

## Contract avoidance in United States Law<sup>1</sup>.

### Causas y procedimiento de anulación de los contratos en el Derecho Norteamericano y su reflejo en el Derecho Privado Europeo: el valor de la autotutela.

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#### Abstract

The avoidance of the contract is a protection remedy of the particular interest in cases as the vices of the assent or the lack of capacity of one of the contractors. The protected person can choose between confirming or annulling/voiding the contract. In the United States, the remedy works as a method of self-governance. The North American model coincides with followed by the uniform Law, and with the one that nowadays proposes in Spain with a view to reforming the civil Code, inside the coordinating process that is developing in the bosom of the European Union. It is the reason of its interest. The contract is avoided by extra judicial way, by means of a declaration of will to have like definitively void the contract, directed to another contracting party. We can speak about self-governance.

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The self-governance doesn't avoid the litigation if one of the contractors refuses to accept the avoidance or annulment of the contract, but yes it supposes that the dictated judgment - in his case - is declarative of the nullity and not constitutive. The general effect of the avoidance of the contract is the obligation (or the duty) of restitution of the submitted goods, with his fruits or with the interests, in the cases in which there was fulfilment. Consequently, the presentations that will to return will earn the corresponding interests from the time of the act of extra judicial avoidance of the contract, not from the moment in which the sentence is pronounced.

A point that is being reviewed is the Anglo-Saxon doctrine of the choice of the remedies: the action must be leading by choosing between the contractual Law and the Law of damages. The Principles UNIDROIT<sup>2</sup> and the European DCFR<sup>3</sup> admit both remedies at the same time. Nowadays, this doctrine is discussed in the United States, in relation by certain suppositions of avoidance of the contract.

## Resumen

La anulación del contrato es un remedio de protección del interés particular en casos como los vicios del consentimiento o la falta de capacidad de uno de los contratantes. La persona protegida puede elegir entre confirmar o anular el contrato. En los Estados Unidos, el remedio funciona como un método de autotutela. El modelo norteamericano coincide con el seguido por el Derecho uniforme, y con el que actualmente se propone en España con vistas a reformar el Código civil, dentro del proceso armonizador que se está desarrollando en el seno de la Unión Europea. De ahí su interés. El contrato se anula extrajudicialmente, mediante una declaración de voluntad de tener por definitivamente nulo el contrato, dirigida a la otra parte contratante. Podemos hablar de autotutela.

La autotutela no evita el litigio si uno de los contratantes se niega a aceptar la anulación del contrato, pero sí supone que la sentencia dictada –en su caso- sea declarativa de la nulidad y no constitutiva. El efecto general de la anulación del contrato es la obligación de restitución de los bienes entregados, con sus frutos o con los intereses, en los casos en que hubo cumplimiento. Por consiguiente, las prestaciones que se hubieren de restituir devengarán los intereses

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<sup>2</sup> Art. 3:18, Principles of the International Commercial Contracts, 2004.

<sup>3</sup> Art. II.- 7:214 DCFR (2009).

correspondientes a partir del tiempo del acto de anulación extrajudicial del contrato, no a partir del momento en que se dicte la sentencia.

Un punto que está siendo revisado es la doctrina anglosajona de la elección de los remedios: la acción debe conducirse optando entre el Derecho contractual y el Derecho de daños. Los Principios UNIDROIT y el Europeo DCFR admiten ambos remedios al mismo tiempo. Actualmente, esta doctrina es discutida en los Estados Unidos, en relación con determinados supuestos de anulación del contrato.

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## Keywords

Avoidance of contracts. Self-protection.

## Palabras clave

Anulación del contrato. Autotutela.

## I.- APPROACH

Regarding Uniform Law, the UNIDROIT Principles<sup>4</sup> and the Principles of European Contract Law (PECL<sup>5</sup>, now gathered and reviewed in the Draft Common Frame of Reference, DCFR<sup>6</sup>), also known as soft law, are important reference points in Contract Law, as well as for the CISG<sup>7</sup>. Currently, the impact of Uniform law on national law systems is a reality. Based on Comparative Law studies, these rules have been selected as practical and common rules. Jurisprudence usually turns to them when law is found lacking. Law scholars are working in this sense to modernize national laws within the context of a slow process of global harmonization.

The avoidance of contracts is only one example. From a Comparative Law point of view we find two different ways to avoid contracts. The first requires going through the judicial process, while a notification would be enough for the second path. The UNIDROIT Principles and the PECL (as the DCFR) follow the second model which is also the American law model. Thus, it is important to know how it works.

The United States and the European countries share many common aspects regarding Contract Law, for example: avoiding contracts is a remedy to protect an individual's interest in cases of defects of consent or lack of capacity. The protected individual can choose to either ratify or avoid the contract.

In the United States contract avoidance works as a method of self-protection. Power of avoidance is an individual right. It may be exercised by disaffirmance; that is to say, by a declaration that an avoidable contract is void. It does not need a judicial process. In this sense, E. Allan FARNSWORTH writes: "Any manifestation of an unwillingness to be bound by the contract will suffice as a disaffirmance of it. Disaffirmance may be by words, written or oral, or by other conduct, including the plea of minority as a defense or the commencement of an action to set aside the transaction"<sup>8</sup>.

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<sup>4</sup> Principles of the International Commercial Contracts, prepared by the International Institute for the Unification of Private Law (UNIDROIT, 1994; reviewed on 2004).

<sup>5</sup> Prepared by the Study Group on a European Civil Code.

<sup>6</sup> Principles, Definitions and Model Rules of European Contract Law, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), based in part on a revised version of the Principles of European Contract Law (2009).

<sup>7</sup> Convention of International Sale of Goods, Vienna, 1980.

<sup>8</sup> *Contracts*, fourth edition, Aspen Publishers, 2004, p. 223.

The general effect of the contract's avoidance is the obligation of restitution of goods when the contract was fulfilled. A point that is being reviewed is the Anglo-Saxon doctrine of choice of remedies (either contractual law or tort law). UNIDROIT Principles<sup>9</sup> and the European DCFR<sup>10</sup> allow both remedies at this time. This doctrine is currently being discussed in the United States in connection with some cases regarding contract avoidance.

## II . BRIEF APPROXIMATION TO SOURCES.

It is unusual to find the resource of relative voiding systematized in American manuals or treaties on contracts, as opposed to European treaties or manuals on Contract law. The doctrine admits the resistance of Common Law at the moment of establishing limits to binding contracts, although it admits at least that these rules had been established for legal treatment of fulfilled contracts without the legal capacity to act, as well as the legal treatment of those in which the behavior of contractors at the contractual moment may be legally relevant (fraud, misrepresentation, for example)<sup>11</sup>. The description of an avoidable contract could appear in the initial chapters dedicated to definitions of general terms like the case of Restatement (Second) of Contracts<sup>12</sup> or of some other manual or treaty<sup>13</sup>, for example; but if we are searching for the rules of avoiding, we need to review the legally recognized instances case by case.

