

## Re configuring contract law for purposes of the CRPD: a discussion paper

### Introduction<sup>1</sup>

This paper seeks to identify some ways in which we might seek to reconfigure contract law in light of the Convention on the Rights of Persons with Disabilities ('CRPD'). It does so in light – particular – of the requirements of Article 12 CRPD, which I take to point the way (implicitly, if not expressly) towards a model of securing, insofar as possible, that all those with disability are enabled to enter into (and exit from) contracts on the same terms as those without disabilities, as aspects of the exercise of their legal capacity.<sup>2</sup>

In broad terms, and in general, a contract is a legal and binding agreement between two parties based on a voluntary and intentional meeting of interests.<sup>3</sup> Contracts, large and small, are an important part of our daily lives, used for purchasing products, buying bus tickets, entering into direct debit arrangements to pay for utilities, paying for a mobile phone in instalments, renting or buying an apartment, etc.

In most countries, contract law is broadly developed and regulated in legislation and case law. All legal systems define in detail the conditions for creating a contractual agreement, and the manner in which it may be cancelled. Those conditions are not identical between legal systems, with particular differences between common law and civil law traditions; not least as to how they respond to situations in which it is subsequently said (either by the person themselves or another) that they did not have the relevant mental capacity to enter that contract. This is addressed further below.

Three points need to be emphasised at the outset of any exploration of how contract law might be reconfigured for purposes of the CRPD:

1. The need for both parties to a contract to have an intentional meeting of minds is foundational across all legal systems. The question of whether it is possible to have such a meeting of minds where one party is said to lack the ability to formulate the necessary intent is one that goes to heart of contract law;
2. Further, contracts do not relate only to financial matters. For example, every surgical procedure requires the patient's consent, usually by signature, which in many countries constitutes a contractual agreement between the patient and the health service provider.

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<sup>1</sup> Note, this is drawn in part, and with permission, from the report prepared for the Open Society Foundation Report on *Alternatives to Guardianship in Financial Affairs* by Attorney Yotam Tolub, available at <http://bizchut.org.il/en/wp-content/uploads/2016/04/alternative-to-guardianship-report.pdf>. However, Attorney Tolub is not responsible for the contents or conclusions of this paper, which are the sole responsibility of the present author.

<sup>2</sup> By contrast with – for instance – the Convention on the Elimination of Discrimination against Women – the CRPD does not provide expressly for an equal right to conclude contracts, but this would appear clearly to flow from the provisions of Article 12 CRPD. Issues of contract law are not addressed in any detail in the Committee on the Rights of Persons with Disabilities' General Comment 1 on Article 12.

<sup>3</sup> This is a very crude definition and specific exceptions can no doubt be found in different jurisdictions, but it will do for purposes of this paper.

3. Moreover, and more fundamentally, Western political tradition (at least) is based upon the model of independent rational agents entering into legally binding arrangements with each other.

The fundamental nature of all of the points set out above only makes clear that the hurdles to implementing changes to contract law so as to bring about compliance with the CRPD are high. To some extent at least some of the work that is to be done is better done, or at least led, by those other than practicing lawyers (such as the present author), or indeed lawyers at all, because of the need to look beyond and behind foundational legal principles from other perspectives.

It is also important:

1. To divide the task into stages or, at least, to have work proceeding in parallel. We need those with the time, energy, intellectual resources and openness to lived experience (either through themselves having it or through close collaboration with those who do) to point the direction to a different way of thinking about contract law. We also need those who are focused on the smaller-scale, more immediate, problems facing those with disabilities who are not properly supported at present to enter into contractual relations<sup>4</sup> within the existing framework of the law;
2. Not to focus too narrowly on contract law as carrying all the load. In particular, as developed further below, too narrow a focus on contract law is likely to lead too quickly to mechanisms that are designed to alleviate exploitation and abuse which disproportionately and in a discriminatory fashion focus upon the individual, rather than the perpetrator of the abuse. Other mechanisms, both legal and otherwise, already exist to address these matters, and are capable of being substantially refined.

