

Comparative View on Hidden Vices and Vices of Consent (Error, Fraud) in the Hypothesis of the Sales Contract

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Abstract

The study that we will undertake is going to capture a comparative analysis of the aspects related to the vices of consent (error and fraud) and hidden vices. In practice, in the case of a sales contract, the same situation can be classified both in the category of hidden vices and in the category of consensual vices (error or fraud). So, the problem that arises in such cases is: can the buyer opt either for the liability action for hidden vices, or for the nullity in action for error or fraud, or is he obliged to promote only one of them? Specifically, the research aims to highlight the possibility that a circumstance can be qualified simultaneously as both a hidden vice and a vice of consent, also providing clarifications for the practical solution of this situation.

Keywords: *hidden vice, consensual vice, error, fraud, liability action for hidden vices, action for annulment for vices of consent.*

JEL Classification: K15, K22

1. Introduction

The freedom of the subject of law to dispose of his own assets by concluding transferable acts (including sales contracts) is conditioned by the observance, at the time of the act, of some conditions of substance and, if necessary, of form, expressly imposed by the legislator³. Ignoring the conditions of validity will make the act in question null.

On the other hand, if the conditions stipulated by the law are met, the act will be valid, generating rights and obligations for the parties who consented to it. Non-compliance with the obligations generated by the act, by not executing them or executing them late, will attract the debtor's contractual liability⁴. Thus, if during a sale the consent of the buyer is "given by mistake or surprised by fraud" (art. 1206 Civil Code), the contract is struck by relative nullity, as its conditions of validity are not respected. On the other hand, when such conditions are met, including those regarding consent that must be "... knowingly expressed" (art. 1204 Civil Code) - an aspect that excludes error or fraud, the consent not being affected in its character intellectual, conscious - but the good presents hidden vices, the sale will be valid, but opening the way for the buyer to take action in liability for the hidden vices.

In this sense, in the specialized literature, it was shown that "Vices of consent must be distinguished from the legal mechanism that tends to ensure the execution of the contract: contractual liability, resolution for non-execution, guarantee against hidden vices, guarantee against eviction⁵" or "Between error and hidden vice there are essential differences: in the case of the error on the substance of the object (*error in substantiam*), because of this vice of consent, the buyer could not buy in its substance the intended asset and can demand the annulment of the contract; instead, in the case of the vices referred to in art. 1707 Civil Code, the buyer bought the desired good, only it is unsuitable for the intended use or due to vices the use or value is reduced - so the error refers only to the quality of the asset -, and the buyer cannot ask for the cancellation of the contract, but has an action under

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³ See Saul Litvinoff, *Vices and Consent, Error, Fraud, Duress and an Epilogue on Lesion*, „Louisiana Law Review”, vol. 50, no. 1, September 1989, pp. 6, 7.

⁴ See also Zimmermann, Reinhard, *Emptio Venditio III', The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford, 1996; online edn, Oxford Academic, 22 Mar. 2012, <https://doi.org/10.1093/acprof:oso/9780198764267.003.0010>, accessed 5 Nov. 2022.

⁵ F. Terre, Ph. Simler, Y. Lequette, *Droit civil. Les obligations*, 10^e edition, Dalloz, Paris, 2009, p. 263.

warranty against the seller"⁶.

In substance, such statements are able to lead to the practical solution of most factual situations that could generate doubts in terms of their qualification. However, there may be cases in which the distinction between the vice of consent, of error, or fraud and the hidden vice of the asset is not as clear as the ground on which it is located would make it clear: the conclusion of the contract (in the case of vices of consent), respectively the effects of the contract (in case of hidden vices).

Thus, it is necessary to delimit and outline the two concepts, vice of consent (of error and fraud) and hidden vice of the sold asset⁷.

2. Comparative view on hidden vices and vices of consent

The error finds its seat of matter in art. 1207⁸ - 1213 Civil Code and is defined in doctrine⁹ as *the false representation of reality at the conclusion of a civil legal act*.

The legislator establishes that the act is defeasible only if "the party ... at the time of concluding the contract, was in an essential error" (art. 1207 paragraph 1 Civil Code), the error being essential, according to art. 1207 para. 2 point 2 of the Civil Code, including when the false representation of reality concerns the substance of the asset, bearing on "...a quality of it or on **another circumstance considered essential by the parties without which the contract would not have been concluded**". Although, traditionally, the substance of the good was viewed from an objective perspective, confusing it with the material from which the good was made¹⁰, we note that the provisions of art. 1207 para. 2 point 2 of the Civil Code¹¹ indicates a subjective assessment criterion regarding the substance, i.e. *a circumstance considered essential, in the absence of which the contract would not have been concluded*¹². Thus, compared to the provision contained in art. 1207 para. 2 points 2 Civil Code, the substance must not be limited to the material from which the good is made, but it represents that quality of the good that led the party to contract and which represented for him the impulsive and determining cause of the contract¹³. In other words, by the substance of the good we must understand that quality of it that the person in error had in mind at the time of concluding the contract, the one that was decisive for the expression of his will and whose absence, if he had known, would have led him not to contract¹⁴.

