LEGAL ANALYSIS OF THE PRINCIPLE OF MISTAKE IN THAI LAW

BY

FLG. OFF. CHAVANYA SUIADEE

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS IN BUSINESS LAWS (ENGLISH PROGRAM)

FACULTY OF LAW

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was approved as partial fulfillment of the requirements for
the degree of Master of Laws in Business Laws (English Program)

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ABSTRACT

Apart from enacting new legislation to ensure fairness and bring about increased certainty to commercial transactions, it is necessary to consider the currently applicable law to ascertain whether it is appropriate to address contemporary issues or not. Accordingly, when examining Sections 156 to 158 which pertains to the principle of mistake under Thai law, a question arises as to the adequacy of such three existing provisions in tackling current problematic situations. This is because Section 156 and Section 157 provide several grounds of mistake which will render an expression of intent void or voidable. The purpose of such mechanism is to protect the actual will of the party who is subject to mistake rather than the other party who acted under good faith, with only one exception whereby the mistaken party will not be protected in the case gross negligence on that mistaken party's part by virtue of Section 158. Apparently, this is a reflection of the subjectivity, rather than the objectivity, principle at play. In view of the foregoing, the author has conducted a comparative study to analyze the principle of mistake. The legal frameworks within the scope of study include English law, French law, and the UNIDROIT Principles of International Commercial Contracts 2016. English law has been chosen to represent a common law country which mainly adheres to the objective principle. French law has been chosen to represent a civil law country which mainly adheres to the subjective principle. The

UNIDROIT Principles of International Commercial Contracts 2016 has been chosen as it represents a model law which combines both the objective and subjective principles. From the comparative analysis the author is then able to make suggestions on amendments to Thai law to make Thai law more just to all relevant parties.

There are two types of mistakes as enshrined in the Thai Civil and Commercial Code, namely, a mistake of an essential element of a juristic act resulting in voidness as per section 156, and a mistake of a quality of a person or of the property that is deemed as an essential element of the juristic act resulting in voidability as per section 157. Apparently, these two provisions provide protection to the mistaken party to preserve the actual will. There is only one exception in the case of gross negligence pursuant to Section 158 to protect the other bona fide party which is inadequate to maintain the trust between parties and would lead to injustice and uncertainty of commercial transactions as a result of the ease by which a juristic act could be nullified or avoided on the basis of a mistake.

In light of the foregoing, the author proposes additional conditions for nullification or avoidance of a bilateral juristic act which is similar to Article 3.2.2 of the UNIDROIT principles. The conditions are that the other party made the same mistake, or the other party caused the mistake, or the other party knew or should have known the mistake, or the other party had not yet acted in reliance at the time of avoidance. Moreover, the insertion of additional exceptions under which a party is not allowed to invoke a mistake as a ground for nullification or avoidance of the juristic act is needed, namely the event that the mistaken party had acknowledged the risk or should not bear the risk of mistake. In so doing, the principle of mistake in Thai law would be more fair and more compatible with the current state of the economy.

Keywords: Mistake, Objectivity, Subjectivity

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Flg. Off. Chavanya Suiadee

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LIST OF ABBREVIATIONS

Symbols/Abbreviations	Terms
Art.	Article
B.E.	Buddhist Era
CC	Code Civil of France
CCC	Thai Civil and Commercial Code
CPC	Thai Civil Procedure Code
No.	Number
UNIDROIT	International Institute for the Unification of Private Law

CHAPTER 1
INTRODUCTION

1.1 Background of Problems

There are vital elements to a juristic act, and the intention to create a legal relationship is one of them. Nevertheless, a declaration of intention could be void or voidable if it is made under mistake, fraud, or duress.

A mistake is untrue or lacks real consent. If the mistake is substantial, it could vitiate the consent and may therefore render the juristic act void or voidable. There are two theories related to mistake—the subjective theory and objective theory, each of which leads to opposite outcomes. The subjectivity theory mainly insists on the result of nullity if one party has an essential mistake. Under this approach, which is generally applicable in civil law countries, nullification is always the effect. Nullification maintains freedom of contract but disregards fairness to the other party. From that consequence, internal law has tried to manage this severance by establishing some exceptions to relieve the rigidity. This is also true for Thailand, which has enacted Section 158 in the case of gross negligence. On the other hand, under the objectivity approach adopted by common law countries, even if such a mistake exists, the validity of a contract is always upheld, as parties are obliged to be bound to their expressed intention. To decrease such rigidity, several exceptions have been introduced. For example, in England, a party could escape from contractual liability if the mistake is due to ambiguity in the circumstances of the case. From these two doctrines, it is manifest that if it is purely applied, both of them would have flaws as each is too extreme and may generate unsatisfactorily inequitable results. Thus, there is an attempt to combine both standards to acquire the most equitable consequences for both parties, such as several model laws including UNIDROIT Principles of International Commercial Contracts 2016.

In Thailand, there are three main issues pertaining to mistakes as enshrined in the Civil and Commercial Code under Section 156 to Section 158.

The first type of mistake is a mistake of an essential element of the juristic act as per Section 156. This applies when the declaration of intent and the true will do not align with each other as in the stage after making the true intention, the mistaken party makes a different declaration than such intention. For additional clarification, paragraph two of Section 156 provides examples of what would be considered a mistake of an essential element of a juristic act. The examples are, namely, a mistake as to a character of the juristic act, a mistake as to a person to be a partner of the juristic act, and a mistake as to a property being an object of the juristic act. There could be other cases besides from the provided examples depending on the type of juristic act. As such, it could be said that Section 156 has a wide scope of application. For instance, the price in a sales contract and the rent in a lease agreement are considered to be an essential element of the juristic act. Consequently, the extreme effect of mistake under this section is that such a declaration of intention would be void which means that it is invalid from the very beginning.

The second type of mistake is a mistake as to the quality of the person or the property that is usually deemed as an essential element of the juristic act as per Section 157. Under this section, the misunderstanding has been created at the time of making an internal intention. After that, the party who is subject to the mistake makes a declaration in accordance with such mistaken intention. Also, the mistake of the quality under this section must be an essential element of the juristic act in ordinary dealings whereby without it, such juristic act would not have been made otherwise it would not affect the validity. The legal consequence of this type of mistake is that the juristic act would be voidable, meaning that the juristic act could still be valid. Nevertheless, the party subject to the mistake has the preference to avoid the juristic act within a specific period of time.

It should be noted that when comparing Section 156 and Section 157, there are three main points to differentiate between these two sections. The first point is when the mistake occurs—while making an intention or while making a declaration. The second point of differentiation is the substance of mistake—an essential element of the juristic act or a quality of the person or the property. The third point of differentiation is the consequence of the mistake—voidness or voidability.

Finally, Section 158 stipulates that a mistake under Section 156 or Section 157 can be a result of gross negligence. Section 158 is considered as an exception of Sections 156 and 157 which aim to protect the mistaken party. Section 158, however, does not extend protection to the party who is mistaken as a result of gross negligence. It prohibits him from availing himself of such invalidity. It is to be noted that gross negligence is more than negligence, which is a simple carelessness or a failure to act. Gross negligence is willful behavior done with extreme disregard. As such, in cases of gross negligence it can seem as if the mistaken party has pretended to have a mistaken intention or make a mistaken declaration of intent, and is thus not deserving of protection.

As a result, the principle of mistake in Thai law places an emphasis on the freedom of contract and protects the party who is subject to mistake. The underlying thinking is that no one should be liable for what he does not intend as stated under Section 156 and Section 157 of the CCC. This is particularly pronounced in the case of Section 156 whereby the consequence of such mistake is the extreme measure of being absolutely nullified without any recourse for the other party who is innocent and was not under any mistake under the principle of bona fides. Furthermore, to seek damages which have arisen as a result of the unenforceability of a juristic act, it is questionable which legal grounds could be raised to claim for such damages. Still, there is an exception stipulated in Section 158 protecting the other party by stating that if a mistake is made by gross negligence, the mistaken party shall not be protected by claiming that the juristic act is void or voidable because his intention lacks real consent. Nevertheless, it aims to punish the mistaken party rather than to protect all contractual parties because all consequences, whether it be voidness or voidability, depend on the action of the mistaken party alone. As the Thai legal regime provides protection to the mistaken party but is infrequently concerned about other parties who may suffer from the invalidity despite having a bona fide intention and having suffered damage, it is the reflection of applying the subjective theory in an extreme way. Although some countries that also adopt the subjective theory have developed the principle of mistake to provide more fairness to the other party, Thai law still does not pay much attention to equalize both parties, except only in the case of gross negligence by the party who is subject to mistake.

At a glance, a mistake seems to be a minor point in a juristic act. Nevertheless, upon more thorough inspection, it is a crucial legal issue because it directly determines validity or invalidity of the juristic act. Furthermore, it could generate several debatable issues, some of which are issues that have not been solved yet. Although many points of Thai law are clear and justifiable, there are still flaws, including the balance of fairness to all parties under the circumstance of mistake. In the author's opinion, Thailand has applied these three Sections of mistake for a long time and that may lead to some aspects that are out of date compared to other countries. Though there was an amendment of the CCC which has been enforced since B.E.2535 (1992), the modification on this area was minor. This leads to the current negative results such as, firstly, the trust between the parties could be decreased as he cannot be sure whether the existing juristic act would be later claimed a mistake and subsequently avoided, or worse, fall under Section 156 and treated as if it had never existed. Secondly, it could reduce the interest in commercial transactions. Lastly, this principle may cause legal proceedings in court to be delayed as a result of the difficulty in proving facts relating to a mistake.

It is therefore attractive to study the principle of mistake under the three sections from Section 156 to Section 158. The author limits the scope of analysis to the issue of a one-sided mistake in the juristic act, especially in contracts, because it is one of the most frequent juridical acts to govern relationships in the society. Furthermore, this thesis would provide comparative legal analysis of the law of Thailand and several countries which are England as a common law country which generally applies the objective principle, France as a civil law country that normally applies the subjective principle, and UNIDROIT Principles of International Commercial Contracts 2016 as a model law applied to international commercial contracts which combine both objectivity and subjectivity principles. The author aims to study the development and principles of each legal doctrine to ascertain the benefits and disadvantages and to identify the interesting points of each system to determine whether the existing provisions are sufficient to deal with the current issues surrounding mistakes or not. The author will accordingly propose amendments to Thai law detailing which cases of mistake should generate nullity or avoidance of a juristic act. Accordingly, if consideration of the additional conditions which have been proposed depend on the other party, it would only be applied to bilateral juristic acts, as unilateral juristic acts do not require the other party's intention to be formed. By virtue of such amendment, equality for all parties and the certainty of commercial transactions would be achieved.

1.2 Objective of Study

1. To study the general principles of objectivity and subjectivity.
2. To study the principle and exceptions of mistake in Thai law found in Sections 156 to 158 of the CCC and their consequences with a focus on a one-sided mistake and protection to the parties.
3. To collect data and examples set forth by other countries with varied legal principles and exceptions to mistakes with a focus on equal protection to the parties.
4. To propose solutions to address legal problems arising from the principle of mistake in Thai law to be more just to all relevant parties.

1.3 Hypothesis

The principles of mistake as embodied in Sections 156 to 158 of the CCC of Thailand provide inadequate protection as they are mainly founded upon the subjectivity principle and fail to protect the party that is not under a mistake, except only in the case where the mistake in question is caused by gross negligence. To remove such unfairness, achieve balanced fairness between both contractual parties and indeed promote business efficacy, the principles as laid down in the CCC need amendment through insertion of additional conditions for nullification or avoidance of a bilateral juristic act on the ground of mistake and also the insertion of additional exceptions under which a party is not allowed to invoke a mistake as a ground for nullification or avoidance of a juristic act.

1.4 Scope of Study

The scope of this thesis involves a look into legal principles, doctrines, and Articles of mistake in Thai law by making an analysis of Sections 156 to 158 of the CCC of Thailand and conducting a comparative analysis to examine what other countermeasures could be effectively applied to Thai law to bring more satisfactorily just outcomes to all parties by studying the following foreign laws and model law;

1. English law through principles and cases.
2. French law through the French Civil Code and cases.
3. UNIDROIT Principles of International Commercial Contracts 2016 and cases.

1.5 Methodology

This thesis conducts a study through a documentary research method based on study and analysis of laws, textbooks, articles, journals, Court decisions, scholars' opinions, and information on the internet from Thailand and foreign sources. From such study, the obtained information will be applied to analyze the concept of mistake under Thai and foreign laws in order to investigate the problems and suggest amendments.

1.6 Expected Contribution

1. To thoroughly understand the principles of subjectivity and objectivity in relation to mistakes.

2. To thoroughly understand the principle of mistake in Thai law and various foreign laws and model law.

3. To thoroughly analyze and understand the problems of mistake in Thai law in the aspect of equality to all parties.

4. To thoroughly understand the principle of mistake in foreign laws and model law in the aspect of equality to all parties, to seek application to Thai law.

5 To provide appropriate legal measures as a solution to address problems arising from the inefficiency of Thai law in terms of equality to all parties.

CHAPTER 2
GENERAL PRINCIPLE OF MISTAKE

2.1 The Fundamental Theory Relating to the Principle of Mistake

Juristic acts are voluntary lawful acts with a purpose to establish a legal relationship between persons so as to create, change, transfer, reserve, or extinguish a right. In order for a juristic act to be enforceable, emphasis should be placed on the intention of the parties to the juristic act, as it is one of the required elements. Therefore, to study the principle of mistake that may vitiate the intention of contractual parties and other related theories is necessary because they are inseparably connected to the mistake and are also considered fundamental principles in the field of contract law.

2.1.1 The Principle of Private Autonomy

This concept is considered to be one of the most fundamental principles of civil and commercial law, and thus often the first to be explored. It posits that a person generally has the autonomy to make any decision freely. They are free to specify their rights and duties within a legal relation with respect to any issue related to themselves, whether personal, such as marriage or divorce, or on what concerns their assets, such as entering into a commercial agreement.[1] After an individual has served themselves with the freedom to set their obligatory relationships, the law would accordingly verify those activities. Nevertheless, this concept could not be applied arbitrarily without any restrictions. To make the scope of application clearer, there are three main limitations. [2]

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[1] Sanunkorn (Jumpee) Sotthibandhu, Commentary on Juristic Act and Contract (16th edn, Winyuchon 2011) 25 (ศนันท์กรณ์ (จำปี) โสตถิพันธุ์, คำอธิบายนิติกรรม – สัญญา (พิมพ์ครั้งที่ 16, วิญญูชน 2554)) น.25

[2] Ibid, p.26

Firstly, everyone has private autonomy. It is natural that they would attempt to preserve this fundamental principle for their necessities and their own benefits. Therefore, a person shall respect another person's boundaries and bear in mind that others place a high value on preserving this freedom as well. In exercising private autonomy, one shall not deprive another of the same. Secondly, the person shall respect the rules which are grounded in conscientious reasoning. Therefore, private autonomy must also be within the boundaries of morals and natural law. Lastly, a person shall respect the law. This is because although private autonomy is considered one of the sources that generate legal consequences as verified by the law, it could be limited or altered by provisions of the law. For example, if the parties had not agreed on the term of price in a sale contract, the price would be set by law.

It is obvious that this doctrine is general and widely applied in the field of civil and commercial matters. Therefore, it is the root of the other following significant principles, including the autonomy of will and freedom of contract.

2.1.1.1 The Principle of the Autonomy of Will

The Principle of the autonomy of will is a subset of the principle of private autonomy. In general, any person has the freedom to make any decision to specify their scope of rights and duties in a legal relation. Consequently, such a decision arises from their intention to be bound and thus would be necessary to the status of a contract in at least three aspects.[3]

First of all, an intention to enter into a contract, as it has been a critical mechanism since the process of negotiation. To clarify, either an offer or an acceptance commonly requires an expressed and willing intention. Therefore, in order to prevent invalidity of the contract, such intention shall be an actual intent.

Secondly, an intention establishes the terms and conditions in a contract. When parties make an intention, they can decide to include the terms as agreed in detail. In particular, the parties could agree differently from what the law

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[3] Daraporn Thirawat, The Present Status of Contract and Unfair Contract Law (2nd edn, Thammasat University 1999) 12 - 15 (ดาราพร ถิระวัฒน์, กฎหมายสัญญา: สถานะใหม่ของสัญญาปัจจุบันและปัญหาข้อสัญญาที่ไม่เป็นธรรม (พิมพ์ครั้งที่ 2, มหาวิทยาลัยธรรมศาสตร์ 2542)) น.12 - 15

stated, provided that such term is not contrary to public order or good morals. As a result, even if such agreed contract does not fall under any type of contract in any legislation, it is still legally binding and known under the name of an innominate contract.

Lastly, an intention results in the legal bindingness of a contract. When a contract is formed, parties are bound to what they have mutually agreed upon. Therefore, in general, they will have the rights and duties to each other in a reciprocal way. From that, if there had been any doubt on their legal relationship, the true intention of the parties would become a decisive criterion to determine.

2.1.1.2 The Principle of the Freedom of Contract

The principle of freedom of contract is a crucial principle applied globally, especially in civil law countries. Not only is it a general principle of law, but is also stated in the legislation of several systems[4] including Thailand, such as in Section 151 of the CCC. This principle is a subset under the principle of the autonomy of will in relation to the true intention or real consent from the parties to govern their own assets .[5] Thus, contracts are adopted as a tool to represent an individual determination on the voluntary agreement.

Wilson explains that freedom of contract has two purposes.[6] The first is the freedom to form a contract. Tamburrino explains further that this means the freedom to establish, continue, and suspend the process of forming an agreement. Thus, when the offer or acceptance had not yet been met to form a contract, the parties have the freedom to withdraw their intention without having to be subject to any direct punishment. It could be seen that the freedom of formation of the contract would be maintained until the contract is formed. After that, they would be legally bound and generally could not claim such freedom to amend it.

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[4] Jumpee Sotthibandhu, The Pre-contractual Laibility (2nd edn, Faculty of Law Thammasat University 2002) 172 (จำปี โสตถิพันธุ์, หลักความรับผิดก่อนสัญญา (พิมพ์ครั้งที่ 2, โครงการตำราและวารสารนิติศาสตร์ คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2545)) น.172

[5] Ibid, p.170

[6] Ibid, p.171

Secondly, freedom from interfering by national states once a contract is made. Under this viewpoint, the state would normally not intervene in parties' activities on an agreement. This purpose relates to the first. It aims to prevent the destruction of the freedom to form the contract.

Furthermore, under several perspectives of Thai scholars, Prof. Kanung Ruechai believes that a contract is constituted from the mutual and material agreement of the intentions of the parties. Also, a contract is derived from free choice. The parties would not be forced to enter into a contract if they do not have any will to do so. Moreover, they are entitled to choose any party to make a contract without being subject to any condition.[7]

On the other hand, Chaiyos Hemaratchata distinguished the freedom of contract into four types[8]. First, the freedom to enter into a contract as parties have the freedom to make an offer and acceptance. Second, the freedom to select another person to be the contractual party and would not be forced to enter into the contract without that willingness. Third, the freedom to decide the contract terms and conditions. Last, freedom from the form as in general, the parties would have the freedom to make a contract without the limitation under any form. However, some types of contracts are mandated by law to follow a certain form otherwise it would be void or unenforceable as there are other reasons behind weighing the balance of this doctrine, such as the need to protect the third party. To exemplify, under Thai law, a sale of immovable property would be void if it was not made in writing and registered.[9] Nevertheless, similarly to the principle of autonomy of will,

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[7] Kanung Ruechai, The Private International Law related to International Business Law (1st edn, Winyuchon 1998) 23 (คะนึง ฦๅไชย, กฎหมายระหว่างประเทศแผนกคดีบุคคลเกี่ยวกับกฎหมายธุรกิจระหว่างประเทศ (พิมพ์ครั้งที่ 1, วิญญูชน 2541)) น.23

[8] Chaiyos Hemaratchata, the Contract Law (1st edn, Chulalongkorn University 1992) 83 - 36 (ไชยยศ เหมะรัชตะ, กฎหมายว่าด้วยสัญญา (พิมพ์ครั้งที่ 1, จุฬาลงกรณ์มหาวิทยาลัย 2535)) น.83 - 86

[9] Section 456 of the CCC. A sale of immovable property is void unless it is made in writing and registered by the competent official. The same rule applies to ships or vessels of six tons and over, to steam launches or motor boats of five tons and over, to floating houses and to beasts of burden.

several restrictions still apply to the freedom of contract, particularly that it shall be performed within the boundaries of the law, public order, and good morals.[10] Exceeding from this boundary, the law cannot verify the freedom of contract and grant it a legally binding effect.

Under Thai legislation, the CCC incorporated this perspective to play an important role and be connected with the mistake in Section 156 and Section 157 with only one exception in the case of gross negligence as stated under Section 158. According to these provisions, the mistake has close relation with the principle of freedom of contract as if the internal intention is made under a mistake in material, the contract shall be void as stated under section 156 because the actual intention is generated from the freedom of contract. Also, if the internal intention is not materially the same as a declaration of intention, the contract shall be voidable as stated under Section 157 because the freedom of contract is vitiated. It can be pointed out that the legal doctrine under Thai law gives more weight to the internal intention rather than an expression because it aims to conserve the freedom of contract to the parties especially on the side that is subject to a mistake on the grounds that no one should be liable for what he did not intend.[11]

2.1.2 The Principle of Good Faith

Good faith is a fundamental principle in contractual relationships and is considered to be an exemption to the notion that parties have freedom of contract and shall keep their promise as agreed. If not in compliance with the principle of good faith, the validity of a contract could be disturbed such as by being modified or even terminated.

The explanation of this principle can be complicated because the word itself is broad. It is generally believed to be an open and abstract norm whose

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[10] Sanunkorn (Jumpee) Sotthibandhu, supra note 1, p.27

[11] Sanunkorn (Jumpee) Sotthibandhu, the Principle of Mistake (1st edn, Winyuchon 2006) 107 - 108 (ศนันท์กรณ์ (จำปี) โสตถิพันธุ์, หลักความสำคัญผิด (พิมพ์ครั้งที่ 1, วิญญูชน 2549)) น.107 - 108

meaning varies depending on the context to which it is being applied.[12] To determine its definition, it could be done in various ways but a well-known way was proposed by Summers which is to exclude good faith from bad faith as the bad faith is assembled with ill will or malice.[13] Therefore, if the person acts honestly, it may be implied that he acts based on good faith. Examples of ill will could be seen from court decisions which include negligence, intervention of another party to execute the contract, an act or omission that obstructed the other party to gain the benefit he expected, etc.[14] Generally, good faith consists of honesty or loyalty to another party which means that psychological and ethical considerations are relevant.

Pursuant to Black's Law Dictionary, good faith represents that the person shall have a relationship in the society based on honesty and faithfulness as follows:

A state of mind consisting of (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage. [15]

Furthermore, good faith may be divided into two aspects, in an objective and subjective way.[16] For the objective sense, this approach is observed as being the standard to the contractual relationship that parties shall conform with to relieve any unfairness that may arise from the principle of private autonomy. On the

[12] Eylem APAYDIN, The Principle of Good Faith in Contracts (1st edn, Kocaeli University 2019) 5

[13] R.S. Summers, 'Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code.' Virginai Law Review, Vol 54, No. 2 (March 1968) p.201

[14] Nareeman Raktham, Application of the Principle of Good Faith in Tax Law: Case Study Revenue Department's Ruling Letters (Master of Law Degree Thesis, Thammasat University, 2006) 9 (นารีมาน รักธรรม, การนำหลักสุจริตมาใช้ในทางกฎหมายภาษีอากร: ศึกษาเฉพาะกรณีการตอบข้อหารือโดยกรมสรรพากร) (วิทยานิพนธ์ปริญญามหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์, 2549) น.9

[15] Black's Law Dictionary, 18th ed.

[16] Eylem APAYDIN, supra note 12, p.1

other hand, the subjective approach is applied to protect the party to acquire ownership even though the property has been transferred from a non-owner.

