CONSIDERATIONS REGARDING THE VALIDITY REQUIREMENTS FOR THE CONSENT

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Abstract
For a valid conclusion of a juridical act it is, firstly, necessary for a valid consent to exist. However, the mere existence is not sufficient. For the act to be valid it is necessary that the consent expressed for its conclusion is also valid. Therefore, beside the formal existence of the consent, a few more requirements need to be fulfilled. The requirements of the consent represent another subject insufficiently clarified. The present study is an attempt to clarify some of the aspects of this matter, that have been rarely analyzed by the Romanian doctrine, keeping in mind the future legal provisions.

Key words: *consent, validity, discernment, intent, exteriorization*

Introduction

The subject of the present study is represented, as the title shows, by the requirements for the validity of the consent, excluding, though, the matter of the vices of consent, a subject matter so diverse that it needs a separate analysis. This matter has no yet received an exhaustive analysis in the Romanian legal doctrine. Furthermore, without bringing substantial changes to this matter, the new Civil Code (still not in force)[1] calls for a few comments. Therefore, the re-analysis of the requirements for the validity of consent, complemented by references to the new legal dispositions, is, without any doubt, very useful, especially given the importance of consent in the process of formation of the juridical act.

Paper content

It is generally[2] admitted that for the validity of a juridical act, four cumulative conditions, regarding the consent, should be met:

a) the consent must come from a person having discernment;
b) it must not be altered by a vice of consent;
c) it must be exteriorized;
d) it must have been expressed with the intent of producing juridical effects.[3]

I avoided naming them "validity conditions regarding the consent" and I presented them as "validity conditions of the juridical act required in connection with the consent" because some of them regard not so much the validity, but the very existence of consent.

Thus, the third of the named requirements regards the very formal existence of consent, presuming by definition an exterior manifestation, in the absence of which we can only talk about a

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[1] The new Civil Code has been adopted by Law No. 287/2009, published in the Official Monitory No. 511/24.07.2009, and it will come into force at a future date, to be established by the laws to be issued for its application.

[2] G. Boroi, *Drept civil.Partea Generala. Persoanele,* (Bucharest, 2010), 211, Gh. Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil*, 152.

[3] The new Civil Code expressly mentions these conditions (except for the one under letter c), which regards the very existence of consent), in a different enunciation. Thus, according to article 1204 of the new Code, the consent of the parties must be earnest, free and expressed wittingly.

decision that has been made, as a part of the psychological process thorough which the will is formed, having no juridical relevance.

Then, the last requirement and, somehow, the second one too (and we take into consideration the obstacle error and some cases of duress) regard the real existence of the consent, meaning that if they were not fulfilled we would find ourselves in the presence of an exterior manifestation, but this would only appear as consent and in reality the latter would not exist because the decision to conclude the juridical act would not exist.

Finally, the first and, generally the second condition indeed regard the validity of the consent, expressing the necessity for it to be the result of a witting and free will[4].

The consent must be *clarified* and *free*.

Firstly, the consent must be *clarified*. As any act of will, the decision to conclude a contract is preceded by a *deliberation*, in the course of which the interested person, analyzing the advantages and disadvantages of the operation they are considering, estimated that the advantages outweigh the disadvantages. This deliberation is obviously *illusive* if the person lacks discernment. Also, the deliberation of the party can be *distorted* by error, either casual or provoked by the counterparty's fraudulent manipulations. In the juridical terminology, the term *error* regards a casual fact. When the cause of the error consists in the manipulations of the counterparty or, in some cases, of a third party, the error is named *undue influence*.

These two vices affect the consent in its *intellectual element*: the party in error or that has been a victim of undue influence did not wittingly consent.

Secondly, the consent should be *free*. It is not free when the decision, instead of really "rising" from a deliberation, is the result of a constraint brought upon the interested party which led him to accepting disadvantageous conditions – this time consciously – in order to escape the threats they faced in case they refused to conclude the contract. The third vice of consent, *duress*, affects its *element of freedom*.[5]

However let us, in turn, analyze all these conditions.

The consent must come from a person having discernment

This requirement rises from the conscious character of the civil juridical act, the later comprising the parties' manifestation of will. The juridical act is first and foremost an intellective operation, as the will to conclude a contract presumes the knowledge of the elements of the projected operation, an operation which is "weighed" by each party before its conclusion[6]. Thusly it is a premeditated juridical operation, as the parties previously take into account all the resulting advantages and disadvantages.

However, to this point it is necessary for each party to have the intellectual faculties needed to "comprehend" and, then, to "want".

In other words, the consent must be given by a person that acknowledges the juridical consequences which result from the conclusion of the juridical act, that can conceive not only the rights they would acquire, but also the obligations they would undertake. And this capacity of representing the consequences consists exactly in the existence of the discernment.[7]

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[4] These two conditions rather regard the cause of the juridical act and only indirectly, by way of the aforementioned, the consent. However, given that they are usually analyzed in connection with the consent, I shall follow these footsteps.

[5] See J. Flour, J.-L. Aubert, E. Savaux, *Les obligations. 1. L´acte juridique*, edition XII, (Paris, 2006), 143-144.

[6] I. Dogaru, *Valențele juridice ale voinței*, (Bucharest, 1996), 70.

[7] The lack of discernment is provided by the new Civil Code in article 1205. The disposition does not bring new elements, but, virtually, consecrates the doctrinal and jurisprudential conclusions.