Looking at the substance of the good from such a perspective, the distinction between error and hidden vice no longer appears to be so obvious, especially when the error is determined by the existence of a hidden vice that makes "the good unsuitable for the use for which it is intended or that diminishes the use or value to such an extent that, if he had known them, the buyer would not have bought or would have given a lower price" - art. 1707 para. 1 Civil Code.

⁶ Fr. Deak, L. Mihai, R. Popescu, *Treaty of civil law. Special contracts*, vol. I, 5th edition, Universul Juridic Publishing House, Bucharest, 2017, p. 163-164. Correctly, in the example given, the authors show that if a house is sold that the buyer claims is built of brick, but in reality, it is made of wooden material, an annulment can be requested. Conversely, if that house is built of brick, but is affected by certain defects (damaged roof or faulty heating system), the warranty obligation against vices will come into play.

⁷ Nicholas B, 'Dicta Promissave' in Daube D. (ed.), *Studies in the Roman Law of Sale*, Oxford, 1959, p. 91.

⁸ Art. 1207 para. (1) The Civil Code provides: "The party that, at the time of concluding the contract, was in an essential error may request its cancellation, if the other party knew or, as the case may be, should have known that the fact on which the error was carried was essential for the conclusion of the contract."

⁹ G. Boroi, C.A. Angheliescu, *Civil law course. General part*, Hamangiu Publishing House, București, 2011 p. 134.

¹⁰ For example, when a gold ring is bought, it being made of this metal, the deed is valid. If, on the other hand, the ring was made of brass, the deed would be voidable for error as to substance, the material used not being that which the buyer had in mind at the time of the conclusion of the contract.

¹¹ The provision contained in art. 1207 para. 2 point 2 of the Civil Code clearly differs from that of art. 954 para. 1 of the Civil Code from 1864, which took over the provisions contained in art. 1110 of the French Civil Code, according to which "The error does not produce nullity unless it falls on the substance of the object of the convention".

¹² For example, when a gold ring is bought and a significant price is paid, considering the age of that ring, the object being made of this metal, but not having the age intended by the buyer, the act is voidable for error on the substance, since the determining reason of the consent of the buyer is mainly its **age and not the material** from which it is made.

¹³ J. Carbonnier, *Les biens et les obligations*, Presses Universitaires de France, Paris, 1962, p. 349; G. Boroi, C.A. Angheliescu, *op. cit.*, 135-136, n.s. 3; I. Reghini, Ș. Diaconescu, P. Vasilescu, *Introduction to civil law*, Hamangiu Publishing House, Bucharest, 2013, p. 497.

¹⁴ F. Terre, Ph. Simler, Y. Lequette, *op. cit.*, p. 225.

We observe that even in the case of the error in substance and sometimes in the case of the hidden vice of the goods sold, when the buyer had known the reality, he would not have entered into the contract of sale. For example: a sales contract is concluded regarding an area of land for the practice of ecological agriculture (the determining reason for the buyer's consent - substance of the good, according to art. 1207 paragraph 2 point 2 of the Civil Code), without the seller and the buyer to know that, due to the treatments applied, the respective land does not meet the conditions for ecological certification. We are in the presence of the *vice of consent error*, because the buyer was mistaken about the substance of the good, about that characteristic of the good considered essential by him and which he had in mind when he gave his consent to the conclusion of the contract, but the circumstance can also be qualified as a defect of the good (hidden vice), which makes it unsuitable for use according to the intended purpose when the contract was concluded.

As I stated at the beginning of the study, the second vice of consent that we will analyze is fraud, based on the matter in art. 1214 -1215, Civil Code.

Thus, art. 1214 paragraph (1) Civil Code provides: "*Consent is vitiated by fraud when the party was in an error caused by the fraudulent actions of the other party or when the latter fraudulently omitted to inform the contractor about some circumstances that he should have revealed to him.*"

As stated in the doctrine¹⁵, it is easy to note that fraud is, in essence, also an error, with the mention that it is provoked, being committed by the crafty actions of the other party. However, unlike error, fraud has two elements in its composition, a subjective element, the willful intention to mislead the other party, and an objective one, represented by the fraudulent, sly action, the latter being able to incur criminal liability for the illegal act of the author¹⁶.

