

# MUTUAL CONCESSIONS - SPECIFIC ELEMENT OF THE COMPROMISE/TRANSACTION CONTRACT

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## **Abstract**

*Given the usefulness and practical importance of the compromise contract conclusion and of the amicably dispute resolution, within the business world, we aim to analyze, in what follows, the concrete means by which these kind of settlement are achieved. Two questions become legitimate in the context of concerns about mutual concessions which the parties make in a compromise contract. These questions are the following: "What are the mutual concessions? Do mutual concessions mean equivalent concessions?" and "How mutual concessions are required to complete a valid settlement? Is the requirement of mutual concessions grounded?"*

**Keywords:** *compromise (contract), mutual concessions, waiving the right, waiving the claim*

**JEL Classification:** *K12*

## **1. Introductory remarks**

Given the usefulness and practical importance of the compromise contract conclusion and of the amicably dispute resolution, within the business world, we aim to analyze, in what follows, the concrete means by which these kind of settlement are achieved.

Although the Romanian law, before the first October 2011 moment, did not address in the content of the legal definition to this characteristic element, however this requirement of "mutual concessions" was imposed by the case law<sup>2</sup> who ruled in the sense that: "within the civil procedural law, the transaction/compromise contract is the agreement of the parties made in order to end an existing litigation by which the parties make mutual concessions, giving up certain rights or claims".

The Romanian legislator endorsed all the critical comments and in an attempt to overcome the shortcomings of the legal definition of the transaction, adopted in Art. 2267 of the New Civil Code the following definition: "*The transaction is the contract by which the parties prevent or settle a litigation, including during forced execution, by mutual concessions or waiving rights or by the transfer of rights from one to the other*".

This agreement involves<sup>3</sup>:

- 1) the pre-existence of a dispute (triggered or imminent);
- 2) the parties' intention to put an end to the existing dispute or to prevent a dispute to arise;
- 3) the existence of mutual concessions, mutual waiving rights or transfer of rights.

Two questions become legitimate in the context of concerns about mutual concessions which the parties make in a compromise contract. These questions are the following:

- A. *What are the mutual concessions? Do mutual concessions mean equivalent concessions?*
- B. *How mutual concessions are required to complete a valid settlement? Is the requirement of mutual concessions grounded?*

## **2. What are the mutual concessions?**

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<sup>2</sup> recently High Court of Cassation and Justice, Civil and Intellectual Property Section, Decision no. 3256 of 22 May 2008, available on the Internet: [www.scj.ro](http://www.scj.ro).

<sup>3</sup> F. Moşiu, „*Contractele speciale în Noul Cod Civil*”, Publisher Wolters Kluwer, 2010, p. 316

In order to answer the first question we need to clarify whether these concessions have as object the law substance (so are of material, substantial nature) or the right of action, i.e. the prerogative of the party to seek justice for the protection of his/her rights.

A study of the doctrine and jurisprudence is necessary to address the above stated objective.

The Romanian case-law stated that mutual concessions mean the reciprocal waiving claims or benefits newly committed or promised by one party in exchange of the other party waiving the right which is disputed or doubtful<sup>4</sup>.

This issue was subject of the French theorists concerns, and less of the French jurisprudence that although periodically repeated the requirement of mutual concessions it has not ruled on the issue if it should be about substantial (material) concessions or not<sup>5</sup>.

In the French law, the provisions relating to "mutual concessions" are not illuminating. Thus, according to Art. 2048 of the French Civil Code is stipulated that the settlement contains a waiver of rights, actions and claims. The observation would be that the concept of "rights", "action" and "claim" are not synonyms.

The doctrine<sup>6</sup> distinguished between two trends in the analysis of these concessions: these are either considered as an abandon of the subjective rights or are regarded as an abandon of claims.

The first thesis may be subjected to criticism.

On the one hand, it is difficult to claim that the parties abandon their subjective rights when they are contested, doubtful, though have not been set by a legal court order. Thus, since upon the conclusion of the transaction, the parties' rights are not determined, it appears impossible to state that each of them has abandoned their rights.

To most French theorists, the parties in a transaction, by reaching an agreement on mutual concession, would abandon a part of their claims. Articles 2045 and 2048 of the French Civil Code seem to consolidate this analysis.

The position of Boyer<sup>7</sup> is characterized by a procedural approach of the settlement: Boyer's thesis consists in the examination of mutual concession as an abandonment of the rights to action: "the parties do not waive their rights; they waive the power they naturally have as individuals to ask the judge to intervene in order to restore a situation denying its right: this power is the right to action".

The vulnerability of Boyer's thesis is that the author examines, as element of the transaction, what is actually an effect, the loss to the right of action shown in Art.2052 of the French Civil Code that gives the transaction the authority of *res judicata*.

We should add that the term of "mutual concessions" is much broader than the one used by the French Court of Cassation in its decision, often quoted as the principle decision of January 3, 1883 which claims "a mutual abandonment" of rights. But if the word "concession" can cover the "abandonment", i.e. by waiving by one or the other of those interested in some of the claims, it also allows the inclusion of commitments stipulation in more positive content, taking the form of one or more new obligations<sup>8</sup>.

