THEORETICAL AND PRACTICAL ASPECTS REGARDING CONSENT, AS VALIDITY CONDITION OF THE CIVIL ACT

Camelia Stănciulescu
Faculty of Business and Administration
University of Bucharest

Abstract
According to article 953 of the Civil Code, "consent is invalid when it is granted by mistake, obtained through violence and fraud". Besides the defects of consent mentioned by the legal provisions, we must point out, in certain conditions, injury, which represents a material prejudice that one of the contracting parties suffers, because of the obvious disproportion in value, emerging right at the moment of concluding the contract, between the performance that it undertook to provide and the performance that it was entitled to receive in exchange[1].An error consists in a situation when a person has an erroneous image of reality, considering that what is false is true, or that what is true is false[2]. Consent must represent the perfect agreement between the wills of the persons that are bound by the legal relationship.

According to article 953 of the Civil Code, "consent is invalid when it is granted by mistake, obtained through violence and fraud". Besides the defects of consent mentioned by the legal provisions, we must point out, in certain conditions, injury, which represents a material prejudice that one of the contracting parties suffers, because of the obvious disproportion in value, emerging right at the moment of concluding the contract, between the performance that it undertook to provide and the performance that it was entitled to receive in exchange[3]. An error consists in a situation when a person has an erroneous image of reality, considering that what is false is true, or that what is true is false[4].

Consent must represent the perfect agreement between the wills of the persons that are bound by the legal relationship. Therefore, when the wills do not converge in an adequate and indissoluble way upon those elements that each party deemed to be constitutive of the legal act, the contract cannot be validly formed, irrespective of the type of deceitful appearances that the parties, or only

[1] According to a contrary opinion, injury is not a defect of consent, it is a condition for annulment of the legal acts performed by the persons under age, with limited acting capacity, who conclude, by themselves, without the prior authority of the parent or the tutor, acts for which the authorization of the tutelary authority is not required; please see D. Cosma, *Teoria generală a actului juridic civil*, Editura Ştiinţifică, Bucharest, 1969, p. 153.

[2] In other words, error is a psychological reality, defined *as a belief contrary to the truth*, because it points out the lack of legal correspondence between the inner and the declared will. One must note, however, that the notion of error is a lot more complex, because the concepts of "true" and "false" have, usually, a relative and variable content; please see P.C. Vachide, *Repetiţia principiilor de drept civil*, vol. II, Editura Europa Nova, Bucharest, 1994, p. 55.

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one of them, might have been misled by. The lack of conformity with reality of the contracting party's belief is what justifies, in certain cases, the invalidation of the legal act[5].

The error may also arise out of the *interpretation* that the receiver of the offer gives to the contractual clauses. When the clause is clear, the receiver of the offer may not invoke the error caused by its own fault, and in case of ambiguity it must make recourse to the author for explanations or to the trial court[6]. In function of its gravity, of the nature and scope of the consequences it has on the consent validity, the error may be[7]:

- A fundamental error or an error that annuls the will;
- A defect of consent error and,
- A harmless error (with no effect on the contract validity).

The defect of consent error, also called serious error, implies that the false representation applies to either the substantial qualities of the legal act object (*error in substantiam*), or to the other contracting party or the beneficiary of the legal act (*error in personam*). This form of error is not as serious as the fundamental error[8], because *it only alters consent*; *the vitiation is only partial*, while the fundamental error, which equates with the inexistence of consent, is total and permanent. In case of the defect of consent error, the wills of the contracting parties are convergent upon the essential elements of the contract: they agree to sell a property, in exchange of a certain price. So, the parties have consented, but the consent was granted on the basis of an error.

The Romanian legislator of 1864 takes corrective measures against the defect of consent error only in two cases: when it affects the substance of the object envisaged by the services provided by the parties, and when it applies to the party with which the contract is concluded, in which case the consideration of the person is the main reason why the legal act was concluded.