A final caveat I must enter is that this paper is written from the perspective of an English lawyer with some working knowledge of systems in other jurisdictions, but without professing expertise in the law of those jurisdictions. I draw upon some examples of the law of England and Wales to illustrate points, but I am aware that other practices and other precedents exist in other legal systems which might equally be drawn upon both to illustrate problems and potential solutions.

### **Entry into contracts**

To my mind, the first and arguably most important issue is how contract law can be reconfigured to enable all to exercise their legal capacity to enter into binding agreements. As noted above, this may well, in fact, be the most difficult issue at a conceptual level, and it may be necessary to maintain ‘work-arounds’ for some time.

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<sup>4</sup> And the consequential matters highlighted in Article 12(5) CRPD, including equal access to bank loans, mortgages and other forms of financial credit.

In any reforms that are proposed within domestic legal systems, it will also be necessary to ensure that – inadvertently – steps are not taken which render entry into “new form contracts” sufficiently risky or uncertain for the other party that they choose not to enter into them. It would be a Pyrrhic victory of the highest order to achieve reforms which in principle enabled all to enter into “new form contracts” but to find that a significant minority were simply unable to access those contracts because of the lack of willing counterparties. Where such refusal represents discrimination on the basis of disability, it is already unlawful under many legal systems, and the risk of discriminatory refusal will – we can properly hope – diminish as the CRPD becomes better embedded and States modify their laws and practices to reflect its wider obligations. However, it is ultimately not possible (nor indeed proper or lawful) to impose legal requirements upon proposed counter-parties to enter into “new form contracts.” There are potential ‘work-arounds’ for this which I touch upon below.

I suggest that a foundational – and indeed I would say axiomatic – principle of any reform must be that the focus must always be on the “new form contract” in issue in any given situation. What support may be required to enable a person to exercise their legal capacity to enter into the “new form contract” will vary wildly according to the particular contract in issue. Many legal systems already recognise (within the framework of mental capacity law) that the mental capacity required to enter into a contract for a small purchase is very different to that required for (say) that of the sale of a house.<sup>5</sup>

Reformulated, I suggest that we need to look in each case to the degree of support that may be required to enable the individual both (1) to understand the nature and consequences of the proposed contract; and, if they do have that understanding, (2) to bring about the conclusion of that contract with a third party should the individual express the intention to do so.<sup>6</sup>

I will return to (1) in a moment, but achieving (2) may well require, in some cases, the intervention of a supporter who has a legally recognised power or right as the individual’s agent to enable (in essence) the necessary security to be brought about to enable the other party to conclude the agreement. In line with the provisions of Article 12(4) CRPD, it is necessary that mechanisms be put in place within the relevant legal systems to ensure that the delivery of such support (in both its aspects) is free from both conflicts of interest and undue influence.<sup>7</sup>

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<sup>5</sup> As *Chitty on Contracts* (32<sup>nd</sup> edition), the leading textbook in England on contract law puts it (footnotes omitted) at para 9-089: “*At common law, the understanding and competence required to uphold the validity of a transaction depend on the nature of the transaction. What is required in relation to each particular matter or piece of business transacted, is that the party in question should have an understanding of the general nature of what he is doing.*”

<sup>6</sup> I am aware that some take the view that “intention” alone suffices. For my part, I think that understanding – even at a basic level – is required in this area in order to form an intention.

<sup>7</sup> An example of how this might work can be found in the Texas Supported Decision-Making Bill (<https://legiscan.com/TX/text/SB1881/2015>), in which any person (including by definition a contracting party) who has sight of a supported decision-making agreement and has cause to believe that the person is being abused or exploited, is under a duty to report the same to the Texas Department of Family and Protective Services. Further, and whilst this is outside the scope of this paper, there is important work to be done on identifying – for the meaning of the Convention – what we wish “undue influence” and “conflict of interest” to mean. On one view, at least on the conventional definition of “conflict of interest,” it is actually impossible to eliminate a conflict of interest in a situation where a family member is supporting the individual in relation to any matter which might impinge (no matter how remotely) on the financial interests of that family member.

