public mediation of commercial disputes", "confidential obligation rules" and "exception disclosure rules" these three items to build China's commercial mediation confidential system.

KEYWORDS: commercial mediation, singapore mediation convention

1. Introduction

The idea of using mediation to solve disputes has a long history in both the East and the West: the Confucian thought of 'Rule of Rites' can be traced back to the Spring and Autumn period and the Warring States period, and there is also a legal saying in ancient Rome goes, 'Eliminating litigation is beneficial to the state.' [1] Nowadays, all countries recognize the role of mediation in dispute resolution to varying degrees, however, there are significant differences in mediation legislation and supporting systems among countries and regions. In addition to the *UNCITRAL Model Law on International Commercial Conciliation 2002* and the *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018* formulated by the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"), the international legislation on mediation has been in a legal blind spot for a long time. This situation has seriously hindered the role of mediation in the settlement of international commercial disputes.

Fortunately, due to the situation that businessmen are generally ‘tired of litigation’, the commercial mediation procedure has been applied frequently in the practice of international commercial dispute resolution because of its characteristics of ‘non-litigation’, ‘high efficiency’, ‘economy’ and ‘flexibility’, and has been widely accepted by the international community. Therefore, in May 2014, the United States submitted a proposal to the UNCITRAL Secretariat proposing that its II Working Group (International Arbitration and Mediation) could develop a multilateral convention on the enforceability of international commercial settlement agreements reached through mediation, so as to encourage parties to use mediation more. The proposal was accepted by the UNCITRAL and it authorized the Working Group II to work on the formulation of multilateral mediation conventions.

After nearly four years of compilation, revision and deliberation, the *United Nations Convention on International Settlement Agreements Resulting from Mediation* was formally adopted at the UN General Assembly on December 20, 2018. And as the representatives of Singapore proposed to hold a signing ceremony for the convention in Singapore at the 51st session of the United Nations Commission on Trade Law, and was willing to bear all the relevant costs of the ceremony, so the convention was also called the *Singapore Mediation Convention* under the proposal of the session.¹

China has signed the *Singapore Mediation Convention* (hereinafter referred to as the *Convention*) on August 7, 2019, becoming one of the first 46 countries to sign the Convention. However, due to the absence of the basic law of commercial mediation in China, therefore, in order to effectively play the role of the dispute resolution mechanism of commercial mediation and effectively undertake the obligations that China should bear after the entry into force of the *Convention*, China should formulate a set of law of commercial mediation that can not only effectively apply to domestic commercial disputes, but also effectively connect with *Singapore mediation Convention*. And to do so, considering the urgency of time, as legal researchers, we should in advance analyze and solve the problems that may arise in the process of law making, such as the identification and implementation of the settlement agreement and the design of mediation procedures, etc.

The research on the structure of the confidentiality system of commercial mediation belongs to the design of mediation procedure and the formulation of substantive norms. Therefore under the realistic premises that lack of relevant commercial mediation researches and the basic laws on commercial mediation, we should refer to the legal regulations in the relevant field of mediation, such as the Court-annexed Mediation at home and abroad, the field of People’s Mediation in China, etc. At the same time, refers to the legislative norms of ‘confidentiality system’ in the field of arbitration at home and abroad, which have many common

¹ UNIS. *General Assembly Adopts the United Nations Convention on International settlement Agreements Resulting from Mediation* [EB / OL]. (2018-12-21)[2019-03-06]. <http://www.unis.unvienna.org/unis/en/pressrels/2018/unisl271.html>

points and similarities with mediation.²Besides, we should also refer to the relevant legal precedents and international conventions. And according to our analyses (based on the related references above mentioned), we believe that we should focus on these three items: ‘non-public mediation of commercial disputes’, ‘confidential obligation rules’ and ‘exception disclosure rules’ to build China’s commercial mediation confidentiality system.

