CHAPTER 5

"For the Sake of Mental Health and Mutual Peace": *The* Transactio-*Agreement in Early Modern Law and Theology*

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1 Introduction

Drawing on Roman law and medieval canon law, jurists from the fifteenth through the eighteenth centuries generally considered *transactio* as the agreement by which parties settle their conflict out-of-court by mutually "giving and taking" something with regards to the subject of a dispute or a lawsuit, the outcome of which is uncertain. For example, if parties disagreed about the amount of a damage claim, they could decide to reach a mutual agreement whereby the injured party accepted a certain but potentially lower compensation than he or she could perhaps have obtained in court, while the defendant accepted to pay damages immediately rather than speculating on a dismissal or a lower sentence by the court. Given its huge practical relevance as a consensual means of settling conflicts, it is small wonder that there was a lot of debate on *transactiones* in the early modern civilian tradition. However, the attention paid to the dynamic of settlement agreements by moral theologians and canon lawyers, in particular, is even more striking. Although following in the footsteps of a much older tradition, their renewed interest in the *transactio*-agreement might be revealing of broader developments in law and society in early modern Europe. At a time when jurisdictional power massively shifted from ecclesiastical to temporal authorities and theologians and canonists saw themselves sidelined by jurists who emphasized their autonomy, they might have been tempted to think of themselves, increasingly, as promoters of peace and reconciliation "in the shadow of the law." Settlement agreements offered a privileged way to solve conflicts outside of court, without recourse to a judge appointed by the prince, but, ideally, with the help of expert mediators such as pastors, confessors, and other religious authorities.

The present contribution will draw mostly on some of the most influential works on the topic written by jurists and theologians who lived in the early modern Iberian empire: Antonio de Padilla y Meneses (d. 1580), Luis de Molina (1535–1600), Pedro de Oñate (1568–1646) and Pedro Murillo Velarde

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(1696–1753). While Molina, Oñate, and Murillo Velarde were Jesuits trained in theology and canon law, Padilla y Meneses was a jurist from the University of Salamanca who went on to become judge and president at the Consejo de Órdenes and the Consejo de Indias.[1] His long, autonomous commentary on the title *De transactionibus* in Justinian's Code stands out among civilians' treatments of the subject.[2] It impacted Murillo Velarde's views on settlement agreements, which are briefly but clearly laid out in his seminal *Curso de derecho canonico hispano e indiano*.[3] That seminal textbook on the application of canon law in the Indies also bears the mark of Molina's influential views on the topic. With three *disputationes* and a total of twenty-five columns dedicated to *transactiones* in his *De iustitia et iure*, the Jesuit theologian from Cuenca provided a rather detailed account of settlement agreements.[4] But it was the starting point for an even more extended exposition on both settlement and arbitration agreements counting no fewer than 150 pages in the third volume of Oñate's impressive *De contractibus*.[5]

2 *Sedes Materiae* in Roman and Canon Law

Although they offered far more detailed, sophisticated, and systematic treatments of the subject than the original sources, it is important to remember that early modern Spanish lawyers and theologians' understanding of the basic features of the *transactio*-contract did not differ significantly from that of civilians and canonists in earlier times. Like them, they drew on seminal passages from the Digest, the Code and the Liber Extra to develop their views.

1 For biographical notices on Padilla y Meneses, see Ignacio Ezquerra Revilla, "Antonio Padilla y Meneses," in *Felipe II (1527–1598). La configuración de la Monarquía hispana*, ed. Martínez Millán, José Javier de Carlos Morales, and Carlos Javier de Carlos Morales (Vallodolid: Junta de Castilla y León, 1998), 447–448.

2 A digital copy of the first, 1566 Salamanca edition of his *In Titulum de Transactionibus Codicis Commentarius* has been made available online by the Bavarian State Library, see http://mdz-nbn-resolving.de/urn:nbn:de:bvb:12-bsb10146947-5.

3 On Murillo Velarde, a Jesuit active in the Philippines, see the biographical note by Luis Díaz de la Guardia y López, "Datos para una biografía del jurista Pedro Murillo Velarde y Bravo," *Espacio, Tiempo y Forma* 14 (2001): 407–471.

4 For further details on Molina's life and work, see Wim Decock, "Luis de Molina: De iustitia et iure (1593–1609)," in *The Formation and Transmission of Western Legal Culture: 150 Books that Made the Law in the Age of Printing*, ed. Serge Dauchy et al. (Cham: Springer, 2016), 142–144.

5 See E. Fernández, "Oñate, Pedro de," in *Diccionario histórico de la Compañía de Jesús biográfico-temático*, ed. Charles E. O'Neill and Joaquín María Domínguez (Rome/Madrid: Universidad Pontificia Comillas, 2001), vol. 3, 2870–2871.

