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Revista de Ciências Jurídicas
e-ISSN: 2317-2150
Universidade de Fortaleza

The transaction or the game of autonomy to avoid conflicts[1]

La transacción o el juego de la autonomía para sortear conflictos

A transação ou o jogo da autonomia para evitar conflitos

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Abstract:

Autonomy is today one of the most popular legal concepts in relation to the person (being classified as private, individual or even personal, as mentioned on numerous occasions in the reform of the Spanish legal system carried out by Law 8/2021). From a critical perspective, this paper analyzes the legal-private regulation of the transaction in Spain (with some reference to the Brazilian regulation) as an expression of autonomy and an institute of substantive law through which possible controversies between the interested parties are avoided or resolved, contributing, in this sense, the main criteria, both traditional and modern, outlined by the doctrine and jurisprudence around the figure examined.

Keywords: transaction, concept, regulation, elements, classes, effectiveness, challenge, autonomy, process, jurisprudence, doctrine.

Resumen:

La autonomía es hoy uno de los conceptos jurídicos en alza que cuenta conmayor auge en relación con la persona (siendo calificada de privada, individual o incluso personal, tal y como se menciona en numerosas ocasiones en la reforma del ordenamiento jurídico español llevada a cabo por la Ley 8/2021). Bajo una perspectiva crítica, este estudio analiza la regulación jurídico-privada de la transacción en España (con alguna referencia a la regulación brasileña) como expresión de autonomía e instituto de derecho sustantivo a través del cual se evitan o resuelven posibles controversias entre los interesadosaportando, en este sentido, los principales criterios, tanto tradicionales como modernos, esbozados por la doctrina y la jurisprudencia en torno a la figura examinada.

Palabras clave: *transacción, concepto, regulación, elementos, clases, eficacia, impugnación, autonomía, proceso, jurisprudencia, doctrina.*

Resumo:

A autonomia é hoje um dos conceitos jurídicos mais populares em relação à pessoa (classificada como privada, individual ou mesmo pessoal, como mencionado em inúmeras ocasiões na reforma do ordenamento jurídico espanhol realizada pela Lei 8/2021). A partir de uma perspectiva crítica, este estudo analisa a regulamentação jurídico-privada da transação na Espanha (com alguma referência à regulamentação brasileira) como uma expressão de autonomia e um instituto de direito substantivo por meio do qual possíveis

[1] Texto traduzido a partir de Inteligência Artificial.

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controvérsias entre as partes interessadas são evitadas ou resolvidas aportando, nesse sentido, os principais critérios, tanto tradicionais quanto modernos, delineados pela doutrina e jurisprudência em torno da figura examinada.

Palavras-chave: *transação, conceito, regulamentação, elementos, classes, eficácia, impugnação, autonomia, processo, jurisprudência, doutrina.*

1 Introduction

There is no doubt that the jurisdictional route – a heterocompositional formula par excellence – symbolises the most common channel for resolving possible intersubjective conflicts in close connection with the fundamental right to effective judicial protection and the prohibition of defencelessness (art. 24.1 Spanish Constitution[2] – CE-), so that the judicial authority – as an organ of the state power that intervenes and exercises, exclusively, the judicial function (art. 117.3 CE) turns out to be, in theory, a neutral third party devoid of any interest in the matters submitted to it that -after initiating the pertinent process- resolves the dispute of interests deduced thanks to the issuance and, where appropriate, subsequent execution of the appropriate decision. In fact, the Spanish legislator is currently immersed in the task of defining the contours of the transcendental right of defence integrated in the aforementioned constitutional precept and its possible guarantees, having approved, to this effect, a recent Draft Organic Law (LO) on the Right of Defence[3]that is still in the period of amendments and whose main guidelines could be summarised in the following five:

1) Free access to the courts of justice, to a trial without undue delay, to have a congruent and law-based decision issued by the ordinary and impartial judge predetermined by law, as well as the invariability of final decisions and their execution in their own terms.
2) With regard to criminal cases, in particular, the obtaining of a right of defence integrates, of course, the right to be informed of the accusation, not to testify against oneself, not to confess guilt, to the presumption of innocence and to a second hearing.
3) That the procedural rules effectively safeguard the equality of the litigating parties.
4) To make the use of electronic means in the activity of the courts and, in general, in that of the rest of the public administrations compatible with the effective exercise of the right of defence.

[2] On this precept in question, see De Las Heras García, 2018, p. 52-60.
[3] Official Gazette of the Spanish Parliament, Congress, XIV Legislature, series A, no. 152-1, 14 April 2023 (121/000152 Draft Organic Law on the Right of Defence).

5) That the foregoing guidelines are applied, with their particularities, to the right of defence when it is exercised before the different administrations, in arbitration proceedings, or, where appropriate, in other alternative means of dispute resolution other than the judicial one (such as mediation or a conciliation file).

