

CONSIDERATIONS REGARDING THE SPECIFICS OF THE TRANSACTION CONTRACT

I. NICOLAE

Ioana NICOLAE

Faculty of Law

“Transylvania” University of Braşov, Romania

*Correspondence: Faculty of Law, 25 Eroilor Blvd, Braşov, Romania

E-mail: ioana.nicolae@unitbv.ro

ABSTRACT

Transaction contract was and continues to be widely applied in legal life. The present study discusses the matters which particularize this contract in legal life, by analyzing its definition, its legal characters, by emphasizing the specifics of the validity conditions and the effects it generates.

KEYWORDS: *transaction, concession and mutual receding, prevention, ending litigation, validity conditions, effects.*

INTRODUCTION

According to article 2267 first alignment of the Civil Code, transaction is that contract by which the parties prevent or decide to end a trial, including in the phase of enforcement, by concession or mutual receding of certain rights or by the transfer of rights from one party to another. The definition of the transaction contract, points out the following issues:

- the parties aim to prevent or end litigation, which means that by concluding a transaction a trial can be prevented (thus we are in the presence of an extra judiciary transaction) or the transaction is concluded during the trial with the purpose of ending it (thus a judiciary transaction). In other words, transaction entails the existence of imminent/inevitable litigation or an already stated trial. At the same time, the parties' intention¹ is that of preventing or ending that particular trial. Transaction entails concession or mutual receding of rights or the transfer of rights from one party to the other. The text of article 2267 second alignment of the Civil Code states that by transaction the parties can create, modify or end different legal relations which are subject to litigation between the parties.

- judicial transaction can be concluded including in the phase of enforcement, thus also during trial, as well as in any phase of attack. If the transaction is concluded in the enforcement phase, we must mention that the transaction can't abolish the executed court decision; however, the parties will be limited to concluding a transaction in regard to the debt which is enforced.

1. JUDICIAL CHARACTERISTICS OF THE TRANSACTION CONTRACT

The transaction contract is particularized by the following legal characteristics²:

- it represents a mutual contract, as the parties have mutual and interdependent obligations through concession and mutual receding of rights or by the transfer of rights from one party to

¹ Doctrine appreciates that the parties' intention to end or prevent litigation, by concluding a transaction contract, represents the very essence of transaction. See R. Dincă, Special civil contracts in the new Civil Code, Universul Juridic Publishing House, Bucharest, 2013, page 294.

² G. Boroi, I. Nicolae in G. Boroi, M.M. Pivinceru, C.A. Anghelescu, B. Nazat, I. Nicolae, T.V. Rădulescu, *Civil law charts*, second revised and completed edition, Hamangiu Publishing House, Bucharest, 2017, page 682-683.

CONSIDERATIONS REGARDING THE SPECIFICS OF THE TRANSACTION CONTRACT

the other. Doctrine³ has stated that reciprocity of the effects of transaction is the essence of this contract, thus transaction is an essentially mutual contract.

- it is an onerous contract as both parties aim to obtain a patrimonial benefit by concluding the transaction, by avoiding trial or by preventing the continuation of a trial in return for any performance.

- it is a commutative contract as both parties are aware of the existence and extent of their obligation when concluding the contract

- it is an indivisible contract, as transaction is the result of a mutual concession and entails an indivisible connection between all the legal relations it entails, because it is indivisible in regard to its object.

- it is a consensual contract, as it is validly concluded by the simple agreement of the parties. According to article 2272 of the Civil Code, in order to prove a transaction, it must be concluded in writing. This means that it must be concluded in writing *ad probationem*⁴, and not *ad validitatem*. Thus, as a rule, transaction is a consensual contract; the exception is the case when transaction results in the transfer or creation of a real right on an immobile good⁵, as it requires the authentic form. Doctrine⁶ states that the notary act is only necessary in case of extra judiciary transaction, as in case of the judiciary transaction, the consent of the parties is regulated in the court decision, which is assimilated to an authentic act. This solution is erroneous⁷, as article 434 of the Civil Procedure Code states that the court decision has the proving force of an authentic act, thus the court decision is not assimilated to an authentic document in regard to all its effects (such as being a validity conditions for the conclusion of certain legal acts).

As a result, the authentic form is mandatory in case of the judicial transaction which results in the transfer or creation of a real right over an immobile good. According to article 439 of the Civil Procedure Code, judicial transaction is concluded in writing and it will form the actual content of the court decision. This court decisions is an executive title for all obligations which result from the transaction of the parties⁸.

