Mediation Agreement in Penal Causes

Gabriel-Cristian CONSTANTINESCU
The Bucharest University of Economic Studies
Bucharest, Romania
Mediator
mediator.constantinescu@gmail.com

Nicoleta-Elena BUZATU, Ph.D
„Dimitrie Cantemir” Christian University
Bucharest, Romania
nicoleta.buzatu@ucdc.ro

Abstract: The mediation agreement in Penal Causes shall appear in a written ad probationem form as to be opposable to a third party and be sent to the judiciary bodies. The juridical nature of this agreement is that of a contract between parties. In its content the agreement should refer to a minimum of several elements. As for the clauses agreed upon, the content of the mediation agreement differs according to the way the convention between the parties was settled: full agreement on both the penal aspect and the civil aspect of the penal cause or, partial agreement on the penal aspect or on the civil aspect of the penal cause. In both cases, the express provision concerning the way the judiciary costs are to be paid, obviates the cases in which in the absence of this provision - the injured person would be obliged - in the virtue of the Code on Penal Procedure - to pay a part of the judiciary costs, although he manifested clemency for the doer or, succeeded to solve his civil claims in an extra judiciary way. The mediation agreement proves to be an important component of the penal procedure having, at the same time, the obligation to observe and fulfill some formal conditions as well as the procedures imposed by the law.

Keywords: mediation agreement; penal causes; penal mediation; civil aspect of the penal trial, judicial costs.

Introduction

Law no 192/2006 [1] describes general regulations regarding the way mediation shall take place. The second section of Chapter VI, entitled “Special Dispositions Regarding the Mediation of Certain Conflicts”, refers to mediation in penal cases. The procedure of mediation is meant to find amiable solutions for the litigations to be mediated. Once a reciprocal convenient solution was found, the parties will conclude an agreement. It can contain an acquiescence to the claims of the other party, a disagreement or, it can turn into a transaction.

Until the modifications of the Penal Procedures Code of 1968 - Law no 202 of October 25, 2010 on certain steps meant to accelerate the measure aimed to solve the cases, published in the Official Gazette no 714 of October 26, 2010 - the mediation agreement had effects only over the penal aspect in case it stipulated a clause that concerned the wish of the injured person not to lodge a complaint in advance, to withdraw the complaint or the reconciliation of the parties.

Consequently, the mediation agreement was considered a means to solve some of these impediments. The above mentioned law completed the content of article 10, paragraph (1) letter h) of the Code of Penal Procedure of 1968 with a new situation that encumbered the enforcement and the pursuance of the penal action by the mediation agreement: a distinct and alternative modality in the absence of the advance complaint, the withdrawal of the advance complaint or the reconciliation of the parties.

This case was maintained in the actual Code of Penal Procedure article 16, paragraph (1), letter g) as follows: “the advance complaint was withdrawn in case the offences for which its being withdrawn removed the penal responsibility, led to reconciliation or in case an mediation agreement was concluded in conformity with the law”.

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1. The Mediation agreement - the written form of the agreement between the parties

The first option offered by Law no 192/2006 as a modality through which mediation can be concluded is “by settling an agreement between the parties pursuant the resolution of the conflict". (article 56, paragraph 1). As because the special law and the Civil Code allow the parties to also make an unwritten agreement, the written agreement is but one of the forms of the convention that can lead to the completion of a mediation.

It was in Law no 370/2009 [2] that the introduction of the written agreement as an alternative was stipulated. Previously, the initial form of Law no 192/2006 specified, in article 58, paragraph (1), the written form of this type of agreement, exclusively: “When the parties in conflict reached a mutual understanding, an agreement is drawn up comprehending all the clauses consented by them and having the value of a written document privately undersigned.”. The modification offered by article 27 of Law no 370/2009 lies in fixing the written form of the agreement as one of the possible and accepted forms: “When the parties in conflict reached a mutual understanding, an agreement can be drawn up comprehending all the clauses consented by them and having the value of a written document privately undersigned”.

The alternatives of the written form of the mediation agreement might be, in conformity with article 1240 of the Civil Code, an oral comprehension or a behavior which, according to the law, to the convention between the parties and to the bilateral practices or customs leave no doubt on the intention of producing adequate juridical effects.

The flexibility of the comprehension aspect between the parties is in full agreement with the flexible character of mediation, described by the specialists [3] as a defining trait of this procedure. Generally speaking, we support the opinion of the specialists according to which the written form is more adequate as it avoids all doubts concerning the content of the agreement [4]. In order to acquire an opposable character for the third party, the form of the mediation agreement shall necessarily appear in a written form. The written form is also accepted by the Law of mediation regarding the way the mediator is going to transmit the mediation agreement to the instance (article 61, paragraph 2) or to the juridical bodies (article 70, paragraph 5) for litigations that had already been presented to the instance and that make the object of a penal investigation. The written form of the agreement is also used in cases in which it has to be presented to the instance or to the notary.

