

Institute of compulsory insurance of the lawyers' professional liability in the Russian Federation and the Republic of Kazakhstan: a comparative legal analysis

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Abstract. The article is devoted to the problems of introducing the institute of compulsory insurance of professional liability of the lawyers in the Russian Federation and the Republic of Kazakhstan. The authors analyze the current legislation of the two states, focusing on compulsory insurance of professional liability of lawyers, identify current problems in this area, justify ways to solve them. The article has a clearly stated scientific and practical value, because it analyzes the experience of establishing the institute of compulsory insurance of the lawyers' professional liability in Russia and the Republic of Kazakhstan. Our research results can be used to improve the law-making and law-enforcement practice of both states.

Keywords: compulsory insurance, lawyers, professional liability, institute, legal assistance

1. Introduction

Relations between the Russian Federation and the Republic of Kazakhstan have always been friendly. Consequently, this partnership is reflected in the development of the legislation of both countries. Providing citizens with qualified legal assistance is one of the most important constitutional principles enshrined in the Basic Laws of these states. In accordance with Article 48 of the Constitution of the Russian Federation, the right to receive qualified legal assistance is guaranteed to everyone. In cases provided by law, the legal assistance is provided free of charge. A similar rule is enshrined in paragraph 3 of Article 13 of the Constitution of the Republic of Kazakhstan.

The legal profession contributes to the realization of the constitutional right of citizens to qualified legal assistance. It is a legal institution designed to protect the rights, freedoms and legitimate interests of a person and a citizen in any civilized state.

In some states there is such an institution as compulsory insurance of professional liability of the lawyers (Germany, France, Sweden, Ireland, Spain, Poland, Czech Republic). This institute is considered as a guarantee of obtaining the qualified legal assistance, client protection and provides the possibility of obtaining a material compensation in case of the incompetence of individual lawyers. In this regard, the issue of the possibility of practically implementing the institute of compulsory insurance of professional liability of the lawyers in the Russian Federation and the Republic of Kazakhstan (based on the existing realities) becomes quite relevant.

2. Materials and Methods

The paper studied the legislation of the Russian Federation and Kazakhstan in terms of the legal regulation of compulsory liability insurance of lawyers, as well as its practical implementation. In order to ensure the completeness of the research and the scientific credibility of its results, the general scientific and particular scientific methods of cognition were used: formal legal, analytical, logical, system-structural, as well as comparative legal, formal legal, and synergistic methods.

3. Results

An analysis of the legal framework of Russia and the Republic of Kazakhstan, in terms of regulating compulsory insurance of professional liability of lawyers, led to the following insights.

In our opinion, at this stage of development of both states, the introduction of compulsory attorney liability insurance is not only inexpedient, but also impossible due to a number of objective reasons:

1. In Russia, a special federal law regulating the issues of compulsory insurance of professional liability of the lawyers is not developed at all. This law could serve as an appropriate legal basis for the implementation of this institution. In the Republic of Kazakhstan, a separate article in the Law is about the duty of a lawyer to insure his professional responsibility. This article has not yet entered into legal force or tested in practice, raising a number of questions regarding its implementation.
2. Introducing the mandatory requirements for the insurance of professional liability of the lawyers is premature in the absence of clear rules for the provision of legal services in general. The quality of legal assistance provided to the client is not possible to determine. The very conceptual foundations are just beginning to form in Russia and the Republic of Kazakhstan.
3. The difficulty is in proving a causal relationship between the quality of services rendered by a lawyer and the negative outcome of the case. In addition, Clause 2 of Article 10 of the Code of Professional Ethics of a Lawyer of the Russian Federation of January 31, 2003 prohibits a lawyer from promising his client a positive result in any case. A similar rule is provided in the Code of Professional Ethics of Lawyers of the Republic of Kazakhstan of September 26, 2014 in Article 12 of Chapter 3. Therefore, the establishment of a causal link between the mistake made by the lawyer and the adoption of the wrong court decision is possible only in court.
4. Obligation of attorneys to insure their professional liability is an unreasonable requirement for advocacy. The inclusion of such a duty in the legislation of Russia and the Republic of Kazakhstan is not approved by the legal community itself, since it is not interested in additional financial burden. In addition, the obligation of lawyers to insure their professional responsibility will result in an increase in the cost of lawyers' services, and as a result, citizens' expenses for the protection of their rights and legitimate interests. This will not contribute to the realization of the right to qualified legal assistance guaranteed by the Fundamental Laws of Russia and the Republic of Kazakhstan. Recently, Russian lawyers have modest fees, especially in the regions. In the Republic of Kazakhstan, the number of lawyers is significantly lower than in Russia, and the cost of insurance can cause aversion and undermine the desire to have this status in the future.
5. The introduction of the institute of compulsory insurance of professional liability of the lawyers in both states may entail the use of various fraudulent schemes for receiving insurance payments, which would further complicate the practice of applying.
6. In case of fixing the legal obligation of lawyers to insure their professional liability, right abuses are possible on the part of principals. This will give rise to mass court appeals to representatives of the professional legal community who have lost the case. The cost of insurance will significantly exceed the cost of renting and maintaining an office, which would lead to a decrease in the number of lawyers in the community.
7. In addition, it should be noted that the main problems of introducing the institute of compulsory attorney professional liability insurance are determining a clear list of insured

events (insured risks) when concluding an insurance contract, as well as proving guilt of a lawyer when an insured event occurs.

