

LEGAL ANALYSIS OF THE PRINCIPLE OF MISTAKE IN THAI LAW*

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Abstract

There are two types of mistakes enshrined in the Thai Civil and Commercial Code “CCC”), 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. Hence, this is a reflection of the subjectivity, rather than the objectivity, principle at play. 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 commerce. A question arises as to the adequacy of such three existing provisions in tackling current problematic situations.

Therefore, the author has conducted a comparative study to analyze the principle of mistake under English law, French law, and the UNIDROIT

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Principles of International Commercial Contracts 2016. Accordingly, the author proposes additional conditions and exception for nullification or avoidance of a bilateral juristic act which is similar to Article 3.2.2 of the UNIDROIT principles. In so doing, the principle of mistake in Thai law would be more fair and compatible with the current state of the economy.

Keywords: Mistake, Objectivity, Subjectivity

1. Introduction

Intention is one of the vital elements of a juristic act. Nevertheless, a declaration of intention could be void or voidable if it is made under mistake, fraud, or duress.

The definition of mistake depends on each legal system. Under Thai law, a mistake is not defined in the code. Rather, its interpretation can be found through jurist's opinion such as a mistake is an understanding or a belief that is not the same as the truth.¹

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 the 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 to maintain 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. 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

¹ Sak Sanongchart, *The Commentary on Juristic Act and Contract under the CCC (10th edn, Nithibunakarn 2008)* 167. (ศักดิ์ สนองชาติ, คำอธิบายโดยย่อประมวลกฎหมายแพ่งและพาณิชย์ว่าด้วยนิติกรรมสัญญา (พิมพ์ครั้งที่ 10, นิตยบรรณการ 2551) 167).

manifest that if they are 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.

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 the validity of the juristic act. Furthermore, it could generate several debatable issues, some of which are issues that have not been solved yet, including the balance of fairness to all parties under the circumstance of the one-sided mistake in the juristic act, especially in contracts.

Thus, the author studies the principles of mistake provided in section 156 - section 158 under the CCC. Furthermore, the comparative study of the matter in the following countries or legal instrument would be conducted: England (representing the objectivity approach adopted by common law countries), France (representing the subjectivity approach adopted by civil law countries), and UNIDROIT Principles of International Commercial Contracts 2016 (the model law applicable to international commercial contracts which combines both objectivity and subjectivity approaches).

2. Conflicting legal treatment in relation to the principle of mistake

2.1 Subjectivity

The subjectivity 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. 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.² Still, 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. 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.³ Obviously, it still has a connection with external expression.

Yet, modern scholars believe that applying this theory alone would adversely affect certainty to the law.⁴ Besides, it would be incorrect to seek for a central notion of mistake only in subjectivity, which is a pure will theory. Rather, it should 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.

2.2 Objectivity

The objectivity doctrine is opposite to the subjectivity doctrine in that it 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

² Marija Karanikic Miric, 'A Critical Look at the Subjective and Objective Purposes of Contract in Aharon Barak's Theory of Interpretation' (2016) 9(2) *Baltic Journal of Law and Politics* 1, 11.

³ *ibid* 11-15.

⁴ *ibid* 15.

party has the responsibility to form a serious intent.⁵ 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.

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. 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.⁶

From all of this, it can be seen that these two pure doctrines at either end of the spectrum are far from producing justice to either party as it could be seen that modern legal systems have attempted not to adopt either doctrine exclusively but make a combination that could better lead to the fairest consequences and strike a right balance.

⁵ Dwin C Mckeag, *Mistake in Contract: A Study in Comparative Jurisprudence* (2nd edn, the Law Book Exchange 2004) 41.

⁶ Wayne Barnes, ‘The French Subjective Theory of Contract: Separating Rhetoric from Reality’ (2008) 83 *Tulane Law Review* 359, 365.

3. The principles of mistake under Thai law and the relevant problems

In Thailand, there are three main provisions of mistakes embodied in the CCC under Section 156 to Section 158. These three provisions divide the types of mistake into two types that could obstruct the validity of the juristic act as stated under Section 156 and Section 157, whereas Section 158 provides the exception that, if the mistake is due to gross negligence, it would not affect the validity of juristic act.

The first type of mistake is a mistake of an essential element of the juristic act as per Section 156.⁷ This provision applies when a declaration of intention is diverted from the actual intent without noticing the material diversion.⁸ 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. As such, it could be said that Section 156 has a wide scope of application. 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 157.⁹ Under this section, the misunderstanding has been created at the time of making an internal intention. After that, the mistaken party makes a declaration in accordance with such mistaken intention. Also, the mistake of the quality under this section must be an essential element

⁷ The Civil and Commercial Code of Thailand, s 156.

