

LEGAL WILL IN THE ROMANIAN CIVIL LAW

N. CRĂCIUN¹ I. CRĂCIUN²

Abstract: *In order to form a valid legal document, a correctly expressed legal will is necessary. Defining the volitive factor (especially the internal one) in forming the legal acts is very important this must be expressed consciously, in a free and externalized way. Within the developmental process of legal will, the subject starts from an intellectual representation of the effects that he/she aims at acquiring and from the appreciation of reasons that can influence the decision making. The reason on which the deliberative process is grounded constitutes the purpose/the cause of the legal document, the latter being an essential element of the legal action.*

The externalized action represents the agreement of the rightful subject which, validly expressed is necessary when forming the legal civil action – the essential element of the legal action.

Key words: *legal will, volitional process, consent, legal document.*

1. The basis of the legal will

In the literature, will was defined as being „an ability and a mental process of guiding the activity in all its aspects” or as a superior self-regulating system as it is carried out preponderantly through the second signalling system and implies deliberation, purpose and a consciously elaborated plan, organisation of the personal forces”[1].

We specify that will can be analysed as a phenomenon in relation to the category of mental particularities of a person, but also as a process, the specific mental form of organization of the entire activity”[2].

The voluntary action of the human being is the result of a complex cognitive process which involves knowledge of reality, being

aware of the needs and challenges, valorization of reasons, purposes, means and correlating them according to each person’s demands, but also of the objective ones, those required by society.

In the above-mentioned conditions, will manifests itself as the individual’s ability to act rationally in order to achieve certain elaborate goals anticipatively on a mental level.

As a means of mentally regulating the activity, will is essentially constituted of: purpose and its representation, the final effect, the image of the situation in which the targeted purpose will be achieved and the image of the action to be accomplished [3].

There are two elements especially relevant for the legal component of will:

¹ Law Faculty, *Transilvania* University of Braşov.

² Public Notary.

the exteriorized will and the determining reason. The most important factor to create legal civil relations presupposes *eo ipso* investigating the volitive component of the human psychological world because “*psychological will is only the de facto ingredient of legal volition*”[4].

The psychological process of creating the consent generates the inner will which, in order to produce legal effects must be objectivised in the declared will.

There must be agreement between the two elements of will. Thus, the freedom of will can be limited to what concerns the internal phasis, that of deliberation, through alternating the cognitive circumstances of the volitional act, as well as the exteriorization phase, when the manifestation of will can be restricted or even suppressed.

As a principle, there should be agreement between the declared will and the internal one, but there are situations in which they do not coincide, and this discrepancy may be due to either the issuer of the declared will, or to certain influences that exceed that [3].

2. The basis of legal action

Legal will represents the fundamental element of legal action.

Inner will represents the real legal volition, the true one, as it was developed and adopted in the inner forum of the subject of law [5].

Through exteriorization, “the individual will becomes the legal will which is capable of producing effects in the sense of coming into being, modifying or disappearance of an actual legal relation.

Differences lead to the existence of two wills, one internal, real and the other one altered by the exteriorization process, the declared will.”

2.1. Determining the inner will

The first problem which is of actual interest is determining the real will against which the effects of the legal action must be appreciated.[8]

According to the subjective conception, the effectiveness of the declared will is recognized to the extent to which it reproduces faithfully the internal will, which is a result of the individual deliberation.

The differences between the internal will and the declared will imply an inaccurate exteriorization of the real will and prevent the valid forming of the contract. Thus, the distorted inner representation over certain essential and determinant elements of the contract as an effect of the spontaneous or induced error does not allow its valid formation.

In conclusion, the inner will is essential in the formation of the private legal act according to *the subjective theory* established by the French Civil Code and taken over by the Romanian lawmaker [art.1266 New Civil Code].

The basis of the theory is satisfying the security of the civil circuit and encouraging the subjects of law to establish contractual relationships.

Thus, the subjective conception grants priority to the inner will, “thus satisfying the static security of the civil circuit”, as it could question the validity of the legal action through which the civil subjective right was transmitted “for reasons of incongruity between the inner and expressed will [6].

2.2. Declared will - effects

The objective conception confirms the dynamic security of the civil circuit, as the parties related to the declared will, which is easier to grasp, are encouraged to contract. Based on this conception, the judge

interprets the appropriate contract according to the declared will.

Although the national doctrine admitted the principle of the declared will as a rule, it also established certain exceptions which are in accordance with the principle of the declared will.

We point out that the established exceptions in the national law are to be found in the French and German legal systems, which have not established exclusively the inner or the declared will.

According to the provisions of article 997 from the Civil Code, the judge is advised to take into account the common intention of the parts in interpreting the contracts and not the literal sense of the terms used."

For example, in case of simulation, the secret act will produce effects between the parties not the ostentive one which is false.

Thus, the inner will produces effects in this case against the declared will through the action opposed to the third parties [7].

In the same way, according to article 953 from the Civil Code, "The consent is not valid when given by mistake, elicited through violence or fraudulent means", therefore only the free, conscious, real manifested will produces effects, and not the altered one through a vice of consent.

In conclusion, "applying the principle of declared will has an exceptional character in the Romanian civil law." [9].

There are certain exceptions from the subjective conception to be found in the doctrine.

In case of simulation, the declared will contained in the public, truthless action produces effects regarding the third parties because only this can be known by others. Or, in case of impossibility of proving the contrary of a document by any other means than a counter document, this can lead to the case in which the declared will prevails over the inner one.

