

# Unilateral Conduct in English Private Law

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## **Abstract**

This thesis explores the question how unilateral conduct can create, vary or discharge obligations in English private law and how unilateral conduct is regulated. First, it is explained that the reason for asking this question follows from the candidate's background in a civil law jurisdiction, in which unilateral juridical acts are regarded a category of legally relevant behaviour. After observing the obstacles in English law to the recognition of the civil law concept of unilateral juridical acts, a number of examples of unilateral conduct are identified that create legal effect. The focus of the thesis is on examples of unilateral conduct that create, vary or discharge obligations. English law allows the creation of obligations by unilateral conduct only in very specific instances. It is observed that unilateral conduct can create or transfer property rights. The different approach is explained primarily by deeply rooted distinction in English law between words and acts.

Subsequently, the thesis discusses how unilateral conduct is regulated. For some issues, notably interpretation, revocability and the intention to create legal effect, similar rules apply to the different examples of unilateral conduct. For other issues, especially mistake and form requirements, the rules diverge.

It is concluded that unilateral conduct forms a category of legally relevant behaviour in English law. This category is divided in unilateral conduct that creates obligations, quasi-contractual unilateral conduct that varies or discharges obligations and unilateral voluntary property transactions. Whereas quasi-contractual unilateral conduct is closely related to contracts and should thus generally be regulated in a manner similar to contracts, the unilateral voluntary property transaction is a distinct concept, to which specific rules apply.

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# **Unilateral Conduct in English Private Law**

## **Chapter 1 - Introduction**

This thesis is the result of one year of research of English private law. The subject of the thesis is the legal significance of unilateral conduct. In this first chapter, I explain the topic, the specific questions I answer in the thesis, what induced me to ask these questions and what I aim to achieve in the thesis.

### **1.1. Unilateral conduct and its legal consequences**

In this thesis I aim to show in which situations unilateral conduct can have legal effect in English private law. In the following, I will use the following definition of ‘unilateral conduct’: a declaration made or an action undertaken by one person, as a result of which legal effect arises, and that is made or undertaken with the purpose to create such legal effect. I briefly discuss the different elements of this definition.

First, unilateral conduct entails that the action or declaration made by one person is sufficient to give rise to legal effect. No acceptance, reliance, counter-promise or –performance is necessary for the legal effect to arise. Unilateral conduct will often be directed at another person, but his response is not a prerequisite for the creation of legal effect.

Secondly, the 'legal effect' that is created by unilateral conduct means every change in the legal position of the person undertaking the conduct or of anyone else. The legal effect can be the creation or the nullification of a right, the acquisition or the loss of a right, bringing about the enforceability of a right, or creating, varying or discharging an obligation.

Thirdly, an essential element is that the person performing the unilateral conduct acts with the motive to bring about the legal consequence. A wrong committed by one person that gives rise to liability falls outside the scope of the used definition of unilateral conduct, even if it is an intentional tort, ie when the person committing a tort acted on purpose, or with substantially certain knowledge that the act would result in damage. The conduct that is relevant to this thesis is that which is performed with the purpose of changing one's own or another's legal position, where the legal consequence takes effect as a result of the unilateral conduct. The 'intention' in an intentional tort is aimed at the factual result of the action and not at the legal effect.

To sum up, unilateral conduct can be distinguished from wrongs on the one hand, because the person committing a wrong does not have the motive to create legal effect, and from contracts on the other hand, because contracts are bilateral.

Unilateral conduct can give rise to a range of legal consequences. In this thesis, I concentrate on the role of unilateral conduct in the creation, variation and discharge of obligations. Despite this focus, I include some aspects of property law where I elaborate on the contrast between the reluctance in English law to acknowledge the effect of unilateral conduct on obligations and the possibility to

create or transfer property rights unilaterally. Subsequently, I discuss what rules apply to the different examples of unilateral conduct. I compare the rules applicable to unilateral conduct with the rules for contract, aiming to explain or justify the differences or similarities. This way, I chart the position of unilateral conduct in English law. This leads to the overarching question: *How can unilateral conduct affect obligations in English private law and how is unilateral conduct regulated?*

I conclude that there is a category of unilateral conduct in English private law, but that within that category a threefold distinction has to be made between unilateral conduct creating obligations, unilateral voluntary property transactions and ‘quasi-contractual’ unilateral conduct that varies or discharges obligations.

## **1.2. Reason for and aim of the thesis**

Unilateral conduct in English law is not generally regarded as a category of legally relevant behaviour. The question that I pose in this thesis might thus seem peculiar to an English lawyer. I am educated in Dutch law, a civil law jurisdiction with a civil code that adopts a systematic approach to private law in general and the law of obligations in particular. In Dutch law, the existence of a category of legally relevant unilateral conduct is uncontested; the ‘*eenzijdige rechtshandeling*’ (unilateral juridical act) is part of the scheme of ‘*rechtsfeiten*’ (legal facts). Internationally, however, the attitude towards unilateral conduct as a basis for legal effect varies widely. Especially in common law jurisdictions this notion is controversial. I research how English law handles the situations in which Dutch law uses unilateral juridical acts. English law does recognise that unilateral conduct can have legal consequences. The follow-up question is whether English

law uses specific solutions for specific situations that are not related to each other, or whether perhaps there is a pattern to be discovered in the dealing with unilateral conduct.

The first aim of this thesis is thus to comprehend the English approach to unilateral conduct. I describe the search for equivalents of what in a civil law jurisdiction would be regarded as unilateral juridical acts. In the final chapter of the thesis, I draw normative conclusions about the possible classification of unilateral juridical acts on the basis of my findings. I propose that English scholars and courts may be aided in dealing with different examples of unilateral conduct by regarding them as species of an overarching category.

The second aim is to enrich my perspective on Dutch law by critically evaluating both English and Dutch law. In Dutch law, the unilateral juridical act is an accepted category, but many questions remain unanswered. By comparing Dutch and English law, my view on the position of the unilateral juridical act in Dutch law has changed.

### **1.3. Research methods**

The reason for asking this question is thus in essence a civil lawyer's curiosity. It would have been instructive to write a comparative analysis of Dutch and English law. However, I choose to focus on English law. The primary argument for this choice is that the time-span of one year, combined with the length of the thesis, does not allow me to write an in-depth analysis of both English and Dutch law on this topic, following comparative legal methodology. The subject takes me to several corners of the law, especially because I include multiple issues and discuss a number of different examples. Moreover, this subject concerns fundamental

aspects of private law and I try to uncover underlying characteristics of the legal culture that might influence the outcome. The subject is thus both broad and deep, and it would take too much time and space to cover two legal systems in the scope of this thesis. Moreover, as a student educated in Dutch law, there is comparatively much more for me to learn by researching English law. It would be a personal waste to spend half of the thesis on Dutch law.

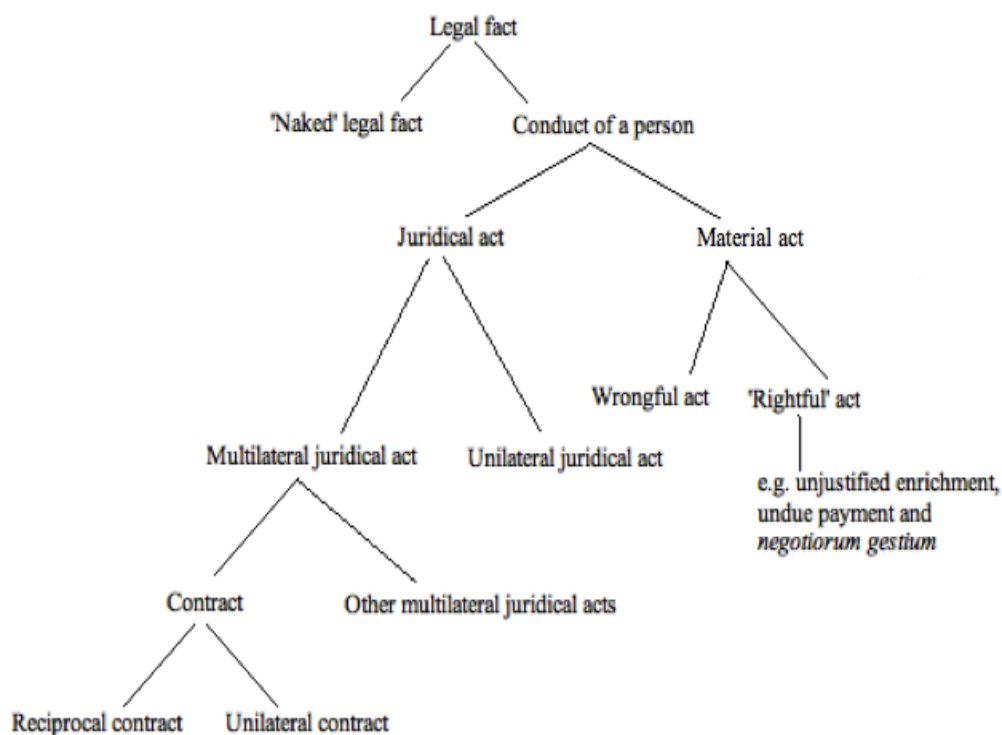
Since, however, my civil law background has been the determinative factor in my decision to ask this question - an English lawyer would not think to categorize examples of conduct as ‘unilateral conduct with purported legal effect’ – I cannot ignore it completely. In the following chapter I will therefore give a framework of the system in Dutch law, to demonstrate to the English reader the context of my research question. Throughout the thesis, I refer to Dutch law when it is opportune, for example when a certain rule in English law is similar to the approach in Dutch law or, conversely, when English law adopts a very different approach. My thesis thus incorporates comparative elements.

## Chapter 2 - The unilateral juridical act in Dutch private law

In this chapter I explain the law of obligations as laid down in the Dutch civil code ('Burgerlijk Wetboek', hereafter referred to as 'BW') and the concept of the unilateral juridical act. After a general overview of the system of the law of obligations, I discuss the definition of unilateral juridical acts and the position of this category in the system. I pay specific attention to the question as to whether the unilateral juridical act can be a source of obligations in Dutch law.

### 2.1. The Dutch system of the law of obligations

Dutch law starts from the idea that legal consequences can arise as a result of legal facts and that legal facts can be divided according to the following scheme:



This schedule is the basis of the Dutch law of obligations. Every act, declaration or occurrence that results in legal effect has a place in this scheme. The central notion in Dutch law is the legal fact ('rechtsfeit'). 'Rechtsfeit' is every action, declaration or occurrence that results in legal effect. Legal effect is every change in legal position. It can entail the creation, variation or discharge of an obligation, but also the acquisition or loss of a right, or obtaining a competence. The creation of obligations is thus only one of the possible legal effects of a legal fact.

Within the category of legal facts, the first major distinction is between actions or declarations by a person (conduct) that give rise to legal effect on the one hand, and occurrences that lead to legal effect without anyone undertaking a specific action to that effect on the other. The occurrences in the second category are called 'naked legal facts' ('bloot rechtsfeit'). Examples are being born or turning eighteen: a person's legal position changes without any conduct being undertaken. In the vast majority of cases, legal effect comes about due to the conduct of a person. This category can be divided in material and juridical acts. Juridical acts are actions or declarations by a person, with the purpose to create legal effect. Juridical acts can be both unilateral and multilateral. A material act is a declaration or an action by a person, as a result of which legal effect arises, but where such legal effect was not intended. This category entails both wrongful acts and 'rightful acts' such as *negotiorum gestio*.

The Dutch system of private law views wrongful acts that amount to delictual liability and contracts as shoots from the same stem, the stem being the legal fact. The unilateral juridical act is another shoot from this stem.

## **2.2. Unilateral juridical acts in Dutch private law**

Having sketched the system of the law of obligations in Dutch law, hereafter I will focus on unilateral juridical acts. There is no definition in the Dutch Civil Code. The unilateral juridical act is a species of the *genus* 'juridical act'. A juridical act in Dutch law requires the communicated motive to create legal effect.<sup>1</sup> The terms 'declaration of intent' and juridical act can be used synonymously.<sup>2</sup>

The characterising element of the unilateral juridical act that distinguishes it from the genus juridical act, is that the legal effect of a unilateral juridical act comes about as a result of the conduct of one party. In Dutch law, unilateral juridical acts are divided into directed and undirected unilateral juridical acts. Undirected unilateral juridical acts create legal effect at the moment at which they are performed. Directed unilateral juridical acts are addressed to another person. In order for a directed unilateral juridical act to have legal effect, the addressee must have received it.<sup>3</sup>

Acceptance or a counter-performance by the addressee of the unilateral juridical act is not required for the legal effect to arise. The act is thus both unilateral in the sense that one person constitutes the legal effect, and unilateral in the sense that is gratuitous.<sup>4</sup>

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<sup>1</sup> Art. 3:33 BW.

<sup>2</sup> Art 3:33 and 3:35 BW.

<sup>3</sup> Art. 3:37 section 3 BW.

<sup>4</sup> M Hogg, *Promises and Contract Law* (CUP 2011) 38.

Unlike in English law, as I discuss in chapter 4, there are no instances in Dutch law in which reliance by the addressee is what makes the unilateral juridical act irrevocable. If reliance is required, the act is not unilateral, as in those cases the creation of legal effect is not the result of the conduct of one party (as is the essential characteristic of the unilateral juridical act), but of two parties. According to art. 3:35 BW reliance of the addressee can be a relevant factor, as it provides that a person is precluded from claiming that the communication did not correspond with his actual motive when the communication induced justified reliance in the addressee. Reliance is however not an inherent part of the concept of the unilateral juridical act. The lack of reliance is a defence by the person that denies to have undertaken a (unilateral) juridical act. Reliance is not a requirement for the valid performance of a specific unilateral juridical act.

Examples of unilateral juridical acts can be found throughout the Dutch Civil Code, in contract law, property law and family law as well as in corporate law. Since the focus of this thesis is the law of obligations, I will give a (non-exhaustive) list of examples of unilateral juridical acts in that field of law.

- avoidance of a juridical act (*vernietiging*), art. 3:49 BW;
- cancellation of a contract (*ontbinding*), art. 6:265 and 6:267 BW;
- offer (*aanbod*), art. 6:217 BW;
- offer for a reward (*uitloving*), art. 6:220 BW;
- revocation (*herroeping*), e.g. in art. 6:219 BW;
- affirmation of a voidable juridical act (*bevestiging*), e.g. in art. 3:55 BW;
- *Nachfrist* notice (*ingebrekestelling*), art. 6:82 (1) BW;
- granting the power to represent (*volmachtverlening*), art. 3:61 BW;

- the will, art. 4:115 and 4:117 BW;
- rejection of an inheritance (*verwerping van een nalatenschap*), art. 4:190 BW;
- permission/consent, e.g. art. 1:88 BW;
- waiver, e.g. art. 1:103 BW.

Also in the field of property law, unilateral juridical acts can be found. To name the most important:

- asserting possession of a *res nullius (occupatio)*, art. 3:113 BW;
- abandonment of ownership (*derelictio*), art. 5:18 BW;
- termination of limited real rights (*opzegging van beperkte rechten*), art. 3:81(2)(d) BW;

All these examples have in common that they are communications of the motive to create legal effect, and the legal effect arises as the result of the conduct of one party. Acceptance, a counter-performance or reliance by the addressee is not required for the legal effect to arise.

I discuss two of the abovementioned cases in more detail. The first is the irrevocable offer. As a starting point, an offer is revocable in Dutch law. The offeror can make the offer irrevocable by incorporating a time period for acceptance. Also if the irrevocability follows in another way from the offer (either because it is explicitly mentioned or because it can be inferred from the wording), it cannot be revoked. Such an irrevocable offer creates a legal relationship between the parties. The irrevocability of the offer has ‘absolute effect’, which

entails that a revocation of an irrevocable offer has no consequence. Despite the attempt to revoke, a contract will come into existence if the offeree accepts the offer. The legal effect of making an irrevocable offer is that the offeror loses the opportunity to prevent that a contract will be concluded.<sup>5</sup>

Secondly, the offer for a reward, or ‘uitloving’. ‘Uitloving’ is mentioned in art. 6:220 BW, but it is not defined in the Dutch Civil Code. In legal literature, it is characterised as the situation in which a reward is promised by one person (the ‘uitlover’), to the person that does something.<sup>6</sup> An offer for a reward is regarded as an offer to the public. Whether a declaration to the public is to be regarded an offer or an invitation to negotiate, depends on whether the person communicated his motive to create legal effect. One should be cautious to assume that a declaration to the public represents a motive to make an offer. An offer to the public, and thus also an offer for a reward, is in principle revocable but can be made irrevocable. I discuss the offer and the offer for a reward under English law in section 4.2.6.

### **2.3. Unilateral juridical acts as source of obligations**

It is undisputed that a category of unilateral juridical acts exists in Dutch law, and that unilateral juridical acts can create legal effect. A question that has not been unequivocally answered is whether it is possible to create obligations with a unilateral juridical act. In legal literature, ‘obligation’ has been defined as a legal relation between two or more parties, by virtue of which one party is entitled to a

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<sup>5</sup> AS Hartkamp and CH Sieburgh, *Mr. C. Asser’s Handleiding tot Beoefening van het Nederlands Burgerlijk Recht. Deel 6-III\*, Algemeen Overeenkomstenrecht* (13th edn, Kluwer 2009) para 177.

<sup>6</sup> YG Blei Weissmann, *Groene Serie Verbintenissenrecht*, Art. 6:220, note 6.2.

performance from the other party and the other party is under the duty to perform.<sup>7</sup>

Book 6 of the Dutch Civil Code is concerned with the law of obligations and the general provisions of contract law. Article 6:1 BW reads: ‘Obligations can only arise when this follows from the law.’ This article has to be interpreted broadly.<sup>8</sup> Due to art. 6:1 BW, Dutch law has an, although qualified, open system of obligations. Obligations can arise from an act without the civil code expressly providing that that act is a source of obligations. The possibility should merely *follow from the law*.<sup>9</sup> In cases that are not specifically governed by the code, the solution should be adopted that fits into the legal system and that corresponds with comparable situations. The fact that the system of obligations is ‘open’ is relevant because the unilateral juridical act is not specified in the civil code as a source of obligations. Art. 6:1 BW provides the possibility to acknowledge the unilateral juridical act as obligatory. According to the authoritative commentary by Hartkamp and Sieburgh, unilateral juridical acts can indeed be a source of obligations.<sup>10</sup> As I will explain below, the legislator seems to have a different view.

### 2.3.1. The position of the legislator and the reality of the civil code

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<sup>7</sup> EH Hondius, *Groene Serie Verbintenissenrecht*, Art. 6:1 BW, A.

<sup>8</sup> WMH Reehuis and EE Slob, *Parlementaire Geschiedenis Boek 6 BW* (Kluwer 1990) 42.

<sup>9</sup> The codification of this rule in art. 6:1 BW was preceded by case law in which this norm was developed: see HR 31 januari 1919, *NJ* 1919, 161 (Lindenbaum/Cohen) and HR 30 januari 1959, *NJ* 1959, 548 (Quint/Te Poel). See also *Parlementaire Geschiedenis Boek 6 BW* (n 8) 42; Hondius (n 7) and LW Valk, *Tekst en Commentaar Burgerlijk Wetboek*, Art. 6:1 BW.

<sup>10</sup> AS Hartkamp and CH Sieburgh, *Mr. C. Asser's Handleiding tot Beoefening van het Nederlands Burgerlijk Recht. Deel 6-I\*, Verbintenissenrecht, De verbinten in het algemeen – Eerste gedeelte* (14th edn, Kluwer 2012) para 49-52; para 101.

In the legislative history of the Dutch Civil Code of 1992, a few passages are dedicated to unilateral juridical acts, but the discussion is piecemeal. A conceptual, overarching vision is lacking. However, on the point of the obligatory nature of unilateral juridical acts, the legislator does express its opinion. In the legislative history of art. 6:160 BW regarding the waiver of a debt, it is stated that obligations can only arise out of contracts and not out of unilateral juridical acts. The rationale for this is that it would be undesirable if a person could force a right upon another person who does not wish to receive it. Another application of this principle is that the promise of a gift must be accepted by the beneficiary before it becomes binding on the promisor.

Despite the legislator's claim, there are numerous examples of unilateral juridical acts which create obligations.