2. Guiding Principles for the Construction of Confidentiality System in Commercial Mediation

2.1 A Review of Basic Viewpoints

The construction of the confidentiality system of commercial mediation should follow certain principles, but these principles are varies in theories and practices of legislative, therefore, we think that it is necessary to sort it out thoroughly. According to *Lawrence Freedman*, an English scholar, he thinks, ‘flexibility and confidentiality are the two main characteristics of court-annexed mediation’. [2] Professor Zhang Yanli believes that ‘the principles of confidentiality and non-disclosure/non-public (In this paper, whether it is the principle of non-public or non-disclosure, it means that from the beginning of mediation till the end, the whole procedure should be conducted in a closed manner) are the unique and based principles in the commercial mediation confidentiality legislation of some countries’. [3] *Yang Liangyi*, *Mo Shijie* and *Yang Daming* come to a conclusion that confidentiality and non-disclosure are the basic principles of the system of confidentiality of arbitration in Britain.[4] Scholar *Tang qionqiong* realizes that the establishment of the confidentiality system in commercial mediation in China should follow the two basic principles of ‘party autonomy’ and ‘strict adherence to the principle of confidentiality’. [5] Based on her analyses of *Singapore Mediation Convention* and the two model laws of the *UNCITRAL Model Law on International Commercial Conciliation 2002* and the *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018* and other legal norms and documents of other countries, she thinks that the principle of ‘non-disclosure’ is included in the principle of ‘confidentiality’, while the principle of ‘flexibility’ is included in the principle of ‘party autonomy’,

² Both arbitration and mediation(including the court-annexed mediation procedure) are dispute settlement mechanisms independent of the jurisdiction of the court, and they share many common points in the enforcement and the relief of arbitration agreement and mediation agreement, in other words, even as an independent dispute resolution procedure, the enforcement and the relief of mediation agreement and arbitration agreement will have to rely on the judicial power of the court. Therefore, considering the similarity between arbitration and mediation, as well as the integrity of the confidentiality system of arbitration, in order to construct the confidentiality system of commercial mediation in China, it is of great value to refer to the provisions of arbitration legal norms on the confidentiality system.

therefore, the guiding principles for the construction of confidentiality system should be 'confidentiality' and 'party autonomy'. In addition to the viewpoints mentioned above, there are other scholars who have also put forward their own ideas, but most of them have no objection to the principle of 'confidentiality' as the basic principle of confidentiality system of commercial mediation, they just have different views on which of the 'non-disclosure principle' and 'party autonomy principle' should be taken as the other basic principles of confidentiality system of commercial mediation.

As far as we are concerned, we believe that the principle of party autonomy and the principle of confidentiality constitute the basic principles of confidentiality system of commercial mediation. We think that as a dispute settlement system independent of the trial/jurisdiction of the court, due to the initiation of the mediation system is based on the unanimous assent of the parties, then the parties shall have significant right of autonomy on the choice of mediation procedures (How), mediator (Who), the place (Where) and the disputes submitted for mediation (What) under the premise of not violating the mandatory provisions of the law. And as for the principle of confidentiality, as we have analyzed, it is the most basic principle of the mediation confidentiality system. Here, some people may think that there will be a conflict between the principle of party autonomy and the principle of confidentiality, that is, according to the principle of party autonomy, all the matters concerning mediation be kept confidential or not should be negotiated by the parties, therefore, the principle of confidentiality should not be the most basic principle of the confidentiality system of commercial mediation. However, there is misunderstanding about this point of view, so in the next paragraph, this paper will seriously elaborate this misunderstanding.

