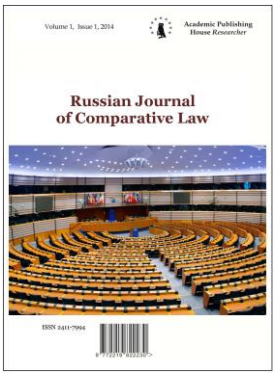

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Liability of the Mediator in France and Russia

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Abstract

This article undertakes comparative analysis of legal liability of the mediator in France and in Russia. Mediation is understood as an alternative method of dispute resolution which is widely-used in European countries. Mediation in France has been practiced for several decades. In Russia the Federal law on mediation was introduced only in 2010. This article attempts to identify both, common features and the differences, in legal regulation of mediation process in these two jurisdictions. Although the mediators bear similar types of liability in France and in Russia, legal approaches to establish such liability are different. Comprehension of legal liability of mediators entails examination of the following elements: regulation of failure to disclose the conflict of interest, breaches of specific contractual provisions, violations of confidentiality rules, false advertising, as well as engagement in legal practice.

Keywords: law of France, law of the Russian Federation, mediators, mediation process, legal liability.

1. Introduction

Mediators in dispute resolutions have been practicing in Europe for decades. Their activities have not always been subject to statutory regulation. Moreover, if we consider millions of cases, which are solved by means of mediation in the world, we will hardly find mentioning of legal suits against the mediators. Several facts could explain such a lack of lawsuits [1]:

- many clients are satisfied by the mediation procedure because the mediator helps them to solve their dispute effectively;
- mediation procedure is subject to rules of confidentiality which can exert indirect influence on the possibility and willingness of the parties to bring this procedure to judicial review;
- mediators and the dispute parties who have already resorted to mediation procedure tend to solve their post-mediation disputes also privately;
- in some jurisdictions, for example, in France, there is no explicit statutory provision which would provide procedural grounds for plaintiffs to look for judicial review of the actions of a former mediator.

Since the popularity of mediation in France and in Russia is gradually increasing, it is important to provide control over the activities of mediators and to introduce special legal

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regulations establishing the rules of challenging the misconduct of mediators before the courts of law.

2. Materials and methods

This article is based on the contextual review of statutory regulation in two jurisdictions, i.e. France and the Russian Federation. These regulations include: Civil Codes, Criminal Codes, as well as specific laws and regulations on mediation. Understanding legal provisions regarding civil, criminal, disciplinary, or administrative liability of mediators is based on academic writings, i.e., books and the articles.

Due to a lack of information regarding court practice dealing with the issue of liability of the mediators we illustrate our points with the available case, considered by the Court of Appeal of Rennes 10 June 2008. In order to examine the difference between French and Russian legal regulation we utilize general methods of legal analysis and general methods of comparative legal analysis.

3. Discussion

Practice in France: a lack of specific regulations

There is no explicit rule concerning liability of the court-annexed or contractual mediator in France. We can find that the general provisions of civil and criminal law are applicable for liability of the mediator. At the same time, in case with contractual mediation the liability of the mediator is of contractual nature. The research and debates in legal literature in France are rather limited, in comparison with, for example, to USA or England.

This can explain why only one court decision when the party sued the mediator is famous in research literature. This case was considered by the Court of Appeal of Rennes 10 June 2008 [2]. The plaintiff asked the court to hold a mediator who had been appointed by the Public Prosecutor liable for misconduct in carrying out the functions of public justice. The plaintiff insisted that the mediator allowed several serious mistakes amounting to negligence in performing the mediation duty. The Court found that the mediator was not liable and no misconduct was found.

Types of liability and sanctions in France

Several types of liability and sanctions are possible to implement against the misconduct of mediators in France.

- Misconduct can cause *personal (civil) liability* under which the mediator is obligated to pay compensation to the parties for the harm caused by his misconduct. Such liability which can be either of contractual or of tort nature, is regulated by the French Civil Code [3].
- Sanctioning grievous misconduct amounts to *criminal liability* when the mediator is subject to criminal sanctions, i.e., fines and imprisonment. Art. 226-13 of the French Criminal Code says: "[t]he disclosure of secret information by a person entrusted with such a secret, either because of his position or profession, or because of a temporary function or mission, is punished by one-year imprisonment, and a fine of €15,000" [4].
- For the mediators holding membership in professional associations the principles and standards of such associations are significant. The plaintiff can ask the authorities to bring his mediator to *disciplinary liability* in the event if the said standards had been violated. Sanctions are ranged from bringing apologies and undertaking additional training to suspension or even abrogation of membership in the association. Violations of professional standards is capable of not only to directly create the basis for further legal actions, but of tarnishing the reputation of mediators. Moreover, if the mediator made a reference to membership in a certain association in his mediation contract, the fact that he or she is bound by the standards of that association is implied by the agreement to pursue mediation as a part of that entity. For example, the National Code of Conduct for mediators establishes the rule that the mediator who joined this Code holds liability for misconduct [5]. In case of failures to comply with professional standards of a certain association, the mediator allowing deviations from these standards can be excluded from the list of mediators maintained by the relevant association or the mediation center.

