

CRIMINAL MEDIATION IN THE ROMANIAN LAW SYSTEM

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Abstract

Criminal mediation is a relatively new field in the Romanian legal system and is an alternative way of resolving conflicts amicably through a third party - the mediator - only for those offenses for which by law the withdrawal of prior criminal complaint or reconciliation parties removes criminal liability.

Keywords: *criminal mediation, voluntary procedure.*

Introduction

Mediation is rooted in the American legal system, which is known for about a century. Over time, in The United States of America this alternative method of dispute resolution has proved its efficiency, reason for which mediation enjoys an extensive media promotion and support by judicial bodies and administrative institutions.

In criminal law, mediation is part of the broader concept of restorative justice, a process in which victim, offender and other persons or members of society, affected by a crime, participate together to solve the problems caused by crime, often with an impartial third party.

The success of mediation in the U.S. legal system determined implement similar forms of conflict resolution in most legal systems of modern states. In Europe, the mediation process was implemented about 20 years and unlike the American model in which mediation is binding, the European model is optional¹. Efforts at EU level to implement this system in member countries, have resulted in the adoption of regulations in this area. Thus, in matter of criminal law we mention Recommendation. R (99)19 on mediation in criminal matters², adopted by the Committee of Ministers of the Council of Europe on 15 September 1999. The aim of Recommendation is emphasizing effective participation of the victim and the offender in criminal proceedings, recognizing the legitimate interest of victims to express their position regarding the consequences of crime and communicate with the offender. A second purpose of the trial is as recommending, encouraging offenders to take responsibility sense, giving thus the opportunity and ability to reintegrate and rehabilitate.

¹ In England, initially tried to impose mandatory mediation as a form of conflict resolution but was not successful, although in this state parties often appeal to this procedure, considering it more efficient and cheaper than court proceedings.

² Council of Europe standards for Justice, Chisinau, 2010, p 373, [www.csm.md / files / Information / Standarde_Justitie.pdf](http://www.csm.md/files/Information/Standarde_Justitie.pdf).

Another important law is the Council Framework Decision of the European Union of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JAI)³ by which was established for the Member States of the European Union to promote mediation in criminal cases for offenses they deem appropriate for this type of measurement, each Member State will ensure that any agreement made between the victim and the offender will be taken into account during mediation in criminal cases.

Romanian legal system, following the directions of principle established in the European Union, has adopted legislation that enshrines the possibility and conditions of settlement in civil, commercial, and restricted category of criminal cases through mediation. In the Romanian legal system, criminal and not only, mediation is optional.

Therefore, criminal mediation is a relatively new field in the Romanian legal system, this prompting some interest much later than in other countries, finally in 2006 the Law no. 192 on mediation and the mediator profession⁴ has been adopted, which were devoted several articles on mediation in criminal cases. Romanian legislator has chosen to regulate this alternative way of solving conflicts only for those offenses for which the law, withdrawal or prior criminal complaint reconciliation of the parties removes criminal liability.

According to art. 1, paragraph 1 of the above mentioned law, mediation is a way of resolving conflicts amicably through a third party as a mediator specializing in conditions of neutrality, impartiality, confidentiality and with free consent of the parties.

Being a voluntary way of resolving conflicts amicably, both victim and offender cannot be compelled to mediate, states the art. 6 of the law that judicial and arbitral bodies, and other authorities having jurisdiction shall inform the parties about the possibility and advantages of mediation procedure and can lead to resort to it to solve conflicts between them.

Although no specific terminology used by regulating possibility of mediation both before and after the onset of a trial, the first paragraph of art. 2 of law classify mediation procedure extrajudicial mediation and judicial mediation, classification is at least at this point agreed by most professional work.

This award is valid for mediation in criminal matters.

Delineation between the two modes of mediation proceedings, as shown in the literature⁵, is necessarily because comparing mediation with justice, in criminal matters, involved criminal judicial mediation, as the only special form of mediation, corresponding to the specificity criminal litigation, thereby determining the extent to this type of criminal litigation articulates with judicial proceedings. In this context, says the same author, mediation appears as a judicial criminal procedure governing criminal proceedings, including and together with other procedural ways that enable conflict committed to a judicial litigation (through prosecution and civil action in criminal proceedings) are oriented towards consensus treatment under the aegis of a judge to seek a negotiated solution to process acceptable and accepted, likely to be agreed by the judge.

Extrajudicial mediation, called extra procedural, occurs before the victim to submit prior complaint. Conversely, judicial mediation would occur after making this complaint. However, criminal proceedings (judicial stage actually) does not begin at the time the criminal complaint, between now and the start of trial by the prosecution taking place preliminary investigation phase, the issues raised by the injured person is checked, so that phrase Judicial mediation is easy inaccurate.

³ <http://eur-lex.europa.eu>

⁴ Published in the Official Gazette of Romania, Part I, no. 441/22.05.2006.

⁵ Mateuț Gh., *Medierea penală*, Revista Dreptul nr.7/2007, p. 150.

In agreement with other authors⁶, we consider that the terms of the mediation process and extra procedural mediation would be more suitable.

Extrajudicial mediation takes place at the initiative of one or both parties.