- 403-statement (a type of corporate guarantee): by depositing the declaration, the holding company becomes directly liable for debts of the subsidiary company;<sup>11</sup>
- will: a will reflects promises made by the testator, which create a binding obligation for the estate. It is not necessary for the inheritor to accept his right, according to art. 4:201 BW. Acceptance has the effect that the inheritor can no longer disclaim his right;
- avoidance of a contract: avoidance has retrospective effect in Dutch law, according to art. 3:53 BW. Not only are the contracting parties liberated from their future obligations to perform, the performances already executed are regarded as never having had a legal basis. Consequently,

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<sup>11</sup> HR 28 juni 2002, NJ 2002, 447 (*AKZO Nobel/ING*).

avoidance of the contract creates the obligation to undo the performance already executed;

- irrevocable offer: I explained above that an irrevocable offer has absolute effect in Dutch law, meaning that revocation has no effect and a contract will be concluded upon acceptance. It follows from the absolute effect that future obligations arise for the offeror, who makes an irrevocable offer, namely the obligations that will arise from the contract if the addressee accepts the offer.<sup>12</sup> As a supplementary obligation in the case the contract concerns the sale of goods, the offeror must take care of the offered good, by acting ‘as a good house father’.<sup>13</sup> In practice, this last obligation will be of limited importance, as the offeree can also accept the offer and subsequently sue the offeror under the contract for non-performance.

### 2.3.2. Justification for the obligatory unilateral juridical act

The examples above demonstrate that some unilateral juridical acts create obligations, despite the statement of the legislator that obligations can only arise as a result of a contract. The question arises as to what criterion determines whether obligations can arise from the unilateral juridical act or, alternatively, whether a contractual context is necessary.

Generally, unilateral juridical acts can create obligations if they aim to confirm or restore an old situation, eg in case of the obligation to undo already executed performances when a contract is avoided. However, not all obligatory unilateral juridical acts fit this system. The 403-statement, the irrevocable offer

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<sup>12</sup> C Spierings, ‘Vragen over het aanbod’, *RMThemis* 2013-3 112.

<sup>13</sup> JM van Dunné, *Normatieve Uitleg van Rechtshandelingen* (Kluwer 1971) 116.

and the will do not merely restore an old situation, but create new rights. There does not seem to be one general justification for these phenomena. Thus, also in Dutch law the position of unilateral juridical act is not completely clear.

## **Chapter 3 – Obstacles to the obligatory unilateral juridical act in English private law**

Having elaborated on one civil law system's view of the unilateral juridical act as a legally relevant category, in this chapter I will explain the difficulties of acknowledging the unilateral juridical act as a source of obligations in English private law.

### **3.1. Sources of obligations in English law**

A first and very fundamental difference between civil law and common law systems that impedes the recognition of unilateral acts as legally relevant, is the fact that the common law does not have a doctrine of juridical acts. As explained in chapter 2, in Dutch law, legal effect can be created voluntarily by undertaking a juridical act. The concept of juridical acts is central to the voluntary creation of legal effect. Both unilateral and multilateral juridical acts can bring about legal effect. The creation of obligations is one type of legal effect. The question as to whether a person can create obligations by performing unilateral juridical acts is a follow-up question to the observation that unilateral juridical acts give rise to legal effect.

Whereas an abstract notion is central to Dutch law, the starting point in English law is a concrete body of facts and the question as to whether on the basis of those facts, an action can be brought before a court.<sup>14</sup> In the absence of a civil

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<sup>14</sup> K Zweigert and H Kötz, *Introduction to Comparative Law* (3rd edn, OUP 1998) 181.

code, the rules regarding actions in private law develop from case law. The issue is not so much whether conduct has (purposefully or not) brought about legal effect, but whether a plaintiff in court proceedings can successfully plead that the defendant is obligated to pay a sum of money or perform an action. English law is more concerned with remedies than with rights.<sup>15</sup> Three bases for actions can be distinguished: contract, tort<sup>16</sup> and restitution. These are viewed as independent sources of obligations and not as related categories that all form part of an overarching 'law of obligations'.<sup>17</sup> Authors sometimes do write about the concept of a 'law of obligations', sub-divided into the three abovementioned categories.<sup>18</sup> In this division, contract is concerned with binding promises,<sup>19</sup> tort with wrongs and restitution with unjust enrichment.<sup>20</sup> In civilian systems such as the Dutch, the 'law of obligations' is regarded as more than the sum of contract, tort and unjust enrichment. It is the part of civil law that is concerned with all personal rights (as opposed to real rights), rights that result from a legal bond between two persons.<sup>21</sup> In Dutch law every act or event that has legal effect is a species of the overarching genus 'rechtsfeit', whereas such a common denominator is absent in English law. English law does not desire a watertight system that regulates all legally relevant

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<sup>15</sup> G Samuel and J Rinkes, *The English Law of Obligations in Comparative Context* (Ars Aequi Libri 1991) 4.

<sup>16</sup> 'Tort' is in itself the collective indication of a number of actions for wrongs: J Edelman and J Davies, 'Torts and Equitable Wrongs' in A Burrows (ed), *English Private Law* (2nd edn, OUP 2007) para 17-04; G Wagner, 'Comparative Tort Law' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2008) 1006.

<sup>17</sup> AM Tettenborn, *An Introduction to the Law of Obligations* (Butterworths 1984) Preface; Samuel and Rinkes (n 155) 37; J Cartwright, *Contract Law. An Introduction to the English Law of Contract for the Civil Lawyer* (Hart 2007) 48.

<sup>18</sup> See eg A Burrows, *Understanding the Law of Obligations* (Hart 1998) 3; Tettenborn (n 17).

<sup>19</sup> C Fried, *Contract as Promise* (Harvard University Press 1981) 13.

<sup>20</sup> Burrows (n 18) 3.

<sup>21</sup> See G Samuel, *Law of Obligations and Legal Remedies* (2nd edn, Cavendish 1996) chapter 1.

conduct between two people under the heading of ‘the law of obligations’. If a fact pattern does not fulfil the requirements for one of the abovementioned actions, the plaintiff’s claim will be rejected.

The different structure of the two systems does not necessarily mean that there is a material difference. Unilateral conduct can also in English law result in legal effect. Due to the lack of a doctrine of juridical acts, the need is simply not felt to assemble all examples of unilateral conduct creating legal effect.

### **3.2. The requirement of acceptance**

In Dutch law, unilateral juridical acts can create voluntary legal effect. The conduct of one person is sufficient for the legal effect to arise. In English law, additional elements are required. Legal effect can be created voluntarily in a contract and in a deed. For the formation of a contract, it is required that parties reach an agreement, which will generally be the case when one party accepts an offer by the other party.<sup>22</sup> The essential characteristic of a unilateral juridical act is that acceptance is not required.

The deed is an example of an exception to the requirement of acceptance. A deed can be made by one person and the legal effect that is purported can thus arise without a second party having to accept it. I discuss the deed in more detail in section 4.1.1.1.

For a valid contract, English law does not only require acceptance, but also consideration. Since consideration requires the promisee to act or to promise to act in exchange for the promise, the requirement of acceptance is inevitable.

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<sup>22</sup> GH Treitel, *The Law of Contract* (13th edn, ed E Peel, Sweet & Maxwell 2011) para 2-001.

### 3.3. The doctrine of consideration

In English law, a promise is as a general rule only binding if it is either supported by consideration or made in a deed.<sup>23</sup> The requirement of consideration entails that something of value in the eye of the law must be given in return for the promise.<sup>24</sup> It can be a benefit, right, interest or profit for one party or a forbearance, loss, detriment or responsibility undertaken by the other party.<sup>25</sup> Consideration must move from the claimant.<sup>26</sup> It appears from the doctrine of consideration that ‘the bargain’ is the central notion of English contract law.<sup>27</sup>

The doctrine of consideration is the mechanism chosen to determine which promises are worthy of being enforced. The claim of the addressee of a gratuitous promise is regarded as less worthy of the money and trouble involved in enforcement than claims resulting from synallagmatic contracts.<sup>28</sup> Since not all promises can be enforced, every legal system needs a method to segregate enforceable and non-enforceable promises. Dutch law uses the criterion whether the promisor expressed his motive to create legal relations.<sup>29</sup> There is no right or wrong approach as to how the distinction between enforceable and unenforceable

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<sup>23</sup> Treitel (n 22) para 3-001.

<sup>24</sup> *Thomas v Thomas* (1842) 2 QB 851.

<sup>25</sup> *Curie v Misa* (1875) LR 10 Ex 153.

<sup>26</sup> *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847; *Thomas v Thomas* (n 24).

<sup>27</sup> F Pollock, *Principles of Contract* (13th edn, ed PH Winfield, Stevens and Sons 1950) 133; J Gordley, *The Enforceability of Promises in European Contract Law* (CUP 2001) 51; *Dunlop Pneumatic Tyre v Selfridge* (n 26).

<sup>28</sup> L Fuller, ‘Consideration and form’ (1941) 41 Colum L Review 799 and 815; Treitel (n 22) para 3-002; M Chen-Wishart, ‘Consideration: Practical Benefit and the Emperor’s New Clothes’ in J Beatson and D Friedman (eds), *Good Faith and Fault in Contract Law* (Clarendon Press 1997) 123.

<sup>29</sup> Art 3:33 and 3:35 BW. See also Hartkamp and Sieburgh 2009 (n 5) para 2 and 3. English law recognises the importance of the intention to create legal relations, but as a subsidiary doctrine: see Cartwright (n 17) 140.

promises is made. The solution adopted by a legal system can hardly be judged in isolation, as it is related to the bigger picture of the rules regarding contracts. In English law, if a promisor is involuntarily bound, he at least receives consideration for his promise and thus will benefit in some way. This is not so in Dutch law, since the promisor can also be bound to a gratuitous promise if the promisee reasonably understood the declaration as binding. In practice, the difference may not be as sharp as presented here. A court in the Netherlands may not be easily inclined to conclude that a motive to create legal effect was present, especially when the court considers gratuitous undertakings. On the other hand, when two (professional) parties before an English court obviously want to conclude a contract, the court will look benevolently at the facts of the case to find consideration.<sup>30</sup>

A second argument in favour of the doctrine of consideration is that it provides the basis for the determination of the extent of liability, namely the expectation measure, since that is what the promisee has paid the agreed equivalent of.<sup>31</sup> Further, the enforcement of gratuitous promises could harm the position of third parties who have a more justified entitlement to the promisor's assets, such as creditors. Gratuitous promises can be made rashly, and the doctrine of consideration or the form requirement of a deed protect the promisor against binding himself without due deliberation.<sup>32</sup> This last argument is not completely convincing, since the consideration has to be provided by the promisee and will

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<sup>30</sup> GH Treitel, 'Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement' (1976) 50 *ALJ* 439, 440; *Shadwell v Shadwell* (1860) 142 ER 62; *De La Bere v Pearson Ltd* [1908] 1 KB 280.

<sup>31</sup> Chen-Wishart (n 28) 123.

<sup>32</sup> Treitel (n 22) para 3-002.

thus not be a barrier for the promisor. Even if a promise was made rashly, the promisor will nonetheless be bound if the promisee makes a counter-promise. He receives something in return, although the value may be nominal,<sup>33</sup> but the promisor still has to perform his own obligation.

The doctrine of consideration is the most prominent obstacle in the acknowledgement of informal unilateral conduct as a source of obligations. There is no requirement of consideration, however, for the creation or transfer of a property right. As a result, unilateral conduct can give rise to or transfer property rights. I will elaborate on this in chapter 5.

Related to the doctrine of consideration is the doctrine of privity of contract, which entails that a contract cannot confer rights and cannot impose liabilities on anyone but the parties to the contract (the persons ‘privity’ to it).<sup>34</sup> This doctrine demonstrates the inclination of English law to require a contractual context to grant or to acquire rights. The operation of the doctrine is restricted by the Contracts (Rights of Third Parties) Act 1999.<sup>35</sup> By virtue of the Act, a third party can in some cases enforce a contract term.<sup>36</sup> The Act marks a shift in the perception of the requirements to create rights. More emphasis is placed on the purposes of the parties and less on the existence of a bargain between the parties. According to the Law Commission, the doctrine of consideration is an

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<sup>33</sup> Treitel (n 22) 3-014.

<sup>34</sup> Treitel (n 22) para 14-001; Cartwright (n 17) 211; J Beatson, A Burrows, J Cartwright, *Anson’s Law of Contract* (29th edn, OUP 2010) 616; *Tweddle v Atkinson* (1861) B & S 393; *Dunlop Pneumatic Tyre v Selfridge* (n 26).

<sup>35</sup> Before the legislation was passed, in many instances the courts had expressed their dissatisfaction with the doctrine: see strongly Steyn LJ in *Darlington BC v Wiltshier Northern Ltd* [1995] 1 WLR 68 at 76.

<sup>36</sup> Contracts (Rights of Third Parties) Act 1999 s 1(1)(a), s 1(1)(b) and 1(2). The element of the doctrine of privity that a contract can only impose liabilities on a party to it remains unaffected by the reforms, Treitel (n 22) para 14-001.

independent doctrine that is not formally affected by the reform regarding third party rights. Nevertheless, the Law Commission sees no objection in accepting that the reform may represent a relaxation of the importance attached to the requirement of consideration.<sup>37</sup>

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<sup>37</sup> Law Commission 'Privity of Contract: Contracts for the Benefit of Third parties' (LawCom No 242 Cm 3329, 1996) para 6.1 and 6.17.

## **Chapter 4 - Unilateral conduct and the creation, variation and discharge of obligations**

In the previous chapter, I identified obstacles to the recognition of the unilateral juridical act in English law. In this chapter and the following chapter, I discuss situations in which unilateral conduct, despite these impediments, creates legal effect. I distinguish between unilateral conduct that affects obligations on the one hand and unilateral conduct which creates or transfers property rights on the other. The latter category will be discussed in chapter 5.

Unilateral conduct can *create* obligations, but can also *vary* obligations that are already in existence, or lead to the *discharge* of obligations. These cases would in Dutch law fall under the definition of the unilateral juridical act.

Ultimately, three categories of unilateral conduct can be distinguished: unilateral conduct that creates obligations, quasi-contractual unilateral conduct that varies or discharges obligations and unilateral voluntary property transactions.

In section 4.2., I discuss instances that on first sight appear to unilaterally create, vary or discharge obligations, but that are in fact insufficient to do so independently.

### **4.1. Unilateral conduct creating, varying or discharging obligations**

#### *4.1.1. Unilateral conduct creating obligations*

#### 4.1.1.1. The deed

Owing to the doctrine of consideration, gratuitous promises cannot bind the promisor. The deed is the most prominent exception to this rule. A deed is a signed and delivered written document in which an interest, right or property is passed or confirmed, or in which an obligation binding on a person is created or confirmed.<sup>38</sup>

A deed can be unilateral or bilateral.<sup>39</sup> The focus in this thesis will be on those deeds in which a unilateral undertaking is laid down, so-called deeds poll. A validly executed deed is binding on the person making it.<sup>40</sup> As a result, binding gratuitous promises can be made in a deed. Neither consideration nor acceptance by the beneficiary is required.<sup>41</sup> To constitute a valid deed a document needs to make *prima facie* clear that the person making it intends the document to be a deed.<sup>42</sup> Secondly, the document needs to be validly executed. Execution entails signing and delivery by the person making the deed or another authorised person.<sup>43</sup>

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<sup>38</sup> RF Norton, *A Treatise on Deeds* (Sweet & Maxwell 1906) 3; Law Commission, 'The Execution of Deeds and Documents by or on behalf of Bodies Corporate' (LawCom No 253 CM 4026, 1998) para 2.4.

<sup>39</sup> An indenture is a deed between two or more parties that provides evidence of an agreement. A deed *inter partes* is a document with the effect of an indenture, which expressly states it is made between two or more specific persons.

<sup>40</sup> *Halsbury's Laws of England* (5th edn 2012) vol 32, para 257.

<sup>41</sup> Treitel (n 22) para 3-170; *Pinnel's Case* (1601) 5 Co Rep 117a at 117b; *Re Whitaker* [1901] 1 Ch 9.

<sup>42</sup> Law of Property (Miscellaneous Provisions) Act 1989, s 1(2)(a).

<sup>43</sup> See section 6.1.2.2.a. for a more elaborate explanation of the form requirements set for deeds.

I will briefly sketch the historical background of the deed to find the justification for this exception to the requirement of acceptance and to the doctrine of consideration. The use of deeds was historically a common way to evidence covenants (consensual agreements) regarding land.<sup>44</sup> In the first half of the fourteenth century, the royal courts ordained that a deed was the only acceptable evidence for any covenant in proceedings before a royal court, to dampen the number of cases brought before them.<sup>45</sup> Beside the writ of covenant there was the writ of debt, on the basis of which the defendant was ordered to pay a sum of money or a quantity of other fungibles, which he owed to the plaintiff and unjustly withheld from him – *debet et detinet*.<sup>46</sup> Like covenants, the existence of a debt was difficult to prove if it depended solely on a private transaction.<sup>47</sup> For debts, however, the courts did not impose the rule that they could only be enforced if proved by a deed. The different approach is said to result from the deep distinction in English law between words and acts. Courts did not allow an action for mere breath.<sup>48</sup> When enforcing debts, the sale or loan that was the basis for the duty to pay was visible conduct. It was the act that created the debt, thus it did not merely depend on words.<sup>49</sup> In the same sense a deed is more than just

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<sup>44</sup> CHS Fifoot, *History and Sources of the Common Law. Tort and Contract* (5th edn, Stevens & Sons 1965) 257.

<sup>45</sup> JH Baker, *An Introduction to English Legal History* (4th edn, Butterworths LexisNexis 2002) 319; Fifoot (n 44) 257.

<sup>46</sup> Fifoot (n 44) 217.

<sup>47</sup> In the absence of a document under seal, the claimant needed to show as cause for the defendant owing him a transaction or contract under which he had provided compensation for the debt (*quid pro quo*). See W Holdsworth, *A History of English Law*, Vol III (5th edn reprinted, Sweet & Maxwell 1991) 413; Fifoot (n 44) 225.

<sup>48</sup> Baker (n 45) 318-319.

<sup>49</sup> *Loveday v Ormesby* (1310) B & M 250.

words, since the duty to perform a promise is signed, sealed and delivered before witnesses.

In the sixteenth century, when the doctrine of consideration had become perhaps the most distinctive feature of English contract law, the binding nature of obligations undertaken in a deed had to be reconciled with the doctrine of consideration. It was argued that the seal imported a consideration and that the parties were therefore bound,<sup>50</sup> but many authors refute this view.<sup>51</sup>

One justification for the fact that gratuitous promises are binding when made in a deed is that it evidences the serious intentions of the promisor. As discussed in chapter 3, the doctrine of consideration is the primary method in English law of distinguishing between promises that are worthy of enforcement and promises that are not. One of the arguments in favour of enforcing promises for which something has been given in return is that it protects promisors from being bound on the basis of a rashly-made promise. The deed is another way of showing actual intent to be bound.<sup>52</sup> It is argued that historically the promise contained in a deed was regarded as a solemn promise. This is related to the importance that was attached in early law to writing as a mode of proof of one's motive, although later a seal was required.<sup>53</sup>

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<sup>50</sup> *Sharington v Strotton* (1564) Plowden 298 at 309.

<sup>51</sup> Holdsworth (n 47) 419; AWB Simpson, *The History of the Common Law of Contract* (2nd edn, OUP 1987) 371-372; AKR Kiralfy, *Potter's Historical Introduction to English Law and its Institutions* (4th edn, Sweet & Maxwell 1962) 449; Treitel (n 22) para 5-001.

<sup>52</sup> *Sharington v Strotton* (n 50) at 308-309.

<sup>53</sup> W Holdsworth, *A History of English Law*, Vol VIII (7th edn, Sweet & Maxwell 2003) 81.

But a test of seriousness is not the only function of the doctrine of consideration.<sup>54</sup> Consideration also reflects a bargain between the parties. That binding gratuitous promises can be made using a deed does not fit this bargain theory. However, the deed has been regarded as an exception that does not require theoretical discussion.<sup>55</sup> Nor is it evident what equivalent the deed provides for other functions of the doctrine of consideration, such as ensuring that the position of other parties entitled to the assets of the promisor is not harmed or establishing the amount of damages to which the promisee is entitled in the event of a breach.<sup>56</sup>

The observed form can thus partly justify the exceptional position of the deed, but not entirely. The deed can be regarded as a, perhaps necessary, safety valve in the strict regime that is established through the doctrine of consideration. While the underlying notion of the doctrine of consideration may be the importance attached to bargains as the basis for contractual agreement, the operation of the doctrine entails much more specific and sometimes burdensome rules. An agreement can be the result of a bargain, but – theoretically – the obligations following from it can be unenforceable for lack of consideration because the counter-performance had already been executed. Particularly in commercial contexts parties will want to avoid problems regarding consideration and therefore use a deed to evidence the agreement. Deeds are also very useful

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<sup>54</sup> As shown by the rejection of Lord Mansfield's attempts to establish that consideration was not necessary when the seriousness of the promisor's intentions could be established on the basis of documentary evidence, advocated in *Pillans v Van Mierop* (1765) 3 Burrows 1663 at 1669-1671, overruled in *Rann v Hughes* (1778) 4 Brown PC 27. See also M Lobban, 'Consideration', in W Cornish and others, *The Oxford History of the Laws of England*, Vol XII (OUP 2010) 360.

