| Chapter V |

Mistake, Deceit, Duress, *Laesio Enormis*

1. General considerations

One of the preconditions of the conclusion of a contract is that the parties' contractual intent is formed freely. The free formation of contractual intent on the one hand means that the parties have a proper understanding of the facts relevant for the conclusion of the contract at the time when it is being entered into. In some cases, the contracting party is not aware that his or her comprehension of the facts underlying the conclusion of the contract may be flawed. Such a misapprehension may be a result of his or her own failure to ascertain the true facts, but it may also be caused by a counterparty or a third party, with the result of the party agreeing to terms that he or she otherwise would not have had agreed to. The former situation is called a mistake, the latter deceit. On the other hand, illicit influence on the contracting party may be exercised in order to compel him or her to conclude a contract under terms he or she would not have agreed to otherwise. These situations are usually referred to as duress, whereby the contracting party is perfectly aware that the declaration of his or her consent is not in line with his or her true intention, but, overpowered by fear, he or she chooses to conclude a contract that otherwise would not have been concluded or that would have been concluded under different terms. Duress vitiates a contract because, so to say, the contracting party must choose 'between two evils': He or she needs to opt between accepting a disadvantageous

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offer and the risk of declining it.[1] Despite these differences, the common denominator of mistake, deceit, and duress is that they all compromise the process of free formation of contractual intent.

Beside mistake, deceit, and duress, this chapter also deals with the issue of validity of contracts in which there is a meaningful inequality between the values of the performance and the counter-performance at the time of their conclusion. Due to its rather different names and legal attributes in different legal orders the author proposes using the Latin expression *laesio enormis* as a common legal expression for this situation. Since *laesio enormis* is in many European jurisdictions, in one way or the other, founded on the mistake of a contracting party regarding the true value of his or her performance or the counterparty's counter-performance, it seems logical to treat it in this chapter.

The legal notion of mistake is based on a false assumption by at least one of the contracting parties about the facts and circumstances usually taken into account when one deliberates whether to conclude a certain contract at all, and if so, under what terms. However, not all assumptions and expectations of the parties that later prove to be unfounded constitute mistake in the legal sense. Mistake exists if the misapprehension relates to a circumstance qualified as essential, though legal orders differ on defining what 'essential' actually means. In this respect the question whether a mistaken motive is considered essential and triggers the legal consequence of voidability of contract gains special relevance. Beside essentiality, it is usually required that the mistaken party would have not concluded the contract had he or she been aware of the true circumstances.[2] However, the mistaken party's right to avoid the contract is in most legal orders negligent-dependent: He or she may not avoid the contract for just any misapprehension, but only for those that had occurred in spite of the fact that the he or she acted with due diligence in ascertaining the true state of circumstances. In this sense, the general rule is that mistake must be inexcusable.[3] Finally, since the counterparty regularly acts in good faith, the mistaken party is usually required to compensate him or her for the damage caused by the avoidance of the contract.

Some legal orders introduce additional conditions for avoiding the contract on grounds of mistake. For instance, in addition to the requirement of being essential, the mistake may have to be recognizable to the counterparty; under the circumstances of the case, it must have been obvious to the counterparty that the party entered into the contract under a misapprehension of essential facts.[4] A special case of mistake is present when the counterparty caused the mistake, though not deliberately, but simply negligently or even in perfect innocence,[5] by proffering false or incomplete information to the party, thereby inadvertently inducing the later misapprehension. The idea that mistake is only legally relevant when induced by the other party gained foothold especially in English law, embodied in the notion of misrepresentation. English law,

1 Kötz, 2017, p. 185.
2 (Von) Bar and Clive, 2009, p. 465.
3 (Von) Bar and Clive, 2009, p. 464.
4 Kötz, 2017, p. 165.
5 Kötz, 2017, p. 164.

namely, had no general rules on avoiding contracts for mistake well into the nineteenth century.[6] A contract could have been avoided only if the other party made untrue statements relying on which the other party entered into the contract. Common law was far less influenced by the intention theory than was civil law, hence the accent is more on causing the mistake than on the mistake caused.[7] The requirement of recognizability in some civil law jurisdictions and the notion of misrepresentation in common law blurs the dividing line between mistake and deceit to some extent.

Mistake, however, exists only when the misapprehension of facts by either or both parties is not so profound as to hinder the meeting of minds of the parties altogether. Even though a mistaken party erred concerning some facts, a minimal consent has to be reached in order to have a contract concluded, which the mistaken party may avoid if the mistake is essential. If, however, the mistake is so profound that it vitiates consent, the parties are in a misunderstanding and the contract does not emerge at all. Such contract is deemed to be non-existent, and consequently the rules of invalidity (usually in the form of avoidance being permitted) apply. Some legal orders explicitly regulate misunderstanding as a cause of non-existence or invalidity of contract, while others do not, but the legal doctrine or the case law reaches a similar conclusion.

Deceit is a mistake that is induced or caused, a mistake qualified by the imputable conduct of another person. That person may be the counterparty or a third party. Since here the mistake is not self-induced but caused by another person, legal orders usually allow the avoidance of the contract even when the mistake is not essential.[8] Still, it must be substantial, meaning that the mistaken party would not have concluded the contract or would have done so under different terms had he or she been aware of the true circumstances. If the deceit is caused by a third party, in most jurisdictions the contract may be avoided only if the counterparty knew or should have been aware of the deceit caused by a third party and therefore acted in bad faith.[9] If the counterparty acted in good faith, the contract prevails, while the mistaken party has a claim for damages against the third party.

A key question is whether the counterparty's inaction or silence may represent deceit. The majority of legal systems admits that it may, if there was a pre-contractual duty of the counterparty to disclose essential information.[10] Such a duty of disclosure may stem from statutory regulations or from the principle of good faith and fair dealing. Conversely, English law traditionally does not accept a general duty of pre-contractual disclosure.[11]

Duress is the most serious assault on the parties' freedom of contract. It excludes the free formation of the contractual intent of the party under its influence.[12] Thus most

6 Zweigert and Kötz, 1998, p. 419.
7 Zweigert and Kötz, 1998, p. 420.
8 (Von) Bar and Clive, 2009, p. 495.
9 Kötz, 2017, p. 182.
10 Kötz, 2017, p. 176.
11 Treitel and Peel, 2011, pp. 9–123.
12 (Von) Bar and Clive, 2009, p. 503.

jurisdictions allow the avoidance of a contract on the grounds of duress, regardless of whether it came from the counterparty or from a third party.[13] The act by which duress is caused need not necessarily be unlawful. In most European jurisdictions the requirements of duress are met if the threat is caused by lawful but illegitimate means.[14] The laws of some countries explicitly distinguish a threat (*vis compulsiva*) from coercion (*vis absoluta*), whereby the latter regularly triggers non-existence of the contract.[15]

There are two possible approaches to the legal definition of *laesio enormis*. One is to construe it as a subtype of mistake of either party concerning the true value of his or her performance or the counter-performance. The other considers the requirement of equality between the value of performance and counter-performance an issue of public interest. The legal consequence of the former view is the right of the aggrieved party to avoid the contract, more precisely a special case of mistake applicable to contracts concluded for consideration. The latter, however, considers even non-intentional deviation from the requirement of approximate equality between the values of performance and counter-performance an issue of public order, and hence its infringement leads to a special form of nullity of the contract. The other dimension of *laesio enormis* is related to the criteria whereby it is to be determined whether the contract infringes the principle of equivalence between performance and counter-performance[16]—that is, when is the disproportion significant enough to justify the intervention of the law in the consent of the parties? In some legal systems, for instance in Austria and France, the inequality between performance and counter-performance becomes legally relevant when it oversteps a precise mathematical threshold: in Austria 1/2, in France 7/12.[17] Traditionally this approach is called *laesio ultra dimidium pars*. The other approach does not rely on any precise mathematic threshold but rather on a legal standard allowing the judge to assess the impact and relevance of the inequality in the light of circumstances of the given case. This approach is usually known as *laesio enormis* (in the strict sense).[18]

2. The Czech Republic

2.1. Mistake

Mistake arises when there is a discrepancy between the subjective image formed by a party and objective reality.[19] If both parties knew of each other's true intent, this true intent is relevant—it is not a mistake at all, because *falsa demonstratio non*

13 Kötz, 2017, p. 189.
14 (Von) Bar and Clive, 2009, p. 505.
15 Zimmermann, 1996, pp. 660–661.
16 Zweigert and Kötz, 1998, p. 329.
17 (Von) Bar and Clive, 2009, p. 513.
18 Zimmermann, 1996, p. 269.
19 Melzer in Melzer and Tégl, 2014, p. 755.

nocet.[20] For a mistake to be legally relevant, additional preconditions must be met. The party must have been misled by the counterparty, which holds if his mistake originates in the activities of that counterparty. It is not significant what the activity is or what its merit is, nor is it important whether the counterparty was aware that its actions were the cause of the party's mistake (but if the party's mistake occurred as a result of trickery, it will constitute deceit under § 584 (2) of the CzeCC—see below). The party's inaction can also be considered a conduct by which the counterparty caused the former's mistake if the party was obliged to behave in such manner in connection with performance.[21]

Moreover, mistake must be excusable. A mistake is not excusable if it is caused mainly by the party himself or herself, either by participation in a common mistake or by not acting with the ordinary care and caution that may be required by the circumstances of the case.[22]

Czech law explicitly regulates essential and non-essential mistake, and special provisions cover deceit and mistake induced by the third party. The CzeCC also recognizes so-called mistake in transmission (*omyl v přenosu*). Provisions on mistake also apply to cases of expression of will altered due to the means used by the person who performed the act or other circumstances having occurred during transmission or carriage.[23]

Special regulations on mistake may be found in the case of settlement. The validity of a settlement shall remain unaffected by a mistake in what was contentious or doubtful between the parties unless a party employed trickery to cause the mistake.[24]

Mistake can take place in the writing or in any numbers; however, such mistake does not prejudice the validity of a juridical act if its meaning is undoubted.[25]

2.1.1. Essential mistake

Essential mistake[26] concerns a decisive circumstance or a secondary circumstance that the parties have declared decisive.[27]

The decisive circumstance concerns the so-called *essentialia negotii* of the juridical act. The term decisive circumstance includes a mistake in the type of juridical act (*error in negotio*), a mistake in the identity of the object (*error in corpore*), a mistake in the decisive characteristic of the object (*error in qualitate*), and a mistake in the addressee (*error in personam*).

