

The valid conclusion of the compromise/transaction contract. Special rules

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Abstract

In this paper we aimed to examine the legal mechanisms that ensure the protection of the parties within this form of private justice-that of compromise conclusion. For a systematic approach of this subject, we reported, first of all, to the general rules governing, in terms of validity, the conclusion of conventions, but mostly we leaned on the particular aspects relating to this specific contract. In order to respond to the main objectives, we reviewed the legal requirements in force and the way the case law interpreted them and also the relevant arguments brought by the doctrine. The research methodology took into account elements of comparative law; we followed, in this respect, the French regulatory model and the Anglo-Saxon common law which is favorable to the conclusion of this type of contract.

Keywords: *compromise (contract), validity conditions, settlement over a void or cancelable document, settlement based on false documents*

JEL Classification: K12

1. Introductory issues

In negotiating a settlement, the force ratio is often the dominating one and the interests at stake are not necessarily equivalent². For the balance between efficiency and justice to be respected, it is necessary that the legislative mechanisms be sufficient to protect the sides.

As a contract, the compromise/transaction contract will be subject, firstly, to the general rules concerning the validity of agreements³. No less though, the specific coloring of this type of contract reflects in the adoption of special rules, according to which the validity of a transaction contract is examined. We find these special rules in the Romanian Civil Code, starting with art. 2271⁴.

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² As suggestively indicated in the French doctrine-C. Radé, „*Les effets de la transaction*”, in «*La transaction dans toutes ses dimensions*», collective paper, Publishing House: Dalloz, 2006, page 88; the example is relevant in this regard: an economically strong and well organized company will not fear the costs of a trial, but will want to avoid bad publicity, while the ‘weak part’ will have nothing to lose, as image, in a trial, but can fear the duration of the trial, the costs and might need, psychologically, to rapidly find a way out of the dispute ...

³ In this regard the provisions of art. 1179 Civil Code (corresponding of art. 948 of the old regulation). Thus “the essential conditions for the validity of a contract are: 1) capacity to contract; 2) the parties agreement; 3) a determined and lawful object; 4) a lawful and moral cause”. Also, according to par.2 “to the extent the law provides a certain form of the contract, it must observed, under penalty of the applicable laws”.

⁴ In the Civil Code of 1864, these special rules were set starting with art. 1706

Thus, the "vices of consent theory must adapt to the particular purpose of the contract-the transaction is an act of disposal: the parties finally give up to exercise the legal action in relation to the dispute it settles, this waiver involves the ability to dispose of the right, foundation for the action"⁵.

In case of legal actions, it is the court obligation to ascertain the fulfillment of the conditions for the valid conclusion of the transaction. Thus, before the transaction of the parties to be acknowledged and to approve it in the expedient decision/consent order, the court is obliged to consider whether the parties' agreement "is not the result of a vice of consent, whether it seeks to circumvent the law, if it is not done to the detriment of general interests or of third parties"⁶. It is estimated that even "before taking note of the request of the parties, the judge must explain to the parties the legal consequences of the act of disposal procedure they have concluded"⁷. The conclusion is that "the judge's control activity is meant to oversee that for the realization of art. 723 Civil Code Procedure Code, the powers of disposal on the substantive rights to be decided by the court, and the trial proceedings available to the parties to be fulfilled in good faith and in accordance with the purpose for which they were recognized by the law"⁸.

2. Capacity condition

According to art. 2271, "*to make a transaction, the parties must have full capacity to dispose of the rights that form the object of the contract. Those who don't have this ability can make transactions only as provided by the law*"⁹.

Since the mutual concessions of the parties, their waivers are equivalent to the acts of disposal, we can conclude that the parties at the time the conclusion of the transaction must have full legal capacity. This is, in fact, an application of the general principle contained in Art. 12 of Romanian Civil Code principle according to which "anyone can dispose freely of its property, unless the law expressly provides otherwise".

For those who do not have the exercise capacity¹⁰, the rule contained in Art. 43 Civil Code indicates that "*legal documents are signed, on their behalf by their legal representatives, as provided by the law*". The law (art. 43 para. 3 Civil code) recognizes to those who lack of legal capacity the possibility to conclude "*acts of disposal of low-value with current character and executed upon their conclusion*".

