



A Proposed Taxonomy of Contracts

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We propose a classification of contracts based on their real-life usage. Recognising that there are a number of different and overlapping ways of classifying contracts, we can identify at least seven ways of doing this: (1) by the subject matter, (2) by the way the contract is made, (3) by the function of contracts, (4) by the time-horizon, (5) by the ability to renegotiate terms, (6) by the involvement of consumers and (7) by the existence of mutual trust. The proposed taxonomy draws our attention to a hitherto neglected area of contract scholarship by revealing an underlying order in which multiple elements in a contract are related to each other.

Introduction

Legal scholarship has not been particularly friendly to any form of taxonomic work that attempts to map contracts and explicate legal doctrines in a rigorous and systematic form.¹ The lack of taxonomic work, in general, may be attributed to the inherent tension between experience and logic in law. The use of logic is indispensable in all attempts to create an accurate and rigorous taxonomy. The taxonomic work of Peter Birks,² for example, is based on a rational analysis of causative events and rights that individuals may realise in courts. Causative events of *consent*, *wrong* and *unjust enrichment* are linked with the rights of *compensation*, *punishment* and *restitution* and create a taxonomic matrix akin to Carl Linnaeus's taxonomy of organisms in biology. This kind of metaphor, however, is not always appropriate. A whale, for example, is not a fish but a mammal. There is now no room for argument about this. There is and is likely to remain plenty of room for argument for classification of contracts. Notwithstanding the immense significance of Birks's taxonomy as a rational device for the study and the general development of private law,³ its taxonomic logic is less useful if one wants to classify contracts because of the existence of a multiplicity of overlapping categories of legal concepts that have emerged through the history. Classifications in contract law do not always fit squarely into conceptual boxes. Undoubtedly, there are some criteria which apply only to contracts. Hence, the central concern of our study is to look at relevant criteria that could help us classify contracts.

Our ambition in this study is neither to classify contracts as a way of identifying different types of contracts nor to deliver a prescription of how

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1 This critique is discussed in detail by B Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and Forms of Legal Literature' (1981) 48 *UCR* 632 at 679.

2 P Birks (ed), *The Classification of Obligations*, Oxford University Press, Oxford, 1997.

3 A Burrows and A Rodger (eds), *Mapping the Law. Essays in Memory of Peter Birks*, Oxford University Press, Oxford, 2006. Also see K F K Low, 'The Use and Abuse of Taxonomy' (2009) 29 *Legal Studies* 255.

contracts should be classified. Instead, our objective is to offer a taxonomic description of contracts within a *normative system of action*⁴ that exists today. The idea of taxonomy derives from the Aristotelian concept of *taxis* which means order. The term *taxis* implies a *system*, a *structure* or a *pattern* in which multiple ‘elements of various kind are related to each other’.⁵ As the life of the law has not been logic but experience,⁶ traditional efforts to create *taxis* (order) in contract law embrace classifications based on the subject matter of contracts, for example, *sale of goods*, *sale of land*, *employment*, or *insurance*. Classifications based on the subject matter of contracts are useful but they do not reveal deeper underlying elements that are related to each other. Moving beyond the subject matter of contracts, extant contract taxonomies are severely limited to theoretical dichotomies, for example, contract in personam versus contract in rem,⁷ discrete versus relational contract.⁸ Our attempt to identify a ‘*taxis*’ in contracts is guided by two rather pragmatic questions. The first question is whether the law of contract is the same for all contracts;⁹ the second question is whether we can identify criteria that could help us distinguish between different contracts on the basis of their real-life usage.

Although we can identify with certainty some distinctive characteristics in particular types of contracts, the general principle in English law is that the same legal principles should apply to the law of contract as a whole.¹⁰ In other words, English law proceeds on the basis that there is a single law of contract applicable to all contracts, together with rules applicable to individual contracts. This is a distinctive feature of common law contract law. Books on criminal law discuss both general principles and specific crimes. Books on tort proceed similarly though there are probably tort courses in universities which cover only negligence and related topics. In other systems, books and courses

4 Contracts represent a ‘normative system of action’ that is connected with other normative systems. Hugh Collins identifies three co-existing normative systems of action: the contract, the economic deal and the business relationship; see H Collins, *Regulating Contracts*, Oxford University Press, Oxford, 1999.

5 See Hayek’s final systematic work: F Hayek, *Law, Legislation and Liberty*, Chicago University Press, Chicago, 1973, pp 35–6.