20 CzeCC, § 555 (1).
21 Handlar in Lavický et al., 2014, p. 2105.
22 Handlar in Lavický et al., 2014, p. 2107.
23 CzeCC, § 571.
24 CzeCC, § 1904.
25 CzeCC, § 578.
26 CzeCC, § 583.
27 Melzer in Melzer and Tégl, 2014, pp. 757–758.

A secondary circumstance concerns mainly the characteristics of objects and persons that do not belong in the decisive circumstance category, and also every arrangement that directly or indirectly regulates the duty to perform.

To qualify a mistake as essential, the assumption is that knowing the true state of affairs, the juridical act would not have been concluded at all.

A special case is the so-called double-sided mistake where both parties are mistaken. In such a case, it is necessary to examine whether it is a mere *falsa demonstratio non nocet*, or whether the juridical act exists at all (if there is even a meeting of minds between the parties).

The consequence of an essential mistake is that the juridical act is voidable[28] (*relativní neplatnost*). Also, a party who has caused a juridical act to be invalid shall compensate the other party for the resulting damage.[29]

2.1.2. Non-essential mistake

A non-essential mistake should be understood as a mistake in a secondary circumstance that neither party has declared decisive.[30] The consequence of a non-essential mistake is merely a right to claim appropriate compensation from the person who caused that mistake.[31] It is important to distinguish between an appropriate compensation and a compensation for damages.

A right to appropriate compensation constitutes a right of the misled participant to obtain a certain performance that would compensate him or her for the loss caused by the fact that he or she acted in mistake. The nature and amount of such compensation should therefore be based on the subject matter of the juridical act and compensate the difference between what was agreed and what would probably have been agreed had the mistake not occurred.[32] Also, the right to appropriate compensation is not a right arising from a defective performance.

2.1.3. Mistake in the motive

The motive (*causa proxima*) is the idea that was decisive for the party when making a certain expression of will.[33]

Generally, a mistake pertaining to the motive is not legally relevant. There are, however, a few exceptions: When mistake in the motive results from deceit, when the motive has been explicitly made part of a juridical act, or when the mistake is an *error in personam* or such mistake is a mistake by a testator.[34]

28 CzeCC, § 583 and § 586.
29 CzeCC, § 579 (2).
30 CzeCC, § 584 (1).
31 CzeCC, § 584 (1).
32 Handlar in Lavický et al., 2014, p. 2114.
33 Melzer in Melzer and Tégl, 2014, p. 763.
34 CzeCC, § 1531. Melzer in Melzer and Tégl, 2014, p. 764.

2.2. Deceit

Deceit is a special kind of mistake regulated under § 584 (2) of the CzeCC. Deceit is the situation in which the other participant deliberately misrepresents reality by presenting something nonexistent as existing, by presenting something that exists as nonexistent, or by disguising an existing fact.[35] Such an induced mistake is legally relevant even if it concerns a secondary circumstance or is a mistake in the motive. However, there must be a causal link between the deceit and the assessed juridical act.

Such mistake occurs if it has been actively caused by the other party or if an already existing mistake is consciously exploited by the other party.[36] Whether a mistake is excusable or not should not be relevant here.[37]

The consequence of a deceit is that the juridical act is voidable.[38] A person who used deceit must always compensate the resulting harm.[39]

A mistake can be also induced by a third party. This is not the case when a person acts on behalf of the party in connection with the conclusion of a juridical act (e.g., as a representative).[40]

Where a party acted as a result of a mistake induced by a third party, the juridical act concluded is valid. However, if the counterparty with respect to whom the juridical act was made was involved in the act of the third party, or knew or at least must have known thereof, such a counterparty is also considered the originator of the mistake.[41]

Some authors believe that knowledge of a third party's action is sufficient for the counterparty to be considered to have misled the party. There is no need for the counterparty to know that the party was misled.[42] Others disagree, saying that the counterparty must know not only about the third party's action but also about the fact that the party was misled.[43]

2.3. Duress

Duress can take two forms—coercion (*vis absoluta*) or threat (*vis compulsiva*).
Coercion is characterized by the use of physical force to enforce certain juridical actions. In such cases, the juridical act is non-existent, as the will of the acting party is entirely absent.[44]

Threat is a situation in which a person is forced to conclude a juridical act under a threat of physical or mental violence inducing a justified concern given the relevance and likelihood of danger as well as the personal characteristics of the person being

35 Supreme Court Ref. No. 26 Cdo 2828/2000.
36 Melzer in Melzer and Tégl, 2014, p. 768.
37 Handlar in Lavický et al., 2014, p. 2115.
38 CzeCC, § 584 (2). Melzer in Melzer and Tégl, 2014, p. 769; Beran in Petrov et al., 2019, p. 648; Handlar in Lavický et al., 2014, p. 2115.
39 CzeCC, § 587 (2).
40 Handlar in Lavický et al., 2014, p. 2117.
41 CzeCC, § 585.
42 Beran in Petrov et al., 2019, p. 648.
43 Melzer in Melzer and Tégl, 2014, p. 767; Handlar in Lavický et al., 2014, p. 2118.
44 CzeCC, § 551.

threatened.[45] In these cases the conceptual characteristics of juridical acts are fulfilled, therefore the juridical act exists. The will of the party, however, is vitiated.

A threat can be aimed not only toward a party, but also a third party if there is a connection between him and the acting party.

A threat is wrongful when:

— the threatened conduct is itself unlawful,
— an unlawful purpose is pursued by the threat (even if the threatened conduct itself is lawful),
— there is an illegal relationship between the purpose and means used to achieve it.[46]

The wording of § 587 of the CzeCC does not distinguish according to whom the threat of physical or mental violence issues from, so it may also originate from third parties. However, the consequences may differ according to whether the counterparty must have known that the party's will was affected or not. According to other authors, in the case of a threat by a third party, it is not decisive whether the counterparty knew about the threat.[47]

There must be a causal link between the threat and the assessed juridical act.

While in the case of coercion, the juridical act is non-existent,[48] in the case of threat it is only voidable.[49] A person who issued the threat shall always compensate the resulting harm.[50]

2.4. Laesio enormis

The situation in which the parties undertake to provide each other with a mutual performance and the performance provided by one party is grossly disproportionate to the performance provided by the counterparty, and where the disproportion results from a fact that the other party knew or was required to know, is called *laesio enormis*.

Laesio enormis cannot be applied to cases of acquisition at a commodity exchange, in the course of trading with an investment instrument under another statute, at an auction or in a manner equivalent to a public auction, or to cases of betting or gaming, settlement, or novation, if they were concluded fairly. Applicability to aleatory contracts is excluded as well.[51]

Also, it is not applicable if the reason for the disproportion between mutual performances is based on a special relationship between the parties, especially if the aggrieved party intended to perform partly for consideration and partly gratuitously,

45 CzeCC, § 587.
46 Melzer in Melzer and Tégl, 2014, p. 780.
47 Handlar in Lavický et al., 2022, p. 1893; Melzer in Melzer and Tégl, 2014, p. 782; Beran in Petrov et al., 2019, 652.
48 CzeCC, § 551.
49 CzeCC, § 586 and § 587.
50 CzeCC, § 587 (2).
51 CzeCC, § 1793 (2) and § 2757.

or where the extent of the disproportion can no longer be determined,[52] or the aggrieved party has expressly waived the right to invoke *laesio enormis* and declared that it accepted the performance at an exceptional price based on its sentimental value, or consented to a disproportionate price although he or she was, or must have been aware, of the actual value of the performance.[53]

Regarding the disproportion, it must be a gross disproportion, unequivocal and obvious to all. As the CzeCC does not state any specific threshold, it is necessary to assess every single case differently. However, the general rule (considering historical and foreign regulation as well as the special regulation in § 2185 (1) of the CzeCC) is that *laesio enormis* exists if the performance is at least twice as valuable as the consideration received in return.

The condition of gross disproportion needs to be assessed using as a reference date the time the contract was concluded based on the usual price applicable at that time. In the case of a pre-contract, the condition of disproportion is assessed considering the time of the conclusion of the pre-contract, not the time of conclusion of the future contract.[54]

In the case of *laesio enormis*, the aggrieved party may request the court to cancel the contract. The counterparty may choose (*alternativa facultas*) to uphold the contract by supplementing the performance by an amount of money to restore the equivalence, having regard to the usual price at the time and place at which the contract was concluded.[55] An entrepreneur who concluded a contract in the course of his business is not entitled to request that the contract be cancelled.[56]

The aggrieved party's unilateral appeal by the other party is not sufficient; it is necessary to seek protection through the court proceeding. The contract is then cancelled with *ex tunc* effect. The right to request that the contract be cancelled and the original state restored is extinguished if not asserted within one year from concluding the contract.[57]

3. Hungary

Mistake,[58] deceit,[59] duress,[60] and *laesio enormis*[61] address defects of consent and are covered by some rather flexible rules in Hungarian contract law. They are built upon open concepts and allow a wide freedom of maneuver to the judge for interpretation

52 CzeCC, § 1794 (1).
53 CzeCC, § 1794 (2).
54 Janoušek in Petrov et al., 2019, p. 1868.
55 CzeCC, § 1793 (1).
56 CzeCC, § 1797.
57 CzeCC, § 1795.
58 HunCC, § 6:90.
59 HunCC, § 6:91.
60 HunCC, § 6:91.
61 HunCC, § 6:98.

and for allocating contractual risks between the parties. Rules covering enforceability of the contract due to mistake in Hungarian contract law do not simply protect the free will of the party but also allocate the risks of information asymmetry. Duty of disclosure as a positive obligation is balanced with the required standard of conduct imposed on the aggrieved party. Thus, failure to disclose relevant circumstances may establish misrepresentation. The aggrieved party, however, also has an obligation to take the steps that are generally expected in order to acquire the relevant information under the given circumstances. The party who should have recognized his or her mistake or undertook the risk of being mistaken shall not be able to avoid the contract. Thus, the open rule of duty of disclosure is confronted with the open rule of required standard of conduct, resulting in the allocation of any risk posed by asymmetric information, by way of the judgment. As a result, mistakes constitute grounds for voidability only when they are excusable.

