COMMENTS

LEGAL NATURE AND ENFORCEMENT OF SETTLEMENT AGREEMENTS: COMPARATIVE REVIEW

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The article is devoted to two major issues: the substantive nature of settlement agreement, and legal remedies available for a creditor under compromise which interest is not satisfied voluntarily. Both issues are covered from comparative perspective employing Russian and the United States statutes, case law and doctrine. First, the paper demonstrates that, while Russian doctrines has evolved a sui generis approach to substantial nature of settlement agreement, United States tend to consider it as special contractual type with consideration granted specifically for termination of a legal dispute. Second, the article analyzes scope of res judicata effect invoked in course of Russian and U.S.-governed settlement, as well as common points and differences in granting creditors with relief in forms of specific performance and recovery of damages. Finally, the paper considers problem of rescission as remedy for material breach of compromise. Author comes to conclusion on desirability of employing this type of claim into Russian legislation.

Keywords: settlement agreement; compromise; enforceability; damages; specific performance; rescission.

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Parties entering into a settlement agreement are striving to resolve their legal dispute at agreed compromise terms. Russian procedural law has evolved to secure this finality as the major characteristic of settlement agreement: upon court approval, settlement leads to termination of proceedings with *res judicata* effect; the case may not be renewed anymore. Even enforcement of settlement may not a subject of a new claim, as courts shall grant the respective enforcement order unconditionally.

However, actual realization of compromise is not always achievable. Parties may face a situation of non-enforceability of settlement due to several reasons.

First of all, a settlement agreement may contain terms not enforceable in the course of normal enforcement proceedings based on a court order. Some examples of such terms are: resuming cooperation/partnership between parties as agreed in the compromise, and entering into new transactions in future.[1] In other words, a settlement may include terms that would not be enforced in course of a specific performance claim.[2] Would a debtor fail to comply with such obligation voluntarily, the creditor shall not enforce it in course of enforcement proceedings.

Secondly, even an obligation armed with a court order may appear to be not enforceable effectively. For example, obligation to transfer property may be enforced only if the debtor actually owns the respective title when approached by the enforcement officer. Obligation to perform work is enforceable through collateral means only (contempt proceedings, both administrative and criminal; *astreint* imposed on the basis of Article 308.3 of the Russian Civil Code; prohibition to leave Russia).[3]

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[1] Regarding possibility to enter into non-enforceable settlement agreement under Russian law *see Берлин А.Я.* Заключение мирового соглашения под влиянием существенного заблуждения: на базе определения Судебной коллегии по экономическим спорам ВС РФ от 14.09.2015 № 309-ЭС15-3840 // Вестник экономического правосудия Российской Федерации. 2017. № 12. С. 180–185 [Artyom Ya. Berlin, *Conclusion of Settlement Agreement Under Influence of Substantial Error: Commentary on Judgment of the RF Supreme Court Chamber on Economic Disputes No. 309-ES15-3840*, 12 Bulletin of Economic Justice of the Russian Federation 171, 180–185 (2017)].

[2] According to Article 308.3 of the Russian Civil Code, a creditor is not entitled to claim in court specific performance of an obligation, if such impossibility is stipulated by statute or contract or derives from the nature of obligation. Under Russian case law, such impossibility takes place for obligations technically non-enforceable by means of specific performance and for obligations closely connected with debtor's personality. Ruling of the Plenary Session of the Supreme Court of the Russian Federation of 24 March 2016 No. 7 "On Court Application of Certain Provisions of the Civil Code of the Russian Federation Regarding Liability for Breach of Obligations" (hereinafter the Plenary Ruling No. 7), sec. 23 (Jun. 3, 2020), available at http://supcourt.ru/en/files/16418/.

[3] Impossibility to impose direct enforcement and replenish absent will of a debtor to perform works gives rise for doctrinal position on restriction of enforcement's sphere of application for *facere* obligations. *See Павлов А.А.* Присуждение к исполнению обязанности как способ защиты гражданских прав в обязательственных правоотношениях [Andrey A. Pavlov, *Specific Performance Award as a Civil Law Remedy in Obligatory Relations*] 149–158 (St. Petersburg: Iuridicheskii tsentr Press, 2001); *Громов А.А.* Реализация требования об исполнении обязательства в натуре в позициях Пленума Верховного Суда // Закон. 2017. № 1. С. 79–80 [Andrey A. Gromov, *Realization of Specific Performance Claim in the Supreme Court Plenary Rulings*, 1 Law 70, 79–80 (2017)].

Thirdly, a settlement's purpose may become obstructed due to impossibility to perform obligations contained therein, e.g. because of the destruction of items to be transferred under the compromise.

Finally, failure of the debtor to perform the agreement may itself lead to loss of the creditor's interest to consideration contained therein.

Modern Russian case law implies the possibility of the compensatory damages caused by failure to perform obligations indicated in a settlement agreement (compromise). To grant this remedy to settlement creditors, the courts usually issue orders for "*change of procedure and method of judgment enforcement*" based on Article 203 of the Russian Civil Procedure Code, Article 324 of the Russian Commercial Procedure Code.[4]

However, practical realization of any civil law remedy with respect to a compromise appears to be difficult, because of the procedural background of this transaction approved by the court. Is it possible to bring a separate lawsuit based on the settlement agreement? Or shall we develop a special procedure for such claims? How does awarding of compensatory damages affect enforceability of the agreement based on the court order? Is it possible to claim early termination or rescission of the settlement agreement on grounds of material breach?

Answers proposed by Russian modern jurisprudence are controversial and do not satisfy needs and aspirations of the litigants. It still embraces traditional Soviet-origin views on compromise as a straightforward transaction that shall be directly enforceable on the basis of the respective court order;[5] any terms and conditions that may cause further disputes between parties are not welcomed by the courts.[6] In this view, the only way open for dynamics of civil relation under a settlement agreement is its word-by-word execution, without any derogations or alternations.

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[4] On realization of new remedies in form of change of procedure and method of judgment enforcement *see Володарский Д.Б.* К вопросу о воздействии судебного акта на осуществленное через суд материально-правовое притязание // Вестник ВАС РФ. 2012. № 12. С. 20–21 [Daniil B. Volodarsky, *On Influence of Judgment on Substantive Claim Invoked Through Judicial Proceedings*, 12 Bulletin of the Supreme Commercial Court of the Russian Federation 6, 20–21 (2012)]; *Гальперин М.Л.* Будущее исполнительного производства: проблемы взаимодействия материального и процессуального права // Закон. 2012. № 4. С. 48 [Mikhail L. Galperin, *Future of Enforcement Proceedings: Problems of Interaction Between Substantive and Procedural Law*, 4 Law 40, 48 (2012)]; *Гальперин М.Л.* Невозможность исполнения требования исполнительного документа в неизменном виде: проблема процессуального или материального права? // Закон. 2017. № 7. С. 37 [Mikhail L. Galperin, *Impossibility of Execution of Unchanged Enforcement Order: A Problem of Procedural or Substantive Law*, 7 Law 27, 37 (2017)].

[5] In Russian procedural law, court order serving a legal basis for enforcement proceedings is called "*исполнительный лист*" (enforcement list). For the sake of terminological consistency, I use general notion of court order for enforcement list.

[6] Постановление Пленума Высшего Арбитражного Суда Российской Федерации от 18 июля 2014 г. № 50 «О примирении сторон в арбитражном процессе» [Ruling of the Plenary Session of the Supreme Commercial Court of the Russian Federation of 18 July 2014 No. 50 "On Reconciliation of Parties to Commercial Proceedings" (hereinafter the Plenary Ruling No. 50)], sec. 13 (Jun. 3, 2020), available at http://www.garant.ru.