2.2 The Definition, Conflict and Application of the Principles

The principle of confidentiality means that, 'After the parties agree to settle the dispute through mediation, the mediators, parties and other mediation participants shall bear the obligation to keep the evidence and any information related to mediation confidential, and they shall not disclose them to any third party'. [6] And to be more specifically, according to *Lawrence Freedman* that the confidentiality shall include two parts: 'confidentiality of mediation procedures' and 'confidentiality of mediation contents'. As for the definition of party autonomy, in the context of mediation, it refers to the initiation of the mediation process, the conclusion of the mediation agreement, and the claim or abandonment of the substantive or procedural rights in the mediation can be reached by the parties through consensus under the premise of not violating the mandatory provisions of the law. [7] From this definition, we can draw a conclusion, that is, as long as it does not violate the mandatory provisions of the law, the parties can decide how to mediate, choose what mediation procedures, and whether to conduct public mediation, and whether to maintain confidentiality of relevant matters involving mediation by unanimous assent.

Obviously, this conclusion seems to make the principle of confidentiality conflict with the principle of party autonomy, but in fact it is not that case, and we only need to understand it in another way: if the parties are completely autonomous or partially autonomous on certain matters above mentioned in the mediation, then the autonomy of the parties should be fully respected. Suppose that if the parties reach a consensus and require disclosure of the entire mediation process, then the application of the confidentiality provisions should be excluded under the premise of not violating the mandatory requirements of the law (e.g., if public mediation may infringe upon the legitimate rights and interests of a third party, for example, public mediation may lead to the disclosure of the third party's trade secrets, in this instance, even if both parties agree to make it public, the mediation shall not be made public); if the autonomous matters of the parties does not involve confidentiality provisions, then the application of the confidentiality provisions established according to the principle of 'confidentiality' shall be applied (e.g., if both parties unanimously choose online mediation, then the autonomy matter only involves in the choice of mediation procedure, therefore, the confidentiality rules should be applied, and no mediation participants may disclose any matters related to mediation).^{3,4}

Finally, after we have determined the guiding principle of constructing confidentiality system of commercial mediation, then the most important question thus lies in how to construct the confidentiality system of commercial mediation according to these two principles. Based on the analyses above, we have found the relationship between confidentiality and party autonomy, that is, commercial mediation should not be conducted in public, unless all the parties agree to conduct mediation in public, but the premise is that public mediation shall not violate the mandatory provisions of the law. Therefore, for the purpose of constructing commercial mediation confidentiality system, the first step is to analyze the 'non-public mediation of commercial disputes' in depth. And, the second step, we need to identify the subjects of confidentiality obligations, that is, in-depth analysis of who should bear the obligation of confidentiality. And the last step concerns with the 'exception disclosure rules', as the German legal maxim goes, 'there is no rule but exceptions (Keine Regel ohne Ausnahme)', therefore, when mediation information

³ In order to avoid falling into theoretical controversy between the 'traditional position' and 'current trend' like nowadays arbitration confidentiality system, and based on the practical needs of constructing the basic commercial mediation law to meet the requirements of *Singapore mediation convention*, China should clearly stipulate the rules for conflict resolution between 'confidentiality' and 'party autonomy'. For details, please refer to Zhang Yuqing. *Exploration and Reflection on Confidentiality Obligation of International Commercial Arbitration* [J]. *International law research*, 2016 (04): 80-96

⁴ Article 9 of the *UNCITRAL Model Law on International Commercial Conciliation 2002* stipulates that all matters related to the conciliation procedure shall be kept confidential unless otherwise agreed by the parties. Article 10 of the *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018* stipulates that all matters related to the mediation procedure shall be kept confidential unless otherwise agreed by the parties.

(matters) that needs to be kept confidential but keeping confidential may endangers the legitimate interests of the state, society or a third party, and in this case, if we can invoke the exception disclosure rules to disclose the information (matter) that should not be disclosed?

In summary, to build China's commercial mediation confidential system, we need to focus on 'non-public mediation of commercial disputes', 'confidential obligation rules' and 'exception disclosure rules' these three items.