Under Thai law, this assumption also exists in several provisions which could be divided into two categories.[17] First, good faith in a specific context such as those stipulated in Sections 412, 413, and 1299 of the CCC which are applied in explicitly defined legal areas. Second, good faith in general terms as stated under Section 5 and Section 368 and are broadly applied as a standard which requires that legal activities shall be performed in good faith. Despite the principle of good faith being an underlying fundamental principle of the CCC, it seems to not be used in the field of the mistake in Thailand because a party who is subject to the mistake tends to be insulated from any liability by virtue of protection from the doctrine of the freedom of contract as opposed to the other party who acted in good faith.[18] Therefore, in circumstances of mistake more balance and equality to all contractual parties shall be struck by not protecting only the mistaken party but also the other party who has made a genuine intention without any mistake by applying the doctrine of good faith. Otherwise, it would be unfair for such latter party to have to sustain a negative effect in the situation which he himself did not even give rise to. Furthermore, this principle is a concrete ground of trust and confidence between the parties to form legal relationships through an agreement. The principle of good faith could furthermore enhance predictability in economic transactions by ensuring that an agreement made would be bound as expected. Despite the foregoing, Thailand has not recognized this principle as much as it should. This is evident from the fact that there is only the exemption reflecting the principle of good faith, which is Section 158, to protect the other innocent party. Besides, such protection seems like a punishment to the mistaken party who has not taken enough care and may as such be considered as lacking good faith rather than an actual concern to the other party owing to the fact that the consequence depends solely on the party who made the mistake. This is

[17] Somyot Chuathai, The Explanation of Civil Law: General Principle (25st edn, Winyuchon 2019) 111 - 115 (สมยศ เชื้อไทย, คำอธิบายวิชากฎหมายแพ่ง: หลักทั่วไป (พิมพ์ครั้งที่ 25, วิญญูชน 2562)) น.111 - 115

[18] Sanunkorn (Jumpee) Sotthibandhu, supra note 11, p.108

unlike many systems whereby the contract will be valid out of respect for the principle of good faith as opposed to the principle of freedom of contract. For example, if a party is under good faith by not realizing at the time of making an agreement that the other party made an intention because of a mistake, the contract is still enforceable. Also, the consequence of a mistake under Section 156 of the CCC is possibly too extreme. Such mistake results in the juristic act being void. This is contrast to the provision in many other countries where such a mistake would result in voidability, where the mistaken party could affirm or avoid, which would be more beneficial to the economy.

2.1.3 The Principle of Pre - Contractual Liability

Before being committed to entering into an agreement, the contractual parties would normally have had commenced their relationship by negotiating to come to a mutually agreed upon term. Nevertheless, it is possible that the parties could not seek a final conclusion and carry out the subsequent stage. Therefore, the contract could not be established and damage may occur to one of the parties from such breaking-off of negotiation.[19]From that, the concept of pre-contractual liability or *Culpa in Contrahendo* is applied to grant recovery to the party who suffers from damage in the period before the contract is formed. The rationale is that parties shall be careful and have loyalty to each other at all times, including before the contract is concluded. This doctrine is a reflection of the good faith principle and was generated from the belief that before making a contract, it is possible for each party to have incurred costs to fulfill negotiations or in making an offer. Therefore, when the contract is not later formed, one party may suffer damage from prior preparations. Such damage may include legal consultation costs and the cost of losing the opportunity to enter into a contract with another party.[20]

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[19] Kjamjai Wawmaneewun, The Pre-contractual Liability: in Theory (Master of Law Degree Thesis, Thammasat University, 1999) 5 (งามใจ แววมณีวรรณ, ความรับผิดก่อนสัญญา: ศึกษาในเชิงทฤษฎี) (วิทยานิพนธ์ปริญญามหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์, 2542) น.5

[20] Ibid, p.140

Therefore, most countries recognize this concept and incorporate it into the legislations in various ways but with the same goal to protect the other party in the period before the contract is made. One practical solution is imposing a negative interest, which is compensation for the party who should not be suffer any damage from entering an unfulfilled contract. Jhering, a renowned jurist, posits that damages should be recoverable against the party whose blameworthy conduct during negotiations for a contract brought about its invalidity or prevented its perfection through negative interest.[21]

Nonetheless, the views of this doctrine through the eyes of common law and civil law are different as the court under the civil law system tends to be more concerned with the legal binding effect from the stage of negotiation than the common law court. The reason behind this is that civil law countries are more concerned about the relationship between the parties than whether an agreement is written down or not. Thereby, the juridical nature of pre-contractual liability has not yet become a unity in theory as there are various opinions provided by different countries and scholars. In general acknowledgement, it may be divided into three groups which are Taurus liability, contractual liability, and pre-contractual liability.[22]

Under Thai law, it could be seen that the mistake of intention or declaration occurs in the process before a contract is concluded because an offer and acceptance have not yet been met. Therefore, a question arises as to whether this pre-contractual occurrence would create any liability to any party or not. The answer is, not really.[23] This is because this regime does not directly exist in Thai law under any provision, including in the issue of mistake which is presented through the consequence of voidness or voidability under Section 156 and Section 157. It can be seen that these two provisions aim to protect the party who is mistaken and does not impose any liability for that party such as by requiring that the party make a

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[21] Friedrich Kessler and Edith Fine, 'Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study.' Harvard Law Review, Vol 77, No.3, (Jan 1964), p.401 – 402

[22] Sanunkorn (Jumpee) Sotthibandhu, supra note 4, p.39 - 40

[23] Sanunkorn (Jumpee) Sotthibandhu, supra note 11, p.109

compensation through negative interest from any willful or negligent act. Nevertheless, Section 158 is the only provision imposing responsibility to the mistaken party as it prohibits the mistaken party from availing himself from the invalidity of the contract if he made an intention by gross negligence. It follows that he has pre-contractual liability for his act by not being able to allege that an agreement is void or voidable due to a mistake. At the same time, the other party in the contract would not suffer from any damage as the contract would still be valid and continue as he expected. Therefore, that party cannot claim for negative interest.

2.1.4 The Principle of “Ignorance of Law Excuses no One”

The tendency to apply this doctrine in contract law has shifted from strict application to one which is less strict and that allows for some exemptions. In the past, no one could rely on the excuse that he was unaware of the law to defend himself and escape liability because the state seeks a unified enforcement of the law and thus could be the reason why Thai law recognizes only the mistake to fact. Nevertheless, as time passes, more legislation has been enacted. It therefore becomes plausible to not assume that everyone should recognize every single regulation. Therefore, many countries recently consider some events arising from the ignorance of law to be the basis for escaping liability.[24]

Nonetheless, although several countries distinguish a mistake in law from a mistake of fact, Thailand has not yet had such distinction in any legislation including in the CCC although it actually exists in reality. Therefore, the court has to apply the mistake of fact instead of the mistake of law through precedents to acquire the fairest solution.[25] For example, the precedent of Supreme Court judgment no.3285/2553[26] ruled that under a land sale and purchase agreement, the purchaser

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[24] Sanunkorn (Jumpee) Sotthibandhu, supra note 11, p.110 - 111

[25] Chanyanit Chiewchansilp, Mistake of Law in the Civil and Commercial Code (Master of Law Degree Thesis, Chulalongkorn University, 2017) 49 (ชัญญานิษฐ์ เชี่ยวชาญศิลป์, ความสำคัญผิดในข้อกฎหมายตามประมวลกฎหมายแพ่ง) (วิทยานิพนธ์ปริญญามหาบัณฑิต จุฬาลงกรณ์มหาวิทยาลัย, 2560) น.49

[26] The Decision of the Supreme Court No.3285/B.E.2553

didn't realize at the time of concluding the contract that some part of the disputed land is in a prohibited area as announced by the Ministry of Science and Technology. From that, the parties entered into an agreement whereby the terms and conditions stipulate clearly that the purchaser would buy this land with the purpose to carry out construction on the land. In this case, the court decided that the buyer was under a mistake on the quality of the object of the contract. Thereby, the agreement between the parties is voidable under Section 157. It could be seen that such a mistake is based on the mistake of law where the vendee ignores the regulations, not to fact. However, the court was driven to apply Section 157 as the defence of mistake in law does not exist under Thai law. Therefore, it is debatable whether it is accurate to apply Section 156 to Section 158 which are expounded only in the case of the mistake of fact, or should the law be amended by including the mistake of law.

2.2 General Principle for Ensuring Free Will

The parties have free voluntary will and are independent in creating legal relationships. Based on this principle, therefore, a declaration of intention becomes one of the essential elements in forming a contract. From that, if an expressed intention is vitiated from the actual intent, such circumstance may affect the validity. Consequently, to categorize the general principles for ensuring the free will of the parties, there are three main concepts which are fraud, duress, and mistake.

2.2.1 Fraud

Fraud is a situation when a person intentionally deceives another by misleading words, conduct, or concealment from what he should disclose aiming to a false acknowledgment of the other for their own benefit.[27] Thereby, fraud is considered to be one of the causes to divert the actual intention and that could undermine the validity.

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[27] Panika Krairin, Fraud by Silence (Master of Law Degree Thesis, Thammasat University, 2012) 8 (ภาณิกา ไกรรินทร์, กลฉ้อฉลโดยการนิ่ง) (วิทยานิพนธ์ปริญญามหาบัณฑิต มหาวิทยาลัยธรรมศาสตร์, 2555) น.8

Under the CCC, matters of fraud are enshrined in Sections 159 to 163. Under these three sections, it could be said that fraud is generated from a breach of the good faith principle. Therefore, if the party makes any commitment because of fraud, the juristic act will always result in voidability irrespective of whether the misunderstanding is in a material aspect or not. Furthermore, it is discernible that fraud leads to the mistake. So, in the same circumstance, the mistaken party may defend themselves to set aside the juristic act by claiming either the mistake or fraudulent, whichever they choose.[28]

2.2.2 Duress

Duress refers to the situation when a person purposely puts pressure on another, forcing him to express an intention to enter into the juristic act or to bear more burden than usual because of that threat. This kind of coercion relates to a mental depression which is called *violenza morale*. *Violenza morale* stands in contrast with *violenza fisica* which pertains to physical harm of the threatened person.[29] Additionally, when someone is under *violenza morale*, he still has an intention but it was vitiated from a true intent because of the duress. Unlike *violenza fisica*, the other is forced physically, such as by holding a hand to sign the contract. Under such circumstances, the person under such threat lacks any intention.

As a threat is considered to destroy freedom of contract, it would always result in invalidity. Therefore, even if the threatening person was a third party, the juristic act is still nullified. Also, it should be remarked that such duress shall be serious enough to affect voidness or voidability to the threatened party to make such a decision. Obviously, without that duress, the threatened party would not make that expressed intention to be bound.

The CCC of Thailand also has sections related to duress in Sections 164 to 166. For example, A had pointed a gun at B with a forcing announcement that he would shoot at B if B did not sign a gift contract to grant land to him. From that,

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[28] Sanunkorn (Jumpee) Sotthibandhu, supra note 1, p.129

[29] Sanunkorn (Jumpee) Sotthibandhu, supra note 1, p.135

such duress affected B to be under pressure and to sign that agreement. Therefore, the gift contract would be voidable under Thai law as stated under Section 164. Nevertheless, the duress that could set aside the validity of the juristic act does not include the right to claim a lawful right under Section 165. For instance, A claims that if B continues to not pay him rent under a rental agreement, he would commence legal proceedings against B.

2.2.3 Mistake

A mistake is untrue or lacks actual intention. If the mistake is essential, it could vitiate the consent which is a necessary factor to form a contract. Moreover, a mistake could occur in any process of decision-making, which may result in different legal consequences. Accordingly, under the Thai CCC, if a party expressed an intention without knowing that it was materially incorrect because it deviated from the true intention, the juristic act shall be void by virtue of Section 156. On the other hand, if the mistake of quality in material had begun since the process of internal intention and results in the expression as misunderstood, the agreement would be voidable by virtue of Section 157.

The concept of mistake is complicated and considered as a debatable issue in several aspects including the applicable theories to seek a balance of fairness for parties in the event of a one-sided mistake between the mistaken party to excuse himself and the other party who is innocent and relies on such mistake. From that, the author has found the issue of mistake to be an interesting legal issue and has chosen to explore the topic to expand knowledge under this thesis.

2.3 Consequences between Voidness and Voidability in Relation to Mistake

Contracts are one of the most frequent juridical acts to govern social relationships. Nevertheless, a contract is not always valid and enforceable as agreed if it is defective. Defects to contratcs can be caused by the intention of the parties to the contract. The consequence of a mistaken intention could lead to the nullity of the contract. As the law has established what is necessary to constitute an agreement in civil and commercial matters, the unreached requirement of contract would result in invalidity in general and thus the parties would have the right not to perform their obligations. Nevertheless, even the principle itself is simple, the complexity still exists in the aspect that there are different kinds of nullities.[30]

In the past, Roman law in the Middle Ages had adopted the distinction between nullity *ipso jure* and nullity *per in integrum restitutionem*. Consequently, the difference between these two had been developed to be obviously distinct. As a result, In the modern differentiation, there are generally two types of nullity, resulting in various degrees of ineffectiveness which are voidness and voidability where each legal system has not adopted a unified view of the consequences in term of the mistake.[31]

2.3.1 Voidness

For the consequence of voidness, it is generally because such a contract is illegal, immoral, or lacking the essential element required to form a contract. Thus, it would lead to absolute nullity from the very beginning where the contract has never been concluded and it would produce no obligation to any party. Thus, it could not be avoided or confirmed because it is impossible to kill what is already dead. Accordingly, no property could be transferred and thus the third party who acquired the good which forms the subject-matter of the contract, even though he paid for the goods, will acquire no title in such property.

Under the CCC, the consequence of voidness is related to acts whose object is prohibited by law or is impossible, or contrary to public order, or good morals as stated under Section 150.[32] Accordingly, in relation to a mistake, the mistake

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[30] E.Sabbath, "Effects of Mistake in Contracts: A study in Comparative Law." The International and Comparative Law Quarterly, Vol 13, No.3, (July, 1964), p.799)

[31] Ibid, p.800

[32] The CCC Section 150. An act is void if its object is expressly prohibited by law or is impossible or is contrary to public order or good morals.

as to an essential element of the juristic act would result in voidness pursuant to Section 156. As a result, such absolute nullity of the juristic act could be alleged by any interested person at any time and the party shall return properties under undue enrichment pursuant to Section 172.[33]

2.3.2 Voidability

Under the consequence of voidability, the parties, commonly the one the law aims to protect, could avoid or affirm the contract within a specified time. Still, if he fails to exercise his right within such period, he would be bound to the contract permanently. Before such avoidance or affirmation, a voidable contract would continue as an effective contract until it is repudiated.[34] Thus, it is said that the voidable contract is a sick contract to be cured or killed as it lives in a manner under the menace of death.[35] However, divergences between each legal system still exist. For example, the recession of voidability would render the contract to be void in civil law countries whereas, on the other hand, it would render the contract to be terminated from the repudiated date in common law countries.

Under the CCC, the consequence of voidability is related to a mistake as to a quality of a person or property under Section 157. As a result, such relative nullity of the juristic act could be avoided by the mistaken party in accordance with Section 175 (3)[36] within one year from the time when ratification could have been made but could not be over ten years since the act was done as stated under Section

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[33] The CCC Section 172. A void act cannot be ratified, and its nullity may be alleged at any time by any interested person.

The return of a property arising from a void act shall be governed by the provisions on Undue Enrichment of the Code.

[34] E.Sabbath, supra 30, p.800 - 803

[35] Lanteran Nadew, 'Void Agreements and Voidable Contract: The Need to Elucidate Ambiguities of Their Effects.' Mizan Law Review, Vol.2, No.1, (Jan 2008), p.92

[36] The CCC Section 175 (3). A voidable act may be avoided by the person of unsound mind who did the voidable juristic act under Section 30 after he has recovered his capacity.

181.[37] Consequently, such juristic act would be deemed to have been void from the beginning and the party shall be restored to the condition in which they were previously, in accordance with Section 176.[38] Nevertheless, if the third party has acquired the property for the value and with good faith, he would be protected by needing not to return such property as stated under Section 1329.[39]

2.4 Conflicting Legal Treatment in Relation to the Principle of Mistake

There are two theories in relation to a mistake, one on each extremity, and with a purpose to strike the balance between preservation of the real intent of the mistaken party on the one hand and the equity of the other contractual party who is innocent on the other hand. The first theory follows a subjectivity approach and the other follows an objectivity approach.[40] Under the subjective approach, generally applied in civil law countries, a party is subjectively mistaken. Such subjective mistake results in the nullity of an agreement without considering the fairness to the other party. In contrast, an objective mistake which is ordinarily adopted in common law

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[37] The CCC Section 181. A voidable act cannot be avoided later than one year from the time when ratification could have been made, or later than ten years since the act was done.

[38] The CCC Section 176. When a voidable act is avoided, it is deemed to have been void from the beginning; and the parties shall be restored to the condition in which they were previously, and if it is not possible to so restore them, they be indemnified with an equivalent.

If any person knew or ought to have known that an act is voidable, he, after making the avoidance, is deemed to have known that the act is void since the voidable act became known or ought to become known to him.

The claim resulting from restoring them to the previous condition under paragraph one cannot be exercised later than one year from the date of avoidance of the voidable act.

[39] The CCC Section 1329. The right of a person who has acquired property for the value and in good faith is not affected even if the act under which his transferor acquired the property was voidable and has been subsequently avoided.

[40] Dwin C. McKEAG, Mistake in contract: A Study in Comparative Jurisprudence (2nd edn, the Law Book Exchange 2004) 13

countries entails the situation whereby a reasonable bystander would lack consent when considered based on the outwardly expressed intention. It is obvious that this doctrine believes that the expression represents the will.[41]

2.4.1 Subjectivity

The subjective approach is concerned with the actual intention of the parties to the contract. This principle concentrates on what the parties truly intend at the time the contract was formed without considering what they externally express.[42] Thus, it prioritizes the doctrine of freedom of contract above all other doctrines as the parties are bound to the agreement only if they are subjectively and actually intended themselves to be. From that, Aharon Barak provided a memorable description of this matter as follows:

The subjective purpose reflects a true intent of the author at the time the text was created. It is a physical-biological-psychological-historical fact. It is an 'archaeological' fact. It is a 'genetic' fact. It is a 'static' fact. It does not change with time. It is not the intent that the author would have had, had he or she thought about the matter, nor is it the intent of the reasonable person; these types of intent constitute objective purpose. Subjective purpose is the 'real' intent of the text's author, the intent the author[s] had, as a matter of fact, at the time he or she [or they] created the text.[43]

Although Barak's conception sounds reasonable, it is doubtful to find the way to measure the internal intentions of the parties because no one could access the other people's mind to know their true intent as Maarten Henket put forward that:

No matter how careful we are and how many particulars we take into consideration, the intention we find will always be a conjecture. We can never be

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[41] Pinai Nanakorn, Unidroit Principles of International Commercial Contracts 2016 for the lecture in LL.M. Thammasat, slide 45

[42] Marija Karanikic Miric, 'A Critical Look at the Subjective and Objective Purposes of Contract in Aharon Barak's Theory of Interpretation.' Baltic Journal of Law & Politics, Vol 9, No.1, (2016), p.11

[43] Ibid, p.11

sure to have discovered the real subjective intentions of the actor at the time of the act. It is, therefore, at the most probable intent that serves as a basis for juridical decision-making. [44]

From that impossibility to unconditionally seek for the exact intention, in practical ways, an interpretation of true will and the normal understanding of such behaviors with the existing norms could not be totally separated in order to understand the overall context. Therefore, it cannot be denied that this theory still has overlap with the expression because it is one of the concrete evidences to convince the judge to believe what he actually intended in the time of making contract.[45] From that, the party who claims that his intent was deviated from the actual one has to offer the evidence of his past behaviors and surrounding circumstances with the attachment of its meaning. After that, the court would apply the criteria in determining the actual will of that party. According to Barak, one way that the court could ascertain the true intention is by examining the wording of the agreement as a whole and surrounding the formation of the contract. Obviously, it still has a connection with external expression.[46]

Yet, modern scholars including Zimmermann believe that applying this theory alone would adversely affect certainty to the law.[47] Besides, it would be incorrect to seek for a central notion of mistake only in subjectivity which is a pure will theory as it shall be evaluated with objectivity to allow smooth continuation of commerce. Therefore, if the mistaken party has an unlimited right to avoid the contract, it would establish an unacceptable threat to the security of transactions. Thus, it should not be solely interpreted but better intermingled with the objective theory to find the fairest outcome for all related parties. For instance, in Germany there is an attempt to combine this doctrine with the objectivity doctrine. The German Civil Code not only requires examination into a declaration of intention whereby real

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[44] Ibid, p.11

[45] Ibid, p.12

[46] Ibid, p.14 - 15

[47] Ibid, p.15

intention shall be decided without consideration of literal meanings, pursuant to Section 133[48] but the court also ruled that it must respect the ground of good faith in commercial practice as stated under section 157[49] as well.

2.4.2 Objectivity

The objectivity doctrine is opposite to the subjectivity doctrine in that the objectivity doctrine accepts only what is expressed externally as explicit evidence proving the literal intention of the party. Bahr explains that when a contract is made, one party has the responsibility to form a serious intent.[50] Therefore, the other honest party in an agreement is served the right which the mistaken party cannot take away by claiming that in fact, he has not had such intention.

Another interesting opinion comes from Judge Learned Hand. Judge Hand posits that although the party's expression is not what he actually intends, his expression is still bound to him as follows:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it was proved by twenty bishops that either party, when he used the words, intended something else that the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.[51]

On the other hand, under Barak's point of view, an objective purpose is the intention of the system and may not be the true intention of the parties. Thus, there are various levels to be considered, from lowest to highest. In detail, the lowest levels are dependent on reasonableness, logic, and efficiency because it reflects the

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[48] The German Civil Code Article 133

[49] The German Civil Code Article 157

[50] Dwin C. McKEAG, supra 40, p.41

[51] Wayne Barnes, 'the French Subjective Theory of Contract: Separating Rhetoric from Reality.' Tulane Law Review, Vol.83, (2008), p.363 -364

intention of a hypothetical reasonable man whereas the highest levels reflect the fundamental values of the system. Consequently, to choose which level to be applied in court, he suggests a judge commence with the lowest one, and if it is not clear enough to address the issue, the next upper levels shall later be taken into account. Barak stated that:

The objective purpose of a contract is therefore to promote justice and the public interest. Because human rights are central among fundamental values, the objective purpose of a contract is also to promote equality, free speech, and freedom of contract.[52]

From that, it is discernible under his opinion that there is no explicit distinction between the subjective approach and objective approach in the lowest stage as the subjective doctrine also demands external intention to be an evidence for the court to ascertain the actual intention.

Common law countries once had adopted the principle of subjectivity. Nevertheless, with passage of time, it was eventually replaced by the objectivity approach. This is because the court had to take into regard commercial activities and prevent an unfavorable effect from the subjectivity approach. It also had to ensure reliability for contractual parties.[53] Therefore, this principle has been developed to be more flexible. In the past, the classical objective theory concentrated only on the "reasonable person" as the intentions from the parties shall be bound if the reasonable person in the position of that party shall understand that expressed circumstance. Later on, under the modern doctrine, pure objectivity is no longer in use but the subjective theory is incorporated.

From all of this, it can be seen that the two pure doctrines at either end of the spectrum are far from producing justice to either party. So, the middle way where these two may be the finest solution. Accordingly, modern legal systems have attempted not to adopt any doctrine solely but make a combination that could better lead to the fairest consequences and strike a balance.

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[52] Marija Karanikic Miric, supra 42, p.19

[53] Wayne Barnes, supra 51, p.365

CHAPTER 3
MISTAKE IN FOREIGN LAW

In addition to Roman law which had influenced the legal system of several European countries, the comparative study in this study would also focus on firstly, English law as a common law country that adopts the objectivity doctrine, secondly, French law as a civil law country that adopts the subjectivity doctrine, and lastly, the UNIDROIT Principles of International Commercial Contracts 2016 which is a model law that combines between each system to figure the fairest solutions. Accordingly, the author would discuss the core principles of each legal doctrine to identify the interesting points.

3.1 Roman Law

One of the precious heritage Romans left to the world is several legal concepts, especially in the area of civil and commercial law. Going back to that historical period, Greek was mostly concerned with the philosophy of law whereas Romans paid attention to enforceable law in a practical way. This included determining how to regulate the status of contracts. From that, Medieval Europe was influenced by applying and extending Roman law.[54] Therefore, it would be advantageous to study Roman law to understand the root of many other legal systems that followed.

