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Namig Natig Mammadov
Baku State University
namig.mammadov7@gmail.com

MISTAKE AS TO THE IDENTITY OF A CONTRACTING PARTY AS ONE OF THE TYPES OF MATERIAL MISTAKES

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Ключевые слова*: заблуждение, заблуждение в отношении личности, существенное заблуждение, недействительность договора*

İntroduction

Parties sporadically conclude a contract on the ground of a common premise which they later detect was false. Some circumstances which destroy the basis upon that contracting parties entered into the contract occur after the conclusion of the contract. In this case, relevant party (or parties) is not able to discover material mistake beforehand and this situation leads to the invalidity of a contract. It is a fact that the court can set aside the contract based on different grounds. Mistake acts as one of these grounds and vivid example of insufficient will. In respect of mistake to the identity, it is special type of substantial mistake which can affect the validity of the contract concluded between the parties. Mistake to the identity is currently covered by the legislation of Azerbaijan Republic.

In contract law, a mistake is an incorrect belief about certain facts that are true. On the whole, it gives the right for the mistaken party to make a defense, and if it is raised successfully can lead to the contract being found *void ab initio* or voidable, or alternatively an equitable remedy may be provided by the courts.The term *void ab initio* means "to be treated as invalid from the outset" [5].

The mistake is formed by distortion of the internal will of the party to the transaction. As a result of the mistake the misconception arises about the transaction and its key components. Unlike fraud, misleading does not occur as a result of deliberate actions of the counterparty. Indeed, the mistake means a mismatch between the true intention and desire of the person and the expression of the will. Its appearance is mainly related to two cases: initially, the participant of the transaction does not have the correct understanding of the cases and facts that are significant for the conclusion of the transaction; secondly, the mistake may occur due to the misconduct of the contracting party [2, p.765].

The impact of a mistake may be to avert the foundation of a contract because, for instance, the parties are at cross-purposes. But the fact of the matter is that a mistake has been made is not sufficient, of itself, to void the contract. The essence of reasoning for this is that the law adopts an objective rather than a subjective approach to transaction [10, p.519].

As a general rule, mistake should have significant importance (material) character. A contract may be invalidated only in the event of a material mistake.

According to the Article 347 *(Invalidity of agreement concluded under impact of material misunderstanding)* of the Civil Code of Azerbaijan Republic, material misunderstanding shall occur in the following circumstances:

a) where person wanted to conclude other agreement different from agreement he agreed to conclude;

b) where person has made a mistake in respect of content of agreement he wished to conclude;

c) where circumstances considered as basis of agreement with parties' conscience taken as a basis do not exist [1].

In respect of mistake as to the identity of a contracting party, it acts as one of the types of material mistake. Article 347.4 of the Civil Code of AR stipulates that misunderstanding in respect of personality of counteragent shall be considered material only where counteragent's personality or his personal qualities have been primary basis for conclusion of agreement [1]. For instance, prescribing for partial payment of the item in sale and purchase contract the seller is mistaken in the buyer's identity or a citizen who orders to draw his portrait will be mislead by the artist's identity.

In order to base on an effective identity mistake, the plaintiff should prove three elements. Firstly, he supposed he was in contractual relationship with someone other than respondent. Secondly, the personality of the contracting party was essential to claimant. Subsequently, the defendant was aware of these two facts, or improperly persuaded the claimant's mistake. It is accepted that the absence of consent is established, only if

the first two elements were proved by the claimant. To a certain extent, these two elements are inevitable for the mistake to identity, but proof of either of the alternative parts of the third element forms the supplementary factor adequate to render that absence of consent operative [11, p.9].

With regard to the origin of mistake to identity, it is based on Roman Law. The Roman law considers the mistake as the disparity between the human concepts and reality, his will and the impression of the one. Up to a point, Romans did not have the theory related to the error (mistake), nevertheless still they could identify the legal influence of such a mistake, especially the recognized the agreement either as impugned or canceled.

According to the Roman law, the unbiased and valid mistake related to the contractor's personality or qualities. Where the identity of the other party to a contract was material, an error as to the identity of this party rendered the contract void. Needless to say that the general character of the contract and personal qualities of the party was mattered in order to create operative mistake to identity and to dispute the validity of the contract [3, p.56]

It is noteworthy to mention that Ulpian's comments on error set forth all the traditional categories of mistake apart from *error in persona.* Nevertheless, this omission is quite natural, since during sale and purchase such mistake is rarely counted. In contrast with modern lawyers accept as a mistake *inter praesentes*, a personal and direct meeting (face-to-face) of the parties, it is not mentioned at all. To put it another way, in the words of Buckland, "strictly speaking the mistake of identity is out of question where the parties are contracting face to face. There is no proof, actually it is quite suspicious that where I had agreed to buy goods of a person called Balbus, I could cancel the contract only if I thought him to be Titus to whom I was recommended" [8, p.17].

In any sale and purchase contract, regardless of whether the agreement was designed directly or at a distance, it is barely the sale that gives rise to heed about identity; it is almost constantly the case that the related credit agreement depends on the identity of the borrower. In this case, error in persona is usually discussed in connection with law other than a consensual contract. It has been obviously observed that Roman jurists did not gave great consideration to this special type of mistake and it is not particularly well developed [8, p.17].

