

## SPECIFIC FORMS OF CONSENT IN THE FIELD OF LIBERALITIES

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**Abstract.** *By lege lata, the consent represents one of the validity conditions which each and every juridical act must meet. Yet, when it comes to the field of liberalities, the consent evinces a series of specific features. While on the one hand the dolus (fraudulent and deceiving intent) – which is one of the vices of consent – basically takes the form of misleading behaviour or suggestion, on the other hand, when it comes to the will, only the testator's consent must abide by the specific validity requirements provided by law. Thus, the present work aims to carry out a brief analysis of the validity conditions applying to the consent, and also to point out the specific forms taken by the latter, by lege lata, in terms of liberalities.*

**Keywords:** consent; vices of consent; dolus; misleading behavior; suggestion.

### 1. A general presentation of consent

#### 1.1. The definition of consent

The consent represents a ground condition of the juridical act, general and essential at the same time, which consists in expressing the decision to conclude the act in question[1]. Specialized juridical literature has assigned the following two meanings to the term “consent”: a) unilateral manifestation of will, that is the will expressed by one of the parties involved in the bilateral or multilateral juridical act, or by the author of the unilateral act; b) will agreement between the parties, in the case of bilateral or multilateral juridical acts.

#### 1.2. Validity conditions applying to consent

In order to be valid, the consent must totally meet the following conditions[2]: a) it must be given by a person with adequate reasoning faculties; b) it must be expressed with the intention to produce legal effects; c) it must be stated; d) it must not be altered by any vice of consent.

##### 1.2.1. The consent must be given by a person with adequate reasoning faculties

The relative presumption concerning the existence of mental judgment, which is fully necessary for concluding juridical acts, applies only for persons with full

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power of exercise. On the contrary, persons under the age of 14 and those under judicial interdiction are considered not to have adequate reasoning faculties. And on the other hand, the under age persons between 14 and 18 are considered to have a judgement in course of formation, so that they can conclude civil juridical acts either personally or with the approval of legal tutors and/or the tutorial authority[3].

Besides the legal incapacities mentioned above, there also natural ones applying in situations which involve individuals with full power of exercise who are temporarily deprived of their reasoning faculties as a result of being in a state of drunkenness, hypnosis, somnambulism, rage, a.s.o.

### **1.2.2. The consent must be expressed with the intention to produce legal effects**

The consent is valid only if made in a state of juridical commitment, that is with the intention to produce juridical effects and, more precisely, to create, modify or rescind a civil juridical relation.

On the contrary, no consent will be considered to have been validly expressed if:

- a) it was given as a joke (*jocandi causa*);
- b) the expression of one's will was made out of friendship, courtesy or pure complacency;
- c) the consent was given with a mental reserve (*reservatio mentalis*) known by the person who benefits from it;
- d) the addressee of the will statement knows that the latter was not made with the purpose to establish a juridical commitment;
- e) the person who gave the consent conditioned it to his pure will ("I take upon myself the commitment only if I please");
- f) the manifestation of will is extremely vague.

### **1.2.3. The consent must be stated**

The legal subjects' inner will has juridical value only if is externalized, that is externally manifested, in one of the following ways: words, acts or gestures. The parties are free to choose how to manifest their will, since the principle which applies to the externalization of consent is that of mutual agreement. Specialized literature and jurisprudence have acknowledged that the manifestation of one's will in order to conclude juridical acts may be not only express, but also tacit. Even if in principle silence is not synonymous to a consent, it nonetheless acquires this value (*qui tacit consentire videtur*) in the following circumstances:

- a) when the law clearly provides for this possibility;
- b) when the parties, through their express will, assign this value to silence;
- c) when, according to tradition, silence means acceptance.

#### 1.2.4. The consent must not be altered by any vice of consent

The consent may be consciously affected in terms of its intellectual contents through error and *dolus*, or in terms of its free character through violence and lesion. We shall now carry out a brief analysis regarding the vices of consent.

##### A) Error

The error represents a vice of consent consisting in the false representation of reality in the mind of the person who concludes the juridical act. Specialized literature provides for two criteria of classifying the error:

a) considering the nature of the reality erroneously presented, there may be made a distinction between *by fact error* – the false representation of a state or actual situation at the conclusion of a juridical act – and *by law error* – the false representation of the existence or the text of a juridical norm.

b) considering the consequences it brings about, the error may take the following forms: error-obstacle, error-vice and harmless error.

