

Legal liability of the Mediator

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Abstract

This Article looking for the legal liability of the Mediator during Practice his work and the researcher try to find the main Legislation in this regards, between the Jordanian Law, Moroccan Law and some of US Legislation.

Researcher dealt several quarters of this responsibility or liabilities like Mediator Obligations in general, Formal Obligation, Facilitative Obligation, Evaluation Obligation, the Mediator obligation to disclose all the facts and circumstances that would raise doubts about the his impartiality and independence, the Mediator's commitment to maintain the confidentiality of information obtained during the Mediation, Civil liability of the Mediator, The nature of the civil liability of Mediator, The terms of the civil liability of the Mediator, The Mediator commits such an act during the performing his job or his duty.

Keywords: Mediator, civil liability, Formal Obligation Facilitative Obligation, Legislations, Jordanian Law, Moroccan Law.

1. Introduction

The relationship between the Mediator and the two parties to the conflict is contractual relationship of private law relations - generate reciprocal rights and obligations between them in accordance with the general rules of civil law.

Similarly, the Mediation contract an informal and it did not has a special organization within the listed contracts in civil law.

In light of the relationship between Mediator and the parties to the conflict, the consequent obligations imposed on the Mediator, and these commitments scheduled in order to ensure the efficient discharge of the Mediator by bringing the points of view between the parties; to reach a mutually satisfactory solution, and that these obligations may be imposed by Mediation law and may be imposed by the nature of the task or profession and these obligations may be resulted from Mediation contract.

Hence, the breach of these obligations, arrange a responsibility to the Mediator, what are the legal responsibility entailed by the Mediator and the type of this responsibility, are they contractual liability or tort, may entails the Mediator criminal liability in the event of a breach of the obligations upon whether this constitutes a breach of penal offense punishable by law.

In this Article we will look to study the civil liability and criminal liability for the Mediator and indicate the obligations owed by the Mediator.

2. The Mediator Obligations

After the referral of the dispute to the Mediator and begin the mediation process, it falls upon himself several obligations he must perform, and these obligations are often determined by the parties during the conclusion of the contract

Similarly, the relationship between the parties to the conflict the Mediator, not based on compulsion in making the adjustment to contrast to the process of litigation that impose judgment on the parties to the litigation regardless of their desires and their own liking.

In light of the contractual relationship between Mediator and the parties to the conflict resulting owed by each other's rights and obligations towards the other, so that any breach of these obligations to the other party, it arranges legal liability.

Thus it can be said: The Mediator of which is configurable, including what is my assessment and facilitative obligations. Similarly, the obligation of the Mediator of conduct or to achieve a result, these obligations will be described in some detail in this section.

2.1 Formal Obligation

Previously we knew that the mediation process helps through which a third party is called (the Mediator) the parties to the conflict; to find a solution to this conflict, hence the need for the Mediator to do some formalities, it is most important to determine the place of Mediation between the parties and the time of the start of the negotiation process in Mediation, since it to secure an appropriate ambiance, and works to improve the ambiance intervention tactless proposal breaks and Mediation processing facilities in a manner that allows Parties to submit their views and express their interests and listen to the interests of the other party.

Hence, the freedom to choose the place where the Mediation will be is one of the advantages of Mediation, if one of the parties did not accept the place where he was chosen because he felt uncomfortable, the Mediator to intervene in this case and thinking elsewhere neutral and comfortable for both parties.

Based on its experience in the field of Mediation will determines the place of the Mediation by the conflict type and personal Parties and by Mediation type, as it is Mediation convention Free the Mediator has the freedom to determine the location, but Mediation institutional Convention and employed by the parties in a specialized center for resolving disputes, the center is determined the place of Mediation in judicial Mediation determines the judge the place of Mediation in the courtroom or in Legal Center of the Court.

In the Jordanian legislation Article stipulates (6) of the Jordanian Mediation Law No. 12 of 2006 as "The Mediator set a date for each hearing and advise the parties to the conflict or their agents the timing, place and meet the parties to the dispute and their agents and trading them to the dispute ...".

It follows from this article that the Jordanian legislator gave the Mediator from a legal point authorized to determine the venue of the Mediation sessions; because it may be difficult starting agreement of the parties at the beginning of the dispute over the venue of the Mediation sessions, but it must be the Mediator that does not exercise this power away from the consent of the parties; and satisfaction even have access to a successful mediation.

In my opinion, Jordanian law grants this power to the Mediator; particularly the Jordanian legislator has taken Mediation which is through the court system and usually takes place inside the courtroom.