According to the provisions of art.954 (1) of the Civil Code, "the error does not cause nullity, except for cases in which it applies to the substance of the contractual object"[9]. This provision also engendered fierce controversies in the specialty literature, as the interpretation is rendered difficult by the ambiguity of the legal text. Thus, the legal doctrine emphasized that, although the law refers to the "object of the convention", or, generally speaking, to the object of the legal act, "it actually refers to the essential qualities of the object of the performances incumbent on the parties." In other words, "the substance of the contractual object is what the parties agreed it was essential for each of them in a certain

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[5] Please see M. B. Cantacuzino, *Elementele dreptului civil*, Editura All Educațional, Bucharest, 1998, p. 396.
[6] These types of error are legally regulated in the Italian or German law, but our legal doctrine also presents opinions that plead for the completion of the civil law in this respect; please see O. Ungureanu, *Reflecții privind eroarea în dreptul civil, Revista juridică* no. 4/2001, p. 155.
[7] Please see G. Boroi, *Drept civil. Partea generală. Persoanele,* Editura All Beck, Bucharest. 2002, p. 160; V.V. Popa, *Drept civil. Partea generală. Persoanele,* Editura All Beck, Bucharest, 2005, p. 102; Gh. Beleiu, *Drept civil român. Introducere in dreptul civil. Subiectele dreptului civil,* Vth edition, Editura Şansa, Bucharest, 1998, p. 145.
[8] Which is why it is also called error-defect of consent; please see G. Boroi, *op, cit.,* p., 161 ; D. Cosma, *op. cit,* p. 156
[9] Please see E. Chelaru, *Drept civil. Partea generală*, Editura All Beck, Bucharest, 2003, p.117.

contract, and, therefore, what they expected from the other contracting party pursuant to the fulfilment of the assumed obligations"[10].

If we analyze diachronically the phrase "error on the substance of the convention object", we notice that, in the classical conception, belonging to the Roman law, *error in substantiam*[11] consisted exclusively in a false representation concerning the matter that the property was made of. The error is limited, in Roman law, to the matter that the property is made of, in case of legal acts in general, and with respect to the sale-purchase act, it relates to the flaws of the object, and the appreciation criterion is objective in both cases. For the Romans, it sufficed that the property should have been made of a different substance or that it should have presented one of the flaws accepted by the Roman legal experts, the determining character of the error on the party's consent being irrelevant.

According to the objective conception, we define the substance of the object as its main quality, which is specific to its nature, and without which it wouldn't be what it is. Delightful as it might be through the logical sequencing of arguments, the objective conception presents real difficulties when we have to outline what is essential in qualifying a property[12]. The shortcomings of the objective criterion are revealed in practical cases: buying a string of pearls, that the purchaser mistakenly considers to be natural, is deemed to be valid, as the matter that the string is made of, namely mother-of-pearl, is adequate; although it was a false belief that the pearls were natural that determined the purchaser to buy the necklace, this has no relevance.

To this rigid and insufficient conception, the modern law opposed the subjective conception, relying on the subjective conception, according to which "the word *substance* must not be understood in the metaphysical sense - that is by placing it beyond the subjective interest-, which is, in fact, the content of every private law. On the other hand, the substance of the convention object is not the substance of a material object; it is the substance of the services that the parties have bound each other to provide, because these services form the direct object of the contract, not the materiality of the property. "As the case may be, the substance may consist in the legal validity of the service, or, with reference to an object, in its constitutive matter, in its origin or age, and an error related to one of the above-mentioned elements may be considered as a defect of consent, according to the decision taken by the court on the determining character of the error."

The usefulness of the object is considered to be an essential quality, provided that the parties should deem *in concreto* that this quality was essential for entering the contract, meaning that, had they known about its inexistence, they would not have entered the contract[13].

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[10] Please see D. Cosma, op., cit., p. 157.
[11] Please see V.V. Popa, *op. cit.,* p.103.
[12] A possibility would be to make reference to the common opinion, to that quality recognized by most people as defining for that property; please see F. Terre, P. Simler, Y. Lequette, Droit civil. *Les Obligations*, Dalloz, Paris, 1999, p. 170.
[13] Please see I.R. Urs, *Drept civil român. Teoria generală*, Editura Oscar Print, Bucharest, 2001, p. 222.

Case law is full of examples: buying a plot of land for the construction of dwellings, but one is unable to use it without the authorization of the Geology Committee, a circumstance that was not known to the purchaser when concluding the act; the sale of the title to property without usufruct on a building, although the usufruct was extinguished by the usufructuary's death; the purchase of animals for traction or for breeding, while these animals are unable to perform these activities etc[14].

The adopting of the subjective conception compels the judge to investigate the will of the party that is afflicted by the error, in order to determine the quality considered to be essential by the party in concluding the legal act. If the parties' intentions were expressed, and if there is no obstacle to the identification of the quality of the property which was envisaged by the parties when concluding the contract, the court's task is a lot restricted. When the recognition of this quality is not possible by analyzing the expressed intentions, it is necessary to apply an objective corrective standard, by assessing, from case to case, the behaviour of a normal, reasonable individual in a similar position.

