Transactions of Minors

in English and German Law

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Abstract

This thesis is a comparative analysis of the ability of minors in English and German law to enter into and perform transactions, as well as of the protection that each jurisdiction provides them with. The core insight that this thesis offers is a better understanding of what the 'protection of minors' from improvident transactions means in each of the two jurisdictions by determining the underlying policies. English law allows minors to enter into and perform transactions and thereby dispose of their property. Minority bars only the enforcement of minors' promises, whether directly or indirectly in tort or unjust enrichment, and subject to certain exceptions. By contrast, German law limits minors' ability to participate in transactions autonomously nearly completely and confers all control over minors' transactions on their parents. The latter can even act on behalf of their child as agents by statute and make their child party to transactions without the latter knowing. This thesis analyses the impact that 'minority' has in the areas of contract, (personal) property, and restitution of unjust(ified) enrichment in light of these policies. Following the far-reaching powers of parents over their children, a further important point of consideration in this thesis is the role which parents and the state play in protecting minors from improvident bargains. It can be shown that parents are generally in a fiduciary position in relation to their children and their property and are personally liable for breaches of duty in this regard. A proposal for English and German law to improve the protection of minors from misappropriations of their property by their parents is discussed in this context. In addition, the thesis assesses further particularities of English and German law concerning 'minority', such as the abstract design of German law versus the flexible and individualised approach taken in England.

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I.

Introduction

Most jurisdictions face the problem that certain members of society are deemed vulnerable. The law must protect them from the consequences of their own decisions or from other persons trying to take advantage of their weaknesses. In some cases, a weakness is specific to a situation, such as when an ill person desperately tries to buy life-saving medicine. Other weaknesses are more general in kind and considered to pertain to a whole group of persons, irrespective of their individual circumstances at the time. A separate 'status' is created for this group.

Minority or, in old language, infancy is such a status. The law in England and Germany nowadays attributes it to persons below the age of eighteen years. Every single citizen is subject to this status for roughly the first quarter of his[1] life. The large number of persons affected by it and the generality of the status of minority pose difficulties: the law has to be sufficiently strict to protect all minors effectively, but it should also be flexible enough to take individual developments into account. Balancing these two aspects is the core problem of this area of law. No person gains the experience and cognitive abilities to lead a successful life as an adult suddenly on his eighteenth birthday. The choice of a specific age follows

[1] In this thesis the grammatical masculine is used to denote any gender.

the need for legal certainty. It is much better determinable than, as historically in use, the ability to count money or the beginning of puberty.[2] Legal certainty is in the interest of both minors and third parties who (wish to) rely on the validity of a transaction with a minor. The appropriateness of the age limit is not re-evaluated here, but appreciating the gradual changes in people's 'weaknesses' related to being underage poses the question of whether the law takes these changes sufficiently into account and strikes the right balance between protecting minors, flexibility, and legal certainty.

1) The Meaning of 'Transactions of Minors'

This thesis is not a work about minority in general but focuses specifically on 'transactions of minors'. The core question is: how do English and German law protect minors from improvident decisions *in the context of transactions*. Young persons can make manifold questionable choices, such as quitting school early. Most questions of this sort would be addressed by what is usually referred to as family law. In contrast to family law, this thesis focuses on the 'transactional side' of minority.

The meaning of 'transactions' requires clarification, not least because this is a comparative legal thesis. In this thesis, the term 'transaction' is understood as the voluntary exchange or transfer of value by at least two persons. It can be two-sided, such as in the case of a sale, but it might be one-sided, such as in the

[2] M Bateson (ed), *Borough Customs, Vol I* (Selden Society Publications, Bernard Quaritch, London 1904) 63 f; B Nicholas, *An Introduction to Roman Law* (revised ed, OUP 2008) 91.

case of a gift. It will often relate to money or other property, but it can equally concern the exchange of a service. The basis of every transaction is typically formed by a contract. In English law, 'contract' is understood as a legally enforceable promise or set of promises, or as an agreement which gives rise to legally enforceable obligations.[3] In German law, a contract is essentially any agreement by at least two persons which aims at bringing about a legal consequence, including contracts in the 'English sense' as well as, for example, transfers of rights.[4] In choosing to discuss 'transactions of minors', the latter, German understanding of a contract is based upon to include, for example, gifts (which is not the case under English law). The reason for adopting this wide notion of voluntary exchanges is that this thesis aims to analyse the protection provided by English and German law to minors *in the context* of transactions. This analysis requires looking at further-reaching consequences of situations where a minor is party to a transaction, typically with an adult, including their practical consequences. It is one thing for a minor to know that his promise or obligation is not binding on him. But what if he already made a gift, paid the price for goods, or rendered a service to his employer? The protection of minors from improvident transactions is analysed against the background of their functional implications: once a minor has entered a contract, the question is whether he is bound to perform, whether and how he can demand counter-performance, whether his performance or its counterpart is valid, or, if all goes wrong, how the transaction can be reversed. Gifts by minors are subject to special rules, too, and even gifts *to*

[3] See the further explanations by S Whittaker in: HG Beale (gen ed), *Chitty on Contracts, Vol I General Principles* (34th ed Sweet & Maxwell, London 2021) [1-031 ff].

[4] M Wolf and J Neuner, *Allgemeiner Teil des Bürgerlichen Rechts* (12th ed CH Beck, München 2020) 329, 339.

minors can be restricted. Instead of voluntarily binding themselves, minors could also commit a wrong in a transactional context and, thereby, incur liability.

Having said that, an analysis of the protection that the law affords minors in the context of transactions cannot solely focus on monetary aspects. Entering into transactions is required for participating in social life which, in turn, is crucial for children's education and successful upbringing. Children or teenagers gradually develop the experience and cognitive abilities which they are deemed to lack before their eighteenth birthday. For that reason, they must be allowed to gain experience by interacting socially and commercially. 'Protecting minors' cannot mean a blanket exclusion of minors' liability or the invalidity of any transfer of property by or to a minor. Third parties would hardly be willing to deal with minors, who, in turn, would be prevented from gaining the experience necessary for becoming successful adults. 'Protecting minors' is also not an end in itself, and the interests of others are worthy of protection, too. Minors in German law have been, rather colloquially, referred to as the 'holy cow of the German Civil Code',[5] but neither in Germany nor in England has it ever been a dogma that the protection of minors is a virtue above all others, as can be seen in the course of this thesis.

Furthermore, in times in which the right to vote for sixteen-year-olds is politically discussed, the status of minority should accord a certain degree of autonomy to minors. Although persons below the age of eighteen years typically still attend school or complete an apprenticeship, some of them can already have

[5] AG Kerpen, [2007] BeckRS 4952.

their own ideas of (semi-)professional pathways. Whether one takes the case of a young tennis player, the winner of a talent show, teenagers who, in the course of the 'Covid-pandemic', have begun day-trading,[6] or 'influencers' earning money on social media—the law should provide a framework which balances protection and autonomy.

The core insight that this thesis has to offer is that the perception of what 'protecting minors' means in the context of transactions in England and Germany is entirely different. In other words, the law governing minors' transactions follows entirely different policies. In English law, the policy underlying the 'protection of minors' from improvident bargains is that minors' promises are unenforceable as against them, whether directly or indirectly, but minors can otherwise dispose of rights or acquire them and, thereby, validly perform an agreement or even make gifts. By contrast, in German law minors are 'protected' from improvident bargains by conferring the control over their transactions on their parents. As will be shown, each jurisdiction follows its own policy consistently, that is to say, the policy is reflected in the context of contract law, transfers of rights, and the restitution of executed transactions. Furthermore, each jurisdiction's policy proves to be the correct basis for interpreting a legal provision in case of doubts about its precise meaning.

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[6] See, for example, L Kellaway, 'Crypto in the classroom: Lucy Kellaway on the kids' new craze', *Financial Times*, November 19, 2021, <https://www.ft.com/content/6ff0f503-f20b-45d5-b2d3-7f93da184e8c>, accessed 27 July 2022; C Barrett, 'Should parents fear a trading app for teenagers?', *Financial Times*, May 21, 2021, <https://www.ft.com/content/3c574399-9f10-4b3a-83bb-8872c83c47cf>, accessed 27 July 2022.

2) Minors, Parents and the State

When discussing the consequences of the minority of a party to a transaction, one might not immediately think of the roles which parents or even the state play in this context. Why their roles require specific analysis in an individual chapter needs explanation. The upbringing of children and teenagers is an ongoing process. Most importantly, parents maintain and look after their children with regard to manifold aspects of life. They have a natural degree of control over their children, stemming from mutual love and affection but also the simple dependency of children on their parents. In some sense, good parenting is the most effective protection for minors. This insight does not only apply to everyday rules, such as not crossing a road unless no car is approaching. Making wise choices about one's spending is equally part of the skills one should learn before reaching adulthood, and parents play a significant role in directing their children in their spending. Parents in England and Germany can take their children's belongings into their possession and exert control over them—whereas they are not at liberty in dealing with them. Going even further, the German concept of 'parental statutory authority' allows parents to enter into contracts on behalf of their children as agents. Thereby, they can make their child party to a transaction even without the child knowing it. Furthermore, parents do not only control whether their child enters into a transaction or not. They often also own or at least control property that, economically, 'belongs to their child'. For example, a relative might gift money 'to the child' for its third birthday but, naturally, hands it over to the parents. They could dispose of the money and practically effect a 'transaction of their child'. Some parents are not always aware that they are dealing with their child's funds, and, even if they are, they can find themselves in

a conflict of interests. Such conflicts of interests and parents' possible ignorance about them open a new perspective on the protection of minors from improvident bargains: not only their own ability to bind themselves or to transfer rights needs to be assessed, it is also their parents' ability to do so. There are also risks arising from parents' powerful position, and these have to be counterbalanced by special provisions which balance both the protection and threat which the status of minority entails for minors in respect of transactions to which they are (made) parties. To English law, the concept of 'parental statutory authority' is alien; however, English parents do have certain powers in respect of their children's property which have not been analysed in the legal literature or case law with sufficient clarity. We will see that the rights and duties which parents have in relation to their children's property are quite similar in England and Germany, although the legal historical and conceptual bases are very different.

The insight that parents' influence over their children's transactions can pose a risk to the latter leads to the question of the state's role in protecting minors from improvident bargains. The state protects the vulnerable, whether under the written constitution in Germany or following the role of the Crown as *parens patriae* in England. The state is, to a certain extent, responsible for protecting children from their parents' abuses of power. This responsibility is conferred on courts and administrative bodies. The principal case of state interference with parents' powers is child abuse and thus outside the scope of this thesis. But there are important cases in which, in general terms, a minors' wealth is at risk because parents abuse their powers. There are several measures that English and German courts can take to protect minors from improvident transactions. Furthermore, a general proposal is made as to how English and German law can protect minors

who happen to acquire valuable property from its misappropriation by their parents. The role that administrative bodies play in this context is not important and not discussed.

3) Further ‘Classes’ of Vulnerable Persons

Minors are not the only group of persons to whom the law attributes a special ‘status’ of protection. Sometimes, a person will typically be in a weaker position than the other party to a transaction, such as consumers versus businesses with a strong market position or tenants in relation to their landlords. Such ‘classes’ of persons differ from minority in that the ‘weaknesses’ suffered by consumers or tenants are immanent to a specific type of transaction or relationship. The weakness is not part of the person of the consumer or tenant *per se* but typical for that kind of situation, whereas a person who is a consumer in one case might well sell something as a business owner to a consumer the next minute. But there are other weaknesses that are more akin to minority in that their roots lie in the individual person rather than the type of transaction. A particularly important one is mental incapacity, eg, following from a mental illness or cognitive disability. With an aging society and increasing number of older persons, these groups of persons are very relevant in legal practice. The ‘class’ of persons lacking mental capacity is additionally explained in this thesis to inform the comparative analysis. Central to this analysis is the question of what similarities the legal provisions governing the protection of minors and mentally incapable persons from improvident transactions have or should have.

4) A Comparative Legal Analysis

This thesis is a piece of comparative legal research. As such, it aims at gaining insight into one jurisdiction by analysing it alongside another, comparing or contrasting each, or by finding similarities. Conducting a comparative legal analysis *per se* does not require justification; however, this leaves open the questions of why English and German law are analysed and what exactly is understood by comparative legal analysis in *this* thesis.

a) English and German Law in Comparison

At a very general level, comparing English and German law means comparing a common law with a civil law jurisdiction. This fact alone entails several differences in respect of the law governing minority. For example, the German Civil Code (BGB) provides very abstract rules that interlink with each other, whereas the English counterpart has developed more separate legal concepts. On the one hand, the focus on doctrinal coherence and the objective of governing any possible case in advance can lead to rather impractical (and practically irrelevant) provisions. On the other hand, the doctrinal coherence of the relevant German provisions has made 'minority' a popular topic in legal education and research. The field can be said to be understood rather well by most German lawyers. By contrast, the concept of minority has no prominent role in English legal education or academia. The lack of comparative accounts of minority in the context of several areas of law makes the analysis in the following chapters even more interesting, especially for anyone with a special interest in English law. For example, English academics still debate the question of whether a minor can seek

restitution of a transaction merely on the ground that he was below the age of eighteen.[7]

b) 'Functions' of Minority

The orthodox method of comparative legal research is 'functionalism'.[8] According to it, 'the basic methodological principle of all comparative law is that of *functionality*'.[9] It states that legal concepts are comparable only if they fulfil a similar function. One might ask what 'functions' this thesis focuses on. Doing so is valuable in that contemplating the so-called 'functional equivalence' of 'minority' in English and German law leads to the question of which legal objectives or underlying policies can be identified in the context of protecting minors from improvident transactions in each jurisdiction. However, a few points should be noted in relation to 'functionalism' vis-à-vis the methodology adopted in this thesis.

The functional equivalence of 'minority' in English and German law is merely a starting point for the present legal analysis. Identifying the functions that legal concepts fulfil in two or more jurisdictions is relevant for determining which legal concepts can usefully be compared in the first place. Choosing two random,

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[7] Viz, it is contentious whether minority is a so-called 'unjust factor'; see chapter IV, section 2)b)3.a.

[8] T Weir (tr), K Zweigert and H Kötz, *Introduction to Comparative Law* (3rd ed OUP, Oxford 1998) 32 ff; see also R Michaels, 'The Functional Method of Comparative Law' in: M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd ed OUP, Oxford 2019) 345 with many further references, emphasising at *ibid* p 347 that there are several types of 'functionalism'.

[9] Zweigert/Kötz, *Introduction* (fn 8) 34.

disconnected legal concepts and 'comparing' them cannot lead to further comparative legal insight. However, this thesis does not intend to exemplify or even prove a functional equivalence between 'minority' in English and German law. Rather, as will be seen over the course of this thesis, when looking closely enough, 'minority' in English and German law can really be said to have dissimilar functions. In this context, it should be noted that the functional equivalence of the legal concepts at hand is sometimes regarded as a heuristic principle in the sense of a precondition to comparing these legal concepts.[10] This view is not followed in this thesis. If it were, the value of this thesis for comparative legal research would be doubtful because, as just explained, the functional equivalence of 'minority' in English and German law can only be identified at a very general level. In contrast to this, carving out the differences between the functions of 'minority' in English and German law can be regarded as a primary insight of this thesis.

One further difference to 'orthodox functionalism' should be mentioned here. Functional analyses are often conducted by comparing groups of cases with similar factual situations. The analysis focusses on outcome of these cases instead of their doctrinal constructions. This approach is not followed here; instead, this thesis focusses on doctrinal aspects of each jurisdiction, and its structure is organised according to doctrinal categories such as contract law or restitution of unjusti(ified) enrichment, as explained in the following sub-section. Furthermore, a 'functionalist' analysis would explore explanations for the differences between the conceptual approaches or results of cases reaching much further than the

[10] Zweigert/Kötz, *Introduction* (fn 8) 40.

present legal-doctrinal analysis.[11] By contrast, this thesis does not conduct a result-orientated exploration of non-legal contexts, such as social, cultural, economic, or political aspects. In fact, the degree of protection from improvident transactions offered to minors, including the protection of their families or of third parties dealing with them, is closely connected to current social norms, political or economic developments, or culture. Exploring these aspects could be very interesting in the context of minority; but the limits of a doctoral thesis do not allow such a broad analysis.[12]

Going back to the functions that 'minority' fulfils in English and German law, it can safely be said that, first and foremost, the status of minority has the function of protecting minors; however, this statement only holds true at a very general level of inquiry, as will be seen over the course of this thesis. A second important function or objective underlying 'minority' is the protection of the interests of third parties in balance with the protection of minors' interests. This function follows from the fact that third parties' interests cannot be bluntly ignored and, even more so, ignoring them could exclude minors from participating in transactions and thereby undermine their interests, too. Furthermore, parents need to have influence over the upbringing and education of their children. These similar functions make it appear sensible to compare the legal concepts of 'minority' in the context of transactions in English and German law from a 'functionalist viewpoint'. What is interesting is that, although 'functional equivalence' can be identified at this general level, this thesis shows

[11] Cf Zweigert/Kötz, *Introduction* (fn 8) 36.

[12] See the further references in the conclusion, chapter VI, section 6)c).

that the ideas of ‘protecting minors’, balancing their protection with third parties’ interests, or the necessary degree of parental control over minors’ transactions differ strongly between England and Germany. But these differences in the functions do not undermine the value of comparing English and German law in this regard. Rather, it is shown that *comparative* legal research allows us to understand what ‘protecting minors’ or safeguarding third parties’ interests means, whereas this has not been possible with a similar emphasis in the national legal literature.

c) Structure and Scope of Inquiry

The scope of inquiry has already been touched upon earlier. The thesis is, in general terms, concerned with the effects of the minority of one party to a transaction, be it the agreement, its performance, or its reversal, and the additional role which parents and the state play in this context. Apart from this introduction and the conclusion, this thesis is divided into four chapters. Each of these is divided into three sections, the first two of which can be referred to as the ‘descriptive part’: a plain description of or, where necessary, inquiry into the relevant legal provisions of each jurisdiction. The purpose of these descriptions or inquiries is to set a basis for the subsequent comparative analysis, and this purpose determines the degree of detail of the ‘descriptive parts’. Certain aspects can be essential when writing a commentary but might be omitted here because they are not relevant or interesting enough for the comparative analysis. Other aspects might be considered very detailed even at a national level of discussion but are interesting for the comparative analysis. The separation between descriptive and analytical sections must not be understood as an end in itself. Certain aspects

which are contentious in or new to the legal discussion at a national level are occasionally discussed (in full detail) only in the comparative analysis of a chapter. This is the case where the direct comparison with the other jurisdiction proves particularly fruitful.

To begin with, chapter II discusses minority in the context of liability arising from contracts or wrongs committed in relation to them. Mostly, this involves questions around minors being party to a contract in the narrower English sense. Both in England and Germany, contractual liability is determined by the concept of 'contractual capacity'. To complement that discussion, tortious (in England) or delictual (in Germany) liability of minors are discussed with a specific focus on transactions. Minority in the context of the German 'pre-contractual liability' unfortunately cannot be discussed due to the quantitative limits on a doctoral thesis.

Chapter III discusses whether and how minors can transfer rights or acquire them in the context of a transaction, including gifts by or to minors. By contrast, transfers of rights by law are not discussed, such as by way of inheritance. Importantly, this thesis is also not concerned with rights to land. This seemingly arbitrary limitation follows from the fact that, in England, minors cannot hold legal estates in land since the enactment of section 1(6) of the Law of Property Act 1925, and thus the impact of minority on transfers of legal[13] rights to land is small. In German law, the topic is indeed not irrelevant but highly complex and would require much further explanation, to an extent that is not feasible in

[13] The term 'legal' is used here in contrast to 'equitable'; a minor could have equitable rights to land, see chapter III, section c)2)c).

this thesis. The same consideration applies to the question of whether and to what extent minors can be members of a partnership or hold shares in limited companies.

Chapter IV inquires whether and how transactions to which a minor is party and which are fully or partly executed can be reversed according to the law of restitution of unjust enrichment (in England) or unjustified enrichment (*Bereicherungsrecht* in Germany). Based on a wide and 'functional' understanding, restitution can mean any 'gain based recovery',[14] which could include remedies that are part of other areas of law, such as the *vindicatio* under German law or the tort of conversion under English law.[15] However, the chapter is solely concerned with the areas of unjust or unjustified enrichment. Again, the reasons are the quantitative limits to a doctoral thesis and, additionally, the fact that the English and German concepts of unjust(ified) enrichment serve as very interesting material for comparative discussion.

Chapter V deviates from the earlier chapters by addressing a broader spectrum of legal areas. Analysing parents' and the state's role in protecting minors from improvident transactions requires a more 'functional approach'. This analysis concerns areas such as family law, the law of trusts and fiduciaries or contract law. What is important to note is that, as mentioned before, the focus is solely on the consequences of transactions for minors. Occasionally, that involves looking at the duties of parents, such as asking whether they can be liable to their

[14] P Birks, *Unjust Enrichment* (2nd ed OUP, Oxford 2005) 3.

[15] See generally G Dannemann, *The German Law of Unjustified Enrichment and Restitution; A Comparative Introduction* (OUP, Oxford 2009) 13 ff.

child for misappropriating its property. Furthermore, the comparative analysis in this chapter also contemplates how minors can be protected better from improvident bargains or, in general terms, how their wealth can be preserved instead of being squandered by their parents. For that purpose, some aspects of US law are also analysed and taken as examples, and it is asked whether the concept of parental statutory authority under German law is outdated.

5) Current Developments

In England and Germany, the law governing minority, whether generally or specifically in respect of legal transactions, is very old and legislative intervention scarce. Most noteworthily, the age of majority was lowered from 21 to eighteen years in England with effect as of 1970 and in Germany as of 1975.[16] As explained in more detail in the following chapter there have also been legislative changes in England in 1874 and in 1987 which, however, did not have too much of an effect. Whether the introduction of 'parental responsibility in relation to children's property' by the Children Act 1989 significantly changed English law or merely consolidated it is difficult to say, as explained in chapter V. There, it is also shown that the only legislative change to the provisions governing minority in relation to legal transactions in Germany since the BGB came into force in 1900 has been the introduction of § 1629a BGB in 1998, which—again—has not had too much effect in legal practice. In this light, the law governing minority

[16] According to the Family Law Reform Act 1969 and the *Gesetz zur Neuregelung des Volljährigkeitsalters* of 1974.

and legal transactions has proved very long-lasting. In line with that legislative consistency, the relevant case law in England has not been subject to significant changes either. A further observation in this context is that, in England, reports of modern cases concerned with a minor as party to a transaction are rather scarce. In Germany, more cases concerning minors can be found, but, in respect of each jurisdiction, it seems that reducing the age of majority from 21 years to eighteen significantly limited the amount of litigation to which minors are party. Before, undergraduate students, apprentices or even young professionals, having already moved out of their parental home, would usually be underage. The difference between both jurisdictions in the amount of case law is especially significant with regard to the powers of parents in relation to their children's property. At least since the enactment of the Children Act 1989, parents in England are liable for misappropriating their children's property to a similar extent as German parents are. Surprisingly, there is not a single case reported in which an English parent would have been held liable in this regard. One (assumed) reason is the uncertainty or lack of awareness regarding parents' exact rights and duties. Interestingly, this uncertainty was deplored by judges in three recent cases concerning minors living in England who inherited property or rights in France, Italy and Germany from a parent, in respect of which the surviving parent intended to enter into a transaction with effect for the child.[17] Due to the right of freedom of movement within the European Union, such situations might arise

[17] *Hays v Hays* [2015] EWHC 3825 (Ch); *In re AC (A Child)* [2020] EWFC 90, [2021] 4 WLR 12; *Bibi Marium Shanavazi* [2021] EWHC 1832 (Ch), 2021 WL 02826481. OLG München, [2004] NJW-RR 1442 is an example for a UK-Germany cross-border case decided in Germany, involving significant property of the child. See the explanations in chapter V, section 2)b)1.

rather frequently, whereas it remains to be seen whether this is the case for the United Kingdom.

6) Note on Terminology

As a final point of this introductory chapter, certain terminology used in this thesis requires clarification, and its usage is explained in the following subsections.

a) 'Capacity'

Most importantly, when speaking (in English) about minority in the context of transactions, lawyers from England and Germany will likely use the term 'contractual capacity'. Using this phrase is dangerous because it is easily misunderstood and prone to convey an imprecise idea of the effects minority has on contracts even to readers familiar with the topic. Why this is the case will only be fully intelligible in chapter IV.[18] Here, it is primarily important to note that, in legal English, the term 'capacity' is used in several different contexts that have nothing to do with the present topic. For example, a person can have the capacity to act as an agent for another, the principal, or someone can have certain capacities arising from an office, such as the director of a company.[19] In particular for German lawyers, who, as seen in the following chapter, are more used to a uniform understanding of 'contractual capacity', it is noteworthy that in English

[18] The relevant explanations can be found in section 3)e) of that chapter.

[19] See generally E Peel, *Treitel: The Law of Contract* (15th ed Sweet & Maxwell, London 2020) [12-001 ff, 16-015 f, 17-057 f, 19-016].

law the reference to, eg, the ‘capacity’ of a company, a person with a mental illness or cognitive disability, or an administrative body to effect a certain transaction denotes very different concepts.

b) Parents

Throughout this thesis, reference is often made to parents of minors or children. In such a case, ‘parents’ means the persons legally in the position of parents by having custody over and parental responsibility in relation to a minor. These persons need not be the biological parents, but such questions are not discussed. Furthermore, parents are assumed to have the ‘standard scope’ of parental rights and duties. Without going into detail, there are many possible reasons why a parent might not fully be in the legal position of ‘a parent’; for example, under German law, a father who is not married to the mother at the time of birth will not have custody of the child without further ado. How courts can interfere with parental rights is discussed in chapter V, but it will always be clear from the context whether parents’ rights and duties are limited. In that light, it might be said that this thesis presumes the ‘traditional’ family of married parents, absent any interference by courts or administrative bodies with their parental powers, and without that presumption expressing any prejudice towards different concepts of family.

c) Property, Rights or Assets

The term ‘property’ is problematic in legal English in that it is contentious what exactly qualifies as property in a strict legal sense. For example, intangibles such

as copyrights are not regarded as 'property' by some.[20] In this thesis, such aspects cannot be sufficiently discussed. It should be noted that even the case law does not follow such a strict understanding of 'property',[21] and it cannot always be followed here either. Where useful, the more general term 'rights' is applied to denote both rights to intangibles and tangibles. Also, in the context of German law, the term 'ownership' is usually used in contrast to 'having title to something' under English law.[22]

A term even more general than 'property' or 'rights' is 'assets'. It is occasionally used in this thesis when speaking about 'rights that have a monetary value and are capable of being those of a [person]'.[23] For the sake of precision, this should be avoided, but it is, for example, the more useful term for translating German parents' powers over their child's *Vermögen*[24] because the term 'children's rights' is more commonly used in the context of family law instead of the present transactional context.

d) Void, Voidable, or Unenforceable

Finally, as this thesis is primarily concerned with the validity or invalidity of transactions, the meaning of the usual terminology applied to refer to different

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[20] B McFarlane, *The Structure of Property Law* (Hart, Oxford 2008) 133 f; see also the discussion in M Bridge et al, *The Law of Personal Property* (3rd ed Sweet & Maxwell, London 2022) [1-002].

[21] For example, *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71.

[22] B Häcker, *Consequences of Impaired Consent Transfers: A Structural Comparison of English and German Law* (Mohr Siebeck, Tübingen 2009) 35.

[23] J Law (ed), *A Dictionary of Law* (8th ed OUP, Oxford 2015) 'Assets'.

[24] Which are discussed in chapter V, section 1)a).

'degrees of invalidity' of agreements should be clarified. The most relevant instances of such terms are 'void', 'voidable' and 'unenforceable'. The problem is more relevant in English than it is in German law. In respect of the latter, it is plain that 'void' (*nichtig*) means that something, such as a contract, is legally inexistent, viz, it is 'a legal nothing'. As seen in the next chapter, it is also straightforward to conclude from § 104 BGB, the starting point for minority in the German Civil Code, that an acceptance or offer by a six-year-old is void and thus 'legally inexistent'.[25] The term 'voidable' must consequently mean 'to make something *nichtig*' or 'to make it a legal nothing'. By contrast, the term 'unenforceable' denotes the fact that the transaction (or whatever is described) is precisely *not* inexistent but in fact valid, except for the right(s) of one or several parties to that transaction not being enforceable against the other(s). In English law, the usage of this terminology has not been perfectly consistent, although in modern cases it mostly is. But, for understanding the consequences of minority, older cases have to be discussed, too, and it can be seen that the relevant terminology often causes more confusion than it is help, as noted by many legal scholars and judges.[26] For the purpose of reaching greater clarity, the meaning of the aforementioned terms is defined in the sense used in Germany, but merely

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[25] Wolf/Neuner (fn 4) 686.

[26] 'Yes; there is a constant confusion in the books between void and voidable, the words having been used indiscriminately', *Williams v Moor* (1843) 11 M&W 256, 260, 152 ER 798, 800; cf also the Law Commission, *Report of the Committee on the Age of Majority* ('Latey Report', 1966) [272, 294–298] and the Law Commission, *Minors' Contracts (Consultation Paper)* [1982] EWLC C81 (1982) [2.16]; Whittaker in: *Chitty* (fn 3) [1-074 ff]; J Beatson, A Burrows and J Cartwright, *Anson's Law of Contracts* (31st ed OUP, Oxford 2020) 23 f; J Salmond and PH Winfield, *Principles of the Law of Contracts* (Sweet & Maxwell, London 1927) 448 f; AW Renton et al (gen eds), *Encyclopaedia of the laws of England: being a new abridgment by the most eminent legal authorities, Vol XI* (Sweet & Maxwell, London 1898) 412; F Pollock, *Principles of Contract: A Treatise on the General Principles Concerning the Validity of Agreements in the Law of England* (10th ed Stevens and Sons Ltd, London 1936) 8 f; PS Atiyah, *An Introduction to the Law of Contract* (5th ed Clarendon Press, Oxford 1995) 340.

because these meanings nowadays seem to be settled in legal English, too, including those cases concerned with minority. Thus, the term 'void' is taken to mean 'a legal nothing',[27] and making a contract void by exercising a right is referred to as 'avoidance' or 'avoiding it'. A contract is 'voidable' if at least one party to it has the right to avoid and thereby render it 'a legal nothing'.[28] This implies that the contract is initially not void. A void contract cannot be adopted or ratified by one of the parties, whereas a party entitled to avoid a contract may or may not choose to do so.[29] 'Void' has retrospective effect if not stated otherwise and so has avoidance.[30] By contrast, a contractual right is 'unenforceable' against one party to a contract if the other party cannot legally enforce it,[31] but the contract is otherwise valid, subject to its impairment on a different ground. When a contract is unenforceable, it is usually only a single right or the rights against one party which cannot be enforced, but that need not be the case. As a general remark, it is important to keep the terminological inconsistencies in mind when relying on the 'label' attributed to a transaction in a judgment: for being certain

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[27] *Frederick E Rose (London) Ltd v Wm H Pim, Junr & Co Ltd* [1953] 2 All ER 739, 746; GH Treitel, 'The Infants Relief Act 1874 - A Short Rebutter' (1958) 74 LQR 104, 105; *Minors' Contracts (Consultation Paper)* (1982, fn 26) [2.16]; G Samuel, *Law of Obligations and Legal Remedies* (2nd ed, Cavendish Publishing, London 2001) 318 f.

[28] Whittaker in: *Chitty* (fn 3) [1-076]; Beatson/Burrows/Cartwright, *Anson's* (fn 26) 24; occasionally, the literature uses the terms 'break through a contract' or 'rescind' it in a context in which it is otherwise said that a minor can 'avoid' it, cf H Gwillim, *A New Abridgement of the Law; by Matthew Bacon, of the Middle Temple, Esq* (7th ed A Strahan, London 1832) 'Infancy and Age' (I) 3, p 360.

[29] *Fawcett v Star Car Sales Ltd* [1960] NZLR 406 at 412.

[30] Expressively stating this is *Lake v Simmons* [1927] AC 487, 505; E Kramer and T Probst, 'Defects in the Contracting Process' in A von Mehren (chief ed), *International Encyclopedia of Comparative Law, Vol II Contracts in General, Part 2* (Mohr Siebeck, Tübingen 2008) [11–92]; Beatson/Burrows/Cartwright, *Anson's* (fn 26) 24 f.

[31] GH Treitel, 'The Infants Relief Act 1874' (1957) 73 LQR 194, 208; Samuel, *Obligations* (fn 27) 319; Whittaker in: *Chitty* (fn 3) [1-078].

about the exact meaning, the label cannot be relied upon, but the exact legal consequences which follow from that transaction in the particular case need to be analysed. For example, a contract referred to as ‘voidable’ would have to be ‘a legal nothing’ after the exercise of the right to avoid it, but where the contract can still be relied upon in some way, such as for proving a warranty purportedly made under it, the contract cannot be void or have been voidable but should be referred to as unenforceable.

II.

Contractual Liability

This chapter analyses how and to what extent minors can incur liability in the context of entering into contracts. A person can incur liability in manifold ways. The significant aspect of *contractual* liability is that the parties assume their rights and duties voluntarily. First of all, the parties will be subject to so-called primary obligations, but secondary obligations, such as liability to compensate damages following the breach of a contractual duty, can still be regarded as 'contractual'. In the context of minority, the question is: to what degree can a minor bind himself to fulfil a contractual duty, irrespective of whether that duty is enforced directly or indirectly? From the perspective of minors, it is further relevant to what extent they can enforce the adult party's obligation. The ability to enter into contracts is often referred to as 'contractual (in-)capacity', and the 'contractual capacity of minors' is what is usually associated with minority in private law. This chapter states the 'general rule' for minors' 'contractual (in-)capacity' both in English and German law as well as the exceptions to each general rule.

