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Content:

Defects of Consent in Contract Law

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[...]

1 Introduction

The mere fact that an offer has been accepted does not suffice to establish that valid mutual consent has been reached. Consent must also have been free and enlightened, in other words it must not have been vitiated.

All European legal systems acknowledge that consent may be defective. They even seem to be very similar in this respect as the same defects appear almost everywhere: mistake, fraud or duress for instance are universal grounds for avoiding the contract. Even if these main categories do not cover exactly the same situations everywhere, the same circumstances seem to allow a party to set aside the contract by invoking one or the other of these defects. It seems to provide the perfect illustration for the increase in popularity of the idea according to which all systems of law, particularly all European systems of law, reach in fact the same point, adopt the same practical solutions, even if the ways and means are different, due to different traditions.

But when looking closer, this harmony is only apparent. If defects of consent are widely accepted as a ground for setting aside a contract, legal traditions vary considerably as to the degree of protection to be afforded to the parties.

The purpose of this chapter is to propose general principles governing defects of consent which could be incorporated in a European Civil Code. The main works already done in this field will be used, particularly those of the International Institute for the Unification of Private Law (UNIDROIT)¹ and those of the 'Lando Commission'.²

Because mutual consent is the very essence of the formation of contract, the elaboration of rules to determine whether consent has been properly given or not has long been at the centre of the preoccupation of academics and judges alike. The result is a complex set of rules, often providing for arcane exceptions and subtle distinctions.
Therefore, unification cannot be achieved simply, and a methodology must, as a preliminary step, be developed. There exists no easy solution and choices will sometimes have to be done arbitrarily.

Many methods must be firmly rejected, which have, however, too often been used for unification in the European Union. For instance, attempting to retain only common rules which can be found in the European legal systems would result in the adoption of the least developed system, thus affording minimum protection and leaving aside all improvements which may have developed over decades or even centuries in other countries. On the contrary, a cumulative approach which would try to integrate all European rules would result in an inefficient system of tremendous complexity.

The first thing to do to achieve unification, especially in the field of defects of consent, is to define categories, i.e. to try to identify types of defects vitiating consent which are consistent with the traditions of all European countries.

However, this is not enough and, at that stage, a balance must then be found between protection and certainty. Some principles present no difficulty as they can be found in all systems and there is certainly no reason to rule them out but on many issues, a political choice will be necessary to decide how far one should protect parties to a contract, i.e. which circumstances justify relief for defect of consent. It is essential to be aware of the necessity of such general choices of policy. These choices must be clearly made and not be left to depend either on the dominant nationality or language in commissions of harmonisation, or on the culture of the person who is in charge of drafting a given article. We all have long traditions and deep prejudices: it is neither satisfactory nor possible to avoid them completely but it is better to be aware of their actual influence.

A general remark must be made on a method which is often applied for unification: the use of standards. UNIDROIT Principles in particular often refer to 'reasonable commercial standards of fair dealing'. It is important to stress that the use of standards, in order to achieve unification, should remain limited since judges will tend to apply them according to their own traditions. In other words, it is certainly not enough to achieve unification to agree on basic standards: what is to be harmonised is not only the concepts mentioned in European Codes but also the reality which they cover.

This leads to another general remark on UNIDROIT Principles. These principles are designed to govern international commercial relations where a lex mercatoria has already appeared. The situation is clearly different in the context of a European Civil Code so that the provisions should be amended accordingly: for instance, a different standard ought to be applied, excluding the reference to commercial practices. A Civil Code is designed to regulate the behaviour of all citizens and it must not be forgotten that, historically, civilisation is the empire of civil law. Thus, the Commission on European Contract Law refers more generally to good faith and fair dealing.

### 2 Choice of Categories

Defects of consent concern the formation of contracts. As a contract has to be valid before it has to be performed, the absence of defects of consent should be checked before considering whether or not the contract has been performed satisfactorily.

In all European legal systems, several types of defect in consent are distinguished. To refer only to some of the main systems, it appears that the following defects of consent exist: a) in English law: mistake, misrepresentation, duress and undue influence; b) in French law: erreur (mistake), dol (fraud) and violence (threat); c) in German law: Irrtum (mistake), arglistige Täuschung (fraud) and widerrechtliche Drohung (illegitimate threat); d) in Dutch law: dwaling (mistake), bedreiging (threat), bedrog (fraud) and misbruik van omstandigheden (abuse of circumstances).

It thus appears necessary, before attempting any substantive unification, to find a new classification which could cover all existing categories of defect of consent.