3.1.1 Classical Roman Law

The beginning point to study the principle of contractual mistake is Roman law especially in the classical era as both common law and civil law was influenced by this empire before generating their own doctrines. During this period,

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[54] Munin Pongsaparn, The Civil Law Systems: From the Twelve Tables to the Thai Civil and Commercial Code (3rd edn, Winyuchon 2020) 61 (มุนินทร์ พงศาปาน, ระบบกฎหมายซีวิลลอว์: จากกฎหมายสิบสองโต๊ะสู่ประมวลกฎหมายแพ่งและพาณิชย์ (พิมพ์ครั้งที่ 3, วิญญูชน 2563)) น.61

most concepts were mainly drawn from jurists as a source of law which is called *ius respondendi*.[55] There are several prominent Roman jurists including Ulpian, Pomponio, Giuliano, whose sentiments concerning the principle of mistake are widely accepted. Going back to the first step in the Ancient Roman era, the concept of mistake had not yet existed as the priority to determine the validity of a contract was a formation.[56] After that, jurists developed four types of contracts[57] the existence of which is dependent upon the intention, as opposed to merely considering whether the correct contract form has been met. In other words, if contracts did not come from the real intent of the parties, the contract could be defected due to mistake. Such consensual contracts were divided to be a contract of sale (*emptio venditio*), a contract of hire (*locatio conductio*), a contract of partnership (*societas*), and a contract of mandate (*mandatum*). In particular, *emptio venditio* was the most interesting issue that jurists had to solve and later became the most influential to modern law. Under this type of contract, three elements are required. The three elements were a thing, a price, and consent or consensus. As a result, the lack of real consent, including the lack of consent as a result of a mistake, would directly affect the validity of contract.

Furthermore, Roman law developed the division of mistake to determine whether a true intention could be annihilated and from what kind of mistake. Therefore, the jurists provided various assessments to error of fact[58] or *error facti* as follows.

3.1.1.1 *Error in Corpore*

Error in copore is a mistake as to the asset which is the subject matter of a contract. Under this concept, Ulpian believes that a contract of sale

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[55] Sanunkorn (Jumpee) Sotthibandhu, supra 11, p.15

[56] Reinhard Zimmermann, Roman Foundations of the Civilian Tradition (Johannesbeurg: 1992) 587

[57] Mihai OLARIU, Contracts in Roman Law (Phd. University Lecturer, Romanian – American University) p.7

[58] Gabriel TITA-NICOLESCU, 'Error. Brief Remarks on the Legal Novelties on Error.' Law Review, Vol.6, (Dec 2016), p.43

requires consensus.[59] Therefore, without consensus from parties on the object of a sale agreement, the contract would be invalid. For example, under a sale contract, if what the vendee intends to purchase is another asset than the one the vender intends to sell, the sale contract would be invalid.

3.1.1.2 *Error in Pretio*

Error in pretio is a mistake in the price to be paid which, as mentioned before, is a material element in forming the sale contract. Therefore, according to Ulpian, this types of mistake would render the contract void.[60] Nevertheless, Poponio believed that this kind of error could result in two outcomes, one being that the formation of the contract is prevented, and the other being that the contract is partially effective.[61] Under this scenario, Pomponio gave an example of a lease contract whereby if the landlord has agreed to lease land at a higher price than the lessee would propose to, the agreement would be prevented from being formed because consensus is a prerequisite to the contract. Conversely, if the lessor intended to lease that land at a lower price than the price the lessee believed, such lease could be partly effective in the lower figure as no party has beneficial interest from this mistaken intention and at least there was a meeting of consensus between the parties in the smaller amount. From that compromise proposed by Pomponio, Zimmerman commented that it was an attempt to apply the law in a more flexible manner.[62]

3.1.1.3 *Error in Negitio*

Error in negitio is a mistake in the nature of the contract. Generally, if the contract lacked consensus from parties, it would be invalid. For example, if A intends to lend money to B but B mistakenly believes that the sum of money is a gift, such transaction is neither a loan nor a gift agreement as there was a beneficiary in the agreement because of the mistake. On the other hand, the mistake

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[59] Catharine Macmillan, Mistakes in Contract Law (Oxford and Portland, Oregon, 2010) 19

[60] Ibid, p.18

[61] Sanunkorn (Jumpee) Sotthibandhu, supra 11, p.16

[62] Catharine Macmillan, supra 59, p.18

in the nature of the contract could sometimes be valid if no party had any beneficial interest.[63] For instance, if A intends to give the money as a gift but B misunderstands that it is a loan, it means that A has no benefit from such mistake. Therefore, the transaction as a gift was valid.

3.1.1.4 *Error in Persona*

Error in persona is a mistake as to the person who concluded the contract.[64] Unfortunately, in this era, this type of mistake did not receive much attention from the jurists. Therefore, it was not so developed.[65] Principally, the *error in persona* would render the invalidity of agreements. This meant that neither the wrong party in the contract nor the intended party outside the contract would be bound to such agreement. For example, if a testator mistakenly writes the name of a person to be his heir, neither the person stated in the will nor the person that the testator truly intended would be able to claim for validity.[66] However, some types of contracts would still be valid even if there was an *error in persona*. For example, in a contract of sale regardless of whether the parties were contracting face to face or at a distance, it would be commonly enforceable because the nature of the sale contract is not concerned with the identity of a person.

3.1.1.5 *Error in Substantia*

Error in substantia is a mistake in the essence of the characteristics in an asset being a subject matter to a contract.[67] Under this kind of mistake, the opinions of jurists were contrarily divided into two. The first one was from Marcellus who regarded that *Error in substantia* would not render the contract void.[68] On the other hand, Ulpian, Julian, and Paul believed that the result would be the same as in a situation of *error in corpore,* as the object is practically different from

[63] Sanunkorn (Jumpee) Sotthibandhu, supra 55, p.17

[64] Gabriel TITA-NICOLESCU, supra 58, p.44

[65] Catharine Macmillan, supra 59, p.17

[66] Dwin C. McKEAG, supra 40, p.24

[67] Gabriel TITA-NICOLESCU, supra 58, p.44

[68] Sanunkorn (Jumpee) Sotthibandhu, supra 11, p.18

what it is supposed to be.[69] For instance, the mistake in understanding that a paste diamond is genuine is a mistake in material in characteristics, even though the object, namely the diamond, is the same piece. Therefore, it led to a ground of nullity of such a sale contract. From these conflicting comments, even Ulpian's theory influences a present doctrine, there is a complication arising as present authors put various criteria to measure this kind of mistake in a different way. Therefore, it may be confusing when applying this concept. For example, which level of mistake to consider to be material enough to obstruct the validity of a contract.

3.1.1.6 *Error in Qualitate*

Error in qualitate is the mistake in quality but it could not be considered as an *error in corpore* because it was not essential enough. Therefore, it could not nullify the contract.[70] For instance, the fineness or purity of gold is not crucial enough to result in a nullity as it is still gold but with a different quality.

Besides from the mistake in fact or *error facti*, there is a mistake in law or *error iuris*.[71] In this era, it was generally believed that a mistake on legal grounds could not interrupt the consent of the parties and render it incomplete as everyone should know the law.[72] So, it was consistent with a principle that no one could be exempted from liability due to the absence of knowledge of law which was called *ignorantia iuris non excusat*. From that, the mistake in law would not affect the validity of a contract.

To conclude, during the classical Roman period, *error facti* could obstruct the formation of consensual contracts which did not fall under a contract form. Unlike contracts that had legal enforcement to be under the formation, the principle of mistake in fact could generally not prevent the validity of contract. Furthermore, it can be seen that in this era there was an absence of a crystal-clear criteria to distinguish between an internal intention and a declaration of intention.

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[69] Catharine Macmillan, supra 59, p.21 - 22

[70] Dwin C. McKEAG, supra 40, p.29

[71] Gabriel TITA-NICOLESCU, supra 58, p.45

[72] Sanunkorn (Jumpee) Sotthibandhu, supra 11, p.21

3.1.2 Medieval Roman Law

After the period of classical Roman law comes the era of post-classical Roman law. During this period, jurists had accepted the existence of both *error facti* and *error iuris*. Moreover, they believed that the mistaken intention would result in the voidness of contract. This was known as *errantis voluntas nulla est*.[73] Also, the emperor Justinian had gathered fragmented legal principles to be united in the code called the Justinian code which is also known as *Corpus Iuris Civilis*.[74] Subsequently, Roman law was in the dark ages where it was almost abandoned and existing only in classrooms. Fortunately, Justinian's Digest was found and that was the starting point of the revival of legal studies in Europe and that was the beginning of the era of medieval Roman law.[75]

A mistake of Roman law in this era had been divided and developed by various schools. At the beginning, the very first well-known scholars were the Glossators in Bologna. This school was founded by Irnerio who explained the Digest of Justinian through a note called Glosses. Furthermore, this institution posited that a contract would be void if it was made under one of the following six types of mistakes, namely, an error in the fact of the sale, an error in price, an *error in corpore*, an *error in materia*, an *error in substantia*, or an error in sex. After that, in the fourteenth and fifteenth centuries, another scholastic academy was formed by the Commentators. The Commentators had tried to connect and incorporate Roman law and other relevant sources of law in order to provide a legal solution. they also believed that if the six types of mistakes identified by the Glossators were an error in substance, the contract would be void.[76]

After that, the following epoch influenced by Roman law was the common law of Europe called *ius commune* which had tried to extract all doctrines

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[73] Sanunkorn (Jumpee) Sotthibandhu, supra 11, p.23

[74] Munin Pongsaparn, supra 54, p.139

[75] Catharine Macmillan, supra 59, p.27

[76] Catharine Macmillan, supra 59, p.28

from the Commentators and then expanded these concepts to all over Europe.[77] After that, in the sixteenth century, Humanists began to take interest in law and believe that Justinian's codification had some aspects related to society, culture, and history. Therefore, this institution tried to resort back in Roman law to search for solutions to legal problems with the belief that the knowledge extracted from the Commentators could not be trusted. From that, they had eliminated Medieval studies, but rather studied from authentic original meanings which later had a significant influence on natural lawyers.[78] Such circumstance resulted in the establishment of several Modern theories in various European countries.

3.2 English Law

As the CCC of Thailand was drafted with the influence from civil law countries such as Germany and Japan, it would not be difficult to understand the principle of mistake applied in those countries because there are similarities with Thailand. Nevertheless, Thai lawyers are not familiar with the doctrine of mistake applied in common law countries. Therefore, this thesis has attempted to study the topic of mistake in English law which has also impacted other common law countries to be the representative of the common law jurisdiction's aspect and later make a comparison.

The concept of mistake in England is complicated and inconsistent in some aspects because it lacks a conceptual unity. In general, there are three main types of mistakes. Firstly, a common mistake refers to cases where parties substantially have the same mistake. Secondly, a mutual mistake can be attributed to the situation where parties are under mistake. Nevertheless, it has an uncertain conclusion whether such

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[77] Sanunkorn (Jumpee) Sotthibandhu, supra 11, p.24

[78] Catharine Macmillan, supra 59, p.29 -30

mistake of the parties shall be the same or not. Lastly, a unilateral mistake is when only one party has a mistake whereas the other has an actual intention.[79]

At present, the categories of mistake has been summarized by Lord Phillips in *Great Peace Shipping Ltd v. Tsavliris Salvage [International] Ltd.*[80] through his judgment.

3.2.1 Common Law Mistake

Common law mistake could be divided into two categories.

3.2.1.1 Mistakes that Negative Consent

This type of mistake could be divided into two types which are a mutual mistake and unilateral mistake.

(1) Mutual Mistake

This type of mistake is applicable when the parties are at cross-purpose by contracting on the basis of different assumptions about the terms.[81] A classic example can be found in *Raffles v. Wichelhaus*.[82] In this case, at the time of making the contract, there were two vessels from Bombay called 'Peerless', departing from the port in October and December. The different departure times led the parties to belief incorrectly that the two vessels are one and the same. Hence, the seller loaded the goods in December whereas the buyer understood that the goods would leave in October. From that, the buyer would like to deny the enforcement of the contract on the grounds of mistake. The Court allowed the purchaser to prove his mistaken intention in relation to the leaving time to avoid the contract. It could be

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[79] Pinai Nanakorn, The story of Nakorn Si Thammarat's province: Royal Funeral Memorial book of Nukul Nanakron, 1999 192 - 193 (พินัย ณ นคร, เล่าเรื่องเมืองคอน: อนุสรณ์ในงานพระราชทานเพลิงศพ อาจารย์นุกูล ณ นคร (2542)) น.192 - 193

[80] Great Peace Shipping Ltd v. Tsavliris Salvage [International] Ltd, [2002] EWCA Civ 1047, Court of Appeal

[81] Richard Stone and James Devenney, Text, Cases, and Materials on Contract Law (3rd edn, Routledge Press 2014) 387

[82] Raffles v. Wichelhaus, [1864] 2 Hurl & C 906

seen that the parties seemed to have agreed but had not agreed in fact[83] because the parties were at a mutual mistake as to different views on which ship was meant.

(2) Unilateral Mistake

This kind of mistake is a one-sided mistake irrespective of whether the other party is aware of such a mistake or not. In the event that the contractual parties are aware that the other party is materially under a mistake, there is one significant case to be an example. It is the case of *Hartog v. Colin and Shields*.[84] In this case, a plaintiff had sued a defendant on the grounds of breaching the contract because the defendant could not deliver 30,000 Argentine hare skins as agreed in the contract. Yet, the defendant argued that his actual intent was to sell the goods at the price per piece which was a general commercial practice, not a price per pound as offered. Obviously, the fact was that the value of the pound was roughly three times compared to the value of the piece, which is something that the plaintiff well knew. So, the court held that the plaintiff was not entitled to receive damages because he must have known that the defendant made a declaration with a material mistake. Therefore, there was no binding contract to be enforced.

Apparently, this is influenced by the objectivity doctrine which aims to protect other innocent parties from a mistake which he did not make by upholding the expressed intention of the mistaken party over the internal intention. Therefore, if it turns out that one party in a contract notices that the other party is under a mistake and fails to inform that party of such mistake, there is no point to insulate him and the contract shall accordingly be deterred. To clarify, Cockburn CJ emphasized in *Smith v. Hughes*[85] that the law of contract does not generally intervene merely because one party is more knowledgeable than the other. Furthermore, if there are overwhelming prohibitions, it may obstruct the creation of contracts because no one could see any advantage from entering into commercial transactions. Thus, it is

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[83] Charles Fried, Contract as Promise: A Theory of Contractual Obligation (2nd edn, Oxford University Press 2015) 59

[84] Hartog v. Colin and Shields, [1939] 3 All ER 556

[85] Smith v. Hughes, [1871] LR 6 QB 597, Court of Appeal

reasonable that in the market, a party could benefit from superior knowledge.[86] Nevertheless, to strike a fair balance, the law does not rectify the party who had known the materially mistaken intention of the other party and had taken an advantage from that ground. Hannen J in *Smith v. Hughes* explained that "the promisor is not bound to fulfill a promise in a sense in which the promisee knew at the time the promisor did not intend it."

It can be viewed that the above circumstance is opposite from the event when the other contractual party is innocent as he did not realize such mistake. From that, the legal consequence would be different. Under the English law objectivity approach, contract formation requires several factors, including the intention of the parties to create a legal relationship.[87] In accordance with the mistake, even the voluntary wills are significant, the balance of legal consequence between all contractual parties is still compulsory. Therefore, the court would not consider the mistake to set aside the contract in general but leave some room by allowing a limited number of situations that the party subject to the mistake can raise to nullify the contract in order to relieve this strictness of objectivity.[88] Certainly, as the common law adopts an objective rather than a subjective approach, protection is extended to the other party and the certainty of commercial transactions as opposed to protecting the mistaken party. In addition, there are difficulties in investigating the actual intention because no one could access another's mind. So, a material mistake alone cannot prevent the formation of a contract as it requires more conditions to nullify an agreement. Thus, the concerned criteria is on an outward intention rather than an inward intention determined on a case by case basis and the judges would put

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[86] Richard Stone and James Devenney, supra 81, p.392

[87] Lawyers from Allen & Overy, "Basic Principles of English Contract Law.", Advocates for International Development, p.5, [Online], Available from: http://www.a4id.org/wp-content/uploads/2016/10/A4ID-english-contract-law-at-a-glance.pdf accessed 15 March 2021.

[88] Evan McKENDRICK, Contract Law: Text, Cases, and Materials (5th edn, Oxford University Press 2012) 519

themselves in the shoes of the reasonable person to positions of the parties.[89] Therefore, if the reasonable man trusts the outward intention to be an actual intent, then the mistaken party would be bound and would unlikely have the possibility to defend. Apparently, the parties should be aware of every progress of making an intention because there are limited exceptions to spoil an agreement on the grounds of mistake.

To clarify further, Howarth describes that an objective approach incorporates more than one interpretation as it could be viewed in three aspects from the different positions of all related persons to a contract.[90] First, the promisor objectivity which takes the perspective of what the promisor who is a reasonable man would understand regarding the promise he made. Second, the promisee objectivity which is based on the side of a reasonable promisee whom the promise is made would understand such promise. Last, the detached objectivity as to what an independent person would understand about the promise from an outside view. Still, these distinctions lead to difficulties of application especially in bilateral contracts because the parties would generally be in the position of the promisor and the promisee at the same time because they both have rights and duties to fulfill in relation to the contract.[91] For example, under a sale contract, a promisor could be both the seller and the buyer because the seller has a duty to sell the goods whereas the buyer has a duty to pay. At the same time, they are both the promisee in the aspect that the seller has the right to receive payment and the buyer would own the goods. From these confusing descriptions, it is questionable whether such descriptions should be reconsidered to be rejected or not. Nevertheless, at least, Howarth's definition has the benefit of indicating that the objective theory can be viewed from different perspectives.

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[89] Larry A. DiMatteo, 'The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment.' South Carolina Law Review, vol. 48, (Winter 1997), p.301

[90] William Howarth, "A note of the Objective of Objectivity in Contract" [1987] 103 LQR 527, 528

[91] Evan McKENDRICK, supra 88, p.21

Furthermore, an explanation demonstrating that this kind of unilateral mistake is subject to an objective approach is through a case study called *Smith v. Hughes*.[92] In this case, a vendee had accepted to purchase oats from a vendor with the misunderstanding that the oats were old. The vendee later found out that such oats were, in fact, new, leading to a refusal to enforce the sale contract. In the court's proceedings, there was a conflict of evidence as the vendee (defendant) had asserted that his expressed intention was to purchase the old oats but the vendor (plaintiff) denied that there was any mention between the parties on the topic of whether the oats were old or new. This conflict represents the situation where the parties' minds were not ad idem on the age of the oats which was considered significant. Blackburn J decided as follows:

if whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

It is clear that the court adopted an objective approach by indicating that the misbelief was not satisfactory enough to persuade the court to rule that no contract had been concluded. Therefore, it could be said that being subject to a mistake could not prevent the validity of a contract because the objective doctrine is more concerned with the outward intention than the inward intention. However, a mistaken party may escape contractual liability if the mistake is caused by ambiguity.[93] This is the result of applying the objectivity rationale regarding the other innocent party not being able to access the internal intention of the mistaken party. Accordingly, if the reasonable person cannot conclude that the expressed intention was the true intent, the other party shall not be able to raise this ground for enforcement and such cause of mistake should be fair enough to set aside the agreement. This exception was

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[92] Smith v. Hughes, [1871] LR 6 QB 597, Court of Appeal

[93] Pinai Nanakorn, supra 79, 205

tested in *Scriven Bros. & Co. v. Hindley & Co.*[94] In this case, there had been an auction sale of a lot of tows and a lot of hemps. In general, tow commonly costs higher than hemp. The defendant bid a lot of hemps with a higher price than usual as a result of the misunderstanding that it was a lot of tows. Evidently, this mistake arose from the shipping mark of these two lots being the same whereby in traditional trading, they would generally have had different shipping marks. Therefore, the Court ruled that such contract was under ambiguity and the reasonable man could not conclude that the defendant intended to bid a lot of hemps. So, the plaintiff could not enforce the contract.

3.2.1.2 Mistakes that Nullify Consent

The general rule of this type of mistake is that a contract would be void if the parties had entered into the contract on the basis of common assumption but it turned out to be false and such mistake is fundamental which include;

(1) Non - Existent Subject Matter

This concept was generated from *Couturier v. Hastie*.[95] In this case, the buyer purchased a cargo of corn which both parties had not known at the time of concluding the contract that the master of the ship had already sold it. When both parties became aware of this fact, the vendor claimed that the vendee had to pay for the price of the corn. Still, the House of Lords ruled that the purchaser had no liability as the corn no longer existed. Manifestly, *Couturier* reflects that if the subject matter to the contract no longer existed (*res extincta*), the contract would be void because the parties had a common mistake concerning the existence of the subject matter of the contract. This precedent demonstrates the voidness of contract on the grounds of mistake even if the judgment does make any reference to the principle of mistake. Lord Chancellor Cranworth remarked that in any sale agreement, there was something to be sold and to be purchased. Therefore, if there was nothing to be sold, there was nothing to be bought. From that, before deciding whether the contract was

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[94] Scriven Bros. & Co. v. Hindley & Co., [1913] 3 KB 564

[95] Couturier v. Hastie [1856] 10 ER 1065, House of Lords

valid or not on the grounds of mistake, it should first concern obligations that the parties assume to be done.[96] After *Couturier*, subsequent cases concerning res extincta including *Pritchard v. Merchants'*[97] where both parties made a sale of an annuity contract upon the life by not realizing that the person objecting to the contract had already died. Therefore, the subject matter to the contract no longer existed leading to the voidness of the life insurance agreement.[98]

After the establishment of *res extincta*, a subsequent doctrine was developed. It concerned the legal title in the subject matter of a contract when goods had already belonged to the purchaser at the time of making an agreement and is called *res sua*.[99] A concrete example of the *res sua* doctrine is in the *Cooper*[100] case. Here Mr. Cooper, the nephew, had leased the salmon fishery from an owner who was his uncle. After that, the uncle died and Mr. Cooper continued to renew this lease contract from his aunt without knowing from the parties that in a will, his uncle handed over ownership of the fishery to him as the beneficiary. As such, Mr. Cooper became the owner of the object in the lease agreement. Therefore, such agreement was not required and was set aside because it falls under *res sua* as the parties had the common mistake in the ownership.

(2) Common Mistake as to Quality

Besides *res extincta* and *res sua*, a mistake in general including the quality of the subject matter to the contract is one type of common mistake.[101] For this doctrine, confusion in application still exists in England as evident in *Bell v. Lever Bros. Ltd.*[102] In this case, Level Brothers Ltd had control over Niger company and hired Bell to be the chairman. Afterwards, the board decided to merge Niger with

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[96] Evan McKENDRICK, supra 88, p.556

[97] Pritchard v. Merchants' and Tradesman's Mutual Life Assurance Society [1858] 140 ER 885

[98] Evan McKENDRICK, supra 88, p.556

[99] Pinai Nanakorn, supra 79, 195

[100] Cooper v Phibbs [1867] UKHL 1

[101] Pinai Nanakorn, supra 79, 195

[102] Bell v. Lever Bros. Ltd [1932], AC 161, House of Lord

another company and terminated the employment contract with Bell. From such termination, the parties had mutually agreed on compensation. However, Niger later found out that Bell breached the employment contract while in office. From that, if Niger had known this before, it would not pay for the compensation. Therefore, the case was brought to the court and the trial judge held that the compensation agreement was void under the common mistake on the grounds that Bell understood that he was entitled to that payment and Niger admitted on its payment's duty. Nevertheless, on appeal, the House of Lords held by a 3-2 majority that the compensation agreement was still valid because the mutual mistake was based on quality. It could be seen that the mistake as to quality has a limited role to play in English law.

Furthermore, Lord Atkin, one of the judges in the majority, explained further that mistakes could be divided into three categories. First, a mistake as to an identity and, second, the mistake in the subject matter to the contract. These two types of mistakes are sufficient to render the contract null and void. On the other hand, the third type of mistake, the mistake in quality, is the type of mistake that could not get as far as setting aside the contract. Nevertheless, Lord Warrington of Clyffe provided a dissent opinion on the question whether the agreement should be void because such a mistake was essential whereby without this erroneous assumption, the compensation contract would not have been made.[103]

In light of the judgment, in considering the reason of measuring whether a mistake is fundamental or not, Catharine MacMillan contributed an interesting opinion that the historical surrounding to the facts behind this case is not the bedrock to support the doctrine of mistake. MacMillan remarked that "the reason that mistake was not considered sufficiently fundamental in this case was because of the peculiar and exceptional circumstances that gave rise to the termination agreements. Hard cases really do make bad law."[104]

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[103] Evan McKENDRICK, supra 88, p.542 - 543

[104] Catharine MacMillan, 'How temptation Led to Mistake: An Explanation of Bell v Lever Brothers, Ltd.' Law Quarterly Review, (Oct 2003)

3.2.2 Mistake in Equity

The test applicable to a mistake in equity is distinguished from the test applicable to a mistake at law as a mistake in equity was more flexible. This flexibility has been shown through *Solle v. Butcher*.[105] In this case, Butcher took a lease from Solle for Maywood House. Under the Rent Restriction Acts, a lessor cannot charge rent of over 140 pounds per year, unless the building was under substantial. The parties mistakenly believed that the building was undergoing substantial alteration and as such had agreed that the rent for this building were to be 250 Pounds per year, which is over the allowed amount pursuant to the Rent Restriction Acts. Nevertheless, this Act provides that there must be a notification of intention to increase the rent, but yet the parties had also failed to do so. From that, Butcher (the lessee) brought a claim to recover the over-payment but Solle (the lessor) claimed that the lease contract was void on the grounds of a common mistake. The court ruled that the agreement should be set aside on terms as the court applied the equity principle in order to relieve the party from the consequences of his own mistake as long as it was not unjust to the third party.

