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THE LIMITS OF THE SETTLEMENT (TRANSACTION AGREEMENT) CONCLUSION ACCORDING TO ROMANIAN LAW

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Abstract: *The Alternative Dispute Resolution, or the means of solving disputes outside the State jurisdiction, primarily through the settlement (transaction agreement) conclusion, have an important expansion in all areas of law. The following study aims to identify the scope of the settlement, according to the Romanian regulations into force. In this approach, there will be identified the main categories of rights that can be the object of a settlement (transaction agreement).*

Key words: *settlement, compromise, dispute resolution, public order.*

1. Introductory remarks

In order to trace the scope of the transaction agreement, we will identify the main categories of rights that can make and cannot make the object of a settlement according to the Romanian law and therefore we will follow the applicability of this contract in the major areas of law.

We start by relating to the special provisions in this matter, provisions contained in article 2268 of the Romanian Civil Code :(1)*It cannot be traded on the capacity or marital status of individuals, nor on the rights that aren't at the parties' disposal;(*2) *It can be traded, though, on the civil action derived from an offense.*

From this legal text, we find two main rules regarding the object of a settlement, as follows:

- a first limitation of the scope of this special agreement is made negatively, by determining those *rights that cannot be traded*, this category expressly includes the capacity and the marital status of individuals i.e. *personal non-property rights.* Also, as a general rule, *rights upon which there are prohibited acts of disposal are excluded from settlement conclusion*. *Per a contrario*, the rights of which the subject may dispose can be the object of the settlement. This rule is an application of the fact that the transaction is an act of disposal, which involves the ability of the subject to dispose of the right, the foundation of action [5];
- the positively worded rule regards the civil action arising from an offense.

Thus, in the light of this rule, the injured party may waive the civil action when reaching an agreement on the existence of tort liability and on the amount of damages, with the offender.

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The transaction concluded in these conditions has no consequences on the criminal proceedings belonging to the society and exercised by the Public Ministry. There are two exceptions to this rule, i.e. when the prosecution cannot be set in motion, and if it was set in motion it can no longer be exercised, in case no prior complaint had been made or withdrawn, or the parties have reconciled, in case of crimes for which prior complaint exists, its withdrawal or reconciliation of the parties removes criminal liability.

Most of the times, the lack of prior complaint or its withdrawal may be a result of the transaction agreement by which the parties have settled the dispute by compensation or waiving, extinguishing thus the criminal and civil proceedings.

It was decided [9] that the criminal law leaves sanctions for offenses at the initiative of the injured party, allowing, by the reconciliation of the parties or withdrawal of the prior complaint, the offense committed by the accused to remain unsanctioned, to enable resumption of normal relations between the aggressor and the victim, but not to open for the victim the possibility to make profits, disproportionately high compared to the damage actually suffered, speculating the situation in which the offender is threatened with enforcement of criminal sanctions.

It is accepted of course, within a reasonable compensation limit, the injured party to make a deal with the offender who undertakes to cover the actual loss, assessed by the parties themselves, so that, in this case, the victim aims at satisfying a legitimate interest, such a transaction in itself having nothing illegal. Quite different is the situation in which, taking advantage of the position held in the criminal trial, the victim obtained from the offender a considerable amount, disproportionate to the actual harm, because, in such a case, the subjective right, recognized by the civil law, to obtain redress is diverted from its economic and social purpose and can no longer benefit from legal protection [9].

Debts arisen from the gaming or betting contract are also expressly excluded, from the settlement scope (under the provisions of article 2264 para.3 Romanian Civil Code).

Then, according to article 38 of the Romanian Labor Code the rights recognized by the law to employees cannot be traded.

These are special provisions, which must be completed with the general principles of civil law. In this regard, article 11 of the Romanian Civil Code, bearing the subtitle "*Observing public order and morality*" stipulates that agreements or unilateral legal acts cannot provide derogation from the laws that concern public order or morals. Also, with regard to the need to respect public order and morality, article 1169 Civil Code is an application of article 11 Civil Code, as follows: the parties are free to enter into any contracts and to determine their contents, to the extent required by the law, public order and morals.

