Katarzyna Południak

Causality of the Settlement in Polish Law

I. Introduction

The aim of this paper is to present the main assumptions in the current discussion on causality of the settlement in Polish law, and to analyse the latest tendencies in its understanding. The settlement is widely recognised as causal, but this classification is variously perceived and there are different conclusions drawn from it.

In the Polish doctrine, there is an ongoing debate on the causality of the institution of settlement. Why has this issue, not having appeared lately, not been resolved yet, whereas on the contrary, new approaches are still being presented? Why is causality so essential in the understanding and posterior use of the institution? Mainly, because pre-judging the issue would allow for a determination of whether it is possible to conclude the settlement or to make a valid acknowledgement as to when the basic legal relationship between the parties does not exist.

According to the classic definition, a legal act is considered to be causal, if the inability to achieve its aim influences its effectiveness. Therefore, there must be a valid causa of such act. A number of doubts emerge, which are caused by: terminological divergence, a different approach in the case of obliging and disposing agreements, and statements according to which there can be no disjoint division between causal and abstract legal acts. These specific problems are beyond the scope of this paper. Simplifying, causa can be understood as a direct, typical legal goal of a particular legal act, a motive to undertake a legal act (in the subjective sense)[1], a legal event justifying enrichment of the party. Traditionally, based on Roman law, three types of cause are distinguished: causa solvendi, causa obligandi vel acquirendi, causa donandi. Later on, as the classical division was criticised[2] as being not sufficient, several other reasons of legal acts have been proposed: causa cavendi, causa ob rem, the cause of determining.

In order to decide whether the settlement should be considered causal, first of all one must verify the cause of the agreement, and, subsequently, whether its invalidity or the lack of it influences the settlement.

In Polish law, the principle of causality is binding in the case of a legal disposition. As a rule, the presumption of causality is adopted also in the case of a contract imposing an obligation, unless otherwise stipulated by the law, or the parties explicitly define in the contract that it is detached from the cause.[3] This is due to the assumption that no rational person would increment something to another person without any reason,[4] and that reason is the causa.[5] However, such a simplification does not enable one to prejudge whether the cause is the basic relationship between the parties, or the aim of it. In the doctrine, both interpretations of the cause of the settlement are presented. Recently, a new approach to the matter was proposed, which associated the cause of the settlement with its prerequisites.

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1 The understanding typical of the French doctrine; in the Polish legal system, a similar role is played by the provisions of Art. 58 and Art. 353^1 of the Civil Code that allows for the evaluation of the legal act according to its accuracy and fairness. The cause is not a separate prerequisite of an act imposing an obligation. *Drozd*, fn. 4, p. 102.

2 *K. Zawada*, Umowa przelewu wierzytelności, Kraków, 1990, p. 50.

3 *Dębula*, fn. 1, p. 162.

4 *Zawada*, fn. 6, p. 49; *Wolter,* fn. 2, p. 265.

5 *Dębula,* fn. 1, p.160.

II. Causa – the aim of the parties

According to the first group of theories,[6] it is assumed that the cause of the settlement should be understood as its purpose, the motives of the parties concluding the agreement, the cause of granting something to the other person. According to this definition, it cannot be understood as being equivalent to the basic relationship between parties that constitutes the mere background of the settlement.[7] Thus, the basic relationship, conditioning the legal situation of the parties, lies in the past, whereas the cause of it is oriented towards the future.[8]

According to the Civil Code, the aim of the settlement is to set aside the uncertainty regarding claims arising from the legal relation existing between parties, or to ensure their performance, or to set aside an existing dispute or a dispute that is likely to arise.[9] Assuming that the settlement can be determining, it may lead to the determination of the legal status of the parties. It results in the exclusion of the possibility of raising certain objections related to the basic relationship: neither can a party evade the legal consequences of the agreement, even if this person found evidence supporting the claims to which the agreement applies, unless it had been made in bad faith, nor can a party repeal the legal consequences of a settlement under the influence of error, unless the error relates to the fact that, according to the settlement, was considered unquestionable by both parties, and the dispute or uncertainty would not have arisen had the parties been aware of the true state of affairs at the time of the conclusion of the settlement.

In other words, an objection known by the party at the time of concluding the agreement cannot be raised to undermine the power of the determining agreement, unless one can prove that the settlement is contrary to the law, or there are certain defects of declaration of intent (a specific regulation of error in Art. 918 of the Civil Code). These modifications of the causality were adopted by the legislature in order ensure the maximum fulfilment of the principle of protection of confidence in trade, the principle of freedom of contracts, and the characteristics of the agreement. Does such a wording of the provision exclude an objection based on the non-existence of the basic relationship? Is the conclusion of the contract therefore possible, if there is no basic relationship between the parties or if its existence is dubious?