<sup>55</sup> See for example J Powell, *Essay upon the Law of Contracts and Agreements* Vol I (Dublin, Chamberlain & Rice 1790), para 340; Chitty regarded deeds as an exception permitted by analogy of the *stipulatio*, J Chitty, *A Practical Treatise on the Law of Contracts* (2nd edn, Sweet 1834) 23.

<sup>56</sup> Chen-Wishart (n 28) 123.

instruments when parties wish to vary the contract after a change in circumstances. By laying the variation down in a deed, no separate consideration has to be provided by the party benefitting from the new terms. This does not mean that no bargain underlies the variation. Another reason for commercial parties to use a deed instead of a simple contract is the twelve year limitation period for actions upon a specialty, instead of the six year limitation period for actions upon a simple contract.<sup>57</sup>

Gratuitous promises are contrary to the intuition that a person acts in the benefit of his estate. Especially in a commercial context not often will someone grant a benefit to another at his own expense without receiving an advantage himself. It is therefore expected that such gratuitous promises are not made, and it would thus be a waste of time and money to bring proceedings over the enforcement of such promises. But situations are conceivable in which a person does want to make a binding gratuitous promise. The deed is the instrument with which counter-evidence can be given against the starting point of irrationality and thus non-enforceability of the promise.

#### 4.1.1.2. Documentary credit

A documentary credit is, in short, the assurance of payment by a bank against presentment of specified documents. The buyer instructs his bank to open an irrevocable credit in favour of the seller. The bank notifies the seller that the credit has been opened and that he will be paid (generally) on presentation of certain documents. It is an irrevocable arrangement that constitutes a definite undertaking

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<sup>57</sup> Limitation Act 1980, s 7 and s 5.

of the issuing bank to honour a complying presentation.<sup>58</sup> Documentary credits are used in (international) commercial dealings. The bank's obligation arises when it issues the credit.<sup>59</sup> Acceptance, reliance, consideration or execution in solemn form are not required.<sup>60</sup> The beneficiary can reject the credit, after which the credit ceases to have effect.<sup>61</sup>

Malek and Quest define the relation between bank and beneficiary as contractual, with the bank making an offer and the beneficiary (tacitly) accepting it.<sup>62</sup> Treitel disagrees with this view.<sup>63</sup> I see the promise of the bank to the beneficiary as unilateral conduct that creates an obligation. It is an exception to the doctrine of consideration. Ellinger argues that documentary credit is a *sui generis* instrument that embodies a promise which is enforceable without consideration by mercantile usage.<sup>64</sup> Also McKendrick expresses this view.<sup>65</sup> Goode notes that the promise is not commercially gratuitous, the promisor obtains a reward from someone else than the promisee.<sup>66</sup>

In Dutch law, issuing a documentary credit is a unilateral juridical act. It is therefore, different than in English law, not an exceptional case. The

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<sup>58</sup> Article 20 UCP 600.

<sup>59</sup> Article 7(b) UCP 600.

<sup>60</sup> R Goode, 'Abstract Payment Undertakings', in P Cane and J Stapleton (eds), *Essays for Patrick Atiyah* (Clarendon Press 1991) 209; Treitel (n 22) para 3-159.

<sup>61</sup> E McKendrick, *Goode on Commercial Law* (4<sup>th</sup> edn, Penguin Books 2010) 1078.

<sup>62</sup> A Malek and D Quest, *Jack: Documentary Credits* (4<sup>th</sup> edn, Butterworths 2009) para 2.8-2.10 and 5.1-5.3.

<sup>63</sup> (n 22) para 2-055.

<sup>64</sup> EP Ellinger, *Documentary Letters of Credit* (Singapore University Press 1970) 122.

<sup>65</sup> McKendrick (n 61) 1078.

<sup>66</sup> Goode (n 60) 209.

documentary credit has the effect that an obligation is created for the bank. By issuing the credit, the bank undertakes the obligation to pay. The issuance has effect without acceptance by the beneficiary.

#### 4.1.1.3. Declaration of trust and appointment of trustees

A third example of unilateral conduct that brings about obligations is the declaration of trust or the appointment of a trustee. If a person wants to establish a trust and himself become the trustee, he can declare a trust. The settlor declares that he will, from that moment, hold the property as trustee, and stipulates that in that capacity he will deal with it in a certain manner for the beneficiary.<sup>67</sup> As a result of the declaration, the settlor becomes trustee and thus binds himself to comply with fiduciary duties. Acceptance, reliance or a counter-act by any other person is not required for the trustee to be subjected to these duties. Also when the trusteeship is exercised by someone other than the settlor, unilateral conduct is relevant in the creation of obligations. According to Gardner, usually the settlor confers with the intended trustee before he appoints him. If this consultation does not take place, the trustee can disclaim the trusteeship.<sup>68</sup> This entails that the appointed person becomes trustee, despite not having agreed to it. The trustee has the right to disclaim his position, but this arises after the trusteeship is bestowed upon him and he has become liable for the fiduciary duties.

The trust is described as a situation in which property is vested in someone (the trustee), who is under legally recognized obligations to handle it in a certain

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<sup>67</sup> S Gardner, *An Introduction to the Law of Trusts* (3rd edn, OUP 2011) 5.

<sup>68</sup> Gardner (n 67) 8 and 186; Trustee Act 1925, part III; JE Penner, *The Law of Trusts* (8th edn, OUP 2010) para 10.52.

way.<sup>69</sup> The first objective and main effect of the trust is thus that property rights are vested in the trustee.<sup>70</sup> The attachment of obligations is a by-product. This does not change the fact that by creating a trust obligations arise. The fact that a trustee's duties are prescribed by law is no obstacle to the qualification of a declaration of trust and the appointment of a trustee as unilateral conduct which gives rise to intended obligations. The obligations of a trustee are perhaps not *created* by unilateral conduct, but unilateral conduct does have the effect that the trustee is *subjected to* these obligations. The unilateral conduct gives rise to obligations for the trustee, since due to the unilateral conduct he must act in accordance with fiduciary duties, which he did not have to comply with before. It certainly is the aim of the creator to bring about these obligations, since they enhance the proper management of the trust property.

The trustee's duties can be divided into a proprietary duty (*in rem*) and personal duties (*in personam*), corresponding to proprietary and personal rights of a beneficiary. The proprietary duty entails the duty to respect that the property is not beneficially the trustee's own.<sup>71</sup> Personal duties include the obligation of proper management of the trust property. Whereas personal duties rest on the trustee personally, the proprietary duty is attached to the trust property and can thus be enforced by the beneficiary against anyone holding the good.<sup>72</sup>

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<sup>69</sup> Gardner (n 67) 210. See also Trustee Act 2000, s 1.

<sup>70</sup> Penner (n 68) 38.

<sup>71</sup> RC Nolan, 'Equitable Property' (2006) 122 *LQR* 232. Gardner (n 67) includes as a proprietary duty the obligation to safeguard the good during transfer, at 214.

<sup>72</sup> Except for the *bona fide* purchaser of the trust property of value without notice, and everyone acquiring from a *bona fide* purchaser: Gardner (n 67) 213.

The trustee comes under the obligation to comply with both types of duties at the moment of his appointment or upon his declaration of trust. The personal duties arise when the trustee has been sought out and appointed. These duties apply to him specifically. With regard to the proprietary duty, a distinction should be made between the situation in which, through a declaration of trust, the settlor both creates a trust and becomes trustee on the one hand and the situation in which the trustee is appointed on the other. Due to the declaration, the trustee must fulfil the proprietary duty. Where the trustee is someone other than the settlor, the proprietary duty is attached to the trust property and arises thus at the moment of the creation of the trust. The trustee must comply from his appointment onwards.

#### 4.1.1.4. Contracts (Rights of Third Parties) Act 1999

In section 3.3 I mentioned the doctrine of privity and its marginalisation due to the Contracts (Rights of Third Parties Act) 1999. A third party can enforce a contract term if the contract stipulates that he may or if the term purports to confer a benefit on him. The third party is not privy to the contract. It is not entirely clear how the relation between the contracting parties on the one hand and the third party on the other should be qualified. It might be seen as the offeror making a promise to both his contractual counter-party and the third party as joint promisees.<sup>73</sup> Alternatively, the situation could be interpreted as the two parties to the contract jointly conferring a right to the third party. The wording of the Act does not provide conclusive guidance. It designates one party as promisor (the

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<sup>73</sup> R Merkin (ed), *Privity of Contract. The Impact of the Contracts (Rights of Third Parties Act) 1999* (LLP 2000) 112.

party against whom the third party can enforce the term), the other as promisee (the party by whom the term is enforceable), but the third party is not identified as joint promisee.<sup>74</sup> If the second interpretation is followed, granting a right to a third party in the sense of the Act can amount to unilateral conduct that purposefully creates legal effect. The third party's right to enforce the contract term finds its origin in a bilateral relation, namely the contract, but the granting of the right is a unilateral undertaking by the parties to the contract. The third party acquires the right without having to accept it, rely on it or provide consideration for it.

It should be noted that as a general rule the granted right is revocable until the third party accepts it or relies on it.<sup>75</sup> It is therefore in the end a bilateral relation, and not a unilateral juridical act, that actually binds the contracting parties. When the contracting parties use the opportunity given in section 2(3)(b) of the Act to grant the right irrevocably, acceptance or reliance by the third party is not required for the contracting parties to be bound and the legal effect thus arises as a result of unilateral conduct.

In Dutch law, the granting of a right to enforce a contract term to a third party ('*derdenbeding*') is not a unilateral juridical act. The third party must accept the right that the parties to the contract try to bestow upon him.<sup>76</sup>

#### 4.1.2. Unilateral conduct varying existing obligations

Unilateral conduct can not only create obligations, but also vary the operation of obligations once they are in existence. I identify four examples.

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<sup>74</sup> Contracts (Rights of Third Parties) Act 1999, s 1(7).

<sup>75</sup> Contracts (Rights of Third Parties) Act 1999, s 2(1).

<sup>76</sup> Art. 6:253 BW.

#### 4.1.2.1. Variation

Contracts can be varied consensually or unilaterally. In case of a consensual variation, the parties to a contract agree in a subsequent simple contract or by deed to vary the terms of the original contract by way of a second contract.

A party in principle cannot unilaterally vary the terms of the contract.<sup>77</sup>

Three exceptions can be identified to this rule. First, a variation can be understood as a release. A deed is required for an effective unilateral release. Alternatively, a unilateral variation can be seen as a repudiation of the contract by the party seeking to vary the terms (see section 4.2.4 for an elaboration on repudiation).<sup>78</sup>

Thirdly, unilateral variation of contractual terms is possible if the original contract granted one (or both) parties the right to do so.<sup>79</sup> The declaring party exercises a right that is granted in the contract, to which both parties have agreed, that supposedly has been bargained for and for which consideration has been provided. Although the basis of the right to vary is thus contractual, the variation itself is unilateral. Such a variation falls under the definition of unilateral conduct with intended legal effect, and would be regarded a unilateral juridical act under Dutch law. The declaration of one of the contracting parties affects the obligations of the contracting parties, without the assent of the other party.

Termination of a contract can also be regarded as variation. I will discuss this in more detail in section 4.1.3.1.

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<sup>77</sup> *Felthouse v Bindley* (1862) 11 CBNS 869; S Wilken, *Wilken and Villiers. The Law of Waiver, Variation and Estoppel* (2nd edn, OUP 2002) para 2.14.

<sup>78</sup> However, acceptance of the repudiation does not result in a change of the terms of the contract, *Moschi v Lep Air Services Ltd* [1973] AC 331 at 345-346.

<sup>79</sup> *Page v Liverpool Victoria Friendly Society* (1927) 43 TLR 712; *Yeo v Stewart* [1947] 2 All ER 28.

#### 4.1.2.2. Affirmation

In case of breach or of misrepresentation, the innocent party or representee may have the right to terminate the contract. He can however choose to keep the contract and its obligations alive by affirming. Misrepresentation can be described as inducement to enter into a contract by a statement or conduct that is misleading.<sup>80</sup> I discuss in section 4.2.1 that misrepresentation does not automatically give rise to or discharge obligations. Instead, it provides the representee with a remedy, such as rescission (see section 4.1.3.2.). The representee can elect not to rescind the contract, but to affirm it. Affirmation is unilateral conduct that has intended legal effect. It is a unilateral statement of the representee that does not have to be accepted.<sup>81</sup> The legal effect of this unilateral conduct is that the injured party will lose his right to terminate<sup>82</sup> and that the obligations in the contract become unassailable again.

Affirmation has an equivalent in the Dutch unilateral juridical act 'bevestiging'.<sup>83</sup>

#### 4.1.2.3. Notice

Sometimes contractual rights can only be executed when notice has been given.<sup>84</sup>

The notice and the lapse of time provided in the notice are necessary steps to

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<sup>80</sup> Treitel (n 22) para 9-001; S Stoljar, *Mistake and Misrepresentation* (Sweet & Maxwell 1968) 87.

<sup>81</sup> J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (3rd edn, Sweet & Maxwell 2012) para 4-41.

<sup>82</sup> E McKendrick, 'Discharge by breach' in *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012) para 24-003.

<sup>83</sup> Art. 3:55 BW.

make enforcement possible. A notice is a statement issued by one party that does not need to be accepted by the counter-party. The possibility to enforce a right and the obligation to perform can thus be said to arise after and as a result of unilateral conduct. A notice might be required to dismiss rights and obligations. An example is the notice to quit that must be served by a landlord who wishes the tenant to leave, or by a tenant if he wants to bring the periodic rent agreement to an end.<sup>85</sup>

The requirement to give notice can follow from the law or from contract. The contractually prescribed notice resembles a contractual provision allowing one party to vary the obligations following from that contract, as discussed above. The notice prescribed by statute purports to protect a weaker contract party, such as a tenant or a consumer, by imposing an extra hurdle before contractual rights can be enforced. The contractual notice can be seen as having a bilateral basis, because it forms part of the agreement between parties. However, the operation of a notice is unilateral, in contractual as well as statutory contexts. Giving a notice is thus unilateral conduct that has intended legal effect. In Dutch law, notices are unilateral juridical acts. One of the most prominent examples is that of the *Nachfrist* notice ('ingebrekestelling'), which is a requirement to claim damages after non-performance.<sup>86</sup>

#### 4.1.2.4. Consent

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<sup>84</sup> For example in a consumer credit agreement, Consumer Credit Act 1974 s 76(1) and (2). On notices in housing law see T Weekes, *Property Notices* (2nd edn, Jordan Publishing 2011) para 2.39.

<sup>85</sup> D Hughes, M Davis, V Matthew and A Jones, *Text and Materials on Housing Law* (OUP 2005) 311.

<sup>86</sup> Art. 6:74(2) juncto art. 6:81 juncto art. 6:82(1) BW.

By giving consent, a person can grant a right to another person, thereby obliging himself to respect that right. In *Mount Eden Land Ltd v Prudential Assurance Co Ltd*<sup>87</sup> the Court of Appeal stated that consent is a unilateral act. In that case, a leaseholder was required to obtain written consent before he was allowed to make alterations to the external structure of the property. According to the Court of Appeal, consent was given in the clearest terms. The alterations by the respondent were made legitimately and there was no breach of covenant. The consent in this case was given in the context of the lease contract.

Giving consent is thus unilateral conduct, which has intended legal effect. The consent modifies the legal relation between landlord and tenant. Obtaining consent fulfils a condition, after which the leaseholder can enforce certain rights specified in the lease contract. In the abovementioned circumstances, the consent can be seen as an impediment to the occurrence of a breach. The presence or absence of consent makes the difference between acting wrongfully or rightfully. Also in other situations consent can prevent a liability from arising. I will discuss this in section 4.1.3.3.

In Dutch law, consent is a unilateral juridical act. Consent is a unilateral declaration, which leads to legal effect in numerous situations. For example, a resolution made by the board of directors of a legal entity may only be effective when the supervisory board gives consent.<sup>88</sup> Another example is that obtaining a neighbour's consent is required before a tree may be planted within two meters of the border of one's property.<sup>89</sup>

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<sup>87</sup> (1997) 74 P & CR 377 at 382.

<sup>88</sup> Art. 2:63j BW.

<sup>89</sup> Art. 5:42 BW.

### 4.1.3. Quasi-contractual unilateral conduct discharging obligations

The third category of unilateral conduct that affects obligations comprises of three examples of unilateral conduct that have the effect of discharging obligations.

#### 4.1.3.1. Termination

If a party to a contract fails to perform, the innocent party may have the right to terminate the contract. Termination is defined as the remedy by which the parties are released from their obligations to perform because of one party's defective or non-performance.<sup>90</sup> Although no general form requirement is imposed, generally a termination notice is used. The termination does not have to be accepted by the party in breach and has immediate effect.

To terminate a contract is unilateral conduct. The notice to terminate is effective after the unilateral declaration of the innocent party, without acceptance of the other party being required. The legal effect of the termination notice is that the obligations that were to arise under the contract are discharged.<sup>91</sup> The innocent party is thus released from the liability to perform further obligations, but the primary obligation of the defaulting party to perform is replaced with a secondary obligation to pay damages for the loss resulting from the failure to perform the primary obligations.<sup>92</sup>

The effect of termination is prospective. The contract is not treated as a nullity, so the legal base for any performance of obligations already perfected

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<sup>90</sup> Treitel (n 22) para 18-001.

<sup>91</sup> Treitel (n 22) para 18-010; *Berger & Co Inc v Gill & Duffus* [1984] AC 382 at 384.

<sup>92</sup> *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 849 per Lord Diplock; *Moschi v Lep Air Services* (n 78).

remains intact. In some circumstances termination can have limited retrospective effect. If the injured party already has partly performed the contract at the time of termination, he may be able to reclaim the price he paid or the goods he delivered.<sup>93</sup> This is the case if there is a total failure of consideration and the injured party has received nothing in return for his performance.

In Dutch law, termination falls under the scope of the unilateral juridical act, as it is a unilateral declaration, made with the motive to create legal effect. The termination notice is effective without acceptance by the counter-party.

#### 4.1.3.2. Rescission for misrepresentation

I introduced misrepresentation in section 4.1.2.2. In this section, I focus on the remedy of rescission that can be exercised by the representee, as a result of which obligations are discharged. Rescission is only available to the representee if the misrepresentation concerns a false statement of fact or law.<sup>94</sup> Further, the misrepresentation must be material,<sup>95</sup> which entails that a statement is only actionable when it was reasonable for the representee to rely on it.<sup>96</sup> Moreover, the representee must have actually relied on the misrepresentation by showing a causal link between the misrepresentation and him entering into the contract.<sup>97</sup>

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<sup>93</sup> Treitel (n 22) para 18-011 and 22-005.

<sup>94</sup> Cartwright (n 81) para 3-05. Misrepresentation can also follow from non-disclosure or from conduct.

<sup>95</sup> Treitel (n 22) para 9-017; *Lonrho Plc v Fayed (No 2)* [1992] 1 WLR 1.

<sup>96</sup> Cartwright (n 81) para 3-12; *Raiffeisen Zentralbank Österreich AG v RBS Plc* [2011] 1 Lloyd's Rep 123.

<sup>97</sup> Treitel (n 22) para 9-020; Cartwright (n 81) para 3-50.

Misrepresentation makes the contract not void, but voidable. Upon discovery of the misrepresentation, the representee can elect to rescind or affirm the contract.<sup>98</sup>

A contract can be rescinded by bringing legal proceedings<sup>99</sup> or by serving a notice to the other party. In some cases, neither is necessary, such as in *Car & Universal Finance Co Ltd v Caldwell*<sup>100</sup> in which a car owner was induced by fraud to sell his car to a swindler who later could not be traced. The notification by the owner of the police and the Automobile Association was deemed sufficient to rescind the contract. Another option for the representee is to use the misrepresentation as a defence when the representor brings an action under the contract.<sup>101</sup> When the contract is rescinded by serving a notice or other unilateral conduct (such as notifying the police) it is unilateral conduct that brings about the legal consequence. The notice or notification of the police is a unilateral declaration by the representee, and the intended legal effect arises without acceptance by the representor.

Rescission of a contract for misrepresentation has retrospective effect. Due to this avoidance *ab initio* the contract is treated as if it had never existed. If the parties already performed (part of) the contract, these performances in hindsight had no legal basis and thus have to be undone.<sup>102</sup> In this sense, rescission creates new obligations, namely the obligation to reverse the performance of contractual

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<sup>98</sup> *White v Garden* (1851) 10 CB 919; D Allen, *Misrepresentation* (Sweet & Maxwell 1988) 29.

<sup>99</sup> This may be required by statute: see for example Housing Act 1985, s 82.

<sup>100</sup> [1965] 1 QB 525.

<sup>101</sup> See for example *Redgrave v Hurd* (1881) 20 ChD 1.