Although the relative avoiding or voiding doesn't receive the doctrinal attention it gets in European Law, it is founded under the law of the United States and is employed as an applicable remedy to some legal situations. Precisely in this point it is very similar to our Contract Law because the remedy is associated to identical factual instances. Therefore, contracts with defects of consent or signed by a minor or a person with a mental disability are traditionally associated to relative annulment in both European continental Law and Anglo-Saxon Law.

The difference perhaps lies in the fact that in Anglo-Saxon law - at least in North America - there is no desire to define the resource, nor care to describe characters, and no interest at all in systematization or classifications. It is well known that it is an eminently practical legal system created jurisprudentially. American law deals directly with the conflict of interest and a remedy is

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<sup>9</sup> Art. 3:18, Principles of the International Commercial Contracts, 2004.

<sup>10</sup> Article II.- 7:214 DCFR.

<sup>11</sup> E. Allan FARNSWORTH; pp. 217-219.

<sup>12</sup> A voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance (§ 7).

<sup>13</sup> For example, in A treatise on the law of contracts (WILLISTON, Vol. 1, p. 75).

applied; in this case, relative annulment. But it is applied in a variety of degrees, with flexibility and adjusted to each case as the jurisprudence develops, without any constraints from rigid and uniform rules.

For example, references can be found of the variety of ways that may be used by one of the parties to void a contract<sup>14</sup>, but not as many on the abstract study of the resource. On the other hand, the laws in this area are usually mandatory and the parties cannot waive those defenses which are implemented at the time of the signing of the contract.

We now have the opportunity to test the flexibility and the internal logic of the American system through the study of the cases mentioned as significantly typical of a contract avoidance.

### **III. TREATMENT OF SINGULAR CASES:**

Contracts signed by minors or disabled individuals, as well as contracts with vices of consent are generally accepted as voidable contracts in American law, although other cases can also be found in a broader list<sup>15</sup>.

#### **A. LACK OF SUFFICIENT CAPACITY TO ACT.**

When a minor signs a contract the contract is voidable because the minor does not have, by himself, sufficient capacity to act. The legal system does not endorse the concept that the contractual intent of the minor may have full legal effect. The same holds true for those deemed incompetent to contract due to mental incapacity. This is to protect both minors and the disabled.

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<sup>14</sup> For example, in the chapter 5 of the work of Ian AYRES/Richard E. SPEIDEL (Studies in Contract Law), it's directly about of avoidance of the contract and its object is explore a variety of ways in which a party can avoid legal obligation for promises that seem to satisfy the requirements for contract (p. 464).

<sup>15</sup> For example, R.E. BARNETT (p. 952) includes a third category, that of the frustration of the end of the contract. In Brian A. BLUM/Amy C. BUSHAW (p. 513) the approximation appears between the suppositions of some vices of the assent and the excusable breach due to a change of the circumstances (Misunderstanding, mistake, and excuses due to changed circumstances). But normally the authors associate under the same epigraph, relatively to the faults in the formation of the contract, the questions relative to the capacity and to the vices of the assent: Between others, E. A. FARNSWORTH/W. F. YOUNG/C. SANGER/N. B. COHEN/R. R.W. BROOKS (pp. 312 and ss.), D.J. BUSSEL/A.I. ROSETT (pp. 351 and followers.); Or under a more wide epigraph relative to the avoidance of the obligation: for example, Ch. L. KNAPP/N.M. CRYSTAL/H.G. PRINCE (p. 507).

In American law, immaturity on grounds of age and mental illness are the two main types of defects that may impair the power to contract<sup>16</sup>.

This type of assumption raises the question of what is the proper way to rescind a contract: how should or how can a contract be voided? Logically, the question also arises in the American system, (What must be done to effectively rescind a “voidable” contract?<sup>17</sup>), which does not find a specific or standardized legal answer, but rather a range of remedies applied jurisprudentially in response to individual cases<sup>18</sup>. In view of these remedies some conclusions can be drawn from comparative law.

### A. 1. MINORS.

Contracts signed by minors under the age of eighteen are avoidable<sup>19</sup> (although some dissenting opinions favor considering them void)<sup>20</sup>.

The Obligation may be avoided by timely and appropriate disaffirmance<sup>21</sup>. This expression, disaffirmance, is one of the key ways of exercising the faculty to avoid contracts in American Law. Disaffirmance is the right to exercise the power to avoid the obligation or contract (power of avoidance)<sup>22</sup>. It is an act of rectification, the negation of an act already carried out beforehand, it is an act of exposing the fault of the obligation that justifies its avoidance and the will to cancel; it is an act of repudiation and termination of contract, it is a statement that the avoidable contract is void<sup>23</sup>.

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<sup>16</sup> Restatement (Second) of Contracts, § 12 (*Capacity to contract*), § 14 (*Infants*), and § 15 (*Mental Illness or Defect*).

<sup>17</sup> Ian AYRES/Richard E. SPEIDEL (p. 464).

<sup>18</sup> It is significant the explanation that we find in the work of E. Allan FARNSWORTH, p.220: The analysis of the case by case is considered too costly and uncertain. The doctrine strains for systematizing the applicable procedure in the suppositions of contracts realized by minors and for incapables.

<sup>19</sup> In this sense, E. Allan FARNSWORTH, p. 222. In this respect in the Restatement (Second) of Contracts, § 14, we see the following text: “Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person’s eighteenth birthday”.

<sup>20</sup> Usually the doctrine considers that the contract is avoidable, though there exist discrepant voices (WILLISTON; vol. 5, pp. 69, 72-75).

<sup>21</sup> Ian AYRES/Richard E. SPEIDEL; p. 465.

<sup>22</sup> This way it expressed by E. ALLAN FARNSWORTH (p. 222-223).

<sup>23</sup> *Black’s Law Dictionary*, eighth edition, Bryan A. GARNER, editor in chief, Thomson-West, 2004, voice *Disaffirm*. Also, *Dahl’s Law Dictionary*, fourth edition, by Henry Saint DAHL, 2006, voice *Disaffirm*.

It also seems to be the partial annulment of the contract<sup>24</sup>, but this is another matter. In addition, it needs to deal with a particular case<sup>25</sup>.

The act of disaffirmance is free of any form<sup>26</sup>, but must clearly express the will to rescind the contract<sup>27</sup>. A simple answer to the request from the other contracting party given by the minor or on his behalf, canceling the contract, is sufficient<sup>28</sup>; as well as any statement addressed to the other contracting party by the minor expressing his will to cancel the contract, and even the act of

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<sup>24</sup> WILLISTON (vol. 5, p. 103). The agreement expresses it in the following terms: "To the extent that it does, it seems that partial disaffirmance is possible".

<sup>25</sup> For example, FARNSWORTH (p. 223), indicates that the full contract is avoided by disaffirmance, not only the aspects that are burdensome for a minor.

