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Chapter 1
Introduction

1.1 Introduction

> If the 'law of contract' were not already entrenched in the traditions of legal education, would anyone organise a course around it, let alone produce books expounding it? (Wightman (1989) 'Reviving Contract', *Modern Law Review*, **52**, 116)

The fact that a lawyer can ask such a question would, no doubt, confound laymen. Yet, it is true that the scope, the basis, the function and even the very existence of the law of contract are the subject of debate and controversy among academic lawyers.

But such questioning seems absurd. After all, we enter into contracts as a regular part of life, and generally we experience no difficulty in so doing. Simple cases include the purchase of a morning newspaper or the purchase of a bus ticket when travelling to work. What doubt can there possibly be about the existence of such contracts or their basis? However, behind the apparent simplicity of these transactions, there lurks a fierce controversy. In an introductory work of this nature, we cannot give full consideration to these great issues of debate. The function of this chapter is simply to identify some of these issues so that the reader can bear them in mind when reading the ensuing chapters and to enable the reader to explore them further in the readings to which I shall make reference.

1.2 The scope of the law of contract

A good starting point is the scope of the law of contract. Contracts come in different shapes and sizes. Some involve large sums of money, others trivial sums. Some are of long duration, while others are of short duration. The content of contracts varies enormously and may include contracts of sale, hire-purchase, employment and marriage. Nevertheless, we shall not be concerned with all such contracts in this book. Contracts of employment, marriage contracts, hire-purchase contracts, consumer credit contracts, contracts for the sale of goods, contracts for the sale of land, mortgages and leasehold agreements all lie largely outside the scope of this book. Such contracts have all been the subject of distinct regulation and are dealt with in books on employment law, family law, consumer law, commercial law, land law and landlord and tenant law, respectively. At this stage, you might be forgiven if you were to ask the question: If this book is not about these contracts, what is it about, and what is its value?

The answer to the first part of such a question is that this book is concerned with what are called the 'general principles' of the law of contract, and these general principles are usually derived from the common law (or judge-made law). Treatises on the general principles of the law of contract are of respectable antiquity in England and can be traced back to Pollock (1875) and Anson (1879). This tradition has been maintained today in works such as Treitel (2007), Anson (2010) and Cheshire and others (2007). One might have expected that these treatises would gradually disappear in the light of the publication of books on, for example, the contract of employment or the contract of hire purchase, which subject the rules relating to such contracts to close examination. Yet,

textbooks on the 'general principles' of the law of contract have survived and might even be said to have flourished.

The existence of such general principles has, however, been challenged by Professor Atiyah (1986b), who maintains that these 'general' principles 'remain general only by default, only because they are being superseded by detailed *ad hoc* rules lacking any principle, or by new principles of narrow scope and application'. Atiyah argues that 'there is no such thing as a typical contract at all'. He maintains (1986a) that it is 'incorrect today to think of contract law as having one central core with clusters of differences around the edges'. He identifies the classical model of contract as being a discrete, two-party, commercial, executory exchange but notes that contracts can be found which depart from each feature of this classical model. Thus, some contracts are not discrete but continuing (landlord and tenant relationships), some are not two-party but multiparty (the contract of membership in a club), some are not commercial but domestic (marriage), some are not executory (unperformed) but executed (fully performed) and finally some do not depend upon exchange, as in the case of an enforceable unilateral gratuitous promise. Atiyah concludes by asserting that we must 'extricate ourselves from the tendency to see contract as a monolithic phenomenon'.

Atiyah uses this argument in support of a wider proposition that contract law is 'increasingly merging with tort law into a general law of obligations'. But one does not have to agree with Atiyah's wider proposition to accept the point that the resemblance between different types of contract may be very remote indeed. A contract of employment is, in many respects, radically different from a contract to purchase a chocolate bar. The considerations applicable to a contract between commercial parties of equal bargaining power may be very different from those applicable to a contract between a consumer and a multinational supplier (see Chapter 17).

This fragmentation of the legal regulation of contracts has reached a critical stage in the development of English contract law. The crucial question which remains to be answered is: do we have a law of contract or a law of contracts? My own view is that we are moving slowly in the direction of a law of contracts as the 'general principles' decline in importance.

Given this fragmentation, what is the value of another book on the general principles of contract law? The principal value is that many of the detailed rules relating to specific contracts have been built upon the foundation of the common law principles. So it remains important to have an understanding of the general principles before progressing to study the detailed rules which have been applied to particular contracts. The general principles of formation, content, misrepresentation, mistake, illegality, capacity, duress and discharge apply to all contracts, subject to statutory qualification. These principles therefore remain 'general', but only 'by default'.