The difference between a mistake and misrepresentation (or deceit) in Hungarian contract law is a very slight one. The courts quite often fail to distinguish between them and address mistake and deceit as overlapping categories.[62] Both mistake and deceit are assumed to be caused by the other party, either actively or by an omission of duty of disclosure. Voidability as a legal consequence is also the same. The difference is that while deceit is a fraudulent conduct, mistake does not presuppose that the counterparty caused the information asymmetry deliberately.[63] Moreover, in case of deceit, the aggrieved party shall be entitled to avoid the contract even if he or she was negligent in controlling the information provided by the other party.[64] Thus, excusability is not a precondition of voidability in case of deceit. If, however, the aggrieved party relied upon the statement of the counterparty without any grounds, he or she is prevented from avoiding the contract due to deceit.[65]

Mistake makes the contract voidable if it is related to a substantial circumstance at the time of concluding the contract, provided that the mistake was caused or could have been recognized by the other party. The circumstances that may be relevant or substantial for a mistake are not specified. Thus, all kinds of qualities of the object of the contract, the parties, or circumstances of the case may make the contract voidable on this ground. The mistake concerns a substantial circumstance such that the party would not have concluded the contract or would have concluded the contract with a different content had he or she been aware of it. If, upon concluding the contract, the parties shared the same erroneous assumption on a substantial issue, either of them may avoid the contract.

62 Supreme Court, Pfv. VI. 22.708/1997/7; Supreme Court, Pfv. V. 21.839/1995/2. Menyhárd, 2000, p. 186.

63 This difference was relevant in the regime of the HunCC (1959) insofar as in the case of deceit the value being returned could have been awarded to the state. In absence of such specific sanction, in the HunCC (2013) the distinction between mistake and deceit is of a far lesser importance in practice.

64 Supreme Court, Legf. Bír. Pf.I. 20.047/1971; Supreme Court, Gfv. IV. 32.297/1996/4.

65 Supreme Court, Gfv. IV. 32.297/1996/4.

In this system, deceit is a mistake capable of influencing the party's contractual will that was caused deliberately. If the party was deliberately misled or maintained in his or her mistake by the other party, he or she has the right to avoid the contract. If deceit was committed by a third party, this may also render the contract voidable, provided that one of the parties was or should have been aware of it.

If the parties settled their dispute arising from an obligation by mutual concession, or if one of the parties unilaterally concedes some of his claim, such a settlement cannot be avoided on the grounds of mistake concerning a circumstance that was disputed between the parties or that they considered uncertain.[66] A gratuitous contract shall be voidable on the grounds of mistake (erroneous assumption), misrepresentation by a third party, or duress, if the other contracting party was unable to recognize these circumstances.[67]

If the party has been induced to conclude a contract by the other party by way of duress, he or she may avoid the contract. Duress is defined as an unlawful threat, where unlawfulness is an open concept, drawing the limits of permitted (tolerated) pressure on the other party. The open character of this solution brings this concept closer to the legal nature of general clauses: It is to be decided by the court whether the pressure falls within the limits of lawful conduct or goes beyond it. In this way the court provides the content of the legal norm. Yielding to duress must be done in order to prevent financial, moral, or physical harm against the aggrieved party or his or her close relative[68] in the case of failure to conclude the contract demanded by the other party. Duress results in voidability only if it was capable of influencing the consent of the aggrieved party; a causal link is required between the anticipated harm and the decision of the aggrieved party. If the aggrieved party concluded the contract in a state of necessity, such a state is a ground for establishing duress only[69] if it was created by the other party or if it was created by a third person and the other party was or should have been aware of it.

Commercial pressure does not establish duress, although the boundaries of duress and commercial pressure are somewhat unclear. Duress results in voidability only if it exceeds the limits of accepted commercial pressure. For example, putting the party under pressure through a potential prosecution constitutes duress if its basis is a crime committed by the party or by one of his or her relatives, but threatening a party with a civil lawsuit constitutes lawful commercial pressure if it is a legal step for enforcing a claim against the party. If duress was committed by a third party against an aggrieved party, it makes the contract voidable if the counterparty knew or ought to have known of it. The concept of economic duress has not been developed in Hungarian contract law theory or practice so far.

Control of the value of performances via *laesio enormis* is addressed on a two-line track in Hungarian contract law. One of these tracks is the extended concept of usury,

66 HunCC, § 6:27.
67 HunCC, § 6:93.
68 Supreme Court, Pfv. II. 20.399/1998/3.
69 Supreme Court, Gf. II. 30.057/1994/5.

which was transposed from criminal law to private law. In the traditional Hungarian private law of the pre-World War II period, if gross disparity of the performances resulted from abusing the other party's distress, necessity, lack of judgement, inexperience, or improvidence, the contract was null and void. This concept of usury followed the German pattern of *Wucher*. The HunCC (1959) maintained this concept, which has been preserved by the HunCC (2013) as well. Thus, if, by abusing the party's situation, the counterparty has stipulated grossly disproportionate benefits upon the conclusion of the contract, the contract shall be null and void. The usurious character of the contract and, as the result of this, its nullity is to be established if the excessive benefit was stipulated while exploiting the situation of the aggrieved party. Abuse is a deliberate act that presupposes that the counterparty is aware of the circumstances of the aggrieved party that make the latter vulnerable and make the exploitation possible. The HunCC does not specify the circumstances whose exploitation could be the basis for declaring the contract null and void; all kinds of circumstances that make such an exploitation possible could be relevant. From the notion of exploitation (abuse), it follows that there must be a causal link between the egregiously disproportionate advantage and the activity of the party accused of wrongdoing. According to the case law, one may speak of exploitation only when the counterparty is aware of the situation of the aggrieved party and stipulates a grossly disproportionate advantage based on this information. Exploitation presupposes a conscious act, so the courts have found that simple knowledge of the situation of the aggrieved party not to be enough to establish usury. The problem is that in many cases that are relevant at first sight, such as contracts for a loan with a very high interest rate, the debtors and the creditors do not even meet, so it cannot be said that the creditors would know anything about the situation of the debtor. Normally it is not in the interest of the debtor to draw the creditor's attention to his desperate situation. As the case law insists, exploitation has a subjective element of fraudulent behavior based on actual knowledge, so this approach is rather restrictive.[70]

The other track is the result of development during the post-World-War-II era. After World War II, the concept of usury proved unsuited to addressing the claims for restitution submitted by families who lost their property due to measures taken by national socialist governments. As the oppressive legislation threatened to deprive them of their property, they were forced to sell their assets at egregiously low prices, well below what in normal circumstances would have been the market price.[71] This was an indirect duress. Hungarian courts, instead of establishing a 'collective threat' as constituting duress, turned to the concept of usury and established an irrebuttable presumption of exploitation, simply on the ground of the gross disparity of the value of performances, provided that the aggrieved party had not attempted gratuitous transfer of ownership.[72] This concept of 'objective' usury has been maintained as a

70 Menyhárd in Filó, 2016, pp. 225–252.
71 Weiss, 1969, p. 268; Beck, 1948, pp. 294–296.
72 Weiss, 1969, p. 271.

rule of *laesio enormis* making the contract voidable in the HunCC (1959) and the HunCC (2013). According to this rule, if there is a gross disproportion between the value of the mutual performances upon the conclusion of the contract, without an intention by one of the parties to give a gift to the other, the aggrieved party has the right to avoid the contract. If the aggrieved party was able to recognize the gross disproportionality or undertook its risk, he or she may not avoid the contract. The parties may exclude this right in the contract provided that the contract was not concluded between a consumer and a professional.

The difference between usury[73] and *laesio enormis*[74] lies in the abuse of the position that qualifies *laesio enormis* as usury and makes the contract null and void instead of being voidable.

4. Poland

In Polish law, mistake, duress, and deceit are treated as defects of declarations of will, exploitation (*laesio enormis*) conversely as a violation of the principles of contractual freedom. This difference is purely formal, because originally in the Code of Obligations (an act that was largely incorporated into the PolCC) *laesio enormis* was a defect in the manifestation of will. Currently, Polish lawyers have adopted the so-called 'normative theory of defects in manifestations of will' according to which only those irregularities of the decision-making process that the legislator has explicitly called defects are defects in declarations of will. For this reason, *laesio enormis* is now considered an irregularity of a different kind: a contractual imbalance.[75]

A mistake[76] is understood as a misconception of the actual state of affairs. It must concern the content of the juridical act (rights and obligations of the parties). A mistake cannot be invoked if it concerns only the motives for which a party concluded the contract, for example, an investment in a certain good in the mistaken belief that its value would increase. Moreover, the error must be essential, i.e., such that if the person making the declaration had known the actual state of affairs and had evaluated matters reasonably, he would not have made such a declaration of will.[77]

There is a dispute in the literature and case law as to whether a simple material error justifies invoking a mistake. Such are situations, e.g., when as a result of an error the price was understated by 100 times, or the mistake concerned the currency (e.g., Australian or Canadian instead of US dollars). The traditional view, accepted in the case law, is that in such a case we are dealing with a material error. Some scholars, however, believe that such a mistake means that the agreement was not

73 HunCC, § 6:97.
74 HunCC, § 6:98.
75 Popiołek, 2020, Commentary to Article 388 PolCC, at 1.
76 PolCC, Article 84.
77 Radwański and Gutowski, 2019, pp. 504–505.

concluded at all, because there were no two unanimous statements of consent by the parties.[78] Another moot item is the possibility of invoking a mistake as to the law currently in force. Although the principle of *ignorantia iuris nocet* is still valid, both courts and the literature seem to agree that the doctrine of mistake constitutes an exception to this maxim in order to protect the unaware party.[79]

Distortion of the content of a manifestation of consent by a messenger is considered equivalent to a mistake. The messenger merely transfers another person's declaration of will and reproduces it. This rule shall apply to human messengers as well as to distortions caused by machines and computer programs.