In the legal-private sphere, civil proceedings[4] have long been conceived as a matter for the parties -*Sache der Partein*- by virtue of the dispositive principle (art. 19 Law 1/2000, 7 January, on Civil Procedure[5] -LEC-) there are other institutes aimed at achieving legal peace other than the process, aimed precisely at avoiding it – encompassed, with better or worse luck, under the acronym ADR, that is, *Alternative Dispute Resolution*- and that embody alternative models to try to remedy heterogeneous interpersonal controversies, constituting, in reality, optional deconflictive or social pacification options undertaken, at least, by virtue of a previous pact or contract. Consequently, the State also tolerates that citizens can resolve certain and eventual disputes by resorting to other institutes, among which, of course, mediation as a self-compositional formula and arbitration as a heterocompositional model stand out,[6]which reveals, on the one hand, the long-awaited impulse in the resolution of conflicts that tends to favor extrajudicial and simultaneous compromises. on the other, a clear crisis and incapacity of the ordinary justice system to embody such legal instruments, in the last instance, a residual solution – "reserved, if not series B" (Taruffo, 1999, p. 316) – with respect to the effective judicial protection of the rights and legitimate interests established in the aforementioned art. 24.1 CE.

In this study we will focus on the transaction as one of the mechanisms of a business nature that seeks to avoid a lawsuit or, if it has been initiated, to put an end to it through the

[4]It should be remembered that the word "procedure" is not exclusive to the judicial field because it refers to the form and this exists in any legal activity, on the other hand, the term "process" is characteristic and unique to judicial action, hence the jurisdictional function is exercised only through the process, that is, if there is no process there is no exercise of jurisdiction.

[5] "1. Litigants are entitled to dispose of the subject matter of the lawsuit and may waive, desist from the trial, acquiesce, submit to mediation or arbitration and settle on what is the subject of the same, except when the law prohibits it or establishes limitations for reasons of general interest or for the benefit of a third party. 2. If the parties seek a judicial settlement and the agreement or arrangement reached is in accordance with the provisions of the previous paragraph, it shall be approved by the court hearing the dispute to be terminated. 3. The acts referred to in the preceding paragraphs may be carried out, depending on their nature, at any time during the first instance or the appeals or the execution of a judgment. 4. Likewise, the parties may request the suspension of the proceedings, which shall be agreed by the Legal Counsel for the Administration of Justice by decree provided that it does not harm the general interest or third parties and that the period of suspension does not exceed sixty days".

[6] By way of example, it is worth noting the recent celebration of the First World Summit on Business Mediation (Valladolid, Spain, 25 and 26 May 2023) organized together with the Spanish Mediation Center of the Spanish Chamber of Commerce, the European Group of Judges for Mediation and the Inter-American Arbitration Commission, seeming that, with this, other figures such as conciliation and, of course, settlement are undervalued.

consensus or agreement of the parties involved in the controversy or controversy in question, that is, through the game of negotiating autonomy. private, individual or, if preferred, personal of the contracting parties (principle of freedom in contracting of art. 1255 CC [7]– in a similar line art. 421 Brazilian CC[8]-).

2 The transaction in the Spanish Civil Code and its requirements

In a brief summary, it is worth remembering that in classical Roman law, the*transactio was equivalent* to the obligatory agreement by which the parties confronted by a dispute ended it, through reciprocal concessions, either by resolving certain doubtful or litigious aspects or even by resolving their differences in order to dispense with future lawsuits[9]. On certain occasions the transaction was identified with a specific cause of abstract business whose execution required*mancipatio* or *traditio* (in the case of bilateral waivers on goods) or *stipulatio* (in matters of obligations), while at other times it appeared to be equated with a concrete hypothesis of the *pactum de non petendo* (in particular, as a waiver pact - permitted by the praetor - which granted the injured party the right to *exceptiopacticonventi*). This *transactio* was not considered an independent figure so that its safeguarding was carried out, exclusively, by means of the *exception, although* at the end of the classical stage the use of the *condictio* would be admitted, in the face of the non-observance of a *datioobtransactionem*. However, since the fourth century, the *pactumtransactionis emerged* as a written contract – writing then constituting a necessary or mandatory formality in Justinian law – subsequently being placed among the innominate contracts preserved by the *actiopraescriptisverbis* in postclassical-Justinian law (Torrent Ruiz, 2005, p. 1370-1371).

The transaction contract is regulated, under the heading "Transactions", in Chapter I (arts. 1809 to 1819), Title XIII, Book. IV Spanish Civil Code (CC) being defined in the first precept as the one by which the parties "... by giving, promising or withholding something, each one

[7] "The contracting parties may establish the pacts, clauses and conditions that they deem convenient, provided that they are not contrary to the law, morality or public order."

[8] "The freedom to contract will be exercida in reason and the limits of the social function of the contract".The Brazilian CC turns out to be, after the Argentinean one of 2015, the most modern in all of Latin America in which the contract is no longer only a tool to satisfy private interests but also serves to protect and promote collective interests under the influence of constitutional principles, being, in particular, a CC characterized by its social sense – abandoning the strict individualistic sense that informed the previous CC 1916 – its three great inspiring principles: ethics, sociability and operability (Momberg Uribe, 2014, p. 162-165).

