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MISTAKE IN THE CONTRACT LAW OF UKRAINE AND SOME FOREIGN COUNTRIES

The article analyzes mistake in the contract law of Ukraine, England and France. The author shows that the modern doctrines of contractual mistake were formed by Roman lawyers who provided that when entering into a contract, the parties may be mistaken about the subject matter of the contract, the price, the nature of the contract, or about the party to the contract, etc.

It is substantiated that a mistake is a false assumption that led the mistaken party to enter into a contract. As a general rule, like all defects of consent, it must be made at the time of the contract. The complaining party must prove that if it had known about its mistake at the time of entering into the contract, it would not have entered into the contract or would have entered into it on completely different terms. Otherwise, such a party cannot claim that there was a defect in its consent.

It is established that the current legislation of Ukraine prioritizes the doctrine of freedom of contract over all other doctrines, which in turn provides for the establishment of a legal relationship between the parties on the basis of a contract only if they subjectively and actually have such intentions. Ukraine adheres to the subjective theory, known to continental law countries, which provides that in case of defects of will, any transaction should be recognized as void.

The author substantiates the signs of a transaction made under the influence of a mistake under Ukrainian law: 1) the internal will of such transactions is not sufficiently formed; 2) there is no influence on the person by other persons; 3) the mistake is material; 4) the mistake exists at the time of the transaction.

The author explains that mistake in English law is characterized by a narrower scope of application compared to mistake in Ukrainian civil law, and therefore the circumstances under which a contract is void due to mistake under English common law are quite limited. In English law, a contract made in mistake can be enforced except for ambiguity based on the reasonable person standard, which must be rejected. This reflects the English law's perception of the

objective theory, where the validity of the contract is always upheld, as the parties are obliged to comply with their expressed intentions.

The author has shown that French private law adheres to the principle «ignorance of the law is no excuse», as evidenced by the fact that a mistake of law and fact cannot be forgiven. A mistake is grounds for void regardless of whether it relates to the performance of the contract by one party or the other. The party that made the mistake has effectively assumed the risk from the moment the contract is entered into, so it cannot claim damages.

It is clarified that in almost all legal systems, a party cannot refuse to perform a contract if the mistake is the result of its own fault or negligence.

Keywords: *mistake, contract, transaction, obligations, contract conditions, private law, fraud, duress, void contract, voidable contract, contract implementation, modification of the contract, termination of the contract.*

Марценко Н. С.

Помилка в договірному праві України та деяких зарубіжних країн

Проаналізовано помилку в договірному праві України, Англії та Франції. Визначено, що сучасні доктрини договірної помилки були сформовані ще римськими юристами, які передбачали, що під час укладення договору сторони можуть помилятися щодо предмета договору, ціни, характеру, сторони договору тощо.

Обґрунтовано, що помилка – це хибне припущення, яке спонукало сторону, що помилилася, укласти договір. За загальним правилом, як і всі дефекти згоди, вона має бути зроблена в момент укладення договору. Сторона, яка подає позов, повинна довести, що якби вона знала про свою помилку на момент укладення договору, то не уклала б договір або уклала б його на зовсім інших умовах. В іншому випадку така сторона не може стверджувати, що в її згоді був дефект.

Встановлено, що чинне законодавство України надає пріоритет доктрині свободи договору над усіма іншими доктринами, що передбачає встановлення правовідносин між сторонами на підставі договору лише за умови наявності у сторін намірів укласти відповідний договір. Україна дотримується суб'єктивної теорії, відомої країнам континентального права, яка передбачає, що за наявності дефектів волі будь-який правочин має визнаватися недійсним.

Обґрунтовано ознаки правочину, вчиненого під впливом помилки, за українським правом: 1) внутрішня воля таких правочинів недостатньо сформована; 2) відсутній вплив на особу з боку інших осіб; 3) помилка суттєва; 4) помилка існує на момент вчинення правочину.

З'ясовано, що помилка в англійському праві характеризується вужчою сферою застосування порівняно з помилкою в українському цивільному праві, а тому обставини, за яких договір недійсний внаслідок помилки за англійським загальним правом, доволі обмежені. В англійському праві договір, укладений помилково, може бути примусово виконаний, за винятком двозначності, що ґрунтується на стандарті розумної особи, який має бути відхилений. Це відображає сприйняття англійським правом об'єктивної теорії, згідно з якою дійсність договору за загальним правилом повинна підтримуватися, оскільки сторони зобов'язані дотримуватися висловлених ними намірів.