The condition regarding the existence of the discernment must not be confounded with the condition of capacity[8], although they are strongly connected (the discernment representing, theoretically, a premise for acknowledging the capacity of concluding juridical acts). The capacity is a state of law (*de iure*), rising from the law, and the discernment is a state of fact (*de facto*), being of a psychological nature and needing to be assessed from person to person, taking into consideration their psycho-intellectual ability, although the law has provided some presumptions regarding it.[9]

Hence, the private persons with full exercise capacity are presumed to have the discernment needed to conclude civil juridical acts. The one lacking exercise capacity (the minor under 14 years of age and the one under court interdiction) is presumed to lack discernment, either because of their young age, or because of their mental health situation. As for the minor between 14 and 18 years of age it is generally assessed that their discernment is developing, in order to emphasize the intermediary situation they are in. but this situation rather regards their capacity and not their discernment. From the hereunder point of view we must specify that the minor between 14 and 18 years of age is presumed to have discernment, as , where the juridical acts which they can conclude on their own are concerned, according to the rules on capacity, their eventual lack of discernment must be proved by the one that invokes it.

As a matter of fact, when we question the existence of discernment we are interested only in the acts concluded by persons who have full exercise capacity and those concluded by the person with restrained exercise capacity (the minor between 14 and 18 years of age) on their own, but for which the rules on capacity did not require a prior approval.

The matter of the acts concluded by those lacking exercise capacity or of the acts concluded by those with restrained exercise capacity, but for which a prior approval is required, will be solved by the rules of capacity, an assessment on the existence of the discernment not being necessary.

Beside the cases in which a person is presumed by law to be lacking discernment (*legal incapacities*), there are also cases in which persons that have discernment by law (for whom, as previously shown, a presumption of existing discernment operates) are in fact temporarily lacking discernment (namely cases of *natural incapacity*). For that matter, have been mentioned drunkenness, hypnosis, somnambulism, rage (*ab irato*).[10]

I want to specify that, in some of these situations, for example in the case of drunkenness, if it has been voluntarily caused, the counterparty could request damages for the prejudice caused by the annulment of the contract for lack of discernment, unless of course they had contributed to appearance of that state (in which case we could even be considering it to be undue influence) or they had somehow tried to take advantage of the respective state of the other party (immoral cause), situations in which he would be prevented from doing that by the existence of their own fault.

To these aforementioned natural incapacities we must also assimilate the situation of the mentally alienated and weaklings before they had been placed under court interdiction, of course in the hypothesis they are adults. Thus, until the court interdiction, they could be considered to have full

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[8] The French doctrine, when analyzing the ability to consent, took two elements into consideration: on the one hand, *the incapacities* – the matter of the persons for whom it s impossible to express a veritable consent, in connection with the lack of juridical capacity, and on the other hand, *the spiritual insanity* – where we consider persons that have juridical capacity, but that cannot acknowledge the importance of their acts and, therefore, cannot express a valid consent. For both situations the sanction is, on principle, relative nullity. For details, see F. Terré, Ph. Simler, Y. Lequette, *Droit civil. Les obligations*, 98-105.

[9] To the same effect, the jurisprudence has ruled: "the capacity of contracting, as well as the undertaking party's valid consent are, in accordance with the dispositions of art. 948 Civil Code and Decree no. 31/1954, validity conditions for the juridical acts, the lack of either one being sanctioned with nullity. Even if one had not been declared incapable, according to the law, a valid consent cannot be deemed to exist if on the date of the conclusion of the act, for reasons of illness, the party was lacking discernment", see H.C.C.J., s.civ., dec. no. 51/15.01.2003, in C.J. no. 4/2004, page 75.

[10] See Fr. Deak, *Tratat de drept civil,* II, 181 and quoted practice: Suceava Tribunal, s. civ., dec. no. 837/1972.

exercise capacity and, therefore, presumed to have discernment. Nevertheless, there is no doubt that the respective illness affects discernment and, therefore, any juridical acts they might have concluded could be annulled for the failure to fulfill this requirement regarding consent. In these cases it is possible that lucidity episodes appear. If the act was concluded during a lucidity episode, the cause for relative nullity under discussion no longer exists.[11]

This situation is also taken into consideration by the new Civil Code. According to article 1205 align. 2 of the new Civil Code, the contract concluded by a person that is subsequently placed under court interdiction can be annulled if, at the time of the conclusion of the act, the causes for court interdiction existed and were generally known.

This disposition will generate controversy when applied in practice, the reason for it being adopted, given the enunciation, being far from clear. A grammatical interpretation of the sentence leads to the conclusion that nullity *could be* sanctioned only if two cumulative requirements are met: the causes for the court interdiction to exist at the time of the conclusion of the juridical act and, at the same time, they should be generally known. But the second requirement appears to be excessive and difficult to accept. Firstly, it would itself raise interpretation problems, given the used terms – "generally known". Then, it would create significant difficulties as far as proof is concerned. Last but not least, the reason for establishing that the lack of discernment leads to the invalidity of the juridical act is incomprehensible, as it contradicts the expressly provided (in the previous article – 1204) requirement according to which consent should be expressed wittingly.

