

## MEDIATION IN CRIMINAL MATTERS

**Adrian Lupaşcu, Assist., PhD Candidate, "George Bacovia" University of Bacău**

*Abstract: The entry into force on February 1, 2014 of the new Criminal Code and The New Code of Criminal Procedure brings aspects of novelty in the field of mediabile crimes and criminal mediation procedures. The new Romanian criminal legislation lines up with the Western standards, moving from the traditional appearance where the emphasis was put on excessive coercion and in some cases even on oppression, to the idea of restorative justice, where the offender must be re-educated in order to eliminate its criminal behaviour and to prevent the commission of acts with criminal character. Also, the legislature now leaves the possibility of the active participation of the victim in the resolution of the criminal conflict in what concerns the repair of the physical and moral damage. The restorative aspects brought by the new legal regulations include mediation, as a related solution for all offences, and a primary solution for offences where the reconciliation of the parties or withdrawal of the prior complaint removes criminal liability. Under the new codes, the State and the judicial authorities will encourage the parties of a legal conflict to participate in mediation procedures, with the purpose of arriving at an amicable solution.*

*Keywords: mediation, Criminal Code, Code of Criminal Procedure, restorative justice, Romania.*

### **Introductory aspects concerning the mediation procedure in criminal matters**

**Mediation**, as alternative means of conflict resolution had in mind as object, from its first forms of manifestation, even the criminal conflicts between people. In the Romanian law (new Criminal Code) mediation in criminal matters had been dealt with in Chapter VI - Special provisions concerning mediation of conflicts, section 2 - Special provisions concerning mediation in criminal cases, in articles 67-70.

The provisions of this law are properly applied even in the **criminal causes** concerning offences for which, according to the law, the withdrawal of the prior complaint or reconciliation of parties removes criminal liability. We must note that unlike other countries, in Romania neither the injured person nor the one who committed the offence can be compelled to accept mediation procedure, not even as prior procedure.

This is why changes were made to article 6 of law no. 192/2006 on mediation and exercise of the profession of mediator through law no. 370/2009 [3] so that “the judicial and arbitration bodies, as well as other authorities with jurisdictional attributions inform (previous text - can inform) the parties on the possibility and the advantages of using the procedure of mediation and directs them (previously text - can direct) to use this way to resolve conflicts between them.”

Unlike civil cases, in the criminal matters the mediation law stipulates the extent of the right of each party to counsel and if necessary, an interpreter. That's why mediators must note in the official report drawn up according to the law, through which the mediation procedure closes, if the parties have benefited from the assistance of a lawyer or the services of an interpreter or where appropriate they should mention the fact that they expressly waived this right. Also, in the case of minors the same guarantees provided by law for the development of the criminal process, must be ensured in the mediation proceedings [1].

Depending on the time the person seeks mediation, we distinguish three situations:

1) if the mediation procedure is conducted before the initiation of the criminal process, and this ends with the reconciliation of the parties, the injured party may not complain, for the same offence, to the criminal prosecution bodies or, as the case may be, to the Court.

2) if the mediation procedure has been triggered within the period prescribed by law for the introduction of a prior complaint, this time limit shall be suspended during mediation.

If the conflicting parties could not be reconciled, the injured person may bring a prior complaint while in the same time, which will resume its course from the date of the closing official report of the mediation procedure; the time elapsed before the suspension will be taken into account.

3) if mediation is conducted after the criminal trial began, the criminal prosecution or, where necessary, judgment is hereby suspended, under the mediation contract submitted by the parties.

*The suspension* lasts until the mediation procedure is terminated through any of the methods provided for by the law of mediation, but not more than 3 months from the date the mediation contract was signed. The criminal proceedings shall be resumed ex officio immediately upon receipt of the copy of the official report for the termination of the mediation procedure, which the mediator is obliged to communicate to the judicial body.

#### **The prior complaint and subsequent actions**

According to the article 295 paragraph (1) of the Criminal Procedure Code (art. 279; paragraph (1) in the old code of criminal procedure), the initiation of the criminal action shall be done only through the prior complaint of the injured party in the case of offences for which the law stipulates that it is necessary for such a complaint. In such situations expressly provided for by law, triggering the criminal process has been left by the legislator at the initiative of the person injured, being an exception to the formality principle of criminal process.