Consequently, in penal actions, the mediation agreement shall observe a minimum form condition - to be presented in an ad probationem written form. As a rule, if the parties do not opt to choose another version, the mediation agreement is drawn up by the mediator who is under the vow of diligence, that is to resume clearly and correctly the agreement between the parties and, in as far as possible, to check the lawfulness of the settled conventions, without assuming any responsibility of himself. According to the Law (article 58, paragraph 1) the mediation agreement has the value of a document under private signature.

2. The elements of the mediation agreement in penal actions

2.1. The juridical nature of the mediation agreement in penal actions. The mediation agreement is the result of the common efforts of the litigating parties, who are assisted by a mediator who, in his turn, did his best to reach an agreement [5]. Although the law does not insist on this aspect, many specialists consider that the mediation agreement has the character of a contract, as stipulated by the Civil Code [6], while other mention certain justified exceptions concerning the conflict between the parties and which are not always taking the form of a contract (for instance: the inter-organizational conflicts, school conflicts, etc.) [7]. In penal actions, one can consider that although they do not refer to a contractual aspect, the agreements of mediation belong to the domain of conventions, as they take the form of a contract and contain agreements with juridical consequences between parties with (no always one can identify a contractual relationship between the doer and the injured person).

2.2. The content of the mediation agreement in penal actions. The special law fixes compulsory elements of the agreement of mediation, in conformity with the free character of the
contract, as stipulated in article 1169 of the Civil Code, according to which the parties are free to conclude all kinds of contracts and decide upon their contents, under the condition to observe the law and the public order; article 1170 also annexes the good faith obligation in connection with the negotiation of the contract.

Yet, when analyzing the text of article 58, paragraph (1) of Law no 192/2006, there appears the obligation of the parties to include in the contract “all the clauses they have agreed upon.” This provision can be interpreted on the one side as an obligation to include in the contract all the clauses upon which the parties have discussed and agreed upon and, on the other side, as a selective criterion for the clauses that will be included in the agreement and which are equally agreed upon by all the parties. This last interpretation is also in agreement with the possibility of concluding a partial agreement - regarding a part of the matters under the litigation - as described in article 57, paragraph (2) of Law no 192/2006 and also proved by the practice of the mediators.

In penal actions, the agreement between parties can regard both penal and civil aspects arisen from a deed incriminated by the penal law. The result of the above mentioned analysis offers the possibility for a mediation agreement to be concluded either in its penal or in its civil aspect, or even in both ways; the choice remains to the option of the parties, a clause which is in conformity with the procedures of the Code of Penal Procedure, as well.

Although the agreement belongs to the good will of the parties, it shall include a few elements [8]: - identification data of the parties; - description of the object of agreement (the conflict subjected to mediation); - the clauses agreed upon by the parties; - the obligatory mention for a full or partial agreement concerning the extinction of the litigation; - duration and the obligatory terms assumed by the parties;

2.2.1. The full mediation agreement in penal actions. The full mediation agreements in penal actions are those agreements that create a penal and a civil comprehension of the actions. In conformity with the provisions of Law no 192/2006 article 67, paragraph (2), a mediation is possible only for cases regarding infringements for which the law stipulates the possibility of withdrawing the advanced complaint or if the parties decided to reconcile as to avoid the penal responsibility.

Such a mediation agreement settles:

- a) the reconciliation of the parties (with the obligation to withdraw, that is to renounce to lodge an advance penal complaint, or to sustain in front of the instance the reconciliation agreement, where necessary) with the result of removing the penal responsibility once the mediation agreement was taken into account by the judiciary body;
- b) the modality by which the doer repairs the material or/ and moral prejudices of the injured person;

As a general rule, the parties settle in the mediation agreement the following:
- to reconcile, with the agreement of the injured party, to either renounce to lodge the advance complaint or to plead in front of the instance and, where necessary, to reconcile with the doer;
- to make the doer admit the civil claims of the injured person;
- the way the doer (or the civil responsible party) should repair the prejudice suffered by the injured party; to renounce to claims (where necessary);
- the way the judicial costs will be paid;

2.2.2. The partial mediation agreement concerning the penal aspect of the penal action. In a penal action referring to deeds for which the law stipulates the possibility to withdraw the advance complaint or the reconciliation of the parties as to avoid the penal responsibility, the injured person can accept to reconcile with the doer as to remove his penal responsibility, without establishing the way the suffered prejudices will be repaired.

