

## The Principles of Fraud under the Law of the Contract in Pakistan: An Overview

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### Abstract

*This article critically evaluates the jurisprudence surrounding fraud under the law of contract in Pakistan. It analyses the judgements of the Pakistani superior courts and the jurisprudence enunciated therein. It deliberates upon the meaning of fraud, on whom the onus to prove fraud lies upon. Whether the law provides for any limitation against a claim for a contract that is hit by fraud. The main findings of this paper are that fraud is an intentional act of deception committed through words or conduct to not just deceptively gain the consent of another party but also to deliberately injure him. The courts have deliberated upon this by either relying on either Pakistani law or foreign judicial decisions or law dictionaries. The onus to prove fraud is on the ones who allege it. A claim of fraud in a contract has a time-period of three years from the time the alleged fraud came within their notice. The victim has two remedies to choose from, either he can declare the contract to be null and void and thus make it of no legal effect. Or if he believes that he will benefit from the contract, he can have it enforced instead. In other words, a contract hit by fraud is voidable on the option of the wronged party. However, if there was a possibility that the party was able to discover the fraud by exercising due diligence like an ordinary man, then the contract will not be voidable. The courts also incorrectly declare contracts involving fraud to be void when in reality, it is voidable at the option of the wronged party. The methodology used in this paper is doctrinal.*

**Keywords:** *Contract, Agreement, Elements, Consent, Vitiating Elements, Fraud*

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### 1. Introduction

A contract refers to a legally binding agreement. An agreement is considered to be not binding unless or until the following elements are incorporated therein: offer, acceptance, free mutual consent, capacity, consideration and lawful objective. The majority of these elements are incorporated within Section 10 of the Contract Act of 1872 (hereinafter referred to as the “Act”) which provides that

*“All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.”*

In simpler terms, we can conclude that each contract is an agreement but not every agreement is a contract (Ibn Munir, 2023). There are however times where a contract may be not valid due to the lack of certain elements. An example of this can be free mutual consent. If the consent is obtained willingly, then such a contract shall be considered invalid (Ibn Munir, 2023). The acts of getting consent unwillingly include *inter alia* coercion, misrepresentation, mistake, undue influence and fraud.

This article shall focus on the element of fraud. Fraud refers to the act of intentionally deceiving someone to get their consent in a contract. This paper deliberates upon the principles of fraud as

evinced within our legal system; what is meant by fraud under Pakistani law; what are the important principles of fraud as expounded by the Pakistani Superior courts; which party bears the onus to prove fraud; does the law impose any limitation on a claim for a contract hit by fraud; how does the act of fraud effect the contract; does the principle of fraud also apply to cases that involve *Pardanisheen* (illiterate) ladies.

## 2. Research Methodology

This work adopts the doctrinal research methodology. It focuses on directly analysing the law and the judgements of the Pakistani superior courts to understand the principles surrounding it. This paper shall thus analyse different judgements and shall assess whether the most important judgements have made correct expositions on fraud according to the law in Pakistan. It shall analyse the rationale employed by the Pakistani superior courts and whether said rationale is indeed correct or not.

## 3. Literature Review

Fraud is one of the vitiating elements that causes the contract to lose its substance. It consists of some deceitful practice with the intention of depriving another person of his right or cause him an injury in some manner (Black, 1910, p. 521). It has also been referred to as falsely representing a matter of fact either by words or conduct or by false allegations or by a concealment of a fact that should have been disclosed with the intention to deceive another so that the individual will act upon it to their legal injury (West, 2005, p. 487).