[9] However, the *transactio* relating to *res iudicata* became invalid and, even, the so-called *transactio post litemcontestatumno ceased to raise numerous questions.*

avoids the provocation of a lawsuit or puts an end to the one that had begun"[10]; being conceptualized by jurisprudence -since ancient times- as that contract by which the interested parties themselves, by common agreement, grant reciprocal concessions (STS 8 May 1920) on rights that they believe they are assisted with regarding certain legal relationships, in order to get out of its uncertainty and put an end to a pending process or likely to be raised by identifying, in similar terms, as "... a dispositive agreement by means of which, and through reciprocal benefits and sacrifices, pending and future lawsuits are eliminated and also the uncertainty of the parties about a legal relationship that, by means of an agreement, takes on a certain and binding configuration".[11] It is, in short, a type of contract aimed at settling a legal dispute, which has arisen between the parties and without submitting it to the courts, by means of an agreement – called, therefore, a "settlement agreement" – in which each of them sacrifices something in its claim and in which the situation arising from said agreement is recognised as obligatory (Moreno Trujillo, 2022, p. 561).

From such definitions it is clear that we are in the presence of a consensual contract (perfected by the mere consent of the interested parties), bilateral, reciprocal or synallagmatic (as it requires a mutual sacrifice of the parties in their claims, so that if one of them cedes something without receiving any concession we would be, at most, in the presence of a trespass, a waiver or a donation, but not of a transaction) and, of course, onerous (given the unavoidable and reciprocal inter *partes sacrifice* that it implies) being based on the reciprocal concessions of the parties in order to achieve an agreement that resolves their differences (*aliquiddatum, aliquidretentum*) which prohibits it from being qualified as a "... pure and simple abdicative waiver of rights"[12] or, even, as a forgiveness or forgiveness of debt[13], not even specifying that there is a true equivalence between the reciprocal concessions of the parties nor that they always have a patrimonial nature, it being sufficient that they have a "... exclusively moral content".[14] The disputed legal relationship is erected in the presupposition of the transaction, although there is no lack of authors who criticise the excessive permissiveness of Spanish jurisprudence in this regard and, therefore, when the requirement of the situation of controversy is interpreted in a

[10] On the other hand, "Da Transação" is disciplined in articles 840 to 850 of the Brazilian Civil Code (Lei n. 10.406, 10 janeiro, 2002), limiting itself to pointing out the first of its precepts that "It is lawful for the interested parties to prevent or terminate litigation by means of mutual concessions".

[11] SAP Badajoz n. 258/2022, 4 November, Section 3, Matías Lázaro (JUR 2022\375848), Legal Basis (FJ) 2º, reproducing STS 1997/7073.

[12] STS n. 929/2000, 11 October, 1st Chamber, Gullón Ballesteros, FJ 2º, *in fine* (RJ 2000\9193).

[13] Same previous Supreme Court, FJ 4º.

[14] STS n. 685/2001, 30 June, 1st Chamber, De Asís Garrote, FJ 2º (RJ 2001\4982). On the contrary, reducing its operability, it establishes art. 841 of the Brazilian Civil Code: "Only a direitos patrimoniais of a private nature is allowed to transação".

broad and flexible sense, there will hardly be any conventional legal relationship that cannot be conceptualised as a transaction (Carrasco Perera, 2001, p. 2040-2041).

In connection with this, the SAP of Murcia n. 179/2016, 13 September, Section 5, Nicolás Manzanares (JUR 2016\241699), FJ 2º, citing numerous pronouncements, reiterates that the transaction includes any "... a dispositive agreement by which, and by means of reciprocal benefits and sacrifices, pending or future lawsuits are eliminated" emphasizing that, in particular, the out-of-court settlement is a true contract and, therefore, creates an obligational bond, subject to the general rules of the contract (essential elements, effects it produces, possible ineffectiveness, etc.) without those obliged to comply with it being able to "..."exhume agreements or clauses, vices or defects, positions or circumstances affecting the legal relationships whose collision or uncertainty generated the transactional agreement"... which means absolute respect for the new situation and scrupulous compliance with the obligations assumed". This same resolution highlights the main lines marked in this regard by the Civil Chamber of the Supreme Court, including the following three as jurisprudential requirements of the settlement:

a) The existence of a subsisting legal relationship between the parties on which there is uncertainty, disagreement, doubts or disputes about the rights, positions or claims of the parties; although some authors consider that the disputed relationship should not be merely doubtful -*res dubia*- (Albaladejo, 2003, p. 846).
b) The intention of the contracting parties to put an end to such uncertainties by establishing their respective rights by terminating the litigation they have been maintaining or, at least, with the desire or desire -*timorlitis*- to avoid the provocation of the lawsuit -even if its initiation is not imminent-. This is intended to transform or novate the disputed and uncertain relationship for another consensual and certain one.
c) The well-known and reciprocal concessions of the interested parties (which will consist of giving, promising or withholding something).