Meant to refer to the reconciliation of the parties only, such a partial mediation will dwell upon reconciliation and on the obligation of the injured person not to lodge an advance complaint or to withdraw the already lodged advance complaint or to plead reconciliation in front of the instance, where necessary.

The partial agreement concerning the penal aspect of a penal action only can be justified in different ways by the injured party as well as by the doer; yet it will contain the express provision referring to the injured person’s renunciation to the civil claims which he will be going to recuperate either after lodging a further civil action or after a new mediation concerning his claims.
In the case of such a type of agreement, as well, it is recommended the way the judiciary costs will be paid. If such a mention lacks, the injured party may find himself in the paradoxical situation as to pay - in the virtue of the provisions stipulated in the Code of penal procedure - the judiciary costs, although he manifested his clemency for the doer.

2.2.3. The partial mediation agreement regarding the civil aspect of the penal action. Irrespective of the possibility of a mediation in a penal action, the parties of a penal action have the opportunity to start the mediation concerning the civil claims, a mediation meant to establish the way the reparation of the prejudice framed as a penal act should be done, in the virtue of article 23, paragraph (1) of the New Code of penal procedure, article 161, paragraph (1) of the old Code or Penal Procedure, respectively. The agreement referring to the civil claims can appear before the beginning of the penal action, during the evolution of the case or after its completion.

In a civil aspect of a mediation agreement - if the nature of the cause obliges - the civil responsible person shall be involved in the agreement, as the will of the doer is not enough to establish the way of repairing the prejudice, if this reparation refers to the civil responsible party, as well.

Such an agreement shall contain clauses referring to the civil claims of the injured person, the way they are recognized and satisfied, as well as the term when the doer and/ or the civil responsible person promise to accomplish them. If the injured person accepts this option, the agreement can expressly provide his renunciation to civil claims, in conformity with article 22, paragraph (1) of the new Code of Penal Procedure, paying attention to the irreversibility of this decision, in conformity with paragraph (3) of the same Code article.

If there is absolutely necessary that the civil responsible person shall be introduced in the penal action, the mediation agreement will also include this civil responsible part, as well. The mediator shall be prepared to face a more complex situation: the negotiation that appears in such a mediation can take place between the injured person - on one side - and civil responsible party and the doer - on the other side - but also between the doer - on one side - and the civil responsible party - on the other side, as to harmonize their positions referring to the civil claims of the injured person. It is not excluded that fact that the authority of the negotiation - in such a case - to be greatly taken over by the civil responsible party, and the content of the agreement to be influenced by the position of this party.

Similarly, in the case of such a type of mediation agreement attention should be paid to the judiciary costs, referring especially to the situation when they are assumed by the doer, as a compensatory means for the prejudice suffered by the injured person.

2.2.4. The express provisions of the way the judiciary costs will be paid in penal actions. The way of paying the judiciary costs is a useful detail to be clearly stipulated in an agreement of mediation, especially in the interest of the injured person who, in the absence of such an express agreement can find himself in the position of paying judicial costs as a result of the termination of the penal action, even if he was not found guilty, as the specialized practice had demonstrated [9].

The New Code of Penal Procedure, in article 275, paragraph (1), point 2), mentions that the charges advanced by the state are paid, in case of offences for which a penal mediation is possible:
- by the injured person, in case he withdraws the beforehand complaint (article 275, paragraph (2), letter b);
- by the defendant and the injured person, in case of reconciliation (article 275, paragraph (2), letter d);
- by the party mentioned in the mediation agreement in case nothing occurred in the penal mediation (article 275, paragraph (2), letter c);
- by the party who withdraws the appeal, appeal in cassation, legal contest or the petition (article 275, paragraph (2), letter b).

In the above mentioned cases the instance decides for the charges that are to be paid by each party (in case of two or more parties) or for an equal charge to all.

Similarly, the same Code of Penal Procedure provides that in as far as the judiciary costs accumulated by the parties are concerned and settled by the instance in actions extinguished in the basis of some penal mediations or in the case the cessation of the penal action as a result of an agreement of mediation, the payment will be made as follows:
- by the defendant to the injured party and the civil party, in the case the penal prosecution was abjured (article 276, paragraph 1), a possible situation in the conditions in which the prosecutor takes this decision, in the virtue of article 316, paragraph 3, letter a) or b) corroborated with paragraph (4), the New Code of Penal Procedure, in case that, in conformity with paragraph (5) of the same article, will establish, by order, the judiciary costs as well.

