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Review Article

To What Extent Does the Law Provide Sufficient Protection for Those Who Enter Into a Contract with a Person Who, Through Age, Mental Illness, Or Intoxication, May Be Said to Lack The Capacity to Make a Binding Agreement?

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Abstract

This paper was motivated as a student of the Business Law and ethics module as part of the generic Master of Business Administration (MBA) program. The paper therefore discusses the legal question "To What Extent Does the Law Provide Sufficient Protection for Those Who Enter into A Contract with A Person Who, Through Age, Mental Illness, Or Intoxication, May Be Said to Lack the Capacity to Make a Binding Agreement"? Indeed, every Contract is an agreement, but it is Not Every Agreement That Qualifies to Be Called a Contract.

Keywords: Business law, ethics, vigilanti, capacity, indolent.

INTRODUCTION

What is Contract?

All contracts are agreement because there must be a mutual understanding between two parties for a contract to be formed. In simplicity, there cannot be a contract without an agreement from two parties. It is therefore prudent that all parties should agree and adhere to the terms and conditions as contracts imposes rights and obligations. In one article authored by Kings University College, Ghana, LLB Law student, Goodnuff Larbi [1], he has this to say: "When a firm's offer is accepted, it results in a contract provided other elements of contracts are accepted. Considering Bernard buying a Toyota Corolla (car) on hire purchase from Quaye who deals with cars. Both parties must come to a consensus (an agreement) on payment of monthly instalment within a specified period. Such an agreement result to specialty contract which is a contract under seal". According to the law Teacher, The Specialty Contract is made under seal. According to Legal Dictionary [2], "A specialty contract is a written document that has been sealed and delivered and is given as security for the payment of a specifically indicated debt".

What therefore defines an agreement?

According to Best Law Dictionary, an Agreement is defined as "The consent of two or more persons concurring, respecting the transmission of some property, right or benefit, with a view of contracting an obligation". "Every promise and every set of promises, forming the consideration for each other, is an agreement." In view of this, it is clear from this definition that a 'promise' is an agreement.

What then is a 'promise'? There are many definitions emanating from multifactorial faculties. According to Goodnuff's article [1]: "When the person to whom the proposal is made signifies his assent thereto the proposal is said to be accepted. A proposal, when accepted, becomes a promise." He made this case study: "For example, Goodnuff proposes to Fafali to marry her and Fafali accepted, now the proposal has become a promise. An agreement, therefore, comes into existence only when one party proposes or offer to the other party and that other party signifies his assent (that is, gives his acceptance) thereto. In short, an agreement is the sum total of 'offer' and 'acceptance'." His article proposes the following characteristics of an agreement:

i. At least two persons. There must be two or more persons to agree because one person cannot agree with himself.
ii. Consensus-ad-idem (an agreement on the same thing). Both the parties to an agreement must agree about the subject matter of the agreement in the same sense and at the same time.

The legal dictionary also has this to say on promise: "A written or oral declaration given in exchange for something of value that binds the maker to do, or forbear from, a certain specific act and gives to the person to whom the declaration is made the right to expect and enforce performance or forbearance. An undertaking that something will or will not occur. It is a manifestation of intent to act, or refrain from acting, in a certain manner.

The person who makes the declaration is the pr omisor. The person to whom the declaration is made is called the promisee.

In contracts, a promise is essential to a binding legal agreement and is given in exchange for consideration, which is the inducement to enter into a promise. A promise is illusory when the promisor does not bind herself to do anything and, therefore, furnishes no consideration for a valid contract.

A promise implied in fact is a tacit promise that can be inferred from expressions or acts of the promisor. A promise implied by law can arise when no expres declaration is made, but the party, in Equity and justic, is under a legal duty as if he had in fact actually made a promise.

What agreement contradict contract?

Agreement that doesn't give room for legal obligation will make contract void. As stated above, an agreement to become a contract must give rise to a legal obligation that is a duty enforceable by law. If an agreement is incapable of creating a duty enforceable by law. It is not a contract.