<sup>102</sup> Cartwright (n 81) para 2-05 and para 4-05.

duties. It also discharges obligations. The duties that were supposed to arise under the contract will not.

The rescission also affects the transfer of property rights that have taken place since the conclusion of the contract. Upon rescission, the property is revested in the representee.<sup>103</sup>

The Dutch remedy in cases of misrepresentation is ‘vernietiging’, which is a unilateral juridical act. The effect is, as in English law, retrospective.<sup>104</sup>

#### 4.1.3.3. Consent

In section 4.1.2.4. I mentioned that consent can alter obligations. Consent can also negative the unlawful or tortious character of conduct.<sup>105</sup> The unilateral conduct thus refutes an obligation to pay damages. An example is trespass to land. Entry to land is tortious when there is no consent, but it is lawful if it is done with the express or implied consent of the possessor of the land.<sup>106</sup> The consent does not have to be accepted by the addressee, nor does consideration have to be provided.

Giving consent can be regarded as a waiver in advance. Before the tortious conduct takes place, the person giving consent discharges his action for trespass.

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<sup>103</sup> *Stevenson v Newnham* (1853) 13 CB 285; if the property rights were transferred to a *bona fide* purchaser, the representee loses his right to avoid the contract, Sale of Goods Act 1979, s 23.

<sup>104</sup> Art. 3:44 juncto art. 3:49 juncto art. 3:53 BW.

<sup>105</sup> RFV Heuston and RA Buckley, *Salmond and Heuston on the Law of Torts* (21st edn, Sweet & Maxwell 1996) 471; WVH Rogers, *Winfield & Jolowicz on Tort* (18th edn, Sweet & Maxwell 2010) para 25-02.

<sup>106</sup> *Paul v Summerhayes* (1878) QBD 9; *League Against Cruel Sports Ltd v Scott* [1986] QB 240.

## **4.2. Unilateral conduct that is not sufficient to create legal effect**

In this section I identify a number of situations in which unilateral conduct is incipient to the creation or discharge of obligations, but where something extra is required. The response of the addressee to the unilateral conduct is crucial. As a result, the obligation arises from or is discharged by interacting bilateral acts and not from the unilateral conduct in itself. I merely point these examples out and do not describe them in detail.

### 4.2.1. Misrepresentation

I shortly described misrepresentation in section 4.1.2.2. The statements by the representor must be complemented with reliance from the representee for tortious liability to arise in case of both negligent and fraudulent misrepresentation. When a party providing information on the request of another knows or ought to know that reliance is being placed on his skill and judgment, the law imposes a duty of care where there is a ‘special relationship’ between representor and representee.<sup>107</sup> The duty of care arises in relationships equivalent to contract where there was an assumption of responsibility but no contract due to the lack of consideration. Since both misrepresentation and reliance are required for the legal effect to arise, the unilateral statement of the representor is not sufficient to create the legal effect. Misrepresentation thus does not fall under the scope of ‘unilateral conduct performed with the motive to create legal effect’. Moreover, the legal effect of misrepresentation when it is combined with reliance, namely tortious liability, is not likely to be intended by the representor.

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<sup>107</sup> *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1964] AC 465 at 486, 529.

In Dutch law, misrepresentation is also not a unilateral juridical act. It does not lead to tortious liability, but just plays a role in the context of contract formation. In those cases, a valid, albeit voidable contract is concluded.<sup>108</sup>

#### 4.2.2. Gratuitous performance of services

If a person that gratuitously renders a service does not comply with his legal duty to take reasonable care and as a result someone else suffers losses, an action may be available in tort. Because the person rendering services does not receive a reward in return for his service, he cannot be held accountable in a contractual context. The fact that one person performs services does not make unilateral conduct the basis for liability. Although there is no contract, there will often be an agreement between the person rendering services and the beneficiary of the services, or at least a relationship with the claimant, on the basis of which responsibility was assumed by the defendant.<sup>109</sup>

One context in which gratuitously undertaking a service results in actionable rights is *mandatum*, a species of bailment.<sup>110</sup> The main object of a mandate is the performance by the bailee of a gratuitous promise. The promise cannot be enforced, but as soon as the bailee accepts the chattels, he becomes to some degree responsible for the goods for as long as they are in his possession.<sup>111</sup>

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<sup>108</sup> Art. 3:44 BW.

<sup>109</sup> *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 178-180, referring to *Hedley Byrne* (n 107).

<sup>110</sup> N Palmer, *Palmer on Bailment* (3rd edn, Sweet & Maxwell 2009) para 11-001.

<sup>111</sup> *Yearworth v North Bristol NHS Trust* [2010] QB 1.

Bailment is *sui generis*.<sup>112</sup> It is not a contract and therefore gives rise to non-contractual obligations. However, the handover of the goods creates a legal relation between the bailor and the bailee to which mutual rights and duties are attached.<sup>113</sup> The legal effect arises thus not as a consequence of unilateral conduct, but as a result of the bilateral relation between the parties.

In Dutch law, this situation would be qualified as a contract, under which only one of the persons is under the duty to perform. When a loss is suffered, a contractual action is available. Gratuitously performing a service is thus not a unilateral juridical act under Dutch law.

#### 4.2.3. Promissory estoppel

I will not elaborate on the specific characteristics of the doctrine.<sup>114</sup> What is relevant in the context of this thesis is that for a successful appeal to the doctrine of promissory estoppel (a) there must be an existing legal relationship between promisor and promisee; (b) the promisor must have led the promisee to believe by a clear or unequivocal promise that he would not enforce his rights, which promise was intended to affect the legal relation between the parties; and (c) the promisee must have relied on the promise. For a successful appeal to the doctrine of promissory estoppel reliance is thus a necessary requirement. The unilateral conduct (the promise) in itself is not sufficient to create the legal effect.

Dutch law has no equivalent of promissory estoppel.

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<sup>112</sup> Fifoot (n 44) 24-25; *Palmer on Bailment* (n110) para 1-001 and 11-001.

<sup>113</sup> *China Pacific SA v Food Corporation of India* [1982] AC 939 at 959 per Lord Diplock.

<sup>114</sup> *Hughes v Metropolitan Rly Co* (1877) 2 App Cas 439; *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

#### 4.2.4. Repudiation

Not only non-performance of obligations, but also expressing in words or conduct that a party repudiates his obligations in some essential respect will constitute a breach of contract.<sup>115</sup> The repudiation does not in itself terminate the contract. The innocent party elects between terminating the contract and claiming damages or keeping the contract alive with regard to the future rights and obligations.<sup>116</sup> The repudiation itself can thus not be qualified as unilateral conduct with intended legal effect. It depends on the choice of the counter-party which consequence is given to the repudiation.

In Dutch law, repudiation is not a unilateral juridical act. It has in itself no legal effect. It merely gives the innocent party the right to exercise the remedies for non-performance,<sup>117</sup> but if that party does not act upon that right, no legal effect arises.

#### 4.2.5. Waiver

In *SuperChem*, Lord Steyn mentioned that a waiver generally has a unilateral character, as it involves the giving up of a right.<sup>118</sup> The term ‘waiver’ is vague and is used in different situations. ‘To waive a right’ entails giving up on an entitlement or a possibility. In this thesis, I discuss multiple instances that fall under that description. For example the election between affirmation and termination: whichever is chosen, the other one is waived. Another example is

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<sup>115</sup> *Mersey Steel and Iron Co v Naylor, Benzon & Co* (1884) 9 App Cas 434 at 438-440.

<sup>116</sup> *Geys v Société Générale London Branch* [2013] IRLR 122; *Mersey Steel* (n 115).

<sup>117</sup> Art. 6:80(1)(b) BW.

<sup>118</sup> *SuperChem Products Ltd v American Life & General Insurance Co Ltd* [2004] 1 CLC 1041 at 1052; K Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell 2006) 233.

giving permission, since the person that gives permission waives his right to bring an action for a wrong in the future (see section 4.1.3.3.). Certain rights can only be waived in a contract or in a deed, such as when an innocent party elects to give up all his rights after breach.<sup>119</sup> The waiver by estoppel or forbearance is akin to promissory estoppel. It entails the unequivocal granting of a concession or a forbearance by a party to a contract to his counter-party, without the support of consideration. An example is when upon a breach the innocent party has led the party in breach to believe that he would not exercise his right to terminate.<sup>120</sup> This concession is only binding when the party in breach acts in reliance on it.<sup>121</sup> The unilateral conduct (the waiver) is thus insufficient to give rise to the legal effect.

Also in Dutch law, a waiver is a vague concept that appears in multiple instances. Some of the examples of ‘afstand van recht’ are seen as unilateral juridical acts, such as the election to affirm a voidable contract. Others, such as the waiver of a debt are contractual: the debtor has to accept the offer of the creditor.

#### 4.2.6. The offer and the offer for a reward

In section 2.2. I explained why the offer and the offer for a reward are unilateral juridical acts in Dutch law. Even before the offer is accepted and the contract is concluded, legal effect arises as a result of the offer. This is different in English law, where an offer generally can be withdrawn at any time before the

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<sup>119</sup> When consideration is provided, the waiver is qualified as an accord and satisfaction; *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd's Rep 98. A waiver in the form of a deed is a release: *Preston v Christmas* (1759) 2 Wils 86.

<sup>120</sup> Treitel (n 22) para 18-078.

<sup>121</sup> *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616 at 622 per Denning LJ.

acceptance.<sup>122</sup> The offeror is bound only after the offer is accepted by the person to whom it is addressed.<sup>123</sup> The offeror is not obliged to keep the offer open, even if he promised to do so, as the addressee did not provide consideration for this promise.<sup>124</sup>

A notable case in English law is an offer for a reward, also indicated as an offer of a unilateral contract. Such an offer is made when one person promises to do, give or forbear from something when another person fulfils a condition or does something.<sup>125</sup> The offer is accepted by the performance and no advance notice of acceptance has to be given.<sup>126</sup> Also offers of a unilateral contract can be withdrawn before acceptance.<sup>127</sup> The offeror is thus only bound after the contract has been concluded. According to Treitel the offeror is deprived of the power of withdrawal, since there is a lot of dispute as to when the offer is deemed to be accepted.<sup>128</sup> This does not change the fact that as a matter of law, the unilateral declaration that entails the offer for a reward does not create legal effect.

### **4.3. Concluding remarks**

In this chapter I discussed in which situations unilateral conduct can have intended legal effect by creating, varying or discharging obligations. In section

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<sup>122</sup> Treitel (n 22) para 2-058; *Routledge v Grant* (1828) 4 Bing 653 at 661.

<sup>123</sup> Treitel (n 22) para 2-002.

<sup>124</sup> H Beale, B Fauvarque-Cosson, J Rutgers, D Tallon and S Vogenauer, *Cases, Materials and Text on Contract Law*, (2<sup>nd</sup> edn, Hart 2010) 271.

<sup>125</sup> Treitel (n 22) para 2-051.

<sup>126</sup> *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

<sup>127</sup> Treitel (n 22) para 2-052.

<sup>128</sup> *Ibid.* See also Gordley (n 27) 311.

4.2. I discussed in which situations unilateral conduct was insufficient to give rise to legal effect, and where thus an additional element such as reliance, acceptance or a reaction is necessary. The legal effect is then created by mutual, interacting conduct. The unilateral act is then the final step in a chain of events.

The most notable example of a unilateral act that creates obligations and through which binding promises can be made is the deed. This exception to the doctrine of consideration and to the requirement of acceptance can partly be justified by the form requirements that must be observed to constitute a valid deed. Also, the use of deeds can be regarded as a remnant of history that provides, perhaps welcome, relief from the doctrine of consideration. A second example of unilateral conduct creating obligations is the documentary credit. The issuing bank is obliged to honour a complying presentation from the moment he issues the credit. The beneficiary does not have to accept to be able to claim under the letter of credit. The third case in which a person comes under an obligation as a result of unilateral conduct is the declaration of trust or the appointment of trustees. The trust has been developed through equity, which might explain why the trust is seen as *sui generis*. Moreover, the trust is foremost seen as an instrument to transfer property rights. The obligations that arise when a trust is established are a by-product of this re-allocation of property rights. In chapter 5, I will discuss the possibility in English private law to create or to transfer property rights through a unilateral transaction.

English law offers opportunities to unilaterally vary or discharge obligations once they have come into existence. However, such unilateral conduct is usually not isolated behaviour. The effect is brought about by unilateral conduct, but the right that is exercised will be rooted in a bilateral or contractual

relationship. These are ‘quasi-contractual’ examples of unilateral conduct. Termination of a contract, for example, influences the legal position of the parties. Despite the unilateral nature, the basis of the right to terminate is bilateral. The contract carries in it the right to terminate it, either expressly in a termination clause or implicitly since the law grants this right in case of fundamental breach or a breach of a condition. The election in itself is unilateral, but connected to and part of the mutual relation between the parties to the contract. Similarly, the requirement to serve a notice or to obtain consent before a right can be exercised<sup>129</sup> can be contractually imposed. The term ‘quasi-contract’ may remind of the concepts that are currently considered as the law of restitution. Those concepts are distinct from and not to be confused with the examples of unilateral conduct. A similarity between unilateral conduct and restitution for unjust enrichment is that they are different from contracts, but are akin to them. This is precisely what can be inferred from the term ‘quasi-contractual’.

Another way in which the independent operation of unilateral conduct should be nuanced is that it is often a reaction to previous behaviour from a counter-party. Termination and affirmation are responses to a breach or repudiation from the counter-party. Judges speak of ‘acceptance of the repudiation’.<sup>130</sup> Rescission follows misrepresentation. The legal consequence is in those situations no surprise to the counter-party. He should be aware of the flaws of his own behaviour and the possible reaction that can follow. He was involved in shaping the situation in which ultimately the legal positions of the parties could be unilaterally altered.

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<sup>129</sup> See *Mount Eden Land v Prudential Assurance* (n 87).

<sup>130</sup> See eg *Geys v Société Générale* (n 116).



## **Chapter 5 – Unilateral conduct and the creation and transfer of property rights**

Chapter 4 was concerned with two types of unilateral conduct, namely unilateral conduct creating obligations and quasi-contractual unilateral conduct varying or discharging obligations. In this chapter I focus on a third set of examples of unilateral conduct, that have the intended legal effect of creating or transferring property rights. I identify five instances. Subsequently, I explain why proprietary estoppel does not fit into this category.

### **5.1. Unilateral creation and transfer of property rights in English law**

This section is concerned with voluntary and gratuitous dispositions of property. Because the recipient does not provide a benefit in return, these dispositions can be called gifts. In section 5.1.1. I discuss the general aspects of gifts and the specific characteristics of gifts executed through physical transfer. In the subsequent sections, I consider other ways of voluntarily disposing of property.

#### 5.1.1. Gifts

In common law gifts are seen as a form of transfer of property, whereas in civil law jurisdictions gifts are considered contracts.<sup>131</sup> The goal of a gift contract in, for example, Dutch law is to transfer the property rights in the donated good, but the contract in itself is insufficient to constitute that effect. To complete the gift,

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<sup>131</sup> R Hyland, *Gifts* (OUP 2009) 575; M Bridge, *Personal Property Law* (3rd edn, OUP 2002) 93; *Thompson v Leach* (1690) 96 ER 391; *Standing v Bowring* (1885) 31 Ch D 282.

the good needs to be delivered to the donee. The delivery is not seen as a unilateral juridical act but as the factual performance of the contract ('feitelijke uitvoeringshandeling'). In English law a gift cannot be a contract because there is no consideration. To transfer property by gift, two elements must be present. First, the donor must have the motive to transfer his property rights to the donee.<sup>132</sup> Secondly, there must be a corporal element, such as a deed or the physical delivery of the good. I consider the form requirements for gifts in more detail in chapter 6.

According to Hyland, in English law gifts are completed without the acceptance of the recipient.<sup>133</sup> Further, he states that acceptance is presumed and that intent is only relevant when the recipient wants to refuse a gift.<sup>134</sup> These statements are contradictory. If acceptance is not required, there is no need to presume it. Hyland concludes that the gift is perfected by the disposition. It was held in *London and County Banking Co Ltd v London and River Plate Bank Ltd*<sup>135</sup> that acceptance of a gift is presumed, even if the recipient of the gift does not yet know about it. In *Siggers v Evans*,<sup>136</sup> where property was transferred through a deed and it was held that the assent of the recipient was not necessary to complete the property transfer, it was mentioned that the assent was presumed. The presumption of acceptance when the beneficiary has no knowledge of the gift is a fiction. A person cannot accept something when he does not know it has been

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<sup>132</sup> S Worthington, *Personal Property Law* (Hart 2000) 229.

<sup>133</sup> Hyland (n 131) 484 and 493. See also *Halsbury's Laws* (5th edn 2009) vol 52 para 249.

<sup>134</sup> Hyland (n 131) 491. See also D Sheehan, *The Principles of Personal Property Law* (Hart 2011) 56.

<sup>135</sup> (1888) 21 QBD 835. See also *Shephard v Cartwright* [1955] AC 431.

<sup>136</sup> (1855) 119 ER 518. See also *Xenos v Wickham* (1866) LR 2 HL 296.

given to him. Since acceptance in these circumstances is not possible, the presumption of such an acceptance is meaningless. At most, it can be expected that the recipient will accept the gift, or it can be presumed that he will accept the gift once he becomes aware of it. Furthermore, the fiction of presumed acceptance is needless. It is unnecessary to construct or presume acceptance of a gift, precisely because a gift in English law is not a contract but a property transaction. Apparently there is still a reflex among judges and authors to seek a bilateral, contract-like relation between donor and donee.

A donee may be ignorant that a gift has been made to him when the gift is executed in a deed. To deliver a deed it is not required that the purpose of the party making the deed to be immediately and unconditionally bound is communicated to the donee. The question arises as to whether a donee can also be ignorant of a gift when it is physically delivered. Delivery requires the clear, unequivocal transfer of possession from the donor to the donee.<sup>137</sup> An unequivocal declaration that a gift is being made does not repair an inaccurate act of delivery. For the purpose of this thesis it suffices to highlight that possession consists of two elements, first the exercise of factual control over an object and secondly the intention to exclude others from the exercise of control. The possibility to exercise factual control can be unequivocally transferred without knowledge of the donee. When a donor wishes to give a book to his neighbour, he can put it in his mailbox with a note that the neighbour may keep the book. However, it is undecided whether knowledge is required for the assumption of the intention to exclude others from control. As long as the donee does not know of the book lying in his mailbox, he may not have the specific intention to exercise

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<sup>137</sup> Sale of Goods Act 1979 s 61(1); *Bridge* (n 131) 43 and 94.

exclusive control over the book. But he will have the general intention to exercise exclusive control over what is in his mailbox.

The reason for the rule that acceptance is not necessary for the completion of a gift is derived by Hyland from *Thompson v Leach*, in which Ventris J held that no man can be supposed to be unwilling to do that which is beneficial to his estate.<sup>138</sup> Although Bridge warns that this point should not be overstated, he assumes that the rule that consent is not required to perfect a gift is of general application.<sup>139</sup> He supposes that this is justified by the fact that the transaction is wholly beneficial for the donee.

Following from *Standing v Bowring*,<sup>140</sup> in English law consent is not even required when the gift is accompanied by obligations and is therefore not entirely beneficial. If the beneficiary of the gift does not want to receive it, he can unilaterally disclaim it. As a result of the disclaimer, the recipient refutes the benefit of the gift but is also relieved from the liabilities that the gift would have imposed on him. The donee can thus unknowingly be burdened by obligations attached to the gift but, since the disclaimer makes the gift void *ab initio*,<sup>141</sup> in the end the donee is not placed in a disadvantageous position.

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<sup>138</sup> (n 131). See for another implication of this presumption Lord Diplock in *Modern Engineering v Gilbert Ash* [1974] AC 689 at 717, on the presumption that neither party intends to abandon any remedies for breach.

<sup>139</sup> Bridge (n 131) 98.

<sup>140</sup> (n 131).

<sup>141</sup> *Mallott v Wilson* [1903] 2 Ch 494 at 501.

As the property rights in the donated good are transferred without acceptance or reliance of the donee being necessary, it is unilateral conduct (the disposition) that creates the legal effect (the transfer of property rights).

### 5.1.2. Deeds

I elaborated substantially on the nature of deeds in chapter 4. Here it suffices to state that deeds are not only used to make binding promises, but also to create or transfer property rights. Similarly to the creation of obligations through a deed, the document takes effect and the property right is thus created or transferred at the moment of execution of the deed. Acceptance of the person to whom a right is transferred or for whose benefit a right is created is not required.<sup>142</sup> If the beneficiary disclaims the right granted to him in the deed, the property rights are re-vested in the person that made the deed.<sup>143</sup>

### 5.1.3. Assignment

Pure intangible property, such as a debt, can be transferred through assignment.<sup>144</sup> Some types of property right can be assigned in law, others in equity. Assignment is a unilateral property transaction in English law. In Dutch law, assignment ('*cessie*') is the execution of an assignment contract. The assignment itself is not seen as a juridical act, but as the factual performance of the contract.

