DISCUSSIONS REGARDING THE INVALIDITY OF STATES' CONSENT IN THE FIELD OF PUBLIC INTERNATIONAL LAW

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The aspects related to invalidity of consent in the field of Public International Law are extremely diverse, common to areas of interference, which could not make the object of an exhaustive approach. This is the reason why the present paper shall concentrate on the clarification of the specificity of the sanctions which appear in the cases of invalid consent, on the analyses of the conditions which have to be met in order to talk about the existence of a vice of consent and on the framing of the differences with regards to the way of regulating these sanctions in the domestic law.

The analysis of the invalidity of consent raises a series of problems of a theoretical nature, generated by the fact that they have only benefited from a shallow analysis in the field of the Public International Law. As a matter of fact, there were authors (Ch. Rousseau) who considered that the procedure of drawing up treaties is a complex one and due to this complexity the possibility that a vice of consent should arise is excluded ("the theory of the infallibility of the state")

Thus, according to the dispositions of the Vienna Convention (1969) regarding the law of the treaties concluded between the states, the vices of consent are:

- breach of the dispositions of the domestic law of the state regarding the competence to sign treaties;
- the error;
- the fraud;
- the corruption of a state representative;
- the coercion of a state representative;
- the coercion against a state.

It is nevertheless worth mentioning the fact that the dispositions of the Vienna Convention as well as the doctrine[2] include the breach of the dispositions of the domestic law of the state regarding the competence to sign treaties in the category of defects of consent. According to the Vienna Convention, in order to trigger the sanction of invalidity of the treaty, there has to be a breach of certain dispositions of the domestic law, usually of a constitutional nature (rules regarding the competent bodies), the procedure to follow, etc.). In order to avoid the abusive invocation of this cause of the treaty, the Convention restrains the possibility of its invocation to a single situation and namely that when the "violation was manifest and concerned a rule of its internal law of fundamental importance" (art. 46- Vienna Convention). According to

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[2] Raluca Miga Beşteliu, Drept internaţional public. Introducere în Dreptul internaţional public, Bucureşti: Ed. All, 1998, p. 289

art. 46 line 2 – Convention – a violation will be regarded as manifest if it would be “objectively evident” to any state conducting itself in accordance with the common practice and in good faith.

Although with regards to the other defects of consent the solution of transposition in the matter of the law of the treaties of the rules from the private law in thee matters of contracts was adopted, as far as this rule is concerned, a specific regulation of the Public International Law was desired.

The inclusion of this cause of invalidity in the text of the Vienna Convention determined countless critics in the scholarly literature[3], criticism which is undoubtedly grounded; thus, it is to be noticed that in the manner of regulating stated in the dispositions of the Vienna Convention a norm of the domestic law determines effects on certain juridical international acts, subject only to the international law (the international law qualifies the norms of domestic law as simple facts).

The breach of the dispositions of the domestic law of the state regarding the competence to sign treaties represents a cause of relative nullity of the international treaty; in the domestic private law we meet a similar institution, namely the error on thee quality of a contracting party and the sanction which intervenes in the domestic law is that of relative nullity as well.

A clarification needs to be made, namely that in the International Law, the Vienna Convention introduces a disposition which is evidently in contradiction with the civil theory in the matter, the state being able to invoke itself the vice of its consent. At the same time, in the domestic law the rule according to which no one may invoke its own turpitude is sanctioned.

With regard to the second cause of invalidation of consent regulated by the dispositions of the Vienna Convention, that of the error, it may lead to the nullity of the treaty if one can speak of an error *de facto* and not an error relates to a fact or situation alleged by the state to have existed at the moment the treaty was concluded and formed an essential basis of its consent to be bound by the treaty; in order to accept the error, it is also necessary for the fact or situation to represent the essential basis of the consent of that particular state to be bound by the treaty. Similarly, it is necessary for the state invoking the error not to have contributed through its behavior to its appearance (art. 48 – the Vienna Convention).

The regulation of the *de facto* error only was determined by the conception – which we assume correct – that the state disposes of specialized personnel so that the possibility that an error might occur relates to a fact is excluded. Therefore, in the International Public Law, the civil theory of the error – obstacle was not taken over with the two forms, error on the nature of the act and error on the identity of the object.

The third vice of consent – the fraud, also named provoked error, benefits in the international law of a similar regulation with that of the domestic law; thus, a state may invoke the nullity of the treaty if its consent was obtained “following the fraudulent conduct of another state which participated at the negotiations” (art. 49- Vienna Convention). The sanction in this case is that of relative nullity as well.