However, in the interest of freedom of the will of the parties it is imperative that the parties have the right to determine the place and in cooperation with the Mediator.

In the Moroccan legislation Chapter (327/67) has made it clear from the Moroccan Civil Procedure Code must be accepted as soon as the Mediator assigned the task to tell him that the parties in a letter guaranteed access with acknowledgment of receipt or by a judicial commissioner ...).

It follows from this that the chapter on the Mediator's obligations News formality parties to the dispute in a letter guaranteed access by accepting the mission and this commitment came a peremptory form which is enforceable on the Mediator.

It remains to be finally point out that the mediator has to take into account when choosing a place of mediation to be a place neutral, so they do not have any of the parties to the dispute preference on this place, both in terms of emotional attachment or in terms of the physical control of the place, and Mediator must take into account the mediation how the parties sit meetings, and this depends on the mediator and personal style and shape of the negotiating table, and that provides for the parties to the conflict identical chairs so as not to suggest for one of the parties it is in a stronger position than the other center, and that the mediator sits somewhere mediates it between the parties and provide the location of the plate and pens suitable provided to the parties until they are recording their observations and provide refreshments such as coffee, tea, water and the provision of external communications in place of mediation, especially that one of the parties may be required, especially in closed session to make a phone call to speak with his lawyer or its agencies .

2.2 Facilitative Obligation

This obligation imposed on the Mediator put the conflict within the right frameworks to clarify the parties ideas and demands that come sometimes vague and misleading and therefore must be the mediator that the correct path and develops, and raises questions about the facts of authorized and draws other incidents vague and thus new perspectives appear, help to resolve the conflict, and did not previously unthinkable parties, so that the mediator to facilitate the mediation process to help the parties to break the deadlock between them, and discover the interests of each of them and put options to satisfy these interests and avoid express his opinion on the merits of the case or the likely outcome.

An example of this a claim the lessor to the lessee the evacuation of property being in arrears in the payment of the fare, which is located here, the issue of tenant delay in rent receipt on the fifth of each month instead of the beginning of each month solutions, here about the reason for delaying the payment of wages, and to try to determine the payment period until the fifth of each Month.

2.3 Evaluation Obligation

Here, the Mediator before the drafting of the agreement that was reached to evaluate this solution physical and legally and in a report signed by the parties and in particular that the physical valuation puts the solution in the scales of justice to make sure that fair, and legal evaluation it is to make sure the Mediator of the solution was in line and consistent with legal principles applicable.

An example on obligation evaluation as if we assume that the worker who left work after fifteen years of service and was referred to the conflict with the employer for mediation to settle the dispute, and the group agreed to waive part of the rights of the workers because he needs to pay for his son's premiums in the university owed, in this case the Mediator that worker warns that it may not waive his rights, including labor law and the value of the workers' dues will be much more and help Group that reached with the employer on the amount to be more equitable and approved by the employer.

2.4 The Mediator obligation to disclose all the facts and circumstances that would raise doubts about the his impartiality and independence

The Mediator must disclose when accepting the task of mediation for any circumstances and facts that raise doubts about his impartiality and independence km must the Mediator obligation neutrality, independence and impartiality of one of the parties to the dispute or against him for personal reasons, because that prejudice to the principle of trust in the Mediator, so that the independence respect onion the Mediator parties to the conflict, neutrality and respect onion the Mediator to the dispute.

It is based on the Mediator's commitment in this respect that the satisfaction of the parties to the conflict is the basis of the mediation process, the Mediator and not restricted to this commitment, leading to the failure of the mediation process, and can lead to a the Mediator liability in accordance with the general rules of civil law.

Must be the Mediator while on a mission Mediation commitment to apply the principle of equality between the parties to the conflict, and to treat both sides equally and brews each equal opportunities and full of presents his problem and point of view, so that the trust achieved and tranquility parties to the conflict in the Mediator person mediation process.

2.5 the Mediator's commitment to maintain the confidentiality of information obtained during the Mediation

The issue of the Mediator's commitment to confidentiality, is one of the most important commitments that the mediator should be adhered to, as must the mediator respect the confidentiality of mediation principle, and only signed subject to legal liability, especially if the mediation confidential sessions may not attend the one who has nothing to do the dispute unless the parties to the dispute have not agreed otherwise, based on the privacy of a dispute mediation and scope of the ban on the mediator, not to disclose the secrets of mediation and hearings procedures and leaking information and documents and words and deeds and evidence on the process of mediation and take advantage of the information material or moral and informed third parties to documents or testify in court Mediation mission, or disclosure of information to the media to take profit from it, or the deployment of mediation procedures, as well as it may not be the mediator to work as legal counsel for a party to the dispute or an arbitrator or expert or witness in order to ensure the confidentiality of mediation. It is also

committed to the mediator assisted by experts and others to maintain professional secrets that link to their knowledge in the course of their dispute before the mediation procedure and only had the injured person from the disclosure of such secrets demands for compensation according to the general rules of responsibility.