The reason for which the lack of discernment leads to the annulment of the juridical act is exactly because, in such case, the consent is not expressed wittingly. And, in the hypothesis hereunder, if at the time of the conclusion of the juridical act, due to the causes which subsequently determined the placing under interdiction, the person did not have discernment, the requirement for the consent to be wittingly expressed is not fulfilled. And that happens independently from the fact of weather the respective causes where known or not. The knowledge of the causes which determined the lack of discernment has no relevance with regard to the validity of consent. Weather the lack of discernment or the causes which have determined it were ("generally") known or not, the consent was not validly expressed. The knowledge of the causes that determined the placing under interdiction could raise the matter of the immoral purpose, but have no relevance regarding the lack of discernment.

A second possible interpretation of the legal disposition would lead to the conclusion that its purpose was only to enunciate the possibility of annulling the contract in the hypothesis in which, at the time of its conclusion, the causes that later determined the placing under interdiction existed and were known, without representing requirements for the sentencing of the annulment. However, this interpretation comes with two big flaws. Thus, it does not take into consideration the wording of the legal disposition, leaving aside the reference to the knowledge of the causes that determined the placing under interdiction. Moreover, in this interpretation, the legal disposition has no effect. The possibility of sentencing the annulment under the given circumstances (however implying the analysis of the extent to which, at the conclusion of the contract, the discernment had been affected) exists without the necessity for a legal disposition which expressly mentions it. Meaning, in this interpretation, the legal disposition would be futile, which contradicts a traditional interpretation rule (that comes from the subject matter of the juridical act) – *actus interpretandus est potius ut valeat quam ut pereat*.

Finally, in another possible interpretation we could assess that the legal disposition institutes a presumption of lacking discernment in the hypothesis in which, at the time the contract was concluded, the causes for the subsequent placing under interdiction existed and were known. This interpretation comes with the advantage of finding, for the reference to the knowledge of the causes for the placing under interdiction, a justification which would not contradict the requirements for the

[11] See Ch. Larroumet, *Droit civil. Les obligations. Le contrat*, 2003, 286.

validity of the consent. Therewith, it would also bring utility to the hereunder disposition, by admitting its effect of establishing the presumption of lacking discernment.

This was probably the intention of those who have written the new Civil Code. But the enunciation of the disposition is however imperfect, lacking clarity.

Nevertheless, even if this legal disposition was not to be reformulated or clarified by way of the subsequent laws which will be adopted for the application of the Code, I think that this third interpretation can be considered for the hereunder provision, given that the first two present inacceptable flaws.

The lack of discernment at the conclusion of a juridical act leads to the sanction of relative nullity of that juridical act.[12]

The consent must not be altered by vice

This requirement urges from the same conscious character of the juridical act, which we have already presented with regard to the first validity condition required for the consent. It is also imposed by the free character of the juridical act, which determines the necessity of a free will, of a party's (parties') manifestation of will which is a result of their own decision and not a result of an external, unnatural influence. The will which is comprised by the contract must really be the result of an inherent psychic process.

The vices of consent are those circumstances which affect the free and conscious character of the will to conclude a juridical act, which alter the psychological process of the formation of consent at the conclusion of the respective act.

As previously shown and same for the abovementioned requirement, this condition regarding the vices of consent refers to the qualities the consent should have. In the circumstance in which a vice of consent is present an exteriorized manifestation of will exists (hence, consent also exists), but it is altered in its intellectual, conscious contents, as the case is with error and undue influence (which, implying a misrepresentation of reality, generate the impossibility of a coherent analysis of the elements of the juridical act, the failure to assess the latter's consequences, similarly to the hypothesis of lacking discernment), or in its free character, as the case is with duress (which limits the freedom of assessment by violently introducing an unnatural element, which is determinant for the making of the decision to conclude the juridical act).

There are also situations that are usually analyzed together with the vices of consent due to their strong connection to the latter, in which the consent is deemed to be lacking completely (obstacle error and some cases of duress), but these represent more than simple vices of consent, the only connection to the latter being the mechanism that produces them, the effects being far more serious (they destruct will).

We should remark that the civil law does not use neither the expression "vices of consent"[13], which is used by the majority of the authors, nor that of "vices of will", which is more rarely used,

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[12] See G. Boroi, *op. cit*., pag. 212. For parctical applications see, e.g. Braşov Appeal Court, s. civ., dec. no. 374/R/1995, in C.P.J. 1994-1998, 51 (*the lack of discernement at the time of making the will*); C.A. Bucureşti, s. a III-a civ., dec. nr. 2079/1999, în C.P.J.C. 1999, 80 (*the lack of discernement at the time of the conclusion of a sale-purchase agreement*) and dec. no. 3247/1999, în C.P.J.C. 1999, 64 (*the lack of discernement at the time of the conclusion of a exchange agreement*); Iaşi Appeal Court, s. civ., dec. no. 193 – 03.11.2000, in M. Gaiță, M.-M. Pivniceru, *Jurisprudența Curții de Apel Iași în materie civilă pe anul 2000*, (Bucharest, 2001), 47-48; Ploieşti Appeal Court, s. civ., dec. no. 282 of 01/02/1999, în *Curtea de Apel Ploieşti, Buletinul jurisprudenței, Culegere de practică judiciară, semestrul I, 1999*, (Bucharest, 2000), 212-215; Ploieşti Appeal Court, s. civ., dec. no. 3454 – 22/10/1999, in I.-N. Fava, M.-L. Belu-Magdo, E. Negulescu, *Buletinul jurisprudenței, Culegere de practică judiciară a Curții de Apel Ploieşti, semestrul II, 1999*, (Bucharest, 2001), 139-142.

We would like to specify that the same sanction is provided by the new Civil Code (article 1205).