⁵ Ph. Malaurie, L. Aynes, P. Y. Gautier: "*Contractele speciale*", coordinator of the Romanian edition M. Șcheaua, translation by D. Dănișor, Publishing House Wolters Kluwer, 2007, p. 565

⁶ Gh. Durac, „Drept procesual civil: actele de dispoziție ale părților în procesul civil”, Iași, Publishing House Polirom, 1999, p. 160

⁷ *idem*

⁸ *ibidem*

⁹ the same idea is deduced from reading art. 1706 of the Romanian Civil Code, now repealed: "transactions can make only those who dispose of the object contained in it. Those that can not dispose of the object included in the transaction, can only transige in the forms established by the special laws "

¹⁰ minor under the age of 14 years and those under the judge interdiction

Provisions for child protection are also covered by the French law. Related to Art. 2045 French Civil Code¹¹, note that the guardian can not sign a contract of transaction on behalf of the minor, except under art. 467 Civil Code, which requires the rule for asking authorization of a judge or family council.

In the English law as well, the minor is held to perform its obligations under a compromise, if the court approved this agreement of the parties¹².

Transactions concluded in violation of the laws stated above are subject to a relative nullity¹³. Also, the inability of protection or care nature covered by art. 2271 Civil code, are sanctioned with absolute or relative nullity of the legal act concluded, as the violated provision, defends, according to art.1654 alin.2 Civil Code, a general or particular interest¹⁴.

The legal doctrine considers¹⁵ that "Incapacities established in other matters covering acts of disposition operate in the case of the transaction, as well" (for instance, those provided by the Civil Code in matters of sale: the spouses may enter into transactions between the, its representatives and civil servants, persons who manage state owned properties or administrative units, judges, prosecutors and lawyers etc.).

At least as regards the transactions concluded by spouses we can not agree with the above doctrinal opinion, since it is not based on a social value that would be affected by the conclusion of the transaction contract in such conditions.

As regards the transaction by which the spouses who are in the process of divorce understand "to settle the property claims, both by sharing the common assets acquired during the marriage and their own property," the court held¹⁶ that it is legal and its effects occur after the divorce.

The transaction can be signed by an agent, but for this "the agent needs a proxy, authentic or not, according to the material subject and the legal transaction and its effect"¹⁷. Further the observation to be made is that "one of the spouses, on his /her own behalf but also on behalf of and at the expense of other will be able to conclude a transaction without requiring a special mandate from the other spouse,

¹¹ Art. 2045 French Civil Code has the following text: „*Le tuteur ne peut transiger pour le mineur ou le majeur en tutelle que conformément à l'article 467 au titre "De la minorité, de la tutelle et de l'émancipation"; et il ne peut transiger avec le mineur devenu majeur, sur le compte de tutelle, que conformément à l'article 472 au même titre*”.

¹² in this respect CPR (Civil Procedure Rules), r 21.10: „*where a claim is made-a) by or on behalf of a child; or b) against a child or protected party, no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court*”

¹³ Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, s.o., „*Noul Cod civil. Comentariu pe articole*”, Publishing House C. H. Beck, 2012, p. 2216

¹⁴ C. T. Ungureanu, „*Drept civil. Partea generală. Persoanele. În reglementarea Noului Cod Civil*”, Publishing House Hamangiu, 2012, p. 88

¹⁵ C. Toader: „*Drept civil. Contracte speciale*” the 3rd edition, Publishing House C. H. Beck, Bucharest, 2008, p. 304

¹⁶ Supreme Court, the civil section, decision no. 2131/1972, in C. Turianu, „*Contracte civile speciale. Culegere de practică judiciară. Ediția a 2-a*”, Publishing House C. H. Beck, 2008, p. 408

¹⁷ T. Prescure, A. Ciurea, „*Contracte civile*”, Publishing House Hamangiu, 2007, p. 351

if the transaction refers to common movable goods and considers mutual waivers or new payments for such assets¹⁸.

It is understandable that "giving the generic mention of legal representation before the court is not sufficient to fulfill the procedural documents containing elements of disposal, such as: recognition, waiver, transaction, false entry. In order to do such acts, it is required a special power of attorney with explicit manifestation that it is conferred to fulfillment of such acts (art. 69 Code of Civil Procedure¹⁹). Given that, the court can not take note of the transaction between the parties based on the general power of attorney given by the applicant, but in violation of Art. 69 para.1 of the Code of Civil Procedure²⁰.

In the English law, in the proceedings to whose CPR r19.7 apply, is required the court approval regarding an agreement proposed by a representative party. Such approval will be granted "if the [court] is convinced that the regulation is in the benefit of all persons represented".

The protection of the represented parties is granted under CPR r19.6 in relation to the binding nature of any decision and its execution²¹.

