
Introduction

1.1 Key points and structure

I shall analyse the vitiating factors of mental incapacity, *non est factum*, mistake, misrepresentation, duress, undue influence and unconscionability. It will be explained that these are what I label the *general vitiating factors* in English contract law. I will adopt a fourfold classification of mistake: common (shared) mistake as to subject matter,¹ mistake as to identity, mistake as to terms and “mutual” mistake.² My analysis will focus upon English law, the American Law Institute’s Restatement (Second) of Contracts (the Restatement), and the law under three major international or European “soft law” codes: namely, UNIDROIT’s Principles of International Commercial Contracts (PICC), the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR).

The purpose of my analysis is to determine the underlying rationales of these vitiating factors under each “system” of law to be considered and to assess the links between the vitiating factors and the different systems of law. My main contention will be that the law’s desire to protect the integrity of contractual consent is a central concern in each of the general vitiating factors. It will be argued that this reflects the fundamental importance of the general principle that contractual obligations are voluntarily assumed. However, it will also be argued that there is a vital distinction between those vitiating factors based upon an *absence of subjective consent from the complainant* and those based upon the fact

¹ It will be contended that the law should not require a mistake as to subject matter to be shared before it can be operative: see pp. 113–14, below. Nonetheless, references in this book to common or shared mistake in English law are reference to common mistake as to the subject matter.

² In this book, ‘common mistake’ refers to the situation where both parties make the same mistake and ‘mutual mistake’ to the situation where both parties are mistaken, but as to different matters.

that the *complainant's consent was impaired by the defendant's unacceptable conduct*.³ The distinction in theory and in practice between absence and impairment of consent will be analysed and explained.

It will then be argued that the distinction between absence and impairment of consent justifies in principle the distinction between the consequences of successfully establishing one of the vitiating factors in English law, namely, between the consequences of voidness *ab initio* and voidability. In principle, those vitiating factors based upon absence of consent justify the conclusion that the putative contract is void *ab initio*, because of the absence of any voluntary assumption of contractual obligations, which is the main justification for contractually binding the complainant. For, when a contract is void *ab initio*, it never existed in law, and this reflects the fact that the complainant did not ever voluntarily assume the putative contractual obligations. On the other hand, those vitiating factors based upon impairment of consent by the defendant's unacceptable conduct justify the conclusion that the impugned contract is voidable, because of the manner in which the complainant's consent was induced.⁴ For, when a contract is voidable, the complainant has the right to elect to avoid it *ab initio* or to affirm it, and this reflects the fact that the complainant did consent to the impugned contract, but that his consent was unacceptably impaired, having been brought about by the defendant's unacceptable conduct. Therefore, the complainant has the initial right to revoke his impaired consent, thereby avoiding the impugned contract *ab initio*, if this right is not lost by affirmation or one of the other bars to rescission.

It must be noted that the universal consequence of pleading one of the general vitiating factors under the PICC, PECL, DCFR or Restatement is voidability.⁵ However, it will be argued that this is a policy decision taken to promote security of contracts and does not represent

³ In this book, 'complainant' refers to the party pleading the vitiating factor and 'defendant' to the other party to the putative/impugned contract. Unless otherwise stated, 'consent', 'intention', 'voluntariness' and their derivatives are used in the *subjective* sense in this book.

⁴ Bigwood (2003), 204–5.

⁵ Note that the Restatement actually recognises certain circumstances in which one of the vitiating factors can prevent formation of a contract, which is in many ways similar to a putative contract being rendered void *ab initio*. See, for example, §163 (misrepresentation as to character or essential terms of a contract precluding formation), pp. 201–11, below; §174 (duress by physical compulsion preventing formation of a contract), pp. 248–9, below.

a fundamental difference in the underlying rationales of the vitiating factors under these systems of law.⁶