It could be noticed that this case is distinguished from *Bell v. Lever Bros. Ltd* as the Court of Appeal could not refuse the decision in *Bell*'s case handed from the House of Lords because it is unusual to disapprove its own decision. Therefore, Lord Denning explained his notion that there were two types of mistakes which were a common law mistake and mistake in equity. This separation has provided three points to differentiate between mistake in equity as per *Solle* from common law mistake as per *Bell*.[106] Firstly, mistake in equity is broader than common law mistake. Secondly, it renders the contract to be voidable, not void as in the case of a mistake of law. Finally, the invalid contract could be on terms that adjust the rights and responsibilities of the parties. Therefore, it could be said that equity became the

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[105] Solle v Butcher [1950] 1 KB 671

[106] Evan McKENDRICK, supra 88, p.557

doctrine to solve particular cases where common law could not provide justice. Steyn J commented that;

a narrow doctrine of common law mistake (as enunciated in *Bell v. Lever Bros. Ltd*), supplemented by the more flexible doctrine of mistake in equity (as developed in *Solle v. Butcher* and later cases), seems to me to be an entirely sensible and satisfactory state of law.

After that, *Solle* became an authority for following cases for over fifty years including for the *Magee v. Pennine Insurance Co Ltd* case.[107] In this case, Thomas Magee had signed an insurance proposal under the misunderstanding that he had a provisional license which, in fact, he didn't. Relying on this proposal, Pennine Insurance Co Ltd. then issued the policy of insurance to him. After that, Thomas Magee made a claim of 600 Pounds because the car which is the object of the contract was wrecked. The insurance company, therefore, had offered a compromise contract for 385 Pounds which he accepted. Nevertheless, the insurance company later found out the fact that Thomas Magee held no license which meant that the proposal was incorrect and thus the company refused to pay for compensation. The Court of Appeal held that both parties entered the contract because of a common mistake and that the contract was valid at law but it was set aside because of the principle of equity. Although the majority held such a decision, Wynn LJ. dissented claiming that this case was no different from *Bell* in the aspect that one party believed that he had the obligation to pay but in fact he did not. However, the legal results from these two cases were different between valid and invalid as one chose to apply the mistake in equity. Therefore, it is obvious that there have been inconsistent decisions between *Bell* compared to *Solle* and subsequent cases.[108] Besides, *Solle* has been criticized on the point that the court has no authority to relieve parties from the consequence of a void contract where there was no misrepresentation. As a result, the court should consider the mistake at law first and if the contract is still valid, the court may proceed with the equitable relief to the parties.

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[107] Magee v. Pennine Insurance Co Ltd [1969] 2 QB 507, (1969) All E.R.891

[108] Pinai Nanakorn, supra 79, 203

Because of such uncertainty, when time passes, there was a case attempting to suppress the doctrine of equity. This was the *Great Peace Shipping Ltd v. Tsavliris Salvage (International) Ltd* case.[109] This case overruled *Solle* by providing that *Solle* should be disapproved because of the inconsistency and incorrect decision in terms of legal principle. Furthermore, it was impossible to reconcile *Bell* with *Solle* and that *Bell* is not good law and should no longer be followed. The facts in *Great Peace* is that salvors agreed to service the salvage for a vessel named Cape Providence. Thus, the salvors had an oral agreement with Great Peace hiring it for five days with the misunderstanding that Great Peace was 35 miles apart from Cape Providence. In reality, it was 410 miles away. After having noticed this fact, the salvors did not immediately cancel the agreement until they found another available vessel to function instead. Therefore, Great Peace sued for compensation for the five working days but Cape Providence argued that the hire agreement was void. From that, the Court of Appeal by Toulson J held that the mistake in distance between Cape Providence and Great Peace were not imperative enough to set aside the contract because Great Peace could fulfill the agreement as evident from the fact that the defendant had not shortly revoked the contract but delayed it until it was able to find the new one.

This case has served the conclusion that the common mistake tends not to set aside the contract as when the parties agreed on something at the time of making an agreement which was impossible to fulfill because of the mistaken state of affairs, one of them will always still be responsible for that. It may be explained that if the parties were of greater diligence, they might find the truth at the time entering into the contract. Unlike the doctrine of frustration, it is the situation where something occurred without their control, thereby preventing the party from performing the obligation. In such case, generally neither party will have to be responsible for that performance because they could not realize at the time of concluding a contract for that interrupted future.[110] Furthermore, sometimes legislation may give more flexibility

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[109] Supra 80

[110] Evan McKENDRICK, supra 88, p.557

to solve a case than common law does which means it is not necessary to wait until the Court of Appeal makes a ruling.[111]

To conclude, a mistake in equity exists in principles but has not been used in the context of both common mistake and unilateral mistake. Therefore, it can no longer be used to bind the courts. Moreover, *Great Peace* did not empower the court to intervene in the contract on the basis of a fundamental shared mistake of fact. From that, it may lead to inflexibility for future courts.[112] Still, legislation may become a solution as it could provide greater flexibility.

Apart from previous cases in equity, there is a concept called **rectification**. Under this circumstance, it is possible that the parties had mistakenly drawn up a contract but it turned out that the written document is not what they actually intend.[113] Therefore, this kind of mistake occurs when the agreement is recorded, not in the process of making a contract. From that, the parties may raise an argument to the court on this issue to rectify the contract in order to make it be in accordance with their true intention.

It can be seen that this rectification is the exception of the parol evidence rule where the parties could generally not offer the contradicted or modified parole evidence to the court if that agreement was made in writing which is similar to Section 94 of the CCC of Thailand.[114] Moreover, one part of the statement in *Frederick E Rose (London) Ltd v. William H Pim Jnr & Co Ltd*[115] by Denning LJ provided the opinion that "rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in

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[111] Evan McKENDRICK, supra 88, p.564

[112] Sweet & Maxwell, Misrepresentation Mistake and Non-disclosure (3rd edn, John Cartwright 2012) 775

[113] Bridget McLAY, 'Rectification for Unilateral Mistake: Time for a Conception Revision.' Aukland University Law Review, Vol 22, (2016), p.316

[114] Pinai Nanakorn, supra 79, 204

[115] Frederick E Rose (London) Ltd v. William H Pim Jnr & Co Ltd [1953] 2 QB 450

complete agreement on terms of their contract, but by the error wrote them down wrongly…"

A further example of rectification is *Joscelyne v. Nissen*.[116] In this case, Mr. Joscelyne, father of Mrs. Nissen, would like to quit his car hire business to spend more time taking care of his wife. Therefore, he intended to transfer his business to Mrs. Nissen with the return that she shall pay him a weekly pension and the expenses of her parents' part of the house including the necessary home help costs such as gas, electricity, coal, etc. Hence, the contract was made in writing and signed by the parties with the terms that Mrs. Nissen shall discharge all expenses in connection with the whole premises and Mr. Jocelyne is free from all rent and outgoing of every kind, in any event, to live on the ground floor of his daughter's land. After that, the parties had argued and the daughter stopped paying the house expenses, claiming that she need not pay for the gas, electricity, coal as they are not stated as a duty. Therefore, the case was brought to the court and the Court of Appeal ruled in favor of the father and ordered to rectify the contract as the parties were in common agreement but the written contract diverged.

To summarize, to claim that the contract could be rectified, Peter Gibson LJ explained in *Swainland Builders Ltd v. Freehold Properties Ltd*[117] that parties shall prove that they had a mutual continuing intention until the time of the execution in the matter of the rectified part and that accordance was expressed but by mistake, the instrument did not represent the common intention of the parties. Nevertheless, even ratification could be a supporting tool, it is unusual in commercial practice due to its limited application because it could not assist the parties in the event that they have the bad bargaining to enter into the contract.[118]

3.2.3 Non Est Factum

This doctrine provides protection to the party who signs the document without the true understanding. It must be noted that Non Est Factum (it is

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[116] Joscelyne v. Nissen [1970] 2 QB 86

[117] Swainland Builders Ltd v. Freehold Properties Ltd [2002] EWCA Civ 560

[118] Evan McKENDRICK, supra 88, p.565

not my deed) cannot be used as a defense for the party who has been careless or has failed to read the terms properly. Thus, when a claimant attempts to invoke the signed agreement, he must prove that he was unable to understand the contract that he had signed and the matter in the signed contract substantially differed from the document he believed he was signing.[119] However, this principle in practice could be applied in a narrow way. It may also not be applicable if there is an innocent third party who may suffer a disadvantage from relying on that signature and that third party must also be protected.[120]

An outstanding case is *Suanders v Anglia Building Society (Sub nom gallie v Lee)*.[121] The facts were that Mrs. Gallie, aged 78, was asked to sign a document assigning her interest in her house to Mr. Lee who was her nephew's collaborator. It turns out that she had broken her reading glasses and asked Mr. Lee what the document was. Mr. Lee answered it was a deed of gift to her nephew and, relying on such information, she signed the document. After that, Mr. Lee had defaulted on the mortgage installments and the building society sought to process the house. Therefore, Mrs. Gallie pleaded Non Est Factum but the House of Lords has held that the signed contract was not fundamentally different from what she had intended. The reason behind this is the Court had to balance the interests between Mrs. Gallie and the building society. So, in order to protect third parties, the Court narrowly applies this doctrine by imposing a heavy burden of proof on the one who seeks to rely on Non Est Factum.

From the above, it could be seen that the mistake at law in several cases could render the contract to completely null whereas a mistake of equity would render the contract merely voidable. Nonetheless, despite such consequences, the contract would generally be valid and enforceable. Therefore, the other party has already had sufficient protection by the operative theory mistake itself, especially in

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[119] Richard Stone and James Devenney, supra 81, p.433

[120] Richard Stone and James Devenney, supra 81, p.435

[121] Suanders v Anglia Building Society (Sub nom gallie v Lee) [1970] UKHL 5

the event of a one-sided mistake. Nevertheless, several inconsistencies still exist under English law. For example, the terminology used by the court is inconsistent and the distinction between law and equity is still uncertain, etc. Moreover, the mistake in English law has a much narrower application compared to a mistake in civil law countries. On the other hand, it has instead developed a principle of misrepresentation. Misrepresentation can be generated from fraud or a misunderstanding as a result of the other party's unintentional false statement. However, misrepresentation does not include inaction or silence on the part of the other party. Accordingly, although in principle a mistake could be a ground for nullifying the contract, it seems to be difficult in reality. Therefore, seeking remedy under misrepresentation would be easier.[122]

To summarize, it is clear after striking a balance between a mistaken party with other contractual parties together with a certainty of commercial activities that the law has chosen to adopt an objective as opposed to a subjective approach, which means a contract would generally be enforceable with some exemptions, especially in the event of ambiguity based on the reasonable man standard, to be set aside.

3.3 French Law

Although France is a civil law country where legislations are a fundamental source of law, it is widely accepted in practice that legal interpretation has also been influenced by judgments, especially from the *Cour de cassation* which is the highest judicial authority in civil and commercial matters.[123] As a result, legal provisions and case law have been discussed in the academic sphere, which possibly are taken into account in courts. Therefore, besides the Code Civil, it is undeniable that case law and legal scholars also influence the principle of mistake.

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[122] Hugh Beale, Cases, Materials and Text on Contract Law, (Oxford, Hart Publishing 2019)

[123] Marc Ancel, 'Case Law in France.' Journal of Comparative Legislation and International Law, Vol 16, No.1, (1934), p.14

3.3.1 Before the Reformation of the Code Civil in 2016

Before the amendment of the Code Civil in 2016, the Napoleonic Code had been applied whereby there had been influence from Pothier, the jurist who clarified that operative mistakes were divided into two types. First, a mistake as to the identity of the subject matter to a contract. In this case, the contract is deemed to not have existed. Second, a mistake as to qualities of the subject matter. In this case, a right of recission arises.[124] According to such influence, the principle of mistake in France has been generated from two sources, namely, the civil code and legal scholars and judgment.

3.3.1.1 The Code Civil

Under the French Code Civil, consent is one of the elements necessary to form a contract as stated under Article 1008.[125] Consent can be vitiated by a mistake in substance of the contract or of the person's identity, resulting in invalidity of the contract.

(1) General Concept under Article 1109[126]

This article has laid a general concept of defective intention called *vices du consentement.* It provides that if consent was given because of an error (*erreur*), such consent still exists but it is defective. Therefore, the contract would result in relative nullity (*nullite relative*), which is also known as voidability.

(2) Types of Mistakes under Article 1110[127]

This article distinguished a mistake that could decrease the quality of consent but not threaten its existence into two types; a mistake in substance

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[124] E.Sabbath, supra 30, p.805)

[125] The C.C. 1804, Art.1108. Four requirements are essential for the validity of an agreement: The consent of the party who obligates himself; That party's capacity to contract; A definite object that forms the subject matter of the engagement; A licit cause for the obligation.

[126] The C.C. 1804, Art.1109. There is no valid contract if consent was only given because of error, was extorted by force or procured by fraud.

[127] The C.C. 1804, Art.1110. Error is not ground for nullity of convention unless it goes to the very substance of the thing forming the object of the contract.

in a contract and a mistake in a person intended to be a contractual party in a material manner. First is a mistake in the substance in a contract (*l'erreur sur la substance*). Although the provision uses the word "substance", the court interpreted that it refers to the mistake in the identity or quality of a subject matter to a contract. As a result, without such quality, all contractual parties may not enter into a contract.[128]

To determine what an essential quality is, there was a dilemma between the objective and subjective approach, thereby generating much discussion and resulting in a significant number of case law on such interpretation. Under the objective approach, the quality of such an object is known to be substantial in general in the etymological sense of the word. For example, it is widely believed that a purchaser intends to acquire authentic painting, not a forgery, from famous artists. Whereas subjective determination is based on the mistaken party's own thought that is also known by the other contractual party. Otherwise, the contract will not be deemed voidable. For instance, in the *Villa Jacqueline* case[129], a villa advertised as having 7,800 square meters had been bought by a plaintiff. The purpose of such purchase was that the buyer intended to divide this purchased property into lots and resell them. The seller is aware of such purpose. After that, the buyer discovered that the actual area was only 5,119 square meters and claimed the contract was null. Under the subjective approach, such mismeasure was recognized by the contracting parties as an essential quality. Therefore, the purchase agreement was null and void under Article 1110 (corresponding to Article 1133 in the present Code).

Error is not ground for nullity when it only goes to the person with whom one intended to contract unless the identity of the person was the principle reason for the convention.

[128] P.D.V. Marsh, Comparative Contract Law: England, France, Germany (Aldershot: Gower, 1994) 122-123

[129] D.P.1932 I.129 Cited in Hugh.Beale, English and Continental Contract Laws: Key Differences, (slide for the University of Warwick) 27

The other relevant case is the *Poussin*'s case.[130] Here, a family had been advised by a dealer that a painting they owned was not a work of Poussin. Thus, they sold it to the dealer at an undervalued price. Later, they discovered that such painting was exhibited as a Poussin in a museum. Consequently, they sought to nullify the sale contract on the grounds of mistake and even though there was still uncertainty as to the painter, the court held that a mistaken party could avoid the contract by applying Article 1110.

Secondly, another type of mistake is a mistake in the person intended to a contract in relation to the person's material identity (*l'erreur sur la personne*). This kind of mistake is typically found in certain types of contracts, especially in non-reciprocal contracts, such as gifts and wills. It can also be found in reciprocal contracts which demand a specific performance, such as an employment contract. Thus, a sale contract would generally be irrelevant because, by its nature, it does not require a precise contractual party to perform the contract as the purpose of a purchaser is merely to acquire goods.

There has been criticism that although Article 1110 has attempted to draw a line to limit application of this article to only two cases, most classical jurists still interpreted this in wide scope. Therefore, crucial mistakes in any kind, whether it is unilateral or mutual, negligent or not, unknown or known to the other party, that substantial mistake vitiating a consent would always be a ground to nullify a contract.[131] It might therefore be implied that protection was more for the side of the mistaken party rather than the other contractual party.

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[130] D.1987.485 Cited in Hugh.Beale, English and Continental Contract Laws: Key Differences, (slide for the University of Warwick) 28

[131] Catherine Valcke, Covergence and Divergence between the English, French, and German Conceptions of Contract, (University of Toronto Faculty of Law, 2008) p.26

(3) Damages under Article 1382[132]

Damages that occur as a result of a mistake arises in the stage of pre-contracting. It can be said that this is a reflection of the principle of pre-contractual liability or *culpa in contrah*endo. Nevertheless, French law generally does not recognize such principle as it is more concerned about the principle of freedom of contract because as far as introducing pre-contractual liability, the role of freedom of contract would decline.[133] Thus, although the other party entered into the contract in good faith, there is no principle of negative interest for the belief that the contract should be valid and enforceable as agreed.[134] As a result, most of the jurists and the court has concluded that a liability of the mistaken party is based on tort law, known as a delictual liability, to relieve the damage as if the contract was avoided, the other party would still be entitled to claim damages even though such mistake is excusable.[135] To be in accordance with tort law, the claimant shall prove that damage has occurred with causality from a tortfeasor which he shall be responsible for.[136]

Yet, it seems that the burden weighs more on the side of the other party who bears the duty to inform the important information rather than to consider that a defected declaration made from mistake could also have caused the other innocent party to decide to declare his intention. Furthermore, Article 1382 itself has been criticized for being too broad and lacking any specific conceptual direction of "fault". Therefore, such relief may be too narrow and could not provide an adequate safeguard to the other party who is in good faith and may result in uncertainty in trade and commerce.

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[132] The C.C. 1804, Art.1382. Every act whatever of man that causes damage to another, obliges him by whose fault it occurs to repair it.

[133] Jumpee sotthibandhu, Supra 4, p.84

[134] E.Sabbath, supra 30, p.817

[135] Friedrich Kessler and Edith Fine, Supra 21, p.430

[136] Lawson F.H.& Aton A.E.& Brown L.N., Introduction to French Law, (2nd edn, Oxford: Clarendon Press 1963) 207

3.3.1.2 The Principles in Legal Scholars and Judgments

A concept known as the Obstacle Errors (*l'erreur obstacle*) is not demonstrated in the Code Civil but is instead a product of academic analysis. This type of mistake is related to a declaration of intention which is serious enough to prevent the consent from even forming. Therefore, it threatens the existence of an agreement and such agreement shall be void, absolutely null, because there was no meeting of the mind. Accordingly, the obstacle errors could be distinguished into three main types.[137]

(1) A Mistake as to the Nature of the Contract

This perception is similar to *error in negotio*. Thus, jurists like Flour and Aubert provided an example that A received an asset from B with the misbelief that such transfer was a gift but, in fact, B intended to lend such asset to B.

(2) A Mistake as to an Object to the Contract

This perception was influenced by Roman law and is known as *error in corpore*. For instance, A sold a van made in the era of the Han dynasty but B misunderstood that it was produced in the Qing dynasty.

(3) A Mistake in the Cause of the contract

A cause, known in French as *La cause,* explains why a debtor has an obligation. The notion of such mistake relates to Article 1131 which provides that an obligation without a cause cannot be effective. It means that if any party is under a mistake on the cause, such contract would accordingly be invalid. There are two main contradictory views regarding this issue.[138] The first view makes a determination on the motive of the person who made a declaration of intention to be bound. The second view makes a determination objectively or abstractly from general legal or formal reasons. At that time, there was a deliberation on which perspective

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[137] Suthabodi Sattabusya, The Mistake (legal journal 4, 1978) 81 (สุธาบดี สัตตบุศย์, ความสำคัญผิด (วารสารกฎหมาย 4, 2521)) 81

[138] John Bell, Sophie Boyron, and Simon Whittaker, Principles of French Law (2nd edn, Oxford University Press 2007) 137-138

was correct. Reasonably, the mistake in *La cause*, therefore, was once one of the most difficult for the common lawyer because of its uncertainty.

From all the types of mistakes analyzed through several sources, it could be seen French law has mainly relied on a subjective approach together with an influence from the principle of autonomy of will. Thus, the will that could bind an individual is the subjective will or actual intention which means it is not interpreted by others or by law. On subjectivity, Kant remarked;

... Any obligation must be founded on the individual will and is legitimate only insofar as it is so founded: that which would not have been consented to would be tyrannical towards the individual subjected to it. To say that the will is autonomous is not to say, merely, that it is free to create such rights and obligations as it pleases. It is also to say that where it did not create any, none exists. [139]

It is obvious that there are two main consequences of mistake, namely, voidability and voidness whereby the consequence depends on the type of mistake. The Code referred only to the errors that vitiate consent which renders the contract voidable, providing an option for the mistaken party whether to avoid or affirm such agreement. *Erreur obstacle* on the other hand is a principle from scholars and judgments whose effect is to prevent the formation of the contract from the beginning, rendering such contract absolutely null. Thus, such division had invited criticism because sometimes it was difficult to differentiate circumstances between a lack of consent and a vitiated consent.[140] As a result, some French authors had proposed that the legal consequence of mistake should generally result in voidability rather than voidness and thus the court followed this viewpoint in a few cases. For example, in *Le Tresor De l's A girculture v. Polina*, although the defendant had mistakenly signed in mutual insurance which in fact was an insurance policy because of the misbelief in the nature of contract, the *Cour De Cassation* ruled that such contract was a mistake as

[139] Catherine Valcke, supra 131, p.25

[140] E. Sabbath, supra 30, p.806

to the substance of the subject-matter, resulting in the contract being voidable. This reflects that the court has preference for the voidability system.[141]

In addition, although the French legal system has adopted the subjectivity doctrine by, in the past, particularly considering the true intention of a mistaken party as there was a wide scope to operate mistake, the court has still balanced for equity in the aspect of certainty in commercial transactions and the other contractual party. Thus, to legitimize the purely subjective approach, there are several events the court has chosen to be mechanisms which limit the grounds of mistake that could set aside the contract to tackle the issue for increased justice in several ways.[142]

Firstly, to determine whether a mistake is material or not, the *juges du fond* always considered a prejudicial effect on the other party. Still, consideration of the effect to the other party was neither strict nor compulsory. For example, although the *Cour de cassation* ruled that the value of goods was not sufficient to vitiate a contract, a lower court could rule that differences in price can affect the quality, which may in turn influence the buyer's decision and intent.

Secondly, it is not important whether the other party was also mistaken or not. The requirement for nullifying the contract is merely that both of them shall be aware that the matter mistaken about is an essential quality. For instance, if two contractual parties entered into a land purchase agreement because the buyer had intended to later sell it in parcels, a fact also known to the seller, all of them were aware of its physical extent but both misunderstood its hectarage, which was essential. So, such a contract is nullified.[143] Another example is in a sale contract where a company bought a property with the purpose to acquire fiscal advantages. As a result, such mistake was not considered to be a ground of annulment.[144] Obviously, the *Cour de cassation* held that a personal reason for entering into a contract that was not

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[141] E. Sabbath, supra 30, p.807

[142] John Bell, Sophie Boyron, and Simon Whittaker, supra 138, p.312-313

[143] Cass. Civ., 23 November 1931, DP1932.1.129

[144] Cass. Civ., JCP.I.330

related to the subject matter could not be a cause of invalidity, except if it has been stated clearly to be a condition in the contract.

Thirdly, a mistaken party could not avoid a contract if such mistake was inexcusable. For example, a seller who bought velvet could not claim that this material was not proper for making a woman's clothes as such fabric shall be used for its purpose and the seller had experience in this manufacturing area which meant he should be aware of the normal use of the fabric.[145] Furthermore, to consider whether a mistaken party is negligent or not depends on the knowledge or the expertise of the mistaken party, such as age, experience, and career of that party together with the honesty of the other contractual party.

Lastly, a mistake itself would generally not give a right for a claimant who is the mistaken party to claim damages against the other party in any loss except the event that the other party lacked care, especially if he had breached a duty of information. Accordingly, as known as innocent misrepresentation in common law, the other party would therefore bear liability for such fault.

