

Vices of Consent

- ❖ If the consent expressed in the form of offer and acceptance could not achieve what the parties have intended, then there is a defect in consent. This defect in consent may arise from:
 - Being misinformed of something by ways of mistake, false statement, fraud
 - Being threatened by another psychologically or physically (duress, reverential fear, threat to exercise a right)
- ❖ If it is discovered that the contract is affected by any of the vices of consent it may be invalidated as in the sense of Article 1696 & ff provisions.
- ❖ Defect in consent may not necessarily invalidate the contract:
 - First an application to that effect is needed
 - Secondly, the application should be based on the grounds that will entitle invalidation of the contract
- ❖ **Mistake**
 - Is a false belief in some thing, a belief which is actually untrue.
 - The false belief must be firm and should not be mere probable supposition.
 - A party who has to prove his firm error should in addition establish that such mistake has led him to contract; that he would not otherwise contract.
 - But for the person who invokes his mistake it is not sufficient hat he proved the subjective test. To this the law adds an object element. The mistake has to be fundamental:
 - o When the mistake relates to something which ordinarily or normally seems to be an essential element of the contract under consideration (identity of the thing sold, price, special qualification of the other party)
 - o When it relates to an element the parties deem it fundamental (e.g. Formal guarantee a person is advised to have but fails to do so will be protected by the law)
- ❖ **Mistake can be classified as:**
 - **Mistake as to the legal nature of the contract/ error in *negotio***

- o Sale-donation
- o Witness-guarantee
- o Signing a petition-annual contribution
- o Purchase bracelet- but in fact gold-plated one
- **Mistake as to the object of the contract/error in substantia**
 - Where the mistaken party has undertaken to make a performance substantially greater and receive a consideration substantially smaller than intended. This mistake can be Mistake as to:
 - the identity of the object
 - its qualities: where the parties have different subject matter in mind. It is not about the values the thing possess but about distinguishing the subject matter the buyer is intending to buy (A intends to buy BMW belong to B but later understand that the offer is for the sale of Toyota; A sends offer to B intending to buy a horse belonging to B but in fact the horse belongs to C; a person sold his gold ring thinking that he sold the gold-plated one; buying fertilizer sulfur thinking that he is buying pharmacy sulfur)
 - generally, the mistake is substantial, by common sense or legal provision.
 - Mistakes as to counter performance or consideration are more common than mistakes as to performance as a person knows less about what he is to receive than about what he is to give:
 - A creditor who releases his debtor under Article 1825 for the full amount thinking that the remission was for few current installments
 - A person who sells his house which later turnout to have much more square meter than he believed to have at the making of the contract

- A person rents a villa in the belief that it includes water well and several other facilities but in fact doesn't have
 - o The value of the performance is irrelevant. There must be more or less meter square living space, etc. Mistake as to money value of what to give or to receive is not in itself a ground of invalidation. Had money values of what to give or receive were considered security of commercial transactions would have been at stake.
- **Mistake as to the person/ *error in persona***
 - o *It may relate to mistake to identity & quality*
 - o Mistake as to identity and quality is important coz identity mistakes invalidate marriage while quality mistakes may invalidate marriage on limited cases.
 - o Under General contract law mistake as to the identity or quality has very little importance coz neither identity nor quality mistakes invalidate a contract
 - o But exceptionally there are cases where the identity and or quality of the other contracting party is important. This is coz the performance of the contract is wholly dependent on the qualification or identity of the contracting party.
 - o Examples:
 - Gratuitous Contracts (donation, remission, free loan, guarantee)
 - certain insurance contracts
 - hire of qualified services (clerk, painter, artist, doctor, lawyer)
 - Partnership, etc.