3. Non-Public Mediation of Commercial Disputes

3.1 Reasons for Non-public Mediation of Commercial Disputes

According to our researches, there are mainly three reasons for the non-public mediation: (a) In essence, commercial mediation is an integral part of mediation, therefore, in China, the construction of confidentiality system should comply with the relevant mediation laws and provisions.⁵(b) In compared with the mediation, the court shall insist on public trial, except for some special cases. Court as the state organs, is often regarded by the general public as the last line of defense for social fairness and justice, and has unique social functions and significance, therefore, when handling cases, the court should not only make the results fair and just, but also make the fairness and justice visible to the public, just as Lord *Hewart* said in *Rex v. Sussex justices, ex party McCarthy (1924) k.b.256259*: 'It is of fundamental importance that justice should not only be done, but should be manifestly and unduly seen to be done'. While mediation as an ADR mechanism, the initiation mediation procedure is generally through the private agreement between the parties(unanimous assent) or under the host of the judge, the parties agree to mediate(court-annexed mediation), all of these make the attribute of privacy of mediation naturally. [7] (c) In the process of commercial mediation, the commercial secrets and business privacy of the parties are often involved. And if it is disclosed, it may cause economic losses to the parties. In summary, non-public mediation is not only the consensus of the international mediation legislation standard, but also belongs to the international practice. [8]

3.2 The Connotation of Non-public Mediation of Commercial Disputes

The connotation of non-public mediation of commercial disputes refers to two items: 'non-public of mediation processes' and 'the subject of mediation'. *Xiao Jianhua*, a domestic scholar, described the non-public mediation of commercial

⁵ Article 19 of the judicial interpretation *The Supreme People's Court [2009 No.45] : Opinions of the Supreme People's Court on the Establishment and Improvement of a Mechanism for Resolving Conflicts and Disputes Linking Litigation and Non-litigation* stipulates that: the mediation process shall not be open, except for those required or agreed by both parties.

disputes as 'confidentiality of mediation procedures'. [9] He thinks that the confidentiality of mediation procedure is totally opposite to the open trial system of civil litigation, which means that in the process of mediation, except for special circumstances, other citizens (people other than mediation participants) shall not be involved in the case, shall not be allowed to listen, and the news media shall not interview and report any mediation information no matter how they get the information. And the personnel participating in the mediation or attending the mediation shall not disclose any information related to mediation.

At present, most of the common law and Romano-Germanic family countries have basically established the legal provisions on the non-public mediation system for commercial disputes. And with the promulgation of the *The Supreme People's Court [2009 No.45]: Opinions of the Supreme People's Court on Establishing and Improving the Mechanism for Resolving Conflicts and Disputes Linking litigation and Non-litigation* (Hereinafter referred to as the *Opinions*), China's mediation law has also basically established the provisions of non-public mediation, but the *Opinions* is just a judicial interpretation, not a legal provision. Although judicial interpretation also has high legal effect, it should be legalized so as to make the provision more definite. We believe that the determination of the non-public mediation rules of commercial disputes through law will make it more reliable and visible to public and will help China to shape an independent mediation procedure space, avoid the spillover of open matters in the mediation process, reduce the parties' fear of the mediation procedure, and create a stage for real and honest communication of the mediation.

4. Establishment of confidential obligation rules

The concepts of non-public mediation and confidentiality obligation are easy to be confused, but they have different connotations. The former refers to the subject who has the right to participate in mediation, while the latter is described by Zhang Baocheng, a domestic scholar, [10] as the scope of the subject who enjoys the privilege of confidentiality and undertakes the obligation of confidentiality.