When a declaration of will is made to the other party, a mistake can be invoked if, in addition, at least one of the following conditions is met:

- the other party caused the error, even if unwittingly (for example: the seller is convinced that he or she sells a Rubens painting as a result of expert opinion, while the work of art turns out to be a forgery),
- the counterparty knew about the mistake of the party but did not rectify it (e.g., in the case of the painting from the previous example, the seller knows that it is not a Rubens and the buyer is convinced that he or she is buying an original), or
- the other party could have easily noticed the mistake (e.g., a professional art dealer who, when selling a reproduction of the Mona Lisa, ignores the buyer's question as to why he is selling an original da Vinci piece at such a low price).

A mistake regarding the content of a contract cannot be invoked by a person who signed the document without reading it.

A qualified form of mistake is deceit (an intentionally induced mistake). In this case the mistake does not have to be material. If a mistake has been deceitfully induced by a third party and the addressee of the declaration of will knew about it, it is as if that addressee himself or herself had deceitfully induced the party into making the mistake.[80]

The effects of a declaration of will made under the influence of a mistake or deceit can be evaded by submitting a declaration of will to the other party in writing within a year of the discovery of the mistake.

Mistake and deceit quite often appear in the context of defects of goods sold. Under Polish law, a buyer of a defective item has a choice of either invoking the provisions on non-conformity of goods or invoking mistake or deception. The latter is more advantageous, as defects may be discovered years later, for example if a work of art bought at an auction turns out to be a forgery only after a resale attempt.[81]

78 See judgement of the Supreme Court—Civil Chamber of February 23, 2018 III CSK 384/16, judgement of the Regional Court in Gliwice—III Civil Appeals Division of December 18, 2014 III Ca 1043/14, Legalis No. 2028827.
79 Sobolewski in Osajda, 2021, Commentary to Article 84 PolCC at 4.
80 Radwański and Gutowski, 2019, pp. 520 et seq.
81 Kozińska and Stec, 2015, pp. 173–200.

As for duress and its effect on the validity of the contract, the threat in such cases must be unlawful and serious. A threat is unlawful when the commission of an offence or even of a lawful action is threatened in order to achieve an unlawful result, for example, the counterparty threatens the party with reporting a crime—which was actually committed by the party—to the police in order to achieve sale of an asset at well below the market price. The threat must be serious, i.e., it must give rise to a genuine fear of its fulfillment. A person making a declaration of will under the influence of a threat must be convinced that either he himself (she herself) or another person is threatened with severe personal or material danger. It has been assumed in the case law that a suicide threat justifies invoking duress by the person who made the declaration of will out of a desire that that person not take his or her own life. At the same time, case law has accepted that the announcement of revealing that a person in a high position has an illegitimate child does not constitute an unlawful threat. One may free oneself from the effects of a declaration of will made under the influence of duress by making a declaration of will in writing within one year from the moment when the state of fear ceased.[82]

As already indicated, exploitation or *laesio enormis* is now treated as a breach of contractual balance. Exploitation occurs when the party, taking advantage of the other party's dire position, frailty, or inexperience, receives disproportionately more than the other party gets. The subjective circumstance here is the assessment of the characteristics of the exploited party. A dire position may mean, for example, a difficult personal situation, such as having to cover the costs of caring for a sick person or buying expensive medicines. Frailty may be due to ill-health or old age. Inexperience covers a wide range of cases, from the lack of familiarity with the object of the contract to overconfidence in a counterparty presenting themselves as a representative of a trustworthy institution, for example, to an inexperienced party. As of December 2021, there is a presumption in force according to which if the performance of one party is twice the value of what is performed by the other party, there is a disparity leading to *laesio enormis.* For this the counterparty must be aware that he or she is contracting with a person susceptible to manipulation and must also take advantage of this when determining the content of the contract. Inequality in the rights and obligations of the parties and an unjustified advantage for one of them is an objective circumstance.[83]

Provisions regarding exploitation were traditionally used in non-business relationships or as a tool for consumer protection. Nowadays, the courts do not distinguish between business-to-business and non-business relationships in this respect.[84] Modern judicial practice recognizes that an entrepreneur can also fall victim to exploitation. In recent years, in case law the provisions on such exploitation have been used, among others, to protect against the imposition of unfavorable credit

82 For a detailed analysis of the exploitation in Polish law see Kondek 2021.
83 Machnikowski, 2020, pp. 679 et seq.
84 Popiołek, 2020, Commentary to Article 388 PolCC, at 10.

or loan conditions on small entrepreneurs and to protect against the imposition of unfair terms in franchise agreements.[85] There is also a question of the possibility of using provisions on exploitation on such markets as the art market, where asymmetry of information and taking advantage of the counterparty's ignorance or inexperience is a normal part of the market game.[86]

The exploited party may claim an increase in the other party's benefit, a reduction in his own benefit, or, as a last resort, termination of the contract by the court. Such a claim may be submitted within two years from the conclusion of the contract. There are, however, cases where the plaintiff had raised the claim after this period. In some of them the courts decided to annul the contract as being *contra bonos mores*.[87] That leads to the conclusion that in Polish law there are in fact two different types of grave contractual imbalances: one leading to modification or termination of a contract (*laesio enormis*) and the other, exploitation (*laesio gravissima?*), resulting in declaring the contract null and void.

5. Romania

5.1. Mistake

A mistake (*error*) is 'a misguided idea of reality'.[88] From the point of view of the legal consequences of mistake, a distinction must be drawn between essential and non-essential mistakes. A mistake is essential if it had a decisive influence on the decision of the party whose consent was affected.

A mistake of fact (*error facti*) is essential in the following cases:[89]

— If it concerns the nature of the contract (*error in negotio*). For example, someone wants to give something as a deposit (*depositum*), but the recipient mistakenly believes that he has received it as a gift.

— If the mistake concerns the identity of the object of the contract (*error in corpore*). For example, the seller thinks he is selling a particular painting and the buyer thinks he is buying another painting.

— If the mistake relates to the quality, i.e., the essential characteristics, of the object of the contract (*error in substantia*; *error in qualitate*). Had the party in mistake been sufficiently aware of these characteristics, he would not have concluded the contract; for example, if the buyer buys a bronze

85 A good example of this practice is the judgement of the Katowice Court of Appeal dealing with a case where the interest rates in a long-term contract agreement (with a duration of 21 years) were so high that they exceeded the real costs of the credit. Judgement of the Katowice Court of Appeal of October 24, 2019, I ACa 184/19, Legalis 2488169. See also Kondek, 2021, p. 21.

86 Andrzejewski and Szafrański, 2016, pp. 130 et seq.

87 Girdwoyń, 2016, pp. 660 et seq.

88 RouCC, Articles 1207–1213; Fekete, 1958, p. 119; Boroi and Anghelescu, 2021, pp. 157–164; Nicolae, 2018, 375–386.

89 Veress, 2021, p. 108.

statue believing it to be made of gold, or a copy of a painting instead of the original.[90]

- If the mistake concerns the identity of the other party (*error in persona*). This can only be the case in contracts where the choice of the person of the contracting party is intrinsic to the essence of the contract (*intuitu personae*).
- Mistake may also affect the motives for concluding a contract (*error in causa*), but this is exceptional since a mistake in the reasons does not normally justify avoidance of the contract (for example, where a person buys shares believing that the share price will rise, but the share price falls after the contract is concluded). However, there are situations in which a mistake affecting the reasons for the contract may also render the contract voidable, for example, if a person grants a large donation in favor of a church in the mistaken belief that his or her only child has died, and the donor is without any heirs. A mistake by the donor as to the grounds for the donation may render it voidable if his or her child is alive.
- In general, there can be no mistake pertaining to the provisions of the law (*error iuris*). The law is presumed to be known to everyone. Ignorance of the law does not invalidate the contract (*nemo censetur ignorare legem*). Romanian law, however, regulates mistakes of law for cases where the law is not accessible and its provisions are not foreseeable (predictable).

Romanian law makes a distinction between excusable and non-excusable mistakes. In order to void the contract, it is not sufficient to show a mistake, but the mistake must be excusable. A mistake is not excusable if the party could have known and established the correct facts by exercising due diligence. Consequently, the contract cannot be avoided by the aggrieved party if reasonable efforts could have prevented the mistake, i.e., the mistake cannot be excused.

Likewise, a mistake concerning the financial situation of the other contracting party (for example, where the seller assessed that the buyer could pay the purchase price because everyone knew that his financial situation was excellent) cannot be excused.

The party in mistake may not rely on the *error* contrary to the principle of good faith. It has been established in case law that, in the case of a contract in a foreign language, a party cannot rely on a mistake as to the nature of the contract. Such conduct is contrary to the principle of good faith since, when expressing his or her consent in a foreign language with which he or she is not familiar, if he or she is acting in good faith, he or she will take the minimum precautions which are natural in such a case (for example, the use of a translator), particularly since the nature of the contract is already clear from the title of the instrument.[91]

90 However, in the case of a mistake as to the value, the rules of *laesio enormis* apply. If there is a fraudulent intent on the part of one party to deceive the other, we are not dealing with a mistake but with another defect of consent, namely deceit.

91 Timișoara Tribunal, judgement No. 46/2016.

Romanian legislation allows the counterparty to salvage the contract affected by a mistake on behalf of the party. If the party pleads a mistake, the counterparty may declare that the contract will be performed as the party in mistake understood it. In this case, the contract is concluded with the content of which the party in mistake was initially aware.[92]

In all cases, the sanction for mistake is the voidability of the contract. No damages can be awarded for a contract avoided by mistake.

A non-essential mistake does not affect the validity of the contract. A non-excusable mistake also does not lead to the contract being voidable; the contract is such cases is valid.

5.2. Deceit

Deceit (*dolus*) is the second type of defect of consent, but unlike mistake, deceit is a private law fraud: Employment of fraudulent means to influence the party to conclude a contract.[93] The conceptual elements of deception are the intention to deceive and the use of fraudulent means.[94]

For example, deceit occurs when the donor is persuaded by unfair influence to conclude a donation. One acts fraudulently if he or she knows that the deceit will lead a party to a decision that such a party would not otherwise have reached.

Deceit may also consist of omitting an important fact (*reticentia*). According to case law, there is no misrepresentation by omission if the lawyer did not inform the client when concluding a contract for representation in another country that he or she did not know the language of that country. The lawyer never claimed that he or she knew the foreign language, and the court held that by using a translator he or she could properly perform his or her obligations without knowing the foreign language and that the contract was therefore valid.[95] The court's decision may even be open to contest: In particular cases, it is necessary to examine whether the lawyer's concealment of the fact (lack of knowledge of the language) was deliberate in order to induce the other party to enter into the contract, or whether the client would or would not have entered into the contract if the concealment had not taken place.