6 O W Holmes, *The Common Law*, Little Brown & Co, Boston, 1881, p 1.

7 The implication of this theoretical dichotomy is significant. For the transfer of a good (res) from the property of the seller to the property of the buyer we need two ‘transactions’: a ‘promissory’ contract that creates the obligation for the contracting parties to perform (contract in personam) and a ‘dispositive’ or ‘property’ contract that transfers the ownership — property rights — to the buyer which is the ‘entitled result’ (contract in rem). The same contract, however, might do both.

8 This theoretical dichotomy attempted to explain patterns of business agreements: see I R Macneil, ‘A Primer of Contract Planning’ (1975) 48 *Southern California L Rev* 627; C J Goetz and R E Scott, ‘Principles of Relational Contracts’ (1981) 67 *Virginia L Rev* 1089; I R Macneil, in D Campbell, ed, *Relational Theory of Contract: Selected Works of Ian Macneil*, Sweet & Maxwell, London, 2001. It appears, however, that relational contract theory has to some extent caused misunderstanding. The particulars of a ‘relational’ contract derive from the specific function of the contractual arrangement and not from the fact that a contract is relational, see M A Eisenberg, ‘Relational Contracts’ in J Beatson and D Friedmann, eds, *Good Faith and Fault in Contract Law*, Clarendon Press, Oxford, 1995/2002, pp 297–304.

9 M Furmston, *Cheshire, Fifoot and Furmston’s Law of Contract*, 16th ed, Butterworths, London, 2012, p 30.

10 *Cehave NV v Bremer Handelsgesellschaft MbH (The Hansa Nord)* [1976] QB 44.

on contract law consider in some detail the law relating to specific contracts.

Recognising that there are a number of different and overlapping ways of classifying contracts, we can identify at least seven ways of doing this:¹¹

- (1) by the subject matter;
- (2) by the way the contract is made;
- (3) by the function of contracts;
- (4) by the time-horizon;
- (5) by the ability to renegotiate terms;
- (6) by the involvement of consumers; and
- (7) by the existence of mutual trust.

Classifying Contracts

By Subject Matter

The traditional way to classify and teach contract law is to look at the subject matter of contracts, for example, the sale of goods, the sale of land, employment, insurance etc.¹² In many countries, much of this material would be taught in a contract course. In that respect, the most frequently used contract is the contract for the sale of goods. Undoubtedly some problems which actually relate to sale of goods are solved by general contract law and others by applying the specific rules relating to sale of goods. This is true of all the specific contracts. There are no general contracts for general contract law to apply to. It is not easy to state in simple terms where the boundary between general rules and particular rules runs except that the rules about formation seem to be the same for all contracts.

A good example of the difficulties is the discussion which took place after the decision of the Court of Appeal in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*¹³ as to whether the reclassification of terms into conditions, innominate terms and warranties applied to sale of goods. Those of us who were teaching contract law then can remember that there were serious scholars who thought the framework of the Sale of Goods Act excluded this possibility. Their doubts were swept aside by *The Hansa Nord*¹⁴ but the general problem remains. Chalmers saw the problem and provided that much of general contract law was to be implied into the Sale of Goods Act.¹⁵

The Sale of Goods Act 1893 and the later amendments which are now consolidated in the Sale of Goods Act 1979 provided the statutory framework that regulates the sale of goods. Daily, billions of contracts for the sale of goods are concluded and performed. Consider the sales in supermarkets or in millions of other small and large shops in cities, towns and villages. The

11 Our method of inference by postulating seven different ways of classifying contracts involved several cycles of inquiry, whereby we moved to an interplay between theoretical concepts and empirical observations. In this effort, we looked at contracts as enforceable manifestations of *consent*, see R E Barnett, 'A Consent Theory of Contract' (1986) 86 *Colum L Rev* 269. A consent-based understanding of contracts encouraged us to search for relevant criteria that circumscribe the interaction between contracting parties.

12 See *Chitty on Contracts*, Vol II, Specific Contracts, Sweet & Maxwell, London, 2012.

13 [1962] 2 QB 26.

14 [1976] QB 44.

