THE LEGAL TRANSACTION - AN EFFICIENT SOLUTION FOR DISPUTE SETTLEMENT

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ABSTRACT
The attempt of relieving the courts of justice of the almost unbearable burden of having to deal with numerous files has led the legislator to conform himself to the European trend of legislating the appearance of completely new and alternative methods for the resolution of litigations, thus shadowing entitled institutions which already existed and offered the possibility of avoiding potential litigations or settling an already pending dispute by means of reciprocal concessions linked to other possible legal relationships the parties might hold, except for the ones which represent the object of the lawsuit.

Key-words: transaction, legal relationship, litigation, lawsuit, mediation, court decree.

1. Concept

New legal institutions have emerged at the level of the national and European legal systems in the attempt of stimulating and/ or upgrading the European and national judicial activity.

This is also how the Mediation board emerged - an institution which represents an alternative mechanism for dispute settlement. Mediation has led to the emersion of a new occupational profile, that of the mediator, which is regulated by a special national law - the Law of mediation no. 192/2006.

Since this is complete novelty, all legal doctrine analysis focused on searching any alternative instruments and mechanisms for dispute settlement, which subsequently led to the ignorance of the New Civil Code and its provisions regarding transaction as a way to prevent or settle a dispute. Alongside transaction, another way for settling disputes is the arbitration and the conciliation. If arbitration represents an institution which was maintained within the New Code of Civil Procedure, the concept of Conciliation disappeared from such legal regulation, and thus it is not a compulsory preliminary procedure in the case of commercial lawsuits. These methods of dispute settlement were not only regarded as means or alternative methods for dispute settlement, but also as an integral part

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of a „general trend for Justice Privatizing” \(^1\). At the same time, it is considered that through the existence of such means which allow involved parties to settle disputes, „such parties can clear off the judicial hazard, or at least partly limit it”\(^2\).

Transaction is defined in the New Civil Code (article 2,267, paragraph 1)\(^3\) as being a contract through which two or more parties end a dispute or prevent it, by means of reciprocal concessions, waivers or transfer of rights from one of party’s patrimony to the other party’s patrimony. The New Civil Code represents a solution to the criticism brought against the Old Civil Code which did not include any reference to reciprocal concessions the parties might undergo for concluding a transaction. Reciprocal concession is essential in order to distinguish between a transaction and a simple acquiescence or a general release with no other equivalent response form the other party\(^4\). In this sense, the New Civil Code makes express reference to such aspects.

The transaction might hold as object judicial reports different from those which are the object of disputes between the parties that might emerge, cease or suffer alteration through transaction.

The premises for concluding a transaction agreement consist in the existence of a lawsuit and of a right to litigation, which is the object of a demand to appeal that a judicial instance was invested with, or of a right to litigation which can lead to the investment of the court with a civil cause and the intention of parties to amicably settle their disputes.

Nevertheless, the transaction can end litigation even in the case of a forced execution, on condition that the parties are fully aware of the fact that their litigation was solved by judgement and decree.

In the absence of litigation, the existence of reciprocal concessions is ruled out, since such concessions would lack their object. Since it might as well be possible that the litigation has not yet emerged or is about to emerge, there still exists the right which makes the object of further uncertainties. By means of reciprocal concessions that parties undergo, they prevent the hazard regarding a possible right to litigation, namely that a Court acquires jurisdiction of a particular civil case.

Since reciprocal transactions are the essence of the transaction, their existence will lead to the conclusion of the transaction agreement. A simple acknowledgement of the demands of a party will lead to the involvement of other civil right institutions or civil law of procedure such as a waiver or acquiescence.

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\(^2\) Idem.

\(^3\) Art. 2.267 paragraph (1) New Civil Code: (1) The transaction is the contract by means of which the parties prevent or terminate litigation, including during the procedure of forced execution, by means of concessions or reciprocal waiver, or by means of right transfer from one party to the other.

\(^4\) Mihai Cantacuzino, “Elementele Dreptului Civil”. 
It is not compulsory that the reciprocal concessions that the parties undergo should be equal in value; the main condition is that they exist altogether. It is possible that a transaction which involves several parties includes a clause covering a third party. One of the parties agrees that the other party shall benefit of its rights (an integral part of the object of the transaction), while making concessions and waivers in favour of a third party involved in the transaction agreement.