1.3 The basis of the law of contract

The basis of the law of contract is also a matter of considerable controversy. Atiyah has written (1986e) that 'modern contract law probably works well enough in the great mass of circumstances but its theory is in a mess'. There are many competing theories which seek to explain the basis of the law of contract (on which see generally Smith, 2004).

The classical theory is the will theory. Closely associated with *laissez-faire* philosophy, this theory attributes contractual obligations to the will of the parties. The law of contract is perceived as a set of power-conferring rules which enable individuals to enter into

agreements of their own choice on their own terms. Freedom of contract and sanctity of contract are the dominant ideologies. Parties should be as free as possible to make agreements on their own terms without the interference of the courts or Parliament, and their agreements should be respected, upheld and enforced by the courts. But today the will theory has been largely discredited. It is not possible to attribute many of the doctrines of contract law to the will of the parties. Doctrines such as consideration, illegality, frustration and duress cannot be ascribed to the will of the parties, nor can statutes such as the Unfair Contract Terms Act 1977.

The will theory has, however, been revived and subjected to elegant refinement by Professor Fried (1981). Fried maintains that the law of contract is based upon the 'promise-principle', by which 'persons may impose on themselves obligations where none existed before'. The source of the contractual obligation is the promise itself. But, at the same time, Fried concedes that doctrines such as mistake and frustration (Chapter 14) cannot be explained on the basis of his promise-principle. Other non-promissory principles must be invoked, such as the 'consideration of fairness' or 'the encouragement of due care'.

But Fried's theory remains closely linked to *laissez-faire* ideology. Fried maintains that contract law respects individual autonomy and that the will theory is 'a fair implication of liberal individualism'. He rejects the proposition that the law of contract is an appropriate vehicle for engaging in the redistribution of wealth. But his theory is open to attack on two principal grounds.

The first is that it is difficult to explain many modern contractual doctrines in terms of liberal individualism or *laissez-faire* philosophy. The growth of standard form contracts and the aggregation of capital within fewer hands has enabled powerful contracting parties to impose contractual terms upon consumers and other weaker parties. The response of the courts and Parliament has been to place greater limits upon the exercise of contractual power. Legislation has been introduced to regulate employment contracts and consumer credit contracts in an effort to provide a measure of protection for employees and consumers. Such legislation cannot be explained in terms of *laissez-faire* ideology, nor can the expansion of the doctrines of duress and undue influence, or the extensive regulation of exclusion clauses which Parliament has introduced (see Chapter 11). Conceptions of fairness seem to underpin many of the rules of contract law (see Chapter 17). Such departures from the principles of liberal individualism have led some commentators to argue that altruism should be recognised as the basis of contract law (Kennedy, 1976), while others have argued that the law of contract should have as an aim the redistribution of wealth (Kronman, 1980). We shall return to this issue in Chapter 17.

A second attack on the promise-principle has been launched on the ground that, in many cases, the courts do not uphold the promise-principle because they do not actually order the promisor to carry out his promise. The promisee must generally content himself with an action for damages. But, as we shall see (in Chapter 20), the expectations engendered by a promise are not fully protected in a damages action. One of the principal reasons for this is the existence of the doctrine of mitigation (see Section 20.10). Suppose I enter into a contract to sell you 10 apples for £2. I then refuse to perform my side of the bargain. I am in breach of contract. But you must mitigate your loss. So you buy 10 apples for £2 at a nearby market. If you sue me for damages, what is your loss? You have not suffered any, and you cannot enforce my promise. So how can it be said that my promise is binding if you cannot enforce it? Your expectation

of profit may be protected but, where that profit can be obtained elsewhere at no loss to you, then you have no effective contractual claim against me. Your expectations have been fulfilled, albeit from another source.

Although you cannot enforce my promise, it is very important to note that in our example you suffered no loss, and I gained no benefit. Let us vary the example slightly. Suppose that you had paid me in advance. The additional ingredients here are that you have acted to your detriment in reliance upon my promise, and I have gained a benefit. Greater justification now appears for judicial intervention on your behalf. Can it therefore be argued that the source of my obligation to you is not my promise, but your detrimental reliance upon my promise or your conferment of a benefit upon me in reliance upon my promise? Atiyah has written (1986b) that 'wherever benefits are obtained, wherever acts of reasonable reliance take place, obligations may arise, both morally and in law'. This argument is one of enormous significance. It is used by Atiyah (1979) in an effort to establish a law of obligations based upon the 'three basic pillars of the law of obligations, the idea of recompense for benefit, of protection of reasonable reliance, and of the voluntary creation and extinction of rights and liabilities'. The adoption of such an approach would lead to the creation of a law of obligations and, in consequence, contract law would cease to have a distinct identity based upon the promise-principle or the will theory (see further Section 1.4). This is why this school of thought has been called 'the death of contract' school (see Gilmore, 1974). We shall return to these arguments at various points in this book, especially in Chapters 20 and 21.