The legislature is only concerned with the result of extrajudicial mediation - if the mediation procedure ends with reconciliation, the injured party can not refer to the same offense the prosecution or the court.

We should note at least two errors on the terms used by the legislature: first, reconciliation cannot take place until after the formulation of a prior complaint, in which we found in extrajudicial mediation, so that the terms of an agreement or understanding were most suitable. Second one, in terms of the hypothesis of referral to court by prior complaint, this last sentence was repealed by Law no. 356/2006 for the amendment of the Criminal Procedure Code, and other laws⁷. Although Law. 192/2006 on mediation and the mediator profession has been amended three times; there was a legislative proposal to reconcile this provision of the law with the new version of the Code of Criminal Procedure, which establishes in Art. 279 paragraph 2 of the complaint prior to addressing criminal investigation body or prosecutor under the law.

Successful completion of the mediation process acts as a cause of preventing entry into criminal action.

If mediation is not completed by agreement, the injured party may submit prior complaint. A useful provision is contained in Art. 69 paragraph 2 of the Law, which enshrines the only case to suspend the deadline for lodging the complaint prior. If the parties during the mediation period for bringing the complaint prior 2 months, this period is suspended during the procedure and thereafter be back and considering elapsed before mediation. The period of suspension will therefore be included between contract signature and date of concluding the mediation - mediation closing minutes.

Judicial mediation occurs after the notification of the criminal investigation with prior complaint. In this case the parties may request mediation or their solicitation or at the court or prosecuting body recommendation.

The consequence for judicial mediation is suspended prosecution or trial (if the parties have resorted to mediation by the prosecution), action taken under the mediation contract submitted by the parties.

The suspension lasts until the close of the mediation process, in any of the methods provided by law, but not less than three months from the date of signing the mediation.

Criminal proceedings are officially resumed immediately after receipt of the report stating that the parties have not reconciled or if it fails to notify the deadline of 3 months.

According to art. 67 paragraph 2 of law, *nor injured person or the perpetrator cannot be forced to accept the mediation procedure*. This provision comes to reaffirm the voluntary nature of mediation, specifics highlighting the importance of this trait in criminal mediation.

Initiation of mediation procedure between injured and the offender party depends, almost entirely, on the will of the first. In the pair victim - offender, the victim has the most sensitive position, he is affected by the criminal act and, in most cases, and willingness to communicate with the other party is a prerequisite for initiation of the procedure. Will also not be neglected the offender will to participate in the mediation, which, in his turn, must show his voluntary consent to its onset. Only sincere willingness of the offender to be a part in the process of reconciliation can give mediation a chance of success, otherwise there is the

⁶ Păncescu F.G., *Mediation Law. Comments and explanations, second edition*, Publishing House CH Beck, Bucharest, 2008, p. 213.

⁷ Published in the Official Gazette of Romania, Part I, nr.677/07.08.2006.

possibility that by the mediation agreement the offender could see only as mere means to avoid criminal liability, which would remove procedure mediation of its purpose⁸.

The mediator cannot impose a solution on the parties to the dispute submitted to mediation as its role in this process is that of a facilitator of communication between the parties, helping them to identify key issues of their conflict and to identify possible solutions and ways to repair.

During mediation, the actual solution is determined solely on the wishes, needs and interests of the parties, without constraining the scope of procedural rules. The parties may choose the solution that satisfies the interests, giving mediation more practical nature in restoring the situation of the parties.

Through the new Code of Criminal Procedure⁹, to meet the functioning of a modern justice and to transpose into national legislation the rules adopted at EU level were introduced several provisions that refer to mediation. Thus was established the possibility of a mediation agreement and was consecrated injured or accused person's right to seek mediator in certain cases provided by law, and the possibility of recovery of claims through mediation.

Also, until the entry into force of the mentioned Code, at the Criminal Procedure Code have been brought current changes and additions¹⁰ regarding to the mediation agreement which may be terminated under the law of offenses for which a reconciliation withdrawal of the complaint or eliminate the liability on criminal or civil claims in criminal proceedings.

Unfortunately, experience shows that without proper information on this new alternative dispute resolution and the benefits of mediation practice is almost non-existent in this area, not far concluded any agreement in criminal matters.

Conclusions

Interest is that mediation (as an alternative dispute resolution) being often successfully used in criminal field because it is essentially an alternative to prosecution and trial phase which is preferably a long process which follows necessarily those steps.

By adopting laws governing mediation and by ensuring an appropriate framework for conducting and promoting mediation not only is a better management of justice but can simplify or eliminate judicial proceedings in cases of conflict.

Mediation, as currently regulated, has no practical use but, in the case of a constant, real and effective media sustains, combined of course with the active involvement of judicial authority, criminal mediation can acquire such a utility.

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⁸ Luminita Dragne, Anamaria Tranca, *Mediation in Criminal Matters*, Legal Universe Publishing, Bucharest, 2011, pp. 136-137.

⁹ Nr.135/2010 Law on Criminal Procedure Code was published in the Official Gazette of Romania, Part I, nr.486/15.07.2010.

¹⁰ Nr.202/2008 law on measures to accelerate the process settlement, published in the Official Gazette of Romania, Part I, nr.714/26.10.2010.