THE SETTLEMENT BETWEEN STRUCTURAL COMPLEXITIES AND DOGMATIC PERSPECTIVES

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CONTENTS: 1. Introduction – 2. Uncertainty of the constitutive elements – 3. The debate on its nature – 4. The so-called 'mixed settlement': functional deviations or enlargement of the object of contract? – 5. The thin borderline between conservative and novation settlement.

1. A precursor of *ADR*, the settlement agreement[1] (*contratto di transazione* in Italian) is a self-regulation instrument of private interests teleologically oriented to the out-of-court resolution of legal disputes. It is characterized by a certain problematic nature, enhanced by its remarkable structural flexibility[2].

As evidenced in the articles of the Italian Civil Code which define its features, the settlement agreement is a wide framework where all sorts of interests meet, and whereby already existing or newly created legal conditions can be regulated.

In actuality, it harmoniously combines the substantial perspective of the regulation of legal relations with the more strictly procedural regulation of the *ad litem* interest[3].

Practical application has also helped to foster its development through gradual adaptation to the needs of specific circumstances.

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[1] For a general comparative approach to contractual matters, see: A. L. CORBIN, *On Contracts*, One Volume Edition, 1952, in particular 154 and ss.; G.M. COHEN, *Implied Terms and Interpretation in Contract Law*, in *B. Bouckaert - G. De Geest, Encyclopedia of Law and Economics*, vol. IV, Edward Elgar Publishing, Inc., 2000, 78 and ss.; G.H. TREITEL, *The law of contract*, Sweet & Maxwell, 1995, 185 and ss.; J.J. PRESCOTT, K.E. SPIER, A. YOON, *Trial and Settlement: A Study of High-Low Agreements*, NBER Working Paper No. 19873, 2014, *passim*.

[2] See: J. POWELL, *Essay upon the Law of Contracts and Agreements* , Printed in Dublin for P. Byrne, J. Moore, J. Rice and W. Jones , 1796, 1 e ss. ; P.H. GLENN, *Legal Traditions of the World* , Oxford University Press, 2000, 160 and ss., 226 and ss.

[3] For a largest comparative approach to the theme, see also: G. GILMORE, *The Death of Contracts*, Ohio State University Press, 1974, 1-81; R. A. HILLMAN, *The Richness of Contract Law*, Kluwer Academic Publishers, 1997, 7-82; M. A. CHIRELSTEIN, *Concepts and Case Analysis in the Law of Contracts,* Foundation Press: Westbury, 1993, 1 and ss.

Therefore, the approach to its analysis cannot leave out the examination of its defining dogmatic accounts, driven by the ambition - not always fulfilled – to clearly identify its peculiar and defining traits, which also aims to distinguish it from similar cases.

Any issue thereto related actually raises interpretation problems, which typically lead to unsolved matters and culminate in the most varied solutions.

As will emerge in the course of this study, the only unifying factor pertains to the purpose of regulating an existing or potentially conflicting legal relation, since, in other respects, several differences in reconstructive perspectives and court regulations persist.

2. A settlement (it. *transazione*) is a consensual agreement whereby the parties end an ongoing dispute, i.e. they prevent the emergence of it through mutual concessions[4]. This is an instrument of private autonomy for the contractual resolution of legal disputes[5]. A constitutive precondition for the agreement must be, therefore, a current or potential contrast[6], to be understood as a conflict of interest as to the existence, extent or the exercise of a right[7].

Whereas its definition does not seem to raise particular problems, the same cannot be said for its constitutive elements[8]. According to the prevailing court

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[4] On this teme in particular, see: J. GORDLEY, *The Philosophical Origins of Modern Contract* , Oxford Clarendon Press, 1991, who affirms (pag. 4): "Natural law influence can be seen, inter alia, in the idea of consent and agreement embedded in the notion of contracts"

[5] For more informations see: J. BEATSON, A. BURROWS AND J. CARTWRIGHT , *Anson's law of contract*, Oxford University Press, 2010, twenty-ninth edition, *passim*; H.G. BEALE, W.D. BISHOP AND M.P. FURMSTON, *Contract – cases and materials*, Butterworths, 2007 fifth edition, *passim*; E. MCKENDRICK, *Contract law: text, cases and materials*, Oxford University Press, 2012 fifth edition, *passim*; BROWNSWORD, R. SMITH & THOMAS, *A casebook on contract*, Sweet & Maxwell, 2009, twelfth edition, *passim*.

[6] For more informations see also STEVEN J. BURTON, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, Harvard Law Review, Vol. 94, *passim*; J. GORDLEY, *The Philosophical Origins of Modern Contract*, Clarendon Press, 1991, 4 and ss.