Agreements of moral, religious or social nature, for example, Goodnuff promise Fafali to party together at Abigail's house or to buy Fafali a Mercedes Benz after breaking her virginity are not contracts because they are not likely to create a duty enforceable by law for the simple reason that the parties never intended that they should be attended by legal consequences.

Offer and Acceptance

From the forgoing discussion, an agreement conventionally evidenced by an offer made by one party (the offeror) and an acceptance of the offer by the person to whom the offer is made (the offeree) does not automatically translate into a contract. In the case of Gibson V Manchester City Council, [1979] 1 WLR 294, the House of Lords held that there was no concluded contract and the defendant was not legally bound to sell the property, as the council's letter did not state the price and was not an offer but an invitation to treat. Also in the case of the Pharmaceutical Society of Great Britain v Boots Cash Chemist, [3] 1 QB 401, where the question was whether the contract of sale was concluded when the customer selected the product from the shelves (in which case the defendant was in breach of the Act due to the lack of supervision at this point) or when the items were paid for (in which case there was no breach due to the presence of the pharmacist at the till). The Court of Appeal held that the defendant was not in breach of the Act, as the contract was completed on payment under the supervision of the pharmacist. The display of the goods on the shelves were not an offer which was accepted when the customer selected the item; rather, the proper construction was that the customer made an offer to the cashier upon arriving at the till, which was accepted when payment was taken. This analysis was supported by the fact that the customer would have been free to return any of the items to the shelves before a payment had been made.

The Old Twist in Offer and Acceptance

A new twist was proposed in the locus classicus case involving Carlill v Carbolic Smoke Ball Company [4] EWCA Civ 1 where a homeopathic medical firm placed their advert that their new homeopathic wonder drug, a smoke ball, would cure people's flu, and if it did not, buyers would receive £100. Interesting, the new era of Covid 19 pandemic resurfaced the case of Carlil as many homeopathic and other natural medicine firms advertised their drugs. In Ghana, the Food and Drugs Authority had to stepped in to clamped down on one firm advertising their wonder COAF -FS for Covid 19. This action by the FDA further forced the management of COAF-FS to issue a disclaimer on their wonder herbal drug. In the case of Carlil, when sued, Carbolic argued the advert was not to be taken as a serious, legally binding offer. It was just an invitation to treat, and a trick. But the court of appeal held that it would appear to a reasonable man that Carbolic had made a serious offer. People had given good "consideration" for it by going to the "distinct inconvenience" of using a faulty product. It was therefore considered an offer and not invitation to threat. The metrics of contract including Offer & Acceptance, Consideration, Intention to create Legal Relations, etc. were mentioned in this case. This case forms the foundation for Contract Law.

The Added New Twist in Offer and Acceptance

The most recent case was held in Bowerman v ABTA [5]. The key issue of the case was whether the Association of British Travel Agents (ABTA) had made an offer that could be accepted with their widely publicized "ABTA promise" to refund holiday expenses fully if booking with an ABTA member. In the ABTA's handbook the refund of the holiday insurance premium

was explicitly stated to be not refundable. The central issue of the case was very similar to that of Carlill v Carbolic Smoke Ball Company [4]. In that case it was judged that in certain circumstances adverts could be held to be offers capable of acceptance by members of the public. In the ABTA case it was similarly held that the ABTA promise could be held to be an offer that was capable of acceptance by members of the public. In this case acceptance would be completed upon booking a holiday with an ABTA member and therefore when this occurred a contract would be formed between the member of the public and the ABTA to fully reimburse holiday expenses in certain circumstances such as the insolvency of the ABTA member.

In another case involving Dresdner Kleinwort Ltd and Another v Attrill and Others: CA 26 Apr 2013 it was held that, the bank's unilateral promise made within the context of an existing employment relationship to pay discretionary bonuses, became part of the contract.