In Justinian's Digest, seventeen provisions are dedicated to settlement agreements under the title *De transactionibus* (Dig. 2,15), which directly follows the title *De pactis* (Dig. 2,14). Incidentally, these are the two titles with which the second book of the Digest, which treats of various subjects related to the administration of justice, ends. In the Code, the title *De transactionibus* (C. 2,4) also follows a treatment entitled *De pactis* (C. 2,3) and is even longer, including forty-three imperial constitutions, often dealing with settlements in matters of succession. In the canon law tradition, too, pacts and settlement agreements were discussed in successive order, as is obvious from the *Liber Extra*, where the title *De transactionibus* (X 1,36) immediately follows the title *De pactis* (X 1,35). The inter-connectedness between discussions on pacts and settlements is important, if only because in the canon law tradition the new, consensualist approach to the enforceability of pacts would have a direct impact on the understanding of the enforceability of settlement agreements. Digest 2,15 contains a lot of provisions about solemn ways in which to make *transactiones* enforceable, e.g., through adding a so-called *stipulatio acquiliana*. But such discussions lose significance among the canon lawyers and moral theologians, since they consider all pacts, however naked, to be binding (*pacta quantumcumque nuda servanda*).

By the mid-seventeenth century, Oñate maintained rather straightforwardly that the entire Roman doctrine about stipulations and clothed settlement agreements had become obsolete and pointless, at least in the Spanish empire, since both canon law and Spanish law recognized the binding force of a *transactio nuda*.[6] But authors steeped in the tradition of the medieval *ius commune*, including moral theologians such as Oñate, nevertheless spent very long hours explaining the intricacies of the Roman law of settlements and its differences with the canon law. Of special significance in this regard is the voluminous treatise on settlement agreements by Giovanni Battista Caccialupi (c. 1420–1496), a professor of civil law at the University of Siena who went on to teach canon law at Rome.[7] In a treatise of one hundred pages, he outlined all the legal problems related to settlement agreements, which he saw as an essential

6 Pedro de Oñate, *De contractibus*, Rome, 1654, vol. 3 (*De contractibus onerosis*), part. 1, tract. 26, disput. 92, sect. 4, nr. 78, p. 808: "Sed notandum valde hanc stipulationem non requiri iure canonico, ut transactio etiam nuda, et per pactum nudum celebrata pariat actionem et obligationem, ut tenent omnes canonistae; et alias probavimus nec iure nostro regio Hispano (…). Et ideo tota praefata doctrina in terris pontificis et in toto regno Hispano iam utilis non est, sed in aliis, quae adhuc subiacent iuri communi."

7 Giuliana D'Amelio, "Caccialupi, Giovanni Battista," in *Dizionario Biografico degli Italiani*, vol. 15, 1972, available online at https://www.treccani.it/enciclopedia/giovanni-battista-caccialupi_(Dizionario-Biografico)/.

instrument for lawyers wishing to comply with their professional duty to promote peace and concord among litigating parties. In the Holy Roman Empire, where the *ius commune* remained an important source of law in the early modern period, a succinct but influential analysis of the *transactio*-agreement was offered by Matthew Wesenbeck (1531–1586). In his commentary on Justinian's Digest, the Antwerp-born *doctor utriusque iuris* who emigrated to Wittenberg because of his Lutheran sympathies made the connection between the discussions on *pacta* and *transactiones* explicit by stating that the settlement agreement was just a species of the generic notion of pact.[8] Adhering to the opinion that bare agreements should be enforceable, Wesenbeck considered that, in his time—and contrary to what was the case in Roman law—*transactiones* should be considered as *contractus*, viz. as binding agreements.

3 Definition of the *Transactio*

Drawing on the afore-mentioned sources, the early modern canon lawyers started their discussions by giving a definition of the *transactio*. An illustrative example can be found in Pedro Murillo Velarde's textbook on canon law. He defined the *transactio* properly as "a non-gratuitous agreement about a dubious and controversial issue, or an uncertain lawsuit which has not yet come to an end" (*un pacto no gratuito acerca de una cosa dudosa y controvertida, o de un pleito incierto y aún no terminado*).[9] Similar definitions can be found in the works of Padilla and Molina. Its core elements—non-gratuity; dubious and controversial nature of the object of the settlement; unfinished character of the lawsuit—reach back to Digest 2,15 and Code 2,4 and the interpretations of those Roman texts in the work of *ius commune* jurists such as Caccialupi.[10] The non-gratuitous character of the settlement agreement sets it apart from a simple donation or abandonment of right. As an onerous agreement, it requires a commitment to do or give something from both parties. Drawing on Roman law,[11] Padilla y Meneses highlighted that a transaction always presupposes that

8 Matthaeus Wesenbecius, *In pandectas iuris civilis et codicis iustinianei lib. iix commentarii* (Basel, 1579), ad Dig. 2,15, nr. 1–2, pp. 54–55: "Pacti species est transactio (…) At hodie cum obliget, ex cap. 1 de pactis, arbitror transactionem dici contractum posse."

9 Pedro Murillo Velarde, *Curso de derecho canónico hispano e indiano*, ad X 1,36,1, nr. 369. I am using the first volume of the edition published by El Colegio de Michoacán and the Universidad Nacional Autónoma de México in 2004, pp. 435–437.

10 J. B. Caccialupus, *Tractatus de transactionibus*, quest. 1, nr. 1, in *Tractatus et commentaria de transactionibus* (Frankfurt/Oder, 1586), vol. 1, p. 4.