My own view is that Fried correctly identifies a strong current of individualism which runs through the law of contract. A promise does engender an expectation in the promisee and, unless a good reason to the contrary appears, the courts will call upon a defaulting promisor to fulfil the expectation so created. But the critics of Fried are also correct in their argument that the commitment to individual autonomy is tempered in its application by considerations of fairness, consumerism and altruism. These conflicting ideologies run through the entire law of contract. (For a fuller examination of these ideologies under the titles of 'Market-Individualism' and 'Consumer-Welfarism' see Adams and Brownsword, 1987.) The law of contract is not based upon one ideology; both ideologies are present in the case law and the legislation. Indeed, the tension between the two is a feature of the law of contract. Sometimes 'market-individualism' prevails over 'consumer-welfarism'; at other times 'consumer-welfarism' triumphs over 'market-individualism'. At various points in this book, we shall have occasion to note these conflicting ideologies and the tensions which they produce within the law.

1.4 Contract, tort and restitution

A further difficulty lies in locating the law of contract within the spectrum of the law of civil obligations. Burrows (1983) has helpfully pointed out that the law of obligations largely rests upon three cardinal principles. The first principle is that expectations engendered by a binding promise should be fulfilled. Upon this principle is founded the law of contract. The second principle is that compensation must be granted for the wrongful infliction of harm. This principle is reflected in the law of tort. A tort is a civil wrong, such as negligence or defamation. Let us take an example to illustrate the operation of the law of tort. You drive your car negligently and knock me down. You have committed the tort of negligence. Harm has wrongfully been inflicted upon me,

and you must compensate me. The aim of the award of compensation is not to fulfil my expectations (contrast Stapleton, 1997, who maintains that the aim of an award of damages in tort is to protect the claimant's 'normal expectancies', namely to re-position the claimant to the destination he would normally have reached by trial had it not been for the tort). The aim is to restore me to the position which I was in before the accident occurred; to restore the 'status quo' or to protect my 'reliance interest'.

The third principle is that unjust enrichments must be reversed. This principle is implemented by the law of restitution or, to use the terminology which is gradually gaining acceptance, the law of unjust enrichment. There are three stages to a restitutionary claim. First, the defendant must be enriched by the receipt of a benefit; second, that enrichment must be at the expense of the claimant; and, finally, it must be unjust for the defendant to retain the benefit without recompensing the claimant. The last stage does not depend upon the unfettered discretion of the judge; there are principles to guide a court in deciding whether, in a particular case, it is unjust that the defendant retain the benefit without recompensing the claimant (see Goff and Jones, 2007 and Burrows, 2010). The classic restitutionary claim arises where I pay you money under a mistake of fact. I have no contractual claim against you because there is no contract between us. Nor have you committed a tort. But I do have a restitutionary claim against you. You are enriched by the receipt of the money, that enrichment is at my expense, and the ground on which I assert that it is unjust that you retain the money is that the money was paid under a mistake of fact.

Contract, tort and restitution therefore divide up most of the law based upon these three principles, and they provide a satisfactory division for the exposition of the law of obligations. This analysis separates contract from tort and restitution on the ground that contractual obligations are voluntarily assumed, whereas obligations created by the law of tort and the law of restitution are *imposed* upon the parties by the operation of rules of law. Occasionally, however, these three principles overlap, especially in the context of remedies (Chapter 21). Overlaps will also be discussed in the context of misrepresentation (Chapter 13) and third-party rights (Chapter 7).

Finally, it must be noted that these divisions are not accepted by writers such as Professor Atiyah. His recognition of reliance-based and benefit-based liabilities cuts right across the three divisions. The writings of Atiyah deserve careful consideration, but they do not represent the current state of English law. Although we shall make frequent reference to the writings of Atiyah, we shall not adopt his analysis of the law of obligations. Instead, it will be argued that the foundation of the law of contract lies in the mutual promises of the parties and, being founded upon such voluntary agreement, the law of contract can, in the vast majority of cases, be separated from the law of tort and the law of restitution.

1.5 Contract and empirical work

Relatively little empirical work has been done on the relationship between the rules that make up the law of contract and the practices of the community which these rules seek to serve. The work that has been done (see, for example, Beale and Dugdale, 1975 and Lewis, 1982) suggests that the law of contract may be relied upon in at least two ways. The first is at the planning stage. The rules which we shall discuss in this book may be very important when drawing up the contract and in planning for the future. For example, care must be taken when drafting an exclusion clause to ensure, as far as

possible, that it is not invalidated by the courts (see Chapter 11). Secondly, the law of contract may be used by the parties when their relationship has broken down. Here the rules of contract law generally have a less significant role to play than at the planning stage. The rules of contract law are often but one factor to be taken into account in the resolution of contractual disputes. Parties may value their good relationship and refuse to soil it by resort to the law. Litigation is also time-consuming and extremely expensive and so the parties will frequently resort to cheaper and more informal methods of dispute resolution. In the remainder of this book, we shall discuss the rules that make up the law of contract, but it must not be forgotten that in the 'real world' the rules of contract law may be only one of many factors taken into account by the parties on the breakdown of a contractual relationship. This is not to suggest that there is no connection between the formal rules of the law of contract and the 'real world' of the parties' relationship. In many cases, the relationship between the parties is governed both by informal understandings (or 'relational norms') and by the formal contract document and the rules of contract law, with the influence of these different factors depending upon the circumstances of the individual case (Mitchell, 2009).