In the context of transactions, liability can also be incurred by committing a wrong against the other party, and such liability is discussed in this chapter to the extent that it is relevant for understanding the protection of minors from improvident transactions, although delictual or tortious liability would not normally be regarded as 'contractual'. This connection between minority in contract and tort or delict will become clear over the course of this thesis.

1) Contractual Liability and Minority in German Law

The rules governing the impact of minority on contracts in German law are primarily located in the so-called 'General Part' of the BGB. This is significant because it means that they can be applied to all areas of private law, as can be seen in later chapters. In the first subsection below, a general overview of the BGB is given, showing how the BGB is structured and how, via the concept of the 'legal act', minority takes effect very abstractly. Understanding this abstraction is crucial for understanding the link between the (in-)capacity to contract *liability* and the (in-)ability to *transfer* rights as well as the effects of minority in the law of restitution, as explained later.

a) Capacity (*Geschäftsfähigkeit*) in General

Contractual capacity in German law is referred to as *Geschäftsfähigkeit*. The term is not defined in the BGB per se. There are only rules governing its absence, incapacity, in §§ 104 to 113 BGB. According to § 105 (1) BGB, a 'declaration of intention' (*Willenserklärung*) by a person lacking *Geschäftsfähigkeit* is void. Conversely, *Geschäftsfähigkeit* is defined as the ability to make a valid 'declaration of intention'.[32] The latter term cannot be understood without the concept of the 'legal act' (*Rechtsgeschäft*).[33] We need to understand how these

[32] The ability to *receive* a declaration of intention is sometimes mentioned, too, but not further relevant here, S Klumpp in: S Herrler (gen ed), *J v Staudingers Kommentar zum Bürgerlichen Gesetzbuch, §§ 90–124; 130–133* (ed 2021 Sellier – de Gruyter, Berlin 2021) Vorbem zu §§ 104 ff [6].

[33] Finding an appropriate translation for *Rechtsgeschäft* is difficult, cf N Jansen and R Zimmermann, 'Vertragsschluss und Irrtum im europäischen Vertragsrecht; Textstufen transnationaler Modellregelungen' (2010) 210 AcP 196, 203 at fn 35; against the background of the origin in the Latin term 'actus juridicus' (W Flume, *Allgemeiner Teil des Bürgerlichen Rechts,*

terms interact with the formation of contracts under German law before turning to more specific aspects of minority.

1. Structure of the BGB

The BGB comprises five 'books'. The first book is the General Part and contains abstract rules that apply to the other four books and effectively to the whole of private law. Each book is organised into sections of which the General Part contains seven. The provisions governing *Geschäftsfähigkeit* are located at the beginning of the third section titled 'Legal Acts' (*Rechtsgeschäfte*). This section is again divided into six 'titles'. *Geschäftsfähigkeit* is the first title, followed by 'Declarations of Intention' (*Willenserklärungen*) and 'Contract' (*Vertrag*).

Book 1: General Part	(§§ 1–240 BGB)
Section 1: Persons	
Section 2: Corporeal Things and Animals	
Section 3: Legal Acts	(§§ 104–185 BGB)
Title 1: Contractual Capacity	(§§ 104–115 BGB)
Title 2: Declarations of Intention	
Title 3: Contract	
Title 4: Condition and Time Limit	
Title 5: Agency	
Title 6: Consent and Ratification	
Sections 4–7	
Book 2: Law of Obligations	(§§ 241–853 BGB)
Book 3: Property Law	(§§ 854–1296 BGB)

Zweiter Teil: Das Rechtsgeschäft (3rd ed Springer-Verlag, Berlin 1979) 29 fn 9) and the French adoption as 'acte juridique', the translation as 'legal act' or 'juristic act' seems fitting and is found in comparative legal literature, cf Zweigert/Kötz, *Introduction* (fn 8) 146.

Book 4: Family Law	(§§ 1297–1921 BGB)
Book 5: Law of Succession	(§§ 1922–2385 BGB)

2. Legal Acts (*Rechtsgeschäfte*)

The concept of the *Rechtsgeschäft* ('legal act') is perhaps the most ingenious and influential of the BGB and was the primary topic in the German jurisprudence of the 19th century.[34] 'Legal acts' are defined as the means by which an individual autonomously determines his 'legal relationships' to other persons or objects.[35] 'Legal relationships' (*Rechtsverhältnisse*) are those relationships[36] between persons (eg, a contract) or between a person and an object (eg, ownership) which are governed by law.[37] Any contract is a legal act, giving rise to or changing legal relationships between persons.

Legal relationships (*Rechtsverhältnisse*) can result from or be changed by either a legal act or statute.[38] An example for the latter is obligations arising from delict or unjustified enrichment. The difference can be subtle: where two persons enter into a sale, the pertinent law will impose numerous legal consequences that

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[34] Flume (fn 33) 30 f.

[35] A von Tuhr, *Allgemeiner Teil des deutschen Bürgerlichen Rechts, Bd 2/1: Die rechtserheblichen Tatsachen, insbesondere das Rechtsgeschäft* (Duncker & Humblot, Berlin 1914) 143 f; Flume (fn 33) 182; K Larenz and M Wolf, *Allgemeiner Teil des Bürgerlichen Rechts* (8th ed Beck, München 1997) 133.

[36] Private law does not govern every area of life; there are solely 'social relations' which entail no legal duties such as friendship or an invitation to a birthday party, cf Larenz/Wolf (fn 35) 259.

[37] Larenz/Wolf (fn 35) 253; critical as regards the relationship to objects: Wolf/Neuner (fn 4) 223 [6].

[38] It should be noted that any (natural) person under German law is able to participate in legal relationships, thus, to have rights or duties (§ 1 BGB) and, therefore, generally to participate in legal affairs.

two laymen would never think of. However, the 'source' of the legal relationship which arises between them is their own (free) volition which was expressed in the form as required by the BGB:[39] the 'declaration of intention'.

3. Declarations of Intention (*Willenserklärungen*)

Any legal act has special requirements to it, and one cannot speak of *the* legal act. However, a legal act is always comprised of at least one 'declaration of intention' (*Willenserklärung*).[40] A declaration of intention is any expression of a party's will which is intended affect his legal relationships (*Rechtsverhältnisse*).[41] The similarity of this definition to the definition of 'legal act' is no coincidence: a legal act can, in fact, consist of only one declaration of intention, eg, in the event of the rescission of a contract.[42]

The most important types of declarations of intention are the offer or acceptance required to enter into a contract. Following the wide scope of the legal act, the term 'contract' under German law has a very wide scope, too. The ambit of the 'contract' as employed in the BGB, especially as the heading of the third title of the third section of its General Part, must be understood properly to grasp

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[39] Von Tuhr, *Vol 2/1* (fn 35) 146 f.

[40] This is widely agreed upon, cf only Wolf/Neuner (fn 4) 329; contra: MJ Schermaier in: M Schmoeckel, J Rückert and R Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB, Band I, Allgemeiner Teil, §§ 1–240* (Mohr Siebeck, Tübingen 2003) vor § 104 [8].

[41] Von Tuhr, *Vol 2/1* (fn 35) 143 f; Flume (fn 33) 25.

[42] Cf Larenz/Wolf (fn 35) 831 [29]; the distinction between legal acts and declarations of intention can get obscured; it is only really relevant where the declaration is of concern separately from the legal act as a whole, see von Tuhr, *Vol 2/1* (fn 35) 147 fn 21; B Mugdan, *Die Gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich, Band 1: Einführungsgesetze und Allgemeiner Teil* (R v Decker's Verlag, Berlin 1899) 425.

the concept of *Geschäftsfähigkeit*. 'Contract' in the BGB can refer to any agreement made by (at least) two persons through substantially corresponding declarations of intention and thus by two legal acts.[43]

What is important to understand is that this wide notion of 'contract' applies to agreements under which (at least) one party assumes an obligation owed to another, referred to as obligatory relationships (*Schuldverhältnisse*) by German lawyers, as well as to agreements by which a right is extinguished, transferred, or substantively altered, so-called 'dispositions' (*Verfügungen*). The obligatory relationship is closer to what an English lawyer would think of when hearing the term 'contract'. As explained in the introduction, the term 'contract' is used in this thesis in 'the wide, German sense', generally applying to obligatory relationships and dispositions.

4. Incapacity (*Geschäftsunfähigkeit*) of Very Young Children

According to § 104 no 1 BGB, 'a person below the age of seven is incapable of contracting'. Under § 105 (1) BGB, any declaration of intention of a person incapable of contracting is void (*nichtig*). As mentioned above, the German concept of contractual capacity is *Geschäftsfähigkeit*. Contractual incapacity is referred to as *Geschäftsunfähigkeit* in German law. This means that any person below the age of seven years is *geschäftsunfähig*. Persons being *geschäftsunfähig* cannot make any changes to their legal relationships by means of legal acts.[44]

[43] Larenz/Wolf (fn 35) 444.

[44] Changes to legal relationships by statute are still possible; for example, a child can inherit ownership of things.

Thus, a six-year-old child is legally unable to purchase sweets, no matter how cheap they are. The child is not even able to accept an offer of a (contract of)[45] gift of the sweets.

5. Limited Capacity

The all-encompassing inability to effect legal acts entailed by *Geschäftsunfähigkeit* is not appropriate for all persons up to the age of eighteen years. The German Civil Code in §§ 106 to 113 BGB therefore provides different rules for minors aged seven to seventeen. According to § 106 BGB, 'a minor who has reached the age of seven years has limited [*beschränkte*] contractual capacity under §§ 107 to 113 BGB' (emphasis added). This special 'status'[46] is referred to as '*beschränkte Geschäftsfähigkeit*'. According to § 107 BGB, 'a declaration of intention whose legal effect is not solely beneficial to the minor requires the consent of his legal representative'. For the present purposes, the legal representatives are the parents. The meaning of the first part of this provision is explained as an 'exception' further below.[47] The second part of the phrase forms the 'general rule': a minor's declaration of intention requires parental consent to

[45] Gifts are obligatory transactions, and 'giving' what is gifted only means to fulfil the contract by disposing of the gift.

[46] Flume (fn 33) 183.

[47] See section 1)b)1. of this chapter.

be effective.[48] 'Consent' (*Einwilligung*) is abstractly defined as prior authorisation (*Zustimmung*).[49]

A declaration of intention made by a child without the consent of a parent is only *provisionally* void. According to § 108 (1) BGB, 'if the minor enters into a contract without the necessary consent of the [parent], the effectiveness of the contract is subject to the ratification by the [parent]'.[50] Ratification (*Genehmigung*) is defined as subsequent authorisation.[51] Once a minor has reached majority, he can ratify his own declaration of intention, § 108 (3) BGB.

It is not necessary for parents to authorise each individual transaction. This would often be impractical. Instead, parents can authorise a certain scope of transactions. The width of that scope depends on its interpretation in each individual case.[52] For example, consent can be given by referring to a certain situation, such as a journey of the child.[53] The scope of consent must not be so wide as practically to avail the child the contractual capacity of an adult, even if only for certain areas of life.[54]

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[48] Furthermore, for a declaration of intention communicated to a minor to take effect for and against him, the declaration must generally be received by a parent, § 131 BGB.

[49] See §§ 182, 183 BGB.

[50] A 'unilateral declaration of intention' (not to be confused with a unilateral contract in English law), eg, the termination of a contract, is immediately void under § 111 BGB if made without parental consent.

[51] See § 184 (1) BGB

[52] D Medicus and J Petersen, *Allgemeiner Teil des BGB* (11th ed CF Müller, Heidelberg 2016) 255.

[53] BGH, [1977] NJW 622; Medicus/Petersen (fn 52) 255.

[54] Klumpp in: *Staudinger* (fn 32) § 107 [105].

The authorisation of a child's declaration of intention—whether by (prior) consent or (subsequent) ratification—can be tendered to either party of the transaction.[55] Parents can communicate their approval of a transaction to their child or another person with whom their child is about to deal. Parents can also revoke their authorisation until the transaction is concluded.[56] Again, the revocation can be tendered both to the child and the other party. If parents tell the owner of a bike shop that their child is allowed to buy a bicycle but subsequently tell their child that the bicycle is only allowed to cost up to EUR300.00, a sale for a higher price would not be valid even if the seller honestly believed in the unrestricted consent.[57]

There is no time limit for parents to ratify their child's provisionally void declaration of intention.[58] The other party is bound and must be prepared to perform his part of the contract at any time should the parents ratify it. Simultaneously, he cannot rely on the contract to be valid. The legislator tried to resolve this insecure position of the other party by a complex set of rules laid down in §§ 108 and 109 BGB:[59] once the other party asks the parents whether they ratify the transaction, they can henceforth only tender the ratification or its denial to the other party rather than their child. Previous ratification tendered only to the child becomes invalid. Parents must declare their ratification within two

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[55] See § 182 (1) BGB.

[56] See § 183 BGB.

[57] Medicus/Petersen (fn 52) 254 propose a solution which protects the third party in such a case, but it is not immediately based on the statutory provisions and cannot be explained here.

[58] See § 184 BGB; Klumpp in: *Staudinger* (fn 32) § 184 [57].

[59] See §§ 108 (2), (3), 109 BGB.

weeks after the other party made the request or it is deemed denied. The other party can revoke his offer or acceptance of the provisionally invalid transaction until the parents have authorised it. Yet, the other party is prevented from doing so if he knew of the child's minority, unless it falsely alleged that its parents gave their consent. However, even in the latter case the other party is barred from revoking if he knew that the minor's parents did not consent.

6. Summary: the General Rule under German Law

Minors below the age of seven years are *geschäftsunfähig* and thus lack the ability to make 'declarations of intention' at all. Therefore, they cannot effect any 'legal act', preventing them from making any voluntary change to their legal relationships with other persons.

Minors seven or older are *beschränkt geschäftsfähig*, ie, limited in their contractual capacity. They can make 'declarations of intention' with the (prior) consent or the (subsequent) ratification by their parents. As explained in the following subsection, in exceptional cases they can also act autonomously, ie, without relying on authorisation by their parents.

b) Exceptions to the General Rule

There are four 'exceptions' to the rule that minors aged seven or older require authorisation by their parents to effect a declaration of intention.[60] They are explained here in relation to contractual *liability*; but, due to the abstract concept

[60] No such exceptions exist for children below that age.

of the 'legal act', they apply equally to minors' transfers of rights, as explained in chapter III.

1. Legally Solely Beneficial Transactions under § 107 BGB

As mentioned before, 'a declaration of intention whose legal effect is not solely beneficial to the minor requires the consent of his [parents]' according to § 107 BGB. Thus, a declaration of intention made by a minor will not require parental authorisation if it is 'legally solely beneficial' (*lediglich rechtlich vorteilhaft*) to him. Reference is made only to the *legal* consequences of a declaration of intention. These consequences are the changes to the rights and duties of one or more parties to an agreement.[61] Other consequences such as economic advantages or disadvantages are ignored. Essentially, the only question is whether a legal duty follows from the 'declaration of intention' or, more generally, the transaction. Any reciprocal contract, ie, an agreement that imposes an obligation on each of the parties, is not legally *solely* beneficial for a minor. Thus, a minor cannot incur contractual liability on the basis of the exception under § 107 BGB, and the provision has little relevance in the context of this chapter. The most relevant declaration of intention in the scope of § 107 BGB is the acceptance of gifts, which is explained in chapter III in the context of transfers of rights.[62]

[61] Wolf/Neuner (fn 4) 392.

[62] See section 1)c) of that chapter.

2. Pocket Money under § 110 BGB

A contract entered into by minors without parental consent is *provisionally* invalid under § 107 BGB, as it can still be ratified. Furthermore, according to § 110 BGB,

> a contract entered into by the minor without authorisation by the [parents] is effective from the beginning if the minor performs his contractual obligations with means that were given to him for this purpose or at his free disposal by the [parents] or by a third party with the approval of the [parents].

Thus, a provisionally invalid contract is considered valid *ab initio* once a minor has performed his part of it with funds that were provided to him by his parents either for that purpose, ie, for entering into the transaction in question or at his free disposal. It is not possible for minors to incur contractual liability under § 110 BGB because the transaction can only be valid to the extent that they performed their obligations. The provision is discussed with a focus on minors' transfers of rights in the following chapter.[63]

3. Independent Conduct of Business, § 112 BGB

According to § 112 BGB, if parents,

> with the authorisation by the Family Court, authorise the minor to conduct a business independently, the minor has unlimited contractual capacity for legal acts entailed by the business operations.

[63] See chapter III, section 1)d).

On this basis, parents can, subject to additional authorisation by the Family Court,[64] allow their child to conduct a business independently. The minor obtains full contractual capacity to effect legal acts directly entailed by operating the authorised business.[65]

A crucial limitation on the relevance of § 112 BGB is that certain legal acts entailed by the business require *further* authorisation by the Family Court, even though the business itself was already authorised and is now up and running.[66] Most importantly, minors operating a business would require authorisation by the Family Court if he wanted to borrow money—making it practically very difficult to operate a substantial business and undermining their reliability as business partners.

4. Employment, § 113 BGB

Parents can authorise their child to take up a certain type of employment. According to § 113 BGB, if parents

> authorise the minor to enter into a service or employment agreement, the minor has unlimited capacity to enter into legal acts entailed by entering, leaving or performing service or employment agreements of the type as initially permitted.

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[64] The decision depends on the Court's 'diligent exercise of discretion', OLG Köln, [1994] NJW-RR 1450.

[65] Von Tuhr, *Vol 2/1* (fn 35) 353; also referred to as 'partial capacity', Wolf/Neuner (fn 4) 401.

[66] The scope of these legal acts is similar to those for which parents usually require authorisation by the Family Court for effecting them on behalf of their child. These will also be discussed in greater detail in chapter V, section 2)a)1.

The child obtains contractual capacity for fulfilling any duties under the employment as well as to begin or terminate an employment similar to that initially authorised. The most important practical effect is that both the minor's service to his employer and the payment of salary to the minor under the contract are valid. In contrast to § 112 BGB, authorisation by the Family Court is not required.[67]

c) Delictual Liability of Minors in Contractual Settings

Persons below the age of eighteen years can harm other persons or damage their property just like adults can and, thereby, commit one of the manifold delicts under German law. It is possible that a person incurs delictual liability in the context of entering into transactions. For example, a minor could sell fake designer clothes online. The legislator decided to limit the ability of minors to be at fault regarding delicts, so-called 'delictual capacity' (*Deliktsfähigkeit*), according to § 828 (1) BGB: 'a person who has not reached the age of seven is not responsible for damage caused to another person' and thus cannot be liable in delict at all. Furthermore, according to subsection (3) of the provision, 'a person who has not reached the age of eighteen is (…) not responsible for damage he causes to another person if he is unable to understand his responsibility when committing the wrong'. In other words, delictual liability is excluded even where a minor is aged seven or older but, when committing the wrong, did not have sufficient understanding to comprehend his responsibility. Thus, the extent to

[67] Authorisation must be obtained for contracts which, for being effected by the parents on behalf of their child, require additional authorisation by the Family Court. The same restrictions as mentioned in the previous sub-section apply (fn 66), which are discussed in chapter V, section 2)a)1.

which a minor of that age can incur liability by committing a wrong depends on his individual abilities. In contrast to contractual liability, parents have no control in this respect. This contrast is further discussed in the comparative analysis.[68]

2) Contractual Liability and Minority in English Law

With regard to German law, we could deduce a general rule governing minors' contracts from the relevant provisions in the BGB. This is not possible in a case law system such as English law. A general rule governing minors' contracts needs to be inferred from the body of case law that has evolved over time. This body of case law can usefully be divided into two periods of time. The time during the effectiveness of the Infants Relief Act 1874 until its repeal by the Minors' Contracts Act 1987 and the time before and after the effectiveness of the Infants' Relief Act 1874, ie, before 1874 and from 1987 onwards. The reason is that the Infants' Relief Act 1874 replaced parts of the common law, whereas its repeal in 1987 restored the former position.

a) The 'General Rule'

It might be regarded as German legal thinking to ask for a general rule, first, before looking at exceptions to it. To begin with, this assumes that there is one. Minors' contracts under English law are sometimes labelled 'voidable at the

[68] See section 3)a) of this chapter.

minor's option',[69] 'not binding on the minor',[70] or 'unenforceable'.[71] To add confusion, section 1 of the Infants Relief Act 1874 rendered certain types of contracts 'absolutely void'. Such inconsistency in 'labelling' minors' contracts does not necessarily have to do harm. In many cases it makes no difference whether a party is not held liable because the contract was void or only unenforceable.[72] But what the inconsistency of the terminology shows is that we cannot rely on the terms used in statutes or judgments for 'labelling' minors' contracts. Instead, one has to look at the consequences of minors' contractual *in*capacity to state a definition of their contractual capacity in English law.

1. The Common Law Position

The comparison between the aforementioned 'labels' attributed to minors' contracts with the case law shows that minors' contracts should generally be referred to as unenforceable as against the minor. Minors' contracts were never void in the sense of 'a legal nothing', although they have been described as such.[73]

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[69] *Bruce v Warwick* (1815) 6 Taunt 118, 128 ER 978; Whittaker in: *Chitty* (fn 3) [11-007]; M Furmston, *Cheshire, Fifoot and Furmston's: Law of Contract* (17th ed OUP, Oxford 2017) 531.

[70] *R Leslie Ltd v Sheill* [1914] 3 KB 607, 626; M Furmston (gen ed), *The Law of Contract* (4th ed LexisNexis Butterworths, London 2010) 858 [4.2], 871 [4.14]; Peel, *Treitel* (fn 19) [12-003, 019, 028]; Whittaker in: *Chitty* (fn 3) [11-049 f].

[71] Beatson/Burrows/Cartwright, *Anson's* (fn 26) 254; 'Latey Report' (1966, fn 26) [298]; *Minors' Contracts (Consultation Paper)* (1982, fn 26) [2.1, 2.13].

[72] As pointed out by Gresson P in *Fawcett v Star Car Sales Ltd* (fn 29) 412, a case where the difference mattered.

[73] *R v Lord* (1848) 12 QB 757, 116 ER 1055, 1057: 'wholly void'; *Lloyd v Gregory* (1638) Cro Car 501, 79 ER 1032; *Zouch v Parsons* (1765) 3 Burr 1794, 1804, 97 ER 1103, 1109; CG Addison, *A Treatise on the Law of Contracts and Rights and Liabilities ex Contractu; Part II* (W Benning & Co, London 1847) 858, incorrectly relying on Coke upon Littleton [172a] (cf F Hargrave and C Butler, *The First Part of the Institutes of the Laws of England; or, a Commentary upon Littleton: Not the Name of the Author Only, but of the Law Itself, Vol II* (18th ed J&WT Clarke, London 1823)), where it is only said that the contract was 'not binding'; Gwillim,

Especially contracts entered into for the purpose of trade have been held void or even 'absolutely void'.[74] If the contract were 'a legal nothing', we should see that the minor cannot enforce it against the adult party. Contrary to that, it was decided as early as 1478 that infant sellers can enforce a sale, whereas they can plead infancy if sued on a contract.[75] Several later cases confirm this statement.[76]

Minors' contracts should also not be regarded as 'voidable at their option', although this statement, too, can be found in the case law and legal literature.[77] If they were, the consequence which should be seen in the case law is that the contract is initially valid until and unless avoided by the minor.[78] Note that 'avoided' is understood here strictly as 'making the contract a legal nothing'.[79] In this context, it is very difficult to conclude from the case law whether the avoidance of the contract actually renders it 'a legal nothing' or whether pleading

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Abridgement (fn 28) 'Infancy and Age' (I) 3, p 360; A Hammond, *A Digest of the Laws of England by the Right Honourable Sir John Comyns, Knight, late Lord Chief Baron of His Majesty's Court of Exchequer* (5th ed A Strahan, London 1822) 565.

[74] *Thornton v Illingworth* (1824) 2 B&C 824, 107 ER 589.

[75] Year Books, Pasch 18 Edw 4, 2a (Seipp Number 1478.012); a simplified version of the text is found in Salmond/Winfield, *Principles* (1927, fn 26) 448.

[76] *Holt v Ward* (1731) 2 Strange, 850 and 938, 93 ER 892 and 954; *Collins v Brook* (1860) 5 H&N 700, 157 ER 1360; *Smith v Bowen* (1669) 1 Vent 51, 86 ER 36; *Drinkall v Whitwood* [2003] EWCA Civ 1547, [2004] 4 All ER 378; *Warwick v Bruce* (1813) 2 M&S 205, 105 ER 359 where Lord Ellenborough CJ had initially held at a termly local sitting that an infant could not sue upon his contract but later corrected his view; this decision was affirmed by the Court of Exchequer Chamber in *Bruce v Warwick* (fn 69).

[77] *Williams v Moor* (fn 26); Salmond/Winfield, *Principles* (1927, fn 26) 448; JA Russell, *A Treatise on the Law of Contracts and upon the Defences to Actions thereon; by Joseph Chitty* (9th ed H Sweet, London 1871) 150; F Pollock, *Principles of Contract at Law and in Equity* (Stevens and Sons, London 1876) 32; WR Anson, *Principles of the English Law of Contract* (1st ed Clarendon Press, Oxford 1879) 98; Gwillim, *Abridgement* (fn 28) 'Infancy and Age' (I) 4, p 369; Whittaker in: *Chitty* (fn 3) [11-007] uses this phrase, too, but specifies that it means 'not binding on the minor but binding on the other party'.

[78] Peel, *Treitel* (fn 19) [12-030].

[79] See the definition in chapter I, section 6)d).

infancy only bars the enforcement of the adult's right—an action against the infant party would fail either way.[80] However, in a modern case a contract was not actively avoided by the minor but still considered not enforceable as against him.[81] If a minor could make his contract 'a legal nothing', it would also be reasonable to expect that he can claim restitution of what he conferred on the other party under that contract—which is not the case, as explained in chapter IV.[82] The statement that minors' contracts are merely unenforceable as against them is also often found in the case law and legal literature.[83] It means that the contract is generally valid, but the adult party cannot enforce it against the minor. The adult can neither claim damages[84] nor obtain an order for specific performance[85]. The minor, in contrast, can claim damages for breach of contract from the adult party.[86]

Does that mean that a minor could enforce any contract without performing his duties under it? There is only one case in which this question

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[80] Salmond/Winfield, *Principles* (1927, fn 26) 448.

[81] *Proform Sports Management Ltd v Proactive Sports Management Ltd and another* [2006] EWHC 2903 (Ch), [2007] Bus LR 93, 106; supporting the view that the contract is 'not binding on a minor unless ratified' are Beatson/Burrows/Cartwright, *Anson's* (fn 26) 248; Peel, *Treitel* (fn 19) [12-030]; Furmston, *Cheshire* (fn 69) 531.

[82] Viz, minority is not an unjust factor, see section 2)b)3.b. of that chapter.

[83] *Barnes v Toye* (1884) 13 QBD 410, 413; Beatson/Burrows/Cartwright, *Anson's* (fn 26) 254; Whittaker in: *Chitty* (fn 3) [11-048], but note that they are referred to as voidable at [11-007]; Samuel, *Obligations* (fn 27) 320; Birks, *Unjust Enrichment* (fn 14) 254.

[84] *Howlett v Haswell* (1814) 4 Camp 118, 171 ER 38.

[85] *Lumley v Ravenscroft* [1895] 1 QB 683.

[86] *Bruce v Warwick* (fn 69); similarly Dampier J in the court below, *Warwick v Bruce* (fn 76); *Smith v Bowin* (1669) 1 Mod 25, 86 ER 703.

arose. In *Warwick v Bruce*,[87] a minor had contracted for all potatoes in a certain plot of land, to be dug out by him, and he had already paid nearly half the purchase price as part payment. After the minor dug out and carried away part of the potatoes, the seller carried away a great part of the potatoes for himself before the minor could do so, and the latter successfully sued the seller for breach of contract. It is unclear from the report whether the minor had to pay the remainder of the purchase price. Lord Ellenborough CJ held that it is 'clear' that the minor can 'sue upon a contract partly executed by him' and that it is 'certainly for the benefit of infants where they have given the fair value for any article of produce, that they should have the thing contracted for'.[88] This statement establishes a link between the part performance by the infant, the benefit of the transaction to the infant, and the fairness of the value of what the infant conferred on the adult party.[89] The latter factor should entail that no claim for damages for breach of contract can be brought if the minor has not yet made any payment. Atiyah—generally and without reference to *Warwick*—held that equity would only allow the enforcement of a contract by a minor 'on the condition that he performs himself'.[90] If full performance by the minor is meant, the statement conflicts with *Warwick*. Other than that, it seems sensible in that *Warwick* requires a balance between the 'benefit to the minor' and the 'fairness of the value' of his (part)

[87] *Warwick v Bruce* (fn 76).

[88] *Warwick v Bruce* (fn 76) at 209/360.

[89] Dampier J indicates that possibly the minor could enforce the contract even without his part performance, *Warwick v Bruce* (fn 76) at 209/361.

[90] PS Atiyah, 'The Infants Relief Act 1874 - A Reply' (1958) 74 LQR 97, 101 text to fn 9.

performance. Given the absence of further case law on this point, how and when this balance is achieved remains a matter of speculation.

2. Ratification upon Majority

Minors under English law can ratify a contract that is unenforceable as against them once majority is reached or within a reasonable time thereafter. The effect is that the minor is bound as if he always had full contractual capacity.[91] The purpose of ratification is to give minors the option of validating the agreement.[92] Ratification need not be supported by consideration, in contrast to a new promise which a former minor could make after reaching majority.[93]

3. The Infants Relief Act 1874

As mentioned before, minors' contracts were primarily governed by the Infants' Relief Act 1874 until its repeal in 1987. The first sentence of section 1 of the Infants Relief Act 1874 stated that contracts

> entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void.

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[91] *Williams v Moor* (fn 26); *Mattei v Vautro* (1898) 78 LT 682.

[92] *Warwick v Bruce* (fn 76); *Holt v Ward* (fn 76).

[93] *Williams v Moor* (fn 26); *Southerton v Whitlock* (1725) 2 Str 690, 93 ER 786; a promise under English law is generally not valid unless supported by 'consideration', ie, any benefit to the promisor or any detriment to the promisee, *Thomas v Thomas* (1842) 2 QB 851, 859, 114 ER 330, 333.

Outside the scope of this section the Act did not apply, and the common law position was not altered.[94] The previous section showed that, at common law, minors' contracts were generally not void in the sense of 'a legal nothing'. Did the reference to 'absolutely void' in section 1 of the Act change this for the period between 1874 and 1987? Again, when examining the case law, care has to be taken in interpreting the terminology used. For example, in *Ex parte Jones* it was only stated that the minor was not liable but not whether the contract was void or only unenforceable.[95] Similarly, in *Stocks v Wilson* the judges could constrain their view to the contract being 'not binding'.[96] If minors' contracts were (absolutely)[97] void in the sense defined earlier, the consequence which ought to be seen in the cases is that the relevant contracts are treated as if they never existed. In contrast to that, in *Godley v Perry* a six-year-old boy bought a defective plastic catapult which snapped when he used it, causing him to lose one eye. Suing the seller for damages, he could rely on a condition implied by section 14 of the Sale of Goods Act 1893, which shows that the contract was not treated as 'a legal nothing'.[98] In *Watts v Seymour*,[99] a minor bought a rifle, the seller acting in breach of a prohibition against such a sale.[100] To determine whether this was the case, the

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[94] This proposition was sometimes challenged, cf *Duncan v Dixon* (1890) 44 ChD 211, 215.

[95] *Ex parte Jones. In re Jones* (1881) 18 ChD 109.

[96] *Stocks v Wilson* [1913] 2 KB 235, 242.

[97] Based on the meaning as defined in chapter I, section 6)d), there is no comparative to 'void', and the term 'absolutely void' is a tautology.

[98] *Godley v Perry* [1960] 1 All ER 36.

[99] *Watts v Seymour* [1967] 1 All ER 1044; see also *Thornalley v Gostelow* (1947) 80 Lloyd's Rep 507, where one of the plaintiffs was a minor and the contract held enforceable.

[100] Under sections 11 and 19 of the Firearms Act 1937.

judges drew on the private law meaning of the term and held that there had indeed been a sale. Again, at least impliedly, they did not hold the sale to be 'a legal nothing'. Against this background, it is not surprising that the prevailing view in the literature was that 'absolutely void' did not mean void but rather unenforceable or 'void as against the infant' at the most.[101] This 'orthodox interpretation'[102] of section 1 of the Infants Relief Act 1874 is followed here. First and foremost, as explained above, it is in line with the application of the provision in the case law because minors' contracts were not considered to be 'a legal nothing' by judges. Second, at least in earlier times, it was not unusual to give terms such as 'void' or even 'absolutely void' different meanings when interpreting statutory law.[103] Within this 'orthodox view', however, there is no certainty about whether a contract was voidable—as defined in this thesis—or only unenforceable. Similar to what was proposed in respect of the common law position, minors' contracts under section 1 of the Act should only be referred to as unenforceable as against the minor, a proposition which can only be proven based on the further legal consequences of minors' contracts gained in chapters III and IV.[104]

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[101] Atiyah, 'The Infants Relief Act 1874' (fn 90) 99, reacting to Treitel, 'Infants Relief Act' (fn 31); M Furmston, 'Infants' Contracts - La Nouvelle Vague' (1961) 24 MLR 644, 645 text to fn 8; Renton, *Encyclopaedia* (fn 26) 413.