The fundamental general principle of voluntariness in the assumption of contractual obligations also provides the explanation for why it is only when an impairment of consent was caused by the defendant's unacceptable conduct (or by unacceptable conduct of which the defendant had knowledge or which was committed by one for whom the defendant was responsible)⁷ that it can be sufficient for vitiation; whereas the source of an absence of consent does not matter, unless it is the complainant's own carelessness.⁸ As explained above, absence of consent directly infringes the principle of voluntariness, so the main justification for legally binding the complainant to the putative contract disappears. On the other hand, an impairment of consent does not directly infringe the principle of voluntariness, because it necessitates that the complainant did consent to the impugned contract. However, the law must seek to prevent procurement of contracts by unacceptable means, so it must provide for vitiation when an impairment of consent is caused by the defendant's unacceptable conduct.⁹

It is contended that vitiation for (1) mental incapacity, *non est factum* and mistake is based upon absence of consent; whereas vitiation for (2) misrepresentation, duress, undue influence and unconscionability is based upon impairment of consent by unacceptable conduct. Those vitiating factors in: (1), above, form my *first category of vitiation*; and those in (2) form my *second category*. It will be explained why the consequence of successfully establishing mental incapacity in English law is voidability, even though it is based upon absence of consent. The remaining vitiating factors in my first category

⁶ Although it has been contended that the distinction between voidness and voidability is justified in principle, this is not to say that the policy decision, reflected in each of the PICC, PECL, DCFR and Restatement, to provide for voidability as the usual consequence of vitiation is "wrong". However, it will be contended that it must be overtly recognised that it is a policy distinction, to ensure that it is not allowed to blur the fundamental distinction in principle between absence and impairment of consent: see pp. 26–8, below.

⁷ E.g., *Barclays Bank v. O'Brien* [1994] 1 AC 180, HL; *RBS v. Etridge (No. 2)* [2001] UKHL 44; [2002] 2 AC 773. Unless the context requires otherwise, references in this book to the relevance to vitiation of unacceptable conduct by the defendant include references to unacceptable conduct of which the defendant had actual or constructive knowledge or which was committed by someone for whose conduct the defendant was responsible.

⁸ It is contended that the complainant should not be allowed to rely upon an absence of consent induced by his own carelessness. See p. 22, below.

⁹ See pp. 19–26, below.

do lead to voidness in English law, and all of the vitiating factors in my second category lead to voidability.¹⁰

Drawing these points together, my central argument is that the desire to protect the integrity of contractual consent is the fundamental link between each of the general vitiating factors but that there is a vital distinction between absence and impairment of consent. In mental incapacity, *non est factum* and mistake, the desire to protect the integrity of contractual consent is important because a successful plea of any of these vitiating factors establishes an absence of consent. This infringes the fundamental general principle of voluntariness in the assumption of contractual obligations: one does not voluntarily assume an obligation to which one did not consent. It is accepted that this cannot be sufficient for vitiation, because it would simply replace the objective principle with subjectivity. It will be explained that this is why each of the first-category doctrines requires proof of *an additional factor to render the absence of consent operative*. In misrepresentation, duress, undue influence and unconscionability, proof of an absence of consent is not required. However, each of these vitiating factors requires proof that the complainant's consent was impaired *by the defendant's unacceptable conduct*. Impairment of consent does not directly infringe the principle of voluntariness, and it is not a sufficient basis for vitiation, because no contractual decision is, in reality, ever *completely* free: one's contractual consent will almost always be impaired to some degree by outside pressures. Indeed, there are many perfectly acceptable pressures which severely impair consent but which contract law should not seek to regulate. However, when an impairment of consent was caused by the defendant's unacceptable conduct, there is an additional reason for vitiation, distinct from, but linked to, the desire to protect the integrity of contractual consent: namely, the desire to prevent procurement of contracts by unacceptable means. It is the combination of these two elements which justifies the conclusion of voidability in the second category of vitiating factor.