<sup>26</sup> The opinions are considered to be ancient and overcome in the opposite direction. For example, the case *McNaughton v. Granite City Auto Sales*, 183 To. 340 (Vt. 1936), relative to the sale of a car to a minor (first in writing, but modified later orally); is indicated expressly that there will be sufficient any significant act of the intention of having for void the contract, as the demand of which they return the money to him. The jurisprudence confirms that there isn't needed form (WILLISTON; vol. 5, p. 93). The agreement does collection of numerous jurisprudential cases, the first one of them - in this point - is very clear: : "Federal: *Del Santo v. Bristol County Stadium, Inc.* (1960, CA 1 Mass) 273 F2d 605 (quoting Massachusetts authority, the court said": "A minor, in order to avoid a contract, is not obliged to use any particular words or perform any specific acts. Any acts or words showing unequivocally a repudiation of the contract are sufficient to avoid it").

<sup>27</sup> "As a general principle, any act which clearly shows an intent to disaffirm a contract or sale is sufficient for the purpose" (WILLISTON, vol. 5, pp. 85-89).

<sup>28</sup> In this respect, FARNSWORTH; p. 222 (in the page 223, the author indicates that the minor can avoid the contract as much before as after reaching the adult age). There can be mentioned here the case *McNaughton v. Granite City Auto Sales*, 183 to. 340 (Vt. 1936), already commented, in that the minor avoids the dealing of a car: "Since this was a contract relating to personal property, and the plaintiff was a minor, she could disaffirm it while under age". Also the case of *Del Santo v. Bristol County Stadium, Inc.* (1960, CA 1 Mass) 273 F2d 605. Ian AYRES/Richard And. SPEIDEL (p. 470) there mentions the jurisprudential case *Mechanics Finance Co. v. Paolino*, 29 N.J.Super. 449, 455-56, 102 To 2d 784, of 1954; Reading the case, in effect, we state that it is a question of an action exercised to recover the money paid by virtue of a signed obligation being minor the plaintiff. The demanded part invokes that the minor had created the appearance of being major of age, with deception (what is denied by the plaintiff). It is discussed about the right of avoidance of the contract, in such circumstances, but favourable jurisprudence is mentioned: "even though he induced the other party to enter into the contract by falsely representing himself to be of age. It is generally true that an infant may avoid his contract". Finally it is decided about the avoidance of the contract: "There is no evidence from which ratification by defendant can be spelled out. This action was begun a little more than three months after he came of age. It cannot be said that he waited more than a reasonable time to disaffirm. Disavowal of a contract by an infant need not be by any prescribed form or ceremony; the filing of an answer by him or in his behalf, disaffirming the contract, is sufficient in itself to accomplish the result".

selling goods pledged to a different buyer<sup>29</sup>. However, the mere action brought to recover the goods does not necessarily bear significant willingness to annul the contract since it is necessary for the minor to manifest that this is his will and this is the base on which he stands, either in the lawsuit or in any other procedure<sup>30</sup>.

Once the minor has reached adulthood, and only then, the contractor entitled with the power to cancel the contract, and he alone, can also ratify or affirm it<sup>31</sup>. Mere silence or inaction after coming of age does not in itself constitute confirmation. Although, on the other hand, it is true that the power to annul the contract can expire over time if not exercised within a reasonable period<sup>32</sup>. For confirmation purposes, time is an important factor if joined with other circumstances such as monthly payments made after adulthood is achieved. Once the individual has become an adult, any declaration issued in which he considers himself bound by the contract (without requiring any special form to this effect<sup>33</sup>), will deprive said adult of the power to annul the contract. Ratification or confirmation extinguishes the power given to a minor by law to avoid a contract<sup>34</sup>.

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<sup>29</sup> WILLISTON; vol. 5, pp. 85-89.

<sup>30</sup> WILLISTON; vol. 5, pp. 90-93. In the treaty it is depicted huge jurisprudence, in one of the cases there was understood that the exercise of an action directed to recovering the goods was insufficient to consider the will of the minor to avoid the contract. Apparently it gives priority here to the interest of the minor, whose will had to be opposite to the avoidance of the contract.

<sup>31</sup> WILLISTON; vol. 5, p. 133. In this sense, FARNSWORTH (p. 223) adds it adds that a ratification realized before time (this is, before reaching the adult age) would be, in yes the same, avoidable.

The doctrine uses indistinctly these two concepts, ratification and confirmation (AYRES/SPEIDEL; p. 465), that, nevertheless, in Spanish Law have different shade since we apply them to different suppositions, reserving the concept of confirmation when we speak about avoidable contracts and that of ratification for the void ones for lack of sufficient representation.

<sup>32</sup> For example, MURRAY (p. 18), explains that if the minor doesn't avoid the contract in a reasonable period of time, his silence will operate as a confirmation of the contract. In case of the *Del Santo v. Bristol County Stadium, Inc.* (1960, CA 1 Mass) 273 F2d 605, it is indicated expressly: "He must, of course, disaffirm the contract during minority, or within a reasonable time after reaching majority".

<sup>33</sup> "Ratification may be by words, written or oral, or by other conduct such as performance or acceptance of the other party's performance under the contract" (FARNSWORTH, p. 223).

<sup>34</sup> For example, in the case *Bobby Floars Toyota, Inc. v. Smith*, 48 N.C.App. 580, 269 S.E.2d 320 (1980). After the sale of a car, the seller sues a minor the payment of the quantity owed by the buyer, who bought the car with seventeen years and continued paying monthly payments with eighteen years (this is, after the adult age). The Court, simultaneously that affirms that the reasonable time to cancel the contract depends on the circumstances of the case ("reasonable time for disaffirmance depends upon the circumstances of each case"), its understood that ten months during of which the minor contractor was doing monthly fees with posteriority to the adult age it was a sufficient time,

Therefore, a minor has a power recognized by law, to cancel or confirm a contract. This power is justified by the protection the minor deserves. The power may be exercised by both the minor and his legal representatives<sup>35</sup>. There is an extensive existing jurisprudence in this regard. In the event of the minor's death, the power passes on to his heirs. However, creditors and other interested third parties are excluded from disaffirming or affirming; and in any case, the other contracting party is also excluded from exercising this power. However, once the infant has exercised his power to annul the contract, any other individual can have the annulment validated<sup>36</sup>. Once a contract has been canceled, it is definitely null and void; and in no case may

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in relation with a good which value is in It is in constant depreciation with the passage of time ("enough time to within which to elect between disaffirmance and ratification with respect to an item of personal property which is constantly depreciating in value"). There is argued, in this respect, in addition, that there is no evidence of which the defendant had avoided the contract ever (before the demand), and it can be considered that , on the contrary, that it ratified it when the payments continued fulfilled the adult age: "We hold, therefore, that defendant's acceptance of the benefits and continuance of payments under the contract constituted a ratification of the contract, precluding subsequent disaffirmance".

