SETTLEMENT VS. MEDIATION IN THE CRIMINAL TRIAL

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“The most sacred of all
the courts to be the one the persons create between themselves
and which would be chosen by agreement”.

PLATO

ABSTRACT: The alternative methods of resolving disputes between different persons represents one of the concerns of the contemporary society which has risen in the context of economical, social and scientific development – catalysts of new types of conflicts. Thus, new approaches have had to be found in order to complement and be of help to the judicial system, as well as to the possible parties, hence promoting the amiable settlement of conflicts.

By means of this study, the authors wish to identify a few aspects related to the institution of dispute settlement and to mediation in criminal law procedure, whilst presenting some advantages of these two which are able to influence the offender’s and aggrieved person’s behavior, in this way making them more responsible and helping them to be more aware of their actions. Are those judicial procedures such as settlement, withdrawal of the preliminary complaint, mediation, capable of spelling the end of dictum “Homo Homini Lupus est”?

KEY-WORDS: settlement, mediation, advantages, conflicts, Criminal Code, amiable settlement

JEL Code: K14

1. INTRODUCTION

The contemporary society is looking its own identity using high-technology in communication and information, that implies the concern regarding the identification and promotion of alternative methods of resolving conflicts. The emergence and development of these methods has become a tangible reality and not just a dream sprang from the long
time needed to solve litigation due to the complex judicial proceedings. Thus, there are two methods of resolving conflicts: the classic system by which a decisive role in solving the case belongs to the court, respectively that the modern system of alternative methods (A.D.R. - Alternative Dispute Resolution), which incorporates procedures and techniques for amiable settlement (www.emediere.ro).

It should be noted here that the last system does not hinder the free access to justice (Valea, 2013) nor does it have to (Art. 21 of the Constitution of Romania) so that in case of failure there is the possibility of initiating or continuing the resolving of the dispute through legal action. Obviously, these methods, procedures can not be a substitute for judicial system, but is an additional way that helps the judicial system in resolving conflicts emerged and why not, even simplifies the judge’s work.


In the Romanian legal system the legal basis is provided by the Law no. 192/2006, the Criminal Code, the Criminal Procedure Code, the Civil Procedure Code (Art. 223).

In this paper we will present for a comparative analysis several landmarks on the regulation of settlement in the Old Criminal Code and Criminal Procedure Code by analyzing the conditions, the moment one could intervene, the people among which it operates and its effects, and later to analyze the existing differences in the light of the New Criminal Code and Criminal Procedure Code. Eventually we will approach mediation in the criminal trial, which in our opinion is an entirely distinct institution (object, purpose, procedure) from that of settlement. All these have a direct impact on the progress of the court procedures and for an understanding and uniform implementation, of the society is forced to find answers and optimal solutions.

2. SETTLEMENT IN THE REGULATION OF THE OLD CRIMINAL CODE AND CRIMINAL PROCEDURE CODE

One of the alternative resolution methods of disputes is settlement, which was regulated in Art. 132 Old Criminal Code. This was regarded as an “effective means to restore the rule of law and to prevent further crimes” (Dongoroz, 1970). In defining this institution, according to the old regulation, Professor Vintilă Dongoroz stated that the settlement is an understanding between the injured party and the offender which ends the conflict born from the offense, with all the implications this fact implies, namely the removal of criminal and civil consequences, preventing the start of a criminal action or the termination of the criminal trial, according to the procedural stage in which it intervenes (Dongoroz, 1970).

Settlement requires the consent of will between the injured party and the accused or defendant, so that the settlement becomes a bilateral legal act, where the parties, in principle, negotiate on an equal footing. In this context it must be stated that the
settlement is different and should not be mistaken for the withdrawal of prior complaint, which is a unilateral act. Also related to the persons among whom this institution operates, it should be noted that, regarding the persons deprived of legal capacity, the settlement was made only by their legal representatives, and for those with limited legal capacity, the authorized persons provided by law according to Art. 132 para 3 of the Old Criminal Code were requested.

For the settlement to produce the desired effects and to lead to the extinction of the criminal proceedings, certain conditions were required to be met.