Hence, we can see that fraud refers to an intentional act of deception which is made either by words or conduct by one party to damage the other party and also gain his consent to the contract. Thus, the victim party gives his consent under a misconception which was given to him intentionally by the other party so as to injure him. Fraud is incorporated within section 17 of the Act which provides that

*“’Fraud’” means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent , with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :\_\_*

*(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;*

*(2) the active concealment of a fact by one having knowledge or belief of the fact;*

*(3) a promise made without any intention of performing it;*

*(4) any other act fitted to deceive;*

*(5) any such act or omission as the law specially declares to be fraudulent.*

*Explanation.\_\_ Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak 1 , or unless his silence is, in itself, equivalent to speech.”*

Hence our law has defined fraud as a deceitful act by a person or his agent to induce the other person into a contract. Furthermore, our law also provides a criterion of acts which it describes as fraudulent. The first one is the suggestion of a fact which the party knows is incorrect but the other party does not know it is incorrect but instead believes it to be true. For example, Ahmed tells Ali that the car has run 1000 km. Ali believes this is true, however Ahmed had actually lied. The car has not actually run 1000 km.

The second one is the active concealment of a fact by one who has knowledge or belief of that fact. Ahmed conceals the fact that the car’s engine was replaced a couple of months ago from Ali despite the fact that Ahmed knows about it. However, he intentionally conceals it from Ali.

However, in both cases, the fact being discussed about is not any random fact, the fact in question should be a ‘material fact’, that is to say, the fact that is either concealed or is intentionally incorrect one should an essential fact that is important for the contract. It should be a fact that is significant and is one in which the whole contract rides on.

The third one is a promise made by one party to another without any intention of actually performing it. This one is self-explanatory. The fourth one is any other act fitted to deceive. This one seems to incorporate any sort of act that comes within the ambit of fraudulent, thus this one could be left to the court’s discretion. The last one is any act or omission which the law specifically declares to be fraudulent. Thus, this is where other laws which specifically discuss fraud can apply such as the Pakistan Penal Code, 1880 (“PPC”).

The law also provides a further explanation on Section 17(2) of the fact that mere silence on the party’s part does not in itself constitute fraud. It will only constitute fraud when the party has a duty to speak about such fact or the circumstances are such that the party’s mere silence also amounts to fraud. If we take the example discussed above once again, if Ali had asked Ahmed about the car’s engine, then Ahmed had a duty to disclose such fact, otherwise should he conceal it, then he is guilty of fraud. Or Ali takes the car for a test drive along with Ahmed and Ahmed still does not disclose the fact about the car’s engine, then he is guilty of fraud. Thus, this takes into the aspect of due diligence by the other party. By due diligence, we mean that the other party must take into consideration what he is getting himself into. Diligence means “vigilant activity; attentiveness; or care, of which there are infinite shades, from the slightest momentary thought to the most vigilant anxiety. (West, 2005, p. 428). It also refers to “attentive and persistent in doing a thing; steadily applied; active; sedulous; laborious; unremitting; untiring (West, 2005, p. 428) and the attention and care required of a person in a given situation; the opposite of negligence” (West, 2005, p. 428).

Thus, he must be attentive, he must take great care, he must be vigilant about each and everything in the contract. The subject-matter, the party, the nature of the contract etc. He must be able to make sure everything is such that he will not be defrauded by the other party. Thus, he has a duty of trying to make sure that he gets a fair deal out the contract he is involving himself in. We will further discuss this in detail hereinbelow.

#### **4. The Scope and Extent of Fraud**

In the case of “*Abdul Wahid v. Mst. Zamrut*”, where there was a dispute over the ownership of an evacuee property, the court held that the facts and circumstances of the instant case in which the question of the party’s conduct is the primary question. The court has to consider and satisfy itself whether the party’s conduct was one which could be considered fraud in the first place (*Abdul Wahid v. Mst. Zamrut*, 1967, p. 162).