Additional Contractual Elements

There are many people who assume that contractual agreements are all about offers and acceptance. This is not the case as additional elements are required before an agreement can be considered a contract. One such critical element is consideration. It is the quid pro quo (literally, Latin for something granted in return for something) in a bargain. In Curie v Misa [1875] "some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other party…" The definition is the benefit/detriment theory of consideration. In essence it sees consideration as either a "benefit or a detriment" as stated in Thomas v Thomas 1842 where the sum of 1 pound was held to be sufficient consideration for a promise to permit a widow to occupy her late husband's house.

The Objective Test in Contract

Another element is intention to create legal relations. In issues of intention to create; the court looks at the objective test instead of the subjective test. What would a reasonable man or intelligent bystander impartially would think of the case? Mostly domestic or social issues are not enforceable or binding accept exceptional cases. In the case of Balfour v Balfour, [1919] 2 KB 571, it was held that social or domestic issues are not binding. However, commercial cases are considered binding or enforceable.

The locus standi

The right or capacity to bring an action or to appear in a court is the meaning of Locus standi. For instance, a foreign government which has not been recognized by the UK government has no locus standi in the English courts' according to lexico.com. so another element is capacity to contract, better known as incapacity concerning limits on a person's legal ability or competence to contract. In reality, every person is assumed to have the ability to enter into a contract, though certain groups of persons are identified as lacking full capacity. This is in order to protect freedom of contract, so where a person lacks the capacity the reason is that the law considers that because of his vulnerability such a person needs protection from being advantage of by the others. However, others legal scholars and commentators are of the opinion that the law is bias in protecting such vulnerability as there is the propensity of such people taking advantage of the protection by the law.

Contract definition?

What therefore is a contract? Pollock had this to say: "a promise or an exchange of promises" enforceable at law or "every agreement and promise enforceable at law", that which permits the promise to be enforceable at law by the promisee is consideration if it has some discernible value. So the question as to what extent does the law provide sufficient protection for those who enter into a contract with a person who, through age, mental illness, or intoxication, may be said to lack the capacity to make a binding agreement is the subject for review in this paper.

DISCUSSION

As Goodnuff, 2020 [1] said, before an agreement can be qualified as a valid contract, it should contain all the essential elements describe supra. What distinguishes a contract from a mere agreement is the fact that if one of the parties fails to honour or discharge his promises the other party may take legal action. Based on the principle of law condensed in the maxim ex turpi causa non-oritur action, that is, an action does not arise from a base cause; a court does not generally enforce a contract or transaction stained with illegality or antagonistic to public policy. Thus an agreement is a wider term than a contract. In the mathematical expression, I can unequivocally say Contract is a subset of Agreement. "All contracts are agreements but all agreements are not contracts".

In view of this, there are some categories of people whose power to make contracts is limited by law which I will explore in this paper. The main categories are minors, and people considered incapable of contracting because of mental disorders or drunkenness. Contracts are of course not only made between individual people. In many cases, one or both parties will actually be groups of people, such as companies [29], local authorities and other organizations. Such groups are generally called corporations, and the contracting capacity of a corporation depends on what type of corporation it is.

Minors

Customarily, anyone under 21 was considered by the law as a minor (in fact the law usually called such people 'infants'). In Ghana, basically, minor's

position in contract is based on the common law. Their ability to make contracts was first limited by the common law, and then by the Infants Relief Act 1874, [25] which engineered rather thorny provisions on the subject. In 1969, the Family Law Reform Act abridged the age of majority to 18, and switched the term 'infant' with 'minor', and then in [26], the Minors' Contracts Act abolished the Infants Relief Act 1874, and reestablished the common law, which still administers contracts made by minors today. The basic common law rule is that contracts do not bind minors. There are, however, some types of contract which are binding on minors, or which are merely voidable.

Contracts binding on a minor

The only contracts which are binding on a minor are contracts for the supply of necessaries. 'Necessaries' are interpreted as including not just the supply of necessary goods and services, but also contracts of service for the minor's benefit.