4.1 Subjects of Confidentiality Obligation

There are some differences in mediation legislation in different countries and the provisions of some international treaties on the subject of specific confidentiality obligations. The provisions of Articles 9 and 10 of the *UNCITRAL Model Law on International Commercial Conciliation 2002* stipulates that the following subjects have the obligation to keep secrets: a party to the mediation proceedings or any third party, including those involved in the administrative work of the mediation proceedings, shall not, in arbitration, judicial or similar proceedings, present or provide testimony or evidence on the

following matters as evidence, (a) The invitation of a party to participate in the mediation proceedings, or the fact that a party has ever wished to participate in the

mediation proceedings; (b) The opinions or suggestions made by one party in the mediation on possible solutions to the dispute; (c) A statement or admission made by a party in the course of the conciliation proceedings; (d) Recommendations made by the mediator; (e) The fact that a party has expressed its wish to accept the settlement proposal put forward by the mediator; (f) A document prepared for conciliation proceedings. Article 4 of the *United States Uniform Mediation Act 2001* (Hereinafter referred to as the *Act 2001*) has strict provisions on the subject of confidentiality: Including mediation parties, mediators and non-party participants, that is, all those who can participate in the mediation procedure have the obligation of keeping confidentiality, and they also have the right to refuse to disclose or prevent others from disclosing the information of mediation according to the provisions of the *Act*.⁶Zhang Yanli also put forward a view which is similar to the provisions of the *Act 2001*: 'Except with the consent of the parties, the parties, mediators and other mediation participants shall not disclose any matters related to the mediation'. The subject of confidentiality obligation shall be comprehensive, and all mediation participants shall bear the obligation of confidentiality and refuse to disclose the information according to law'. We agree with this view. We think that this view is scientific and reasonable. Commercial mediation is slightly different from civil mediation, because the disclosure of information known in the mediation processes may involve a company's business model, business data and other business secrets, which may cause great losses to the parties if it is leaked. Therefore, considering that China's relevant mediation laws and regulations do not directly specify the scope of confidentiality subject, we think that in order to build the confidentiality system of commercial mediation, China should define the scope of the subject of confidentiality according to this viewpoint in the future legislative activities.

4.2 Scope of Confidential Information

The scope of confidential information refers to the matters that what kind of information should be kept by the above-mentioned person who has the obligation of confidentiality. Usually, the parties to the mediation will sign a confidentiality agreement on the scope of the confidential matters, and the agreement will normally specify the confidentiality obligations of the mediation parties and non-party participants.⁷However, this kind of confidentiality agreement also has its limitations:

⁶ *UNCITRAL Model Law on International Commercial Conciliation 2002* and the *United States Uniform Mediation Act 2001* also include the courts and arbitration tribunals that may be informed of the secrets of mediation into the scope of subjects with confidentiality obligations.

⁷ In practice, the confidentiality agreement signed generally include the following contents:(1)The scope of confidential matters usually refers to the selection of mediators, all emails, telephone calls and talks related to mediation and procedures;(2)the obligation to prohibit disclosure in subsequent proceedings like court and arbitration tribunal, and all statements in mediation enjoy the protection of inviolable privilege, In the subsequent procedure, it should not be disclosed or adopted as evidence;(3) the mediator has the privilege not to be forced to report and testify to the court; (4) the exceptions to the confidentiality of

‘The privity of contract limits the scope of the subject who bear the confidentiality obligation, that is, only the parties who sign the agreement are bound’. [11] Therefore, in order to meet the requirements of the principle of confidentiality, one of the legislative(guiding) principles of the construction of confidentiality system of commercial mediation above mentioned, that is, if the parties have not signed the confidentiality agreement, relevant law should still make a clear provisions of the scope of confidential matters or make a general rule as miscellaneous provisions, such as article 9 of the *UNCITRAL Model Law on International Commercial Conciliation 2002* stipulates in a general way that the confidential information that the subject of confidentiality obligation should keep: ‘Unless otherwise agreed by the parties, all the information related to the mediation proceedings shall be kept confidential, except for those disclosed in accordance with the law or for the purpose of performing or enforcing the settlement agreement’. And judicial interpretation in China *The Supreme People's Court [2007 No.2]: Opinions on Providing Judicial Guarantee for the Construction of Socialist Harmonious Society* stipulates that, ‘The mediation process shall not be made public, except when both parties request or agree to make the mediation public’.⁸ However, it is obvious that neither the model law nor the judicial interpretation of China specifically stipulates what kind of information can be disclosed, but roughly defines the scope of information that can be disclosed through the provisions of the miscellaneous provisions. Although this way of legislation is reasonable according to the guiding principle, it has some defects, that is, it can not guide the behavior of the parties to the dispute, for example, the parties to a dispute may want to know exactly what information can be disclosed and what information cannot be disclosed, but the miscellaneous provisions give the judge the right to determine whether an information can be disclosed or not. We think this is not conducive to the construction of commercial mediation confidentiality system, so the specific scope of disclosure information or non-disclosure information shall be determined, and this will be discussed deeply in the chapter of ‘exception disclosure rules’.