- *the error-obstacle*, also called destructive error of will, consists in the false representation in respect to the nature of the juridical act or the identity taken by the object of the juridical act in question. The error-obstacle triggers the sanction of absolute nullity of the juridical act, given the fact that there is no juridical will in the process[4].

- *the error-vice*, which is less serious than the error-obstacle, involves the substantial features of the object within the juridical act, but also the identity or the essential attributes of the person who gives the consent. The error-vice comprises only one element - a psychological one - and the cause quite hard to prove which is the false representation of reality.

In order to speak about this type of error, the following conditions must be met:

- the element involved by the error and which led to the conclusion of the act must be a determinant one, that is if the true reality would have been known in the first place, the juridical act would have never been concluded;

- in the case of bilateral acts by onerous title, it is necessary for the other party to have known that the element involved by the error is the determinant reason for the conclusion of the juridical act.

The sanction applied for the error-vice is the relative nullity of the juridical act.

- *the harmless error* occurs in non essential circumstances and does not influence the validity of the juridical act concluded. For instance, the area of the rented flat is narrower, a case which requires a smaller price for the rent and not the nullity of the juridical act.

**B) Dolus (deceptive fraudulent intent)**

Dolus signifies misleading someone, by resorting to illegal means, in order to convince him to conclude a juridical act which otherwise would have not concluded.

Dolus comprises two elements, a subjective and an objective one, a fact which makes it easier to prove. The subjective (intentional) element which characterizes dolus consists in the intention to mislead someone so as to determine that person to conclude a juridical act. On the other hand, the objective (material) element consists precisely in resorting to deceiving means, typical to illegal acts, so as to mislead someone.

In order to be considered a vice of consent, the dolus must meet the following conditions: a) it must be determinant for the conclusion of the juridical act, that is to involve essential and decisive elements in regard to the contracting party whose consent was vitiated; b) it must be generated by the other contracting party.

As a rule, in the case of bilateral and multilateral acts, the dolus must come from the other contracting party. The dolus may affect the consent even in the case of unilateral acts, taking the form of misleading behavior or suggestion.

The vitiation of consent by dolus triggers the sanction of relative nullity of the juridical act concluded.

**C) Violence**

Violence represents a vice of consent which means threatening someone so as to frighten and determine him to conclude a juridical act which otherwise would have not concluded.

Just like dolus, violence is made up of two *elements*:

- the objective element which consists in making threats against somebody's person (life or physical safety), patrimony (the existence and integrity of assets), or moral system (honor, honesty or feelings).
- the subjective element which consists in inducing a fear in order to determine the victim of the violence to conclude a civil juridical act which otherwise would have not been concluded.

In order to be considered a vice of consent, violence must meet two conditions altogether: a) it must be illegitimate, unjust; b) it must be determinant for the conclusion of the juridical act.

As a rule, the vitiation of consent by violence triggers the relative nullity of the juridical act.

#### *D) Lesion*

Lesion represents a vice of consent which involves the material loss suffered by one of the parties of a juridical act, as a result of the obvious disproportion in terms of value between the parties' counter performance.

Lesion comprises only one element, that is the obvious disproportion in terms of value between the parties' counter performance.

In order to speak about lesion, the following conditions must be met:

- a) the lesion must be a direct consequence of the conclusion of the juridical act;
- b) the lesion must exist in relation to the conclusion of the juridical act;
- c) the disproportion in terms of value between counter performances must be evident.

Lesion can be invoked only by the under age persons with restricted power of exercise, that is by the persons between 14 and 18. At the same time, the acts which risk to be annulled because of the lesion must meet the following conditions altogether:

- a) be administrative acts;
- b) be concluded by an under age person with restricted power of exercise, alone, without the approval of the legal tutor;
- c) be harmful for the under age person;
- d) be by onerous title.

The vitiation of consent by lesion triggers a double sanction: the act is rescinded on legal demand and one of the counter performances is diminished or increased, as the case may be.

