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THE SETTLEMENT AGREEMENT

- PhD THESIS -

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- SUMMARY -

The topic of this PhD thesis relates to an important issue in the current context of encouraging settlement agreements. Thus, the practice of compromise conclusion, whose pattern is the settlement contract, records some legal problems whose solving requires explanations that will allow the interested parties an appropriate knowledge of this legal instrument.

Given the usefulness of this contract and the fact that within the Romanian doctrine, the settlement contract was investigated mainly incidentally, in the general presentations of the civil contracts, we have decided to approach in depth this scientific subject.

Taking into account that currently, from the terminology point of view, the settlement agreement is likely to receive several meanings, we mention from the beginning that our scientific approach is regarding the special contract, regulated by the Romanian Civil Code, starting with art. 2267, that is the contract by which "*the parties prevent or extinguish a litigation, including during the forced execution phase, through concessions or mutually waiving rights or through the means by which they transfer rights from one to the other*".

Given the above, the PhD thesis reveals a suitable and complete analysis of this type of contract, through the synthesis of the documentary material and of pertinent case-law, able to contribute in satisfying the *general purpose, that of widening the legislation, literature and applicative knowledge as regards the settlement agreement.*

In order to achieve this purpose we started the research from the following *objectives:*

- disclosure of the settlement contract place within the means of alternative dispute resolution;

- rigorous examination of the legal features of this agreement, by the conceptual analysis, the determination of the legal nature of the contract, and by studying the conditions for its conclusion and effects;
- case-law presentation of the settlement agreement applications in as many areas as possible;

We should also state that at the basis of our comparative research, we have followed two main research directions, namely the French regulatory model, the English common law, given the tradition of this system to settle disputes amicably.

In these circumstances, we conceived a *preliminary title* which refers to the theoretical and practical interest of studying this contract and that presents the methodological and theoretical scientific support of our study.

We have then designed *three parts of the PhD thesis:*

- *first part that is an introduction that relates to the alternative dispute resolution in general and that argues the fact that the settlement agreement is the main product of non-judicial compromise means; in this section the settlement contract is regarded from its evolution point of view;*
- *the second part outlining the legal features of this type of contract (classical analysis elements that relate to the legal concept, the legal nature, the rules concerning the conclusion of this special agreement and its effects);*
- *the third part that presents the practical applications of the compromise, covering areas of private or public law.*

Each part is divided in the logical order of meeting the requirements of the specific objectives, into several chapters, sections.

Thus, *the first part of the PhD thesis* calls for an exceedance of the State monopoly in the justice activity. Freely disposing of the exercise of their rights,

subject to the legal limits, the parties may resort to amicable means of resolving their disputes, the mediation being the main ADR mechanism (*Alternative Dispute Resolution*).

In this context, we speak today of a reconfiguration of the access to justice, at European level this being interpreted even more comprehensively, covering the access to appropriate dispute resolution procedures for individuals and legal entities.

Moreover, having in mind those stated by the Court of Justice of the European Union (joined cases C-317/08, C-318/08, C-319/08 and C-320/08), the right to an effective jurisdictional protection does not represent an absolute prerogative. On the contrary, the access to jurisdictional protection can be restricted. Finally, any jurisdictional procedure needs for the law to define the ways and the conditions of admissibility. In this regard, the Member States have special discretion. As the Court stated, within respecting the rights to defence, the restrictions must nonetheless meet objectives of general interest and not to constitute, in relation to the aim pursued, a disproportionate intervention undermining the law content itself.

The above are the main conclusions of *the first Chapter of this PhD thesis.*

Chapter II covers an overview from a historical perspective of the settlement agreement, following its origin in the Roman law, the French regulatory model and the Anglo -Saxon tradition. We have considered also the European Union law, where the transaction contract is approached more from the proceedings point of view.

In the *third Chapter* we analysed the friendly settlements concluded before the European Court of Human Rights. According to the case law of this court, these friendly settlements involve mutual concessions from the complainant and the respondent State.