It will also be necessary, I suggest, to provide – most likely by way of legislation – comfort to the other party as to how and when a binding agreement is concluded where a supporter is involved (either in the presence of the individual or, potentially in some cases, in their absence). Whilst I have said that the supporter is the person’s “agent,” this is not a model which fits entirely within conventional models of agency law (at least as understood in England and Wales),<sup>8</sup>

Further, at least in jurisdictions (predominantly those based upon civil law) where a contract entered into by a person lacking the requisite (mental) capacity is void from the outset, and can be declared so at any stage, it is likely that specific legislative reforms will be required to ensure that there can be no doubt as to the binding nature of the contract. Finally, and in order to make the provision of support practically available, consideration will be required as to whether a supporter is (or is not) to be made personally liable for any default on the contractual terms by the individual. From a common sense perspective, placing personal liability upon a supporter would be likely to diminish the pool of individuals who are willing to act as such.

In relation to (2), there will, I suspect, need to be a “let out” that a supporter cannot be required as agent for the individual to enable a contract to be concluded for the purchase or supply of illegal goods or services (because of the consequences for the supporter in law as an accessory or accomplice to a criminal offence). A trickier issue is whether the supporter can be required as agent for the individual to enable a contract to be concluded where the individual does not have the money to pay for the item or service. If there is no possibility of credit being afforded then there could be no such contract as it is simply impossible. If there is the possibility of credit being afforded then, on one view, the supporter should simply proceed even though the individual will go into debt (it will, of course, have been a prior obligation upon the supporter to assist the individual to understand this) – the supporter’s role is to support the individual to exercise their legal capacity, even if the exercise of their capacity in this regard may well not be financially prudent. That having been said, I must confess that the cautious lawyer in me would like to have a ‘let out’ to enable a supporter not to have to take such steps if they properly believe that such would be seriously adverse to the financial wellbeing, but I appreciate that this may not find favour with all. A ‘softer’ version would be to require a supporter in such a situation to seek the assistance of an external body (whether or not judicial) to resolve the issue.

What, however, of the position where a person cannot, even with support, be brought to understand the proposed contract or to formulate any relevant intention? We can give a very broad definition of “understand” and “intend;” we can also require sophistication and nuance on the part of those delivering support, but for my part it seems to me that it is necessary to

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That would lead to the perverse outcome that the family member, who may very well be the “right” supporter in every way, is then disqualified from delivering that support.

<sup>8</sup> See, for instance, P. Watts, ‘Contracts made by Agents on Behalf of Principals with Latent Mental Incapacity: The Common Law Position’ (2015) 74 CLJ 145. It could not be a form of agency which depended upon the individual’s capacity to enter into such an agreement (at least as conventionally understood), otherwise, we would in large part simply have shunted the problem “upstream” into a debate about whether the person had or lacked such capacity. A better way of looking at this would be that the individual is a statutory agent – i.e. empowered and indeed required by statute to act in certain ways in the interests of the “principal,” upon certain conditions being set down.

acknowledge that there will be circumstances where it is simply not possible to say that the person understands the proposed contract or is able to formulate the relevant intention. To take an example – with apologies for turning immediately to the coma case<sup>9</sup> – what of the position where a person is in a coma following an accident and is to be discharged from the hospital where they have been provided with treatment<sup>10</sup> to a private care home? Assuming that they will be meeting the costs of that care home from their own assets, it will be necessary for a contract to be concluded so as to enable those costs to be met, and it is simply not possible in my view to say that they can be brought, even with support, to reach any meaningful level of understanding or to formulate any meaningful intention. We need to provide in such circumstances a way in which to enable the person to obtain that service that they require.

There is one possible work-around to achieve such an outcome, namely simply to provide that contracts are not necessary in such circumstances. There is a precedent of sorts within the framework of the Mental Capacity Act 2005, which provides in section 7 that:

- (1) If necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he must pay a reasonable price for them.
- (2) “Necessary” means suitable to a person's condition in life and to his actual requirements at the time when the goods or services are supplied.