By the mandatory rules laid down in the special legislation, it is necessary to provide additional formalities for the valid conclusion of the transactions by the public authorities.

Thus, the special law on expropriation (Law no. 33/1994) provides that the interested parties may agree on the transfer of ownership, and on the amount and nature of the compensation, in compliance with the legal substance, form and advertising requirements, without further triggering the expropriation procedure. It is recognized that such an agreement has the legal nature of a transaction, being applicable the provisions in this matter. In case of a decision²², the court ruled in favor of the party who claimed the cancellation of the transaction relating to expropriation on the grounds that there was no decision of the City Council by which such a transaction had been approved. According to the provisions of art.84 para.3 of the Law 69/1991²³, (into force when the court was invested) "waivers of rights or recognition of rights in favor of third parties are based on expertise acquired by the City Council".

In the English law, a local authority can only act within the powers conferred by the law. If acting beyond these powers the *ultra vires* doctrine, whose object is the protection of the public order, shall cancel the measure in question²⁴. Though it is perfectly permissible for a local authority to settle the disputes in

¹⁸ *idem*

¹⁹ "acknowledgments regarding rights under trial, waivers, as well as settlements can only be made under a special power of attorney"

²⁰ Supreme Court, civil section, decision no. 566/1989, in „*Dreptul*” no. 1-2/1990, p. 139

²¹ D. Foskett, „*The law and practice of compromise. With precedents*”, Thomson Reuters (Legal) Limited, 2010, p. 54

²² Î.C.C.J., Civil section, Decision no. 1014/08.03.2002, published in *Pandectele Române* no.6/2002, p. 48-50

²³ was repealed by the Law no. 215/2001

²⁴ D. Foskett, *op. cit.*, p. 54

which it is involved, but when signing an agreement beyond its powers is *ultra vires* and the apparently reached agreement will be void ab initio.

In the decision given in the case *Eastbourne BC v Foster*, Unreported, 20 December 2000²⁵, the local authority has entered into a "settlement agreement", with one of its principal employees under which he received a financial payment for closure of activity, that exceeded what the local authority could properly and legitimately agree with him. It was clear in the trial that the agreement was void *ab initio*.

3. Conditions for manifestation of will. Issues related to vitiating the will upon the conclusion of the transaction

In relation to the general rules on the manifestation of the will by the parties bound by an agreement, the consent must exist, must come from a person with discernment, must be freely, consciously expressed, given by the party with the intention of binding to mutual concessions and unvitiating.

If the transaction is a judicial one, the judge will personally check the existence of the consent²⁶.

For the court "to take note of the transaction of the parties, it is required the compromise to intervene between all parties, which have to appear in court, to submit the document under private signature which recorded their consent on terminating the existing process and to seek a consent judgment, being irrelevant that some of the parties have failed to file an appeal"²⁷.

The transaction must undoubtedly express the will of both parties. For the hypothesis the "transaction is submitted only by one party, not being endorsed by both parties before the court, so as to prove that it is an expression of their free will and does not contain the elements necessary to constitute the consent judgment, the court can not rule a consent judgment as long as the conditions of the provisions of Art. 271, and Art 272 Civil Procedure Code, related to judgments of both parties agreement, have not been met"²⁸.

Thus, the intention of the parties may be affected by the following vices: error, fraud or deceit and violence, the penalty applicable being the relative nullity. The general rules of common law are applicable in this matter according to Art.2273, "*the transaction may be affected by the same causes of nullity as any other contract.*" In derogation of the common law, the transaction "*can not be*

²⁵ previous taken from the pre-quoted work

²⁶ in this regard C. Toader, *op. cit.*, p. 303, I. Dogaru, E. G. Olteanu, L. B. Săuleanu: „*Bazele dreptului civil. Volume IV. Contracte speciale*”, Publishing House C. H. Beck, Bucharest, 2009, p. 1094

²⁷ Î.C.C.J., civil section and intellectual property, decision no. 3256/2008, in V. Terzea, „*Coduri adnotate. Civil code, volume III (art. 1405-1914)*”, Publishing House C. H. Beck, Bucharest, 2009, p. 200

²⁸ The Supreme Court of Justice, commercial section, decision no. 795/2003, in V. Terzea, „*Coduri adnotate. Civil code, volume III (art. 1405-1914)*”, Publishing House C. H. Beck, Bucharest, 2009, p. 211

cancelled for error of law regarding matters subject to disagreement of the parties nor for lesion"²⁹.