11 Cod. 2,4,38.

something is given or promised by each of the parties, who engage in a kind of mutual "giving and taking."[12] Murillo Velarde, too, emphasized that each party must be given or promised something or allowed to retain something. If not, the settlement is in reality an "amicable agreement" (*amicabilis compositio*), often fostered by a mediator, which can only be considered as a transaction in an improper, wide sense of the word. As will be explained below, the technical difference between a *transactio* in the strict sense and an amicable settlement matters, because spiritual goods cannot form the subject matter of a *transactio* in the proper sense, although they can be the object of an *amicabilis compositio*. A prominent example concerns papal "Bulls of compositio" such as the Bulla Cruciata issued by Pope Gregory XIII in 1573. Molina made it clear that that Bull was rightly called a bull promoting *compositio* and not a *transactio*, since the Pope—as a third party—intervened to provide relief for uncertain debts and no mutual sacrifices were being agreed upon between the debtor and the creditor(s) themselves.[13]

As far as the "dubious" or "uncertain" nature of the object of the settlement is concerned, it is important because otherwise the parties have unjustly received or retained something as part of the bargain. For example, if the plaintiff has received a sum to renounce his action in court, while he actually had no right to sue whatsoever, the transfer of the money happened without a legal title. Conversely, the defendant who has been allowed to retain something when he knew he did not have a claim to anything has also been enriched without legal cause. As a matter of conscience, Murillo Velarde explained, parties have to make restitution in such cases, and in the external court the transaction is considered void. The requirement of uncertainty also explains why the controversy should not yet have been settled definitively by a court sentence. In other words, a "judged thing" (*res judicata*), viz. a judicial sentence that has gained definitive force, is considered an impediment to a lawful settlement out-of-court. A *transactio* requires that the controversy is not yet over, regardless of whether a lawsuit is already pending or—as Justinian's Code implied by referring to siblings settling an inheritance case out of mere fear of future litigation[14]—the matter is so disputed that a lawsuit can come of it. Molina even specified that the uncertain nature of the object of the controversy should be evaluated from an entirely subjective point of view, that is from the

12 Padilla y Meneses, *In Titulum de Transactionibus Codicis Commentarius*, ad Cod. 2,4,38, p. 165–168. Similar observations can be found in Wesenbecius, *In pandectas iuris civilis*, ad D. 2,15, nr. 6, p. 57.

13 Luis de Molina, *De iustitia et iure* (Mainz, 1602), tract. 2, disp. 556, col. 1366, lit. c-d.

14 Cod. 2,4,2.

point of view of the disputing parties. Sometimes it could happen that from an objective perspective, a thing was no longer controversial or had been settled by court sentence already, but the parties themselves ignored that. Under such circumstances, the Jesuit theologian held, the uncertainty has to be assessed from the point of view of the parties.[15] Moreover, the doubt among the parties has to be considered at the moment of concluding the *transactio*. Information received subsequent to the conclusion of the settlement is irrelevant to its validity. "No matter the truth," Molina explained, "no matter what would be subsequently revealed by the lapse of time," a transaction includes the "sale and exchange of a dubious right, to the extent that it was doubtful at that moment, against the thing that was given in exchange for it."[16] In conclusion, the notions of objective truth and true knowledge are irrelevant to the justice of a settlement agreement.

Since a *transactio* was considered an agreement (*pactum*) by Roman law but had no specific legal remedies attached to it that were named after it, early modern jurists still classified it theoretically under the category of "innominate contracts."[17] In theory, at least, this had consequences when it came to enforcing a settlement agreement. According to the famous rule in Roman law that naked agreements are not binding but can only give rise to an *exceptio*,[18] one could not sue the other party to the transaction by virtue of the mere settlement agreement itself. However, thanks to the reversal of this rule in early modern canon law and Hispanic law, in particular, as Molina rightly insisted,[19] early modern canon lawyers in the Spanish world could consider settlements as fully binding agreements by virtue of the consent between the parties alone. As a consequence, Murillo Velarde was right to emphasize that a settlement agreement was binding for both parties by virtue of their mutual consent, meaning that it was irrelevant whether form requirements such as those prescribed by the Roman *stipulatio* had been observed or not. Their agreement had the same force as a judicial sentence (*res judicata/cosa juzgada*), with all consequences related to this status when it came to declaring the agreement void. Probably following the German canonist Heinrich Pirhing (1606–1679),

15 Molina, *De iustitia et iure*, tract. 2, disp. 556, col. 1365, lit. a-b.

16 Molina, *De iustitia et iure*, tract. 2, disp. 556, col. 1371, lit. c.

17 Padilla y Meneses, *In Titulum de Transactionibus Codicis Commentarius*, ad Cod. 2,4,28, p. 126, col. 1, nr. 9.

18 Dig. 2,14,7,4.

19 Molina, *De iustitia et iure*, tract. 2, disp. 556, col. 1368, lit. e-col. 1369, lit. c. For further explanation, see Wim Decock, *Theologians and Contract Law. The Moral Transformation of the Ius commune* (*c. 1500–1650*) (Leiden/Boston: Nijhoff/Brill, 2013), 142–162.

Murillo Velarde further specified that a settlement agreement could have a "real" or a "personal" character, depending on whether it was binding upon the inheritors of the settling parties.[20] A "real" *transactio* followed the goods about which a settlement had been reached, transferring the rights and obligations ensuing from the *transactio* to the rightful heirs of those goods. A "personal" *transactio*, on the other hand, lasted during the lifetime of the settling party only.