Within the framework of Article 12 CRPD, of course, the reference to “capacity to contract” is problematic, and perpetuating such a model (or that which appears in other legal systems to address the same problem) may well not find favour even if reformulated to relate to the situation where a person is – even with all appropriate support – unable to understand the contents and consequences of the relevant contract. The work-around is also, of course, limited in that it requires an element of judgment by others as to what may be “necessary” for that person, a judgment which may well be skewed by preconceptions as to that individual.

I am therefore not sure that, in the long-run, an approach modelled in any part upon avoiding contracts is what we should be aiming for. Rather, it seems to me that the only proper response in such a situation is to enable the appointment of a supporter empowered to conclude the relevant contract on behalf of and in the name of the person so as to exercise their legal capacity in this regard. In line with the proposal within the Essex Autonomy Project 3 Jurisdictions report that I co-authored,<sup>11</sup> I would suggest that the supporter should in constructing the individual’s decision and concluding that contract operate with the rebuttable presumption that effect should be given to the person’s reasonably ascertainable will<sup>12</sup> and preferences, subject to the constraints of possibility and non-criminality. That presumption should be rebuttable

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<sup>9</sup> But in the full knowledge that this is the case which is immediately raised by all those concerned to understand how the CRPD is intended to work in practice.

<sup>10</sup> I do not touch on here as to the basis upon which that treatment was provided or is to be provided at the care home.

<sup>11</sup> <http://autonomy.essex.ac.uk/eap-three-jurisdictions-report>. This is a modified version of the “best interpretation” approach set down in General Comment 1.

<sup>12</sup> To the extent that “will” might be read as a synonym for “intention” then there is a question in such a case as the one under discussion as to whether the person can be said to have any relevant “will.” This is a matter which is ultimately philosophical as much as it is legal, and I do not address it further here.

only if stringent criteria are satisfied. Action which contravenes the person's known will and preferences should only be permissible if it is shown to be a proportional and necessary means of effectively protecting the full range of the person's rights, freedoms and interests.

### *Conclusion*

I should emphasise that the model set out above is not a model designed to perpetuate guardianship as it is currently constituted in many countries. In very many cases, it would with appropriate work and support simply be unnecessary to have a guardian at all. Even in those cases where a supporter is required so as to be able to give effect to the legal capacity of the individual in the financial domain, they could only act where they had taken all appropriate steps to support the individual to understand the specific contract and express an intention upon which they could act, and they would then be bound to follow that intention.<sup>13</sup> It would only be where the requisite understanding and intention was altogether lacking in respect of a specific contract that there would be any power for the supporter to proceed on the basis of their construction of the person's decision.

One obvious argument that can be raised against the model set out above is that it will be resource intensive in terms of the provision of support. However, I would suggest that these concerns can be overdone, not least as it can properly be hoped that the provision of support can diminish over time in relation to individuals who, by experiencing the consequences of entry into contracts, can gain concrete experience and understanding of their nature and effect. Further, with appropriate education of financial institutions, they can be led to see that securing and enabling those with disabilities to enter into valid contracts with them can act to their own financial benefit by “unlocking” assets and resources currently not available.

### **Exit from contracts**

Whilst I have focused at the outset on measures designed to enable individuals with disabilities to enter into binding contracts, it is important to recognise also that there they may wish to exit a contract<sup>14</sup> which it is said has been concluded by them in circumstances where there are proper grounds to doubt it has been. This is likely – but not necessarily – to be the case where the contract is disadvantageous to the person.

Many of the grounds upon which exit from a contract are “universal” ones. Two of key ones that apply in English law are:

1. Where one party violates its commitment. For example, if an individual received a damaged product or received it after an unreasonably long time, they may notify the other party that they are cancelling the contract. Cancellation must be made very soon

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<sup>13</sup> Subject to the potential constraints identified above.

<sup>14</sup> I deliberately use this vague term because there are a number of things that may be happening – it may be that they wish the contract to be cancelled (or rescinded) so that both parties are put back in the position that they were in before. They might also want to bring a recurring contract (for instance for the monthly delivery of goods) to an end but wish to keep the goods received to date. They may also want to return goods provided under a contract.

after the violation, the notification must be unambiguous and the reasons for it must be stated.