In order to classify these defects of consent, it seems appropriate to have a purposive approach and to determine why, for each category, the law accepts that a contract should be set aside. Three main categories thus appear in the European systems.
1) Sometimes, the law directly wants to protect a party who has erroneously given his assent to a contract, in other words, whose consent has been given by mistake.

2) In other cases, it is mainly the fraudulent behaviour of a party which induced the defect of consent of the other which is to be punished. The complaining party has been deceived, his consent has been fraudulently extorted. It is possible to characterise these cases by saying that a consent has been obtained by fraud.

3) At last, in some circumstances, a party is aware when concluding the contract that he should not do so there is no mistake as to the content of the contract. But at the same time, it is not possible for this party to refuse to enter into the contract because of a threat, or even because of the circumstances. This last category is the most difficult to name because of the various terminology used by different European legal systems.

UNIDROIT principles divide this category into two distinct defects of consent: threat (Art. 3.9) and gross disparity (Art. 3.10), which may for instance arise due to unfair advantage taken 'of another party's dependance, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack or bargaining skill'. But the abuse of another party's ignorance, inexperience or lack or bargaining skill seems closer to fraud or may induce a mistake. Only some of the other circumstances mentioned in the UNIDROIT Principles Articles 3.9 and 3.10 (mainly threat, economic distress, urgent needs) share a common aim and could thus be joined under a single category.

In all these last cases, the complaining party was aware of concluding a disadvantageous contract but could not do otherwise than accept the offer made to him: the justification for setting aside the contract is that consent was not freely given. Although the terminology used by the European legal systems tends to be narrow and put an emphasis on different circumstances threat, violence or abuse of circumstances the conditions for setting aside a contract under these various doctrines are similar. There has been a constraint, a pressure, which has caused the consent to be given and the other Party has unduly taken advantage of the situation: a consent has thus been exacted by undue pressure.

3 Consent Given by Mistake

There is a mistake when a party was not aware of all material information when concluding the contract. A party has made a mistake if, had he known something at the time of the contract, he would not have concluded it or at least on very different terms.

The European systems of contract law make several main distinctions regarding possible mistakes.

3.1 Different Traditions

3.1.1 English Law

The circumstances in which a contract is void for mistake under English common law are quite restrictive.

In so far as the rules deriving from the common law are concerned, a distinction is usually drawn depending on whether, despise the mistake, the parties reached agreement or not. In either case, the contract is void ab initio.

In the first type of mistake, both parties made the same mistake so that they actually agreed on the same thing but their agreement cannot have its normal effect: their mistake is often said to nullify consent. As the parties made the same mistake, it is often said that there is mutual or common mistake. The mistakes which can thus nullify consent are very limited: there must be a fundamental mistake, namely as to the existence of the subject-matter; mere mistake as to quality of subject-matter is much more problematic. But doctrines of implied conditions or of implied terms are often used to set aside the contract in cases where other systems of law would have granted relief for mistake.

In the second type, the mistake prevented the parties to reach agreement so that this mistake is often said to negative agreement. Mistake negatives consent when the parties never had the same thing in mind. Either one party only has made a mistake, for instance on the identity of the other (there is a unilateral mistake), or both have made mistakes but different ones, for instance one party intended to deal with one thing and the other with a different one (in other words, there was a misunderstanding).

A third type of mistake exists in the case where a party has signed or performed a written document essentially different
from that which he intended: this is the defence of non est factum.

Besides these common law rules, equitable rules give mistake a wider role but the remedies granted are then less radical and depend on the type of mistake (for instance refusal of specific performance, rectification of written agreements or even sometimes rescission).

3.1.2 French Law

Mistake is a false assessment of reality made by a contracting party.

Some mistakes are so important that there has never been any agreement: they are usually called erreur-obstacle (they are an obstacle to the formation of contract) even though judges never use this vocabulary. It is for instance a mistake as to the very nature of the contract (one intends to rent a house, the other to sell it) or an identity of the subject-matter of the contract (one intends to sell one apartment, the other to buy another).

As regards mistakes vitiating consent, the French Civil Code (Article 1110) mainly distinguishes between mistakes relating to what is exchanged by the contract, i.e. mistakes about the subject-matter of the contract (erreur sur la substance) and mistakes relating to the other party (erreur sur la personne).

Erreur sur la substance was initially limited to mistakes as to the material out of which the subject-matter or the contract was made. Its scope has soon been widely extended to include mistakes on the essential qualities (qualités substantielles) of the contract's subject-matter which caused its conclusion. This kind of mistake is often a ground for annulling a contract. There are many doctrinal controversies on the test to be applied to characterise mistake (judges seem to apply a subjective test); and on whether mistake can only relate to what is received from the contract or also on what is offered (for instance can the seller of a painting complain if he discovers that it has been done by a famous painter and is worth far more than the price for which he sold it?).

