
THE CONSENT AND THE VICE OF CONSENT

Petru Tărchilă, Assoc. Prof., PhD, "Aurel Vlaicu" University of Arad

Abstract: The consent is an essential prerequisite of validity for any juridical act and it is defined as the parties` decision to complete the juridical act. The consent must meet the following conditions to acquire legal value, to be considered valid: to be issued by a judicial person, to be externalized, to have the intention of producing legal effects, not be affected by any consent flaw: mistake, fraud, violence or damage. The paper analysis the provisions of the New Civil Code regarding the vice of consent in relation to the determining characteristics of the consent.

Keywords: the consent, mistake, fraud, violence, damage.

I. The validity conditions of civil juridical act

The New Civil Code referring to vices of consent for the validity of a civil juridical act, the parties` consent for concluding the juridical act is also of great importance. Parties should assume the legal consequences that it produces¹. Thus, the following situations are considered consent flaws:

- mistake;
- fraud (cunningness);
- violence ;
- damage;

Mistake or false representation of reality in one`s consciousness is represented by a person`s determination to close the civil juridical act due to a false representation, which in other circumstances wouldn`t have been closed.

In turn, mistake is classified in mistake which prevents a contract from coming into existence, mistake vice of consent and irrelevant mistake.

Fraud involves deceiving a person through cunning means in the attempt to close a juridical act, which the person wouldn`t have closed under other circumstances. That is the reason why fraud is also known as cunningness because one of the parties uses it to close the civil juridical act².

Violence is that vice of consent which involves threatening a person with an evil, which can bring about a fear so high as to make the person decide closing the juridical act. The act wouldn`t have been closed under other circumstances.

Damage is a vice of consent which involves material damages experienced by a person due to the obvious value disproportion between two mutual performances. Article 1.206 of

¹ See also: P. Tărchilă, *Drept civil. Partea generală și Persoanele*, Ed. Gutenberg, Arad, 2008, p.272

² See: L.Pop, *Tratat de drept civil*, Editura Cordial Lex, Cluj, 2011, p.289.

the New Civil Code promoted by Law no 287/2009 referring to the vices of consent provides the following:

„Consent is corrupted when it results from mistake, fraud or violence. Consent is also corrupted if it is the result of damage.”

Art.1207 of the New Civil Code handles the institution of mistake as vice of consent in the following manner: „The party which is finds itself in an essential mistake at the moment of closing the act can demand the invalidation of the contract if the other party knew or should have known about the mistake and its importance in the closing of the contract.”

Mistake is essential:

1. when bearing on the nature or object of the contract;
2. when bearing on the identity of the object, the performance or one of its qualities or on a circumstance considered essential by both parties without which the contract would not have been closed.
3. when bearing on the identity of a person or on one of the person`s qualities in whose absence the contract would not have been closed.
4. The mistake of law is essential when it refers to a determining juridical norm, according to the will of both parties and essential for closing the contract.
5. Mistake which refers to simple contract reasons is not essential, except when such reasons were considered essential or determining by the parties.

II. The Vices of Consent

II.1. Provisions of the New Civil Code referring to Mistake as Vice of Consent

Articles 1208 to 1211 of the New Civil Code refer to the main forms of mistake which are found more often in civil jurisprudence, as follows:

Art.1208 handles the institution of unardonable mistake as a contract which cannot be considered void if the fact bearing the mistake could have been known by the parties and solved through reasonable diligence.

Mistake of Law cannot be appealed to in cases of legal accessible and predicable provisions.

Article 1209 refers to the institution of assumed mistake and stipulates that „A contract cannot be made void if it bears on it an element for which the risk of mistake has been assumed by the party who appeals to it or should have been assumed under various circumstances.”³

Article 1210 refers to the institution of calculation mistake and provides that: „A simple calculation mistake does not make the contract void only its amendment, except the case when the mistake in terms of quality was essential for closing the contract. The calculation mistake must be corrected at the request of either party.”

Article 1211 refers to the institution of communication or transmission mistake and stipulates that: „ The provisions referring to mistake apply when mistake bears on the

³ See: G.Beleiu, *Drept civil*, Ed.Şansa, Bucureşti, 2010, p.144.

declaration of will or when the declaration was inaccurately transmitted by a third party or by means of distance communication means”.

Referring to the claim of good faith mistake, the legislator provides in Article 1212 of the New Civil Code that, „The party, victim of a mistake cannot prevail over the mistake contrary to the demands of good faith”.