Deceit may be principal (*dolus causam dans*), where it results in the deceived party entering into a contract that he or she would not have entered into in the absence of deception, or incidental (*dolus incidens*), where the deception results in a less favorable contract than would have been concluded in the absence of the deception.[96]

The other contracting party may cause deceit in contracts, but there is also deceit if a third party causes it but the contracting party who benefits from it knew (or ought to have known) about it (collusion with a third party).

92 RouCC, Article 1213.
93 RouCC, Articles 1214–1215; Boroi and Anghelescu, 2021, pp. 165–169; Nicolae, 2018, pp. 387–393.
94 Fekete, 1958, p. 119.
95 Iași Tribunal, judgment No. 1112/2014.
96 Veress, 2021, p. 112.

The sanction for deceit is the voidability of the contract. The deceived may also have a claim for damages against the deceiver. Deceit may never be presumed; therefore, the burden of proof in demonstrating it falls on the aggrieved party.

5.3. Duress

Duress (*vis ac metus*) is a threat forcing a party to enter into a contract or to do so under terms that in the absence of duress would not have been accepted.[97]

Duress results in a forced manifestation of consent caused by a sense of fear resulting from coercion. Coercion exists when the object of the threat is a person (for example, the physical integrity of the contracting party or a member of his or family or the integrity of his property), but the unlawful threat may also concern, for example, the honor or reputation of the person.

It does not constitute a case of duress when the party is induced to enter into a maintenance contract by statements of the counterparty that imply that, without entering into the contract, the party will be 'left alone,' 'will have no one to care for him,' or 'will die alone,' since these do not indicate possible wrongful conduct toward the party but simply indicate the consequences of not entering into the contract.[98] Recognizing a debt during police questioning is also in and of itself not a result of coercion.

It does not constitute duress but a complete lack of contractual consent when the victim's hands are held (physical coercion) and he is forced to sign a written instrument recording the contract. 'In such cases, passivity goes so far, that there is no legal consent, at most an appearance of consent. In the absence of a transactional consent, the contract is null and void.'[99] In the case of physical coercion (*vis absoluta*) there is no intent to conclude the contract. There is consent in the case of mental coercion, but it is distorted. Even under duress, the party chooses between two evils. Only mental coercion is a defect of intent and therefore a ground for voidability. Physical coercion, on the other hand, is an independent ground for nullity due to a total lack of contractual consent.[100]

Duress exists when the threat creates an insurmountable fear in the party, leading him or her to enter the contract. He or she can choose between just two options: either to suffer the prospect of threat being carried out or to enter into the contract. If he or she chooses the latter, his or her consent to enter into a contract will be defective since he or she would not have entered into the contract in the absence of coercion, or would have entered into it only on other terms more favorable to him or her.[101]

Duress must be substantial (serious) when considering the personal circumstances of the party being threatened. There is no particular threshold provided for by law, but the age, sex, economic, and social position, as well as any relevant individual

97 RouCC, Articles 1216–1220; Boroi and Anghelescu, 2021, pp. 169–174; Nicolae, 2018, pp. 394–398.
98 Bucharest 4th District Court, judgment No. 1182/2013.
99 Fekete, 1958, p. 120.
100 Veress, 2021, pp. 113–114.
101 Fekete, 1958, p. 120.

characteristics of the person threatened must all be considered. Whether the threat can intimidate the person threatened is a matter for the judge to consider. If a person merely pleads that the duress was caused by the other party's power or heightened self-worth, and the element of duress does not actually appear in the circumstances in which the contract was concluded, the judge cannot accept this as a ground for challenge. Fear of the authority, power, and personality of the other party (*metus reverentialis*) is not in itself a form of duress. Duress presupposes, in addition to the subjective fact of fear, some objective threat (e.g., verbal intimidation, the display of a weapon).

The threat proffered must be unlawful. A threat to exercise a right in accordance with its intended purpose cannot constitute coercion. For example, a creditor may threaten his debtor with legal action or enforcement. This is not coercion unless the creditor intends to obtain an undue advantage for him or herself by these means. It is also not generally unlawful to raise the prospect of a criminal charge. However, it is considered coercive to use the threat of a criminal charge to induce someone to enter into a contract, such as an interest-free loan, because the legitimate threat is used to obtain an undue advantage.

It is not unlawful and therefore does not invalidate an employee's written request to terminate an employment contract if the employee signed this request because the employer would otherwise have initiated a disciplinary investigation against him or her and claimed damages, because these are the employer's legal options against an employee who has committed a disciplinary offense and caused material damage.[102]

Putting pressure on a person to sign a contract by threatening suicide is unlawful.

The other contracting party can cause duress in contracts, but there is also an involuntary wrongful act when the coercion was caused by a third party but was known (or should have been known) to the contracting party who benefited from the duress.

The threat must always be proven, and the sanction is that the contract is voidable on the request of the aggrieved party. Voidability can be asserted in two ways: If the coerced party has already performed, he or she can bring an action to have the contract avoided and recover the services performed. If the other party (the threatening party or the party for whose benefit the threatening party has acted) demands performance, the coerced party can raise an exception (defense), i.e., request that the action be dismissed because the contract is voidable.

5.4. Laesio enormis

Disproportionality refers to a material disadvantage suffered by a party because the value of the service received is well below the value of his own service.[103] Hence, disproportionality can only exist in the case of a contract for consideration. The disproportionality requires the 'victim' to enter into the contract under financial pressure (economic hardship) or because of his inexperience or lack of knowledge (ignorance).

102 Bucharest Tribunal, III[rd] Labor Law and Social Security Section, judgment No. 10897/2014.
103 RouCC, Articles 1221–1224; Boroi and Anghelescu, 2021, pp. 174–177; Nicolae, 2018, pp. 399–404.

A contract cannot be avoided merely because there is a disproportionality between the performance and the counter-performance. There are two forms of disproportionality that can be considered to be a reason for voidability:

— The minor assumes an excessive obligation in relation to his or her financial situation or concerning the benefits arising from the contract, for example, the tenant rents a property the minor owns for a below-market rent. Since the minor as a rule cannot exercise his or her contractual capacity alone, such cases of disproportionality are relatively rare.
— For an adult, the disproportionality must be serious. In the system of the RouCC, this means that the apparent difference in value must be greater than half of the real value, and the disproportionality must exist not only at the time the contract is entered into but also at the time the action to avoid it is brought to the court, for example, where the seller accepts that the buyer under pecuniary constraint pays 4,000 lei for property worth 10,000 lei.

There is no disproportionality if the contract was only partially for consideration (for example, the seller donates two-thirds of the price to the buyer) or if the thing was bought in the context of an enforcement procedure in compliance with the legal provisions. There is no disproportionality but deceit when one party deliberately deceives the other party into disposing of a plot of land for a price much lower than its real value.

The sanction for disproportionality is the voidability of the contract or (*facultas alternativa*) restoring the proportionality of the contract on the application of the party entitled to avoid the contract. The court also may uphold the contract if the other party fairly offers a reduction of its own claim or, where appropriate, an increase of its own obligation (adaptation of the contract).

An action for annulment or for re-establishing proportionality becomes time-barred after one year from the conclusion of the contract. In this specific case, the voidability of the contract cannot be raised by way of an exception (in defense) after the one-year prescription period has elapsed.

Aleatory contracts (e.g., maintenance contracts, annuity contracts, insurance contracts) cannot be challenged on the grounds of disproportionality.

6. Serbia, Croatia, Slovenia

6.1. Serbia

The Serbian Law on Obligations makes the validity of a contract dependent on a contractual intent that is formed freely and is earnest.[104] The various forms of external influence on the free formation of contractual will and its internal defects, however, may yield different outcomes. Some do not jeopardize the public order and cause

104 SrbLO, Article 28 (2).

detriment only to the private interests of one of the parties. In these cases, the usual legal consequence is the right of the aggrieved party to avoid the contract. However, there are cases in which the process of free formation of contractual intention is hindered to such a degree that it shall be deemed that the contract has not been concluded at all. Mistake, deceit, and duress belong to the first group, psychical duress or coercion and misunderstanding to the second. The rules pertaining to these legal notions, though regulated in the SrbLO, apply to other juridical acts as well.[105] *Laesio enormis* is in Serbian law based on the parties' mistake concerning the true value of their performance and the counter-performance, and hence it is categorized in the first group. However, it is applicable only to contracts, more precisely only to contracts for consideration, and not to all juridical acts.

Already in the title of the rules pertaining to mistake, the SrbLO stresses that it must be essential: The legal institution bears the title 'Essential mistake.' The intention of the law seems clear: to delineate profound misapprehension of the facts by the parties having a set of legal consequences from situations that do not affect the validity of the contract. In defining mistake as essential, the law states that it must relate to essential properties of the object of the contract, to the person with whom the contract is to be made, should the contract be concluded with regard to that person (*intuitu personae*), or be in relation to other circumstances considered relevant according to trade usages or the intention of the parties, provided the mistaken party would otherwise not have concluded the contract under such terms.[106] The SrbLO, therefore, considers *error in substantia* and *error in persona* essential mistakes, but leaves the definition open to encompass any other circumstance that may be construed as such, according to the general opinion or the intent of the parties. The range of other circumstances in relation to which mistake is considered essential should be determined in the light of the cause of the contract.[107]

However, the right of the mistaken party to avoid the contract is subject to three significant limitations. First, the mistake is negligence-based: The SrbLO requires that the mistaken party act with due diligence, as ordinarily demonstrated in transactions of a similar kind. If a party failed to ascertain all circumstances of the transaction with due diligence before entering into the contract, this mistaken party is barred from avoiding it.[108] Second, the counterparty usually acts in good faith, meaning that he or she has not induced or maintained the misapprehension of the facts by the mistaken party. Therefore, the SrbLO provides that if the contract has been avoided on the grounds of mistake, the counterparty is entitled to claim damages.[109] Finally, in the light of the principle of the primacy of the contract, that is, of the requirement that a contract must be maintained as valid whenever possible, the contract may not

105 SrbLO, Article 25 (3).
106 SrbLO, Article 61 (1).
107 Cigoj, 1984, Book I, p. 255.
108 SrbLO, Article 61 (2).
109 SrbLO, Article 61 (3).

be avoided if the counterparty is willing to perform the contract under the terms that would have been agreed to but for the mistake.[110]

The SrbLO explicitly states that error in the motive, that is, a misapprehension concerning the subjective reasons that drove the mistaken party to conclude the contract, may constitute an essential mistake if the contract is gratuitous and the motive was decisive for engaging in the contractual obligation.[111] Under the influence of French law and legal literature,[112] the theory of cause of contract gained a direct embodiment in the law as one of the conditions of formation of the contract.[113] It distinguishes the objective from the subjective cause (motive) of contract, the latter being legally relevant in general only if it is illicit.[114] The frustration of otherwise lawful motives does not affect the validity of a contract[115] concluded for consideration, unless it has been formulated as one of the terms of the contract.[116] Exceptionally, in relation to mistake, an erroneous conception about the decisive motive that drove a party to conclude a gratuitous contract is, however, legally relevant, since it frustrates the cause of contract.[117]

The SrbLO extends the rules on mistake to all cases of indirect expression of contractual intention via intermediaries.[118] This means that the mistake of statutory representatives and agents during the formation of the contract is to be construed as a mistake of the principal, that is of, the party on behalf of whom they acted.