Nevertheless, if the acts realized with posteriority to the adult age don't suppose necessarily the recognition of an obligation, the later avoidance can be estimated. For example, in the case *Keser v. Chagnon*, 159 Colo. 209, 410 P.2d 637 (1966), it thought that the mere use of the vehicle for 60 later days to reaching the adult age didn't suppose confirmation of the contract, when this one was avoided ten days later (the case is mentioned in Ian AYRES/Richard's work *And. SPEIDEL*; p. 470). The Court remembers in this case the general principle in the minor protection matter, according to whom this one is legitimized "to avoid his contract, not only during his minority but also within a reasonable time after reaching his majority" (the buyer " did not notify Keser of his desire to disaffirm until 66 days after he became twenty-one- the adult age has changed in the USA, happening today from 21 to 18 years - and that he did not return the Edsel until 10 days after his notice to disaffirm, during all of which time Chagnon had the possession and use of the vehicle in question"). In spite of all, it is considered that the norm according to which the contract must be avoided in a reasonable term "is not as strict where, as here, we are dealing with an executed contract. There is no hard and fast rule as to just what constitutes a "reasonable" time within which the infant may disaffirm" .In this respect, the jurisprudence of some States considers that small payments or the use of the goods for the minor with posteriority to reaching the adult age, doesn't demonstrate necessarily the confirmation of the contract, whereas it is required in any States that the confirmation of the minor, reached the adult age, realizes in writing. Except in these cases, if, reached the adult age, there are realized acts or conducts that objectively demonstrate the intention of considering the contract as binding, it will be considered the contract ratified. This way so, if, after reaching the adult age, he sells uses or even retains in a not reasonable time the received goods, can't later avoid the contract. The same thing if he receives of another contracting party some presentation in conformity with the stipulated, after reaching the adult age. Everything previous leads to the doctrine to affirming: "Whether ratification has occurred will depend upon the facts of each case and the burden of proving ratification is on the adult" (*WILLISTON*; vol.5, pp. 133-140).

<sup>35</sup> It is admitted in some instances that should exercise this power the guardian of fact of the minor and, in case of death, the executor or administrator of the inheritance (*FARNSWORTH*; p. 222).

<sup>36</sup> *WILLISTON*; vol. 5, pp. 75-83.

the minor, after having annulled the contract, withdraw the act of disaffirmance or cancellation of the contract<sup>37</sup>.

How long may this power to avoid a contract last? As a general rule, a contract signed by a minor may be rescinded by the minor while in his minority and once reaching adulthood, for a reasonable period of time. The details of what may be deemed a reasonable period of time can be found in the abundant jurisprudence on the matter<sup>38</sup>. In any case, a minor can only confirm a contract upon reaching adulthood as mentioned before, since this act would be subject to the same weakness as the original contract with the minor<sup>39</sup>. The rule allowing a minor to annul a contract before reaching adulthood is seen as favorable to the minor's interests, especially as a means of defense, since normally the power to rescind a contract is exercised when compliance is claimed<sup>40</sup>.

As for the effects of the contract's annulment in these cases (contracts signed by minors), jurisprudence rejects that the obligation to restore the initial situation (restoration) due to the cancellation of the contract should be borne by the minor, but the obligation to repay in kind any assets received under the contract and still in his possession at the time of avoidance (restitution), remains. A minor who signed a contract while underage is not required to make any compensation for the use or depreciation of these goods, nor repay the equivalent of what has been received (however, there seems to be general debate on the general rule in several States). On many occasions, the effects of such a strict rule are jurisprudentially mitigated when dealing with unjust enrichment or quasi-contractual liability (the latter, for example, states that minors are responsible for the goods they have contracted and which are necessary for their subsistence, and if the contract is annulled after having consumed the goods, a quasi-contractual liability may be argued)<sup>41</sup>.

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<sup>37</sup> WILLISTON; vol. 5, pp. 110-112. The act of disaffirmance - it makes clear - doesn't have the consideration of a new contract but it consists essentially in the elimination of the originally realized one.

<sup>38</sup> WILLISTON; vol. 5, pp. 93-102. In the agreement it explained that, nevertheless, an exception exists in numerous jurisdictions, relative to the cases of writing transmission of real estate, for that there is needed that the minor has reached the adult age in order to avoid the contract for yes same. In the State of Michigan, in opposition to the general rule commonly accepted, it governs the norm according to which the minor can't avoid for yes same the realized contracts, until he reaches the adult age, already it is a question of personal property or real estate.

<sup>39</sup> WILLISTON; vol. 5, p. 102.

<sup>40</sup> WILLISTON; vol. 5, p. 99-102.

<sup>41</sup> AYRES/SPEIDEL; pp. 470-471. The general rule, according to which the minor isn't obliged to return the good any more than when has it in his possession, neither to return for the equivalent value, to indemnify for the depreciation, it

The effects of avoid the contract does not affect third-party purchasers who are of good faith and for remuneration. The purchases of these third parties are protected<sup>42</sup>.

## A.2. MENTAL INCAPACITY.

Contracts entered into by a person with a mental incapacity, as those by a minor, are deemed voidable contracts under American law; although, a minority opinion that favors considering them absolutely null can be found<sup>43</sup>, as seen in the previous case. In fact, the law covers the acts of a mentally disabled person under a custodial institution, as well as those made by an individual mentally incompetent at the time of entering the contract (for example, signing a contract under the influence of alcohol or drugs<sup>44</sup> or in a situation of temporary mental incapacity). Regarding the cancellation of the contract by disaffirmance or the possibility of confirmation by ratification, the conceptual aspects discussed in the previous section apply here<sup>45</sup>. As in the case of minors, it is a privilege of a personal nature<sup>46</sup>.

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is considered a privilege in favour of the minor (the infant's privilege), that is not pacifically approved by any authors a cause of nature that it can suppose for another contractor, and that finds exceptions in some States (in this respect, WILLISTON; vol. 5, pp. 113-133; it is demonstrated a favourable opinion by reducing the excessive protection of the minor when, attending to the circumstances, it turns out to be excessively harmful to the adult and could suppose an abuse or injustice on the part of the minor; of another part, it is affirmed that it is increasing the jurisprudence that allows to the seller to deduce the value of the depreciation and the use). FARNSWORTH (p. 225) declares in opposition to the rigor of this rule and leaves witness of the jurisprudence that manages to tint it, softening it in certain suppositions.

<sup>42</sup> WILLISTON; vol. 5, p. 110.

<sup>43</sup> WILLISTON; vol. 5, pp. 225-234. In the treaty it makes clear that the jurisprudence is for the most part favourable to thinking that the acts realized by a mentally incapable person are avoidable (p. 234). FARNSWORTH (pp. 231-332) indicates that nowadays is overcome the idea of that the contract realized by an incapable person is void, and that for the most part it thinks that it is a question of an avoidable contract, though in some States it remains the former idea of the absolute nullity of this type of contracts.