The literature in this field[4] showed correctly the lack of invoking conditions of the willful misrepresentation within the dispositions of the Vienna Convention; the dominant opinion is that in this case, as well as in the case of the error, it is necessary to prove the fraudulent conduct of the other state participating to the negotiation, but also the fact that it was decisive for the expression of the consent of the state victim of the fraud. The accuracy which needs to characterize the legal regulations would have imposed the express sanction of these conditions within the dispositions of the Vienna Convention.

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[3] Valentin Constantin, Drept Internațional Public, Timişoara: Ed. Universității de Vest, 2004, p. 147

[4] Ion Diaconu, Tratat de Drept Internațional Public, Bucureşti: Lumina Lex, 2002, p. 111, 112

The corruption as invalidating the consent of a state representative may be invoked when the acts of corruption were evident and able to exercise a considerable influence on that particular representative (art. 50 – Vienna Convention). The literature[5] shows that the petty favors or simple acts of courtesy which cannot determine a change in the attitude of a state representative at the expense of the state shall not be considered.

In the doctrine[6] there was the opinion – to which we agree – according to which there was no necessity for a strict regulation of this vice of consent; the regulations regarding the fraud were sufficient to cover the hypothesis of corruption of the state representative. Furthermore, the sanction in the case of corruption is the relative nullity, the same as in the case of the fraud.

In the theory of the civil law, corruption represents just a form of the fraud, being represented by the caption exercised on the co-contractor. Although the source of the dispositions of the Vienna Convention in the matter of the invalidity of consent is represented by the theory of the vice of consent from the domestic civil law, the option was not to include corruption within the framework of the fraud to regulate them separately, in the detriment of juridical accuracy.

The coercion exercised on the state representative, in the case it is instrumented, deprives the treaty of any legal effect (art. 51 – Vienna Convention). The coercion refers to "acts or aggressions" against the state representative as an individual and not in his quality of state organ. The sanction in this case is the absolute nullity.

The Vienna Convention regulates as a distinct cause of invalidity the coercion exercised against the state itself; according to the dispositions of art. 52 of the Convention, any treaty whose conclusion was obtained by threat or by use of force becomes void**,** in violation of the principles of International Law contained in the United Nations Charter. Like in the case of the previous form of coercion, the sanction is that of absolute nullity.

The Vienna Convention stipulates two types of nullity – absolute and relative – with distinct juridical regimes.

The relative nullity may be invoked only by the state whose consent was tampered with and may be subsequently covered through confirmation by the same state (art. 45 – Vienna Convention).

The absolute nullity may be invoked by any state, party of a treaty and even ex officio by an international court; it affects the validity of the treaty even from the moment of its conclusion (*ab initio*). Absolute nullity cannot be covered through confirmation.

Although the institution of nullity in the domestic private law constituted an important source of inspiration for the theory of the treaties invalidity in the Public International Law, one should nevertheless notice a faulty transposition of the effects of nullity in the field of Public International Law.

Thus, the doctrine operates the following distinction: the sanction of absolute nullity shall determine the absence of effects of the treaty even from the moment of its conclusion, *ab initio*. *Per a contrario*, we understand that relative nullity determines the absence of effects of the treaty in the future, producing only *ex nunc effects* – for the future and not *ec tunc* effects – for the past. One should also mention the fact that in the domestic private law, both relative and absolute nullity produce effects for the past as well as for the future, as a general rule; it is a natural option in the situation when nullity represents the sanction which deprives the juridical act of the effects contrary to the juridical norms laid down for its valid conclusion.[7]

We believe that the manner of regulating the treaties invalidity transposed in the dispositions of the Vienna Convention fails to meet the exigencies and rigors of the definition of

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[5] Raluca Miga Beşteliu, op. cit, p. 290

[6] Valentin Constantin, op.cit, p. 148

[7] Gheorghe Beleiu, Drept civil român. Subiectele dreptului civil, Bucureşti: Ed. Şansa, 1995, p. 178

nullity. Moreover, although it seems that the idea of the makers of the Convention was to create a juridical regime distinct for the two types of nullity, no time limit was established, a term until when the relative nullity may be invoked.

REFERENCES

Gheorghe Beleiu, Drept civil român. Subiectele dreptului civil, Bucureşti: Ed. Şansa, 1995
Valentin Constantin, Drept Internaţional Public, Timişoara: Ed. Universităţii de Vest
Ion Diaconu, Tratat de Drept Internaţional Public, Bucureşti: Ed. Lumina Lex, 2002
Raluca Miga Beşteliu, Drept internaţional public. Introducere în Dreptul internaţional public, Bucureşti: Ed. All, 1998