1.6 A European contract law?

The subject-matter of this book is the English law of contract, and so the focus is upon the rules that make up the English law of contract. But it should not be forgotten that we live in a world which is becoming more interdependent and where markets are no longer local or even national but are, increasingly, international. The creation of world markets may, in turn, encourage the development of an international contract and commercial law. There are two dimensions here.

The first relates to our membership of the European Union; the second is the wider move towards the creation of a truly international contract law. The first issue relates to the impact which membership of the European Union is likely to have on our contract law. As yet, membership has had relatively little direct impact, but this is unlikely to remain the case. An example of its potential impact is provided by the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083), which gave effect to an EC Directive on Unfair Terms in Consumer Contracts (93/13/EEC). The Regulations give to the courts greater powers to strike down unfair terms in consumer contracts which have not been individually negotiated. The purpose which lay behind the Directive, as stated in Article 1, was 'to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in consumer contracts'. The Directive and the Regulations will be discussed in more detail in Chapter 17, but the issue which concerns us at this point is the potential which EC law has to intrude into domestic contract law. Some clue as to the likely reach of EC law can be found in Article 95 of the Treaty establishing the European Community, which gives the Council of the European Community the power to adopt measures which have as their object 'the establishment and functioning of the internal market'. This Article formed the legal basis for the Unfair Terms Directive, as can be seen from its preamble where it is stated:

> whereas in order to facilitate the establishment of a single market and to safeguard the citizen in his role as consumer when buying goods and services by contracts which are governed by the laws of other Member States than his own, it is essential to remove unfair terms from those contracts.

It can be argued that differences between the substantive laws of Member States do act as a restriction on intra-Community trade because contracting parties are generally unsure of the legal rules which prevail in the different Member States and are therefore more hesitant about contracting with persons in other Member States. For example, an English supplier selling goods to an Italian customer will generally want to ensure that the contract is governed by English law because he is ignorant of the legal position in Italy. Conversely, the Italian customer will wish to ensure that the contract is governed by Italian law for the reason that he does not know the law in England. This gives rise to what lawyers call the 'conflict of laws'. If the law was to be the same in each Member State, these problems would not arise, and a further barrier to intra-Community trade would be removed.

The Unfair Terms Directive remains the principal example of the intervention of EC law into domestic contract law. But we could be on the verge of a much more expansive role for EC law and its institutions in the regulation of contract law. On 1 July 2010, the European Commission issued a Green Paper on 'policy options for progress towards a European Contract Law for consumers and businesses' (COM (2010) 348 final). This is the latest stage of a process which effectively began on 13 July 2001 when the European Commission issued a Communication on European Contract Law to the Council and to the European Parliament. The Communication set out four options for the future. These options were as follows: (i) no further EC action, (ii) promotion of the development of common contract law principles leading to more convergence of national laws, (iii) improvement of the quality of European legislation which is already in place and (iv) adoption of new comprehensive legislation at EC level. In its Action Plan, published in February 2003, the Commission proposed to improve the quality of existing and future European legislation, produce a common frame of reference (CFR) which should contain common rules and terminology in the area of European contract law, promote the elaboration of EU-wide standard contract terms and reflect further on the production of more far-reaching reforms. Then on 11 October 2004, the Commission issued a further Communication on a European Contract Law and the Revision of the *Acquis*: The Way Forward (COM (2004) 651 Final). In this document, the Commission stated that it would 'pursue the elaboration of the CFR'. The Draft Common Frame of Reference ('DCFR'), prepared by the Study Group on a European Civil Code under the chairmanship of Professor Christian von Bar, was completed in late 2008 and published in 2009 (see Study Group on a European Civil Code, 2009). The DCFR has proved to be a controversial document. While it has received some academic criticism (see, for example, Eidenmüller and others, 2008), its influence on the 2010 Green Paper is clear. Thus, the Green Paper states that the Commission has 'set up an Expert Group to study the feasibility of a user-friendly instrument of European Contract Law, capable of benefiting consumers and businesses which, at the same time, would provide for legal certainty.' The Expert Group will also 'assist the Commission in selecting those parts of the DCFR which are directly or indirectly related to contract law, and in restructuring, revising and supplementing the selected provisions.'