Also, to the general rules are added the cases of nullity specific to the transaction:

- concluded for the execution of an invalid act (Art. 2274 Civil Code);
- concluded on the basis of documents later found to be false (Art. 2275 Civil Code);
- concluded as a result of ignorance of documents that were hidden by one of the parties, or knowingly, by a third party (Art. 2276);
- the transaction concluded on a completed trial (Art. 2277).

It is estimated that Art. 2273 and the following of the current Civil Code "orders the matter of the nullity reasons, whether approached scattered and incomplete in the former Code"³⁰.

In the French law, two provisions of the Civil Code are devoted especially to the topic of consent vice: article 2052³¹ the second these, which deals with the matter negatively, excluding the error of law and the lesion as causes of the transaction cancellation and the Art 2053³² of the Civil Code, which states, in contrast, positively that the transaction can be "canceled" when there is an error regarding the person, or of the object of appeal, in the event of fraud or violence³³.

Other causes of nullity of the transaction are then addressed in articles 2054 to 2057 of the French Civil Code, but some cases might refer, in reality, to the flaws outlined above. The provisions addressing this issue series actually end in a positive statement, claiming in Article 2058, which closes Title X, that the calculation error in a transaction must be corrected³⁴.

The reasons for invalidating an agreement can be invoked both when it has an extrajudicial nature and where the agreement is approved by a consent decision³⁵.

The action for annulment may be promoted against a settlement, while the appeal of the consent decision is allowed only when "it concerns the conditions of regularity of the decision, not its content"³⁶, motivated by the fact that "the instruction of the consent decision is in fact a transposition of the convention of the parties, which does not equal a judgment based on evidence".

²⁹ applying the principle established by art. 1224

³⁰ Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, s.o., *op. cit.*, p. 2217

³¹ „Elles ne peuvent être attaquées pour cause d'erreur de droit, ni pour cause de lésion”.

³² „Néanmoins, une transaction peut être rescindée lorsqu'il y a erreur dans la personne ou sur l'objet de la contestation. Elle peut l'être dans tous les cas où il y a dol ou violence”.

³³for details in this respect, see B. Mallet-Bricout, „Vices et transaction” in «*La transaction dans toutes ses dimensions*», collective work, Publishing House Dalloz, 2006, p. 35-36

³⁴ *idem*

³⁵ Gh. Durac, „Drept procesual civil: actele de dispoziție ale părților în procesul civil”, Publishing House Polirom, 1999, p. 168, with reference to the specific literature

³⁶ C. Macovei, „Contracte civile”, Publishing House Hamangiu, 2006, p. 351

The prosecutor is recognized the procedural legitimacy to use ways of appeal to achieve the judicial review of a decision that approved the agreement of the parties, when this decision is illegal³⁷.

The consent decisions are subject to review, this is because "removing the parties' agreement by the review of the consent decision, the court would disregard the will of the parties and their binding nature of the conventions recognized by the law"³⁸.

In this regard, the case law³⁹ held that "the decision approving the parties agreement is, according to Art. 273 Civil Procedure Code, subject to appeal, however, the transaction is likely to be challenged by an action for annulment on the grounds of nullity prescribed by the law".

Once a settlement is canceled and the consent decision, which approves this agreement follows the same legal regime. Thus, it has been decided⁴⁰ that "erroneously the first court dismissed the count of the main action of nullity of the civil sentence which noted the parties transaction, as inadmissible, holding that a court judgment can only be reformed by an appeal, taking into account that, once the agreement between the parties was cancelled and the consent decision, approving this agreement, take the same legal regime.

To note, in this context, that the court⁴¹ decided in this case that the civil party to the criminal case, being compensated with a sum of money, as a result of admission of the civil action against the defendants, choosing to join the civil and the criminal case, no longer can exercise an action for nullity of a transaction, since to this hypothesis the principle *'electa una via non datur recursus ad alteram'* applies.

When the transaction is void, the judge no longer has the power to change the terms⁴².