Precisely, the objective pursued by the transaction will be to eliminate the controversy that distances or keeps its participants in dispute, which is why this type is configured as a self-composed remedy for the resolution of the conflict by the contracting parties themselves, being considered, in a similar way to the contract for arbitration, as a contract in which the decision of a dispute operates as a cause. a contract aimed at excluding legal uncertainty, a contract on rights of waiver or guarantee and of affirmation and clarification of rights (Castán Tobeñas,

1981, p. 12-16). Consequently, it is a legal transaction[15] resolving legal disputes that, as we have warned, is based on the principle of private autonomy of the intervening subjects, that is, on the "complex power recognized to the person for the exercise of his faculties, either within the scope of freedom that belongs to him as a subject of rights, or to create rules of conduct for oneself and in relation to others, with the consequent responsibility as an action in social life" (De Castro y Bravo, 1967, p. 12, alluding to its etymological root "nomos = law; autos = own, same"). In this way, the object of the transaction, as a contract aimed at the settlement of a dispute, is a disputed material legal relationship or situation whose cause lies in the composition of the disputed interests and produces the effect of converting *the* res dubia *into a certain*, for which "... erases the past and is the source of a new legal relationship, as well as, by giving another content to the disputed legal relationship, the compromisers are obliged to perform the services in which the reciprocal concessions agreed by them were materialized".[16]

Regarding its nature, it is still debated in the doctrine whether the transaction constitutes an attributive or transferable act (that is, whether it attributes or transfers to each contracting party the rights that, through it, are awarded) or whether, on the contrary, it turns out to be a merely declaratory act of rights (that is, whether it is limited to declaring which of the disputed rights belong to each of the participants). The majority of scholars consider the transaction to be a merely declaratory act – which is also verified by Article 843 of the Brazilian Civil Code[17] – without prejudice to the fact that it contains transferable clauses in such a way that, among other aspects, it will not serve as a prescriptive title with respect to the usucapion (since it must be the original title of the disputed right) nor will there be any room for the reciprocal remediation of the rights recognized or declared (Castán Tobeñas, 1981, p. 807-808; Díez-Picazo; Gullón, 1990, p. 497, although Moreno Trujillo, 2022, p. 566, considers that remediation by eviction has a place in the "complex" transaction, not in the "pure" one), although some authors maintain that the so-called "complex" transaction will always be transferable while the "pure" one may be attributive or declaratory (Albaladejo, 2003, p. 848-849).

[15] As is well known, the institution of the "legal business" was not included, in general terms, in the Spanish CC, turning out to be the work of German doctrine (*Rechtsgeschäft*) and was later accepted by Italian and Spanish jurisprudence and doctrine. The legal transaction encompasses very different figures (marriage agreements, marriage, will, adoption, recognition of a child, etc.) although in the Spanish CC there is no doubt that the most complete regulation of the "legal business" is found in that of the contract.

[16] SAP A Coruña n. 137/2020, 27 May, Section 3, Fernández-Porto García (JUR 2020\217786), FJ 8º, referring to copious jurisprudence of the Civil Chamber of the Supreme Court.

[17] "The transaction interprets restrictively, and by it is not transmitted, as soon as it is declared or reconcognized direitos".

3 About its elements

We can synthesize the elements of the transaction by distributing them into three groups:

I.- Personal elements: That there will be, at least, two contracting parties (art. 1254 CC or arts. 427 and 840 Brazilian CC). In general terms, the CC is silent on the capacity required to compromise, although some of its precepts reveal that it will be necessary to alienate (arts. 1810 and 1812 CC according to the apothegm *transigereest alienare*) and, therefore, the parties must have the capacity to dispose of the disputed legal relationship (Díez-Picazo; Gullón, 1990, p. 493), also requiring a special power of attorney in the event that the contract is entered into by means of voluntary representative (art. 1713, paragraph 2, CC and art. 25.2.1 LEC[18]). The CC, however, includes certain rules for three specific cases:

- With respect to the assets and rights of children subject to parental authority, the same rules will be applicable to compromise as to alienate them (art. 1810 CC), bearing in mind art. 247 CC[19]with respect to emancipated minors (amended by Law 8/2021, 2 June, reforming civil and procedural legislation for the Support of people with disabilities in the exercise of their legal capacity -LAPD-).

- The guardian and the representative curator will require judicial authorization to settle on issues related to the interests of the person whose representation they hold, except in matters of little economic relevance (art. 1811 CC with new diction given by the LAPD).

- Corporations with personality will need to observe their own form and the requirements provided for the disposal of their assets (art. 1812 in connection with art. 38 CC) cohabiting, cohabiting some particular provisions for specific cases[20].

Apart from such hypotheses, in the specific event that the transaction is entered into between a trader and a consumer, the provisions of its specific regulations must be followed, in particular, in Law 7/1998, of 13 April, on general conditions of contract or in Royal Legislative

[18]"... 2. Special power of attorney shall be necessary: 1º For waiver, settlement, withdrawal, acquiescence, submission to arbitration and statements that may entail dismissal of the proceedings due to extra-procedural satisfaction or supervening lack of purpose".

[19] Paragraph 1 of which states: "Emancipation entitles the minor to govern his person and property as if he were an adult; but until he reaches the age of majority, the emancipated person may not borrow money, encumber or alienate real estate and commercial or industrial establishments or objects of extraordinary value without the consent of his parents and, in the absence of both, without that of his legal counsel...".

[20] By way of example, it is worth mentioning art. 31 of Law 33/2003, 3 November, on the Assets of the Public Administrations: "It may not be settled judicially or extrajudicially on the assets and rights of the State Patrimony, nor may disputes arising over them be submitted to arbitration, except by means of a royal decree agreed in the Council of Ministers, at the proposal of the Minister of Finance, following the opinion of the Council of State in plenary".

