1968

Review of The Validity of Sales Contracts: A Comparative Study

Whitmore Gray
University of Michigan Law School
Available at: https://repository.law.umich.edu/reviews/109

Follow this and additional works at: https://repository.law.umich.edu/reviews

Part of the Commercial Law Commons, Comparative and Foreign Law Commons, Contracts Commons, and the International Trade Law Commons

Recommended Citation

This Review is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Reviews by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
Max-Planck Institute for Foreign and International Private Law, Hamburg


These 2 volumes are a slightly revised version of the substantive reports prepared by the Max Planck Institute in Hamburg (Director: Professor Konrad Zweigert) for the Rome Institute for the Unification of Private Law. They were designed to serve as a basis for the elaboration and discussion of a new uniform law on this subject matter, which would supplement the 1964 Hague conventions on a Uniform Law on the International Sale of Goods and Uniform Law on the Formation of Contract for the International Sale of Goods.

The reports give a clear summary of the state of the law in 1962 (with some later additions) on the point in France, Italy, Holland, Spain, Germany, Austria, Switzerland, England and America, with occasional references to the Scandinavian countries. For the most part the reports do not include critical comparative comments or suggestions for modifications, but each section concludes with a very helpful comparative analysis of the national material presented.

The book is divided into 4 sections: I. Effects of Lack of Capacity to Contract; II. Criteria and Effects of Mistake, Duress and Misrepresentation; III. Illegality, Impossibility and Unconscionability; and IV. Object, Cause and Consideration.

Part I includes problems of defective capacity of minors, insane persons, and of married women. Ultra vires acts of legal persons are not covered, nor are some very specific restrictions of capacity in the various systems. A review of the views of the various systems as to the effects of defective capacity on a contract describes whether in a given type of case it is void, or only voidable at the option of the protected party. Here as elsewhere, the often complicated and conflicting case law of the various American states is set out in some detail.

Seen from a comparative viewpoint, the conflict is one of the interests of the protected persons versus security of transactions. In situations where the protected party has concealed his lack of capacity, he may receive les
protection; in cases where it was known to the other party, the other party may be less favored by the system.
The most one-sided protection is that given in many Romanist and common-law systems, whereby the protected party has an unrestricted choice as to whether he will avoid his contract. This leaves the other party uncertain as to his duties as well as his rights, and the new code proposals unanimously provide some way that he may make a demand to determine his rights. The Middle and North European countries have served as models for the Dutch and French proposals for a system of temporary voidness, which gives at least a right to get a definite decision as to enforceability, and in some cases a right to withdraw.
All systems assume a restitution pattern in the event of eventual invalidity of the contract with some relaxation of the obligation of the protected person. They vary widely, however, on the effect to be given misrepresentation of capacity by the protected person, ranging from fully excluding the right to avoid to no effect whatsoever.
It would be possible to approach unification either through attempting to regulate what procedures and remedies were to be used (and the conditions of their availability), or to go farther and include more of the bases in addition to defective capacity for invalidity in some situations in some systems, e.g. the need for unfairness, bad faith or damage to the protected person.
Part II deals principally with mistake which leads to the setting aside of contract, as distinguished from the misunderstanding or dissens which prevents contract formation in all systems. Mistake as to one's basic assumptions in making a declaration is distinguished from mistake in expressing the declaration or in its transmission. (This mistake in basic assumptions might include the possibility of the performance, but this is left as a species of impossibility for Part III.)
The subject matter of the mistake is often ill-defined, though in fact many systems recognize something like the Italian and Swiss statutory categories. Art. 34 of the Uniform Law on the International Sale of Goods regulates some mistakes of the buyer, but leaves the other buyer's and all the seller's remedies for mistake to be regulated in a subsequent uniform law.
A major difference is the lack of subjective criteria for relief in Germany and Switzerland, where almost any mistaken party can rescind. In exchange for this broad right, however, he is subject to a suit for damage caused by his rescission. The other systems use a more complicated formula, weighing fault on the side of the mistaken party and type of reliance on the other party's part, to restrict the cases in which the mistaken party can rescind, usually without any more than a restitution obligation.
While many of the effects of relievable mistake parallel those of defective capacity, it is apparent that in most systems the mistaken party's interests have been preferred. German and Anglo-American law give more protection than most to the other party through strict time limits on the right to rescind, and Anglo-American law further protects through the requirement that the mistaken party must be able to restore the status quo ante.

The effect of induced mistake, or fraud, is rather uniform. While there are some differences as to fault in relying on the misrepresentation, it is clear that misrepresentation of almost any point can suffice for rescission at the election of the other party. There is, however, a split over the damage rights – Germany and the U.S. majority allowing expectation interest, Switzerland and the U.S. minority limiting the right to reliance losses.

Duress (including undue influence), or use of physical, economic or other overt compulsion to induce assent to a contract, is also generally recognized as a basis for rescission. The means used to overcome the will is not usually important, though the Anglo-American systems include abusive use of legal process.

Part III discusses first the effect of illegality, and concludes that both the various prohibitions infringed and their effect on enforcement of individual contracts are so varied as to be impossible to unify. Much also depends on the subjective position of the parties in each case, and there is a basic division as to remedy between the continental systems, which generally allow restitution, and the Anglo-American, which generally deny recovery on the in pari delicto theory. Perhaps unification at least of a conflicts rule might be possible, however, on the lines of the Hague Convention of 1955 on Conflicts, or the Bretton Woods Agreement provisions dealing with contracts which violate exchange controls.

While the same vagueness and variety also apply to principles of "unconscionability" or "contra bonos mores", it is perhaps possible and desirable to try to isolate some typical sales situations brought under this heading. While simple inequality of performances (laesio) seems to be clearly rejected as a basis for rescission, some specific amount of inequality (perhaps like the 50% figure used in Italy) appears to meet with general acceptance as a basis. In addition there generally must be either economic necessity or personal elements or both as justification for intervention. Long-term exclusive arrangements where there appears to be a real exchange of mutual advantages will be enforced, but courts will sometimes intervene to give a right to terminate where this is needed. No uniform regulation seems needed, except perhaps a provision that they are basically valid.

Initial impossibility is the subject of many statutory provisions in both continental and Anglo-American countries. The courts have deviated from
them, however, so that principles as in fact applied are perhaps more significant here. While there is some divergence in rules concerning the obligation to deliver a thing which has been destroyed prior to the contract, or which did not belong to the seller, the real question is one of whether and what kind of damage remedy should be available. A uniform system should take into account that all systems make a damage remedy (or restitution) available in appropriate cases, and that in fact the impossibility does not affect the validity of the contract itself.

Part IV deals with object, cause and consideration.

While the Romanist systems use cause and object, and the Anglo-American use consideration as general requirements, none of these is specifically recognized as a requirement in German and Scandinavian law. As a general proposition, however, there are no significant differences among the systems which fall within the limits of the present study.

The second volume consists of 95 pages of extracts in the original languages of the relevant portions of the statute law of the countries covered, including 40 pages of provisions from the new American Uniform Commercial Code and statutes of the American states. Also included are the full texts of the Hague Convention of 1955 on the law applicable to international sales contracts, and the 1965 Uniform Law on the International Sale of Goods and Uniform Law on the Formation of Contract for the International Sale of Goods.

Professor Dr. Whitmore Gray