As for the court-annexed mediation, mediators involved in it are not subject to civil liability because they enjoy quasi-judicial or qualified immunity. The court-annexed mediators face

sanctions ranging from reprimands and disqualification for future service to the imposition of the costs of the mediation procedure.

Types of liability and sanctions in Russia

There are four types of liability of the mediator in the Russian Federation: disciplinary liability, administrative liability, civil liability, and criminal liability.

- The mediator can bear *disciplinary liability* only if he or she performs duties on professional basis. According to Art. 18 and 19 of the 2010 Federal act "On alternative dispute resolution procedure involving a mediator (mediation procedure) (hereinafter: the 2010 Mediation act), self-regulated organizations of mediators must control professional performance of their members [6]. Disciplinary measures are imposed on mediators in case if they allow violations of standards and regulations of the self-regulated organizations. Disciplinary liability cannot be applied for non-professional mediators.
- According to Art. 17 of the 2010 Mediation act the mediator can be subject to *civil liability*: "mediators and organizations providing mediation services are responsible before the dispute parties for the harm caused to the parties as the result of carrying out special activities as stipulated by civil legislation". In particular, such liability can take the mode of compensation of losses or compensation of moral damage (Art. 15 and 151 of the Civil Code of the Russian Federation) [7].
- *Administrative liability* follows three types of actions. Firstly, according to Art. 30.1 of the 2006 Federal act "On Advertisement" the mediator is liable for violations of this law [8]. Secondly, administrative liability can be imposed when the mediator carries out illegal activities for acquisition and/or dissemination of information which contains credit history (Art. 5.53 of the Code of Administrative Offences of the Russian Federation) [9]. The third possibility of imposing administrative liability on mediator follows from putting the dispute parties in any privileged position as well as from derogations from the rights and legitimate interests of one of the parties (Art. 11 (7) of the 2010 Mediation Law and Art. 5.62 of the Code of Administrative Offences of the Russian Federation).
- Criminal law of Russia does not specifically mention mediators as special subjects of *criminal liability*. In the Russian legal system mediators are not civil servants yet they can be liable for "compulsion to complete a transaction or to refuse to complete it under threat of violence, destruction or damage of other person's property, and also under the threat of spreading information that could cause substantial harm to the rights and legally-protected interests of the victim or his relatives, in the absence of elements of extortion" (Art.179 of the Criminal Code of the Russian Federation) [10]. Moreover, Art. 183 of this Code establishes that: "illegal disclosure or use of information classified as a commercial, tax or banking secret, without the consent of the owner thereof by a person to whom such information is entrusted or became known in the line of service or work shall be punishable".

What are the cases where the mediator can be subject to legal liability?

There are several specific circumstances that could give rise to legal complaints against the mediators as the result of their professional misconduct.

1. Failure to disclose a conflict of interest

The situation when the mediator has own interest, contrary to the interest of one of the parties or several parties, and when he or she fails to disclose this interest provides grounds for actions against the mediator. This obligation to disclose a conflict of interest is covered by the principles of impartiality and neutrality in dispute resolution procedure. Moreover, the standards of professional ethics require that a mediator refrains from actions which would favor one party over another. A conflict of interests *per se* does not prevent the mediator from performing his duties. On the contrary, if a mediator fully discloses such a conflict and the parties consent to it the dispute resolution process can continue. What kind of conflicts should the mediator disclose? It is an ambiguous question because Russian law does not provide clear answers to it. Yet, for example, the American Arbitration Association and the Society of Professionals in Dispute Resolution adopted the Model Standards of Conduct for Mediators, according to which the mediator should disclose all actual and potential conflicts of interest [11].

Failure to disclose a conflict of interest may lead to disciplinary sanctions imposed by those professional associations in which the mediator holds membership. Moreover, the mediator can

carry out civil liability for breaches of the rules regarding conflict of interests. In some cases, breaches of express contractual terms can also amount to civil liability. Mediation contracts, as a rule, include the clauses of neutrality, impartiality, or lack of bias [12]. All these terms are subject to wide interpretation, any of which assumes the existence of obligation to disclose a conflict of interest. Even contracts which do not expressly mention impartiality of mediators can imply the necessity of impartial action.