First, reconciliation intervened in the case of offenses for which the initiation of criminal proceedings was made once with the prior complaint of the injured party. However, from this rule, there is an exception, respectively reconciliation was permissible for certain crimes tracked by default, according to Art. 197 para. 2, 5 (the rape), Art. 199 (the seduction) – the Old Criminal Code.

A second condition was that the injured party and the offender had to express their agreement before the judicial body. A decision of the High Court of Cassation and Justice, held that in order to rule the termination of the criminal trial, the court had to take into account the agreement, for the total, unconditional and definitive settlement, expressed in the court personally or through person with a special proxy or when it resulted from authentic documents (Mateut, 2007)

According to Decision no. 34/2008 in cases of offenses for which legal assistance is mandatory (Art. 171 para. 2 and 3 Old Criminal Procedure Code), the court may rule the termination of the criminal trial due to settlement, only in the presence of the defender chosen or appointed lawyer.

One of the features of this institution, already anticipated in the above, is featured by the personal character of settlement. Thus, unlike the prior complaint that operates in rem, generating effects for all participants, the settlement of the parties produce effects in personam, ie only to the persons involved. Other features derive from the fact that the settlement must be total, unconditional and definitive. We will examine each of these characters below. The settlement is total when its effect is the termination of the criminal trial both in terms of the criminal and civil aspect. The unconditional nature does not subordinate this institution to any of the conditions and therefore it did not involve an onerous arrangement. Last but not least, the reconciliation must be definitive, with no possibility to return to the consent given to the judicial body as this would leave open to resuming of the criminal trial, which is inadmissible. Exceptionally, however, it should be noted in this context that the offenses which are subject to the procedure of settlement before the judging committees, the settlement of the parties could be conditioned and not definitive when one party took obligations on the civil aspect. (Art. 34 of Law 59/1968 on judging committees). If the obligation was not fulfilled, the criminal trial would resume according to Art. 282 (1) b Old Criminal Procedure Code (Dongoroz, 1970).

According to the Old Criminal Code, the settlement could be achieved in two ways: explicitly – where the parties expressly states that they have reached an agreement or implicitly, when it is a result of a factual situation, an example in this sense being the

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1 The High Court of Cassation and Justice, United Sections, Decision no. XXVII/2006 (Official Gazzete no. 190 of 20 March 2007).
2 Published in the Official Gazette no. 152 of 11 March 2009.
marriage between the offender and victim after committing the crime of rape and before the decision to be set final (Vasiliu, 1972).

Another aspect to be considered is the time up to which the settlement could intervene, the law provided that it could be no later than the final decision in a particular case, according to Art. 132 (2) Old Criminal Code. Thus, the parties could reconcile on the entire course of the criminal trial starting with the prosecution stage and including during the appeals procedures, this regulation providing real opportunities for settlement.

The main legal effect of settlement was that it removed criminal liability and, consequently, entailed the termination of the civil action. However, the effects were produced also in the procedural plan so that judicial authorities ordered the cessation of the prosecution in the criminal proceedings or the termination of the trial during the judgment phase (Art. 10, 11 Old Criminal Procedure Code).

A question that arose in doctrine was whether we could speak of a transaction concluded between the offender and the injured party. The doctrine says that the transaction terminated only the civil action, while one could not say the same about criminal action. However, in the legal literature it was said that in the case of petty crimes for which the law allowed the possibility of settlement, it should be admitted, exceptionally, the termination of the criminal action, as this transaction can occur inclusively between the victim and the defendant/accused legal person (Mateut, 2007).

3. SETTLEMENT IN THE REGULATIONS OF THE NEW CRIMINAL CODE AND CRIMINAL PROCEDURE CODE

A cause that removes the criminal liability, the settlement, is provided in Art. 159 the New Criminal Code and consists of the agreement concluded between the injured party and the suspect/accused, aiming to stop the conflict born as a result of the offense. It can be seen from the definition that the settlement has retained the same meaning and purpose in the regulation of the New Criminal Code, with a difference in terms of people among whom it intervenes respectively between the injured person and suspect/accused; the quality of “accused” was replaced with that of the “suspect”, designating a person who committed an offense for which the prosecution started. At the same time, the New Criminal Code regulated the institution of “settlement” and not “the settlement of the parties” because the victim has the status of injured person, being a procedural subject mainly in criminal proceedings, according to current regulations, unable to act as injured party (Udroiu, 2015) (yet not being a party). However, critically speaking, participants at criminal trial are parties to a procedural framework. Too many terminological subtleties lead to losing the essence of the criminal trial.

