

# THE PROTECTION OF THE RIGHT TO EXPRESS A FREE AND VALID CONSENT WITHIN CIVIL ACTS, BY INCRIMINATING FRAUDULENT MANEUVERS

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## Abstract

The valid conclusion of a civil legal act requires that parties should express their will freely and consciously, unaffected by vitiated consent. Of all the vices of consent, in this article, I have analyzed undue influence in the light of the rules imposed by the New Civil Code. Thus, we have presented the elements of undue influence, particularly the configuration of the deceptive maneuvers. Further on, we have analyzed the legal requirements to qualify undue influence as a vice of consent. We have given a special consideration to the manner in which undue influence can be sanctioned, as far as it has been proven. The misled part could either request the annulment of the contract or the payment of damages, or even both categories of sanctions.

**Key words:** undue influence, vice of consent, civil legal act, annulment, damages

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Consent is one of the conditions of valid conclusion of a civil legal act, consisting of the externalization of the parties' will, made with the intention to generate certain legal effects (Reghini I., et al., 2013). The validity conditions of consent are set forth in Art. 1204 of the Civil Code: "consent of the parties must be serious, expressed freely and knowingly". To be freely assumed and knowingly given it is necessary that, at the time of its expression, consent be unvitiated (Ciochină D., 2012). According to Art. 1206 of the Civil Code, consent is vitiated when given by error, obtained by fraud or extorted by duress - para. (1). Also, consent is vitiated in case of lesion - para. (2).

A party needs to be able to express his legal will freely, without external pressure or fraudulent maneuvers, in order to have the correct and accurate image of the legal consequences, namely of the rights acquired and the obligations he is bound by when entering into a civil legal act (Hubrean A., 2012). Vices of consent are considered to be deficiencies of internal will and are sanctioned with relative nullity of the legal act, in order to remove this way the legal effects which do not correspond to the real will of the party who concluded the act under their influence (Vasilescu P., 2012).

In this study we refer to undue influence, highlighting under what conditions the deceptive maneuvers are likely to vitiate consent and what are the ways of sanctioning them.

## MATERIAL AND METHOD

### Determining the constituent elements of undue influence

Undue influence consists in inducing a person into error, by cunning or deceptive means, in order to determine him to conclude a legal act, which otherwise he would not have concluded or would have concluded in other contractual terms. Undue influence is an induced error, unlike error as vice of consent, which occurs spontaneously (Beleiu Gh., 2007). Undue influence has been considered a typical form of bad faith, of lack of loyalty at the conclusion of legal acts (Clocotici D., Gheorghiu Gh., 1996).

Undue influence is *regulated* in Articles 1214-1215 of the Civil Code.

Unlike the previous regulation, the new Civil Code no longer distinguish between *primary undue influence* – concerning essential elements for the conclusion of the act - and *incidental* (or *secondary*) *undue influence*, concerning nonessential elements for the conclusion of the legal act - Art. 1214, para. (2) of the Civil Code. This means that the annulment of the contract may occur even if the inducing into error referred to less important elements for the conclusion of the legal act.

Therefore, it is also considered undue influence the error caused under the conditions stipulated in Articles 1207-1213 of the Civil Code,

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on nonessential error. It is also considered undue influence the breach of the obligation imposed by Art. 1170 of the Civil Code, on acting in good faith in the negotiations and conclusion of the contract, the parties being bound to inform each other about certain circumstances that ought to be disclosed.

If the co-contracting party considers that the element he has been misled about is not essential, it is in his power not to seek the annulment of the act and to opt only for obliging the author of undue influence to pay damages.

As an exception, it is believed that the caused error has to be essential when seeking annulment of marriage, given the *intuitu personae* character of the act and the speciality of marriage, although this requirement is not mentioned by Art. 298 para. (1) of the Civil Code (Irinescu, L., 2015).

Below we will analyze the constituent elements of undue influence, to identify the ways of manifestation of fraudulent maneuvers and to assess their impact on the will of the party that is the victim of undue influence.

Undue influence consists of two elements: a material, objective element and an intentional, subjective element.

- *The material, objective element* is the use of cunning means to induce the co-contracting party into error, consisting of various cunning, fraudulent schemes. They can materialize into a positive action aimed at distorting reality by misrepresentation of some elements (*fraudulent action*) or into a negative action by fraudulent omission of disclosing to the co-contracting party certain aspects he was entitled to know (*fraudulent inaction*).

- As *fraudulent action*, undue influence may consist, for example, in the seller presenting a piece of jewelry as being made of a precious metal, although in reality it is just gilded, the buyer being thus drawn into purchasing it. With liberalities, the fraudulent action is achieved by *suggestion* or *captation* (Bocșan M.D., 2001). Captation (attracting goodwill) consists of fraudulent maneuvers used to earn the trust or goodwill of a person, by speculating his affection or passion for the potential beneficiary (Ungureanu O., 2005) while suggestion (delusion) is the use of the earned trust to determine that person to make a donation or a testamentary disposition to which otherwise he would not have consented (Chirică D., 2003).