Professor Amanda K. Esquibel in her research, entitled "the Case of the Conflicted Mediator" claims that "even if it is not an explicit term of any such contract, neutrality and impartiality are such a fundamental aspect of what [mediation] parties seek that they should be considered a part of the contract. It is akin to courts implying terms of good faith and fair dealing in contracts" [13]. All the said considerations exist in theory. Yet there is still no court instance which has only implied impartiality with respect of mediation contracts in case of failures to disclose a conflict of interests and a lack of explicit obligations.

2. Breach of specific contractual promises

The obligations of mediators stem from different sources of law, including the mediator's contract with the parties. Let's analyze two examples of clauses in contracts concluded between the mediator and the parties which can lead to mediator's liability: "In addition to group mediation, each party shall will have a chance to meet with the mediator privately (*caucus*)", and "At the conclusion of mediation, the mediator will help the parties to write the terms of their agreement" [14].

In the first example the mediator promises to meet the parties privately. But what if the mediator concludes that the mediation is unlikely to produce a useful result and terminates this promise consequently not meeting the parties *in caucus*? The mediator then fails to implement a specifically-prescribed stage of the mediation process and becomes liable for the breach of contractual obligations. Sure, it is difficult to estimate and establish damages in the relevant claim. However, avoiding such a situation coupled with including in the contract the clause alike "continued participation in mediation is voluntary for all parties including the mediator" appears to be a better fit for professional standards.

In the second example the mediator includes in the mediation process the promise of particular outcome, i.e., the mediation agreement strongly implies that mediation will lead to an agreement between the parties. In such a case the mediator promises to deliver a particular result and takes the risk of liability if the parties will not arrive at the desired outcome.

3. Engagement in legal practice

France

During mediation procedure the mediator can be enrolled with activities specifically reserved for legal professional, e.g., in advocacy or notarial activities. Although the last two activities represent legal practice, there is no statutory definition of "legal practice" in France (which holds true also with many other national jurisdictions). Most statutory definitions refer to such concepts as, e.g., "providing legal information," "ensuring general legal order," or "providing legal advice". When the mediator undertakes legal action, such as, e.g., examination of evidence or assessment or drafting of a formal contract for the parties' agreement two situations can be differentiated:

a. Non-attorney mediator engages in the conduct which is reserved only for legal professions which is the risk of potentially unauthorized legal practice.

b. The mediator is authorized to practice law and he or she implies to use legal techniques in mediation procedure. The mediator faces cross-professional ethical considerations because he or she must simultaneously uphold the standards of mediation and legal professions.

Noteworthy, in France there is no clear statutory provision about obligation of the mediator not to take actions reserved for legal professionals. According to the National Code of Conduct for mediators, the mediator should inform the parties that they can ask advice from different professionals. Moreover, if there is a doubt that the agreement between parties can affect public order or lead to inequity, the mediator specially invites the parties to seek advice from competent professionals. In this Code the definition of mediation also highlights that the mediator is a third party who is neutral, impartial, independent, and does not act on decision-making or advisory capacity. However, Recommendation R (98)1 of the Committee of Ministers to member states of the Council of Europe on family mediation establishes that: "the mediator may give legal information but should not give legal advice. He or she should, in appropriate cases, inform the

parties of the possibility for them to consult a lawyer or any other relevant professional person" [15]. Hence, the mediator in France in cases of family mediation can provide legal information. Legal regulation does not reserve such an opportunity for other mediation cases. However, according to the internationally-accepted practice and rules of mediation, resorting to legal actions by a mediator in other mediation procedure is not impossible.

The Russian Federation

Let us consider the issues of engagement in legal practice by mediators in Russia. There are situations when the mediator can be engaged in the conduct of legal practice. In Russia there is an authorized register of professions which exclude the possibility to perform the duties of mediation. Persons cannot be mediators, unless otherwise is provided by federal law, if they hold positions in: public office in the Russian Federation, public office in the constituent entities of the Russian Federation, state civil service, or municipal service.

Russian law does not allow possibility to act as mediators for acting nor retired judges. Yet in many other countries, for example in France, the judge plays a significant role in the mediation processes and in development of mediation services. Moreover, Russian law is silent about the possibility for an advocate to engage in mediation. However, in practice, the legal community has reached the conclusion that the advocates can be engaged in mediation.

