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**A Comparative View on Regulating the Transaction Agreement.
French, German and British Law**

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Abstract: Over the few decades there has been a steady growth in the conclusion of the transaction contracts, given the multiple needs it responds to-it avoids long delays and high costs associated with the legal proceeding and it ensures the removal of doubt as regards the legal proceeding result. It is the purpose of this article to provide a comparative analysis over the legal regulation of the transaction contract in several European member states and to examine the legal changes brought by the New Romanian Civil Code. In order to achieve these objectives, we have examined the national and foreign legislation and doctrine, confirmed by the case law. Therefore, this study contributes to knowledge of the defining aspects of the transaction contract at European level, following the crystallization of the legal concept and its normative evolution.

Keywords: settlement, compromise, mutual concessions, judgment by consent, alternative dispute resolution

1. Introduction. Practical Importance of the Transaction Agreement as an Alternative Way of Dispute Settlement

Seen as a remedy to the state justice imperfections, the conclusion of the transaction contract is today one of the increasingly spreading phenomenon, being used by the parties seeking to extinguish the litigiousness right disputed by them, based on mutual concessions.

There have been identified (Jeammaud, 2006) a number of philosophical and especially civic virtues of this type of agreement: the parties do their own justice, in the sense that the protagonists get back to being partners and agree somehow to do each other's justice, without resorting to court proceedings.

The French doctrine (Malaurie, Aynes & Gautier, 2007) defines the utility and complexity of this legal instrument in a suggestive way by the formula "a poor arrangement is worth more than a good lawsuit" („*un mauvais arrangement vaut mieux qu'un bon procès*"), this because "a legal agreement is more acceptable and less dramatic". This is natural, as long as a free and mutual consent requires a higher degree of acceptance than in the case of imposing a legal order. Settlement of disputes by courts should be regarded as a last resort, for as long as the subjective law protection can be made by agreement of the parties.

Thus, the interest in the transaction agreement is not surprising at all, given the multiple practical needs it responds to, as this is a solution required in nowadays practice especially to avoid long delays and high costs associated with legal proceedings, i.e. removal of doubt as regards the legal proceeding result.

In UK, in the "Review of Civil Litigation Costs" carried out by Lord Justice Jackson, the Final Report issued in December 2009, included as recommendation the view that in general the *alternative dispute resolution (ADR)* has a vital role to play (Blake, Browne & Sime, 2011).

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The family of contracts related to the dispute resolution is substantiated by the following fact: “the contract/agreement and the trial should not exclude each other, but should be combined” (Clay, 2006).

The transaction agreement is often the result of a conciliation. Usually it is the result of the direct agreement of the parties, but it doesn't exclude, also, the presence, the activity of a mediator, that is a person specialized in conducting the mediation process.

2. Historical View on the Transaction Agreement. Roman Law

In relation to the terminology of the word "transaction", it comes from the Latin *transactio, onis*, namely derives from the verb *transigo, ere* which means "to carry to the end", "to settle a business", "to put an end to", hence the current meaning - the transaction puts an end of a misunderstanding, a dispute between the parties (Maurie et al., 2007).

In the Roman law, the transaction was an unnamed contract of the type "*do ut des*" (Deleanu&Deleanu, 2000), that according to its form, it might lead to the creation or extinction of obligations, i.e. the transmission of property rights. Hence the translative nature of the transaction recognized in the Roman law - "*transigere est alienare*", seen as a fair title (Prescurea, 1934).

So, in this matter, as in many others, we have to go back to the Roman law, where we find the title "*De transactionibus*", in Digeste (book II, title XV) (Tabary, 1863).

In the Roman law, two conditions had to be met for a transaction (Tabary, 1863): the parties to have made mutual sacrifices ("*sacrifices mutuels*") and the existence of *dubius eventus litis*, as the Roman legal experts called it. Thus, if one of the conditions was not met, there was no transaction.

The first condition, to require contractors to make mutual concessions, was indisputable in the Roman law, revealed by Law 38, Book II, Title IV, which provided: "*transactio nullo dato, vel retento, seu promisso minime procedit*" (Tabary, 1863). Therefore, one had to have something to give, retain or promise.