15 Sale of Goods Act (UK), s 62(2).

current legal principles that govern these sales transactions reflect the long-established reasonable expectations of buyers and sellers. For example, there is the expectation of the seller to be paid and the expectation of the buyer to acquire property in an acceptable quality. The expectations of buyers and sellers in the example above demonstrate that the sale of goods represents an act that amalgamates the law of obligations and the law of property. But experience is not limited to one case; the historically accumulated case experience matters because it provides the most fundamental contribution to the law of contract. Classifying contracts by subject matter is not restricted to the sale of goods. The subject matter of the contract may be the sale of land, employment, banking or insurance. In each of these subject matters, contracts are regulated by detailed rules which have been developed for the particular contract.

By the Way the Contract Is Made

Classifying contracts by the way they are made dates back to Roman law. In classical Roman law, contracts could be verbal, literal, real or consensual. This four-fold classification is to be found both in the Institutes of Gaius and Justinian but the law undoubtedly developed in the four centuries between. For the present purpose, the two most important categories are verbal and consensual. In classical law a wide range of promises could be made by formal question and answer by the contract *stipulatio*. The four consensual contracts — sale, hire, partnership and mandate — are a model for modern law because consent alone was required.¹⁶

Looking at modern transactions by the way they are made, we propose three subcategories of contract:

- (1) informal cash transactions;
- (2) standard form printed contracts; and
- (3) individually negotiated contracts.

Informal cash transactions are ubiquitous in our everyday life, for example when we buy a coffee or newspaper. Standard form printed contracts contain general terms and conditions which usually apply to discrete and, often, anonymous transactions. Standard form printed contracts contain terms which one of the contracting parties has defined in advance with the intention to incorporate them into multiple transactions. In more complex transactions, businesses use a set of clauses, known as boilerplate clauses.¹⁷ Standard printed contracts are a demonstration of an ongoing rationalisation and adaptation process to the evolving needs of commercial practice.¹⁸ Standard

16 See D Johnston, 'The Logic and Experience in Roman Law' in A Burrows and A Rodger, eds, *Mapping the Law, Essays in Memory of Peter Birks*, Oxford University Press, Oxford, 2006, pp 513–24.

17 R Christou, *Boilerplate Clauses: Practical Issues*, Sweet and Maxwell, London, 2002.

18 The impetus for their growth in use during the second half of the 19th century came from the massive industrialisation and rapid expansion of services, particularly in the financial, insurance and transportation sectors. The significant publication of Raiser's monograph in 1935 instigated a discussion of the importance of general terms and conditions and the need for an effective control by administrative authorities and courts; see L Raiser, *Das Recht der Allgemeinen Geschäftsbedingungen*, Hanseatische Verlagsanstalt, Hamburg, 1935. Despite Raiser's enormous influence among academic scholars, legislative powers in Europe needed

printed contracts are designed and used by businesses to increase operational efficiency and to promote economies of scale by replicating similar commercial transactions. It is obvious that standard printed contracts are instrumentalised to pass on risks and liabilities to other contractual parties.¹⁹ It is hardly surprising that exclusion or limitation clauses are among the most contentious cornerstones of standard printed contracts. A good guidance regarding standard printed contracts is provided by professional institutes, trade associations or tribunals. They usually update and publish standard conditions of contracts.²⁰ Standard form contracts come in two subclasses. In one the form is drafted by one side with its own interests principally in mind. In the other the parties adopt and often adapt an industry-wide form which is roughly neutral between the parties. Bills of lading, charterparties and standard construction contracts are obvious examples.

Individually negotiated contracts are manifestations of consent in which contracting parties have negotiated the terms of the contract individually. For example, business-to-business agreements are usually negotiated individually. The negotiation process is often long and it may involve several actors.

By the Function of the Contract

The function of the contract constitutes a relevant taxonomic criterion. However, it appears that there is a lack of attention among contract scholars to function of the contract.²¹ When we assess the function of a contract, we look at the nature and purpose of the contract. Some contracts, for example, are of their nature necessarily executory; that is where the making of the contract always comes distinctly before performance. Contracts to marry are the classic example, though they are no longer contracts in English law. Bets are usually another example — now contracts once more.

Another example is the framework contract. A framework contract²² between parties is a contractual arrangement that provides a framework of clauses which regulate future contracts. Generally, framework contracts are not concerned with immediate contractual decisions.²³ The buyer, for

more than 40 years to react with an actual drafting of statutes. See eg Unfair Contract Terms Act 1977 and AGB-Gesetz 1976. See also J Adams and R Brownsword, 'The Unfair Contract Terms Act: A Decade of Discretion' (1988) 104 *LQR* 94; S Bright, 'Winning the Battle Against Unfair Contract Terms' (2000) 20 *Legal Studies* 331.