This introductory chapter will proceed along the following lines. First, I will explain why I am analysing the seven vitiating factors mentioned above, and no others, and why understanding the rationale of vitiation is important. Second, I will explain why a comparative analysis of the law is important, for assessing both the validity of my theory and the treatment

¹⁰ It has already been noted that the PICC, PECL, DCFR and Restatement provide for voidability as the universal consequence of the general vitiating factors: see p. 2, above.

of the general vitiating factors under the different systems of law (i.e., English law, the PICC, the PECL, the DCFR and the Restatement). Third, I will explain why I have chosen the PICC, PECL, DCFR and Restatement as the focus of the comparative analysis. Fourth, I will contend that the common link between the vitiating factors is the desire to protect the integrity of contractual consent and explain why the law should be concerned with this. In doing so, I will explain the relevance of voluntariness and show why it remains a fundamental general principle of contract law, even though it is not an absolutely necessary element of a binding contractual obligation. Fifth, I will explain the distinction between absence and impairment of consent and show how this distinction, and the two different degrees of infringement of the principle of voluntariness it reflects, justifies the distinction between the consequences of voidness *ab initio* and voidability. Sixth, I will explain why an impairment of consent must have been brought about by the defendant's unacceptable conduct before it can lead to vitiation; whereas the source of an absence of consent does not matter (unless it is the complainant's own carelessness),¹¹ but there must be an additional factor to render it operative before it can lead to vitiation. Seventh, I will consider the merits of the approach, taken under the PICC, PECL, DCFR and Restatement, of providing for voidability as the universal consequence of vitiation. Finally, I will briefly show how the rules of the general vitiating factors in English law and under the PICC, PECL, DCFR and Restatement establish that they fit my central theory. That is, how the rules of mental incapacity, *non est factum* and all forms of mistake show that vitiation for these doctrines is based upon the complainant's absence of consent, and how the rules of misrepresentation, duress, undue influence and unconscionability show that vitiation for these doctrines is based upon the fact that the complainant's consent was impaired by the defendant's unacceptable conduct.

In Chapters 2–13, I undertake in-depth doctrinal analysis of the general vitiating factors. For each vitiating factor, I analyse the position in English law and the position under the PICC, PECL, DCFR and Restatement.¹² The rules of mistake in English law differ according to the nature of the mistake. Therefore, the analysis of mistake in English law is separated into five chapters, one dealing with *non est factum*, one

¹¹ See pp. 21–6.

¹² The PICC, PECL and DCFR do not address mental incapacity (or, indeed any form of contractual incapacity).

with common (or shared) mistake, one with mistake as to identity, one with mistake as to terms and one with mutual mistake. However, the PICC, PECL, DCFR and Restatement all take a unified approach to mistake (including *non est factum*), applying the same rules regardless of the nature of the mistake,¹³ so the analysis of mistake under these documents is contained within a separate chapter.¹⁴ Similarly, the PICC, PECL and DCFR do not distinguish between the treatment of the equivalents of undue influence and unconscionability, so I analyse the treatment of these doctrines by the three “soft law” codes in a single chapter.¹⁵ Finally, Chapter 14 draws together the different threads of analysis and comparison, to summarise the current law and highlight proposed development.

1.2 The general vitiating factors and the importance of understanding the rationale of vitiating

The reason that I shall analyse mental incapacity, *non est factum*, mistake, misrepresentation, duress, undue influence and unconscionability, and only these vitiating factors, in depth, is that that they are the general vitiating factors of English contract law: that is, they are the vitiating factors that can apply to any type of contract and any type of relationship between the contractual parties, where the reason for vitiating is not public policy. Public policy may influence them to one degree or another, but contractual principle is their foundation.

For example, abuse of confidence, although closely related to presumed undue influence, applies only to fiduciary relationships and ‘is founded on considerations of general public policy’.¹⁶ Although, in undue influence, the irrebuttable presumption of influence applies only to certain formal categories of relationship (which are fiduciary

¹³ Although, note that §163 of the Restatement recognises that ‘a misrepresentation as to the character or essential terms of a proposed contract’ will prevent formation of a contract (rather than merely rendering an impugned contract voidable) if it induces the other party to act in such a way that it appears that he is consenting to the putative contract. It will be explained that this is similar to the separate treatment of *non est factum* in English law, save for the fact that it also applies to non-written contracts and the fact that English law does not actually require a misrepresentation before *non est factum* can be successfully pleaded. See pp. 210–11, below.

¹⁴ Chapter 8, see pp. 142–69, below. ¹⁵ Chapter 13, see pp. 299–308, below.