З'ясовано, що французьке приватне право дотримується принципу «незнання закону не звільняє від відповідальності», про що свідчить той факт, що юридична та фактична помилка не може бути прощена. Помилка є підставою для визнання договору недійсним незалежно від того, чи стосується вона виконання договору тією чи іншою стороною. Сторона, яка припустилася помилки, фактично взяла на себе ризик з моменту укладення договору, тому вона не може вимагати відшкодування збитків.

З'ясовано, що майже в усіх правових системах сторона не може відмовитися від виконання договору, якщо помилка є наслідком її власної вини або недбалості.

Ключові слова: *помилка, договір, правочин, зобов'язання, умови договору, приватне право, обман, примус, нікчемний договір, недійсний договір, виконання договору, зміна договору, припинення договору.*

Formulation of the problem. It is well known that intention is one of the most important elements of a legal action when entering into a contract. However, a statement of intent may be void or voidable if it is made by mistake. Therefore, if the mistake is material, it may lead to the invalidity of the consent and, therefore, render the legal act void or voidable.

Each legal system has different definitions of the essence of mistake, which are mostly not accompanied by a legal definition reflected in civil codes, but are the result of interpretation of legal norms and activities of courts. This state of affairs does not contribute to the unity of understanding of this concept and may create different views on the problem of understanding the essence of mistake in contract law. In addition, the theories of mistake known to private law - the subjective theory and the objective theory - are not always perfect and each leads to opposite results. The subjective theory (applied in continental law countries) basically insists on the nullity of a transaction

if one of the parties made a material mistake. The objective theory (inherent in common law countries) generally assumes that even if a mistake exists, the validity of the contract is always upheld, as the parties are obliged to adhere to their expressed intentions. Each of these two doctrines has drawbacks when applied in practice, as each may lead to unfair results. Therefore, there is a need to examine both standards of conduct in order to obtain the most equitable outcome for both parties to the contract.

Analysis of resent research and publications. The issue of studying mistakes in contractual obligations is quite popular in science and law enforcement practice both in Ukraine and in foreign countries. Many works by Ukrainian and foreign scholars and practicing lawyers have made a significant contribution to the study of this issue. Among them, in particular, the works of Lavrinenko I.A., Bakhayev A.S., Davydova I.V., Krat V.I., Shatwell K.O. and others should be highlighted. However, in the conclusions of the research works of the above scholars, the mistake is considered either fragmentarily or through the prism of national legislation, or to a greater extent relates to the significance of the mistake for the validity of the transaction. The issues of understanding the essence of mistake in the legal systems which are closest to Ukraine and whose positive experience of legal regulation of this issue can be used in the recodification of domestic civil law remain unaddressed.

The purpose of this study is to provide a comprehensive analysis of the category of mistake, its content and essence, and to carry out a comparative legal analysis of the private law rules of foreign countries.

Presentation of the main research material. To enter into a contractual relationship, the future parties to the contract perform legal acts - legal acts aimed at establishing a legal relationship between them (aimed at the creation, modification, transfer, preservation or termination of a right). For such legal actions to be legally valid, the parties' intentions must be consistent with their behavior (i.e., the internal will must reflect the actual volitional actions of the subject of law, as this requirement is one of the mandatory elements of a contract). In addition, the civil law of Ukraine stipulates that when entering into civil legal relations, civil rights holders must act reasonably and prudently [1]. However, in practice, parties to contractual relations do not always manage to comply with these requirements, so situations of entering into transactions under the influence of a mistake may often arise [2]. A mistake distorts the will of a party to a legal relationship when the person does not actually understand that his or her will does not correspond to reality and the chosen type of contractual relationship [3]. The mistake neutralizes the intentions of the parties to the contract and distorts their understanding of the contractual structure to which they are parties [4]. In essence, a mistake is a false belief of one or both parties to a contract at the time of its conclusion and arises with respect to the subject matter or terms of the contract, the identification of the other party, the nature of the transaction [5]. Obviously, a mistake implies a misconception of the subject about any circumstances relevant to the conclusion of the transaction [6].

Mistake should be distinguished from similar phenomena, such as fraud, for example. In the case of fraud, a party is actually induced to enter into a contract on the basis of a mistake, whether innocent, negligent or fraudulent. In such a case, there is an external influence of one person on another in order to induce the conclusion of a contract. Instead, in case of mistake, as a result of internal mental processes of the person, he/she is mistaken about certain characteristics and terms of the contract [7]. Fraud distorts the true intention of a party to a contract and is inherently a direct violation of the principle of good faith, which is mandatory for the parties. Therefore, if a contract arises as a result of fraud, it will be considered void under the laws of most countries.