In “*Mst. Bhano v. Mian A.M. Saeed*”, where there was an allegation of fraud in a land dispute case, the court held that “no law provides a special quantum of evidence for the establishment of fraud.” (*Mst. Bhano v. Mian A.M. Saeed*, 1969, p. 301). In the case of “*Mir Ghaus Bakhsh Bizanjo v. Chief Election Commissioner*”, where two candidates who were running for seats to the National Assembly of Pakistan challenged the order of the Election Commission who had declared the bye-election of the constituency to be null and void. We will concern ourselves with the court’s observations on fraud. The court held that the main ingredient of fraud is the intention to deceive or to induce a person to enter into a contract on a false belief (*Mir Ghaus Bakhsh Bizanjo v. Chief Election Commissioner*, 1969, para 14). The court also held that fraud cannot be proved without there being any malicious or bad intention (*Mir Ghaus Bakhsh Bizanjo v. Chief Election*

*Commissioner*, 1969, para 14). The court also held that forgery is a category of fraud (*Mir Ghaus Bakhsh Bizanjo v. Chief Election Commissioner*, 1969, para 17).

This is an example of Section 17(5) of the Act which provides for the application of other provisions of law which discuss fraud. However, this provision provides for pieces of legislation that specifically discuss fraud. One can also argue that this is an application of Section 17(4) which provides for the discretion of the court to consider ‘any act that is fitted to deceive.’ These observations of the court are laudable as malicious or bad intention is indeed an essential element of fraud. In “*Ghulam Muhammad v. Fateh Muhammad*” where there was an allegation of fraud in a contract where there was sale of land, the court first observed that the exchange deed was voidable at the option of the victim party as they had deceived or induced the respondents/plaintiffs to enter into the exchange with them by suggesting a fact which they knew was not true and had reason to believe was not true. (*Ghulam Muhammad v. Fateh Muhammad*, 1987, para 23).

However, the court also held that the contract was still enforceable and was not voidable as the victim party had the means of discovering the truth by ordinary diligence. (*Ghulam Muhammad v. Fateh Muhammad*, 1987, para 24). This observation is correct. In “*Land Acquisition Collector, Tarbela Dam Resettlement Organization, WAPDA, Ghazi v. Hikmat Khan*” where there was a dispute of compensation of acquired land at the expense of the public exchequer, the court after observing that the definition of fraud as provided by Section 17 of the Act is provided only in a particular manner and is therefore exhaustive proceeded to extend the scope of the definition of fraud by relying on a law dictionary and ruled that

“An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right; a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment .of that which should have been A disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury”...A generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated” (*Land Acquisition Collector, Tarbela Dam Resettlement Organization, WAPDA, Ghazi v. Hikmat Khan*, 1997, para 9).

The court’s reliance on a law dictionary is appreciative. However, it would have more appreciative to have relied on even more law dictionaries so as to extend the definition of fraud even further. This was done so by the court in “*Abdur Rehman Khan v. Muhammad Altaf*” where the court after relying on the definition of fraud as provided by various law dictionaries came to the conclusion that

“From a bare perusal of the above definitions it is to be observed that the main ingredient of fraud is the intention to deceive or to induce a person by mis representation to enter into a contract on a false belief. A fraud may consist of an action in suppression of what is true or an action in representation of what is false. In order to sustain an action for deceit it must be proved that there was a statement as to a fact which was false; and secondly, that it was false to the knowledge of the person making part or that they made it not caring whether it was true or false. When a Court is called upon to exercise its discretion in equity to set aside a decree on the ground of fraud or collusion then it does not confine itself to the narrow definition contained in S. 17 of the Contract Act and all possible kinds of fraud which can come to mind are covered by the definition of fraud.” (*Abdur Rehman Khan v. Muhammad Altaf*, 1997, p. 1268).

This observation is laudable and it is in line with the judgement discussed directly prior to this one in terms of the definition of fraud to not be narrowed down to the definition provided in Section 17 of the Act.