[13] The new Civil Code use this expression in the very title of the paragraph which deals with this subject matter, "The Vices of Consent", articles 1206-1224.

these expressions being creations of the doctrine. As it has already been assessed[14], of the two expressions, the more suited (adequate as far exactness is concerned), is the phrase "vices of will", and that is because, on the one hand, the respective vices alter not only the consent but firstly they alter the cause (the purpose) of the juridical act[15], which together form the juridical will, and, on the other hand, as the notion of consent has two meanings (of unilateral manifestation of will and of concurrence of wills), and as vices can be met not only in bilateral or multilateral juridical acts, but also in cases of unilateral acts, confusion can be caused by using the other phrase. Nevertheless, not wishing to initiate further discussions, I shall use the already traditional expression of "vices of consent", in order to comply, under this aspect, with the majority of the authors.

The vices of consent are, according to article 953 of the Civil Code, error, undue influence and duress. Many of the authors also include lesion in the area of the notion of vices of consent, but the qualification of the lesion is, in the light of the in force legislation, subject to controversy. The provisions of the new Civil Code eliminate this controversy, by qualifying lesion as a vice of consent.[16]

The sanction for the case of vitiated consent is, as a general rule, the relative nullity of the juridical act.

However, the analysis of the vices of consent is not subject to the study hereunder.

The consent must be exteriorized

This requirement is urged by the very definition of consent: the decision of concluding a juridical act, which is manifested in the exterior.

The requirement regards the existence of the consent and in case it is not fulfilled the latter is lacking, as the decision made to conclude a juridical act, if it is not exteriorized, does not have the worth of consent.

Therefore this requirement is equivalent to the condition that consent exists. Nonetheless it could have not been named accordingly, as it only covers the hypothesis of the formal, material lack of consent, and it is necessary for the latter to exists as far as its contents, substance are regarded, meaning it should declare, reflect a real decision to conclude the juridical act. Further, as we shall see, sometimes a mere exteriorization of the made decision is not sufficient and it needs to take a certain from required by law, in the absence of which consent cannot be deemed as given, at least not for the juridical act for which the decision had been made.

Hence, this requirement establishes the connection between consent and the form of the civil juridical act, as the principle and conditions applicable in relation to the form of the juridical act regard the very exterior manifestation of will, which is consent.

Thus, the general rule applicable with regard to the exteriorization of consent is that the mere concurrence of the parties' wills is sufficient for a valid juridical act to be concluded. This means that the parties are free to choose the exteriorization form for their will, the way the decision to conclude the contract is brought to knowledge remaining irrelevant as long as it takes place.

There are though exceptions[17] from this rule, as the case of those juridical acts for which the law requires that the manifestation of will takes a certain, special form, a form tha is required *ad validitatem*.

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[14] G. Boroi, *op. cit*., 214; A. Pop, Gh. Beleiu, *Curs de drept civil. Partea generală*, (Bucharest, 1973), 268-269.

[15] In fact they alter the cause and, indirectly, the consent.

[16] Article 1206 align. 2 of the new Civil Code.

[17] For some juridical acts an express manifestation of will is necessary (acts for which a particular form is required *ad validitatem*, the acceptance of a donation – article 814 align. 2 of the Civil Code, the conventional solidarity in civil law – articles 1034 and 1042 of the Civil Code, *et cetera*).

In such cases, it is mandatory that the parties' will is expressed and acknowledged in the form required by law and cannot otherwise produce any effects or, at any rate, not quite the effects that the parties had in mind.

We must not leave aside the form requirement *ad probationem* because, although it does not affect the validity of the juridical act, in case the parties' manifestation of will does not fulfill the mandatory form, due to the probation issues, it could come to producing no legal effects.

The form required for the contract to be opposable to third parties does not generally concern the matter of the manifestation of consent, as it presumes the fulfillment of some formalities subsequent to the conclusion of the juridical act and, hence, to the exteriorization of the manifestation of will.

The manifestation of will can be exteriorized *expressly*, when it is expressed in ways liable to directly transmit it to the counterparties or to third parties (irrespective of the used practical means: verbally, in the case of persons that are present, by phone, fax, e-mail, by documents, by signs[18]), or *tacitly*, when it is implied, as from the parties action or attitude the intention of concluding a contract results.

For example, article 689 Civil Code provides the cases when *the acceptance of the inheritance* is express and when it is tacit. The tacit manifestation of will present the advantage of saving time, though it sometimes comes with the disadvantage of being equivocal. Moreover, such manifestation is excluded in the case of some of the legal acts, as those for which a certain form is required *ad validitatem*.

The means of exteriorization are diverse. Therefore, consent can be verbally expressed (for consensual juridical act), the agreement being considered fulfilled as soon as the parties have stated their harmonious will to fulfill the agreement. Another mean of expressing consent is represented by the deeds, in their authentic (usually requested by solemn agreements) form or in their private signature form (these being requested *ad validitatem* or in other cases *ad probationem*). Consent can be also expressed through conclusive actions or gestures (e.g.: an idle taxicab with the "vacant" light on, holding your hand up when asking to buy a newspaper etc.)

A specific issue regarding the exteriorization of consent is establishing *the judicial value of silence* (seen as the absence of any exterior manifestations).

It is unanimously considered that, on principle, silence does not mean consent, as civil law does not follow the adage "*qui tacit consentire videtur* ("qui n edit mot consent").