There is no place for damages, rescission or other alternative remedies; parties shall remain bound by the compromise as such.

The Russian approach differs radically from the one employed by civil procedure in the United States. Therefore, direct enforcement of a compromise under court order is merely one possible option in a wide range. Among them are general contractual remedies, such as damages and specific performance, as well as ones deriving specifically from the compromise's procedural background (e.g. rescission with return to status quo; contempt proceedings).

It appears that the difference of approaches comes from the very notion of settlement agreement as understood by Russian and American law. The legal nature of compromise predetermines its dynamics and possibility to adjust general civil remedies.

This paper will provide a comparative analysis of (i) compromise's substantive nature and (ii) remedies available for a creditor to settlement agreement not executed voluntarily from the Russian and U.S. perspectives.

1. Legal Nature of Settlement Agreement

1.1. Russian Perspective

1.1.1. Substance

Since adoption of the 1864 Regulations of Judiciary, Russian law has never established any positive statutory qualification of settlement agreements. Draft Imperial Civil Code including French-inspired chapter on compromises has never entered into force. The procedural laws, on the other hand, have always regulated only purely procedural consequences of entering into compromise.

Imperial and early Soviet doctrine traditionally defined settlement agreement as a contract for elimination of disputable character of civil relationship through mutual compromise.[7] Explaining this notion, V. Isachenko wrote that

> Concluded settlement agreement does not have a meaning of partial termination of obligation being the dispute's ground for the disputed concluded peacefully, but complete elimination of the obligation, either unconditionally or on condition to replace it with a new obligation or new contractual agreement.[8]

Several authors, including T. Yablochkov, G. Sherchenevich, and M. Gurvich (early works) directly qualified this material effect of a compromise as *novation*, i.e. agreement on replacement of initial obligation with a new one between the same

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[7] *Васьковский Е.В.* Учебник гражданского процесса [Evgeny V. Vaskovsky, *Textbook of Civil Procedure*] § 117 (St. Petersburg: Bashmakov Brothers Edition, 1917).

[8] *Исаченко В.Л.* Русское гражданское судопроизводство. Т. I [Vasily L. Isachenko, *Russian Civil Proceedings. Vol. 1*] 304 (St. Petersburg: M. Merkushev's Printing House, 1910).

parties.[9] Others, including A. Golmsten, N. Zeider, and P. Trubnikov, did not use this notion expressly, but still underlined the key feature of novation–liquidation of initial legal relation and simultaneous emergence of new one.[10] According to E. Nefediev,

> Concluding the compromise, parties liquidate this ambiguity [of the disputable relationship], so the old relation is replaced with a new one–clear, undoubted. With a settlement, the previous relation is terminated, and a new one emerges instead.[11]

This view on the compromise as a novation of obligation appears in the modern doctrine too. For example, A. Pavlov noted that

> Law does not exclude possibility of novation of obligation being subject to judicial proceedings. In such situations, novation of a disputable obligation may be done in form of a settlement agreement, and novation agreement shall also meet requirements of procedural law.[12]

According to a well-established doctrine, novation has the following key attributes:[13]

a) *Validity of the initial obligation*–legal effect of novation is possible only if a novated obligation exists;

b) *Animus novandi*, i.e. expressed intention of parties to establish a new obligation with termination of an old one (*novation shall not be implied* principle);

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[9] *Яблочков Т.М.* Учебник русского гражданского судопроизводства [Tikhon M. Yablochkov, *Textbook of Russian Civil Proceedings*] 206 (Yaroslavl: I.K. Gassanov's Publishing House, 1912); *Шершеневич Г.Ф.* Учебник русского гражданского права [Gabriel F. Shershenevich, *Textbook of Russian Civil Law*] 448 (Tula: Avtograf, 2001); Советское гражданское процессуальное право [*Soviet Civil Procedural Law*] 188 (M.A. Gurvich (ed.), Moscow: Vysshaia shkola, 1964).

[10] *Гольмстен А.Х.* Учебник русского гражданского судопроизводства [Alexander Kh. Golmsten, *Textbook of Russian Civil Proceedings*] 268–269 (St. Petersburg: M. Merkushev's Printing House, 1913); *Зейдер Н.Б.* Гражданские процессуальные правоотношения [Nikolai B. Zeider, *Civil Procedural Relations*] 17 (Saratov: Saratov University Publishing House, 1965); *Трубников П.Я.* Судебное разбирательство гражданских дел [Pavel Ya. Trubnikov, *Judicial Consideration of Civil Disputes*] 94 (Moscow: Gosiurizdat, 1962).

[11] *Нефедьев Е.А.* Исполнение судебных решений / *Нефедьев Е.А.* Избранные труды [Evgeny A. Nefediev, *Enforcement of Judgments* in Evgeny A. Nefediev, *Selected Works*] 387 (Krasnodar: Sovetskaia Kuban, 2005).

[12] *Павлов А.А.* Условия и последствия новации // Вестник ВАС РФ. 2007. № 8. С. 8 [Andrey A. Pavlov, *Conditions and Consequences of Novation*, 8 Bulletin of the Supreme Commercial Court of the Russian Federation 4, 8 (2007)]; *Шилохвост О.* Прекращение обязательства новацией // Российская юстиция. 1996. № 8. С. 17 [Oleg Shilokhvost, *Termination of Obligation by Means of Novation*, 8 Russian Justice 17, 17 (1996)].

[13] *Id.*

c) *Termination of novated obligation and all its supplementary obligations*;

d) *Emergence of a new obligation substantiated in novation agreement.*

Therefore, compromise being a novation agreement shall reflect the expressed intention of the parties to terminate obligation–subject to their dispute and establish a new obligation. Parties to such an agreement desire to define substance of their relationship *ab novo*; possible consequences of the debtor's failure to perform its duties may be discussed exclusively on the basis of new relationship; there is no place for the old obligation, as it has been terminated.

This express or implied novation serves as basis for the main procedural consequence of a settlement under Russian law–dismissal of proceedings with prohibition to renew them in any form: as soon as the disputable relationship is terminated forever, any proceedings in its regard would be purposeless.[14] According to K. Malyshev,

> Under settlement agreement each party gives and acquires rights on good will; would a party agree to compromise, deferrals and losses, it may blame only itself.[15]

Novation approach to settlement agreement easily justifies the necessity of mutual compromise under settlement, unanimously proclaimed by all aforementioned authors; agreement without mutual compromise would not impose novation effect on the parties' relationship; depending on pre-trial state of their relationship, such agreement would constitute release of debt with *animus donandi* (if deferral is on claimant's side), or simple confirmation of obligation/gift (if deferral is on respondent's side).[16]

In the period of the 1964 RSFSR Civil Procedure Code, this approach was revisited. R. Gukasyan demonstrated in a fundamental treatise "Problem of Interest in Soviet Civil Procedural Law," that material qualification of settlement agreement may not be limited to novation: such conclusion was based on wrong assumption that compromise should always entail replacement of a legal relationship.[17] The nature of the link between initial relationship and compromise may vary depending on several factors. In light of this view, the settlement may entail:

– Confirmation or concretization of pre-trial material relationship (assertion contract);

– Release of debt;

– Change of pre-trial material relationship (amendment of contract).

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[14] Isachenko 1910, at 308.

[15] *Малышев К.И.* Курс гражданского судопроизводства. Т. I [Kronid I. Malyshev, *Course of Civil Proceedings. Vol. 1*] 399 (St. Petersburg: M.M. Stasiulevich's Printing House, 1876).

[16] Shershenevich 2001, at 447.