In “*Shipyard K. Damen International v. Karachi Shipyard and Engineering Works Ltd.*”, where the proposition was whether the court can interfere in a bank guarantee payment for the purposes of restraining said payment. The court after relying on various foreign caselaw, held that “unless there is an allegation of fraud or the like the courts will not interfere directly or indirectly to withhold payments” (*Shipyard K. Damen International v. Karachi Shipyard and Engineering Works Ltd*, 2003, para 12). In “*Abdul Hameed v. Jehan Khan*”, the court defined fraud by relying on Section 17 of the Act (*Abdul Hameed v. Jehan Khan*, 2004, para 15). In “*Gharibwal Cement Limited v. Income Tax Appellate Tribunal, of Pakistan, Lahore*”, the court while contemplating on the scope of ‘concealment’ held that a concealment is an active act which operates in both the mind and in action. It implies the pre-existence of an ability and an opportunity to judge and decide. Additionally, it is important to note that the act employed to deceive is either half open or is totally concealed. A fraud cannot be presumed, it must be proved as a positive act (*Gharibwal Cement Limited v. Income Tax Appellate Tribunal, of Pakistan, Lahore*, 2005, para 9).

This observation is laudable. In “*Muhammad Yousuf v. Badruddin Ahmed*”, Sabihuddin C.J. in his concurring note observed that a contract intended to defraud collection of public revenues would be opposed to public policy. (*Muhammad Yousuf v. Badruddin Ahmed*, 2007, p. 439). In “*Habib Ahmad v. Meezan Bank Limited*” the court while relying on the definition provided by a law dictionary observed that

“The fraud as per Black’s Law Dictionary (Sixth Edition) is an act ‘as distinguished from negligence, it is always positive, intentional. It comprises all acts of omissions, and concealments involving a breach of a legal or equitable duty and resulting in damage to another. And includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or by a silence, by word of mouth, or by look or gesture. Fraud, as applied to contracts, is the cause of an error bearing on material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other.’ (*Habib Ahmad v. Meezan Bank Limited*, 2016, para 8).

In “*Mirza Shakir Baig v. Miss Iffat Chughtai*”, the court while contemplating on the scope of Section 17 of the Act held that the essential element of fraud is the intention to deceive or to induce a person by active concealment or misrepresentation to enter into a contract on a false notion (*Mirza Shakir Baig v. Miss Iffat Chughtai*, 2017, para 9).

Thus, we can conclude that fraud is an act of deception whether by words or conduct towards the other contracting party to intentionally damage him so as to obtain his consent for the contract. Thus, the victim party gives its consent under a false impression which was given to him intentionally so as to cause him any sort of injury. The courts have deliberated upon this by either relying on the definition provided under Section 17 of the Act, or extend its scope by means of applying other provisions of law that discuss fraud, or use its discretion to extend its scope or rely on foreign caselaw or law dictionaries to extend its scope.

### **5. Burden of Proof of Fraud**

The burden to prove fraud is on the party who alleges it (*Muhammad Aslam v. Muhammad Tufail*, 1995, para 11; *Baggu v. Mst. Rahiman Bibi*, 1996, para 9). This position was accepted by the court in “*Zafar Iqbal v. Inspector General, Frontier Crops, Balochistan, Quetta*”, the court held that the

onus of proof of fraud in on the one who alleges it and that no presumption on that regard can be made. (*Zafar Iqbal v. Inspector General, Frontier Crops, Balochistan, Quetta*, 1990, para 9). In “*Shamir v. Faiz Elahi*”, the court held that fraud must be proved through strong and independent evidence. (*Shamir v. Faiz Elahi*, 1993, p. 148). Thus, there must be concrete evidence in order to prove fraud in a case. The court held in “*Muhammad Aslam v. Muhammad Tufail*” the onus of proof of fraud lies on the ones who allege it. (*Muhammad Aslam v. Muhammad Tufail*). A similar observation was made in the case of “*Baggu v. Mst. Rahiman Bibi*” In the case of “in “*Abdur Rehman Khan v. Muhammad Altaf*”, the court held that

“The Courts have been very careful and cautious in dealing with any situation where the slightest allegation of fraud or collusion is raised by any of the parties to the case and, whenever any such allegation or issue is raised the Court takes upon itself to hold a thorough and complete inquiry to find out as to whether the transaction is tainted with fraud or not and, if so, then the entire proceedings of the Court as well as the proceedings prior to the Court become illegal and void if it be established that the basis of case before the Court was a forged or fraudulent document” (*Abdur Rehman Khan v. Muhammad Altaf*, 1997, pp. 1268-1269).