And back vowels in should be the Mediator commitment to the confidentiality of the mediation process to a desire to consolidate the parties to the dispute confidence in mediation as an alternative means of dispute resolution for not exciting or evidence and information Mediation trading during the follow-up litigation procedures; Due to the independence of mediation for judicial proceedings procedures and extends commitment to the scope of secrecy to the opponents, and lawyers and experts.

Jordanian legislator has taken the principle of the mediator's commitment to confidentiality where the article (8) pointed out of the Jordanian mediation Law No. 12 of 2006 that "mediation is confidential procedures may not be invoked or what has been the concessions of the parties to the dispute before any court or any party".

Jordanian legislator was the order requiring of the text, so that it is not permissible for any party, including the mediator that what has been protesting the actions or concessions in the course of the mediation process, both before the competent court to hear the dispute, or to any party whatsoever.

However, the Jordanian legislator missed a penalty for violation of this rule and in particular the mediator, but, according to the general rules it is plaintiffs are entitled to compensation on the back of the breach of the principle of confidentiality.

In the opinion side of the Fiqh The secret stipulated by the Jordanian legislator in Article (8) of the mediation law initiated for the benefit of litigants, and therefore they may agree otherwise in accordance with the general rules, and this was followed by the American justice in this regard since decided to resume the Florida court issue (mckinlay v.mckialy) The confidentiality of mediation not be applicable if the parties to adhere to the waiver of these secret during court proceedings.

Moroccan legislator's taking the commitment principle of confidentiality as stated in chapter (327/66) from the Moroccan Civil Procedure Code, "It needs to be the mediator should be to conceal the professional password to third parties in accordance with the requirements and subject to the penalties prescribed in the Criminal Code relating to guards as a professional secret, and may not be raised Notes intermediate and permits received before the judge before it the dispute by agreement of the parties, which may not be used in another lawsuit.

Here, Moroccan legislator came too by text of the order requiring the Mediator should concealment of professional confidentiality and arranged for violating mediator criminal liability, according to the Penal Code.

Moroccan legislator is committed not to raise Mediator and permits comments received before the competent court to hear the dispute unless the parties to the conflict to do so and this is the principle of confidentiality.

3. Mediator's Commitment to Diligence

It is well known that the commitment to make care is a commitment to make the effort to get to the intended purpose does not matter in this case as to achieve the result that the important thing is to make care; the standard to make care is the standard of the average person in an asset.

Mediator obligation of conduct includes a quest in the convergence of views between the conflicting parties; to reach a solution satisfactory to the parties which gives Mediator parties to the conflict freedom and room for reflection on the conflict and make some concessions that would reach a settlement, and can draw this commitment through what was the text of Article (6) of the Jordanian Mediation law which states "... and take the appropriate actions to bring the views in order to reach an amicable solution ..." this is the text of the release of the hands of Mediator to take any action to facilitate the mediation process.

Similarly on Mediator to be flexible in dealing with the parties to the conflict, by helping the parties to express themselves giving constructive conversation between the parties to the conflict and achieve the result which is to resolve the dispute and the Mediator is also the mediation process management diligently and justice, and action should be of high image encourages respect mutual between the parties.

We conclude from the foregoing that Mediator's commitment is the obligation of conduct and not an obligation of result, but it is a Mediator to seek seriously and finds out what he sees fit; to achieve the goal and the result is

a settlement of the dispute between the parties, that is, Mediator's commitment to make care in order to achieve the result and not an obligation to achieve starting as a result.

Mediator must focus on the interests of the parties and not on their attitudes and focus on building credibility with the parties to reach a result.

4. Civil liability of the Mediator

It is known that civil liability, incurred to damage resulting from a breach of a particular obligation is divided civil liability in the legal construction to contractual liability and tort liability.

The contractual responsibility of the existence of the contract, as in the case of non-implementation of the debtor's commitment to my contract, provided that the non-implementation due to a foreign cause, which means, it is based on three pillars of intentional error, damage, and the causal relationship between the nodal error and damage. The tort it establishes a breach of a legal obligation to do so that all result in damage to third parties requires compensation, so the tort is the availability of the three pillars of the harmful act and the damage and the causal relationship.