With regard to the Soviet Law, there was stipulated only one norm dedicated to the correction of this mistake. Particularly, it was expressed in article 32, according to which "agreement designed and influenced by substantial discrepancy (mistake), could be considered as invalid by the party who was acting under the very influence of this discrepancy" [12, p.102]. As a matter of fact, the law have no further explanation about it. Therefore, the contractor's personality as a type of mistake was not represented as the base for the legal qulafication. Despite the fact that abovementioned theory existed in the Soviet Law, from the practical side the voidance of such conracts could not be evaluated as uncommon [3, p.57].

Discrepancy, as a technical term, which used to confer one of the causes for disagreement (or claim to set aside it) meant that during implementing it, the party was guided or mislead by the wrong conditions, not related to the reality proper. Actually, it indicates the lack of knowledge for the real circumstances and the party's wrong perception. Narrowly, this is the situation, when a person developed misconception or when certain circumstance was unfamiliar to him and the one, based on this misperception, used to show the will, which would not have been showed had such kind of circumstance have not existed at all. This kind of discrepancy could have been related, for instance, to the counteragent's idenity and personal qualities [12, p.103].

It is obviously observed, English contract law has a broad approach to the law of mistake. It encompasses a group of distinctive rules. If the law regards a mistake to be sufficiently significant, then a contract due to the mistake may be declared void. English contract law essentially identifies three types of mistakes in contract: *common mistake, unilateral mistake and mutual mistake.*

Unilateral mistake is the type of mistake where only one contracting party is mistaken as to the terms or subject-matter. Unless the non-mistaken party was informed about the mistake and tried to benefit from it, the court will support such a contract. If there exists a mistake in the identity of the contracting party, it is also feasible for a contract to be invalid [6].

On one hand, courts of common law in the nineteenth century moved gradually towards the improvement of a general doctrine of mistake. On the other hand, the specific form of mistake – a mistake as to identity was welcomed by them and there was a rapid development on it. When the doctrine entered into the common law in the 1870s, it happened thanks to the works of the treatise writers, commencing with Judah Benjamin [8, p.216]. The mistake as to the identity of a contracting party was developed through different cases and the judgments of courts.

The case law is hard to reconcile. Judges and jurists disagree as to the effect of mistake of identity upon the formation of a contract. This disagreement extends beyond discordance as the operative principles to the very existence of the doctrine. The problem of mistake of identity almost on every occasion takes the same form. A wrongdoer practises a deception cleverly to convince an innocent person [9, p.711]. Mistake of identity cases are consistently cases of unilateral mistake and this type of mistake is brought by the deliberate deception of the other contracting party. These cases are peopled with rogues, swindlers and cheats determined to wrongfully acquire the goods of another [9, p.712].

Mistake as to identity emerges when one party – occasionally deluded by a "rogue"–believes themselves to be haggling with another, uninvolved, third party. In this specific situation of this kind, the contract will either be void for mistake, or voidable for fraud. This distinction depends on by which method contract was made. Two types of contract exist: a) Contract made *inter absentes*, when the parties do not negotiate face-to-face, e.g. through correspondence. The prominent cases related to inter absentes are *Cundy v Lindsay [1878]*; *King's Norton Metal Co v Edridge Merrett & Co [1897]; Shogun Finance Ltd v Hudson [2004]* and, b) Contract made *inter praesentes* - when the parties meet face-to-face. The famous cases related to inter praesentes are *Phillips v Brooks [1919]; Ingram v Little [1961]; Lewis v Averay [1971]*. Macmillan describes: "There are few more vexed areas of contract law than mistake of identity." English contract law provides less protection for purchaser from rogue than American law [6].

It is noteworthy, to analize mistake as to the identity of a party with several *cases. The standard case* is one in which one party, X, concludes a contract with Y in the fallacy that Y is in fact Z. The mistake of X is typically prompted by Y's fraudulent representation that he is Z. Whether X's mistake causes to be the contract between himself and Y void? This question does not have a simple and exact answer. By and large, the answer is related to whether the contract between X and Y has been diminished to writing. Where the contract has been diminished to writing, and the written agreement states that the parties to it are X and Z, then the authorities offer that the contract between X and Y may indeed be invalidated for mistake. But where the contract between X and Y has been made orally in face-to-face (inter praesentes) dealings then X is improbably to succeed in his claim that the contract is void for mistake because, in such a case, the law accepts that X intended to contract with the person who was actually in front of him (i.e. Y) and that presumption is very difficult to refuse [10, p.526].

***Cundy v Lindsay* (1878)**

The beginning of mistake to identity is bearing a relation with this case. This is an English contract law case introducing the concept that contracts could be automatically void for mistake to identity, where it is of significant importance. The case said to establish the doctrine of mistake of identity [8, p.230].