As a result, French Law has allowed an essential mistake to be a ground of nullity in general with several exceptions to generate more balance for equity. Unlike in England, the mistake would not generally create a right to set aside a contract.

3.3.2 The Reformation of the Code Civil in 2016

In 2006, the Code Civil of France was amended by the *Ordonnance* to be more up-to-date and comply with other European countries to enshrine both economic efficiency and fairness in contracts.[146] The legislators attempted to achieve

[145] Cass. Com., 4 July 1973, B IV.238; D1974.538

[146] Dzmtranslate, "Will French Contract Law Soon Govern International Business Transactions?" [Online], Available from: https://www.dzmtranslate.com/will-french-contract-law-soon-govern-international-business-transactions/ accessed 25 February 2021

this goal in various ways.[147] First, they tried to simplify the language to be more modern. Second, several legal principles that were developed through cases have been adopted to be part of codification to preserve harmony between contractual equality. Last but not least, the structure in each section was revised to provide a clearer scope. As a result, the defects in consent which are a mistake, fraud, and duress were increased from nine articles to fifteen. One of these provisions concentrated on a defected consent under Article 1130[148] stipulating that a mistake could be one of the reasons to vitiate consent if without it, the parties would not have a contract or contract differently on substantial terms. Still, the definition of mistake is not interpreted in the Code but it may be said that mistake constitutes a false image of reality.[149] Consequently, such defective consent could lead to a relative nullity as stated under Article 1131.[150]

Moreover, the reformed Code under Article 1179[151] stated clearly that nullity could be categorized into two types. Firstly, an absolute nullity which is a consequence of the violation of the public interest under Article 1180.[152] This could

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[147] Solene Rowan, the New French Law of Contract, (British Institute of International and Comparative Law, 2017) 6

[148] The C.C. 2016 Art.1130. Mistake, fraud and duress vitiate consent where they are of such a nature that, without them, one of the parties would not have contracted or would have contracted on substantially different terms.

Their decisive character is assessed in the light of the person and of the circumstances in which consent was given.

[149] John Cartwright and Simon Whittaker, The Code Napoleon rewritten: French Contract Law After the 2016 Reforms, (Oxford, Portland 2017)

[150] The C.C. 2016 Art.1131. Defects in consent are a ground of relative nullity of the contract.

[151] The C.C. 2016 Art.1179. Nullity is absolute where the rule that is violated has as its object the safeguard of the public interest.

It is relative where the rule that is violated has as its sole object the safeguard of a private interest.

[152] The C.C. 2016 Art.1180. Absolute nullity may be claimed by any person who can demonstrate an interest, as well as by the ministère public.

be raised by any relevant person but could not be affirmed. Secondly, a relative nullity which is a consequence of the violation of private interest under Article 1181.[153] This may be raised by the party who the law intends to protect and could also be affirmed and the court would declare such nullity unless the party could establish the agreement by themselves.[154] As this type of mistake stated in the code relates to private interest, the legal consequence would be a relative nullity. Nevertheless, there is another type of mistake existing in scholarly writings and judgments which is an *erreur-obstacle* known as the mistake that prevents the contract from coming into existence. At present it is unclear whether the reformed code considers this to be a defect in consent or an absence of consent.[155]

From such reformation, in the aspect of mistake, several articles were re-numbered and the case law was codified in order to ensure comprehensiveness and takes into account the interests and behavior of the other contracting party as follows;

3.3.2.1 A Definition of Mistake under Article 1132[156]

A mistake whether of law or of fact that is the basis of relative nullity is separated into two cases, the essential qualities of the act of performance owned and the other contracting party. It is discernible that before the reformed Code,

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It may not be remedied by affirmation of the contract.

[153] The C.C. 2016 Art.1181. Relative nullity may be claimed only by the party that the legislation intends to protect.

It may be remedied by affirmation.

Where more than one person has the right to bring an action for relative nullity, renunciation by one of them does not prevent the others from bringing proceedings.

[154] The C.C.2016 Art. 1178 para.1. A contract which does not satisfy the conditions required for its validity is a nullity. Nullity must be declared by a court, unless the parties establish it by mutual agreement.

[155] John Cartwright and Simon Whittaker, supra 149, p.97

[156] The C.C. 2016 Art.1132. Mistake of law or of fact, as long as it is not inexcusable, is a ground of nullity of the contract where it bears on the essential qualities of the act of performance owed or of the other contracting party.

a mistake of law can nullify a contract but such ability was uncertain.[157] For example, there was a case where an owner of land offered an occupant under the mistake that he had a preemption right. Accordingly, the *Court de Cassation* held that a mistake of law, even inexcusable, could be justified to invalidate the offer. From such unpredictability, the present code, therefore, stated clearly that a mistake of law is applied with the same regime as a mistake of fact. Thus, the error of law must not be inexcusable as the error of fact which is a reflection of the principle of "ignorance of law excuses no one". Besides, such mistake of law must be related to the essential qualities of the service or the co-contractor.[158]

Consequently, to consider these two causes of mistake, it is explicitly stated in the Articles 1133 and 1134.

(1) A Mistake in the Essential Qualities of the Act of Performance under Article 1133[159]

Whether a mistake as to the quality of the act of performance was on any party's side, if it has been agreed, whether expressly or implicitly, and the parties consider such quality to be an essential quality to enter into a contract, it would be governed under this provision. Nevertheless, it does not mean that such mistake should be shared mutually because it would be too restrictive.

Accordingly, there is a distinctive revision putting a definitive end to the debatable issue on the interpretation of the term substance. From that,

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[157] Henri Leon and Jean Mazeud, Lecon De Droit Civil Tome Il Vol.1: Obligation Theorie Generale, (Paris: Montchrestien, 1956) 144

[158] Clément François, "Présentation des articles 1130 à 1144 du nouveau paragraphe 2 « Les vices du consentement »" [Online]. Available from https://iej.univ-paris1.fr/openaccess/reforme-contrats/titre3/stitre1/chap2/sect2/ssect1/para2-vices-consentement/accessed 25 February 2021]

[159] The C.C. 2016 Art.1133. The essential qualities of the act of performance are those which have been expressly or impliedly agreed and which the parties took into consideration on contracting. Mistake is a ground of nullity whether it bears on the act of performance of one party or of the other.

Acceptance of a risk about a quality of the act of performance rules out mistake in relation to this quality.

the measure to determine what is a substantial mistake is shifted from "the very substance of the thing that is the object of the agreement" under Article 1110 in the previous Code to "the essential qualities of the act of performance" under this present Article 1133. Therefore, the earlier dilemma of applying the subjective or objective doctrine was eliminated because this provision stated clearly on the criteria that such quality shall be agreed by the contractual parties to be essential where the parties took it into the sphere of the contract. Thus, the new Code chooses to apply an objective approach to avoid taking into account fanciful qualities which were not known to the other party because he should not bear a risk on such a one-sided mistake which he does not know[160] and thus also helps to limit the wide scope of applying a mistake to invalidate a contract.[161] Accordingly, this perception was generated from case law as could be seen through the case of construction of the building.[162] One of the pleas in this case, the purchasers had discovered that the purchased building was a non-traditional construction. As a result, they claimed that, in their mind, the building shall be necessarily built traditionally and that the nature of the construction constituted one of the substantial qualities. Therefore, according to their claim, the consent had been vitiated by an error in the method of construction of the house. However, the court held that the method of construction of the building had not been concluded into the contractual terms. Hence, there was no requirement to carry out an investigation and its decision has already been justified.

Moreover, under paragraph three, if the mistaken party had accepted that risk since the time of entering into a contract, they could not claim the

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[160] John Cartwright and Simon Whittaker, supra 149

[161] "Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations" [Online]. Available from: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000032004539?init=true&page=1&query=Rapport+au+Président+de+la+République+relatif+à+l%27ordonnance+n°+2016-131&searchField=ALL&tab_selection=all accessed 27 February 2021

[162] Cour de cassation, civile, Chambre civile 3, 22 octobre 2013, 12-26.047, Inédit

ground of mistake to avoid the contract. This perception was adopted from case law, especially with respect to the authenticity of works of art and the constructability of land.[163]

(2) A Mistake in the Essential Quality of the Other Contracting Party under Article 1134[164]

The contract would be a relative nullity if such contract takes an essential quality of the party into account. Apparently, the perception of this provision is repeated from Article 1110 paragraph two of the former version of the Code.[165]

3.3.2.2 A Motivation under Article 1135[166]

If motivation is not in relation to the essential qualities of the act of performance owned or to the other contracting party, such motivation would not be a ground of nullity. As a result, this provision emphasizes that the motivation could not be used to avoid a contract if it is the subjective will where the other party could not realize. On the other hand, if the parties express it, such motivation would be part of the scope in an agreement because it was established as a contractual term and thus could nullify the contract. Evidently, this article is a prominent example affirming that case law was adopted into the Code as the court has laid the principle that motivation was not a cause of nullity even it was significant.[167]

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[163] Supra 146

[164] The C.C. 2016 Art.1134. Mistake about the essential qualities of the other contracting party is a ground of nullity only as regards contracts entered into on the basis of considerations personal to the party.

[165] Supra 146

[166] The C.C. 2016 Art.1135. Mistake about mere motive, extraneous to the essential qualities of the act of performance owed or of the other contracting party is not a ground of nullity unless the parties have expressly made it a decisive element of their consent.

However, mistake about the motive for an act of generosity is a ground of nullity where, but for the mistake, the donor would not have made it.

[167] Supra 146

Nevertheless, paragraph two explains the other situation that in case of a gift contract whereby the donor makes the contract because of a motive, motivation can then be an exception to nullify a contract. This shows that the government had tried to suppress the cause principle, which was once an element required to form a contract as stated under Article 1332 in the former code, but does not suppress it completely and at the same time, still retaining the cause principle's functions.[168]

3.3.2.3 A Mistake as to Value under Article 1136[169]

A mistake as to value resulting from a poor economic evaluation is not a ground of nullity unless it is a result of an error in the essential qualities of the act of performance. For example, if a contractor had intended to purchase a solid gold candlestick but it was only gold plated, this is a mistake in the value related to an error in the essential qualities of the act of performance. Accordingly, the nullity for such a mistake can be admitted. On the other hand, if a person had bought a solid gold candlestick for 10,000 Euros and later found out that it was only worth 5,000, he could not invalidate the sale contract on the grounds of mistake as to value because there was no error on the essential qualities.[170] It could be seen that Article 1136 encapsulates a classic jurisprudential solution.

3.3.2.4 Damages Due to a Mistake

(1) The Damages on the Side of the Other Party under Article 1240[171]

If the party who has avoided the contract was mistaken through his own fault, the other innocent party seeks for damage through the general

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[168] Supra 146

[169] The C.C. 2016 Art.1136. A mistake as to value is not a ground of nullity where, in the absence of a mistake about the essential qualities of the act of performance, a contracting party makes only an inaccurate valuation of it.

[170] Supra 146

[171] The C. 2016 Art. 1240. Any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it.

law of extra-contractual liability under Article 1240 (former Article 1382), known as tortuous responsibility. Comparing this doctrine to the previous code, there is seldom difference which means that such relief has still been too narrow and could not provide an adequate safeguard to the other party who is in good faith. Besides, such a claim only exists in scholarly work, not actually in practice and there is no reference to it in the reformed code. Instead, the sanction to the mistaken party is to refuse the validity of the contract on the ground of mistake.[172]

(2) The Damages on the Side of the Mistaken Party under Article 1104[173], 1112[174], and 1112-1[175]

This legislative doctrine was adopted from the court's decisions which had been given based on the principle of good faith that the other

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[172] Hugh Baele, supra 122

[173] The C.C. 2016 Art.1104. Any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it.

[174] The C.C. 2016 Art.1112. The commencement, continuation and breaking-off of precontractual negotiations are free from control. They must mandatorily satisfy the requirements of good faith.
In case of fault committed during the negotiations, the reparation of the resulting loss is not calculated so as to compensate the loss of benefits which were expected from the contract that was not concluded.

[175] The C.C. 2016 Art.1112-1. The party who knows information which is of decisive importance for the consent of the other, must inform him of it where the latter legitimately does not know the information or relies on the contracting party.
However, this duty to inform does not apply to an assessment of the value of the act of performance.
Information is of decisive importance if it has a direct and necessary relationship with the content of the contract or the status of the parties.
A person who claims that information was due to him has the burden of proving that the other party had the duty to provide it, and that other party has the burden of proving that he has provided it.
The parties may neither limit nor exclude this duty.

party had a duty to disclose information to the mistaken party if such information is significant enough to affect the decision-making process of entering into a contract.[176] It shall be noted that an awareness of information but failure to inform does not have a purpose to deceive the mistaken party otherwise it would be considered a fraud.

Under the reformed Code, the provisions relating to a relationship between the parties before the contract is formed are added and could be divided into two scenarios. Firstly, under Article 1104, contracts must be negotiated, formed, and performed in good faith which obviously presents that the principle of good faith has been applied not only since the contract is concluded, but also in the previous process of negotiation. Secondly, Articles 1112 and 1112-1 provide that the pre-contractual negotiations require good faith and the party shall inform the other party if he knows the significant and decisive information for the consent otherwise he would be liable for extra-contractual liability under Article 1240 whether the contract is annulled or not as stated under Article 1178 paragraph 4[177] and the contract may be avoided by the mistaken party. Besides the extra-contractual liability under Article 1240 which is a safeguard to any injured party, the provisions tend to insulate the mistaken party by stating clearly for the liability of the other contractual party to disclose the decisive information to prevent the cause of the mistake.

In light of the above, the mistake in material that vitiates a consent could generally be raised to set aside a contract as stated in the Code. Still, it shall be noted that there is another type of mistake that is not codified which is the *Erreur-obstable* which could not be nullified by a mistaken party because there is no contract

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In addition to imposing liability on the party who had the duty to inform, his failure to fulfil the duty may lead to annulment of the contract under the conditions provided by articles 1130 and following.

[176] Jumpee Sotthibandhu, Supra 4, p.86

[177] The C.C. 2016 Art.1178 para.4. Irrespective of whether or not the contract is annulled, an injured party may claim reparation for any harm suffered under the conditions set out by the general law of extra-contractual liability.

at all which means the parties have never reached the agreement. Hence, before investigating the validity of consent, it shall be considered first whether such consent exists or not as if there is no consent, there is no contract at all. Nonetheless, since the age of the previous Code, the court has frequently treated such cases related to *Erreur- obstable* in a less strict way on the basis of errors as to the substance resulting in relative nullity because it only concerns private interests. Accordingly, the reformed code has not yet dealt with this situation and thus it may be presumed that case law remains relevant and likely to provide the same solution.[178]

Therefore, although several case laws have been codified to bring more objectivity, such as providing that motivation and value cannot generally be the grounds to nullify the contract, subjectivity has still been the main principle in use. Besides, when considering all aspects, the reformed Code could not tackle several broad interpretations which are sometimes debatable. For example, the difficulty to distinguish an agreed quality, motive, and value. Therefore, there has been widespread criticism that the recodification on the issue of mistake seems to have the purpose to codify case law rather than providing solutions for greater certainty of commercial transactions.

3.4 UNIDROIT Principles

The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organization consisting of 63 member-States. It should be noted that Thailand is not a member-State. One of its objectives is to be an instrument for harmonizing and coordinating private and in particular commercial law between states and groups of states[179] because the domestic law of each party is divergent and thus may lead to higher transaction costs and lower capacity of

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[178] Hugh Beale, Supra 122

[179] History and Overview < https://www.unidroit.org/about-unidroit/overview>b accessed on 22 February, 2021

competition as a result of such obstacles.[180] Therefore, UNIDROIT principles set forth general rules for international commercial contracts as a soft law with a persuasive value. It contains 211 articles. According to the purpose of the principles stated in the Preamble[181], it would be applied when parties have expressly agreed or their contract is to be governed by such principles. Furthermore, the principles may provide assistance in interpreting or supplement the relevant rule under domestic law or international uniform law instruments. Also, it is expected to serve as a model law for both national and international legislators. Under this soft law, the working group had attempted to put an official commentary in each article with examples to clarify the understanding. Therefore, the author would take such commentaries in the issue of mistake, under chapter 3: Validity of Contract section 2: Grounds for Avoidance, as the main structure and direction for this part of the thesis.

3.4.1 Definition of Mistake

The definition of mistake can be found in Article 3.2.1.[182] Mistakes could be either erroneous assumptions relating to fact or to law which exists at the time of entering into a contract. A mistaken party is the party that had misconceptions in fact or law and then misjudged its prospects under such contract. However, if the understanding at the time of concluding a contract was correct but a party had made an erroneous judgment and later refused to fulfill a contract, it seems to be governed by the principle of non-performance rather than a mistake. Thus, the rules of mistake would not be applied.

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[180] International Institute for Trade and Development, The Final Report of the legal readiness to enter into ASEAN Community, 2016) ช (สถาบันระหว่างประเทศเพื่อการค้าและการพัฒนา (องค์การมหาชน), รายงานการศึกษาวิจัยฉบับสมบูรณ์ เรื่อง การเตรียมความพร้อมด้านกฎหมายของไทยในการเข้าสู่ประชาคมอาเซียน (2559)) น.ช

[181] UNIDROIT Principles of International 2016, International Institute for the Unification of Private Law (UNIDROIT), Rome p.1

[182] Ibid, p.100

In order to avoid the contract on the ground of mistake, a mistaken party by himself could notify the other party within a reasonable time pursuant to Article 3.2.11[183] and Article 3.2.12 (1) [184] without any necessity for a court proceedings. From that, the contract would be considered as though it had never existed, pursuant to Article 3.2.14.[185]

3.4.2 Relevant Mistake

The supporting reason a party could raise to avoid a contract is laid out in Article 3.2.2[186] that such mistakes shall be serious. [187] To consider what is serious, the chosen criteria are an average combination of objective and subjective principles. For example, an application of a reasonable person's standard from objective approach was introduced to this provision whereby if the reasonable man in the same situation as the mistaken party would not have contracted or would have done so with a materially different term, such mistake would be a serious mistake. Besides, the

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[183] UNIDROITS Article 3.2.11. The right of a party to avoid the contract is exercised by notice to the other party.

[184] UNIDROITS Article 3.2.12. (1) Notice of avoidance shall be given within a reasonable time, having regard to the circumstances, after the avoiding party knew or could have not been unaware of the relevant facts or became capable of acting freely.

[185] UNIDROITS Article 3.2.14. Avoidance takes effect retroactively.

[186] UNIDROITS Article 3.2.2. (1) 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, and

(a) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or

(b) the other party had not at the time of avoidance reasonably acted in reliance on the contract.

(2) However, a party may not avoid the contract if

(a) it was grossly negligent in committing the mistake; or

(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.

[187] Supra 181, p.101

context under this paragraph is an open-ended formula where one takes into account the intentions and surrounding of the case, especially commercial standards and relevant usages. As stated in the commentary, the value of goods or services and mere expectations or motivation of the mistaken party are not usually considered to be a serious mistake in commercial transactions. Similarly, personal qualities are not taken into account either, except in specific circumstances such as a loan agreement which may require creditworthiness of the borrower. Therefore, these types of mistakes are not the grounds to justify avoidance of a contract.

There are additional requirements to invalidate the contract as this provision takes into regard the viewpoints from all sides of contractual parties. Article 3.2.2 (1) applies to the other contractual party who is not subject to a mistake. There are four scenarios.[188]

3.4.2.1 The Other Party Made the Same Mistake under Article 3.2.2 (1) (a)

This condition is applied when the other contractual party has a mutual mistake. Therefore, he does not deserve any protection because of his involvement in the same error. For example, A and B entered into a sale agreement to purchase a car. Both of them had not been aware that the car had already been stolen since the time the contract was made. Therefore, they were under the same mistake and thus may avoid the contract.

3.4.2.2 The Other Party Caused the Mistake under Article 3.2.2 (1) (a)

In this case, the mistake is a result from the other party, whether expressed or implied, from negligence or innocence. Here, even silence could also be construed as a cause of mistake whereas the advertising or negotiating could normally be tolerated. However, such origin shall not be made intentionally otherwise it would be fraudulent instead.

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[188] Supra 181, p.102 - 104

3.4.2.3 The Other Party Knew or Should Have Known the Mistake and It Is Contrary to Reasonable Commercial Standards of Fair Dealing under Article 3.2.2 (1) (a)

The criteria determining what the other party should have known is based on a reasonable person under the same situation which is the principle adopted from the objective approach. Also, to claim for invalidity, the mistaken party also has to prove that the other party had the duty to inform.

3.4.2.4 The Other Party Had Not Acted in Reliance on the Contract at the Time of Avoidance under Article 3.2.2 (1) (b)

This situation reflects the bona fide principle of the other party who had already prepared to be capable to perform the contract before receiving the notice of avoidance. Thus, if such avoidance would destroy such preparation, the mistaken party could not be excused on the grounds of mistake.

On the other hand, for the side of the mistaken, this is governed by 3.2.2 (2) and could be distinguished into two circumstances.

3.4.2.5 The Mistaken Party Was Grossly Negligent in Committing the Mistake under Article 3.2.2 (2) (a)

If a mistake was due to gross negligence, it would be an injustice to the other innocent party if the invalidity to the contract were to prevail over an enforceable contract because such mistake was caused by his fault. For example, a seller had already stated precisely in a purchase agreement that the goods which are the object of the contract have some minor defects. Nevertheless, the buyer was reckless in reading and skipped that part of the agreement. Therefore, he could not claim such a mistake to be a ground of avoiding the contract because of his gross negligence. This subsection has a similarity to Section 158 of the CCC in Thailand in that a mistaken party could not avail himself from invalidity due to his gross negligence.

3.4.2.6 The Risk of Mistake Should Be Borne by the Mistaken Party under Article 3.2.2 (2) (b)

Under this circumstance, parties may conclude a contract with the assumption that certain facts would be proven to be correct but it turns out later to not to be so. In this case, such a mistaken party could not avoid the contract on the grounds of mistake. For instance, A traded a picture to B at a reasonable price under the incorrect assumption that it was painted by C. After that, A found out that it was painted by a famous artist which should cause it to be worth more than the price previously sold. Even so, A is not entitled to avoid the sale contract.

Besides, it should be remembered that the cause of mistake shall exist at the time of making a contract. If a mistake happens after the time of making a contract, it could not be raised as a defense. For example, at the time of entering into a sale contract, the parties agreed on a certain price. Over the next month, the price in the market doubled. Here, such risk of price increase could not be a basis for the vendor to avoid the contract.

In relation to cases, one example that reflects the application of mistake occurred in Lithuania.[189] Here, a bank had granted a loan to a company secured by both a mortgage and a suretyship by the bank's shareholders. After that, the company failed to pay for the loan and the bank exercised the right of suretyship. Consequently, the bank's shareholders filed a counterclaim arguing that such a contract was void on the grounds of mistake as the shareholders' incorrect belief that the suretyship would be enforced after the mortgage. Nonetheless, the court decided in favor of the bank that the contract was enforceable because it would be void only if a mistake is serious in the view of a reasonable person. Therefore, a party is not entitled to void such contract by claiming that they do not understand the effect of each clause.

Another case took place in Switzerland and was settled through arbitration.[190] The facts were that company A had entered into a contract with company B. Subsequently, a problem arose because of a letter of credit to be opened by company B. Thus, company A commenced an arbitration proceeding but company B argued that the arbitration clause in the contract did not specifically named the

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[189] International Bar Association 2019, Perspective in Practice of the UNIDROIT Principles in 2016, 186-187

[190] Supra 181, p.187

institution. Moreover, company B invoked a material mistake in an attempt to invalidate that clause. However, the arbitral institution denied such argument and decided in favor of company B with references of related Swiss law and a similar rule as that of in Article 3.2.2 (at that time, Article 3.5)

3.4.3 Error in Expression or Transmission

If an error is in an expression or transmission of a declaration on the part of the offeror as stated under Article 3.2.3,[191] the sender could avoid a contract by resorting to this provision. Thus, to claim for a nullity, it shall be reviewed whether the receiver or offeree had not informed such error, constituting unreasonable commercial standards. To conclude, the conditions under Article 3.2.2 shall be met in order to invoke this article.

Furthermore, if the declaration was correct but it turned out that the receiver has by himself misunderstood such expression, or the transmission had already been accurate but a technical fault later led to a mistake, this Article would not be applicable. Still, the offeree could raise Article 3.2.2 directly if the requirements have been met.[192]

3.4.4 Remedies for Non - Performance

There are several types of remedies that may be available with respect to the same circumstance, including the remedy of avoidance of mistake and remedies for non-performance. These two types are separated and therefore if the mistaken party opts for remedy by relying upon a claim of non-performance, he could no longer avoid that contract on the ground of mistake because a conflict between

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[191] UNIDROITS Article 3.2.3. 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.