[17] *Гукасян Р.Е.* Проблема интереса в советском гражданском процессуальном праве [Rafael E. Gukasyan, *Problem of Interest in Soviet Civil Procedural Law*] 138–140 (Saratov: Privolzhskii Book Publishing House, 1970).

Russian jurisprudence embraced this doctrine; now it serves as based of modern view on material nature of settlement agreement.[18] Supreme Commercial Court Justice Sarbash wrote in his renowned dissenting opinion on this matter:

> As far as compromise is a contact, it is subject, along with procedural legislation norms, mutatis mutandis to civil statutory norms on contracts, including freedom of contract and interpretation of contracts rules. In course of freedom of contract principle, a settlement agreement might contain any clauses not contrary to statute. Settlement agreement may cover all or some of relations between parties. Settlement agreement may fall within scope of contracts well-known to material law (e.g. release fee, novation, release of debt etc.), or turn to a sui generis contractual type not expressly covered by civil legislation. Moreover, parties are not obliged to include a mandatory provision on mutual compromises into their settlement agreement. Questionable settlement agreement … is an assertion contract. The contract for assertion (recognition) of existing debt is not expressly covered by Russian civil legislation, but not contradicts to it. The subject matter of such contract is usually liquidation of ambiguity in parties' relationships on legal and factual matters.[19]

This quote is a brilliant summary of dominating Russian doctrine on material nature of a settlement agreement. In further discussion, I will base my analysis on this assumption. The only necessary addition to this *sui generis* civil law approach is that, unlike any other civil contract, the settlement agreement does not enter into force upon reaching of consensus of parties.[20] Moreover, the consensus as such does not have any legal meaning: a party may withdraw its signature under the compromise without any negative consequences. The settlement enters into force and becomes irrevocable only from the moment of its approval by the court. This approval is subject to the following preconditions:

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[18] *Зинченко А.И.* Мировые соглашения в гражданском судопроизводстве: автореф. дис. … канд. юрид. наук [Alexander I. Zinchenko, *Settlement Agreements in Civil Proceedings: Synopsis of a Thesis for a Candidate Degree in Law Sciences*] 15 (Saratov, 1981); Советский гражданский процесс [*Soviet Civil Procedure*] 220 (M.S. Shakaryan (ed.), Moscow: Iuridicheskaia literatura, 1985); *Давыденко Д.Л.* Мировое соглашение как средство внесудебного урегулирования частноправовых споров: дис. … канд. юрид. наук [Denis L. Davydenko, *Settlement Agreement as Instrument for Non-Judicial Settlement of Private Law Disputes: Thesis for a Candidate Degree in Law Sciences*] 35–36 (Moscow, 2004); *Рожкова М.А.* Мировая сделка: использование в коммерческом обороте [Marina A. Rozhkova, *Compromise: Use in Commercial Transactions*] 45 (Moscow: Statut, 2005); *Егоров А.* Доктрина окончательного урегулирования правового спора // Журнал РШЧП. 2019. № 3. С. 83, 89 [Andrey Egorov, *Doctrine of Final Dispute Resolution*, 3 Journal of the Russian School of Private Law 83, 89 (2019)].

[19] Justice Sarbash dissenting opinion on case No. A60-62482/2009-S7, 22 March 2011.

[20] *Бекленищева И.В.* Гражданско-правовой договор: классическая традиция и современные тенденции [Ilona V. Beklenishcheva, *Civil Law Contract: Classical Tradition and Modern Trends*] 58 (Moscow: Statut, 2006).

a) Motions of both parties or their joint motion for approval of settlement (as was said above, this motion may be withdrawn at any moment before approval);

b) Compliance of compromise with requirements of law, rights and lawful interests of other parties;[21]

c) Clear, straightforward and unambiguous terms of settlement which are not capable of raising any further doubts or disputes;

d) Enforceability of compromise under procedural rules of compulsory enforcement of judicial acts.[22]

1.1.2. Procedural Consequences of Settlement

Upon compromise approval, the court issues an order of dismissal of proceedings.[23] Dismissal is the form of closing of the proceedings without issuing a judgment; this closing is final, as it imposes the same *res judicata* effect on disputable relation as a judgment would do.

Generally, *res judicata* under Russian procedural law is the rule precluding claimant from bring a new action identical to one finally resolved by judgment or dismissal of proceedings due to waiver of claim or settlement agreement. The claim is considered identical when concurs with the original one on the following criteria: (i) the subject matter, (ii) the factual grounds, and (iii) the defendant.[24] A claim lacking any criterion is not identical and not covered by *res judicata*.

These limitations are expressly indicated in procedural statutes and constitute a well-established practice when applied to judgments. For example, a party obtaining a judgment for the principal amount of debt is not prevented from invoking interest in separate proceedings; they are considered non-identical due to different subject matter. However, with respect to compromise, Russian courts tend to apply *res judicata* test broadly.

This practice has roots in the Russian Supreme Commercial Court Presidium Ruling No. 13903/10 of 22 March 2011. The Court was requested to review the possibility of invoking interest on unjust enrichment amount voluntarily paid by the defendant in the course of settlement agreement concluded in separate proceedings. The lower court rejected the claim on the basis of novation doctrine (*see* para. 1.1.1 above); the compromise constitutes a novation, pre-trial relation between parties is terminated, hence, it may not give raise for interest. The Supreme Commercial Court disagreed with that argument, but upheld the general decision to reject the claim on the following motives:

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[21] Arts. 153.8(2), 153.10(6) of the Russian Civil Procedure Code; Arts. 139(3), 141(6) of the Russian Commercial Procedure Code.

[22] Plenary Ruling No. 50, sec. 13.

[23] Art. 153.10(13) of the Russian Civil Procedure Code; Art. 141(13) of the Russian Commercial Procedure Code.

[24] Art. 221 of the Russian Civil Procedure Code; Art. 151(3) of the Russian Commercial Procedure Code.

> … the sense and contents of rules defining amicable proceedings, as long as the goals of judicial proceedings in commercial courts lead to conclusion that a settlement agreement approved by court is, by its very nature, the procedural mechanism of dispute resolution based on conciliation of parties on mutually acceptable conditions which causes liquidation of a legal dispute to its complete extent.
>
> According to Article 9(2) of the Russian Commercial Procedure Code, parties to a proceeding bear risk of consequences of their procedural actions and omissions. Failure to include clauses regarding any additional obligations into compromise's text means that the parties have agreed to terminate their civil law dispute completely, therefore, the parties are precluded (estopped) from invoking new claims based on the primary obligation or accessory ones.

In other words, the Court found that the compromise had not terminated pre-trial obligations (otherwise, it would be enough to argue their non-existence, as the first instance court had done). Instead, the Court extended *res judicata* effect of the settlement dismissal order from original claim to other claims connected with it.

This position was criticized widely. Supreme Commercial Court Justice Sarbash issued a dissenting opinion where he underlined that the disputable agreement had been an assertion contract and could not terminate accessory obligation. M. Rozhkova concurred with that opinion:

> Settlement agreement is not a distinct contractual type; … it may have only simple confirmation effect for pre-trial obligations.[25]

Despite its controversy, this approach was further upheld in section 15 of the Plenary Ruling No. 50. In this abstract teaching, the Court has clarified the doctrine as follows:

> … if parties entering into a settlement agreement failed to indicate other legal consequences for the respective legal relation (including the primary obligation being a subject of the claim brought to court and additional ones), such agreement shall mean complete termination of dispute raising from this relation. Therefore, consequent advancement of new claims from the same relationship, either from basic or from additional obligations, is not allowed.