**Prior complaint** is treated as a double manifestation of will of the injured person, primarily as a notification of the judicial bodies and secondly as an expression of will so that the offence will be prosecuted and punished. Unlike other institutions related to the criminal process, the institution of the prior complaint has in the criminal procedural rules (art. 295 - 298 of the Criminal Procedure Code - articles 131-132 old code of criminal procedure -) a mixed legal nature, being a cause which punishes and initiates criminal procedure.

The complaint is a form which attracts criminal liability of the perpetrator whereas the application of the sanction provided by the criminal law is subject to its existence. The lack of prior complaint or the failure to comply with the requirements of the law leads to the removal of criminal liability [2].

Under the new Code of criminal procedure, the prior complaint may be formulated in a period of 3 months from the date the crime was committed – art. 296, paragraph 1 of the Criminal Procedure Code –. “The prior complaint must be lodged within three months from the day on which the injured party has learned about the commission of the crime”. In the old Criminal Code, the prior complaint was submitted in a period of two months from the date the victim knew who the perpetrator was.

The current criminal code, normative act in force since February 1, 2014, provides certain offences for which the withdrawal of the preliminary complaint or the reconciliation of the parties removes criminal liability [3]:

- Hitting or other violence (art. 193);
- Personal injuries through negligence (art. 196);
- Family violence (art. 199);
- Threat (art. 206);
- Harassment (art. 208);
- Rape (article 218 (paragraph 1) and paragraphs 1 and 2);
- Sexual assault (art. 219);
- Sexual harassment (art. 223);
- Violation of domicile (art. 224);
- Violations of professional office (art. 225);
- Violation of private life (art. 226);

- Disclosure of professional secrecy (art. 227);
- Punishment of some flirting upon prior complaint (art. 231);
- Theft – art. 228
- Qualified Theft - art. 229, paragraphs 1 and 2 letters b and c
- Theft for the purpose of use - art. 230
- Abuse of confidence (art. 238);
- Abuse of trust in defrauding creditors (art. 239);
- Simple Bankruptcy (article 240);
- Fraudulent Bankruptcy {art. 241);
- Fraud (article 242);
- The appropriation of the property found or gotten by mistake to the offender (art. 243):
  - Deception (art. 244);
  - Insurance fraud (art. 245):
  - Destruction (art. 253 (paragraphs 1 and 2);
  - Disturbance of possession (art. 256):
  - Unfair representation and Assistance (art. 284):
  - Violation of the Mail secrecy (art. 302)
  - Family Abandonment (art. 378);
  - Failure to follow the measures relating to custody of minors (art. 379);
  - Preventing the exercise of religious freedom (art. 381)

#### **Holders of prior complaint**

The category of persons likely to be holders of prior complaint is amply covered by the Code of criminal procedure. From the standpoint of mediation, it is important to know these holders whereas only they can withdraw the prior complaint after mediation, regardless of whether this procedure was attended by them or their representatives and have reached an mediation agreement.

These regulations make the right to introduce a complaint to have a personal, exclusive, indivisible and non-transmissible character in relation to the character of crimes for which the Criminal Code stipulates that such a complaint is necessary.

The holder of the prior complaint is only the injured party, fact which arises from the provisions of article 157 of the Criminal Code (articles 131 - old criminal code), according to which in the case of offences for which the initiation of the criminal action is conditioned upon the introduction of a prior complaint by the injured party, the absence of such a complaint removes criminal liability [4].

In the same article 157, paragraph 2 of the Criminal Code, the act that brought harm to several people will attract criminal liability even if the prior complaint is made only by one of them. According to paragraph 3 the act attracts the criminal liability of all natural or legal persons who participated in committing a crime, even though the prior complaint was made only with respect to one of them.