⁸ Prakob Hutasingh, *The Principle of Juristic Act and Obligation* (Nitibunnakarn 1964) 45 (ประกอบ หุตะสิงห์, *กฎหมายแพ่งลักษณะนิติกรรมและหนี้* (นิติบรรณการ 2507) 45).

⁹ The Civil and Commercial Code of Thailand, s 157.

of the juristic act in ordinary dealings. 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 nullify the juristic act within a specific period of time.

Finally, Section 158 is an exception to Sections 156 and 157 that on the one hand aim to protect the mistaken party. Section 158, on the other hand, 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.¹⁰ It is to be noted that the threshold of gross negligence is higher than negligence, which is a simple carelessness or a failure to act. Gross negligence is willful behavior done with extreme disregard,¹¹ and thus does not deserve 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 rationale 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 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. Furthermore, if the affected party is 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

¹⁰ The Civil and Commercial Code of Thailand, s 158.

¹¹ Jeed Sethabutr, *The Principle of Juristic Act and Obligation* (7th edn, Faculty of Law Thammasat University 2013) 137. (จิต เศรษฐบุตร, หลักกฎหมายแพ่งลักษณะนิติกรรมและหนี้ (พิมพ์ครั้งที่ 7, คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2556) 137).

is made by gross negligence, the mistaken party shall not be protected. Nevertheless, it aims to punish the mistaken party rather than to protect the other party because all consequences depend on the action of the mistaken party alone. This is the reflection of applying the subjective theory in an extreme way. Although some countries including France 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.

For example, A had intended to hire B who is a tailor to make a wedding dress without knowing him before. However, when A entered the shop, she mistook that C is B because their names are 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 such as expenses for the preparation to perform the contract, A still holds the right to claim for such voidness without any liability which is obviously unfair to C.

In the author's opinion, Thailand has consistently applied these three sections of mistake for a long time and the development in this area has been minor. This leads to the current negative results. Firstly, the trust between the parties could be decreased as he cannot be sure whether the existing juristic act would later be claimed a mistake and subsequently avoided or, for worse, fall under Section 156 and be treated as if it had never existed. Secondly, it could reduce the interest in commercial transactions as there is an unfair protection between the mistaken party and the other innocent

party. 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.

4. The comparative study with principle of mistake in foreign laws

4.1 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 without having to examine the internal intention, as shown in *Smith v. Hume*¹² by Blackburn J. Therefore, the contract would generally not be void due to mistake except in the event of ambiguity based on the standard of the reasonable man. In such a scenario, the mistaken party could claim that the contract is void on the ground of mistake.

Compared to Thailand which is a civil law country and has applied the subjective principle, Thai law adopts some similar perceptions to English law in the aspects of the rectification and *non est factum* as stated under Section 94 of the Thai Civil Procedure Code. According to this provision, 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.¹³ Thus, it may not be necessary to amend this issue.

¹² *Smith v. Hughes*, [1871] LR 6 QB 597, Court of Appeal.

¹³ Pinai Nanakorn, *The Story of Nakorn Si Thammarat's Province: Royal Funeral Memorial Book of Nukul Nanakorn* (1999) 204. (พินัย ฌ นคร, เล่าเรื่องเมืองคอน: อนุสรณ์ในงานพระราชทานเพลิงศพ อาจารย์นุกูล ฌ นคร (2542) 204).

However, several concepts of mistake under English law are different from those under Thai law in many aspects, as the CCC gives more weight to the protection on the mistaken party to nullify the juristic act as could be seen under Section 156 and Section 157 with the only exception stated under Section 158. On the otherhand, under English law, the contract would generally be valid and enforceable except where 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 exists.¹⁴ Obviously, the operation of mistake under English law itself that has limited allowance to nullify the contract on the ground of mistake 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 follows the subjective principle to recognize the actual will rather 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 by his declaration. Accordingly, the English system could be the model for Thai law in the aspect of adequate protection to the other party to preserve the good faith principle. Still, besides such perception, the author is hesitant to adopt other principles of mistake under English law because several disorganization still exists, as it has a much narrower application compared to the mistake in

¹⁴ Richard Stone and James Devenney, *Text, Cases, and Materials on Contract Law* (3rd edn, Routledge Press 2014) 386-389.

civil law countries, as the English law has instead developed a principle of misrepresentation.¹⁵