Contracts for necessary goods and services

The Sale of Goods Act 1979, section 3(2) [27] defines 'necessaries' as 'goods suitable to the condition in life of the minor or other person concerned and to his actual requirements at the time of sale and delivery'. It therefore includes more than just such essentials as food, shelter and clothing, and in deciding the issue the courts can take into account the social status of the particular minor items which might not be considered necessaries for a working-class child may nevertheless be necessaries for one from a wealthy background. When deciding if a contract is one for necessaries, the courts first of all determine whether the goods or services are capable of amounting to necessaries in law, and then consider whether they are in fact necessaries as far as the minor before them is concerned. The tests are particularly challenging to apply, but effectively mean that a minor will be bound by most consumer contracts, but usually not by commercial ones.

For instance, In Nash v Inman [6] a Savile Row tailors supplied a Cambridge undergraduate with 'eleven fancy waistcoats at two guineas each'. When the tailor sued for payment, the student claimed that the contract could not be enforced against him, as he was a minor (at this time people were considered minors until the age of 21). The Court of Appeal held that although the goods were suitable to the young man's 'condition in life' (he was 'the son of an architect of good position'), they did not satisfy the second limb of the statutory definition. They could not be regarded as suitable to his actual requirements at the time, because his father had given uncontradicted evidence that he already had a sufficient wardrobe of clothes. Therefore, the contract was not binding.

In the common law, similar approach is taken to contracts for services as for goods. In Chapple v Cooper [7] an undertaker sued a widow, who was a minor, for the cost of her husband's funeral. It was held that this was a necessary service, and so the young woman was obliged to pay. In discussing what kind of goods and services could be considered necessaries, the court said 'Articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed.' The Sale of Goods Act also provides that if necessaries are sold to a minor, but before receiving the goods the minor decides that they are no longer wanted, there is no obligation to accept and pay for them. Nor is a minor bound by a contract which contains oppressive or exceptionally onerous terms.

Whether a term is adequately burdensome to ignore liability will depend on the circumstances of each case. In Fawcett v Smethurst [8] a minor was held not to be bound by a contract for the hire of a car, even though it was a necessary service in this case, because the contract included a term making him liable for damage to the car 'in any event' that is, whether or not the damage was his fault. Where there is a binding contract for necessaries, the minor is only bound to pay a reasonable price for them, which need not be the contract price.

Contracts of service for the minor's benefit

Minors are also bound by contracts of service, providing these are on the whole helpful to them. In practice this generally means contracts of employment under which a minor gains some training, experience or instruction for an occupation an apprenticeship would be a common example. In Clements v London and North Western Railway Co [9] a minor made an agreement under which he gave up his statutory right to personal injury benefit, but gained rights under an insurance scheme to which his employers would contribute. It was held that the rights gained were more beneficial than those given up, and so the contract was, on balance, for the minor's benefit and therefore binding.

In Robert v Gray [10] 1 KB 520, the respondent agreed on a joint tour with Roberts, an adult professional. The plaintiff exhausted a lot of time, went to a lot of trouble and incurred liabilities to make the necessary preparations. A dispute arose and Gray rejected the contract before the tour began. The plaintiff sued for damages but the respondent pleaded his infancy, alleging the contract was not for necessaries. The court held that, the contract was for the respondent's benefit and therefore the contract is one for necessaries.

In Hamilton v Lethbridge [11] 14 CLR 236, while still a minor, the respondent entered into articles of apprenticeship with the defendant. The articles contained a covenant to the effect that the respondent would not, when qualified, practice as a solicitor with 50 miles of Toowoomba, where the plaintiff practices. The respondent breached the terms of the agreement.

The court held that, the covenant was enforceable. Although the contract contained clauses that may have regarded as harmful to the respondent, on balance the contract as a whole was beneficial.

Also in the case of Mercantile Union Guarantee Corp Ltd v Ball [12] 2 KB 498. The respondent, a minor carrying business as a haulage contractor, entered into a hire purchase agreement to buy a truck. He fell into arrears and when sued, he raised the defense of infancy. The Court held that, he was not liable. The contract was a trading contract and as such, was not one by which a minor could be bound.