19 S Macaulay, 'The Standardized Contracts of United States Automobile Manufacturers. The Impact of Large Scale Business Enterprise Upon Contract', in *International Encyclopaedia of Comparative Law*, Vol VII (3), Mohr, Tuebingen, 1974.

20 See eg *ICE Conditions of Contracts*, 7th ed, 1999; *Standard Form of Building Contract*, 1998; and *Private with Quantities and Standard Building Contract without Quantities*, 2005 published by JCT (Sweet and Maxwell).

21 The Austrian Arthur Schnitzer was among the first contract scholars who advanced our knowledge of the importance of looking at the functional criterion. For the importance of the functional criterion, see A Schnitzer, *Die funktionelle Anknüpfung im internationalen Vertragsrecht*, Festgabe Schönnenberger, Freiburg i.Ue, 1968, p 387.

22 Also known as 'umbrella agreement', see S Mouzas and M Furmston, 'From Contract to Umbrella Agreement' (2008) 67 *CLJ* 37. German lawyers use the term *Rahmenvertrag* or *Rahmenvereinbarung*, see W Krüger, *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 2a, 1103-1104*, C H Beck, München, 2003.

23 Nevertheless, a number of business agreements might include immediate contractual decisions leaving some of the terms open. In these cases, it seems to be more appropriate to

example, has no obligation to buy a specified amount of goods or to accept future offers. In this way, the function of a framework contract is to set up the *framework of future selection processes*.²⁴ The parties to a framework contract are not required to specify new terms in their future contracts nor are they required to refer to the pre-existence of a framework contract. The advantage of this function is that it allows the update of consent over time and reduces *transaction costs*, which are the costs in terms of time and effort to select, manage and oversee single transactions. For this reason, framework contracts are often encountered in regular, stable and established commercial relationships.

By the Time-horizon

Some contracts are, at least on one side, for performance over a long term. Consider insurance, major building, shipbuilding and aircraft building contracts. Many contracts of employment, but also leasing contracts, fall into this category. In many of these contracts, the balance of economic advantage will be liable to change over time. So what seemed an attractive deal at the time of the contract may become unattractive without either party being at fault. In civil law jurisdictions, long-term contracts are recognised as a legal category. They can be compared with the legal term 'Dauerschuldverhaeltnisse' (long-term contracts) in new German Law of Obligation, BGBI I, S 3138, effective at 1 January 2002. Accordingly, 'Dauerschuldverhaeltnisse' (long-term contracts) include tenancy and leasing agreements, licence agreements, distribution agreements as well as management or know-how transfer agreements. The particularity of these long-term agreements is that contracting parties need to show mutual respect to the interests of their counterparts, especially with regard to the principle of good faith (Treu and Glauben).²⁵ Notwithstanding the relevance of long-term contracts in the German Law of Obligation, long-term contracts are not yet recognised as a separate legal category in common law. There are calls that reject the claim for a separate category of long-term contracts with the argument that it is largely left to the related parties to include into their contracts clauses such as 'force majeure', 'hardship' or 'third-party intervener' which deal with particular contextual eventualities.²⁶

By Ability to Renegotiate Terms

The ability to renegotiate terms is a significant criterion for the classification of contracts. There are contracts where the ability to negotiate effectively

view these contractual arrangements as open terms agreements, see M P Gergen, 'The Use of Open Terms in Contract' (1992) 92 *Colum L Rev* 997.

24 The underlying assumption is related to the notion of contract as selection framework ('Selektionsumfeld' als Vertragsgegenstand), see H Von der Crone, *Rahmenverträge. Vertragsrecht-Systemtheorie-Oekonomie* Schulthess Polygraphischer Verlag, Zürich, 1993.

25 For a contemporary analysis, see E Flohr and J Klapperich, *Dauerschuldverhaeltnisse nach der Schuldreform*, ZAP Verlag fuer Rechts-und Anwaltspraxis, Duesseldorf, 2003).