On the contrary, the erreur sur la personne is said in the Civil Code not to constitute in principle a defect of consent except in those contracts where the person with whom the contract was concluded is essential (contracts concluded intuitu personae, i.e. in consideration of the person). Despite this restrictive approach, this type of mistake has been extensively interpreted: it can be a mistake about the identity of the person with whom the contract was concluded, but also on the essential attributes of this person (qualifications, Background, solvency, etc.).

Other types of mistake cannot be a ground for annulling a contract. For instance, a party cannot complain if a mistake was made directly as regards the value of the subject-matter of the contract (erreur sur la valeur), i.e. if his wrong economic assessment was not due to a mistake about the essential qualities of the subject-matter of the contract. Thus, the seller of a Picasso painting who asked a few hundred Francs may only have the contract annulled if he did not know it had been done by this master. Mistake about the motive to enter into the contract is also not considered to be a defect of consent in Article 1110 of the Civil Code, except if it can be established that it was part of the conditions for concluding the contract.

3.1.3 German Law

Under German law, different types of mistakes are mentioned by § 119 and § 120 of the Civil Code (BGB). These provisions are rather unclear and have given rise to different opinions. Nevertheless, it is common to distinguish between three possible mistakes: mistake about the content of the consent (Inhaltsirrtum), a mistake made when doing or transmitting a declaration (Erklärungsirrtum and Übermittlungsirrtum) and a mistake about the characteristics of a person or of a thing (Eigenschaftsirrtum). When there is a mistake about the content of the consent (Inhaltsirrtum), the complaining party has said what he wanted to say but he was wrong to say what he said. He can be mistaken on very various things: on the type of contract concluded, on the person or on the subject-matter of the contract.

A party can also make a mistake when he makes a declaration or when he transmits it (Erklärungsirrtum and Übermittlungsirrtum). Here, the party does not say, write or act as he intended. Those kinds of mistakes especially happen when both parties are not at the same place at the time of the contract.
A more recent development is the recognition of mistake about the essential attributes of a person or of a thing (Eigenschaftsirrtum) on which there are some doctrinal controversies. Unlike other types of mistake, the essential attributes of a person or of a thing have not been described in the declaration of will. It is often said that this third category deals with mistakes about motive which are thus exceptionally a ground to avoid the contract.

3.1.4 Dutch Law

Error (dwaling)\textsuperscript{14} is set out in a section devoted to the formation of contracts, whereas the other defects of consent are only mentioned under legal acts in general.

Under Dutch law (Article 228 of Book 6),\textsuperscript{15} a contract which has been entered into under the influence of error (dwaling) and which would not have been entered into had there been a correct assessment of the facts can be annulled but only if one of the three following circumstances exists: if the error is imputable to information given by the other party, unless the other party could assume that the contract would have been entered into even without this information; b. if the other party, in view of what he knew or ought to have known regarding the error, should have informed the party in error; c. if the other party in entering into the contract has based himself on the same incorrect assumption as the party in error, unless the other party, even if there had been a correct assessment of the facts, would not have had to understand that the party in error would therefore be prevented from entering into the contract.

Thus, under Dutch law, mistake seems mainly a relief against misrepresentation, whether or not it was fraudulent (Art. 228, under a), or failure to disclose information (Art. 228, under b).\textsuperscript{16} However, common mistake also gives the right to avoid the contract (Art. 228, under c).

The mistake can relate to facts or to law, to the subject-matter of the contract or to the person of the other party (but only when the contract was concluded with a view to the person of the other party).\textsuperscript{17}

3.2 Propositions for Unification

Some requirements seem essential for a mistake to be characterised. Others may depend on more general choices of policy.

Mistake is an erroneous assumption which led the mistaken party to enter into a contract. Like all defects of consent, it must be made at the time the contract was concluded. All these elements are reflected in the UNIDROIT principles, according to which ‘mistake is an erroneous assumption relating to facts or to law’\textsuperscript{18} existing when the contract was concluded.\textsuperscript{19} What seems to remain to be settled is whether a party can only complain about a mistake made as to what he received from the contract or also as to what he himself offered: this controversy, based partly on an economic analysis of contract law, is very similar to the one made on duties of disclosure.\textsuperscript{20}

Another requirement seems essential though not admitted in all European systems: the complaining party must prove that, had he known his mistake at the time of the contract, he or, more precisely, a reasonable person in the same situation would not have entered into it or on very different terms. If this is not the case, he cannot argue that there has been a defect in his consent. Thus, the International Institute for the Unification of Private Law (UNIDROIT) adds that ‘a party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known’.\textsuperscript{21}

Only these elements are the core of mistake and, to establish such a defect of consent, unlike the others, only the psychology of the complaining party has to be checked.