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[25] *Рожкова М.А.* Мировая сделка: ошибки судебной практики как отражение недостатков правового регулирования // Гражданское право и современность: сборник статей, посвященный памяти М.И. Брагинского [Marina A. Rozhkova, *Compromise: Errors of Case Law as Mirror of Statutory Defects* in *Civil Law and Modernity: Digest in Memoriam of M.I. Braginsky*] 694 (V.N. Litovkin & K.B. Yaroshenko (eds.), Moscow: Statut, 2013).

Therefore, the actual scope of *res judicata* effect of settlement agreement is wider than one accepted for judgments under procedural statutes: parties are precluded from any new claims deriving from the same relationship or nucleus of facts. A. Smola comments on this approach that it might be justified with good faith which requires a party to agree expressly on all consequences of conciliation by means of compromise; law shall protect the other party's reasonable expectations by avoidance of "surprise" claims.[26] However, the scope of this estoppel instrument, i.e. objective and subjective boundaries of "relationship" finally conciliated by a settlement, is still broadly disputed in case law and doctrine.[27]

1.2. United States Perspective

1.2.1. Substance

United State law has a well-established view on a settlement agreement as a contract. Unlike Russia, U.S. doctrine has never been affected with controversy between material and procedural substance of this instance; the contractual nature has been always recognized as the first and foremost nexus of the compromise. According to a renowned precedent,

> Settlement agreements are merely one type of contract and should be governed by the laws governing contracts in general.[28]

In that regard, all aspects of formation, capacity to contract, and interpretation are governed by the applicable state material law;[29] there is no intervention of procedural legislation in the regulatory framework. This purely "materialistic" view on settlement agreement leads to several consequences which might appear surprising for a continental lawyer.

The only necessary prerequisite for enforceability of compromise is consensus of parties, i.e. meeting of their minds on essential terms of the contract.[30] As a general rule, no court approval is required; moreover, even the written form of the agreement as such is not mandatory. If a dispute arises, existence and enforceability of an oral

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[26] *Смола А.А.* О правовых последствиях заключения мирового соглашения для других судебных споров между теми же сторонами // Вестник экономического правосудия Российской Федерации. 2016. № 10. С. 83 [Anna A. Smola, *On Legal Consequences of Settlement Agreement Conclusion for Other Judicial Disputes Between the Same Parties*, 10 Bulletin of Economic Justice of the Russian Federation 77, 83 (2016)].

[27] Smola 2016, at 83; Egorov 2019, at 89.

[28] *Nicholson v. Barab*, 233 Cal.App.3d 1671 (Cal. Ct. App. 1991).

[29] *White Farm Equipment Co. v. Kupcho*, 792 F.2d 526 (5th Cir. 1986).

[30] George E. Feldmiller & W. Perry Brandt, *Settlement Agreements as Contracts* in *Settlement Agreements in Commercial Disputes: Negotiating, Drafting & Enforcement* 5-1, 5-5 (R. Rosen (ed.), New York: Aspen Publishers, 2002).

settlement agreement are subject to judicial review based on available evidence.[31] The key issue to be determined is whether the parties had the intention to be bound by an oral settlement agreement. To adjudicate this issue, a four-factor test has been evolved in the case law:

> (1) whether there has been an express reservation of the right not to be bound in the absence of a signed writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract has been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing.[32]

The similar approach is taken when dealing with term sheets, draft agreements and all other types of ambiguous or unfinished paperwork; the court shall ensure whether the presented document may constitute a contract as a consensus on essential terms.[33]

Legislation of individual states provides for several exceptions from a general rule of consensus as the sole precondition of the settlement agreement. G.E. Feldmiller and W.P. Brandt note that

> Many states require, by statute or common law, that court approval be obtained for settlements of disputes involving estates, minors and incompetents.[34]

Any compromise on behalf of those parties would be ineffective without prior court approval;

> [a]djudicating the respective motion, the court shall determine whether the terms of proposed compromise are in the best interest of minor.[35]

As the Superior Court of Pennsylvania explained its rationale of this rule, it had been "specifically designed to remove from the litigants and their counsel the authority to subjectively determine what is right for the minor."[36] The same authorization is required for settlement agreements entered into by a bankruptcy trustee acting on behalf of an insolvent party.[37]

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31 Feldmiller & Brandt 2002, at 5-16.

32 *Ciaramella v. Reader's Digest Association*, 131 F.3d 320 (2d Cir. 1997).

33 Feldmiller & Brandt 2002, at 5-10.

34 *Id*. at 6-49.

35 *Carter v. Fenner*, 136 F.3d 1000 (5th Cir. 1998).

36 *Power v. Tomarchio*, 701 A.2d 1371 (Pa. Super. Ct. 1997).

37 Peter W. Schneider, *Parties' Authority to Settle a Dispute or Claim* in *Settlement Agreements in Commercial Disputes: Negotiating, Drafting & Enforcement*, *supra* note 30, at 6-1, 6-53.

Settlement agreement is considered a special contractual type in the United States. This can be clearly demonstrated through a specific application of consideration doctrine to compromises. Consideration is the traditional concept of common law providing that any contract is valid when obligation accepted by debtor is exchanged for "good and valuable consideration." This concept, being close to the continental notion of *causa*, assists in the differentiation of contractual types, answering the question: For which economic valuables is consideration exchanged?[38]

Modern U.S. law presumes that

> The very entry into a settlement agreement to resolve a dispute–in lieu of costly litigation–affords sufficient benefit to the settling parties to constitute legally sufficient consideration.[39]

This condition is met when parties entering into compromise believe in good faith that a bona fide dispute is being resolved; so,

> [c]onsideration may be found lacking where a settling party who originally had asserted a claim knows, or has good reason to know that the claim being settled is without foundation or support.[40]

This concept, close to "subjective dubiousness of claim" of civil law, may be understood through the common law notion of dispute requiring a difference of opinion concerning the parties' respective rights or obligations, such as one party's rejection of another's claims.[41]

Due to the subjective nature of this concept, the scope of actual judicial review to the value of consideration under compromise is limited;

> [c]ourts are reluctant to make adverse *ex post facto* judgments regarding the adequacy of consideration.[42]

There is a well-established case law favoring validity of any settlement where a party had good faith reasons to be interested in resolving the dispute out of court.[43]

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38 Beklenishcheva 2006, at 21.

39 Feldmiller & Brandt 2002, at 5-20.

40 *Id*. at 5-21.

41 *Johnson v. Land O'Lakes, Inc.*, 18 F.Supp.2d 985 (N.D. Iowa 1998).

42 Feldmiller & Brandt 2002, at 5-26.

43 *Sammons v. Schwarz*, 55 F.Supp. 714 (1944); *Wynne v. Aluminum Awning Products Co.*, 202 F.2d 130 (4th Cir. 1953); *Dominguez Estate Co. v. Los Angeles Turf Club*, 259 P.2s 962 (Cal. Ct. App. 1953); *Budget Rent a Car of St. Louis v. Guaranty National Insurance Co.*, 939 S.W.2d 412 (1996).

In view of this general notion of compromise as contract exchanging termination of dispute for good and valuable consideration, settlement agreements usually include specific clauses directed to achieve this legal goal. They are known as releases or covenants not to sue.