4 Differences between Compromissum and Amicabilis Compositio

Jurists and canonists in the tradition of the *ius commune* understood the *transactio* or settlement agreement to be technically distinct from the *compromissum*. As Juan de Hevia Bolaño (1570–1623) explains in his *Curia filípica*, the *compromissum* involves the appointment of an *arbiter*, a third party charged with settling the dispute, which is not the case in a *transactio*.[21] In the strict sense of the word, the *transactio* was also distinguished from the so-called "amicable settlement" (*amicabilis compositio*), since the latter was characterized by its gratuitous character and often involved a third party, such as a mediator. The technicalities of these distinctions were worked out very carefully by Pedro de Oñate. He discussed the nature of the arbitration agreement (*compromissum*) extensively in a separate chapter of more than one hundred pages that immediately followed his lengthy treatment of settlements. What united both agreements, according to Oñate, was that they both served as contractual modes of conflict resolution, allowing the litigants to settle their disputes out-of-court (*extraiudicialiter*), in a binding fashion, but without recourse to a judge or tribunal in the formal sense of the word.[22] Private modes of dispute settlement were popular in practice, Oñate explained, because they allowed the parties to settle their dispute far away from "the noisy business of the courts" and in a quicker and more cost-efficient fashion. The difference between both forms of private resolution of conflicts is that a *compromissum* involves the appointment of a third party (*arbiter*), who renders a judgment that binds the parties to the *compromissum*. A *transactio*, on the other hand,

20 Murillo Velarde, *Curso de derecho canonico hispano e indiano*, ad X 1,36,1, nr. 369, towards the end. Compare the *Synopsis pirhingiana seu compendiaria canonum doctrina*, ad X 1,36, §1, p. 209.

21 Juan de Hevia Bolaño, *Curia filípica* (Madrid, 1790), tom. 2, lib. 2, cap. 14 (*Compromiso*), nr. 1, p. 432.

22 Oñate, *De contractibus*, vol. 3, part. 1, tract. 27, disput. 93, introd., nr. 1, p. 843.

involves mutual giving and taking between the parties themselves, even if they are assisted by mediators or advisors.

Drawing on well-known doctrinal distinctions elaborated by the civilians and canonists of the *ius commune*,[23] Oñate went on to explain that the power of the third party designated as an arbiter by the *compromissum* could vary according to the will of the litigants.[24] If the parties wanted the third party to judge according to the strict rules of law (*servato iuris ordine*), then they designated an *arbiter*. An arbiter cannot deviate from the laws, even if he is allowed to pay more attention to statutory laws and local customs than to Roman law. Technically speaking, the third party is designated by a different name, namely *arbitrator*, if, by virtue of the *compromissum*, the parties allow him to base his judgment on other considerations than just the law. Typically, this includes resolving the conflict by relying on notions of equity (*ex aequo et bono*), morality, and even friendship. An *arbitrator* enjoys a wide margin of discretion, but, even so, he should not indulge in arbitrary decision-making, let alone proceed according to the whims of his fantasy (*secundum phantasiam*). Following the seminal analysis by Abbas Panormitanus, a late medieval canonist, Oñate lists thirteen differences between *arbitri* and *arbitratores*, one of the most notorious being that a woman can act as an *arbitrator*, but not as an *arbiter*, since she cannot serve as an ordinary judge, who is tied to following the strict order of law, either. Women's major role as *arbitratores*, or rather *arbitratrices*—Oñate uses the female noun—was widely recognized, if only because of the famous example of Eleanor of Aquitaine (1122–1204). The reason why *arbitri* and *arbitratores*, on the one hand, were distinguished from *amicabiles compositores*, on the other, is that the former were deemed capable of delivering a true judgment that was binding by virtue of the arbitration agreement (*compromissio*). The efforts made by the *amicabilis compositor* could only result in advice or propositions.

5 Persons Capable of Entering into a Transactio

Since settling a dubious and controversial case out-of-court by virtue of a settlement agreement implies concluding an agreement, it requires legal capacity, and, more specifically, the capacity to alienate (*ius disponendi*) the good

23 Mark Godfrey, "Arbitration in the Ius Commune and Scots Law," *Roman Legal Tradition*, 2 (2004): 122–135; Anne Lefebvre-Teillard, "L'arbitrage de l'histoire," *Archives de philosophie du droit*, 52 (2009): 1–14.

24 Oñate, *De contractibus*, vol. 3, part. 1, tract. 27, disput. 96, sect. 4, p. 925–928.

that is under dispute. Drawing on Roman law rules about the power to alienate, Murillo states that sanity of mind is the principal criterion to evaluate this capacity. As a result, physical impairments such as deaf- and muteness are no impediment to concluding a settlement agreement, but being afflicted with dementia is. If they are represented by a tutor, pupils and minors are allowed to settle, just like a prodigal person represented by his curator, but those tutors and curators need an authorization by a judge if the object of the settlement is an immovable good or any other precious thing. Authorization by their superior is also required from "síndicos" and town administrators wanting to settle regarding immovable or precious goods. Prelates, church administrators, and rectors can settle about goods of moderate value, even if they are immovables, but they need to observe the same solemnities that are required for the alienation of church goods. The possibility of a more direct form of agency exists for prelates, church administrators, and rectors, according to Murillo Velarde, if they have received a "mandato procuratorio libre con la cláusula de haberlo por rato del cabildo," meaning that the entity they are representing automatically ratifies their acts.[25] He even adds that those administrators taking care of the interests of church property can settle about any good, provided that they can retain or recover it or improve its condition, even if that requires paying some money. Simple members of a religious community, however, cannot settle about anything without the consent of their superior.