❖ **Non-fundamental Mistakes**

- They don't relate to the fundamental element of the contract but only motives
- A will quite truly declared may be induced by untrue external points that motivates parties to contract
- Such doesn't relate to the contract but motives.
- Examples:

- o A bought a house from B to install his son, after the Son got married. (marriage is motive)
- o Buy a painting thinking that it was painted by famous artist
- o Buying house in Harar thinking that my job there will last long but transferred immediately after the contract
- o Selling a house thinking that gov't will expropriate but that wasn't true.
- But mistake as to motive can be a ground of invalidation where the parties expressly or implicitly make it a condition of the contract.
- Arithmetical or calculation errors
- ❖ **Good faith of Mistaken Party (Art. 1702)**
 - Proposal to guarantee substantial quality but rejected by other
- ❖ **Damages Arising out of Invalidation**
 - *Errans* fault: *Roman & English Law* says no invalidation
 - Both parties' innocent: *French & Swiss Laws: Invalidation but no compensation*
 - *Ethiopian Law??*
- ❖ Knowledge of the mistaken party
 - **He knew:** Actual knowledge
 - **Should have known:** Presumed Knowledge
 - **Under Ethiopian Law:** The only defense for the mistaken party not to pay damages is to prove the knowledge of the other contracting party and not his innocence.
 - o But invalidating mistake and of its knowledge by the other party which makes invalidation worthwhile are difficult to prove.
 - o The court should take into consideration of circumstances
 - **Example**
 - A bought gold-plated ring for 2000 birr thinking that it is pure gold. The price of gold-plated one is 100. In this case:
 - o There is **decisive mistake**: as no one in his senses would buy gold-plated ring for 2000 birr
 - o There is fundamental mistake as in the sense of Art. 1699 (b)

- o The seller's fault is presumed as he should have known the seller's mistake. This much price difference shows that the buyer has wrongly appreciated the material facts.
- **Damages Arising out of invalidation v non-performance**
 - o **Invalidation:** It will put the parties in the position they would have been had the contract not been made
 - o **Non-performance:** It will put the parties to the position they would have been had the contract been performed
- **Fraud**
 - o Is a false representation by means of conduct, statement made knowingly in order to gain a material advantage against another party
 - o It doesn't mean telling false statement/untruth. It is beyond that
 - o To invoke fraud, the following need to be fulfilled:
 - Knowledge of falsity (intentionally)
 - Materiality
 - Justifiable Reliance
 - causal connection/cause-effect relationship
 - parties' reasonable effort to ascertain the truth
- **Why fraud? Why not mistake?**
 - o It is easier to prove fraud/deceitful practice than the *errans* state of mind
 - o An innocent mistaken party may be liable to pay damages. But in case of fraud even a negligent mistaken party may claim damages
 - o Coz it is difficult to determine the amount and size of substantial error under Art. 1699(b). But in case of fraud there is no need to go thru this brainstorming process.
- **Two types:**
 - o **Decisive fraud:** deceived party wouldn't have contracted otherwise and it is a ground of invalidation.

- o **Incidental fraud:** have no determining effect on the contract. Deceived party would even have contracted even if he knew he is deceived but only at a less onerous terms. It is not therefore a ground of invalidation. But can be a basis for claim in tort.
- **Third Party fraud:**
 - o Labor exchange agency's fraud on employer not known to the employer
 - o Debtors fraud on the guarantor not known to the creditor
- It cannot be a ground of invalidation unless the other party knew or should have known of the fraud.
- Knowledge should be at the making of the contract and not after.
- Remedies for fraud:
 - o Invalidation
 - o Payment of damages
 - o Criminal penalty
- **False statement**
 - o False statement, as a rule, is not a ground of invalidation
 - o Exceptionally, however, where false statement is made and relationship giving rise to special confidence, loyalty and trust existed between the parties.
 - o Such special confidential relationship should have existed before the contract
 - o False statement without the confidential relationship is only actionable under tort.
 - o Under Ethiopian law the only contract remedy for the victim of false statement is based on fundamental mistake unless the type of relationship exists.
- *What relationships?*
 - o Family relationships at least up to second degree
 - o Membership to close religious community
 - o Subordination created by contract (employer-employee)
 - o Professional service relationships (lawyer-client)
- *Why false statement? Why not mistake?*

- o Proving mere false statement is easy
- o Mistaken party may not be required to pay damages

Article 1705(2): False statement induced by silence

- o A person sells his house coz he heard that there will be expropriation of extra houses. The city Mayor knew the false statement but entered into a contract with the seller. By his silence he led the party to believe the false information.