According to the article 296, paragraph 2 of the Criminal procedure code, if the injured party is a minor or an incapable, the prior complaint will be lodged by the person entitled to make the demand or his legal representative (i.e. - parents, guardian, curator, or through a representative). The mandate must be one with special character and the power of attorney shall be attached to the file. If the injured party is a person lacking in exercise capacity or with limited exercise capacity or a legal entity that is represented by the offender, in accordance with the provisions of art. Art. 157, paragraph 4 of the new Criminal Code (article 131, paragraph 5 of the previous Criminal Code), the criminal action can be put in motion ex officio. The prior complaint is introduced to the prosecutor or at the investigation bodies of the judicial police, depending on the local jurisdiction.

### The mediation procedure under the guidance of the judicial bodies

The judicial Bodies should bear in mind the following **procedural issues**:

*The prior complaint is addressed to the criminal prosecution bodies* – Prosecutor, policeman or special investigation bodies - by the person who has suffered a physical, material or moral injury through an offence, personally or through a proxy or legal representative for persons lacking exercise capacity within 3 months from the day on which the injured party (or the person entitled in the case of the minor or person lacking exercise capacity) learned about the commission of the crime, according to art. 296, paragraph 1 of Criminal Procedure Code (articles 284 paragraph 1 of the old code of criminal procedure).

According to article 69, paragraph 2 of law no. 192/2006, if the mediation procedure was triggered during the term prescribed by the regulations for the introduction of a prior complaint, *this time limit shall be suspended during mediation*. If the conflicting parties could not be reconciled, the injured person may lodge a prior complaint in the same term and it will resume its course from the date on which it was drawn up the official report for the termination of the mediation proceedings; the time elapsed before the suspension will be taken into account.

According to article 70 of law no. 192/2006, if the procedure of mediation opens after the initiation of the criminal trial, *the criminal prosecution or, where appropriate, the judgment shall be suspended* until the mediation procedure is terminated by any of the manners provided by law, but in no more than 3 months from the date of signing of the mediation agreement (a copy of this agreement will be submitted alongside the application for suspension of the prosecution/judgment).

According to the article 60, paragraph 1, of law 192/2006 "at any stage of the mediation procedure, any of the conflicting parties is entitled to terminate the contract of mediation. The other party and the mediator will be given the warning in writing. The mediator shall note of the unilateral denunciation of the mediation contract and within 48 hours from the date he was first announced about it he draws up a report of termination of the mediation procedure." Here we mention the fact that the party which has denounced the agreement and the mediator shall notify the prosecution over the closure of mediation proceedings, in order for them to resume the criminal prosecution [5].

*Criminal proceedings shall be resumed ex officio* immediately after receiving the report that states that the parties have not been reconciled, or, if it is not communicated, at the end of the three months granted by law to settle through mediation.

The paragraphs introduced in article 70 of the same law 192/2006 must be taken into account:

(5) For solving the criminal cases under the agreement concluded as a result of mediation, the mediator is obliged to forward to the judicial bodies the mediation agreement and the official report which terminates the mediation in original and in electronic form if the parties have reached an agreement or just the official report concluding the mediation in situations described in art. 56, paragraph 1, letter b) and c).

(6) The provisions of art 61, paragraph 2 shall apply correspondingly if the mediation is recommended by the judicial organs. Article 61 (2) At the termination of mediation, the mediator shall, in all cases, submit to the competent court the mediation agreement and the official report which terminates the mediation in original and in electronic form if the parties have reached an agreement or just the official report concluding the mediation in situations described in art. 56, paragraph 1, letter b) and c).

The judicial authorities *will refuse the referral with a new complaint for the same deed*, and if the injured party insists, it will enter the rejection resolution based on the explicit provision of article 69, paragraph 1, of law no. 192/2006; however, if the criminal prosecution

was initiated, it will cease on the basis of article 16, letter g) of the Criminal Procedure Code (art. 10, letter h) of the old Code of criminal procedure) by order of the Prosecutor.

With respect to the *confidentiality of the prosecutor/criminal investigation body* which holds the mediation agreement, it is sufficient to say that just like the mediator, these bodies are required to maintain confidentiality. The criminal proceedings are not public like the court meetings, and only the most essential parts of the agreement are presented as grounds for the procedural measures; without these for example, the criminal prosecution cannot be initiated.