The scope of the institution of settlement is restricted in the new codification only for the offenses for which the start of the criminal action is done ex officio and for which law expressly requires it. However, from this rule there is an exception, namely for the crimes pursued due to a prior complaint of the injured party, the settlement would be possible if, specifically, the prosecutor exercises criminal proceedings ex officio and if the law expressly provides it (Art. 159 para. 1 the New Criminal Code).

Regarding the people between which it intervenes, the new regulation maintains the same rules for the people without legal capacity or people with limited legal capacity, and for legal entities, settlement is achieved by its legal or conventional representative or the
person appointed in its place (Udroiu, 2015). Also Art. 159 (6) New Criminal Code states that “if the offense is committed by the representative of the injured legal person, the settlement will take effect only if it is endorsed by the prosecutor” (naturally by ordinance according to Art. 286 New Criminal Procedure Code).

Another similarity between the new and the old regulation is the characteristics of this institution, respectively the personal feature (the effects of settlement occur in personam, meaning only to people between which it intervened and not to all participants in the crime), as well as the fact that reconciliation must be total (both criminal and civil aspect) unconditional and definitive. However, unlike the Old Criminal Code, according to the New Criminal Code, the settlement must be explicit so that it cannot be a result of certain circumstances (Antoniu, 2011), an express agreement of will being thus necessary. From this, it follows that settlement is a bilateral act, unlike the withdrawal of the prior complaint, which is a unilateral act, assertion which was entirely valid in the old regulation.

The current regulation comes with a novelty in terms of the moment up to which settlement can intervene. According to Art. 159 (3) New Criminal Code, the settlement can be achieved throughout the prosecution phase, during the preliminary room or during the trial, but only up to the court’s writ of summons. The writ of summons occurs at the first hearing if the summoning procedure is legally fulfilled and the case is ready for judgment, in accordance with Art. 374 (1) New Criminal Procedure Code. If the settlement occurs after this time or during the appeal hearings, it will not lead to the termination of the criminal trial, but the attitude of the defendant may be considered in the process of punishment individualization (Antoniu, 2011). But does the introduction of a civil party or civilly liable party in the criminal trial after the writ of summons change the terms presented above?

In the Constitutional Court case law\(^3\), regarding the moment up to which settlement can occur, it was established that the provisions of Art. 159 (3) New Criminal Code are constitutional only to the extent to which settlement can occur also in cases commenced before the enforcement of the New Criminal Code and the cases where the writ of summons was overreached.

Due to the existence of different views about the provisions on settlement, the High Court of Cassation and Justice ruled a referral in the interest of law\(^4\) which held that the termination of the criminal trial for which settlement removes criminal liability may be imposed by the court only if it finds the act of will off the defendant and of the injured party to have a total, unconditional and definitive settlement, expressed at the hearing in person or by people with special mandate, or by authentic documents. This decision was handed down under the old regulations, but has applicability and can be invoked also at present. The Court reasoned its decision with a reserved interpretation in accordance with the constitutional principle of enforcing the more favorable criminal law.

The effects of settlement are similar to those of the Old Criminal Code. Thus, settlement removes criminal liability and terminates the civil action. However, in terms of procedural, the legal bodies will rule the closing of the file in the prosecution phase or the

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\(^3\) Constitutional Court, Decision no. 508/2014, published in the Official Gazette no. 843 of 19 November 2014.

\(^4\) The High Court of Cassation and Justice, United Sections, Decision no. 27/2006, published in the Official Gazette no. 190 of 20 March 2007.
termination of the proceedings during the criminal trial, as opposed to the old regulation where the closing of the file could not be ruled but the termination of the criminal trial.