Decree 1/2007, of 16 November, approving the Revised Text of the General Law for the Defence of Consumers and Users and other complementary laws (TRLGDCU), in particular, to the contractual guarantees recognised for the sake of consumer protection and, above all, in relation to unfair terms and transparency control affecting, in particular, the so-called "vulnerable consumer".[21] Under this prism, STS n. 205/2018, 11 April, requires – in the event of a transaction entered into between a commercial company (entrepreneur) and a consumer (customer) to try to remedy the ineffectiveness of a previous usurious contract – that the consumer has real knowledge of the economic and legal scope of the transaction, that he renounces in writing the possible exercise of civil actions and that the characteristics of the agreement reached are delivered to him in physical or digital format. informing him in detail about it in order to know its true consequences and conditions.

The subsequent CJEU judgment of 9 July 2020 (case C-452/18) declared that the clause stipulated in a contract between a professional and the consumer to resolve an existing dispute – through which the consumer waives the right to judicially assert his claims – is likely to be "unfair" when the consumer does not have the information that allows him to understand the legal consequences derived from such a clause[22]. On the other hand, it should not be omitted that art. 3 Royal Decree-Law 1/2017, of 20 January, on urgent measures for the protection of consumers in the field of floor clauses orders credit institutions to establish a system of "prior claim" to the filing of voluntary legal claims for the consumer, tolerating that the entrepreneur and the customer reach an agreement on the amount to be repaid for improper application of a floor clause (that is, it admits the validity of possible agreements or transactions in this sphere without it being necessary to prosecute the dispute).

[21]Defined in art. 3.2 TRLGDCU (amended by Law 4/2022, 25 February 2022) as follows: "... 2. Likewise, for the purposes of this law and without prejudice to the sectoral regulations that are applicable in each case, vulnerable consumers with respect to specific consumer relationships are considered to be those natural persons who, individually or collectively, due to their characteristics, needs or personal, economic, educational or social circumstances, are, even if territorially, sectorally or temporarily, in a special situation of subordination, defenselessness or lack of protection that prevents them from exercising their rights as consumers under conditions of equality".

[22]SAP Badajoz n. 258/2022, 4 November, Section 3, Matías Lázaro (JUR 2022\375848), FJ 2º, concluding that in the present case the following were required for the validity of the agreement obtained as a settlement: a) Existence of a situation of uncertainty or controversy between the parties, the clause being judicially questioned; b) Willingness of the parties to make reciprocal concessions to avoid litigation, and c) Observance of the duties of transparency in the transaction (i.e., that the clients really know the economic and legal consequences of their acceptance). On the settlement relating to the floor-clause due to lack of transparency, see STS n. 157/2022, 1 March, Civil Chamber, Section 1, Díaz Fraile (RJ 2022\1111), FJ 3º: "... there is no doubt that the waiver is part of a transaction, an agreement reached to resolve a latent controversy since the Supreme Court ruling of 9 May 2013 was made public, between the financial institution and the borrowers, and was intended to avoid litigation in relation to the floor clause initially included in the mortgage loan contract".

II. Real elements: They have been qualified, with STS n. 751/2009, 30 November, as the fundamental requirements of this type of contract, being none other than the agreement to eliminate the controversy – or "transactional" agreement – and the reciprocity of concessions in accordance with art. 1809[23]. The disputed legal relationship, which is the subject of the transaction, must be freely available to the interested parties (former art. 19.1 LEC) and may fall "... on the civil action arising from a crime; but that does not mean that public action for the imposition of the legal penalty will be extinguished" (art. 1813 CC and, in the same direction, art. 846 Brazilian CC), but it is not allowed on "... the civil status of persons, or on matrimonial matters" (i.e., such matters affecting public order cannot be disposed of although, in general, the economic consequences derived from them are negotiable, Carrasco Perera, 2001, p. 2043, Martínez de Aguirre Aldaz, 2020, p. 325) nor on "... future alimony" (art. 1814 CC).[24]

From these provisions, it can be deduced that the transaction may have as its object any legal relationship, thing or right, controversial or doubtful, that is available to the interested parties (Albaladejo, 2003, p. 850) because it is of private interest and is in commerce (Moreno Trujillo, 2022, p. 564), it would even be possible to compromise on the ineffectiveness of a previous contract by usury as it is a matter not excluded by art. 1814 CC[25]. The specific content of the transaction will therefore cover two main obligations, on the one hand, the aforementioned and reciprocal concessions of the interested parties and, on the other, absolute respect for the legal situation generated after the transactional agreement that will replace the existing one, thus clearing up the previous uncertainty or controversy (Moreno Trujillo, 2022, p. 564-565).

In this sense, the CC includes rules relating to the strict interpretation of the transaction which, in part, reproduce the general rules of the contracts so that it will only cover the objects specifically expressed in it or which, by a necessary induction of its words, must be considered to be included in it. The general waiver of rights is understood only with respect to those related to the dispute on which the transaction has fallen (art. 1815 CC).