2. Where there has been a flaw in the making of the contract. There are several different kinds of flaws. The first is an error on the part of the signatory. For example, an individual who thought they were receiving a newspaper subscription at a reduced price and discovers only after the fact that they must pay a much higher price. Another defect is referred to as misrepresentation, that is, when the signatory's mistake happened due to misrepresentation by the other party, or because the party was induced to enter into the contract by another party's false statement of fact. This is a more serious problem, because it involves inappropriate behavior on the part of the seller – e.g., a false representation regarding the transaction. In this way, for example, one may cancel a contract that has been signed with a seller who promised a genuine iPhone but delivered a fake one. Particularly serious examples of misrepresentation constitute fraud.

Other situations are on their face universal, but may have particular relevance in the context of those with disabilities. In English law, there has been a long established equitable<sup>15</sup> jurisdiction to protect a person against duress, undue influence, unconscionable transactions and related conduct, including the abuse of confidence.

Because I see that there are some useful mechanisms which might be deployed more creatively in due course as we move towards compliance with the CRPD, it is perhaps worth highlighting both the doctrine of undue influence and that of unconscionable transactions.

### *Undue influence*

The doctrine of undue influence applies where person has entered into a transaction as a result of the exercise of undue influence. Where undue influence has been used, the transaction can be set aside. “*One of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused.*”<sup>16</sup> It is not any influence which is relevant; the weight and nature of the influence must be such that the person's consent to the particular transaction, “*ought not fairly to be treated as the expression of [their] free will.*”<sup>17</sup> There is no precise test as to when line is crossed, but doctrine is not intended to be a means to relieve a person of their own folly,<sup>18</sup> and as the courts have put it in rather colourful language: “*Extravagant liberality and immoderate folly do not of themselves provide a passport to equitable relief.*”<sup>19</sup>

There is no need for wrongdoing by the person exerting the undue influence, and indeed their conduct can be unimpeachable. By way of (very old) example, in the case of *Allcard v Skinner*, the rules of a religious sisterhood stated in terms that novice nun was to regard the voice of the spiritual director of the convent as “the voice of God” and prevented her from seeking advice

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<sup>15</sup> A branch of the law that seeks to remedy inequities.

<sup>16</sup> *Royal Bank of Scotland Plc v Etridge (No.2)* [2002] 2 AC 773

<sup>17</sup> *Etridge* at para 7.

<sup>18</sup> *Allcard v Skinner* (1887) 36 Ch.D. 145 (CA) 182

<sup>19</sup> *Tufton v Sporni* [1952] 2 T.L.R. 516 at 519.

from a non-member without her leave. A few days after becoming a member of the convent, she made a will bequeathing all her property to the spiritual director, and then subsequently handed over money and shares to spiritual director. The court found that, whilst no additional pressure was exerted in relation to the gifts, they had been made subject to an undue weight of influence. In passing, it may be noted that the judge observed that “*the influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful*”. Nor, indeed, is there a need to show that the wrongdoer cheated the victim<sup>20</sup>

In England and Wales, “undue influence” has traditionally been divided into ‘actual’ and ‘presumed’ undue influence, but in reality just a question of fact as to whether the transaction was a result of undue influence.<sup>21</sup>

- ‘Actual’ undue influence arises where e.g. blackmail or coercion can be shown;
- ‘Presumed’ undue influence is an evidential presumption arising where:
  - There is relationship of influence between person and the other exerting the claimed influence; and
  - The impugned transaction is one that calls for explanation.

At that point, absent satisfactory explanation of the full exercise of the will of the claimant as a result of full, free and informed thought, the court will find that transaction can only have been procured by undue influence

The courts have developed special classes of relationships within which a relationship of influence will be presumed. They have also been willing to find relationships in other cases, two of which may seem of particular relevance for present purposes being:

- *Hackett v Crown Prosecution Service* [2011] EWHC 1170 (Admin), where a relationship of presumed influence was found between a son and his mother, where the son had been given a power of attorney and the mother was “deaf, dumb, barely educated and illiterate” and was reliant on the son to manage her affairs and physically care for her; and
- *Williams v Williams* [2003] WTLR 1371: where a person had an intellectual disability, had recently lost his mother, had turned to his brother for company and support, had no other close relationships and so “*reposed a high degree of trust and confidence in [his brother] in relation to his affairs*”.