If from the lodging of the complaint, until the start of the criminal prosecution, during the prior, extra-procedural acts, the parties wish to seek mediation, we believe that the prosecutor, upon the proposal of the criminal investigation body (by paper) or ex officio, orders the non-initiation of the criminal prosecution (NUP) through a reasoned resolution. The prosecutor's disposition is an extra-procedural act and it must meet the conditions of legality. The resolution shall be communicated to the person who made the complaint and if necessary, to the one in front of whom the prior acts were drawn up, and the folder remains at the criminal investigation body.

The commencement of criminal proceedings is ordered under art. 286 of the Code criminal procedure (art. 228 - old CPC) by the criminal investigation body (subject to reasoned confirmation of the Prosecutor who exercises the supervision of the work of criminal investigation within 48 hours from the date of commencement of criminal proceedings) or by the prosecutor personally, through resolution, and the criminal prosecution may take place with or without setting in motion a criminal action. *The suspension of criminal prosecution can occur on account of illness* according to article 312, paragraph 1 of the Criminal Procedure Code (article 239 – old CPC), or when carrying out the procedure of mediation - art. 312, paragraph 3 of the Criminal Procedure Code. Having received the suspension request and the copy after the mediation contract, the criminal investigation authority proposes to suspend the prosecution through a report filed with the public prosecutor, who disposes the suspension through ordinance.

After the ordinance for the suspension of criminal prosecution is communicated to the suspect/accused and the injured person, the file is returned to the criminal investigation body. During the suspension, the body shall continue to carry out acts whose performance is not hindered by the situation of the suspect/accused or the presence of the two parties to the mediation. The criminal investigation body is bound to inquire periodically during the 3 month suspension if the cause that led to the suspension of the prosecution subsists.

If the mediation ended successfully and the mediator has recorded in the mediation agreement the injured party's obligation to withdraw the prior complaint as soon as possible, or the reconciliation of the parties, then the parties and the mediator shall notify the judicial bodies. The same thing happens if the mediation ended only with the understanding of the parties on the civil side, and not on the criminal side. Criminal investigation authority reactivates the criminal prosecution through a report to resume the prosecution submitted to the prosecutor who decides the resumption of the prosecution through ordinance in accordance with art. 313 Code of criminal procedure (art. 271 – old CPC.)

If the parties have agreed only on the criminal side and the prior complaint is withdrawn the criminal investigation body shall propose the termination of the criminal proceedings and report the ranking of the dossier in accordance with art. 314-315 of the Criminal Procedure Code and the Prosecutor shall decide through ordinance if the criminal proceedings were put in motion or through a reasoned resolution if criminal proceedings were not put in motion [6].

The process is the same if the prior complaint targets only the criminal responsibility and the parties appeal to mediation, culminating in the withdrawal of the complaint. For the

resolution of the civil side the injured party can address the civil court, according to the provisions of article 315, paragraph 2, letter a) of the Criminal Procedure Code within 30 days. According to the article 318, paragraph 7 a copy of the Ordinance of the Prosecutor shall be communicated to the person who lodged the referral, to the suspect or accused and, where appropriate, to other interested persons.

In addition, according to article 315, paragraph 2, letters a) and b) of the Criminal procedure code (articles 245 - old code of criminal procedure), by order of waiver of criminal prosecution, the prosecutor also orders the removal of or at the same time maintenance of the precautionary measures, restitution of assets seized or of bail and restoring the situation previous to the commission of the offence (in accordance with the understanding reached during mediation), judicial expenses, safety measures, where appropriate.

When the case of termination of the criminal prosecution of an arrested suspect/defendant, the Prosecutor will decide whether to hold the criminal prosecution on the same day that he receives the official report with the proposal from the criminal investigation bodies. If the Prosecutor has ordered the cessation of criminal prosecution, he must immediately require the Court to cancel the measure of pre-trial detention, and that, within 24 hours from the receipt of the file together with the proposal for the cessation of criminal prosecution, disposes through cessation the revocation of the measure, and orders the immediate release of the suspect/accused, then returns the file to the Prosecutor within 24 hours, together with a copy of the conclusion. The Court shall notify the administration of the holding place through an address, with the disposition to immediately liberate the suspect.