<sup>44</sup> FARNSWORTH (p. 229) FARNSWORTH (p. 229) explains that the system has been admitting progressively, between the suppositions of disability that they make avoidable the contract, a wide variety of reasons, which include the mental delay, the mental illness, cerebral hurts or cerebral deteriorations due to the age, as well as to the consumption of alcohol or drugs.

<sup>45</sup> FARNSWORTH; p. 232: "The rules on disaffirmance are generally similar to those for minors". The most notable difference between one and another regime is that to void the contract to the incapable person it is required him to return what has he received, so that it will not be allowed to him avoid it when it couldn't return the goods for having consumed or misled them, unlike what it happens with the minor, who can void still when it could not return.

<sup>46</sup> WILLISTON; vol. 5, p. 264 (*personal nature of the privilege*). En el mismo sentido, FARNSWORTH; p. 232 (*the power of avoidance is personal to the incompetent*).

As for the active legitimacy to exercise the power to annul or affirm a contract, American law admits that the contract may be annulled or confirmed by the protected person, once he has recovered or, depending on the case, by his legal representatives or heirs (or the administrator of the estate)<sup>47</sup>. Apparently, on certain occasions both cancellation and confirmation by either the legal custodian, and even a close friend or an ad litem guardian have been admitted. However, neither the counterpart nor third parties are entitled to annul the contract. The contract is initially valid concerning third parties who may be affected, so that, for example, a creditor cannot attack the transfer of goods by a debtor solely on the grounds that he was incapacitated at the time to do it<sup>48</sup>.

Are there any circumstances in which a person with a mental incapacity cannot avoid a contract? A leading case in mid-nineteenth century England initiated a rule whereby “when a person, apparently of sound mind and not known to be otherwise, enters into a contract which is fair and bona fide, and which is executed and completed, and the property, the subject-matter of the contract, cannot be restored so as to put the parties in status quo, such a contract cannot afterwards be set aside either by the alleged lunatic or those who represent him”, the conflict could be resolved in fairness and avoid the annulment of the contract. This case has won the support of most American jurisdictions throughout the 20th century<sup>49</sup>.

In addition to the above and contrary to what is normally applied in cases of minors, a contract entered into by a person with a mental incapacity who cannot restore the received goods is often admitted as binding and cannot be voided. Nevertheless, this resource for the restoration of received goods is not universally admitted and some jurisdictions admit voiding the contract even though the person with the mental incapacity cannot restore what he has received under the

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<sup>47</sup> FARNSWORTH; p. 232.

<sup>48</sup> WILLISTON; vol. 5, pp. 249-257.

<sup>49</sup> WILLISTON; vol. 5, pp. 259-263; It is about the case of UK: *Molton v. Camroux* (1848) 2 Ex 487, 4 Ex 17, in which was not recognized the action exercised by the representatives of the deceased patient to recover the payments realized by him by an insurance of annual revenues: “Where a person, apparently of sound mind and not known to be otherwise, enters into a contract which is fair and bona fide, and which is executed and completed, and the property, the subject-matter of the contract, cannot be restored so as to put the parties in statu quo, such contract cannot afterwards be set aside either by the alleged lunatic or those who represent him” (<http://heinonline.org>, 2 Ex. 487). The rule has been included in the Restatement. In the appointed sense, CALAMARI/ PERILLO/ BENDER (p. 381).

contract<sup>50</sup>. In any case, the mentally incapacitated person will never be deprived of the power of avoidance if the other party was aware of his disability<sup>51</sup>. Moreover, in this case the other party will be charged for the payment of accrued interest when the amount of money received by the person with the mental incapacity is restored<sup>52</sup>.

The mentally incapacitated person's responsibility when contracting essential goods is certainly applicable here<sup>53</sup>. As in the previous case concerning contracts by a minor, and disregarding the fact that the contract may be annulled, quasi-contractual liability may be sought in these cases<sup>54</sup>.

## **B. DEFECT OF CONSENT.**

Certain acts or omissions by any of the contracting parties when entering into a contract can seriously affect the contract formation process. These acts can be varied in nature, such as bad faith, error, fraud, violence or duress. These cases have a defect of contractual consent as a common denominator. In the United States they can be included in a category similar to our own "defect of consent" category (Obtaining Assent by Improper Means<sup>55</sup>; Overreaching<sup>56</sup>; Market Misconduct or Error<sup>57</sup>)<sup>58</sup>. According to some authors, giving legal relevance to this type of contract formation defect could be based on both efficiency and equity<sup>59</sup>.

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<sup>50</sup> FARNSWORTH; pp. 232-233. The author explains that even if the unable or incapable person should spend the received goods, and he can't return them, he will have to indemnify for the equivalent.

<sup>51</sup> FARNSWORTH; p. 233.

<sup>52</sup> WILLISTON; vol. 5, pp. 270-273.

<sup>53</sup> FARNSWORTH; p. 233. The author indicates that the incapable person has the duty, in any case, to return for the goods of the first need received.

<sup>54</sup> WILLISTON; vol. 5, p. 274.

<sup>55</sup> BARNETT; p. 981. Under this heading, the author includes: A) *Misrepresentation*; B) *Duress*; C) *Undue Influence*; y D) *Unconscionability*.

<sup>56</sup> FARNSWORTH/YOUNG/SANGER/COHEN/BROOKS (pp. 322 y ss.) they include under the expression "Overreaching" the vices of the assent (duress, fraud, mistake). When someone of these vices concurs in the formation of the contract, this one is considered avoidable (though in occasions they use as equivalent the expression "rescindable").

<sup>57</sup> KASTELY/POST/OTA; pp. 405 and followers. They include *duress*, *undue influence*, *misrepresentation*, *failure to disclose*, *mistake of fact* y *unconscionability*.

<sup>58</sup> Restatement (Second) of Contracts; § 159 (*Misrepresentation defined*), § 162 (*When a misrepresentation is fraudulent or material*), § 164 (*When a misrepresentation makes a contract voidable*), § 167 (*When a misrepresentation is an inducing cause*), § 168 (*Reliance on assertions of opinion*), § 169 (*When reliance on an assertion of opinion is not justified*), § 175 (*When duress by threat makes a contract voidable*), § 176 (*When a threat*

We will now focus on error and fraud as factual instances that make a contract voidable<sup>60</sup>.

## B. 2. ERROR.

Error is defined by the Restatements as "a belief that is not in accord with the facts"<sup>61</sup>. The discovery of an error, sometimes unilateral<sup>62</sup>, in other cases mutual, can void a contract when certain assumptions or instances occur:

FARNSWORTH indicated that a mere error - that is to say, when the false representation of reality has not been caused by fraud (non-fraudulent misrepresentation) - only makes the contract voidable if it is a material error<sup>63</sup>. However, it is generally accepted that a contract is not voidable by the mere fact that one party discovers that the contract was not as profitable as he thought or he has made a bad business deal<sup>64</sup>.