The release is defined as a contract that extinguishes one or more legal claims.[44] Its primary legal effect is to bar any later action based on matters covered by scope of the release.[45] This "bar effect" is not a termination of underlying material rights per se; instead, it forms a defendant's *exceptio* against a subsequent action. The District Court of Appeal of Florida argued on this matter that

> A release executed by a party attempting to assert a claim allegedly barred by said release is an affirmative defense and must be pleaded in the answer.[46]

The scope of release may vary depending primarily on its drafting style. A release may be *general*, i.e. covering all claims existing (had matured) and known to the parties at the time the release is executed.[47] A *specific* release covers only claims expressly named in its text, even if other claims exist at the time of its execution.[48] Even unknown or future claims can be released upon express agreement of parties.[49]

1.2.2. Procedural Consequences of Settlement

A settlement agreement containing a release clause causes a *res judicata* effect over the claims the parties intended to settle.[50] Generally, the doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction is conclusive as to the rights of the parties and their privies and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action; it is applied to settlements with full existent.[51]

The identification of claim for the purpose of applying this doctrine is based on different methods of evaluation evolved in case law. One branch of cases considers whether the suits arise out of "a single group of operative facts";[52] another compares

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44 *Brady v. Prairie Material Sales, Inc.*, 546 N.E.2d 802, 190 Ill. App. 3d 571 (1989).

45 *Anheuser-Busch Co. v. Summit Coffee Co.*, 934 S.W.2d 705 (Tex. App. 1996).

46 *Sottile v. Gaines Constr. Co.*, 281 So.2d 558 (Fla. 3d DCA 1973).

47 *Id*.

48 *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931 (Tex. 1991).

49 *Williams v. Glash*, 789 S.W.2d 261 (Tex. 1990); *Bruner v. Illinois Ctr. R.R. Co.*, 578 N.E.2d 1385, 1388 (Ill. App. Ct. 1991).

50 *Wiencek v. Woodfield Ford Sales, Inc.*, 597 N.E.2d 744 (Ill. App. Ct. 1992).

51 *Spiller v. Continental Tube Co.*, 447 N.E.2d 834 (Ill. 1983).

52 *Radosta v. Chrysler Corp.*, 110 Ill. App.3d 1066 (Ill. 1982).

the evidence necessary to support two lawsuits.[53] A. Egorov explained these methods through a concept of "transaction" being a nucleus of facts lying in the grounds of a claim regardless of any substantive theories available for the claimant.[54]

As a practical matter, *res judicata* effect of release shall be employed by the defendant as a matter of affirmative defense. Depending on specific procedural rules varying in different states, the defendant may plead dismissal of case, summary judgment, etc.

This doctrine, however, may be employed only for claims named in the release. The courts would not interpret them broadly to include claims not mentioned there specifically or not based directly on criteria set out in the compromise.

2. Enforcement of Settlement Agreements: Available Remedies

2.1. Russian Perspective

2.1.1. Specific Performance and Damages

Specific performance is the principal remedy available for creditor under a settlement agreement and the only one specifically named in the statute.[55] As far as all settlement agreements are subject to judicial approval and are reduced to court orders, they are directly enforced on the basis of this order. Courts issue enforcement orders in according with the literal text of the debtor's obligations under the compromise; that is the practical reason of substantive requirements of clearness and unambiguity (*see* para. 1.1.1 above). The court may convene a hearing to clarify the exact amount of recovered debt.[56]

It is well-known that specific performance is a general, but not the only remedy available for creditors under general civil law transactions. Moreover, this remedy is not considered strongly effective, i.e. securing full restoration of violated right (*restitutio in integrum*).[57] Civil legislation entitles the creditor to choose between: (a) termination of contract due to its material breach (Art. 450(2)(1) of the Russian Civil Code); (b) performance of the duty by third parties at the debtor's expense (Art. 397 of the Russian Civil Code); and/or (c) compensation of damages (Art. 939 of the Russian Civil Code). As A. Pavlov noted, the last remedy is usually the most convenient for the creditor, taking into account development of the open market and the widespread loss of importance of the debtor's personality in civil relations.[58]

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53 *Village of Northbrook v. County of Cook*, 88 Ill. App.3d 745 (Ill. 1980).

54 Egorov 2019, at 77.

55 Art. 153.11(2) of the Russian Civil Procedure Code; Art. 142(2) of the Russian Commercial Procedure Code.

56 Plenary Ruling No. 50, sec. 22.

57 Gromov 2017, at 70.

58 Pavlov 2001, at 81.

This issue gives rise to question of the possibility to invoke compensatory damages instead of pursuing specific performance under the initial court order.

At first glance, nothing restricts right of the creditor to seek recovery of damages caused by debtor's failure to comply with the settlement agreement. Article 15 of the Russian Civil Code proclaims this remedy as the basis for any violation of the subject's material rights. Under Article 393 of the Russian Civil Code, invoking other remedies does not restrict the right of creditor to claim recovery of damages, unless the law stipulates otherwise; recovery is based on the *restitutio in integrum* principle. Material law contains no special provisions restricting applicability of these rules to settlement agreements.

One would not find such restriction in procedural statutes. The only procedural consequence of compromise approval is dismissal of proceedings on a specific case settled by this agreement; a new claim is precluded only if being on the same subject and grounds, between identical parties. Obviously, an action for damages caused by failure to perform duties of the compromise normally would not be identical to the one settled by this compromise (I will further review the exception when damages are claimed for the amount released by the claimant when settling the initial claim).

Therefore, as long as the creditor's claim for damages caused by failure of the debtor to comply with terms of compromise constitutes a new civil law dispute, having its own subject matter and grounds not identical to the settled dispute, it shall be procedurally filed as a new lawsuit. However, consistent following of this position would lead us to several practical difficulties.

First of all, recovery of damages for non-performance of obligation (compensatory damages) relieves the debtor from specific performance (Art. 396(2) of the Russian Civil Code); hence, realization of the respective claim by the creditor affects the existence of obligation established by the settlement agreement. According to A. Karapetov, the very possibility to award compensatory damages is based on the presumption of termination of the respective contract by the creditor.[59] Meanwhile, the modern Russian case law does not allow influence of non-procedural circumstances on obligatory relationships established by court. There are several examples of such an approach:

– *Informational Letter of the Russian Supreme Commercial Court Presidium of 21 December 2005 No. 103* (sec. 7): agreement on novation of obligation confirmed by the judgment is not enforceable, unless it is approved by court as a settlement agreement;

– *Plenary Ruling No. 50* (sec. 23): any amendments to a settlement agreement shall be approved by court as a new compromise.

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[59] *Карапетов А.Г.* Соотношение требований о взыскании убытков с иными средствами защиты прав кредитора // Убытки и практика их возмещения: сборник статей [Artyom G. Karapetov, *Damages Claims Compared with Other Remedies Available for Creditor* in *Damages and Practice of Compensation Thereof: Collection of Articles*] 202, 208–209 (M.A. Rozhkova (ed.), Moscow: Statut, 2006).

Therefore, a question arises whether it is possible to invoke a legal fact causing a terminating effect on obligation of compromise outside legal proceedings where that agreement has been approved.

D. Volodarsky noted that the aforementioned approach of the courts was inspired by practical issues connected with absence of adequate remedy for a debtor against groundless enforcement of judicial act due to termination or amendment of underlying civil relationship under substantive law, out of judicial control, e.g. action against enforcement.[60] The approach stating that a judgment imposes effects of finality and constancy on a civil relationship is not correct, as far as

> material relationship does not suffer any internal changes due to its confirmation by final judgment; state activities directed to enforcement of a substantive right have merely procedural nature.[61]

I believe that this conclusion is correct for settlement agreements, as long as their scope of judicial force is limited only to creating *res judicata* effect for a case settled by the compromise. Possibility to enforce compromise directly derives not from judicial force of an approving court order, but only from the specific provision of law. This makes settlement agreements common with other undisputed enforcement acts like enforcement order of notary public, rather than judgment providing a final and substantive dispute resolution.[62]

Otherwise, we should have argued that obligation from a settlement agreement may be terminated only through state enforcement service, on the basis of the respective order on completion of enforcement proceedings. However, Russian procedural law provides for voluntarily performance of compromise as a general rule; enforcement order is issued upon the creditor's request only in case of the debtor's failure to comply with its terms.[63] The Russian Supreme Commercial Court in its Plenary Ruling No. 50 also teaches that partial voluntarily performance shall be taken into account by court issuing the enforcement order and/or the enforcement officer.