mediation, such as the implementation of mediation agreements or disputes involving mediation agreements;(5) the responsibility of violating the confidentiality agreement.

⁸ Article 19 of the *The Supreme People's Court [2007 No.2]: Opinions on Providing Judicial Guarantee for the Construction of Socialist Harmonious Society* The mediation process shall not be made public, except when both parties request or agree to make the mediation public. The organs, organizations and mediators engaged in mediation and the court staff responsible for the management of mediation affairs shall not disclose the relevant information of the mediation process, testify in the litigation of relevant cases, and the parties shall not record the mediation process, the concessions or promises made by the parties in order to reach a mediation agreement, and the opinions or suggestions expressed by mediators or the parties shall not be put forward as evidence, except for the following circumstances: (a) Both parties agree; (b) Matters that can be disclosed by law; (c) The people's court considers it necessary to protect the national interests, social public interests and the legitimate rights and interests of third party.

4.3 Responsibility and Remedy for Breach of Confidentiality Obligation

According to the guiding principles of the construction of the confidentiality system of commercial mediation, the assumption of responsibility for breach of confidentiality obligations should be divided into two types:(A) Mediation parties who violate the confidentiality obligations after signing the confidentiality agreement should bear the liability for breach of contract or claim compensation for tort liability according to the confidentiality agreement. Because the essence of the confidentiality agreement belongs to the confidentiality contract signed by the mediation parties.⁹ (B) If the mediation parties do not sign the confidentiality agreement, but violate the confidentiality obligations stipulated by the law, then the parties who disclose the information should bear the tort liability compensation.

5. Exception disclosure rules

5.1 The Argument between Absolute Confidentiality Obligation and Relative Confidentiality Obligation

The disclosability of information obtained in the process of commercial mediation, that is, under what circumstances can the relevant confidential parties break through the provisions of confidentiality obligations to disclose the secrets (information) they have known. In the field of arbitration confidentiality, there are two views on the disclosure of information obtained in the arbitration process: one is the absolute confidentiality obligation represented by the United Kingdom, and the other is the relative confidentiality obligation represented by Australia. The main difference between these two views is whether the subject who has the obligation of confidentiality has the obligation of absolute confidentiality or relative obligation of confidentiality. The British courts have always advocated that the arbitration proceedings heard in private will inevitably bring about the obligation of absolute confidentiality. In the British court's guiding case *Ali Shipping Corporation Case*,¹⁰ judge *Potter* of the court of appeal made it clear that confidential information can only be disclosed under the following five categories of confirmed exceptions: (A) The party providing the materials expresses or implicitly agrees to the disclosure; (B) After the arbitration, the court ordered the disclosure in the court procedure; (C) The disclosure is approved by the court; (D) In order to protect the legitimate interests of arbitration parties, disclosure is 'reasonably necessary', for example, to sue a third party or to defend a third party's action; (E) Disclosure is required by the public interest or the interests justice. Any other confidential information other than these five items shall not be disclosed for any reason. Countries headed by Australia think that the confidentiality obligation belongs to the relative confidentiality

⁹ For details, please refer to the case of mutual action between Zhang Xinwei and Baidu: <http://www.techweb.com.cn/news/2006-12-28/135402.shtml>