Distortion of will and expression of will is also possible in the case of coercion to enter into contractual legal relations. Coercion implies that one person exerts pressure on another, as a result of which the latter is forced to express an intention to enter into a contract. Coercion is usually associated with mental oppression and violence and does not reflect the true will of the party subjected to coercion. Coercion to enter into contractual legal relations actually destroys the freedom of contract, which in turn always leads to the invalidity of the contract [8].

Thus, a violation of free will may occur in the case of mistake, fraud and duress. In all cases, there is a violation of the general principles of ensuring the free will of the parties to create legal relations between them.

The Civil Code of Ukraine (hereinafter - the CC of Ukraine) provides that defects of will may be expressed in certain forms, and transactions with defects of will include: 1) transactions made by a legally capable individual who, at the time of their commission, did not realize the significance of their actions and (or) could not control them; 2) transactions made under the influence of a mistake; 3) transactions made under the influence of fraud; 4) transactions made under the influence of violence; 5) transactions made under the influence of a hardship.

Article 225 of the CC of Ukraine provides that a transaction made by a legally capable individual at a time when he or she did not realize the significance of his or her actions and (or) could not control them may be declared invalid by a court at the request of that person, and in the event of his or her death - at the request of other persons whose civil rights or interests have been violated [9]. For example, when a person suffered from a

persistent, chronic mental disorder at the time of the conclusion of the gift agreement, therefore, did not realize the significance of their actions and could not express their true will [10].

Article 229 of the CC of Ukraine defines the legal consequences of a transaction made as a result of a mistake. Such transactions are considered to be transactions with defects of internal will, since it is formed under conditions of a person's distorted view of the circumstances that are essential for the transaction and are completely independent of external influence (deformation of the will) [11]. The Civil Code states that if a person who has entered into a transaction has made a mistake regarding circumstances of material importance, such a transaction may be declared invalid by a court. A mistake regarding the nature of the transaction, the rights and obligations of the parties, and such properties and qualities of a thing that significantly reduce its value or the possibility of using it for its intended purpose is considered material. For example, if the expression of will does not correspond to the internal will of the person and was not aimed at the actual occurrence of legal consequences stipulated by the contract (mistake regarding the legal nature of the transaction), it should be considered that the person acted under the influence of a mistake, since he or she believed that he or she was entering into a completely different contract [12]. At the same time, a mistake regarding the motives for the transaction is generally not material, which is confirmed by court practice [9; 13].

Thus, a transaction made under the influence of a mistake is characterized by the following features under Ukrainian law: 1) the internal will of such transactions is not sufficiently formed; 2) there is no influence on the person by other persons; 3) the mistake is material; 4) the mistake exists at the time of the transaction.

Article 230 of the CC of Ukraine provides for the legal consequences of transactions made under the influence of fraud (when one of the parties to the transaction intentionally misled the other party regarding circumstances of material importance) [9]. According to court practice, the subject of misrepresentation is a party to a transaction, either directly or through other persons by agreement. In addition, fraud occurs if a party denies the existence of circumstances that may prevent the transaction from being completed, or if it conceals their existence, or tries to assure the other party of the following properties and consequences of the transaction that cannot actually occur [14]. As a general rule, such a transaction is invalidated by the court if it is proved in court that the other party was intentionally and purposefully misled about the facts that affect the conclusion of the transaction.

Article 231 of the CC of Ukraine defines a transaction made under the influence of violence (physical or mental pressure), which also results in its invalidity [9]. Violence may involve causing physical or mental suffering to a party to a transaction in order to force the transaction and creates a fear of unfavorable consequences. The courts rightly distinguish violence from the threat of violence, which consists in the exercise of only mental, but not physical influence, and occurs in the presence of both illegal and legal actions. In this case, a threat may be a ground for invalidating a transaction when the circumstances that existed at the time of its execution show that the refusal of a party to the transaction to perform it could have caused damage to his or her legitimate interests [15].

A transaction made under the influence of a difficult circumstance and on extremely unfavorable terms is provided for in Article 233 of the CC of Ukraine and provides for the possibility of invalidation by a court [9]. Hardship is considered to be a difficult property situation of a person, which is expressed in the lack of funds necessary for normal existence for the person and his/her family. Since the concept of unfavorable conditions is an evaluative one, to determine the degree of unfavorability, the court must examine the usual conditions, the consequences for this type of transaction, and the losses of the person from entering into this transaction [16].

The analysis of the provisions of the CC of Ukraine and case law gives grounds to assert that the current legislation of Ukraine prioritizes the doctrine of freedom of contract over all other doctrines, which in turn provides for the establishment of a legal relationship between the parties on the basis of a contract only if they subjectively and actually have such intentions.