### *Unconscionable transactions*

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<sup>20</sup> See e.g. *Niersmans v Pesticcio* [2004] EWCA Civ 37.

<sup>21</sup> Another way of putting it is the divide between (i) overt persuasion and (ii) failure to protect from a relationship of influence and a transaction calling for an explanation.



A linked, but conceptually different, concept at common law is that of unconscionable transactions. This doctrine has developed differently in different common law countries. In England and Wales, the three key requirements are that:

- A person is suffering from a particular kind of vulnerability;
- The terms of the transaction are oppressive to the person;
- The other knowingly took advantage of the vulnerability

In England and Wales, the scope of vulnerability has been narrowly defined, to include illiteracy, lack of education, age and poverty. A more expansive view has been taken in other jurisdictions – including (for my part promisingly) a recognition of situational vulnerability. Two examples suffice:

- *Blomley v Ryan* (1956) 99 C.L.R. 362 (Australia): vendor of land had a fondness for alcohol and was supplied with some by the purchasers at the meeting where the sale was concluded. The sale was set aside even though the vendor knew what he was doing.
- *Louth v Diprose* (1993) 175 C.L.R. 621 (Australia) an infatuated lover had his purchase of a house for the object of his affections set aside. The court found that the woman knowingly took advantage of the claimant's infatuation to accept gifts from him when in dire financial trouble, and falsely manufactured a threat of homelessness arising out of the disintegration of the marriage of her sister and brother-in-law, from whom she was renting the property the claimant bought for her.

It seems to me that there is merit in exploring these areas further to allow suitably tailored individual responses to particular cases, although both the language of and – importantly – the mindset of those applying the law will need to evolve so as to place the focus primarily upon the actions of the other party to the contract, rather than the individual with the disability. One step that will need to be considered and may assist is as to the role of presumptions. It may well be, for instance, that it is possible to establish a statutory presumption requiring the other party to justify and therefore to 'save' contracts which arise out of situations where a prima facie case (i.e. a real issue) has been raised that a contract has been entered into what might broadly be termed exploitative circumstances. There will also need to be more detailed examination as to whether the other party's unacceptable conduct needs to be active, or can it be passive – i.e. failing to take (objectively) necessary steps to prevent an individual from entering into an obviously unfavourable contract.<sup>22</sup>

I note that adopting these approaches will always require an element of external judgment (in the sense both of analysis and formation of normative views) as to the circumstances surrounding the formation of the contract in question and for the consequences for the individual. However, for my part, I have no difficulty with that so long as those applying the

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<sup>22</sup> See for this, J. Morgan, *Great Debates in Contract Law* (London: Palgrave, 2nd edn, 2015)

law do so from a perspective which is properly informed by the balance between the various rights at play framed, and in part defined, by the CRPD.<sup>23</sup>

This approach feeds through, similarly, into consumer protection matters that I address in the next section.

I have not so far touched upon the extent to which it is possible for the person to pray in aid their own lack of (mental) capacity (or, in the formulation set out above, understanding and intention) to exit a contract, either themselves at a point when they have gained or regained that capacity/understanding and intention or through a supporter. At present in England and Wales, an individual lacking the requisite mental capacity can avoid the resulting contract if they can show that the other party knew<sup>24</sup> or ought to have known that was the case.<sup>25</sup>

It seems to me that a provision should be preserved as a safeguard against abuse and exploitation, not least to cater for the position where it is only with assistance that a person is later led to understand the true position (and where no steps had been taken prior to the conclusion of the contract to provide the individual with appropriate support). However, both so as to maintain fidelity with the principles of the CRPD and the broader requirement that, in general, contracts should be final and certain, it seems to me that recourse to such should only be allowed in a narrow range of cases, and caution should be exercised against allowing it in situations where (in fact) the person did understand and form the requisite intention but now regrets their decision.