The case of Wayne Rooney

The famous English football player, Wayne Rooney, entered into a contract when he was 15 years old with a company called Proform Sports Management Ltd (Proform), [13] EWHC 2903 (Ch); [2007] 1 All ER 542. Under the contract, Rooney agreed that Proform would act as his representative for two years in any transfer negotiations during that period. At the time of making the contract, Rooney was already signed with Everton Football Club. Before the end of the two-year period, Rooney sought to terminate the contract. The High Court concluded that Rooney was entitled to do this, because the contract was a voidable contract with a minor. While Rooney's contract with Everton amounted to a contract for necessaries, the contract with Proform did not.

In De Francesco v Barnum [14] a 14-year-old girl entered into a stage-dancing apprenticeship with De Francesco, under an agreement which was considerably more favourable to De Francesco than to the girl. She was not to marry during the seven years of the apprenticeship, could not take on professional engagements without his written consent and was completely subject to De Francesco's commands. He, on the other hand, made no commitment to employ her, and stated that if he did do so it would be at a very low rate of pay. The agreement also allowed him to send her abroad, and to put an end to the agreement at any time. Fry LJ concluded: 'Those are stipulations of an extraordinary and unusual character, which throw, or appear to throw, an inordinate power into the hands of the master without any correlative obligation.' Consequently, the court held that the contract was not for the minor's benefit, and could not therefore be enforced against her. In some cases the courts have widened the concept of a contract of service beyond the usual employment situations.

In Doyle v White City Stadium Ltd [15] the plaintiff was a minor who entered into an agreement with the British Boxing Board to secure a fighter's license. One of the terms of such a license was that if a boxer was disqualified for committing a foul, he would not receive the 'purse' (fee) for the fight, only his travelling expenses. Doyle was contracted to take part in a fight, for which the purse was £3,000, and the contract was subject to British Boxing Board rules. He was disqualified for hitting below the belt, but tried to claim the £3,000 from the promoters and the Board. The court looked at the contract, and held that although boxing was not an occupation in which an ordinary apprenticeship was possible, the type of contract made with the Board could be compared with a contract of apprenticeship. Looked at as a whole, the contract was beneficial to the minor, and even the clause which deprived him of £3,000 was one which was designed to encourage clean fighting and thereby protect young, inexperienced boxers. He was thus bound by the contract and could not claim the £3,000. There is no general principle that a contract for the benefit of a minor is automatically binding on him or her. For example, trading contracts are never binding on minors, even where they are for their benefit. Thus, in Cowern v Nield [16] a minor was in business selling hay and straw. It was held that he was not liable to repay the price of a consignment of hay that he failed to deliver.

Contracts voidable at common law

Apart from contracts for necessaries which bind the minor, the general rule at common law is that a minor's contracts are voidable. In other words, these contracts are not binding on the minor, but bind the other party. Thus, these contracts are valid when they are made, but can be terminated by a minor at any time before becoming 18 or within a reasonable time afterwards. This category covers contracts which involve a long-term interest in property such as land, shares or partnerships. If such a contract is terminated before any money is paid or obligations created, the position will be as if the contract had never been made in the first place, but problems can arise where obligations are incurred or money is paid, and then the minor terminates the contract. The law is somewhat unclear, but it seems likely that a minor would be liable to pay any debts arising before such a contract is terminated. Where a minor has already paid money under a contract, and then terminates it, whether that money can be recovered will depend on whether the minor got anything in return for it.

In Corpe v Overton [17] a minor agreed to enter into a partnership, which was to be formed in the future. He paid a £100 deposit, knowing that he would lose it if he did not in the end go through with the partnership. Before the partnership was put into operation, the minor repudiated the agreement. The courts held that he was entitled to have his deposit back, because there was a total failure of consideration – at the time he terminated the contract, he had received nothing in return for it.