If the cause of the settlement is the determination of the legal situation of the parties, then, in order to fully accomplish this purpose, raising any possible objection resulting from the basic relation between parties should be excluded. The only situation in which the settlement would lose its validity pertains to cases in which fulfilling the purpose of the settlement would be impossible. This is the case whenever the determination turns out to be impossible. According to the Polish legislator, this situation occurs when there is an error of fact recognized previously by the parties as an unquestionable fact, and the dispute or uncertainty would have not arisen had the parties been aware of the true state of affairs at the time of the conclusion of the settlement.

Regarding the uncertainty concerning the existence or non-existence of the basic relationship, the settlement should be valid and binding for the parties, as only this interpretation allows for a successful determination of the legal status of the parties and elim-

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6 *M. Pyziak-Szafnicka,* fn. 3, p. 86–87, 195; *A. Szpunar*, Z problematyki ugody w prawie cywilnym, Przegląd Sądowy 1995, no. 9, p. 12; *T. Smyczyński*, Zagadnienie czynności prawnych abstrakcyjnych w projekcie kodeksu cywilnego, Ruch Prawniczy, Ekonomiczny i Socjologiczny 1961, no. 4, p. 50.

7 This interpretation of *causa* does not preclude situations in which the cause would be the basic relationship – except for cases of unjust enrichment.

8 *Pyziak-Szafnicka*, fn. 3, p.78.

9 Article 917 of the Civil Code.

inates the uncertainty. The parties may raise an objection regarding the lack of the basic relationship only if at the time of the conclusion of the settlement, the existence of the latter was indisputable and unquestionable. In this case, the only objections that are excluded are those which were formed on the basis of the uncertainty or the dispute.

III. Mutual character of the concessions

Having accepted such an understanding of cause, one may observe some incoherence as to how such an agreement may be considered mutual. The provision of the code might suggest the mutual character of the settlement but, after an analysis, its reciprocal character remains doubtful. First and foremost, reciprocal legal acts may be challenged in the event of failure in order to obtain equivalent benefits. This undermines the legal certainty and the determining nature of the settlement, strongly reducing the usefulness of the institution in real life. What is more, several doubts have emerged, considering the reciprocity of such agreement.[10] It would be more appropriate to understand not the agreement as being mutual, but to consider the concessions of the parties to be reciprocal. As both parties make concessions for the purpose of clarifying and determining their legal situation, such an approach might be more appropriate.

Furthermore, a broader interpretation of the premises of the settlement tends to consider a settlement to be an agreement in which one party is making an objectively significant concession, while the other party agrees not to file a suit.[11] The acceleration of economic turnover has changed the perception of the duration of a conflict. The rapid resolution or determination of a legal situation of a party can be more beneficial than the vindication of rights in court, even if the latter would mean no concessions. This is the case because, as a result of the settlement, the parties avoid engaging their resources for time-consuming judicial proceedings instead of utilising them for the respective intended economic and/or social purposes. Secondly, as the reputation is a considered value for the parties that are engaged in trade (especially online), even significant concessions to the consumer can have far less severe consequences than a negative comment on the trader's website.

In conclusion, in some cases not only the equivalence of benefits can be dubious but also their existence. Therefore, the concessions and their mutual character can be judged only in the subjective way. Thus, reciprocity of concessions should be understood as the fact that they are made by each party, not that the concession of the first party is the equivalent of the concession made by the other one. In other words, the settlement should not be considered an agreement of mutual character, as it leads to a result which is contrary to the purpose of the institution, but the mutuality of the concessions is what makes it economically viable.

[10] *W. Czachórski*, Zobowiązania – zarys wykładu, Warszawa 2009, p. 573, *Pyziak-Szafnicka*, fn. 3, p. 195.

[11] *M. Pyziak-Szafnicka*, fn. 3, p. 202.