[102] Treitel, 'Infants Relief Act' (fn 31); Atiyah, 'The Infants Relief Act 1874' (fn 90); Treitel, 'Infants Relief Act – Rebutter' (fn 27).

[103] Cf the examples in W Wyatt-Paine, *Maxwell on the Interpretation of Statutes* (6th ed Sweet & Maxwell, London 1920) 165, 202 f, 372 f, 375-378, 380 f, 567.

[104] This was already suggested by the 'Latey Report' (1966, fn 26) [299] and the *Minors' Contracts (Consultation Paper)* (1982, fn 26) [2.13].

What then, one might ask, is the difference the said Act made? This was, indeed, a point of criticism raised against the 'orthodox view'.[105] But the Act in its section 2 brought an important change: ratification of a contract entered during infancy was no longer possible.[106]

4. A Minimum Age to Enter into Contracts under English Law?

There is no express rule in English law that minors below a certain age cannot enter into contracts at all, whereas it seems unlikely that a babbling toddler can enter into any legal agreement.[107] But is there any age limit and, if so, what is it? Although minors' contracts are generally unenforceable as against them, there are, as seen further below in this section, exceptions to this general rule which could be inappropriate in respect of very young children.

There are statutes which assume that children of a certain age should not or are not allowed to enter into certain agreements.[108] This implies that they would be able to do so because, otherwise, the prohibition would be superfluous. But this is insufficient for establishing any general rule.

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[105] Treitel, 'Infants Relief Act' (fn 31).

[106] *Duncan v Dixon* (fn 94) 217; the exact effect of s 2, again, depends on the meaning given to the term 'void', which was contentious, cf Atiyah, 'The Infants Relief Act 1874' (fn 90) 102. The courts had to make much effort to distinguish newly made promises from otherwise invalid ratifications, cf *Brown v Harper* (1893) 68 LT 488 and *Ditcham v Worall* [1874–80] All ER Rep Ext 1324, 1326.

[107] Scott LJ in *R v Oldham Metropolitan BC Ex p Garlick* (1992) 24 HLR 726 at p 742 held (obiter) that 'to enter into a contract' a 'minor must at least be old enough to understand the nature of the transaction'; but note that the case is concerned with an application to a local council for social housing and not a transaction as defined in this thesis.

[108] For example, s 3 of the Pets and Animals Act 1951 or s 18(1)(a) of the Children and Young Persons Act 1933 in conjunction with s 2(2)(a) of the Children (Protection at Work) Regulations 1998.

In *Mills v IRC*, the twelve-year-old daughter of a famous actor showed great talent as an actress herself, and her father decided to set up a complex tax saving scheme under which she, *inter alia*, entered into a contract obliging her to provide her services exclusively to a company specifically set up for this purpose. The scheme turned out to be less advantageous than intended, and the question arose whether the girl had been able to effect the relevant transaction(s). Lord Denning MR held that she had no capacity to do so both due to her age and her lack of understanding of the agreement.[109]

As to the first reason given by the judge, the defendant's age, he held that the girl had not reached the 'age of discretion' at common law—for girls 16 years.[110] However, the age of discretion determines when a child is allowed to choose its residence or to leave the parental home.[111] It is concerned with the balance of parents' rights over their children and the children's autonomy. It has little to do with minors' ability to effect a transaction which, by contrast, is concerned with the balance of the protection of minors from contractual liability and the interests of adults dealing with them in good faith.[112] In this light, Lord Denning's argument remains rather doubtful.

The second argument brought forward by the Lord Justice is more convincing. He argued that the girl's lack of understanding of the complicated

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[109] *Mills v IRC* [1973] Ch 225; affirmed by the HL in *IRC v Mills* [1975] AC 38.

[110] *Mills v IRC* (fn 109) 240.

[111] See *In re Agar-Ellis* (1883) 24 ChD 317 which Lord Denning MR relied upon; *Thomasset v Thomasset* [1891–94] All ER Rep 308.

[112] Peel, *Treitel* (fn 19) [12-003].

contract allows her to plead *non est factum*. This defence was developed to allow illiterate defendants to escape liability on a deed because it was incorrectly read to them.[113] Its scope was widened in favour of persons who, through no fault of their own, lack any understanding of a (written) document signed by them.[114] The application of *non est factum* generally depends on balancing the interests of an impaired person and the interests of third parties who have no knowledge of the defect.[115] Against this background, it seems possible to allow very young children to plead *non est factum* where they lack the intellectual ability to understand a complex legal document.

For the defence of *non est factum* to be fruitful for protecting very young children with no or insufficient understanding of the relevant transaction, certain adaptions would have to be made. First and foremost, the doctrine conventionally only applies to deeds[116] and other written documents.[117] The scope of application of the doctrine would have to include oral agreements to afford general protection to young minors. Second, for pleading the defence, the defendant has to prove that there was a significant difference between what he imagined the document to contain and what it actually contained.[118] The fact that a very young child will often have no understanding of the transaction at all could mean that there cannot

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[113] It was established in *Thoroughgood's Case* (1584) 2 Co Rep 9a, 76 ER 408.

[114] Especially in *Saunders v Anglia Building Society* [1971] AC 1004, 1016 (also known as *Gallie v Lee*).

[115] *Saunders v Anglia* (fn 114) 1016, 1027.

[116] The concept of deeds is explained in chapter III, section 2)a)4.

[117] Beatson/Burrows/Cartwright, *Anson's* (fn 26) 275.

[118] *Saunders v Anglia* (fn 114) 1016, 1017 and 1035; *Lloyds Bank Plc v Waterhouse* [1993] 2 FLR 97, 111; *Muskham Finance v Howard* [1963] 1 QB 904.

be such a 'difference'. Thus, the requirement of a difference in understanding has to be applied less rigidly in the present context. The House of Lords contested the strictness of this requirement by stating that 'hard-and-fast dividing lines' do not produce legal certainty but rather lead to unreasonable results.[119] Third, pleading *non est factum* can be barred by the claimant having been 'innocent', viz, if he was not aware of the defendant's deficit, or the defendant was negligent or 'careless' in entering into the transaction.[120] The standard of care applicable to very young children should arguably be rather low, for them to be barred from pleading *non est factum* only exceptionally.

Overall, the defence of *non est factum* can provide a basis for establishing that a very young child cannot enter into a contract at all, whereas at present there is no case confirming this view.[121] Instead of an exact age limit, an individual minor's understanding would be decisive. The most crucial question in this context is whether the scope of application of *non est factum* could be widened and encompass transactions other than written ones, too.

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[119] *Saunders v Anglia* (fn 114) 1016, 1017; too narrow limits would deprive the courts of it as an 'instrument of justice', *ibid* 1026.

[120] *Paradiso Finance Ltd v Vdovin* [2017] EWHC 3508 (Comm); *Saunders v Anglia* (fn 114) 1016; *Marvco Color Research v Harris* [1980] 1 WLUK 219 (High Court, Ontario).

[121] The HL in *IRC v Mills* (fn 109) refused to protect the girl with the defence as she had not made the respective plea, *ibid* 53.

5. Summary: the General Rule under English Law

In summary, the effect that the minority of one party to a contract has in English law is that the contract is unenforceable as against the minor but otherwise valid. The minor can ratify the contract upon reaching majority.

There is no further age limit in English law within the status of minority; but, by applying the *non est factum* defence more flexibly, further limitations could be introduced based on the individual abilities of a very young minor and on the complexity of the transaction in question.

b) Exceptions to the General Rule

The aforementioned general rule governing minors' contracts in English law has several exceptions. They have evolved in the case law over hundreds of years and, to some extent, allow minors to incur contractual liability.

1. Contracts for Necessary Goods

The earliest identifiable exception is contracts for necessaries:[122] executed contracts for necessary goods delivered to a minor are binding on him.[123] This statement needs explanation. What is 'necessary' in this context? What exactly does 'binding' mean here? And what about executory contracts?

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[122] Hargrave/Butler, *Coke upon Littleton Vol II* (fn 73) [172a].

[123] *Peters v Fleming* (1840) 6 M&W 42, 151 ER 314; *Ryder v Wombwell* (1868) LR 4 Exch 32.

The first question is, nowadays, answered by section 3(2) of the Sale of Goods Act 1979: '"necessaries" means goods suitable to the condition in life of the minor (…) concerned and to his actual requirements at the time of the sale and delivery.'[124] Necessary goods are not confined to basic needs such as food or medicine but can, for example, include expensive clothing[125] or jewellery[126]. The reference to the 'condition in life' and 'actual requirements' shows that the scope of the term is not determined objectively but depends on the individual minor.[127] For the goods to be 'to his actual requirements', the minor must not already be sufficiently supplied with them. The onus of proof is on the supplier of the goods. Whether he had knowledge of the fact that the minor was already sufficiently supplied is immaterial.[128] Trading contracts are never held to be for necessaries.[129] 'Trade' in this context means that the minor acts as a trader, purchasing and selling goods or running a business by himself.[130]

Contracts for necessary goods are not 'binding' on a minor as they would bind an adult. According to section 3(2) of the Sale of Goods Act 1979, a minor

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[124] See already s 2 of the Sale of Goods Act 1893; the definition is consistent with the previous common law definition, cf *Peters v Fleming* (fn 123); *Chapple v Cooper* (1844) 13 M&W 252, 153 ER 105; *Ive v Chester* (1619) Cro Jac 560, 79 ER 480.

[125] *Nash v Inman* [1908] 2 KB 1.

[126] *Peters v Fleming* (fn 123) 316.

[127] *Peters v Fleming* (fn 123) 316.

[128] *Johnstone v Marks* (1887) 19 QBD 509; *Barnes v Toye* (fn 83); *Nash v Inman* (fn 125), 9; *Stocks v Wilson* (fn 96) 241; *Ford v Fothergill* (1794) Peake 301, 170 ER 164; *Brayshaw v Eaton* (1839) 5 Bing NC 231, 132 ER 1094; *Story v Pery* (1831) 4 C&P 526, 172 ER 810; *Mortara v Hall* (1834) 6 Sim 465, 58 ER 668; *Cook v Deaton* (1827) 3 C&P 114, 172 ER 348.

[129] *Cowern v Nield* [1912] 2 KB 419; *Whywall v Champion* (1738) 2 Stra 1083, 93 ER 1047.

[130] *Mercantile Union Guarantee Corpn Ltd v Ball* [1937] 2 KB 498, 3 All ER 1; *Lowe v Griffith* (1835) 4 LJCP 94.

'must pay a reasonable price for' the goods. The exact sum is a 'question of fact dependent on the circumstances of each particular case'.[131] The important difference is that—at least once the adult has delivered the goods—he can ask for a reasonable price to be paid for them instead of the contract being unenforceable.

Whether executory contracts for necessary goods are binding on a minor is contentious. 'Executory' in this context means that the goods concerned have not been delivered to the minor. Can the seller still demand payment?[132] For example, could a minor order necessary goods such as furniture in a shop to be delivered but refuse to accept them upon delivery without paying a reasonable price?

One argument for answering this question in the negative is the wording of section 3(2) of the Sale of Goods Act 1979. According to that provision, a minor is liable 'where necessaries are sold and delivered to a minor (…)'. Delivery is a prerequisite for a minor to be liable. Otherwise, the conjunction 'or' would have had to be used. However, this argument based on the wording of the Act is rather weak in that it cannot apply to necessary services (as explained in the next subsection) and, more importantly, misses the point that this Act was only intended to consolidate the law relating to the concept of 'necessaries' already existing at common law.[133] The Act might not even apply where goods have not yet been delivered but, instead, such cases could still be governed by the common

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[131] S 8(3) of the Sale of Goods Act 1979; again, this provision is consistent with the previous common law, cf *Chapple v Cooper* (fn 124).

[132] As will be explained in chapter IV, once the minor has paid, he cannot claim his money back merely because he was underage; but restitution is due if the adult fails to supply any of the necessary goods, cf section 2)b)3.a. and section 2)b)3a. of that chapter.

[133] See fn 124 above.

law.[134] Furthermore, under section 1 of the Infants Relief Act 1874, which was in force until 1987, all contracts for 'goods supplied or to be supplied (other than contracts for necessaries)' were rendered 'absolutely void'.[135] It has been suggested in the literature that the exception for necessaries—in brackets—did not only apply to goods 'supplied' but also 'to be supplied' and thus, under that Act, a minor was liable on executory contracts for necessary goods.[136] However, even if the brackets applied to both terms, this would only mean that the common law was applicable.[137]

The common law position, however, is difficult to grasp. Some argue that liability arises from executory contracts because, generally, minors in English law can enter into contracts, they can bind themselves to an executory contract for necessary goods and be liable for it.[138] However, it is plain that minors can enter into (unenforceable) contracts. Liability for necessary goods sold *and delivered* to a minor is an exceptional case in which minors are bound to pay a reasonable price. The fact alone that minors can enter into contracts at all cannot imply that a similar exception to the general rule must be made where delivery is pending. Another argument for the binding effect of executory contracts for necessary goods is drawn from an analogy to service contracts (as discussed in the next

[134] PH Winfield, 'Necessaries under the Sale of Goods Act, 1893' (1942) 58 LQR 82 f, referring to s 61(2) of the Sale of Goods Act 1893.

[135] Which did not mean that they were 'void' in the sense of 'a legal nothing'; cf the explanations of this terminology in chapter I, section 6)d).

[136] Treitel, 'Infants Relief Act' (fn 31) 197.

[137] JC Miles, 'The Infant's Liability for Necessaries' (1927) 43 LQR 389.

[138] Beatson/Burrows/Cartwright, *Anson's* (fn 26) 254 at fn 141 referring to *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; this case is concerned with consent to medical treatment.

subsection), which exceptionally can bind minors.[139] Certain service contracts have, in fact, been held binding on minors although they were still *partly* executory.[140] However, there is a crucial difference between contracts for necessary goods and services, which rebuts this argument. Service contracts naturally involve obligations that are performed over a longer period of time. In contrast to this, the delivery of goods usually occurs at one singular point in time. What is more, in the relevant cases the service contracts referred to were already partly executed.[141]

The more convincing argument is an historical one. The concept of necessaries existed long before it was engraved in statute in section 2 of the Sale of Goods Act 1893, which was replicated in section 3 of the 1979 Act. It can be shown that the provision stems from the action for goods sold and delivered.[142] This action was the common law remedy to claim the price for goods supplied (to a minor) and required the delivery of the goods.[143] Therefore, delivery is prerequisite for a minor to be liable for necessaries, both at common law and under the statutory provision. The time of the delivery is also the relevant point in

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[139] Beatson/Burrows/Cartwright, *Anson's* (fn 26) 255 f.

[140] *Roberts v Gray* [1913] 1 KB 520; *Doyle v Whyte City Stadium* [1935] 1 KB 110.

[141] Miles, 'Necessaries' (fn 137) 390 f.

[142] Which also explains the wording in the statute, cf Winfield, 'Necessaries' (fn 134) 85; Miles, 'Necessaries' (fn 137) 389 f; *Pontypridd Union v Drew* [1927] 1 KB 214, 220.

[143] In cases where no delivery had been made, the appropriate action was that for 'goods bargained and sold', but this remedy can hardly be found in the pertinent case law at all, whereas only the action for goods sold and delivered was the appropriate remedy according to Winfield, 'Necessaries' (fn 134) 85 at fn 9 relying on *Ryder v Wombwell* (fn 123), *Gorer v Readon* (1869) 20 LT 40, and *Hill v Arbon* (1876) 34 LT 125.

time for ascertaining whether goods were necessaries.[144] It might seem harsh on a salesman to bear the risk of certain goods still being necessaries at the time of delivery—circumstances in the sphere of the minor that he cannot know about. But it would be equally harsh on the minor to be liable for goods which were necessary for him at the time of the sale but have ceased to be so at the time of their delivery.[145] On this basis, it seems correct to hold that the delivery of the goods (or the supply of services) is required for a minor having to pay for them.[146]

2. Service Contracts

Two types of service contracts can be identified in English law that are binding on a minor in exception to the 'general rule'. First, contracts for or of service are binding on a minor if they are 'on the whole for his benefit'; second, a contract is binding if it is for a 'necessary service'.[147] With regard to the latter category, the definition of necessary goods applies, *mutatis mutandis*, to necessary service contracts,[148] eg, for school education.[149] The characteristics of 'beneficial contracts of service' are explained, first, before the distinction between service

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[144] Winfield, 'Necessaries' (fn 134) 86, 91; supportive: *Mortara v Hall* (fn 128); in contrast to this interpretation see Renton, *Encyclopaedia* (fn 26) 413 (in relation to the Act of 1893).

[145] The protection of minors in this context is also emphasised in *Ford v Fothergill* (fn 128); *Mortara v Hall* (fn 128); *Bainbridge v Pickering* (1779) 2 Bl R 1325, 96 ER 776; Miles, 'Necessaries' (fn 137) 390; Winfield, 'Necessaries' (fn 134) 93.

[146] Whittaker in: *Chitty* (fn 3) [11-015].

[147] A minor's contract *of* service is understood as the minor rendering the service to the adult party, whereas under a minor's contract *for* service, the minor is rendered the service by the adult party.

[148] *Peters v Fleming* (fn 123) 316; *Walter v Everard* [1891] 2 QB 369.

[149] *Peters v Fleming* (fn 123) 316; generally, any service can be a necessary, Peel, *Treitel* (fn 19) [12-009].

contracts that are 'on the whole beneficial' and such that are 'necessary' to a minor is discussed.

Minors' contracts for education, instruction, apprenticeship, or employment are generally regarded as 'on the whole for [their] benefit' and bind them like an adult.[150] Minors are exceptionally not bound if the terms of the agreement are so onerous on them that it cannot reasonably be regarded as being for their benefit. Assessing 'the contract as a whole' includes all surrounding circumstances, eg, whether the agreement can usually be found on similar terms in the profession or whether the current state of the economy is such that it is reasonable for the employer to set up an agreement which is more in his favour.[151] The salary has to be adequate to the minor's duties[152] and must not depend solely on the will of the employer.[153] For example, in *De Francesco v Barnum*, two girls entered into an apprenticeship with a ballet teacher under which they were bound to be exclusively managed by him for seven years.[154] The teacher failed to organise professional engagements, and the two girls barely had any income. The girls arranged performances with other managers and were sued by their teacher for damages for breach of contract. The claim was dismissed as the contract was

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[150] *Cooper v Simmons* (1862) 7 H&N 707, 158 ER 654, 658; *De Francesco v Barnum* (1890) 45 ChD 430, 438; Hargrave/Butler, *Coke upon Littleton Vol II* (fn 73) [172 a].

[151] *Olsen and Another v Corry and the Gravesend Aviation Ltd* [1936] 3 All ER 241; *Leslie v Fitzpatrick* (1877) 3 QBD 229, 232; *De Francesco v Barnum* (fn 150), 439; *Meakin v Morris* (1884) 12 QBD 352, 354.

[152] *Leslie v Fitzpatrick* (fn 151), 232.

[153] *R v Lord* (fn 73); *De Francesco v Barnum* (fn 150); *Meakin v Morris* (fn 151); *Corn v Matthews* [1893] 1 QB 310.

[154] *De Francesco v Barnum* (fn 150).

not enforceable as against the girls because it was not 'on the whole for their benefit'.

Contracts for a necessary service are governed by the rules explained in relation to necessary goods in the previous subsection. The service supplied to the minor must be suitable to his condition in life and to his requirements at the time of the supply. It seems that the concept of 'necessaries' developed earlier than that of 'contracts on the whole beneficial' for a minor.[155] The exact origins of the latter concept are unclear, and it is doubtful whether the differentiation is useful. Attempts can be found to allocate certain kinds of contracts to one category or the other,[156] but both categories considerably overlap and are difficult to delimitate with precision.[157] Potentially, the two categories could be differentiated depending on whether a minor renders a service to an adult or *vice versa*. Contracts *for* a necessary service might always be services rendered to a minor, whereas beneficial contracts *of* service are such under which a minor renders a service to the other party. However, there are cases in which a service was rendered to a minor and reference was made to the contract being 'beneficial' without the term 'necessaries' being used at all.[158] On a similar note, contracts held to be analogous to beneficial contracts of service (as explained in the following subsection) have

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[155] It is already mentioned in 'Coke upon Littleton', see Hargrave/Butler, *Coke upon Littleton Vol II* (fn 73) [172a].

[156] Salmond/Winfield, *Principles* (1927, fn 26) 451 f; *ibid* 450, where Winfield tries to categorise certain contracts by reference to a passage in Hargrave/Butler, *Coke upon Littleton Vol II* (fn 73) [172b], but this distinction is rebutted in *Doyle v Whyte City Stadium* (fn 140) 131.

[157] Salmond/Winfield, *Principles* (1927, fn 26) 451: 'nothing but confusion'.

[158] *Flower v London and North-Western Rwy Co* [1894] 2 QB 65; *Mackinlay v Bathurst* (1919) 36 TLR 31.

been referred to as being for necessaries, too.[159] Furthermore, a contract of apprenticeship is regularly classified as a beneficial contract of service.[160] Apart from serving his master, an apprentice *receives* instruction. An apprenticeship can also include terms that would, looked at individually, be for necessaries, such as lodging.[161] Delimitating both categories on the basis of the direction of the performance of a service is impossible. Considering the wide overlap between both categories, a strict differentiation or classification of each case is also of limited use.[162] Furthermore, drawing a clear distinction is hampered by the fact that a contract for necessary service, too, is not enforced if it is not regarded as being generally beneficial to the minor.[163] Another similarity between both categories is that contracts by which a minor trades are not held binding on him because they are both never 'necessary' or 'on the whole beneficial' for him.[164] After all, a clear line between the categories of contracts of necessary service and

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[159] In *Roberts v Gray* (fn 140) the underlying contract, expressly including the 'employment of the minor', was held binding on him because it was both held to be for a necessary service and for the benefit of the minor.

[160] *De Francesco v Barnum* (fn 150); *Corn v Matthews* (fn 153); *Green v Thompson* [1899] 2 QB 1.

[161] Salmond/Winfield, *Principles* (1927, fn 26) 453.

[162] As noted by Salmond/Winfield, *Principles* (1927, fn 26) 453.

[163] *Flower v London* (fn 158), not expressly using the term necessary, but the service rendered to the minor certainly was necessary to him; *Fawcett v Smethurst* (1914) 31 TLR 85; J Salmond and J Williams, *Principles of the Law of Contracts* (Sweet & Maxwell, London 1945) 305; Whittaker in: *Chitty* (fn 3) [11-012].

[164] *Shears v Mendeloff* (1914) 30 TLR 342; arguing that there is no adequate reason for this are Salmond/Winfield, *Principles* (1927, fn 26) 453 f.

beneficial contracts of service cannot be drawn. It does not surprise that both categories are sometimes treated rather indiscriminately in the literature, too.[165]

3. Contracts Analogous to Beneficial Contracts of Service

In a few cases, contracts 'analogous' to beneficial contracts of service have been held binding on minors where no service contract was involved at all or the service in question was only a secondary component of the entire agreement.

In *Doyle v Whyte City Stadium*,[166] a minor had acquired a boxing licence by signing a contract under which he agreed to be deprived of any payments for fighting should he be disqualified from a fight. He was disqualified for hitting below the belt[167] and payment to him was withheld accordingly. The contract underlying the agreement, which was not further specified, was held binding on the minor because it was 'analogous' to 'beneficial contracts of service' and, in fact, on the whole for the minor's benefit.[168] The decision mostly relied on *Clements v London & North Western Ry Co*,[169] where an insurance scheme between a minor and an insurance society was held binding on the minor—

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[165] Beatson/Burrows/Cartwright, *Anson's* (fn 26) 252, 255, at fn 146; Renton, *Encyclopaedia* (fn 26) 'Infants' p 414.

[166] *Doyle v Whyte City Stadium* (fn 140). See also *Denmark Productions Ltd v Boscobel Productions Ltd* (1967) 111 SJ 715, in which The Kinks, a band of underage musicians, are party to a management contract; the decision was overruled in *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699, but not on the point that the contract was binding on the defendants as being beneficial for the infants.

[167] The scandalous fight can be viewed online, <https://www.youtube.com/watch?v=sxge3eFKsrQ>, accessed 27 July 2022.

[168] *Doyle v Whyte City Stadium* (fn 140) 131, per Slesser LJ; the other judges agreed with his view.

[169] [1894] 2 QB 482.

depriving him of certain statutory rights[170]—on the ground that it was both a service contract and part of the minor's employment[171] which, on the whole, was held being beneficial to him.[172] In order to reach this result, the court assessed the two agreements, the insurance scheme and the employment, in conjunction. This was emphasised in *Doyle v White City Stadium*, where the insurance scheme in *Clements* was regarded as 'so incidental or ancillary to the contract of employment as properly to be one where the infant may bind himself'.[173] An important reason for the court in *Doyle* was that obtaining the boxing licence was the only way for the minor to enter into a contract 'of service or performance' with the boxing agency and thus was essential for him to make his living.[174] It can be doubted whether in *Doyle* and *Clements* the underlying reasoning was really one of 'analogy' rather than based on a wide application of the concept of beneficial contracts of service. For assessing whether a contract is 'on the whole beneficial', all surrounding circumstances must be taken into account,[175] including

[170] Which was 'out of proportion', *Clements v London* (fn 169), 487, 489; the minor could also have insured himself more favourably without losing claims against the employer, *Bradburn v The Great Western Railway Company* (1874) LR 10 Exch 1.

[171] *Clements v London* (fn 169), 489, 492.

[172] *Clements v London* (fn 169), 492, 495.

[173] *Doyle v Whyte City Stadium* (fn 140) 131.

[174] Per Slesser J, *Doyle Whyte City Stadium* (fn 140) 132 f; opposing the view that it was a service contract is Lord Hanworth MR, *ibid* 126.

[175] Other cases the judges relied upon to decide whether the contract for the boxing licence was on the whole beneficial were *De Francesco v Barnum* (fn 150) and *Corn v Matthews* (fn 153); both only deal with one single contract and state what has been explained above: that all surrounding circumstances have to be taken into account when determining whether a contract is 'on the whole beneficial'.

adjacent other contracts, for deciding whether an agreement is beneficial or not.[176] In the remainder of this thesis, reference is only made to service contracts which are 'on the whole beneficial' to a minor, but cases of 'analogous' application of this concept are also meant to be included.

4. Contracts Imposing Ongoing Obligations

In some cases and the literature, a further 'exception to the general rule' is discussed, according to which minors can be bound by a contract unless it is revoked during minority or within a reasonable time thereafter.[177] This exception has been held applicable to four types of agreements: contracts concerning land, subscriptions to shares in a company, partnership agreements, and marriage settlements.[178] The details of this 'exception' are doubtful, but they are not discussed here further because the types of agreements are either outside of the scope of this thesis or, as regards marriage settlements, no longer relevant in practice.

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[176] Seemingly in line with this: Beatson/Burrows/Cartwright, *Anson's* (fn 26) 252; Peel, *Treitel* (fn 19) [12-015]; Furmston, *Contract* (fn 70) 864 ff; Furmston, *Cheshire* (fn 69) 536 text after fn 39.

[177] *The North Western Railway Company v M'Michael* (1850) 5 Ex 114, 155 ER 49, 54 per Parke B.

[178] The individual types of contracts have been attempted to be classified in the literature, but it seems that a coherent rationale can hardly be identified, Furmston, *Contract* (fn 70) [4.11]; Peel, *Treitel* (fn 19) [12-019 ff, 027].

c) Tortious Liability of Minors in Contractual Settings

Minors under English law are generally liable in tort just like adults.[179] In certain situations, however, holding a minor liable in tort would circumvent his protection from contractual liability by indirectly enforcing his promise.[180] The rule is that minors are not liable in tort where this would be the case. Therefore, in any 'contractual situation' the court has to assess whether liability for the tort in question would amount to enforcing a promise by the minor.[181] This is straightforward in some situations, such as theft by a minor. Even where the theft occurred in the course of a minor's employment, it is obvious that liability in tort would not enforce any promise by him in connection with the employment,[182] irrespective of whether that employment contract itself would be enforceable. Because no promise by the minor can be enforced, tortious liability is not barred by minority. By contrast, in *R Leslie Ltd v Sheill*,[183] a minor fraudulently induced money lenders to extend credit to him by misrepresenting himself as being of age. He was not held liable for damages for fraud (or, as will be seen,[184] in unjust enrichment). Liability to pay damages for non-repayment of the loan would have

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[179] Whether the assessment of minors' behaviour according to legal standards, eg, what constitutes negligence in a certain case, must be adapted to the peculiarities of underage persons is not discussed here; see, for example, regarding the applicable standards, *McHale v Watson* (1966) 115 CLR 199 (High Court of Australia); *Mullin v Richards* [1998] 1 WLR 1304; *Gough v Thorne* [1966] 1 WLR 1387; see, generally, R Bagshaw, 'Children Through Tort' in J Fionda (ed), *Legal Concepts of Childhood* (Hart, Oxford 2001) 127.

[180] *R Leslie Ltd* (fn 70); *Stocks v Wilson* (fn 96).

[181] A similar approach can be seen in the context of claims for restitution brought against minors; see chapter IV, section 2)b)4.a.

[182] *In re Seager* (1889) 60 LT 665.

[183] *R Leslie Ltd* (fn 70).

[184] See chapter IV, section 2)b)4.a.

substantially enforced the promise to repay. Although that need not exactly be the contractually agreed sum (which included interest), it can be close enough to enforcing the minor's promise to repay and thus the claim for damages must be barred. Not even a minor's fraud is regarded as sufficient to deny him the protection from any indirect enforcement of his promise.[185] In contrast to this, in *R v McDonald* a minor hired furniture and sold it to a third party. His liability for larceny can be explained on the ground that selling the goods was outside the contract for the temporary possession that the hire would grant.[186] Contrasting *McDonald* to cases of loans made to minors highlights the difficulties in delimiting cases in which tortious liability would indirectly enforce a minor's promise from cases in which it would not. There can be a very fine line between mere tortious liability and such that indirectly enforces a promise. Where a minor hired a mare for a ride, expressly being told by the lender that she is not suitable for jumping, and the minor injured and killed the mare by attempting to jump a fence, he committed 'a bare trespass' 'as if, without any hiring at all, the defendant [minor] had gone into a field and taken the mare out and hunted her and killed her'.[187] But where the mare is hired for a 'short journey' and injured by overuse and strain on a very long journey, holding the minor liable in tort would indirectly enforce his promise only to travel a short journey and circumvent his protection from contractual liability.[188]

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[185] See also *Bartlett v Wells* (1862) 1 B&S 836, 841, 121 ER 924, 926.

[186] *R v McDonald* (1885) 15 QBD 323.

[187] *Burnard v Haggis* (1863) 14 CBNS 45, 53, 143 ER 360, 364 per Willes J.

[188] *Jennings v Rundall* (1799) 8 Term Rep 335, 101 ER 1419; *Fawcett v Smethurst* (fn 163).

The fine line that has to be drawn has been referred to as lying between actions that are 'in substance *ex contractu*' and such that are '*ex delicto*'.[189] The test for whether the minor's behaviour falls on the one or the other side of that line can be described as asking whether it 'fell outside the contract altogether' or whether it was foreseen by it.[190] Applied to the hire of the horse above, jumping the mare fell outside the contract, whereas considerably extending the journey did not. That approach is even taken where a minor fraudulently induced another to enter into a contract, whether regarding his being of age or warranting certain qualities of goods sold,[191] as seen in the example of *R Leslie Ltd v Sheill*.

One might deem some of these decisions unjust, especially that in *Sheill*; in this context it should be noted that there was a line of cases supporting an equitable jurisdiction of the court to order a minor to restore to the other party what he received by fraud and to account for profits made from disposing of them.[192] This remedy could formerly bring justice where a minor abused his

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[189] *Grove v Nevill* (1663) 1 Keble 778, 83 ER 1238, where an infant sold another's jewel, representing it as his own, but he was held not liable as this would not be an 'actual tort or anything ex delicto, but only ex contractu'; see also *In re Seager* (fn 182); *Fawcett v Smethurst* (fn 163). Another differentiation drawn by courts is that between an 'affirmation' or false statement, 'for such [the infant] shall never be attained a disseisor' and acts to which 'there must be a fact joined to it, as cheating with false dice, etc.', *Johnson v Pie* (1665) 1 Keb 913, 83 ER 1317. The position at common law is also reviewed by Knight-Bruce VC in *Stikeman v Dawson* (1847) 1 DG&Sm 90, 110, 63 ER 984, 993.

[190] *Ballett v Mingay* [1943] KB 281, where a minor was held liable in detinue for goods bailed to him which he could not return as, in the meantime, he had parted with them to a third party; Lord Greene MR relied on the distinction between *Burnard v Haggis* (fn 187) and *Jennings v Rundall* (fn 188); see also *Fawcett v Smethurst* (fn 163). *R v McDonald* (fn 186) is a case quite similar to that of *Ballet v Mingay*, where the minor was convicted of larceny for parting with goods hired and bailed to him.

[191] *Green v Greenbank* (1816) 2 Marsh 485, (1816-1817) 17 RR 529 with regard to warranting the quality of goods bartered by the minor.