Therefore, partial performance of the settlement agreement is considered to extinguish the respective right regardless of the court's sanction. There are no grounds to assume that recovery of damages in course of another dispute, being under substantive law a reason for obligation's termination along with performance, would not cause the respective legal effect.

Unfortunately, Russian procedural law still does not provide any form of order reflecting this material extinguishment of obligations indicated in settlement

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60 Volodarsky 2012, at 20–21.

61 *Id.*

62 Berlin 2017, at 184.

63 Art. 153.11 of the Russian Civil Procedure Code; Art. 142 of the Russian Commercial Procedure Code.

agreement. Practically, courts apply in extended manner Article 43(1)(2) of the Federal Law of 2 October 2007 No. 229-FZ "On Enforcement Proceedings." This provision entitles the court to issue an order on termination of the enforcement proceedings due to loss of possibility to enforce specific obligation of the debtor. However, scholars argue that this provision cannot satisfy the anti-enforcement interest of debtor, as it is applicable for existing enforcement proceedings only; moreover, this procedure serves as an instrument for indisputable termination of enforcement proceedings and may not serve well for legal dispute resolution.[64]

Despite absence of any express prohibition to recover damages arising from failure to comply with settlement term as a separate action, the courts sometimes reject these claims based on a broad understanding of the concept of final dispute resolution by compromise. By doing so, the courts argue that new disputes are not allowed not only from the initial relationship (which judicial consideration is dismissed due to approval of settlement), but neither from failure to meet obligations from compromise. For example, the Fifteenth Arbitration Court of Appeal in rejecting a claim for damages arising from three settlements in form of *lucrum cessans* noted that

> Disputable agreements were concluded by their parties for the sake of termination of dispute arisen from subcontractor agreements for land surveying and cadastral works. However, the approved compromises contain no indication for additional obligations based on the named agreements, therefore, they are directed to termination of a civil law dispute to its full extent. Hence, the claimant may not bring new claims against the defendant from the same legal relation.[65]

I assume the court was guided by the estoppel doctrine of the Supreme Commercial Court (*see* para. 1.1.2 above). However, I strongly believe that its sphere of application may not be extended to the impossibility of new claims arising from the settlement agreement (not the initial relationship itself). It would be imprudent to claim that parties entering into a compromise renounce all possible future claims from this new relationship. For example, courts undoubtedly recover interest for delay of payment under settlement agreements (*see* sec. 52 of the Plenary Ruling No. 7).

Anyways, with regard of the aforementioned practical difficulties arising in course of bringing separate actions from settlement agreements, an alternative procedural form of these claims has become popular, namely "change of procedure and method

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[64] *Володарский Д.Б.* К вопросу о механизме защиты должника от неосновательного действия судебного акта // Вестник ВАС РФ. 2013. № 6. С. 116–117 [Daniil B. Volodarsky, *On Mechanism of Protection of Debtor Against Improper Effects of Judgment*, 6 Bulletin of the Supreme Commercial Court of the Russian Federation 94, 116–117 (2013)].

[65] Постановление Пятнадцатого арбитражного апелляционного суда от 19 августа 2016 г. по делу № А32-45410/2015 [Ruling of the Fifteenth Arbitration Court of Appeal of 19 August 2016 in case No. A32-45410/2015] (Jun. 3, 2020), available at http://www.consultant.ru.

of judgment enforcement" (Art. 324 of the Commercial Procedure Code). By employing this article, the courts can order debtors to repay the price of goods to be handled under the compromise or cover the expenses for a replacement deal. Considering such applications, the courts review evidence confirming the amount of claim in adversary proceedings, including the appointment of experts. Actually, courts reveal all circumstances under the respective substantive claim's standard of proof, so under the veil of procedural application for change of procedure and method of judgment, enforcement is actually a separate lawsuit for contractual liability.

However, the courts are tending to conceal this substantive nature of orders brought in course of Article 324, underlining that there is no place for a new lawsuit, but a mere single procedural issue. A good example is the position of the East-Siberian Circuit Commercial Court:

> The appellant's argument that the claimant's application for change of procedure and method of judgment enforcement is actually a damages claim is not correct, as recovery of damages is a separate substantive matter with its own standard of proof. Considering an application for change of procedure and method of judgment enforcement, one should prove only difficulty of enforcement; at the same time, change of specific performance to monetary obligation does not change substance of claim in these proceedings and is intended to protect violated rights of the claimant.[66]

This approach is not without disadvantages. First, as noted by M. Galperin, Article 324 was designed to change the method of enforcement indisputably, when the alternative method is expressly indicated in the judgment[67] (i.e. in terms of compromise). Its procedure is not designed for consideration of new disputes, as there is no place for adversary proceedings, although the courts are striving to overcome these disadvantages by the actual extension of scope of Article 324 proceedings (e.g. free admission of any relevant evidence). So, in absence of the "second stage" of legal proceedings concept in Russian law, change of procedure and method of judgment enforcement remains a working alternative to a separate damages lawsuit arising out of settlement agreement.

2.1.2. Rescission

Article 450(2) of the Russian Civil Code provides early termination of contract as a general remedy available to the creditor for material breach on the debtor's side. A settlement agreement, being a civil law contract, should fall within scope of this provision.

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[66] Постановление ФАС Восточно-Сибирского округа от 10 ноября 2010 г. по делу № А33-258/2000 [Ruling of the East-Siberian Circuit Commercial Court of 10 November 2010 in case No. A33-258/2000] (Jun. 3, 2020), available at http://www.garant.ru.

[67] Galperin 2017, at 37.

However, the possibility of a settlement's early termination seems to be against the very nature of this instance, which is designed for final resolution of a legal dispute on terms approved by the court. Russian procedural law does not indicate any grounds, procedures or consequences of a settlement's termination. The only exception known to Russian law is an insolvency settlement agreement. According to Articles 164–166 of the Federal Law of 26 October 2002 No. 127-FZ "On Insolvency (Bankruptcy)," the court may terminate a settlement agreement upon the respective claim of creditors holding at least 25% of claims towards the debtor in monetary terms on the basis of a material breach. Upon such termination, the bankruptcy proceedings are renewed with creditors' claims reinstated as of before the agreement (with deduction of amounts actually received in course of the settlement's performance).[68]

At the first glance, as far as the Russian law does not allow to terminate settlement, even the material breach on the debtor's side may not be a ground for its termination. Creditors and debtors shall remain bound by a compromise, until its underlying duties would terminate by means of performance (completion), compensatory damages claim, or other grounds not connected with termination of contract (e.g. impossibility of performance not attributable with the debtor).

Moreover, strict application of Article 450(2) of the Civil Code seems impractical, as its basic legal consequence is termination of contract for future, without retroactive effect (Art. 453(3) of the Civil Code). Hence, termination of a settlement agreement would give rise to compensatory damages only, but may not cause annulation of the compromise's legal effects already matured, namely, liquidation of an underlying dispute and dismissal of proceedings. The creditor would not be given a chance to return to initial litigation.