One issue that arises in such a case is as to the burden of proof (as this is likely to go, amongst other things, to the expense and likely complexity of any proceedings to exit contracts on this basis). Should it be for the person asserting their own lack of understanding/intention to prove this (or to have it proved on their behalf)? Or should it be for them to raise a *prima facie* case (i.e. raise a real issue) as to whether this was the case, and for the other party to establish that they in fact had the requisite understanding/intention. There are respectable arguments either way, but in part because I see this is as a situation which will usually arise out of one where there is a suggestion that the other party in some way took advantage of the individual's circumstances, it seems to me that it is likely to be proper to require them to establish why it is that the individual should be held to the contract.

The position in civil law countries is on one view simpler because the contract will be void from the outset, whether or not the other party knew the position, on the basis that the individual never had the requisite *animus contrahendi* on the part of both parties, i.e. the voluntary intent to enter into a binding contract at the time of signing. The burden of proof lies on the individual who wishes to declare the contract void. On one view, whilst this doctrine provides a 'fail safe' against the situation where an individual has in essence had a contract 'forced' upon them despite a lack of the necessary support, my instinctive reaction is that the doctrine feeds into the assumption that persons with disabilities are unable to understand or form the intention to

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<sup>23</sup> The key balance here between those contained in Article 12 and Article 16(1).

<sup>24</sup> *Imperial Loan v Stone* [1892] 1 QB 599.

<sup>25</sup> *Dunhill v Burgin* [2014] UKSC 18.

enter into contracts. For my part, it seems to me that harmonising as between common law and civil law in this regard along the lines set out above balances the position more appropriately.

Finally, the obvious corollary of the position developed above in relation to entry into contracts should be set out. If the other contracting party is able to establish – in a position where the contract is challenged (by anyone) that the supported individual entered a contract with the requisite level of support and there were no other vitiating factors such as abuse or undue influence – then the contract must stand as valid and the individual in question must be held to it.

### *Conclusion*

Development of the law in this area will have to proceed with care as we will be walking a tightrope between making it easier to exit contracts in circumstances where they have been entered into in questionable circumstances and making exit so easy as to render it less attractive for other parties to enter into transactions in the first place. Further, it will always be necessary to think – practically – about any remedies can be accessed by (or on behalf of the individual). If they are too complex, expensive, and time-consuming, then the reality is that they will not be accessed and will serve no purpose. It should always be recognised that after the event ‘untangling’ is never as desirable as ensuring the delivery of appropriate support and (where necessary) protection prior to the conclusion of the contract.

### **Consumer protection**

Many countries have and are developing legislation specifically devoted to consumer protection. Consumer contracts are ones in which one party is a private entity that buys a property, product or service for personal needs (i.e., not for business), and the other party is a commercial entity. Thus, a lease between two private individuals would not be considered a consumer agreement, but a lease from an apartment hotel would be, since the latter rents out apartments as part of its business. The purpose of consumer laws is to afford additional protection beyond the general protection afforded by contract law, in order to bridge the inherent power gap between the private consumer and commercial entities.

Intelligent use of consumer protection laws affords much more effective protection than contract law for a number of reasons:

1. Protections in consumer law are usually based on simple and clear rules, unlike contract law protections, which are more subject to legal interpretation.
2. There is usually a simple judicial procedure for conducting proceedings against a commercial entity that violates the rights of the consumer.
3. In many countries there are organisations which assist citizens to exercise their consumer rights.

There are different kinds of consumer protections, and each country has its own arrangements. For our purposes, one of the most relevant rights regarding consumer protection laws is the right to reconsider, which appears in different forms in many legal systems. It is often possible to return a product purchased in a consumer transaction within a specified time, because the buyer has had a change of heart. There are usually conditions that must be met in order to cancel the transaction – for example, the product must not have been used and must be returned within the time determined by law. Further, products below a certain price cannot often be returned. The advantage of this protection is that the buyer does not have to prove that there has been a misunderstanding, exploitation, or an act of deliberate misrepresentation in order to return the item. Essentially, the buyer does not have to prove anything, and the change of heart does not have to be based on any rational explanation. Let us take, for example, individuals (with or without a disability) who purchase subscriptions to a fitness centre. They are entitled to change their minds and ask to cancel the subscription, whether it is because they personally had a change of heart or because they were persuaded by others to cancel it.