Usually, in synalagmatic contracts, the error of the contracting party does not apply to its own performance; it applies to the counter-performance of its partner. There are cases in which the error applies to the object of one's own performance, when, for legal consistence reasons, the annulment of the contract should be imposed. For example, we can consider the case of the inheritor that waives its succession rights, as it mistakenly believes that the extent of its share of the heritage is insignificant, or of the seller that renounces a painting, believing that it is the copy of a famous work, when, in reality, the painting is the work itself. Several arguments relying on the text of the law referring to the "convention object" have been invoked against the annulment of the contract on grounds of error that affects one's own performance, although, in any synalagmatic contract there are two objects, by definition. It was emphasized that, if it were to admit the error in such a case, legal instability and uncertainty would emerge, especially in the field of trade with art works, because the annulment of the contract would lead to the punishment of those who know how to discover valuable objects in places where the other cannot identify them, and it would mean to discourage the intellectual effort and taste[15].

It was emphasized that only in certain cases the error related to one's own performance triggers the annulment of the contract, and in most cases this error is only related to value or it is an unpardonable error, and in these cases our legal system does not justify the penalty of annulment. We must distinguish between the cases in which the economic value is the substantial quality of the good which is exclusively affected by error, and the cases in which this value is nothing but the logical consequence of an error related to a different quality,

[14] Please see T.S, Civil Section, decision no. 171967, în CD 1967, p. 80; T.R. Cluj, decision no. 89/1961, no. 1190/1961, no. 12678/1961 published in *Tratat de drept civil. Partea generală*, volume comprising several authors, Editura Academiei, Bucharest, 1967, p. 284.

[15] This idea is not sustained by case law and by the greatest part of the doctrine, on the grounds of the general character of art. 954 of the Civil Code, which applies to both unilateral and synalagmatic contracts, because *ubi lex non distinguit, nec nos distinguere debemus*; please see D. Cosma, *op. cit.,* p. 158.

considered to be essential by the parties. The error related to the economic value of the performance or of the counter-performance cannot constitute an error affecting the substance, because to admit this solution would mean to promote, indirectly, the acceptance of injury as being a defect of consent between individuals who are of age, contrary to the provisions of article 1156 of the Civil Code, which prohibits the enforcement of an action for annulment by individuals who are of age, and it would also mean to infringe upon the provisions of art.25 of the Decree no.32/1954, which delineate the scope of application of injury.

In the legal literature, the distinction was made between the error on substance and the redhibitory (latent) defects on the matter of the sale, subject to art.1352-1360 of the Civil Code, thus appreciating that, notwithstanding their common foundations, their consequences are different[16]. Thus, although the latent flaws might be a particular instance of error on substance, the penalty applicable to error is annulment, while the redhibitory defects offer the buyer an option between the action for reducing the price and the action for contract rescission, and the prescription term for the action for annulment has some features that distinguish it from the prescription term applying to the action brought on grounds of latent defects[17].

"The error does not engender nullity when it applies to the person with which the contract was signed, except for the case in which the consideration of the person is the main cause for the conclusion of the convention", in accordance with art.954 (2) of the Civil Code. This second type of defect of consent error, *error in personam,* has a narrower scope of application, applying to the physical, civil identity or to the qualities of the person, qualities which are deemed to be determining at the conclusion of the contract. If *error in substantiam* can be incident to any contract, especially in case of extensive interpretation of the notion of object substance, *error in personam* can only be found in deeds where the consideration of the person represents the main cause, namely *intuituu personae* contracts[18]. This is the case of gratuitous contracts (donation, commodate), in which case the consideration of the beneficiary's person is, almost always, essential. Conversely, in the contracts for valuable consideration, the person of the contracting party is indifferent.

The error about the contracting party's person sometimes justifies the relative nullity of the sale-purchase contract in exceptional cases: an object to which the seller attaches a great sentimental value is only to be removed on grounds related to the buyer's personality. Without a general appreciation criterion, the judge will determine the extent in which the contracting party's person affects the consent of the party afflicted by the error, in function of the nature of the

[16] Please see D. Cosma, *op. cit.,* p.158

[17] Please see D. Chirică, *Principiul libertății contractuale şi limitele sale în materie de vânzare-cumpărare*, in R.D.C. no. 6/1999, p. 256.

[18] However, it is impossible to formulate a universally valid rule, which would imply that all gratuitous acts are concluded *intuitu personae* and that the acts for valuable consideration exclude this character. Exceptions can be found in case of contracts whose object is the obligation to do (contract for order of a literary work, legal aid contract, health-care assistance contract), where the contracting party's professional skills are essential (professional training, prestige, talent, reputation); please see Gh. Beleiu, *op. cit.,* 135; G. Boroi, *op. cit.,* p. 161.

convention, of the state of affairs and of the parties' intention. What is important, however, is that the error should apply to that element of the contracting party's personality which was decisive in determining the party's consent.