Also, the transaction as result of mutual concessions "implies an inextricable (indivisible) link between all the relations and conditions it contains,

³⁷ Supreme Court, civil section, decision no. 1663/1967, in C. Turianu, „*Contracte civile speciale. Culegere de practică judiciară. The 2nd edition*”, Publishing House C. H. Beck, 2008, p. 410

³⁸ Supreme Court, the civil section, decision no. 750/1981, in C. Turianu, „*Contracte civile speciale. Culegere de practică judiciară. The 2nd edition*”, Publishing House C. H. Beck, 2008, p. 406

³⁹ The Court of Appeal Bucharest, the 3rd civil section and for cases involving minors and family, Decision no. 192/ February 1st, 2007, in M. Paraschiv „*Partajul judiciar. Practică judiciară*”, Publishing House Hamangiu, 2009, p. 438-441

⁴⁰ The Court of Teleorman, civil section, decision no. 184/October 10, 2007, irrevocable by the civil sentence no. 768/May 14, 2008 of the Court of Appeal of Bucharest, the 3rd civil section and for secția a III-a civilă și cases involving minors and family in L. C. Stoica, „*Ineficacitatea actului juridic civil. Practică judiciară. I Nulitatea*”, Publishing House Hamangiu, 2009, p. 532-538

⁴¹ The Court of Appeal Bucharest, the 3rd civil section and for cases involving minors and family, Decision no. 109/ January 23rd, 2007, in M. Paraschiv *op. cit.*, p. 445-450

⁴² Observation in the French doctrine - Ph. Malaurie, L. Aynes, P. Y Gautier, „*Contractele speciale*”, Coordinator of the Romanian edition M. Șcheaua, translation by D. Dănișor, Publishing House Wolters Kluwer, 2007 p. 570

so that none of the clauses can be suppressed or change without cancelling the whole contract”⁴³.

This point of view is also reiterated in the current doctrine⁴⁴: “Should an agreement become cancelled, whatever the reasons, such voidness will affect the entire contract due to the indivisible nature of all contract clauses. Thus, should one clause of the agreement become null, it will not be possible to substitute it with another, as it often happens with other types of contracts. In such situations it is presumed that said void clause has a determining role in the formation and existence of the contract”.

The French legal literature⁴⁵, based also on a court decision, adopted a critical attitude regarding the above interpretation. It has been showed that the French judges do not appear to feel constrained to declare total voidness, as proven by a decision passed by the First Civil Chamber in which appear to consent the partial voidness of an agreement. Thus, although such interpretations are isolated, they are not excluded.

3.1. Excluding error of law as ground for invalidating the contract

In the Romanian legal doctrine and in the case law there has been a controversy regarding the general acceptance of error of law as vice of consent.

Those in favor of excluding the error of law from the vices of consent based their position on the obligation to know the law⁴⁶.

In the case law⁴⁷ too, the very same points of view were promoted; thus, it has been decided that “the lack of knowledge of law, limited education and ignorance of the consequences of the consent given before the notary public do not constitute causes of error – vices of consent and do not affect the validity of the legal civil document. With the due diligence and prudence of a responsible owner, the obligation belongs to the plaintiff and she had the possibility to practice her right, to request the necessary information concerning the purpose of her appearance before the notary public upon request of the defendant, and to choose not to agree to conclude the act.”

Currently, according to the Romanian legislation⁴⁸ the error of law may be construed as vices of consent, provided that the law is not predictable and

⁴³ M. B. Cantacuzino, „*Elementele dreptului civil*”, Publisher „Cartea Românească”, București, 1921, p. 668

⁴⁴ T. Prescure, A. Ciurea, „*Contracte civile*”, Hamangiu Publishing House, 2007, p. 354

⁴⁵ B. Mallet-Bricout, *op. cit.*, p. 49

⁴⁶ „*nemo censetur ignorare legem*”

⁴⁷ Bucharest Court of appeal, 3rd civil section, decision no. 754/15 october 2004, in L. C. Stoica, „*Ineficacitatea actului juridic civil. Practică judiciară. I Nulitatea*”, Hamangiu Publishing House, 2009, p. 330-336

⁴⁸ Article 1207 paragraph 3 and article 1208 paragraph 2 Civil code: „The error of law may not be invoked in the case of the legal provisions that are accessible and predictable. The error of law is essential when it concerns a determining legal norm, compliant with the parties’ will, for signing the contract”.

accessible⁴⁹. By derogation of the common law, the compromise/transaction contract cannot be voided on account of error of law.

The French doctrine is unanimous on the cancellation of the legal civil document for error of law too⁵⁰. The literature specific to the settlement indicates that it is not possible to obtain the cancellation on account of error of law.

The analysis of the case law conducted in the French legal literature revealed, however, the tendency of the judges to adopt a strict view of the error of law, which allows, without contradicting the code, the cancellation of a certain number of agreements⁵¹. The conclusion is that such strict view paradoxically contributes to an extinct view of the vices of consent⁵².