Why there are such restrictions? A number of explanations can be brought. Firstly, mediation is an independent institution of civil society. The combination of employment in state and municipal services with mediation activity is impermissible under Russian law in this context. State and municipal civil servants remain representatives of public authorities. They cannot act as independent mediators in disputes resolution regarding civil law relations. The risks of corruption and conflict of interests can also explain such restrictions.

4. Violation of confidentiality rules

The principle of confidentiality is one of the basic principles of ethical conduct in different areas of professional activity. Art. 5. of the 2010 Mediation Law in Russia establishes the principle of confidentiality of information concerning mediation procedure. In France Art.9 of the Civil Code establishes, that: "[e]veryone has the right to respect for his private life". Violation of the obligation to be confidential in some professions leads not only to professional sanctions but also to sanctions under criminal law. As mentioned above, Art.226-13 of the French Criminal Code establishes criminal liability for the disclosure of secret information. This article still does not specify which exactly persons can be subject to this type of liability.

In her article, entitled "Professional secrecy and the mediator" Francoise de Lavenere, a mediator and a member of the association Fédération Nationale des Centres de Médiation shares her opinion that the mediator is subject to confidentiality obligation, as enshrined in Art. 131-14 of the Code of Civil Procedure: "[t]he findings of the mediator and the declaration he has collected may not be used nor cited in the subsequent proceeding without the consent of the parties, and may not, in any case, be referred to in any other procedure" [16].

To sum up, in order to represent a ground for legal liability the breaches of confidentiality must meet three requirements:

1. Information should be confidential.
2. There should be a fact of disclosure of this information.
3. The person should be under an obligation to keep the information confidential.

5. False Advertisement

The National Code of Conduct for mediators in France establishes in Art. 1.4., entitled "Promotion of mediators' services" that mediators may promote their practice provided that they do it in a professional, truthful, and dignified way. Advertising his or her service, the mediator who holds himself out to the public in a false manner risks to face sanctions. It could be civil liability (private civil lawsuits for compensatory damages) or sanctions imposed by an association or a center where he is registered [17].

In Russia there are strict legal rules concerning promotion of the mediators' services. Art. 30.1 of the Federal law "On Advertisement" establishes that the mediator can be liable for violating the principles of fair advertisement practices. For example, he or she can make advertisements of own activities upon a completion of special training courses for mediators and obtaining a proper certificate. All information which the mediator publishes in an advertisement must contain information on documents confirming the completion of the training programmes. There is a

requirement for mediation organizations to explicate the rules of mediation procedure and the standards and rules of professional activity of the mediator in the advertisement. The mediator cannot state in advertisement that mediation has advantages in comparison with court or tribunal dispute settlement procedures.

4. Results

In France there is no specific legal regulation concerning liability of the mediator. Civil or criminal liability is derived from general provisions of the Civil Code and the Criminal Code. As far as credibility and reputation are the most important aspects of mediators' activity in France, it is more important for the mediator to be possess good reputation than to benefit from serving in an easier yet unfair way.

With the entry into force of the 2010 Mediation Law in the Russian Federation the provisions of several other statutes were amended. The Mediation Law contains references to the Civil Code of Russia in cases of compensating damages caused by the mediator to the dispute parties. Moreover, one can find rules regarding legal liability for certain offences in the Russian Code of Administrative Offences as well as in the Russian Criminal Code, and in the Federal law "On Advertisement".

5. Conclusion

Both in France and in Russia, the mediation procedure is a complex mode of dispute resolution which requires an effective combination of legal, psychological, linguistic, and social techniques. That is why the legislation as well as legal practices need to ensure that mediators should possess appropriate education and experience in order to avoid the issues with impartiality, neutrality, confidentiality, or violation of contractual promises.

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Ответственность медиатора во Франции и России

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Аннотация. Статья посвящена сравнительному анализу ответственности медиатора во Франции и России. В настоящее время медиация является альтернативой обращению в суд и имеет хорошую репутацию в европейских странах. Медиация существует во Франции уже несколько десятилетий, однако в России закон о медиации вступил в силу только шесть лет назад. Именно поэтому рассмотрение различий между урегулированием медиации в обеих странах представляется интересным с научной точки зрения. Несмотря на то, что виды ответственности медиатора во Франции и в России почти одинаковы, страны используют различные подходы к юридическому закреплению норм об ответственности. Более того, существует несколько аспектов, которые интересно рассмотреть – сокрытие конфликта интересов со стороны медиатора, невыполнение специфических положений договора, вовлеченность в юридическую практику, нарушение конфиденциальности и недобросовестная реклама.

Ключевые слова: Франция, Россия, медиатор, медиация, ответственность.

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