Legal doctrine considers that these delimitations are insufficient, because it is not distinguished clearly between the two phenomena acting concurrently (Bacaci Al., 1985). In testamentary matter especially, captation and suggestion are considered a single process, since the first is aimed at discrediting those initially

covered by law for gratification, and captation follows suggestion, channeling the will of the person making the disposition toward the gratification of the author of the fraudulent maneuvers or of a third party (Bocșan M.D., 2001). For example, the methods employed for these purposes may materialize in the victim's isolation, in order to distort his perception of reality and limit his contact with the persons in his entourage, slandering these persons or assigning them denigrating statements about the victim of undue influence, at the expense of those who should legally be gratified. Although judicial practice found that the most frequent victims of undue influence as captation are elderly or sick persons, it emphasizes that the vitiation of consent by undue influence and the lack of discernment of the person making the testamentary disposition exclude each other, so they cannot both be pleaded in the same case (Hubrean A., 2012).

- As *fraudulent inaction*, undue influence may, for example, be the seller's failure to inform that the walls of the building present moist infiltration, aiming to obtain a higher price by selling it than that due if the buyer knew the true condition of the building. When the objective element consists of a fraudulent inaction, undue influence is achieved by reticence (Popa I.Fl., 2002).

In particular, the issue of undue influence by reticence shows the ratio between the duty to disclose information, which lies with the most experienced or professional party, or the one who has "privileged information", on the one hand, and the duty to find out information, incumbent on each contracting party, on the other hand (Chirică D., 1999). Thus, with contracts of adhesion or with those concluded with consumers, the weaker party should be informed of all essential elements underlying his declaration of will, as otherwise he can claim he had been the victim of undue influence by reticence (Căpățână O., 1999).

- *The subjective, intentional element* lies in the intent to induce a person into error in order to determine him to conclude a legal act under certain conditions. If this error already exists in the representation of a person, the subjective element is manifested by the intention to preserve this error hence that error to persist in the consciousness of that person who, being still under that impression, would become part in the contract (Adam I., 2011).

To fall under the scope of undue influence, the misinformation or the non-disclosure of information must have been done deliberately, for fraudulent purposes. The reason for this requirement is the need to defend the freedom of the person's legal will, whose consent must not be

vitiated, in order to conclude the contract otherwise than in accordance to reality. Particularly in the case of undue influence by reticence, it is to be checked whether silence was kept intentionally, thus being qualified as "guilty silence" (Andrei P., 1982).

If the lack of accurate information is due to negligence, the action will not be classified as undue influence (D. Cosma, 1969). Also, it is not classified as undue influence the case when a party does not give certain information that should be known by the other party, as the former was not aware of the error the latter was in (Ungureanu O., 2005). However, the other party may request damages if he was injured, and if therefore he was in error on an essential element of the act, he may also request the annulment of the contract.

## RESULTS AND CONSIDERATIONS

### Analysis of the conditions required by law to sanction undue influence as vice of consent

- To be considered vice of consent, undue influence must meet the following cumulative requirements:

- *To come from the other party or from the representative, agent or gerent* of the businesses of the other party, according to Art. 1214 para. (1) of the Civil Code. It is not necessary that undue influence is common, meaning to exist for each party of the legal act. Even if undue influence is not committed by the co-contractor personally, but through his legal or conventionally representative or by his agent - Art. 1373 of the Civil Code, or by the person who, without mandate, is managing his interests - Art. 1330 of the Civil Code, it is considered that the effects of these actions have been to his profit, as all these people were acting on his behalf, thus undue influence is considered the same as if committed directly.

*If undue influence comes from a third party*, according to Art. 1215 of the Civil Code, *it must be proved that the other party knew or, as the case may be, should have known* of the undue influence at the conclusion of the contract (a kind of complicity to undue influence). Otherwise, if the co-contractor does not meet the requirements of undue influence by reticence (consisting of knowing and not warning the victim of undue influence of the maneuvers carried out by the third party), he cannot be punished for the deed of the third party (Ungureanu C.T., 2013). Conversely, if a third party, in connivance (in agreement) with the seller, recommends the other party to buy a good, although he knows it is different than that the other

party intends to buy, this is a case of vitiated consent through undue influence.

- *To be decisive for the conclusion of the legal act*, thus to decisively influence the consent of the other party. This condition implies that the committed fraudulent actions or inactions determined the other party being in error, irrespective of the essential or nonessential character of the error (Turcu I., 2011). Unlike the provisions in the Civil Code of 1864, the fulfillment of this condition does not require the error to be induced with reference to a determinant element, as is the case with error, in the sense of Art. 1207 para. (2) of the Civil Code. This amendment represents the widening of the scope of undue influence, that can apply not only to the essential elements, but also to the mere reasons of the contract, but which are considered important for the party concerned. Evaluating the determinant character of undue influence is therefore done by subjective criteria.

However, we believe that, under current regulations, it is necessary for the victim of undue influence to have contracted under the influence of the caused error (Gavrilescu L.-C., 2013). Not any maneuvers used to attract the co-contractor's interest will be considered fraudulent actions, but only those who had a real impact on him and altered the representation of the contractual reality. Impact assessment of undue influence is made *in concreto*, according to the circumstances of the case. In making this assessment, one will take into account the level of intellectual development, age, experience and any other elements which indicate whether the party on which it was exercised was or not deceived by the machinations of his co-contracting party (Florescu G., 2008).