In the case of fraud, the sanction regulated by the legislator is the relative nullity of the contract, provided that the fraudulent works come from the other party. More, para. (3) of art. 1214 means that the relative nullity can also be invoked when the fraud comes from the representative, assumed representative or business manager of the other party. In addition, the fraud may also come from a third party, but in this case, for the application of the nullity penalty, it is necessary that the party (the co-contractor of the one whose consent was vitiated) knew or should have known the fraud at the time conclusion of the contract (art. 1215 paragraph 1 Civil Code).

Unlike the error, in the case of fraud the error caused must not be essential, a solution arising from the provisions of art. 1214 para. (2) Civil Code "*The party whose consent was fraudulently vitiated may demand the annulment of the contract, even if the error in which he was found was not essential.*"

The use of fraudulent means to conceal a defect in the good sold gives the interpreter the opportunity to place the legal situation under analysis either in the realm of vice of consent or in the realm of the warranty against hidden vices that the seller owes. For example, plastering the walls with moisture, followed by the alienation of the house, may lead to the seller being liable for hidden vices, but it may also be qualified as a vice of consent, with the practical consequence of canceling the contract concluded under such conditions. In this sense, the legislator also talks about hidden vices "...which the seller knew..." (art. 1708 para. 2 Civil Code), which the seller concealed (art. 1709 para. 4) Civil Code), which the seller was aware of (art. 1712 para. 1 Civil Code), thus admitting the possibility that, through the conduct of the seller, manifested at the time of the act, the buyer is the victim of a fraud. The provision contained in art. 5 of Decree no. 167/1958 is also eloquent, regarding the statute of limitations¹⁷, according to which "**The right to action regarding hidden vices... is prescribed by the completion of a period of 6 months, if the vices were not hidden with cunning**".

In relation to what has been presented, we must admit that, in certain circumstances, a factual circumstance can be qualified, at the same time, as an error or fraud - vice of consent and as a hidden

¹⁵ G. Boroi, C.A. Angheliescu, *op. cit.*, p. 140.

¹⁶ See Georgeta-Bianca Spîrchez, *The valid conclusion of the compromise/transaction contract. Special rules*, in „Juridical Tribune - Tribuna Juridica”, Volume 2, Issue 2, December 2012, p. 167.

¹⁷ Repealed by Law no. 71/2011 for the implementation of Law no. 287/2009 regarding the Civil Code, published in Official Gazette no. 409 of June 10, 2011.

vice of the good. This finding raises another practical problem: does the buyer of a good have the option of choosing between an action for rescission of the contract for error or fraud and an action for liability for hidden vices in the good sold?

For a long time in judicial practice¹⁸ it was decided that the one who bought a good has a right of option between the action for nullity for error and the action for liability for hidden vices. Later, however, the option of judicial practice changed, showing that the presence of a hidden vice simply implies the exclusion of the action based on error¹⁹. How could this option of judicial practice be justified?

Regulating the effects of the guarantee against hidden vices, art. 1710 para. 1 Civil Code provides that, based on the seller's obligation to guarantee against vices, the buyer can obtain, as the case may be: the removal of the vice by the seller or at his expense, the replacement of the sold good with a good of the same kind, but without defects, the corresponding reduction of the price, the resolution of the sale.

Moreover, according to para. 2 of the same articles, at the request of the seller, the court, taking into account the seriousness of the vices and the purpose for which the contract was concluded, as well as other circumstances, may order another measure provided for in paragraph 1 than the one requested by the buyer. It is noted that by regulating the effects of the warranty against hidden vices of the thing sold, the legislator aims to save the deed of sale, as far as possible. Thus, among the measures that can be taken, the only one (the most serious) that will lead to the termination of the contract is the resolution of the sale, the application of the others leaving the contract to continue producing legal effects. The legislator's intention to save the contract also results from the content of para. 2 of art. 1710 Civil Code, the court being entitled, even if the one who bought the good requests the resolution of the contract, order, at the request of the seller, another measure from those provided in paragraph 1. When it comes to error, instead, the application of the nullity penalty (the only one possible) will lead to the retroactive termination of the contract. An exception is, of course, the situation in which the adaptation of the contract operates (art. 1213 of the Civil Code), which would imply, for the hypothesis we are considering, either the removal by the seller of the vices, or the replacement of the sold good with a good of the same kind, but free from defects (measures that the buyer can obtain under the seller's warranty obligation against vices).