[192] Supra 181, p.104 - 105

applying these two remedies may arise as laid out in Article 3.2.4.[193] For instance, B had paid ten times the actual price to purchase an iron cup because of a mutual misunderstanding with a seller that such cup was made of silver. Here, B will only be entitled to a remedy of non-performance but would not be entitled to claim for remedy of avoidance of mistake.

This article is rather encouraging as it testifies that a shield is also available for the other party as well to reward his good faith. Besides, it could be a warning sign that parties shall be attentive before concluding a contract because the right of the mistaken party after avoiding the contract is limited.[194]

3.4.5 Loss of Rights to Avoid a Contract

Article 3.2.10[195] may be regarded as an exception to deny the mistaken party's right to invalidate the contract, even if the mistake meets the conditions set forth in Article 3.2.2. According to this article, if the other party promptly declares the willingness to perform or actually performs the contract as what was understood by a mistaken party before receiving a notice for avoidance, the mistaken party then would lose the right to avoid such contract. Still, the prohibition of invalidating the contract would not prohibit him from claiming damages from the other

[193] UNIDROITS Article 3.2.4. 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.

[194] Supra 181, p. p.105 - 106

[195] UNIDROITS Article 3.2.10. (1) If a party is entitled to avoid the contract for mistake but the other party declares itself willing to perform or performs the contract as it was understood by the party entitled to avoidance, the contract is considered to have been concluded as the latter party understood it. The other party must make such a declaration or render such performance promptly after having been informed of the manner in which the party entitled to avoidance had understood the contract and before that party has reasonably acted in reliance on a notice of avoidance.

(2) After such a declaration or performance, the right to avoidance is lost and any earlier notice of avoidance is ineffective.

party who knew or should have known of the ground for avoidance as stipulated in Article 3.2.16.[196]

3.4.6 Damages

The doctrine of damages is set forth in Article 3.2.16 which provides protection in a neutral manner to any party, whether it be the mistaken party or the other party, for damages that occurred regardless of whether the contract has been avoided or not if the opposite party knew or should have known such mistake.

Therefore, if the contract is avoided due to a mistake where the mistaken party knew or should have known such ground which is related to his own negligence,[197] the other party who suffers as a result of the avoidance could claim for damages from the mistaken party under Article 3.2.16. Ascertaining damages is carried out by placing the other party in the position where it would have been if it had not concluded the contract.

From the above, it is noticeable that the UNIDROIT principles have endeavored to blend the subjective approach together with the objective approach in view of seeking equity. To protect a mistaken party, it allows a limited scope of circumstances that would enable such a party could avoid a contract. At the same time, to safeguard the other contractual party, a contract is still valid and enforceable if, for example, such other party is innocent or acts in reliance of the contract. Therefore, it could be said that UNIDROIT principles have extracted advantageous parts of each concept to find fair enough rules to govern a mistake.

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[196] UNIDROITS Article 3.2.16. Irrespective of whether or not the contract has been avoided, the party who knew or ought to have known of the ground for avoidance is liable for damages so as to put the other party in the same position in which it would have been if it had not concluded the contract.

[197] Stefen Vogenauer, Commentary on the UNIDORIT Principles of International Commercial Contract (PICC), (2nd edn, Oxford press 2015), 483

CHAPTER 4
MISTAKE IN THAI LAW

4.1 The Principle of Mistake in Thai Law

This Chapter investigates the principle of mistake in several aspects to illustrate the overall picture, especially the one-sided mistake where the other party is innocent with an attempt to later make comparisons and find applicable solutions to ensure fairness to the greatest extent possible.

4.1.1 The Brief History and Development of Mistake Principle in Thai Law

4.1.1.1 The Age of Ancient Thai Law

In the early ages, concern for issues of the intention of the parties in relation to the formation of a contract was not distinct. For example, in a loan agreement, intention was rarely considered to be grounds for forming the contract as it was rather significantly related to the higher position of the lender. At the same time, other types of agreements, including sale contracts, had not recognized an intention to be a prerequisite for a contract. The reason behind this is likely because the correspondence between the parties were not that of a mutual agreement. Rather, it tended to be a kindness from the person in the superior position providing something to another person who is in need of such assistance.[198] Therefore, it was more of a reliance and dependence on one another in a society, rather than a legally binding obligation. As time went by, the very first situation that may display the role of intention in relation to a contract concerned a gift whereby a donor transferred a property to another person because he was under threat. This circumstance relates to a vitiated intention and thus the donor could withdraw such contract anytime because

[198] Robert Lingat, The History of Thai Law, Second Book (2nd edn, Thai Wattana Panit 1983) 170 (ร. แลงการ์, ประวัติศาสตร์กฎหมายไทย เล่ม 2, (พิมพ์ครั้งที่ 1, กรุงเทพ ฯ: ไทยวัฒนาพานิช, 2526), น.170

the declared intention was made under duress.[199] As a result, it could be concluded that Thai law in this era had not been much concerned about the principle of mistake.

4.1.1.2 The Age of Drafting the Civil Code

In the period of colonization from Western countries in the eighteenth century, reformation of the Thai legal system had become compulsory. Reformation was used as a bargaining point to amend several unfair Treaties which Thailand had concluded with European countries. Consequently, although Britain had dominant power over other countries, it turned out that most legal advisers and committees were from France because of conditions in the Treaty which Thailand made with the French Government.[200] Therefore, in the era of King Rama V, the Civil and Commercial Code B.E. 2451 had been drafted with the influence from France. The Code was later translated into the Thai language in B.E. 2457 to become the draft of the Civil and Trade Code for the Kingdom of Siam.[201] This was a major movement in Thailand as the principle of mistake began to become more explicit in the legislation. Under such draft, there were two provisions relating to mistakes.[202] The first is Section 81 which provides that if consent arose from a material mistake, it is defective. The second is Section 82 which provides that a material mistake could be avoided if the mistaken person takes enough precaution as an ordinary person would. Thus, such mistaken consent could be amended so as to comply with the actual will. Later on, the Code of Thailand was revised in B.E. 2466 by a committee providing similar results as Section 68 and Section 69.

Still, drafting was suspended due to several factors.[203] Therefore, King Rama VI appointed a committee to once again draft the Civil and

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[199] Ibid, p.251

[200] Robert Lingat, Supra 198, p.228 - 230

[201] Charnchai Sawangsak, The Influence of France to the Reformation of Thai Law ชาญชัย แสวงศักดิ์ และคณะ, “อิทธิพลของฝรั่งเศสกับการปฏิรูปกฎหมายไทย”, วารสารกฎหมายปกครอง เล่ม 14 ตอน 2 น.100 (2538).

[202] Draft of the Civil and Trade Code for the Kingdom of Siam, B.E. 2457

[203] Robert Lingat, Supra 198, p.241

Commercial Code. This Code was influenced by the Japanese Civil Code which, in turn, was adopted from the German Civil Code[204] together with other model laws from several countries, including France and England, to finally become the Civil and Commercial Code enacted in B.E. 2468.[205] As a result, the principles of mistake were more understandable under two provisions.[206] Firstly, as per Section 119, if the declared intention was made because of a mistake and such mistake is in a material character of the juristic act, then that declaration would be void unless it arose from the gross negligence of the person who made the mistaken declaration. Secondly, in Section 120, if the declared intention is made by mistake as to the quality of the person which is essential, the declaration would be voidable.

4.1.1.3 The Age of Civil and Commercial Code B.E. 2535 and the Amendment

In this period, after the Thai Civil Code had been revised for a prolonged period of time, the principles of mistake were retained but wider, from Section 119 and Section 120 of the previous code to become Section 156 and Section 157 which applies in Thailand until this day. Also, Section 158 was added. Section 158 laid out the principle that if a mistake was due to negligence from a person who made the declaration, he cannot avail himself by invalidating the juristic act.

Upon inspection of the minutes of the committee which drafted this Code in comparison to the preceding principles of mistake, it could be seen that there are both similarities and differences. For the maintained principles, the mistake could be divided into a mistake in the essential element of the juristic act and the essential quality of the person. Also, the legal consequences of mistakes could be

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[204] บันทึกคำสัมภาษณ์พระยามานวราชเสวี (ปลอด วิเชียร ณ สงขลา) โดยภาควิชานิติศึกษาทางสังคม ปรัชญา และประวัติศาสตร์ คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, (กรุงเทพฯ : วิญญูชน, 2557)

[205] Korrasut Korpuengklang, The Principle law and legal system, for the lecturein nor.100 Thammasat (9 September 2019) 22 กรศุทธิ์ ขอพ่วงกลาง, เอกสารประกอบคำบรรยาย วิชาน.100 ความรู้พื้นฐานเกี่ยวกับกฎหมายและระบบกฎหมาย ชุดที่ 3, (9 กันยายน 2562) น.22

[206] The Thai Civil and Commercial Code B.E. 2468

segregated into voidness and voidability. Nevertheless, there are several differences.[207] Firstly, the meaning of mistake of essential element of the juristic act under Section 156 has been expanded and concrete examples are provided. Secondly, the wording applied under all provisions concerning mistakes has been replaced from "thing" to "properties" which is wider as it includes both corporeal objects and incorporeal objects. Lastly, gross negligence of a mistaken party is further applied to not only under Section 156 but also Section 157, resulting in the inability of such party to assert that the juristic act is set aside.

Nevertheless, in the process of revision of the draft Civil and Commercial Code, there were several issues to consider.[208] Firstly, the committee concluded that if a mistake is as to an essential element of the juristic act, such declaration of intention should be void, not voidable, in order to preserve the principle of contract that the offer and the acceptance shall meet. Nevertheless, such an assumption may not be accurate as, in general, no one could perceive the actual intention until it is expressed. Secondly, the right of the mistaken party to invalidate a juristic act is contrary to Section 158. Section 175 lists the persons who can avoid the voidable act, and the persons who can do so include only the person whose intention was vitiated, not the other party. In comparison to Section 158, Section 158 prohibits a mistaken party who was under gross negligence from availing himself and invalidating the contract. Therefore, if such a person cannot avoid the juristic act, according to Section 175, the other parties could not do so either. Thus, it may create a contradictory result when applying Section 158 in the event related to Section 175. Lastly, as the mistaken party can resort to availing himself from the defected juristic act, there was a debatable issue whether the other parties should be protected equally by being entitled to damages or not as they may suffer from damage when such agreement is set aside and he has already concluded an agreement with others. Still, there is no principle apparently in place to protect him, except when the conditions to claim for damages under the principle of a wrongful act has been met.

[207] Sanunkorn (Jumpee) Sotthibandhu, Supra 11, p.35

[208] Sanunkorn (Jumpee) Sotthibandhu, Supra 11, p.35 - 37

Moreover, even a third party could be insulated under Section 1329[209] if he acquired the property for the value with good faith. It is dubious how the law could ameliorate such other party if the third party is not protected under Section 1329 to be allowed to make a claim against him.

In light of the above, although the CCC had been amended continuously but the development on the issue of mistake is minor. Therefore, only three provisions may not be adequate to tackle the problems in the present day, especially in relation to the equality of all parties and the certainty of commercial transactions.

4.1.2 The Definition and the Principle of Mistake Embodied in Provisions of the Code

As a mistake is not directly defined in the CCC, its interpretation should be found through legal scholars and jurists' opinions as illustrated in the following examples.

Phya Deb Vidura defines a mistake as "a delusion."[210]

Prof. M.R. Seni Pramoj defines a mistake as " a misbelief from a true to a false and vice versa or could imply that such belief is not the same as the truth."[211]

Prof. Dr. Jeed Sethabutr defines a mistake as "a misunderstanding as a circumstance is one way but the thought is in another."[212]

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[209] The CCC Section 1329. The right of a person who has acquired property of the value and in good faith is not affected even if the act under which his transferor acquired the property was voidable and has been subsequently avoided.

[210] Deb Vidura Phya, The Commentary of the CCC Chapter 1 -2, Section 1 - 240 (Natibundit Sapa 1959) 428 (เทพวิทุร พระยา, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 1 – 2 มาตรา 1 - 240, (เนติบัณฑิตยสภา 2502)), น.428

[211] Seni Pramoj, The Commentary on Juristic Act and Obligation (Nitibunnakarn 1978) 89 (เสนีย์ ปราโมช, ประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมและหนี้, (นิติบรรณการ 2521)), น.89

[212] Jeed Sethabutr, The Principle of Juristic Act and Obligation (7th edn, Faculty of Law Thammasat University 2013) 102 (จิ๊ด เศรษฐบุตร, หลักกฎหมายแพ่งลักษณะนิติกรรมและหนี้, (พิมพ์ครั้งที่ 7, คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2556)), น.102

Prof. Yoot Saeng-Uthai posits that "a mistake is when a thought of a person who makes a declaration is not the same as the truth and such person does not notice the fact or the mistake."[213]

Ajarn Sak Sanongchart defines a mistake as "an understanding or a belief that is not the same as the truth which could be a mistake of fact or a mistake of law."[214]

In light of the above definitions, the author posits that a mistake is an erroneous belief without noticing that it is untrue.

4.1.2.1 A Mistake as to an Essential Element of the Juristic Act under Section 156

A mistake in a material matter of the juristic act is when a declaration of intention is diverted from the actual intent without noticing the material diversion[215] and thus would result in the juristic act being void because no intention is considered to have occurred[216] as provided for in Section 156 of the CCC that "A declaration of intention is void if made under a mistake as to an essential element of the juristic act.

The mistake as to an essential element of the juristic act under paragraph one is, for instance, a mistake as to a character of the juristic act, a mistake as to a person to be a partner of the juristic act, and a mistake as to a property being an object of the juristic act.

Several jurists have defined a test to determine whether the mistake is essential or not. Accordingly, a mistake is essential if by lacking such mistake,

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[213] Yoot Saeng-Uthai, The Obligation 1 (Thammsasat University Press 1979) 17 (หยุด แสงอุทัย, กฎหมายลักษณะมูลหนี้หนึ่ง, (โรงพิมพ์มหาวิทยาลัยธรรมศาสตร์ 2517)), น.17

[214] Sak Sanongchart, The Commentary on Juristic Act and Contract under the CCC (10th edn, Nithibunnakarn 2008) 167 (ศักดิ์ สนองชาติ, คำอธิบายโดยย่อประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมสัญญา, (พิมพ์ครั้งที่ 10, นิติบรรณการ 2551)), น.17

[215] Prakob Hutasingh, The Principle of Juristic Act and Obligation (Nitibunnakarn 1964) 45 (ประกอบ หุตะสิงห์, กฎหมายแพ่งลักษณะนิติกรรมและหนี้, (นิติบรรณการ 2507)), น.45

[216] Jeed Sethabutr, Supra 212, p.131

a juristic act would not be concluded.[217] Paragraph two of the Section provides concrete examples of an essential mistake, which includes but is not limited to the following.

(1) A Mistake as to a Character of the Juristic Act

A mistake in the character is when an actual will was to make one juristic act but mistakenly transpired to be another.[218]

In precedent judgment of the Supreme Court no.965/2530, a defendant took a plaintiff who is his mother to a land office for transferring land to him with the reliance on her illiteracy and decrepitude. Nevertheless, the plaintiff did not actually intend to do effectuate such transferring. Thus, the juristic act was due to a mistake as to an essential character and resulted in voidness pursuant to Section 119.

In precedent judgment of the Supreme Court no.1542/2498, a plaintiff printed fingerprints in one document with a misunderstanding that it was a request document for issuing a title deed but in fact, the document was for permission to divide the land into several parcels. The Supreme Court ruled that the contract is null and void as per Section 119.

In precedent judgment of the Supreme Court no.6255/2546, a plaintiff intended to sell land, not to make a mortgage agreement, to a defendant. Therefore, the mortgage contract was because of a mistake in material leading to voidness in accordance with Section 156.

(2) A Mistake as to a Person Being a Party to the Juristic Act

The type of mistake occurs when a mistaken party intends to make a juristic act with one party but due to an error, does so with another party.

In precedent judgment of the Supreme Court no.480/2539, a foundation had already been established but not yet registered as a legal entity that would be capable of receiving a transferred property. Still, it was claimed to be a legal

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[217] Seni Pramoj, Supra 211, p.90

[218] Sak Sanongchart, Supra 214, p.170

entity and received a gift as the donee. As a result, the gift contract made with the donor was void.

In precedent judgment of the Supreme Court no.15919/2555, a Nor Sor 3 Kor deed was issued illegally in order to deceive a plaintiff to purchase the land at a price of 660,000 Baht. In fact, the defendant did not have the legal right to possess such parcel of land and therefore would deprive the plaintiff of possession rights as well. Hence, the purchase contract was void under Section 156.

It shall be noted that a party shall consider such mistaken quality as essential to the juristic act, otherwise the mistake would not be governed under this provision. For instance, a purchase agreement generally does not require specificity of the parties because a seller only attempts to acquire money and a buyer only wants an object without further requirements. Thus, if an offer and acceptance meet, the sale contract is formed.[219] The examples are as follows.

In precedent judgment of the Supreme Court no.1245/2529, the object of a contract of sale with a right of redemption was money from repurchasing. Here, having a specific buyer is not essential to such type of contract. Thus, even if the seller made a mistake as to the buyer, the contract would still be valid and enforceable.

In the precedent judgment of the Supreme Court no.707/2535, a second defendant made a suretyship agreement with a plaintiff. Under such circumstances, the second defendant accurately understood that he shall satisfy an obligation in the event that the debtor fails to perform the contract. Therefore, a misbelief that the first defendant is a mother of someone else is not material enough to render the contract void.

(3) A Mistake as to a Property Being an Object of the Juristic Act

When the parties have concurred on a character of the juristic act, this would generally be legal binding and enforceable. Nevertheless, if the

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[219] Sak Sanongchart, Supra 214, p.171

character of the juristic act is correct, but there is a mistake as to an object which is considered essential, it could result in voidness.

In precedent judgment of the Supreme Court no.507/2542, the parties entered into a land sale and purchase agreement with the misunderstanding that it could be traded, transferred, or could have a title deed issued. In fact, such land was public property. Therefore, this scenario is a mistake in the property which was essential and the contract was void.

In precedent judgment of the Supreme Court no.4997/2549, the first defendant who was a seller had taken the plaintiff to a land which was the object of a repurchase contract. However, in identifying the plot of land, the seller pointed to land owned by another person. This misled the plaintiff to agreeing to buy such land. In this case, the plaintiff's intention constituted a mistake in the property which is essential. Accordingly, the contract was null and void.

Nevertheless, the court has held through several cases that in some events, such an object is not crucial enough to cause the juristic act to not to be enforced.

In precedent judgment of the Supreme Court no.7196/2540, a purchaser bought a product but had never reproached that the brand of the product was incorrect and had continued to use it. He had also made partial payment for the goods. So, the mistake in the object was not essential to render the sale contract void.

In precedent judgment of the Supreme Court no.1008/2543, a defendant insured a car under an insurance contract to the plaintiff. The code number was specified differently from the actual registration number. However, the engine numbers and chassis numbers were correct. Thereby, such a mistake was not a major mistake to render the contract void. The court ruled that the defendant shall be liable.

It could be seen that paragraph two of Section 156 illustrates three scenarios that are an essential element of the juristic act. Nonetheless, such examples are not conclusive and do not limit other circumstances to trigger the application of Section 156. Thus, the court have ruled that the following are essential elements.

In precedent judgment of the Supreme Court no.6103/2545, a plaintiff had intended to sell a disputed land at the price of 52 million Baht but mistakenly made a legal transfer to a defendant for the price of 4 million baht due to a fraudulent broker. Hence, although such a mistake as to the price was neither a mistake in the nature of the contract nor in a party nor property, it was considered to be significant and thus the contract is void.

In precedent judgment of the Supreme Court no.8755/2551, a defendant had deceived a plaintiff that he had a possession right to transfer the land and issue related documents when in fact he does not. Thus, such mistake was essential enough to render the contract void.

From the example precedent judgments, it can be seen that the principle of mistake could overlap with the principle of fraud as the mistake may be caused by fraud. Hence, a declaration under such vitiated intention could fall under both causes. Accordingly, as the legal consequence of Section 156 is voidness whereas the consequence of Section 159 is voidability, it depends on the mistaken party to select either Section as a basis to commence a lawsuit.[220]

4.1.2.2 A Mistake as to a Quality of the Person or Property under Section 157

Section 157 of the CCC provides that "A declaration of intention is voidable if made under a mistake as to a quality of the person or the property.

A mistake under paragraph one must be a mistake as to the quality of the person or the property which is considered as essential in the ordinary dealings, and without which such juristic act would have not been made."

Obviously, the mistake as to quality is not an error on the party or the object to the juristic act. On the other hand, it is a mistake on the quality of the correct party or object. Hence, several jurists opined that this kind of mistake is considered to be a mistake as to the motivation that generally does not have any legal

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[220] Sak Sanongchart, Supra 214, p.173

effects on the validity of the juristic act. Nevertheless, there might be an exception to this principle, thereby leading to voidability, if the mistake is on the quality of the party or object in material.[221] Hence, since the intention of a party is vitiated, it would not be as severe as a mistake under Section 156 which is considered as a lack of intention, subsequently resulting in voidness.[222] In order to exclude this type of mistake from the general motive which could not set aside a juristic act, the determination relies on "essential". Accordingly, to define what is essential is considered on a case by case basis, not only considering its physical figure, but also other relevant aspects that could affect its value.[223] Still, there are two criteria that may be helpful in such determination.[224] First, the criteria for determining the party's intention whether he considers such quality to be significant or not. For example, a foreigner who cannot understand the Thai language intends to settle in Thailand. Thereby, he hires a female cook who has both cooking and communicating skills in English. Without these skills, he would not have entered into a hire contract with the cook. As a result, besides being culinary abilities, command of the English language is required as it is considered to be an essential quality of the cook due to the employer's intention. Therefore, English skills is a quality which could avoid the employment contract in accordance to Section 157. The second criteria for determination is the character of the juristic act whether such character requires which quality to be essential. In general, types of juristic acts that are concerned about quality his house under a hire of work agreement. Thus, by the nature of the contract, B shall have skills always demand specific qualifications in order to perform obligations under the juristic act. For instance, A intends to hire B to construct to perform such construction, otherwise he is not qualified. Besides, it may include several types of juristic acts which demand trust and fiduciary characteristics from the party such as gift, loan, agency, and partnership agreements.

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[221] Prakob Hutasingh, Supra 215, p.48

[222] Sak Sanongchart, Supra 214, p.183

[223] Prakob Hutasingh, Supra 215, p.48

[224] Sak Sanongchart, Supra 214, p.179 -180

An example of a mistake as to the quality of a person can be seen from precedent judgment of the Supreme Court no.6518/2545. In this case, three defendants hired a plaintiff to work with the first defendant because they had considered that the plaintiff was a competent person who was qualified in intellectual property which is material to the employment contract. Thus, whether the plaintiff had graduated from the California Bar Association or not was an essential qualification. As a result, the mistake in such quality would not lead to a voidable contract.

An example of a mistake as to the quality of the property can be seen from Supreme Court judgment no.3105/2553. In this case concerning a land lease agreement, a plaintiff did not realize that the disputed land was not adjacent to Therdtai Road, despite there being a condition in the contract that it shall be. Therefore, the mistake is related to a quality of the property which is normally considered essential as the plaintiff would not have entered into the contract if such quality was absent. As a result, the contract is voidable under Section 157.

Another example is Supreme Court judgment no.2270/2558. In this case, a house that the plaintiff purchased from the defendant is partly located on the land of another person. Had there not been such mistake, the contract would not have been concluded. Therefore, such contract is voidable.

From the above precedent judgments, it can be concluded that it is possible that the principle of mistake could overlap with the principle of fraud when the mistake occurred because of deceit. Hence, because the legal consequence of both Section 157 and Section 159 is voidability, it depends on the mistaken party to elect either section or both of them to commence a suit.[225]

4.1.2.3 A Mistake Due to Gross Negligence under Section 158

Although a mistake under Section 156 and Section 157 could affect the validity of a juristic act, there is one exception. If he mistaken party was grossly negligent, he would not be able to avoid himself from the enforcement of the juristic act pursuant to Section 158 of the CCC which provides that "If the mistake

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[225] Sak Sanongchart, Supra 214, p.184

under Section 156 or Section 157 was due to the gross negligence of the person making such declaration, he cannot avail himself of such invalidity." Thus, such an application has a limited scope and only depends on the side of the mistaken party.