The exclusion of the error of law as ground of voidness of the compromise/transaction contract may be explained by the following idea⁵³: many settlements are made based on uncertain legal grounds and if either of the parties were certain to win the lawsuit, they would not close an agreement, unless they do not want the simple and quick settlement of the litigation, possibly even in the detriment to their very own interest (based on the principle “a bad settlement is better than a good lawsuit”⁵⁴).

Thus, in continuation of the previous idea, it is noted⁵⁵ that the parties of an agreement seek, more than anything, to settle the litigation emerged or that is about to emerge and not necessarily to abide by the legal provisions applicable to them. The parties accept to assume a risk by the amicable solution of the litigation, even if based on an erroneous legal ground, deciding upon writing their own rules⁵⁶. If the parties had truly wanted to earn the totality of their rights, they would have chosen the litigation.

Until recently the Anglo-Saxon law considered that only the error of fact leads to the cancelation of the parties' agreement⁵⁷. The error of law led to the cancelation of the document only if it could have been passed in a mixed declaration of fact and law⁵⁸.

A few precedents are quoted⁵⁹ to serve as examples:

- first of all the *Kleinwort Benson Ltd v Lincoln City Council* case, where the House of Lords passed a decision that said that the right to recover money on

⁴⁹ This condition is evaluated through the aspects of the case law CEDO

⁵⁰ For details concerning this matter G. Florescu, „Nulitatea actului juridic civil”, Hamangiu Publishing House, 2008, p. 182

⁵¹ L. Poulet, „Transaction et protection des parties”, Librairie Générale de Droit et de Jurisprudence”, 2005, p. 197

⁵² *idem*

⁵³ Idea detailed in the French doctrine; more information: B. Mallet-Bricout, *op. cit.*, p. 38-39

⁵⁴ „un mauvais arrangement vaut mieux qu'un bon procès”

⁵⁵ B. Mallet-Bricout, *op. cit.*, p. 38-39

⁵⁶ In motivation of this idea, the French doctrine expression is relevant: „the parties waive their intent to seek the sanction in court of their right and are content with the conventional sanction embodied by the settlement” (Ph. Malaurie, *op. cit.*, p. 570)

⁵⁷ R. Duxbury, „Contract law”, 2nd edition, Sweet&Maxwell's Textbook Series, p. 290

⁵⁸ *idem*

⁵⁹ *ibidem*

legal grounds of restitution when such money has been paid on account of an error of fact is also extended to the error of law;

- in the *Brennan v Bolt Burdon* case, the Court of Appeal refused to invalidate a compromise agreement (a settlement), invalidation inquired based on an error of law, considering that the amendment of the law was a risk that the parties of such agreement must take.

3.2 Inadmissibility of lesion in settlement

The inadmissibility of the lesion as a way to vitiate a settlement, both in the Romanian law and in the French regulation model, is justified by the particularities of this contract, the main goal of which is to settle a dispute and not to establish a balance that can be controlled by the judge⁶⁰. Following this thought process, it is claimed that the balance of the settlement is the one the parties wanted to define that could not have been objectively assessed⁶¹.

In the Romanian doctrine too⁶², the inadmissibility of the lesion in settlement is explained by relation to the object of this agreement – preventing and settling a litigation - “object that is considered to be incompatible with the possibility of cancellation or subsequent adaptation of the contract to the principle of civil system circuit; such measures taken with regard to the contract would generate uncertainty and insecurity in the parties of the agreement (but also in the interested parties) concerning the outcome of a past or future lawsuit”.

3.3. Explanations concerning the error on the object of the settlement agreement

Since the error over a person does not constitute a particularity in the settlement, we aim to document ourselves on the legal significance of error on the object of the litigation.

The bibliographic research⁶³ indicates that the error on the object of the litigation regards the disputed right over which the parties negotiate, which in fact constitutes the fundament of the legal action extinguished by the settlement, examples thereof referring to the right to compensation, property right, legal heir right etc.

The court⁶⁴ had the opportunity in one case to pass decree on the “inexistence of the object of the legal contract”. Thus, it has been found that the “inexistence of a legal document that would certify the parties’ property rights concerning all five rooms of the real estate that was object of the agreement (the

⁶⁰ B. Mallet-Bricout, *op. cit.*, p. 38

⁶¹ *idem*

⁶² Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, ș.a., *op. cit.*, p. 1286

⁶³ C. Toader, *op. cit.*, p. 306, Ph. Malaurie, L. Aynes, P. Y Gautier, *op. cit.*, p. 572, B. Mallet-Bricout, *op. cit.*, p. 46

⁶⁴ Court of sector 1 Bucharest, Civil Sententece no. 7411/14 May 2007, irrevocable by lack of appeal, in L. C., ”*Ineficacitatea actului juridic civil. Practică judiciară. I Nulitatea*”, Hamangiu Publishing House, 2009, p. 228-231

sales and purchase contract comprising only two rooms) bears the significance of inexistence of the object of the legal contract from a legal point of view”.