The suspension produces effects on the whole cause, when the suspect or defendant is prosecuted for committing several crimes. It is possible, that several defendants are prosecuted in a cause for related facts. In these situations, the suspension operates only for the ones who made the complainant and the applicant of the mediation contract; thus the prosecution must disjoin the cause.

#### **Mediation in light of the new criminal proceedings**

The new Code of criminal procedure entered into force on February 1<sup>st</sup>, 2014 and has introduced the following references to mediation:

**Art. 16** Cases that prevent the initiation and exercise of the criminal action.

(l) Criminal proceedings cannot be initiated, and when it was put into motion it can no longer be exercised if:

g) the prior complaint was withdrawn, in the case of offences for which its removal eliminates criminal liability, the reconciliation of the parties, or a **mediation agreement** in accordance with the law has been concluded;

The regulation of the mediation agreement as the cause that prevents putting in motion and/or the exercise of criminal action was conducted initially through law no. 202/2010, with its addition to the contents of the article 10, letter “h” of the old Code of criminal procedure, and the actual art. 16, paragraph 1, letter “g”. [7]

**Article 23** The transaction, mediation and recognition of civil claims.

(1) In the course of the criminal process, with respect to civil claims, **the defendant** and the **civil** party as well as the **civilly responsible party may conclude a transaction or a mediation agreement** according to the law.

**Article 81** The injured person's rights.

(1) During the criminal proceedings, the injured person shall have the following rights:

a) the right to call a mediator in cases allowed by law:

**Article 83** The rights of the accused. During the criminal trial, the defendant has the following rights:

g) The right to call on a mediator in the situations allowed by law: g1) the right to be informed of his rights;

**Article 108** Communication of Rights and obligations

(4) The judicial body must bring to the attention of the accused **the possibility of concluding an agreement, during the criminal investigation**, as a result of admission of guilt and in the case of judgment the opportunity to benefit from reducing the penalty provided by law, as a result of the accusations.

**Article 111** The listening mode of the injured person

(2) The aggrieved party is then informed about the following rights and obligations:

b) **the right to appeal to a mediator**, in the cases allowed by law.

**Article 318** Renunciation of the criminal prosecution

if the Prosecutor decides that the suspect or the defendant must comply with the obligations laid down in paragraph 3, by means of Ordinance, he sets the deadline by which they are to be met, which may not be longer than 6 months or 9 months for **obligations assumed through the mediation agreement** concluded with the civil part and that flows from the communication of the ordinance.

**Article 483** Referral to the Court with the agreement of acknowledging guilt.

(3) if the provisions of article 23, paragraph 1 are incidental the Prosecutor shall submit the Court an agreement acknowledging guilt accompanied by the mediation agreement.

**Article 486** Resolution of the civil action

(1) if the Court recognizes the agreement acknowledging guilt and the parties have concluded a **mediation agreement** with regard to the civil action, the Court notes that through a sentence.

(2) if the Court admits the agreement acknowledging guilt but the parties have not concluded a transaction or a **mediation agreement** with regard to the civil action, the Court leaves the civil action unresolved.

The new code of criminal procedure introduces a *new special procedure* governed by art. 478 that provides that, during the criminal prosecution, after setting in motion the criminal action, the defendant and the Prosecutor may conclude an agreement as a result of the guilt of the defendant. The agreement aims at recognizing the legal act and the juridical classification of the offence for which the criminal proceedings have been put into motion and regards the amount of penalty, and the form of its execution.

If the agreement, initiated by the Prosecutor or the accused, was endorsed by a hierarchically superior prosecutor, the Prosecutor shall inform the civil side (injured party) about the conclusion of the agreement acknowledging guilt and suggests they address the civil court for the recovery of their civil claims. These claims can be harnessed through mediation.