¹⁶ *CIBC v. Pitt* [1994] 1 AC 200, 209, HL, per Lord Browne-Wilkinson; generally, Enonchong (2006), 201–29.

or highly analogous), the requisite influence of defendant over complainant can be proved to exist in any type of relationship, which need not be fiduciary.¹⁷

Another example by way of contrast with general vitiating factors is the duty of disclosure, which, in English law, applies only to contracts of the utmost good faith or as between parties in a fiduciary relationship. Therefore, even though it is highly analogous to misrepresentation, non-disclosure is not a general vitiating factor.¹⁸ Additionally, illegality is not a general vitiating factor. This is not merely because, strictly speaking, it is not a vitiating factor at all;¹⁹ it is because illegality is based upon public policy. It would be to encourage (or at least not to dissuade) contracts for illegal purposes if they could be legally enforced; and it would be against public policy for a court to provide remedies for non-performance, or to compel performance, of an illegal act. Similarly, the reason for vitiating on the basis of minors' incapacity is the public policy of protecting minors.²⁰

Rectification of a contractual document for mistake is in many ways similar to vitiating for mistake. Where the parties agreed to terms XYZ, but mistakenly recorded them as ABC, neither party intended to agree to terms ABC. Similarly, the complainant may mistakenly believe that the document is on terms XYZ, when it is actually on terms ABC, and the defendant knows of this mistake or unconscionably induced it. Rectification may be available in each of these circumstances.²¹ If it is, there is no contract on terms ABC. Here, the effect is the same as mistake as a vitiating factor. The difference, however, is that there *is* a contract on terms XYZ. Therefore, rectification is not concerned with vitiating of contracts; it is concerned with enforcing a (different) contract.²² This is why I do not consider it in depth.

¹⁷ Cf. Bigwood (2003), 401–23 (“relational” (i.e., presumed) undue influence cases necessarily fiduciary in nature).

¹⁸ Under the PICC, PECL, DCFR and Restatement, there is a general duty of disclosure, applicable regardless of the type of contract or the relationship between the parties. However, under the PICC, PECL and DCFR, a non-disclosure must be fraudulent before it can lead to vitiating.

¹⁹ The usual consequence of a successful plea of illegality is unenforceability rather than voidness or voidability, but, in certain circumstances, restitution might be available, so the effect could be the same as vitiating.

²⁰ See p. 53, below.

²¹ *Commissioner for the New Towns v. Cooper* [1995] Ch 259, 277, 280, per Stuart-Smith LJ.

²² *Ibid.*, 278, per Stuart-Smith LJ.

There have been various attempts to discern theoretical links between some of the general vitiating factors.²³ However, it is submitted that my theory: (1) establishes an important universal link between the general vitiating factors (the desire to protect the integrity of contractual consent); (2) establishes an important, rational distinction (the distinction between absence and impairment of consent); and (3) explains and justifies the practical and theoretical significance of this distinction (the distinction between voidness *ab initio* and voidability).

One of the main reasons why understanding the rationale of vitiating is important is the significance contract law places upon the notion of security in contractual dealings. This principle necessitates that, once the requirements of formation are apparently satisfied, there must be a sound reason for vitiating. When one knows the rationale of a vitiating factor, one can assess whether it represents a sound reason for overriding the principle of security of contracts. Further, understanding the rationale of vitiating helps to guide development of the law, because it allows one to determine whether new fact-patterns come within that rationale and should therefore fit within a particular vitiating factor. For example, each step in the development of *non est factum*²⁴ has required proof of facts establishing an absence of consent, because this has always been the basis of the plea.²⁵

1.3 The importance of comparative analysis

It is submitted that analysis of English law and the PICC, PECL, DCFR and Restatement will highlight fundamental similarities between the treatment of the general vitiating factors across the different “systems” of law. It will be contended that these fundamental similarities are reflected in the application of my central theory to each system of law. This will help to highlight the validity of my theory, but, much more importantly, it will highlight the validity of the approaches taken by English law and the PICC, PECL, DCFR and Restatement to the general vitiating factors. For, it is submitted that the in-depth doctrinal analysis will show that the different systems of law share fundamental contractual

²³ E.g., Lord Denning MR in *Lloyds Bank v. Bundy* [1975] QB 326; Cartwright (1991); Birks and Chin (1995); Capper (1998); Bigwood (2003); Enonchong (2006); M. Conaglen, ‘Duress, Undue Influence, and Unconscionable Bargains – The Theoretical Mesh’ (1999) 18 NZULR 509.