26 E McKendrick, 'The Regulation of Long-term Contracts in English Law', in J Beatson and D Friedmann, eds, *Good Faith and Fault in Contract Law*, Clarendon Press, Oxford, 1995/2002, pp 305-33.

changes dramatically once the contract is made. Consider the appointment as manager of a Premiership football club as a classic example. The manager will never be in such a good bargaining position again as the moment before he signs the contract. The term renegotiation may imply two different things. It may imply a complete re-negotiation of contract terms or renegotiation of certain terms.²⁷ If renegotiation were costless, the parties to an agreement would negotiate to change any provision which prevents them increasing the creation of value.²⁸ Therefore, commercial companies usually constrain renegotiation by institutionalising negotiation processes or annual, quarterly or periodic business reviews; they also establish control systems which may include mutual notification, key communication dates throughout the year or electronic data interchange. Control systems can verify contractual performance on an ongoing basis and they can support the exercise of termination rights.²⁹ The possibility of renegotiation may be limited by the inclusion of 'force majeure' or by agreed alternatives to litigation³⁰ such as arbitration according to the rules of the International Chamber of Commerce.

By the Involvement of Consumers

Many contractual arrangements involve consumers and these contracts are not individually negotiated. Consider contracts between retailers and the consumers or financial and credit contracts. For those cases where one of the parties is a consumer, there is a strong and increasing tendency to make special rules. Contracts that involve consumers are nowadays regulated by statutes to which do not always conform to traditional principles of contract law.³¹ The aim of these statutory regulations is to ensure 'consumer protection' and 'fairness' in transactions with consumers. More generally, the increasing importance of codified legal restrictions, as well as the growing importance of statutes, cannot be overlooked;³² a logical consequence of applying the involvement of consumers as taxonomic criterion is to classify contracts into *commercial contracts* and *consumer contracts*. This classification does not imply that commercial contracts are immune from regulatory intervention. Norms such as *good faith* or *fair dealings* set new objective standards in the conclusion of commercial contracts.³³ Notwithstanding the validity of traditional contract principles, a number of

27 For the importance of renegotiation, see I Ayres, 'Valuing Modern Contract Scholarship' (2003) 112 *Yale LJ* 881.

28 R H Coase, 'The New Institutional Economics' (1992) 88 *American Economic Review* 72.

29 A monitoring of contractual performance is particularly useful in cases where time is of the essence and there is delay in performance by the promisor, see J E Stannard, 'The Contractual Last Chance Saloon: Notices Making Time Of Essence' (2004) 120 *LQR* 137.

30 J Efron, 'Alternatives to Litigation: Factors in Choosing' (1989) 52 *MLR* 480.

31 See eg Consumer Credit Act 1974, Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contracts Regulations SI 1999.

32 J Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 *LQR* 247. See also R Zimmermann, 'Statuta Sunt Stricte Interpretanda? Statutes and Common Law: A Continental Perspective' (1997) 56 *CLJ* 315.

33 R Zimmermann and S Whittaker, (eds) *Good Faith in European Contract Law*, Cambridge University Press, Cambridge, 2000. See also J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law*, Clarendon Press, Oxford, 2002; and G McMeel, 'Prior Negotiations and Subsequent Conduct — The Next Step Forward for Contractual Interpretation?' (2003) 119 *LQR* 272.

contemporary developments such as the provisions in the Convention on International Sale of Goods (the Vienna Convention), the United States' Uniform Commercial Code and Restatement (Second) of Law of Contracts, the gradual emergence of a European legal thinking³⁴ and the process of legal harmonisation in Europe are affecting the way we view commercial contracts and our view of the rights which arise from them. The way that commercial contracts are viewed in practice is changing in three directions: first, there is a gradual acceptance of new international commercial standards and regulations in the conclusion and performance of contracts; second, courts are taking a more purposive approach and shifting away from literalist methods to questions of interpretation of contracts;³⁵ and, third, the need to take into account all the surrounding circumstances of contractual relationships is gradually becoming apparent.³⁶

By Existence of Mutual Trust

Many contracts are made between strangers. In such cases, it is sensible to take into account the possibility that the other party's performance will be defective. Of course, this risk might also be quite small. In practice, the parties will often behave differently if they trust each other. Accurate assessment of whom you can trust is undoubtedly a major commercial skill for contract-makers. However, trust is an anthropocentric notion; and as such inextricably linked to human beliefs, sentiments or intentionality.³⁷ It may be possible to have trust *in* an organisation; however, trust *by* an organisation appears to be nonsensical.³⁸ As such trust is more easily applicable to

34 Markesinis speaks about a 'gradual convergence', see B Markesinis (ed), *The Gradual Convergence: Foreign Ideas, Foreign Influences and English Law on the Eve of the 21st Century*, Oxford University Press, Oxford, 1994, while Zimmermann draws our attention to the emergence of a 'European Legal Science', see R Zimmermann, 'Savigny's Legacy. Legal History, Comparative Law and the Emergence of a European Legal Science' (1996) 112 *LQR* 576.