An issue of particular concern in the Spanish context related to heirs who were charged with transmitting part of the heritage they had received to a fideicommissary, especially in the case of the famous majorat (*mayorazgo*), an inheritance technique used by rich bourgeois and aristocratic families to hand down large family estates from one generation to the next.[26] As a result of the creation of a *mayorazgo*, assets were normally concentrated in the hands of the oldest son and became inalienable in principle. However, by royal permission they could be turned into mortgages, that is, collateral for loans.[27] This practice became widespread in the early modern period, with the authorities granting many authorizations. Consequently, *mayorazgos* also started to become the subject of settlement agreements, despite the fact that this entailed an act

25 Murillo Velarde, *Curso de derecho canónico hispano e indiano*, ad X 1,36,1, nr. 370.

26 Bartolomé Clavero, *Mayorazgo. Propiedad feudal en Castilia, 1369–1836* (Madrid: Siglo XXI de España, 1989).

27 Wolfgang Forster, "Failed Memoria: Rights of Patronage and of Burial in Bankruptcy," in *Dealing with Economic Failure: Between Norm and Practice* (*15th to the 21st Century*), ed. Albrecht Cordes and Margrit Schulte Beerbühl (Frankfurt am Main: Peter Lang, 2016), 54–55.

of alienation, urging theologians like Molina to find sophisticated reasons to defend the practice.[28] Vassals, too, were in principle prohibited from concluding a settlement about feudal land or inherited goods. Since they had no power to alienate the goods which they possessed, they needed consent by the feudal lord to reach a settlement. As can be seen in Molina's *De iustitia et iure* and other texts, this issue was also hotly debated. If the interests of the agnatic family members were not put at risk, Molina accepted that a transaction could be concluded between the feudal lord and his vassal.[29] Juan de Solórzano Pereira (1575–1655) adopted a similar line of reasoning in the second volume of his *De indiarum iure,* explaining that *transactiones* about feudal land could be considered valid if not imperiling the interest of the feudal lord or his heirs.[30] He reasoned by analogy to extend this rule to the problem of *transactiones* about *encomiendas* (i.e., grants of power over indigenous people) and *mayorazgos* (i.e., entails typical of Spanish succession law). Solorzano maintained that settlements about *encomiendas* and *mayorazgos* were forbidden if they were harmful to the interests of their lords or their heirs, but could still be allowed by the authority of the prince. Less than a decade later, he repeated his views in the *Política indiana*.[31]

6 Subject Matter of *Transactio*—The Danger of Simony

An issue of paramount concern to early modern canon lawyers was the prohibition on settlements regarding spiritual goods, because it touched upon the central issue of simony, viz. the prohibition to offer a temporal advantage, e.g., money, rights, or homage, to obtain a spiritual favor. For example, if two priests disagree about an ecclesiastical benefice, they cannot settle their dispute through a *transactio*, that is by mutually giving and taking something, on pain of committing the mortal sin of simony. This followed, as a specific application, from the general prohibition on bargaining about spiritual goods laid down in the last canon of the title of the *Liber Extra* dealing with agreements (*pacta*) in general, which immediately precedes the title on settlement agreements (*transactiones*).[32] Along with questions of agency and representation, this was

28 Molina, *De iustitia et iure*, tract. 2, disp. 557, col. 1378–1380.

29 Molina, *De iustitia et iure*, tract. 2, disp. 557, col. 1377, lit. e.

30 Juan de Solórzano Pereira, *De indiarum iure sive de iusta indiarum occidentalium gubernatione*, vol. 2, Madrid, 1639, lib. 2, cap. 14, f. 404, nr. 57.

31 Juan de Solórzano Pereira, *Politica Indiana*, vol. 1 (Madrid, 1776), lib. 3, cap. 15, n. 34, pp. 311–312.

32 X 1,35,8 (canon *Pactiones*).

the main topic in the papal decretals dealing with settlement agreements and a standard part of all discussions regarding settlements, especially if benefices were involved.[33] As a sign of the intimate connection between moral theology and canon law in the early modern Spanish world, it is interesting to note that the *correctores romani* added a gloss to the Gregorian edition of the *Corpus iuris canonici* (1582) referring to Martín de Azpilcueta (1492–1586) and Domingo de Soto (1494–1560), two leading scholars of the School of Salamanca, for further explanation about the invalidity of agreements about spiritual goods. While not mentioning the *transactio* agreement in particular, Azpilcueta does specify in his *Manual for Confessors* that all agreements in which a spiritual good is esteemed at a price, not just sale contracts, are tainted by the mortal sin of simony.[34] Soto does not go into settlement agreements either, but spends very long pages on the sin of simony in his *On Justice and Right*, giving as an example the sale of a "ius patronatus," understood as the right to propose a candidate for an ecclesiastical benefice.[35]