- **Duress:**

- o Psychological or physical pressure exerted on a person
- o Threat of imminent danger which may be future or immediate
- o Threatened harm must be such that disastrous loss would occur if the threat were carried out.
- o The wrongful act should leave the person with no reasonable alternative
- o There should be little time left between the threat and impending realization
- o It should be serious and imminent but it does not mean that it should be real.
- o Example: pointing a gun on some one's head but the gun was unloaded.
- o Should impress a reasonable person but standard to be used to determine if an alleged duress is sufficient to invalidate a contract is conditional subjective. This is not the same as an objective standard in the sense of an average reasonable person in the position of the victim. Article 1706(3) states that the nature of duress should be determined having regard to age, sex and positions of the person.
- o So the standard is partly subjective and partly objective: would another person, having the same age, sex, and position as that of the victim, be coerced into this contract?
 - Examples:
 - A minor threatened an adult to conclude a contract
 - A threatened to kidnap B's wife unless he agrees to enter into a contract

- A pointed a gun at B to sign a contract
- Lawyer A threatened client B to pay him excessive lawyer fee at the pain of disclosing the secrets of B.

- **Third Party Duress**

- o For the contract to be invalidated on the ground of duress the source of duress is not important.
- o Were it not for this provision it would have been tempting for any powerful man to exercise duress through his followers and argue lack of knowledge/that he is unaware.
- o When there is innocent beneficiary, invalidation is tempered by the qualified possibility of damages.
- o The law has different treatment of fraud and duress in this regard. What is the difference between Articles 1704(2) and 1707?

Gross Disparity:

I. Unconscionable Contracts

- Substantial disproportion in the values of the performances of the parties is necessary, but not sufficient for invalidation
- It does not apply to gratuitous contracts as there is no point in assessing the mutual advantages of the parties.
- It doesn't apply if it is after the conclusion of the contract. In that case Art. 1764 is applicable. Exception to this is Art. 3183
- Rationale: security of commercial transactions would have been at stake
- immoral behaviour of the exploiter amounts to determining the victims consent through taking advantage of his want, simplicity of mind, senility, and inexperience
- unconscionable contract to be invoked as a ground of invalidation:
 - the advantage must be substantially favourable to the other party

- Want, simplicity of mind, senility and business inexperience of the other party must be utilized
- Justice (morality) requires that contract to be invalidated.
- What is the balance of the contract is affected by unforeseen circumstances that happened after the formation? Article 3183 is the solution and not invalidation.

2. Threat to exercise a Right-Article 1709

- o It is not a ground of invalidation. The duress must be unjustified.
- o This is a problem of abuses of rights.
- o Threat is used with a view of obtaining an excessive advantage
- o Examples:
 - Employer catches his employee stealing and later forced him to sign a contract to work for free or he will face jail
 - Husband catches his wife while she is cheating and forced her to sign a contract and agreed that she will not share from the common property

3. Reverential Fear-Article 1709

- It is a respect for parents and superiors.
- In principle it is not a ground of invalidation of a contract
- The law assumes that the influence of respected ones and superiors is good
- Victims of undue influence/reverential fear have the mental capacity to enter into contracts but they lack the ability to adequately protect themselves from the influence of superiors who gain their confidence
- The fact that the other party inspires the fear will not render the contract voidable. In addition, it should be proved that the other party drives an excessive advantage from the contract.

Getahun Walelgn Dagnaw
LL.M International Business Law (CEU)
LL.M International Economic Law (Kyushu University)
Bachelor of Laws (LL. B) Haramaya University