The mistake takes on the aggravated form of deceit if its emergence is attributable to the counterparty's imputable conduct. It exists according to the SrbLO when the counterparty caused the misapprehension on the part of the misled party or upon having detected that the party is in mistake and maintained him or her in such a state with the intention of inducing him or her to conclude the contract. In such cases the sanction is more stringent: The misled party may avoid the contract even in the case when the mistake is not essential.[119] Deceit therefore may be perpetrated even by the inactivity or silence of the counterparty, if he or she noticed that the party is in self-induced mistake.[120] Besides the right to avoid the contract under more favorable conditions as in the case of mistake, the misled party has a claim for damages from the counterparty as well.[121] The SrbLO regulates the situation in which the source of the misled party's misapprehension is not in the counterparty's conduct but attributable to a third party. The right to avoid the contract depends on the counterparty's

110 SrbLO, Article 61 (4).
111 SrbLO, Article 62.
112 Dudaš, 2011, p. 678.
113 SrbLO, Articles 51–53.
114 SrbLO, Article 53.
115 Dudaš, 2010, p. 150.
116 Perović in Perović, 1995, p. 137.
117 Cigoj, 1984, Book I, p. 259.
118 SrbLO, Article 64.
119 SrbLO, Article 65 (1).
120 See in more detail, Dabić, 2018, pp. 55–58; Hiber, 1991, p. 266.
121 SrbLO, Article 65 (2).

good faith. If the counterparty knew or ought to have been aware of the deceit caused by a third party, the misled party may avoid the contract.[122] In contrast, if the counterparty did not know and ought not have been aware of the deceit, the contract may not be avoided. In such case the contract is valid and the misled party may only claim damages, whereby the claim is to be directed against the third party. To be more precise, the claim to request damages is independent of the right to avoid the contract, and may be asserted even if the contract may not be avoided.[123] These rules apply to contracts concluded for consideration. A gratuitous contract entered into under deceit caused by a third party may be avoided regardless, if the counterparty knew or ought to have known thereof.[124]

Regarding the third traditional flaw of contractual intent, duress, the SrbLO prescribes that if the counterparty or any third party caused justified fear to the other party by unlawful threat, under the influence of which the latter concluded the contract, he or she has a right to avoid the contract.[125] Duress therefore always vitiates contractual intention and hence is a ground of avoidance of the contract, regardless whether it stems from the counterparty or from a third party, whereby it is irrelevant whether the counterparty acted in good faith.[126] The law further defines fear caused by duress as being considered legitimate if it can be implied from the circumstances of the case that the life, bodily integrity, or other important values of the contracting party or any third person were endangered.[127] These rules apply obviously to duress in a form of threat (*vis compulsiva*). The SrbLO does not regulate the legal consequences of concluding a contract under coercion (*vis absoluta*), which completely precludes the possibility of expressing one's own contractual intention freely. The majority opinion in the literature is that in such a case no contract is concluded, hence the contract is considered non-existent, triggering the consequences of nullity.[128]

The legal consequences of mistake, deceit, and duress are regulated in greater detail in the rules pertaining to the invalidity of contracts based on voidability or nullity. The SrbLO states that a contract may be avoided due to, among other grounds, flawed contractual intention,[129] upon the request of the party in whose interest the right of avoidance is instituted.[130] In case of mistake, deceit, or duress, the entitled party is the mistaken, the misled, or the party under duress, as the case may be. The right to avoid the contract lapses after one year as counted from the day when the party becomes aware of the ground for avoidance,[131] but no later than three years

122 SrbLO, Article 65 (3).
123 Perović in Perović, 1995, p. 142.
124 SrbLO, Article 65 (4).
125 SrbLO, Article 60 (1).
126 Perović in Perović, 1995, p. 133.
127 SrbLO, Article 60 (2).
128 Perović in Perović, 1995, p. 132.
129 SrbLO, Article 111.
130 SrbLO, Article 112 (1).
131 SrbLO, Article 117 (1).

from the day of the conclusion of the contract.[132] The former is usually referred to as a subjective prescription period, since it begins from the day when the party entitled to avoid the contract gains knowledge of the true circumstances in case of mistake and deceit or when the duress ceases.[133] On the other hand, the latter is referred to as an objective prescription period, since it begins from a moment (conclusion of the contract) that is independent of either parties' cognizance of the relevant facts.[134]

However, the counterparty may find his or her position legally insecure, since there is a contingency as to whether the other party would exercise his or her right to avoid the contract. For this reason, the SrbLO envisages the right of the counterparty to request that the other party state within a time limit not shorter than 30 days whether he or she intends to honor the contract.[135] If the party fails to submit a declaration within the said time limit, or states that he or she does not regard the contract as valid, the contract shall be considered avoided.[136]

Under Serbian law, *laesio enormis* is considered a special case of mistake concerning the inequality between the economic value of the performance and the counter-performance. The SrbLO, in the part pertaining to effects of contracts for consideration, prescribes that if there was an obvious disproportion between the value of the contractual obligations of the parties at the time of the conclusion of the contract, the aggrieved party may avoid the contract if he or she did not know and ought not have known of their true economic value.[137] Contrary to the general rule on prescription periods applicable to avoidance, the SrbLO sets out a single, one-year prescription period for the avoidance of contracts on the grounds of *laesio enormis*. The prescription period is considered objective, since it commences from the moment of conclusion of the contract.[138] Though *laesio enormis* is considered a subtype of mistake under Serbian law, thus triggering voidability of the contract, to some extent it may jeopardize public interests as well. For this reason, the SrbLO explicitly forbids the parties from waiving in advance the right of avoidance of the contract.[139] However, the right of the aggrieved party to request avoidance of the contract is limited in several respects. First, as in the case of mistake, the aggrieved party does not have a right to avoid the contract if the counterparty proffers to perform his or her obligations in a value or extent that does not vitiate the equality between the performance and counter-performance.[140] Second, the SrbLO explicitly excludes the application of *laesio enormis* to some categories of contracts, namely, aleatory contracts, sales at auction, contracts in which the higher price is paid because the object of performance

132 SrbLO, Article 117 (2).
133 SrbLO, Article 117 (1).
134 Perović in Perović, 1995, p. 231.
135 SrbLO, Article 112 (2).
136 SrbLO, Article 112 (3).
137 SrbLO, Article 139 (1).
138 SrbLO, Article 139 (2).
139 SrbLO, Article 139 (3).
140 SrbLO, Article 139 (4).

of the other party has a special or sentimental value for the counterparty (*pretium affectionis*),[141] and contracts on settlement of claims.[142] The rules on *laesio enormis* apply also to persons engaged in commercial activities, but in their case the standard of due diligence is set higher. Thus, the application of *laesio enormis* to commercial contracts is not excluded but may be considered exceptional.[143] The Preliminary Draft of the Civil Code explicitly excludes the application of *laesio enormis* to commercial contracts.[144]

In some cases, the misconception the parties may have can be so profound that it may even prevent them from reaching the minimal threshold of consent, in which case no contract is deemed to have been concluded at all. The SrbLO explicitly regulates such situations under the title 'Misunderstanding.' It prescribes that should the parties believe they have agreed, while in fact a misunderstanding exists between them regarding the nature of the contract or the cause or subject matter of their obligations, the contract does not come into existence.[145] The first situation exists, for instance, when one party believes that a contract of sale is concluded, while the other thinks a contract on donation has been entered into. The second relates to a case where a party believes that the counterparty will transfer an ownership right as the object of the contract, while it merely transfers a right of use. Finally, a misunderstanding also exists when a party believes that one specific item is the object of the contract, while the counterparty understood a different item.[146] In this case, the distinction between misunderstanding and mistake is at its narrowest. If the parties had in mind the very same item as the subject of the contract but it does not have the characteristics one party had in mind, the case may be qualified as a mistake. However, if the parties had in mind different items, the case is to be construed as a misunderstanding, since the misapprehension vitiates the cause of the contract.[147]

6.2. Croatia

The HrvLO has basically taken over the rules on mistake from the former federal law, though some significant novelties have been introduced. On the one hand, misapprehension in relation to the object of the contract has been removed from the notion of misunderstanding and qualified as one of the situations when the mistake is essential.[148] On the other hand, mistake is no longer negligent-based, that is, it is no longer required of the mistaken party that he or she acted with due care in the time of the formation of contract in order to prevent the emergence of misapprehension of

141 SrbLO, Article 139 (5).
142 SrbLO, Article 1094.
143 Krulj in Blagojević and Krulj, 1980, p. 361.
144 *Prednacrt Građanskog Zakonika Republike Srbije* [Preliminary Draft of the Civil Code of the Republic of Serbia] https://www.mpravde.gov.rs/files/NACRT.pdf, Article 273 (5).
145 SrbLO, Article 63.
146 Radovanović in Pajtić, Radovanović and Dudaš, 2018, p. 269.
147 Cigoj, 1984, Book I, pp. 264–265.
148 HrvLO, Article 280 (1).