Also, for a transaction there must be a *dubius eventus litis*. The transaction of *res judicata* was null and void, because they talked about a completed, settled trial (Law 23, Book XII, Title VI). So the general rule was that *res judicata* could not be subject to a transaction (Tabary, 1863).

However, it does not mean that each time a legal court decision found a solution to a case, any transaction was impossible. If the validity, legality of the court order was challenged, they spoke about an obvious *res dubia* and thus the transaction could be concluded.

Next, to study the normative evolution of this type of contract, we consider necessary to make a historical and comparative foray, which reveals the fact that this legal instrument is and it was, at a large extent, favoured by different European countries legislation.

In this respect, we decided to follow three main areas of research in our approach: we shall firstly refer to the French regulatory model, we will next turn our attention to the British law, given the tradition of amicably dispute settlement concluded and then we'll make reference to the German law justified by the Roman – German closeness to France.

We must state from the beginning that the transaction is examined both in the special contracts doctrine and in the civil procedure specific doctrine, since when the transaction is judicial, this is set both in a contractual mechanism and a procedural incident.

«*Transaction*» in French law, «*compromise*», «*settlement*», «*agreement*» in British law, «*Vergleich*» or «*Prozessvergleich*» (compromise settlement) in German, the institution is widely known and its usefulness is increasingly more highlighted.

3. The French Regulatory Model

In the French law, the transaction is the subject of regulation of Title XV (*Titre XV*: «*Des transactionis*») of the Third Book of the Civil Code (*Livre III*: «*Des différentes manières dont on acquiert la propriété*»), the bases of materials being Art. 2044-2058¹.

In this context of analysis it is appropriate to refer to the circumstances that led to the regulation of this special agreement in the French law (Jemmaud, 2006). Thus, these provisions (Art. 2044-2058) were not included in the initial draft of the Civil Code, but to respond to the comments coming from legal courts, the editors had written these articles *in extremis*, getting inspired from the treaty «*The Civil Laws in their natural order*» written by Jean Domat.

It was noted that Jean Domat got away from the position inherited from the Roman law on the transaction, as it was regulated in the Justinian law. The conception mirrored in the paper *The Civil Laws in their natural order*, regarded the transaction as valid without being given or promised anything before. This is the explanation (Jemmaud, 2006) for which the legal definition of the transaction in the French law does not refer to how to achieve the transaction, namely to the mutual concessions. But mutual concessions, as part of the transaction results from Art.2048 which stipulates that the transaction contains a waiver of rights, actions and claims.

The transaction represents, therefore, the subject of provisions that the doctrine authors (Malaurie et al., 2007) qualified as "incomplete" and "empirical" since the main condition of the transaction qualification is missing from the definition. According to Art.2044 in the French Civil Code, a settlement is a contract whereby the parties end a *dispute* which has arisen or is about to arise („*La transaction est un contrat par lequel les parties terminent une contestation née, ou préviennent une contestation à naître*”).

However, since the first decades of the nineteenth century, thanks to a decision of 1818 of the Court of Appeal of Toulouse – the courts have endorsed this transaction condition, namely that of mutual concessions, that we find in the Roman law, but was neglected and even removed by Domat. The first decision of the Court of Cassation adopting the same position dates back to 1883 (Jemmaud, 2006).

According to Art. 2056 of the French Civil Code, the transaction is only possible as long as no final decree was ruled. Actually, it is possible to conclude the transaction even with regard to the enforcement of a decree. Although we might think that once the parties agreed to the terms of the settlement in a non-adjudicative process, there won't be difficulties as regard the enforcement of such an agreement, there are many cases that demonstrate the opposite.

Later, the French legislator interest for this type of agreement is reflected by adopting special laws favouring the transaction in various areas. For example, we mention here, the Law of July 5, 1985 relating to the compensation for damages suffered by victims of traffic accidents that stipulated in the insurer's charge the obligation to make an offer for compensation, which was qualified as a transaction offer, if the victim accepted it, the transaction became effective (Malaurie et al., 2007).

4. The Transaction in the British Law - Historical Aspects

The British law - whether it's the English or the American law - is traditionally favourable to alternative dispute resolutions (Blake et al., 2011) and particularly to the transaction between parties.