And as for the cases of generic misrepresentation (false representation of reality) which generally lead to contract avoidance, E. Allan Farnsworth lists them as follows:

"First, there must be an assertion that is not in accord with the facts. Second, the assertion must be either fraudulent or material. Third, the assertion must be relied on by the recipient in manifesting assent. Fourth, the reliance of the recipient must be justified"<sup>65</sup>.

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*is improper*), § 177 (*When undue influence makes a contract voidable*), § 208 (*Unconscionable contract or term*). The Uniform Commercial Code: § 2-302 (*Unconscionable contract or clause*).

<sup>59</sup> AYRES/SPEIDEL; p. 489.

<sup>60</sup> As for the physical or psychic violence (duress), it thinks that it does void to the contract when a person has been forced to contract in opposition to his will, though the relative nullity or voidability is admitted into certain cases of psychic violence (threatens). FARNSWORTH; pp. 263-264.

<sup>61</sup> Restatement (Second) of Contracts, § 151.

<sup>62</sup> Though the contractual law doesn't use the term "mechanical errors", it is said that of fact practically all the cases conceptualized as "unilateral mistake" are cases of "mistakes committed mechanically", a cause of a lack of attention or a sensitive fault (FULLER/EISENBERG; p. 715).

<sup>63</sup> pp. 240 y 244.

<sup>64</sup> WILLISTON; vol. 26, p. 491. In this respect, BURTON (p.219) explains the importance of distinguishing a mistake of a lamentable result (to distinguish to mistake from regret). A graphical example we find it in a very ancient case, of 1885, in which a woman sold a stone for very low price, which then turned out to be a seven hundred times more valuable diamond (*Wood v. Boynton*, 64 Wis. 265, 25 N.W. 42, commented in FRIER's work WHITE, pp. 407-408).

<sup>65</sup> p. 237

Therefore, the so-called misrepresentation or false representation of reality sometimes coincides with the concept of error that we use in Civil Law or Continental Law (when it is not caused by fraud, i.e. non-fraudulent misrepresentation) and other times with our concept of contractual fraud (as is the result of misrepresentation), on which we will focus below<sup>66</sup>. This is why I have chosen to first describe the concepts and then the legal system for annulling contracts in cases of defects of consent as a whole, although pointing out as appropriate the different scenarios offered by this system.

### B. 3. FRAUD<sup>67</sup>.

It is convenient to give a brief definition of fraud before describing the legal system for avoidance of contracts affected by defects of consent. Fraud, basically referred to as misinformation given to induce a person to sign a contract, is relevant when the contractor would not have entered into the contract if he had been aware what was being concealed or what was he being misinformed of.

Fraud is broadly defined as intentional damage caused to the other contracting party, usually through deceit, inducing him to sign a contract he would not have entered into had he known the real situation (false representation or misrepresentation of reality)<sup>68</sup>. The usual effect of fraud is

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<sup>66</sup> FARNSWORTH/YOUNG/SANGER/COHEN/BROOKS (p. 322) explain; "Not only fraud, in the sense of deliberate trickery or deceit, but even an innocent misrepresentation made in the bargaining process may be a ground for avoiding a contract. Indeed, it is sometimes required that a party possessed of information material to the exchange either disclose it or refrain from exploiting the ignorance of the other". It is the jurisprudence that is contributing the criteria to continuing in relation with the information that it is necessary to provide to another part, there being born in mind circumstances of diverse nature: for example, the duty to report can be estimated when relation of kinship exists between brothers, as a duty based on the confidence; such it is the supposition of fact of the case *Jackson v. Seymour*, Supreme Court of Appeals of Virginia, 1952, in which the plaintiff, a widow in painful economic condition, sued his brother, to whom it had sold an appraised area trusting in the criterion of the buyer, according to which the area didn't have value any more than for pasture, when actually it had a notable timber wealth. Bearing in mind that his brother invoked in his defence that bought the area to help his sister and that to the time of the acquisition he was not knowing the timber wealth that it was containing, the Court declared that the avoidance was not proceedable for deception or deceit. Nevertheless, the avoidance could have thought in consideration if the plaintiff had invoked the mutual mistake. Even the deceit invoked by the plaintiff could have been estimated, given the circumstances (Westlaw, 71 S.E. 2d 181). The case commented by DAWSON/BURNETT/HENDERSON/BAIRD (pp. 481-488).

<sup>67</sup> The word fraud we must translate it in this context for "deceit", supposition different from the creditors' fraud that in Spain habitually we designate as "fraud".

<sup>68</sup> In the opinion of some authors, the deceit (fraud) differs from the mistake or false representation of the reality (misrepresentation) because it adds the conduct of bad faith (in this respect, WILLISTON; vol. 26, pp. 483-491). Nevertheless, other authors distinguish the mere (material) mistake of the mistake fraudulently caused (to that one

making the contract avoidable, though sometimes annulment has been granted<sup>69</sup>. Analogous to fraud is the case of intentional intimidation or contracting under threat (duress by threat), which also makes the contract voidable<sup>70</sup>. However, in cases of physical violence the contract can be considered void due to defect of consent rather than voidable<sup>71</sup>.

Once the differences between error and fraud have been described, we can set out the remedies provided for such cases, evaluating the similarities and differences between them.

The jurisprudence is full of cases in which defects of consent have led to both the claim for damages and contract avoidance<sup>72</sup>. However in cases of error or misrepresentation of reality, it is necessary to clarify that claim for damages only to be estimated when it is proven that they have been caused through fraud<sup>73</sup>. In this case, the other contracting party may be required to what he affirmed would be carried out by the contract<sup>74</sup>.

Both remedies - annulment and claim for damages – are possible. However, the protected person must choose between the two<sup>75</sup>. Nonetheless, there are exceptions: although opting for

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alludes in general like misrepresentation) precisely because in the latter there appears the intention of cheating another contractor, who does not appear in the first one (nonfraudulent misrepresentation) (FARNSWORTH; pp. 236 and ss.).

<sup>69</sup> Especially when the one who used the deceit exercises an action opposite to whom it was cheated, there is rejected the exercise of the action (WILLISTON; vol. 26, pp. 483-485 and 500). On the other hand, the opposition of the exceptio on the part of the protected subject demonstrates the will of this one of voiding the contract, which since then remains void.

<sup>70</sup> Restatement (Second) of Contracts, § 175: “1. If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim”.

<sup>71</sup> Restatement (Second) of Contracts, § 174.

<sup>72</sup> WILLISTON; vol. 26, p. 491.

<sup>73</sup> FARNSWORTH; p. 243. The avoidance of the contract, on the contrary, precedes so much in the cases of material mistake as of fraudulently caused mistake. BARNETT (p. 981).

<sup>74</sup> WILLISTON; vol. 27, pp. 99-103.