This error that leads to the voidness of the contract may bear the existence, the nature of the disputed right⁶⁵.

Nevertheless, the error on the object of dispute may refer to the very existence of the litigation, the litigation being the cause of the settlement⁶⁶.

Thus, it results the specific cases of canceling an agreement, cases regulated both by the Romanian and the French laws: settlement concluded in performance of a void title, settlement concluded over a closed law suit etc.

To avoid any confusion⁶⁷, we take note that the object of the litigation:

- does not consist of the services owed by the signatories of the settlement, which construes the concessions;
- it is not to be mistaken with the object of the litigious right either: the conclusion is that an error over the substance of such object does not determine the obtainment of cancellation of the settlement;
- the error over the extent of the present prejudice, that is over the value of the litigious right, of the compensation is also excluded⁶⁸.

In the French Law, the Court of Cassation made a useful distinction between the hypothesis of aggravation of the prejudice (error related to the severity of the injuries for instance that is not taken into account) and the hypothesis of the emergence of a new prejudice, of a later injury (error related to the very existence of the injury endured)⁶⁹. Moreover, the special laws “improved” the enforceable common law, the victim being allowed to ask a compensation supplement in case the initially proven damages aggravate.

Last but not least, there can also be the cases⁷⁰ where consent given was vitiated by the error over the legal nature of the document concluded. We proceed to describe such a case where the court decided that “the plaintiff did not intend to gratify his former wife by waiving any and all claims over the share rightfully to her of the real estate during the marriage but wanted to obtain a series of counter favors. Therefore he did not express a valid consent for concluding the settlement, his consent being vitiated by the error over the legal nature of the document (*error in negotium*), destructive will, leading to absolute voidness of the legal document concluded”.

⁶⁵ We give here examples extracted from *op. cit.* of Ph. Malaurie, L. Aynes, P. Y Gautier, examples provided on page 571: a person settles over the extent of its liability while it is not even liable at all; error over the status of heirs’ right that serves as the fundament of a settlement.

⁶⁶ Mallet-Bricout, *op. cit.*, p. 46

⁶⁷ Delimitation made by the French doctrine: Ph. Malaurie, L. Aynes, P. Y Gautier, *op. cit.*, p. 572

⁶⁸ Justified by the fact that the lesion is not caused by the cancellation of the settlement. Relevant to this effect is an example from the French case law referred to in *op. cit.*, of C. Toader, p. 306: by civil decree on 20 June 1978 of the French Court of Cassation where it overruled the motion to cancel a settlement, intended by expropriated who accepted a certain amount as compensation for their lands and later discovered very valuable natural reserves on the plots.

⁶⁹ For this relevant case law the work of Mallet-Bricout, *op. cit.*, p. 46, was consulted

⁷⁰ For instance, Bucharest Court of Appeal, 3rd civil section for Family and Children related cases, Decision no. 192/1 February 2007, in L. C. Stoica, *op. cit.*, p. 231-236

3.4. Specific cases of cancellation of the settlement contract

Settlement over a void or cancelable document:

According to article 2274 of the Civil code⁷¹, “void is the agreement that is entered for the performance of a legal document affected by absolute nullity, except where the parties have expressly settled over the nullity”.

In addition to the provisions of the Civil code in 1864, a new paragraph has been incorporated with specifications concerning the party permitted to require the cancellation of the agreement entered for the performance of a cancelable document, which may only be the party that, at the date of the agreement, was unaware of the cancelable status.

The invoked text reveals the existence of two foreseen cases, with specific sanctions⁷²: “in the first case, if the parties did not expressly settled over the nullity of the title, the nullity is absolute, and as such the provisions of article 1247 of the Civil code become enforceable”; “in the second case, the nullity is relative but the motion to cancel falls under the exclusive right of the party that, at the date of the agreement, was unaware of the cancelable status”.

The settlement based on false documents:

In accordance with article 2275 of the Civil code⁷³, “it is also void the agreement entered based on documents that later on have been confirmed to be false”.