Still, there are certain situations when, by exception, silence is considered an expression of will in fulfilling an agreement, as follows:

- when the law specifically provides this (e.g.: article 1437 of the Civil Code[19]);
- when the parties establish by express will that silence is to be considered consent (.e.g.: by pre-contract or even contract when establishing the means of renewing an agreement or denouncing it)[20];

[18] See, e.g., R. Bercea, *Consimţământul virtual şi consimţământul real în contractele încheiate în mediul electronic*, in Dreptul no. 1/2004, 90 and fl.

[19] Article 1437 states that "after the lease term has expired, if the tenant does not move out and is left in possession, the lease is being considered renewed, its effects being regulated by the rules regarding the no term lease". Therefore, the text establishes the tacitly renewal of the lease.

[20] I would like to mention that the significance granted to silence must be the result of the parties' agreement and not the statement of a single party by itself. This is why we cannot take into consideration the example given by some authors (see D. Alexandresco, *Explicaţiune teoretică şi practică a dreptului civil român în comparaţiune cu legile vechi si cu principalele legislaţiuni străine*, (Iasi 1898), 44): not replying to a letter sent by a merchant that considers the recipient his debtor (a common practice these days as well) could be regarded as an acceptance of debt by the recipient.

• when silence is considered consent according to custom. In theory, these situations are called "circumstantiated silence", when the regularity of previous contractual relations between parties and customs do not impose an express acceptance to contract[21].

Apart from these situations, there are a few other cases when silence is to be considered consent:

• in matters of offer and acceptance, when the offer is made exclusively to benefit the other party, the latter's silence is seen as acceptance[22];

• when, at the request of one party, the other party fulfills the obligation, without having to expressly answer, in which case, the latter's silence is considered acceptance[23].

Italian theoreticians state that, for silence to be regarded as consent, the usual way of taking action or good faith, in the parties' relations, must impose the obligation to talk, or that according to a given specific historical or social timeline and regarding the quality of the parties and their business relations, one party's silence should be understood as its acceptance of the other party's will.[24]

Consent must be expressed with the intention of producing juridical effects (*animo contrahendi negotii*).

This requirement, also expressed as "consent must be stated as a juridical commitment"[25], emerges right from the essence of the civil juridical act, which is an exercise of will with the intent of producing juridical effects.

The requirement concerns the existence of consent in its substantial form. Consent is the decision to fulfill an agreement, revealed to the exterior. This decision essentially implies the intention to engage in juridical acts, to modify or extinguish juridical relations, in other words, precisely fulfilling the requirement in case.

Not fulfilling this requirement is equivalent to not making a decision on fulfilling a juridical act, or to not expressing it through an exterior act of will. There would be a statement of will creating apparent consent, but it would not be related to a decision made as to fulfill the juridical act. Consent would exist merely as a frame without content.

Thereby, we will consider this requirement not to be fulfilled, as consent is expressed without the intent of producing juridical effects, in the following cases[26]:

1. When the expression of will has been stated as a joke (jocandi causa), out of friendship, courtesy, or pure compliancy[27]. In these cases, the intention of assuming a juridical agreement is obviously missing, possibly remaining in the area of moral obligations, unsusceptible of being accomplished, if needed, through the coercive force of the state. If, in certain circumstances, some juridical effects could be born out of such acts, they would not originate in juridical acts, but in

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[21] The silence of a customer of a regular provider, who picks up the merchandise left at his doorstep, with no will exchange, being possible, is considered to be a sale; see D. Cosma, *Teoria generală a actului juridic civil*, 128.

[22] C.Stănescu, C. Bârsan, *Drept civil. Teoria generală a obligațiilor*, edition IX, (Bucharest, 2008), 48; D. Cornoiu, *Drept Civil, Partea generala*, (Bucharest, 2000), 142; A. Pop, Gh. Beleiu, *Curs de drept civil. Partea generală,* (Bucharest, 1973), 267; A. Cojocaru, *Drept civil. Partea generală*, (Bucharest, 2000), 191.

[23] I. Dogaru, *op.cit.*, 72-73. In this case, this silence is not in the above mentioned sense, an expression of will being revealed through the execution of the obligation.

[24] See Cass, sez. lav., 1603.07, n. 6162, in *Mass. Giust civ*., 2007, 3 cited by L. Viola, *Il contratto. Validita, inadempimento, risarciemento*, vol. 1, CEDAM, 2009, 718.

[25] Tr. Ionaşcu, *Tratat de drept civil, Vol. I, Partea generală*, (Bucharest, 1967), 263.

[26] For qualifying these situations as "non-juridical" expressions of will, see P. Vasilescu, *Manifestări de voință non-juridice*, in P.R. no. 1/2003, 239 and fol.

[27] The juridical literature offers many examples on this matter: promising to pay someone a visit, attempting to come to the aid of a stranded motorist, in general providing free of charge services to others. See Tr. Ionaşcu, *op.cit.*, page 263, A. Cojocaru, *op.cit.*, page 191, M. Mureşan, P. Ciacli, *Drept Civil. Partea generală*, (Cluj-Napoca, 2000), 120.

simple juridical actions (e.g.: the obligation to indemnify for damages resulting out of an illicit action)[28].

The French doctrine[29] took into consideration, regarding the compliance of wills, compliances of wills that are "non-compulsory", as follows: "*acts of courtesy or compliancy*" and "*honorable commitments*".