In conclusion, taking over the synthetically formulated idea from the doctrine [5], we can say that, if we can, as a general rule, settle on any conflict, to the transaction agreement there are three kinds of obstacles that one encounters: the *unavailability of the right, the public interest and the public order*. In this regard, the unavailability of the right refers to non-commercial rights: non-property rights, and to the inalienable property rights as well.

2. Rights outside trade

Extrapatrimonial rights are not subject to any transaction. In this category we

place primarily the rights on the individuals' condition and capacity. In relation to this, the first sentence of article 2268 Civil Code resumes the idea shown by article 29 Civil Code [1] which orders that no one can renounce in whole or in part, the ability to use or to exercise his/her capacity.

The status of persons can only be determined, modified, suppressed by the effect of court decisions, the holders of rights being forbidden to make acts of disposal on such items, due to the nature of their public policy order.

In an illustrative list of the doctrine, the capacity of persons, the parental power, the non-property rights in general, the alimony, the right to life, health, etc. cannot be the subject of any settlement [1].

As regards the right to health, we should bring some more explanations revealed in the doctrine [2]. Thus, one can settle on civil damages resulting from injury to a person's health, because by this agreement prosecution is not affected; it takes its course, i.e. ceases by reconciliation of the parties, according to the rules of criminal procedure, and not as a result of the transaction which exclusively refers to civil claims.

Also, the case law [9] has established that the action of denial of paternity cannot be admitted simply based on the recognition of the mother, as recognition itself does not produce legal effects while there is no proof that the husband objectively could not have intimate relations with the mother during the period of conception. The contrary solution would eventually be equal to establishing the civil status of the child based on that recognition, which is unacceptable, because the civil status of a person results from the legal provisions governing the matter, which cannot be traded. Recognition may be an act of convenience; the court is not entitled to take note of it, as it is required to perform all tests for the correct assessment of the civil status.

With regard to parentage, we also relate to the interdiction stated in article 437 Civil Code: in the actions regarding parentage, the right cannot be waived. Also, the individual who brings an action concerning the parentage of a child or on behalf of a person placed under judicial interdiction and the minor child who brought such action on their own cannot abandon the trial.

Also, *patrimonial inalienable rights* are not likely to be subject to any settlement. Thus, public property assets covered by article 135 of the Romanian Constitution are not in the civil circuit, as being inalienable: all underground riches, means of communication, airspace, waters with hydropower, and those that can be used in public interest, beaches, territorial waters, natural resources of the economic zone and the continental shelf. Public assets, in general, are inalienable, unsesizable and imprescriptible.

It is known that the goods we usually call alienable form the rule, and the inalienable ones are the exception. Assets in civil circulation are [6] those assets that are likely to be subjected to translative or constitutive acts, or, in other words, assets that can be acquired or disposed of by the juridical act ".

3. The public order. Public interest. Morals

As it has been established in the doctrine [5] the public order may oppose to the settlement's efficiency in two ways. On the one hand, the transaction agreement can neither eliminate nor change the right of public order, in that it is impossible to waive such a right in advance ".

An accurate understanding of the matter investigated involves defining these concepts, clarifying their meaning. No less

important is that these legal concepts are and must be regarded evolutionary, being accepted [7] that the legislature can change its options or judgments on these concepts.

In the Romanian doctrine, a first glimpse [3] on the civil law of public order shows that this can be qualified as such whenever one orders or stops a legal act whose application is immediately useful or harmful for the entire social body. When the act is not immediately useful or harmful only to one or a few of the members of the society, the law dealing with such an act is not of public order.

Recently [7] it was stated that public order does not mean "social peace", "public tranquility" etc., it encompasses all the principles and rules of social and moral order that the legislature considered essential for the society and, therefore, needs to be respected by all ".

An analysis of the French specialized [4] literature indicates that, in the early nineteenth century, based on a restrictive conception, only the legislature could limit the freedom of contracts. Public order was thus the power of the legislature. Later, it was accepted that public order can be not only textual but also virtual or constructive: without the legislator's intervention, the judge describes the public order character when they consider it necessary for the protection of the society's interests. It happens that in the absence of a precise text, the judges declare the agreement as contrary to public order because its object is contrary to the fundamental principles of law and modern social organization.