[7] In a comparative perspective see: R.P. ECLAVEA, *Contracts. Construction and Effect*, in *17 Am Jur 2d Contracts*, 2003, 336 e ss., who says: "The construction of words and of other manifestations of intention forming an agreement is the process of determining from such manifestations what must be done by the respective parties in order to conform to the terms of the agreement. Additionally, a contract should be viewed prospectively as the parties viewed it at the time of its execution, and not from a retrospective point of view"

[8] For a comparative approach, see to : E. POSNER, *The Parol Evidence Rule, The Plain Meaning Rule, and the Principles of Contractual Interpretation*, in *U. Penn. L. Rev.*, 1998, 533 and ss.; C. M. MCCORMICK, *The Parol Evidence Rule as a Procedural Device for Control of The Jury,* in *Yale L. Journal*, 1932, vol. 41, 365 and ss.

decisions[9], the disagreement between the parties must stem from a state of uncertainty regarding the position of one of the parties and the related rights[10]. The *res dubia* emerges as a substantial prerequisite for the settlement, along with the dispute and the two-way nature of the concessions.

It should however be clarified that said "uncertainty" refers to a merely subjective characteristic, based on the personal assessment made by the parties about the conditions in fact and/or in law (and the related legal positions), and not a condition that is intrinsic to the context which will be affected by the agreement[11]. A testimony of the subjective nature of the *res dubia* is the absolute irrelevance of the *a posteriori* demonstration of the possible groundlessness of the claim made by one of the parties. In fact, once the agreement has been enforced, there is no chance to determine the pre-existing legal condition[12] to contest the validity of the settlement[13], save within the terms of art. 1971 C.C. et seq. On the other hand, for the purposes of appealability, the investigation into the subjective circumstances underlying the settlement is limited by the provisions contained in articles 1969, 1970, 1971 C.C. et seq.

Even in reference to the real necessity for the *res dubia*, doctrinal positions diverge[14]. Along with the thesis, supported by court decisions, that makes it an

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[9] For a comparative approach, see: G.R. SHELL, *Contracts in the Modern Supreme Court*, 81 *Calif L Rev, 1993,* 431 and ss.

[10] In particular, see U. WEISS, *The Regressive Effect of Legal Uncertainty*, Tel Aviv University Law Faculty Papers, 2005, *passim*.

[11] On this point see Cass. 25 October 2013, n. 26164, on *www.dejure.it* " Ai fini di una valida conclusione di una transazione è necessario, da un lato che essa abbia ad oggetto una "res dubia", e, che cioè cada su un rapporto giuridico avente, almeno nella opinione delle parti carattere di incertezza, e, dall'altro che, nell'intento di far cessare la situazione di dubbio, venutasi a creare tra loro, i contraenti si facciano delle concessioni reciproche" (For the finalization of a settlement to be valid, it is necessary, on the one hand, that it refers to a *res dubia*, viz., concerning a legal relation having, at least in the views of the parties, a certain character of uncertainty, and, on the other hand, that, in order to put an end to the situation of doubt arisen between them, the contractors make mutual concessions: translation editor's). Similarly, Cass. 6 may 2003, n. 6861, in *Riv. not.*, 2003, 343 et seq.; Cass., 6 October 1999, n. 11117, in *Giur.it*., 2000, 1152; Cass., 10 July 1985, n. 4106, in *Riv. dir. comm*., 1987, II, 37.

[12] As in Cass. 1 September 1995, n. 9229*,* in *Giust. Civ. Mass.*, 1995, 1587, "non è rilevante la posizione psicologica della parte, o delle parti, sulla situazione di diritto della controversia: non lo è neppure la certezza assoluta della intangibilità della propria posizione" (the psychological position of the party, or parties, on the legal position of the dispute is not relevant: neither is the absolute certainty of the inviolability of their own position: translation editor's).

[13] Cf. Cass. 27 April 1982, n. 2633, in *Giur. It. Mass.*, 1982, as in *www.dejure.it.*

[14] For more information, see : J.H. MERRYMAN, *On the Convergence (and the Divergence) of the Civil Law and the Common Law*, Stanford J of Int. , 1987, 357 and ss. ; J. FRANK , *Influence of Civil Law in Common Law*, Pennsylvania Law Review 1, 1956, *passim*; W. TETLEY, *Mixed jurisdictions: common law vs*

essential requirement just as much as mutual concessions, there is another orientation which, by denying it its specific autonomy, assimilates it to the *res litigiosa*, to be understood as the actual legal dispute or the potential cause of the settlement[15].

According to this approach, supported by the lack of any textual reference, the settlement does not presuppose the uncertainty of the *status quo*, but only the existence or the potential for a dispute, susceptible of being settled through the concessions laid down in art. 1965 C.C.

Consequently, the only essential requirement should be sought in the *res litigiosa*, conceived as an existing or virtual contrast between two or more parties about «the enforcing of a right, consisting in the claim and challenge of the very existence and extent of said right[16]», on which all the different opinions converge[17].

Clearly, it is not enough to have a simple financial dispute on whose ground, in truth, the negotiations of any contract are made: the Italian term *lite* refers to a legal dispute, a situation that is already regulated by law, in response to which the parties take opposite views[18].

The latter need not be ongoing, as it could also be a contrast *in itinere*, that is, a merely potential one.

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civil law (codified and uncodified), La L Rev,2000, 677 e ss. ; G. GORLA, *The Theory of Object: A Critical Analysis by Means of the Comparative Method*, Tulane Law Review, 1954, 456 e ss.