"*Acts of courtesy or compliancy*". There are compliant wills that do not oblige, from a juridical point of view, because the parties involved did not want to establish a juridical relation that would allow the claim of an obligation.[30] This is the case with *political promises* that do not oblige, legally speaking, their authors[31]. *Compliancy acts* can be seen as agreements based on "*fashionable relations*", which only compel to courtesy rules (an invitation made and accepted does not represent a legal contract)[32] . Among friends, people one knows, or family members, promises are often being made, and there is an agreement as to what aspects impose a certain "interdependence": children are being promised trips or various items in exchange for their progress in school; promises to visit back are being made; meetings for recreational purposes are being set in a certain place; certain services are being promised etc.

All of these examples are non-juridical acts, as the parties involved do not want to establish juridical relations or to capitalize the promised advantages through legal means. They are simply the result of a mannerly conduct and of natural bonds between people, with no legal connotations.

The borderline between a contract and a "courtesy act" appears to be more difficult to draw, especially when it comes to providing free of charge services.

Various activities can be performed based exclusively on the courtesy and kindness of the person assuming these responsibilities: small favors you do for a family member, a friend or a neighbor; help and advice in case of illness; counseling by a specialist in different fields (legal, financial, technical etc.); hauling people and goods free of charge etc. We can easily notice that these activities can represent the object of well defined legal provisions, resulting from proper contracts (work, contracting, counseling, transport etc.). What sets them apart is not the characteristic of being performed with no interest in gaining something, but rather their cause and their effects. These operations lack a legal cause, what is being performed is based on friendship or family bonds, and the effects are different. There is no doubt that not carrying out- *lato sensu*- a convention will lead to an assumption of responsibility for the culpable party, an unconceivable fact when it comes to courtesy acts.

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[28] M. Mureşan, P. Ciacli, *op.cit.*, 120.

[29] See F. Terre, Ph. Simler, Y. Lequette, *Droit Civil. Les obligations*, 58-60.

[30] See the French jurisprudence, Paris Appeal Court, the 26th of September 1995, R.T.D. Civ. 1996, 143, observations by J. Mestre- in a contract, the parties "make promises and assume obligations; there are only promises made with the intention of assuming obligations, granting the other party the right to claim their fulfillment, resulting in a contract and a convention. But there are also other promises that we make in good faith and with genuine will to fulfill them, but without the intent of granting the other party the right to claim their fulfillment. In other words, the person that makes the promise also states that he/she does not assume an obligation, this being made possible in some situations by certain qualities of the one making the promise or the one for whom the promise is being made. For example, when a father promises his son, a law student, that he will reward him with a pleasure trip, provided that he manages his time properly, it is obvious that the father, while making a promise, does not assume an obligation, not in a juridical sense anyway.

[31] See Paris Court of Appeal, 18th of October 1994, R.T.D. Civ. 1995, 351, observations by J. Mestre. For the situation in which a journalist's press accreditation for some private charity events can be considered a contract, see T.G.I. Paris, 7th of October 1996, R.T.D. Civ. 1997, 126, observations by J.Mestre.

[32] E. H. Perreau, "*Courtoisie, Complaisance et usage non obligatoires devant la Jurisprudence*", R.T.D. Civ. 1914, 481 and following; D. Mayer, "*L'amitie*", JCP, 1974, I, 2663; P. Bedoura, "*Amitie et le droit civil*", (Poitiers, 1976).

Still, the French doctrine and jurisprudence has seen a great deal of controversy over the juridical nature of an act of assistance[33]. In order for the person that suffers a prejudice to receive compensation, the jurisprudence based it, on several cases, on tort liability or on business administration. However there are also court decisions that admit the existence of an assistance convention, a solution that reveals a strong artificial character[34].

See, for example, the case of free labor performance for the benefit of a neighbor or a friend, as well as in the situation of free medical services[35]. If the solution characterization removes some solutions to these contractual benefits, most analyze the relationships within the voluntary help of a free service contract. If some of the answers dismiss the solution of qualifying these benefits[36] as contractual, others analyze the voluntary help relationships within a free service agreement[37].

However, when it comes to these complaisance acts, tort liability is the only liability that can be undertaken, with the application of the ordinary law on the matter and with no juridical connection with the fact that the prejudice was triggered by the "performance" of said complaisance act. The hypothesis that circumscribes itself best to the last situation is represented by the damage caused during the voluntarily conveyance of passengers and goods. In this case, it was decided that the act of complaisance of the "carrier" can only be the source of tort liability, with the obligation, legal of course, to repair the damage caused by his act or his work. Tort liability applies here, not due to the fact that the conveyance is voluntary and free, but due to the fact that its source is not a legal agreement, the act of "carriage" lacking legal cause (obviously, the parties' intent to undertake legal obligations is lacking)[38]. A legal agreement will be needed though, in the situation of paid hitchhiking.

The situation of remanding various goods, of varied values, in the occasion of the anniversary of an event. It was also argued that we give and receive such objects, without any liberal intention, without being impressed of the object's value, without expecting gratitude or the return of the gift. No trace of legal intent can be detected in these acts, and any attempt to detect a juridical cause in such expression of will or the intention to make such realities into legal relationships, which the "parties" ought to execute by the force of the law, falls on the ridiculous[39].