## **2. Specific forms of consent in the field of the donation contract**

The consent given by the parties of the donation contract must abide by the requirements of the Common. But contrary to the Common Law, the parties' consent in the field of the donation contract must be expressed, as an exception from the principle of mutual agreement, in a solemn form, that is by means of an authentic act. Yet, solemnity does not also characterize the manual gift which, albeit a liberality and variety of donation, is a real act. Even if legal requirements imposed by the Common Law provide that no consent must be vitiated, in the field of liberalities this happens mostly by *dolus*. Less frequent is the consent vitiated by error or violence. The error as vice of consent may regard the donator's identity, the donated good or the cause of the donation[5].

In the field of liberalities at large, *dolus* takes the form of misleading behavior and suggestion. It is hard to make a clear distinction between the two forms, given the fact that they have points in common, in terms of the activities resorted to and the purpose looked for.

*The misleading behavior* occurs when the donee resorts to deceiving procedures and fraudulent brutal direct means in order to gain the donator's confidence, deceive his good faith and determine him to dispose on his behalf. The illegal means and procedures which characterize misleading behavior are of a wide variety. Let us remind a few: the sequestration of the donator, the taping of his phone calls, the intimidation of his relatives and friends by means of offences, abuse of influence or power, groundless promises etc. against them.

*Suggestion* consists in resorting to indirect means with a hidden, elaborated and deceiving character (e.g.: tricks, false assertions about the donator's relatives and friends, speculations upon the donator's views or feelings etc.), in order to induce to the donator the idea of instituting a liberality which otherwise he would not have instituted out of his own initiative.

Specialized literature[6], that we agree with, considers that *dolus* as misleading behavior does not occur if the person who generated it is deprived of judgment. Thus, as a result of their incompatibility, the absence of judgment and misleading behavior cannot appear together.

It is considered deprived of judgment that person who is unable to realize the consequences of his deeds. On the contrary, misleading behavior can be caused only by the person who consciously resorts to fraudulent means in order to determine the donator to make a donation on his behalf. Therefore, the incompatibility between the two is completely evident.

The vitiation of the donator's consent triggers the relative nullity of the donation contract. In order for this to happen, the fraudulent means and procedures resorted to must have been undoubtedly determined the donator to make a donation. Consequently, the liberality must be annulled only if it is proved that *dolus* generated the donator's will to donate. The gravity of the *dolus* can be assessed only by the court.

Contrary to the Common Law, *dolus* attracts the rescission of the donation contract even if it comes from another person than the beneficiary of the liberality *inter vivos*.

### **3. Specific forms taken by the consent in the field of the will[7]**

Given the fact that the will is a juridical unilateral act, only the testator's consent must observe the requirements of the Common Law. In principle, when it comes to the field of the will, the testator's consent may be vitiated by error, *dolus* or violence. Lesion cannot be encountered as vice of consent in the field of the will, even if the testator is an under age person of 16 years old, since violence applies only for bilateral juridical acts, commutative and by onerous title.

Although in theory they are perfectly plausible in respect to wills, error and violence are less frequently encountered in practice.

The error can trigger the vitiation of the consent and the rescission of the will in the following circumstances:

- it affects the legatee's identity or essential attributes (e.g.: the testator thought that the legatee was his child outside the marriage);

- it affects the fundamental ground of the will (e.g.: the testator did not know he had blood relations; if he had known, he would have not instituted other legatees).

Even if from a contractual point of view the second condition presented above does not trigger the nullity of the contract, in the case of the will, which is an unilateral juridical act, such ground triggers its nullity[8].

In theory, the will can be rescinded as a result of the testator's consent being vitiated by physical or moral violence. But in practice, this hypothesis is not possible, given the fact that the testator, whose consent was vitiated by violence, has the possibility to revoke his will subsequently.

The most frequent vice of consent in respect to wills is *dolus* which may take the form of misleading behavior or suggestion[9]. The vitiation of the testator's consent occurs when the legatee (or third party) resorts to deceiving ways in order to gain the testator's confidence and determine him to make a will which he would have not done out of his own initiative[10].

As briefly pointed before, misleading behavior occurs when someone makes use of deceiving procedures and fraudulent brutal direct means (such as the sequestration of the disposing party, the taping of his phone calls, the intimidation of his relatives and friends etc.) in order to gain the testator's confidence, deceive his good faith and determine him to make a will in his behalf. On the other hand, suggestion consists in resorting to indirect means with a hidden, elaborated and deceiving character (e.g.: tricks, false assertions about the legitimate heirs, speculations upon the testator's views or feelings etc.) in order to induce to the testator the idea to institute a liberality which otherwise he would not have instituted.