A range of options is currently on the table. At one end of the spectrum is a 'non-binding instrument, aiming at improving the consistency and quality of EU legislation.' A non-binding instrument is one which does not have the force of law. A possible model is provided by the Principles of European Contract Law which have now been incorporated in a revised form in the DCFR. The Principles were drawn up by the Commission on European Contract Law (a non-governmental body of lawyers drawn

from the Member States). The Principles were divided into seventeen chapters: general provisions, formation, authority of agents, validity, interpretation, contents and effects, performance, non-performance and remedies in general, particular remedies for non-performance, plurality of parties, assignment of claims, substitution of new debtor: transfer of contract, set-off, prescription, illegality, conditions and capitalisation of interest. Reference will be made to the Principles at various points in this book. Another version of a non-binding instrument is the so-called 'toolbox' which could be used by the Commission 'when drafting proposals for new legislation or when reviewing existing measures.' A 'toolbox' of this nature has the potential to improve the coherence of European contract law and to improve the quality of European legislation.

At the other end of the spectrum is 'a binding instrument which would set out an alternative to the existing plurality of national contract law regimes, by providing a single set of contract law rules.' The most radical option is a regulation establishing a European Civil Code, the scope of which would extend beyond contract law. Only slightly less radical is a regulation establishing a European Contract Law which 'could replace the diversity of national laws with a uniform European set of rules, including mandatory rules affording a high level of protection for the weaker party.' While this displacement of national rules of contract law would promote the cause of the harmonization of contract law, it is unlikely that many European States will be willing to take this step in the short to medium term. A further alternative would be to establish a Directive on European Contract Law which could harmonise national contract law on the basis of minimum common standards. Such a Directive might be of particular benefit to consumers, but it is probably an awkward half-way house that will not find general acceptance. For some, it would be too limited because it does 'not necessarily lead to uniform implementation and interpretation of the rules', while for others the setting of minimum common standards would represent an unwarranted intrusion into national contract law.

The final option canvassed in the Green Paper is a regulation setting up an optional instrument of European Contract Law. An optional instrument would exist alongside the national law of Member States and would give to contracting parties the choice between domestic (or national) law and the optional instrument. Thus, it would 'insert into the national laws of the 27 Member States a comprehensive and, as much as possible, self-standing set of contract law rules which could be chosen by the parties as the law regulating their contracts.' The setting up of such a parallel system would not be without difficulty. It would add another level of complexity (given that the optional instrument would exist alongside the various domestic laws of Europe), and it would only have effect if selected by the parties. Contracting parties are probably more likely to select national law in preference to a new, optional instrument. But, if progress is to be made towards the creation of a European contract law, the optional instrument is probably an essential first step on that road. At the time of writing, it remains unclear whether this first step will be taken or whether the option which will command the greatest support will be the further development of a non-binding instrument. But whichever option is chosen, it would seem that we are still a long way from a binding European Contract Law which would replace the national laws of the various European States. The future of English contract law is secure for at least the medium term.

1.7 An international contract law?

A broader vision of the future is concerned with the internationalisation of contract law. There are, essentially, two different ways of proceeding. The first is the production of non-binding statements of principle or model contracts; the second is the attempt to impose mandatory uniform rules on the international community.

The first category consists of non-binding statements of principle and model contracts or standard contract terms. We shall give one example from each category. The most important example of a non-binding statement of principles is to be found in the UNIDROIT Principles of International Commercial Contracts. The Principles were first published in 1994 and were republished in expanded form in 2004. The 2004 edition of the Principles consists of some 185 Articles, and each Article is accompanied by a brief commentary setting out the reasons for its adoption and its likely practical application (see further Vogenauer and Kleinheisterkamp, 2009). These Articles are not intended to be imposed upon the commercial community in the form of mandatory rules of law. They are non-binding principles which, it is hoped, parties to international commercial contracts will incorporate into their contracts either as a set of contract terms or as the law applicable to the contract. While national courts are presently either unwilling or unable to recognise the Principles as a valid choice of law and thus the law applicable to the contract, the same cannot be said of arbitrators. The UNIDROIT Principles now have a significant role to play in international commercial arbitration. They are particularly useful where parties from different parts of the world are unable to agree on the law applicable to the contract: the UNIDROIT Principles offer a neutral set of Principles which may be acceptable to both parties to the contract.

Standard contract terms also have an important role to play in international commerce. Two prominent examples are the INCOTERMS (a set of standard trade terms sponsored by the International Chamber of Commerce) and the FIDIC (Fédération Internationale des Ingénieurs-Conseils) Conditions of Contract for Works of Civil Engineers, which have achieved widespread acceptance in international sales and international construction contracts respectively. There can be little to object to in such developments because they seek to bring about harmonisation through persuasion rather than imposition. Their alleged weakness is, however, the fact that they are not mandatory. They can therefore be ignored or amended by contracting parties and thus are a rather uncertain method of seeking to achieve uniformity.