[192] *Stocks v Wilson* (fn 96) 242 f; *In re King, Ex parte Unity Joint Stock Mutual Banking Association* (1858) 3 DeG&J 63, 44 ER 1192.

protection.[193] It is now superseded and generalised by section 3(1) of the Minors' Contracts Act 1987, as explained in chapter IV.[194]

3) Comparative Analysis

Following the separate descriptions of minority in the context of contract and tort or delict, both the relevant English and German law can now be compared with each other. This analytical section shows that English and German law, although both aim at 'protecting minors', follow quite different ideas of what 'protecting' means in the context of minors' liability. For the purpose of emphasising certain dissimilarities between English and German law in the context of the capacity to contract, the law protecting mentally incapable persons is also discussed.

a) Protection from Liability

Incurring liability is possibly the greatest risk which can follow from entering into a transaction. Personal liability can exceed the value of funds or property that a person has and even lead to bankruptcy. For example, limiting the amount of pocket money which a minor can spend would be pointless if he could purchase anything on credit—with parents potentially feeling obliged to pay off their children's liabilities. Thus, incurring liability is in fact the primary point of

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[193] But see the criticism expressed by Lord Sumner in *R Leslie Ltd* (fn 70), 614 ff; and see, by contrast, the affirmative account of the *Minors' Contracts (Consultation Paper)* (1982, fn 26) [2.24].

[194] See section 2)a)2. of that chapter.

consideration when thinking of the 'protection of minors'.[195] Underage persons are not regarded as experienced, mature, or educated enough to bear the full responsibilities of their actions, and there is always the additional risk of adults trying to take advantage of these weaknesses.[196] At the same time, the outright exclusion of minors' liability would ultimately have to result in their exclusion from social interaction. A compromise of some sort has to be reached, and the ways in which this is achieved reveal very different ideas of what 'protecting' minors should mean.

As regards English law, we have seen that, generally, minors cannot incur liability by making a promise. Minority bars liability arising from a contract in that a claim for damages or specific performance can be defeated. This defence is extended to the indirect enforcement of promises by barring liability in tort if the relevant claim would be 'substantially *ex contractu*'. Parents have nothing to say in this respect, and not even their signature can validate a contract by their child.[197]

The German counterpart to this general rule is that minors (who have reached the age of seven years) cannot effect any legal act without prior or subsequent authorisation by their parents. Parents are generally free in the exercise of their discretion as to which contracts they authorise and for what

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[195] 'Latey Report' (1966, fn 26) [289]; Peel, *Treitel* (fn 19) [12-003]; Thier in: *HKK BGB Bd I* (fn 40) §§ 104–115 [3].

[196] *Minors' Contracts (Consultation Paper)* (1982, fn 26) [1.6, 2.1]; M Bisges, 'Schlumpfbeeren für 3000 Euro – Rechtliche Aspekte von In-App-Verkäufen an Kinder' [2014] NJW 183.

[197] As seen in *Proform* (fn 81). The powers of parents are discussed in chapter V.

purpose. But, in contrast to English law, the same principle is not extended to the protection from delictual liability. In this regard, minors' liability is either excluded outright, if under the age of seven, or it depends on their individual understanding of their responsibility when committing the wrong.

The differences between these two approaches are highlighted by their exceptions. Under English law, minors can exceptionally contract liability by making a promise if it is, in general terms, for their individual benefit. Minors can obtain necessary goods or services on credit and be bound to pay a reasonable price. They can also bind themselves to a contract of service if it is 'on the whole beneficial' for them, for example, because it enables them to begin a professional career as an athlete. Whether parents approve of the transaction is, again, irrelevant. By contrast, for incurring contractual liability under German law, minors always and *without exception* require parental approval (or even that of the Family Court). By spending their pocket money under § 110 BGB, minors cannot incur contractual liability because their obligations must be fully performed for the provisionally invalid transaction to be validated. A transaction entered into by a minor without parental consent is not valid under § 107 BGB if it entails a 'legal disadvantage', which is always the case where a two-sided contract is concluded. As further explained in the following chapter, even the acceptance of a gift can entail *legal* duties and be barred.[198] Under §§ 112 and 113 BGB, minors can incur liability but, again, require parental (or even court) authorisation for the relevant business or service contract. What is significant in contrast to the English approach is that, once the required approval has been granted, a minor can

[198] See chapter III, section 1)c).

contract liability to a vast extent and irrespective of his individual benefit. The emphasis is on legal certainty instead of the actual advantage for the minor.[199] Where parental authorisation is given, there are no quantitative limitations to the liability which can be incurred. There are, however, 'qualitative' limitations in place in the sense that certain types of transactions cannot be entered into by parents without more. These are discussed in chapter V. Here, it is noteworthy that the wide-ranging powers of parents to allow their children to enter into contracts (or even, as can also be seen in chapter V, parents' ability to do so on behalf of their children) shows a certain indifference towards the individual benefit for the child.[200] The legislator works on the basis that parents usually not only know what is best for their child but also act accordingly. That this is a bold assumption can be seen in chapter V.

In contrast to letting the parents' view determine which transactions should stand or to inquiring whether any legal disadvantage follows from it, English law takes a much more liberal approach. At the outset, a minor's contract is valid and can be performed by him, as further explained in chapter III. It is only the minor's promise which is unenforceable. English academics and judges hold the view that it would be unreasonable for the common law to deprive minors of their rights under a contract; instead, it is deemed sufficient to render the contract unenforceable as against them, lest minors are unnecessarily deprived of their

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[199] As shown by the important decision of the Federal Supreme Court in BGH, [1985] NJW 136, which led to the special limitation of minors' liability as discussed in chapter V, section 1)a)4; M Löhnig, *Treuhand; Interessenwahrnehmung und Interessenkonflikte* (Mohr Siebeck, Tübingen 2006) 675 fn 138.

[200] H-M Pawlowski, *Rechtsgeschäftliche Folgen nichtiger Willenserklärungen: Amts- und Parteinichtigkeit von Rechtsgeschäften. Zum Verhältnis von Privatautonomie und objektivem Recht* (Otto Schwartz, Göttingen 1966) 58.

benefit.[201] Minority is supposed to protect only the underage party. The same view was held in respect of the effects of the Infants' Relief Act 1874 which, on the face of it, rendered minors' contracts 'absolutely void'—whereas the 'orthodox view' reached quite the opposite result.[202] Furthermore, judges are given vast discretion in assessing a transaction, including all its surrounding circumstances, and in determining whether it is 'on the whole beneficial' for that particular minor. The relevant case law gives the impression that English judges are accustomed to conducting such a comprehensive assessment, determining not only legal-conceptual aspects but inquiring, for example, into an individual minor's prospects as a professional boxer or billiards player.[203] Of course, such assessments can be time-consuming. But, contrary to what one might think, the case law or relevant legislative reports do not convey the impression that, thereby. English judges are overburdened.[204]

Having said that, the individualised approach that English law takes by ignoring parents' intentions (at least at a legal level) does not always lead to better results. What amounts to 'necessaries' or a minor's individual 'benefit' can be rather doubtful. The old cases dealing with contracts for necessary goods are often concerned with young students at university who live at a very high standard. In *Nash v Inman*,[205] an agent of a London Savile-Row-tailor travelled to 'Cambridge

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[201] *Coan v Bowles and Others* (1691) 1 ShowKB 165, 171, 89 ER 514, 518; *Bruce v Warwick* (fn 69); Pollock, *Principles of Contract* (1876, fn 77) 33.

[202] Atiyah, 'The Infants Relief Act 1874' (fn 90) 100.

[203] *Doyle v Whyte City Stadium* (fn 140); *Roberts v Gray* (fn 140).

[204] See, eg, the 'Latey Report' (1966, fn 26) [315 ff, 326].

[205] *Nash v Inman* (fn 125).

and other places' and heard of the defendant spending a fortune. He approached the student at his lodgings and could obtain an order for expensive clothes. The 'eleven fancy waistcoats' that the student had ordered were held to be suitable to his current standard of living; however, he eventually did not have to pay for them because he could show that he was already sufficiently supplied with such items. It can be difficult for any tradesman to determine what is 'necessary', even when facing a minor, let alone when, for example, shopping via the internet. Such difficulties undermine legal certainty.

In this context, it has been mentioned above that 'trading contracts'—ie, contracts by which a minor trades—have never been held to be such for necessaries or such which are 'on the whole beneficial' for a minor. In light of what can be seen in contrast to German law, it is clear why this is the case. The essential element under English law is that a minor's *promise* is unenforceable and, thereby, liability cannot voluntary be incurred. Agreements such as that underlying *Doyle* or *Roberts v Gray* are professional 'managing contracts' and might be regarded as not too distinct from trading—yet, the agreements were binding.[206] The decisive difference is that, by trading goods, a minor puts his capital at risk. The benefit received by his bargain can easily be lost, whereas a 'reasonable price' would still have to be paid once delivery has occurred. Situations in which a minor puts his own capital at risk should be avoided.[207] By contrast, as an employee or apprentice, a minor cannot incur excessive contractual liability.

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[206] See the explanations in section 2)b)3. of this chapter.

[207] Peel, *Treitel* (fn 19) [12-017]; Furmston, *Contract* (fn 70) 866.

As regards liability for wrongs, minors' responsibility for committing a delict under German law is not immediately linked to their 'contractual capacity' even where they make a (false) promise to an adult—unlike in English law. For example, a seventeen-year-old can incur delictual liability by committing fraud and causing financial harm to another person according to § 823 (2) BGB.[208] The minor's liability is only limited by his inability to understand his responsibility in the particular case.[209] The fact that there are no *quantitative* limitations to liability has been criticised as potentially overburdening minors and infringing their private autonomy.[210] This problem has since been mitigated by the introduction of a personal insolvency schedule under which freedom from liability can be achieved over the course of six years and subject to certain restrictions.[211] Still, a minor who begins adulthood highly indebted due to damage caused during minority would be bound to apply any income to pay off debts for at least six years. English law is both stricter as well as more lenient towards minors. The latter is the case because no liability in tort can arise where it would be 'in substance be *ex contractu*' and, where this is the case, liability is excluded outright and irrespective of the understanding of the minor in question. However,

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[208] In conjunction with § 263 of the German Criminal Code (StGB); the minimum age for criminal responsibility is fourteen years, § 18 StGB.

[209] See section 1)c) of this chapter.

[210] C-W Canaris, 'Verstöße gegen das verfassungsrechtliche Übermaßverbot im Recht der Geschäftsfähigkeit und im Schadensersatzrecht' [1987] JZ 993, 1001 f; see for an overview of the discussion V Reck, *Die Geschäfte des täglichen Lebens volljähriger Geschäftsunfähiger; § 105a BGB* (Verlag Dr. Kovač, Hamburg 2008) 75 ff.

[211] Under §§ 286 ff of the Insolvency Act; this scheme is not only available to minors; see also G Wagner in: *Münchener Kommentar zum BGB: Bd 7 §§ 705–853 BGB* (8th ed CH Beck, München 2020) § 828 [16 f].

other than that, there are no particular limitations to minors' liability for wrongs.[212]

Finally, it has been seen that German law excludes both the contractual as well as any delictual liability of minors who have not yet reached the age of seven years. English law has no additional age limit, but further limits can potentially be established based on the doctrine of *non est factum*. These aspects are further analysed in chapter III once the (in-)ability of minors of that age to transfer rights has been discussed.[213]

b) Capacity of other 'Classes' of Persons: a Uniform Concept?

As mentioned before, persons below the age of eighteen years are not the only 'class' of persons who are deemed worthy of special protection from improvident transactions. Understanding how certain other groups are protected from improvident transactions allows for a better understanding of the concept of minority in England and Germany. For this purpose, a brief explanation of 'mental incapacity' follows in this subsection, and these explanations are further drawn upon in later chapters.

Under German law, the central concept used to determine whether a minor's transaction should stand or fall is the validity of his legal acts (*Rechtsgeschäfte*). Effecting a legal act is required for any (voluntary) change to

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[212] The lesser understanding of minor defendants matters in a *factual* sense, whereas this is not different for older people, cf already section 2)c) of this chapter, in fn 179.

[213] See section 3)d) of that chapter.

one's legal relationships (*Rechtsverhältnisse*) to others. Thus, via the 'hinge' of the legal act, a person's ability to effect such changes can be limited sweepingly and on the basis of very few, abstract provisions. Furthermore, it allows utilising these abstract rules for other purposes, too, which is typical for provisions located in the 'General Part' of the BGB. In fact, minority is only one of several reasons why a person's legal acts or declarations of intention can be void. A declaration of intention made by an unconscious[214] person or someone with '*temporarily* disrupted mental activity' (primarily persons under the influence of drugs) is void, according to § 105 no 2 BGB. Persons with a *permanent* mental illness or cognitive disability, henceforth referred to as 'mentally incapable persons', are also unable to effect legal acts according to § 104 no 2 BGB.[215] The status of these persons is akin to that of minors below the age of seven years.[216] In other words, minority is only one reason for 'contractual incapacity' (*Geschäftsunfähigkeit*). Due to these harsh consequences of mental incapacity and their potential conflict with the constitution,[217] in 2002 the German legislator introduced § 105a BGB, according to which mentally incapable persons can perform and thereby validate 'bargains of everyday life'. In contrast to the 'pocket money provision' in the context of minority, § 110 BGB, mentally incapable persons do not need to have the relevant funds made available to them by any

[214] Such as due to hypnosis, fever delirium, somnambulism or epileptic seizure, cf A Spickhoff in: C Schubert (gen ed), *Münchener Kommentar zum BGB; Bd 1 §§ 1–240 BGB* (9th ed CH Beck, München 2021) § 105 [36 ff].

[215] More precisely, the provision pertains to persons who find themselves 'in a chronic state of pathologic mental disturbance to the extent that their ability to form a free intention'. Mental illness also excluded as persons delictual liability, § 827 BGB.

[216] In contrast to minority, mental illness can exceptionally pertain only to certain 'areas of life', such as legal proceedings, cf Spickhoff in: *Münchener Kommentar* (fn 214) § 104 [50–54].

[217] Canaris, 'Übermaßverbot' (fn 210).

specific person. All that is required is that the transaction is one of 'everyday life', concerns a small amount, and has been fully executed by the mentally incapable person. Furthermore, in 2002 the German legislator introduced a new form of guardianship which allows courts to appoint a guardian for a person, irrespective of his age, if that person cannot take care of his affairs independently due to a mental or physical illness or disability.[218] Typically, the court orders that legal acts by the affected person require the guardian's consent, which is comparable to the requirement of parental authorisation.[219] This requirement does not apply to legal acts which are 'legally solely beneficial', comparable to § 107 BGB.[220] Thereby, the person in care practically attains a status similar to that of minors aged seven years or older, ie, he is only *limited* in his capacity to effect a legal act.[221] In this light, it is apt to say that German law has developed one uniform system of rules governing (the) capacity (to effect legal acts) for different 'classes' of vulnerable persons, with small alterations in each instance. A reader of this thesis automatically gains a substantial understanding of the capacity of any of the relevant groups of persons by understanding the concept of capacity in §§ 104 ff BGB and the relevance of the inability to effect legal acts.

In English law and legal literature, the term 'capacity' is used in manifold ways. Apart from minority, the 'capacity' to contract is discussed in the context of mentally ill, cognitively disabled, drunk, or sleepwalking persons, as well as

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[218] So-called *Betreuung*, see §§ 1896 ff BGB.

[219] Under § 1903 (1) BGB.

[220] See § 1903 (3) BGB.

[221] BGH, [2015] NJW 2497 [17].

companies and public authorities.[222] However, there is no uniform *concept* of contractual capacity, and quite different policies are followed.[223] The way and the extent to which these approaches limit a person's ability to incur contractual liability depends on the individual class of persons. Explaining mental incapacity here can prove this point and emphasise the difference between the English and the German approach.[224]

A contract is fully binding on a mentally incapable person even where he

> was so insane at the time that he did not know what he was doing (…), unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.[225]

Thus, for relying on mental incapacity, the defendant must show that he was unable to understand the relevant transaction and that the other party knew of his impairment.[226] If these requirements are met, the transaction is 'voidable', ie, the

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[222] See chapter I, section 6)a).

[223] See also the critical comparative account by Samuel, *Obligations* (fn 27) 320.

[224] *Probably*, the capacity of other groups of persons such as intoxicated persons is similar or akin to that of mentally ill persons, cf A Burrows, *The Law of Restitution* (3rd ed OUP, Oxford 2011) 317 at fn 36.

[225] *Imperial Loan C Ltd v Stone* [1892] 1 QB 599, 601 per Lord Esher MR; see also *Molton v Camroux* (1848) 2 Exch 487, 501, 154 ER 584, 589 per Pollock CB.

[226] This approach at common law is also reflected in ss 2 and 3 of the Mental Incapacity Act 2005 which is, however, not immediately relevant for the contractual capacity of mentally ill persons; cf Whittaker in: *Chitty* (fn 3) [11-093].

mentally incapable person can rescind it and, thereby, make it void *ab initio*.[227] This approach is fundamentally different from what we have seen in respect of minority. Minority renders a contract unenforceable as against the minor. The effect of minority neither depends on a minor's understanding of the subject matter nor the other party's awareness of the minor's inability to understand. In contrast to the protection of mentally incapable persons, a minor fraudulently misrepresenting himself as an adult and thus as having full capacity to contract does also not deprive himself of his protection. A similarity between minority and mental incapacity is that the supply of necessary goods to a mentally incapable person renders the latter, too, liable to pay a reasonable price.[228]

Now, is it problematic that one 'class' of vulnerable persons (ie minors) is treated very differently from another, such as mentally incapable persons? Posing this question implicitly assumes that there is some similarity between them. And, in fact, it is easy to pinpoint some general similarities: minors are deemed worthy of protection because their understanding of certain matters is not yet fully developed; they are more likely to make improvident decisions or to be taken advantage of by unscrupulous adults. Mental incapacity can have the same effects, and (besides the other party's state of mind) English law draws on the individual's actual understanding of the transaction to determine whether he requires special protection. However, there are also important differences between minors and

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[227] *Dunhill v Burgess (Nos 1 and 2)* [2014] UKSC 18, 1 WLR 933 [1] per Baroness Hale DPSC, with whom the other judges agreed; the remedy of a mentally incapable person is expressly referred to as the right to rescind, *Fehily v Atkinson* (fn 225) [119].

[228] According to s 7 of the Mental Incapacity Act 2005; before, the same applied under s 3 of the Sale of Goods Act 1979 and s 2 of the Sale of Goods Act 1893. Even before, the position in respect of necessaries at common law was held to be similar to that of minors, *Re Rhodes* (1890) 44 ChD 94.

mentally incapable persons. Despite being subject to a certain impairment, mentally incapable persons *can* have considerable experience in life and might also have developed a stronger personality than young persons usually do. There can also be very different degrees of mental incapacity which, for practical reasons, must be taken into account by one legal concept. Mental incapacity is less general in kind, and it makes a difference whether the law incapacitates an adult or a minor. Rather than asking whether the English stance is problematic, it should be noted that the German approach of 'one uniform concept' led to severe criticism over the course of the 20th century and eventually required the legislator to amend the law. As mentioned before, § 105a BGB was introduced in 2002 to mitigate the harsh consequences of mental incapacity that, before, accorded to any mentally incapable person the legal status of a small child. The introduction of the general court-imposed guardianship, too, was a reaction to the criticism that the law was too abstract and generalised, rather than providing individualised solutions which can be adapted to the needs of the affected persons. The application of one uniform approach is problematic at least if followed in the abstract and strict way in which the BGB is designed. Nevertheless, it cannot be denied that it allows a more structured and conceptualised approach to the protection of certain groups of persons who are exposed to similar risks. In chapter IV, a way for English law to protect these 'classes' of persons more uniformly but flexibly and with regard to the individual situation, is proposed with a specific focus on the protection of minors.[229] At this point, suffice it to say that

[229] See chapter IV, section 3)b).

applying uniform concepts to these 'classes' of persons without individualisation has rightly been rejected in the English legal literature.[230]

c) Protection from Promises and Impairment of Intention

The general rule under English law is that minors' promises are not invalid but only unenforceable as against the minor party. Minors can enforce a contract, at least if (partly) performing their part of it, and the contract is generally valid and capable of being performed, as explained in more detail in chapter III. This shows that minors' ability to form a legally valid intention is not regarded as impaired by minority, and minors are able to effect a legally valid offer or acceptance. This point is also highlighted by the topic's position in textbooks on English contract law: incapacity is treated as a 'vitiating factor' instead of a requirement for the formation of a contract.[231] It is also emphasised by the fact that, as can be seen in the following chapter, minors' transfers of rights are generally valid, too. Conceptually, minors' intention is not regarded as flawed by English law but, as a matter of policy, their promises are unenforceable as against them. This stance is carried over to the law of tort. Again, minors are not regarded by the law as generally less responsible for their acts than adults,[232] but it is their promises which are barred from (indirect) enforcement.

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[230] Burrows, *Restitution* (fn 224) 316.

[231] See, for example, chapter 7 in Beatson/Burrows/Cartwright, *Anson's* (fn 26).

[232] Although, for example, a lower degree of skill might lead to a more lenient standard of what constitutes negligence; but in principle this is the same for adults.

German law makes opposite assumptions: minors below the age of seven years are regarded as unable to form the intention necessary for effecting declarations of intention (*Willenserklärungen*) and thus legal acts (*Rechtsgeschäfte*).[233] This assumption is the conceptual basis for minors' (or, in fact, any person's) contractual (in-)capacity: the reason for denying certain 'classes' of persons such as young children or mentally ill, cognitively disabled, drunken, sleepwalking or delirious persons this ability was seen by the draftsmen of the BGB as the lack of willpower and cognitive faculty.[234] Once a minor has reached the age of seven, the law assumes that he can form the intention required to effect a declaration of intention, provided the parents authorise it. Declarations of intention are required for entering into any agreement or contract in the wide German sense of that term. A corollary of this highly conceptualised approach is that the question of whether a transaction is actually for the benefit of the individual minor is not a primary concern. In fact, one might be tempted to state that the German legislator is not concerned with 'protecting' minors from detrimental consequences but with dogma instead.[235]

The limitation on German minors' liability in delict shares a conceptually similar basis with minors' ability to contract. The ability to make a declaration of

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[233] Von Tuhr, *Vol 2/1* (fn 35) 144, 334; Larenz/Wolf (fn 35) 484; Medicus/Petersen (fn 52) 240; Flume (fn 33) 182.

[234] Mugdan, *Band 1* (fn 42) 423 f; see already FC von Savigny, *System des heutigen Römischen Rechts; Bd III* (Veit und Comp, Berlin 1840) § 106 p 22 f; as regards mentally ill persons see *ibid* § 112 p 83 f.

[235] As expressed by I Keitel, *Der Minderjährige als strukturell Unterlegener; eine exemplarische Untersuchung des Minderjährgenschutzes im Einheitsgefüge der Privatrechtsordnung* (Alma Mater, Saarbrücken 2014) 125; W Müller-Freienfels, *Die Vertretung beim Rechtsgeschäft* (Mohr Siebeck, Tübingen 1955) 170 in fn 59 speaks of the 'god-given doctrine' that minors' intentions are legally invalid and emphasises the focus of English (and American) law on whether or not a minor's transaction actually benefits him.

intention, *Geschäftsfähigkeit*, and the ability to commit a delict, *Deliktsfähigkeit*, are each instances of the more general ability to act with legal effect at all, the so-called *Handlungsfähigkeit*.[236] This concept is concerned with the ability to create rights and duties by one's own attributable behaviour.[237] A toddler, for example, lacks this ability.[238] In each case, ie, as regards the ability to contract and the ability to commit a wrong, German law assumes that a child is unable to act with *legal* relevance until the age of seven years is reached. The age limit of seven stems from Roman law,[239] which strongly influenced the development of German law.

English law has no general concept such as *Handlungsfähigkeit*.[240] In particular, even very young children are able to act with legal effect, in contrast to German law. Whereas this can turn out to their benefit, such as in *Godley v Perry*,[241] where a six-year-old could rely on warranties made (by statute) under a contract of sale,[242] it seems doubtful whether children of that age need to be able to purchase goods on credit if these goods are 'necessaries'. Children of that age are not usually able to form the degree of intention which should be required to

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[236] Wolf/Neuner (fn 4) 131 ff; Flume (fn 33) 46 speaks of the ability to form a *Handlungswille*.

[237] Spickhoff in: *Münchener Kommentar* (fn 214) § 104 [37].

[238] Larenz/Wolf (fn 35) 132.

[239] Unfortunately, historical aspects such as this cannot be explained in more detail in this thesis; cf H-G Knothe, *Die Geschäftsfähigkeit der Minderjährigen in geschichtlicher Entwicklung* (Peter Lang, Frankfurt aM 1983) 116, 160; but see the further explanations in chapter V, section 3)b).

[240] Whereas liability in contract, tort, and unjust enrichment have an historically similar basis in the action on the case; this aspect is discussed very briefly in chapter IV, section 3)e), although not precisely in this context.

[241] *Godley v Perry* (fn 98).

[242] See section 2)a)3. of this chapter.

hold them responsible for their acts, and to this extent the stricter and more 'conceptualised' approach taken by German law by setting up an additional age limit seems correct. In this chapter, it is proposed that the defence of *non est factum* should be applied more liberally in favour of very small children.[243] Interestingly, this defence is also pleaded by mentally incapable persons.[244] The underlying reasoning, a lack of understanding and 'innocence' on the part of the defendant, will often be the same with regard to small children. This point lends further weight to the arguments brought forward in favour of the more liberal application of the *non est factum* defence, as essentially advocated by Lord Denning MR in *Mills v IRC*.[245]

d) Pragmatism versus Abstraction

This chapter shows how in particular the so-called General Part of the BGB is designed in an abstract manner. It is intended to be applicable to the entirety of private law. The BGB is an attempt to create a coherent system of rules under which any possible future case is considered in advance.[246] This approach has advantages and disadvantages. On the one hand, it promotes legal certainty; on the other, it entails that generalisations have to be made and not all individualities can

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[243] See section 2)a)4. of this chapter.

[244] *Faulder Spr v Silk* (1811) 3 Camp 126, 170 ER 1328; *Yates v Boen* (1738) 2 Str 1104, 93 ER 1060; GHL Fridman, 'Mental Incompetency; Part I' (1963) 79 LQR 502, 509.

[245] See chapter II, section 2)a)4.

[246] The historical and methodological background of this tendency is highly interesting but cannot be addressed in this thesis. According to the view of GF Puchta, all legal concepts could logically be derived from each other, forming a 'pyramid', at the top of which the concept of 'human freedom' would stand, P Krüger (ed), *Cursus der Institutionen von GF Puchta, Bd 1* (10th ed Breitkopf und Härtel, Leipzig 1893) 4.

be taken into account. Due to the clear and unambiguous use of legal terminology, stating a definition of contractual capacity in German law was comparatively easy. The link between a person's ability to form a sound intention and his ability to make a declaration of intention via the concept of *Geschäftsfähigkeit* shows the connections between different legal concepts in the BGB. The general effect on an 'attempted' contract is entirely clear although, admittedly, complicated. The term 'void' is used consistently throughout the system of rules. Statutory law seems to be in need of consistent terminology to be able to govern every possible situation abstractly. Against this background, the replacement of certain parts of the common law by the Infants Relief Act 1874 until its repeal in 1987 was significant as it *attempted* to supersede parts of the case law by abstractly designed statutory law. The interpretation of the Act was clearly a challenge for courts and legal scholars, and its result might surprise readers from a civil law background. Furthermore, both with regard to this Act and to the relevant cases, the 'labels' which were attributed to minors' contracts could not be relied upon. Unsurprisingly, terminologically differing accounts of minors' contractual capacity can still be found in English textbooks. For defining the effect of minority, the labels assigned to minors' contracts had to be checked against their legal consequences. A further issue in this regard is that, in English legal proceedings, minority does not have to be considered by judges unless pleaded,[247] even where it is obvious that a minor is party to a transaction. Contractual capacity is not a positive requirement for a contract to exist but merely a defence

[247] See generally C Cavallini, 'Why is the *Iura Novit Curia* Principle not Applied Yet in English Law?' (2017) Global Lawyer 20170010.

which *can* be pleaded by the minor. In this light, the conceptualised and legally more certain German approach seems advantageous.

But there are caveats to this proposition. The sweeping effects of minority in German law have to be counterbalanced by parents' ability to authorise their child to make a declaration of intention once it has reached the age of seven years.[248] This, on the other hand, leads to an insecure position of third parties who cannot rely on ratification being granted but, simultaneously, have to be prepared to perform the contract in case the parents do ratify it. The legal solution shows a pattern which is typical for German private law and of which further examples can be seen throughout this thesis. The ambitious attempt to offer an abstract and consistent solution to a complex problem, in this case, the balance of the interests of minors and third parties dealing with them, leads to a result which is not always intended or appropriate: if a minor's contract were not merely *provisionally* void, he would always be deprived of any possible advantages from the agreement, which, as has been stressed by English scholars, would turn the protection of minors to their detriment. Thus, parents' option of ratifying a contract is required. However, this puts third parties in an unfortunate situation. A further set of rules had to be provided in §§ 108 (2), (3), 109 BGB to protect third parties' interests:[249] the third party can request a decision to be made. The German legislature would, of course, provide an exception for cases in which the third party knows about the infancy, but not, however, if the minor said his parents had consented to the agreement, unless (!) the third party knew the minor was lying.

[248] And, as explained in chapter V, by their ability to act on behalf of their child as agents.

[249] See section 1)a)5. of this chapter.

This doctrinal 'ping-pong' is popular among civil lawyers and provides ample resources for legal education at university. As well-planned as this system seems, English law has got along very well, too, by only deciding a dispute once it occurs.

The pragmatic English approach allows minors to benefit from a transaction whilst being protected from contractual liability. The interests of third parties dealing with minors in good faith and on credit are not considered worthy of protection. 'In fact, a tradesman dealing on credit with an infant does so at his peril (…) unless (…) the goods supplied were necessaries (…).'[250] But the English approach is more practical in that transfers made by minors are generally supported by a valid contract. Adults only need to insist that the minor performs in advance. This comes to the advantage of minors who, thereby, can participate in social life without risking contractual liability. The binding effect of a promise is only 'exceptionally' permitted by English law where this is, in general terms, 'necessary' or 'on the whole beneficial' for the *individual* minor. For example, English law asks whether certain goods are appropriate to a 'minor's position in life' or whether he is 'already sufficiently supplied' with them; and it matters whether a minor's employment is, on the whole, helping him to make a start in a profession, even though the contract contains some onerous terms. The German provisions governing capacity tend to ignore individual circumstances of a transaction. It is solely the *legal* consequences which decide whether an agreement is within the scope of the exception in § 107 BGB or requires authorisation by the parents. By focussing on the *legal* consequences instead of

[250] *Barnes v Toye* (fn 83), 413; see also section 2)b)1. of this chapter, at fn 132.

the practical effects of transactions, a more abstract provision can be designed. However, we can sometimes see that judges cannot apply such rules strictly as, otherwise, the result would conflict with policy considerations. There is an immense amount of literature concerned with the correct interpretation of § 107 BGB.[251] In contrast, taking the specific circumstances of the person in question into account is not conceptually problematic for English law as it has never declared the design of as-abstract-as-possible rules an end in itself. Rather, considering all facts of the individual case lies at the heart of a case law jurisdiction. We have seen how in *Doyle* or *Clements* the judges identified the interest of minors to make a start in a profession and earn a living.[252] The law did not already provide a solution for these cases. The 'analogy' to beneficial contracts of service was quickly found, whereas—as the relevant judgments show—it was of secondary importance whether the result was based on the concept of 'necessaries' or contracts which are 'on the whole beneficial' to a minor. The judges in these cases accepted that individual minors were bound by their contracts and consequently deprived of their prize money or certain rights under a statute.[253] But they achieved the effect that minors could bind themselves and thus be creditworthy partners. Without any liability, economically significant contracts cannot be entered into. Furthermore, while in general the 'exceptions' in the English law governing minors' contracts face criticism due to their

[251] Further discussions of similar doctrinal complexities follow in chapter III, section 1)c), but are not immediately relevant here.

[252] See section 2)b)3. of this chapter.

[253] See the explanations in section 2)b)3. of this chapter.

inconsistency and uncertainty,[254] these attributes can provide a useful degree of flexibility. English judges rarely find themselves in the position that the law, if applied 'strictly', leads to an obviously unacceptable result. The broad and fact-orientated terminology such as 'on the whole beneficial' is flexible enough to be an 'instrument of justice'.[255] A negative example of this flexibility seems to be the possibility that minors can enforce a contract merely by partly performing their duties under it, depending on the benefit for them and the fairness of the value of their (part) performance—the underlying decision of *Warwick* should, if at all, only be followed with great hesitance.[256]

That minors require the ability to bind themselves in a professional environment has been recognised by German law in § 113 BGB, which affords minors contractual capacity for legal acts entailed by a certain type of employment (if authorised by the parents).[257] Whereas this provision is practically very important, the parallel provision under § 112 BGB, which gives minors capacity for the independent conduct of a business, has not gained much practical relevance due to the complexities involved in its application. However, the conduct of a business in the form of 'trading' is a point in which English law, too, is restrictive and resists the 'individualised' approach described before. So-called

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[254] 'Latey Report' (1966, fn 26) [282 ff, 315 ff].

[255] As phrased in *Saunders v Anglia* (fn 114) 1026 with regard to the *non est factum* doctrine.

[256] See at fn 87.

[257] See section 1)b)4. of this chapter.