The simple acknowledgement of the demands of one of the parties cannot represent an object of the transaction, since this would mean that the binding element of the transaction – the reciprocal concession – lacks. Within a lawsuit, acknowledging demands is a unilateral act of one of the parties and the consent of the other party is not necessary, as earlier discussed. In this case the acquiescence is either total or partial.

Since reciprocal concessions are the essence of the transaction, their absence leads to the conclusion of another type of agreement, such as donation, partition, etc.

2. Regulation

The transaction is regulated by the New Civil Code within article 2267-2278, but if the transaction agreement ends a lawsuit of the Court, such provisions of the civil code are complemented by the provisions of article 438-411 of the Code of Civil Procedures.

The transaction by means of which a lawsuit is finalised is legalized by a judicial decree and this shall represent the operative part of the judicial decree.

3. Classification

The legal dispositions which regulate the transaction can actuate a classification of the transaction, based on the exact time and purpose of its conclusion.

Based on its purpose of ending a lawsuit or not, the transaction can be:
- A judicial transaction by means of which a lawsuit is ended through judicial decree;
- An extrajudicial transaction by means of which a potential lawsuit is prevented or avoided altogether, since the involved parties waive the activation of a contentious procedure, which is the lawsuit.

Based on the exact time of its conclusion, the transaction can be:
- Transactions which prevent a lawsuit;
- Transactions which end an on-going litigation;
- Transactions which end by means of a procedure of forced execution.

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"when the consensus of parents happens during litigation we can speak about the judicial character of the contract, and thus about the judicial transaction"
4. Characteristics

The transaction represents a synallgamatic, onerous, interchangeable and consensual contract, as unanimously agreed by the Romanian doctrine.

The transaction bears reciprocal rights and obligations for each of the parties, to an extent commonly agreed upon its conclusion. The existence of such rights and obligations is under no circumstances hazardous. It is also possible to conclude transactions where the obligations of the parties involved are the subject of modalities (terms or conditions).

The transaction is a contract which needs to be concluded in a written form, *ad probationem*, as set forth by article 2272 of the New Civil Code which states that „In order for it to be valid and provable, the transaction shall be concluded in written”.

Nevertheless, even if the written form of the transaction is necessary in order to certify for its conclusion and contents therein, it can be considered that such transaction is valid only if concluded in order to end a lawsuit or the transaction serves a purpose which does not impose a solemn form.

The written form is necessary and sufficient in the case of the judicial transaction and it shall be presented as such to the Court who will issue a judicial decree to legalize the agreement of the parties, since such transaction represents an integral part of the judicial apparatus.

The situation is completely different when by means of the transaction, the parties are trying to prevent a civil lawsuit (extrajudicial transaction), while the acts of disposition have an object which imposes the signing of the legal document *ad solemnitatem*, as it is compulsory that the transaction is closed in an authentic format. Contrary, the transaction becomes void and the document shall be considered a mere introduction to a written format.

The extrajudicial transaction which is not authenticated and which hold as a purpose the prevention of a lawsuit shall not attain its given purpose if the *ad solemnitatem* form is compulsory, since this becomes void. Even though the transaction is void, it can be considered an introduction to a written form of evidence within a civil lawsuit, following that the rules of evidence administered are completed by other means of evidence.

The conditions imposed for a transaction to be valid are, alongside the general ones, conditions of the transaction, absolutely necessary for each contract, but the legislator has found it just to emphasize the capacity of concluding a contract, since the transaction holds a certain specificity which needs to be considered.

Since the transaction is an interchangeable and onerous contract, as well as an act of disposition of the parties in regard to various rights they hold within their patrimony, the parts should have the capacity to have control over the rights which are the object of the contract. According to article 2271 of the New Civil Code, „In order to conclude a transaction, the parties must have full control over the rights which are the object of the contract. Those who do not have such capacity can only conclude transactions under the conditions imposed by law”.
Here, we shall consider the legal competence of the party involved in the transaction, be it full or restrained.