4. Discussion

Paragraph 3.9.1 of the General Code of Laws for Lawyers of the European Community states the following: “Lawyers should always be insured against filing claims related to the lack of professional competence. The amount of insurance is determined within reasonable limits in relation to the risk of possible mistakes made by lawyers in the course of their professional activities” [1]. At the same time, there are the states where the attorneys' professional liability insurance is voluntary, for example, in the United States.

Since January 1, 2007, Subparagraph 6 of Clause 1 of Article 7 of the Federal Law of May 31, 2002 No. 63-FZ on Advocacy in the Russian Federation entered into force. According to this subparagraph, the lawyers are obliged to insure the risk of their professional property liability [2]. It was assumed that the compulsory insurance would help protect the property interests of both the lawyers themselves and their principals if they suffer losses due to the fault of lawyers. At the same time, Article 19 of this law provides that such insurance should be carried out in accordance with the federal law. However, it has not been adopted to date. That's why an appropriate legal framework has not been established for its implementation.

In the Republic of Kazakhstan, the legislative experience of compulsory attorney liability insurance was absent to date, and lawyers had the right to voluntarily insure the risks of their professional activities. However, the Law of the Republic of Kazakhstan dated July 5, 2018 No. 176-VI on Advocacy and Legal Aid introduced Article 36 from January 1, 2020. The article provides for the obligation of lawyers to enter into a contract of insurance of professional liability for obligations arising as a result of causing harm to third parties who are provided with legal assistance in accordance with the agreement as a result of the provision of such assistance [3]. The Ministry of Justice of the Republic of Kazakhstan motivated the introduction of this provision by the absence in the law of mechanisms to protect citizens from the services of unscrupulous lawyers who can cause significant property damage to the principal. In this case, the compulsory insurance of professional liability of the lawyers and legal advisers is provided as a guarantee for the principals in obtaining qualified legal assistance. The Order of the Minister of Justice of the Republic of Kazakhstan dated September 27, 2018 No. 1455 approved a standard contract of insurance of professional liability of the lawyers. The insured event under an attorney's professional liability insurance contract implies the insured civil liability for damages caused to the property interests of third parties who receive legal assistance in accordance with a contract. Responsibility arises as a result of professional errors made by the insured person providing the legal aid. Professional mistakes for the purposes of this article are as follows: (a) skipping procedural deadlines; (b) improper paperwork; (c) failure to notify a person who is provided with legal assistance in accordance with the contract about the consequences of the committed legal actions that entailed harm to him; (d) loss or damage of documents received by the insured (insured person) from the client, for the provision of legal assistance; (e) an unlawful disclosure of information constituting a lawyer's secret; (f) other actions (inaction) that entailed harm to the property interests of third parties, who are provided with legal assistance in accordance with the contract as a result of the provision of such assistance to the insured person.

Analysis of the provisions of the Law of the Republic of Kazakhstan dated July 5, 2018 No. 176-VI allows to state that the object of insurance is the professional attorney's liability, and the insurance minimum amount is determined by this law. Also, an approximate list of insurance claims is established in the law. At the same time, there are a great number of issues regarding the practical implementation of Article 36 of the aforementioned Law. For example, it is not clear that the minimum insured amount relates to a single insured event or calendar year. The list of professional errors of an insured event is not exhaustive, which, while being implemented, may cause controversy regarding the existence of an insured event. Moreover, the mistake made by the lawyer is almost

impossible to prove. Also, the Law did not define the criteria for calculating the amount of damage caused by a lawyer.

Many authors are skeptical about the need to introduce compulsory attorney liability insurance. In particular, it is noted that it is actually impossible to oblige lawyers to insure professional liability, because the state does not define the rules and conditions for such insurance [4]. I. S. Tokmakov notes that “the need to introduce the institution of compulsory insurance of professional liability by lawyers, at the moment, seems to be very unclear” [5]. A. P. Zgonnikov holds to the same position [6].

At the same time, in the Russian Federation, an attempt to return to the resolution of the issue of compulsory liability insurance by lawyers was made again. This question was updated in connection with the development of the draft Concept of Regulating the Market of Professional Legal Assistance developed by the Ministry of Justice of the Russian Federation. The draft Concept identified the resumption of work on the consideration of introducing the compulsory insurance against the risks of professional liability of lawyers and legal professions as one of the general trends [7].

5. Conclusion

Summing up the research conducted on the legislation of the Russian Federation and the Republic of Kazakhstan, we need to note that the institution of compulsory insurance of professional liability of lawyers is internally quite contradictory. Despite various approaches to its implementation, we believe that its implementation in contemporary Russia and the Republic of Kazakhstan is premature. This is due to the inconsistency of positions on a number of key insurance issues. Introduction of compulsory attorney professional liability insurance is a new and quite possible promising tool for managing professional risks in Russia and the Republic of Kazakhstan. However, at present, the advocacy is not yet ready to introduce compulsory professional liability insurance and to new financial burdens. A return to this issue is possible in the near future. However, it is the subject to the development of such a draft federal law, the provisions of which would satisfy the interests of lawyers, their principals, and insurance companies.

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