In this context, it neither seems necessary that the other party knew of the mistake made, nor that he made the same mistake himself: those circumstances may, for the former prove a fraud and for the latter excuse the other party but they do not matter when assessing the mistake made by the complaining party.

When trying to harmonise different systems of law it is necessary to define the essence of each defect of consent. The
essence of mistake and what is to be checked for this defect of consent to give right to relief, is only the psychology of the mistaken party. The mistake made must be serious enough for the mistaken party to deserve protection. The behaviour of the other party is to be checked through another defect of consent - fraud - which may arise by knowingly failing to dispel a mistake made by the other party.

It thus does not seem necessary (although this is a requirement under English law) to add, as the UNIDROIT principles do, the requirement that 'the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and [that] it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error'. Furthermore, paragraph (a) of Article 3.5(1) of the UNIDROIT Principles seems unnecessary and even misleading. It seems unnecessary because even if the behaviour of the other party is to be taken into account, in any event it inevitably falls within one of these categories: either the other party knew of the mistake or he did not know (he thus made the same mistake) so that all the possibilities seem to be covered by this provision. The only possibility perhaps that is not envisaged is when a party knew of the mistake but it was not contrary to reasonable commercial standards of fair dealing to leave the other party in error. In this latter case it is most unlikely that a party made an important mistake so that in any event the requirements of Article 3.5(1) will not be satisfied. These provisions are a typical example of the method too often used which consists in simply cumulating the individual national rules and results in an unnecessarily confusing and unhelpful unification.

Furthermore, this provision is misleading: for instance if it is mentioned that a party may avoid the contract when the other party made the same mistake, a judge would be induced to hold, a contrario, that the avoidance is impossible when the other knew of it which is absurd because, a fortiori, when the other party knew of the mistake made, it should be made easier to avoid the contract. It should thus at least be provided that a party may avoid the contract for mistake 'even if' the other party made the same mistake (i.e. was completely innocent).

It is only with regard to certainty that, in some circumstances, it would be too easy to allow a party who regrets having entered into a contract to pretend to have made a mistake about a fact which was very important to him. To have the contract set aside, a party should then have to prove that the other party was aware of what he was looking for in concluding the contract. Under French law, this is called an erreur commune but this term of 'common mistake' is misleading because it is precisely not necessary that both parties made a mistake or, a fortiori, that they made the same mistake.

It may also occur that the complaining party does not deserve to be protected because he is responsible for his own mistake. In almost all systems of law, a party may not avoid the contract if the mistake is the result of his own fault or negligence or if this party had assumed or must assume the risk of mistake.

[...]

2 The Commission an European Contract Law (Chairman: Professor Ole Lando) has chosen to begin its work with the rules governing performance and remedies for non-performance. On these rules, see Principles of European Contract Law, Part 1: Performance, Non performance and Remedies, Prepared by the Commission on European Contract Law, Edited by Ole Lando and Hugh Beale, Martinus Nijhoff Publishers (1995). The part on validity of contracts, which covers defects of consent, remains in draft form. The version which will be used in this chapter was agreed on by the Commission at the eighth Meeting in May 1996, but is still subject to revision by the Editing Group and will thus be referred to less.
4 This is not what the International Institute for the Unification of Private Law (UNIDROIT) proposes. Thus, according to Article 3.7 concerning mistake, 'a party is not entitled to avoid the contract on the ground of mistake if the circumstances on which that party relies afford, or could have afforded, a remedy for non-performance'. Under French law, this provision is both unnecessary and confusing because when the mistaken party has partly performed his obligation, the rules concerning nullity may sometimes prevent him from avoiding the contract.
6 In particular Carbonnier (1996); Flour and Aubert (1996); Ghestin (1993); Malaurie and L. Aynès (1996/1997); Terré,

7 Sources on German law: in French, see Witz (1992) and M. Pédamon (1993). In German, see for instance Brox (1992); Flume (1979); Larenz (1989); Medicus (1994).

8 The Dutch Civil Code has been published both in English and in French under the auspices of the Dutch Ministry of Justice: New Netherlands Civil Code, Patrimonial law (property, obligations and special contracts), translated by Haanappel and Mackaay (1990). On Dutch contract law, see mainly Hartkamp and Tillema (1995).

9 The same remark could be made about the Principles of European Contract Law established by the Commission on European Contract Law which, under the title of 'excessive benefit or unfair advantage' concern exactly the same circumstances.