In an effort to ensure a greater degree of uniformity, it has been argued that there is greater scope for mandatory rules of law. But the attempt to impose uniform terms on the commercial community has given rise to considerable controversy. The most notable example of an international convention in this category is provided by the United Nations Convention on Contracts for the International Sale of Goods, commonly known as the Vienna Convention or CISG. Unlike earlier conventions, the Vienna Convention does not enable states to ratify the Convention on terms that it is only to be applicable if the parties choose to incorporate it into their contract. It provides that, once it has been ratified by a state, the Convention is applicable to all contracts which fall within its scope (broadly speaking, it covers contracts for the international sale of goods) unless the contracting parties choose to contract out of the Convention or of parts thereof. The Convention has been in force since 1988 and, although the United Kingdom has not yet ratified it, it has been ratified by many major trading nations, such as the United

States, France, Germany and China. Supporters of such Conventions argue that they promote the development of international trade by ensuring common standards in different nations. Contracting parties can then have greater confidence when dealing with a party from a different nation, and such uniformity should result in lower costs because there will be no need to spend time arguing about which law should govern the transaction, nor will there be any necessity to spend time and money seeking to discover the relevant rules which prevail in another jurisdiction.

But such Conventions have also been the subject of considerable criticism. It is argued that they do not achieve uniformity because national courts are likely to adopt divergent approaches to their interpretation (some courts adopting a literal approach, others a purposive approach). In this way, the aim of achieving uniformity will be undermined. The Vienna Convention took many years to negotiate and, even now, over 30 years after agreement was reached, it has not been adopted by all the major trading nations of the world. Furthermore, it is not at all clear how the Convention will be amended. The commercial world is constantly on the move, and the law must adapt to the changing needs of the market if it is to facilitate trade. An international code which is difficult to amend is unlikely to meet the demands of traders. It is also argued that such Conventions tend to lack clarity because they are drafted in the form of multicultural compromises in an effort to secure agreement and thus lack the certainty which the commercial community requires. Lord Hobhouse, writing extra-judicially, summed up these arguments when he wrote (1990) that:

> international commerce is best served not by imposing deficient legal schemes upon it but by encouraging the development of the best schemes in a climate of free competition and choice ... What should no longer be tolerated is the unthinking acceptance of a goal of uniformity and its doctrinaire imposition on the commercial community.

While these arguments have a great deal of force, they are not universally shared (for a reply, see Steyn, 1994) and it should be noted that they do not deny the value of internationally agreed standards. But it is suggested that they do show that we should proceed by way of persuasion rather than imposition. Attempts to draft international standard form contracts and non-binding statements of the general principles of contract law should be encouraged as they are most likely to produce uniform standards which will meet the needs of contracting parties and, in so doing, lower the cost of concluding international contracts.

1.8 The role of national contract law in a global economy

What is the likely role of national contract law in a global economy? This is not an easy question to answer. Much is likely to depend on the various projects currently in existence which aim to produce either a European or an international law of contract. If they are successful, the role for national contract law is likely to diminish considerably. On the other hand, if they are unsuccessful, the national laws of contract will continue to regulate the vast majority of contracts that are made. But it should not be thought that trade across national boundaries is a new thing. It is not. While the volume of such trade has increased significantly in recent years, international trade is not a new phenomenon. Indeed, many of the cases to be discussed in this book were litigated between parties who had no connection with England other than the fact that their contract was governed by English law (usually by virtue of a 'choice of law clause' in their contract). The explanation for the choice of English law as the governing law

is undoubtedly to be found in England's great trading history, which has been of great profit to the City of London and English law, if not to other parts of the United Kingdom. The commodities markets have had their centres in England for many years, and many contracts for the sale of commodities are governed by English law. London has also been an important arbitration centre, and a number of our great contract cases started life as arbitration cases which were then appealed to the courts via the stated case procedure, before the latter procedure fell into disrepute and was abolished in the Arbitration Act 1979. The fact that English contract law has had this 'global' influence in the past may make English lawyers reluctant to accede to attempts to create a European or an international law of contract: they may have too much to lose if English law diminishes in importance. Of course, much depends on the reasons why contracting parties choose English law as the governing law or choose to arbitrate in London. If the reason is to be found in the way in which English lawyers handle disputes or in procedural factors, then there is little for English lawyers to fear from the creation of a European or an international law of contract. But if parties choose English law because of the quality of the substantive law, then the City may well lose out if English contract law is to be abandoned at some future time in favour of some uniform law. The threat to national contract law in the short-to-medium term is relatively low, but in the longer term it is much harder to quantify, and the arguments for and against the adoption of a uniform law may be governed as much by economics and practical politics as the quality of the uniform law which is ultimately produced.