#### *a. Assignment in law*

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<sup>142</sup> *Xenos v Wickham* (n 136); *Siggers v Evans* (n 136) at 520.

<sup>143</sup> *Thompson v Leach* (n 131).

<sup>144</sup> Law of Property Act 1925 s 136; *Bridge* (n 131) 144.

Section 136 of the Law of Property Act 1925 provides the requirements for valid assignment. The assignment must be absolute and in writing under the hand of the assignor. Express notice must be given to the debtor. The law states that the assigned debt or chose in action is effectual in law to pass and transfer from the date of the notice. Assignment in law can be gratuitous.<sup>145</sup> No statutory requirement of notice to or acceptance from the assignee is imposed.

*b. Assignment in equity*

Equitable choses in action can be assigned in equity. Three forms of equitable assignment can be distinguished: (a) informal assignments; (b) transfers by way of trust; (c) transfers by way of contract.<sup>146</sup> In this section I consider only informal assignments. For an effective informal assignment it is necessary that the assignor manifests his motive to transfer the chose in action, which must be in present existence, certain or capable of being ascertained. The identity of the assignee must be clear. The appropriate forms and formalities must have been satisfied.<sup>147</sup> For an effective equitable assignment the language is irrelevant, as long as the meaning is plain and the motive to transfer the property is clear.<sup>148</sup> Although it is argued that consideration must be provided for a valid equitable assignment,<sup>149</sup>

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<sup>145</sup> M Smith and N Leslie, *The Law of Assignment* (OUP 2007) para 16.39.

<sup>146</sup> *Ibid*, para 11.03.

<sup>147</sup> *Ibid*, para 13.02.

<sup>148</sup> *William Brandt's Son & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 462.

<sup>149</sup> OR Marshall, *The Assignment of Choses in Action* (Pitman & Sons 1950) 109 and 119.

according to Smith and Leslie the better view is that equitable assignment can be gratuitous.<sup>150</sup>

The predominant view is that notice of the assignment to the assignee is not necessary.<sup>151</sup> If the assignee does not need to be informed of the transaction, it follows that he does not have to consent to it. Bridge<sup>152</sup> states that the assignee must consent to an equitable assignment for it to be effective, but in the case to which he refers, *Standing v Bowring*, I find no basis for this statement. According to Cotton LJ in that case<sup>153</sup> the property is vested in the recipient at once after the transfer, despite his lack of knowledge, subject to his right to repudiate the right. This is even the case where onerous obligations are attached to the gift. In *Standing v Bowring* a stock in public funds was transferred. The Act regulating that transfer, the National Debt Act 1870, recognised the possibility of acceptance, but did not make it necessary or essential, since section 22 provided that ‘the person to whom a transfer is so made may, if he thinks fit, underwrite his acceptance thereof’ (emphasis added). According to Cotton LJ the gift is perfected as far as it could be perfected when the donor puts the fund out of his own power. Non-communication to the donee is not material.<sup>154</sup>

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<sup>150</sup> Smith and Leslie (n 145) para 13.79. See also *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1; Bridge (n 131) 150; G Thomas and A Hudson, *The Law of Trusts* (2nd edn, OUP 2010) para 5.36.

<sup>151</sup> Smith and Leslie (n 145) para 13.73. See also RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (4th edn, Butterworths LexisNexis 2002) para 6-430; *Standing v Bowring* (n 131); *Way’s Trusts* (1864) 46 ER 416. See for a different view Marshall (n 149) 100.

<sup>152</sup> (n 131) 148

<sup>153</sup> (n 131) at 288.

<sup>154</sup> (n 131) at 284. See also *Small v Marwood* (1829) 109 ER 112.

Assignment, in law as well as in equity, is thus unilateral conduct that created the legal effect of transferring rights.<sup>155</sup>

#### 5.1.4. Trusts

In chapter 4 I considered the obligatory aspects of trusts. However, the trust primarily concerned with the allocation of property rights. Property rights are vested in a trustee for the benefit of another.<sup>156</sup> The trustee holds legal ownership of the property and the beneficiary has an equitable interest.<sup>157</sup> The exact scope of the right of the beneficiary depends on the terms and the context of the trust.

A trust is established either through a declaration of trust by the settlor or through the transfer of assets to the trustee, accompanied by a declaration that he will hold the property as trustee for the designated beneficiaries. In both instances, it is unilateral conduct that brings about the proprietary effects. In the first case, the declaration of the settlor changes his position regarding the assets. Assuming that before he made the declaration he was the owner of the property, he retains a legal title to the goods but creates an equitable interest for the beneficiary. Where the settlor appoints someone other than himself as trustee, the trust is established at the moment of transfer of the assets, thus creating property rights for the trustee and equitable rights for the beneficiary. This entails that the transfer does not have to be accepted by the donee. As a result of the transfer, the trustee acquires a legal title and the beneficiary an equitable interest in the trust assets. The creation of a trust is thus a unilateral undertaking creating or altering property rights.

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<sup>155</sup> See also Hogg (n 4) 316.

<sup>156</sup> Gardner (n 67) 5.

<sup>157</sup> JE Martin, *Hanbury & Martin Modern Equity* (17th edn, Sweet & Maxwell 2005) para 2-001; Thomas & Hudson (n 150) para 1.01, 1.07 and 1.40.

### 5.1.5. Wills

A will is a document in writing that contains statements regarding the disposition of a person's assets upon his death.<sup>158</sup> The will does not take effect until the death of the testator. The document is inherently revocable until that moment.<sup>159</sup> When the testator dies, the title to his property is fully vested in the personal representative.<sup>160</sup> The beneficiary does not hold an interest in the estate until the residue has been ascertained, or, when it is a specific legatee, until the personal representative assents to the gift.<sup>161</sup> Before that time, he does have the right that the personal representative properly administers the estate and that it is applied for his benefit when the administration is complete.<sup>162</sup>

Trusts and wills are distinct institutions, but in some sense related.<sup>163</sup> The relationship between legatee and personal representative resembles that between the trustee and the beneficiary. However, the origins are distinct and the functions differ. A trustee must manage the trust assets, whereas the personal representative's task is to liquidate the testator's estate. A will can create a trust.

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<sup>158</sup> F Barlow, *Williams on Wills* (9th edn, LexisNexis Butterworths 2008) para 1.1; R Jennings, *Jarman on Wills* (8th edn, Sweet & Maxwell 1951) 26. A will can do more than disposing of property, for example appoint executors or a guardian for a child who is a minor: see A Borkowski, *Succession* (2nd edn, OUP 2002) 38.

<sup>159</sup> *Proctor v Dale* [1994] Ch 31.

<sup>160</sup> Bridge (n 131) 93; Hanbury and Martin (n 157) para 2-020; *Williams on Wills* (n 158) para 25.18.

<sup>161</sup> *Williams on Wills* (n 158) para 1.8

<sup>162</sup> *Stamp Duties Comr v Livingston* [1965] AC 694; R Kerridge, *Parry and Kerridge: The Law of Succession* (12th edn, Sweet & Maxwell 2009) para 24.32; *Raymond Saul & Co v Holden* [2009] Ch 313.

<sup>163</sup> Hanbury and Martin (n 157) para 2-013.

The executor can be the same person as the trustee. In that case the executor transfers the property from the estate to himself.

The will can be seen as a unilateral undertaking that becomes effective upon death. Death is a condition that needs to be fulfilled in order for the will to take effect, but it is not the death but the will that brings about the legal effects. The effect of the will is that the property is vested in the personal representative. The executor subsequently must unwind the estate and distribute the assets to the beneficiaries under the will. The will is the instrument that sets the machinery of the execution of the deceased's estate in motion.

In Dutch law, the will is a unilateral juridical act, which takes effect at the moment of death of the testator. In contrast to English law, the property rights do not immediately transfer. The death of the testator gives rise to an obligation for the estate to transfer assets to the beneficiaries. The beneficiaries acquire a corresponding right. The legal effect of the will in Dutch law is thus obligatory and not proprietary.

## **5.2. Proprietary estoppel**

In sections 4.2.3. and 4.2.5. I discussed estoppel. A third application of the doctrine of estoppel is proprietary estoppel. Proprietary estoppel arises when a landowner brings about the belief in another person that he has or will have an interest in the land, and in reliance on this belief the latter acts in such a way that makes it inequitable for the landowner to leave him empty-handed.<sup>164</sup> The unilateral conduct of the landowner is, however, in itself insufficient to bring

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<sup>164</sup> *Dillwyn v Llewellyn* (1862) 4 De GF&J 517; *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133.

about the legal effect. For a successful appeal to the doctrine of proprietary estoppel, the following requirements have to be fulfilled: 1) either a representation or assurance must be made to the claimant, or the defendant must have acquiesced to the claim; 2) the claimant must have relied on it; and 3) the reasonable reliance was to the claimant's detriment. The reliance of the promisee is thus a necessary element. The legal effect thus arises as a result of bilateral conduct.

### **5.3. Concluding remarks**

Property rights can be created and transferred through unilateral conduct. Gifts, deeds, assignments, trusts and wills have in common that they do not have to be accepted or relied upon to generate the effect that the addressee acquires a property right. These institutions are distinct, but intertwined. Gifts are executed in deeds or trusts, trusts can be established in wills and deeds can transfer assets thereby creating a trust. In cases regarding gifts the courts refer both to cases in which the gift was made by a deed and cases in which the gift was not made in a deed.<sup>165</sup> The courts seem to approach these instances not as separate concepts, but as manifestations of voluntary property dispositions. Despite specific operations of the different instances, the aim and effect is the same, namely the transfer of a property right.

In English law, the fact that gifts cannot be contracts because of the doctrine of consideration does not determine whether gifts are unilateral or bilateral transactions. Acceptance or reliance could be required. It is not, due to the principle in English law that no man is supposed to be unwilling to do that

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<sup>165</sup> See *Standing v Bowring* (n 131); *Xenos v Wickham* (n 136); *Siggers v Evans* (n 136); *Thompson v Leach* (n 131).

which is beneficial to his estate, as expressed by Ventris J in *Thompson v Leach*.<sup>166</sup> Consequently, a benefit conferred upon a person is by default accepted until the contrary is proved.<sup>167</sup> The starting point is the expectancy that the recipient will agree to the transaction in his favour. However, this principle does not necessarily imply that acceptance is superfluous and that the recipient only has to take action when his position deviates and he wishes to disclaim the gift. In Dutch law, the expectancy that a person will act in a way that is beneficial to his estate is not explicitly formulated. Nonetheless, it appears to be an underlying principle. Despite this expectancy, the donee must assent to a gift. The requirement of acceptance raises a low threshold. When the donee does not immediately disclaim the offer for a gift after he learns of it, the offer is held to be accepted.<sup>168</sup> The acceptance requirement in Dutch law is based on a second principle, namely that a person should not be able to force a benefit upon another who does not wish to receive it. This principle also underlies English private law, as the donee has the right to disclaim a gift. Dutch law and English law thus incorporate the same two fundamental notions, but choose different ways to manifest them.

English law allows people to enrich one another gratuitously by means of property transactions. This contrasts with the restrictive possibilities to unilaterally create personal rights. In chapter 7, I discuss the reasons why English law regards property transactions as unilaterally binding and promises not.

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<sup>166</sup> (n 131).

<sup>167</sup> *Cook v Lister* (1863) 13 CBNS 543 at 595 per Willes J; *Shephard v Cartwright* (n 135).

<sup>168</sup> Art. 7:175(2) BW.

## **Chapter 6 – Rules applicable to unilateral conduct**

In the previous chapters, I identified examples of unilateral conduct that create obligations, examples of quasi-contractual unilateral conduct that vary and discharge obligations (chapter 4) and examples of unilateral conduct that create and transfer property rights (chapter 5). In this chapter, I answer the question that arises next, namely which rules are applicable to unilateral conduct. In the following, I will discuss how the different examples of unilateral conduct are regulated. I contrast the rules for unilateral conduct with the rules for contracts.

The aim of this chapter is to chart how English law deals with unilateral conduct by addressing different issues that can arise during the life span of unilateral conduct. I discuss five issues. Consecutively I will consider the conditions for legal effect, interpretation, revocability, mistake and enforcement of rights acquired on the basis of unilateral conduct. The length of this thesis does not permit me to describe the applicable rules for each issue for every example of unilateral conduct specified in the previous chapters. Instead, I highlight notable occurrences.

In chapters 4 and 5, I indicated that some examples of unilateral conduct have legal effect only when the addressee relies upon it or performs a subsequent action. As explained, I do not regard these instances as ‘unilateral conduct’ in the sense of this thesis. In this chapter, I will not discuss them.

## **6.1. Formation and conditions for legal effect**

### 6.1.1. Formation of contracts

The most important feature of a contract is that the obligations arising out of it are based on the agreement of the two parties concerned.<sup>169</sup> Offer and acceptance are the constitutive elements of the agreement. The statements made by offeror and offeree are only binding when they show contractual intention.<sup>170</sup> A distinction has to be made between express and implied agreements. If there is an express agreement, contractual intention is presumed and the burden of proof of its absence lies on the party denying the intention.<sup>171</sup> In the absence of an express agreement, a court must establish with confidence that there was an intention to be contractually bound.<sup>172</sup>

Even where there is the purpose to be legally bound, promises are not contractually binding unless they are accepted and supported by consideration. As a general rule, contracts do not have to be made in a certain form.<sup>173</sup>

### 6.1.2. Conditions for legal effect of unilateral conduct

#### 6.1.2.1. Motive to create legal effect

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<sup>169</sup> Treitel (n 22) para 1-001.

<sup>170</sup> *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] CLC 999; *Dalrymple v Dalrymple* (1811) 161 ER 665; Treitel (n 22) para 4-001.

<sup>171</sup> *Edwards v Skyways* [1964] 1 WLR 349.

<sup>172</sup> *Blackpool and Fylde Aero Club Ltd v Blackpool BC* [1990] 1 WLR 1195 at 1202; *Baird Textile v Marks & Spencer* (n 170).

<sup>173</sup> Treitel (n 22) para 5-003.

Communicated motive to create legal effect is necessary to constitute binding unilateral conduct. This holds for deeds,<sup>174</sup> gifts,<sup>175</sup> wills,<sup>176</sup> notices to quit<sup>177</sup> and trusts,<sup>178</sup> although courts can find an implied or constructive trust where the purpose to create one may have been absent.

The same criterion is thus in place for both contract and unilateral conduct. The operation of this requirement, however, differs. The threshold is higher before the addressee of unilateral conduct can reasonably assume that the actor intended to be bound than for a promisee under a contract:

- the burden of proof of the donor's motive to make a gift lies with the donee;<sup>179</sup>
- for a document to be a deed it must be *prima facie* clear that the person making it intends it to be a deed;<sup>180</sup>
- conduct can only amount to affirmation if the intention is unequivocally demonstrated;<sup>181</sup>

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<sup>174</sup> Law of Property (Miscellaneous Provisions) Act 1989, s 1(2)(a).

<sup>175</sup> *Worthington* (n 132) 229.

<sup>176</sup> *Re Meyer's Estate* [1908] P 353; *Williams on Wills* (n 158) para 5.6; *Jarman on Wills* (n 158) 29.

<sup>177</sup> B Martin and F Christie, *Landlord and Tenant Law* (2nd edn, Blackwell 1994) 179. For the purpose of this chapter I will single out the notice to quit, used to terminate a tenancy, as an example.

<sup>178</sup> *Moore v Darton* (1851) 64 ER 938; *Knight v Knight* (1840) 3 Beav 148; Thomas and Hudson (n 150) para 2.03.

<sup>179</sup> *Worthington* (n 132) 229.

<sup>180</sup> Law of Property (Miscellaneous Provisions) Act 1989, s 1(2)(a).

<sup>181</sup> *Peyman v Lanjani* [1985] Ch 457.

- the election to terminate is effective when the innocent party makes it unequivocally clear that he no longer holds himself bound to the contract;<sup>182</sup>
- a contract is rescinded for misrepresentation by an unequivocal act, with which the representee clearly demonstrates that he elects to rescind the contract and no longer holds himself bound by it;<sup>183</sup>
- the declaration of trust must be clear;<sup>184</sup>
- a notice to quit a tenancy must show a clear intention.<sup>185</sup>

Contracts are not to be implied lightly.<sup>186</sup> However, the norm in the case of unilateral conduct that motive must be unequivocally shown or that it must be *prima facie* clear seems even stricter. Even when the motive is not unequivocally or *prima facie* clear, a court may confidently reach the conclusion that the promisor intended to be contractually bound. This difference is justified by the fact that a person undertaking a unilateral act will not obtain any benefit for it in return. In a contractual context, the doctrine of consideration safeguards that the promisor will receive a counter-performance, even though that might not be of the same value as what he promises to do or give. A person is less inclined to commit to an act for which he receives no reward than to enter into a contract from which

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<sup>182</sup> *The Munster* [1983] 1 Lloyd's Rep 370; *Bear Stearns Bank v Forum Global Equity* [2007] All ER 103.

<sup>183</sup> *Car & Universal Finance v Caldwell* (n 100) 531; Cartwright (n 81) para 4-18; G Spencer Bower, A Turner and KR Handley, *Actionable Misrepresentation* (4th edn, Butterworths 2000) para 256.

<sup>184</sup> Thomas and Hudson (n 150) para 5.53.

<sup>185</sup> Martin and Christie (n 177) 179.

<sup>186</sup> Treitel (n 22) para 4-026.

he will also benefit. It is thus not surprising that courts are more hesitant to assume such motive. This is another manifestation of the principle that a person is presumed to act for the benefit of his estate.

When the threshold of unequivocal motive cannot be met, the doctrine of estoppel can step in. In *Peyman v Lanjani* it was held that if unequivocal affirmation cannot be proved, the innocent party may be precluded by words or conduct from denying that he abandoned the contract.<sup>187</sup> All requirements for estoppel have to be met. It is not necessary that the innocent party knows of his right to terminate or rescind, which is necessary for affirmation.<sup>188</sup> However, reliance is required. The legal effect thus does not follow directly from the conduct of the innocent party, but from the bilateral relationship between the parties.

#### 6.1.2.2. Form requirements

For a number of unilateral acts, form requirements have to be fulfilled before the conduct takes effect. Unilateral conduct that creates obligations or that creates or transfers property rights is generally subject to form requirements, whereas quasi-contractual unilateral conduct that varies or discharges obligations is generally informal.

##### *a. Deed and trust*

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<sup>187</sup> *Peyman v Lanjani* (n 181). See also Cartwright (n 81) para 4-45; G Spencer Bower, P Feltham, D Hochberg and T Leech, *The Law Relating to Estoppel by Representation* (4th edn, LexisNexis 2003) para XIII.1.33.

<sup>188</sup> Spencer Bower, Turner and Handley (n 183) para 255.

A document is only effective as a deed if it is validly executed. Execution entails the signing and delivery of the document.<sup>189</sup> The Law of Property (Miscellaneous Provisions) Act 1989 softened the form requirements, but nonetheless the deed remains a formal instrument. The document must be made in writing and must be signed in the presence of a witness, who attests the signature. The person making the deed delivers it by acknowledging by words or conduct, expressly or impliedly, that he intends to be immediately and unconditionally bound by the provisions in the deed.<sup>190</sup>

The form requirements for trusts depend on the type of property that forms the object of the trust. An express trust is constituted when the settlor has done everything that is necessary to transfer the property and render the settlement binding upon him.<sup>191</sup> A declaration of trust regarding land or any interest therein must be manifested and proved by some writing signed by a person who is able to declare such trust or by his will.<sup>192</sup> When a beneficiary wants to transfer his interest to another, the disposition must be in writing and signed by the person making it.<sup>193</sup> The constitution of a trust regarding personal property is informal.<sup>194</sup> This is an exception to the general rule that unilateral property transactions must conform to form requirements. If the settlor already possesses the goods and wishes to hold them as trustee for the beneficiary from that moment onwards, his

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<sup>189</sup> Law of Property (Miscellaneous Provisions) Act 1989, s 1(2)(b) and 1(3)(a) and (b).

<sup>190</sup> *Vincent v Premo Enterprises (Voucher Sales)* [1969] 2 QB 609; *Xenos v Wickham* (n 136).

<sup>191</sup> *Milroy v Lord* (1862) 45 ER 1185 at 1189 per Turner LJ.

<sup>192</sup> Law of Property Act 1925, s 53(1)(b).

<sup>193</sup> Law of Property Act 1925, s 53(1)(c).