<sup>4</sup> as ruled by C.A. Craiova, Civil Section, decision no. 8683/1999, in V. Terzea, „*Coduri adnotate. Codul civil*”, vol. III (art.1405-1914), Publishing House C.H. Beck

<sup>5</sup> conclusion derived from the analysis of the French case-law, made in the „*Enciclopedie Dalloz. Repertoire de droit civil*”, Tome XI, publié sous la direction scientifique de Eric Savaux, p.5

<sup>6</sup> see in this regard L. Poulet, „*Transaction et protection des parties*”, Librairie Générale de Droit et de Jurisprudence”, 2005 p. 162

<sup>7</sup> Quoted by L. Poulet, in the book „*Transaction et protection des parties*”

<sup>8</sup> L. Poulet, cited work, page 57

Briefly, mutual concessions can be of great diversity. They have before them the vast field opened by the contractual freedom. Therefore, let's accept that the question of knowing what exactly mutual concessions are, is left more or less open. In a too big desire to make a theory of the issue, to want too many limitations in the register of possible concessions, that can be taken into account, we would risk to limit the transactional freedom. So let's keep its suppleness as decided in the French doctrine<sup>9</sup>.

It is still to clarify whether by the phrase "mutual concessions" we should understand equivalent concessions.

For the case-law is enough for the transaction to include mutual concessions regardless of their relative importance. In other words, "reciprocity" is not necessarily synonymous with "equivalence". Judges do not go so far to ask a perfect balance between each one's concessions.

This conclusion was reached by French doctrine<sup>10</sup>, which held that if reciprocity requires that all concessions of one party to meet the other's concessions, it does not need a strict equivalence. Moreover rescission for lesion is expressly excluded in the transaction by Article 2052 of the French Civil Code<sup>11</sup>. Correspondingly, in the Romanian law, the New Civil Code stipulated at Art. 2273 Para.2 that the transaction « can be cancelled neither for error of law on matters subject to disagreements between the parties and nor for lesion » and also Art.1224 New Civil Code regulating lesion inadmissibility in the case of the transaction.

Should this mean that there is no control? In other words, the ridiculous nature of a concession may be sanctioned?

Although this point is rarely emphasized, it is clear that the judge has the power to review the legality of the concessions to which the parties have agreed. To highlight these issues we refer to an example<sup>12</sup> in this respect, by which the court ruled as follows: « If the shares and the payment agreed by the parties of the transaction shown to they are clearly disproportionate, creditors oppose and have even initiated the forced execution procedure, the court is entitled not to approve the agreement of the former spouses, on contribution rates and how common property is allotted, considering that it is made with the obvious purpose to defraud the interests of the applicant's personal creditors, and to order that, at the separation of the common property, to take into account the parties actual contribution in the purchase and their market value ».

Also, if one of the concessions is contrary to the public order, it will be considered null and void. In addition, we have to admit that the judge can control the possibility of concession. Indeed, the impossible cannot be assigned.

On the other hand, by concluding the compromise, the parties waive to exercise their action in complaint or defence. They accept not to submit their claims to any jurisdictional check. Since, no claim will be capitalized by way of justice, the exact value of waivers remaining unknown<sup>13</sup>.

At the same time, it is not necessary that the concession made by the party to feed from the object of the dispute arisen or about to arise, even if that was the most often case. Therefore, waiver by one party to its action may result in a foreign benefit of the dispute. We are talking about a partially translativ transaction, when one of the parties waives action in exchange of acquiring a new right. In this regard are the provisions of Art. 2267 Para. 2 of the Romanian New

<sup>9</sup> B. Fages, „*Equilibre et transaction: l'exigence de concessions réciproques*”, in « *La transaction dans toutes ses dimensions* », collective paper, Publishing House Dalloz, 2006

<sup>10</sup> see, in this respect, *Enciclopedia Dalloz. Répertoire de droit civil*, Tome XI, publié sous la direction scientifique de Eric Savaux, p.6

<sup>11</sup> „*Elles ne peuvent être attaquées pour cause d'erreur de droit, ni pour cause de lésion*”.

<sup>12</sup> C.A. Bucharest, Section III Civil for cases involving minors and family, Decision no. 1954 of October 31 2006, in „*Partajul judiciar. Practică judiciară*.”, author M. Paraschiv, Publisher Hamangiu, 2009

<sup>13</sup> Ph. Malaurie, L. Aynès, P. Y. Gautier,, „*Contractele speciale*”, coordinator of the romanian edition M. Șcheaua, translated by D. Dănișor, Publisher Wolters Kluwer, 2007, p. 559-560

Civil Code that provide that “through a transaction can arise, modify or extinguish legal relations other than the subject of the dispute”.

### 3. How mutual concessions are required to complete a valid settlement? Is the requirement of mutual concessions grounded?

Back to the second question relating to the action that requires mutual concessions for the valid conclusion of the compromise settlement, a first solution could be to consider that they have a validity title, which determines the cancellation of the transaction that would not register mutual concession or where one of the concessions is risible.

This could be explained by the fact that the absence of either should lead to the absence of the other and starting from it, to rule the nullity of the whole. But, this is not the case-law.

Indeed, the lack of mutual concessions has traditionally as consequence the re-qualification of the agreement, which, therefore, no longer has the value of transaction. The solution is undoubtedly preferable to the solution of cancellation<sup>14</sup>.

Further and referring to the practical result of mutual concessions as part of the compromise contract, we note that these are the criteria by which we can distinguish transactions from certain unilateral acts which are more related to acquiescence, divestment or procedural disposals acts of the parties.

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<sup>14</sup> B. Fages, „*Equilibre et transaction: l'exigence de concessions réciproques*”, in « *La transaction dans toutes ses dimensions* », collective paper, Publishing House Dalloz, 2006, p. 58, 59