A contrasting case is Steinberg v Scala (Leeds) Ltd [18]. The plaintiff, a minor, bought shares in Scala. These shares were not fully paid up, which means that a company issuing such shares can subsequently demand from a shareholder payment up to the nominal value of the shares: for example, if a person pays £1 for a share which has a nominal value of £2.50, she can be asked to pay a further £1.50 at a later stage. Scala did make such a

request, and Ms Steinberg paid a further £250. The court case arose because she later decided to reject the contract, and wanted her £250 back. Her claim failed: the court held that although terminating the contract meant she was free from any future obligation to make payment; she could not get the £250 back because there had not been a total failure of consideration. She had the shares, so she had got something in return for her money.

Remedies against minors

Clearly the rules on minors and contracts have the potential to create injustice for example, where an adult is unaware that the other party to a contract is a minor. Therefore, the equitable remedy of restitution, which is used to make anyone who has been unjustly enriched give back their profit, has been applied to minors. If a minor dishonestly obtains goods and then keeps them, an order for restitution can be made to make the minor give them back to the plaintiff. In practice, this equitable remedy has become less significant in the light of the power granted by section 3 of the Minors' Contracts Act 1987.

In this Act, where an adult has entered into an unenforceable contract with a minor, or a contract which the minor has aborted, the courts may give any property acquired by the minor under the contract back to the adult, provided it is 'just and equitable' to do so. This provision goes further than the equitable remedy, in that it may be used even if the minor has not acted falsely. A young person who has already sold or exchanged the property may have to pay the cost of the goods, or give up any property received in exchange for them.

However, a minor who no longer has the goods or any proceeds of their sale or exchange cannot be made to pay anything, as this would effectively enforce what is still an unenforceable agreement. The equitable remedy of specific performance can never be used against a minor, nor can it be used by a minor, because the remedy requires mutuality between the parties. If an adult realizes that they are making a contract with a minor they may ask for a guarantee from an adult. In section 2 of the Minors' Contracts Act 1987, where a contract is unenforceable because it was made with a minor, a guarantee of that contract will be enforceable. Thus, the adult who provided that guarantee will have to compensate the other contracting party for their loss according to the terms of the guarantee. This arrangement is frequently used where loans are made to minors.

Minors and tort

Minors can usually be liable under tort law so long as they are old enough to know the nature of what they are doing, but this rule cannot be used as an indirect way of enforcing a contract which would otherwise not be binding on a minor. In Leslie Ltd v Sheill [19] a minor borrowed money, having lied about his age. The contract for the loan was an unenforceable one. In deliberately misrepresenting his age, the minor committed the tort of deceit, and knowing that he could not sue the minor for breach of contract to recover the money, the moneylender brought an action for damages in tort. The action was unsuccessful because the court held that it was merely an attempt to enforce a contract on which the minor was not liable.

With very young children the courts may take the view that they lack the mental capacity to enter a contract, so that the rules on mental incapacity, discussed, would apply [30]. Thus, in R v Oldham Metropolitan Borough Council, ex parte Garlick [20], the House of Lords considered that the laws on the validity of contracts made by minors could only apply if they were old enough to understand the nature of the transaction and the nature of any continuing obligations incurred. Thus, while a child well under the age of ten could buy sweets, a four-year-old could not contract for the occupation of residential premises.

Challenges with the law on minors

The law on minors and contracts is widely thought to be out of step with modern society. Many of the cases arose more than a hundred years ago, and often involved people between 18 and 21, who would now be considered adults. It is also strange that the age of full contractual capacity is 18, when an individual of 16 or 17 may legally be in fulltime employment, married and even a parent. In addition, consumer protection laws may reduce the need for special protection for minors.

New Reform

In 1982, the Law Commission proposed that all contracts should be binding on minors who are 16 years or over. Below that age, contracts should be enforceable by minors, but not against them. A minor who misrepresents their age in order to secure a contract should be liable in tort for deceit, but in other cases of fraud a minor under 16 should not be liable if the effect of that liability would be to allow the other party to enforce indirectly an otherwise unenforceable contract.