III. Formal elements: Contrary to what is indicated in Article 842 of the Brazilian Civil Code,[26] the Spanish Civil Code does not provide that the transaction has to comply with any formal requirement and, therefore, the principle of formal freedom (Article 1278 of the Civil

[23] SAP de Burgos n. 163/2018, 21 May, Section 3, Melgosa Camarero (JUR 2018\204617), FJ 2º.
[24] See also Articles 748 and 751.1 of the Civil Procedure Code.
[25] Same SAP Badajoz n. 258/2022(JUR 2022\375848), FJ 3º, possibility admitted by the SC and the CJEU.
[26] "A transação far-se-á por escritura pública, nas obrigações em que a lei o exige, ou por instrumento particular, nas em que ela o admite; it will be redirected on rights answered in court, it will be fair by public deed, or by terms of the orders, assinado pelos transigentes e homologado pelo juiz".

Code) governs to its full extent, even though it can be deduced from the preceding Article 1815 of the Civil Code that, frequently, its conclusion will take written form. Consequently, the transaction contract is not a solemn or formal legal transaction and may be entered into in any form, verbal or written, as it is not foreseen that it must be subject to any solemnity as a requirement for its validity[27] , bearing in mind, moreover, that if it is recorded in a public document it may serve as a legal cause of opposition to the executive judgment (arts. 556.1, paragraph 2, and 557.1.6 LEC).

4 Transaction Types

The transaction is susceptible to be classified in heterogeneous ways according to the criterion adopted, thus, among other classifications, it may be "total or partial" depending on whether or not it completely resolves the *dispute between parties*; also in determinant or "peremptory" or consist of appointing an arbitrator for the resolution of the specific conflict, etc., although one of the most relevant distinctions – completely ignored in the CC – is the one that distinguishes between a transaction 'pure', that is, when the reciprocal concessions consist in ending, promising or retaining something of the things or rights in dispute or, in another case, 'mixed or complex', that is, when the dispute is remedied by things or rights that were not, *ab initio*, the object of the dispute.

However, with the support of art. 1816 CC, it is common to group the types of transaction into only two types, "judicial" or "extrajudicial", depending on how it remedies or resolves a controversy that has already given rise to a lawsuit that is still pending a judicial decision or if, on the contrary, it seeks to settle any other *dispute between parties* not yet raised before the courts (a distinction that is also deduced from the literal meaning of art. 1817 CC, paragraph 2). However, the uncertainty arising from this last distinguishing feature has been highlighted because both types of settlement ultimately constitute the same contract and the CC calls 'judicial settlement' both that entered into by the parties during a proceeding and which the judicial authority approves, and that achieved outside the process and then submitted to it by concluding it by means of an order approving the settlement (arts. 19.2 and 415.2 LEC, then becoming an enforceable title as provided for in Article 517.2.3.º).

[27] STS n. 391/2009, 28 May, 1st Chamber, 1st Section, Roca Trías (RJ 2009\2424), FJ 2º.

Hence, in reality, it can be maintained that the transaction will always be 'extrajudicial' in terms of its conclusion, although it may generate judicial or extrajudicial effects, not participating at all in the characteristics of procedural acts even if, through it, a lawsuit already initiated is put to an end (Castán Tobeñas, 1981, p. 805). Given that neither the CC nor the LEC offer a concept of a "judicial" settlement, it seems preferable to designate with it the one obtained during the process and approved and approved by the judicial authority since, as is obvious, it would never be possible to speak of a judicial settlement without judicial homologation (Carrasco Perera, 2001, p. 2045; Moreno Trujillo, 2022, p. 562, requiring, in accordance with STS no. 468/2010, its incorporation into the file).

The settlement with judicial or "judicial" effects as it is called in art. 1816 CC and, in general, the LEC (not lacking those who also call it a "procedural settlement") will be the one that resolves the controversy that has produced the initiation of a prior process, being characterized by two main features, on the one hand, because it is possible to reach a "transactional agreement" to end a process with or without judicial presence, then its eventual homologation by order (former art. 19.2 LEC and art. 206.1.2ª LEC) constituting, since then, an enforceable title (art. 517.2.3.º LEC) and, on the other hand, because the interested parties may settle on the subject matter of the proceedings at any time during the first instance, appeals or enforcement of judgments, in the same way that they have the possibility of submitting to arbitration or mediation (former art. 19.3 LEC).

With respect to the force displayed by a transaction, despite the confusing wording of the first paragraph of art. 1816 CC, only the one approved judicially will acquire the *visque* characterizes a final judgment; on the other hand, the one reached extrajudicially will have contractual force or *lexprivata inter partes* than art. 1091 CC[28]grants to any other type of contract; hence, the aforementioned art. 1816 CC states that "... the enforcement procedure will not proceed except in the case of compliance with the judicial settlement" (Albaladejo, 2003, p. 851-852; Castán Tobeñas, 1981, p. 816-817;Carrasco Perera, 2001, p. 2044-2045). Consequently, in the event of a hypothetical breach of an out-of-court settlement, the injured party will have to seek judicial assistance again so that, after the corresponding process, a judgment is issued in order to either resolve or enforce the previous solution reached by the interested parties which, in the end, has not been observed.

[28] "The obligations arising from contracts have the force of law between the contracting parties, and must be fulfilled in accordance with them."