Next to settlement agreements about benefices, one of the most discussed examples of forbidden *transactiones* concerns marriages. Because of the sacramental nature of the marital bond, the last canon of the title *De transactionibus* in the *Liber Extra* makes it very clear that in matrimonial matters judges are not allowed to encourage the litigants to settle.[36] Civil lawyers also adopted this viewpoint, arguing that, on account of its sacramental character, settling about marriage went beyond the power of husband and wife.[37] In the exceptional case that marriages need to be dissolved, a judicial procedure for annulment has to be followed.[38] However, mediation or settlement in a wider sense (*compositio*) is allowed in marriage disputes, as the gloss already recognized.[39] The reason being that, technically speaking, a *compositio* is not defined as an onerous agreement. Hence, it does not involve the "giving and taking" that is proper to *transactiones* in the strict sense of the word. If the

33 X 1,36,4 (canon *Constitutus*), X 1,36,7 (canon *Super eo*), X 1,36,10 (canon *Praeterea*).

34 Martín de Azpilcueta, *Manuel de confessores y penitentes* (Salamanca, 1556), cap. 23 (*De los siete pecados mortales*), tit. *De la symonia*, p. 482, nr. 99.

35 Domingo de Soto, *De iustitia et iure* (Lyons, 1582), lib. 9, q. 7, art. 1, f. 298v.

36 X 1,36,11 (canon *Ex parte tua*).

37 Padilla y Meneses, *In Titulum de Transactionibus Codicis Commentarius*, ad Cod. 2,4,43, p. 210, col. 1, nr. 5.

38 On the continued relevance of these old norms in modern canon law, see Paolo Moneta, "La transazione nel diritto canonico," in *Forme stragiudiziali o straordinarie di risoluzione delle controversie nel diritto commune e nel diritto canonico*, ed. Pedro Bonnet and Luca Loschiavo (Naples: Edizioni Scientifiche Italiane, 2008), 133–152.

39 Gloss *Sacramentum* ad X 1,36,11.

rights and obligations following from the sacred marriage contract are not the subject of bargaining, and the gratuitous character of the settlement is guaranteed, the canon lawyers do not object to attempts at reconciliation by negotiation. Moreover, the gloss applied the same reasoning to *compositiones* regarding spiritual goods.[40] Even if spiritual goods cannot be the subject of onerous agreements such as *transactiones*, they can be negotiated through an amicable settlement (*amicabilis compositio*), since such an agreement does not imply the exchange of any kind of temporal good for a spiritual one. For the same reason, a *permutatio*, that is a pure exchange of two spiritual goods, e.g., of the prebend attached to a particular church with the prebend attached to another ecclesiastical office, does not violate the prohibition on simony, as long as the barter does not imply additional compensation agreements involving the payment of pensions of one party to the other. In the early modern period, this idea became widespread through Soto's treatment of the subject, which was referenced in the Gregorian edition of the *Corpus iuris canonici*.[41]

In his textbook on canon law, Murillo Velarde lays down as a rule that settlement agreements can concern any subject, as long as there is no specific prohibition on a particular kind of *transactio*.[42] Apart from the cases discussed in the previous paragraphs, he mentions two further cases of *transactiones* in the field of private law that are prohibited unless the judge authorizes them: settlements about future alimony payments (*manutención*), especially *causa mortis*, and settlements about the inheritance of a living person or the goods inherited through a testamentary bequest. According to Murillo Velarde, the main reason why those agreements are forbidden if uncontrolled by a judge is that they put at risk the testator's will. Furthermore, he draws attention to settlements that imperil the public order and the prosecution of criminal offences. The possibility of settling disputes and lawsuits following from crimes had formed the object of continuous and controversial debates since the medieval *ius commune*.[43] Following an influential provision from Justinian's Code,[44] he argues that it is allowed to settle about a capital crime except in the case of adultery. The reason is, according to early modern civil and canon lawyers, that everybody has the right to redeem his blood by any means possible.[45] However,

40 Gloss *Ut si super decimis* ad X 1,36,2.

41 Soto, *De iustitia et iure*, lib. 9, q. 7, art. 2, f. 299r–300r.

42 Murillo Velarde, *Curso de derecho canónico hispano e indiano*, ad X 1,36,1, nr. 371.

43 Raphaël Eckert, "La transaction pénale du XIIe au XVe siècle. Étude de droit savant, de législation et de coutume" (PhD thesis, Université de Strasbourg, 2009).

44 Cod. 2,4,18.

45 Wesenbecius, *In pandectas iuris civilis*, p. 56; E. Pirhing, *Synopsis Pirhingiana seu compendiaria canonum doctrina* (Augsburg/Dillingen, 1695), ad X 1,36, §4, p. 210.

pursuant to the famous principle that "crimes should not be left unpunished,"[46] other public crimes, which do not require blood punishment, cannot be settled, not even in a gratuitous, amicable way through the *amicabilis compositio*. If parties settle about non-blood crimes, Murillo Velarde explains, the settlement is taken as a confession of guilt. But he allows for an exception: if the offender can prove that he settles to avoid vexation (*vejación*) or the expenses of a lawsuit, then the settlement is allowed and not taken as a confession of guilt.[47] Another exception pertains to the crime of falsifying, since it is punished with *infamia*, which is as severe as capital punishment. Therefore, an offender accused of forgery can try to reach a settlement agreement.