The legal concept of public order is generally associated with mandatory rules, which protect the general interest. It appears [4] that the principles of European law on contract and the principles of unique law have abandoned the concept of public order for the benefit of mandatory rules.

Numerous rules governing inheritance and liberalities are imperative, the violation of which is punishable by absolute nullity.

Thus, with regard to succession the legal mandatory provisions of the Civil Code and other laws become imperative. For example: renunciation of inheritance is a solemn legal act which can only be achieved under the conditions of the Law no.36/1995; establishing legal inheritance share is achieved only by a notary public in the inheritance proceedings, by the certificate of inheritance or certificate as heir, or by the court through court order.

In a case law decision [10], the court authorized the settlement reached between the parties, having in regard the transaction agreement only from the point of view of partition of inherited assets, and not from the point of view of the opening succession following *de cujus*, the quality of heir, and the shares due to the parties, because these cannot form the subject of a transaction agreement and the parties will be unable to dispose of these legal consequences.

Under the effect of internationalization of law and its Europeanization, the idea of European international public order is emerging [4]. However it should be recognized that even in Europe, some key issues are subject to such different treatments (for example issues related to the regulation of gay marriage, adoption by gay couples), so that it seems difficult to adopt a common conception on the European public order [4].

Identification of fundamental principles of European public order can be done by reference to European principles such as: principle of proportionality, or of legal security [4]. European public order of fundamental rights is based on an evolutionary hierarchy of values, which reverse the hitherto known rule in the European states: this no longer gives priority to the general interest, but protects

fundamental rights and freedoms of individuals against issues that may affect it, not only from other individuals, but also by foreign legal orders. In this respect, far from being limited to defending a single collective interest, public order became the concept that allows, in the private law, guaranteeing individual freedom and fundamental rights of individuals [4].

In connection to public order, the concept of "morals", that is the set of rules imposed by some social moral conduct, existing at a time and in a particular place, in parallel with the public order, is a "norm", a "standard" according to which human behaviour is appreciated [7].

In relation to the public order provisions, it is accepted [8] that we can negotiate on an action for annulment, provided for the settlement to be flawless, influencing the initial act, but we cannot negotiate on absolute nullity as these are the interests of public order. No less, it must be accepted that if the settlement is a remake of the act, which excludes it as being void, it is valid, but it actually is the new source of partial rights [5].

Also, public rights cannot be waived conventionally. This is the case with actions relating to public order or public authority and public action which arises from an offense. In the French law [5] we find exceptions from this principle, namely in terms of economic, tax and customs violations, many texts authorize the prosecuting administration to deal with the offender with regard to the amount of the fine. On the other hand, the tax administration can trade with a taxpayer on tax fines when they are not final: such transaction settles off the local government's action.

The administrative law protects the public interest.

Thus, in a case [11] in which, by the application addressed against the Ministry of Administration and Interior, the plaintiff sought cancellation of the ministerial orders, though the issuer recognized the orders are unlawful and endorsed the applicant's request for cancellation, the court has not authorized such settlement and refused to render a consent order according with the parties' agreement.

According to article 1 para. (6) of the Law no. 554/2004, the public authority issuing an illegal unilateral administrative act may ask the court to cancel it, in the situation in which the act cannot be dismissed as it had already entered in the civil circuit and produced legal effects.

4. Conclusions

Given the research we have done, in relation to the rules of comparative law, the case law and the relevant doctrine opinions, we get to the following conclusions:

- means of solving conflicts outside the state jurisdiction, primarily through settlement conclusion, know a major expansion in all areas;
- this development is driven by the efficiency requirements arising in practice and which require abatement of the excessive rigidity of some provisions to be as adequate as possible to the current market conditions;
- when the settlement (transaction agreement) takes the judicial form, the magistrate's mission is to check, based on the interpretation of the applicable provisions, the legality of such an amicable settlement and approve it by consent order; the interpretation must exceed restrictive views known so far and to relate, with priority, to the principles of European law.

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