The legal competence is defined by article 37 of the civil Code as being "the ability of a person to conclude on their own any kind of civil juridical acts." The limited legal competence determines a limitation of the possibility to conclude a transaction which must hold an object of low value or the party (the minor who is at least 14 years of age) who closes the transaction must have prior consent from his parents of legal tutor or the consent of the guardianship authorities in all special cases provided by law. Minors who are not yet 14 years of age or the legally incompetent cannot conclude a transaction.

The validity conditions of the transaction are not limited to the legal competence to conclude contracts but extend to the object of the transaction, as well. This cannot be represented by goods which have been removed from the civil registry or are prohibited by applicable laws.

Article 2268 of the New Civil Code states that "a transaction whose subject is the capacity or the civil status of a person or rights on which parties cannot have control over cannot be concluded". Thus, we shall notice that some rights cannot make the object of a donation contract, while the exercise of such rights can. Nobody can decide on a parent’s right to have relationship with his own minor child, even if the latter resides, as settled by a Court decree with the other parent, while the manner in which such relationship are to be exercised can be decided by Court decree. The court resolution may be issued following the consensus of parties in this regard. Such consensus shall make the subject of the transaction. The right to child support cannot be the object of the transaction, while the manner in which such payment obligations for child support are carried through can.

The old doctrine6 embraced the view point stipulated by the jurisprudence of the time that "the legal binding duty of the community cannot be driven through by means of conventions or unilateral statements, which might acknowledge that certain goods are of personal property. Such convention made during marriage becomes void." 7 At the same time, the same doctrine advocated that during marriage a partition of common goods acquired during marriage could only be carried through for sound reasons and only judicially, upon judge’s decision to do so.

Such interpretation was valid since the Old Civil Code and The Family Code governed the family relationships and the common goods of the wedded.

According to the directives of the New Civil Code, which regulate the establishment of another judicial duty, such as that alongside the legal community of property, there can also be the commonly agreed regime regarding matrimonial conventions. Such convention can be concluded both before and after marriage. In the latter case, such convention is effective as of the provided date or the date

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when the convention was signed. The regulation of the new civil code creates the legal premises necessary to concluding a transaction regarding the regime of community of property acquired during marriage.

As long as both husband and wife have the possibility, as provided by applicable law, to conclude a convention regarding the community of property acquired during marriage, before marriage or at any given time during marriage, the transaction by means of which the litigation is prevented or the partition of common property is resolved may be concluded. Based on such transaction the Court will issue a decision.

By a transaction, it cannot be decided on the right to maintain family relationships with the minor child, but it can be decided on the manner and extent to which such rights are to be exercised. There are subjective rights that the holders may exercise according to the dispositions of the applicable law, but such subjective rights or the means by which they are to be exercised cannot make the object of a transaction.

The civil aspect of a penal process may be solved, either totally or partially by means of a transaction. Thus, the defendant may conclude a transaction with the civil party, by which he solves the civil litigation or the demands of the latter.

The transaction concluded as part of a penal process may not influence the criminal proceedings or the liability of the defendant for the crime committed against the civil party.

The exercise of the criminal proceeding may be influenced by the express wish of the aggrieved party to retrieve his/ her complaint, to reach a consensus with the defendant and conclude a mediation contract. These are all actions which lead to the termination of the criminal proceeding and it can be determined that such cases cannot make the object of a transaction. This is the only case when the usage of mediation is more advantageous than concluding a transaction, since by means of a mediation report the criminal procession for crimes in the case of which law states that the consensus of parties represents a solution for criminal proceedings to cease can be ended.

Some authors believe that by means of a transaction it is impossible to decide on the copyrights without further defining or explaining of such statement. Still, the property copyrights may be the object of a transaction for preventing or resolving litigation. The moral copyrights, the rights to reveal any authorship, the right of paternity, the author’s right to integrity of authorship are considered not to be the object of transactions, since when these rights are infringed, tort liability emerges. Such kind of tort liability can, on the other hand, make the object of a transaction.

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8 Art. 329 Noul Cod civil: "Alegerea unui alt regim matrimonial decât cel al comunității legale se face prin încheierea unei convenții matrimoniale".