MENTAL INCAPACITY

This category covers people suffering from mental disability (which appears to include both mental illness and mental handicap), and those who are drunk when the contract is made. In general, contracts made with someone in either state will be valid, unless, at the time when the contract is made, that person is incapable of understanding the nature of the transaction and the other party knows this. In such circumstances the contract is voidable: the party suffering from mental disability or drunkenness can choose whether or not to terminate it. Where one party is incapable, through drunkenness or mental disability, of understanding the nature of the transaction, but the other party does not realize this, the courts will ignore the incapacity. In Hart v O'Connor [21] the Privy Council held that a person of unsound mind was bound by his agreement to sell some

land because, when the contract was made, the buyer did not realize that the seller had any mental incapacity.

The fact that a person has a poor understanding of the language in which the contract was made and is illiterate does not render them incapable of making a contract. The defendant in Barclays Bank v Schwartz [22] was Romanian and had signed contracts rendering him liable for his company's debts of over £500,000[31]. In an attempt to resist paying the money he argued that his poor English and illiteracy meant he lacked the capacity to make the contracts. This argument was rejected by the Court of Appeal, being described by the court as 'straight from the book of feeble excuses'. A person who was illiterate, or did not understand the language of a contract, was aware of this, and the obligation was on them to make sure that the contract was explained. There are no specific rules governing contracts made for necessaries by mentally incapable parties; they are subject to the general rules above, and also to section 3 of the Sale of Goods Act 1979, [28] which, as for minors, states that only a reasonable price need be paid for necessaries (regardless of whether the other party was unaware of the disability). In some cases, the Mental Health Act 1983 puts the property of a mentally disordered person under the control of the courts. Contracts made by such individuals are void.

STATES OR GOVERNMENTS

They usually have unlimited capacity to enter into contracts subject to their constitution. In the 1992, Constitution of Ghana, contract becomes incapacity if not subjected to parliamentary approval as stipulated in article 181(5). In the case of the Attorney General v Waterville(Woyome), [23], the presidency approved the loan without parliamnetary approval. The supreme court ordered the Waterville to refund the money back to the state. Such is the case also in the Isofoton. The argument is also centered on whether all international business transaction must be subjected to parliamentary approval?

This question is relevant in view of the fact that based on the criteria above (not only looking at the jurisdiction of the private party to the transaction but also examining the substance of the transaction), many transactions will qualify as international business transaction. Secondly, the Article 181(5) provides for the requirement of parliamentary approval subject to "necessary modification" that is to be made by Parliament.

As rightly argued in the case, the application of the criteria above will imply that any agreement between Government of Ghana and a private entity that involves significant foreign element will have to be subject to parliamentary approval. Therefore, it follows that an agreement between Government of Ghana and British Airways for the purchase of air ticket will have to be subject to parliamentary approval to be valid, so will an agreement for housing projects between Government of Ghana and STX Ghana Ltd. This interpretation will undoubtedly overburden Parliament on the one hand with approval of all such agreements, and suffocate executive function on the other hand with the need to subject all such agreements to parliamentary approval. To overcome this interpretation, the Supreme Court provided two (2) solutions:

(i) Major versus Minor International Business Transaction

(ii) Necessary Modification by Parliament

Major versus Minor International Business Transaction

The Supreme Court held that "it would be impractical for Parliament to scrutinize and approve every single business transaction with international ramifications entered into by the Executive. In order to overcome the "impractical" effect, the Court implied into Article 181(5) the word "major" which means only major international business or economic transactions are subject to parliamentary approval under the Article. Adadzi and Nwoye [24] attempted to address this and according to them, for an agreement or a business transaction between a private entity and the Government of Ghana that qualifies as international business or economic activity to be subjected to parliamentary approval, that agreement must be for a major business transaction. In other words, agreements for minor business transactions between private entities and the Government of Ghana are not subject to parliamentary approval even though it qualifies as "international business or economic activity". The criteria as to what qualify as major or minor business transaction was not provided by the Supreme Court.