**Comparative table – Settlement according to the Old Criminal Code and the New Criminal Code**

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<tr>
<th></th>
<th>Old Criminal Code (OCC) and Criminal Procedure Code (OCPC)</th>
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<tr>
<td>Regulation</td>
<td>- Art. 132 OCC</td>
<td>- Art. 159 NCC</td>
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<td>- Art. 10 OCPC</td>
<td>- Art. 16 NCPC</td>
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<td>Persons</td>
<td>- the injured person and the accused/defendant</td>
<td>- the injured person and suspect/defendant</td>
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<td>- persons with no legal capacity or with limited capacity</td>
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<td>- for offenses pursued <strong>ex officio</strong>; by exception, and</td>
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<td>injured person; by exception, and for certain crimes</td>
<td>for crimes pursued upon the prior complaint when the</td>
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<td>pursued <strong>ex officio</strong></td>
<td>prosecutor exercises criminal proceedings <strong>ex officio</strong></td>
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<td>- the agreement expressed before the judicial body</td>
<td>- the law expressly provides it</td>
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<td>Time</td>
<td>- the latest up to the time the decision remains final</td>
<td>- up to the writ off summons by the court</td>
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<td>Characteristics</td>
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<td>Effects</td>
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<td>- eliminates criminal liability</td>
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<td>- terminates civil action</td>
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4. MEDIATION IN THE CRIMINAL TRIAL

In the context of the ongoing development of social and economic relations, the 21st Century is marked by globalization, thus leading inevitably to an increase in litigations. Because of this effect of scientific progress, economic and also the freedom of movement of persons, the prevention and combating of those conflict situations, which are not serious, more wisely and expeditiously, was a necessary challenge. The classic settlement of the conflict by entrusting it to the judicial bodies has proved that it is not always the best answer. In this context, gradually, the states could not remain indifferent, therefore they tried to find alternative methods of resolving the disputes by adopting regulations that would lead to a new stage of legislation.

The institution of mediation appeared for the first time in the US where Centers of Justice were created, known as “community mediation programs”, where groups of volunteers were formed which mediated disputes in the community in which they lived, thus offering an alternative to the judicial proceedings (Gagu). The notion of “alternative dispute resolution” (ADR) occurred in the 80s-90s, was invented, of course not without interest, by American lawyers and businessmen, where everything was translated into money. However, historically (www.juridice.ro), one might say that mediation pre-existed the judiciary systems, because before a judicial system was created, the group or tribal leaders, or elders in a community resolved disputes based on principles of fairness. In time, a system of law was created, with rules and principles, which left mediation in the background, people wanting justice imposed by a judge.

Due to the problems and difficulties of the classic legal system, but also amid the overcrowding of the courts, one felt the need to adopt alternative methods of resolving conflicts, thus mediation was introduced. In Europe, it appeared after the 90s as a cure to the classic law systems due to the endangered quality of justice. This phenomenon knew a real success becoming more and more widespread, due to the beneficial effects on society in general and for people in particular. In Romania, the modern form of mediation occurs later, the initiative being outlined after 2000, being one of the conditions of accession to the European Union, so that later, in 2006 the Law no. 192/2006 on mediation and the mediator profession to be implemented5.

In a not too distant history there were some similarities in the work performed by the court committees according to Law no. 59/1968 and mediation. Thus, the panel of judges, according to Art. 1 of the mentioned law, “are public organs of influence and jurisdiction [...] through which the participation of large masses to the enforcement of law and education of people in the spirit of promoting a correct attitude towards work, the strengthening and development of public wealth, but also ensuring good behavior in society”. It can be seen that these court committees had, as the mediator, attribution of trying to reconcile the parties in a conflict. However, like the mediator, it was not compulsory for the members of the court committee to have legal training. However, there are important differences between these two institutions.

The court commissions had limited competence, in the sense that they resolved criminal conflicts for certain criminal offenses with low social risk nature, limitative provided by the law. Thus, they had authority to judge these crimes, to rule a judgment

and apply sanctions, unlike the mediator who only facilitates communication between the parties to an amiable settlement. Also, the court committee hearings were public, while mediation sessions are confidential, private.