The French doctrine\textsuperscript{10} defines transaction as a declarative statement as it doesn’t transfer any property rights. In the Romanian doctrine there are authors who have shared this point of view, thus proving there is exception to such rule, namely that when “a party assigns to the other party some property which is not the object of the litigation”.(see author). This kind of judicial character is not agreed by the Romanian doctrine, since by means of various acts of disposition which are part of the transaction, the transfer of the property rights within transaction may arise. Such as, within transactions which solve partitions, the injunction which has an exchange agreement at its basis, etc.

The transaction cannot have as an object a litigation which was permanently solved by Court. Exception to this rule is the situation in which one of the parties holds no knowledge that the litigation was solved by judicial decree.

5. Transaction nullity causes

As any other judicial document, the transaction may be affected by nullity, be it absolute or relative, while the causes of nullity, alongside other causes, are regulated by the provisions set forth by article 2274-2277.

The transaction becomes absolutely void if it is made in connection to an absolutely void judicial document. An exception to this rule is the situation when the parties have expressly traded on nullity. In the event when the cause of nullity which affects the judicial act in relation to which the transaction was concluded is relative, the nullity of the transaction may be invoked by the party which at the moment of the transaction was not aware of the causes of the relative nullity. This type of nullity is regulated by the provisions of article 2264, paragraph 2 which is an expression of the Latin adage belonging to Ulpianus: “Nemo de improbitate sua consequitur actionem”.

The transaction which was concluded based on documents which later proved not to be authentic becomes void.

The new documents, which are unknown to the parties when concluding the transaction, do not lead to the transaction becoming void. An exception to this rule is the case when the documents were hidden by one of the parties which concluded the transaction. Such solution is the consequence of fraudulent tactics of the party who knew about the existence of such documents and thus of another judicial situation arising before concluding the transaction. If from such documents which were subsequently uncovered it results that the parties or at least one of the parties had no right over the object of the transaction, such transaction becomes void.

As previously shown, the transaction is voidable if it solved a litigation which was already solved by Court by means of a definite decree, with one of the parties

not knowing about it. Such nullity is relative and can be expressly confirmed by
the parties (by means of a judicial declarative statement) or tacitly by means of the
willing execution of obligations undertaken through transaction, while knowing at
the same time about the existence of a judicial decree.

6. The effects of the transaction

The effects of the transaction have been analysed by specialised doctrine and
each of the authors tried to make their mark as to this aspect by sharing common
points of view or further defining and explaining existing perspectives.

There are authors who considered that the transaction produces transfer
effects, while others stated that it produced declarative effects, and others thought
transaction produced effects of limitation or integrant effects, each of these authors
supporting their theories by identifying and enlisting the effects of the transaction
contract.

The effects of limitation results from the fact that the concluded transaction
produces it effects and makes it impossible for the parts to issue new demands
with regard to the object of the judicial report deriving from the transaction.

According to the provisions of article 439, the judicial transaction is concluded
in a written format and shall represent the operative part of the judgement which
will be decreed, it will have the authority of res judicata, if the decision is final,
consequently, if its object is a demand regarding the obligations terminated by the
transaction or the rights hence acknowledged, the defendant may invoke the
exception of res judicata.

The transaction by means of which a lawsuit was concluded may be abrogated
by an action for annulment, resolution or cancellation, or by means of a revocatory
action or an action of concealment in law. In the case the transaction is terminated,
the judicial decree has no effect, but in a case which is contrary to this, the judicial
degree shall produce its effects leading to a res judicata situation. The authority of a
res judicata situation creates the impossibility that legal action is taken twice on the
same party, under the same authority, for the same cause and the same object.

The declarative effect of the transaction is acknowledged by all authors, which
means that by transaction the rights of parties are acknowledged, so that each
party consolidates its pre-existing right, while the party which acknowledged such
rights cannot make any judicial appeals in this concern.

Even if the transaction has a declarative effect, it cannot represent a just title for
the prescription of 10 to 20 years, it does not entail any obligation to warrant the
rights acknowledged and does only produce its effects in the future.

The transfer effect and the granting of rights can exist based on the nature of
specific rights for which the reciprocal concessions are made, so that if any of the
parties waives any of its rights in exchange of an obligation, the transfer of rights
takes place by means of the conclusion of the transaction. This further entails the
transfer character of the transaction.
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