We have chosen to approach this issue in the substantiated investigated matter, based on the assessments of the judicial literature, according to which friendly settlements are a particular type of compromise made before the European Court of Human Rights.

Seen from a national perspective, the amicable settlements on human rights matters are totally unacceptable, the situation being different internationally, where several human rights treaties provide a framework for the conclusion of mutual agreements.

Undoubtedly, the instrument of friendly settlements introduces a peculiar element in the judicial proceedings before the European Court, otherwise rigid, making it a best practice mechanism. The fact is that the alternative dispute settlement is a phenomenon that is a challenge in the field of human rights protection.

The second part of the PhD thesis regarding the legal features of this special contract begins with highlighting the defining aspects of the settlement agreement.

Chapter IV examines the legal concept of settlement agreement and how the doctrinal observations based on the legal definition have substantiated the new legal concept in the New Civil Code.

The conclusion that has been imposed is that the construction of the legal definition should emphasize the specific difference, that individualizes the settlement in relation to the family of legal acts that relates to the litigation, fact that had been achieved by the New Civil Code legislature; we pointed out the specific elements of this contract and emphasized the requirement of mutual concessions that is likely to individualize the settlement agreement from other procedural disposal acts, the absence of mutual concessions traditionally having the only consequence of re-classifying the agreement, which, therefore, no longer has the value of a compromise.

Based on the conceptual and terminological analysis outlined above we focused next, in *Chapter V* on determining the legal nature of the settlement contract, taking into account its specificity at the confluence of the contract law and civil procedural law (in terms of judicial settlement).

The subject of its legal nature, in this case, has generated controversy in the legally specialized literature. Three theories were crystallized: the contractual theory, the jurisdictional theory and the mixed or eclectic theory. The first two are in direct opposition, while the latter combines their common elements, in order to provide an adequate explanation of the complex problem of the legal nature of court settlement. The strong impression of the agreement of the parties in the court settlement resulted in shaping that doctrine vision according to which the parties decide in a sovereign manner. Actually, we also believe that this thesis does not explain satisfactorily the whole complex nature of the consent order. Neither the jurisdictional theory shows sufficient arguments to capture the true legal nature of the judicial settlement, as it doesn't take into account the influence of the parties that settle the case amicably. This failure makes us not to retain this theory either, holding it as partially accurate. The most comprehensive approach, in our opinion is found in the mixed theory that captures the dual nature: contractual and jurisdictional, at the same time.

Useful in such an endeavour is the operation of delimiting the settlement from other similar legal categories, which is imposed in relation to the doctrine, as well.

The research in this chapter ends with the examination of the legal characters of the compromise, highlighting the legal implications of these features.

In *Chapter VI* we presented the rules that govern the settlement agreement conclusion and protection of the parties and third parties, as well. In connection with this, firstly we need to know the conditions pertaining to the valid

conclusion of the settlement and the consequences of failing to fulfil the legally established requirements, so that the compromise fulfils its purpose and does not become itself the source of other disputes.

As a contract, the settlement will be subject, firstly, to the general rules concerning the validity of agreements. No less though, the specific coloring of this type of contract reflects in the adoption of special rules, according to which the validity of such an agreement is examined. We find these special rules in the Romanian Civil Code, starting with art. 2271.

Also, to the general rules there are added the cases of nullity specific to the settlement agreement:

- concluded for the execution of a legal 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 finalized trial (art. 2277).

The exclusion of the error of law as ground of voidness of the agreement was explained by the French doctrine (B. Mallet-Bricout) through the following idea: numerous agreements are made based on uncertain legal grounds and if either of the parties were certain to win the lawsuit, they would not have settled, unless they did 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").

Thus, continuing the previous idea, the conclusion is that the parties of a compromise 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 rules. If the parties had truly wanted to learn the totality of their rights, they would have chosen the litigation.