Right on, there are similarities between the two institutions, namely that following the settlement of the case by the court committee, the parties could address the court, by complaint against its decisions. Mediation does not suppress access to justice in case of disagreement, the parties being able to address the court.

Today in the criminal proceedings, the mediation is an approach to restorative justice (Constantinescu), which is based on the social reintegration of the offender, his rehabilitation in the society, the emphasize of the non punitive aspect for acts low social danger but also the amiable settlement of the conflict by repairing damages caused by the commission of the offense.

What is mediation? Law no. 192/2006 defines mediation as “a way of resolving conflicts amicably with the help of a specialized third party as a mediator, in conditions of neutrality, impartiality, confidentiality and with free consent of the parties.” This is based on the trust the parties give to the mediator who facilitates negotiations between the persons involved in the conflict aiming an amicable settlement, so that, ultimately, the solution to be a convenient, efficient and sustainable for each of the parties (Nita, 2000). Also, through mediation, people have the opportunity to take responsibility for conflict resolution, while avoiding abusive measures and the deterioration of relations between the parties. Also among the advantages offered by this institution can recall the confidential nature, the encouragement of dialogue, collaboration and mutual respect.

As for the criminal trial, amid the entry into force of the New Criminal Code and Criminal Procedure Code, criminal mediation institution is aimed to be substantiated.

Certain clarifications need to be made. Thus, according to Art. 67 of Law no. 192/2006 mediation applies in cases concerning offenses for which the withdrawal of the prior complaint or the settlement removes criminal liability. However, paragraph 2 of the same article provides that neither the injured person nor the perpetrator can be forced to accept the mediation procedure. The legislature gives, therefore, the injured person, a right to decide regarding the perpetrators’ liability for certain crimes through which they can reach an amicable solution. The right to appeal to a mediator is expressly enshrined in the new criminal legislation, as stipulated in Art. 81 and 83 New Criminal Procedure Code. It is a personal right, but that is regulated both for the injured party and for the offender.

Mediation in criminal cases is an agreement between the injured party and the offender that regards only the compensation for damages caused by the alleged offense (Art. 23). Thus, in a mediation agreement in the civil side, the intervention of the civilly liable person is necessary and, insofar as the nature of the case requires, which will be considered part of the agreement (Constantinescu).

However, considering the provisions of Art. 16 para. 1 letter g Criminal Procedure Code in relation to Art. 396 para. 6 of the Criminal Procedure Code mediation has an effect on the criminal side, too.

In criminal cases, mediation must be conducted so that each party is guaranteed the right to have legal assistance and, if necessary, an interpreter as provided by Art. 68 (1) of Law no. 192/2006.
As regards the time by which a mediation agreement can be concluded, the Constitutional Court ruled in Decision No. 397/2016, in which it held that the provisions of Art. 67 of Law no. 192/2006 are constitutional insofar as the conclusion of a mediation agreement regarding the offenses for which settlement may occur is effective and only if it occurs until the writ of summons. It appears, therefore, that the time by which settlement could occur as well as the completion of a mediation agreement were standardized.

In terms of the effects this institution produces, we make a difference between the moments this occurs: in case it intervenes in the prosecution phase, the prosecutor decides the closing of the file, respectively, during the trial, the court orders the termination of the criminal trial. It should also be noted that during the course of mediation proceedings, prosecution or judgment shall be suspended until its closure one of the ways provided by law, but not exceeding a period of 3 months from the date of signing the mediation agreement, the criminal trial following to be resumed ex officio. According to Art. 69 of Law 192/2006, in case “the mediation procedure was initiated within the period provided by law for the filing of the prior complaint, the hearing would be suspended during the course of mediation. If the parties found in a conflict did not settle, the injured party could introduce a prior complaint within the same period, which would resume its course after drawing up the minutes of closing the mediation procedure, considering it the period elapsed before the suspension.”

Analyzing this institution, we wonder if the injured party may refer the matter to the judicial body later for the same offence, if the mediation procedure was conducted before the criminal trial and was completed by the settlement of the parties. The answer to this question can only be negative.