The court further observed that

“Even a judgment/decree or an order obtained from a Court on the basis of a fraudulent statement or any other kind of fraud loses its authenticity or sanctity and fraud renders the judgment, decree and order of every Court and Tribunal as voidable” (*Abdur Rehman Khan v. Muhammad Altaf*, 1997, p. 1269).

Both observations of the court are correct. The Supreme Court also endorsed this principle. (*Zulaikhan Bibi v. Mst. Rohan Jan*, 2011, para 13).”

In “*Habib Ahmad v. Meezan Bank Limited*”, the court held that

“allegations of fraud require specific evidence establishing unequivocally the maleficence or a mis-representation made with a design to get benefit for oneself or misleading the other into a course of action detrimental to its rights.” (*Habib Ahmad v. Meezan Bank Limited*, 2016, para 8; *Abdul Zahir v. Khuda-E-Dad*, 2016, para 17).

Hence, allegations of fraud need concrete and specific evidence of a party’s intentional deception towards another party for his benefit in order for it to be substantiated.

#### **6. Burden of Proof in cases involving *Pardanisheen Lady***

In “*Raza Hussain v. Muhammad Khan*”, where there was a suit for specific performance and an allegation of fraud by a *pardanisheen*/illiterate lady, the court observed that the same principle of burden of proof in normal cases of fraud does not apply in cases involving *pardanisheen* ladies. Rather, in such cases, the burden of proof is always on the person claiming advantage of such transaction to show that it was made with her free-will. (*Raza Hussain v. Muhammad Khan*, 1999, para 10).

Hence, we can also conclude that the burden to prove fraud is on the ones who allege it and that fraud vitiates all proceedings prior to it, that fraud does not apply in cases involving *pardanisheen* ladies and that judgements obtained by fraud can be set aside by both higher and even lower courts even if the judgement were to be of a higher court.

#### **7. Limitation on the Claim of Fraud**

A claim of fraud in a contract can only be made within three years as provided by Article 181 of the Limitation Act 1908 from the time the alleged fraud came within their notice (*Abdul Hameed v. Jehan Khan*, 2004, para 9).

#### **8. Effect of Fraud**

As mentioned hereinabove, agreements made without free consent are voidable on the option of the party whose consent was not freely given. This finds force under Section 19 of the Act which provides that

*“When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.*

*Exception. — If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.”*

Thus, any agreements in which the consent was not given freely but was given due to means of coercion, undue influence, fraud, misrepresentation shall be a voidable contract at the behest of the party whose consent was not given by his own free will. He may have it rescinded or have it enforced (*The Eastern Automobile Company Ltd. v. Tasdiq Hussain, I.F.S., Conservator of Forests*, 1959, p. 686).

In the case of “*Muhammad Bashir v. Mst. Walayat Begum*”, where there was a dispute of sale deed involving property, the court held that an instrument of transaction relating to a transaction in the nature of *hiba-bil-iwwaz* which was obtained by fraud would not be valid (*Muhammad Bashir v. Mst. Walayat Begum*, 1967, para 17). This is correct to a certain extent but however, it would only be up to the victim party to declare such transaction as valid or not as a contract hit by fraud is a voidable contract, not a void contract.

In the case of “*Hamida Begum v. Murad Begum*”, where there was a dispute on trust property, the court while relying on Indian judicial decisions observed that

*“If, however, the instrument is executed by a person competent to do so, but it is alleged that he was forced or persuaded to execute the same under coercion, fraud, misrepresentation or undue influence, then it would be” a voidable instrument in accordance with the principles embodied in sections 19 and 19- A of the Contract Act. The instrument would remain operative as long as it was not set aside by a competent Court”* (*Hamida Begum v. Murad Begum*, 1975, p. 637).