The exclusion of the lesion as a way to vitiate a settlement agreement, 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 judge. 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 assessed.

In this context, apparently none of the parties can complain about the existence of the inequality, especially because they had accepted not to submit the dispute to a judicial control. Nevertheless, we raised the question regarding the legal mean by which a settlement agreement concluded as a result of an economic constraint may be cancelled.

Related to this concern, the French case law has established the concept of „economic violence", explained through the abuse of an economic dependence, which is likely to alter the formation of the parties'free will. In Romanian law, related to this subject, there had been given examples from the special legislation measures that protect the „weak party" in a contract; thus the relevant example is that of the settlement agreement concluded by an employee with his employer, by which the employee had given up to rights recognized by law.

In conclusion, our opinion is that a settlement agreement concluded as a result of an economic constraint may be canceled if the existing necessity conditions are met, and the disproportion affecting the contractual performances is unjust, illegal; according to this last aspect, the extent to which one of the parties misuses the economic dependency of the other party for the purpose of getting an undue benefit, shall be relevant.

In terms of protecting the parties, by making it mandatory for the court to determine the legality of the settlement agreement, we showed the nature and the limits of this intervention in the ratification of the parties' compromise.

In the case of the judicial settlement, the court neither judges nor adds anything to the effects of the transaction agreement, but only checks the legality of the agreement between the parties, the consent order acting as authentication of such agreement, as any court order is assimilated, in terms of evidence as authentic paper.

However, we drew the conclusion that the court verifies the admissibility and the validity of the agreement between the parties, not-exercising only a "recording" role, but one of legal "supervision" and "control" of the judicial acts of the parties in the civil lawsuit to which was vested.

Therefore, we proposed to expressly regulate the court obligation that, before taking note of the settlement, the judge to explain the legal consequences of the disposal act the parties have concluded.

If the disposal acts of the parties were done in order to achieve illicit purposes, if the parties were not authorized to dispose or if the consent was vitiated, from procedural viewpoint the parties may not appeal, but take an action for annulment or declaration of nullity, remaining that only if the consent order is given in violation of the procedural law, as regards the absolute competence of the court, procedurally to use the appeal remedy.

Given the irrevocable will of the parties to end the dispute amicably, however we believe that the procedure should not have allowed any appeal against the consent order which took note of the parties' agreement.

With reference to the effects of a settlement agreement, examined in *Chapter VII*, in relation to the observations from a monograph of the earlier Romanian literature written by Eugen Prescurea, we brought amendments to the theory of declaratory effect of the transaction, criticizing the quasi-unanimous

position of the doctrine that many years supported the declaratory effect of this contract. As the author above reveals, the theory of transaction as declaratory act is contrary to the historical tradition, known by the Roman law or by the old French law system. This effect was imposed by an intentional deformation to justify the favouring tax regime applied to these types of contract.

In addition, within this Chapter, influenced by the French doctrine, we have proposed a new approach on the *res judicata* of the judicial settlements.

Thus, to ensure the inviolability of the transactional solutions, the texts in the Romanian Civil Code, after the French model, referred in the past to a functional notion of the civil procedure, attribute generally recognized to the court judgments (*res judicata*).

Regarding this attribute, there were conceptual debates in the doctrine, emphasizing that striking similarities between the purpose of not-receipt shown by this contract and the one that results from a judgment would still not lead to assimilation and to avoid any confusion, there was proposed in the French doctrine (for instance Ch. Boillot) to be use the expression "the authority of what was settled".

By making the settlement agreement a specific contract, provided with effects similar to *res judicata*, the authors of the former Civil Code intended to propose a defined regime to the parties. It is possible for the contracting parties to give it the same force based only on the contractual mechanism, but the advantage of the previous legislation is to clearly ensure an extended efficiency of all settlements concluded. Thus, if the force of the compromise is based only on the contractual mechanism, in the case of notifying the court with the dispute already conventionally settled, the solution would be to dismiss the claims and not of inadmissibility of such an action, based on admission of the procedural exception. The difference explained also by a French author is that of a waste of

time: in the latter case, the judge fails to discuss the substance of the claims; in the other case, the claims are examined but only for dismissal.