2. SPECIFICS REGARDING THE VALIDITY CONDITIONS OF THE TRANSACTION CONTRACT

The special requirements for the conclusion of the transaction contract are the following: first, there must be a conflict of interest between the parties which could generate or has already generated litigation; second of all, the intention of the parties is to prevent litigation or end a pending trial; thirdly, the existence of mutual concession or mutual receding of rights or the

³ R. Dincă, Special civil contracts in the new Civil Code, Universul Juridic Publishing House, Bucharest, 2013, page 295.

⁴ The written form is necessary in order to provide proof of transaction during a trial which is much more difficult than the one the parties tried to avoid. R. Dincă, Special civil contracts in the new Civil Code, Universul Juridic Publishing House, Bucharest, 2013, pages 295-296.

⁵ According to article 1244 of the Civil Code, except for other cases stated by law, transactions must be concluded in authentic form, under the sanction of absolute annulment, in case they create or transfer real rights which are to be registered in the cadastral register.

⁶ See F. Moțiu, Special contracts, sixth revised and completed edition, Universul Juridic Publishing House, Bucharest, 2015, page 318 and R. Dincă, Special civil contracts in the new Civil Code, Universul Juridic Publishing House, Bucharest, 2013, page 296.

⁷ G. Boroi, I. Nicolae in G. Boroi, M.M. Pivinceru, C.A. Angheliescu, B. Nazat, I. Nicolae, T.V. Rădulescu, *Civil law charts*, second revised and completed edition, Hamangiu Publishing House, Bucharest, 2017, page 682-683.

⁸ See article 632 second alignment and article 633 second point of the Civil Procedure Code

transfer of rights between parties⁹. All these special requirements¹⁰ of the transaction contract are stated in article 2267 of the Civil Code.

In regard to the capacity of the parties of the transaction contract, article 2271 of the Civil Code states, that in order to conclude a transaction, the parties must have full capacity to exercise the rights which form the object of the contract. Those who do not have this capacity can conclude a transaction only under the conditions stated by law. The final thesis of this article refers to the people who don't have exercise capacity; in their case, the transaction will be concluded by their legal representatives in their name, with previous notice to the tutelary authority. Transaction can be validly concluded by proxy, provided there is special empowerment for this. Transaction entails waving a right, thus it is equivalent to disposition acts, even if transaction does not necessary entail alienation¹¹, as the parties must have full exercise capacity.

In regard to the consent of the parties, the general common law validity conditions must be respected (thus consent must come from a person with exercise capacity, it must be expressed with the intent of causing legal effects and it must be freely expressed)¹², as there are no specifics to point out. In this context, we must mention the provisions of article 2273 of the Civil Code, a text according to which transaction can be affected by the same annulment causes as any other contract. Given all these, it can't be annulled for an error of law regarding the issues which are the object of the parties' agreement, or for lesion. This matter will be separately analyzed when discussing the resolution causes of the transaction contract, in a separate study.

In regard to the object of the transaction, there are some more specifics as opposed to common law, as follows¹³:

- according to article 2268 first alignment of the Civil Code, civil status or civil capacity can't be subject to transaction (for example, the mother of the child can't recede the complaint for establishing paternity, the mother can't renounce the payment of child support which she owes to the child); also, certain rights of which the parties can't dispose of according to the law (such as successor procedures which have not begun) can't be subject to transaction.
- by exception, according to article 2268 second alignment of the Civil Code, the civil action which derives from committing a crime, thus preventing a separate trial for the awarding of damages can be subject to transaction.
- according to article 2270 first alignment, transaction is limited to its object; renouncing all rights, actions or claims extends only in regard to the cause which was the subject of transaction. This means that the effects of transaction are strictly limited to the object of litigation.

⁹ G. Boroi, I. Nicolae în G. Boroi, M.M. Pivinceru, C.A. Angheliescu, B. Nazat, I. Nicolae, T.V. Rădulescu, *Civil law charts*, second revised and completed edition, Hamangiu Publishing House, Bucharest, 2017, page 683.

¹⁰ Also see L. Stănculescu, *Civil law course. Contracts*, second revised and completed edition, Hamangiu Publishing House, Bucharest, 2014, page 466.

¹¹ Fr. Deak, *Civil law treaty. Special contracts*, Actami Publishing House, Bucharest, 1996, page 476.

¹² See G. Boroi, C.A. Angheliescu, *Civil law course. General part*, second revised and completed edition, Hamangiu Publishing House, Bucharest, 2012, page 138 and following

¹³ G. Boroi, I. Nicolae în G. Boroi, M.M. Pivinceru, C.A. Angheliescu, B. Nazat, I. Nicolae, T.V. Rădulescu, *Civil law charts*, second revised and completed edition, Hamangiu Publishing House, Bucharest, 2017, page 683-684.