IV. Causa – as the basic relationship

The perception of the cause as an economic objective[12] has been strongly criticised in the Polish doctrine.[13] Due to the change of wording of the provision concerning the settlement[14] it was argued that currently the conclusion of the settlement concerning the existence of the legal relationship is beyond the scope of the provision.[15]

A fundamental principle of the Polish law supports this interpretation: according this principle, the state should be able control the main causes of business operations.[16] Subsequently, the control over the cause of the increment made by a party should facilitate implementing policies of a given political system.[17]

The cause should be defined as a result of an analysis of the events that caused the legal relationship, the base for the settlement – the cause is the basic relationship. The causa should not be confused with the concession of the parties, as the latter do not explain the reason of the acquisition of rights, they merely consolidate them. The settlement cannot preclude the verification of the existence and validity of the cause, as the valid basic legal relationship is essential for the conclusion of the settlement.[18] According to this interpretation, causality of the agreement precludes its conclusion when the existence of the basic relationship is dubious.

This amendment to the legal regulation, narrowing the scope of use of the institution of the settlement, makes sense as it mitigates the risks of the agreement, and is a safety feature.

V. Is this model obsolete?

This theory, due to the changes in the Polish legal system, is no longer convincing. Making a political tool of substantive civil law seems improper and puts into question the fundamental objectives of legal regulations.

Furthermore, it is accepted that a person can waive certain rights, or change his or her legal situation to an extent where he or she can dispose of the right, or enter into commitments (aprioristic waiver by a person of protection granted to him by the mandatory rules is forbidden). It is, therefore, unjustified, to limit the freedom of a person in shaping one's legal situation in a particular factual situation, if a person wants to waive an individual claim in the particular dispute.

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[12] A theory derived from the German doctrine by *M. Pyziak-Szafnicka*, in particular, the considerations on the determining agreements – see *Dębula,* fn. 1, p. 164.

[13] *Czachórski*, fn. 1, p. 171; *Radwański*, fn. 1, p. 1074, *S. Garlicki*, in: *M. Piekarski* (ed.), Odpowiedzialność cywilna za niedobory, Warszawa 1970, p. 231; *Dębula*, fn. 1, p. 149–159.

[14] Wording of the previous Art. 621 of the Code of Obligations: "By agreement the parties make mutual concessions concerning the existing legal relationship between them in order to repeal the existing dispute or one that is likely to arise or uncertainty as to claims arising from the legal relationship, or to ensure the implementation of these claims." – Current wording of the provision of Art. 917 of the Civil Code: "By the contract the parties shall make reciprocal concessions within the scope of the legal relation existing between them for the purpose of setting aside uncertainty as to claims arising from that relation and ensuring their performance or setting aside a dispute which exists or which might arise."

[15] *Radwański*, fn. 1, p. 1074; on the contrary: *Z. Masłowski*, Uznanie, ugoda, odnowienie, zwolnienie z długu, poręczenie*,* Katowice, Warszawa 1966, p. 34.

[16] *Radwański*, fn. 1, p. 1074.

[17] *Czachórski*, fn. 1, p. 39–42; *Smyczyński,* fn. 11, p. 47.

[18] *Radwański,* fn. 1, p. 1074–1075.

In addition, there are certain provisions of protective nature, applicable in the case of breach of law or the defect of a declaration of intent. Judicial control should thus be limited to the verification of the occurrence of the following circumstances: being contrary to a statute, or aiming at the circumvention of a law, the principles of community life, having defects causing in absolute nullity of the act, or being exploitative.[19] The authorisation of courts to test the validity of the settlement also in the context of compliance with the current political system and political objectives is unjustified.

VI. Causa obligandi vel acquirendi and determining character of settlement

According to this theory, the cause of the settlement is always causa obligandi vel acquirendi, as the party increments something to the other party in order to obtain benefits, either of material character or not.[20] Despite this aspect, the determining character of the settlement cannot be questioned, as it is the aim of the contract. Thus, both elements are essential for the conclusion of the settlement.

Therefore, the non-existence of the basic relationship does not nullify the settlement. It is argued that due to the determining character of this agreement the settlement can be successfully concluded when the uncertainty of the parties concerns the existence of the basic relationship. The settlement is valid, even if subsequently the non-existence of the basic relationship is discovered. In such a case, the settlement has a constituting power, and it remedies the defects or the lack of the basic relationship.

This interpretation is, however, possible only if the non-existence or invalidity was caused by a legal event which could be influenced by the parties. Otherwise, its remedial effect is impossible, the settlement would still be invalid (i. e., absolute invalidity of the legal act).

The constitutive character of the settlement was underlined also in the judgement of the Supreme Court.[21] The capacity of creating rights by the settlement can be observed as far as it removes uncertainty.

However, the doctrine[22] points out that such a statement oversimplifies matter. The settlement may consider the basic relationship, but there are two situations to be distinguished. First, when the dispute between the parties concerns the existence of basic relationship, while the basic relationship exists, though it is subjectively doubtful – it is determined by a settlement. Second, when the basic relationship does not exist. The parties though, acting because of the mistaken belief, conclude a settlement in order to determine their legal situation.