However, as a practical matter, creditors are striving to override this bond, to rescind the settlement not performed by the debtor duly and return to the initial dispute. Creditors are regularly trying to challenge settlements on the basis of Chapter 9 § 2 of the Russian Civil Code (invalidity of transactions). Formally, such claims are about invalidity of settlement *ab initio*; actually, they are about simple failure of the debtor to perform its duties under the compromise.

A clear example of this approach is the Russian Supreme Court (Economic Disputes Judicial Division) case No. 309-ES15-3840 of 14 September 2015. The creditor challenged the settlement agreement compromise for its waiver of a substantial share of penalty sought in course of the initial proceedings against the debtor's warranty to maintain joint business activities presented during the settlement negotiations.

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[68] It should be noted that the described procedure may not be applied to general settlement even by means of analogy of law, as insolvency settlements are not compromise *in casu*: the underlying relationship is not disputable (parties to the agreement are creditors which rights are confirmed by the court); there is no parties' consensus to enter into agreement (the majority voting for settlement suppresses the dissenting minority creditors). Therefore, insolvency settlement is a separate bankruptcy procedure bearing only coincidental name with a general civil procedural compromise. *See* Shershenevich 2001, at 447.

The Supreme Court upheld the lower court's order for rescission of the settlement and continuation of the initial penalty dispute. The formal argumentation was that the creditor had erred in the debtor's identity, making the agreement invalid on the basis of Article 178 of the Russian Civil Code.

In my analysis of this Supreme Court case, I have noted that actually its rationale was not recognition of the creditor's *error in persona*–this reference was manifestly *contra legem*. On the contrary, the Court upheld the creditor's request to rescind the settlement and revert to the initial dispute as a remedy for breach of contract on the debtor's side.[69] The Lower courts embraced this position.

For example, in a case of the Eastern-Siberian Circuit Commercial Court,[70] the creditor successfully claimed rescission of a settlement containing the debtor's obligation to perform construction works. The circuit court agreed with the creditor's theory of error in substantial circumstances. According to the Eastern-Siberian Circuit, the creditor erroneously relied on the debtor's ability to perform works; this conclusion was based on evidence of failure to deliver the agreed volume of construction and substantial unrepairable defects of actually performed work. It is worth noting that, according to the appellate court's opinion reversed by the circuit court, these defects had not existed at the date of settlement, i.e. one cannot argue that the compromise was not performable *ab initio*.[71]

I will now refrain from a discussion on validity of transactions containing initially impossible obligations.[72] In any event, failure of a debtor to meet its contractual obligation may not be qualified as a newly discovered circumstances (in procedural terms) or a justifiable error (in terms of Article 178 of the Russian Civil Code). The law allows a rescission claim only when a party errs in circumstances existing on the date of transaction; failure to predict future conduct of a counterparty (e.g. improper performance) does not qualify as an error. Therefore, courts granting "error" rescission claims against settlement agreements actually satisfy the interest of creditors for annulation of their waiver of the court's jurisdiction to adjudicate their initial disputes. This annulation is construed as a remedy for the debtor's failure to perform its duties under the compromise.

The alternative substitute for rescission is a claim for damages caused by failure to perform the settlement calculated as the amount sought by the creditor in the

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69 Berlin 2017, at 181.

70 Постановление ФАС Восточно-Сибирского округа от 18 сентября 2010 г. по делу № А19-13228/2008 [Ruling of the East-Siberian Circuit Commercial Court of 18 September 2015 in case No. A19-13228/2008] (Jun. 3, 2020), available at http://www.garant.

71 Определение Четвертого арбитражного апелляционного суда от 8 июня 2015 г. по делу № А19-13228/2008 [Decision of the Fourth Arbitration Court of Appeal of 8 June 2015 in case No. A19-13228/2008] (Jun. 3, 2020), available at http://www.consultant.ru.

72 There are several approaches in Russian jurisprudence on whether initial impossibility to perform obligation should cause invalidity of a transaction, rescission claim on error grounds, or general contractual liability for failure to perform obligation.

initial proceedings (waived due to approval of compromise). For example, in case No. A74-2459/2012, the Eastern-Siberian Circuit Commercial Court considered such claim deriving from compromise concluded on the following terms: the claimant waives its claim for compensation of land lots price; the defendant shall transfer these lots to the claimant within four months. As the defendant failed to meet its obligations, the claimant file a new lawsuit for compensation of damages equal to initially sought amount. The court granted this new claim and noted that the possibility to pursue the initial claim had been lost after cessation of the respective proceedings due to approval of compromise. Therefore, in the court's view, failure of the debtor to deliver its performance under the settlement turned this lost possibility into recoverable damages for the creditor.

I cannot agree with this approach. Approval of a settlement agreement causes a *res judicata* effect over the initial dispute; this effect includes: (a) ultimate cessation of proceedings; and (b) impossibility to bring a new identical claim. Therefore, another claim of the creditor is allowed only when based on new grounds. Being supportive of that claim, the court argued that failure to execute the settlement agreement caused damages in the form of loss of profit (*lucrum cessans*). However, there is now causal link between breach of settlement and damages in question, as far as the possibility to recover the disputable amount had been lost because of *res judicata*, not further violation at the debtor's side. Proper performance would not restore this lost possibility.

Therefore, consequences of the compromise's *res judicata* effect may not qualify as contractual damages. As such, a creditor may invoke the price of performance under the settlement agreement, the cost of the replacement transaction and other circumstances related to the new contractual bond deriving from the settlement. Invocation of the initially sought amounts is directed to denial of the *res judicata* effect contained in the court order on compromise approval, and is not acceptable.

These examples, however, clearly demonstrate that creditors have an interest in rescission of a settlement agreement as a special remedy for failure to comply with its terms. *De lege lata*, it is possible only in grounds of a settlement's invalidity: error, mock transaction, lack of legal capacity, fraud, etc. Procedurally, rescission claims are filed as appeals against a court order on compromise approval (sec. 21 of the Plenary Ruling No. 50). Should the cassation court grant the appeal, the respective order is reversed, and the initial proceedings are resumed.

2.2. United States Perspective

2.2.1. Specific Performance and Damages

The United States law has historically maintained the approach that a settlement agreement, being a contract, is enforced as any contract would be–by means of separate litigation.[73] Any contractual claims including specific performance or

[73] Kenneth J. Nachbar & Pauletta J. Brown Morris, *Legal Enforcement of Specific Terms* in *Settlement Agreements in Commercial Disputes: Negotiating, Drafting & Enforcement*, *supra* note 30, at 16-1, 16-3.

damages should be brought as new lawsuits to the court having jurisdiction on the basis of the applicable statute or forum selection clause. Basically, it would be a state court, as contractual claims are referred to the state level of the U.S. judicial system. Jurisprudence of American courts has specifically elaborated admissibility of such clauses in compromise.[74]

However, the procedural specifics of settlement agreement have extended beyond this purely contractual approach. As K.J. Nachbar and P.J. Brown Morris noted,

> The courts are in some sense participants or, at the very least, bystanders in the formation of any settlement agreement because a settlement agreement requires the dismissal of the underlying action.[75]

In view of the aforesaid, case law has developed several simplified methods of settlement enforcement through jurisdiction of the court considering the original dispute.