Considering the above, we can state, against the provisions of art. 1268 para. 3 Civil Code "The clauses are interpreted in the sense in which they can produce effects, and not in that in which they cannot produce any" (*actus interpretandus est potius ut valeat quam ut pereat*) that the option of judicial practice to give priority to the action in liability for hidden vices, with the exclusion of the nullity action for error is justified, because only the first one would result in saving the contract, thus giving practical effectiveness to the rule stated in art. 1268 para. 3 Civil Code.

With regard to the buyer's right of option between the nullity action for fraud and the action in rescinding for hidden vices, when the same circumstance can also be qualified as fraud -vice of consent and as a hidden vice of the good, it was decided²⁰ that it exists, the acquirer of the asset having opened the way for either of the two actions. The solution is fair, given that fraud, unlike error, has a material element in its structure – the use of cunning means – which constitutes a civil tort. In the hypothesis in which the buyer would be obliged to promote with priority the action in liability for vices, it could reach the situation in which that contract produces legal effects by applying one of the measures provided for in art. 1710 para. 1 letters a)-c) Civil Code. The practical consequence would be that legal force would be given to the crafty maneuvers that the seller carried out, meaning, it would end up that against the will of the buyer, the civil tort committed by the seller would produce legal effects.

¹⁸ Decisions of the French Court of Cassation of 8 May 1978, 11 February 1981 and 28 June 1988, cited by F. Terre, Ph. Simler, Y. Lequette, in *op. cit.*, p. 264, footnote 3.

¹⁹ The decisions of the French Court of Cassation of 14 May 1996, 7 June 2000, 12 July 2001 and 17 November 2004, cited by F. Terre, Ph. Simler, Y. Lequette, in *op. cit.*, p. 264, footnote 4.

²⁰ Decisions of the French Court of Cassation of 16 April 1991, 29 November 2000 and 6 November 2002, cited by F. Terre, Ph. Simler, Y. Lequette, in *op. cit.*, p. 264, n.s. 5.

2. Conclusions

In conclusion, a certain factual circumstance can be qualified, at the same time, as an error - vice of consent or fraud - vice of consent and as a hidden vice of the good, with the practical consequence that was previously exposed: in case we are in the presence of the error - vice of consent and the hidden vice of the good, the buyer cannot choose between the nullity action for the error and the liability action for the vice, being obliged to promote the latter; to the extent that the same circumstance can be qualified as fraud - vice of consent and as a hidden vice of the good, the buyer has the opportunity to choose between the two actions.

Bibliography

1. F. Terre, Ph. Simler, Y. Lequette, *Droit civil. Les obligations*, 10^e edition, Dalloz, Paris, 2009.
2. Fr. Deak, L. Mihai, R. Popescu, *Treaty of civil law. Special contracts*, vol. I, 5th edition, Universul Juridic Publishing House, Bucharest, 2017.
3. G. Boroi, C.A. Angheliescu, *Civil law course. General part*, Hamangiu Publishing House, București, 2011.
4. I. Reghini, Ș. Diaconescu, P. Vasilescu, *Introduction to civil law*, Hamangiu Publishing House, Bucharest, 2013.
5. J. Carbonnier, *Les biens et les obligations*, Presses Universitaires de France, Paris, 1962.
6. Law no. 287/2009 regarding the Civil Code, republished in the Official Gazette, Part I no. 505 of July 15, 2011, with subsequent amendments.
7. Law no. 71/2011 for the implementation of Law no. 287/2009 regarding the Civil Code, published in Official Gazette no. 409 of June 10, 2011.
8. Saul Litvinoff, *Vices and Consent, Error, Fraud, Duress and an Epilogue on Lesion*, „Louisiana Law Review”, vol. 50, no. 1, September 1989.
9. Zimmermann, Reinhard, 'Emptio Venditio III', *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford, 1996; online edn, Oxford Academic, 22 Mar. 2012, <https://doi.org/10.1093/acprof:oso/9780198764267.003.0010>, accessed 5 Nov. 2022.
10. Nicholas B, 'Dicta Promissave' in Daube D. (ed.), *Studies in the Roman Law of Sale*, Oxford, 1959.
11. Georgeta-Bianca Spîrchez, *The valid conclusion of the compromise/transaction contract. Special rules*, in „Juridical Tribune - Tribuna Juridica”, Volume 2, Issue 2, December 2012.
12. Decisions of the French Court of Cassation of 8 May 1978, 11 February 1981 and 28 June 1988.
13. Decisions of the French Court of Cassation of 16 April 1991, 29 November 2000 and 6 November 2002.
14. Decisions of the French Court of Cassation of 14 May 1996, 7 June 2000, 12 July 2001 and 17 November 2004.