facts.[149] The doctrine indicates that by this change the HrvLO returned to the tradition of objective mistake from the BGB and ABGB, where the avoidance of the contract on the grounds of mistake is not dependent on the culpability of the misapprehension of facts by the mistaken party.[150]

In the light of the changes introduced in the rules pertaining to mistake, the statutory rule on misunderstanding has also been subject to modification. Namely, the misapprehension of the parties concerning the object of the contract is no longer one of the grounds of misunderstanding. Furthermore, misapprehension concerning the cause of contract has also been excluded from the rule on misunderstanding, which is in line with the general standpoint adopted in the HrvLO that the cause of contract, understood in its objective meaning, should not presuppose the validity of a contract. Only the nature of the contract, as a ground of misunderstanding, remains from the former federal law on obligations, in addition to which a new ground has been introduced: Misunderstanding also exists if the parties have differing apprehension about any essential element of the contract.[151] The case law considers misunderstanding as resulting in a non-existent contract.[152]

Regarding *deceit*, no novelties may be identified in comparison to the former federal law on obligations, while in relation to duress only one new rule has been introduced. The new HrvLO explicitly states that a contract concluded under coercion (*vis absoluta*) is invalid,[153] whereas the former federal law regulated only the consequences of threat (*vis compulsiva*). Some consider that a contract concluded under coercion is properly qualified in the law as null and void,[154] but others tend to suggest *de lege lata* that it should be qualified as non-existent.[155]

The rules on voidability of a contract due to mistake, deceit, or duress in the HrvLO show no discrepancy from the rules of the former federal law.

Likewise, concerning *laesio enormis*, the HrvLO took over almost verbatim the rules from the former federal law. The only discrepancy is that it explicitly excludes commercial contracts from the scope of application of the rules on *laesio enormis*,[156] which was not the case in the former federal law. The newer literature points out that the diligence of a good salesman requires that persons engaged in commercial activities have a proper apprehension of the value of the performance and of the counter-performance.[157] By this statutory novelty the legislator acknowledged the same conclusion reached by the case law adopted during the application of the federal

149 HrvLO, Article 280 (2).
150 Gorenc in Gorenc, 2014, p. 431.
151 HrvLO, Article 282.
152 Decision of the Croatian Supreme Court No. Rev. 149/06. Cited by Gorenc in Gorenc, 2014, p. 435.
153 HrvLO, Article 279 (3).
154 Gorenc in Gorenc, 2014, p. 429.
155 Slakoper in Slakoper, Gorenc and Bukovac Puvača, 2009, p. 319.
156 HrvLO, Article 375 (5).
157 Slakoper in Slakoper, Gorenc and Bukovac Puvača, 2009, p. 342.

law on obligations regarding the application of the rule on the excusable negligence of persons engaged in commercial activity.[158]

6.3. Slovenia

Regarding mistake, misunderstanding, deceit, duress, and *laesio enormis*, no substantial amendments have been introduced in the SvnCO in comparison to the rules of the former federal law on obligations. The only discrepancy between the two statutes is that the rules on misunderstanding have been removed from the part in which mistake, deceit, and duress[159] are regulated into the part on the formation of contract, indeed to its very beginning.[160] This approach seems to have more merit, since misunderstanding is less a case of vitiated contractual intent leading to the avoidance of the contract than a case where no contract has been concluded at all. The newer literature points out that reasons for this translocation of the rules were never given by the legislative.[161] There are very few cases in the case law seeking to shed light on the differentiation between misunderstanding and mistake relating to the object of the contract.[162]

The literature also points out that court cases regarding mistake and *laesio enormis* are very rare in the case law, since the courts tend to take a strict interpretation of the excusable nature of the mistake.[163] Relating to threat and coercion, the usual consequence is voidability of the contract. However, recent case law demonstrates that the courts tend to declare the contract null and void if the pressure exerted on the aggrieved party was grossly excessive, frustrating his or her contractual will entirely.[164]

The rules on the voidability of contracts due to defect of contractual intention[165] have also been taken over verbatim from the former federal law.

7. Slovakia

7.1. General remarks

The Slovakian legal system contains an explicit regulation of mistake and deceit, a regulation of *laesio enormis* in a limited form as well, and, in general, a regulation of duress. However, the legal consequences of these situations are different.

In case of mistake (*omyl*) and deceit (*lesť*) the aggrieved party may invoke the voidability of a juridical act (in Slovakian legal writings and case law the term relative

158 See the Decision of the Supreme Court of Croatia No. Rev. 361/85. Cited by Slakoper in Slakoper, Gorenc and Bukovac Puvača, 2009, p. 342.
159 SloCO, Articles 45–49.
160 SloCO, Article 16.
161 Možina and Vlahek, 2019, p. 79.
162 See for example the judgment of the Slovenian Supreme Court No. II Ips 335/2015. Cited by Možina and Vlahek, 2019, p. 79.
163 Možina and Vlahek, 2019, pp. 79–80.
164 See for example the judgment of the Slovenian Supreme Court No. II Ips 94/2016. Cited by Možina and Vlahek, 2019, p. 81.
165 SloCO, Articles 94–99.

invalidity is used to describe such a situation) according to § 40a of the SvkCC. Under this paragraph, a juridical act is considered valid unless the person affected by such an act invokes the voidability of the act. Voidability cannot be invoked by the person who caused it. The court therefore takes voidability into account only on the basis of the aggrieved party's request. Thus, it is left to him or her to decide the fate of the juridical act.

On the other hand, the (*vis compulsiva*) duress (*nátlak, bezprávna vyhrážka*) leads to the contract being rendered null and void (so-called absolute invalidity), which can be invoked by anyone and which the court must take into account *ex officio*. However, this only applies to non-commercial relations. If it is a commercial relationship, then the duress leads to voidability under § 267 (1) of the SvkCommC, according to which '[i]f the invalidity of a juridical act is established for the protection of a participant, such invalidity may be invoked only by that participant.' The only exception is duress in the case of corporate law contracts, where nullity applies.

Laesio enormis can lead to voidability if the imbalances are the result of mistake or deceit; in that case, everything that is to be said about mistake or deceit applies to *laesio enormis* as well. In other cases, due to *laesio enormis*, only the right to withdraw from the contract (i.e., the right to terminate the contract unilaterally) may arise, but only if it is a contract concluded in distress (*tieseň*) and the imbalances are egregiously disadvantageous (*nápadne nevýhodné*). In this latter form, however, *laesio enormis* does not apply in commercial relations. The difference between voidability and withdrawal from the contract is that withdrawal is a juridical act but voidability is a state that must be invoked by the person affected. However, the effects of both are the same.

Where the consequence is invalidity—whether voidability, invoked by the person acting, or nullity—the juridical act does not give rise to the intended legal consequences. According to § 457 of the SvkCC, '[i]f the contract is invalid or has been avoided, each of the participants is obliged to return to the other everything he has received.' The law does not distinguish whether the party acted in good or bad faith. On the other hand, this obligation, as well as the right that corresponds to it, like any other right or obligation, should be exercised in accordance with good morals.[166] However, no case law invoking the rule of *nemo auditur* is known to us.

Moreover, the person who caused the invalidity shall be liable for the damage suffered as a result of the invalidity.[167] This is a general liability within the meaning of § 420 of the SvkCC of which the liable person may relieve himself or herself if he or she proves he or she was not at fault. The Slovakian Commercial Code has a similar provision (§ 268), stipulating that '[t]he person who caused the invalidity of a certain juridical act shall be liable to compensate the damage done to the party to which the juridical act was directed, unless the said party was aware of the invalidity of the juridical act.' However, it is not clear whether the damage should be compensated to

166 According to Gyárfáš, 2019. See also SvkCC, § 3 (1).
167 SvkCC § 43.

the extent of the positive or negative contractual interest. The literature tends toward the latter.[168]

7.2. Mistake

The Slovakian legal system contains a regulation of mistake in § 49a of the SvkCC, which applies to both commercial and non-commercial juridical acts. It distinguishes between the so-called ordinary mistake and deceit. In both cases, the legal relevance lies in the fact that the person acting may invoke the voidability of the juridical act.

An ordinary mistake is relevant legally only if it is essential. According to § 49a of the SvkCC, a mistake is considered essential if it was decisive for the party in concluding the juridical act. In other words, if it were not for the mistake, the acting person would not have performed the juridical act. There must therefore be a causal link between the mistake and the performance of the juridical act.[169] The SvkCC does not define what an essential mistake is. It does not distinguish between a mistake in the motive, in the object, in the properties, or in the subject of the juridical act.[170] The only exception is a mistake in the motive (*pohnútka*), which, taken alone, is never legally significant, i.e., it never renders on its own a juridical act null and void,[171] regardless of whether the contract is gratuitous or not. Whether a mistake is essential—a mistake in fact decisive for the performance of a juridical act—must be perceived objectively, although a subjective aspect is also possible if it was possible to determine from the circumstances which fact was subjectively decisive for the acting person.

The SvkCC does not provide for a consequence if a misunderstanding between the parties leads to no consensus between them, but tends to the doctrine that the existence of such *dissensus* means that the contract was not concluded at all.[172]

According to § 49a of the SvkCC, the party may avoid a juridical act for a material mistake only if the person to whom the juridical act was addressed caused the mistake himself or ought to have known about it. Otherwise, the party may not invoke voidability. It does not matter whether the person caused the mistake through a fault or not; all that matters is whether he caused it or must have known about it.[173] Slovakian legislation does not give the party the possibility to avoid a juridical act if the mistake was caused by a third party.

On the other hand, it can be deduced from § 40a of the SvkCC, according to which voidability cannot be invoked by the person who caused it himself or herself, that the party cannot invoke a mistake if the mistake is inexcusable. Therefore, if it was possible to detect the mistake and the party did not detect it merely because of negligence, then such party cannot avoid the juridical act due to this mistake.[174]

168 Mitterpachová, 2019; Hlušák, 2017.
169 Dobrovodský and Gyárfáš, 2019; Mazák, 2010, p. 179.
170 Dobrovodský and Gyárfáš, 2019; Fekete, 2018; Mazák, 2010, p. 179.
171 SvkCC § 49a *in fine*.
172 Knapp and Luby, 1974.
173 Dobrovodský and Gyárfáš, 2019.
174 Dobrovodský and Gyárfáš, 2019; Fekete, 2018.