In the federal courts, jurisdiction to hear issues of compromise enforcement arises as explained in the U.S. Supreme Court *Kokkonen* opinion: the court order upon joint motion of the parties shall contain a provision on retention of jurisdiction for the purpose of enforcement and/or obligation of the parties to comply with terms of the settlement.[76]

Establishment of specific state or federal court jurisdiction opens the door for a specific performance or damages claim for terms of the settlement. There is a well-established case law that settlement agreements shall be enforced "summarily,"[77] i.e. through brief indisputable procedure. For specific performance, it results with the issuance of a court order to comply with the terms of the settlement enforceable through contempt proceedings.[78]

It is well known that common law generally does not favor specific performance. It is considered extraordinary remedy as compared with damages; there is a rebuttable presumption of non-compelling specific performance, unless "under all the circumstances it would be inequitable to do so."[79] Although the courts employ these criteria with respect to specific performance of settlement agreements, in light of the policy of the law to favor settlements they

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[74] *Hadid v. Al-Ibrahim*, 1996 W.L. 924775 (D. Colo. 1996); *Cottonwood Holdings, Inc. v. C3, Inc.*, 1995 W.L. 276196 (S.D.N.Y. 1995).

[75] Nachbar & Brown Morris 2002, at 16-3.

[76] *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994).

[77] *Malave v. Carney Hosp.*, 170 F.3d 217 (1st Cir. 1999); *Young v. F.D.I.C.*, 103 F.3d 1180, 1194 (4th Cir. 1997); *In re City Equities Anaheim, Ltd.*, 22 F.3d 954 (9th Cir. 1994).

[78] Nachbar & Brown Morris 2002, at 16-23.

[79] *Haffner v. Dobrinski*, 215 U.S. 446, 450 (1910); *Wesley v. Eells*, 177 U.S. 370, 376 (1900).

> may be inclined to grant specific performance of a settlement agreement, even in situations where such relief would likely be unavailable for breach of ordinary contracts.[80]

Damages, on the other hand, are considered "the most common form of relief for breach of a settlement agreement."[81] This relief is also granted summarily; courts enjoy wide discretion in defining monetary scope of the remedy.[82]

2.2.2. Rescission

Rescission, i.e. nullification of all legal effects of a settlement agreement with restoration of status quo and resuming of dismissed proceedings, is the most powerful and controversial remedy available to an aggrieved party. According to M.D. Goldman and B.C. Ralston,

> Rescission is not viewed lightly by courts, because it requires them to exercise the extraordinary power of 'unmaking' a contract and restoring the parties to the positions they held prior to settlement.[83]

Rescission, being a common law analogue of a continental challenging/setting transaction aside, is generally allowed on grounds affecting a valid consensus as a meeting of parties' minds entering into compromise. Among them are: fraud, duress, material mistake, lack of authority/legal capacity, etc.

What is more interesting is that the compromise may also be rescinded on grounds of material breach of contract. This is a unique relief, as generally material breach gives rise for termination of contract, not rescission. The very possibility to reverse dismissal of proceedings in course of rescission is based on the approach to peaceful dispute resolution through compromise as a material consideration in course of this transaction (*see* para. 1.2.1 above).

Procedurally, requests to rescind are filed as motions to vacate an order on dismissal of proceedings due to settlement.[84] There is a controversy among the U.S. courts whether reopening of underlying proceedings is a proper remedy for breach of settlement agreements.

Some federal courts of appeal have held that reversal is possible on the basis of Federal Rule of Civil Procedure 60(b)(6) providing for vacating of final judgment, order

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80 Nachbar & Brown Morris 2002, at 16-24; *Bell-Atlantic-Washington, D.C. v. Zaidi*, 10 F.Supp.2d 575 (E.D. Va. 1997).

81 Nachbar & Brown Morris 2002, at 16-20.

82 *Meetings & Expositions, Inc. v. Tandy Corp*., 490 F.2d 714 (2d Cir. 1974).

83 Michael D. Goldman & Brian C. Ralston, *Rescission and Avoidance of Settlement Agreements* in *Settlement Agreements in Commercial Disputes: Negotiating, Drafting & Enforcement*, *supra* note 30, at 18-1, 18-5.

84 *Id*. at 18-87.

or proceeding for reasons "justifying relief from the operation of the judgment." For example, in *Keeling v. Sheet Metal Workers Int'l Assn.*, the court argued that, although

> in the usual course upon repudiation of a settlement agreement, the frustrated party may sue anew for breach of the agreement and may not, as here, reopen the underlying litigation after dismissal

complete failure to comply with terms of settlement done in bad faith constitutes extraordinary circumstances, that justifies vacating the court's prior dismissal order.[85]

Alternative position that breach of settlement agreement is *per se* not a sufficient reason to set dismissal aside has been argued, for example, in *Sawka v. Healtheast, Inc.*:

> Relief under Rule 60(b)(6) may only be granted under extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur … Those circumstances are simply not present here, since Sawka may file a separate action on the settlement agreement itself.[86]

In regard to conflicting case law approaches, a party seeking for rescission of settlement on material breach grounds shall prove on "clear and convincing evidence" standard: (a) material nature of breach, meaning the complete deprivation of injured party of the benefit it reasonably expected; (b) intent of the breaching party to abandon the settlement or not to comply with its terms in future;[87] and (c) bad faith conduct of the breaching party frustrating the very purpose of settlement agreement.[88]

Conclusion

1. Russian and United States law diverge in the substantive nature of settlement agreement. Russian doctrine focuses on the interaction between pre-trial legal relationship and terms of compromise, defining its character on case-by-case basis and making settlement a *sui generis* contract. Termination of a dispute is considered as a purely procedural event. Contrarily, a U.S.-governed settlement agreement is a special contractual type in which consideration is granted for termination of

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[85] *Keeling v. Sheet Metal Workers Int'l Assn.*, 937 F.2d 408 (9th Cir. 1991); *see also United States v. Baus*, 834 F.2d 1114, 1124 (1st Cir. 1987); *Fairfax Countywide Citizens v. Fairfax County*, 571 F.2d 1299, 1302-03 (4th Cir.), cert. denied, 439 U.S. 1047, 99 S.Ct. 722, 58 L.Ed.2d 706 (1978); *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir.), cert. denied, 429 U.S. 862, 97 S.Ct. 165, 50 L.Ed.2d 140 (1976); *VanLeeuwen v. Farm Credit Admin.*, 600 F.Supp. 1161, 1164, 1167 (D.Or. 1984).

[86] *Sawka v. Healtheast, Inc.*, 989 F.2d 138 (3d Cir. 1993); *see also Mayberry v. Maroney*, 558 F.2d 1159, 1163 (3d Cir. 1977); *Stradley v. Cortez*, 518 F.2d 488, 493 (3d Cir. 1975).

[87] Goldman & Ralston 2002, at 18-30.

[88] *Keeling v. Sheet Metal Workers Int'l Assn.*, *supra* note 85.

dispute–economic valuable of substantive nature. The primary obligation under such agreement is a release, i.e. legal act of claims extinguishment.

2. Russian and U.S. law agree on *res judicata* as a primary procedural effect of settlement. However, while in the United States, scope of claims affected by *res judicata* is defined on the basis of express terms of release set out in the compromise, Russian case law has evolved an estoppel doctrine extinguishing not only a claim expressly named in settlement, but also any underlying claims from the same legal relationship.

3. Both Russian and U.S. law employ specific performance and recovery of damages as general types of relief sought by creditors for failure to comply with terms of compromise voluntarily. This goal is achieved primarily through court orders issued unconditionally or in summary proceedings, although damages may still be claimed by mean of a separate lawsuit.

4. Under Russian law, rescission of a settlement agreement is expressly allowed only on the grounds of a contract's invalidity. Material breach of agreement does not give rise for a rescission claim. However, there is a strong commercial demand for such relief, and litigants are striving to obtain rescission through broad interpretation of the invalidity statute (e.g. *error in persona*). In the United States, rescission of compromise due to material breach is a valid remedy, although being possible under extraordinary circumstances only. *De lege ferenda*, this concept may be employed by Russian law, e.g. by introduction of a special invalidity clause into the Civil Code.

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