'trading contracts' are said never to be such for necessaries,[258] and consequently they 'have never been binding', even if not always sensible.[259]

A further example of the contrast between the (pragmatic) English and (abstract) German approaches can be seen in the context of mental incapacity. As regards English law, whether mentally incapable persons can rescind a transaction depends, besides other things, on their understanding of it and thus, indirectly, on its complexity. Thereby, English law employs an approach that, in the German literature, is referred to as 'relative incapacity': the ambit of the defendant's capacity is *relative* to the complexity of the subject matter. In German law, this approach is widely rejected for infringing legal certainty.[260] It is considered difficult for third parties to predict when and to what extent a mentally incapable person is able to understand a transaction. The English approach underlying mental incapacity is discussed in further detail in chapter IV,[261] where it is also made fruitful for the protection of minors, and it can be seen that such 'relative' incapacity does not lead to unacceptable judgments.

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[258] See in this chapter at fn 129, and 164.

[259] *Lowe v Griffith* (fn 130), where an infant could not rent a house because he was running a barber shop in it; this can hardly 'put his property at risk', which is arguably the rationale behind judges' aversion against 'trading contracts', cf section 3)a) of this chapter, at fn 207.

[260] BGH, [1953] NJW 1342; BGH, [2020] BeckRS 22079.

[261] See section 3)b) of that chapter.

III.

Transfers of Rights

In the preceding chapter, we have learned whether and to what extent minors can incur liability in the context of entering into contracts. We have seen that both in English and German law minors' contracts can be valid. But for the contract to have a practical use, the parties to it must be able to perform their agreement which, in many cases, requires transferring rights from one party to the other. The ability to enter into contracts and perform them is essential for participating in social life. Whereas it is plain that minors, like any natural person, can hold rights,[262] it is not plain whether a transfer or acquisition of a right by a minor is valid. In the same context, one can further ask whether minors can make a gift to another person or receive one. Understanding when and to what extent this is the case, in conjunction with chapter II, allows for a comprehensive understanding of minors' ability to determine their legal relationships to other persons and objects voluntarily.

[262] WS Holdsworth, *A History of English Law; Vol III* (5th ed Sweet & Maxwell, London 1942) 516 at fn 4; A von Tuhr, *Allgemeiner Teil des Deutschen Bürgerlichen Rechts, Bd 1: Allgemeine Lehren und Personenrecht* (Duncker & Humblot, Berlin 1910) 377 f.

1) Transfers of Rights and Minority in German Law

The fundamental point that we need to understand in German law is that the concept of legal acts (*Rechtsgeschäfte*) uniformly applies to any voluntary act by which a person intentionally determines his legal relationships to other persons or things.[263] The preceding chapter showed how 'contractual capacity' under German law draws on the concept of legal acts to determine whether or to what extent a person can enter into a transaction.[264] This means that what we have already learned about minors' contractual capacity in the context of contracts is, for the most part, applicable to transfers of rights by or to them. This seemingly complex concept is explained in the following subsection before the particular impact of minority on transfers of rights is explained.

a) Obligatory and Dispository Agreements

As already explained in the previous chapter, any voluntary change of a person's legal relationships (*Rechtsverhältnisse*) requires a 'declaration of intention' (*Willenserklärung*).[265] A contract in the wide 'German understanding' of the term requires two (or more) corresponding declarations of intention. Such an agreement is not only relevant for creating an obligation, as seen in the previous chapter, but also for voluntarily acquiring or disposing of rights, for example, by acquiring ownership of a movable.

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[263] The concept of legal acts is explained in chapter II, section 1)a)2.

[264] See chapter II, section 3)b).

[265] See chapter II, section 1)a)3.

Agreements by which one person assumes an obligation owed to another (or several others) are typically referred to as 'obligatory transactions' (*Verpflichtungsgeschäfte*), whereas agreements which affect an existing right, eg, for changing their content, are referred to as 'dispository transactions' (*Verfügungsgeschäfte*).[266] This distinction is important for understanding German private law and dubbed 'principle of separation'.[267] This principle entails that, where a contract (in the narrower, English sense) is performed, there are multiple agreements. In fact, there are often at least three. For example, where a person buys a newspaper, there is an agreement underlying the sale as the obligatory transaction, an agreement underlying the transfer of ownership of the cash from the buyer to the seller, and an agreement underlying the transfer of ownership of the newspaper from the seller to the buyer.[268] Building upon the separation of these agreements is the so-called 'principle of abstraction'. It means that the validity of one of these agreements does not depend on the validity of another.[269] Most importantly, the validity of a transfer of rights made in performance of an invalid obligation is still valid, although it can happen that the same vitiating factor affects several or all agreements involved in a transaction. In the following subsection, it can be seen that contractual incapacity is such a vitiating factor. By drawing on the 'hinge' of the legal act,[270] contractual (in-)capacity affects all agreements attempted to be made by a minor. Still, their separate analysis is

[266] Wolf/Neuner (fn 4) 343.

[267] Wolf/Neuner (fn 4) 342.

[268] If multiple individual items are transferred, there can be many more dispository agreements.

[269] Mugdan, *Band 1* (fn 42) 422.

[270] See already chapter II, section 3)b).

important and the functioning of the principles of separation and abstraction should be kept in mind as the 'exceptions' to incapacity can cause the validity of an obligation and that of a transfer to be inconsistent, viz, one is valid whereas the other is not.

b) Transfers of Rights under the 'General Rule'

The BGB distinguishes between the transfer of rights to movables and intangibles. The latter can generally be transferred by assigning them. According to § 398 BGB, 'a claim may be transferred by the obligee to another by way of a contract with that person (assignment)' and, under § 413 BGB, 'the provisions relating to the transfer of claims are applied with the necessary modifications to the transfer of other rights unless otherwise provided by law'. Thus, assignments of intangible rights are made by a simple agreement between the parties unless the law makes more specific provisions. For example, shares in companies or patents can be assigned by simple agreement.

The transfer of ownership of movables is governed more specifically by provisions located in the third 'book' of the BGB.[271] According to § 929 BGB, 'for the transfer of the ownership of a movable, it is necessary that the owner delivers the thing to the acquirer and both agree that ownership shall pass. If the acquirer is in possession of the object, the agreement on the transfer of ownership suffices'. 'Delivery' in this context merely means that possession is taken by the acquirer, whereas the transferor loses his possession; it is not to be confused with

[271] Under §§ 929 ff BGB; see also the overview of the BGB in chapter II, section 1)a)1.

the English understanding of the term, as explained further below. It is noteworthy that possessing an object merely requires factual control of it and a 'natural intention' to possess, also referred to as *animus possidendi*, rather than the 'legal intention' required to form a declaration of intention.[272] Therefore, the ability to possess is not affected by contractual incapacity and (even very young) minors can take things into possession or divest themselves of it.[273]

The 'general rule' governing minority in German law is that minors aged seven years or older are limited in their 'contractual capacity' and require authorisation by their parents to make a declaration of intention.[274] Without it, they cannot enter into any agreement and thus cannot effect any transfer of rights unless one of the 'exceptions' to incapacity applies. Minors below the age of seven years are *geschäftsunfähig* and thus cannot effect any legal act, irrespective of their parents' authorisation and without exception. They cannot offer or accept the transfer of any right by or to them, even if only a gift ought to be made to them.

The 'exceptions' to the general rule allow minors aged seven years or older to enter into certain agreements with no or a lesser degree of parental control. The effects of these 'exceptions' are explained in the following subsections.

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[272] F Schäfer in: R Gaier (ed) *Münchener Kommentar zum BGB; Bd 8 §§ 854–1296 BGB* (8th ed CH Beck, München 2020) § 854 [5 ff, 8, 26 f, 46]. As regards the intention required to effect a declaration of intention see chapter II, section 3)c).

[273] See Spickhoff in: *Münchener Kommentar* (fn 214) § 105 [12, 14].

[274] See chapter II, section 1)a)3.

c) ‘Legally Solely Beneficial’ Transfers under § 107 BGB

As explained in chapter II, minors aged seven or older can make declarations of intention even without authorisation by their parents if that declaration is ‘legally solely beneficial’ for them. Transferring a right to another person entails a diminution of one’s rights and is always ‘legally disadvantageous’, even if the ownership of a thing is economically very disadvantageous.[275] Consequently, transfers of rights by minors always require parental authorisation.

Acquiring a right generally does not entail any legal disadvantage. A minor can, for example, agree to obtain ownership of a bicycle without his parents knowing of it. Due to the aforementioned principles of separation and abstraction, the question of whether the underlying contract, such as a sale, was valid is irrelevant to the validity of the transfer to the minor. Without a valid contract, however, the transfer will lack its ‘legal basis’ and is subject to restitution of unjustified enrichment, as explained in chapter IV. Where a transfer is made to a minor gratuitously, the underlying contract of gift is valid under § 107 BGB and no restitution is due.

However, there are things whose ownership entails duties borne by the owner and whose acquisition can be indirectly legally disadvantageous to a minor. A typical case is rights to land if further duties are entailed by it. For example, the transferee of the ownership of a rental flat enters into the tenancy agreement by

[275] For example, owning contaminated land, resulting in expensive duties to contain the contamination.

statute.[276] Even a gift of the flat would be legally disadvantageous to a minor as the tenancy agreement would impose duties on him as a landlord, despite the fact that he can charge rent. As transfers of rights to land lie outside the scope of this thesis, this issue is not further discussed here.

What is more important in the present context is that any agreement under which minors gain access to social media services but, in return, surrender rights to their personal data entails a legal disadvantage and thus requires parental authorisation;[277] similar considerations apply when minors download 'free' apps onto their smartphone. In such a case, the user surrenders personal data to the operator of the app platform and to the developer of the app.[278]

Finally, it should be noted that, according to the prevailing view, the performance of an obligation owed to a minor is regarded as legally disadvantageous for him because it causes his right to the performance to be extinguished. Consequently, parental authorisation of the performance is additionally[279] required.[280] This is at least the case if the underlying contract is valid, including the minor's right to the performance, because his parents have authorised it. If performance is made to a minor without the required parental

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[276] Under § 566 BGB.

[277] Only detailed aspects of this view are still debated in the relevant literature, which will not be further discussed here; see only Klumpp in: *Staudinger* (fn 32) § 107 [33].

[278] S Meyer, 'Gratisspiele im Internet und ihre minderjährigen Nutzer' [2015] NJW 3686.

[279] German law distinguishes the transfer of right by which an obligation is performed from the performance or 'its effect'; see B Markesinis, H Unberath and AC Johnston, *The German Law of Contract: A Comparative Treatise* (2nd ed Hart, Oxford and Portland 2006) 349 ff.

[280] BGH, [2015] NJW 2497.

authorisation, the transfer of rights is nevertheless valid; however, the enrichment of the minor gained thereby lacks its 'legal basis' and, as explained in chapter IV, is subject to a claim for unjustified enrichment.

d) Transfers of Pocket Money under § 110 BGB

Where a minor enters into a contract without parental authorisation, the contract is only provisionally void and can still be ratified by the parents.[281] A further way of validating it with retrospective effect is the minor's performance of his obligations under the contract with 'pocket money' according to § 110 BGB.[282] This emphasises how German law distinguishes between the underlying contract, the obligatory transaction, and its performance by subsequent dispository transactions. Where a minor buys a newspaper without parental consent, as in the example mentioned before, the contract of sale is provisionally void but retrospectively validated by the minor's payment of the purchase price, provided the relevant cash was given to him by his parents for such a purpose or at his free disposal. With the contract being valid, the minor now has a right to claim the transfer of the newspaper to him. If a minor has purchased something with his pocket money and receives profits from or a substitute for it, for example, by winning a prize with a lottery ticket bought with pocket money,[283] the profits or a substitute of what was initially obtained can again be pocket money under § 110

[281] See chapter II, section 1)a)5.

[282] See also the translation of this provision in chapter II, section 1)b)2.

[283] RGZ 74, 234 (1910).

BGB. Whether this is the case depends on whether the profit or substitute can still be regarded as within the scope of the initial funds given to the child.[284]

Pocket money need not necessarily be given to a minor by his parents, and even a minor's salary can be pocket money if the parents leave the salary to him at his disposal.[285] Furthermore, in contrast to what is usually considered pocket money, there is no quantitative limit to the funds—theoretically, a child could have one million Euros of monthly pocket money. But, for the exception under § 110 BGB to apply, parents must always initially consent to the funds being made available to their child. Thereby, parents retain control over their child's spending.

Furthermore, although parents can provide their child with funds at their child's *free* disposal according to the wording of § 110 BGB, the predominant view is that the child is *never entirely free* in using its pocket money.[286] The application of the funds is always, even if not expressed by the parents at all, restricted by their (hypothetical)[287] will. This view is based on the argument that § 110 BGB is a special instance of parental consent under § 107 BGB, according to which a child's legal act generally requires parental authorisation to take effect. Thus, what pocket money under § 110 BGB can be used for is always to some

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[284] Critical: F Kalscheuer, 'Die Mittelüberlassung zu freier Verfügung – Zum 100-jährigen Jubiläum des Lotterielos-Falles (RGZ 74, 234 ff.)' [2011] Jura 44, 47.

[285] Mugdan, *Band 1* (fn 42) 434.

[286] Wolf/Neuner (fn 4) 397; Mugdan, *Band 1* (fn 42) 434; Klumpp in: *Staudinger* (fn 32) § 110 [28 f].

[287] 'Hypothetical' because, in such a case, the parents did not *express* their intention at all; otherwise, the pocket money would undoubtedly be bound by their express will under § 110 BGB.

extent limited by parents' (hypothetical) general will, even though they did not communicate any restrictions on its use. What parents approve of or not is assessed based on the relationship between parent and child, primarily from the perspective of the latter;[288] 'good faith' of third parties is not protected when balanced against the interests of minors.[289] For example, a child's purchase of a toy gun with pocket money, left to the child without further restrictions, was still held ineffective due to the parents' general aversion to such toys.[290]

e) Partial Capacity under §§ 112, 113 BGB

As already explained in chapter II with a view to contractual liability,[291] under § 112 BGB and § 113 BGB minors can acquire full contractual capacity for a certain area of life.[292] According to § 113 BGB, such 'partial contractual capacity' is obtained where parents consent to their child's contract of service, for example, employment. The child attains capacity to enter into any further agreement in the course of the employment, such as upon receiving his salary or agreeing to its increase. But, once the salary is received by the child, it is again subject to the general limitations on minors' ability to transfer rights.[293] Under § 112 BGB, further-reaching 'partial contractual capacity' can be gained. With the consent of the Family Court, parents can allow their child the conduct of a business and,

[288] Spickhoff in: *Münchener Kommentar* (fn 214) § 110 [30].

[289] As shown in AG Freiburg, [1999] NJW-RR 637.

[290] AG Freiburg, [1999] NJW-RR 637.

[291] See sections 1)b)3. and 4. of that chapter.

[292] See already chapter II, section 1)b)3.

[293] Spickhoff in: *Münchener Kommentar* (fn 214) § 113 [33].

consequently, the child has capacity to enter into agreements related to the business operation. In the context of transfers of rights this means, for example, that a minor could transfer the ownership of cookies which he makes and sells. In contrast to this trivial example, the business can theoretically be a serious one and of considerable size. However, the provision excludes from the scope of the minor's 'partial contractual capacity' transactions which parents could otherwise not authorise without the Family Court's consent.[294] Details of these restrictions are discussed in the course of chapter V.[295] For now, it suffices to know that due to these restrictions the practical relevance of § 112 BGB is rather small.[296]

2) Transfers of Rights and Minority in English Law

In English law, transfers of titles to movables can be made by sale, delivery, or deed.[297] Rights to intangible objects such as copyrights can be assigned.[298] Furthermore, a brief look is taken at the implications that minority has on a trust in which a minor is involved.

In English law, there is no uniform concept such as the 'legal act', underlying both contracts and transfers of property and which would

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[294] Under § 112 (1) sentence 2 BGB.

[295] See section 2)a)1. of that chapter.

[296] Spickhoff in: *Münchener Kommentar* (fn 214) § 112 [2].

[297] RJ Smith, *Property Law* (10th ed Pearson, London 2020) 118.

[298] 'Assignment' is sometimes used synonymously with 'transfer', generally, including the aforementioned 'delivery of title' to a movable; in this thesis, 'assignment' is used *specifically* to denote transfers of intangibles as, for example, in Bridge, *Personal Property* (fn 20) [22-001].

automatically render 'minority' applicable in the context of both. The central question in this section is, therefore, whether or to what degree each specific mode of transferring rights is at all affected by one of the parties to a transaction being underage.

a) Transfers of Rights to Movables and Minority

In English law, the possession of a thing gives the possessor a title to it, ie, the right to possess it. Several persons each can have a title to the same thing, for example, if one person loses his watch and another finds it (and takes it into possession). An earlier title to a thing is stronger than a title that comes into existence at a later point in time. 'Stronger' means that the holder of the title can sue a person with an inferior title in trespass or conversion for the wrongful interference with his right to possess the object in question.[299] As explained in this section, a title to a thing can be transferred ('delivered') to another by transferring possession of the goods to him with the intention to transfer *that* title. Where mere possession is conferred on another, such as under a hire of goods, the other person does not acquire the transferor's title but a new one.[300] A title to goods can also be transferred under a sale *solo consensu*, ie, by agreement alone, if the parties agree on it. Finally, a title to a movable can be transferred by deed.

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[299] As in the case of a chimney sweeper's small boy, *Armory v Delamirie* (1722) 1 Strange 505, 93 ER 664; see also the general explanations by D Nolan and J Davies, 'Torts and Equitable Wrongs' in A Burrows (ed), *English Private Law* (3rd ed OUP, Oxford 2013) [17-301 ff] and by L Rostill, *Possession, Relative Title, and Ownership in English Law* (OUP, Oxford 2021) 25 ff.

[300] See, again, *Armory v Delamirie* (fn 299); D Fox, 'The Transfer of Legal Title to Money' [1996] RLR 60, 61 fn 9 and 10.

1. Possession

Legally possessing something requires a certain degree of physical control over as well as the intention to possess the object. The relevant intention to possess is usefully referred to as *animus possidendi* and, even where *possession* is conferred on another, must not be confused with any intention to transfer one's title to an object.[301] Whether a minor has the physical or mental ability to possess something depends on his individual development but is not affected by the fact that he is underage per se.[302] Even very young children can have the necessary *animus possidendi* to take and keep something in possession and, thereby, they can have a title to a movable.

2. Transfer of Title

The delivery of one's title to a movable requires the conferral of the possession of the movable as well as the transferor's intention to transfer his title to the transferee.[303] As just explained, whether a minor is able to possess something and confer its possession depends on his individual abilities. The current question is whether minors generally have the ability to form the necessary intention to transfer their title by delivery or whether the relevant intention is vitiated by their minority. Furthermore, according to some voices in the literature, the transferee's

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[301] *Powell v McFarlane* (1979) 38 P&CR 452, 470 ff; *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, 435; *Littledale v Liverpool College* [1900] 1 Ch 19, 23.

[302] Slade J in *Powell v McFarlane* (fn 301) at p 469 argued that infancy was 'clearly relevant in deciding whether he [the plaintiff, a minor] had possession'; however, in the course of the judgment, the age of the plaintiff was only relevant for deciding whether he, as a 14 to 15 year old boy, really had the intention to possess exclusively, not whether he *could* do so with regard to his minority.

[303] *R v Ashwell* (1885) 16 QBD 190, 225.

intention to acquire the title is required, too. If that is true, it can also be asked whether minors have the ability to form the intention to acquire a title to a movable.

Although this point is not entirely uncontested in the literature,[304] it is clear from the cases that a minor can both transfer and acquire a title to a movable by delivery. In *Taylor v Johnston*, a terminally ill underage girl made a gift of (corporeal) money on her deathbed to her aunt. Noteworthily, a gift is not supported by consideration and thus no contract under English law. The gift to the girl was challenged by the girl's executrix but held to be valid.[305] As explained in chapter II, minors are also able to enforce their contracts.[306] There are also numerous cases where a minor made an effective payment to the other party, for example, where a minor took a lease and paid his rent[307] or where he bought goods[308]. In turn, cases where a minor received payments show that transfers of

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[304] Arguing that the same reasons which impair a person's contractual capacity should have effect on his ability to transfer a title to a chattel by delivery, too, is D Fox, *Property Rights in Money* (OUP, Oxford 2008) [3.108]; but at *ibid* [4.55] with a caveat in case of minority; see also Fox, 'Transfer of Money' (fn 300) 63: 'broad similarities'; Bridge, *Personal Property* (fn 20) [18-006], referring only to gifts and 'vitiating factors' generally.

[305] *Taylor v Johnston* (1882) ChD 603, 608 per Bacon VC: 'I am not aware of any law which prevents an infant from making a donation of any chattels or personal property in his actual possession.'

[306] See section 2)a)1. of that chapter.

[307] *Lloyd v Gregory* (fn 73).

[308] *Warwick v Bruce* (fn 76); see especially *ibid* p 209 where it is stated that the minor paid 40l and thus it must be to his advantage that the contract is enforced which implies that he would lose the money if the contract is not enforced; *Ryder v Wombwell* (fn 123), where it is said that the infant had already bought so much jewellery that the jewels in question could not be necessaries; *Thornalley v Gostelow* (fn 99), where the plaintiffs, including a minor, sued for damages for defects of a boat they bought from the defendants and had paid £210 for it; *Watts v Seymour* (fn 99), where a minor bought a rifle and paid for it in cash; *Godley v Perry* (fn 98), a plastic toy catapult is sold to a six-year-old child who immediately pays the price of 6d.

title by delivery *to* minors are valid, too.[309] This is further supported by the fact that necessary 'goods sold and delivered' to minors can entail liability to pay a reasonable price.[310] The delivery of title to goods was also not barred by the Infants Relief Act 1874.[311] Finally, section 3(1) of the Minors' Contracts Act 1987 speaks of 'property acquired' by a minor.[312]

3. Sale of Goods

A sale is primarily a contract, but, according to sections 2(4) , 17 and 18(*Rule 1*) of the Sale of Goods Act 1979, it can transfer the seller's title to goods to the purchaser by way of the agreement alone if the parties do not agree otherwise,[313] sometimes referred to as transfer *solo consensu*. Such a transfer does not require a change in possession of the goods. It is meant when the term 'sale' is used in this subsection.

Where a minor purchases goods, the rules governing contractual capacity apply both to the contractual relationship and the acquisition of property under the

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[309] *R v Lord* (fn 73): payment of 20s a week is made to a minor directly; *Young v Bristol Aeroplane Co Ltd* [1946] AC 163: payments of salary and compensation under the Workmen's Compensation Act 1925; *Evans v Ware* [1892] 3 Ch 502: a minor works as milk carrier and gets paid 21s per week; *Cowern v Nield* (fn 129): minor sells clover and hay and gets paid by cheque 35l 19s; *De Francesco v Barnum* (fn 150).

[310] Cf s 3(2) of the Sale of Goods Act 1979; see also chapter II, section 2)b)1.; Winfield, 'Necessaries' (fn 134) 85.

[311] *Stocks v Wilson* (fn 96) 246 f, where a delivery (of a bill of sale) of furniture which was not 'necessaries' to a minor was held effective.

[312] Regarding this provision see chapter IV, section 2)a)2. The insight availed by this provision is limited in the present context as s 3(1)(b) of the Act speaks of 'property acquired under the contract' which could both mean a transfer by the sale itself or by delivery pursuant to it.

[313] And provided the goods are specific or already ascertained, s 16 of the Act.

sale, following section 3(1) of the Sale of Goods Act 1979. But the 'general rule' as identified in chapter II is that minors' contracts are unenforceable as against them (unless ratified upon majority).[314] Whereas this certainly means that the duty of an infant purchaser to pay the price is unenforceable, a transfer of title cannot be 'unenforceable'. Thus, the reference in section 3(1) of the Sale of Goods Act 1979 does not lead much further here.

That a title to goods could pass under an unenforceable contract is occasionally contested in the literature regarding the doctrine of consideration: without consideration, there could not be a valid transfer merely by sale.[315] However, consideration is only required to render a promise enforceable; it is not necessary for the validity of a transfer.[316] It can also be merely a counter-promise and need not be fulfilled to take effect.[317] Consequently, an infant buyer's promise to pay should be sufficient to effect a sale, and the fact that this promise is unenforceable should not undermine the validity of a transfer of title by sale to a minor.

Overall, the case law does neither allow the conclusion that minors' transfers of title by sale alone are valid nor that they are not. It is often unclear

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[314] See chapter II, section 2)a).

[315] S Zogg, *Effects of Mistake and Other Defects on the Passage of Legal Title* (Intersentia, Cambridge 2020) 59 ff. Historically, Zogg's assertion might have once been correct, cf AWB Simpson, *A History of the Common Law of Contract; The Rise of the Action of Assumpsit* (revised ed OUP, Oxford 1987) 544.

[316] And must not be confused here with 'total failure of consideration', on which see chapter IV, section 2)b)3.a.

[317] Beatson/Burrows/Cartwright, *Anson's* (fn 26) 98.

whether a title to goods passed *solo consensu* or by delivery.[318] For example, where a minor conducts trade and thus necessarily sells goods, property in them could still have been transferred by him by delivery.[319] But rare cases argue for the validity of minors' transfers by agreement alone: in *Watts v Seymour*, it was held that the respondent had 'sold' a rifle to a boy under the age of seventeen in violation of the Firearms Act 1937, whereas the minor never acquired possession of the rifle.[320]

At first sight, trying to protect minors from their improvident decisions might speak against the validity of their transfers by sale taking effect *solo consensu*. However, as seen immediately below, minors can assign rights without more, and these assignments are considered to be 'abstract' in their validity from the validity of an underlying contract. Furthermore, as can be seen in the 'comparative analysis' in section 3) of this chapter, the policy underlying minority in English law is consistent with the proposition that minors are able to transfer their title to goods by way of sale because they are generally at liberty to dispose of rights held by them.

In summary, it seems likely that a title to goods can pass both to and from a minor by virtue of the agreement alone under the Sale of Goods Act(s), but the available case law is not conclusive.

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[318] Eg *Godley v Perry* (fn 98); in *Warwick v Bruce* (fn 76) the goods were still to be ascertained when the agreement was made.

[319] In *Cowern v Nield* (fn 129) part of the goods sold to the plaintiff were never delivered by the minor, but it is not clear, because irrelevant for the decision, whether the title in the goods passed (by the sale alone).

[320] *Watts v Seymour* (fn 99) 1047.

4. Deed

A deed is a legal instrument that is made by a written statement and can bring about an obligation even without consideration as well as create or transfer any type of property interest. A title to a movable can be transferred by deed, too. The requirements for deeds are nowadays laid down in section 1 of the Law of Property (Miscellaneous Provisions) Act 1989.[321] The relevant document must make it clear on its face that it is a deed, be signed by all parties to it (which can be only one), and witnessed by one or two persons, depending on whether the deed is signed at the instruction of another person. The person executing the deed must conduct some action that indicates his intention of being bound, such as giving notice to the transferee.[322] But the transferee under a deed need not know anything about the deed for it to become effective.[323]

Transfers by deed are primarily relevant for the conveyance of a title to land, which is not discussed in this thesis. As minors cannot hold a legal interest in land,[324] modern case law in the context of minority and deeds is also scarce.

In respect of transfers of other rights, the initial question is whether transferring a right *by* deed is substantially really a different mode of transfer or

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[321] Note that the present explanations apply to individuals, such as minors; additional requirements apply to companies executing a deed, cf s 44 of the Companies Act 2006.

[322] Also referred to as the 'delivery' of the deed, but that does not mean 'delivery' as the mode to transfer title to movables; cf M Bridge, *Personal Property Law* (4th ed OUP, Oxford 2015) 175.

[323] *Standing v Bowring* (1885) 31 ChD 282; *Doe on the Demise of Garnons v Knight* (1826) 5 B&C 671, 108 ER 250; D Sheehan, *The Principles of Personal Property Law* (Hart, Oxford 2017) 50.

[324] See s 1(6) of the Law of Property Act 1925.

merely a different form of other modes, such as assignment.[325] The latter is discussed below and can be declared without using a deed. Minors are able to assign rights, and it is uncertain whether using a deed changes the effect that minority has on the validity of a transaction. Theoretically, it might be that using (the form of) a deed is more restricted because the deed is a more complex and formal document and gives the appearance of validity. However, as we can see in this chapter, there is generally no reason to doubt the validity of transfers by or to minors under English law. The only caveat to this statement is the *non est factum* doctrine, which has been discussed in the context of contracts by very young children and should, according to the view submitted in this thesis, be relevant for their transfers of rights, too. It can defeat a minor's transaction made by deed. In summary, and amidst a lack of pertinent case law, it is concluded here that using a deed does not affect the validity of transfers of rights by or to a minor.

b) Assignments and Minority

In English law, things (choses) in action, such as contractual rights, copyrights, or patents,[326] are transferred by assignment from the assignor to the assignee. Assignments can nowadays take the form of a (statutory) legal assignment under section 136 of the Law of Property Act 1925 or of an equitable assignment. Both legal and equitable assignments do not require the assent of the assignee or even

[325] See *Standing v Bowring* (fn 323), where an assignment was effected by deed, and *Walter v Everard* (fn 148), where an apprenticeship was effected by deed.

[326] The exact scope of 'choses in action' need not be distinguished for the purpose of this thesis; see, generally, WS Holdsworth, 'The History of the Treatment of "Choses" in Action by the Common Law' (1920) 33 HLR 997.

the giving of notice to him to be effective.[327] For a legal assignment to be effective, it must be in writing and notice must be given to the obligor. Equitable assignments take effect without such notice[328] and need not be in writing[329]. A more detailed discussion is not necessary for the present purposes, although it should be noted that the topic is very complex in English law.[330]

Where a party to a contract with a minor assigns his rights under that contract, the rights are subject to minority and thus unenforceable as against the minor. Although there is no authority on this particular case, it follows from the general rule that defences to which a right is subject are not defeated by its assignment because *nemo dat quod non habet*.[331]

Assignments certainly require the assignor's intention to assign the right. In that regard, as could be seen in the context of delivery, it can be asked whether minors are able to form this intention. The assignment by a minor of his (copy-)right was held valid in *Chaplin v Leslie Frewin (Publishers) Ltd*.[332] In that case, the underage son of famous actor Charles Chaplin essentially sold his (future) copyright in a book which he was about to write and which contained

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[327] Most likely, viz, the case law leaves room for a different analysis even though one would be very hard-pressed to argue in support of this requirement, cf L-C Wolff, 'Assignment Agreements under English Law: Lost between Contract and Property Law?' (2005) JBL 473, 477 ff.

[328] *Gorringe v Irwell India Rubber and Gutta Percha Works* (1886) 34 ChD 128.

[329] Except if they fall within the scope of s 53(1)(c) of the Law of Property Act 1925; see further Wolff, 'Assignment' (fn 327) 475; Bridge, *Personal Property* (fn 20) [22-033].

[330] Equitable assignments are sometimes conceptually not even regarded as transfers, whereas they should, but this point is of no further relevance in the present context, cf the discussion in G Tolhurst, *The Assignment of Contractual Rights* (2nd ed Hart, Oxford 2016) [3.11].

[331] Bridge, *Personal Property* (fn 20) [23-015 ff].

[332] *Chaplin* (fn 21).

(alleged) scandalous details about the boy's upbringing in exchange for royalties and a substantial upfront payment, as he was in urgent need for money. Later, he regretted writing the book and tried to stop the publishers from proceeding with its publication.[333] The judges treated the assignment by the minor as being independent of the underlying contract and held it to be effective irrespective of whether the 'infant revokes [the] contract'.[334] The significance of this statement is, in German parlance, that the transfer and contract are 'abstract' in their validity.[335] As explained in the following chapter, in the context of restitution this 'abstraction' is consistent with the proposition that minority is not an unjust factor.[336] For the present purposes, it suffices to note that assignments of rights by minors are valid.

Whether the intention of the assignee to acquire a right by assignment is necessary, too, is contentious, and assessing whether minority affects the ability to *acquire* rights by assignment does not shed further light on this question. There is no case law stating that minors can be assigned rights under section 136 of the Law of Property Act 1925 or by means of an equitable assignment of legal rights, whether or without their consent, but there is also no case to the contrary. Still, it is submitted that assignments to minors both at law and in equity should generally be effective. This is in line with what can be seen in the context of delivery, deed

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[333] The dispute was subsequently settled by the parties and the young Chaplin withdrew his appeal to the House of Lords, cf *The Times* of February 16, 1966, p 15.

[334] *Chaplin* (fn 21) 94 per Danckwerts LJ; Winn LJ, *ibid* p 96, supports that view, whereas Denning LJ at p 89 dissents; following Denning LJ's minority opinion is the obiter dictum by Lord Hope of Craighead, *Fisher v Brooker* [2009] UKHL 41, 1 WLR 1764 [27].

[335] As regards the principles of separation and abstraction see already section 1)a) of this chapter.

[336] See chapter IV, section 2)b)3.a.

and (probably) sales. It would be odd if a gift of a chattel could be made to minors even by deed or (constructive) delivery, but rights to money in a bank account could not be assigned to them.[337] As with gifts by delivery or deed, the assignee should have a right to reject them.

c) Trusts and Minority

Under a trust, the trustee holds the legal (ownership of) rights for the benefit of the beneficiary.[338] The beneficiary thereby acquires an equitable right.[339] Having an equitable right to a movable means to have a right against the title to the movable to the effect that the 'legal owner', ie, the person who has that title, is limited in dealing with it and, most importantly, must use the title or its proceeds for the benefit of the person having the equitable right.

Trusts are relevant in the context of minority because they have much been in use for settling the line according to which family property would be inherited and for avoiding inheritance tax. Unfortunately, the complexities in the context of trusts and 'minority' make an appropriate analysis of this topic impossible in this thesis. It can be stated, however, that trusts for the benefit of minors are common, whereas a beneficiary underage can neither authorise a breach of trust[340] nor

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[337] See also *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452.