According to the facts of the case, Lindsay & Co were manufacturers of linen handkerchiefs, amongst other things. They received correspondence from a man named Blenkarn. He had rented a room at 37 Wood Street, Cheapside, but purported to be 'Blenkiron & Co'. Lindsay & Co knew of a reputable business of this name which resided at 123 Wood Street. Believing the correspondence to be from this company, Lindsay & Co delivered to Blenkarn a large order of handkerchiefs. Nevertheless, he never paid for them and instead sold them to the defendant - an innocent third party, Cundy. That is why, Lindsay & Co sued Cundy for conversion of goods [4]. If the contract was invalid, title in the goods would not pass to the rogue, so the defendants have no title the goods. Ownership of the goods would remain with the plaintiff.

Held: The court stated that the contract was void for unilateral mistake as to the identity and the claimant was able to demonstrate an identifiable existing business with whom they intended to contract with. The defendant was held liable for conversion [7].

***Shogun Finance LTD v Hudson* (2003)**

Facts: A rogue purchased a car on HP terms from a car dealer. He had produced a stolen driving licence in the name of Durlabh Patel. The car dealer faxed the driving licence to the plaintiff Shogun Finance LTD. The dealer wrote out the hire-purchase contract in the name written on the license. The claimant then did a credit search on Patel A rogue then sold it on to the defendant - Hudson and defaulted on the finance agreement. The claimant brought an action against the defendant claiming to be the owner of the car as the contract was void for mistake to identity. Hudson counterclaimed, claiming to have the title to the vehicle.

Held by 3-2 decision: The defendant's appeal was dismissed. The contract was void for mistake to identity. The contract concluded between the finance company and the rogue was made inter absentes. The identity of the person was crucial to the contract as that it was Durlabh Patel that the credit check was carried out on. Hudson was required to return the car to Shogun [7].

***Phillips v Brooks LTD* (1919)**

Facts: Phillips was a jeweller. The fraudster purchased some items from the claimant's shop claiming to be Sir George Bullogh. He paid by cheque and persuaded the jewellers make an allowance for him to take a ring and claimed that he needs to give it immediately for his wife's birthday. He gave the address of Sir George Bullogh. Actually, Phillips knew of Bullough and knew he lived at the address. The rogue then pawned the ring at the bona fide third party – Brooks LTD in the name of Mr. Firth. He then disappeared without a trace.

Held: The court stated that the contract was not void. There was no mistake as to identity due to the fact this contract was made face-to-face. In this case, the law assumes they intend to deal with the person in front of them not the person they claim to be. The jewellers were unable to demonstrate that they would only have sold the ring to Sir George Bullogh. Bona fide third-party meaning Brooks Ltd was the legal owner of the ring [7].

Conclusion

Taking everything into account, the mistake as to the identity of a contracting party acts as one of the basic grounds for the invalidity of a contract. A mistake of identity prevents the formation of a contract or renders it void when it has essential importance with the subject-matter. Needless to say, mistake of identity has gone through various development stages and new doctrine was established due to the works of famous lawyers and judgments of the courts. Up to appoint, it had a weak base in the case law, but later courts accepted this doctrine. This type of material mistake is covered by the up-to-date legislations of different countries. All the essential elements should be proved by the claimant in order to create an operative identity mistake.

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Kontragentin şəxsiyyəti barəsində yanılma vacib əhəmiyyətli yanılmanın bir növü kimi

Xülasə

Müqavilə tərəflərin hüquq bərabərliyinə, iradə ifadəsinə və qarşılıqlı razılığına əsaslanır. Amma bəzən elə hallar meydana gəlir ki, məsələn, yanılma nəticəsində iradəsi qüsurlu olan müqavilələr yaranır və bu da onların etibarsızlığına səbəb olur. Azərbaycan Respublikasının Mülki Məcəlləsinə əsasən kontragentin şəxsiyyəti barəsində yanılma da müqavilənin etibarsızlığı əsaslarından biri kimi çıxış edir və vacib əhəmiyyətli yanılmanın bir növü kimi qəbul edilir. Kontragentin şəxsiyyəti barədə yanılma hələ Qədim Roma dövrlərindən başlayaraq inkişaf yolu keçmiş və ingilis ümumi hüququnda bir doktrina kimi təşəkkül tapmışdır. Xüsusilə qeyd etmək lazımdır ki, presedent hüququ kontragentin şəxsiyyəti barədə yanılmanı formalaşmasında böyük rol oynamış və onu daha yaxşı analiz etməyə imkan yaratmışdır.

Заблуждение в отношении личности контрагента как вид существенного заблуждения

Резюме

Договор основан на правовом равенстве, волеизъявлении и взаимном согласии сторон. Одноко иногда бывают случаи, когда, например, заблуждение приводит к появлению контрактов имеющих упречная воля и вызывает их недействительности. Согласно Гражданскому Кодексу Азербайджанской Республики, заблуждение в отношении личности контрагента также является одним из оснований недействительности договора и принимается как вид существенного заблуждения. Заблуждение в отношении личности контрагенра развивалось с древнеримских времен и стало доктриной в английском общем праве. Особенно следует отметить, что прецедентное право сыграло важную роль в формировании заблуждения в отношении личности контрагента позволило лучше анализировать его.

Rəyçi: prof.Ş.Səmədova

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