5 Effectiveness and challenge of the settlement agreement

With regard to the validity of a transaction, the provisions of any other contract will be applicable, that is, those referring to its binding nature (former art. 1091 CC), irrevocability (art. 1256 CC) [29]and relativity (art. 1257, para. 1, CC),[30] and the general rules of termination will also apply, that is, the mutual disagreement of the parties, radical nullity or non-existence, voidability, etc. As a specification of the transaction, it is also usually mentioned the retroactive effect with respect to what we have called "pure" which, on the contrary, will not occur in the "complex or mixed" one because this supposes a novation of the previous disputed legal situation (Moreno Trujillo, 2022, p. 566).

The question arises, however, as to whether or not it would be feasible to exercise the tacit resolutory condition of reciprocal obligations (art. 1124 CC[31]) in the transaction since it is, after all, a synallagmatic contract. For some authors, the resolution would be possible with the particularity that it would not be possible to claim what could have been recognized by means of it to the other party since, otherwise, the *exceptiopacti*[32] or exception of transaction -*exceptiorei per transactionemfinitae*-(Albaladejo, 2003, p. 853) could be invoked; on the other hand, other civil lawyers question whether such a resolution can be accommodated, emphasizing the practical drawbacks that it would imply (in particular, the assessment and determination of the damages caused), as well as the effect of res judicata that art. 1816 CC ties to the judicial settlement by preventing that, in the event of non-compliance by one of the parties, a previously decided dispute may arise judicially again (Moreno Trujillo, 2022, p. 567). However, the Spanish courts have been admitting the resolution of the transaction[33]in the event of non-compliance with what was agreed.

[29] "The validity and performance of contracts cannot be left to the discretion of one of the contracting parties."

[30] "Contracts only produce effect between the parties who grant them and their heirs; except, with regard to these, the case in which the rights and obligations arising from the contract are not transferable, either by their nature, or by agreement, or by provision of the law".

[31] "The power to terminate obligations is understood to be implicit in reciprocal obligations, in the event that one of the obligated parties does not comply with what is incumbent on him. The injured party may choose between demanding compliance or termination of the obligation, with compensation for damages and payment of interest in both cases. He may also request the resolution, even after having opted for compliance, when this is impossible...".

[32] As clarified by the STS n. 199/2010, 5 April, Civil Chamber, Section 1, Xiol Ríos (RJ 2010\25415), FJ 3º, this "*exceptiopacti*" or exception of compromise has a meaning similar to that of material res judicata so that "... it can be opposed in any proceeding, although the LEC only refers to it as an exception to the enforcement action (Article 557.1.6.a LEC)".

[33] For all SAP A Coruña n. 137/2020, 27 May, Section 3, Fernández-Porto García (JUR 2020\217786), FJ 8º pointing out that, in any case, said termination of the transaction does not imply that of the contract from which it derives (in this specific case the resolution of a sale was interested).

Faced with such a panorama, and trying to simplify a hypothetical practical solution, we consider that, in any case, by virtue of the classic *restituto in integrum,* the party who complies with the transaction reached could always be recognized, in the event of a breach, his right to reparation *in natura* (i.e., the enforcement in a specific manner by the person who failed to comply with the transaction) or, when this becomes impossible, a reparation by equivalent (i.e., through the payment of compensation for damages which, in addition, is provided for in article 1001 of the Civil Code[34]on the occasion of contractual civil liability), thereby causing a result very close to or almost identical to that provided for in the aforementioned article 1124 of the Civil Code.

With respect to the possible challenge of a transaction concluded, article 1817, paragraph 1, CC[35]refers – with a wording that could be greatly improved – to the precepts relating to the defects of the will established in article 1265 CC (i.e., error, fraud, violence and intimidation, the latter being also omitted in the aforementioned article 1817 CC but being, of course, applicable) and, consequently, it would be appropriate to bring an action for annulment in order to declare, where appropriate, the relative nullity or voidability of the "settlement agreement", singling out specific cases of error in para. 2 of the same precept, as well as in arts. 1818 and 1819 CC.

In this venue, the following four considerations should be borne in mind:

1) That although the CC grants the value of "res judicata" to the judicial settlement (art. 1816 CC), this does not rule out at all that it may be challenged. In fact, on this aspect the STS n. 199/2010, 5 April, Civil Chamber, Section 1, Xiol Ríos (RJ2010\25415), FJ 3º, has already pointed out that a transaction cannot be completely assimilated with the effectiveness of res judicata typical of final judgments (SSTS 28 September 1984, 10 April 1985 and 14 December 1988) and, therefore, "... the impossibility of reconsidering the settled issues does not imply that the transaction is invulnerable, since its validity and effectiveness can be challenged, leaving it without effect and reviving the previous legal situation", that is, that the interpretation of art. 1816 CC cannot ignore the contractual nature of the transaction (STS 8 July 1999), the judicial one enjoying a double nature because, while maintaining its substantive nature, judicial approval gives it a procedural character as an act that puts an end to the process with the effect of being its execution as if it were a judgment (arts. 1816 CC and 517 LEC), also specifying

[34] "Those who in the performance of their obligations incur in wilful misconduct, negligence or late payment, and those who in any way contravene the wording of the same, are subject to compensation for the damages caused."