35 This shift is vividly demonstrated in the speech of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896. For a general discussion, see C Staughton, 'How Do the Courts Interpret Commercial Contracts?' (1999) 58 *CLJ* 303; K Lewison, *The Interpretation of Contracts*, Sweet and Maxwell, London, 2004; A W Katz, 'The Economics of Form and Substance in Contract Interpretation' (2004) 104 *Colum L Rev* 496. See also the Chancery Bar lecture of Lord Nicholls, 'My Kingdom for a Horse' (2005) 121 *LQR* 577. The two cases cited by Lord Nicholls, *The Karen Oltmann* [1976] 2 Lloyd's Rep 708 and *The Pacific Colocotronis* [1981] 2 Lloyd's Rep 40 are reviewed in a further Note by A Berg, 'Thrashing through the Undergrowth' (2006) 122 *LQR* 354.

36 See D Campbell, H Collins and J Wightman (eds), *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts, European Private Law Theory*, Hart Publishing, Oxford and Portland, 2003. See also G McMeel, 'Prior Negotiations and Subsequent Conduct — The Next Step Forward for Contractual Interpretation?' (2003) 119 *LQR* 272.

37 See S Mouzas, S Henneberg and P Naudé, 'Trust and Reliance in Business Relationships' (2007) *European Journal of Marketing* 41(9/10):1016–32. See also R C Solomon and F Flores, *Building Trust*, Oxford University Press, Oxford, 2001; F Fukuyama, *Trust*, Hamish Hamilton, London, 1995; D G Pruitt, *Negotiation Behavior*, Academic Press, New York, 1981; P H Blau, *Exchange and Power in Social Life*, John Wiley, New York, 1964.

38 See G Simmel, *The Sociology of Georg Simmel*, transl by K H Wolff, Free Press, New York,

interpersonal relationships than interfirm relationships.³⁹ In almost all contracts there is an element of reliance on the other party. If I buy a coffee from a restaurant I have never been to before, I am relying on their making it in an acceptable way. This is quite different from saying that I trust them. Trust and reliance overlap but they are clearly distinct. This is shown by the unusual facts of *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland*.⁴⁰ In this case, the defendants (RBS) sold to the claimants (RZB) a £10,000,000 share in a facility it was providing to Enron. At the time of the transaction both RBS and RZB and most of the world thought Enron a highly successful company but they were soon to discover better. The contractual arrangements were complex and difficult to summarise but a central feature of the dealings between RBS and Enron was that Enron had made a (contractually not binding) promise that RBS would be made whole. This is very clearly stated in Christopher Clarke J's judgment:⁴¹

The assurances that were given (more than once) were given in very strong terms and at a very high level. They were intended to be relied upon, and were relied upon, as a means (so it was hoped and expected) of ensuring that RBS would get the required return. In a different context, there would be no difficulty in inferring that they had been intended to have contractual effect, particularly given that the words used were words of promise in a business setting. In the present context, for the reasons already stated, it was important that they should not have contractual effect. For that very reason, it was desirable that they should be given in terms as absolute, and at a level as high as was possible; so that, although the assurances were not contractual undertakings, they were the next best thing. In that way, the likelihood of Enron reneging on them was reduced. Several RBS witnesses regarded it as unthinkable for Enron to walk away from such assurances and something which would impact very badly on its strategy for dealing with banks. That was how relationship banking — in which oral assurances are not uncommon — worked. It is clear from the terms of the Credit Application (see para 7.2) that RBS' reliance was on its relationship with Enron. It is also clear from the evidence of Mr Hardy that he did not regard what Mr Chivers said to him on 20 September 2000 as a legally binding promise (the very point of this transaction was that any support from Enron to the bank could not be binding).

Trust was in effect here a substitute for contractual reliance.