<sup>194</sup> A Hudson, *Equity and Trusts* (7th edn, Routledge 2013) 246; *M'Fadden v Jenkyns* (1842) 12 LJ Ch 146; *Milroy v Lord* (n 191).

declaration is sufficient to create the equitable interest for the beneficiary. The beneficiary does not even have to be notified. In practice, most express trusts will be laid down in writing to provide evidence, similar to informal contracts being written down for this reason.<sup>195</sup>

*b. Unilateral voluntary property transactions*

To make a valid gift, some action or form is required. By virtue of section 17 of the Sale of Goods Act 1979, property is transferred at such time as the parties intend it to be transferred. However, this provision applies to cases where there is a contract for the sale of goods and thus a bilateral relation. For gifts, mere motive is not enough.<sup>196</sup> For a valid property transfer, there must either be physical delivery of the object, a deed or a declaration of trust.<sup>197</sup> For personal property the most commonly used mode of completing a gift is physically handing over the good.<sup>198</sup> Statute requires gifts of some types of property to be made in writing or in a deed, such as an interest in land.<sup>199</sup> Specific form requirements can also be set by the articles of association of a company regarding the transfer of shares.<sup>200</sup> When the donee already possesses the good, the communication of the motive of

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<sup>195</sup> Gardner (n 67) 89; LA Sheridan, *Keeton and Sheridan's The Law of Trusts* (12th edn, Barry Rose 1993) 77; P McLoughlin and C Rendell, *Law of Trusts* (Macmillan 1992) 63.

<sup>196</sup> *Bunn v Markham* (1816) 129 ER 90.

<sup>197</sup> Bridge (n 131) 94.

<sup>198</sup> For personal property that is not easily physically delivered, symbolic delivery can offer a solution, *Lock v Heath* (1892) 8 TLR 295; *Rawlinson v Mort* (1905) 21 TLR 774.

<sup>199</sup> Law of Property Act 1925, s 52-54.

<sup>200</sup> *In re Rose* [1952] Ch 499; *In re Paradise Motor Co Ltd* [1968] 1 WLR 1125; Bridge (n 131) 97.

the donor is all that is needed to perfect the gift and vest the property rights in the donee.<sup>201</sup>

In contrast, the disclaimer of a gift is informal, even when the gift can only be made in a certain form.<sup>202</sup>

Wills must be made in writing and be signed by the testator in the presence of two witnesses, who subsequently must sign the will in the presence of the testator.<sup>203</sup>

*c. Quasi-contractual unilateral conduct varying or discharging obligations*

Conduct performed with the motive of changing or discharging obligations generally does not have to conform to form requirements. To vary a contract on the basis of an agreement laid down in the contract, the variation has to conform to the rules set out by the parties.<sup>204</sup> Notices to quit are informal, unless statute or the terms of the contract dictate otherwise.<sup>205</sup> Similarly, the purpose to affirm a contract can be communicated expressly or can be implied from conduct.<sup>206</sup> As a general rule, the election to terminate or to rescind a contract must be communicated to the counter-party.<sup>207</sup> The communication is informal.<sup>208</sup> The

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<sup>201</sup> *In re Stoneham* [1919] 1 Ch 149.

<sup>202</sup> *In re Paradise Motor* (n 200); *Hyland* (n 131) 493.

<sup>203</sup> Wills Act 1837, s 9.

<sup>204</sup> *Wilken* (n 77) para 2.41.

<sup>205</sup> *Ahearn v Bellman* (1879) 4 Ex D 201.

<sup>206</sup> *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 382.

<sup>207</sup> *Heyman v Darwin Ltd* [1942] AC 356 at 362 per Viscount Simon.

counter-party cannot always be reached. It follows from *Car & Universal Finance Co v Caldwell* that a person cannot insist on his right to be informed when he has deliberately hindered the innocent party in communicating to him. The court can infer the motive of the innocent party to determine the contract from an overt demonstration falling short of communication or repossession and order that the innocent party's action was sufficient to avoid the contract. Sellers LJ in *Car & Universal Finance Co v Caldwell*<sup>209</sup> justifies that a contract can be more readily affirmed than terminated because termination changes the legal relations between parties and brings obligations to an end, whereas affirmation merely confirms them.

## **6.2. Interpretation**

### 6.2.1. The objective interpretation of contracts

Contracts are interpreted objectively. What matters is the expressed motive rather than the actual motive.<sup>210</sup> The process of interpretation entails the ascertainment of the meaning that the document would convey to a reasonable person, and the establishment of the legal effect of the document.<sup>211</sup>

The subsequent question is how this objectivity takes shape. Cartwright distinguishes between the interpretation of written documents and the

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<sup>208</sup> Cartwright (n 81) para 4-19.

<sup>209</sup> (n 100) at 550.

<sup>210</sup> *Smith v Hughes* (1871) LR 6 QB 597; *The Hannah Blumenthal* [1983] 1 AC 854; K Lewison, *The Interpretation of Contracts* (5th edn, Sweet & Maxwell 2011) para 2.03; G McMeel, *The Construction of Contracts* (2nd edn, OUP 2011) para 3-01; Treitel (n 22) para 1-002.

<sup>211</sup> Lewison (n 210) para 2.02.

interpretation of communications between the parties.<sup>212</sup> When a common motive has to be extracted from the statements uttered by the parties, to determine what parties have agreed upon, a relevant factor is the perspective of the addressee of a declaration. The interpretation of, for example, an offer takes as a starting point how a reasonable person in the shoes of the offeree would have understood the meaning of the words.<sup>213</sup> When parties lay down their agreement in writing, the interpretation focuses on the meaning of the written document. This becomes the exclusive evidence of the existence and the terms of the agreement.<sup>214</sup> As a result, the courts focus on the wholly objective meaning of the words of the document, also called detached objectivity.<sup>215</sup> Both parties have consented to the representation of the agreement in its final, written form, which replaces all previous communications. There is no longer a distinction between what statement came from which party, there is only the sublimation of the communication into one document. If there is an ambiguity in the language, the meaning of the words should be constructed with the view of an objective outsider that has all relevant background information. The perspective of the ‘addressee’ is meaningless because there is no longer an addressor or an addressee.

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<sup>212</sup> Cartwright (n 81) para 13-07.

<sup>213</sup> *Centrovincial Estates PLC v Merchant Investors Assurance Co Ltd* [1983] CLR 158; *Smith v Hughes* (n 210); *Freeman v Cooke* (1848) 154 ER 642.

<sup>214</sup> *L'Estrange v Graucob* [1934] 2 KB 394; Cartwright (n 81) para 13-05 and 13-34.

<sup>215</sup> McMeel (n 210) para 3.05.

In *Investors Compensation Scheme Ltd v West Bromwich Building Society*,<sup>216</sup> Lord Hoffmann gives five principles to ascertain the meaning of a commercial (written) contract:

1. interpretation should ascertain the meaning that the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract;<sup>217</sup>
2. the relevant background includes not only the facts, but also other factors such as the state of the law or proved common assumptions which would have affected how the language of the document would have been understood by a reasonable man;<sup>218</sup>
3. previous negotiations of the parties and declarations of subjective intent are not admissible;<sup>219</sup>
4. the meaning of the words is contextual. Regard should be had of the agreement as a whole;
5. words should be given their natural and ordinary meaning, rather than a technical one.<sup>220</sup>

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<sup>216</sup> [1998] 1 WLR 896.

<sup>217</sup> *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 997.

<sup>218</sup> *BCCI SA v Ali* [2002] 1 AC 251 at 269 per Lord Hoffmann.

<sup>219</sup> See also *Monypenny v Monypenny* (1861) 11 ER 671 at 684 per Lord Wensleydale.

<sup>220</sup> *Prenn v Simmonds* [1971] 1 WLR 1381 at 1384 per Lord Wilberforce; *Mannai Investments Co Ltd v Eagle Star Life Insurance Co Ltd* [1997] AC 749 at 771 per Lord Steyn. When the parties both propose a reasonable interpretation, the court can order that one result is to be preferred because it is consistent with the commercial purpose of the document, which makes it likely that effect is given to the intention of the parties: see *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900.

The detached objectivity is clear from these principles. The reasonable outsider, who has access to all information the parties have access to, is the yardstick.<sup>221</sup>

The reason for adopting the objective approach is the advancement of certainty in commercial dealings.<sup>222</sup> A commercial contract will often be relied upon by third parties, who should have reasonable certainty as to its meaning.<sup>223</sup> But also for the parties themselves the objective approach is beneficial. A commercial actor has to make decisions quickly and he should be able to trust that courts and arbitrators, should a conflict arise, will all adopt the same approach and a similar approach as he himself takes to the construction of certain terms.<sup>224</sup> The objectively ascertained commercial purpose of the transaction can be a circumstance that influences the construction, although courts should realise that there may not be a common intention or objective, but merely two commercial parties that compromise during negotiations. Also, given that when parties appear before a court with questions regarding the interpretation of statements between them they are involved in a conflict, a court will not be much assisted by two most likely contrary interpretations.

### 6.2.2. Interpretation of unilateral conduct

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<sup>221</sup> Lewison (n 210) para 2.03.

<sup>222</sup> *AIB Group (UK) Ltd v Martin* [2002] 1 WLR 94 at 96 per Lord Hutton; Lewison (n 210) para 2.03; Treitel (n 22) para 1-002.

<sup>223</sup> P Devlin, *The Enforcement of Morals* (OUP 1965) 44; Lewison (n 210) para 2.03.

<sup>224</sup> *President of India v Jepsens (UK) Ltd* [1991] 1 Lloyd's Rep 1 at 9 per Lord Goff of Chieveley.

A number of books have been written on the interpretation of deeds.<sup>225</sup> In those works formalistic rules of construction are proposed. Courts should, in the interpretation of deeds and wills,<sup>226</sup> adhere as rigidly as possible to the express words used in the document in their natural ordinary meaning, unless it follows from the context that the testator or the person making the deed intends to use them in a different sense or if the ordinary meaning would lead to an inconsistency which could not have been intended by the person who drafted the document.<sup>227</sup>

These rules are not specific to unilateral declarations but to be applied both to indentures and to deeds poll. The most recent of the books on interpretation of deeds was published in 1967. In recent decades the approach of the courts has shifted to a more commercial interpretation of documents that is in accordance with common sense.<sup>228</sup>

Initially, Lord Steyn in *Mannai Investments*<sup>229</sup> states rather cautiously that the objective approach can by analogy be of assistance in respect of unilateral contractual notices.<sup>230</sup> Later, however, he states that the same mechanisms of

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<sup>225</sup> HW Elphinstone, RF Norton and JW Clark, *Rules for the Interpretation of Deeds* (London 1885); Norton (n 38); H Broom, *Broom's Legal Maxims. Principles of Legal Interpretation* (Sweet & Maxwell 1937); B Chedlow, *The Interpretation of Deeds and Statutes* (Sweet & Maxwell 1958); G Dworkin, *Odger's Construction of Deeds and Statutes* (5th edn, Sweet & Maxwell 1967).

<sup>226</sup> However, some authors warn against using the same rules for interpretation of deeds and gifts: see Elphinstone, Norton and Clark (n 225) 6.

<sup>227</sup> *Grey v Pearson* (1857) 10 ER 1216 at 1223 per Lord Cranworth; Norton (n 225) 46. For a recent case in which it was held that the starting point of interpretation of a deed is the language and that other considerations only play a role when the language is ambiguous: see *Chappell v Chappell*, 06-03-2013 (Ch D).

<sup>228</sup> McMeel (n 210) para 1.40.

<sup>229</sup> (n 220). This case that was decided a year before *Investors Compensation Scheme* and turned on the interpretation of a notice to determine a lease.

<sup>230</sup> At 767.

construction should be applied to unilateral documents as to contracts.<sup>231</sup> McMeel<sup>232</sup> and Lewison<sup>233</sup> both write that the modern rules of interpretation apply not only to contracts but also to other private law instruments, including deeds and unilateral notices. If the same interpretation rules apply to all private law instruments, unilateral declarations also have to be construed objectively. The distinction between the wholly objective interpretation of written documents and the addressee-oriented objective interpretation of ‘addressed communications’ can also be applied to unilateral conduct. Deeds and trusts are written documents that have a beneficiary, but that are not technically addressed to another party. Neither instrument has to be received by another party to take effect. Where there is an ambiguity in the language of the deed, no special consideration can or should thus be given to the position of the *de facto* addressee, the beneficiary. The document should be interpreted wholly objectively, ascertaining the meaning that it would convey to an objective outsider with access to all information that was available to the parties. On the other hand, unilateral declarations or statements that can be seen as communication between two parties, such as termination and affirmation notices, should be interpreted in the way a reasonable person in the position of the addressee would have understood the meaning of the statement. Lord Steyn states in *Mannai Investments*<sup>234</sup> that a notice should be interpreted objectively, according to how the recipient would have understood it.

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<sup>231</sup> At 772.

<sup>232</sup> McMeel (n 210) para 1.27. See also Stephenson LJ in *Peyman v Lanjani* (n 181) at 488.

<sup>233</sup> Lewison (n 210) para 2.04.

<sup>234</sup> (n 220) at 767.

6.2.3. Justification of the use of a similar interpretation norm

Contracts and unilateral conduct are interpreted using the same norm. This is justifiable. Just as a commercial actor must be able to trust that an objective approach will be taken when interpreting a contract term, he must be able to trust that the same norm will be applied when the document is unilateral. Certainty in commercial affairs is advanced when the standard used for the interpretation of unilateral statements does not unnecessarily diverge from the norm applied to the interpretation of contracts. At first sight it may seem sensible to favour the person undertaking the unilateral conduct, since he has not received a benefit in return. However, it is reasonable to apply the objective norm. The person acting unilaterally purports to reach other people and possibly influence them by spurring actions in response to or in reliance on the unilateral act. The person undertaking the unilateral conduct does not make a declaration for himself, he binds himself towards another person. It is thus not the perspective of the person making the statement that should be the starting point, but that of the recipient. Moreover, the addressee of the document has no opportunity to influence the chosen wording or reach a compromise. He may not have the chance to ask for clarification. Although it may seem unreasonable to bind a person acting gratuitously to an interpretation he did not intend, the strict standard for determining whether the person performing the unilateral conduct intends to create legally binding relations provides some safeguard against him being bound against his will. Once his motive to be bound has been established, it is not unreasonable to interpret his conduct objectively.

The *contra proferentem* rule applies to unilateral conduct.<sup>235</sup> Although the party at whom the conduct is directed seems undeserving of this advantaged position because he gave nothing in return, the application of the *contra proferentem* rule is justifiable. The party making a unilateral statement necessarily chose the wording.<sup>236</sup> Not only did the counter-party have no influence when the clause was drafted, it could not even make its opinion known by accepting or refusing to accept. Whereas in a contractual context the party responsible for drafting the clause can defend himself by stating that the other party apparently agreed to the use of the clause, this argument is not available to a person undertaking unilateral conduct.

#### 6.2.4. Interpretation of wills

A slightly different standard applies to the interpretation of wills. The main aim of the construction of wills is to find the intention of the testator.<sup>237</sup> The intentional approach is however restricted. The construction focuses on the intention of the testator as he has declared it in his will and not on the intention he had in his mind.<sup>238</sup> Moreover, the rules laid down in *Investors Compensation Scheme* and *Mannai Investment* apply to wills.<sup>239</sup> In *Perrin v Morgan*<sup>240</sup> Lord Romer emphasizes that well-settled rules of construction of private law documents have

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<sup>235</sup> *Savill Bros Ltd v Bethell* [1902] 2 Ch D 523 at 537-538; Chedlow (n 225) 7.

<sup>236</sup> *Browning v Beston* (1555) 1 Plow 131; Broom (n 225) 42.

<sup>237</sup> *Perrin v Morgan* [1943] AC 399; R Kerridge, *Hawkins on the Construction of Wills* (5th edn, Sweet & Maxwell 2000) 41.

<sup>238</sup> *Earl of Scarborough v Doe* (1836) 3 Ad & El 897 at 963.

<sup>239</sup> *Williams on Wills* (n 158) para 50.1.

<sup>240</sup> (n 237) at 420.

to be upheld. Lawyers and others concerned with the writing of wills should have certainty that certain words and phrases will be granted the meaning that has been attributed to them for generations. This entails that in first instance a wholly objective approach is used. When construing a will, however, the task of the court is not completed after establishing the objective meaning of the words. The court should subsequently ascertain from the language of the whole will, read in the light of the circumstances, whether or not the testator intended to use the words in the established sense or in a different meaning.<sup>241</sup> Ultimately, the intention of the testator is the ‘polar star’ by which the court should be guided.<sup>242</sup>

Some of the techniques used to reach that goal are similar to the interpretation methods for other written instruments. The will must be considered as a whole and words should be understood in their ordinary meaning.<sup>243</sup> However, specific rules apply to construction of wills, such as that effect has to be given to every word.<sup>244</sup> Moreover, courts use a number of presumptions, against intestacy,<sup>245</sup> of rationality and favouring relatives and persons with a claim against the testator.<sup>246</sup> Notably, extrinsic evidence of the testator’s intention is allowed when the will would otherwise be meaningless, when the language is ambiguous either *prima facie* or in light of surrounding circumstances.<sup>247</sup> Whereas the inadmissibility of negotiations and subjective intention reflects the principle of

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<sup>241</sup> *Perrin v Morgan* (n 237) at 421.

<sup>242</sup> *Broom* (n 225) 13.

<sup>243</sup> *Williams on Wills* (n 158) para 50.2 - 50.3.

<sup>244</sup> *Parker v Tootal* (1865) 11 ER 1286.

<sup>245</sup> *Re Harrison* (1885) 30 Ch D 390 at 393-394 per Lord Esher.

<sup>246</sup> *Williams on Wills* (n 158) para 51.7.

<sup>247</sup> Administration of Justice Act 1982, s 21(1) and (2).

objective interpretation,<sup>248</sup> the admissibility of extrinsic evidence for the construction of wills indicates a more subjective approach.

One justifying factor for this stronger emphasis on intention is the fact that the testator cannot be asked to clarify the document when it becomes effective. This argument is, however, not entirely convincing, because it is not limited to wills. It is, for example, also conceivable that a director makes a deed that binds a company, and when the director later dies he cannot be asked for an explanation of the wording he chose. Nonetheless, the deed will be interpreted objectively. For the emphasis on subjective intention in the interpretation of wills there must thus be other reasons. According to Elphinstone, more latitude is allowed when interpreting wills, because testators are supposed to be without legal counsel.<sup>249</sup> Since nowadays also deeds are no longer interpreted formalistically, this difference seems to have lost its meaning. A reason for the greater importance attached to the intention is that the furtherance of commercial certainty that is the reason for objective interpretation plays a less significant role in the interpretation of wills. Persons that are named in a will may rely on receiving a certain amount of money and may be disappointed when the interpretation leads to a different result than they expected, but the actions they undertook in reliance will generally be on a small, individual scale. On the other hand, the ratio that the person writing the document should be able to trust that all courts will interpret the words similarly and in the same way as he himself does applies to testators as well as to business men. This concern is largely overcome, since the long-standing interpretation of words and phrases are the starting point of the interpretation. A

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<sup>248</sup> Lewison (n 210) para 1.05.

<sup>249</sup> Elphinstone, Norton and Clark (n 225) 6.

further reason for more emphasis on the testator's intention is an emotional one. Executors and courts wish to give effect to the last wish of the testator.

### **6.3. Revocability**

#### 6.3.1. Revocability of contracts

An offer to conclude a contract can, as a general rule, be withdrawn at any time before acceptance.<sup>250</sup> Once the contract is concluded, a party cannot withdraw unilaterally. However, a contractually granted right might be revocable, as will be seen in the section on consent.

#### 6.3.2. Revocability of unilateral conduct

Unilateral conduct is generally irrevocable. Deeds, trust and other types of unilateral conduct that create or transfer property rights, are irrevocable once a proprietary effect has been established. Also most examples of unilateral conduct inducing obligatory effects are irrevocable, such as affirmation, termination, notice and rescission. The revocability of consent depends on whether the consent has been given coupled with a property right.

##### 6.3.2.1. Irrevocability of deeds, trusts and documentary credit

The possibilities to revoke a deed after its execution are very limited. A deed can be cancelled, but not through unilateral conduct of the person that made it. There must either be mutual consent or a court order.<sup>251</sup> After the cancellation, no claim

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<sup>250</sup> Treitel (n 22) para 2-058; *Byrne & Co v Leon van Tienhoven & Co* (1880) 5 CPD 344.

<sup>251</sup> *Lord Ward v Lumley* (1860) 157 ER 1342.

can be brought for the enforcement of any covenant or promise in the deed, but the cancellation has no retrospective effect. As a result, property already transferred by the deed is not automatically re-vested. Alteration of a term after execution has no effect, the beneficiary can nonetheless enforce it against him.<sup>252</sup>

The settlor of a trust can make an express power of reservation at the time of constitution of the trust. Thomas and Hudson think it possible to imply a power to revoke.<sup>253</sup> The fact that a power to revoke must be read into the declaration underlines that the trust is in principle irrevocable. Otherwise, such an implication would be unnecessary.