We ended this chapter with the investigation of settlement non-efficiency cases for reasons subsequent to its conclusion, which develops the means of dissolving the transaction, through retroactive resolution, action for revocation or declaring simulation.

The third part of the PhD thesis is designed to be eminently practical, aiming primarily at its usage utility in various matters: law of obligations, insurances law, labour law, and even criminal law etc.

These practical applications are the subject of *Chapter IX and X*, as we followed this methodological approach given two aspects, according to the French doctrine (X. Lagarde): one aspect is identifying the domains of the compromise (the private law field being its appropriate field of manifestation) and another aspect consists in determining, especially within the domains related to the public law to what extent the parties may derogate from the imperative requirements of the law, through the solution they reach.

Firstly, in *Chapter VIII* we have launched the scope of the settlement agreement.

In the Romanian law, a first delimitation of the scope of this contract is made negatively, by excluding the rights which cannot be traded.

Therefore, the law expressly provides that it cannot be traded the ability of a person, the marital status of individuals and rights that the parties cannot dispose on, according to the law (art. 2268 Civil Code). There are also explicitly excluded from the scope of a settlement contract any liabilities arising from the gambling or betting contracts (in accordance with art. 2264 par. 3 Civil Code), and according to the labour law it cannot be settled on the workers' rights recognized by the law (art. 38 Labour Code).

Corroborating with the general provisions of the Civil Code, we retain that the main limitations of the transaction are: the rights that cannot be traded, the public interest and the public order.

Per a contrario, in all cases we speak of rights on which the parties may settle, they are allowed to reach an amicable agreement, and in this thesis we had the opportunity to illustrate such cases.

Regarding the issues of public order, protection of certain contracting parties and the rights of third parties, the legislative texts, the interpretations of doctrine and the case law are in constant evolution and show a tendency to allow the maximum extent to which it may be exercised the right to settle.

Traditionally, it was considered that the rights made "unavailable" by the public order rules cannot be settled. More recently we see the acceptance in areas marked by the law as being of public order, such as labour disputes and even public administration.

However, in these cases it is necessary to exercise a judicial control and we recommend even that the validity of the agreement to depend on the judicial review.

Specifically we refer to the idea of replacing the interdiction of settlement agreements in public order domains subjecting it to its legal control. This could be translated into a right conferred on the parties to enter into a compromise contract in a matter relating to public order, subject to a judge approval.

These proposals come in the context in which a compromise, although resulting from a private initiative, answers an objective of general interest.

Placing the contract signatories under the supervision of a judge aims at lowering the risk of developing a subsequent dispute between the parties or with third parties.

The judge's involvement in the formation of the judicial contract, the authority attached to his /her intervention determines the decrease of nullity

grounds that could taint the transaction agreement.

The PhD thesis ends with the conclusions and proposals submitted during the above chapters, in order to achieve the main goal, that of ensuring the balance between efficiency and legality when signing a settlement agreement.

Given the research that we have done, in relation to the rules of comparative law, to the case law and doctrinal opinions, we hereby state the following general and final conclusions:

The practical importance of the settlement agreement was explained through the function performed by this instrument. On the one hand, a compromise operates as a practical, economic measure by which the parties may be exempt from expenditure and loss of time inherent to trials, on the other hand, no less important is the social contribution brought by it, given that it helps to restore the relations between the parties.

Different means of dispute resolution, outside the state jurisdiction, primarily through the settlement agreement, know a major expansion in all areas.

This development is driven by the efficiency requirements arising in practice and which lead to decreasing the excessive rigidity of some provisions, so that to be as adequate as possible to the current market conditions.

We should note though that the progressive extension of the scope of the settlement may be accepted subject to the exercise of the judicial control.