In 1996 was drafted the *Woolf's Report: Access to Justice*. This report criticized the excessive duration of trials, their high cost and the procedural terminology incomprehensible for the citizen².

¹ French Civil Code retrieved from <http://www.legifrance.gouv.fr/>, *Le service public de l'accès au droit*.

² Report retrieved from <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/reportfr.html>, Date: 12.12.2011.

In this Report, Lord Woolf wrote: “*My approach to civil justice is that disputes should, wherever possible, be resolved without litigation*”.

In order to achieve this goal, there were designed the so-called “Pre-action Protocols”, to facilitate the compromise/settlement between the parties. The glossary defines these as “statements of understanding between legal practitioners and others about pre-action practice and which are approved by a relevant practice direction”. So, it was noted (Grainger, Fealy&Spencer, 2000) that “their provisions are designed to encourage a sensible exchange of views and a pooling of information between the parties even before a dispute develops into litigation-all with the view to the promotion of early settlements or at least the minimization of expense through greater “focusing” on the real issues”.

The draft of the reform proposed for the British civil procedure, known as « *Woolf Reforms* » became a law: « *Civil procedure act* » was adopted in 1997; new rules of this procedure have been drafted and entered into force on April 26, 1999, along with the new « *Practice Directions and forms* ».

The civil procedure rules (CPR) cover a special part - *Part 36: "Offers to settle and payments into Court"*. These provisions allow both the applicant and the defendant to make transaction offers (*offer to settle*).

In its initial form, Part 36 of the CPR replaced the Order 22 of the Supreme Court Rules and the Order 11 of the District Court on payments made in court for prosecution of claims. The obligation to make payment in court for prosecution of claims was repealed during revisions that entered into force on April 6, 2007 (Foskett, 2010).

Regardless of these specific provisions of Part 36 of the Civil Procedure Rules, an amicable resolution of the dispute could be reached as follows: a simple transaction (*pure agreement*), by the expedient decision acknowledging the parties' settlement, rendered by the court record office (*judgment by consent*), by a certain decision called *Tomlin order* and, last but not least, by the two parties' waiving (divestment) the trial (Ferrand, 2006).

We find the transaction in the British legislation of the agreement/contract (referred to as « *compromise* ») as a legal instrument of general undeniable utility to avoid court proceedings. Moreover, in the British law, the legal basis for a "compromise" (transaction), legally established, is the common law of contracts.

In the British literature (Foskett, 2010), confirmed by the case law¹, the compromise or the settlement is regarded as representing the dispute settlement by mutual concessions, namely reaching an agreement and settling a dispute by mutual concessions.

Referring to the disputed rights, the British theorists (Foskett, 2010) make a clear separation between the *actual dispute*, the *potential dispute* and the *unarticulated dispute*. One example to illustrate the "implied settlement by transaction (*settlement implied*)" is represented by payment made by an insurer to an insured person who claimed payment under the insurance contract. The payment made by the insurer is generally regarded as a solution to the problem, even if there are possible debates on payment liability.

5. The Transaction in the German Law. General Issues

The judicial concept of "transaction" is defined also in the German Civil Code. The German Civil Procedure Code makes additional statements on the transaction signed or ascertained by a German court of law.

¹ Gurney v. Grimmer (1932) 38 Com. Cas. 12 at 18: “*when a matter has been compromised it assumes that a mutual concession has been made by both parties and that each party has got something less than he claimed*”.

Referred to as « *Prozessvergleich* », the legal transaction occupies a place of honor in the German law. The legal transaction is seen by the German doctrine and case law as a special type of transaction. The same applies to the settlement made by a lawyer on behalf of its client - (*Anwaltsvergleich*) (Ferrand, 2006).

The doctrine and the case law meet at a certain point, acknowledging the double nature of the legal transaction, both contractual and procedural: it is about a private contract (*privatrechtlicher Vertrag*) and a step in the proceeding (*Prozesshandlung*). The legal transaction (*gerichtlicher Vergleich, Prozessvergleich*) has the same effects of substantive law as the extrajudicial transaction (Ferrand, 2006).

The conclusion of a legal transaction is enabled by the civil procedure reform of July 27, 2001. Regardless the independent judge's initiative to attempt to reach an amiable settlement of the dispute, it is possible that the two parties submit a written transaction proposal.