It is also true that the tradition of gifts is only occasional and individual, with the clearly stated aim of producing pleasure and joy to another whom, in turn, appreciates the gesture of kindness of the former. Therefore, it is clear that the intentional spring of such gestures comes from the more or less sincere affection we have for each other. But this is the case, when will is expressed with the intention of it taking legal effects, namely to convey property. It is the typical situation of the manual gift, a variety of donation. It is true that, beyond the remanding of the good, the parties have no legal obligations. And it is also true that, forced execution is not the case, because the only assumed obligation, the remanding of the good, was performed (without the delivery of the good, the legal act does not exist). However, the fact that the producing of legal effects was intended, namely the transfer of property, is enough, in order to describe the manifestation of will, as a legal act

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[33] See R. Bout, "*La convention dite d'assisttance*", Melanges Kayser, 1979, pages 157 and following; C. Roy-Loustanau, "*Du domage eprouve en portent assistance benevole a autrui"*, Aix thesis, 1980.

[34] See F. Terre, Ph. Simler, Y. Lequette, "*Droit civil. Les obligations*", *op. cit.*, page 60.

[35] A. Rouast, *La prestation gratuite de travail*, Études Capitant, (1939), 695; M. Boitard, *Les contrats de services gratuits*, (Paris 1941); F. Grua, *L'acte gratuit en droit commercial*, (Paris 1978); A. Viander, *La complaisance*, in JCP, 1980, I, 2987, quoted by F. Terré, Ph. Simler, Y. Lequette, *Droit civil. Les obligations*, 59

[36] See: Cass., 2e civ., dec. of 18.03.1992, n JCP 1992, IV, 1525; dec. of 26.01.1994, in R.T.D. Civ. 1994, 864, obs. by Jourdain; Cass., 1re civ., dec. of 07.04.1998, 1050; Cass., 2e civ., dec. of 10.06.1998, in JCP 1999, II, 10042.

[37] See: Cass., 1re civ., dec. of 08.11.1977, 10.10.1995, 16.07.1997, 17.12.1996 and 13.01.1998, quoted by Ph. Simler, Y. Lequette, *Droit civil. Les obligations*, *op. cit.*, pag. 59.

[38] Driver's liability can only tort liability. For an international application, see Cass., 1re civ., dec. of 06.04.1994, in JCP 1994, I, 3781, no. 1, obs. by Fabre-Magnan, and in R.T.D. Civ. 1994, 866, obs. by Jourdain.

[39] See, P. Vasilescu, *Relativitatea şi obligativitatea actului juridic. Repere pentru o nouă teorie generală a actului de drept privat*, (Bucharest, 2003), 94-95.

(moreover, if this operation was not qualified as mentioned the transmittal of property could not be justified, because legal effects could not be acknowledged as far as a non-juridical act is concerned). And the consideration of the person, the wish to bring them joy, have legal relevance themselves, representing the very determinant reason for the conclusion of the juridical act, which is one of the two elements that form the cause of the juridical act.

„Gentlemen's agreements". It happens that some people commit themselves to "honor". Designated also by the term "gentleman's agreement", this practice is more common than might appear at first sight, whether we refer to family, professional, economic relations or frienship. However, these agreements call for an answer to the next question: are they binding or not[40]?

Since these agreements fall within the field of family relationships, they generally seem devoid of such binding, revealing themselves as convenience relationships or courtesy relationships.

For the other relationships mentioned, things are not the same. Whether they wanted to compensate a lack of the law or to "escape" the enforcement of certain rules, or – even simpler, but perhaps more significant – to have had understood, by hesitation or repugnance, not to engage "in a valid form", the parties of these agreements seek much less to evade the effects of the law, then to situate their agreement outside of the state law field. But the state law does not acknowledge this separation and interprets gentlemen's agreements as legally binding for their authors, according to the commune rules of contracts, the case law stating the same effect[41]. The intention of the parties to take their agreement outside the limits for the application of the law is not relevant in the area of the analysis hereunder. It is sufficient that the parties' intention of concluding a binding agreement is established for that agreement to be qualified as being a juridical act. Further, it is an issue of interpretation left in order to establish the contents of the parties' manifested will, respectively, what are the effects which the parties had in mind. Surely, the issue of the intention of the parties of undertaking obligations by way of such agreements must be assessed from case to case, as the hypothesis in which such an intention did not, actually, exist cannot be excluded.

Therefore, the distinction between the non-legal expressions of will and the legal ones sometimes raise difficulties. Without being able to enunciate a general rule, some elements are in this respect, helpful. For example: the gratuity of the benefit, the type of benefit, the scope of the agreement, the legal and economic importance of the transaction, the value of the good, the risk of making the benefit. But these can only act as signs that delimitate the expression of will that produces legal effects from the one that lacks such effects.

2. *When consent was given under a pure potestative condition by the part that binds* (Article 1010 Civil Code[42]), namely under the form "I bind if I want to", being interpreted that such a condition is practically equivalent to the lack of intent to be bound - "*sub hac conditione, si* taken yet.

3. *When the expression of will is too vague*, the intention of undertaking a legal commitment or the content of such legal engagement, that the party intends to undertake, are not resulting unequivocally.

4. *When the one to whom the declaration of will is being addressed to, knows that its author gave it without the intention of legally engaging himself,* or as commonly referred to in the legal literature, when the expression of will was made with a mental remoteness (*reservatio mentalis*) known by its recipient. I preferred to avoid this enunciation because it contains a mistake: as long as the remoteness is known by another person as well, no longer can it be qualified as mental

[40] See: K. Zweidert, *Du sérieux de la promesse. Remarques de droit comparé sur la distinction des actes qui obligent et des actes qui n'obligent pas*, (1964), 33 and fol.; B. Beignier, *L'honneur et le droit*, (Paris, 1995), 562 and fol.; D. Ammar, *Essai sur le rôle de l'engagement d'honneur*, (Paris, 1990), 396 and fol.