[35]"A transaction involving error, fraud, violence or falsification of documents is subject to the provisions of article 1265 of this Code."

that this makes it possible to differentiate between judicial and extrajudicial settlement "... since the latter cannot be enforced unless a judicial pronouncement on its existence and effectiveness is previously obtained that serves as an enforceable title. Judicial approval, however, does not modify the consensual nature of the transaction as a legal transaction aimed at the self-regulation of the interests of the parties and, therefore, although judicial settlements can be made effective by means of enforcement, article 1817 CC does not eliminate them from the challenge for defects of consent (STS of January 26, 1993)".

2nd) Paragraph 2 of the same art. 1817 CC reduces the operability of the error of fact -*error facti*- by stating *"... one of the parties may not oppose the error of fact to the other provided that the latter has withdrawn from a lawsuit that has begun due to the settlement",* that is, it tries to prevent the person who suffers from some kind of *error of fact* from being able to use it in those cases in which, precisely because of the transaction, the other party has withdrawn from a process already initiated.

3) Based on art. 1818 CC, a transaction already entered into will not be altered by the simple fact that at a later time new documents appear or are discovered, unless the ignorance of the latter is due to the bad faith of one of the interested parties. As García Goyena maintained – when commenting on the homonymous precept contained in Project CC 1851 – if the documents were retained by one of the obligated parties, there is bad faith, so that "it falls in the case of fraud, and consequently the transaction will be null and void" (Martínez de Aguirre Aldaz, 2020, p. 329).

4) Finally, Article 1819 of the Civil Code[36]specifies a specific case of error by determining the effects derived from cases in which, due to mere ignorance or ignorance, a transaction resolves or remedies a matter on which a court ruling has previously been issued. Faced with such a dilemma, the precept differentiates two possible hypotheses according to whether or not the previous resolution has become final:

- If the previous judgment ignored has become final, paragraph 1 of the precept then considers that the subsequent settlement could suffer from relative nullity or nullity (since the ineffectiveness is predicable, in general, of defects of the will), despite the fact that the CC here incorrectly alludes to rescission as a type of invalidity.

In the event that both parties were aware of the finality of the judgment, we would not be in the presence of a settlement – since the dispute would have been settled before by the judicial

[36] "If, when a lawsuit has been decided by a final judgment, a settlement is entered into on it because any of the interested parties is unaware of the existence of the final judgment, the latter may request that the transaction be rescinded. Ignorance of a sentence that can be revoked is not a cause to attack the transaction."

authority – although it should be noted that the contract would be valid based on the dispositive principle that governs the civil jurisdictional order and, In short, the nullity of a private agreement generated by res judicata emanating from a previous resolution would not be appreciable. What this first legal provision requires is the concurrence of the error, it being sufficient that only one of the parties suffers from it and this regardless of whether or not it was inexcusable because, after all, it would be a substantial error regarding the existence of the contractual cause (Carrasco Perera, 2001, p. 2047[37]).

- If the previous unknown judgment has not become final, paragraph 2 of the same precept vetoes the possibility of challenging the transaction concluded, that is, it gives the impression that what was agreed by the interested parties would prevail without the possibility of asserting what was also resolved by the judicial authority, which, however, turns out to be misguided since, in fact, it must be interpreted in the sense that the transaction cannot be challenged until the previous judgment becomes final (Carrasco Perera, 2001, p. 2047).

In the event that both parties enter into a settlement knowing the previous decision and only one of them challenges the latter, the party harmed by the judgment could oppose its enforcement – as we indicated above with the aforementioned procedural rules – by reason of the transaction concluded.

6 Conclusions

The transaction, as a contract that seeks to resolve disputes, seems to be devalued or undervalued today if we compare it with other figures that have received greater media support, such as arbitration or mediation. What is characteristic of the transaction regulated in the CC are the reciprocal concessions of the contracting parties in order to remedy the disputed and available relationship that separates them, which may well not be equivalent or even lack patrimonial content, since the game of private autonomy operates in the perfection of the transaction, bearing in mind that if it is entered into between a consumer and a businessman, it will have to be firstly, to the provisions of the sectoral regulations protecting consumers and users.

The traditional classification of the transaction established in the CC is limited to distinguishing between judicial and extrajudicial, ignoring whether it is pure or complex, a

[37]Against this criterion, case law shows itself when it maintains that if an error in the essential elements of the agreement turns out to be inexcusable, they do not determine the nullity of the legal transaction in question.

distinction that comes from the doctrine and accepted by the jurisprudence that, *de legeferenda*, it would be desirable to include due to its importance in a future reform of the CC, outlining, in particular, its heterogeneous consequences and correcting, in line with this, some technical inaccuracies contained in the same CC as happens, by way of example, with the incorrect reference to the termination verified in its art. 1819. The judicial settlement is so called by its mere approval by the judicial authority, thus acquiring a different consideration and effectiveness with respect to the one entered into out of court when, in reality, both constitute a single contractual modality and, therefore, are challengeable.

As for the possible exercise of the power of resolution, characteristic of synallagmatic obligations, due to the breach of the transaction – reciprocal contract – on the part of one of the parties involved and the dilemmas that this could entail in practice (especially with respect to a judicial settlement), it would perhaps be preferable to avoid this question by resorting to the classical principle of *restitutio in integrum* (from which reparation *in natura derives* or, in another case, by equivalent) which would obtain a result similar to that probably achieved with the exercise of the disputed resolution action.

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