They further admitted that, the Court mindful of the need for criteria for such determination indicated that whilst it is imperative for Parliament to provide clarity on the Article 181(5) of the Constitution, a certification by the Attorney-General that the transaction in question is "major" before a dispute arises would weigh heavily on the minds of the Supreme Court. However, the court is quick to add that such a certification would not be conclusive. In effect, in an agreement for international business transaction, the private party may adopt one of two options as they recommended:

(i) Require that the agreement be subject to parliamentary approval, or

(ii) Request from the Attorney General legal opinion to the effect that the agreement is for a minor international business transaction and does not require parliamentary approval.

If the second option is adopted, the private party still bears the risks of rejection of the legal opinion of the Attorney General by the Court, since such an opinion is not conclusive in the event of dispute. Even though the private party carries the risk, they are of the view, that the courts mindful of the

principles of equity will favour such private party where the Government of Ghana seeks to invalid an agreement that was so certified by the Attorney General as minor, on the ground that the parliamentary approval should have been sought.

The authors agree with the above suggestions from the court, they are however skeptical of a measure that stops short of a clear delineation or determination of the scope of Article 181(5) of the Constitution. This is due to the fact that existing foreign investors and prospective ones would not be certain of the status of their agreements with the Government of Ghana and where the Government of Ghana deems it fit, it could set up non-parliamentary approval as a basis to invalidate an agreement to avoid its contractual obligations or one aimed at preventing the investor from taking benefit of any potential investment.

They are of the view that the criteria to determine whether an international business transaction is a major or minor international business transaction should depend on the value of the transaction, effect (in terms of the impact on the economy or citizenry) of the transaction, and scope of the transaction. They therefore suggest that any criteria formulated by Parliament in clarifying the scope of Article 181(5) application should be based on these criteria.

Necessary Modification by Parliament

Article 181(1) to (4) requires parliamentary approval of loans either granted or taken by Government through a resolution passed by Parliament. Article 181(5) provides that "This article, shall with the necessary modifications by Parliament apply to an international business or economic transaction to which the Government is a party as it applies to a loan". The clause therefore permits Parliament to make necessary modification to the application of the whole Article 181 to international business or economic transaction. In that respect, Parliament is permitted to determine:
(i) The types of international business or economic transaction must be subject to parliamentary approval.
(ii) The procedure to be adopted in the approval of international business or economic transaction.

The Court has determined that even though Parliament has not done the "necessary modification" the clause is still applicable. Given the criteria adopted by the Court, there is still uncertainty over what constitute major or minor international business or economic. In order for certainty in this area, Parliament as a matter of urgency needs to provide this "necessary modification" for certainty for private party investors and advisors to determine whether or not an international commercial agreement to which the Government of Ghana is a party requires parliamentary approval.

CONCLUSION

From the foregoing discussions, there are some categories of people whose power to make contracts is limited by law. The main categories are minors, and people considered incapable of contracting because of mental disorders or drunkenness. The contracting capacity of a corporation depends on what type of corporation it is and also the state based on constitutional provisions. So for one to be bound by a contract, a person must have the legal ability to form a contract in the first place. Both parties in a contract must have the necessary mental capacity to understand what they are doing.

A person who is unable, due to age or mental impairment, to understand what she is doing when she signs a contract may lack capacity to contract. For example, a person under legal guardianship due to a mental defect completely lacks the capacity to contract. Any contract signed by that person is void. In other situations, a person may not completely lack the capacity to contract. The contract would then be voidable at the option of the party claiming incapacity, if he or she is able to prove the incapacity.

RECOMMENDATIONS

Hence from the argument, the author of this paper proposes that the equitable maxim which states that equity aids the vigilanti and not the indolent should be adopted for whoever is trying to contract with any of these parties. It is said that no one wins a case due to the ignorance of the other party but rather on his strength. Hence to avert time wastages and financial losses due to defenses of incapacity to be raised by these persons in a contract; everyone should be vigilant before contracting.

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