It is to be noted that this provision does not include ordinary negligence. Ordinary negligence is when a person fails to take the reasonable precautions that any prudent person would take, whereas gross negligence is an extreme disregard that is more than simple carelessness or failure to act.[226]

The legal consequence of this provision is not to protect the mistaken party who vitiated his intention. Compared to Section 156 which results in voidness, this section solely prohibits the mistaken party not to avail himself, but does not obstruct the other party to claim such voidness. Besides, as sometimes gross negligence is considered as a non-existence of intention, Section 154 of the CCC could be applied in the event that the declarant does not intend to be bound by his expressed intention. As a result, if the other party knows of such hidden intention, the actual intention of the mistaken party would be enforceable. This has been shown through the precedent judgment of the Supreme Court no.527/2506. In this case, a plaintiff had already known a defendant's mistake on calculating the offering price. Therefore, the defendant is not liable for the bid because it was void.[227]

On the other hand, according to Section 157 which results in voidability, such mistaken party may not avail himself as is the case for Section 156. Nevertheless, the consequence related to Section 157 would be contrary to Section 175 which allows certain persons who can avoid the voidable act, which does not include any other party than the mistaken party. Hence, if the mistaken person under Section 158 cannot avoid the juristic act, according to Section 175, the other parties could not do so either.[228]

Several Supreme Court judgments have ruled on the issue of mistake due to gross negligence as follows.

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[226] Jeed Sethabutr, Supra 212, p.137

[227] Sak Sanongchart, Supra 214, p.172

[228] Sanunkorn (Jumpee) Sotthibandhu, supra 11, p.36

In Supreme Court judgment no.7058/2543, several auctions were announced, causing confusion to a buyer who offered a price that would have to be auctioned in other cases to the present case. The event in which the buyer mistakenly stated the price was because of gross negligence. Therefore, the buyer could not take advantage of such a mistake to avoid the contract.

In Supreme Court judgment no.4906/2558, a plaintiff had not paid attention when inspecting a disputed land before deciding to purchase it from a defendant. Moreover, the defendant had already given a warning to the plaintiff about the examination. Since it was gross negligence on the part of the plaintiff, the purchase and sale agreement is still binding and not voidable.

In the following cases, the Supreme Court handed down rulings that the mistake was made under ordinary negligence, not gross negligence.

In Supreme Court judgment no.3484/2529 concerning an exchange contract, a defendant had examined documents relating to the identity of a car, whereby the document did not appear forged. Hence, even if the defendant did not contact the Police Department Registration Division to prove the authenticity of the documents, it could not be said that the defendant was under gross negligence and thus Section 158 would not apply.

In Supreme Court judgment no.4997/2549 concerning a repurchase agreement, a plaintiff had and accepted land from the first defendant because he believed that such land was adjacent to a paved road. Such misunderstanding was because the first defendant fraudulently pointed to identify the land of others to the plaintiff. Hence, such error was not considered to be the plaintiff's gross negligence.

Upon consideration of Section 156 to Section 158, it can be seen that Section 156 and Section 157 gives more weight to the protection on the side of the party who is subject to the mistake to preserve the freedom of contract. Still, there is only one exception stated under Section 158 to be a safeguard to the other innocent party that the mistaken party could not claim for nullity if he is under gross negligence.

Therefore, if the mistake falls under Section 156 and Section 157, Section 158 would be the only condition which the mistaken party cannot claim in order to nullify the juristic act on the ground of the mistake.

4.1.3 Consequences

4.1.3.1 Voidness

Pursuant to Section 156, a mistake as to an essential element of the juristic act would result in voidness because such mistake is considered to be a lack of an intention. Thus, the juristic act is not done voluntarily under Section 149, which is a reflection of the principle of autonomy of will. Nevertheless, such doctrine shall be considered together with the certainty of relationship in the society which takes into account the expressed intention, even though it is not the actual will.[229] According to Section 172[230], such void juristic act could not be rectified and any interested party could raise such invalidity at any time. Therefore, this type of nullification is as if the juristic act has automatically never been concluded without the required allegation from any party on the issue.

Nevertheless, it is possible that the mistaken party later notices such mistake but does not intend to invalidate the juristic act, because he may have a new intention to enforce the contract as expressed or, to make matters worse, none of the parties has noticed such circumstance and have continued to perform the contract as agreed even though the contract is still absolutely null and void which leads to the acquirement of something without legal ground. Thus, such legal consequence may not always be beneficial to the parties and it would obviously have a negative effect on commercial transactions. Besides, the mistake that occurred in the process of forming an internal intention could not be known to the other innocent party except if it is expressed. Accordingly, if the law seeks to protect the mistaken party, it may be proper to do so in a milder manner rather than in an extreme manner.

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[229] Jeed Sethabutr, Supra 212, p.141

[230] The CCC Section 172. A void act cannot be ratified, and its nullity may be alledged at any time by any interested person.

As a result, besides preserving the principle of contract that the offer and acceptance shall meet, which was the conclusion at the time the drafting committee of the CCC B.E. 2535 had chosen, other aspects shall be taken into account to in weighing which consequence between voidness and voidability is better suited to the present day.

4.1.3.2 Voidability

Under Section 157, an essential mistake as to the quality of the person or the property results in voidability. Thus, there are two main consequences that follow. Firstly, the juristic act is deemed to have been void from the beginning if it is avoided by the entitled person.[231] Accordingly, the parties shall be restored to the condition in which they were previously in, pursuant to Section 176 (3). Moreover, if the third party has acquired any property through payment and in good faith, he would be protected by not being obliged to return such property to the parties in the voidable juristic act, pursuant to Section 1329.[232] On the other hand, secondly, the juristic act is considered to have been valid from the beginning if the entitled person makes a ratification[233] or such person does not avoid the juristic act within the specified period of time.[234]

It shall be noted that mistakes under Section 156 and Section 157 which lead to the consequence of nullity shall not be due to gross negligence of the mistaken party, otherwise the mistaken party cannot avail himself of such invalidity. Accordingly, besides from the circumstances under these two provisions, the juristic

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[231] The CCC Section 176 (3). A voidable act may be avoided by the person who has made the declaration of intention owning to mistake, fraud or duress, or ...

[232] The CCC Section 1329. The right of a person who has acquired property for the value and in good faith is not affected even if the act under which his transferor acquired the property was voidable and has been subsequently avoided.

[233] The CCC Section 177. If any person entitled to avoid a voidable act under Section 175 ratifies voidable act, it is deemed to have been valid from the beginning; but the right of third persons cannot be affected thereby.

[234] The CCC Section 181. A voidable act cannot be avoided later than one year from the time when ratification could have been made, or later than ten years since the act was done.

act shall be valid and enforceable. For example, a mistake as to the quality of a property which is not in essential could not be raised to avoid the juristic act.

4.1.4 The Association between the Mistake with the Process of Making an Intention

Four elements are required for a juristic act to form. These are parties, a declaration of intention, an object, and a formation.[235] Accordingly, a declaration of intention shall be voluntary, but sometimes it is vitiated due to a mistake which is sufficient to avoid the juristic act. Therefore, investigating such disruption in between the process of making the intention to determine the legal consequence should not be overlooked. There are three imperative stages of making an intention in relation to a mistake.[236]

4.1.4.1 Motivation

A motivation could be any reason that inspired or persuaded a party to enter into a juristic act. Motivation varies upon each individual, leading to uncertainty, divergence, and dependence. Therefore, under the CCC, the unexpressed motivation could not have any legal consequence so as to stabilize relationship in the community to not be undermined easily. Moreover, to be realistic, a person shall accept the own risk of their expectations, irrespective of whether such result is negative or positive without being disrupted by law.[237] For instance, A thought that his bicycle had been stolen, therefore, he went to the shop to purchase a new one. The fact is, his mother took the bicycle and hid it because she was concerned that A would be reckless and get into an accident when cycling. Such misunderstanding of A occurred in between the process of motivation, which persuaded him to conclude the sale contract with the shop to acquire a new bicycle. At the moment of making the decision, A neither had a mistake in the quality of the objective (the bicycle) nor declared his intention different from what he determined in his mind. Therefore, the

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[235] Sanunkorn (Jumpee) Sotthibandhu, Supra 1, p.40

[236] Sanunkorn (Jumpee) Sotthibandhu, Supra 11, 44 - 46

[237] Jeed Sethabutr, Supra 212, p.130

mistake in the stage of motivation had no legal effect on the contract and if the contract consists of the other three required elements, it would be enforceable.

Nevertheless, a point can be made that although in general the motivation does not affect the legal consequence, several scholars, including Roman law, still provides or some exceptions.[238] The first is when the motivation becomes a part of a condition, whether a precedent or subsequent condition. As a result, although the mistake could not invalidate the juristic act, such juristic act would take effect or cease to take effect, depending on the condition under Section 182.[239] The second exception is when the mistake in the stage of motivation is due to fraud. Although the motivation has no legal effect under the mistaken perspective, the juristic act could be voidable because of fraud. The third exception concerns when the mistake is considered to be an object of a juristic act because without such motivation, the juristic act will not have been made. The last exception is when the motivation is related to the quality of a person or property which is material in ordinary dealings.

4.1.4.2 The Formation of an Internal Intention

In this stage, the mistake has a role in encouraging the party to have an internal intention connected to the misleading motivation in the previous stage. As a result, although the party expresses his intention as what he had in mind, it is erroneous and the party is not aware of it in this internal step. Therefore, if such unexpressed intent is a mistake in the quality of the person or the object in material, it would result in voidability by virtue of Section 157. For example, Miss B thought that Mister C is a gardener as she had frequently seen Mister C wearing safety attire and always carrying grass shears in a public lawn. Miss B erroneously decided to make a hire of service agreement with Mister C to provide gardening services in her back yard. It turns out that Mister C is an actor with no gardening skill. Here, Miss B declared her intention which is true to her internal determination, but such a decision was significantly incorrect as to Mister C’s quality. Therefore, the agreement is voidable.

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[238] Sak Sanongchart, Supra 214, p.168 - 169

[239] The CCC Section 182. A clause which subordinates the effect or the end of the effect of a juristic act to a future and uncertain event, is considered a condition.

4.1.4.3 The Declaration of Intention

In this stage, a party expresses its intention but it is inaccurate without realizing a deviation from the actual intention. Therefore, although an internal intention had been correct but the mistake arose in the process of expression. The mistake is based on an essential element of the juristic act, the juristic act shall thus be void pursuant to Section 156. For example, Miss D intended to purchase a silver necklace with at price of 5,000 Baht but indeed the object costs 50,000 Baht. Consequently, such a declaration was different from the internal intent because of a mistake in the process of expressing it. Therefore, although Section 156 paragraph two does not stipulate that a mistake in price is an example of an essential element of the juristic act, the Supreme Court has held that the mistake in price could be a mistake regarding an essential element. As a result, the sale contract shall be void.

After thoroughly reviewing the principle of mistake in Thai law, the actual intention of the parties seems to contribute to the subjectivity doctrine with a rare consideration on what the parties externally express, which is the product of the principle of freedom of contract. Accordingly, it is represented through Section 156 and Section 157 that voidness and voidability are the consecutive effects, regardless of the equity of the other party who has relied on good faith. Especially in relation to Section 156, it could be applied in a wide scope, as paragraph two provides merely examples and the consequence of such mistake is voidness.

In the author's opinion after examining court precedents, court proceedings have become a mechanism to prevent the over-application of the pure subjective theory. The court does so by not ruling that all cases are to be governed under Section 156 and Section 157 too easily. For example, according to the facts of each case, the mistake may not be considered being a mistake in material to prevent the validity of a juristic act. Nonetheless, such criteria applied by the courts are sometimes inconsistent and unpredictable. Furthermore, there is only one exception to relieve such extreme protection to the mistaken party which is Section 158 in the case of gross negligence which represents observance of the objectivity doctrine and the good faith of the party to the juristic act. Thus, it is questionable whether Thai law has an appropriate balance between subjective and objective principles or not.

As a result of such uncompromising application to the doctrine of subjectivity, complications have arisen at least in three aspects. First, a ground of trust between the parties to form legal relationships through juristic acts, especially contracts, is undermined. Second, at the same time, it could stimulate an unpredictable economic transaction by decreasing confidence that the agreement would be bound as expected. Last but not least, court proceedings would be extended because the time taken to prove the internal will of the mistaken party is longer than the time taken to prove what is expressed.

4.2 Legal Analysis

4.2.1 The Problematic Issue

4.2.1.1 The Balance for Equality to all Parties

Thai law seeks to verify the principle of autonomy of will that the juristic acts shall be valid if it is generated from the actual will rather than being concerned of other principles which is a reflection of a subjective principle. As a result, there is a possibility that the juristic act would be invalid due to several grounds of mistake, as stated in Section 156 and Section 157 where the mistake from the mistaken party is excusable. Still, the problem is that the other party is abandoned despite being worthy of protection, as such private autonomy of a mistaken party could not disturb another free will and the other innocent party should be assured that the agreement he made would be valid as expected under the principle of good faith. Thus, increasing the protection to the other party would not only preserve the principle of good faith but also the freedom of contract on the side of the other equally.

After the author has examined the cases handed from the Supreme court of Thailand, the author is of the opinion that court proceedings have become a mechanism to prevent the over-application of the pure subjective theory by ruling that not all cases are to be governed by Sections 156 and 157, such as by ruling that the mistake does not reach the criteria of mistake in material or that the mistake is due to gross negligence thereby prohibiting nullification. Besides, in most cases the fact of the case is that the other party knows the essential circumstances of mistake, which sometimes could constitute an overlap with fraud and, therefore, it may be one of the surrounding grounds why the Supreme court has ruled that juristic acts, especially the contracts, is nullified. Nonetheless, such criteria applied by the judge are sometimes inconsistent and unpredictable depending on the discretion. Moreover, when considering the provisions under the CCC and the examples provided by Thai jurists, there might be nullity due to a mistake even when the other party is in good faith and without any knowledge of the mistake. It is therefore clear that unfairness exists in provisions of the legislation. Accordingly, there are three example situations and legal consequences the author would raise to show how the CCC governs the fairness to parties in the event of a mistake in civil and commercial activities.

In the first example, A had intended to hire B who is a famous tailor to make a wedding dress without knowing him before. However, when A entered the shop, she saw C sitting there and mistook that C is B because their name is spelled similarly. Consequently, A made a hire of work agreement with C but, after that, A found out the truth and would like to terminate the contract by claiming that the mistake was in relation to a party to the contract which shall be void under Section 156. Under such circumstances, even C may have suffered from damage, A still holds the right to claim for such voidness without any liability for damages that occurred to C for what C has prepared before the contract was concluded.

In the second example, A hired B who is a famous tailor to make a wedding dress with extra high quality requiring a specific skill. Accordingly, A and B have entered into a hire of work agreement but in fact, B does not have such specific skill despite being well-known in this industry and A has not been under gross negligence because most famous tailors have such ability. As a result, A would like to avoid the contract by claiming that the mistake was on the quality of the person in essential which would render the contract to be voidable by virtue of Section 157.

When comparing this second example to other systems, it is apparent that other laws somehow could provide more protection to the other party. For example, under English law, the one-sided mistake where the other party is not aware of is a unilateral mistake. Accordingly, such mistake could not affect the validity of contract except in the case of ambiguity where the reasonable man could not believe that a declaration is a true intent. Thus, the operation of the legal system itself is adequate to protect the other innocent party by applying the objective principle. As a result, if the second example is governed under English law, it may have no legal effect at all and thus the contract would still be valid and enforceable.

Turning to considering UNIDROIT principles, it is obvious that a serious mistake alone could not be a ground to invalidate a contract. Accordingly, the contract could be avoided on the ground of mistake only if it is a serious mistake based on fulfillment of the reasonable man test and further conditions stated in Article 3.2.2. Consequently, if B has not made the same mistake, caused the mistake, knew or should have known the mistake which is contrary to commercial standards, or has not yet prepared himself to perform the contract, moreover, A shall not be under gross negligence or should bear the risk, then A has met the conditions to avoid the contract. Obviously, this doctrine reflects fair protection to all contractual parties as A could still avoid the contract but not so easily in order to protect B as well.

In the third example, the facts are similar to the first example, but A had already recognized B's appearance through a picture in a newspaper. Hence, A should notice at the time of meeting C that C is not B and shall not make the agreement with C. If A had still entered into the contract with C, it would be considered that A was under gross negligence and thus she would not be able to void the contract as stated in Section 158. This situation is a reflection of the only protection under the objective principle that Thai law has provided to the other bona fide party by not assisting the mistaken party to invalidate the contract if such mistake is due to gross negligence.

In the last example, the facts are similar to the first example, but C had known at the time of entering into the contract that A intended to make the contract with B, not him. Thus, C was intentionally silent to the fact which A was ignorant. Under this scenario, it is obvious that C, the other contractual party, shall not be insulated because such mistake had arisen because of his fraud. Therefore, as the other party did not act in good faith, the actual intention of the mistaken party should prevail because there is no reason to protect the ill will.

As shown through these four examples, in the event of a one-sided mistake where the other party is under good faith, the mistaken party has preserved the rights to invalidate the juristic act if the mistake falls under Section 156 and Section 157 as provided in the first and second examples provided that such mistake was not due to gross negligence as stipulated in Section 158 as provided in the third example whereas the other innocent party may be suffering from damage, such as to lose the opportunity to make a contract with others in that period, or to bear the cost of the preparation. Consequently, the concept of mistake under the CCC is one which choose to shelter the mistaken party to preserve the freedom of contract than the other innocent party. Thus, it could lead to inequity and uncertainty of commercial transactions. As a result, Thai law may require further conditions besides Section 158 to limit causes to nullify or avoid the juristic act on the grounds of mistake.

4.2.1.2 The Claim for Damages to the Other Party

When considering damage occurring to the other innocent party due to the juristic act being invalidated on the ground of a one-sided mistake which may frequently be found in commercial contracts, several countries make negative interest available to the other contracting party who has suffered from preparing to perform the contract because he has expected that it would be valid and enforceable as agreed, such as for losing the opportunity to enter into a contract with others, for wasting time and for other costs, etc.

When analyzing the CCC, a question arises as to which legal grounds could be applied to allow recovery of damage sustained by the other party who is under good faith and is not under a mistake. Obviously, the principle of pre-contractual liability could not be the solution because such doctrine does not exist in any provision of the CCC. As a result, several jurists believe that it should be done under tort law, as the other party who acted in good faith could claim for damages because of the mistaken party is negligent[240] in the meaning of Section 420 of the CCC[241] and thus would cause the burden of proof to be on the other party, by virtue of Section 84/1 of the CPC.[242]

Nonetheless, the author believes that such legal grounds may not be the most appropriate application for the other party to claim damages because of uncertainty. In other word, it depends on existing evidence whether the required elements under section 420 in terms of whether the mistaken party intentionally or negligently made the mistake has been met or not. Furthermore, the mistake itself may not be considered to be an unlawful act under Section 420 because the consequences of a mistake under Section 156 and Section 157 in the present CCC are rectified by the law that the mistaken party shall be protected. Besides, when considering the protection provided to the injured person, it covers life, body, health, liberty, property, or any right of another person which is considered as an absolute right but the issue of mistake in a juristic act constitutes a relative right between the parties. Thus, applying Section 420 may not be the most appropriate application. Accordingly, there would not be any explicit provision to be grounds for the other innocent party who suffered from damage to claim for damages.

4.2.1.3 The Consequence of Voidness under Section 156

According to the problematic issues in 4.2.1.1, together with the first example thereof, it is apparent that the consequence of mistake under Section 156 is voidness, which is an extreme result aimed at preserving the principle of contract

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[240] Serm Vinitchaikul, The Commentary on Juristic Act and Debt under the CCC (Rongpim Komsampamit 1972) 45 (เสริม วินิจฉัยกุล, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ลักษณะ นิติกรรมและหนี้, (โรงพิมพ์กรมสรรพามิต 2515)), น.45

[241] The CCC Section 420. A person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore.

[242] The CPC Section 84/1. Party who alleges the fact in each issue shall bear a legal burden of proof of the fact...

where the offer and acceptance meet. Thus, applying the voidability consequence could not properly maintain such doctrine. Nevertheless, the assumption may be debatable because no one could gain insight into the unexpressed intention and there is also a principle of good faith of the other party to be concerned. Moreover, the mistaken party may intend to continue the juristic act even it was made from a mistake, but he could not optionally rectify such voidness, unlike a voidable juristic act, because the law has considered that it has never been made and existed.

Therefore, although the legal consequence of voidness would be a benefit in the aspect of supporting the contract principle and could explain the clear distinguished line between the mistake in essential of the juristic act and a mistake in quality of person and property which are generated from different processes, it may lead to a disproportionate amount of negativity for the other innocent party, as the mistake is a personal issue free from any disruption from the act of any other person. It would therefore not be supportive for commercials and transactions if the voidness is allowed to be the following consequence under Section 156. Besides, it should be noted that the internal will could not be accessed by anyone. As a result, the importance of the actual intention shall be recognized by law only when it is expressed to be known.

4.2.2 The Proposed Solutions through the Study of Comparative Laws

At present, most countries do not apply any doctrine of subjectivity and objectivity solely but have tried to combine both doctrines for fairness to all parties. Although Thai law itself follows this direction by applying the subjectivity doctrine in Section 156 and Section 157 with a combination of the objective doctrine under Section 158, yet the main focus for the safeguard has still been on the side of the mistaken party. As a result, to balance between the other party to possibly enforce the juristic act as agreed and enable the mistaken party to nullify the agreement which is vitiated from the actual intention, several arrangements should be introduced by not permitting the cause of mistake to nullify the juristic act as easily under Thai law.

Studying the principle of mistake in other countries together with the model law to make a comparison to the CCC may provide several solutions. Thus, the author has extracted advantages from the countries and model law in study to examine as follows.

4.2.2.1 The Comparison with English Law

The doctrine of mistake in most common law countries, including England, has relied on objectivity, whereas most civil law countries have applied the subjective principle. Accordingly, in the event of a one-sided mistake, also known as a unilateral mistake, where the other party is in good faith, the outward intention would be considered to be the actual will rather than examining the internal intention. Therefore, the contract would generally not be void due to mistake except, to relieve the strictness, in the event of ambiguity based on the standard of the reasonable man. From such a scenario, the mistaken party could claim that the contract is void on the ground of the mistake.

Compared to Thailand which is a civil law country and has applied the subjective principle, it has some similar perceptions as English law in the aspects of the rectification and Non est factum as stated under Section 94 of the CPC. According to Section 94 of the CPC, if documentary evidence is required by law, oral evidence would generally not be admissible, except in a number of situations, including to prove that such document is inaccurate. Thus, it may not be necessary to amend this issue.

However, most concepts of mistake under this system are not familiar to Thai law in many aspects, as the CCC has a sole recognition to have limited allowance for the mistaken party to avoid the juristic act that is only if it is a mistake related to Section 156 and Section 157 but occurring as a result of gross negligence under Section 158. Unlike English law, the contract would generally be valid and enforceable except if the parties are at cross-purposes, the mistake is known to the other party, the reasonable man under the same situation would also mistake the circumstances as the mistaken party does, or the parties make the same mistake in material, such as the subject matter never existed. Obviously, the operative of mistake under English law itself is adequate to protect the other innocent party whereas under the Thai system, the opposite can be said. As a result, although the legal treatment of mistake under the CCC is the subjective principle to recognize the actual will than an outwardly expressed declaration, it is interesting to adopt a more objective approach from England to increase equality and certainty of transactions, especially the criteria of the reasonable man by considering whether such expression is believed by a reasonable man that it is an actual intention or not. If not, it is sensible that the mistaken party should be bound to his declaration. Accordingly, the English system could be the model for Thai law in the aspect of adequate protection to the other contracting party to preserve the good faith principle. Still, besides such perception, the author is hesitant to adopt other doctrines because several disorganization still exists in English law in relation to the principle of mistake, as it has a much narrower application compared to the mistake in civil law countries as it has instead developed a principle of misrepresentation.

4.2.2.2 The Comparison with French Law

As Thai civil code has been influenced by France for as a result of the drafting committee being composed partly of French jurists, the former Code Civil of France and the judgments had laid close scenarios to Thai law, indicating what types of mistakes could affect the validity of a contract and thus had led to similar results between voidness and voidability. For example, the mistake in quality of substance and person under the former code would result in voidability known as relative nullity which is similar to Section 157 of the CCC, whereas the obstacle errors developed by legal scholars and judgments would prevent the contract from even forming, resulting in the consequence of absolute nullity which is similar to Section 156 of the CCC. Furthermore, the other similarity is that the *Cor de cassation* of France played an important role to harmonize equality to the other party through court decisions. For example, the mistake to nullify the contract shall be excusable, which is similar to Section 158 of the CCC or the other party shall be aware of the fact that is essential to be a ground of avoiding the contract. Thus, it is similar to the present role of the Thai Supreme Court, which has attempted to strike a balance for fairness.