Common law countries have a somewhat different conceptual approach to understanding mistake in contracting, which assumes that the parties act reasonably and knowingly. It is believed that each of the parties, being reasonable, will not consent to enter into a transaction if its internal will and external will differ. In other words, according to this concept, it is assumed that when entering into contracts, the expression of will represents the will of the party entering into the contract. For example, the concept of mistake in England is quite complex and includes three types of mistakes. Among them are common mistake (it is assumed that the parties make the same mistake), mutual mistake (both parties make a mistake, but each party may have a different mistake) and unilateral mistake (only one party makes a mistake, while the other has a valid intention) [17]. Such mistakes may result in both complete invalidity of the agreement and its nullity. In many cases, even despite the above legal consequences, the agreement may be considered valid and enforceable.

It appears that mistake in English law has a narrower scope than mistake in Ukrainian civil law, so the circumstances in which a contract is voidable for mistake under English common law are quite limited. In addition, under English law, a contract entered into in mistake may be enforced except for ambiguity based on the reasonable person standard, which must be rejected.

The French Civil Code (hereinafter - FCC) has a slightly different approach to the problem of mistake in contract law, which, as a result of systemic reform after 2016, has undergone significant changes in the legal regulation of transactions made with defects of will. As a result of the FCC reform, the defects of consent, such as mistake, fraud and duress, were increased from nine to fifteen articles. In particular, Article 1130 of the FCC provides that mistake may be one of the grounds for invalidating consent if, without it, the parties would not have entered into the agreement or would have entered into the agreement on other essential terms [18]. The FCC does not define the concept of mistake, but it is clear from the content of its provisions that a mistake is a false representation of reality [19].

Article 1179 of the FCC provides that invalidity can be divided into two types: absolutely void (resulting from a violation of the public interest under Article 1180 of the FCC) and relatively void (the violated rule has the sole purpose of protecting a private interest under Article 1181 of the FCC) [20]. In addition, the French private law doctrine contains another type of mistake - an obstacle (erreur), which also prevents the conclusion and existence of a contract in general. However, it is not entirely clear whether an obstacle can be defined as a defect of will under the FCC, so to a greater extent, an obstacle to the conclusion of a contract can be discussed at the level of doctrine and case law.

Article 1132 of the FCC provides for a mistake of law or fact that is grounds for the relative void of a transaction. Relative void may be recognized only by the party whose interests the law intends to protect and may be corrected by confirmation. The void of a contract is established by a court unless the parties have established it by mutual agreement [18].

French private law clearly reflects the principle that «ignorance of the law is no excuse», as evidenced by the fact that a mistake of law and fact cannot be forgiven. The mistake is a ground for void regardless of whether it concerns the performance of the contract by one party or the other.

The FCC also makes a good point that the party that made the mistake actually assumed the risk from the moment the contract was concluded, so it cannot claim damages. This suggests that the other party to the transaction is quite rightly entitled to rely on the validity of its counterparty's expression of will as a result of the objective impossibility of recognizing the mistake [21]. A bona fide party to a transaction should not bear the risk that the other party, for reasons unknown to it, has expressed in the transaction a different will than it would have expressed in a «normal» set of circumstances. In such a case, invalidation of the transaction would be clearly unfair and would not comply with the general principles of civil law, as the unscrupulous party may abuse the law and refer to its mistake in order to avoid undesirable legal consequences of the transaction. Therefore, it would be extremely unjustified, illogical and unfair to invalidate a transaction solely on the grounds that a person makes a statement about his or her mistake, given the interests of civil turnover in general and other legal entities in particular. The following provisions are also typical for Ukrainian contract law and are in practice.

Article 1135 of the FCC deals with the motivation of the parties when entering into a contract, which is not considered to be related to the essential qualities of the act of performance [18]. For this reason, motivation cannot be used to avoid the performance of a contract if it is a subjective expression of will that the other party could not realize. Obviously, motivation is not a reason for the invalidity of a contract, even if it is material. On the other hand, if the parties express such a motivation that will be part of the content of the contract in view of its interpretation as a condition of the contract, then a mistake in motivation may lead to the invalidity of the contract. Therefore, as a general rule, according to Article 1135 of the FCC, a mistake regarding a mere motive that is not related to the essential qualities of the act of performance or the other contracting party is not a ground for void, unless the parties expressly stated this and made it a decisive element of their agreement.

Article 1134 of the FCC provides for a mistake regarding the essential qualities of the other contracting party, which is a ground for void only in respect of contracts concluded on the basis of considerations of personal importance to the party [18].