The comment made on the margin of this law⁷⁴, relative to the nature of the applicable sanction is that the “collocation «it is also void» translates into absolute nullity⁷⁵ of the agreement entered based on false documents. This legal solution complies with the provisions of article 11 and 1247 NCC, laws that prohibit and declare absolute null any and all legal documents averse to the public order”.

The case of documents discovered after the agreement has been signed:

Article 2276 of the Civil code⁷⁶ prescribes that the “subsequent discovery of documents that were unknown to the parties before and that may have

⁷¹ Correspondent to article 1713 of the old regulation with the following content: „thus can be disputed the agreement concluded to the effect of performing a void title, except when the parties have expressly agreed upon such nullity”

⁷² Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei etc. *op. cit.*, p. 2218

⁷³ Correspondent to former article 1714: „the agreement made based on documents proven to be false becomes void”

⁷⁴ Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei etc. *op. cit.*, p. 2218

⁷⁵ It is useful to mention here the motivation of the Supreme Court of Cassation and Justice in the decision no. 2812/2003 (available on www.scj.ro): „It is a matter of principle however that the status - absolute or relative – of the nullity of a legal document is determined by the nature of the legal norms breached and by the general or particular interest that has been damaged by such breach. The falsification of official documents leads in all situations to the absolute nullity since the social values affected by it are not limited to the interest of one or a few persons but targets the very security of the civil circuit, undermining also the authority of the issuing state bodies”.

⁷⁶ Similar to the former article no. 1716: „when the parties have generally debated upon any and all businesses they may have, the documents that may have been known by them during the agreement and later discovered do not constitute cancelation of the agreement, except when such document

influenced the content of the agreement do not construe a cause for its nullity, except when such documents have been hidden by either of the parties, or by a third party with its consent.

(2) The agreement is void when either of the documents discovered reveal that the parties or either of them had no right to conclude an agreement with”.

The interpretation of the law leads to the conclusion⁷⁷ that “the documents discovered are always pre-existent to the agreement and could have influenced its content. Nonetheless, should the lack of knowledge of such discovered documents be caused either by circumstance ignored by the parties or hidden (in dishonesty) by either of the parties or by a third parties with its consent”.

Thus, not even the discovery of certain papers and documents unknown upon entering the agreement is construed as ground to cancel the agreement if such were not hidden by action of either of the contracting parties⁷⁸.

The sanction prescribed by article 2 is natural, seeing that the agreement comprises documents of ownership so that the agreement can only be based on goods over which the parties have rights⁷⁹

The agreement entered without knowing that the litigations has been settled by final court order

The lawgiver prescribed in article 2277 of the Civil code⁸⁰ a specific case of settlement nullity: “*the agreement over a law suit is cancelable upon request of the party that was unaware of the fact that the litigation has been settled by a final court order*”.

Relevant to this legal provisions are the remarks recorded by the specialty literature⁸¹:

- the first remark we use, is that case in point “we are dealing with an error of the parties over the substance of the object, as the parties believed that the right to which the agreement refers is litigious and questionable, while, in fact, it had already been settled by a final court order”;

- the second remark is that the agreement closes an open law suit, yet the two phases of the law suit are well known: judgment and execution; in this thought process the author quoted finds that “there is no logic contradiction between the

have been hidden by action of either contracting parties.” According to paragraph 2 “nonetheless, the agreement will become void when it does not comprise but one object and it is proven by either of the subsequently discovered documents that either of the parties lacked right over such object”

⁷⁷ Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, ș.a., *op. cit.*, p. 2218

⁷⁸ The Supreme Court of Justice, civil section, decision no. 1880/1992, in „Dreptul” no. 10-11/1992, p. 110

⁷⁹ Bucharest Court of Appeal, 4th civil section, decision no. 1864/2003, in V. Terzea, „*Coduri adnotate. Codul civil. volumul III(art. 1405-1914)*”, C. H. Beck Publishing House, Bucharest, 2009, p. 200

⁸⁰ Case of nullity previously provided under article 1715: „it is also void the agreement over a law suit closed by final, irrevocable sentence unknown to the parties or to either of them. When the sentence that has been unknown to the parties can still be disputed the agreement remains valid.”

⁸¹ Fl. Baias, „*Unele considerații referitoare la tranzacție*”, in Revista Română de Drept issue 9-12/1989

idea of irrevocable settlement of the litigation – which is grounded on the law – and the principle of availability, which gives the parties the right to not impose forced performance (when such right may be disposed of without limitations). Still, the very same principle allows, [the parties] to close an agreement in this particular phase of the civil law suit”.

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