For example, the court has handed judgments that a mistake is not essential enough to obstruct the validity of a juristic act pursuant to Section 156. Besides, most precedent judgments the author has studied have the scenario that the other party knows the essential fact which sometimes could be an overlap with fraud. Accordingly, it may be one of the surrounding circumstances why the Supreme court has ruled that the juristic act is nullified under Section 156 or Section 157. Still, the fairness to all contractual parties provided solely by the discretion of the court, but in absence of a legislative amendment, could not affirm the certainty.

After reformation of the code of France, the law has been more concerned with fairness and thus leads to several differentiated points compared with Thai law to be studied. First, the principle of mistake under Thai law has been applied to the scope of juristic act whereas in French law it has been applied in the specific field of contract law which is narrower. Accordingly, the mistake in the CCC could cover unilateral acts which do not require the declaration of the other party to be concluded. Therefore, making a comparison shall be done properly. Second, Thai law has no precise provision on juristic acts in the principle of good faith to govern the contract law because the CCC has Section 5 and Section 368 to be applied in a general manner. This is unlike French law, which states clearly to emphasize the important role of the good faith principle in relation to a mistake in several provisions as it would cover every process of intention and declaration making, including the pre-contractual stage. Third, in order to standardize the mistake of law in the CCC which is actually decided by the court that it could avoid the juristic act such as the precedent of Supreme court no.3285/2553, it may be necessary to explicitly legislate this type of mistake of law in the CCC to make it clear that the determination would be the same as a mistake of fact. Thus, it would be comparable to Article 1132 of the French Code. Fourth, the consequences of mistake under the CCC could be void under Section 156 and voidable under Section 157 whereas French law only recognizes relative nullity or voidability to be the consequence of violating private interests, as stated in Article 1131 together with Article 1179. Nevertheless, it is debatable whether the French system recognizes the obstacle errors which result in an absolute nullity or not, as it has not been adopted into the code. Still, the tendency of the *Cor de cassation* is to hand the consequence of voidability rather than voidness, which echoes the opinion of several French jurists. Last but not least, pursuant to scholarly work and judgments, the Thai approach considers that a motivation generally does not affect the validity of a juristic act, which is an approach similar to that of France. The difference is that such recognition is not adopted into the CCC whereas French law has already codified such judgments to the reformed code. The reason behind this is possibly because there are several exemptions that Thai jurists have considered that motivation could nullify the juristic act in several events. Therefore, there is still room left for the court's discretion in this regard.

When examining the reformed code of France, although its main principle is subjectivity, concrete judgments were codified for more unity and certainty. For example, the mistake in the motivation or the value could not be a ground to nullify a contract pursuant to Article 1135 and Article 1136. Accordingly, the extreme nature of the subjective principle has been lessened. Therefore, it is interesting to consider whether Thai law should follow such a direction by ratifying several court judgments into the CCC to effectuate a higher degree of justice or not.

4.2.2.3 The Comparison with UNIDROIT Principles

The UNIDROIT Principles have attempted to bring about equality to all contractual parties and uphold certainty of commercial transactions by combining the subjectivity and objectivity approaches. Consequently, the advantages from each principle are extracted and applied to this model law. In accordance with the doctrine of mistake, a contract could be avoided on such grounds if the required conditions are met, as stated in Article 3.2.2. It is to be noted that the relevant mistake under Article 3.2.2 covers only the field of the contract, whereas Section 156 and Section 157 of the CCC is applicable to juristic acts. Hence, mistakes under Thai law are applicable in a wider scope, as it may include unilateral acts. Therefore, in comparing Thai law and UNIDROIT principles, comparisons must be done with respect to bilateral juristic acts if the proposed conditions depend on the other party because a unilateral juristic act does not require the other party's intention.

As demonstrated, the UNIDROIT principles rectify the mistake of law besides the mistake of fact under Article 3.2.1 similarly to the French reformed code whereas Thai law does not. Also, the criteria to allow the mistaken party to invalidate the contract due to a mistake under the UNIDROIT principles is outstandingly different from the CCC and thus the author would consider this point to be one of the most interesting suggestions for amendments to Thai law. Article 3.2.2 provides distinctive protection to the other party to be more fair by stating additional requirements that shall be satisfied for such mistake to be serious based on the reasonable man standard and, the other party is under the same mistake, the other party caused the mistake, the other party knew or should have known the mistake and it is contrary to reasonable commercial standards, or the other party had not yet acted in reliance on the contract at the time of avoidance. Besides, there are also exceptions under which a party is not allowed to avail himself from such invalidity as he was grossly negligent or when there is a risk of mistake that should be borne by the mistaken party. Obviously, it emphasizes again how much Thai law protects the mistaken party and ignores the safeguard to another party as could be seen that the protection to the other party under Thai law on grounds of gross negligence is similar to only one out of six conditions permitted by the UNIDROIT principles.

Besides, there is no concept under Thai law similar to UNIDROIT which causes the mistaken party to lose the rights to avoid a contract if the other party had already performed as agreed or immediately informs his willingness to perform the contract before receiving the notification of avoidance. Also, there is a possibility that the contract would be void because of a mistake under Section 156 which is a severe consequence whereas UNIDROIT principles state that a mistaken party could notify the other party within a reasonable time to avoid the contract pursuant to Article 3.2.11 and Article 3.2.12. As a result, the contract would be considered as having never existed, which is a similar consequence to a voidable contract and is less extreme when compared to a void contract and better suited to commercial transactions.

In light of the above analysis, the author would like to propose that the UNIDROIT principles, especially Article 3.2.2, should be adopted into the CCC as the principles itself has already combined subjectivity and objectivity principles to ensure fairness for all contractual parties and benefit commercial transactions whereas English law still applies more objectivity and French law applies more subjectivity. As a result, these two countries could be model laws to the CCC in some aspects, but several concepts have still struggled within its own respective systems and is also in between the process of developing to rectify.

CHAPTER 5
CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

It is undeniable that the issue of mistake plays a vital role in business transactions because it could directly affect the validity of juristic acts. As discussed in the previous chapter, the concept of mistake under Thai law has been enforced for prolonged period, contributing to up-to-date principles being overlooked. Up-to-date principles could be codified or amended to mitigate unfairness by affording more protection to the other innocent party and to the certainty of transactions, as could be seen through Section 156 to Section 158 and the court’s judgments. Accordingly, the other innocent party to the juristic act, especially in contracts, cannot be ensured that the contract would be enforceable as agreed. Besides, such other party could only claim damages if the conditions of a wrongful act under section 420 is reached, obliging him to bear the burden of proof. Therefore, the unfair protection may reduce the interest of commercial transactions and delay the legal proceedings in court because there is a difficulty in proving the actual and internal will of the mistaken party. It goes without saying that this is the product of the concentration on the freedom of contract reflected in Section 156 and Section 157 rather than the good faith principle as reflected in Section 158 and thus subjectivity prevails over objectivity. Consequently, concerning the issue of mistake, it is arguable whether there is fair enough protection to all parties or not.

As demonstrated in Chapter 2, the freedom of contract is related to a true intention or real consent of the parties to govern their assets through an agreement that represents an individual and voluntary determination. In relation to the legal issue of mistake, freedom of contract is considered to be a priority because if the internal intention is not the same as the declared intention in respect of an essential element of the juristic act, it would result in voidness as stated in Section 156. Also, if the internal intention is made because of a mistake as to the quality of person or property in material, it would result in voidability as per Section 157. Clearly, the mistake under Thai law is more concerned of internal intention rather than an expression of intention for the purposes of maintaining the doctrine that no one should be liable for what he did not intend. On the other hand, the good faith principle which entails the honesty and the trust between the parties to keep their promise as agreed could be seen only in Section 158 in the case whereby the mistaken party acts by gross negligence.

Regarding the subjective and objective approaches, the subjective approach concentrates on what the party truly intends at the time of concluding the juristic act over what has been externally expressed. Thus, it has a close relationship to freedom of contract. Nevertheless, to seek for a balance in the legal regulation of mistakes should not be done only in subjectivity which is a pure will theory as it shall be evaluated with objectivity to be suitable for the current state of the economy and for fairness to the other party. On the contrary, the objective approach accepts only what is expressed externally to prove the literal intention of the party. Therefore, the other honest party in an agreement is served the right which prohibits the mistaken party from claiming that he has not had such intention. According to these two pure theories, modern law has attempted not to adopt any doctrine solely but make a combination to address contemporary issues which could better lead to the fairest consequences.

As demonstrated in Chapter 3, when comparing the problem regarding equality of contractual parties with other legal systems, namely, England, France, and UNIDROIT principles, it turns out that French law requires an intention in the subjective sense to form the contract, whereas English law does not have such requirement and thus would be already satisfied if one party reasonably believes that the other's expression is an actual will. Therefore, the mistake in English law tends to protect the reasonable expectation of the other party whereas civil law systems place an emphasis on the actual will by affording more protection to the mistaken party.

When analyzing each of the two countries which represent a common law country and civil law country respectively, it seems that the two countries each have their own way to relieve the extreme and strict nature of their applicable principles in various ways. Under the principle of mistake in England, even if the declaration is considered to be the actual will, in other words reflecting objectivity, the mistaken party could be excused under several exemptions, such as by claiming that the mistake is caused by ambiguity in the circumstances of the case, rectification, etc. On the other hand, under French law, even if a mistake in material could normally invalidate a contract, several exceptions have been codified. In particular, there are provisions which state that motivation cannot be an excuse, which is Article 1135 of the reformed code. A compromising approach could be found in the UNIDROIT principles which did not adopt a purely subjective or purely objective approach, but takes a position on the average combination between the civil law and common law approaches to bring about the most equitable results. Thus, according to Article 3.2.2 of UNIDROIT, it allows the mistaken party to avoid the contract if further conditions are met.

As a result, after this problematic issue has been examined under a comparative legal analysis, it becomes clear that the doctrines in other systems have ascertained more suitable options to all parties. This is particularly true with respect to UNIDROIT principles. On the other hand, the CCC only has Section 158, which is insufficient. Thus, the amendments which would allow nullification or avoidance of a juristic act on the ground of mistake is compulsory to bring more fairness to all relevant parties.

5.2 Recommendations

The author would like to propose measures to ensure equality for all parties and enhance certainty in commercial transactions when confronted with issues of mistake which vitiates consent in Thai law by means of the following amendments to legal provisions.

5.2.1 The Application of Further Conditions to Nullify or Avoid the Juristic Act

The author proposes that there shall be further requirements that must be met in order for the mistaken party to nullify or avoid the juristic act on the ground of mistake. As mentioned earlier regarding the issue of unfair protection to the other innocent party who has a safeguard only under Section 158, the author has conducted a comparative legal analysis and, particularly with respect to UNIDROIT principles, have found interesting points to propose as further conditions to the CCC as follows.

Firstly, the other party must be under the same mistake. This is extracted from English law and UNIDROIT principles.

Secondly, the other party must have caused the mistake. This is extracted from UNIDROIT principles. Particularly, such cause could be done expressly or implicitly, with negligence or innocence, but it shall not be made by fraud, otherwise it would be governed under provisions concerning fraud from Section 159 to Section 163 of the CCC. Moreover, it is proposed that silence could also be a cause of an error but, again, it must not have been done intentionally, otherwise the intentional silence would be fraudulent under Section 162 of the CCC.

Thirdly, it is proposed that the mistake is or should have been known to the other party. This is extracted from the English, French, and UNIDROIT legal systems. Accordingly, the criteria to determine what the other party should have known is based on a reasonable man standard from an objective principle. The UNIDROIT Principles state precisely that such mistake that the other party knows or should have known shall be contrary to reasonable commercial standards of fair dealing, which in turn gives rise to the duty to inform. However, the author proposes to not include this part of the UNIDROIT principle, because the CCC is applicable to civil and commercial matters which also covers non-commercial transactions. As a result, if the serious mistake is recognizable by the other party, there is enough ground to justify that he should not be protected by law because of his lack of good faith.

The author maintains that these first three conditions are sensible because the other party does not deserve the protection as he was involved in one way or another with the mistaken party's error.

Fourthly, the author proposes that the other party must, at the time the mistaken party gave the notice of avoidance, not have acted in reliance yet. This is extracted from the UNIDROIT principles. For to this condition, the other party must not have yet prepared himself under good faith to be capable to perform. Therefore, he would not have suffered any damage through relying on the juristic act, especially contracts. It is understandable that this point may cause some concern, but as far commercial business is taken into account, good faith in the formation and performance of the contract should be fully protected and the possibility of avoidance should be ruled out.[243]

The principle of mistake under French law and UNIDROIT principles would be applied to the contracts which entails a narrower scope in comparison to the CCC, which includes mistakes in juristic acts. Thus, when considering the above conditions which depends on the other party, it could not cover to unilateral acts because it does not require the other's declaration to be formed. Hence, the conditions from the side of the other party shall not be taken into account. Accordingly, the proposed amendments would only be applied to bilateral juristic acts, which includes contracts.

In addition to the conditions from the side of the other party, there shall be an exception under which a party is not allowed to avail himself from such invalidity viewing from the side of the mistaken party if he had assumed the risk of mistake or if he should bear the risk. This is extracted from French law and UNIDROIT principles. Consequently, such exceptions could be applied to all juristic acts as it is considered from the side of the declarer which in this case is the mistaken party. Thus, it may be added to the existing Section 158 to supplement the case of gross negligence.

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[243] Ernst A. Kramer, 'Contractual Validity According to the UNIDROIT Principles.' European Journal of Law Reform, Vol.1, No.3 (1999), p.278

To conclude, the proposed amendments with respect to the principle of mistake could be seen through the comparative table between the present CCC and the amended CCC as follows.

The issue	The present CCC	The amended CCC
The conditions for nullification or avoidance which governs bilateral juristic acts.	(Not available)	The other party 1. made the same mistake; or 2. caused the mistake; or 3. knew or should have known the mistake; or 4. had not yet acted in reliance of the mistake at the time of avoidance.
The exceptions under which a party is not allowed to invoke for nullification or avoidance which governs juristic acts.	It was due to gross negligence of the person making such declaration (Section 158)	1. the party was grossly negligent in committing the mistake; or 2. 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.

If Thai law could adopt further required conditions to nullify or avoid the juristic act besides the present requirements from Section 156 to Section 158, the protection of the other party would be increased, whereas the protection of the mistaken party would be decreased. Thus, it would lead to equality and certainty of transactions because the other innocent party could trust and have confidence. Accordingly, it would stabilize the commercial transactions as the mistaken party could not later too easily make a claim to nullify or avoid the juristic act on the ground of mistake. At the same time, the mistaken party's protection still exists, just with more limitations. From the above reasons, the author posits that this approach should be the main solution to amend the CCC.

If such further relevant conditions are applied, the possibility that a juristic act will be nullified or avoided would reduce. Moreover, in relation to the fourth condition, it means that the other party who is in good faith would not have to suffer from any damage because he had not yet acted in reliance on the juristic act, especially in the case of commercial contracts. Therefore, the uncertainty on which legal ground the other party could raise to claim for damages would be eliminated and it would be unnecessary to apply the principle of negative interest because the amended function of the mistake itself already provides adequate protection to the other party.

5.2.2 The Application of Mistake of Law

It should be noted that the author would highlight only the viewpoint found from studying comparative law which could lead to a clearer application of the law concerning mistake. However, the author has not yet suggested this topic into the amended provision because it requires consideration of other aspects, and would thus be out of the scope of this study. In any case, besides the mistake of fact, there should be a mistake of law which would be subject to the same criteria. This is extracted from French law which distinguishes a mistake of law from a mistake of fact in essential quality of the act of performance and of the other contracting party under Article 1132 and from UNIDROIT principles under Article 3.2.1.

Despite there being a principle that ignorance of law excuses no one, the tendency to apply such principle has decreased in strictness because there are too many enacted legislations to assume that everyone should recognize all applicable laws in the present. Hence, it is possible for there to be a misunderstanding that there is no law to prohibit the disputed issue when in fact there is such as in modern laws of various countries which has provided for some exemptions to waive this principle, especially if its purpose is to protect the mistaken party. Additionally, the Supreme Court of Thailand has acknowledged the mistake of law through several cases but has to give a ruling that a mistake is a mistake of fact as a mistake of law does not exist under the CCC. Therefore, if the mistake of law is included, the court would be able to tackle the problematic situation where the mistake is related to the law but there is no supporting provision to rely on. Instead, the court has to rule that such case constitutes a mistake of fact which is out of scope of Section 156 and Section 157. Also, the criteria to determine a mistake of law would no longer be ambiguous, as it adopts the same standard of determination as a mistake of fact. Moreover, the law would be enforced according to its purpose of requiring strict interpretation because it could lead to the invalidity of juristic acts.

5.2.3 The Application of Voidability under Section 156

With respect to this issue, the author would propose only the direction which is relevant to the scope of study which is whether the consequence of voidness under Section 156 could be replaced by the consequence of voidability or not, in order to mitigate the extreme results. The author has not yet suggested this topic as an amendment to the CCC because the consequence of voidness and voidability require consideration of other aspects, including the effects of having to either return property due to the consequence of voidness under Section 172 or having to be restored to the condition in which they were previously in by virtue of the consequence of voidability under Section 176, as well as the effect to third parties, all of which are not included in the scope of this research.

From comparative analysis, it is seen that Article 3.2.11 of the UNIDROIT principles provides that a mistaken party could avoid a contract by notifying the other party within a specified period of time. After doing so, the contract would be considered as though it never existed, which is similar to the consequence of avoiding a voidable contract. Also, several legal systems studied above tend to provide that the consequence of a mistake is voidability. Still, when examining French law at present, it cannot be concluded whether an obstacle error, which is a defected consent rendering a contract void, has been eliminated under the reformed code and considered rather as an absence of consent which results in voidability or not. On the other hand, a mistake at law in English law sometimes is akin to an obstacle error in French law, but the overall objectivity approach has provided sufficient protection to the other party. Hence, it can be seen that each legal system has not adopted the consequences of a mistake in a uniform manner.

To be in accordance with economic transactions in the present and to provide equality to all contractual parties, if the consequence of mistake under both Section 156 and Section 157 is voidability, it would strike a balance between the autonomy of will of the mistaken party and the good faith of the other party by relieving the strictness of the legal consequence. Moreover, the mistaken party would have an opportunity to either affirm such juristic act or to nullify it within the period otherwise it would be permanently valid and enforceable because he may change his mind to continue with such defected juristic act as the parties have commenced the preparation of some matters that consumes time and cost. Thus, the legal consequence of voidability would be supportive to the other party who has expected that the juristic act would be performed as expressed and thus the certainty of commercial transactions would be developed. On the other hand, by maintaining the consequence of voidness, it would be beneficial to the understanding of the association between mistake and the process of making an intention, as the mistake under Section 156 and Section 157 occur in different stages. Furthermore, it may be better suited to maintain the principle of contract. Thus, the pros and cons between these two are taken into account to determine which direction is more suitable.

In light of the above analysis, the suggestions should be incorporated into the CCC and reflected via the following amendments.

Section 157/1 “a mistake under Section 156 or Section 157 could nullify a bilateral juristic act if the reasonable man in the same circumstance would have such a mistake and

(1) the other party made the same mistake; or

(2) the other party caused the mistake; or

(3) the other party knew or should have known the mistake; or

(4) the other party had not yet acted in reliance of the mistake at the time of avoidance.

Section 158 "If the mistake under Section 156 or Section 157 was due to gross negligence of the person making such declaration or the person assumed the risk or should bear the risk of mistake, he cannot avail himself of such invalidity."

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APPENDICES

APPENDIX A
French Civil Code 2016

Article 1104. Contracts must be negotiated, formed and performed in good faith.

Article 1112. The commencement, continuation and breaking-off of precontractual negotiations are free from control. They must mandatorily satisfy the requirements of good faith.

In case of fault committed during the negotiations, the reparation of the resulting loss is not calculated so as to compensate the loss of benefits which were expected from the contract that was not concluded.

Article 1112-1. The party who knows information which is of decisive importance for the consent of the other, must inform him of it where the latter legitimately does not know the information or relies on the contracting party.

However, this duty to inform does not apply to an assessment of the value of the act of performance.

Information is of decisive importance if it has a direct and necessary relationship with the content of the contract or the status of the parties.

A person who claims that information was due to him has the burden of proving that the other party had the duty to provide it, and that other party has the burden of proving that he has provided it.

The parties may neither limit nor exclude this duty.

In addition to imposing liability on the party who had the duty to inform, his failure to fulfil the duty may lead to annulment of the contract under the conditions provided by articles 1130 and following.

Article 1128. The following are necessary for the validity of a contract:

1. the consent of the parties;
2. their capacity to contract;
3. content which is lawful and certain.

Article 1130. Mistake, fraud and duress vitiate consent where they are of such a nature that, without them, one of the parties would not have contracted or would have contracted on substantially different terms.

Their decisive character is assessed in the light of the person and of the circumstances in which consent was given.

Article 1131. Defects in consent are a ground of relative nullity of the contract.

Article 1132. Mistake of law or of fact, as long as it is not inexcusable, is a ground of nullity of the contract where it bears on the essential qualities of the act of performance owed or of the other contracting party.

Article 1133. The essential qualities of the act of performance are those which have been expressly or impliedly agreed and which the parties took into consideration on contracting.

Mistake is a ground of nullity whether it bears on the act of performance of one party or of the other.

Acceptance of a risk about a quality of the act of performance rules out mistake in relation to this quality.

Article 1134. Mistake about the essential qualities of the other contracting party is a ground of nullity only as regards contracts entered into on the basis of considerations personal to the party.

Article 1135. Mistake about mere motive, extraneous to the essential qualities of the act of performance owed or of the other contracting party is not a ground of nullity unless the parties have expressly made it a decisive element of their consent.

However, mistake about the motive for an act of generosity is a ground of nullity where, but for the mistake, the donor would not have made it.

Article 1136. A mistake as to value is not a ground of nullity where, in the absence of a mistake about the essential qualities of the act of performance, a contracting party makes only an inaccurate valuation of it.

Article 1178. A contract which does not satisfy the conditions required for its validity is a nullity. Nullity must be declared by a court, unless the parties establish it by mutual agreement.

An annulled contract is deemed never to have existed.

Acts of performance which have been carried out give rise to restitution under the conditions provided by articles 1352 to 1352-9.

Irrespective of whether or not the contract is annulled, an injured party may claim reparation for any harm suffered under the conditions set out by the general law of extra-contractual liability.

Article 1181. Relative nullity may be claimed only by the party that the legislation intends to protect.

It may be remedied by affirmation.

Where more than one person has the right to bring an action for relative nullity, renunciation by one of them does not prevent the others from bringing proceedings.

Article 1240. Any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it.

APPENDIX B

UNIDROIT Principles of International Commercial Contract 2016

Article 3.2.1. Mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded.

Article 3.2.2. (1) 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, and

(a) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or

(b) the other party had not at the time of avoidance reasonably acted in reliance on the contract.

(2) However, a party may not avoid the contract if

(a) it was grossly negligent in committing the mistake; or

(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.

Article 3.2.3. 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.

Article 3.2.4. 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.

Article 3.2.10. (1) If a party is entitled to avoid the contract for mistake but the other party declares itself willing to perform or performs the contract as it was understood by the party entitled to avoidance, the contract is considered to have been concluded as the latter party understood it. The other party must make such a declaration or render such performance promptly after having been informed of the manner in which the party entitled to avoidance had understood the contract and before that party has reasonably acted in reliance on a notice of avoidance.

(2) After such a declaration or perform- ance the right to avoidance is lost and any earlier notice of avoidance is ineffective.

Article 3.2.11. The right of a party to avoid the contract is exercised by notice to the other party.

Article 3.2.12. (1) Notice of avoidance shall be given within a reasonable time, having regard to the circumstances, after the avoiding party knew or could not have been unaware of the relevant facts or became capable of acting freely.

(2) Where an individual term of the contract may be avoided by a party under Article 3.2.7, the period of time for giving notice of avoidance begins to run when that term is asserted by the other party.

Article 3.2.16. Irrespective of whether or not the contract has been avoided, the party who knew or ought to have known of the ground for avoidance is liable for damages so as to put the other party in the same position in which it would have been if it had not concluded the contract.

BIOGRAPHY

Name	Flg. Off. Chavanya Suiadee
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Educational Attainment	2015: Bachelor degree of law (Second-Class Honors) Thammasat University
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