Misleading behavior and suggestion trigger the rescission of the will only if they altered the testator's consent, that is if without their presence in the first place the testator would have never instituted a liberality. Thus, misleading behavior and suggestion taken separately do not constitute a ground for rescinding the will[11].

The simulated affection towards the testator and the interested performance of certain services or cures on his behalf do not trigger the nullity of the will[12], if they did not determine the testator to institute a liberality. At the same time, deceiving actions must not be confounded with true and natural compassion or support showed by people, which are by no means the result of the fraudulent misleading behavior or suggestion.

In conclusion, in order to speak about *dolus* in respect to wills, the following conditions must be met altogether[13]:

a) the use of fraudulent deceiving actions;

b) the intention to mislead the testator in bad faith;  
c) fraudulent actions resulting in altering the testator's will, that is determining him to make a disposal which he would have not done out of his own initiative. Given the fact that will is an unilateral act, the condition for the *dolus* to come from the other party must not be met here, since *dolus* may come from any other person[14].

The Notary Public's assessment, included in the authentic will and mentioning that the testator's consent was not vitiated on drafting his last will act, represents a proof until the contrary evidence, given the fact that it may be questioned with any kind of evidence[15].

When it comes to wills with complex contents which comprise several independent juridical acts, the consent may be only partially vitiated, so that some testamentary clauses may be annulled as a result of the vitiation while others rest perfectly valid. But if instead of vitiated the consent is absent, then the will becomes completely null, as it is completely unconceivable for the testator's judgment to exist in respect to certain testamentary clauses and lack in respect to others. Therefore, when it comes to wills with complex contents, the court has a difficult task, that is to establish not only the existence of the vice of consent, but also its influence upon the entire last will act.

If the testator's consent was vitiated, there will be applied the sanction of relative nullity. The prescription term (of 3 years) required for the rescission of the will as a result of the testator's consent being vitiated, starts from the opening of the inheritance.

### **Conclusions**

In respect to all juridical acts, comprising liberalities which can be *inter vivos* or *mortis causa*, the consent represents a general and essential validity condition, alongside with capacity, object and cause. According to the Common Law, the consent is valid only if it comes from a person with adequate reasoning faculties, is expressed with the intention to produce juridical effects, is clearly stated and is not altered by any vice of consent. Similarly, in the field of liberalities, the disposing person's will must abide by the requirements mentioned above.

When it comes to the will, contrary to the Common Law, only the testator's consent must observe the above conditions altogether, as a result of the unilateral character evinced by the last will act.

The donator and testator's will is most frequently vitiated by *dolus* which takes the form of misleading behavior and suggestion that are quite difficult to set apart, given the fact that they have common points in terms of the actions resorted to and the purpose looked for.

Last, in the field of liberalities, *dolus* may also come from another person than the beneficiary, contrary to the Common Law which provides that deceiving fraudulent actions must come from the guilty contracting party. This derogation is justified by the free character of the donation contract and will.

## REFERENCES

[1] See for example: Gh. Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil*, (Universul Juridic Publ. House, Bucharest, 2001), VII edition revised and amended by: Marian Nicolae and Petrică Trușcă, p. 146; P. Trușcă, *Drept civil. Introducere în dreptul civil. Persoana fizică. Persoana juridică*, (Universul Juridic Publ. House, Bucharest, 2005), III edition revised and amended, p. 124; A. Cojocaru, *Drept civil. Partea generală*, (Lumina Lex Publ. House, Bucharest, 2000), p. 187; G. Boroi, *Drept civil. Partea generală. Persoanele*, (Hamangiu Publ. House, Bucharest, 2008), III edition revised and amended, p. 210.