The causa of this agreement is obtaining a benefit from the other party (mainly of material character, but possibly also based on the strengthening of the legal position of the party), so it can be qualified as causa obligandi vel acquirendi. The settlement is considered causal, so the cause must form part of the basic relationship between parties, which is afterwards shaped by the settlement. In other words, the causa of the settlement lies in the content of the basic relationship. If the cause is lacking, the posterior actions are invalid. Hence, if this essential part of the basic relationship is lacking (i. e., there was no basic relationship at all), the purpose of the agreement cannot be reached. The

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19 *Pyziak-Szafnicka*, fn. 3, p. 198.

20 *Masłowski*, Uznanie, fn. 19, p. 35.

21 Supreme Court on 24.06.1974 (file ref. no. III CRN 110/73).

22 *S. Prutis*/S. *Srocki,* Glosa do wyroku SN z dnia 24 czerwca 1974 r., III CRN 110/74, Państwo i Prawo 1–2|1976, p. 257–260.

concessions made because of the non-existent basic relationship are an undue benefit,[23] as the settlement was lacking the cause. In conclusion, the determining character of this agreement should be understood as allowing the parties to shape the existing relationship, rather than creating a new one.

VII. Criticism

The understanding of the cause of the settlement as both determination and mutual increments highlights the dualistic nature of the institutions. The first of the presented theories allows greater flexibility in assessing the validity of the settlement. The possibility of the validation of the basic relationship that was the background for the settlement is limited to the situation, when its defects did not result in its absolute invalidity. Nevertheless, retroactivity of the settlement based on the possibility of influencing the past (ex tunc-effect) might be dubious, and so is the validating power of such a settlement.

The other view, in spite of attributing a determining character to the settlement, negates the possibility of the constitutive character of this agreement. It is argued that the causality of a contract makes it impossible to conclude an effective and valid settlement in the case of the non-existence of its cause – the basic relationship. This understanding is substantially similar to the view presented by the part of the doctrine which does not recognise the determining aim of the settlement as a part of its cause. It results in uselessness of the institution in the case when the parties do not know whether the basic relation between themselves exists, and, therefore, want to clarify their legal situation, because the subsequent discovery of the evidence of the non-existence of a basic relationship will be the basis to challenge the settlement. Consequently, the benefit of the institution disappears, which can provoke serious problems and may discourage parties to conclude the settlement at all, as its determining character is not sure.

VIII. Recent tendencies

The latest approach regarding the issue demonstrates that the causality or its lack in the case of the settlement concluded because of the uncertainty considering the existence of the basic relationship is irrelevant.[24]

Due to legislative changes[25] it is claimed that contemporarily the conclusion of the settlement concerning the existence of the legal relationship is beyond the scope of the provision of Art. 917 of the Civil Code. Such agreement is possible due to the freedom of contract, but it shall not guarantee the binding determination of the legal relationship of the parties,[26] mainly because the parties are not competent to create a fiction of the existence of the contract in past. The settlement determining the existence of the debt is possible. It has the character of evidence, and prevents the parties from raising the objections known by them at the time of concluding the agreement. Nevertheless, it does not remedy the lack or the invalidity of the basic relationship. Hence, if such a settlement

[23] Ibid., p. 259.

[24] *Dębula*, fn. 1, p. 165.

[25] Art. 621 of the Code of Obligations in comparison to the current wording of the provision of Art. 917 of the Civil Code.

[26] *F. Zoll*, Klauzule dokumentowe. Prawo dokumentów dłużnych ze szczególnym uwzględnieniem papierów wartościowych, Warszawa 2004, p. 80.

is concluded, it can constitute new facts or modify the previous legal relationship.[27] In the latest doctrine, doubts are also planted in accordance to the determining character of the settlement.

Firstly, the aim of introducing an institution of the determining agreement is disputable. Although it facilitates the elimination of the state of uncertainty, it may also impede the conformity of the description of legal events and the reality.[28] Legal fiction is rarely permissible by Polish legislator, and there are no normative premises that would suggest that it could be used in the case of the settlement. Furthermore, it is underlined that confirming a non-existent claim and renewing such commitment is impossible.[29]

It is also claimed that the determining act neither constitutes a new source of obligation, nor does it change the previous one. It could be considered a binding, irrebuttable (even if inconsistent with elements unknown at the time of concluding the agreement) explanation of the legal situation of the parties. By this agreement, the parties cannot constitute a valid basic relationship in the past – the settlement cannot be considered a tool enabling the parties to cure a defectively concluded contract. Such a right has not been granted to the parties by the legislator in the case of the settlement.