- by the defendant if the civil action of the penal cause is fully admitted (article 276, paragraph 2);

- by the defendant and the injured person if the civil action of the penal case is partially admitted, and the instance decides the charge of the defendant to be only the partial obligation of paying the judiciary costs and between the parties there is no agreement regarding the payment of these costs (resulted from article 276, paragraph (2) correlated with paragraph (3);

- by the persons named by the civil law, in case of the withdrawal of the beforehand complaint or of a reconciliation, if the mediation agreement does not stipulate the way the parties agreed on the judiciary costs (article 276, paragraph (6) correlated with paragraph (3);

- by the parties provided in the mediation agreement with has mentions in this respect, in case of a penal mediation (article 276, paragraph (3));

Consequently, the law obliges the judiciary body to accept the agreement of the parties in as far as the way of paying the judiciary costs are concerned: of those advanced by the state and of those accumulated by the parties but, in the absence of an agreement on the matter, it fixes a clear distribution of these obligations to each of the subjects of the penal action.

2.3. The date the place and the signature on the mediation agreement in penal matter. To mention the date in the mediation agreement is a normal practice of the mediator in the drawing up of a document. As for the place, the same practice generated the custom to mention, alongside with the locality where the agreement is supposed to be signed, the specific place where it is drawn up (the precinct of the mediator’s office or, quite seldom, another place chosen by the parties together with the mediator). In many cases the practice of the mediator makes him register the agreement in his own book and on this occasion the registration date is included, as well. To register in the mediator’s register an agreement that belongs exclusively to a third party (in contradiction with the contract of mediation, where the mediator is a party himself) is an act of a semi-formal mediation agreement which is not imposed by the law.

Nevertheless, the date of the agreement of mediation, even if recorded in the mediator’s book, is not opposable to the third party. The specialists’ opinions lead to the conclusion that not being a public officer, the mediator cannot exactly date the contract between the parties. The opposability of the date can be obtained in front of a public notary, public officer, lawyer, member of the personnel of the diplomatic or consular missions, etc. [10].

The law describes the mediation agreement as having the value of a private undersigned document. Only the mediated parties can sign an agreement of mediation. The signature of the mediator on such a document can only refer to a special clause regarding its being drawn up by the mediator or in the mediator’s office, without juridical consequences for the parties in connection with the authenticity of the agreement. The agreement can have a authentic value then when the parties bring it to a notary to authenticated.

3. The mediation agreement - a component of the penal procedure

From the point of view of the penal procedure the effects of the mediation agreement are conditioned by the classification of the deed within the category of offences that can be mediated (that is the offences for which the law provides the possibility that by the withdrawal of the advance complaint or by the reconciliation of the parts the penal responsibility could be removed) and of the observance of the required conditions regarding the agreement of mediation. Yet, the practice raises a difficulty in establishing the legal classification of the deed; only the criminal prosecution bodies [11] are able to make a real classification and, to a lesser extent, the mediator or the persons involved in the litigation. In order to fulfill the conditions stipulated by the law (article 16, paragraph (1), letter g) of the New Code of Penal Procedure, article 19, paragraph (1), letter h) of the old Code of Penal Procedure respectively, the mediation agreement shall observe a series of conditions in order to become an obstacle in exercising the penal action:
Mediation in penal actions, is an initiative of the restorative justice. The restorative justice aims at repairing the harm produced by an offence against a victim, a community and even against the very offender who get “whatever necessary”; among the restorative practices which gained a growing popularity in our country is mediation [15]. The application of mediation in penal actions should be increased and encouraged by the Romanian justice.

The mediation agreement, the formal result of mediation proper, plays an essential role in the penal procedure. The mediators’ practice alongside with the judiciary practice will find out further solutions for matters that, at present, are still procedurally unknown to mediators, jurists and magistrates.

*By law ferenda*, for establishing a non-equivocal practice, it is necessary to improve the law of mediation or even of the Code of Penal procedure with some clear specifications referring to: the necessity for the defendant to be assisted by a lawyer all through the penal mediation as to eliminate the possibility of interpreting mediation in the terms of a judiciary procedure with consequences in the nullity of the mediation agreement that should result in the absence of the assistance offered by a lawyer.

Similarly, the practice and the future law, as well, can grade the way in which the mediator can involve himself in the legal classification of an offence which can be charged as an infringement by the penal law, this granting the effects of the mediation agreement resulted from a penal action which was not the object of a penal action (for which no penal complaint has been lodged).

**References**


[14] Decision XXVII of 18.09.2006 of the High Court la Cassation and Justice/ ICCJ, published in the Official Gazette of 20.03.2007, admitting the appeal in the interest of the law on the interpretation and the unitary implementation of the dispositions regarding the way the mutual wish of the parties to reconciliation, in the cases stipulated by the law: “The cessation of a penal action, in the case of offences for which the reconciliation of the parties obviate the penal responsibility can be disposed by the instance then when it definitely finds the free will of the offender and of the injured person to make a real reconciliation, unconditional and definitive, stated in the council board by these parties, personally, by special proxy or by authenticated acts”.