<sup>75</sup> FARNSWORTH; In the opinion of the author, both remedies, tort and contract law, direct to avoid disloyal conducts in the process of formation of the contract, allowing that the affected one could choose between the two. The first one of them (tort) finds his origin in the action for deceit or deception of the common law and allows, at best, that the affected one could claim the damages based on the value that the business would have supposed for him to have been realized in conformity with what was made him wait. As for the rules of the Law of contracts, the majority they derive from the action of rescission originally based in equity, and allow to the subject affected by the deception to undo the transmission of goods realized, avoiding the contract (these measures direct for him to restore the situation immediately previous to the celebration of the contract). In contrast with the tort bumps, the above mentioned tend to suppress the conducts that aren’t tolerable, and not to indemnifying the damages (p. 234). The action for

annulment means choosing contract law and renouncing the path of tort law, jurisprudence admits that compensation for incidental or consequential damages due to misrepresentation (e.g. legal fees<sup>76</sup>) may be requested simultaneously. What is not allowed is to cancel the contract and, at the same time, seek the benefits that could be expected to be obtained under the terms of the contract<sup>77</sup>. Let us consider that this is in line with compensation for the damage caused by the breach and that even in these cases, the remedy is available as a general alternative to the termination of the contract<sup>78</sup>.

The victim of the fraud must choose between the contract's confirmation and annulment with the understanding that, once executed, he agrees with the contract if he does not void it alleging fraud within a reasonable period of time. Confirmation can be expressed by behavior contrary to the will to annul; for example, the purchaser using the property as its owner, or claiming for damages based on misrepresentation, since this means choice of remedy (which, as seen, is incompatible with the annulment of the contract)<sup>79</sup>.

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damages, nevertheless, seems that traditionally it hasn't been admitted into the cases of violence or intimidation (p. 235). The author warns that the consequences of the deception used to induce to contract other one, are less severe when the Law of contracts applies to itself that when there is applied the Law of damages (p. 237).

<sup>76</sup> FARNSWORTH; p. 254.

<sup>77</sup> It seems that these cases will be an exception to the general rule (WILLISTON; vol. 27, p. 192-193). In the same agreement, § 69:61 (RECOVERY INCIDENTAL OF EXPENSES AFTER RESCISSION), specifies that it is compatible with the avoidance of the contract the claim for incidental damages derived directly from the deceit or deception: "there appears to be an increasing tendency, where rescission is permitted because of fraud, to give recovery of incidental expenditures incurred as a result of entering into the contract. This trend is well expressed by the court in a leading case: "One who has been induced by fraud to enter into a contract may either rescind the contract and recover what he has parted with or affirm the contract and sue for damages caused by the fraud. He cannot both, because the two remedies are inconsistent and mutually exclusive". "However, we think the rule denying damages in case of rescission must be limited to denial of damages that in effect permit one to rescind a bargain and at the same time claim the advantages of the bargain. Damages incidental to the contract and caused directly by the fraud may be allowed upon rescission" (pp. 195-197).

<sup>78</sup> WILLISTON; vol. 26, pp. 3-58.

<sup>79</sup> FARNSWORTH; PP. 252-253. The author tints that the rough doctrine of the choice of the remedies remains softened in some cases, and that is necessary to admit that to nobody it harms the alternative exercise of one and another action (UCC 2-721).

In these cases the contract's annulment should be complete<sup>80</sup> and initiated by the protected individual by means of a declaration of intent (by disaffirming), based on the false representation of reality under which the contract was entered into (misrepresentation). It can also be avoided, unless there has been prior confirmation, as a defense against actions from the other contracting party.

If annulment of the contract is chosen, the protected person is entitled to demand restitution of any goods delivered, whether in kind or its equivalent, including the value of the use of the property.

When the purpose of avoidance is restitution (i.e. the contract is void and the initial situation or status quo ante must be restored) it usually requires suing for the restitution<sup>81</sup> of the benefits received under the contract, including restitution in kind of the goods received and a reasonable economic value for the use thereof, as well as damage due to wear and tear or depreciation if this were the case. On the other hand, the claimant must return the money received under the contract with interest and, occasionally, the other contracting party's expenditures for repairs, expenses and reasonable improvements, as well<sup>82</sup>.

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<sup>80</sup> FARNSWORTH; p. 252, § 4.15, note 1: "That the victim of fraud must avoid the entire contract even though it is divisible, see *Filet Menu v. C.C.L. & G.*, 94 Cal. Rptr. 2d 438 (Ct. App. 2000) ("a divisible contract is still only a single contract"); In effect, the litigious case had his origin in a contract that could be considered to be divisible, since it took as an object different supplies of restaurant (menus, napkins, tablecloths, ...) in different stages and with instalment payments, which isn't considered to be an obstacle in order that the avoidance is total if there was fraud (Westlaw, 79 Lime. App 4th 852). Into other cases of vices of the assent, nevertheless, yes the partial avoidance would be admitted, so that the Courts can modify the contract so that there is solved the fault that existed in its formation (T.D. CRANDALL/D.J. WHALEY; p. 477).

<sup>81</sup> In relation with the general remedy of the avoidance and the restitution for the cases of deceit and mistake, WILLISTON (vol. 27, p. 106) explains: "The alternative remedy of rescission and restitution is in its origin equitable; however, similar relief can generally be obtained at law. If the defrauded party has parted with nothing, but has merely entered into an executory obligation by simple contract, it needs no extensive citation of cases to establish the point that he may plead the fraud as a defence. If the obligation was under seal, this was not allowed at early common law. It was necessary to apply to equity for an injunction (judicial order). If the defrauded person has parted with property that he or she wishes to regain, he or she is compelled to become an actor".

<sup>82</sup> AYRES/SPEIDEL; p. 532-533. It is mentioned the case *Smeekens v. Bertrand*, 262 Ind. 50, 58, 311 N.E.2d 431 (1974).

However, it seems that the most usual way in these cases is a direct lawsuit for damages (deceit action)<sup>83</sup>. By suing for damages a more compensatory or beneficial coverage is reached. With the aim to clarify, the case of Hill vs Jones<sup>84</sup> is an example: While visiting a house for sale, the buyers hear a faint noise in the wooden floor and ask whether there are termites. The seller denies this saying it is a water problem (water had actually damaged the house a few years before). No argument took place between the parties about this. The house is sold in these circumstances with an agreement that the sellers would pay for an inspection stating that the house was not infected with termites. The inspection found that there was no visible evidence of infection, although there was evidence of damage caused by a previous anti-termite treatment. The estate agent informed the parties that the property had passed the inspection, but apparently none of the contracting parties saw the report. Upon moving into the house, the buyers realized (through various evidences) that the house had been infested with termites in the past. Shortly thereafter, the existence of termites in the house was confirmed. The question that arises in this case is if must the seller should have informed the buyer that the house had been infested with termites in the past, because the buyer requested the annulment of the contract claiming defect of consent (misrepresentation).

As we mentioned before regarding the choice of either taking the path of Contract Law or suing for damages, it could be said that, if as a result of the termites, the buyer would have lost not only the house but also all or part of his furniture, and if the buyer had had to incur in costs to avoid the termites or for the conservation of the furniture in another location or even had to rent another property to live in, suing for damages would probably protect his interests better than the avoidance of the contract. U.S. law, in principle, requires him to choose between the two remedies (except, as we have seen, for incidental damage caused by fraud which is compatible with the annulment of the contract).