1.9 Contract law and human rights

One of the most significant events in our recent legal history is the enactment of the Human Rights Act 1998, which incorporates the European Convention on Human Rights into English law by creating 'Convention rights' which are enforceable in domestic law (Human Rights Act 1998, s 1). The impact which the rights contained in the Convention will have on the law of contract remains somewhat uncertain.

In this introductory chapter, there are two issues which are worthy of brief note. The first is that the Act makes it 'unlawful for a public authority to act in a way which is incompatible with a Convention right' (Human Rights Act 1998, s 6(1)). It therefore clearly applies as between a public authority and a natural or a legal person. But does the Act also have 'horizontal effect', that is to ask, does it apply between two private citizens or between an individual and a business?

The answer to this question is currently the subject of an extensive debate. It seems clear that the Act has some horizontal effect, in the sense that Convention rights can be invoked in litigation between private parties when seeking to interpret domestic legislation. It is more difficult to discern whether the Act has greater horizontal effect. Support for the proposition that it does may be found in the fact that section 6 includes 'a court or tribunal' within the definition of public authority. Given that it is unlawful for the courts, as a public authority, to act in a way which is incompatible with a Convention right, the courts may conclude that they must give effect to the Act even in litigation between two private individuals (where the issue between the parties is not one that relates to the interpretation of domestic legislation). On the other hand it can be argued that, while the court must not act in a way which is incompatible with a Convention right, given that the Convention does not apply against a private individual, a court cannot act incompatibly with a Convention right if it refuses to apply the Convention

in a claim against a private individual. While there remains considerable uncertainty in relation to the extent to which the Act is applicable in litigation between private individuals, there can be no doubt that, at the very least, the Act will apply to contracts entered into by public authorities.

The second question relates to the scope of the 'Convention rights' and the extent to which they may be violated by contracts or by the rules of contract law. Some examples are obvious. A contract of slavery would be a violation of Article 4 of the Convention, but English law already refuses to recognise the validity of such a contract. The difficult cases are going to be those rules of contract law which are currently valid but, in fact, can amount to a violation of a Convention right. At the moment, it is only possible to speculate as to which Convention rights may suddenly surface in contract litigation. The most obvious are perhaps Article 6 (which states that 'in the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'), Article 14 (which states that 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status') and Article 1 of the First Protocol (which states that 'every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'). So, attempts to expropriate contract rights or to deny to claimants the right to have their disputes resolved by a court of law may involve a violation of a Convention right.

Here it will suffice to give two examples of the potential impact of Convention rights on the law of contract. The first is the decision of the House of Lords in *Wilson v First County Trust Ltd (No. 2)* [2003] UKHL 40; [2004] 1 AC 816 in which their Lordships allowed an appeal from the decision of the Court of Appeal ([2001] EWCA Civ 633, [2002] QB 74). The Court of Appeal had made a declaration that section 127(3) of the Consumer Credit Act 1974 was incompatible with the rights guaranteed by Article 6(1) of the Convention and by Article 1 of the First Protocol. Section 127(3) renders an improperly-executed consumer credit agreement unenforceable by the creditor where the debtor does not sign a document which contains all the prescribed terms of the agreement. The Court of Appeal held that this absolute ban on the enforceability of the agreement was incompatible with the defendant pawnbroker's human rights. The problem identified by the Court of Appeal was that section 127(3) imposes an absolute ban on enforcement, and this was held to be a disproportionate response to the problems created by consumer credit agreements which are not in the prescribed form. In this respect, section 127(3) was contrasted with sections 127(1) and (2) of the 1974 Act, which give to the court a discretion to enforce a consumer credit agreement notwithstanding the failure to comply with formal requirements. The Court of Appeal stated that the contrast between sections 127(1) and 127(3) was 'striking', and they concluded that no reason had been advanced which could justify an 'inflexible prohibition' on the enforcement of such agreements when it was possible to regulate the issue by giving the court the power 'to do what is just in the circumstances of the particular case'.

The House of Lords held that the Court of Appeal had erred in concluding that section 127(3) was incompatible with Article 6(1) of the Convention. In so deciding, their

Lordships emphasised that Article 6(1) cannot be used in order to create a substantive civil right of action which otherwise has no basis in national law. The target of Article 6(1) is procedural bars on bringing claims to court. As Lord Nicholls recognised (at [35]): 'the distinction between the substantive content of a right and an unacceptable procedural bar to its enforcement by a court can give rise to difficulty in distinguishing the one from the other in a particular case.' But on the present facts, no such difficulty arose. Section 127(3) was a restriction on the scope of the right which the creditor acquired, and it did not bar access to the court in order to decide whether the case was caught by the restriction.