[15] About the necessity of *res dubia*, positions diverge. Along with the thesis, supported by court decisions, that makes it an essential requirement just like mutual concessions, there is another orientation, which, by denying its specific autonomy, traces it back to the *res litigiosa*, to be understood as the actual legal dispute or the potential cause of the settlement. In this sense, F. SANTORO PASSARELLI, *Nozione della Transazione*, in *Riv. dir. civ.*, 1956, 303. On the same topic, C. ROMEO, *Res dubia e reciproche concessioni in tema di causa transattiva*, in *Cont.*, n. 12, 1999, 1113 ff.; P. D'ONOFRIO, *Transazione*, in *Commentario del Codice Civile*, edited by A. SCIALOJA and G. BRANCA, 1974, 269. For more, see also: HERMAN, SHAEL & HOSKINS, DAVID, *Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations*, in *Tul L Rev* , 1980, *passim*.

[16] E. DEL PRATO, entry *Transazione*, in *Enc. Dir.*, XLIV, Milan, 1992, 813.

[17] Some judgments of the Court of Cassation identify the *res litigiosa* with the matter of the settlement and not as a precondition for it, considering that the matter of the agreement cannot be the legal position in question, but rather the dispute that was caused by it.. Cf. Cass. 6 October 1999, n. 11117, in *Giur. it.*, 2000, 1152, "L'oggetto della transazione non è il rapporto o la situazione giuridica cui si riferisce la discorde valutazione delle parti, ma la lite cui questa ha dato luogo o può dar luogo e che le parti stesse intendono eliminare mediante reciproche concessioni" (The object of the settlement is not the relation or the juridical situation referred to by the discordant evaluation of the parties, but the resulting or potentially resulting dispute which the parties intend to resolve through mutual concessions: traslation editor's).

[18] For a comparative perspective, see: A. LEFF, *Unconscionability and the Code – The Emperor's New Clause* in *UPA L Rev 485*, 1967. 142 G.R. SHELL, *Contracts in the Modern Supreme Court* 81, in CALIF L REV, 1993, 431 and ss.

It is also believed that requests should be all but outlined, with the character of "potentiality" referring to the establishment of a trial between the parties. If this requirement is to be interpreted as regarding the claims and not the conflict *inter partes*, it would then be difficult to assess the reciprocity of the concessions, since it would not be possible to analyze the two-way correspondence of costs and benefits in the agreement[19].

In order to start a dispute, therefore, it is necessary that the disagreement between the parties has reached at least the threshold of formal opposition of the view taken by the other party, so as to determine a contrast between discordant theses[20].

The well-known maxim *aliquid datum aliquid retentum* summarizes the last requirement of the settlement agreement, as referred to in art. 1965 CC.

The "mutual concessions" are the sacrifices that each party is willing to bear regarding the content of one's claim against the other, in order to put an end to the dispute or to prevent its *incipit*.

It is not required, within the settlement, that the parties specify in detail the sacrifices made and the rights that may be waivered, provided that from the interpretation of the new agreement emerges the reciprocity of the benefits obtained through the sacrifices made.

The settlement, in fact, cannot exist without mutual concessions, as these alone are the means whereby its causal connection is outlined[21].

In the opposite case, the agreement will not be granted its settling nature and function.

In other words, it is not enough that the parties reach a resolution of the existing *dispute*, as it is essential that such resolution is reached through mutual sacrifices.

Without them, the settlement will fall under a different causal connection (eg. evaluation agreement, recognition of debt), which is external to the notion of settlement.

The existence of such a factor must be evaluated in reference to the existing (or so regarded by the parties) legal situation at the very finalization of the contract, since it is – outside the cases provided by in artt. 1971-1975 C.C. – irrelevant, and considered to be a belated error by one of the parties about the legal conditions in force at the time of stipulation.

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[19] This study follows the prevailing court reports. Cf. *ex pluris* A. PALAZZO, entry *Transazione*, in *Novissimo dig. it.*., *Disc. priv., sez. civ.*, XIX, Turin, 1999, 40 and ss.

[20] To make a comparison, see D.B DOBBS,., *Law of Remedies Damages, Equity, Restitution* , West Pub Co, 1993, 3. and ss.

[21] For a comparative approach, see to M.A. EISENBERG, *Expression Rules in Contract Law and Problems of Offer and Acceptance*, in 82 *Calif L Rev , 1994,* 1127 and ss.

The concept of reciprocity of the respective concessions[22] does not imply an equivalence between the two. This is confirmed by the legal provisions in art. 1970 CC, which exclude the possibility of an appeal in the case of damages.

The consideration of mutual sacrifices and benefits deriving from the agreement falls within the discretion of the parties and is an expression of their contractual autonomy, since the trial judge cannot replace the comparative assessment on the suitability and adequacy of mutual concessions[23].

Mutual concessions, therefore, need not be homogeneous nor corresponding, but either party must endure a sacrifice with a view to an advantage whose content may be various. Thus, for example, the recognition of a performance to be carried out can be reciprocated with one to be given or borne and vice versa[24].