7.3. Deceit

Unlike an ordinary mistake, which is legally relevant only if it is essential and excusable, an intentional mistake—that is to say, a deceit—is legally relevant even if it is not essential, that is to say, if it does not relate to circumstances decisive for the juridical act. Likewise, deceit is considered legally significant in legal literature even if it is inexcusable.[175] As with an ordinary mistake, it is irrelevant whether it is a mistake in a legal reason, in the properties, or in the subject of the juridical act. The only exception is a mistake in the motive, which does not render the juridical act null and void.

However, a deceit is legally significant only if it is caused by the person to whom the juridical act was addressed. It is not legally significant if caused by a third party. If the addressee knew of the deceit by the third party, then the person acting may avoid the juridical act only in accordance with the principles applicable to an ordinary mistake.

7.4. Duress

Slovakian legislation considers the issue of duress to be a question of freedom of action. According to § 37 (1) of the SvkCC, a juridical act must be concluded freely, otherwise it is null and void. The law does not provide any other details. However, the legal literature distinguishes between physical coercion when someone, e.g., moves a person's hand with a pen on a paper to simulate s signature, and an unlawful threat when someone threatens the person with some harm.[176] We are of the opinion—contrary to the view of the legal literature[177]—that the first case is not governed by § 37 of the SvkCC, because the law presupposes the existence of a declaration of intent; but if someone, e.g., moves the hand of the acting person, it is not a declaration of intent of the acting person at all. Thus, in our opinion only the second case falls within the scope of § 37 of the SvkCC.

In the legal literature, an unlawful threat means only a threat that is unlawful and is objectively capable of giving rise to a serious concern that the party or another person will be harmed if such a party fails to perform a certain juridical act. It is not sufficient, therefore, that a threat should pose a matter of concern to the acting person if that concern is not objectively justified. However, the direct addressee of the threat does not have to be the (future) party; it is sufficient if the threat is directed against another person, but its aim is to make the party perform a certain juridical act.[178] The originator of the threat does not necessarily have to be the contracting party; it is sufficient that he or she be a third party.[179]

175 Dobrovodský and Gyárfáš, 2019.
176 According to Mitterpachová, 2019; Fekete, 2018.
177 Mitterpachová, 2019; Fekete, 2018; Mazák, 2010, p. 126.
178 Mitterpachová, 2019; Fekete, 2018; Mazák, 2010, p. 126.
179 Mitterpachová, 2019.

The consequence of an unlawful threat in non-commercial matters is the nullity of the juridical act. However, as stated, in commercial relations it will lead only to voidability.[180]

7.5. Laesio enormis

Section 49 of the SvkCC stipulates that a person who 'has concluded a contract in distress under strikingly disadvantageous conditions has the right to withdraw from the contract.' To withdraw from the contract means to terminate it with *ex tunc* effect by juridical act toward the other party. The aggrieved party has this right regardless, whether she was in mistake or not. According to case law, '[d]istress is an economic or social situation in which a particular person finds herself at the time of conclusion of the juridical act, which affects her in such a way and with such an intensity that she will, as a result, perform a juridical act that she would not otherwise have performed.'[181] This state must be based on objectively existing (i.e., not only supposed) circumstances and is always determined by the subjective aspect—the acting person herself and her resistance to the difficult situation. The same objective situation can cause distress in one person but not necessarily in another. At the same time, from the point of view of the existence of distress, and this needs to be emphasized, 'it is irrelevant how this situation arose and what caused it.'[182]

Distress is thus a state objectively perceived as a difficult economic or social situation that is experienced in this way subjectively by the aggrieved party. There must be a causal link between the distress and the conclusion of a contract with strikingly disadvantageous conditions. It is irrelevant whether the other party caused the distress or knew about it at all.[183]

Distress gives rise to the right of the aggrieved party to withdraw from the contract. Strikingly disadvantageous conditions are those where the value disparity between the performance of one of the parties and that of the other is obvious or evident, i.e., where it can be surmised that the disadvantageous nature of the conditions must have been obvious to the other party. The disadvantage does not necessarily have to lie in a disproportionate performance (since *laesio enormis* also applies to gratuitous contracts), but can lie also in the contractual terms as such.

In some instances, a case may be assessed concurrently not only as *laesio enormis*, but also as usury or mistake (deceit) if the conditions laid down by law for usury and mistake (deceit) are met.

180 SkCommC § 267 (1).
181 Supreme Court of the Slovak Republic, case No. 2 Cdo 41/1996.
182 Supreme Court of the Slovak Republic, case No. 2 Cdo 41/1996.
183 Fekete, 2018; Mazák, 2010, p. 177.

8. Concluding remarks

All the analyzed legal orders have similar legal institutions, the aim of which is to secure that the parties' contractual intent is formed freely. For the most part, the pertinent rules show a great deal of similarity, but notable differences can also be adduced.

Concerning mistake, Czech law requires that the mistake originate from the other party. The counterparty's inaction can in some cases also be considered a conduct triggering legally relevant mistake. The Czech law requires that a mistake be excusable and differentiates essential from non-essential mistakes. In the former case the contract is voidable, while in the latter the contract cannot be avoided, but the party in mistake may request compensation. Mistake in motives is of legal relevance only exceptionally. In Polish law mistake cannot be invoked if it concerns the motives of a party. Mistake in Polish law is relevant only if it is somehow attributable to the counterparty. In Hungarian law mistake is also negligence-based, but in some way it must be attributable to the counterparty, since it is required that the latter caused it or at least that it could have been recognized by him or her. Romanian law also differentiates excusable and non-excusable mistakes, on the one hand, and essential and non-essential mistakes, on the other. Mistake concerning motives is in Romanian law only exceptionally relevant. Romanian law allows the counterparty to salvage the contract by offering performance as the party in mistake understood it. The legal remedy is voidability of the contract, but no damages may be awarded in relation to avoidance of contract due to mistake. Mistake in Serbian and Slovenian law is negligence-based, while the HrvLO shifted the nature of mistake toward its objective concept. In Serbian, Croatian, and Slovenian law mistake is essential if the party's misapprehension of facts relates to essential properties of the object of the contract, to the person of the contracting party in *intuitu personae* contracts, and other circumstances considered relevant according to trade usages and the intention of the parties. In all these three laws the remedy is voidability, but the party in mistake is liable for damages to the counterparty caused by the avoidance of contract. On the other hand, the counterparty has a *facultas alternativa*: He or she may maintain the contract in its validity if he or she is willing to perform the contract under the terms that would have been agreed to but for the mistake. Motivational error is legally relevant in gratuitous contracts. Slovakian law also makes legally relevant only a mistake that is essential. A motivational error alone never renders a contract invalid, regardless of whether it is for consideration or gratuitous.

Regarding deceit, Czech law makes it legally relevant even if it relates to non-essential terms or motives of the contract. The legal remedy is voidability of the contract with an obligation to pay damages by the person who caused deceit. In Hungarian law the dividing line between mistake and deceit is that in the case of deceit it is required that the counterparty had deliberately influenced the misled party's contractual intent. If deceit was committed by a third party, the misled party may avoid

the contract only if the counterparty was or should have been aware of it. In Polish law deceit is considered a qualified mistake intentionally induced by a counterparty or a third party. If deceit was induced by a third party, the contract may be avoided if the counterparty acted in bad faith. In Romanian law voidability is the legal remedy for deceit. In addition, the party who caused deceit is liable for damage caused by the deceit. Serbian, Croatian, and Slovenian law have identical rules concerning deceit. Deceit is legally relevant even when the mistake caused is not essential. A peculiarity of the Serbian, Croatian, and Slovenian rules is that deceit may be perpetrated by inactivity of the counterparty as well, and it may stem either from the counterparty or from a third party. If the deceit is caused by a third party, the contract may be avoided only if the counterparty knew or should have been aware of the deceit if the contract is for consideration. If it is gratuitous, it may be avoided regardless of the good faith of the counterparty. In Slovakian law deceit is legally relevant even if the mistake caused is not essential or excusable.

Czech law differentiates coercion from threat as two forms of duress, whereby the former results in non-existence of the contract, the latter in voidability. The legal remedy of duress in the form of threat is voidability in Hungarian law as well. The Romanian law also differentiates coercion from threat, leading to similar consequences. The Serbian and Slovenian laws on obligations do not regulate coercion specifically, but the case law and legal literature clearly differentiate it from threat, which is regulated explicitly. Threat makes the contract voidable, while coercion makes it non-existent, that is, null and void. Croatian law, however, explicitly regulates coercion as well, specifying that the contract in such cases is null and void. Slovakian law differentiates the consequences of threat: In commercial transactions it leads to voidability, while in other transactions it makes the contract null and void.

Concerning *laesio enormis* the Czech law uses the concept of gross disproportion between the values of the performance and the counter-performance. In addition, it requires that the aggrieved party neither knew of nor was required to know of the lack of equivalence. The right to request the court to invalidate the contract ceases in one year from its conclusion. In Hungarian law *laesio enormis* exists if there is a great disproportionality between the values of mutual performances, but the aggrieved party is not entitled to avoid the contract if he or she should have recognized it or undertook its risk. Romanian law does not require that the aggrieved party be in mistake concerning the equivalence of the contract. Another discrepancy is that the Romanian law does not use a legal standard in determining when *laesio enormis* exists, but instead specifies explicitly a threshold of more than half of the true value. The remedy is voidability, while the other party may uphold the contract by offering performance at the value at which the equivalence is restored. The right to avoid the contract is limited to one year from the conclusion of the contract. In Polish law this time limit is two years. The rules of Serbian, Croatian, and Slovenian laws on *laesio enormis* are identical: They are based on gross disparity as a legal standard and not on a precise mathematical threshold and rely on the injured party's mistake relating to the equivalence of the performance with the counter-performance. A novelty introduced

into Croatian law relates to the explicit exclusion of the application of the rules on *laesio enormis* in the case of commercial contracts. Slovakian law also excludes the application of *laesio enormis* to commercial contracts. In addition, in Slovak law it is not required that the aggrieved party be in mistake relating to the equivalence of performance and counter-performance.

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