4.2 French law

The CCC has been influenced by the French Civil Code as a result of the drafting committee being composed partly of French jurists. The former Code Civil of France had laid down several principles similar to those under Thai law, indicating what types of mistakes could affect the validity of a contract. For example, the mistake in quality of substance and person under the former Code Civil of France would result in voidability known as relative nullity which is similar to Section 157 of the CCC, whereas the *Erreur-Obstacle* 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 *Cour de Cassation* of France played an important role to harmonize equality.¹⁶ For example, a mistaken party could not avoid a contract if such mistake was inexcusable as could be seen in a famous case that a seller who bought velvet could not claim that this material was not proper for making a woman's clothes as the seller had experience in this manufacturing area which meant he should be aware of the normal use of the fabric.¹⁷

Consequently, after the reform of the Civil Code of France, the Code has maintained the division of the mistake into a mistake in the essential

¹⁵ Hugh Beale, *Cases, Materials and Text on Contract Law* (Oxford, Hart Publishing 2019).

¹⁶ John Bell, Sophie Boyron, and Simon Whittaker, *Principles of French Law* (2nd edn, Oxford University Press 2007) 312-313.

¹⁷ Cass. Com., 4 July 1973, B IV.238; D1974.538.

qualities of the act of performance¹⁸ and a mistake in the essential quality of the other contracting party.¹⁹ Accordingly, the case law has been codified into Article 1333. This revision putting a definitive end to the debatable issue on what substantial mistake is, as it is shifted from “the very substance of the thing that is the object of the agreement” to “the essential qualities of the act of performance”. Thus, the mistaken quality that could nullify the contract shall be agreed by the contractual parties to be essential which means 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.²⁰

Besides, the author could differentiate further points between the reformed Civil Code of France and the CCC. Firstly, French law clearly emphasizes 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.²¹ Secondly, it explicitly imposes the mistake of law besides mistake of fact. It explicitly legislate a type of mistake of law in the code; thus, it is clear that the determination would be the same as a mistake of fact.²² Last but not least, French law has already codified judgments to the reformed code that a motivation and a mistake as to value generally does not affect the validity of a contract.²³

¹⁸ The Code Civil of France, art 1133.

¹⁹ The Code Civil of France, art 1134.

²⁰ Bell, Boyron and Whittaker (n 16).

²¹ The Code Civil of France, art 1107, art 1112, and art 1112-1.

²² The Code Civil of France, art 1132.

²³ The Code Civil of France, arts 1135-1136.

When examining the reformed code of France, although its main principle is subjectivity, concrete judgments were codified with the attempt to bring more unity and certainty, such as providing that motivation and value cannot generally be the grounds to nullify the contract. Therefore, it is interesting to consider whether Thai law should follow such direction or not.

4.3 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.²⁴ Consequently, the advantages of each approach are applied to this model law.

The UNIDROIT principles rectify the mistake of law besides the mistake of fact.²⁵ Also, the consideration to allow the mistaken party to invalidate the commercial 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 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 that 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

²⁴ UNIDROIT Principles of International Commercial Contracts 2016, International Institute for the Unification of Private Law (UNIDROIT), Rome, 101.

²⁵ UNIDROIT Principles, art 3.2.1.

was grossly negligent or when there is a risk of mistake that should be borne by the mistaken party.

Besides, the mistaken party would lose the right to avoid a contract if the other party had already performed as agreed or immediately informed his willingness to perform the contract before receiving the notification of avoidance.²⁶ Furthermore, UNIDROIT principles state that a mistaken party could notify the other party within a reasonable time to avoid the contract.²⁷ As a result, the contract would be considered as having never existed, which is less extreme when compared to a void contract.

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 system and is also in the process of developing to rectify flaws.

5. Recommendations

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,

²⁶ UNIDROIT Principles, art 3.2.9.

²⁷ UNIDROIT Principles, art 3.2.11 and art 3.2.12.

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 by 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 law, French law, and UNIDROIT principles. 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 not to 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. Under this condition, the other party must not have yet prepared himself under good faith to be capable to perform as agreed. Therefore, he would not have suffered any damage through relying on the juristic act, especially commercial 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.

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. If Thai law could adopt further required conditions and exception to nullify or avoid the juristic act besides the present requirements under Section 156 to Section 158, the protection of the other party would be increased. Accordingly, it would lead to equality, and thus 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. Therefore, the other innocent party could trust and have confidence. At the same time, the mistaken party's protection still exists, just with more limitations.

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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