7 Force of the Settlement and Remedies

Early modern Spanish law expressly recognizes the executory force of a settlement agreement, provided that it is concluded in the presence of a public notary (*escrivano publico*).[48] Some authors, such as Hevia Bolaño, emphasize this form requirement, but others, such as Murillo Velarde, do not mention it explicitly.[49] Padilla y Meneses points out that the automatic execution of a transaction agreement is daily practice in the Spanish realm on account of royal law. He recalls the requirement of conclusion in the presence of a public notary, but rejects the notion that *transactiones* need to be concluded before an ordinary or delegated judge to obtain executory force.[50] Following an authoritative provision from Roman imperial law,[51] all authors agreed that a valid settlement agreement was considered to have the same force as a judicial sentence (*res judicata/cosa juzgada*). In other words, for the sake of the peace

46 Dig. 9,2,51,2; see also Peter Landau "Ne crimina maneant impunita. Zur Entstehung des öffentlichen Strafanspruchs in der Rechtswissenschaft des 12. Jahrhunderts," in *Der Einfluss der Kanonistik auf die europäische Rechtskultur, vol. 3: Straf- und Strafprozessrecht*, ed. Mathias Schmoeckel and Orazio Condorelli (Cologne: Böhlau, 2012), 23–36.

47 Here, Murillo Velarde's opinion seems to contrast with that of Pirhing, *Synopsis*, ad X 1,36, §4, p. 211, who does not mention the possibility of reversing the presumption of confession.

48 King Philip II, *Recopilación*, Alcalá de Henares, 1581 (= Nueva Recopilación, 1567), part. 1, lib. 4, tit. 21, ley 4, f. 258v; King Carlos II, *Recopilación*, Madrid 1681 (= Recopilación de Leyes de los Reynos de las Indias, 1680), lib. 5, tit. 10, ley 5, f. 169v.

49 Hevia Bolaño, *Curia filípica*, tom. 1, part. 2, par. 3 (*cosa juzgada*), n. 12, p. 107; Murillo Velarde, *Curso de derecho canonico hispano e indiano*, ad X 1,36,1, nr. 371.

50 Padilla y Meneses, *In Titulum de Transactionibus Codicis Commentarius*, ad Cod. 2,4,10, nrs. 7–8, pp. 58–59.

51 Cod. 2,4,20.

in the republic, a *transactio* puts an end to a private dispute in the same, definitive manner as a judicial sentence. As a consequence, it cannot be invalidated easily, unless grave lack of consent to the agreement can be demonstrated. For example, if new documents appear that prove one of the parties wrong, this is not sufficient to invalidate the settlement agreement, at least if the *transactio* has been entered into with good faith.[52] The validity of a *transactio* can only be questioned if one of the parties has fallen victim to duress (*metus*), deceit (*dolus*), or fundamental error (*error substantialis*).[53] According to the general rule that juridical acts can be undone in the same way that they have been established,[54] the parties who concluded the settlement agreement can themselves decide to declare it null by mutual consent, but a settlement cannot be invalidated by the public authorities, e.g., through an imperial rescript.

A much-disputed issue concerned the possibility of attacking a settlement that was considered to be unbalanced and unfair, for instance because one of the parties had "given" far more than it had "taken." This problem tied in with general debates on justice in contractual exchange and the remedy provided for "lesion beyond moiety" (*laesio enormis*).[55] According to a standard interpretation of this remedy, which is based on Justinian's Code (C. 4,44,2), a party who has been treated unfairly, because he or she has been damaged for an amount "more than half of the just price" (e.g., merchandise evaluated by experts to be worth roughly 1000 guilders is sold for more than 1500 guilders), has the right to invoke this remedy; at the option of the defendant, the contract can then be invalidated or its price reconsidered. Generally speaking, canon lawyers and moral theologians in the early modern Spanish world requested the strictest observance of rules of justice in exchange, deeming any deviation from the so-called "just price," which was considered to have a certain "latitude" (in the aforementioned case somewhere between 900 and 1100 guilders), illicit and giving rise to a duty of restitution. Famous canonists such as Martín de Azpilcueta urged the civil courts to adopt the canon law principle of commutative justice for the sake of protecting the souls of the citizens. He proposed to extend the remedy against *laesio enormis* or "gross disparity" to any case where the just price had not been observed.[56] The civil courts, however, deemed such

52 Padilla y Meneses, *In Titulum de Transactionibus Codicis Commentarius*, ad Cod. 2,4,19, col. 1, nr. 3, p. 98.

53 Murillo Velarde, *Curso de derecho canonico hispano e indiano*, ad X 1,36,1, nr. 372.

54 Dig. 50,17,35.

55 Decock, *Theologians and Contract Law*, 507–604.

56 Decock, *Theologians and Contract Law*, 544–553.

a strict regulation impractical. At most, they were willing to provide relief for cases of *laesio enormis*, as in the original Roman provision.