[338] We will not be concerned with trusts for charitable purposes; for a good overview see W Swadling, 'Property: General Principles' in A Burrows (ed), *English Private Law* (3rd ed OUP, Oxford 2013) [4.140 ff].

[339] Which can also be referred to as 'persistent right', McFarlane, *Property Law* (fn 20) 23.

[340] *Adye v Feuilleteau* (1783) 3 Swanst 90, 36 ER 784, 785; *Wilkinson v Parry* (1828) 4 Russell 272, 38 ER 808; GW Knowles (ed), *A Treatise on the Law and Practice Relating to Infants by Archibald H Simpson* (4th ed Sweet & Maxwell, London 1926) 223.

terminate a trust.[341] But whether a minor can declare a trust is unclear, and the case law reported in this respect is concerned with so-called 'marriage settlements',[342] which are no longer practically relevant and involve further complexities.[343]

d) Very Young Children

So far, the 'general rule' for minors under English law appears to be that they can acquire and transfer rights voluntarily. However, as in the context of the ability of minors to incur contractual liability in the previous chapter,[344] the question arises whether there should be any limitations to the ability of very young children to participate in transfers of rights.

It is not entirely clear whether very young children can form the intention to transfer their title to a chattel by delivery or sale. It is only clear that even very young children can form the *animus possidendi* necessary to possess.[345] This does not necessarily mean that they are able to dispose of their title to a movable. *Fox* argues that, from a policy point of view, it seems probable that they cannot.[346]

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[341] In contrast to adult beneficiaries, *Saunders v Vautier* (1841) 4 Beav 115, 49 ER 282, affirmed on appeal, (1841) Cr & Ph 240, 41 ER 482.

[342] *Duncan v Dixon* (fn 94); *Edwards v Silber* [1892] 2 Ch 278, affirmed by *Edwards v Carter* [1893] AC 360; *In Re Hodson* [1894] 2 Ch 421; *Smith v Lucas* (1881) 18 ChD 531; *Greenhill v North British and Mercantile Insurance Company* [1893] 3 Ch 474; L Tucker et al (gen eds), *Lewin on Trusts* (20th ed Sweet & Maxwell, London 2020) [2-005], fn 17.

[343] See chapter II, section 2)b)4.

[344] See chapter II, section 2)a)4.

[345] Although that might be doubtful in respect of toddlers, there is no case law to the contrary.

[346] As argued by Fox, *Money* (fn 304) [4.52].

With regard to transfers of rights in land, Parker J in *Johnston v Clark*[347] observed that 'an infant of two years could not have the discretion or judgment necessary, according to the principles of our common law, for any voluntary alienation of property.' A similar proposition can be found in the literature in respect of minors' ability to settle property on trust.[348] This reminds one of the arguments put forward by Lord Denning MR in *Mills v IRC*[349] with regard to the ability of very young children to enter into contractual relations.[350] His Lordship applied the *non est factum* doctrine analogously in a case where a young child did not have sufficient understanding of a complex transaction intended to avoid taxes. Potentially, the same route could be taken in respect of transfers of rights. Again, the crucial point would be to extend the application of the doctrine of *non est factum* to transactions not made in the form of a deed. On this basis, minors could generally plead that a transfer of right in which they participated 'is not their deed' because they lacked any understanding of the transaction. The exact requirements of that doctrine, generally and in the context of minority, are kept rather vague but flexible by judges. No exact age limit can be established on this basis, but each case has to be assessed based on the individual abilities of the child in question and the complexity of the transaction. The doctrine would only apply to an individual transaction and not to *transactions* by that child, generally.

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[347] [1908] 1 Ch 303, 312.

[348] AJ Oakley, *Parker and Mellows: The Modern Law of Trusts* (9th ed Sweet & Maxwell, London, 2008) [4-004].

[349] [1973] Ch 225.

[350] See above in chapter II, section 2)a)4.

3) Comparative Analysis

With the analysis of minors' ability to contract in chapter II and the analysis of their ability to transfer and acquire rights in this chapter, we have gained a good understanding of how minors under English and German law can voluntarily determine their legal relationships to other persons and objects. It can now be seen how the two doctrinally different areas—the law of contract and the law of property—are aligned to protect minors from improvident transactions. Furthermore, on the basis of this insight, the true policies which underlie minority both in Germany and England can be identified. Finally, a closer look is taken at the concept of the 'status of minority', how it is conceptualised in both jurisdictions, and where differences between the German and English concepts might emanate from.

a) Coherence of 'Minority' in Contract and Property

From a functional perspective, the law needs to allow allocations of rights to or from minors where necessary for them to participate in social life. On the other hand, dispositions of rights must be barred where they would circumvent the protection afforded to minors by their contractual (in-)capacity. Otherwise, minors could simply 'ignore' their inability to be bound by contracts. From a doctrinal perspective, this entails that the complex set of rules governing the validity of minors' transfers of rights should be coherent with that governing their ability to enter into a contract.

In German law, minors below the age of seven years cannot effect any legal act at all. Consequently, the validity of (attempted) contracts and subsequent

transfers by or to minors lacking any contractual capacity is coherent in that they are always void, despite the fact that obligatory and dispository transactions are treated as strictly separate and abstract in their validity according to the principles of separation and abstraction. As regards minors aged seven years or older, transfers of rights *by* them are only valid if authorised by their parents. In practice, authorisation of, for example, the purchase of a bicycle encompasses all necessary agreements, ie, obligatory and dispository agreements. In such a case, authorisation renders the transaction valid as a whole. This is also the case where the bicycle is paid for with pocket money under § 110 BGB. Upon payment by the minor, the underlying contract is retrospectively validated. In this respect, the validity of transfers of rights and that of the underlying contract are coherent. German law can show frictions in respect of transfers of rights *to* minors who are aged seven years or older. Such transfers (apart from immovables) are usually valid under § 107 BGB without parental authorisation because they are 'legally solely beneficial'.[351] Here, the principles of separation and abstraction come into play: the fact that the underlying contract is (provisionally) invalid is irrelevant for the validity of the transfer to the minor, and the adult party loses ownership of his right.[352] Another instance of such 'incoherence' between obligation and transfer is seen when, according to the predominant view, a performance to a minor pursuant to a valid contract is not authorised by his parents and therefore denied its 'performative effect'.[353] Without having reached its purpose of fulfilling the

[351] Which is the case in respect of certain transfers of land, see section 1)c) of this chapter.

[352] 'Provisionally' invalid because the parents can still ratify the contract, see already chapter II, section 1)a)5.

[353] See section 1)c) of this chapter.

contractual obligation, the transfer lacks its so-called 'legal basis'. In both instances, to recover his rights or their value, the adult party has to bring a claim for restitution of unjustified enrichment, as explained in chapter IV. In this context, it has been said that the law of unjustified enrichment has to 'heal the wounds' that the principles of separation and abstraction cause.[354]

In English law, contracts by minors are generally valid but unenforceable as against them. In line with this, transfers by or to minors are generally valid[355] and thus contracts can be performed. Of course, there are situations in which an allocation of rights is deemed 'unjust' and it has to be reversed—but, as explained in the following chapter, the position of minors in this context is not considerably different from that of adults. This shows that, as regards the validity of minors' contracts and their performance, English law is coherent. This is despite the fact that the transfer of a right has been held to be independent of the validity of the underlying contract or, in the words of Danckwerts LJ in *Chaplin*, transfers of property made by the plaintiff remain effective against him, even if the contract is otherwise revocable'.[356] As mentioned before, this statement could, in German terminology, be taken as meaning that the transfer is 'abstract' from the validity of the contract. However, this depends on the meaning here given to 'revocable'.[357] If it did mean 'voidable' or 'rescindable', to the effect that it avoids the contract

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[354] O Jauernig, 'Trennungsprinzip und Abstraktionsprinzip' [1994] JuS 721, 722 fn 12 quoting Heinrich Dernburg.

[355] There remains some uncertainty as regards transfers by sale alone (*solo consensu*) and by deed, cf sections 2)a)3. and 4. of this chapter.

[356] *Chaplin* (fn 21) 94.

[357] That care must be taken in respect of the precise meaning of such legal terminology in English law has been shown in the introduction, chapter I, section 6).

ab initio, whereas the transfer remains valid, there would in fact be 'abstraction' between the contract and transfer and an element of 'incoherence'. But the effect of minority is only to render the minor's promise unenforceable, whereas the contract is otherwise valid. If a minor also had the right to rescind or avoid his contract, minority would function as a so-called 'unjust factor' for the purpose of restitution of unjust enrichment, which is, as seen in the following chapter, not the case.[358] In line with this, the majority of the judges in *Chaplin* held that the minor could merely refuse to perform his obligation under the contract rather than invalidate the transfer retrospectively.[359] In summary, while it cannot be stated with certainty whether transfers of rights under English law are *always* abstract from the validity of the underlying contract, it can be seen that both are, in any case, coherent in their validity and the law of restitution does not have to 'heal' any conceptual wounds.

b) The Policies Underlying Minority

In chapter II, the policy underlying the protection of minors from incurring *liability* in a transactional context was analysed.[360] We have seen that English law focuses on limiting the extent to which minors can incur liability by making promises, whereas German law confers the control over minors' transactions on their parents. Now, we have also seen how minors can dispose of or acquire

[358] See chapter IV, section 2)b)3.a.

[359] Lord Denning MR disagreed, cf *Chaplin* (fn 21) 89.

[360] See chapter II, section 3)a).

rights, and the wider policies that English and German law follow under the head of 'minority' can be analysed.

1. Protection against Dispositions of Property?

With regard to English law, this chapter has shown that, although minors are protected from the enforcement of their promises by the other party, they can validly transfer and acquire rights, whether as a gift or for the purpose of performing a contractual duty. In that light, the general policy in England is that minors are *only* protected from making promises and, thereby, incurring liability, but they can spend what they 'have in their hands' as they please—and even assign intangibles. English law does not immediately try to protect minors from squandering their money or even allow parents to give (legally binding) directions on how funds should be applied. A minor might lose everything he has by spending it improvidently—but not more than that. In some cases, a minor can even dispose of future property.[361] A child's spending can be controlled by parents primarily by not giving it any money or only the amount of pocket money which they think fit to be spent by the child.

As regards sales of goods, the case law does not permit concluding that minors can transfer their title to goods by a sale alone, ie, *solo consensu*.[362] In light of the policy that is at the basis of minority in English law as identified here, and keeping in mind that minors can assign rights without more, which makes

[361] In *Chaplin* (fn 21) the copyright in a *future* book was assigned; see also section 2)b) of this chapter.

[362] See in this chapter section 2)a)3., especially at fn 319.

transferring rights even easier than agreeing on a sale to another person, it is probable that transfers by minors by a sale alone are valid, too.

There is one potential caveat to this proposition. Transfers of rights are arguably invalid if, through them, a minor risks his own welfare or that of his family, especially as regards the assignment of future rights. While there appears to be no general prohibition on the assignment of one's entire estate, if the (future) right intended to be assigned is the sole source of income of a family, its assignment is void.[363] This should apply *a fortiori* if the assignment is made by a minor: as just explained, the policy of English law is to allow minors' transfers of rights but to protect them from the enforcement of their promises. Transfers of *future* income can functionally be regarded as akin to making a promise and must therefore be treated with caution. Following this, where a minor assigns future property to the extent that his position in life with regard to living expenses or education would be considerably compromised, the assignment should be void due to a conflict with public policy.[364] However, *Chaplin* shows that this limitation need not be too strict where a minor strikes an acceptable bargain, as the copyright in the future work was Chaplin's major asset. Furthermore, there is no authority in support of the proposition that minors' dispositions of *current* property are similarly limited. Rather, such a proposition would run counter to the general policy which underlies minority in English law as just identified.

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[363] *Horwood v Millar's Timber and Trading Company, Ltd* [1917] 1 KB 305; *King v Michael Faraday and Partners, Ltd* [1939] 2 KB 753.

[364] Note that social benefits cannot be assigned, anyway, cf ss 122, 187(1) of the Social Security Administration Act 1992.

German law is entirely entangled with the idea that minors' ability to form a legally valid intention is either completely absent or of such insufficient quality that it requires the support of parental authorisation.[365] With the exception of gifts to them, minors can generally not make any change to their legal relationships 'on their own', ie, without some participation of their parents. The practically most relevant provision is § 110 BGB, allowing for pocket money to be made available by parents. The effect of a minor's disposition of pocket money is that the underlying, provisionally void contract is validated once the minor's obligation is fully performed. Parents can determine exactly how much pocket money their child has. Even if a child has hundreds of Euros in cash in its hands, the parents could (legally, not necessarily practically) limit their child's spending to EUR10 per week. They can also limit the exact purposes for which the money can be used. This shows a strong emphasis on parents' ability to influence their child's upbringing and education in the context of its spending behaviour.[366] Even where parents have not given any directions as to how pocket money must be spent, courts can strike down transactions which are opposed to parents' (hypothetical) 'general views'. Minors' own intentions are not given great effect, whereas control over their transactions is conferred on their parents (nearly) completely. The latter, on the other hand, have wide-ranging powers and discretion both over

[365] See already chapter II, section 3)c).

[366] Spickhoff in: *Münchener Kommentar* (fn 214) § 104 [8 f].

the liability and property of their children. That a minor might, thereby, lose property or incur liability is only a secondary concern for German law.[367]

Both in England and Germany, parents' control over their child's spending does not only depend on legal provisions but on their actual influence on their child's behaviour. On this basis, one might argue that the exact provisions and legal niceties are of limited relevance in reality, and that *factual* control is what really matters. However, there are cases where the exact legal provisions did make a difference. In one German case, a young boy bought a so-called 'softair' toy gun with pocket money given to him by his parents. His parents found the gun and ordered their child to return it, asking the seller for the money back. The seller was compelled to return the purchase price in exchange for the return of the gun. The court held, conforming with the prevailing view, that even if the parents had given their child the money at its 'free' disposal, the scope of permissible transactions is limited by their general intentions.[368] By contrast, under English law the seller could have relied on the validity of the purchase. In the famous *Lotterielosfall* ('lottery-ticket case') decided by the *Reichsgericht* in 1910, a 17-year-old minor had bought a lottery ticket with his weekly pocket money of M3.00.[369] He was lucky and won a substantial sum with which he decided to buy a sports car for M3,200. While the purchase of the lottery ticket was effective under § 110 BGB, the court held that the prize money did not qualify as pocket

[367] The relationship between parents and their children, including limitations on parents' power over their children's liability and property rights, is discussed in chapter V, section 1)a).

[368] See the case of AG Freiburg, [1999] NJW-RR 637 and the explanations in section 1)d) of this chapter.

[369] RGZ 74, 234 (1910).

money under the provision. It was not within the scope of what the father had given to his child as pocket money. The reasoning of the court also relied on the fact that the father was not wealthy, that the child still went to school, and the view that motorsport is dangerous, expensive and morally questionable. The case report is short, but the seller would have to return the purchase price and the child the car, subject to the defence of disenrichment.[370] Under English law, the minor could have purchased the car without more, as he had the cash in his hands and would have been able to perform the transaction immediately. Furthermore, as explained in the following chapter, restitution (of unjust enrichment) is not due merely on the basis of minority.[371]

2. Third Parties' Interests

With regard to the interests of sellers of toy guns, sports cars and any other item, it can be noted that English law allows third parties to rely on the validity of executed transactions with minors. Transfers of rights, whether pursuant to a contract or as a gift, are valid both by and to minors. Only where deals are made on credit and reliance is placed on the promise of a minor, the adult party enters muddy waters. As the parents' approval of a transaction cannot make the promise binding on their child, the adult party has to rely on one of the 'exceptions' to the general rule for the minor to be bound to pay a 'reasonable price' for necessary goods or services or to honour a contract of service that is 'on the whole beneficial'. The ambit of the relevant rules is not entirely clear, and many of the

[370] See in respect of this defence chapter IV, section 1)d).

[371] See chapter IV, section 2)b)3.a.

pertinent precedents are outdated.[372] However, typical situations such as an apprenticeship are certainly covered if they are in line with what is usual in the profession. Apart from that, adults dealing with minors simply have to rely on advance payment by the minor to be on the safe side. Whether the adult party has (constructive) knowledge of the other person's minority or is entirely ignorant of it does not have any effect on the validity or enforceability of the transaction.[373]

Under German law, adults must be much more cautious. Whether a contract or a disposition of a right is authorised by the parents is rarely evident and, akin to the English position, good faith in the other party's majority or in parents' consent is not protected. It should also be remembered that the adult party is even *provisionally* bound by an unauthorised contract with a minor, and seeking certainty in this respect is not straightforward under §§ 108 f BGB.[374] Even where a contract is authorised and the adult proceeds to perform his obligation, the 'performative effect' of his transfer to the minor requires further authorisation by the parents.[375] For better protection of the interests of third parties, the transaction as a whole should generally be assumed to have been authorised by the parents. A further issue in this context is that, according to the predominant view, parents can never make pocket money available to their child at its (entirely) 'free' disposal. As just seen in relation to the purchase of a toy gun, this can be especially dangerous for third parties. In that case, the seller did not even get his entire goods

[372] See already chapter II, section 2)b).

[373] In contrast to the position of mentally ill persons, where knowledge of the mental weakness and lack of understanding is required on the part of the third party, cf chapter II, section 3)b).

[374] See chapter II, section 1)a)5.

[375] According to the predominant but not uncontested view, cf section 1)c) of this chapter.

back, as the minor had already used up ammunition and could plead disenrichment.[376] The predominant view followed by courts and the literature in respect of the construction of § 110 BGB seems too problematic to be supported, and the pragmatic English position is a further argument against it. According to the opposing view, parents can provide their child with funds at its entirely free use.[377] On this basis, where parents leave their seventeen-year-old girl's salary at her free disposal and she uses the money to pay for a tattoo without the parents' knowledge, the underlying contract is valid according to § 110 BGB since the girl paid with pocket money.[378] The construction of the term '*free* disposal' as being subject to parents' (hypothetical) 'general consent' contradicts the wording of § 110 BGB.[379] The provision begins with the words: 'A contract made by the minor *without* authorisation by the [parents] (…)' (emphasis added). Also, this 'general consent' would have to be of a very special kind: not sufficient to effect parental consent under § 107 BGB (as § 110 BGB would then be superfluous) but still providing a basis to limit § 110 BGB.[380] If there are any discernible restrictions on the use of pocket money, it should be assumed that it was only left to the child for a certain purpose rather than at its *free* disposal. If, on the other hand, funds are left to a child at its free disposal, the child should be allowed to dispose of the funds freely. The rules governing illegality under §§ 134, 138 BGB

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[376] Pleading disenrichment can defeat a claim for restitution of unjustified enrichment and is usually available to underage defendants, see chapter IV, section 1)d) and 3)c).

[377] G Piras and H Stieglmeier, '§ 110 BGB im Zeichen der Zeit' [2014] JA 893, 894 at fn 12; D Leenen, 'Die Heilung fehlender Zustimmung gemäß § 110 BGB' [2000] FamRZ 863.

[378] As held by AG München, [2012] NJW 2452.

[379] AG München, [2012] NJW 2452; Leenen, 'Heilung' (fn 377) 865 f.

[380] Leenen, 'Heilung' (fn 377) 869 at fn 61.

still apply in conjunction with youth protection laws.[381] After all, an important objective of § 110 BGB is to give minors the opportunity to learn how to deal with money.[382] This learning process requires the freedom to make mistakes. Also, third parties such as sellers should, as much as feasible, be able to trust in the validity of a transaction immediately fully executed. The onus of proving that funds used by a minor to fulfil an assumed contractual duty were 'pocket money' already lies on the adult party.[383] For these reasons, there should be no inherent restriction on the validating effect of § 110 BGB according to parents' hypothetical 'general will'.[384] For a third party, discerning whether the money with which a minor pays represents pocket money under § 110 BGB is practically impossible, and the situation only becomes worse if parents' hypothetical intentions must be observed.[385] English law allows adults to rely on the validity of executed transactions and is clear about the far-reaching unenforceability of transactions on credit. In other words, minors can participate in social life by entering into transactions whenever they are able to pay immediately, and an adult can trust in the finality of the bargain. The pragmatic approach taken by English law does not only offer minors more autonomy, it also allows third parties to rely

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[381] According to § 134 BGB, 'a legal act which violates a statutory prohibition is void unless provided otherwise by law'; according to § 138 BGB, 'a legal act which violates public policy is void'.

[382] Klumpp in: *Staudinger* (fn 32) § 110 [2].

[383] Klumpp in: *Staudinger* (fn 32) § 110 [31].

[384] Approving of the result: Piras/Stieglmeier, '§ 110 BGB' (fn 377); I Czeguhn, *Geschäftsfähigkeit – beschränkte Geschäftsfähigkeit – Geschäftsunfähigkeit* (Erich Schmidt, Berlin 2003) 67.

[385] Generally agreeing is Keitel, *Minderjährige* (fn 235) 163, who speaks of the 'relativity of the protection of minors'; contra: D Rodi, *Die Rechtsnatur des § 110 BGB* (Mohr Siebeck, Tübingen, 2020) 93 f, who objects and states that the protection of minors has 'absolute priority' over the protection of third parties.

on transactions with minors. Under German law, the fact that a minor has cash in his hands does not mean he can validly spend it; furthermore, if an adult mistakenly believes in the parents' authorisation and performs to the minor party, the latter can raise the defence of disenrichment rather liberally, as explained in the next chapter. In that light, it seems preferable to treat money that is at the disposal of minors, at least with the knowledge of the parents, as pocket money under § 110 BGB and, absent more specific directions by the parents, to assume that the child is allowed to dispose of the funds freely.[386] The result would be closer to the English position but still leave room for holding transactions void if they obviously conflict with the child's interests and the parents' intentions, such as in the *Lotterielosfall* discussed in the previous subsection.

3. No Uniform Policies Underlying Contractual Incapacity

In chapter II, it could already be seen that there are further 'classes' of persons who are limited in their capacity to participate in transactions. As explained, German law has adopted a (mostly) uniform legal concept of 'contractual capacity' for the protection of different 'classes' of persons, namely persons who are underage, unconscious, intoxicated, or suffer from a mental illness or cognitive disability.[387] The incapacity of unconscious and intoxicated persons follows the view that they are currently unable to form a valid legal intention which would deserve recognition by the law. However, their status is only

[386] If the third party can proof that funds given to a minor by his parents, there is a rebuttable presumption that the child received the funds 'at its free disposal' under § 110 BGB, cf Klumpp in: *Staudinger* (fn 32) § 110 [31].

[387] See section 3)b) of chapter II.

temporary. No further provisions are needed. In contrast, the incapacity of minors and persons suffering a mental illness or cognitive disability is present for a long period of time. Simply invalidating all their legal acts is not feasible. As regards minors, the policy of shifting the control over a child's transactions to its parents reflects the normal parent-child relationship. But mentally incapable adults might not have parents anymore or it could be inappropriate to subject them to parental powers. This function is instead exercised by legal guardians.[388] However, given the fact that mentally incapable adults might well have the ability to make some decisions for themselves, depending on their individual degree of mental weakness, it seems strange that the starting point of the BGB is to treat mentally incapable persons *conceptually* like minors below the age of seven years.[389] It is unlikely that precisely the same *policies* should be followed in respect of both 'classes' of persons. As shown before, this discrepancy led to strong criticism in the literature, dubbing the incapacity of mentally incapable persons 'unconstitutional'.[390] The assumption that minors below the age of seven years and mentally incapable persons are generally unable to form a sound intention has been referred to as 'wholly doctrinal' and 'quixotic'.[391] In response to some of the criticism, the German legislator introduced § 105a BGB. The provision validates 'bargains of everyday life' entered into by mentally incapable persons if their obligation is fully performed. The parliamentary reasoning explicitly referred to the 'Anglo-American concept of necessaries', which shows an insufficient

[388] See already the explanations in chapter II, section 3)b).

[389] 'Initially' the same because there are specific rules applying to mentally ill persons only.

[390] See chapter II, section 3)b).

[391] Canaris, 'Übermaßverbot' (fn 210) 997 at fn 39.

understanding of that concept.[392] A limited degree of autonomy with regard to small-scale transactions is thereby afforded to mentally incapable persons, and the discrepancy between the *conceptual approach* and the underlying *policy* is mitigated. The position of minors, whether *Geschäftsunfähig* or only limited in their contractual capacity, is not generally regarded as in need of immediate reform.[393]

English law generally allows both minors and mentally incapable persons to enter into and fulfil contracts; the position of intoxicated persons is probably similar to that of mentally incapable persons.[394] However, mental incapacity does not protect a person from liability unless, due to his mental weakness, he had no sufficient capacity to understand the transaction and the other party was aware of that fact.[395] On the other hand, where this is the case, a mentally incapable person is not only protected from liability but can also avoid an executed transaction *ab initio*. In contrast to this, minority per se does not allow the reversal of an executed transaction, no matter whether the other party knew of the minority or whether the transfer was gratuitous.[396] On the whole, English law employs considerably different *concepts* for governing the contractual capacity of minors and persons who suffer from a mental illness, cognitive disability or who are intoxicated. In accordance with this, it seems that judges have followed very

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[392] *BT-Drucksache* 14/9266 p 43.

[393] Canaris argued in that direction, cf Canaris, 'Übermaßverbot' (fn 210) 996 f, but that view cannot be found in the literature anymore.

[394] See chapter II, section 3)b), fn 224.

[395] *Fehily v Atkinson* (fn 225).

[396] See chapter IV, section 2)b)3.a.

distinct *policies* in respect of them, although there are no perfectly conclusive statements in the case law to that effect. In respect of minors, judges have focused on protecting them from liability. In particular in older cases, the typical minor being sued is the son of a wealthy family, and only in such a case would it be sensible to sue at all.[397] One might wonder why it is not the less wealthy minors whom judges have been trying to protect. A possible reason is that the costs caused by legal proceedings were high, and it was worth suing only in respect of higher sums. Furthermore, voluntarily incurring liability requires creditworthiness which is, in that sense, a privilege of the wealthy but not the poor. By contrast, the remedy being available to mentally incapable persons is more akin to the equitable doctrine of unconscionable bargains, as can be seen in the following chapter.[398] This doctrine has its roots in the protection of the 'poor and ignorant' and, although extended to cases where the protected party is not at a social disadvantage, requires the transaction to be tainted by an element of unconscionability.[399] For the present purpose, it is sufficient to understand that, in respect of the contractual incapacity of different 'classes' of persons, there is no discrepancy in English law between the conceptual approach of 'capacity' and the underlying policy considerations.

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[397] Cf the well-known case of *Nash v Inman* (fn 125); *Peters v Fleming* (fn 123); *Ive v Chester* (fn 124).

[398] See chapter IV, section 3)b).

[399] *Fry v Lane* (1888) 40 ChD 312.

c) Gifts to Minors

Under German law, minors can make a declaration of intention without parental authorisation if it is 'legally solely beneficial' for them, § 107 BGB. Thereby, they can enter into a contract of gift as well as acquire ownership of a gift in performance of such a contract.[400] As mentioned before, the receipt of rights to land can be disadvantageous and, in such a case, the gift nevertheless requires parental authorisation.[401] The conceptual reason is that a 'real agreement'—a contract in the wider, German understanding—is required for any voluntary transfer of rights, and it is governed by similar provisions as 'obligatory transactions' are.

Under English law, transfers to minors are generally valid, including gifts. The fact that there is no limitation on minors' receipt of potentially onerous property has been criticised in the literature.[402] One possible reason for the absence of such a limitation could be the fact that transfers of rights in English law do not necessarily require the transferee's express 'acceptance' of the transfer to him. If that were true, the recipient of a gift only has a right to reject it within a reasonable time after becoming aware of it.[403] By contrast, if the transferee's intention is a prerequisite to transfers in the sense of an 'acceptance', the question

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[400] Without notarisation, a contract of gift is only fully valid once executed, viz, with making the gift to the minor both the obligatory and the dispository transaction become valid at the same time, cf § 518 BGB.

[401] See section 1)c) of this chapter.

[402] Wolff, 'Assignment' (fn 327) 491 ff.

[403] This does not only apply to gifts, however, where the transferee gives good consideration for a transfer, it is rarely evident (or relevant) whether the transfer was accepted or merely not rejected.

of whether it is vitiated by minority or another 'vitiating factor' is much more pressing. In fact, and sometimes precisely for the reason of protecting the recipient, it has been argued in the literature that transfers of rights under English law, too, require a 'real agreement'.[404]

Whether this view is correct cannot definitely be decided here but should briefly be discussed in the context of 'minority'. One reason put forward in support of this view is that, although it is recognised that an express acceptance is not required, the absence of the rejection of a gratuitous transfer would, with time, amount to some kind of acceptance.[405] Even if that were correct, it is difficult to see which consequences one could infer from labelling the lack of rejection 'acceptance'. Another argument, concerned with the delivery of movables, holds that the *animus possidendi*, the intention to take possession of a movable a title to which is delivered and which certainly is a requirement on the part of the recipient of a delivery, amounts to an acceptance and thus a 'real agreement'.[406] But it appears that, for lending support to this argument, the term '*animus possidendi*' is

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[404] L van Vliet, *Transfer of Movables in German, French, English and Dutch law* (Ars Aequi Libri, Nijmegen 2000) 121; B Häcker, 'Das Trennungs- und Abstraktionsprinzip im englischen Recht – dargestellt anhand der Übereignung' [2011] ZEuP 335, 341; Zogg, *Effects* (fn 315) 26 f. Contra: Fox, *Money* (fn 304) [3.75], who states that only the *animus possidendi* needs to be present.

[405] Zogg, *Effects* (fn 315) 26 f.

[406] But see in contrast to this *London and County Banking Co Ltd v The London and River Plate Bank Ltd* (1888) 21 QBD 535, 541 f, where a transfer by delivery took effect without the knowledge of the transferee, who supposedly had constructive possession of anything in his vault.

conceptually and linguistically 'blended' with an (assumed) intention to acquire the title.[407]

What is clear is that minors *can* acquire property: either there is, depending on the mode of transfer, no 'real agreement' or they have the ability to enter into it. How dangerous is it, then, that English minors can be gifted property without more? Much of the discussion in German law in this context is concerned with ownership of land. Minors under English law are barred from holding a legal estate in land according to section 1(6) of the Law of Property Act 1925. Being the beneficiary of land held on trust is not burdensome. In respect of movables, it is difficult to see how obtaining (the best) title to them could entail disadvantages.[408] The possession of certain things such as weapons or cars is both dangerous and legally burdensome, but that does not depend on whether the possessor has (the best) title to them. Choses in action assigned to a minor do not entail considerable disadvantages either.[409] Potentially, calls on shares which are not fully paid up can make their holder liable,[410] but these are nowadays rare. After all, it does not come as a surprise that no case can be found where an infant donee exercised his right to reject a gift under English law. Such a right is necessary to prevent a right from being 'forced' onto another person if express

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[407] That the *animus possidendi* cannot be exactly the same as the intention to acquire *the* title of the other party becomes clear when looking at hires; J Hill, 'The Role of the Donee's Consent in the Law of Gift' (2001) 117 LQR 127, 130 after fn 10 refers to the *animus possidendi* as a 'mental element' and proceeds on that route by speaking of a 'bilateral act', reaching the conclusion that there is an agreement; Hill has to express several caveats to his thesis at *ibid* 130 f.

[408] Zogg, *Effects* (fn 315) 26.

[409] Wolff, 'Assignment' (fn 327) 491 points out that assignments of rights can have accounting and taxation implications for the assignee.

[410] Such as in *Steinberg* (fn 337), but it is no longer usual for shares not being fully paid up to be traded.

acceptance is not a prerequisite for perfecting a gift. It has been seen in chapter II that minors can ratify their contracts upon reaching majority and within a reasonable time thereafter.[411] Following that, minors should be able to reject gifts made to them within a similar period of time. Other than that, gifts of movables or intangibles need neither be restrained by reasons of law nor policy.

d) The 'Status' of Minority

German law has been referred to as establishing a special 'status' of minority.[412] Certainly, every jurisdiction which sets some age limit could be said to do so. What is significant in respect of the German 'status principle' is that contractual incapacity applies to all transactions of minors, irrespective of their advantageousness in economic or other terms, but only draws on legal aspects. Legal certainty is valued more than a nuanced, individualised approach. German law establishes this status by drawing on the validity of a person's legal acts, affecting any changes which a person could voluntarily make to his legal relationships with other persons.[413] The one exception which allows minors to act entirely without parental control—'legally solely beneficial' declarations of intention under § 107 BGB—depends only on the *legal* consequences of a transaction. Any economic aspects are ignored and, even more so, any aspects in the person of the individual minor. Other than that, the validity of minors' transactions depends solely on their parents' approval. And, based on minors'

[411] See section 2)a)2. of that chapter.

[412] Flume (fn 33) 183.

[413] Technically, even marriage contracts or las wills are legal acts and would be affected by §§ 104 ff BGB, but there are more specific provisions in §§ 1303 f, 2229 (1) BGB.

limited 'delictual capacity' (*Deliktsfähigkeit*) and limited ability to act with legal effect at all (*Handlungsfähigkeit*),[414] their delictual liability is limited, too, rendering the status that minority entails for a person encompassing.