- *To represent an excusable error*, the provisions of Art. 1208 of the Civil Code in the matter of error, being applicable by analogy. The excusable caused error is assessed through the fulfillment of the duty to self-inform, taking into account the specificities of each form of undue influence – action or inaction (Zamsa C., 2011).

In the case of an alleged undue influence by fraudulent action, a person who manifests excessive credulity, trusting exaggerated and obvious distortions of reality, may not invoke the annulment of the concluded act, because, in such a case, the error is not caused by the co-contractor, but by his own looseness of thought and action (Chirică D., 2005). For example, exaggerating the qualities of a product is a manner that is at the limit of loyalty, but it is not in itself fraudulent, especially if it takes a metaphorical form (Turcu I., 2011).

The annulment of the act can neither be obtained in a case where undue influence by

reticence due to lack of information is claimed, if it was the alleged victim's duty to get informed and he neglected to do so. There is a general legal duty of disclosure when one party knows a determinant circumstance for the conclusion of the contract and the other party is unable to get informed on his own about that circumstance (Pop L., 2009). To determine the innocence of the victim, it has been proposed for the information obligation to rest with both parties, this obligation resting exclusively with the debtor only if the creditor's access to information is manifestly more difficult or more costly (Chirică D., 1999).

➤ *To occur previously and persist at the time of the conclusion of the contract*, therefore fraudulent maneuvers to be present and operational at the time when the agreement of wills happens, although their revelation is a subsequent operation of reconstructing the past (Turcu. I., 2011).

- *Evidence of undue influence* is achieved in terms of Art. 1214 para. (4) of the Civil Code: "undue influence is not assumed", which means that the party invoking it must prove it. Undue influence itself does not result directly from the content of the act, not even if there is an imbalance between the performances which the parties have undertaken by entering that legal act. Being a legal fact, an offense, undue influence may be proved by any evidence, including witnesses or simple presumptions (Chirică D., 2005).

Consisting also of an objective element, undue influence is easier to prove than error, which is only a psychological state (Ungureanu O., 2007). Evidentiary difficulties may arise, however, in the case of undue influence by reticence. In this case, the burden of proof is reversed, so the one bound by the duty to disclose has to prove that he fulfilled this duty (Adam I., 2011). In fact, the burden of proof rests firstly, in this case also, with the alleged victim of undue influence who has to prove that the duty to disclose rested with the co-contractor, as well as its corresponding failure. Only secondly, the debtor of the duty to disclose bears the burden of proving that he executed the mission to transmit that information (Popa I.F.I., 2002).

- The applicable *sanction* for undue influence is recognizing the right of the party whose consent was vitiated to request annulment of the legal act concluded under its influence and to demand damages. Being considered a vice of consent, the victim of undue influence may request *the annulment of the act*, under Art. 1214 para. (3) and Art. 1215 para. (2) of the Civil Code.

If there is reciprocity of undue influence, then each party has the right to request the annulment of the act based on the undue influence which he suffered.

To cover nullity, as in the case of error, confirmation may intervene, according to Art. 1265 para. (3) of the Civil Code. However, it is not likely for the provisions referring to the adjustment of the contract, stated in Art. 1213 of the Civil Code, to be invoked, as the views on the matter are different (Gavrilescu, L.-C., 2015).

Moreover, since undue influence is also a civil offense, Art. 1257 of the Civil Code on *damages and reduction of performances* are applicable if the victim of undue influence was caused an injury (Boroi G., Angheliescu C.A., 2011).

Thus, if through the action for annulment was not possible the reinstatement of the party to the former state, that is the party has not achieved full compensation for the caused injury, one alternatively resorts to an action in tort.

Also, independent of the annulment of the contract, when it is decided to maintain the contract, the author of undue influence is liable for the injuries caused by this offence, the co-contracting party being entitled to claim either indemnification or the reduction of his performance proportionally with the value of the damages he would be entitled to.

*The restriction of the right to annul the contract* is considered a particular form of sanctioning undue influence, in the case provided by Art. 45 of the Civil Code, namely when the one in incapacity hid his age by fraudulent maneuvers, he is not entitled to obtain the annulment of the contract on grounds of his incapacity (Radulescu T.V., 2011).

## CONCLUSIONS

The aspects analyzed above show that current regulations focus on the tortious dimension of undue influence, regardless of the essential or nonessential nature of the element on which the mislead party bears a false representation. Therefore, for undue influence to be categorized as vice of consent, it is sufficient for the fraudulent maneuvers to have an impact on the co-contracting party, relative to its suggestibility, that made him conclude the contract in the induced conditions. If it cannot be proved that the deceptive maneuvers decisively contributed to the conclusion of the contract, it cannot be considered that consent was vitiated by undue influence. Regarding the sanction applicable to proven undue influence, it is up to the victim to choose to request the annulment of the contract or maintaining the contract and the author of undue influence ordered to pay damages.

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