Interestingly, many canon lawyers were willing to accept the idea that their more rigorous understanding of the need to observe the principle of justice in exchange did not apply to settlement agreements. Considering that it has the legal force of a definitive judicial sentence, Pedro Murillo Velarde maintained that a settlement could not be avoided on account of any kind of *laesio*, not even if the *laesio* is beyond half of the just price.[57] His opinion was more straightforward than that of a civilian like Wesenbeck.[58] In the interest of maintaining the established peace and putting a definitive end to the dispute, Murillo Velarde and other canonists were willing to accept that application of one of the major principles of contract law was frustrated in the specific case of *transactiones*.[59] Put differently, the canonists preferred at some point to preserve peace rather than fight unfair bargains. In the Spanish context, canonists regularly cited the authority of Gregorio López's (1496–1560) gloss on the *Siete Partidas* to defend this view. As a matter of fact, López explains that not even the most serious forms of lesion (*laesio enormissima*) can lead to questioning the validity of a settlement agreement.[60] Nevertheless, the issue remained controversial. Luis de Molina was unimpressed by López's gloss and remained supportive of the opinion that *laesio enormis* was applicable to *transactiones*, even though he acknowledged that an attempt to avoid a settlement by virtue of the remedy of *laesio enormis* had very little chance, in practice, to succeed.[61] He could rely on the authority of Arias Piñel (1515–1563), a professor of law at Coimbra and Salamanca, a successful legal practitioner and author of an influential commentary on Cod. 4,44,2.[62] After spending long pages examining the quality of a multitude of diverging opinions in this controversial matter, Piñel

57 Murillo Velarde, *Curso de derecho canónico hispano e indiano*, ad X 1,36,1, nr. 372.

58 Wesenbecius, *In pandectas iuris civilis*, p. 58, nr. 8. While showing sympathy for the contrary opinion, Wesenbeck referred to court practice and the "more equitable and human opinion" of Bartolus to defend the view that *transactiones* could be attacked on the grounds of *laesio enormis*.

59 Similar arguments are still used in contemporary canon law, see Moneta, "La transazione nel diritto canonico," 138 and 144.

60 G. López, Gloss *Quanto quier* on Siete Partidas, part. 5, tit. 14, l. 34, Salamanca, 1555, f. 105v–106r.

61 Molina, *De iustitia et iure*, tract. 2, disp. 556, cols. 1372–1373.

62 Wim Decock, "Elegant Scholastic Humanism? Arias Piñel's (1515–1563) Critical Revision of Laesio enormis," in *Reassessing Legal Humanism and its Claims: Petere Fontes?*, ed. John W. Cairns and Paul du Plessis (Edinburgh: Edinburgh University Press, 2013), 137–153.

eventually concluded that the remedy of *laesio enormis* should be available in settlement agreements.[63]

8 Concluding Remarks

Against the background of a Christian belief system that promotes concord, reconciliation, and peace, early modern jurists and theologians were eager to use a legal technique, inherited from Roman law, that could serve as an efficacious tool for consensual, rather than antagonistic forms of conflict management: the *transactio*-agreement. Christians were called upon to end conflicts by settlement rather than endless lawsuits, and even to drop a case rather than try at all costs to win it.[64] "All laws allow *transactiones*," Murillo Velarde insisted at the beginning of his exposition, "because every Christian must try out settlement before taking the case to court."[65] He thought that clergymen were under a particular obligation to foster settlement out-of-court, since it was their duty to bring peace and restore harmony to the litigating parties. But as the prologue to Caccialupi's treatise demonstrates, the exhortation to reconcile litigants out-of-court was addressed equally forcefully to legal professionals themselves. Having previously written a treatise on the professional ethics of lawyers (*De advocatis*), the jurist from San Severino Marche recalled at the beginning of his *Tractatus de transactionibus* that urging his client to try and settle with his adversary before taking him to court was a matter of a lawyer's deontology. Judges, too, were constantly reminded of their duty to encourage reconciliation out-of-court.[66] Padilla y Meneses even thought that they should sometimes do so against the will of the parties.[67] It is small wonder then that, as Carlos Garriga has observed with regards to legal practice in the Spanish Indies, conflict resolution in the early modern period depended more on settlements, informal agreements, and social networks than on supreme courts and judicial institutions.[68] There was a general consensus that *transactio* was

63 A. Piñel, *Ad rubricam et legam 2, Cod. de rescindenda venditione commentarii*, ad l. 2, part. 1 (Rinteln, 1667), p. 214–227.

64 Raoul Naz, "Transaction," in *Dictionnaire de droit canonique*, ed. Raoul Naz (Paris: Librairie Letouzey et Ané, 1965), vol. 7, cols. 1314–1319.

65 Murillo Velarde, *Curso de derecho canónico hispano e indiano*, ad X 1,36,1, nr. 369, in the beginning.

66 Glosses *Ex parte tua* and *Ad componendum* to X 1,36,11.

67 Padilla y Meneses, *In Titulum de Transactionibus Codicis Commentarius*, p. 4, nr. 2.

68 Carlos Garriga Acosta, "Sobre el gobierno de la justicia en Indias (siglos XVI–XVII)," *Revista de Historia del Derecho*, no. 34 (2006): 67–160.

a substantial means to settle disputes, if only because, as Oñate observed,[69] "it extinguishes the flames of lawsuits, takes away the toxic heat of conflict, fosters mental health and brings peace of heart to both parties."

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69 Oñate, *De contractibus*, vol. 3, part. 1, tract. 26, introd., nr. 1, p. 795: "Extinguit enim flammas litium, aufert calorem noxium, confert salutem mentium, utramque pacem cordium."

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