Article 1213 of the New Civil Code refers to the institution of contract amendment and stipulates that „The party, victim of an essential mistake bound to the contract can demand the amendment of contract provisions if the other party agrees to the execution.

II.2. Provisions of the New Civil Code referring to Fraud as Vice of Consent

The New Civil Code defines fraud in article 1214 as the mistake caused by fraudulent actions of one party or when one party fraudulently omitted to inform the contracting party (contractor) about certain circumstances that ought to have been revealed. The party whose consent was corrupted by fraud can claim the contract as null and void. The contract can become void also when the fraud is committed by the representative or guarantor for the business of the other party.

Fraud cannot be inferred.

Article 1215 of the new Civil Code refers to the institution of fraud committed by a third party and stipulates that „The party which is the victim of a fraud committed by a third party cannot claim a contract to become void only if the other party knew about the fraud or should have known about the fraud at the moment the contract was closed. What needs to be remembered is that irrespective of the contract being annulled, the author of the fraud is responsible for the damage caused.

II.3. Provisions of the New Civil Code referring to Violence as Vice of Consent

Violence as vice of consent is referred to in Article 1216 and stipulates the following: „The party which closed the contract under justified fears and threats induced by the other party or by a third party, can demand the annulment of the contract”. There is violence when the inferred fear is such as to make the party believe that under those circumstances, the lack of consent would jeopardize the life, the person, honour and goods of the party.⁴ Violence can void the contract also when it is directed against a close person such as the wife, ascendants and descendants of the party whose consent had been corrupted.

In all cases, violence is ranked according to the age, social status, health and character of the aggressed person as well as according to any other circumstance that could influence its being at the moment the contract was closed.

The New Civil Code refers to certain juridical aspects encountered in legal practice in articles 1217-1220: threat with exercise of a right is referred to in article 1217 and stipulates that „It is considered violence, the threat with exercise of a right made with the aim of obtaining unjustified advantages”.

⁴ See: O.Ungureanu, *Drept civil. Introducere.*, Ed.Rosetti, București, 2009, p.208.

Article 1218 refers to the institution of a state of necessity and stipulates that a contract closed by a party which is in a state of necessity can become void only if the other party took advantage of these circumstances.

Article 1219 refers to the institution of reverential fear and stipulates that fear which is caused only by respect, without any violence, does not void a contract.

Article 1220 refers to violence committed by a third party and stipulates that it voids the contract only if the party whose consent was not corrupted knew or should have known about the violence committed by the third party. Irrespective of voiding, the author of violence is responsible for the consequences and damages.

II.4. Provisions of the New Civil Code referring to Damage as Vice of Consent

Damage is referred to in the New Civil Code, articles 1221-1224 as follows:

Art.1221 defines the institutions of damage as the profit of one party over the other party's state of need, lack of experience or knowledge, stipulating in its favour or in the favour of a third party a higher value than the real one at the date when the contract was closed.

The existence of damage is assessed according to the nature and goal of the contract. Damage can also exist when an underage child assumes an excessive obligation in relation to its heritage status, to the advantages it obtains by contract or to the overall circumstances.

Article 1222 refers to damage penalty and stipulates that the party whose consent was corrupted by damage can demand the annulment of the contract or the reduction of its obligations as compensation for the damage-interests it is entitled to.

The action for annulment is admitted only if the damages exceed half of the value the service performed by the injured party had at the time the contract was closed. The disproportion should subsist until the registration of the action for annulment.

III. Conclusions

The parties' will to close the juridical act by exteriorizing it is an essential condition of its validity and so is the parties' consent. Consent should fulfil the following conditions in order to consider the juridical act valid and with legal values:

- to be issued by a discerning person
- to be exteriorized
- to be issued with the intention of producing juridical effects
- not be affected by any vice of consent: mistake, fraud, violence or damage. Along with the ability to contract, a prerequisite for the validity of a civil juridical act, the parties' consent for concluding the juridical act is also of great importance. Parties should assume the legal consequences that it produces.

Thus, the following situations are considered consent flaws: mistake; fraud (cunningness); violence; damage.

Bibliography

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- [4] O. Ungureanu, *Drept civil. Introducere.*, Ed. Rosetti, București, 2009.
- [5] G. Belei, *Drept civil*, Ed. Șansa, București, 2010.