A documentary credit becomes irrevocable when it is communicated to the beneficiary.<sup>254</sup>

#### 6.3.2.2. Irrevocability of unilateral voluntary property transactions

An executed gift is irrevocable.<sup>255</sup> A donor can stipulate a condition, retaining the right to revoke the gift when that condition is not fulfilled. However, in that case the transfer is not immediately effective as a gift.<sup>256</sup> Disclaiming a gift is also irrevocable.<sup>257</sup> This is in line with the pattern signalled above, since disclaiming a

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<sup>252</sup> *Brown v Savage* (1674) 23 ER 101; JA Morrison and HJ Goolden, *Norton on Deeds* (2nd edn, Sweet & Maxwell 1928) 35.

<sup>253</sup> Thomas and Hudson (n 150) para 16-02.

<sup>254</sup> Goode (n 60) 218 and 234.

<sup>255</sup> Hyland (n 131) 499; Worthington (n 132) 262.

<sup>256</sup> Hyland (n 131) 512.

<sup>257</sup> *In re Paradise Motor* (n 200).

gift makes the transaction *void ab initio* and thus has the proprietary effect of revesting the property rights in the donor.

A will is inherently and inescapably revocable.<sup>258</sup> However, a will only takes effect upon the death of the testator and is until then just a declaration of intention.<sup>259</sup>

The irrevocability of property transactions is understandable. The grantor of the right is not bound until he actually performs the transaction. The binding nature of property transaction would be severely undermined if subsequently the grantor could change his mind and take the property right back. The person that is granted a property right will have the right to disclaim it, but the grantor is bound.

#### 6.3.2.3. Irrevocability of quasi-contractual unilateral conduct varying or discharging obligations

Unilateral conduct electing to terminate or to affirm a legal relation is irrevocable. In Comyns' Digest it was formulated that when a man determines his election, it is determined forever.<sup>260</sup> Lord Goff of Chieveley stated in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)*<sup>261</sup> that once an election is made, it is final and binding. The same wording was used by Lord Blackburn in *Scarf v Jardine*.<sup>262</sup> The irrevocability of affirmation is

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<sup>258</sup> *Vynior's Case* (1609) 8 Co Rep 81b; *Williams on Wills* (n 158) para 1.4, 18.4.

<sup>259</sup> *Attorney General v Jones and Bartlett* (1817) 146 ER 291; *Williams on Wills* (n 158) para 1.2.

<sup>260</sup> J Comyns and A Hammond, *A Digest of the Laws of England*, Vol III (5th edn, London 1822) 161. See also *Cartwright* (n 81) para 4-40.

<sup>261</sup> [1990] 1 Lloyd's Rep 391 at 398.

<sup>262</sup> (1882) 7 App Cas 345 at 360.

generally accepted.<sup>263</sup> The innocent party must know both the facts giving rise to the right to terminate and the right itself. In *Peyman v Lanjani*<sup>264</sup> Stephenson LJ stated that it was necessary that the party in breach had relied to his detriment on the affirmation to make it irrevocable. Slade LJ and May LJ, however, were of the opinion that the unequivocal intention and the communication thereof constituted irrevocable affirmation, without reliance.<sup>265</sup>

There is not as much authority for the irrevocability of the election to terminate or to rescind as there is for affirmation. In *Jones v Carter*<sup>266</sup> the election of the lessor to determine a term of a lease covenant was held to be binding. The court considered that the lessee would no longer hold himself bound to the lease after the termination and perform actions that would have constituted a breach under the lease. It would be unjust to permit the lessor to change his mind and hold the lessee responsible for a breach of duty. The objections of the court are valid in case a lease that is brought alive again would be revived *ab initio*. When a revived contract would take effect again from the moment of revival, leaving a gap between the termination and the revival, there would be no such concern.

A last example of the irrevocability of unilateral conduct ending a contract is the notice to quit. Such a notice cannot be revoked once it has been served on the counter-party, unless the other party consents to the revocation and thus to the

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<sup>263</sup> *Bentsen v Taylor* [1893] 2 QB 274; *Peyman v Lanjani* (n 181); Treitel (n 22) para 18-078; E McKendrick, 'Discharge by breach' in *Chitty on Contracts* (n **Error! Bookmark not defined.**) para 24-004.

<sup>264</sup> (n 181) at 488.

<sup>265</sup> *Ibid*, at 494 and 500. See also E McKendrick, 'Discharge by breach' in *Chitty on Contracts* (n 82) para 24-004.

<sup>266</sup> (1846) 153 ER 1040 at 1043.

conservation of the tenancy, in which case the revocation is a bilateral undertaking.

#### 6.3.2.4. Revocability of consent

Consent can in certain circumstances be revoked. For example, permission to enter land can be seen as a licence. If the licence is not coupled with an interest in the land, it is revocable.<sup>267</sup> Conversely, if an interest is granted, the licence cannot be revoked.<sup>268</sup> This corresponds to the rule that granting a property right is irrevocable. A contractually granted licence is in principle revocable. Unless the contract indicates otherwise, the licence is not perpetual. The licence can be validly terminated provided that a reasonable time is given to the grantee to withdraw from the property.<sup>269</sup>

### **6.4. Mistake**

A mistake can be defined as an erroneous belief.<sup>270</sup> This section is concerned with the question as to whether and under what circumstances such an erroneous belief enables parties to a contract to avoid it or a person who has performed unilateral conduct to set aside the consequences thereof.

#### 6.4.1. Mistake and contract

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<sup>267</sup> *Armstrong v Sheppard & Short* [1959] 2 QB 384.

<sup>268</sup> *Wood v Leadbitter* (1845) 153 ER 351; *James Jones v Earl of Tankerville* [1909] 2 Ch 440.

<sup>269</sup> *Winter Garden Theatre Ltd v Millennium Productions Ltd* [1948] AC 173.

<sup>270</sup> *Great Peace Shipping Ltd v Tsavliris Salvage International Ltd* [2003] QB 679 at 689.

English law offers very narrow possibilities to avoid a contract for mistake. The mistake must have led to a positive state of mind of the party seeking avoidance. He must have misunderstood something that was legally relevant to the validity of the contract and factually relevant to his decision to conclude the contract.<sup>271</sup> Only misunderstandings about the circumstances that existed at the moment of conclusion of the contract are relevant.<sup>272</sup> If a fact may or may not be true and a party takes the risk, he cannot later avoid the contract for mistake.<sup>273</sup>

A mistake can either be unilateral, when one party is under a misapprehension, or common, when both parties share the same misunderstanding. The traditional view was that contracts could only be void for mistake of fact, not for mistake of law. The Court of Appeal rejected this in *Brennan v Bolt Burdon*.<sup>274</sup> A mistake can be about the person he is contracting with or about the terms of the contract. In those cases, parties misunderstood each other and therefore did not actually reach an agreement. The mistake negatives the consent to enter into a contract, so that no contract could come or has come into existence.<sup>275</sup> A mistake about the subject-matter of the contract, such as to the existence of the goods, their qualities or the lawfulness of the transaction, can also render a contract void. The mistake does not negative the consent – the parties factually and legally reached an agreement – but nullifies it. As a general rule, a mistake as to the subject-matter cannot be a ground to avoid the contract. Such a

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<sup>271</sup> Cartwright (n 81) para 12-03.

<sup>272</sup> *Great Peace Shipping* (n 270) at 76.

<sup>273</sup> Cartwright (n 81) para 12-05.

<sup>274</sup> [2005] QB 303; Treitel (n 22) para 8-022.

<sup>275</sup> *Bell v Lever Bros Ltd* [1932] AC 161 at 217-218 per Lord Atkin.

misapprehension should only be remedied when it was induced by a misrepresentation or when the contract contained a risk-assumption by one party.<sup>276</sup> In specific circumstances, however, a mistake to the subject-matter can affect the validity of the contract. Unilateral mistake is not sufficient.<sup>277</sup> When both parties are mistaken about the subject-matter the contract is void when the subject-matter does not exist or is so different in quality that it is essentially different from what the parties thought it to be.<sup>278</sup>

The above reflects the common law of mistake. Although there is no separate doctrine of common mistake in equity where common law holds the contract valid,<sup>279</sup> equity can in some circumstances provide relief. First, a court can deploy the equitable remedy of refusing specific performance of a contract entered into under a common mistake that is not fundamental enough to avoid the contract. Secondly, equity can provide relief through rectification. Rectification for common mistake is used to correct a written document that does not adequately reflect the objective<sup>280</sup> common motive of the parties,<sup>281</sup> by changing the wording so that it does.<sup>282</sup> A court should be wary that through rectifying the document the parties are submitted to contract terms to which they did not agree. Also, the certainty and ready enforceability of written contracts would be impeded if they could be amended too easily. Thus, the burden of proof that the document

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<sup>276</sup> Cartwright (n 81) para 15-05.

<sup>277</sup> *Smith v Hughes* (n 210) at 603.

<sup>278</sup> *Bell v Lever Bros* (n 275) at 218 per Lord Atkin.

<sup>279</sup> *Great Peace Shipping* (n 272) at 725.

<sup>280</sup> Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at 1126.

<sup>281</sup> *Agip SpA v Navigazione Alta Italia SpA* [1984] 1 Lloyd's Rep 353 at 359.

<sup>282</sup> *Murray v Parker* (1854) 19 Beav 305.

does not reflect the motive of the parties falls on the party seeking rectification. It will only be awarded in case of strong and convincing evidence.<sup>283</sup> By seeking rectification for a unilateral mistake, a party wishes to correct an incorrect reflection of his own motives. Courts will only allow a rectification for unilateral mistake when (a) one party (A) erroneously believed that the document contained or omitted a particular term, which, mistakenly, it did (not) contain; (b) the other party (B) was aware of the inclusion or omission and that it was due to a mistake on the part of A; (c) B did not point out the omission or inclusion to A.<sup>284</sup> In these circumstances it may be inequitable to reject rectification.

#### 6.4.2. Mistake and unilateral conduct

The rules for mistake are not clear for all examples of unilateral conduct. Recently, the Supreme Court has decided which standard must be applied to determine whether unilateral conduct by which property rights have been transferred can be set aside for mistake. The Supreme Court stated that voluntary property transactions are distinct from contracts and that thus a different norm must be applied.<sup>285</sup>

##### 6.4.2.1. Mistaken voluntary property transactions

A voluntary property transaction is the transfer of goods or money without receiving a direct benefit in return. This category thus includes payments. Two remedies are available when a voluntary property transaction has been made

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<sup>283</sup> Treitel (n 22) para 8-061.

<sup>284</sup> *Thomas Bates and Sons Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 at 515.

<sup>285</sup> *Pitt v Holt* [2013] UKSC 26.

under mistake. First, the donor can make a personal claim for restitution. Secondly, he can appeal to the equitable remedy to set aside the transaction.

*a. Restitution*

A person that paid a sum of money or transferred goods under mistake can reclaim the money or the value of the goods when the recipient is unjustly enriched.<sup>286</sup> In *Barclays Bank Ltd v Simms Son & Cooke Ltd*<sup>287</sup> it was held that money paid under mistake is *prima facie* recoverable if the person making the payment shows that he made the payment under a causative mistake of fact. It is not required that the mistake is fundamental. Goff J considers that the consequences of such a requirement would be far-reaching and that *Morgan v Ashcroft*,<sup>288</sup> from which the fundamentality requirement is derived, is a too uncertain basis to adopt a rule with such far-reaching consequences. He thus considers the pragmatic and practical consequences of a fundamentality requirement.

It can be derived from *Kleinwort Benson Ltd v Lincoln City Council*<sup>289</sup> that payments made under a mistake of law can also be recovered. Goff & Jones state that although the majority in that case does not unequivocally address the matter, the ‘general thrust of the reasoning strongly suggests’ that in the future mistakes

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<sup>286</sup> PH Winfield, *The Law of Quasi-Contracts* (Sweet & Maxwell 1952) 37; A Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 64; P Birks, *An Introduction to the Law of Restitution* (OUP 1986) 167.

<sup>287</sup> [1980] QB 677 at 695; R Goff & GH Jones, *The Law of Unjust Enrichment* (8th edn, Sweet & Maxwell 2011) para 9-98.

<sup>288</sup> [1938] 1 KB 49.

<sup>289</sup> [1999] 2 AC 349.

of law must be treated similarly to mistakes of fact.<sup>290</sup> A causative mistake of law is thus sufficient for a claim in restitution, just as a causative mistake of fact is.

*b. Equitable jurisdiction to set aside a transaction*

A second remedy available to a person who mistakenly undertook a voluntary property transaction is the equitable jurisdiction to set aside a transaction.<sup>291</sup> For contracts, it has been held that there is no jurisdiction in equity to rescind if the mistake would not lead to avoidance of the contract in common law.<sup>292</sup> The test was deemed too uncertain and it was held to be undesirable to undermine common law policies. The remedy of rescission is available for voluntary property transactions, but it has long been unclear under what circumstances. The judgment of the Supreme Court in the case of *Pitt v Holt*<sup>293</sup> provides clarity. The court states that the requirement for setting aside a voluntary transaction is that there must be a causative mistake of sufficient gravity. This test will normally be satisfied only when there is a mistake as to either the legal character or nature of the transaction or as to some matter of fact or law, which is basic to the transaction.<sup>294</sup> Mere ignorance, even if causative to the mistake, is insufficient to constitute mistake.<sup>295</sup> The court thus nuances the norm laid down in *Gibbon v Mitchell*, which entailed that a voluntary transaction could only be set aside for a spontaneous mistake of law or fact if the mistake is about the effect of the

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<sup>290</sup> Goff & Jones (n 287) para 9-99.

<sup>291</sup> Goff & Jones (n 287) para 9-101; *Lister v Hodgson* (1867) LR 4 Eq 30.

<sup>292</sup> *Great Peace Shipping* (n 272); *Cartwright* (n 81) para 13-31.

<sup>293</sup> (n 285).

<sup>294</sup> *Ibid*, at [122].

<sup>295</sup> *Ibid*, at [108].

transaction itself and not merely as to its consequences, or the advantages to be obtained from it.<sup>296</sup> In the Court of Appeal judgment in *Pitt v Holt*,<sup>297</sup> Lloyd LJ adopted this categorisation and held that a spontaneous mistake must be as to the legal effect of the disposition rather than to its consequences, or as to an existing fact which is basic to the transaction. Moreover, he held that the mistake must be sufficiently serious. The Supreme Court does not require the mistake to be either about the effect of the transaction or as to a fact basic to it. It simply requires the mistake to be sufficiently serious and uses the classification of Lloyd LJ as a way to provide guidance to courts for the operation of the norm. According to Lord Walker, it would leave the law in a too uncertain state if the norm from *Gibbon v Mitchell* were to be confirmed, and it would be contrary to the general characteristics of equity to adopt rigid classifications expressed in abstract terms.<sup>298</sup>

The causative mistake is sufficiently grave to set aside the transaction when, in the absence of circumstances of suspicion such as fraud, it is of so serious a character as to render it unjust on the part of the donee to retain the property given to him.<sup>299</sup> The injustice of not correcting a property transaction must be assessed objectively, but with an intense focus on the facts of the particular case.<sup>300</sup>

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<sup>296</sup> *Gibbon v Mitchell* [1990] 1 WLR 1304 at 1309 per Millett J. See also *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476.

<sup>297</sup> [2012] Ch 132; Goff & Jones (n 287) para 9-104.

<sup>298</sup> *Pitt v Holt* (n 285) at [123].

<sup>299</sup> *Ogilvie v Littleboy* (1897) 13 TLR 399 at 400, affirmed under the name *Ogilvie v Allen* (1899) 15 TLR 294. See also *Ogden v Trustees of the RHS Griffiths Settlement* [2009] Ch 162.

<sup>300</sup> *Pitt v Holt* (n 285) at [126].

Unlike contracts, unilateral property transactions can be set aside on the basis of a unilateral mistake despite the absence of additional factors such as misrepresentation or fraud. The court states that this has been attributed to the fact that gifts fall outside the scope of the law's special concern for the sanctity of contracts.<sup>301</sup> O'Sullivan, Elliott and Zakrewski suggest that the law's interest is in protecting bargains and the security of contracts, a concern that does not play a role in the context of gifts.<sup>302</sup> The Supreme Court in *Pitt v Holt* notes that the fact that a purely unilateral mistake can be sufficient to grant relief can be reason to impose a stricter seriousness-test. In the Court of Appeal judgment Lloyd LJ adopted the strict norm to protect the recipient's possession and enjoyment from being too easily interrupted by the donor reclaiming his gift.<sup>303</sup> The Supreme Court does not deny that the certainty of executed transfers is a compelling interest when shaping the policy of a restrictive approach towards setting aside transactions. Lord Walker, however, distinguishes between contracts and voluntary property transactions. The rules for mistake in contract law must be distinguished from equitable rescission of voluntary dispositions. A voluntary transaction should not be accorded the same protection as a commercial bargain.<sup>304</sup>

It is conceivable that both rescission and restitution are available remedies to a person having made a transfer of property under mistake. The conditions

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<sup>301</sup> *Pitt v Holt* (n 285) at [114].

<sup>302</sup> D O'Sullivan, SB Elliott and R Zakrewski, *The Law of Rescission* (OUP 2007) para 29.22.

<sup>303</sup> Goff & Jones (n 287) para 9-106.

<sup>304</sup> *Pitt v Holt* (n 285) at [115].

under which they can be successfully requested diverge. The *Pitt v Holt* case confirms the contrast between the common law doctrine of restitution and the equitable doctrine of rescission. Whereas for restitution no fundamentality or seriousness of the mistake is required, rescission is only granted in confined circumstances. Goff & Jones expect that courts in the future might establish gift transactions as a special class requiring special rules, with the result that for gifts a serious mistake would be required both for a claim in restitution as well as for rescission.<sup>305</sup>

#### 6.4.2.2. Mistake and wills

The court will refuse to give effect to a will executed under mistake.<sup>306</sup> It must be shown that the testator was mistaken about and thus did not approve of particular clauses in the will. There is no qualification of the mistake as having to be serious. *Animus testandi* is essential for the validity of the will.<sup>307</sup> This strong emphasis on intention for wills, stronger than for other acts, was already apparent in the section on interpretation.

The will can be repaired in three ways. First, the court of probate can omit words from the will. Secondly, the court may adjust the legal effect of a will through construction. Thirdly, section 20 of the Administration of Justice Act 1982 gives courts the power to rectify a will if it fails to carry out the intentions of

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<sup>305</sup> Goff & Jones (n 285) para 9-110.

<sup>306</sup> *Re Meyer's Estate* (n 176); *Williams on Wills* (n 158) para 5.7.

<sup>307</sup> *Jarman on Wills* (n 158) 29.

the testator.<sup>308</sup> The courts take a pragmatic approach to prevent the will from being incapable of being executed.

#### 6.4.2.3. Mistake and affirmation and termination notices

Little has been written on the effect of mistake on the validity of unilateral conduct varying or discharging obligations. It is, for example, unclear whether affirmation elected under mistake can be set aside. Since affirmation is irrevocable, an action for setting aside on the ground of mistake is the only option for the affirming party to reverse the effects of the affirmation, such as the loss of the right to terminate the contract. Nor is it clear whether the injured party that terminated the contract under mistake can later go back and undo his election. In *Pitt v Holt*, the Supreme Court makes a distinction between setting aside a voluntary property transaction and avoiding a contract for mistake. The question is whether one of these two regimes should be applied to affirmation or termination notices, which fall outside the scope of both categories, or whether a specific norm applies.

Affirmation and termination notices should not be equated with voluntary property transactions. The norms formulated in *Barclays v Simms* for restitution and in *Pitt v Holt* for setting aside such a transaction are not applicable to notices. Nor is the standard to avoid contracts on the basis of mistake. Lord Walker emphasises in *Pitt v Holt* the ‘special concern for the sanctity of contracts’ and for the protection of commercial bargains. Although a termination or affirmation notice is given in a contractual context, it does not reflect a commercial bargain.

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<sup>308</sup> See for a recent case *Ashwin Joshi v Dhanlaxmi Kirit Kumar Mahida* [2013] EWHC 486. See also *Hawkins on the Construction of Wills* (n 237) 3.

Mistake should have no invalidating effect on the election to terminate or to affirm a contract. Ewart stated that the elector ‘may regret that he made a mistake, but how can he restore ruptured relations?’<sup>309</sup> The right to affirm or to terminate is granted by the contract. The elector wishes a second chance, but the contract gave him only one. Sheppard is also of this opinion. He adds that courts expect commercial parties to be aware of the consequences of their actions and to protect their interests.<sup>310</sup> In the case of *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd*<sup>311</sup> a termination notice was served under mistake. The court resolved the issue by determining whether a reasonable recipient would have understood that a mistake was made, thus making it impossible that the declaration was an unequivocal communication of intent to terminate the contract.