It should be noted that with the closure of the mediation, the mediator shall communicate to the judicial body a copy of the minutes and the parties are obliged to submit the authentic form of the agreement or to present themselves before the judicial body so it can record their agreement.

5. SETTLEMENT VS. MEDIATION

In the following, we will highlight some aspects of the advantages of mediation (www.emediere.ro):

- In mediation proceedings, the parties determine the date and time for its performance, unlike criminal proceedings where the hearings are imposed on the parties;
- Mediation involves a much shorter settlement period than the period in which a criminal trial runs;
- The parties, as agreed, can choose the mediator, feature that is not provided in criminal proceedings;
- The criminal trial is characterized by formalism, strict compliance with procedural rules, which can not be found in a mediation meeting
- In the trial, the resolution is imposed on the parties, but in the case of mediation, the mediator does not impose anything to the parties. They negotiate amicably aiming for the settlement of the conflict;

5 Published in the Official Gazette no. 532 of 15 July 2016.
6 Published in the Official Gazette no. 441 of 22 May 2006.
The mediator does not judge and does not give verdicts to the parties, he only facilitates communication between the parties;

- If the parties do not settle their dispute through mediation, they may address the court, their access to justice being unrestrained;
- The mediator does not establish the legal classification;
- Mediation is confidential;

However, the institution of mediation is far from perfect. In this respect, we mention some of the disadvantages of this procedure:

- the exercise by judges, prosecutors, lawyers, notaries of mediators’ duties which could create confusions among litigants and diminish confidence in the effectiveness and purpose of mediation due to a suspicion of impartiality (Chiriac, 2015);
- the lack of minimum legal knowledge of the people who can provide mediation activities is a serious impediment to the successful conduct of this procedure, the mediators being put in the situation of being unable to provide the necessary information to the parties in a specific area or to explain their rights and obligations;
- the multitude of changes brought to the organizational law and to the statute affects the predictability and the legal stability.

In relation to the institution of settlement, we must specify that, in mediation, the mediator facilitates understanding between the parties, and not the settlement. The mediation agreement is a civil contract between the parties, which results in the termination of the criminal trial, but is not subject to any conditions of validity the way the settlement is subject to conditions. However, it may not be illegal or contrary to morality.

Also, unlike settlement, mediation has the advantage of providing results convenient for both sides, better gratification of their interests achieved with lower expenses and time saving. Can mediation be assimilated to reconciliation? We believe that mediation is an alternative method of resolving a conflict separate from the institution of settlement. Through the mediation agreement people do not settle, but come to an understanding, that is why this understanding produces the same procedural effects as the settlement.

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<th>Settlement</th>
<th>Mediation</th>
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<tr>
<td>Regulation</td>
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<td>Law no. 192/2006</td>
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<td>- cause sui-generis of removing criminal liability (Decision of the High Court of Cassation and Justice)</td>
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<td>Domain of offenses</td>
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<td>- larger domain: offences for which according to the law, the withdrawal of the prior complaint or the settlement of the parties removes the criminal liability</td>
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<td>Time</td>
<td>- up to the writ of summons by the court</td>
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6. CONCLUSION

The institution of settlement should not be confused with the institution of mediation.
The legislature is obliged to reflect more and make the normative specifications necessary for the existence of two independent institutions which, although not identical, can have the same purpose.

The mediator must translate into the interpersonal reality “the art of negotiation”, which can not overlap with the “art of law”.

Mediation in civil or criminal proceedings may only be the prerogative of a specialized profession, or does it belong to the lawyer, prosecutor or judge as well?

But objectively speaking, between the legal institution of settlement and the legal institution of mediation is at this time an immeasurable difference, given by the legislative confusion, once the first is characterized as being unconditional, while the second can not escape its onerous nature. Therefore, we believe that within the criminal law they can not coexist.

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<th>Format</th>
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<tbody>
<tr>
<td>- personal agreement before the court or by persons with special proxy or authentic document</td>
<td>- termination of the criminal trial</td>
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<td>- civil settlement between parties (the rules regarding the civil contracts)</td>
<td>- termination of the criminal trial</td>
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