

# OUT OF THE COURT SETTLEMENT IN RELATION WITH THE CHALLENGING IN COURT OF THE UNFAIR CONTRACTUAL TERMS

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## **Abstract**

*The purpose of this article is to analyse the problem of concluding a transaction agreement (Romanian language "contract de tranzacție") in relation with the unfair clauses which may occur in the contracts concluded between professionals and consumers. In this respect our purpose is to analyse, within this article, the current level of the doctrine in what concerns the transaction agreement, as this was regulated by the New Civil Code, as well as the possibility to conclude such contracts in relation with a contractual clause or a number of contractual clauses considered unfair. We will concentrate especially on the possibility to conclude a transaction agreement prior the identification of the clause subject to a possible dispute, which forms the object of the transaction agreement. The purpose of this analysis is to present an alternative method to safeguard the contract between the professional and consumer by the contracting parties themselves, contractual parties who better understand and represent the ways forward for the situations when unfair contractual terms occurs.*

**Keywords:** transaction, unfair clauses, contract safeguarding, void

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## **1. Legal background**

According to article no. 2267 of the New Civil Code the transaction is the agreement which may occur between the parties in order to avoid or put an end to a dispute, including during the enforcement procedure, following either of mutual concessions or the transfer of rights from a part to another.

The New Civil Code maintains the main solution regulated within article 1704 and the following of the 1864 Civil Code according to which the transaction involves the existence of a disputed right or at least an ambiguous right, materialized within a lawsuit brought in court or which may be brought in court. On the imminent character of the disputed right we will revert within our analysis.

As far as the applicability of the transaction, it may not concern the capacity of any of the parties or the marital status of it as well as the rights one may not dispose of, but the transaction may be concluded in relation with the civil rights arising from a crime

The transaction agreement shall be concluded in written form *ad probationem*. The conclusion of the transaction written form *ad probationem* shall avoid the situation when the evidences submitted during the lawsuit may lead to a more complicated lawsuit than the one the parties intended to avoid by concluding the transaction<sup>2</sup>. Therefore, the new regulation kept the mutual nature of the transaction, the written form regulated within article no. 2272 of the New Civil Code being required only *ad probationem*. Within the old regulation the written form of the transaction agreement was regulated not *ad solemnitatem*, but as the will of the legislator to reject the possibility of using the testimony even in relation with the transactions which passed the legal threshold<sup>3</sup>. The prior legal doctrine stated that the simple denial of the signature of one of the parties of the transaction agreement might be proven by any evidence, based on the fact that in this case the parties do not intend to prove the transaction itself but its veracity<sup>4</sup>.

An extremely important element regulated by the New Civil Code as far as the transaction is concerned and which was not expressly regulated within the old regulation, but constantly stated by

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<sup>2</sup> Fr. Deak, *Tratat de drept civil, Contracte speciale*, Ed. Universul Juridic, Bucharest, 2001, p. 606

<sup>3</sup> Dimitrie Alexandrescu, *Explicațiunea teoretică și practică a dreptului civil român*, Tomul X, Ed. Atelierere grafice Socec & Co. Societate Anonimă, Bucharest, 1915, p.204

<sup>4</sup> Ibidem

the legal doctrine<sup>5</sup> is represented by the mutual concessions the parties must make to each other within the transaction agreement. These concessions emphasise the synallagmatic character of the transaction agreement and the fact that the termination of the transaction agreement shall be submitted to the provisions applicable to synallagmatic agreements (e.g. the non-performance exception). By concluding a transaction the parties give up the lawsuit against the other part. Given the context, the uncertainty character which characterise the transaction agreement may lead to a doubt as far as the obligations of the parties are concerned or the obligations the parties gave up. The doubt is emphasised by the fact that in case of a lawsuit one may not be certain in relation with the part who may lose and the one who may win. This aspect may especially be seen within the lawsuits that involve the agreements concluded by and between professionals and consumers. Therefore, within a transaction agreement one may not asses on the amount of concessions the parties make. In relation with the mutual concessions we will revert within our analysis.

## 2. The imminent character of a disputed right

As far as the disputed right is concerned, the French legal doctrine has stated that “the litigation is in heart of the transaction”<sup>6</sup>. However, the disputer right may not have yet given a lawsuit but it shall effectively exist. The lawsuit might be on the way to be brought in court but the disputed right must be actual. Therefore, in case the object of the transaction agreement is a future and eventual right, the agreement is null and void for the lack of object, and the nullity is in fact a non-existence<sup>7</sup>. In order to emphasise the importance of the existence of the disputed right<sup>8</sup> an author has stated that it represents „a defining cause” of a transaction agreement.

The Romanian legal doctrine<sup>9</sup>, started with the interpretation from the doubtful character of the right on which the parties have concluded the transaction. The assessment whether a right, object of a transaction, is doubtful or not, is a matter of fact which shall be appreciated by the courts.

From our point of view, it is sufficient that the right which is object of a transaction exist only the in personal representation of the parities at the date the transaction is concluded, otherwise many of the transactions would have no object. Therefore, each time the parties conclude a transaction agreement in relation with the possibility of bringing in court some of the clauses considered as unfair which may occur in the contracts concluded by and between professionals and consumers, such transactions shall be valid due to the fact that even if, in fact the clauses are not unfair and they may not be brought in courts, the parties are entitled to consider it as being unfair due to the courts practice. Last but not least the purpose of the transactions is to solve by mean of mutual concession of the parties a dispute and avoiding a lawsuit which might have a negative impact for both parties. Therefore, the transaction represents an alternative of private justice regarding the problems which might arise in relation to different rights of the parties.