## **6.5. Enforcement**

### 6.5.1. Enforcement of contractual obligations

The standard remedy for a breach of contract in English law is the award of damages to compensate the loss that the innocent party incurs as a result of the breach. Only under special circumstances, when damages are inadequate, will specific performance of the obligation be ordered.<sup>312</sup>

### 6.5.2. Enforcement of obligations arising out of unilateral conduct

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<sup>309</sup> JS Ewart, *Waiver Distributed* (Harvard University Press 1917) 83.

<sup>310</sup> AM Sheppard, ‘Demystifying the right of election in contract law’ [2007] JBL 442 at 456.

<sup>311</sup> [2010] EWHC 465 (Comm).

<sup>312</sup> *Photo Production v Securicor* (n 92) at 848-9; *Co-operative Insurance Society Ltd v Argyll Stores Ltd* [1998] AC 1.

Specific performance of gratuitous promises is not granted.<sup>313</sup> Equity, it is said, does not favour voluntary transactions.<sup>314</sup> A gratuitous promise laid down in a deed can thus not be specifically enforced. However, it is unclear why specific performance is denied. Burrows finds it hard to see a rational distinction between the common law remedies such as damages that are available for deeds poll and equitable remedies such as specific performance that are not.<sup>315</sup> According to him, this bar to specific performance is a legacy of history and should be removed. There is some judicial support for this, for example in *Mountford v Scott*,<sup>316</sup> in which specific performance was granted despite there only being token consideration. In 2004, the Federal Court of Australia ordered specific performance of a deed poll in *Toal v Aquarius Platinum Ltd (No 2)*.<sup>317</sup>

If a trustee does not fulfil his duties, he can be held liable for breach of trust if the beneficiaries suffer losses. Negligence, dishonesty or intent does not have to be proved.<sup>318</sup> Three remedies are available to the beneficiaries. First, they can order the trustee to restore the original trust property, which is referred to by

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<sup>313</sup> *Wycherley v Wycherley* (1763) 2 Eden 175; *Jefferys v Jefferys* (1841) C & 138; E Fry and WD Rawlins, *A Treatise on the Specific Performance of Contracts* (6th edn, Stevens & Sons 1921), para 116; G Jones and W Goodhart, *Specific Performance* (2nd edn, Butterworths 1996) 24; SJ Whittaker, 'Introduction' in *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012) para 1-128; S Pulleyn 'Equitable Easement revisited' [2012] Conv 395.

<sup>314</sup> Lord Cottenham LC in *Jefferys v Jefferys* (n 313) at 141; FW Maitland, *Equity* (2nd edn, ed by J Brunyate, CUP 1936) 305; SJ Whittaker, 'Introduction' in *Chitty on Contracts* (n 313) para 1-128; Fry and Rawlins (n 313) para 116; Jones and Goodhart (n 313) 24.

<sup>315</sup> A Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 495.

<sup>316</sup> [1975] Ch 258.

<sup>317</sup> [2004] FCA 550.

<sup>318</sup> *Target Holdings Ltd v Redfern* [1996] AC 421 at 432 per Lord Browne-Wilkinson.

Hudson as ‘specific restitution of the trust property’.<sup>319</sup> This is the primary remedy, because it enforces the trustees’ obligation to safeguard the trust property.<sup>320</sup> Alternatively, if the trust property cannot be recovered, the beneficiaries can claim the value of the good in money. Thirdly, they can claim equitable compensation of any further losses. The beneficiaries might also be able to trace the value of the trust property.<sup>321</sup> It is notable that the primary remedy for breach of trust is the restoring of the trust property. This resembles specific performance, whereas for deeds it is held that equity does not aid a volunteer. A difference between the two situations is that the deed is a voluntary transaction and the trustee is under the fiduciary duty to properly manage the trust property. This distinction is not entirely convincing, because the trust is or can be the result of a voluntary transaction. The enforcement of the obligations following from the establishment of the trust can thus also be explained as favouring a voluntary transaction. Another factor justifying the ‘specific performance’ of trusts is that the aim of the remedies for breach of trust is compensatory.<sup>322</sup> The purpose is to restore the trust property rather than supplying the beneficiaries with a newly promised benefit.

The beneficiary of a will only acquires an interest in the residue when the amount of residue has been ascertained, as mentioned in chapter 5. Before that

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<sup>319</sup> Hudson (n 194) 867; D Hayton, P Matthews and C Mitchell, *Underhill and Hayton’s Law Relating to Trust and Trustees* (18th edn, LexisNexis 2010) para 87.1; Maitland (n 314) 216.

<sup>320</sup> *Target v Redfern* (n 318) at 434; *Nocton v Lord Ashburton* [1914] AC 932 per Viscount Haldane at 958.

<sup>321</sup> Hayton, Matthews and Mitchell (n 319) para 90.1.

<sup>322</sup> Thomas and Hudson (n 150) para 32.01; J Thurston, *A Practitioner’s Guide to Trusts* (9th edn, Bloomsbury Professional 2011) 139.

moment he only has the right that the executor properly administers the estate and apply it for his benefit after completion.

A third party to whom a contractual right is granted under the Contracts (Rights of Third Parties Act) 1999 may enforce a contract term in his own right, as provided by section 1(1). Under section 1(5) the third party beneficiary can exercise any remedy that would have been available to him if he were a party to the contract. The rules relating to damages, injunction, specific performance and other relief apply accordingly. The third party beneficiary can even claim damages for loss of bargain, although the bargain was not made with him but between the parties to the contract.<sup>323</sup>

## **6.6. Concluding remarks**

The main conclusion of this chapter is that unilateral conduct creating, varying or discharging obligations seems to be a blind spot in English private law. There is case law and literature about unilateral conduct affecting property rights, but for some topics unilateral obligatory declarations are quite neglected.

The following general observations can be made. There are differences between the rules applicable to contracts and to unilateral conduct, but also some similarities.

For contracts, as well as unilateral conduct, the **intention to create legal relations** must be present. In court proceedings, a judge will impose a higher

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<sup>323</sup> Treitel (n 22) para 14-097.

standard as to how clearly the motive to undertake legally binding unilateral conduct must be communicated. Because a person is not presumed to bind himself gratuitously, it is reasonable to require to unequivocally show that the promisor expressed this purpose. Just as contracts are generally informal, so quasi-contractual unilateral conduct that varies or discharges obligations. Unilateral conduct creating or transferring property rights must generally comply with form requirements.

The same rules of **interpretation** apply to all private law documents. Like contracts, unilateral conduct has to be interpreted objectively. For contracts as well as unilateral conduct, a distinction can be made between the wholly objective interpretation of written documents and addressee-oriented objectivity of unilateral communications. Although the person undertaking the unilateral conduct receives nothing in return, it would not be reasonable to interpret the conduct favouring his interests. Unilateral conduct is generally directed at another party that should be able to trust that the objective meaning of the used words prevails. The will forms an exception. A stronger emphasis is placed on the actual intention of the testator, which is justifiable given the special nature of the will as an instrument that purports to give effect to the last wishes of the deceased.

Contracts are not unilaterally **revocable**. Nor is unilateral conduct. Unilateral conduct creating obligations, unilateral voluntary property transactions and quasi-contractual unilateral conduct by which a party exercises his right to elect and for notices are all generally irrevocable. The purpose in all instances is to advance certainty and trust in commercial dealings. The main exception is

consent. Unless consent is coupled with the granting of a property right, it is revocable.

In the context of **mistake**, contracts and unilateral property transactions must be distinguished. It follows from the case of *Pitt v Holt* that commercial bargains deserve a higher degree of protection than voluntary property dispositions.<sup>324</sup> Gratuitous property transactions can be set aside for unilateral mistake under the equitable doctrine of rescission. This does not mean that equitable rescission is easily granted. The mistake must be so serious in character as to render it unjust on the part of the donee to retain the property given to him. This requirement will generally be fulfilled only when the mistake is either about the legal effect of the disposition (rather than the consequences) or about an existing fact that is basic to the transaction. A second remedy available for voluntary transactions made under mistake is a personal claim for restitution. For a successful claim, it suffices to show that the payment was made under mistake. No seriousness test applies and there is no specification as to what aspects of the transactions the mistake must relate to. Wills form also in this context an exception. A court will refuse to give effect to a will executed under mistake, regardless of the seriousness of the mistake. The greater emphasis on intention for wills is also apparent regarding interpretation. Affirmation and termination notices cannot be set aside for mistake.

When it comes to **enforcement** of rights, the precept is that equity does not assist a voluntary property transaction and that thus specific enforcement is

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<sup>324</sup> *Pitt v Holt* (n 285) at [114]-[115].

not available for gratuitous obligations undertaken in deeds. The reason for this rule is not clear. On the other hand, specific performance is an exceptional remedy for contractual obligations as well.

## **Chapter 7 – The position and regulation of unilateral conduct**

In the previous chapters, I described a quest for something that may not exist. The concept of the unilateral juridical act, as is provided for in the Dutch Civil Code, is unknown in English private law. That concept could not even be recognized, first due to impediments rooted in well-established doctrines and secondly due to a different structural approach. Nevertheless, unilateral conduct is acknowledged to be a possible source of legal effect. In this thesis, I have mapped which effects can be brought about by which examples of unilateral conduct and how these examples of unilateral conduct are regulated.

In this chapter, I first examine the reasons for English law to distinguish between the unilateral creation of obligations and the unilateral creation or transfer of property rights, based on my findings of chapters 4 and 5. Subsequently, I consider whether unilateral conduct in English private law is or should be regarded as a legally relevant categorisation, despite the obstacles identified in chapter 3. In section 7.3. I discuss how unilateral conduct should be regulated. Lastly, I reflect on Dutch law.

### **7.1. A different approach to obligations and property rights**

As shown in chapters 4 and 5, property rights can be created and transferred through unilateral conduct, whereas the possibilities to unilaterally create obligations are very limited. Three factors underlie this different approach.

First, English law is more inclined to effectuate acts than words. This is illustrated by the rule that an inaccurate act of delivery cannot be repaired by an unequivocal declaration that a gift is being made. Plowman J in *Vandervell v Inland Revenue Commissioners*<sup>325</sup> stated that ‘a man does not cease to own property by saying “I don’t want it”. If he tries to give it away the question must always be, has he succeeded in doing so or not?’ The distinction between words and acts is visible in more situations. Cartwright states that courts are more cautious to impose liability for careless statements, ie for words than for acts.<sup>326</sup> Tortious liability is based on an action as a consequence of which losses are suffered. Informal contracts incorporate a mechanism to ensure the commitment of both parties through the doctrine of consideration. The form requirements imposed on a person making a deed validate that he does not merely say something, but that he undertakes an action (writes the promise down, signs it before witnesses, delivers it). The property transactions discussed are not about promises to give something, but actually giving it.<sup>327</sup>

A concept from Dutch law may contribute as a second factor, which is related to the first point, namely the concept of ‘knowability’ of property rights (‘kenbaarheid’). It entails that third parties must be able to easily find out who holds what rights to a good. A shift in entitlements to property is as a general rule visible to the public, for example when due to a gift the control over a good changes from one person to the other. Subsequently, the public can adjust their

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<sup>325</sup> [1966] Ch 261 at 275.

<sup>326</sup> Cartwright (n 81) para 6-01. See also Lord Reid in *Hedley Byrne* (n 107) at 482-483.

<sup>327</sup> Hogg (n 4) 47.

behaviour to the new situation. It would be undesirable if an executed property transaction could easily be undone. This is connected to property rights being absolute, whereas obligations only work between the parties involved. The concept of knowability and the inclination to give weight to the position of third parties links into two rules of English law. First, the wholly objective interpretation of private law documents foregoes the perspective of contracting parties but takes the position of a reasonable and informed third party. Secondly, the principle that rectification of a document is not allowed when it prejudices innocent third parties.<sup>328</sup>

Thirdly, as I mentioned earlier, English law recognises as a fundamental notion the presumption that someone acts in the interests of his estate.<sup>329</sup> Besides the consequence that gifts do not have to be accepted, this notion invokes the maxim that someone does not undertake an obligation without benefitting from it himself. To make a gratuitous promise generally is disadvantageous for one's own estate. Therefore, English law starts from the notion that such a promise is not binding. The presumption can be refuted by complying with form requirements such as laying down the promise in a deed.

## **7.2. Unilateral conduct in English private law: an implicit category?**

In this thesis I have identified a number of examples of unilateral conduct. All these different examples have in common that the legal effect that they create is

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<sup>328</sup> *Cherry Tree Investments Ltd v Landmain Ltd* [2012] P&CR 10; *Chartbrook v Persimmon Homes* (n 280); *Meagher, Gummow & Lehane's Equity* (n 151) para 26-80.

<sup>329</sup> *Thompson v Leach* (n 131).

the result of an undertaking by one party. In this respect, all types of unilateral conduct belong to the same category. The subsequent, more interesting question is whether this categorisation is valuable for one's understanding of English law. This is only the case if categorisation means more than applying a label to different instances that have otherwise nothing in common.

The examples of unilateral conduct that I discuss in this thesis, have three possible legal effects. First, some examples of unilateral conduct can create, vary or discharge obligations. Secondly, some examples of unilateral conduct can create or transfer property rights. Thirdly, two examples of unilateral conduct can do both. Are all examples appearances of one overarching concept? It is apparent from the previous section that English law views property transactions as fundamentally different from promises. This gap could possibly be bridged by the two instances that can have both proprietary and obligatory effect, deeds and trusts. When one document can create both types of effect, the distinction between property rights and obligations does not necessarily have to be an insurmountable obstacle to bringing different examples of unilateral conduct together. At this point it becomes relevant whether similar rules are applicable to the examples. When the same rules apply to all types of unilateral conduct, it is sensible to regard them as belonging to the same category even though they create different legal consequences. I elaborated on the rules applicable to unilateral conduct in chapter 6. This chapter shows an ambiguous image. In some areas, notably interpretation, revocability and the motive to create legal relations, the same rules generally apply to all types of unilateral conduct. In other instances a distinction emerges between unilateral conduct creating or transferring property rights and

unilateral conduct creating, varying or discharging obligations. This is most visible for form requirements and the rules regarding mistake. What adds to the sometimes confused image is that for some issues it is not always clear what the rule is for all examples. Generally, the same rules apply to all examples of unilateral conduct that create or transfer property rights including the two hybrid instances deed and trust. The image of the rules applicable to (other) unilateral conduct creating, varying or discharging obligations is more diffuse. Those rules seem to be developed more piecemeal.

On the one hand the different examples of unilateral conduct have too little in common to confidently designate them as belonging to one meaningful category, but on the other hand the similarities cannot be disregarded. A categorisation of unilateral conduct should take into account a further subcategorization, namely the distinction between unilateral conduct creating obligations, unilateral property transactions and quasi-contractual unilateral conduct varying or discharging obligations. Instances of the last of these subcategories include variation, notice, affirmation, termination and rescission. These are all examples of conduct by which the person undertaking it is exercising a right that is granted in the contract, that alters a contractual relation or that is undertaken in a non-contractual but bilateral context. The odd one out is consent. This is unilateral conduct that is not undertaken in the course of a contractual or otherwise previously existing relation. The legal effect plays its main role in actions on tort.

By distinguishing between unilateral property transactions and quasi-contractual unilateral conduct, I aim to do justice to the fact that contracts are distinct from property transactions, as was pointed out recently by the Supreme Court in *Pitt v Holt*.<sup>330</sup>

### **7.3. Regulating unilateral conduct in English law**

The question that follows is whether the categorization implies that the different examples of unilateral conduct should be regulated in the same way. The regulation of unilateral conduct should follow the same subcategorization I proposed in the previous section. The generally similar regulation of unilateral voluntary property transactions is desirable, since the different types of transactions are intertwined and are different operations of one concept, the gift.

Quasi-contractual unilateral conduct should, as much as possible, be regulated similarly to contracts. The fact that comparable rules apply to contracts and these unilateral declarations is beneficial for certainty in commercial dealings. Often parties will not realise that the legal effect arises as a result of unilateral conduct, especially when they are undertaking the action in a contractual context. It is desirable that they are not surprised by unnecessarily derogating rules. In some instances quasi-contractual unilateral conduct is regulated differently from contract. A notable example is the higher threshold for establishing the motive to be bound to unilateral conduct. This is justifiable, because the expectancy has to be refuted that a person will not bind himself to do something that is detrimental to his estate. Another instance in which different rules apply to contract as

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<sup>330</sup> *Pitt v Holt* (n 285) at [114].

opposed to quasi-contractual unilateral conduct is the fact that mistake does not invalidate the election to terminate or to affirm a contract. Also this divergence is justifiable. The starting point of the law is that election is only binding when it is made in knowledge of the facts and of the rights that are to be waived. A spontaneous misunderstanding of these facts should not lead to the electing party acquiring a right to re-elect.

The third category of unilateral conduct in English private law consists of the examples of unilateral conduct that create obligations. I identified four examples: deed, trust, documentary credit and granting an irrevocable right under the Contracts (Right of Third Parties) Act 1999. The deed and the trust are not only types of unilateral conduct that create obligations, but also unilateral voluntary property transactions. They should be regulated along those lines. To documentary credit and to granting an irrevocable third party right, contractual rules should be applied.

Granting a right under the Contracts (Rights of Third Parties) Act 1999 enables a third party to enforce a contractual right. This unilateral undertaking is intertwined with the contract it springs from. The same regime should be applied.

Issuing a documentary credit is unilateral conduct by the bank, but is undertaken on the basis of a contract between the bank and the buyer, and the reason for issuing the credit in the first place is to provide security for the performance of a contract between buyer and seller. The documentary credit is thus closely related to contract law and should be treated as such.<sup>331</sup>

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<sup>331</sup> See Goode (n 60) 219.

#### **7.4. Unilateral juridical acts in Dutch law: a meaningful categorisation?**

While deliberating the existence of a category of unilateral conduct in English private law, I also questioned the value of the categorisation of unilateral juridical acts in Dutch law. The existence of the category is imposed by the system of the civil code. Moreover, the different examples of unilateral juridical acts in Dutch law are distinct, but the legal effect they create is in all instances obligatory. Categorisation is thus less controversial. However, the category of unilateral conduct is a looser classification than, for example, contract. In the case of contract, all special contracts are appearances of the same concept of contract. Unless when the specific application asks for specific rules, the same default rules apply to all types of contract. The same is not true for unilateral juridical acts. That makes it more difficult to formulate general rules and principles that are applicable to all types of unilateral conduct.

Most examples of unilateral juridical acts in Dutch law are quasi-contractual. These are, and should be for reasons similar to those in English law, regulated in analogy with contracts as much as possible. Even more than in English law, the line between unilateral juridical acts and contracts is blurred, as consideration is not required for the valid conclusion of a contract. Therefore, it will often depend on the facts whether in a specific case there is a unilateral juridical act or a contract. This is often the case with for example the giving of consent. It provides an additional argument to apply the same rules to contracts and juridical acts.

On the other hand, some examples of unilateral juridical acts cannot be considered as quasi-contractual, such as the will or the abandonment of property. It would be strained to impose contractual rules on these unilateral juridical acts. Thus, one model regulation for all unilateral juridical acts based on the regulation for contracts is not desirable. In the parliamentary history of the section on mistake in the Dutch Civil Code it can be read that the legislature did not want to incorporate an article on mistake for all juridical acts, including unilateral ones, as it wanted to give the courts freedom to answer the question if and under what circumstances a juridical act could be set aside for mistake separately for each group of unilateral acts.<sup>332</sup> This approach does justice to the diversity within the category of unilateral juridical act. Nevertheless, it would be helpful to courts if there were default rules in place for unilateral juridical acts, from which they can derogate. These default rules should be derived from the rules applicable to contracts, possibly adapted taking into account the unilateral nature of unilateral juridical acts. When a unilateral juridical act has a distinct character and the application of quasi-contractual rules does not lead to a sensible result, a tailor-made solution should be adopted. The formulation of these default rules is the subject of further study.

## **7.5. In conclusion**

Ultimately, in my perspective my quest has not been in vain. The thesis reflects my interpretation of the results of my research into unilateral conduct in English private law. Unilateral conduct is present in English law. Although the examples

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<sup>332</sup> Parliamentary History Book 3 BW, p 322; J Hijma, *Groene Serie Verbintenissenrecht*, article 6:228 BW, note 7.

may at first depict a fragmented image, upon closer examination it shows that a pattern can be discerned. Acknowledging the existence of a category of unilateral conduct that voluntarily and purposefully creates legal effect helps to better understand certain instances in English law. The categorisation and regulation I propose leave enough room to preserve the flexibility and tailor-made approach that characterises English law.

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