Any lawful performance may be the subject of a grant settlement. This includes the waiver of a right or the waiver of an appeal - which, on closer inspection, affects the power of action of a private individual - provided that such rights can be enjoyed.

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[22] For a largest comparative approach, see A.T. VON MEHREN, *The Civil Law System,* Englewood Prentice Hall, 1957, 529 and ss. ; S. M. LEAKE , *Principles of the Law of Contracts,* Stevenson and Son, Ltd, 1906, 739 and ss.

[23] Cf., Cass. February 22, 2000, n. 1980, in *Giur. it. Mass.*, 2000, on *www.dejure.it* : "Affinchè un negozio possa essere considerato transattivo è necessario, da un lato, che esso abbia ad oggetto una "res dubia", e cioè cada sopra un rapporto giuridico avente, almeno nell'opinione delle parti, carattere d'incertezza, e, dall'altro lato, che, nell'intento di far cessare la situazione di dubbio venutasi a creare tra loro, i contraenti si facciano delle concessioni reciproche, nel senso che l'uno sacrifichi qualcuna delle sue pretese in favore dell'altro, indipendentemente da qualsiasi rapporto di equivalenza fra "datum" e "retentum". L'accertamento della natura transattiva di un determinato negozio, compiuto dal giudice del merito nel rispetto dei canoni legali di ermeneutica contrattuale e sorretto da motivazione immune da vizi, si risolve in una valutazione di fatto, incensurabile in sede di legittimità **(**For a contract to be considered a settlement agreement it is necessary, on the one hand, that its object is a *res dubia*, i.e. it regards a legal relation which has, at least in the view of the parties, a character of uncertainty, and on the other hand that, with a view to bring the situation of doubt to an end, the parties make mutual concessions, meaning that one sacrifices some of their claims in favor of the other, independently of any equivalence in the "datum /retentum" ratio. The evaluation of the settling nature of a particular contract, made by a trial judge in compliance with the legal canons of contractual heremeneutics and supported by cause above any vices, results in an evaluation in fact, which cannot be questioned in a in a court of law: traslation editor's). Similarly, Cass. 17 January, 2003, n. 615, in *Riv. not.*, 2007, 1441. According to court decisions, the unquestionability of the proportionality between mutual concessions, even if with different motivations, is also undisputed. On the same topic, see F. CARNELUTTI, *Transazione ed eccessiva onerosità*, in *Riv. dir. proc.*, 1955, 49 ff, who links the *de qua* unquestionability to the supposed uncertain nature of the settlement.

[24] Cass. 6 May, 2003, n. 6861, in *Giust. Civ. Mass.*, 2003, 5.

Even a release – so long as it represents the will to waiver one's right - can be of a settling nature[25].

A settlement which does not include mutual concessions is to be considered completely null for lack of an essential element[26].

3. In line with the tenets of the Italian Civil Code, both with regard to the definition and the *sedes materiae* of its regulations, the settlement is considered a bilateral, pecuniary contract with mutual performances[27].

Its nature, however, has long been debated. Whereas one theory recognizes its predominant function to resolve the contrast between opposing claims, another theory emphasizes the elimination of uncertainty in the legal relation *inter partes*.

The comparison with the evaluation contract (*negozio di accertamento* in Italian) and the need to clarify this relation have greatly contributed to outlining its functional profile[28].

In particular, it has been noted that, through the settlement agreement, the parties – far from wanting to impart the requirement of certainty to the legal relation being challenged - seek to settle a dispute through mutual concessions instead[29].

Thus, while the settlement agreement is the resolution of a present or future dispute which leads to a settlement of interests suited to change and replace the legal relation disputed, the evaluation contract has the only purpose of imparting legal certainty to a previous relation or contract and clarifying its provisions and effects[30].

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[25] Cf., *ex pluris*, Cass. 20 January 2003, n.709, in *Giur. it. Mass.*, 2003, on *www.dejure.it.*

[26] See Cass. 25 October 2013, n. 2461, in *Giur. it.*, I, 2014, 34 ff.: " .:"..res dubia e reciproche concessioni sono elementi imprescindibili per la validità di una transazione" (..*res dubia* and mutual concessions are essential elements for the validity of a settlement: traslation editor's).

[27] See E. DEL PRATO, *Superamento della lite e transazione*, in *Riv. arb.*, 2002, 366 ff. It is important to mention the heated debate that has engaged authors on the negotiating or contractual nature of the settlement. On the topic, see F. CARNELUTTI, *La transazione è un contratto?*, in *Riv. dir. proc.*, 1953, I, 185 and P. D'ONOFRIO in *La transazione e il contratto. Scritti giuridici raccolti per il centenario della Casa editrice Jovene*, 1854-1954, Naples, 193 ff. For more informations, see also: J.H. MERRYMAN, *On the Convergence (and the Divergence) of the Civil Law and the Common Law*, 17 Stanford J of Int L 357, 1987, *passim*.

[28] For more information: KESSLER, FRIEDRICH, *Contracts of Adhesion – Some Thoughts About Freedom of Contract*, 1943, in *Colum L Rev*, pp. 629 - 632.