CONSIDERATIONS REGARDING THE SPECIFICS OF THE TRANSACTION CONTRACT

- according to article 2270 second alignment, transaction regards only the cause which was the object of transaction, regardless of whether the parties manifested their intention by general or special expressions, or if their intention is clear from the content of the transaction. In regard to the cause of the transaction contract, it must exist, it must be licit, moral, it must obey the provisions of law and it must not defraud the interests of the parties' creditors. If transaction occurs during trial and the court believes the parties had an illicit or immoral purpose, the request for concluding a transaction will be denied and the trial will continue¹⁴.

3. THE EFFECTS OF THE TRANSACTION CONTRACT

According to article 2267 second alignment of the Civil Code, transaction can create, change or end legal relations which are different from the object of the parties' litigation. Thus, the results of the transaction contract can be extinctive, declarative, constitutive or translative or relative.

Extinctive effects consider the fact that after the transaction contract is concluded, the parties can't claim the rights which were subject of the transaction; if the rights in regard to which the parties concluded a transaction are later subjected to trial, the mandatory force of the contract can be invoked, regardless of whether the transaction was judiciary or extra judiciary¹⁵.

The declarative effects of the transaction contract occur as preexisting rights are acknowledged, thus no new rights are created¹⁶. The declarative effect generates¹⁷: the retroactive consolidation of the rights acknowledged by transaction; the party whose rights were acknowledged by transaction is not the successor of the other party in regard to these rights; in other words, the parties are not held to guarantee their acknowledged rights; transaction in regard to immobile goods is not subject to registration in the cadastral register.

The constitutive or translative effects of the transaction contract derive from the provisions of article 2267 second alignment of the Civil Code. As a general rule, the transaction contract has declarative effects; however if the parties state new obligations within their mutual concessions, the constitutive or translative effects occurs. These effects generate the following legal consequences: if the transaction states the transfer of rights between parties, the contract will only cause effect for the future, thus there is an obligation of guarantee as the person who acquires a rights is the successor of the other party in regard to that particular right; transaction which regards immobile goods is subject to authentic form and registration in the cadastral register.

The relative effects of the transaction contract consider the fact that it causes effects only in regard to the contracting parties, not in regard to third parties (*res inter alios acta*), according to the principle of the relativity of the effects of the contract. Transaction is not opposable to the people which acquired rights over the litigating good previous to the conclusion of the transaction. In other words, the retroactive character of the transaction can't be opposed to

¹⁴ See F. Moțiu, Special contracts sixth revised and completed editions, Universul Juridic Publishing House, Bucharest, 2015, page 321.

¹⁵ G. Boroi, I. Nicolae in G. Boroi, M.M. Pivinceru, C.A. Anghelescu, B. Nazat, I. Nicolae, T.V. Rădulescu, *Civil law charts*, second revised and completed edition, Hamangiu Publishing House, Bucharest, 2017, page 684. For the same opinion, see F. Moțiu, Special contracts sixth revised and completed edition, Universul Juridic Publishing House, Bucharest, 2015, page 322.

¹⁶ Similarly see Fr. Deak, Civil law treaty. Special contracts, Actami Publishing House, Bucharest, 1996, page 480.

¹⁷ Also see R. Dincă, Special civil contracts in the new Civil Code, Universul Juridic Publishing House, Bucharest, 2013, page 300.

third parties who acquired rights over the litigation good previous to the conclusion of the transaction.

CONCLUSIONS

The transaction contract, whether judiciary or extra judiciary, represents a widely applied contract in legal life, which is why the present study showed the particularities of this contract, in the new configuration of the Civil Code. The importance of this contract in ending or preventing a trial is uncontested, as the parties avoid costs, the arbitrary of a court decisions and it is also time economic, as it is a known fact that the duration of the trial is most times uncertain.

BIBLIOGRAPHY:

1. G. Boroi, M.M. Pivinceru, C.A. Angheliescu, B. Nazat, I. Nicolae, T.V. Rădulescu, *Civil law charts*, second revised and completed edition, Hamangiu Publishing House, Bucharest, 2017
2. R. Dincă, *Special civil contracts in the new Civil Code*, Universul Juridic Publishing House, Bucharest, 2013
3. Fr. Deak, *Civil law treaty. Special contracts*. Actami Publishing House, Bucharest, 1996
4. F. Moțiu, *Special contracts, sixth revised and completed edition*, Universul Juridic Publishing House, Bucharest, 2015
5. L. Stănciulescu, *Civil law course. Contracts*, second revised and completed edition, Hamangiu Publishing House, Bucharest, 2014
6. G. Boroi, C.A. Angheliescu, *Civil law course. General part. Second revised and completed edition*, Hamangiu Publishing House, Bucharest, 2012