[41] For details on the solutions adopted by the French doctrine and practice in the matter, see F. Terré, Ph. Simler, Y. Lequette, *Droit civil. Les obligations*, *op. cit.*, 60 and P. Vasilescu, *Relativitatea actului juridic civil (...),* 99-100.

[42] Article 1010 of the Civil Code provides that „the obligation is void when affected by a potestative condition on behalf of the undertaker".

remoteness because, hypothetically, it was already expressed. However, the idea is clear. It refers to the situation in which the lack of intention to be bound, the remoteness is known by the other party, but hidden from the others, third parties. Namely, it creates an appearance of legal commitment, contradicted by the secret understanding between the parties. Certainly, simulation also falls under this hypothesis (it represents the case presented above, under the form of the fictitious act[43]).

It should be noted however that in such a case, the juridical act, and thus the consent can be considered valid in relation to good faith third parties.

Some authors consider that other requirements relating to consent should also be met, such as: "consent should emanate from one of the legal act's parties[44]", "consent should come form a person with full legal capacity[45]", "consent should be reliable[46]"," consent should be precise[47]", "will should be free[48]"," will should be conscious[49]".

However, it is not necessary that these requirements should be retained, due to their futility, or their being included in the content of other such requirements, or, in fact, their not concerning the consent.

Thus, the requirement that consent must emanate from one of the juridical act's parties is unnecessary. The party expressing its will shall be bound, as a party of the juridical act (except when the party acts as a legal mandate). It makes no sense to look at the problem form a reversed point of view, namely, to first establish the parties and then to identify a new requirement for the expression of consent. And if the point was to evoke the idea that nobody can be bound without his consent, it is a matter beyond our discussion regarding consent, being related to the legal effects of the juridical act, namely, the principle of relativity that applies to them.

The requirement for consent to come from a person with full legal capacity refers to, in fact, another condition of the juridical act, namely the capacity. It is certain that, in order to validly conclude a legal act it is required that all its essential requirements should be met, but also, said requirements should be considered separately and the validity of one of them is not to be confused with the validity of the juridical act itself. In any case, the requirement is also inaccurate, because not only those with full legal capacity can perform juridical acts; for example, minors between 14 and 18 years old may conclude certain legal acts by themselves, even without prior approval.

The requirement of being reliable is included in the content of the requirement stating that consent must be expressed with the intent of producing juridical effects.

The requirement of being precise regards the object of the juridical act, which needs to be determined or determinable, or the offer. In any case, to the extent that it could regard the consent, it would be also included in the content of the requirement of being expressed with the intent of producing juridical effects, which implies, as we have seen, the expression of will to be clear Even more, the expression of will can also be tacit, and therefore not quite precise, nevertheless being given a value of consent.

At last, the conditions stating that the will should be free and also conscious represents the presentation, under a different name, of the requirements regarding the lack of consent vices and the existence of discernment.

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[43] See D. Cosma, *op. cit.*, 120; E. Lupan, *op. cit.*, 215; P. Vasilescu, *Relativitatea (...), op. cit.*, 73 and fol.

[44] R.P. Vonica, *Drept civil. Partea generală*, (Bucharest, 2001), 562.

[45] R.P. Vonica, *op. cit.*, 562; Tr. Ionaşcu, *op. cit.*, 263.

[46] Tr. Ionaşcu, *op. cit.*, 263-264, V.V. Bica, I. Burghelea, *Drept civil. Teoria generală. Persoanele*, (Bucharest, 2001), 59.

[47] *Idem.*

[48] V.V. Bica, I. Burghelea, *op. cit.*, pag. 58-59.

[49] *Idem, as in the previous note, this is about the authors' references to the work of another author, regarding to which I think a misinterpretation occured. In that work there are no additional requirements concerning consent, but they are simply presented under a different title.*

In the end, I would like to mention that the sanction that intervenes for not fulfilling the requirements for consent is the nullity of the juridical act in case. We will have *absolute void* when the conditions regarding the existence of consent are missing, both its formal existence- not exteriorizing the consent (in this case, as a general rule, no sanction can exist as the juridical act itself does not exist, not even having an apparent validity), and also in the existence of the content, of the decision made to fulfill a juridical act- lack of intention to produce juridical effects, the obstacle error[50] and some violent situations. On the other hand, we will have *relative nullity* when the conditions regarding the quality of consent are not fulfilled, the free and conscious character- lack of discernment or the existence of a vice of consent.

Conclusions

As we have seen, the validity requirements for consent still represents a present subject, an ampler approach being needed, from a perspective that also includes aspects which are especially revealed in the French doctrine. The present study completes the classic approach to the subject in discussion. The analysis can serve for a better understanding of the notion of consent, of the requirements for its validity and for a correct appraisal of the situations in which these are not fulfilled, leading to the application of the specific sanction, the nullity of the juridical act. Evidently, nevertheless, the subject is far from exhaustion. On the one hand, the matters taken into consideration in the present study need an ampler analysis and, on the other hand, other aspects have been left out, as the case is with the matter of the vices of consent. But these matters shall be object to future studies.

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[50] The new Civil Code, including the obstacle error in the notion of essential error (that also includes the classic vice error), sanctions it with relative void (article 1207)

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