[29] For a comparative approach: G. GILMORE, *The Death of Contracts,* Ohio State University Press, 1974, *passim*, R.A. HILLMAN, *The Richness of Contract Law,* Kluwer Academic Publishers, 1997, 7 and ss; G. C. VERPLANCK, *An Essay on the Doctrine of Contracts: Being an Inquiry how Contracts are Affected* in *Law and Morals, by Concealment, Error, or Inadequate Price,* G & C Carvill, 1825, 224 and ss.; M. A. CHIRELSTEIN, *Concepts and Case Analysis in the Law of Contracts,* Westbury Foundation Press, 1993, 1.

[30] On this topic, F. SANTORO PASSERELLI, *La transazione*, Naples, 1986, 67 and ss.; E. DEL PRATO, entry *Transazione*, cit., 819 and ss.

This suggests that the settlement has a clearly constitutive nature: through the requirement *aliquid datum aliquid retentum*[31], in fact, the parties transform, correct, and possibly extinct *in parte qua* the controversial relation by innovating its content. Conversely, the evaluation contract has declaratory effects[32], as it presupposes a situation to be evaluated, entailing a statement recognizing the existence of a mandatory or actual relation[33].

It could happen that, within the general context of a settlement, an evaluation of the pre-existing situation is also made. In that case, the statements of the parties can serve as confessions, but besides the peculiarities of specific cases, courts persist in considering the settlement and the evaluation contract as autonomous patterns that must not overlap.

Although it has been stated *incidenter tantum* that the settlement can be considered a *species* of a broader *genus* of evaluation contracts[34], the majority of court decisions continue to differentiate its purposes and effects[35].

4. The second paragraph of art. 1965 CC. provides that «through mutual concessions one can also create, modify or extinguish *legal relations that are different* from the original object of the claims and dispute of the parties».

This is an enlargement of the typical object of the settlement agreement, which extends beyond the relation from which the dispute *inter partes* originated, and gives rise to the so called «mixed settlement»[36].

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[31] For comparison, see: D. MARKOVITS, *Contract and Collaboration*, Yale Law Journal 113, 1417–1518.

[32] As in Cass. 12 March, 2008, n. 6739, in *Riv. dir. civ.*, 2009, 201, with annotations by L. BOZZI.

[33] As in A. FALZEA, entry *Accertamento* (Teoria generale), in *Enc. dir.*, I, Milan, 1958, 205 ff.

[34] On this topic L. D'AMBROSIO, *Il negozio di accertamento*, Milan, 1996, 29 ff.

[35] *Ex pluris* Cass. 17 September 2004, n. 18737, in *Giust. Civ. Mass.*, 2004, 11, which, in reference to the evaluation contract, states the following: "Con tale negozio, infatti, (che a differenza della transazione non ha natura costitutiva, non innovando alla situazione giuridica preesistente), le parti, senza procedere a reciproche concessioni, rimuovono dubbi ed incertezze relativi ad un determinato rapporto giuridico con una regolamentazione nuova, ma corrispondente alla situazione giuridica preesistente" (In fact, through this contract (which unlike the settlement agreement does not have a constitutive nature, as it does not innovate the pre-existing legal situation), without making reciprocal concessions, the parties remove doubts and uncertainties relating to a specific legal relation with new regulations, which nonetheless corresponds to the pre-existing legal situation: translation editor's).

[36] O. LANDO, H. BEALE, *Principles of European Contract Law Parts I and II. Prepared by the Commission on European Contract Law*, The Hague 1999; O. LANDO, E. CLIVE, A. PRÜM AND R. ZIMMERMANN, *Principles of European Contract Law Part III*, The Hague, London and Boston ,2003, *passim*; A. SCHWARTZ, R. E. SCOTT, *Contract Theory and the Limits of Contract Law,* 113 YALE L.J. 2003, 541-618.

Not unlike the previously addressed issues, the case *de qua* creates classification problems and "typological" overlaps. In fact, decisions concerning the *different* relations involved in a comparative evaluation about mutual concessions are likely to create functional interference with the main relation. In other words, within the complexity of the entire contract, which may also include the resolution of issues unrelated to the settlement, it could be very difficult to determine which is the causal connection that parties have decided to follow, and consequently, which is the regulation that can be practically applied.

A typical case of mixed settlement is the finalization of a contract with binding effects, which is also accompanied by a translational one - in order to settle the dispute, one party gives the other the property of a good that is beyond the original dispute. In the *de qua* case, it is necessary to establish which is the causal connection that regulates the relation emerging from mutual concessions.

In fact, if based on terminology suggestions one adheres to the theory that assimilates this agreement to the category of mixed contracts, the case in point should be seen as a combination of multiple contracts that merge into a single one[37]. The mingling of several contracts that converge into a single type, driven by a common interest of a practical-economic nature, is resolved, as is well known, through two main criteria: *absorption* and *combination*.

The first one considers a certain contract type as prevailing, and bases its regulation on that. The second one uses, in a more complex way, the rules belonging to different converging paradigms.

It is not uncommon to suggest, alternatively, the joint use of the said criteria, provided that the abovementioned regulations are compatible[38].