In relation to the claim that there had been a violation of Article 1 of the First Protocol, their Lordships concluded that Article 1 was applicable on the facts of the case but that it had not been breached. Importantly, the House of Lords concluded that the word 'possessions' includes contractual rights so that the deprivation of a contractual right may raise human rights issues in an appropriate case (see, for example, *Pennycook v Shaws (EAL) Ltd* [2004] EWCA Civ 100; [2004] Ch 296). On the facts, the majority concluded that section 127(3) did operate to deprive the creditor of his contractual rights in such a way as to trigger the operation of Article 1 but that on the facts there had been no breach. Section 127(3) was held to be a 'legitimate exercise in consumer protection'. Borrowers who fall within the scope of the Consumer Credit Act are often 'vulnerable' and do not bargain on an 'equal footing' with lenders. Parliament was entitled to conclude that the protection of such borrowers required the automatic invalidation of contracts which did not satisfy the requirements of the subsection in order to give lenders the strongest incentive to comply with its clear and transparent requirements. The fact that the aim could possibly have been achieved by conferring a discretion on the court to invalidate the contract could not be dispositive. The response of Parliament could not be said to be disproportionate to the policy which underpinned the legislation, and it did not amount to a breach of the Article.

The second example of the potential role of human rights law in the law of contract is provided by the law relating to the regulation of illegal contracts. The law currently refuses to enforce a contract which is illegal or which is contrary to public policy, and it also generally refuses to allow a party who has conferred a benefit on another party to an illegal contract to recover the value of the benefit so conferred. The reason for this is generally that the courts wish to deter parties from entering into illegal contracts (see further Sections 15.17 and 15.18). The law in this area is widely considered to be unsatisfactory, and the Law Commission have begun work on reforming it. But does the Human Rights Act add an extra dimension to the problem? Can a party who has entered into a contract which is illegal or which is contrary to public policy argue that his Convention rights have been violated if a court refuses to enforce the contract or refuses to allow him to recover the value of the benefit which he has conferred on the other party to the contract? Take the example of a contract under which one party promises in return for a fee to procure the marriage of another. There is authority in England which concludes that such a contract is unenforceable (*Hermann v Charlesworth* [1905] 2 KB 123) but, if a court held that it was bound by authority not to enforce such a contract or to allow the recovery of any benefit conferred under it, could the claimant, assuming for now that the Act has horizontal effect, allege that there has been a breach of Article 6 of the Convention? The answer is not entirely clear. The potential significance of Article 6 also surfaced in the Law Commission's initial Consultation Paper (1999) on reform of the law relating to the effect of illegality on contracts and

trusts (on which see Section 15.18). At that time the Law Commission provisionally recommended that the courts should be given a discretion to decide whether or not to enforce an illegal contract or to reverse an unjust enrichment which has occurred under an illegal contract (it was later decided not to take forward this proposal: see Section 15.18). Is a proposal of this nature compatible with the European Convention on Human Rights? In the past, it would not have been necessary to ask this question: if Parliament passed a law which was generally thought to be desirable, it was the task of the courts simply to give effect to it. But today, proposed legislation must be tested for compatibility with Convention rights. The Law Commission identified three provisions of the Convention which could potentially apply to their proposals, namely Article 6, Article 7 ('no punishment without law') and Article 1 of the First Protocol. However, they declared that they were 'confident' that their proposals are compatible with the Convention. In the case of Article 1 of the First Protocol, the Law Commission stated that, to the extent that the Article was applicable, the public interest provision would apply and, in the case of Articles 6 and 7, they maintain that no part of their proposals would deny a claimant access to the courts or to a fair and public hearing. The conclusion of the Law Commission in this respect was affirmed by the Court of Appeal in *Shanshal v Al-Kishtaini* [2001] EWCA Civ 264; [2001] 2 All ER (Comm) 601 where it was held, on the facts of that case, that the public interest exception did justify the 'availability of the common law defence of illegality to a contractual or restitutionary claim based on the commission of a prohibited act'. However, the public interest invoked in *Shanshal* was stated to be 'very strong'. In other cases, where the illegality is of a technical nature, and the public interest in refusing to enforce the agreement is consequently much lower, the refusal to give effect to the contract may possibly be held to be a disproportionate response. The existence of some uncertainty can be demonstrated by the fact that the Law Commission conclude their consideration of the point by stating that: 'we would be very grateful if consultees with the relevant expertise could let us know whether they agree with our view that our provisional recommendations do not infringe the European Convention on Human Rights and Fundamental Freedoms, and, if they do not agree, to explain their reasoning.' This demonstrates the uncertainty which currently surrounds the impact which Convention rights may have on private law. Convention rights may yet turn out to be a time bomb ticking away under the law of contract and private law generally.

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