**Conclusions**

**1. Crimes subjected to mediation.** In the case of the offences seen through prior complaints, according to the article 6 of law No. 192/2006 on mediation and exercise of the profession of mediator modified by law no. 370/2009 the judicial authorities are required to inform the parties of the possibility and the advantages of using the procedure of mediation and to guide them to use this way of resolving conflicts between themselves.

**2. The civil side of the criminal case.** Also, the parties may appeal to mediation in all types of offences, in order to settle the civil side of the criminal file.

**3. Offences with prior complaints.** At the mediation of a criminal conflict referred by a prior complaint, the judicial bodies have the obligation to inform about the suspect's right to defense and about the special defense or restrictive measures, as well as the representation, as in the related criminal procedure law.

**4. Plea bargaining agreement.** With the introduction of the procedure of plea bargaining agreement, there is a wide field of mediation on the civil side of the criminal

process, once the suspect has the opportunity to negotiate the amount and manner of execution of the sentence with the Prosecutor.

**5. Agreement on mediation in criminal matters.** Amicable, non-judicial settlement of conflicts in criminal matters, through mediation, presents advantages for all parties, as follows:

a) *for the criminal prosecution bodies and the courts:* freeing up the courts and criminal prosecution bodies by reducing the number of cases investigated and prosecuted, reducing workload, the number of minor cases, periods and minor expenses incurred from the budget, insufficiently insured, thereby raising the quality of justice by concentrating on complex dossiers, reduction of cases of complaint against the acts of the criminal prosecution bodies, appeal cases, the prevention of future conflicts that are going to come on the role of the Court due to situations of unresolved conflict;

The criminal mediation agreement is an agreement between the parties with respect to the claims and obligations they both have, which is not concerned with a way of prosecuting (which is the exclusive competence of the judicial bodies) and which is not reduced to a common understanding regarding demands that constitute the object of civil action in the criminal trial. The terms of the mediation agreement may practically be about any rights the parties may have, including those that do not connect with the proper criminal proceedings; it is essential for them to have as their purpose the total and permanent termination of the conflict between the parties, aspect which must result unequivocally from the mediation agreement [8].

b) *for the conflicting parties:* faster resolution of conflicts, disputes, by avoiding lengthy processes, reducing costs (procedure possible without lawyers), reducing the adverse negative effects on the person, the flexibility of the mediation procedure over court proceedings, provides a greater chance to reach a stronger understanding, the active, direct and voluntary involvement of the parties in the mediation process; allows finding creative solutions to solve a conflict in which nobody loses, all sides win; strengthening the good relations between the parties; keeping the privacy of the development and full results; elegant form of progress; avoid exposure to the public by providing a private discussion where the parties talk freely, without the limits of procedure/judge; reducing hostility and the conflict climate, prevention of other conflicts; improving communication between family members and between the parties.

With the passage of time, the advantages and benefits conferred by this procedure to both litigants and judicial bodies will come to be known, promoted and applied correctly and efficiently, so that many of the cases brought to the attention of the judicial organs will be resolved before reaching the courts, saving thus the relations between the conflicting parties.

### **Bibliography**

[1] Luminița Dragne, Anamaria Trancă, "Mediation in criminal matters" Legal Universe Publishing House, Bucharest, 2012, p 9

[2 ] Petronela Stogrin, Criminal mediation procedure, Mediators Chamber of Romania - Internship training, Bacau, 2014, p 27

[3] Law no. 286/2009 on the new Criminal Code, published in Official Gazette no. 510 of July 24, 2009 entered in force on February 1, 2014

[4] Boga Maria Ciprian, "Referral of the criminal prosecution bodies" Hamangiu Publishing House, Bucharest, 2012, p.107

[5] Petronela Stogrin, Criminal mediation procedure, Mediators Chamber of Romania - Internship training, Bacau, 2014, p 29

[6] Luminița Dragne, Anamaria Trancă, "Mediation in criminal matters" Legal Universe Publishing House, Bucharest, 2012, p.14



[7] Boge​a Marius Ciprian, “Referral of the criminal prosecution bodies” Hamangiu Publishing House, Bucharest, 2012, p.108

[8] Cristi Danileț - Considerations on criminal mediation - Law Journal no. 2/2014, p 182