However, it has been noted that the reference to mixed contracts and their hermeneutical rules would lead to the risk of neglecting the economic-individual function of the contract, attributing causal prevalence to the contract type that emphasizes the performance brought into the agreement, rather than the objective assigned to it by the parties.

In other words, the *mixed* nature of a settlement concerning relations that are beyond those of the original claim is likely to transform a terminological similarity into a conceptual misunderstanding. Actually, from the perspective of causal connection, one must consider that the mixed settlement follows the same paradigm

[37] As in C.M. Bianca, *Diritto civile*, *Il Contratto*, Milan, 2000, 78 ff.

[38] The same, F. SANTORO-PASSARELLI, *La transazione*, cit., 204 ff. The author classifies this type as a mixed contract through the application of criteria of prevalence (settlement regulations) and combination (concurrent contract regulations).

as the simple settlement: the resolution of a dispute, current or potential, through mutual concessions[39].

The difference between the two theories clearly corresponds to the enlargement of the object of contract, which extends into other relations between the parties, unrelated to the original claim.

Thus, rather than modulating the dogmatic reconstruction of the mixed settlement with reference to the causal connection, this theory has its justification in the enlargement of the relation constituting the object of the future agreement.

In the case of settlement, in fact, the purpose for which the performance is brought into the contract – i.e. overcoming any disagreements through mutual concessions – assigns a specific function to it, which cannot be modified or altered by the contract types that could theoretically cover the possibly set performance(s)[40]

The fact remains that, in the specificity of the actual case, and notwithstanding the overriding application of the rules previously established for settlements, one can subsequently follow the regulation of the contract referred to by the will of the parties, as it is obviously compatible.

Courts, on their part, have kept a neutral attitude towards the classification of the mixed settlement, by shifting its solution onto the necessity to interpret the will of the parties within the settlement of the ongoing or potential dispute. In fact, from the decisions on the matter, we also find a reference to related agreements among the axiological categories theoretically considered [41].

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[39] On the same topic E. DEL PRATO, *Contratti misti: variazioni sul tema*, in *Riv. dir. civ.*, 2012, 1, 1087. The author points out that the type of contract can be determined on the basis of the purpose to be achieved, just like for the settlement, "… la cui nozione non individua il tipo in base al contenuto di una o entrambe le prestazioni, ma descrive una funzione assolvibile da qualsiasi prestazione di cui le parti possano disporre" (…whose notion does not characterize the type according to the content of one or both performances, but rather describes a function that can be performed by any performance available to the parties: translation editor's). Therefore, the suitability of the settlement to embrace any performance deduced in the contract makes its contractual architecture so wide that the mixed settlement cannot be counted among the mixed contracts.

[40] More in E. DEL PRATO, entry *Transazione*, in *Enc. Dir.*, *cit.*, 825.

[41] See the decision of the Supreme Court, which, on a contract concerning the transfer of an asset upon payment and the simultaneous composition of some unsettled relations between the parties, states the following: " La convenzione che regola contestualmente una pluralità di rapporti fra le stesse parti, mediante il ricorso a più schemi negoziali, resta assoggettata ad un'unica disciplina giuridica, anziché, per ciascun rapporto, alla disciplina propria del corrispondente negozio, nel caso in cui ricorra ipotesi di negozio complesso, caratterizzato dalla fusione in una causa unica degli elementi causali concorrenti alla formazione della convenzione medesima, in dipendenza di un unico nesso obiettivo e funzionale, ovvero ipotesi di contratto misto, caratterizzato da una sintesi di elementi propri di più contratti nominati in cui prevalgono quelli di una determinata figura negoziale, non anche nella diversa ipotesi in cui essa si articoli in distinti ed autonomi contratti collegati (da mera occasionalità, od anche

Far from being just a theoretical debate, the plurality of reconstructive hypotheses that range from classifying the contract from a causal perspective (mixed, complex, related agreements), to a simple enlargement of the object of contract, determines significant changes on the practical regulation.

Whereas the mixed contract imposes the need to consider the rules prescribed by individual contracts, the same is not true for the enlargement of the object of contract. In it, the specific case is fully subsumed in the traditional type of settlement,