#### **IV. THE FACULTY TO AVOID A CONTRACT: NATURE, EXERCISE AND EFFECTS.**

In light of the factual circumstances mentioned, and the legal regime applicable to them, we can extract some general conclusions on the effects of the power to avoid a contract on its legal nature.

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<sup>83</sup> AYRES/SPEIDEL (p. 533).

<sup>84</sup> The Court of appeal of Arizona, 1986; 151 Ariz. 81, 725 P.2d 1115 (Westlaw, 725 P.2d 1115). The case is mentioned, together with others, by AYRES/SPEIDEL (pp. 533 and ss.).

The power to avoid the contract in U.S. law is conceived as a power of choice between the avoidance of the contract or confirmation, recognized as favorable for the protected person<sup>85</sup>. It can be exercised as a defense against complaints from the other contracting party, or even without need of this happening<sup>86</sup>. Avoidance is a remedy of defense<sup>87</sup>.

An avoidable contract remains intact and is considered valid<sup>88</sup> unless the holder of the power of annulment chooses to exercise it and avoid the contract (power of avoidance)<sup>89</sup>. The power of avoiding is personal. It must be exercised by "disaffirmance", i.e. by a statement of the will to void the contract. This does not require a court ruling. In this sense, E. Allan Farnsworth writes: "Any manifestation of an unwillingness to be bound by the contract will suffice as a disaffirmance of it. Disaffirmance may be by words, written or oral, or by other conduct, including the plea of minority as a defense or the commencement of an action to set aside the transaction"<sup>90</sup>. The act of disaffirmance is essentially a unilateral and reciprocal declaration of will. The contract is void from the time that the protected person communicates, tacitly or explicitly, his will to avoid the contract given the cause of avoidance.

A different way of exercising that power is to extinguish it by confirming the contract. This is a personal power. Judges do not have the power to avoid the contract, which shall remain valid until revoked by the person who has that power<sup>91</sup>. The power to avoid the contract may be lost by

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<sup>85</sup> WILLISTON; vol. 1, p. 76: "A voidable contract is one under which a party, usually a victim of some wrong by another party, may elect to avoid any legal obligations".

<sup>86</sup> They are both own manifestations of the voidability, which as remedy can be exercised by route of action or of exception, judicial or by extrajudicial way. This exposition of the voidability like defence or remedy opposite to the claim of fulfilment, or before the rescission by breach it is estimated clearly in BARNETT'S work; p. 951.

<sup>87</sup> For example, look BERENDT/CLOSEN/LONG/MONAHAN/NYE/SCHEID; p. 411 (*Defences to contract formation*). Also in KUNEY/LLOYD (p. 254), we can see the expression "formation defences" referring to supposes of "mistake", "misrepresentation", "duress", y "unconscionability", in the others, with the following explanation: "Essentially, a formation defence is used to avoid finding an enforceable contract when offer, acceptance, and consideration or a valid consideration substitute are present".

<sup>88</sup> WILLISTON; vol. 1, p. 79: "The propriety of calling a transaction avoidable contract rests primarily on the traditional view that the transaction is valid and has its usual legal consequences until the power of avoidance is exercised".

<sup>89</sup> "In certain types of contracts, one or more of the parties may have the power to put an end to the contract simply by manifesting an election to do so. (...) Until the party who has the power of avoidance elects to exercise it, the contract remains intact" (MURRAY, p. 18).

<sup>90</sup> *Ob. ment.*, p. 223.

<sup>91</sup> WILLISTON; vol. 1, pp. 76-77.

an unreasonable delay in its exercise or by an excessive delay in restoring the assets received<sup>92</sup>. In cases where there was no compliance by any of the parties, it is not necessary to exercise it if no action is presented -for example, to demand compliance- against, however, has the power to avoid the contract<sup>93</sup>.

As for the effects of the avoidance of the contract (consequences), they vary depending on the case, as we have seen. Thus, the Restatement (Second) of Contracts is also commented<sup>94</sup>.

## **V. COMPARATIVE LAW CONCLUSIONS.**

It is possible to conclude that the Anglo-Saxon model is similar to Germany's in view of the legal treatment avoidance receives in the American system. This is the model that the UNIDROIT<sup>95</sup> Principles of Uniform Law and the developing European law (both the Principles of European Contract Law<sup>96</sup>, which are later reflected in the Draft Common Frame of Reference (DCFR), as well as the Draft European Contract Code<sup>97</sup>) have adopted. It is a system of self-governance, in which the annulment of the contract is exercised by the protected individual without resorting to judicial proceedings. The model is totally alien to the French system, which requires sentencing.

The judicial and extrajudicial systems of contract avoidance have a common origin in Roman Law, although the judicial model seems to be more influenced by post-classical, formalist Roman Law (*actio nullitatis*), while the extrajudicial system is closer to genuine classical Roman Law (*restitutio in integrum / exceptio*). If the contract has been fulfilled and the protected individual avoids it, he can exercise the appropriate action for restitution in courts against a contractor who resists restitution (*restitutio in integrum*). However, the contractor will be in arrears from the time the contract was successfully voided. If the contract has not been fulfilled, the protected individual can avoid it by opposing the lawsuit demanding compliance, stating the cause of annulment (*exception*) or without having to wait for this to happen.

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<sup>92</sup> WILLISTON; vol. 1, p. 79: "In some cases, the power of avoidance may be lost by unreasonable delay in returning benefits received or in manifesting the election to avoid".

<sup>93</sup> WILLISTON; vol. 1, p. 79.

<sup>94</sup> § 7, Comment, c, Westlaw.

<sup>95</sup> Article 3.14 Principles UNIDROIT (2004).

<sup>96</sup> Article 4:112 PECL (Grupo Lando, Study Group).

<sup>97</sup> Article 148 Preliminary design of European Code of Contracts. (Gandolfi Group Academy of Pavia).

The extrajudicial model, such as the U.S. model, promotes the understanding of avoidance as a defense remedy for the protection of the particular interest. The French-based judicial model, however, blurs the essence of this resource, due to the notion that it belongs to the Law of Sanctions or is more linked to contract structure defects.

Since the avoidance of a contract is a functional inefficiency (aforementioned protective of particular interest) and not structural or necessarily linked to defects in the structure of the contract, we conclude that the American system complies with the principles of modern Contract Law. If there is an issue that perhaps deserves to be reviewed is the incompatibility of remedies (contract law / tort law) admitted as a general rule in American Law. At least in soft law systems proposed as Uniform Law, such as the UNIDROIT Principles and the DCFR, we find the contrary solution which makes them compatible: the party affected by the defects of consent may apply for compensation for damages whether or not the contract was voided (Article 3:18 the Principles of International Commercial Contracts, UNIDROIT, 2004, and Article II. - 7 : 214 DCFR, 2009).

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