English law shows some traits of a 'status principle', too, although there is only one age limit. Promises of minors are strictly unenforceable, whether directly or indirectly. Similar to German law, economic or individual circumstances are ignored in this respect. However, and this is an important difference to German law, the 'exceptions' to this general rule allow minors to contract liability for the supply of necessaries or under service contracts that are 'on the whole beneficial'. Thereby, a minor's standard of living, supply with goods or services, or professional prospects are taken into account. On a similar note, the *non est factum* defence can—if the proposal made in this thesis is followed—allow the avoidance of a transaction depending on the individual understanding of a very young child.[415] The protection from the enforcement of promises extends to the areas of tort and, as explained in the next chapter, restitution of unjust enrichment. In that light, English law establishes a 'status of minority', too. But the English 'status' is conceptually different in that it, first, does not plainly reject taking economic or individual aspects into account and, second, solely draws on the enforcement of minors' promises, whereas their 'legal intentions' are otherwise not vitiated.

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[414] See the explanations in chapter II, section 3)c).

[415] See chapter II, section 2)a)4. and in this chapter section 2)d).

One might wonder why the German legislator deemed it necessary to design the 'status' of minority so strictly as even to bar a six-year-old from accepting a gift of sweets or a toy. An important reason is conceptual and linked to the ideas of the legal act and the indispensable requirement of sufficient 'intention' to effect one.[416] It has been seen that a contract under German law is any (at least) two-sided legal act and simply requires two corresponding declarations of intention.[417] Contracts in this wide sense can be obligatory, ie, giving rise to obligations, or dispository, ie, giving rise to or changing a right to a thing or another right.[418] The common element is the declaration of intention (*Willenserklärung*) as the act of a person by which his legal relationships are affected *voluntarily* rather than by statute. Thereby, *contractual* incapacity affects the ability to do anything that requires a legal act, including transfers of rights. Persons lacking contractual capacity, such as minors below the age of seven years, cannot make any *voluntary* change to their legal relationships to other persons or objects.[419] As explained in chapter II,[420] the reason for denying certain 'classes' of persons such as minors this ability was an assumed lack of willpower and cognitive faculties that is expressed in the legal concept of *Geschäfts(un-)fähigkeit*. That concept, in turn, has been shown to be a special

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[416] Another important reason—which cannot be discussed in this thesis—is the reception of Roman law into German law.

[417] See already the explanations in chapter II, section 1)a)2.

[418] See section 1)a) of this chapter.

[419] Unless it does not require a legal act, such as taking a thing into possession or even acquiring ownership of it by possessing it as an owner for more than ten years, cf § 937 BGB; this also depends on the exact scope of the concept of 'legal acts', which is contentious in detail, cf Schermaier in: *HKK BGB Bd I* (fn 40) [8].

[420] See section 3)c) of that chapter.

instance of the ability to act with legal effect at all, so-called *Handlungsfähigkeit*.[421] In the present chapter, it has become clear how this concept applies not only to contractual agreements but also to 'real agreements'. One corollary is that young children cannot effect any transfer of rights, and children aged seven or older can only do so with some form of approval by their parents, except for the acceptance of (most) gifts. On the basis of the broad concept of *Geschäftsfähigkeit* and the wide notion of contracts and legal acts, it is inevitable that the 'status of minority' in German law not only shields minors from liability but has to invalidate both obligatory and dispository transactions completely unless further requirements are met.

As mentioned in the previous section, it is not clear whether a 'real agreement' is required for transfers of rights under English law, comparable to German law.[422] What we can see in the present context is that English law is not overly concerned with the subjective abilities of persons lacking contractual capacity, both as regards entering into contracts or transferring rights. There is no concept such as *Geschäftsfähigkeit*, underlying both contracts (in the narrow sense) and transfers, or even one such as *Handlungsfähigkeit*, extending to tort. Instead, the concept in the limelight is the promise.

Arguably, one reason for this peculiarity is to be found in the historical development of English contract law. In the early times of the common law, there was no substantial or even formal distinction between tort and contract. What was

[421] Even small children have some *Handlungsfähigkeit* and can, for example, take something into possession, although toddlers might lack this ability altogether, cf Wolf/Neuner (fn 4) 129 f.

[422] See already the preceding section.

available to plaintiffs were different types of actions with individual requirements but no substantial common denominator. The modern contract originates in the action of assumpsit, which, in turn, evolved from the action of trespass on the case in distinction to general trespass as an allegation of a breach of the king's peace.[423] The early practice of the royal courts was to try only the latter actions because only with them was the Crown concerned, whereas private matters would be left to local courts.[424] In the 14th century, the Royal courts began to widen their jurisdiction, and plaintiffs could increasingly turn to them for resolving private matters.[425] Cases of assumpsit grew strongly in number and made a more coherent development necessary of what we now term contract law.[426] The action of assumpsit evolved to be the general remedy for enforcing (alleged) contracts, primarily because the defence of 'wager of law' was not available against it.[427] That fact, in turn, made assumpsit more disadvantageous for defendants, including infants who were sued. Assumpsit was probably first limited in respect of infants in a case from 1614.[428] As suggested by *Simpson*, the reason was that, against an

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[423] Simpson, *History* (fn 315) 199, 202; SFC Milsom, *Historical Foundations of the Common Law* (2nd ed Butterworths, London 1981) 323; Whittaker in: *Chitty* (fn 3) [3-002].

[424] Where limitations to infants' liability were established based on their individual abilities such as counting a certain sum of money, cf Bateson, *Borough Customs* (fn 2) 63 f; the relevant cases cited are from the 13th and 14th centuries.

[425] Milsom, *Historical Foundations* (fn 423) 286 ff; Simpson, *History* (fn 315) 202.

[426] Mere mutual promises became actionable via assumpsit in the 16th century, Milsom, *Historical Foundations* (fn 423) 323, 333.

[427] Wager of law was a method of proof for which the defendant took an oath of a certain fact, which was confirmed by eleven further persons by oath; these persons would regularly be hired and the credibility of what they testified was consequently very doubtful, cf J Baker, *An Introduction to English Legal History* (5th ed OUP, Oxford 2019) 81; AWB Simpson, *A History of the Land Law* (2nd ed OUP, Oxford 1986) 219 f. There are further historic reasons for these developments, cf *ibid* pp 200 ff.

[428] Simpson, *History* (fn 315) 542.

action of assumpsit, infant defendants would lose the benefit of wager of law, in contrast to the action of debt.[429] A crucial development was that, in the mid-seventeenth century, judges began to delimitate actions *ex contractu* and *ex delicto*, differentiating whether an assumed promise would be enforced,[430] as explained in chapter II in relation to minors' tortious liability[431] and can again be seen with regard to claims in unjust enrichment.[432] Only later, many of the procedural distinctions between the individual actions and especially between such in tort and in contract were (formally) removed with the Common Law Procedure Act 1852. Simultaneously, general treatises evolved that referred to and systematised the areas of tort and contract as such.[433] What this short outline shows is that English contract law at its roots focused on the enforcement of individual promises in the form of the action of assumpsit and that limitations to their enforceability would conceptually affect only the individual (alleged) promise rather than an agreement in the sense of a 'meeting of the minds'. This is reflected in the fact that it is only minors' promises which are unenforceable against them, whereas they could always enforce promises made to them. As explained in chapter II,[434] a minor can do so at least if he fulfils his own duties

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[429] Simpson, *History* (fn 315) 542, also showing that, shortly before, cases can be found where assumpsit lay against infants.

[430] Whittaker in: *Chitty* (fn 3) [3-002].

[431] See chapter II, section 2)c).

[432] See chapter IV, section 2)b)4.a.

[433] Earlier works can be found, too, for example, by Bracton, cf GE Woodbine (ed), *Bracton on the Laws and Customs of England, Vol II* (tr by SE Thorne, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, 1968), or W Blackstone, *Commentaries of the Laws of England: Book I, of the Rights of Persons* (Oxford ed by W Prest (gen ed), OUP, Oxford 2016).

[434] See section 2)1. of that chapter.

under the contract. Furthermore, on this basis English law could not—and did not need to—develop a uniform abstract concept such as 'legal acts' in German law, underlying both contracts and transfers of rights, which would have led to the conclusion that minors' contractual incapacity should automatically vitiate their transfers or even acquisitions of rights, too. Also, the comparatively late and partly piecemeal development of English contract law might have prevented the development of a coherent concept of contractual (in-)capacity, both with regard to minors[435] and to different 'classes' of persons overall, such as mentally ill, cognitively disabled, intoxicated, or unconscious persons.[436]

The fact that, in English law, contracts and voluntary transfers are not uniformly based on 'contracts' in a wide (German) sense or that no concept of legal acts is available as a 'hinge' to affect all these agreements at once does not mean that English law could not simply establish a *policy-based* rule stating that minors' contracts and transfers are invalid. But it has not chosen to do so. Two possible reasons can be identified for this. First, without such abstract concepts at hand, a legal system is less likely to make sweeping and wide-ranging decisions, such as the avoidance of all legal acts of numerous 'classes' of persons. Second, even if that decision had appeared viable to them, it seems unlikely that English judges or legislators would have opted for it. In fact, Parliament attempted to impose a wide-ranging exclusion of minors from voluntary transactions with the Infants Relief Act 1874. But its effect, seemingly declaring all contracts of minors (except such for necessaries) 'absolutely void', was mitigated (one might say,

[435] As stated by Holdsworth, *History, Vol III* (fn 262) 518.

[436] As deplored by Samuel, *Obligations* (fn 27) 320.

ignored) by judges and legal scholars to the extent that the Act hardly had any effect at all. There were understandable policy reasons for doing so, especially that otherwise minors would have been deprived of advantageous transactions.

In chapter II, the application of the *non est factum* doctrine for making a very young minor's contract void was discussed, and the present chapter proposes that this defence is also applied to transfers of rights by very young minors.[437] If that proposition were to be accepted and followed strictly, a new class or 'status' of contractual capacity, depending on a minor's (or even any person's) understanding of the subject matter, could evolve under English law. Such a sweeping and wide-ranging approach has been criticised in the context of German law and should not be introduced to English law without more. It could render any attempt by children to enter into a complex transaction void and, thereby, deprive the current law of some of its flexibility. For example, no room would be left to take into account advantages for a minor following a transaction. It might even result in a class of persons with 'complete incapacity'. Such a status is otherwise not found in English law and would be at odds with its generally more liberal and pragmatic thrust, as also exemplified by the protection afforded to mentally incapable persons.[438] Having said that, it seems unlikely that English courts would apply the *non est factum* doctrine with such rigidity, and these hypothetical concerns might just emanate from civil law thinking. English judges emphasise both flexibility and justice in each individual case, as shown in the seminal case of *Saunders v Anglia Building Society* where, after having assessed all relevant

[437] See chapter II, section 2)a)4. and in this chapter section 2)d).

[438] See the explanations in chapter II, section 3)b)

precedents, Lord Wilberforce refused to express precise limits to the *non est factum* doctrine as this would 'deprive the courts' of an 'instrument of justice'.[439] If this doctrine were applied at all in the way proposed in this thesis, it could probably be developed 'sensibly', and the formation of a new 'status of incapacity' would be avoided. A situation like in German law, where, due to the rigidity of one legal concept, other provisions have to mitigate its consequences in a game of 'doctrinal ping-pong',[440] seems unlikely. In this light, the uncertainty of English law as regards the contractual capacity of very young children or their ability to transfer rights is a disadvantage which can be accepted. On the same note, the merits of the German approach of 'ignoring' circumstances in the person of an individual minor in favour of legal certainty[441] are doubtful when compared with the highly flexible and individualised types of 'exceptions' to minority under English law.

[439] *Saunders v Anglia* (fn 114) 1026.

[440] See also chapter II, section 3)d).

[441] Cf only Flume (fn 33) 182 f.

IV.

Restitution of Unjust or Unjustified Enrichment

In chapters II and III, we have seen to what extent minority has an impact on transactions, be it a contract entered into by a minor or a transfer of rights by or to him. Where a transaction by which a benefit is allocated between the parties turns out to be (partly) invalid, both English and German law aim to reverse the allocation of the benefit. That the person who received that benefit is 'enriched' can be regarded as 'unjust' or 'unjustified' and is discussed in the present chapter with a focus on the effect of the minority of one party to a transaction. In respect of German law, the discussion focuses on the law of restitution of unjustified enrichment (*Bereicherungsrecht*) as laid down in §§ 812 to 822 BGB. Its counterpart in English law is referred to as the 'law of unjust enrichment', which is governed largely by the common law. But there are also two English statutory provisions which can allow the reversal of minors' transactions and which also need to be discussed. Before turning to the question of what role 'minority' plays in the law of restitution, the English and German laws of unjust(ified) enrichment are explained briefly at the beginning of each section. In each jurisdiction, the subject matter is rather complex, and the legal niceties in the context of minority and restitution can only be understood with a sufficient basis.

1) Unjustified Enrichment and Minority in German Law

After a brief overview of the German law of restitution in the first subsection, the possible reasons for a minor's transaction being subject to a claim for restitution are discussed. Thereafter, one of the bars to a claim for restitution that can be relevant in the context of minority as well as the defence of disenrichment, which is particularly relevant for underage defendants, are both explained. Finally, the additionally complex issue of minority and restitution of executed reciprocal contracts is discussed.

a) Overview of the 'Absence of Basis' Approach

The starting point of the German law of unjustified enrichment or *Bereicherungsrecht* is § 812 BGB. According to this provision, 'a person must return to the claimant something which he received from the claimant without legal basis by transfer or in any other way at the claimant's expense'.

1. Transfers and 'Non-Transfers'

The distinction between situations in which the defendant's enrichment was gained by 'transfer' and such where he gained it 'in any other way at the claimant's expense' is nowadays regarded as fundamental in the German law of unjustified enrichment.[442] The relevant German terms of *Leistung* and *Nichtleistung* are difficult to translate and easily misunderstood. *Leistung*

[442] See the explanations in Dannemann, *Unjustified Enrichment* (fn 15) 21 ff.

('transfer' or 'performance')[443] in the present context does not refer to whether the claimant discharged an (existing) obligation owed to the defendant. Rather, an enrichment is gained by transfer if the claimant conferred a benefit on the defendant with the intention of benefitting him.[444] Any other receipt of a benefit is deemed a *Nichtleistung* ('non-transfer' or 'non-performance'). In such a case, the claimant did not intend to benefit the defendant but might indirectly have done so, or the defendant might simply have encroached on the claimant's rights.

For the present discussion of restitution and minority, the distinction between transfers and 'non-transfers' is relevant because certain rules only apply to transfers; in such a case, this is mentioned in the text. Other than that, the doctrinal delimitations of particular types of 'non-transfers' are not relevant here.[445] The most important type of these enrichments by 'non-transfers' is that the defendant encroached on the claimant's rights, and in such a case it is spoken of as an 'encroachment' by the defendant.

2. Enrichment

According to § 812 BGB, the defendant must have gained 'something' (*etwas*) from the claimant. 'Something' can practically be anything, such as a payment or

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[443] In a different context, 'performance' would be the more natural translation, but this term can easily cause confusion with the performance of a contract or an obligation.

[444] S Lorenz in: N Horn (gen ed), *J v Staudingers Kommentar zum Bürgerlichen Gesetzbuch, §§ 812–822* (ed 2007 Sellier – de Gruyter, Berlin 2007) § 812 [4]. Note that for an enrichment having been gained by the claimant's transfer, no contract or obligation needs to exist between claimant and defendant.

[445] For further explanations see Dannemann, *Unjustified Enrichment* (fn 15) 45 ff.

a service, and it need not have any value or even be useful.[446] A crucial point is that the defendant must return the specific 'something' which he received, for example, (possession or ownership of) a car or a banknote. However, many benefits such as the receipt of a service or an app downloaded onto one's smartphone cannot be returned themselves, and the defendant has to return their objective market value. The same applies to the extent that a specific object is no longer available, such as a car destroyed in an accident.[447]

3. No Legal Basis

For any claim for restitution to be successful, the enrichment must not be supported by a legal basis. Most importantly in the context of (minors') transactions, the legal basis for a benefit gained by the defendant by a transfer is his right to that benefit. That right can, for example, result from a contract, and generally the rules governing obligations determine whether it ever came into existence or has ceased to exist. Contract law and unjustified enrichment are thereby aligned.[448] The obligation of the transferor either exists or is absent; the exact reason for its absence—such as 'contractual incapacity'—is irrelevant.

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[446] Schwab in: *Münchener Kommentar* (fn 211) § 812 [1 ff]; Dannemann, *Unjustified Enrichment* (fn 15) 25 ff.

[447] According to § 818 (2) BGB. Also, substitutes of or proceeds derived from the 'something' have to be surrendered according to § 818 (1) BGB if resulting by law (instead of being bargained for).

[448] R Zimmermann, 'Unjustified Enrichment: The Modern Civilian Approach' (1995) 15 OJLS 403, 406: 'synchronised'.

4. No Bar to the Claim and No Defence

Even where the requirements of a claim for restitution would otherwise be met, it can still be defeated. Most provisions in this context need not be discussed in the context of minority.[449] It can be shown that, contrary to § 814 BGB, minors are not barred from claiming restitution merely because they knew of the lack of legal basis. More importantly, the defence of disenrichment, ie, the defendant arguing that he somehow 'lost' the benefit, is applied to underage defendants in accordance with the policy underlying the protection of minors in German law.

b) Reasons for an Absence of Legal Basis

For the defendant's enrichment to be supported by a legal basis and the claim for restitution to be due, the defendant must have a right to the benefit which he received.

1. Contractual Incapacity

For the present purposes, inquiring into transactions with minors, the relevant right—if it exists—stems from a contract. The law governing contractual obligations, therefore, determines whether a legal basis can be identified. As explained in the preceding two chapters, a minor's legal act is void without exception if the minor has not reached the age of seven. Older minors' legal acts are (provisionally) void unless authorised by their parents or unless one of the 'exceptions' applies. The ability to effect 'legal acts' is required to make a

[449] See for further details Dannemann, *Unjustified Enrichment* (fn 15) 75 ff.

declaration of intention which, in turn, is a prerequisite for entering into agreements.[450] Thus, where a claim for restitution can be brought by or against a minor, the typical situation is that the transaction is (partly) executed, whereas the parents have not consented to their child's transaction (and do not ratify it) or the minor is aged below seven years. It should be noted that each party to a void transaction can bring a claim for restitution: the fact that one party of a transaction was a minor can be relied on by the adult party, too. In that light, the concept of minority does not only protect the minor but is 'two-sided'.

2. Further Reasons for an Absence of Legal Basis

There are, of course, further reasons why an obligation can be or become void and the 'legal basis' absent. Vitiating factors which are noteworthy here are the illegality of the agreement, whether for violating a statute or public policy,[451] rescission for mistake,[452] as well as rescission for fraud or duress.[453]

The first point to note is that a minor's declaration of intention and any subsequent contract can only be affected by one of these factors if the declaration is not already void for incapacity. Second, none of the aforementioned vitiating factors takes the minority per se of either claimant or defendant into account. Of

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[450] See chapter II, section 1)a)2.

[451] According to § 134 BGB, 'a legal act which violates a statutory prohibition is void unless provided otherwise by law'; according to § 138 BGB, 'a legal act which violates public policy is void'.

[452] Under §§ 119, 142 BGB. According to § 142 BGB, 'if a legal act is rescinded, it is void from the beginning'.

[453] Under §§ 123, 142 BGB.

course, a person might, for example, be more likely to labour under a mistake if he is very young and inexperienced; but this similarly applies to any other person with limited cognitive abilities.

As far as we are concerned with illegality for violating a statute protecting youths, such as prohibitions against selling tobacco or alcohol,[454] these provisions are primarily relevant in criminal law and public law (such as the commercial supervision of pubs). The situation that a minor enters into an illegal transaction *with* parental authorisation and subsequently claims restitution has little practical relevance.[455] Employment contracts can be relevant in this context because minors can have partial contractual capacity to enter into them under § 113 BGB,.[456] For example, a provision under which an underage employee waives important rights can be void for violating public policy.[457] But such cases are very rare and not considered here in detail.

c) Knowledge that Performance is Not Owed

According to § 814 BGB, 'restitution of the performance of an obligation cannot be claimed by the transferor if he knew that he was not obliged to perform or if the transfer followed a moral duty or a duty of decency'. For having 'knowledge'

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[454] See §§ 9, 10 *Jugendschutzgesetz* as regards alcohol and tobacco; gambling with minors is restricted to a certain extent under § 6 *Jugendschutzgesetz*.

[455] See the exceptional case of LG Potsdam, [2021] BeckRS 26936 in which, however, it is not clear whether the contract would not have been void absent authorisation by the Family Court (cf the explanations in chapter V, section 2)a)1.).

[456] See chapter II, section 1)b)4.

[457] LAG Berlin, 28.03.1963, summarised in *Arbeitsgerichtliche Praxis* (CH Beck, available online) § 113 no 1; LAG Berlin, 26.10.1962, summarised in *Arbeitsgerichtliche Praxis* (CH Beck, available online) § 138 no 23.

of the absence of an obligation, it is sufficient that the claimant knew of the facts underlying the absence of basis and could conclude the consequences based on the abilities of a layman.[458] This raises the question of whether a minor could be barred from claiming restitution, for example, because he knew that his parents would never ratify the underlying contract or if it was entirely unreasonable to believe they would. If so, a minor would be unable to claim restitution and practically be bound to a transaction that his parents did not authorise. But this is exactly what §§ 104 ff BGB aim to prevent and conflicts with the general policy underlying minority in German law. One way of avoiding this outcome is to let the parents' state of mind determine whether their child knew of the absence of basis of its transfer. Thereby, control over whether restitution can be sought and, effectively, over minors' transactions is again shifted to their parents. This approach is consistent with what has been identified as the general policy underlying the protection of minors from improvident transactions in German law.

Taking the perspective of the other party, adults are not generally barred from claiming restitution from a minor merely due to their knowledge that a transaction required parental authorisation. As a general rule, adults should be allowed to believe that a transaction will be ratified unless the contrary is obvious.[459] The bigger hurdle for adults claiming restitution from a minor is the defence of disenrichment, as discussed in the following subsection.

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[458] Schwab in: *Münchener Kommentar* (fn 211) § 814 [16].

[459] Schwab in: *Münchener Kommentar* (fn 211) § 814 [14].

d) Disenrichment and Minority

The law of unjustified enrichment does not seek to compensate the claimant's loss or even cause a loss to the defendant.[460] Consequently, according to § 818 (3) BGB, 'the obligation to provide restitution or compensation of the value is excluded to the extent that the recipient is no longer enriched'.[461] The principal requirement of this defence is that the defendant's overall wealth is no longer 'swollen' by the benefit received from the claimant. However, the defence cannot be raised if the defendant knew of the absence of basis when receiving the benefit.[462]

1. Changes in a Minor's Wealth

In German law, the defendant initially has to return the specific object that he received. This means that a loss of value of the object is irrelevant, for example, a car losing value merely due to ageing. But the value of the object has to be returned in money to the extent that the object cannot be returned in its initial condition. In such a case, without going into much detail, whether the initial enrichment is still somehow present in the defendant's wealth needs to be assessed.

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[460] Lorenz in: *Staudinger* (fn 444) § 818 [1, 33].

[461] As translated by Dannemann, *Unjustified Enrichment* (fn 15) 310.

[462] Or if he has already been sued, §§ 818 (4), 819 (1) BGB; but this alternative need not be discussed here.

In some cases, especially when a service is rendered to the defendant, the specific benefit perishes immediately.[463] In one of the seminal cases in the context of minority and restitution,[464] a minor received the benefit of transport services. Again, the objective value of that service would have to be returned in money, but in many cases there remains no benefit in the defendant's wealth and he can plead disenrichment. Whether this is the case depends on whether, by receiving the service, the defendant saved expenses because he would have paid for a similar service anyway. A similar consideration applies if the defendant received (and consumed) consumable goods, such as apples: the goods or services are 'necessary' to him in the sense that he would have incurred expenses had it not been for the receipt of the benefit, such as where he had to purchase a ticket for a similar journey in any case.[465] By contrast, the defendant did not save other expenses if similar expenses would have been 'luxurious' in the sense that he would not have ordered and paid for them; consequently, he is not enriched anymore.

If minors are supplied with 'necessary' goods or services (in the present sense), they could be held liable in unjustified enrichment to return their (objective market) value, which would and effectively 'force them into' a

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[463] Lorenz in: *Staudinger* (fn 444) § 818 [21, 26]; Schwab in: *Münchener Kommentar* (fn 211) § 818 [129, 185]; K Larenz and C-W Canaris, *Lehrbuch des Schuldrechts, Besonderer Teil, Bd II/2* (13th ed CH Beck, München 1994) 254 f. This point has been very contentious in the past, cf only the differentiated account by C Kellmann, 'Bereicherungsausgleich bei Nutzung fremder Rechtsgüter' [1971] NJW 862, 864 f, reaching the conclusion that even a stowaway on a plane is enriched by the possibility of being transported for one 'logical moment'. One corollary of the predominant view today is that the burden of proof for showing that expenses were saved is on the claimant.

[464] Which is discussed in the following sub-section and in section 3)d)1. of this chapter.

[465] AG Mühlheim adR, [1989] NJW-RR 175.

transaction. Thus, it is agreed that minors require protection from such claims and, consistent with the general policy underlying the 'protection of minors' from improvident transactions in German law, the predominant view is that the parents' intention should decide which goods or services are 'necessary' and which are 'luxurious' for their child.[466]

2. 'Bad Faith' as to the Absence of Legal Basis

According to § 819 (1) BGB, 'if at the time of receipt the recipient knows of the absence of legal basis' or once he learns of it later, he is barred from pleading disenrichment.[467] A defendant who is disenriched but in 'bad faith' in respect of the absence of legal basis at the time his enrichment perishes nevertheless has to pay the value of what he received. He would, for example, have to pay the objective value of a 'luxurious' service rendered to him or of goods which he would otherwise not have ordered. To have the relevant knowledge, the defendant needs to know the facts which led to the absence of basis as well as to have a certain degree of knowledge or 'awareness' of their legal consequences.[468] The relevant provisions of §§ 818 and 819 BGB do not differentiate between persons with full and those with limited or no 'contractual capacity'—although knowledge

[466] As proposed by A Staudinger and B Steinrötter, 'Minderjährige im Zivilrecht' [2012] JuS 97, 105 at fn 99.

[467] The provision should be read in conjunction with § 818 (4) BGB.

[468] The exact requirements for the defendant to 'know' of the absence of legal basis are contentious in detail but not further relevant here, see Schwab in: *Münchener Kommentar* (fn 211) § 819 [2]; D Reuter and M Martinek, *Ungerechtfertigte Bereicherung* (2nd ed Mohr Siebeck, Tübingen 2016) 445.

of the absence of basis will be difficult to establish in the case of a young child due to its lesser cognitive abilities.[469]

Still, at least older minors are typically aware that their transactions are subject to their parents' approval and thus often 'in bad faith'. On this basis, minors would often be effectively bound to unauthorised transactions because they have to return the value of what they received although they are disenriched. This would undermine the policy of protecting minors by shifting the control over their transactions to their parents,[470] whereas minors are deemed to have no or only limited ability to form the intention required to effect legal acts.[471] Consequently, the predominant view is that, for determining whether a minor was in 'bad faith' in respect of the absence of legal basis when receiving a benefit, his parents' state of mind is decisive instead of his own, whereas the minor's state of mind is irrelevant in such cases.[472]. Realistically, parents typically do not know about an unauthorised transaction and thus their child cannot be in 'bad faith'; thereby, minors often have a blank cheque for pleading disenrichment unless and until their parents become aware of the unauthorised transaction.

However, there are situations in which this favourable treatment of minors is not justified. For example, a minor might have gained a valuable object by defrauding or even stealing from the claimant and (pretends to have) lost it. In

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[469] See, for example, OLG Naumburg, [2005] NJOZ 435.

[470] See chapter III, section 3)b).

[471] See chapter II, section 1)a)2.

[472] Schwab in: *Münchener Kommentar* (fn 211) § 819 [9] at fn 26; Lorenz in: *Staudinger* (fn 444) § 819 [9 f].

such a case, there is no reason to protect him from 'being practically bound to an unauthorised transaction'. Cases in which minors deserve special protection need to be delimited from such in which they do not and, consequently, minors' own state of mind should decide whether or not they were in 'bad faith' at the time of the disenrichment. Seminal in this context is the so-called *Flugreise*-decision.[473] A seventeen-year-old had sneaked onto a plane from Hamburg to New York City as a stowaway. He was able to take a seat among the other passengers without being detected. When he tried to enter into the USA, it became clear that he had no visa, and the airline flew him back to Germany. *Inter alia*, the airline demanded payment of the usual ticket price for the journey from Hamburg to New York City based on the unjustified enrichment of the minor by that journey. From a modern perspective,[474] the central question for the courts was whether the minor could plead disenrichment in respect of the benefit of the journey. For the difficult task of determining whether the parents' or their child's own state of mind should be decisive for whether the latter was in 'bad faith', the Federal Supreme Court proposed to inquire whether the minor committed a delict (or even a crime) in gaining the benefit.[475] Where this is the case, the Court would draw on the minor's own state of mind but 'within the limits of his delictual liability' under § 828 BGB, which makes reference to an underage wrongdoer's understanding of his

[473] BGH, [1971] NJW 609; see also the explanations and the partial translation in Dannemann, *Unjustified Enrichment* (fn 15) 28 f, 242 ff.

[474] At the time of the decision, a different understanding of the 'enrichment' was still dominant and the question was whether the minor was enriched at any given point in time at all; this would nowadays not anymore be at issue; see fn 463.

[475] BGH, [1971] NJW 609.

responsibility for a wrong.[476] In the case of minors aged seven or older, this means that, for determining their 'knowledge' of the absence of basis, their understanding of their responsibility in the individual case should be decisive. In the *Flugreise*-decision, the Federal Supreme Court held that the minor's behaviour amounted to a delict (and a criminal act) and that he did have the necessary understanding of what he did, thus having knowledge of the absence of legal basis of his enrichment. Consequently, he was barred from pleading disenrichment and had to 'return' the objective market value of a ticket for a similar journey, essentially the normal ticket price. The approach developed by the Federal Supreme Court has been subject to strong criticism.[477] This issue, together with alternative approaches, is discussed in the comparative analysis of this chapter.[478]

e) Restitution of Executed Reciprocal Contracts

The restitution of performances which have been exchanged under reciprocal contracts causes special problems. Under a reciprocal contract, each party's duty to perform its own obligation is intrinsically linked to that of the other party. Both parties know that they only receive a benefit in exchange for something they have to give in return. Their expectation of exchanging performances is precisely why

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[476] As explained in chapter II, section c), delictual liability of minors below the age of seven is excluded and above that age depends on their understanding of their responsibility in the individual case.

[477] It is not entirely certain whether courts today would still feel bound by this decision; LG Köln, [2007] BeckRS 8593 leaves the question open; AG Berlin-Köpenick, [2011] BeckRS 15022 states *obiter* that the minor's own knowledge is decisive if he committed a delict.

[478] See section 3)d)1. of this chapter.

they fulfil their part of the agreement. Where the agreement subsequently turns out to be void, reciprocal claims for restitution of unjustified enrichment can be due. This causes no problems as long as each benefit received is still fully present, no further expenses or losses have been incurred, and each party is solvent at the time restitution is sought.

However, in the meantime, each party might have consumed what he received in the assumption that the transaction is final, or purchased goods have accidentally perished. Suppose a stamp with the objective value of EUR10 is sold for EUR12 and the contract turns out to be impaired. Unfortunately, the stamp has already been destroyed in the buyer's hands and he can plead disenrichment. If both claims for restitution were entirely independent of each other, the seller's claim for restitution of the stamp or its value would be defeated, whereas the buyer could ask for his money back. The risk of the goods perishing in the hands of the buyer shifts to the seller. In contrast, if the bargain had been valid, the buyer would have borne the risk of the stamp perishing from the moment of delivery onwards, whereas the seller would have borne the risk of losing the money once he got paid. This suggests not only a link between the parties' performances, but also that this link ought to affect both claims for restitution.

German law faces the problem that the provisions governing unjustified enrichment in §§ 812 ff BGB do not take into account the link underlying both obligations to perform, usually referred to as *Synallagma*.[479] Strictly based on the wording of these provisions, each claim for restitution is independent of the other.

[479] See Häcker, *Impaired Transfers* (fn 22) 71 ff; Dannemann, *Unjustified Enrichment* (fn 15) 142 ff.

In light of this disparity between the results under §§ 812 ff BGB and the parties' reasonable expectations, German lawyers unanimously agree that the legislature of the 19th century did not provide an appropriate solution to the complex of the restitution of vitiated reciprocal contracts.[480] The predominant approach for resolving this issue as applied by the judiciary is commonly referred to as the *Saldotheorie*.[481] It proposes to set off the two claims for restitution following a void or avoided executed reciprocal transaction. Provided both claims aim for the same 'species' of object, which will typically be money,[482] only one claim for restitution of the surplus persists.[483] A plea for disenrichment can still be made against the surplus, but the situation that one party's claim is extinguished entirely, whereas restitution must still be provided by that party is prevented. In the example given above, the seller's claim for the value of the stamp (EUR10) would be set off with that of the buyer for the restitution of the purchase price (EUR12). The seller has no claim for the restitution of the value of the stamp due to the buyer's disenrichment. The buyer could claim from the seller EUR2 (the

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[480] E v Caemmerer, '"Mortuus Redhibetur". Bemerkungen zu den Urteilen BGHZ 53, 144 und 57, 137' in G Paulus, C-W Canaris, and U Diederichsen (eds), *Festschrift für Karl Larenz zum 70. Geburtstag* (CH Beck, München 1973) 621, 625.