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da funzione economica comune), dato che il vincolo di collegamento non vale a sottrarre ciascun contratto al proprio regime giuridico. Pertanto, con riguardo al contratto avente ad oggetto il trasferimento a titolo oneroso di un bene e la contemporanea definizione in via transattiva di alcune pendenze fra le parti, l'applicabilità all'intera convenzione delle norme della vendita o della transazione, ovvero la concorrenza delle une e delle altre per ciascun rapporto (nella specie, al fine della determinazione del prezzo della vendita e del riconoscimento o meno della sua rescindibilità per lesione) postulano, rispettivamente, la riconduzione della convenzione medesima nell'àmbito del negozio complesso o misto, ovvero della ipotesi dei negozi solo collegati (The convention that rules a plurality of relations between the same parties at the same time using multiple contractual patterns remains subject to a single set of regulations, rather than, for each relation, to the regulation of the corresponding contract. This occurs a) in the case of a complex contract, characterized by the merging in one cause of all the causal elements concurring to the formation of the provisions themselves, based on one objective and functional relationship; b) in the case of a mixed contract, which is characterized by a synthesis of elements typical of several standard contracts where those of a particular contract type prevail, and not in the divergent case in which it is divided into distinct and independent contracts linked together (by mere occasionality, or even by a common economic function), since the bond of connection is not sufficient to save each contract from its own regulation. Therefore, in reference to a contract concerning the transfer of an asset upon payment and the simultaneous composition of some unsettled relations between the parties, the applicability to the entire convention of the rules of sale or settlement, or the concurrency of the former or the latter for each relation (in the case in point, in order to determine the price of sale and the recognition of its rescindibility for damages) imply, respectively, the attribution of the convention itself to the set of complex or mixed contracts, or the case of merely connected contracts: traslation editor's). Cf. Cass. 5 April 1984, n. 2217, in *Giust. Civ. Mass.*, 1984, on *www.dejure.it*. Court decisions have also supported the thesis of contract connection, according to which the prevailing function must be the settling one, functionally connected to the *second* contract that the parties have meant to reference: " La fattispecie ex art. 1965 c.c. può essere correttamente inquadrata nello schema del collegamento negoziale in cui si integrano due cause: una prima relativa all'operazione economica nel suo complesso, una seconda, relativa al diverso rapporto contrattuale, mediante il quale le parti convengono di risolvere la controversia, avente la causa propria del tipo utilizzato" (The case *ex* art 1965 C.C. can be correctly framed into the type of contract connection that integrates two causes, the first referring to the financial operation as a whole, and the second referring to the different contractual relations, through which the parties agree to settle the dispute, having its cause in the type that has been used: traslation editor's), in *Comm. al cod. civ.,* artt. 1882- 1986, edited by P. Cendon, Milan, 2010, 1167.

and only marginally is there room for the regulation of the contract to which the performance belongs, provided there is no incompatibility.

In line with the indications given by courts, a clear need emerges for case observations that can guide the solution to the problem through the interpretation of the will of the parties when signing the settlement agreement.

One can argue that the absorption or non-absorption into the settlement of performances deviating from the specific object of the claim that the parties include in the settlement agreement has its origin in the role that the will of the parties has within the definition of the ongoing or potential dispute. If this is just an opportunity, but not the main reason, to justify the transfer of assets, one can see a problem of autonomous causal evaluation with the latter. Conversely, when the object of the distinct performances can be traced back *latu sensu* to the controversy, there will be an absorption of these cases into the typical function of the settlement agreement, since there is no room for independent evaluation of the contract to which the performances in question belong.

5. The hermeneutical difficulties encountered with mixed settlements resurface even more dramatically when it comes to novation settlements[42], which offer real interpretational disorientation to those who attempt to provide a unified account[43].

The *innovative* effect, ingrained in any possible settlement agreement aimed at the resolution of a legal dispute through mutual concessions, can often lead to overlaps with that of *novation*, which is also the result of a modification of a legal relation originally existing between the parties. The panorama of doctrinal opinions regarding the parameters distinguishing the conservative and the novation type is fragmented and discontinuous.

It ranges from one thesis that denies any difference between the two hypotheses, considering the novation effect typical of any settlement[44], to another that hinges the core of distinction on the declaratory effect of the former against the constitutive effect of the latter[45].

Another theory argues that it is necessary to evaluate the will expressed by the parties when finalizing the settling *pactum*. A novation settlement can only exist if there has been an express will from the parties to extinguish the previous obligation, in line with the traditional notion of novation, as a typical means of extinguishing

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[42] For a largest comparative approach: A. KULL, *Disgorgement for Breach, the 'Restitution Interest,' and the Restatement of Contracts*, in *Texas Law Review*, *79*, 2001, 2021–2053; A. SCHWARTZ, R. SCOTT, *Contract Theory and the Limits of Contract Law*, in *Yale Law Journal*, 113, 2003, 541–619.

[43] This is argued by V. GENNARI, *La risoluzione della transazione novativa*, Milan, 2005, 139 ff.

[44] P. D'ONOFRIO, *Della transazione*, in *Comm. Scialoja e Branca*, Bologna - Rome, 1974, 282 ff.

[45] On the declarative nature of the settlement, F. CARRESI, *La transazione*, in *Tratt. Vassalli*, IX, Turin, 1956, 228 ff.

obligations without payment, composed not only by the modification of the original obligation in its title or object (*aliquid novi*), but also by the unequivocal desire to reset the previous relation through the creation of a new *vinculum iuris* (*animus novandi*). Yet, on the approach to the regulation of obligation, opinions differ: for some, the express will to *innovate* the disputed relation (*animus novandi*) would be enough; for others, there should be an indivisible union between the subjective and the objective element instead[46].

Much more complex is the interpretation which, by following the indications of the courts, has specified and perfected the distinguishing elements in the two types of settlement.