The court ascertains by a legal order the existence and the content of the parties' settlement. Before, the judge was supposed to hold a hearing to prepare the minutes of the transaction between the parties, while, along with the reform of 2001, the parties may also complete a transaction by simply submitting conclusions in this regard (Ferrand, 2006).

With regard to the legal definition of the transaction in the German law, it says that it is a contract by which the dispute between the parties and their uncertainty as to their legal relationship is removed by mutual concessions (*gegenseitigen Nachgeben = mutual concessions*).

6. The Legal Notion of the Transaction Contract in the Romanian New Civil Code

The specialized literature (Deak, 2001; Dogaru, Olteanu & Săuleanu, 2009; Toader, 2008) has made some observations on the Article 1704 of the former Civil Code; thus the definition of the transaction contract was seen as incomplete, since the definition of the transaction omitted highlighting the specific difference (the actual way of achieving the transaction by mutual concessions) which individualizes this type of contract in relation to other legal documents concluded in relation to a dispute or to put an end to the parties' dispute.

Although the legal definition of the transaction has not provided mutual concessions, the fact that they were legal means by which transactions were made could be inferred from the interpretation of Art. 1709 of the Civil Code that reminded about «waiving all claims and actions», without specifying the mutual nature of such «waiving».

This requirement of «mutual concessions» was imposed by the case law¹ that ruled in the sense that in the limits of civil procedure, the transaction is the agreement or the legal agreement of the parties, in order to put an end to an existing process by which the parties make mutual concessions, waiving certain rights or stipulating new claims.

The Romanian legislator endorsed all the critical comments we referred to above 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 (Moțiu, 2010):

- 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;

¹ Recently Î.C.C.J. (Romanian Superior Court of Justice), civil section, Decision no. 3256/22.05.2008, retrieved from <http://www.scj.ro/>, Date: 15.12.2011

3) the existence of mutual concessions, mutual waiving rights or transfer of rights.

In Romanian doctrine (Pop, 2006), after examining the jurisprudence/case law, there have been given examples when disputes of rights can arise-cases in which the defendant adopts at least one of the following three attitudes:

- he challenges the legal basis of the right invoked by the claimant;
- he challenges the content of the right or its existence;
- he claims that the right doesn't exist anymore as it was extinguished by one of the means of extinguishing the obligations.

The cause/scope of concluding the transaction contract is the parties' intention to prevent or to extinguish the dispute between them, and is generally presented as one of the defining elements of this kind of agreement.

Referring to the significance of the third element characteristic of a transaction-the mutual concessions-the case law held that it means mutual waivers of claims or new benefits promised by one of the parties in exchange of the other's part waiver to the disputed right¹.

There can be encountered a variety of mutual concessions given the contractual freedom of the parties. We should be satisfied, therefore, to let open the question to know exactly in which consist these mutual concessions, in order not to limit it in theory, as the transactional freedom shouldn't be restricted too much, at least by the private law.

Our option will be to maintain the flexibility of the mutual concessions concept, as it was decided by the French doctrine (Fages, 2006).

7. Conclusions

The Alternative Dispute Resolution, whose pattern is the transaction contract, is an instrument, worth to be considered in order to capitalize the rights in optimal conditions. The practical importance of the transaction was explained through the function performed by this legal instrument. On the one hand, a transaction operates as a practical, economic measure by which the parties may be exempt from expenditure and loss of time inherent to trials, and 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.

This study contributes to knowledge of the defining aspects of the transaction agreement, from a comparative view, following its normative evolution, crystallization of the legal concept.

The comparative analysis of the legal regulation of the transaction concludes that this is an instrument recognized even by the Roman law, which is favoured currently by the legislation of many European countries.

On the legal definition action, the conclusion is that the legal definition must highlight the specific difference, the one individualizing the transaction agreement in relation to the family of legal contracts concluded in relation to the dispute, which was made by the New Civil Code legislator; also we have highlighted the transaction agreement specific issues.

¹ Craiova Appeal Court, civil section, Decision no. 8683/1999, in *Coduri adnotate. Codul civil*, vol. III (art.1405-1914)/*Annotated Codes. The Civil Code* (Terzea V.), Bucharest: C.H. Beck.

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