¹⁰ *Ali Shipping Corporation w Shipyard Trogir (1998) 1 Lloyd ' s Rep. 643.*

obligation, that is, unless a confidentiality agreement is signed, the confidentiality subject shall not take the non-public hearing as the basis for the confidentiality subject to undertake the confidentiality obligation.¹¹Therefore, if the parties want more protection, they should sign a confidentiality agreement. Arbitration and mediation are similar because they are both non-litigation dispute resolution systems. Therefore, the construction of confidentiality system of commercial mediation is also faced with the controversy between the absolute confidentiality obligation and the relative confidentiality obligation. However, based on the requirements of the principles of ‘party autonomy’ and ‘confidentiality’ and the practical needs of constructing the basic commercial mediation law to meet the requirements of *Singapore mediation convention*, and some provisions of judicial interpretations in China, we think that the legislation of the confidentiality system of commercial mediation in China should adopt the view of absolute confidentiality obligation.

5.2 Scope of Disclosable Information

According to the requirements of absolute confidentiality obligation, the construction of confidentiality system of commercial mediation should clearly list the confidential information that can be disclosed. According to the viewpoint of Wang Zuxing and the provisions of *The Supreme People’s Court [2009 No.45]: Opinions of the Supreme People’s Court on Establishing and Improving the Mechanism for Resolving Conflicts and Disputes Linking litigation and Non-litigation*, [12] and the *The Supreme People’s Court [2007 No.2]: Opinions on Providing Judicial Guarantee for the Construction of Socialist Harmonious Society*, the secret information that can be disclosed generally includes three categories: (A) The information that the parties agree to disclose; (B) The information that can be disclosed according to the requirements of law or public policy; (C) In order to implement or enforce the mediation agreement. But, to be more specific, according to our review of the literatures and materials(laws, documents, acts and provisions), we believe that in order to meet the requirements of the absolute confidentiality obligation, the specific scope of information that can be disclosed shall include the following items: (a)The parties express or implied consent to the disclosure of information; (b)After mediation, the court or arbitral tribunal order the disclosure in court procedure, or the settlement agreement reached in international commercial mediation is not performed and the parties seek relief from the competent authority, the competent authority requires disclosure; (c) The disclosure is approved by the court; (d) Factual materials already existing before mediation can be disclosed; [13] (e)The information of malicious participation and sabotage of mediation procedures can be disclosed;¹² (f)The confidential information involves criminal offence,

¹¹ *Plowman v. Esso Australia Resources Ltd. Et al.* , *Supreme Court of Victoria* , 1992 , reported in 8 *Mealey ’s International Arbitration Report no . 1 (January 1993)* H1B27 , at H26 ; *Tibor Varady , John J. Barcelo III and Arthur T. Von Mehren, Documents Supplement to International Commercial Arbitration : A Transnational Perspective (5th edn . , WEST , 2009)pp . 644-669.*

¹² *Doe v. Francis*, 2003 WL 24073307(N. D. Fla. filed Oct. 8, 2003)

personal injury and the wrongdoing of mediator; (g)The choice when the duty of testifying in court conflicts with the duty of confidentiality. When there is a conflict between the obligation to testify in the court and the duty of confidentiality, there is usually a problem of balancing the interests of fairness and justice and the legal obligation, in this case, the judge needs to exert his discretion.

6. Concluding remarks

The establishment of commercial mediation confidentiality system is conducive to creating a good mediation atmosphere, protecting the parties' freedom of will, promoting the frank communication between parties, maintaining the independence of mediation, and the integrity of mediation procedures. The construction of the confidentiality system of commercial mediation is not only to pave the way for the docking of the basic law of commercial mediation of China with the *United Nations Convention on International Settlement Agreements Arising from Mediation*, it is also based on the fact that businessmen are tired of litigation in recent years and the scale of commercial mediation is gradually expanding all around the world. Therefore, based on the particularity of commercial mediation, China should pay attention to the construction of commercial mediation confidentiality system to promote the improvement of commercial mediation system.

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