In light of the above, we must know the limits of responsibility of Mediator and type is tort or contractual bar and the civil responsibility of the Mediator and the selection of cases of civil liability of the Mediator.

4.1 The nature of the civil responsibility of Mediator

Entail responsibility on the person who committed an act that would cause harm and requires law prosecution and disposition to be issued by Mediator must be contrary to legal base (Mediation law, the laws of civil procedure and the general rules of the Mediation profession controller) even arrange civil liability towards Mediator.

Hence, the Mediator asks for his actions in the event of breach of civil obligations as a result of his mission in the mediation process, and also asks if he left the legal rules governing the nature of his work as a mediator controller, the Mediator also asks for all damage caused to others in the exhibition he manages the dispute to be resolved amicably if it goes against one of the obligations that previously mentioned; and so the responsibility must be available tort, injury and a causal link between the act and the damage.

The base that the Mediator if the duties with care committed to the limits of his authority and respect the rules of law, there is no responsibility for it, but if neglected and deliberately breach of the provisions contained in Mediation law and the Palace of the commitment, the responsibility in this case be the responsibility of tort because of neglect and ill-hatched in conflict management; access to a mutually satisfactory solution so that the relationship between the mediator and the parties to the conflict organizational links, not dogmatic, although the referral to mediation are often in agreement.

As it once refer the dispute to Mediator, it is influenced by the work taking into account the provisions of the law that made him a mediator shall resolve disputes, and this is for of the Mediator any judge when the judge as the Mediator in the task of judicial mediation.

As for the Mediation agreement made through agreement between the parties to the dispute and the mediator and governed by the contract, the responsibility which resulted to the mediator is contractual responsibility in accordance with the general rule in civil liability.

The question arises to what extent the judge can be held accountable Mediator? Is it considered here as a judge or a Mediator?

It can be said: The Mediator judge is the a Mediator of a particular kind that he originally was a judge and carries the name of a Mediator, under the mediation law, it is subject to the law of mediation as it is a judge and as a result the function of court, it is subject to the law of the independence of the judiciary, but is asking according to the Civil Code and see that responsibility lies with consequent Mediator is the responsibility of tort especially if Mediator's commitment obligation of conduct and not an obligation to achieve a result, Thus, if neglected mediator and inadvertently breach the legal provisions referred to in the mediation laws and the Palace in the performance of its obligations, it is official and the source of this responsibility tort I also consider that it should not be the mediator Judge accountability, so that the mediator judge is subject to the outcome of the judiciary, and if proven negligence or breach of the provisions Law, the Judiciary Act or the independence of the judiciary

law identified procedures for accountability discipline, as is giving freedom to the parties to the conflict to sue mediator judge, will make the Mediator spends most of his time in the courts because any failure of the mediation process will resort parties or one of them to justice in order to claim compensation, and this It is not correct with the goal that began cause of him a mediation process.

4.2 The terms of the civil liability of the Mediator

The civil liability towards Mediator has to be the availability of a number of conditions including:

4.2.1 Should Mediator is to be committed a tort:

Here it has to do Mediator responsibility that comes from Mediator harmful act that arranges harm to others, which requires the liability was based Mediator to disclose the secret to one of the parties to the dispute to the other party, which favors in the conflict, and the difficult position of the owner of the secret that was spilling, or be treated in a Parties treatment different from the other party, which raises doubts about the impartiality of his mission as a mediator convergence of views between the conflicting parties.

4.2.2 The Mediator commits such an act during the performing his job or his duty:

Here it is required to be harmful act done by the Mediator during the Mediation process and during the performance of his mission as a Mediator.

4.2.3 The Mediator exceeded the limits of his job by Act of him:

Mediator's Act must be within the limits of his jurisdiction, otherwise entail civil liability, Mediators was shown the opposite view of the law in the conflict known in front of him, and end up the failure of the mediation process and the damage to the parties to the conflict.

4.3 The limits of Mediator's liability

Starting, Mediator is not subject to the liability system adversarial; because he is a judge and therefore no one may be parties to the conflict, or both follow quarreling judges action when Mediator claim for damages suffered by him or the parties to the conflict, because of the mistake made by Mediator during the mediation process. But subject to the general rules of civil liability in the normal individual and depends standard normal person, which is an objective standard, requires Mediator not have immunity unless it was issued an error does not issue from the normal Mediator in the same circumstances in which this error was issued.