²⁴ See p. 85, below. ²⁵ See pp. 76–9, below.

principles, such as voluntariness and the objective principle, and have adopted many similar policy considerations, such as the desire to dissuade procurement of contracts by unacceptable means and (to varying degrees) the desire to protect bona fide third-party purchasers whose title depends upon the validity of a previous contract of sale to which he was not a party.

In terms of assessing the validity of my central theory, I believe that (and will seek to argue why) it is logically sound, recognising (and being based upon) both the fundamental general principle of voluntariness in the assumption of contractual obligations and the crucial theoretical and practical distinction between absence of consent and present-but-impaired consent. The fact that my theory is reflected across each of the important systems of law²⁶ helps to underline its soundness. Moreover, the fact that each of the systems of law has the same rationale underlying the general vitiating factors helps to show the sound basis in principle of each system. For example, it is contended that it is vitally important to recognise that all of the systems of law I consider share the fundamental principles of voluntariness and objectivity in contract formation. Recognising such fundamental similarities is an important step in appreciating the close and vital links between the different systems.

However, this, of course, is not to say that the systems of law are identical, or that my theory is reflected perfectly, without any areas of departure, within each system. It is vital to identify any differences between: (1) my theory and the prevailing rules of English law and the PICC, PECL, DCFR and Restatement; and (2) the rules of the systems of law themselves. Once any differences have been discovered, they must be analysed to seek to determine why they exist and whether there are any ways in which any of the systems of law could or should be developed, as well as to identify whether there are any theoretical or practical weaknesses within my theory. For example, there is a significant difference in the consequence of successfully establishing one of the general vitiating factors in English law, on the one hand, and under the PICC, PECL, DCFR or Restatement, on the other. In the latter case, the universal consequence is voidability; whereas English law maintains the

²⁶ As explained below (see p. 11), the PECL was based in part upon the PICC, and the DCFR is heavily based upon the PECL; but even if one were artificially to treat these codes as a single system of law, the comparative analysis would still show that my theory is reflected across three internationally significant systems of law: English law, the three codes and the US Restatement.

distinction between voidness *ab initio* and voidability. It is important to identify and critically analyse such a significant distinction, to ask why the systems of law take such different approaches. It will be explained below why I believe that this distinction is policy based, recognising the greater emphasis placed upon security of contracts under the PICC, PECL, DCFR and Restatement.²⁷ The important question then becomes why the systems give different weight to competing policy considerations: is there something about English law which justifies giving greater effect to the distinction between absence and impairment of consent and recognising this in a distinction between voidness *ab initio* and voidability; or should English law consider favouring security of contracts and adopting the universal consequence of voidability?²⁸

When we appreciate the differences between systems of law and ask why they exist, we can begin to determine whether these differences are appropriate, and analyse whether there are lessons that can be learned and perhaps should lead to development of the law under one or more of the systems.²⁹

1.4 Why analyse the PICC, PECL, DCFR and US Restatement (Second) of Contracts?

It has already been argued that comparison of the position of English law with that of other jurisdictions is a valuable tool for analysing my theory. The question, then, becomes why I have chosen to compare English law with the PICC, PECL, DCFR and Restatement. The first three documents are the three main European or international statements of principles of contract law that deal with the general vitiating factors,³⁰ and they deal with all of the general vitiating factors except mental incapacity. One of the main points of value of the comparison between the codes and English law is the fact that a wide range of different jurisdictions were considered in the drafting of each code. Of particular interest for the comparison will be civil law influences on the three codes.

²⁷ See pp. 26–8, below. ²⁸ *Ibid.*

²⁹ Similarly, if new codes, such as the Common Sales Law for Europe proposed by the Commission, are developed, it will be important that consideration is given to the major European and international codes, as well as the law of each member state; a comparative analysis of the of the systems, highlighting similarities and differences and the reasons for these similarities and differences, will be fundamentally important to the process of development.

³⁰ The Vienna Convention on Contracts for the International Sale of Goods expressly does not deal with the validity of contracts: Art. 4(a).