In sum, there is great potential in consumer laws to resolve difficulties that arise regarding contractual relations. Several constituencies will benefit from increasing protections in this sphere, including elderly people, who are often vulnerable to financial exploitation. Developing additional protective measures in the framework of consumer laws should be considered to increase their effectiveness, such as fast tracks for investigating consumer claims.

In this regard,<sup>26</sup> it is perhaps important to highlight the steps that have already been taken by the European Union in the form of the Unfair Commercial Practices Directive 2005 ('UCPD').<sup>27</sup> Article 5(1) of the Directive prohibits unfair commercial practices. An unfair commercial practice is one that is contrary to the requirements of professional diligence, materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers. Importantly, Article 5(3)<sup>28</sup> makes clear that “commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.”

In guidance issued in May 2016<sup>29</sup> on the implementation/application of the UCPD the European Commission addressed further the question of vulnerability. The guidance drew

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<sup>26</sup> And with due thanks to Professor Fumie Suga for highlighting this to me in the course of her presentation at the 4<sup>th</sup> World Guardianship Congress in Erkner in September 2016.

<sup>27</sup> Directive 2005/29/EC, enacted in English law by the Consumer Protection from Unfair Trading Regulations 2008, as amended. See also – more recently – the Consumer Protection Act 2015.

<sup>28</sup> Mirroring Recital 19.

<sup>29</sup> [http://ec.europa.eu/justice/consumer-marketing/files/ucp\\_guidance\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf)

upon the Commission's study on consumer vulnerability across key markets,<sup>30</sup> noting that the study established a broad definition, where being more susceptible to marketing practices represents one of five "dimensions" of consumer vulnerability. The study defined the "vulnerable consumer" as:

*"A consumer, who, as a result of socio-demographic characteristics, behavioural characteristics, personal situation or market environment:*

- o Is at higher risk of experiencing negative outcomes in the market;*
- o Has limited ability to maximise his/her well-being;*
- o Has difficulty in obtaining or assimilating information;*
- o Is less able to buy, choose or access suitable products; or*
- o Is more susceptible to certain marketing practices".*

Importantly, the study – and the Guidance – recognises the reality that:

*“[m]ost consumers show signs of vulnerability in at least one dimension, while a third of consumers show signs of vulnerability in multiple dimensions. Less than a fifth of the consumers interviewed show no signs of vulnerability.*

*As consumer vulnerability is multi-dimensional, so is the impact of personal characteristics on the likelihood of being vulnerable as a consumer. For example, characteristics like age and gender can increase vulnerability in some dimensions, but not in others.”*

More sophisticated understandings of vulnerability – and in particular of situational vulnerability – will assist in the development of consumer protection law and practice that can do more of the ‘heavy lifting’ as regards alleviating the concern as to avoiding harm and exploitation that – to date and (from my perspective) understandably - motivated many of the restrictions placed around contract law.

Consumer protection is not a panacea. For instance, it does not assist where an individual has already used the product or service, or when the contract is not for consumer purposes, but, for example, an agreement to serve as a guarantor or an agreement between two private entities. However, and as already recognised by many,<sup>31</sup> it is a vitally important part of the bigger picture within which we need to place contract law.

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<sup>30</sup> Study on consumer vulnerability in key markets across the European Union (EACH/2013/CP/08) - see: [http://ec.europa.eu/consumers/consumer\\_evidence/market\\_studies/vulnerability/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/market_studies/vulnerability/index_en.htm)

<sup>31</sup> Including in Attorney Tolub's original report, the work of Michael Bach (see, for instance, his presentation on legal capacity available via <http://www.inclusionireland.ie/capacity>) and the work of Professor Suga noted above.

## **Conclusion**

The field of contracts is in need of new and creative thinking. Some modest suggestions are outlined in the paper above. Much of that thinking is as much about practice and education as it is about law. Ultimately, some of that thinking is so fundamental that it should not be left to the lawyers alone. To ask what is required to enter into a binding agreement between two people is to ask a question that goes to the very heart of the constructs upon which societies are currently built.

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**November 2016**

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