Relationships between businesses are invariably based on considerations of mutual interest and risk assessment.⁴² In risk-laden business-to-business relationships, the establishment of accountabilities through explicit performance standards and monitoring may be in conflict with interpersonal trust. If contracting parties are genuinely open, their behaviour will facilitate the exchange of information that is necessary to move the process of value creation forward; but this openness might be exploited by counterparts who

1950. Also G Moellering, R Bachmann and S H Lee, 'Understanding Organizational Trust, Foundations, Constellations and Issues of Operationalisation' (2004) 19(6) *Journal of Managerial Psychology* 556–70.

39 R Hardin, 'Trusting Persons, Trusting Institutions', in R J Zeckhauser, ed, *Strategy and Choice*, MIT Press, London, 1991.

40 [2010] EWHC 1392 (Comm).

41 [2010] EWHC 1392 (Comm) at [143].

42 J K Sebenius, 'Negotiation analysis: A characterization and review' (1992) *Management Science*, 38(1), pp.18-38.

are more concerned with value-claiming. Conversely, if the contracting parties are competitive in claiming value, they might limit or prevent the achievement of joint gains through give-and-take processes. Although trust might be more applicable to interpersonal relationships, its importance as a relevant aspect of exchange relationships⁴³, invites us to look at indicators of trust, such as the occurrence of repeated exchange between contracting parties, and examine the particularities of contractual arrangements in which we can observe the existence of mutual trust.⁴⁴

Conclusions and Implications for Contract Scholarship

The effort to classify contracts is inevitably confronted with the problem of relativity. Contract law is a '*regime of correlative right and duty*'; hence, '*the unity of the contractual relationship consists in the fact that contractual performance is the content of both the defendant's duty and the plaintiff's right*'.⁴⁵ The problem of relativity encouraged us to look at a classification of contracts beyond their *subject matter*, considering further criteria such as the way the contract is made, the function of the contracts, the time-horizon of the contract, the ability to negotiate terms, the involvement of consumers and the existence of mutual trust. These criteria broaden our view of contract as a manifestation of consent. Consent is an intercognitive achievement among contracting parties⁴⁶ and is, ultimately, the moral basis that differentiates between valid and invalid transactions.⁴⁷ As a moral basis, consent treats contracting parties as counterparts that bring 'property rights' to an exchange. Any attempt to classify contracts would therefore require an insight into the significance of property rights or entitlements that specify the substance of correlative rights and duties that actors may possess, acquire, or transfer in their interactions with others.

A taxonomy of contracts aims at the creation of a logical order; but this is not always possible because there is inherently a tension between rational order and real-life experience. Classifications of contracts do not always fit squarely into rational categories. Recognising the existence of overlapping categories, our proposed taxonomy of contracts attempted to reconcile this tension by elaborating a logical classification of contracts on the basis of their real-life usage.

43 Historians have emphasised the central role that trust has played in the development of trade and banking, see J Stiglitz, *Freefall: Free Markets and the Sinking of the Global Economy*, Penguin Books, London 2010.

44 The preponderance of empirical evidence suggests that umbrella agreements are drafted when the contracting parties trust each other and thus they contemplate repeated exchange in continuing business relationships, see S Mouzas and M Furmston, 'From Contract to Umbrella Agreement' (2008) 67 *CLJ* 37.

45 See E J Weinrib, *The Idea of Private Law*, Harvard University Press, Cambridge, 1995, p 136.

46 Historical evidence and theory suggests that, absent consent, contractual arrangements are not sustainable because they do not facilitate the creation of the maximum potential value, see A T Kronman and P A Posner, *The Economics of Contract Law*, Little, Brown and Co, Boston, 1979.

47 R E Barnett, 'A Consent Theory of Contract' (1986) 86 *Colum L Rev* 269. Also compare R E Barnett, 'Constitutional Legitimacy' (2003) 103 *Colum L Rev* 11.

A Proposed Taxonomy of Contracts 11

The proposed taxonomy of contracts delivers three important contributions to the study of contracts. First, classifying contracts on the basis of their real-life usage can help us understand the context of contracts. This is possible if we analyse contracts beyond theoretical dichotomies, such as contract in personam versus contract in rem, to address the real problems that contracting parties face in reaching consent. Second, classifying contracts beyond their subject matter can help us address the *unity of the contractual relationship* as the defendant's duty and the plaintiff's right. This allows us to incorporate into our thinking correlative dimensions such as the existence of trust. Third, classifying contracts on the basis of their real-life usage delivers a logical order that draws our attention to new criteria and deeper underlying elements hitherto neglected in contract scholarship.