In conclusion, in the consideration of the above mentioned aspects, a transaction might be concluded in relation to any patrimonial right, pure and simple rights (Romanian language ”drepturi pure si simple”), conditional rights (Romanian language ”drepturi conditionale”), eventual rights (Romanian language ”drepturi eventuale”), rights under terms (Romanian language ”drepturi afectate de termen”) etc. as long as there is no legal provision regulating otherwise.

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<sup>5</sup> Ibidem

<sup>6</sup> Philippe Malaurie, Laurent Aynes, Pierre – Yves Gautier, *Drept Civil. Contractele Speciale*, Wolter Kluwert Romania, București, 2009, Coordinator of the Romanian edition lawyer Marius Șcheaua, translation Diana Dănișor.

<sup>7</sup> Cass civ. 1er, 3 februarie 2004, Bull. civ. I. no 30.

<sup>8</sup> L.Boyer, *La notion de transaction*, Toulouse, Sirey, 1947.

<sup>9</sup> Dimitrie Alexandresco, *Explicațiunea teoretică și practică a dreptului civil român*, Tomul X, Ed. Atelierere grafice Socec & Co. Societate Anonimă, Bucharest, 1915, p. 193.

### 3. The transaction of a null and void deed

Article 2274 of the New Civil Code regulates the particular elements of the nullity of a transaction concluded in order for a null and void title to be executed. It is null and void the transaction concluded for the execution of a deed that is null and void, except the case when the parties concluded a transaction expressly on the nullity. According to the last thesis of the above mentioned article the legislator allowed to the parties, as it was allowed under the previous regulation, to conclude a transaction in relation with a nullity clause even for the cases where we have absolute nullity.

The question regarding the transaction in relation with a null clause resides in the fact if such transaction may be concluded at the moment the initial contract is concluded or if the transaction can only be concluded following the establishment of the nullity by a competent court.

For the purposes of the analysis it shall be mentioned that in case some of the clauses concluded between professionals and consumers are unfair they are null and void<sup>10</sup>. Consequently, in case there are unfair clauses, the provisions of article no. 2274 para. (1) of the New Civil Code are applicable as far as the transaction is concerned, while the provisions of para. (2) of the same article is applicable only in relation with relative nullity<sup>11</sup>.

According to the above mentioned, we may assess that the transaction may be concluded both at the date the null and void deed is concluded and subsequent during the judgement (at the date the nullity is established or subsequently).

Firstly, when the transaction agreement is concluded from the beginning of the contractual relation between the professionals and consumers, within the clauses of the transaction it must be mentioned that it refers to null and void clauses. From our point of view, the parties within the transaction shall not necessarily expressly mention the clauses the transaction refers to, but it is enough that the parties consider some of the clauses might at a certain moment be considered unfair and, therefore they are considered null and void. The parties doubt might be based either on the courts practice or the lack of clarity of the law. From our point of view, there shall be no problem when, within the preamble of the transaction agreement, the parties state the cause of the agreement as follows: "considering that the jurisprudence in relation to the risk commissions is not unified as well as the fact that the current legislation is not establishing in a sufficient manner the limit between the abuse and acceptable of such commission the parties have decided to conclude the present transaction in relation to the clause...". By using such a clause the parties may partially avoid the interpretation that the transaction has no object and underline the doubt as a condition of the transaction that the parties have taken into consideration.

As far as the concessions the parties may make at that moment, are concerned, these may start with the renegotiation of the clauses of the agreement and providing favourable conditions for the consumer or even the exclusion of the unfair clause from the agreement. Therefore, the parties may achieve by mean of transaction almost the same objectives that might be achieved within a lawsuit but avoiding the costs that such a procedure might involve.

Moreover, even though the New Civil Code did not regulated identically as the article no. 1708 of the previous regulation, we may assess that the transaction agreement might regulate a penalty clause for the situation when one of the parties do not fulfil their obligations arising from the transaction agreement. The transaction agreement might be cancelled with the fulfilment of the same decisions as any synallagmatic contract (e.g. the non-performance exception).

Secondly, when the transaction agreement is concluded during the lawsuit the second situation regulated by article 2267 of the New Civil Code is applicable. We mentioned that the acceptance by one party of the position expressed by the other in a law suit or the cancelation of the law suit is not a transaction but a unilateral decision of its author. The difference between the above mentioned

<sup>10</sup> Decision no. 686 dated February 21, 2013 pronounced in the appeal of Section II of the Civil High Court of Cassation and Justice.

<sup>11</sup> Flavius-Antoniui Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *Noul Cod Civil – Comentariu pe articole*, Ed. CH Beck, Bucharest, 2012.

procedures and the transaction agreement is that in case the parties agree to conclude a transaction they make mutual concessions to each other in order to end the lawsuit.

As long as the New Civil Code allow the parties to conclude a transaction in relation with a null and void clause, the conclusion of a transaction agreement in relation with unfair clauses within the agreements concluded by and between professionals and consumers could not be considered a breach of the law.

#### 4. Conclusion

In conclusion, the transaction agreement might represent an alternative to lawsuits that are more and more often between professionals and consumers. The sanctions against the unfair clause intend to protect the consumers' rights in relation with the professionals that are supposed to have a superior economic position. However, the annulment of some of the clauses in the agreements might, in certain situations, may create a worse situation for the consumer. By mean of the transaction agreement, even though the consumer give up the right to bring the situation in court, he might have a more favourable situation by mean of better conditions or the exclusion of the unfair clause. Furthermore the consumer may acquire an additional instrument in its relation with the professional and eventually a compensation for the cases when the professional refuses to engage negotiations/to suspend the effects of a certain unlawful clause.

*De lege ferenda*, we consider that the problem of concluding a transaction for safeguarding purposes has to be expressly regulated by the legislator otherwise existing the risk for such a mechanism to be used in an abusive manner by the professionals in their relation with consumers.

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