[2] Specialized literature upholds this view almost unanimously. See for example: T. Pop, *Drept civil român. Teoria generală*, (Lumina Lex Publ. House, Bucharest, 1993), pp. 133-134; I. Dogaru, *Elementele dreptului civil, Introducere în dreptul civil. Subiectele dreptului civil*, (Șansa Publ. House, Bucharest, 1993), vol. I, pp. 154-155; Șt. Răuschi, *Drept civil. Partea generală. Persoana fizică. Persoana juridică*, (Publ. House of the Foundation „Chemarea” Iași, 1993), p. 86 and the followings; E. Poenaru, *Drept civil. Teoria generală. Persoanele*, (Dacia Europa Nova Publ. House, Lugoj, 2001), pp. 109-110; D. Lupulescu, *Drept civil. Introducere în dreptul civil*, (Lumina Lex Publ. House, Bucharest, 1998), pp. 103-104. There are also authors who consider that the observance of only three conditions insures the validity of the consent. For that purpose, see M. Mureșan, *Drept civil. Partea generală*, (Cordial-Lex Publ. House, Cluj-Napoca, 1996), pp. 127-128, who considers that only the last three conditions mentioned must be totally met for insuring the validity of the consent. At the opposite side, there are also authors who add one more condition to those four already mentioned, according to which the consent must be serious and precise. For that purpose, see A. Ionașcu, *Tratat de drept civil. Partea generală*, (Academiei Publ. House, Bucharest, 1967), p. 264. As to us, we agree with the view most upheld.

[3] In respect to the capacity of concluding juridical acts, see I. Genoiu, *Raportul juridic*, (C.H. Beck Publ. House, Bucharest, 2007), pp. 88-96.

[4] See: Tr. Ionașcu, *Tratat de drept civil*, (1967), I volume, p. 202; I. Rucăreanu, *Viciile de consimțământ, în Tratat de drept civil. Teoria generală*, (Academiei Publ. House, Bucharest, 1967), vol. I, p. 283; A. Cojocaru, *quoted works*, p. 195; Gh. Beleiu, *quoted works*, p. 150, G.

Boroi, *quoted works*, p. 216. There has also been stated the opinion according to which the sanction applicable for the vitiation by error-obstacle is the relative nullity. For that purpose, see D. Cozma, *Teoria generală a actului juridic civil*, (Științifică Publ. House, Bucharest, 1969), p. 156.

[5] See: C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român*, (All Publ. House, Bucharest, 1998), III volume, p. 436; C. Murzea, E. Poenaru, *Donația și testamentul. De la doctrină la jurisprudență*, (Hamangiu Publ. House, Bucharest, 2007), p. 28.

[6] See Gh. Beleiu, *quoted works*, p. 153; Tribunal of Hunedoara County, Decision No. 98/1982 in R.M.L. No. 2/1983, p. 63.

[7] For the specificity of dolus in the field of the will, see I. Genoiu, *Drept succesoral*, (C.H. Beck Publ. House, Bucharest, 2008), pp. 108-109.

[8] See I. Adam, A. Rusu, *Drept civil. Succesiuni*, (All Beck Publ. House, Bucharest, 2003), p. 163.

[9] M. Eliescu, *Moștenirea și devoluțiunea ei în dreptul R.S.R.*, (Academiei R.S.R. Publ. House, Bucharest, 1966), p. 178.

[10] See: M. Eliescu, *quoted works*, pp. 178-179; St. Cărpenaru, *Dreptul de moștenire*, in Fr. Deak, St. Cărpenaru, *Drept civil. Contracte speciale. Dreptul de autor. Dreptul de moștenire*, (Bucharest University, 1983), p. 430; D. Chirică, *Drept civil. Succesiuni*, (Lumina Lex Publ. House, Bucharest, 1996), pp. 76-78; Fr. Deak, *Tratat de drept succesoral*, (Universul Juridic Publ. House, Bucharest, 2002), II Edition, updated and completed, p. 171.

[11] Supreme Court of Justice (S.C.J.), Civil Department, Decision No. 1160/1992, regarding Law Issues within the decisions taken by the S.C.J. between 1990-1992, p. 145.

[12] S.C.J., Civil Department, Decision No. 2447/1991, in Law No. 7/1992, pp. 78-79.

[13] See: Fr. Deak, *quoted works*, p. 171; I. Adam, A. Rusu, *quoted works*, p. 165.

[14] This exception from the Common Law is consecrated by the legal doctrine and jurisprudence also in regard to the field of the donation contract which is a bilateral juridical act. Actually, this exception is justified by the free character of the act in question and not by its unilateral or bilateral structure. See M. Eliescu, *quoted works*, p. 179.

[15] C.A.B. (Court of Arbitration Bucharest), Civil Department, Decision No. 532/1994, in Decisions Register 1993-1998, p. 84.