Certain types of errors are acknowledged by the Romanian legislation as vitiated consent and sanctioned accordingly, but in case of indifferent error, the declared will prevails, despite inconsistencies with the inner will.

When there is a certain inconsistency between the real will and the declared will", the usual tendency is for the lawmaker to relate only to the declared will, the real one being in this case unnoticed. The situation is different from simulation, when the mental reserve is shared with the purpose of dissimulating the real act towards the third parties [10].

We mention that the two theories are equally well theoretically proven but their translation into practice required a number of corrections. For example, the legal systems of French origin refuse to take into account real will, favouring the declared one [11].

3. Consent

Consent is an essential element both in legal unilateral actions and multilateral ones.

Consequently, the exercise of one's will is sufficient for a valid formation of a unilateral act, as the valid signing of multilateral legal acts necessarily requires an agreement of will among all the contracting parties.

It must be admitted that the most important legal civil action, source of obligations, is the civil contract. According to article 1182 from the New Civil Code, "*The contract is signed following its negotiation by the parties or through accepting an offer to contract without reserve. It is sufficient for the parties to agree upon the essential elements of the contract, even if they leave certain secondary elements to be agreed upon subsequently or they entrust the determination of these to another person.*"

In the doctrine, the contract was identified as “the engagement through which two or more people manifest their agreement in creating, modifying or ending a legal relationship”, or defining it as “a willing agreement among two or more people in order to create a legal relationship.” [12]

The essential element of the contract is *the agreement* of the parties, as “there is no contract when the willingness of the two parties has not been acknowledged, but there is none as well when the two parties expressed agreement tacitly [13].

Thus, multilateral legal acts must be the result of an agreement of wills, including all the wills of the Contracting Parties, acting together to achieve the finality of the pursued legal operation.

The agreement [14] of wills necessary and sufficient to form a mutually binding contract consists of offer and demand, in compliance with the peculiarities imposed by the number of parties, the following rules also apply to multilateral legal documents.

The offer (policitation) is the proposal made by a person to another person or to the public to sign a contract in certain conditions.

The offer can be special when there is a written or oral notification of a person or tacit when will derives from implicit actions and facts (for example exposing the merchandise in the shop window with the price tag etc.) [15]

The offer must fill specific requirements: to be firm, unequivocal, to be precise and complete (meaning to contain all the necessary elements for the valid signing of the contract). [16]

Once the offer reaches to the addressee, it has an unrepealable character in the interval of time agreed upon by the parties or, in its absence, of the term considered reasonable for its acceptance, considered depending on the nature of the contract.

According to article 1191 from the New Civil Code, “*The offer is unrepealable as soon as its issuer binds himself to maintain a certain term. Also, the offer is unrepealable when it can be considered so under the agreement of the parties, of the usages between them, of the negotiations, of the content of the offer or the practices*”. The declaration of revocation of an irrevocable offer produces no effect.

Still, the offer agreed upon in due time becomes obsolete in case of death or placing of the offerer under interdiction if it occurred previous to the acceptance.

According to art. 998 of the Civil Code, the withdrawal of the offer within the agreed or reasonable period confers liability in tort on the offeror. Thus, “any act of man that causes damage to another forces the person through whose fault it was caused to be repaired” [17].

Acceptance is the manifestation of the will of a person to enter into a contract under the terms of the offer that he was addressed to for this purpose.

Acceptance must conform to the general conditions of validity of any manifestation of will.

Acceptance can be special and, in case of a solemn contract, always is under the form required by the law *ad validitatem*. It can also be tacit, when it definitely results from convincing actions and attitudes of the acceptor, like for example the commencement of the execution of the contract

Whether the offer can be accepted under tacit terms also represented a problem in doctrine.

Thus, the situations where the mere silence is equivalent to the acceptance of the offer were accepted.

In the above-mentioned conditions, the legal value of silence is regulated in case of the lease contract when if after the term for contracting the leasing of the commodity expired, the lodger is allowed

to keep possession, the execution of the contract is presumed as a continuation of the location in the previous conditions. Thus, by simply being tacit and executing the contract, it is presumed that the locator accepts the offer of the lodger to sign a new lease contract in the same conditions as the previous.”

Also, court decisions are constant in admitting the confirmatory value of silence when the offer was made exclusively in favour of the acceptor, the mere silence of the debtor to the offer of debt remission is considered as acceptance. "[18].

On the other hand, the parties can conventionally value silence as acceptance in their future contracting reports. The situation is different when the stable offerer is unilateral, that is under the acceptor's silence, the contract ends after expiration of a certain term.

Acceptance must be pure and simple, in full compliance with the offer to perfectly overlap in terms of content [19]. Thus, the intention of the parties must be consistent on all contract terms, whether principal or accessory.

It must be mentioned that the partial agreement or modifying the content of the offer by the acceptor represents in reality a counteroffer [20] which, in turn, will have to be accepted in the above-mentioned conditions.

The express, tacit agreement or the mere silence must be indubitable, expressing the acceptor's unequivocal intention of contracting in the conditions stipulated in the offer.’

The agreement must not be belated. It is belated when it occurs before the valid withdrawal of the offer or its nullity caused by the offerer's death or incapacity.

It is to be noted that the number of concordant wills necessary in order to conclude a multilateral contract is equal to the number of participants. Thus, unanimity is presumed as a sine qua non

condition in the conventions generating indivisible or solidary obligations, each party understands to be bound only if all other parties will bind themselves.

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