The French legal practice has established that it is possible to have an error on the physical identity of the person, in case of the author of an accident who, because of a mix-up of files, comes to an agreement with a person different from its victim[19]. Another controversial subject in legal practice represents the sale of a third party's property. As pointed out above, the solutions adopted differ, considering whether both of the contracting parties, or at least one of them, were afflicted by error, or, on the contrary, whether the contract was concluded in the know.

In case the parties or at least one of them happens to be afflicted by an error, the sale-purchase contract might be annulled for an error relating to the essential quality of the seller, which was considered by the buyer to be the owner of the property. Judiciously, it was noticed that this cause for annulment may be exclusively invoked by the buyer and by its successors in title, because, on the basis of provisions of art.954 (2) of the Civil Code, the error must apply to "the person with which the contract was concluded; so, the seller, even if it is in good faith, cannot invoke the annulment of the concluded legal act, because it cannot invoke its own error[20].

In a different opinion, it is emphasized that, in this concrete case, the grounds for the annulment of the sale-purchase contract must consist in deception, because the buyer, acting in good faith, was misled by the seller, acting in bad faith, about the quality of owner of the latter. Another expressed opinion was that this is the case of deception by reticence, the fault in this case consisting in the infringement of the obligation of mutual information.

In the analyzed issue, another opinion was expressed, according to which the sale of a third party's property is neither null, nor challengeable by way of an action for annulment, on the contrary, it is a convention that is concluded in a perfectly valid manner. In case the seller does not fulfil its obligation of transferring the property, the buyer can require the contract rescission for faulty non-fulfilment. The solution was challenged by convincing arguments, which are, mainly, the following:

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[19] Consent may be determined by an error regarding the civil identity of the person, its citizenship, name, age, civil status, genealogy, sex. It is necessary to determine the qualities of the contracting party, in relation to which the party is afflicted by error, and the qualities consist in morality, experience, unbiased behavior, etc., while the essential character of these qualities is appreciated by the court to which the matter was referred to, depending on the nature of the contract and the degree of intelligence and experience of the person afflicted by the error. Thus, it was possible to admit the nullity of an arbitral convention, justified by the fact that the person chosen as arbitrator did not meet the minimal requirements of impartiality and independence, imposed by its capacity; please see F. Terre, P. Simpler, Y. Lequette, *op. cit*., p. 177.

[20] Please see Fr. Deak, *Tratat de drept civil. Contracte speciale*, Editura Actami, Bucharest, 1999, p. 56 ; C. Hamangiu, I. Rosetti-Bălănescu, Al Băicoianu, *op. cit*., p. 905; D. Cosma, op. cit., p. 217; R. Sanilevici, I. Macovei, *Consecințele vânzării lucrului altuioa în lumina soluțiilor practicii juridicare*, in RRD no. 2/1975; G. Boroi, *op. cit.,* p. 163.

- According to the provisions of art. 1295 (1) of the Civil Code, the seller's obligation to transfer the property is lawfully fulfilled, at the conclusion of the contract; consequently, in the absence of a derogatory clause, the obligation is extinguished by fulfilment, at the very moment of the contract's conclusion;
- As long as, in the field of contract execution, there ceases to be a concrete obligation to give, naturally the non-fulfilment of this obligation is out of the question, just as the rescission, by way of consequence;
- On the other hand, „the obligation to give, as regulated by art. 1295 (1) of the Civil Code cannot be part of the obligations undertaken to be fulfilled later, also because, in this way, the condition of anteriority of the eviction cause would be thwarted, therefore this extremely important guarantee in favour of the buyer couldn't function any more"[21].

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[13] E. Jakab, B. Halcu*, Consecințele civile şi penale ale vânzării lucrului altuia,* in *Pandectele române* no. 1/2005;
[14] O. Ungureanu, *Reflecții privind eroarea în dreptul civil, Revista juridică* no. 4/2001

[21] Consequently, it was considered that, in the given hypothesis, *the sale is subject to rescission*, on the grounds of the seller's non-fulfillment of the obligation it assumed under the contract, that is the obligation to guarantee to the buyer the peaceful possession of the object; please see E. Jakab, B. Halcu*, Consecințele civile şi penale ale vânzării lucrului altuia,* in *Pandectele române* no. 1/2005, p. 247.