Older judgments rest on the necessity of an *animus novandi* at one with *aliquid novi*, to be understood as a relation that is different from the original and, above all, "incompatible" with the previous one, which is the result of the arisen dispute[47]. Subsequently, incompatibility has come to be understood as the result of (even partial) waivers to the respective claims aiming at modifying, by means of discharge, the previous situation, as well as specifying the subjective element, to be interpreted as an express will to unambiguously extinguish the previous situation[48].

Despite perfecting the parameters for the *discrimen*, court decisions have not been able to dispel a good number of doubts regarding regulation differences between conservative (or simple) settlement and novation settlement. Some uncertainties remain about determining the required "incompatibility", but, above all, one wonders about the problem concerning the possible resurgence of the disputed relation in case of non-fulfillment of the new contract.

According to most judicial authorities[49], in fact, one of the traits distinguishing the two types concerns the legal effects resulting from a terminated contract, whereas,

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[46] See the account in E. VALSECCHI, *La Transazione*, in *Tratt. Cicu e Messineo*, XXXVII, Milan, 1954, 434 ff.

[47] Cass. 9 December, 1996, n.10937, in *Giur. it.*, 1998, 932 ff.

[48] Cf. Cass. 16 November 2006, n. 24377, as in *www.dejure.it.*

[49] As in Cass. 26 January, 2006, n.1690, in *Giust. Civ. Mass.*, 2006, 1, " Nell'ipotesi in cui un rapporto venga fatto oggetto di una transazione e questa non abbia carattere novativo, la cosiddetta mancata estinzione del rapporto originario discendente da quel carattere della transazione significa non già che la posizione delle parti sia regolata contemporaneamente dall'accordo originario e da quello transattivo, bensì soltanto che l'eventuale venir meno di quest'ultimo fa rivivere l'accordo originario, al contrario di quanto invece accade qualora le parti espressamente od oggettivamente abbiano stipulato un accordo transattivo novativo, cioè implicante il venir meno in via definitiva dell'accordo originario, nel qual caso l'art. 1976 c.c. sancisce, con evidente coerenza rispetto allo scopo perseguito dalle parti, l'irrisolubilità della transazione (salvo che il diritto alla risoluzione sia stato espressamente pattuito" (In the event that a relation is made the object of a settlement and it does not have a novation purpose, the so called non-extinction of the original relation deriving from that trait of the settlement does not

in the case of traditional settlement, one would see the resurgence of the old contract, averted in the case of novation settlement.

On the base of this assumption, only the novation effect, accompanied by the requirements specified by court preclusions, is able to reset the original agreements in a definitive way.

This position is also supported by the normative data, i.e. the combined provisions of art. 1976 C.C. regarding the resolution of settlements and art. 1458 C.C., regarding the *ex tunc* effects of the resolution, which suggests, in the prevalent view, that only the novation settlement entails the impossibility of enforcing the settlement for non-fulfillment, unless that right has been expressly stated.

Actually, on a closer inspection that connects the issue *de qua* to the general traits of the settlement agreement with special regard to the causal profile, we find that by accepting the aforementioned solution, the basic purpose of the settlement fails. This, in fact, reverses the premises of the legal argument according to which the novation settlement is a *species* of the broader *genus* of conservative settlement[50].

The most defining trait of the transaction, which identifies its typical function, is the resolution of the dispute, ergo the creation of an extinctive effect of the original claims which, through the settlement agreement, are transformed into a new and different self-regulation of interests.

If such an extinctive effect is confined to the novation settlement alone which requires, in order to be practically applied, all the court specifications and allowing, in the remaining cases, the resurgence of the previous order of interests, then the very *ratio* of the settlement as a tool to resolve the *res litigiosa* (and with it, the pre-existing situation) disappears.

By this, we do not mean to take our distance from the normative data, but only to provide an interpretation that reflects the nature of the settlement agreement.

The compliance with art. 1976 C.C. which allows the resolution by non-fulfillment of the non-novation settlement does not automatically imply the resurgence of the original relation, which is not necessarily related to the *ex tunc* effect of the resolution ex art. 1458 C.C.

The resolution actually concerns the settlement agreement and, with it, the mutual concessions therefrom deriving. The *ex tunc* effect is produced, evidently,

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mean that the position of the parties is simultaneously regulated by the original contract and the settlement agreement, but rather that, if the latter fails, the original contract is back into force. The same does not apply when the parties have expressly and objectively finalized a novation settlement which implies the termination of the original contract, in which case art. 1976 C.C. states, in clear consistency with the aim pursued by the parties, that the settlement is unresolvable (unless the right to resolution has been expressly agreed): translation editor's)».

[50] Criticism on this topic is in L. M. PETRONE, *La transazione novativa: un contratto in cerca di autore!*, in *Obbl. e Contr.*, 2009, 4 ff.

upon these latter, and does not necessarily give rise to the resurgence of the original relation.

The resurgence is a *quid pluris* from regulations, which only require the repayment of the amount performed in pursuance of mutual concessions, and nothing more.

Therefore, even the simple settlement produces the extinction of the dispute and, with it, of the previous legal situation. The case of novation settlement represents only a specification of how the parties cease the previous relation, on whose occurrence a more stable contractual effect is determined, thus preventing the parties from availing themselves of the resolutory remedy, as provided by art. 1976 C.C.