4.4 Mediator responsibility to the parties in the conflict

Mediator associated with the parties to the dispute through mediation and accept Mediator hold direct Mediation mission, it becomes linked to a contract with the parties to the conflict, and is generated from this contract a set of mutual rights and obligations, and here Mediator asks accordance with the general rules of civil law contractual responsibility or should Mediator to continue to direct his work until the termination of Mediation mission and carrying out this task through the Mediation date and respect for the defense, confidentiality and neutrality rights, and here if Mediator breached one of his duties under the Mediation contract, asks accordance with the general rules of contractual responsibility

Examples of errors made by Mediator not to Mediator continue to function as mediation or Mediator authorize others to do the task of Mediation without the parties to the conflict, then, and it's too deadline Mediation without the completion of Mediation mission, or commit a Mediator fraud or fraudulent agreement with one of the parties to the dispute or to commit Mediator error professionally serious, such as distortion of facts and documents conflict, and here it must be a mistake on the part of Mediator to prove even ask civilians.

As well as it can be a Mediator responsibility to the parties to the dispute tort, based on a wrong basis, according to the general rules of civil law for liability tort, so when there is no contract, and mediation between the mediator and the parties to the dispute, or when you have a Mediation contract null and void for the failure of one of the pillars Mediation, such as satisfaction and the place held.

4.5 Third-party Mediator's liability

It is not considered the other is a party to the Mediation agreement between Mediator and the parties to the conflict held, but if you hit third-party Mediator damages of work, it asks the direction of others, according to the general rules of tort liability in civil law.

Here, it must the others to demonstrate Mediator who caused the damage to third parties due to the work of Mediator and the causal relationship between fault and damage error, and raise civil suit to confront Mediator responsible in accordance with the usual procedures for the establishment of civil suits.

In the case of absence of a causal relationship between the tort and the damage as if Mediator proves that the damage caused by the victim or participated in the creation of the damage it in this case denies a causal relationship and no longer the responsibility, as well as command if Mediator proved that the third party is the reason why the damage as if the non-disclosure secrets to a Mediation parties to the conflict to pay the other party process, the causal relationship and no longer the case, and thus the liability Mediator, whether contractual or tort.

5. Criminal liability of the Mediator

The use Mediation raises complex issues concerning confidentiality and the legal liability of the Mediator.

Mediator as we have said he must respect the expectations of the parties with respect to confidentiality, but suppose that in mediation Mediator asked the parties to identify the information session, which must be kept confidential and assure them that this information will not be exposed However, in this meeting, Mediator aware of the abuse to a child in the family of does keep this confidential information? And how Mediator criminally accountable if disclosed this information?

In some US states that information relating to child abuse is considered a secret, but you must be on the Mediator to inform the relevant authorities? The same applies if Mediator learned through mediation sessions that a serious crime, you will get to the other party, should be reported or subject to criminal liability.

In Jordan, for example, Article 207 of the Penal Code reads as follows:

- (1) Each employee assigned to search for crimes and prosecution of or neglected or postponed news contacted his knowledge about a crime, he shall be punished with imprisonment from one week to one year or a fine from five to twenty dinars.

The article (26) further stated of the Code of Criminal Procedure Jordanian paragraph (2) provides that each of the informed of in the other cases, the occurrence of a crime he has to tell them of the Prosecutor.

From these texts I find that the Mediator is obliged to report any crime related to his knowledge by, and not criminally asking in this case.

But by contrast the Mediator is subject to the provisions of the Penal and Criminal Procedure Law in subjection to the provisions of criminal responsibility, when they located him errors, constitute a crime as if the Mediator stole some papers and documents or evidence presented to him on the subject of the mediation process or the rigging of these securities, the mediator in this case, be in charge of the criminal and prosecuted criminally, according to the provisions of the Penal Code.

Moroccan legislator in Chapter (327/66) from the Moroccan Civil Procedure Code explicitly stipulates the Mediator should be compulsory concealment of professional secrecy for others, and subject to the penalties provided for in the Criminal Code relating to guards as professional secrecy.

And thus it arranged Moroccan legislator, expressly penal responsibility to the Mediator, if you do not abide by guards as professional secrecy and referred to the penal code that criminalize the disclosure of professional secrecy law.

He has a good job when Moroccan legislature expressly provides for criminal responsibility of the Mediator.

So it is clear that the Mediator criminally responsible, if not the process of mediation and fundamentalism accordance with the procedures and rules that lead to the result of the settlement of the conflict.

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