This observation is correct to a certain extent. Ultimately, the contract will be set aside or enforced accordingly to the positions the parties were had the representations made were true should the party desire it. In “*Shaista Gul v. Qaza Khan*” the court held that positive fraud vitiates a decree (*Shaista Gul v. Qaza Khan*, 1977, para 7.) Once more, that is up to the party that was wronged. In the case of “*Mst. Izzat v. Allah Dita*”, where there was a dispute on the sale of land, the court while discussing the scope of section 19 of the Act observed that in order for this section to be applicable, the consenting party should be made aware of the nature of the agreement, that is to say, the contracting parties consciously agree about the subject matter of the contract (*Mst. Izzat v. Allah Dita*, 1981, p. 171). In the case of “*Ghulam Muhammad v. Fateh Muhammad*” in a land dispute by means of inheritance and there was an allegation of fraud and misrepresentation with regard to the exchange deed, the court observed that Section 19 was not applicable as the concerned person was in position to discover the truth by exercising ordinary diligence when they executed the exchange deed (*Ghulam Muhammad v. Fateh Muhammad*, 1987, para 24).

In “*Mst. Jamila Hamid v. Atta Muhammad*”, the court relied on the judgement of “*Hamida Begum v. Murad Begum*” and observed that

“if an instrument was executed by a person competent to do so and it was alleged that he was forced or persuaded to execute the same under coercion, fraud, mis-representation or undue influence, then it was a voidable instrument in accordance with the principles embodied in sections 19 and 19-A of the Contract Act and the instrument would remain operative as long as it was not set aside by a competent Court” (*Mst. Jamila Hamid v. Atta Muhammad*, 1990, para 24).

In “*Muhammad Younus Khan v. Government of N.W.F.P.*”, the court held that

“There is no cavil with the proposition that fraud vitiates all solemn acts and any instrument, deed, or judgment, or decree obtained through fraud is a nullity in the eye of law and can be questioned at any time so much so that they can be ignored altogether by any Court of law before whom they are produced in any proceedings” (*Muhammad Younus Khan v. Government of N.W.F.P.*, 1993, para 15).

The court seems to be misinterpreting Section 19 of the Act which provides that a contract hit by fraud is voidable at the option of the wronged party. And this isn't the first time either. Interestingly enough, the court still manages to define fraud within the scope of Section 17 of the Act.

Hence, we can understand that a person who was a victim of fraud has two remedies. One is that he can declare that the contract is null and void and is thus of no legal effect. Or if he believes that he will gain a benefit from the contract, he can have it enforced as well. In such a case, he will then be put in a position where the representations that were made would be considered true. However, in case the party was in a position in which he could have discovered the fraud by exercising ordinary diligence as any other ordinary man would have done so, then the contract shall not be voidable. We have also understood that the superior courts incorrectly declare contracts that have been hit by fraud to be void when in reality, such contracts can only be voidable at the option of the victim party.

### **9. Conclusion**

From the deliberation hereinabove, we may make the following conclusions: fraud refers to an intentional act of deception which is made either by words or conduct by one party to damage the other party and also gain his consent to the contract. The Pakistani superior courts have deliberated upon this definition by relying on either Pakistani law, or foreign law dictionaries and case law. The onus to prove fraud is on the one who alleges it. Article 181 of the Limitation Act, 1908 stipulates that a claim of fraud in a contract can only be made within three years from the time the alleged fraud came within their notice. It also does not apply to cases involving *pardanishen* ladies and that judgements obtained by fraud is liable to be set aside by both higher and lower courts even if the judgement is of a higher court. Fraud also vitiates all proceedings that was made prior to it. Also, the party who was wronged by fraud has two remedies which he can apply. Either, he declares the contract to be null and void and of no legal effect whatsoever or if he believes that he will benefit from the contract, then he can have the contract enforced as well. Hence, a contract hit by fraud becomes voidable at the option of the victim party. However, where the case was such that, the wronged party could have discovered fraud by exercising due diligence like any ordinary man could, then the contract will not be voidable. Interestingly enough, the courts incorrectly rule contracts hit by fraud to be void when actually such contracts become voidable at the option of the victim party.

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