Article 1136 of the FCC provides for a mistake as to price that may arise as a result of a poor economic evaluation. As a general rule, a mistake as to price is not a ground for declaring a transaction void unless it is the result of an mistake in the essential qualities of the result of the contract performance [18].

In accordance with French private law, damages are payable by the party in fault (Articles 1104, 1112 and 1112-1175 of the FCC), based on the principle of good faith and legitimacy of the other party's actions.

Article 1104 of the FCC provides that any action of a person that causes damage to another person obliges such person, through whose fault it occurred, to compensate for the damage. Article 1112 of the FCC provides that pre-contractual negotiations must be free and based on the principle of good faith. In case of fault committed during negotiations, compensation for damages is calculated in such a way as to compensate for the loss of benefits expected from the contract that was not concluded. A party that knows information that is crucial for the other party's consent is obliged to notify the other party if the latter does not legally possess such information or relies on the contracting party (Article 1112-1) [22]. This obligation to inform does not apply to the assessment of the value of the act of performance. At the same time, information is crucial if it has a direct and necessary connection with the content of the contract or the status of the parties. A person claiming that the information was due to him bears the burden of proving that the other party was obliged to provide it, and the other party bears the burden of proving that it provided it. The parties may neither limit nor exclude this obligation. It is assumed that knowledge of information but failure to disclose it is not intended to mislead the falsely misled party, otherwise it would be considered fraud [23].

Thus, according to the provisions of the FCC, the relationship between the parties must be built on the basis of good faith both at the stage of negotiations (Article 1104 of the FCC) and at the stage of conclusion and execution of the contract. A mistake may be made both in relation to the content of the contract itself and at the stage of consent to enter into the contract. Therefore, before examining the validity of the consent, it is necessary to first find out whether such consent exists, since if there is no consent, there is no contract at all. As a general rule, a mistake that renders the consent invalid may be grounds for setting aside the contract. Regardless of whether the contract is terminated, the aggrieved party may claim compensation for any damage caused to it under the terms provided for by the general law of non-contractual liability.

Conclusions. To summarize the research, it should be noted that the modern doctrines of contractual mistake were formed by Roman lawyers, who provided that when entering into a contract, the parties may be mistaken about the subject matter of the contract, the price, the nature of the contract or the party to the contract, etc. In general, a mistake is a false assumption that led the mistaken party to enter into a contract. As a general rule, like all defects of consent, it must be made at the time of the contract. The complaining party must prove that if it had known about its mistake at the time of entering into the contract, it would not have entered into the contract or would have entered into it on completely different terms. Otherwise, such a party cannot claim that there was a defect in its consent. Taken together, these elements constitute the essence of the mistake, and in order to establish such a defect in consent, unlike others, it is necessary to check the psychology of the party justifying the existence of the mistake. The mistake made must be serious enough for the party who made the mistake to deserve protection. The behavior of the other party should be checked by means of another defect of consent - deception, which may arise from the deliberate failure to refute the mistake made by the other party.

The current legislation of Ukraine prioritizes the doctrine of freedom of contract over all other doctrines, which in turn provides for the establishment of a legal relationship between the parties on the basis of a contract only if they subjectively and actually have such intentions. Ukraine adheres to the subjective theory, known to continental law countries, which provides that in case of defects of will, any transaction should be recognized as void. In general, a transaction made under the influence of a mistake is characterized by the following features under Ukrainian law: 1) the internal will of such transactions is not sufficiently formed; 2) there is no influence on the person by other persons; 3) the mistake is material; 4) the mistake exists at the time of the transaction.

Mistake in English law has a narrower scope than mistake in Ukrainian civil law, so the circumstances in which a contract is voidable for mistake under English common law are quite limited. In English law, a contract made in mistake can be enforced except for ambiguity based on the reasonable person standard, which must be rejected. This reflects the English law's perception of the objective theory, where the validity of the contract is always upheld, as the parties are obliged to comply with their expressed intentions. In order to reduce this rigid position, several exceptions were introduced, which are discussed in this paper.

French private law adheres to the principle that «ignorance of the law is no excuse», as evidenced by the fact that a mistake of law and fact cannot be forgiven. A mistake is grounds for void regardless of whether it relates to the performance of the contract by one party or the other. The party that made a mistake has actually assumed the risk from the moment of entering into the contract, so it cannot claim damages.

In general, in almost all legal systems, a party cannot withdraw from a contract if the mistake is the result of its own fault or negligence. Therefore, a party that files a claim for invalidation of a contract on the grounds of a mistake in its volitional behavior will in fact be liable for its mistake to the other party to the contract.

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