10 This vocabulary is used by Beale, Bishop and Furmston (1995), pp. 791 ff.; see also Treitel (1995), and also his *Outline of the Law of Contract*, Butterworths, 5th edn (1995), who speaks of 'improper Pressure'.

11 A few authors reserve this term for mutual misunderstanding, i.e. when both parties made a mistake but not the same one.

12 See Bell v. Lever Brothers Ltd. [1932] A.C. 161. For a more recent case, see Associated Japanese Bank International Ltd v. Crédit du Nord SA [1989] 1 W.L.R. 255, 266-267, 268, where it was said that the former case decided that a mistake might render a contract void provided it rendered the subject-matter essentially and radically different from what the parties believed to exist: *Chitty on Contracts* (1994), p. 297, by H.G. Beale.

13 These discussions are dividing authors in France since the famous 'Poussin' case (which lasted from 1972 to 1987) where a contract was avoided on the ground of mistake because the sellers had sold a painting for a modest sum which was then discovered to have probably been painted by Nicholas Poussin (the sole probability of it being a Poussin was judged to be enough for the contract to be avoided).

14 On 'error' under Dutch law, see Van Rossum (1991).

15 English translations of the Dutch Civil Code are those of Haanappel and Mackaay (1990).

16 See Van Rossum (1991), p. 312, who notes that in case-law, the emphasis is also on the false precontractual statement of fact made by the representor or his failure to disclose information.


18 The choice could be different but it seems to be widely admitted that the erroneous assumption can be taken into account whether it relates to facts or law. The only restriction to be made is that mistake about law cannot be invoked to avoid application of the law (*nemo legem ignorare censetur*). The UNIDROIT commission justifies this rule by referring to the increasing complexity of modern legal systems and subsequent difficulties for cross-border trade. On the contrary, it could be argued that legal unification is precisely aimed at reducing mistakes of law.

19 UNIDROIT Principles Art. 3.4. See also Article 4:103 of the Principles of European Contract Law: ‘A party may avoid a contract for mistake of fact or law existing when the contract was concluded if [...]’.

20 See *infra*.

21 UNIDROIT Principles Art. 3.5(1). The Principles of European Contract Law do not stress this point, and only refer to it indirectly, when providing, in Article 4:103, that in order for the contract to be avoided, the other party must have been aware of the mistake. See *infra* note 26.

22 Or the Principles of European Contract Law.

23 UNIDROIT Principles Art. 3.5(1). According to Article 4:103 of the Principles of European Contract Law: a party may avoid a contract for mistake only if (a) (i) the mistake was caused by information given by the other party; or (ii) the other party knew or ought to have known of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error; or (iii) the other party made the same mistake’.

24 Or Article 4:103(1)(a) of the Principles of European Contract Law.

25 Let us reason for instance on the example taken by the UNIDROIT commission in its comments to illustrate the first condition, i.e. when both parties labour under the same mistake, which is not very convincing. This example is as follows: ‘A and B, when concluding a contract for the sale of a sports car, were not and could not have been aware of the fact that the car had in the meantime been stolen. Avoidance of the contract is admissible’: Does this mean that, *a contrario*, if B was or could have been aware of the fact that the car had in the meantime been stolen, avoidance of the contract would not be admissible: it would be absurd as avoidance of the contract would be far more justified if B knew than if he did not know the mistake made by A.

26 Article 4:103(1)(a) of the Principles of European Contract Law thus provides that a party may avoid a contract for mistake only if (b) the other party knew or should have known that the mistaken party, had he known the truth, would not have entered the contract or would have done so on fundamentally different terms’.

27 Under French Law, it is called *erreur inexcusable* but the negligence does not have to be particularly important. Compare with the UNIDROIT Principles which require gross negligence: see Art. 3.5(2): ‘However, a party may not avoid the contract if (a) it was grossly negligent in committing the mistake’. Article 4:103(2) of the Principles of European Contract Law only refers to a mistake which ‘was inexcusable’: once again, this standard has no meaning in itself and requires to be interpreted.

28 See UNIDROIT Principles Art. 3.5(2): a party may not avoid the contract if (b) the mistake relates to a matter in regard
to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party. Art. 3.6. seems to consider one particular kind of risk when it says that ‘an error occurring in the expression or transmission of a declaration is considered to be a mistake of the person from whom the declaration emanated’: the risk of mistake while expressing or transmitting a declaration is on the person from whom the declaration emanated. The rules are very similar to the Principles of European Contract Law.

**Referring Principles:**

- IV.7.3 - Right to avoid the contract for mistake in fact or law