What is more, accepting the theory would lead to the absurd situation in which the parties, not complying with any specific requirements of the form of premises, would be able to constitute a fictitious agreement or legal event in the past. Clearly, the parties are not granted the right to change the legal reality with a retroactive effect.[30] Generally, the validation of an agreement which is absolutely invalid is forbidden,[31] although the legislator allows for certain exceptions to this rule.[32] However, such an exception has not been established in the case of the settlement.

It is claimed that the cause of the settlement is not the purpose of determination of certain aspects, nor it is the basic relationship, but causa obligandi vel acquirendi.[33] This solution is based on the conviction that every settlement is formed by mutual concessions. Each party acts in order to obtain some benefit from the other. This analysis leads to the conclusion that the settlement without a cause cannot exist, as the mutual concessions form a main premise of this institution. Such interpretation may lead to the questionable conclusion that the settlement is a reciprocal agreement, but the reciprocity in this case should be, according to the doctrine, considered only a feature of the concessions.[34] In addition, as the understanding of the premise of mutual concessions is interpreted broadly, this results in an immensely wide scope of the applicability of the institution.

Last but not least, stating that a settlement is causal or abstract only changes the moment of verification of the cause. Where the agreement is causal, a lack of cause directly results in its invalidity, whereas, where the agreement is abstract, the provisions of unjust enrichment are to be applied. Due to the settlement, the parties renounce the possibility to raise objections. They cannot restore the previous situation. The fact that the re-

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27 Ibid., p. 81.

28 *Dębula*, fn. 1, p. 150.

29 Ibid.

30 Ibid., p. 152.

31 Which is in accordance with the Latin sentence *quod ab initio vitiosum est, non potest in tractu temporis convalescere.*

32 Art. 14 § 2 of the Civil Code, Art. 890 § 1 of the Civil Code, Art. 945 § 2 of the Civil Code, Art. 945 § 2 of the Code of Commercial Companies, Act of 3 December 1984 about the recognition the validity of contracts for the transfer of farm successors (Dz.U. 1984 nr 55 poz. 282).

33 *D. Dębula*, fn. 1, p. 164.

34 Ibid., p. 143–144.

nouncement was made in the causal act or in the abstract one does not influence this outcome.[35]

IX. Common assertion of doctrine and juridical practice

In conclusion, the causality of the settlement is unquestionable. However, formulating a commonly accepted definition of the cause of settlement is impossible at this point, as the opposite views and interpretations are being supported by representatives of the Polish doctrine. Nevertheless, several general statements can be formed, and observations can be made.

Firstly, the theory underlining the fact that the parties in the settlement cannot create a valid legal relationship or legal event as the use of a legal fiction in the past is not to be accepted is highly convincing. The legislator grants the right to validate the invalid legal action by a posterior act only exceptionally, so the possibility of derivation of such right from the wording of provision of Art. 917 of the Civil Code is questionable. In this context, extending this right so as to establish the possibility for this right to cover also the situation in which the parties create a new basic relationship in the past by using a broadening and functional interpretation can be regarded as being excessive.

Although in civil law one might say that "what is not prohibited is permitted," it must be underlined that the invalidity of the contract is, as a rule, definitive, and the validation is allowed as an exception. It is widely accepted that exceptions are interpreted restrictively, not broadly. Thus, in cases where the legislature did not provide for a validation, bringing about the intended legal effects would require the parties to enter into a new legal relationship, for example by concluding another agreement. Therefore, the settlement of the parties considering a legal relationship in the event of its non-existence or invalidity can create a new commitment and modify the legal situation of the parties.

Determining the character of this agreement is of great importance, as it facilitates a peaceful and quick settlement of the dispute, without having to institute legal proceedings. Its popularity and usefulness in trade and other aspects of social life leads to the possibly broad interpretation and favourable respond of the judiciary while court proceedings. Hence, limiting the scope of its use is not in accordance with the contemporary tendencies.

As a consequence, the settlement concerning the existence of the contract should be considered valid, and such settlement can have a constituting power, but it shall not be interpreted as creating a basic relationship in the past, merely establishing a new one. This interpretation not only allows parties to determine their current legal situation and guarantees them stability, but it is also not contradictory to the basic assumptions on the invalidity of the legal action.

[35] Ibid., p. 165.