[481] Which has been reconceptualised to the so-called 'doctrine of the factual Synallagma', cf P Hellwege, *Die Rückabwicklung gegenseitiger Verträge als einheitliches Problem: deutsches, englisches und schottisches Recht in historisch-vergleichender Perspektive* (Mohr Siebeck, Tübingen 2004) 88.

[482] Because, following damage to the object manifesting the enrichment, its value in money has to be returned, RGZ 54, 137 (1903); RGZ 94, 253 (1918); BGH, [1970] NJW 656; BGH, [1979] NJW 160; BGH, [2001] NJW 1863; BGH, [2000] NJW 3064; the approach of 'setting off' both claims has not always been taken too strictly, but the exact details need not be explained here, see only Schwab in: *Münchener Kommentar* (fn 211) § 818 [241 f]; it should be noted that the 'setting off' of the claims occurs only at the time at which the benefit perishes in the hands of one of the parties, see with reference to criticism in the literature Schwab in: *Münchener Kommentar* (fn 211) [251]. See further von Caemmerrer, 'Mortuus Redhibetur' (fn 480) 635.

[483] BGH, [1999] NJW 1181; BGH, [2000] NJW 3064; BGH, [2001] NJW 1863; occasionally the judiciary contradicts itself by stating that, rather than there being only one claim persisting, the two claims exist independently but the defendant is barred from pleading disenrichment, cf BGH, [1979] NJW 160.

purchase price minus the value of the stamp received by the buyer). It is possible (but unlikely) that the seller can plead disenrichment in respect of the EUR2. If, instead of the stamp being destroyed, the money is lost by the seller and the latter can plead disenrichment, his claim for the (specific)[484] stamp cannot logically be 'set off' with (the value of) the money received by him, but the seller would be compelled to return (the value of) the money received by him for claiming restitution of the stamp.[485]

One effect of applying the *Saldotheorie* is that the parties are practically bound to the transaction. Where the transaction is void due to the minority of the claimant, this result is not deemed appropriate and an exception is made to the *Saldotheorie*.[486] Otherwise, minors could effectively be bound by a fully performed transaction which is void because their parents have not authorised it or they are younger than seven years of age. The protection afforded to them as minors would be undermined. Because such an exception is necessary, and for several other reasons, the *Saldotheorie* has been subject to severe criticism in the literature and alternative solutions have been proposed.[487] This plethora of views cannot be presented here. In the present context, it is sufficient to note that, according to each of these alternative solutions, including the *Saldotheorie* itself,

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[484] Under German law, generally the specific object received by the defendant must be returned, cf section 1)d)1. of this chapter.

[485] Lorenz in: *Staudinger* (fn 444) § 818 [47].

[486] BGH, [1994] NJW 2021; J Petersen, 'Der Minderjährige im Schuld- und Sachenrecht' [2003] JURA 399, 401; F Peters, 'Die Erstattung rechtsgrundloser Zuwendungen' (2005) 205 AcP 159, 194; M Lieb, 'Werner Flume und das Bereicherungsrecht' (2009) 209 AcP 164, 173; von Caemmerrer, 'Mortuus Redhibetur' (fn 480) 636; Hellwege, *Rückabwicklung* (fn 481) 109; Dannemann, *Unjustified Enrichment* (fn 15) 143; Lorenz in: *Staudinger* (fn 444) § 818 [42].

[487] For an overview of many relevant proposals see, eg, Hellwege, *Rückabwicklung* (fn 481) 87 ff.

§§ 812 ff BGB are again applied 'strictly', and a minor's claim for restitution is judged independently from that of the other party. For example, if the buyer of the stamp was underage and the stamp destroyed, he could claim restitution of the purchase price and nevertheless plead disenrichment in respect of the seller's claim for the value of the stamp.[488]

On the other hand, there is no similar exception on the part of the adult.[489] If the adult loses his enrichment, his claim against the minor will be deduced by the value of what he received in return, or, if his claim aims at a specific object such as the stamp in the example above, he can only claim the return of the object if he returns the value of the benefit received by him.

2) Unjust Enrichment and Minority in English Law

The English law counterpart to unjustified enrichment is the law of (restitution for) unjust enrichment. Before we turn to this subject matter, two statutory remedies should be discussed that allow adults dealing with minors to claim restitution in specific circumstances. Understanding these provisions allows for a better understanding of certain particularities in the context of minority and unjust enrichment.

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[488] Subject to the general requirements of this plea, see especially the preceding sub-section.

[489] D Reuter and M Martinek, *Ungerechtfertigte Bereicherung* (Mohr Siebeck, Tübingen 1983) 607; arguing that the *Saldotheorie* should equally be applied to the claims of each party was Pawlowski, *Willenserklärungen* (fn 200) 59, but this view seems no longer supported in the literature.

a) Statutory Remedies for Restitution from Minors

The two relevant statutory provisions help adults who have transferred something to a minor on credit if the minor refuses to honour the underlying agreement because of his minority. Both provisions complement one another.

1. Sale of Goods Act 1979

According to section 3(2) of the Sale of Goods Act 1979, 'where necessaries are sold and delivered to a minor (…), he must pay a reasonable price for them'.[490] This statutory remedy was already introduced by the Sale of Goods Act 1893 and superseded the common law rules as regards necessary goods.[491] 'Necessaries' are defined as 'goods suitable to the condition in life of the minor (…) concerned and to his actual requirements at the time of the sale and delivery'. In contrast to the common law position, it is clear from this wording that the goods must have been necessaries at the time of the delivery and, furthermore, that a minor will not be liable under an executory contract for necessary goods; further details were already discussed in chapter II.[492]

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[490] Minors' liability for necessary goods or services at common law has already been discussed in chapter II, section 2)b)1.

[491] *Nash v Inman* (fn 125) 7 per Cozens-Hardy MR. Sub-section 3 of the provision limits the scope of the remedy to necessary goods and an adult who rendered necessary services to a minor on credit still has to rely on the common law to be remunerated.

[492] See the discussion in chapter II, section 2)b)1.

2. Minors' Contracts Act 1987

Where a claimant has entered into a contract with a minor and that contract is unenforceable due to minority, the court can order the minor 'to transfer to the [adult] plaintiff any property acquired by the [minor] defendant under the contract' or 'any property representing it' according to section 3(1) of the Minors' Contracts Act 1987.[493] As minors' contracts are generally unenforceable as against them, the provision is applicable unless one of the 'exceptions' to minority applies—in which case the minor must pay a 'reasonable price'.[494] No case can be found in which section 3 of the Minors' Contracts Act 1987 was applied and thus several questions are left open.

The term 'property' employed by the legislator clearly excludes services rendered to a minor, whereas it includes any rights to movables. The contentious question is whether it also comprises 'intangibles'.[495] Without going into detail on this point, for the present purposes it seems sensible to include at least rights resulting from usual means of payment, such as money paid via bank transfers.[496]

What is less clear is the phrase 'any property representing' the initially acquired property. Certainly, this applies to property that a minor receives by

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[493] Its introduction followed the recommendations by the Law Commission, *Law of Contract: Minors' Contracts (Report)* [1984] EWLC 134 [4.16 ff].

[494] See chapter II, section 2)b).

[495] There is an ongoing dispute about what qualifies as 'property' in English law, cf chapter I, section 6)c).

[496] In support of this view is s 4(1) of the Theft Act 1968, according to which 'property' includes 'money and all other property, real or personal, including things in action and other intangible property'.

barter or sale in exchange for the originally acquired property. But what if a minor uses the proceeds of the sale to acquire other property? And what if, in between both transactions, he mixed the cash received by the first sale with his own cash or deposited it in the bank account from which he makes the payment? To answer these questions, some voices in the literature point to the equitable doctrine of tracing.[497] 'Tracing is the process of identifying a new asset as the substitute for the old.'[498] This statement makes tracing seem a useful concept for answering the present question. However, it should not be applied too rigidly in the sense that all case law governing tracing is incorporated into section 3 of the Act. The doctrine of tracing is very complex and in itself subject to uncertainty.[499] Furthermore, this could restrict a judge unduly in determining when the order for restitution against the minor is 'just and equitable'. The notion of tracing should be understood in conjunction with the court's discretion and arguably results in a kind of 'statutory tracing',[500] which can be influenced by a broader array of aspects in the context of minors' transactions. For example, if a minor purchases property with money gained by selling the initially acquired property, for deciding whether the property purchased by the minor 'represents' the initially acquired property, the fairness of the bargain between the minor and the adult claimant should be taken into account to determine whether it is 'just and equitable' under section 3(1)(b) of the Act to

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[497] C Mitchell et al (eds), *Goff & Jones: The Law of Unjust Enrichment* (9th ed Sweet & Maxwell, London 2016) [34-07]; B Häcker, 'Minority and Unjust Enrichment Defences' in A Dyson et al (eds), *Defences in Unjust Enrichment* (Hart, Oxford 2016) 195, 220; Peel, *Treitel* (fn 19) [12-043].

[498] *Foskett v McKeown* [2001] 1 AC 102, 127 per Millet LJ.

[499] Bridge, *Personal Property* (fn 20) [32-003].

[500] As coined by Whittaker in: *Chitty* (fn 3) [11-063] and substantially already envisaged by the *Minors' Contracts (Report)* (1984, fn 493) [4.21].

order the minor to convey to the adult the purchased property.[501] Furthermore, whether a minor has incurred other expenses which are more or less linked to the transaction or whether an order for restitution would indirectly enforce a minor's contract should be taken into account, too.[502] Other aspects include whether the adult took advantage of a minor's inexperience and 'tricked him' or 'whether a minor does or does not appear to be of full capacity'.[503] Following the fact that section 3(1) of the Act only refers to specific property, any property which a minor would have to surrender based on 'statutory tracing' should have to be specifically identifiable and, in turn, a minor's general present or future wealth should not be diminished.[504] A claim for restitution should be regarded as 'just and equitable' only if it is confined to 'gain based recovery',[505] meaning the defendant is not at a loss. Pleading change of position, as explained further below, is not required.

b) Unjust Enrichment and Minority

The recognition of unjust enrichment as an independent subject area of English law has been promoting the development of overarching concepts and principles that apply to what were formerly independent types of claims.[506] The impact

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[501] Peel, *Treitel* (fn 19) [12-043].

[502] Whittaker in: *Chitty* (fn 3) [11-064].

[503] Whittaker in: *Chitty* (fn 3) [11-064].

[504] Agreeing: Whittaker in: *Chitty* (fn 3) [11-063]; contra: *Goff & Jones* (fn 497) [34-31].

[505] Birks, *Unjust Enrichment* (fn 14) 3.

[506] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548; the relevant claims are that for 'money had and received to the claimant's use', 'money paid to the defendant's use', 'quantum meruit' and

which the minority of the claimant or the defendant has on a claim in unjust enrichment has not been sufficiently clarified in this comparatively young legal field. Before explaining this impact, a brief overview of the basic principles of unjust enrichment is given in the following subsection.

1. Overview of the 'Unjust Factor Approach'

Whether a claim for restitution of unjust enrichment lies can usefully be assessed in four stages: (i) was the defendant enriched? (ii) Was the enrichment at the claimant's expense? (iii) Was the enrichment unjust? (iv) Are there any defences?[507]

a. Enrichment

The defendant is 'enriched' if he has received a benefit of some value.[508] The possibility of determining the monetary value of the benefit is crucial: restitution is, for the most part, a personal remedy and thus only results in a claim for the value of the benefit in money; in most cases, for identifying the defendant's

'quantum valebat'; they are still used in practice but not be referred to specifically here; cf Burrows, *Restitution* (fn 224) 15 f; G Virgo, *The Principles of the Law of Restitution* (3rd ed OUP, Oxford 2015) 45, 58 f.

[507] Burrows, *Restitution* (fn 224) 27.

[508] The value is assessed as of the time at which the defendant received the benefit, *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938 [14].

enrichment the focus is not exactly on what the claimant conferred on the defendant but on its (monetary) objective market value.[509]

b. At the Claimant's Expense

The defendant's enrichment is gained at the claimant's expense if it is derived by subtraction from the claimant's wealth.[510] There need not be any specific loss on the part of the claimant and, even more so, no equivalence between such a loss and the enrichment. The relevant link can be described as requiring that the enrichment should comprise a 'transfer of value' from the claimant—further details are not relevant in the context of this thesis.[511]

c. Unjust

Restitution is only due where the enrichment is 'unjust'. English law has developed several so-called 'unjust factors' to determine when this is the case.[512] Commonly recognised unjust factors are, *inter alia*, (induced) mistake, duress, undue influence, unconscionable bargains, failure of consideration, and

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[509] *Benedetti v Sawiris* (fn 508) [15] per Lord Clarke and at [102] per Lord Reed. This statement is only uncontentious as far as personal claims in unjust enrichment are concerned; so-called 'proprietary restitution' is recognised by some as part of the law of unjust enrichment, cf *ibid* and Häcker, *Impaired Transfers* (fn 22) 125 ff. This issue is not further relevant here.

[510] *Investment Trust Companies v HMRC* [2017] UKSC 29, [2018] AC 275; Burrows, *Restitution* (fn 224) 63 f.

[511] *Investment Trust Companies* (fn 510) [43, 71]; Burrows, *Restitution* (fn 224) 66.

[512] *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] AC 221, 227 per Lord Steyn; *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349, 363 per Lord Browne-Wilkinson, at p 386 per Lord Goff, at p 395 per Lord Lloyd, at p 409 per Lord Hope; *Test Claimants in the FII Group Litigation v HMRC* [2012] UKSC 19, 2 AC 337 [81] per Lord Walker.

illegality.[513] In this thesis, we are only concerned with those unjust factors which show relevant implications due to the minority of a party to the litigation. The most pressing question in this context is whether the minority of the claimant itself constitutes an unjust factor.

d. No Defence

If a claimant can establish that the defendant is unjustly enriched at his expense, the defendant can still plead certain defences whereby the claim can be barred entirely or in part. As will be seen, minority can act as a defence in certain situations. Furthermore, the change of position defence is relevant in the present context. It allows a defendant to plead that the enrichment initially gained by him is no longer represented in his overall wealth and, therefore, the claim in unjust enrichment should fail to that extent.

2. No Legal Basis

Even where a claimant can establish that the defendant is unjustly enriched at his expense, restitution is barred if the conferral of the benefit is supported by a corresponding obligation of the claimant. The obligation to render that benefit to the defendant can be said to negative the unjust factor by manifesting his 'legal entitlement' to the enrichment.[514]

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[513] Burrows, *Restitution* (fn 224) 86.

[514] The requirement of 'no legal basis' is commonly accepted; *Kleinwort Benson* (fn 512), 408; Burrows, *Restitution* (fn 224) 88.

In situations where the benefit was conferred outside any contractual situation or the contract is void,[515] no corresponding obligation of the claimant exists. In contrast to this, if the benefit was transferred in pursuance of a valid contract, there is a legal basis for the enrichment, and the claimant has to show that the contract is voidable at his option and that he avoided the contract accordingly.[516] Generally, for stripping the defendant's enrichment of its legal basis, the claimant can rescind or terminate the transaction. Terminating a contract renders the parties' duties to perform invalid for the future, but it leaves the agreement intact to some degree.[517] The right to terminate a contract arises where a breach of duty by the defendant is sufficiently grave to amount to a 'repudiatory breach'.[518] Termination is particularly relevant for claiming restitution on the ground of a total failure of consideration.[519] Rescinding a contract renders it void *ab initio*.[520] The right to rescind arises, for example, where the claimant can establish the defendant's misrepresentation, duress, or undue influence, in accordance with contract law; the grounds for rescission (nearly) align with the

[515] 'Void' in the strict sense of legally not existing; cf chapter I, section 6).

[516] *Kleinwort Benson* (fn 512), 408 per Lord Hope; *Portman Building Society v Hamlyn Taylor Neck* [1998] 4 All ER 202, 208 per Millet LJ.

[517] Peel, *Treitel* (fn 19) [18-021 ff].

[518] *Rice v Great Yarmouth BC* [2003] TCLR 1.

[519] See further below in section 2)b)3.a. of this chapter.

[520] *Redgrave v Hurd* (1881) 20 ChD 1.

available unjust factors and thus the claimant will typically be able to strip the enrichment of its legal basis.[521]

One point which becomes relevant later again but should be mentioned here is that the right to rescind can be barred by several factors. Most importantly in the present context, it has historically been held that the inability of a claimant to provide counter-restitution bars rescission.[522] The claimant was usually said to be required to restore the defendant precisely to his position as of before the transaction was entered into.[523] However, it is nowadays agreed that a claimant only has to provide 'substantial' counter-restitution by returning the value of what he received from the defendant.[524]

3. Relevant Unjust Factors

There are several types of unjust factors on the basis of which a claim for restitution of unjust enrichment can be brought. In this section, so-called '(total) failure of consideration' is discussed first because it is often relied on in cases concerning minors. Thereafter, it is explained that 'minority' itself is not an unjust factor. After this contentious matter is dealt with, we can see that minority per se

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[521] More precisely, rescission can be said to *effect* restitution, but further details are not necessary here, cf J O'Sullivan, 'Rescission as a Self-Help Remedy: A Critical Analysis' [2000] CLJ 509.

[522] Typically referred to as 'impossibility of *restitution in integrum*'.

[523] The strictness of the rule depended on whether rescission was sought at common law or in equity; for the former see, eg, *The Western Bank of Scotland v Addie* (1866-69) LR 1 Sc 145, 165 per Lord Cranworth; see further Häcker, *Impaired Transfers* (fn 22) 105 at fn 24, 109 at fn 44.

[524] See, for example, *Salt v Stratstone Specialist Ltd* [2015] EWCA Civ 745 [22].

only affects the equitable doctrines of undue influence and unconscionable bargains and their corresponding unjust factors.

Other unjust factors are not immediately affected by the minority of one of the parties but might indirectly be applicable more readily due to minors' lesser ability to form a sound judgment and their limited cognitive abilities or experience. A minor might labour under a mistake or fall for a misrepresentation more easily than an older person in the same situation. These aspects are briefly considered in the last of the following subsections.

a. Total Failure of Consideration

Where the defendant entirely fails to perform his contractual counter-promise, the claimant can terminate the contract on the basis of a major breach of contract,[525] and the claimant can claim restitution based on a 'total failure of consideration'.[526] That the failure of the defendant to honour his promise must be *total* for restitution to be due has come under criticism in the literature but must still be regarded as good law.[527] For example, an advance payment for the delivery of a machine can be recovered based on a total failure of consideration if the machine

[525] Requiring that a condition is breached or that the breach is sufficiently serious as to deprive the innocent party of most if not all of the benefit of the contract, often referred to as 'fundamental breach', see the judgment of Diplock LJ in *Photo Production Ltd. Respondents v Securicor Transport Ltd* [1980] AC 827, 849; McKendrick in: *Chitty* (fn 3) [27-038].

[526] The term 'consideration' should not be confused with the requirement of consideration supporting a binding promise in contract law.

[527] *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32.

cannot be delivered, even though it might have been built already.[528] However, if building the machine was part of the contractually promised counter-performance, and it was in fact (partially) built, consideration cannot fail *totally* even if the machine is never delivered.[529] Minors, just like adults, can generally recover what they transferred in the attempt to perform a transaction if there is a total failure of consideration, but they are not in a more favourable position than adults. As stated by Lord Sterndale MR: 'I cannot see myself, in the case of an action to recover money actually paid, any difference between the position of an infant and of an adult and an adult can only recover money actually paid if there has been a total failure of consideration.'[530]

Distinguishing between a total and a mere partial failure of consideration can be very difficult in practice. In *Corpe v Overton*, the infant plaintiff had agreed with the defendant to enter into the latter's business as a tailor in the form of a partnership; for this purpose, the plaintiff had paid a certain sum upfront. After the defendant failed to take any steps to begin the business operations, the plaintiff brought an action for money had and received and was successful on the ground that consideration had failed totally.[531] By contrast, if an infant claimant received something in return—even though of very little value—restitution is denied.[532] Thus, where a minor pays to another a deposit for the purpose of

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[528] *Fibrosa Spolka* (fn 527).

[529] *Stocznia Gdanska* (fn 527).

[530] *Steinberg* (fn 337) 462 f; see also *Corpe v Overton* (1833) 10 Bing 252, 131 ER 901.

[531] *Corpe v Overton* (fn 530).

[532] *Pearce v Brain* [1929] 2 KB 310.

entering into a partnership and operating a business together, he cannot recover for failure of consideration once business operations have commenced.[533] In the words of Lord Kenyon, 'if an infant was to buy a thing not being necessaries, he could not be compelled to pay for it; but having done so, he could not recover back the money'.[534] In *Steinberg v Scala (Leeds) Ltd*, a minor bought shares in a company and later changed her mind; she had neither attended any shareholder meeting nor received any dividends. Still, it was held that she had received *some* consideration in the form of the shares,[535] unless the shares would have had no market value at all.[536] The strictness of this approach can lead to one-sided results, as exemplified in *Pearce v Brain*.[537] A minor exchanged his motorbike for a car. Subsequently, the car broke down after driving only 70 miles due to a defect already present at the time of the exchange. The minor tried to reverse the transaction and claimed restitution of his motorbike, but he was denied his claim absent a *total* failure of consideration.

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[533] *Holmes v Blogg* (1818) Taunt 508, 129 ER 481, which was distinguished in *Corpe v Overton* (fn 530).

[534] *Wilson v Kearse* (1802) Peake Add Cas 196, 170 ER 243; note that the judgment does not expressly refer to 'total failure of consideration' but is interpreted and followed by later authorities as such, cf *Ex parte David Taylor* (1856) 8 De GM&G 253, 44 ER 388. As presently seen, the judge's statement is too general and should be read keeping in mind that minors can claim restitution where adults can.

[535] *Steinberg* (fn 337).

[536] *Hamilton v Vaughan-Sherrin Electrical Engineering Company* [1894] 3 Ch 589, which was overruled in *Steinberg* 'unless distinguishable in that there the shares were of no market value'.

[537] *Pearce v Brain* (fn 532). In *Yeoman Credit Ltd v Apps* [1962] 2 QB 508 an adult is in an akin situation; *Holmes v Blogg* (fn 533); in *Chaplin* (fn 21) the *total* failure of consideration was already rejected by the lower court, and the judges where only concerned with the question of whether the minor's transfer was valid at all; see also chapter III, section 2)b).

One last point to be made in this context relates to the so-called '*Thomas v Brown*-requirement'.[538] According to it, despite a failure of consideration being total, a claim for restitution cannot succeed if the defendant is 'ready, able, and willing' to perform his duty.[539] This requirement is sometimes said not to apply to infant claimants because, otherwise, they would be bound to an agreement in pursuance of which they performed in advance.[540] The authority purported to support this exception is *Corpe v Overton*: a minor was able to recover a deposit which he had paid in anticipation of a partnership agreement which was never formed.[541] However, in *Corpe*, the minor was *additionally* able to rescind the contract for misrepresentation (on which see subsection e. below), and there was no basis upon which the other party could have offered and be 'ready, able and willing' to perform his part of the agreement. In contrast, the claimant in *Thomas v Brown* affirmed the contract after the reason for which she proceeded to rescind had become known to her. Therefore, *Corpe* is no authority for an exception to the *Thomas v Brown*-requirement where a claimant is underage. Keeping in mind the policy of English law for minors' transactions, protecting minors from incurring liability by making a promise but otherwise allowing them to spend what they 'have in their hands',[542] there is also no immediate policy

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[538] Burrows, *Restitution* (fn 224) 326 f.

[539] *Thomas v Brown* (1876) 1 QBD 714.

[540] Burrows, *Restitution* (fn 224) 313; S Meier, *Irrtum und Zweckverfehlung; Die Rolle der unjust Gründe bei rechtsgrundlosen Leistungen im englischen Recht* (Mohr Siebeck, Tübingen 1999) 320.

[541] *Corpe v Overton* (fn 530).

[542] See chapter III, section 3)b).

reason for exceptionally allowing minors to recover their advance performance even where the other party is 'ready, able and willing' to perform.

b. Minority Not an Unjust Factor

Some voices in the literature argue that minority *per se* should serve as an unjust factor.[543] However, this is not the case. If it was, we should see that minors can claim restitution without establishing any of the other unjust factors, provided that the defendant cannot successfully plead a defence. For example, minors would not have to establish a *total* (or, in fact, any) failure of consideration for claiming restitution—which is not the case, as seen in the previous section. Despite this clear answer, the arguments raised in favour of minority being an unjust factor should be discussed.

One argument is that minors' intention would be vitiated to such a degree that their transactions ought to be reversed: if mistake is an unjust factor, 'incapacity' should be regarded as such '*a fortiori* from mistake'.[544] In all fairness, this sweeping proposition was made very generally and not related specifically to minority. In this context, however, it could easily be rebutted: a

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[543] *Goff & Jones* (fn 497) [24-21]; Häcker, 'Minority' (fn 497) 199; Virgo, *Restitution* (fn 506) 379; Hellwege, *Rückabwicklung* (fn 481) 203; P Birks, *An Introduction to the Law of Restitution* (revised ed, OUP, Oxford 1989) 217; Treitel, 'Infants Relief Act' (fn 31) 204; Meier, *Irrtum* (fn 540) 324; see also the dissenting judgment of Lord Denning MR in *Chaplin* (fn 21). Contra: Atiyah, 'The Infants Relief Act 1874' (fn 90) 101 f; Burrows, *Restitution* (fn 224) 314.

[544] E O'Dell, 'Incapacity' in: P Birks and FD Rose, *Lessons of the Swaps Litigation* (Mansfield Press, London 2000) 113, 118, also describing incapacity as 'the ultimate impairment of consent'; similarly broad in terms is Virgo, *Restitution* (fn 506) 379, but cf the more specific statements at p 384 f.

mistake as to the person of the transferee can render a transfer of property void,[545] but even a child can make a gift.[546] Generally, English law does not take the view that minors' intention is vitiated[547] but only that, as a matter of policy, their promises are generally unenforceable as against them. This policy was identified already in chapter III[548] but becomes even clearer in the context of restitution.[549] As stated by Willes J, 'there is no doubt that an infant may buy jewellery or plate, if he has the money to pay and pays for it'.[550]

A further argument raised in support of minority being an unjust factor is that, thereby, doctrinal frictions in the common law are prevented.[551] In *Pearce v Brain*,[552] as explained in the preceding subsection, a minor was denied restitution of a motorbike which he bartered for a defective car because there was no *total* failure of consideration. The argument brought forward in the literature is that the minor should have had a proprietary right to his motorbike instead of having been denied a remedy because his title could not have passed under the 'void' transaction.[553] At the basis of this argument is the assumption that the transaction was 'void' in the sense of being 'a legal nothing'. That assumption results from a

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[545] *Cundy v Lindsay* (1878) 3 App Cas 459.

[546] See chapter III, section 2).

[547] See chapter II, section 3)c).

[548] See section 3)b) of that chapter.

[549] See the quote by Lord Kenyon at fn 534.

[550] *Ryder v Wombwell* (fn 123), 39 f; see also *ibid* 42; see also *Chaplin* (fn 21).

[551] Meier, *Irrtum* (fn 540) 322.

[552] *Pearce v Brain* (fn 532).

[553] Meier, *Irrtum* (fn 540) 322.

misunderstanding of the term 'absolutely void' as used in the Infants' Relief Act 1874; that the term does not mean 'a legal nothing' was shown in chapter II,[554] and it has been shown that property could pass even where the underlying contract was 'absolutely void' and,[555] even more so, it was emphasised that the validity of the transfer of rights is independent of the validity of the contract.[556] If minors' contracts are correctly understood as only being unenforceable as against them, there is no doctrinal friction and, as this thesis shows, the English law governing minority in the context of contract, personal property, and unjust enrichment is coherent on the whole without declaring minority an unjust factor.

Finally, it has been argued that in the relevant cases in which a minor could not claim restitution because he was unable to rely on a *total* failure of consideration and had no other unjust factor at hand,[557] restitution was merely denied because precise counter-restitution, also referred to as *restitutio in integrum*, was impossible.[558] As explained, this requirement was once understood strictly and could bar the right to rescind a transaction and, in turn, bar restitution.[559] In essence, the argument is that the reason for denying restitution

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[554] See especially fn 103.

[555] See the discussion in chapter III, section 2)a)2.

[556] *Chaplin* (fn 21).

[557] The most important cases in this respect are *Pearce v Brain* (fn 532); *Valentini v Canali* (1890) LR 24 QBD 166; and *Steinberg* (fn 337). The unjust factor of total failure of consideration is explained in section 2)b)3.a. of this chapter.

[558] *Goff & Jones* (fn 497) [24-21]; following their criticism are Burrows, *Restitution* (fn 224) 313 and Meier, *Irrtum* (fn 540) 321.

[559] See the explanations in section 2)b)2. of this chapter.

was not the (merely) partial failure of consideration, but that the minor would have been able to claim restitution simply because of his minority—had it not been for the impossibility of *restitutio in integrum*. The follow-up conclusion is that, because nowadays only counter-restitution *in value* must be provided instead of precise *restitutio in integrum*, the minority of the claimant *per se* should normally allow him to claim for restitution. However, this argument is incorrect. Although in some of the relevant cases *restitutio in integrum* would in fact have been impossible and although the language used in the relevant judgments might be interpreted as referring to this fact,[560] the question of *restitutio in integrum* being possible was not at all decisive in these cases. Where a claimant bases his claim on a failure of consideration, the relevant remedy for stripping the enrichment of its legal basis is termination.[561] Termination is generally not subject to the requirement that the claimant is able to provide counter-restitution.[562] The question logically never arises as long as a *total* failure of consideration is required—irrespective of whether the claimant is underage or not—as, on that basis, he cannot have received anything in return. As long as *partial* failure of consideration is not *expressly* recognised, discussing whether it would be correct to deny a minor his claim for restitution because he cannot provide counter-restitution rather misses the point. In other words, the relevant cases must not be read as 'if only *restitutio in integrum* had been possible, it would not have mattered that the minor received something'. That *restitutio in integrum* is

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[560] Meier, *Irrtum* (fn 540) 321 f.

[561] See section 2)b)2. of this chapter.

[562] But see Peel, *Treitel* (fn 19) [18-033]; Hellwege, *Rückabwicklung* (fn 481) 271.

possible can be an additional requirement to a claim for restitution but not an alternative to showing the presence of an unjust factor.

In summary, as the law stands, minority is not an unjust factor, and a claimant cannot claim restitution of a benefit conferred on another merely based on the fact that he is below the age of eighteen. Whether that ought to be changed is discussed in the comparative analysis of this chapter.[563]

c. Undue Influence

The equitable doctrine of undue influence aims at protecting a person from the influence exercised by another person with whom he stands in a special relationship of 'trust and confidence'.[564] If that influence was 'part of the process by which [his] consent to it was obtained', the victim is entitled to the rescission of the relevant transaction and to restitution of what he transferred in its course.[565] To this end, the claimant must show that the relevant relationship of trust and confidence existed between him and the defendant, that the defendant exercised influence over him which significantly affected his process of decision-making, and that the transaction is one that 'calls for an explanation', although it need not be disadvantageous.[566]

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[563] See section 3)a).

[564] The leading modern case is *Royal Bank of Scotland Plc v Etridge* [2001] UKHL 44, [2002] 2 AC 773.

[565] *Hewett v First Plus Financial Group Plc* [2010] EWCA Civ 312 [34] per Briggs J.

[566] *CIBC Mortgages Plc v Pitt* [1994] 1 AC 200, 207 f per Lord Browne-Wilkinson; *Allcard v Skinner* (1887) 36 ChD 145, 171.

For establishing undue influence, claimants can of course 'actually prove' that all requirements are met. However, the judiciary has developed two presumptions which come to the aid of claimants.[567] First, where a claimant can show that the relevant relationship of trust and confidence or dependency existed between him and the defendant and that the transaction in question cannot be explained by reference to the 'ordinary motives of ordinary persons', the court will regard it as 'prima facie evidence that the defendant abused the influence he acquired in the parties' relationship'.[568] Second, in certain situations, courts will additionally presume that the relevant relationship of trust and confidence or dependency existed between the parties. Most importantly in the present context, this is the case between parents and their children.

Transactions between parents and their children are looked at by courts 'with suspicion', and protection is afforded even to young adults.[569] Due to the second presumption just explained, where a child conferred a benefit on its parents, it does not even have to show that the relationship of trust and confidence or dependence *actually* existed, but 'the law presumes, irrebuttably, that one party had influence over the other'.[570] The child still has to show that the transaction 'calls for an explanation' to prove that the influence was abused because, in the

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[567] *Allcard v Skinner* (fn 566) 171; the historical dichotomy of 'actual' and 'presumed' undue influence was lifted in *Etridge* (fn 564), which are now only regarded as two modes of *proving* undue influence.

[568] *Etridge* (fn 564) [13, 14].

[569] 'Though there is no very great evidence of undue influence, yet the court will always look with a jealous eye upon a transaction between a parent and a child just come of age and interpose if any advantage is taken', *Cocking v Pratt* (1750) 1 Ves Sen 400, 401, 27 ER 1105 per Strange MR; parents' influence can be presumed even after the child attained majority; the duration is a matter of the individual case, *Archer v Hudson* (1844) 7 Beav 551, 49 ER 1180.

[570] *Etridge* (fn 564) [18].

words of Lord Nicholls, it 'would be absurd for the law to presume that every gift by a child to a parent (…) was brought about by undue influence unless the contrary is affirmatively proved.'[571] An example is the sale of property by a child to its parent at a fraction of the value,[572] or where (in essence) an unusually valuable gift is made to a parent.[573] The presumption of the exercise and impact of undue influence can be rebutted by proving that the child acted independently and not under the influence of a parent, for example, by showing that it had independent and competent advice.[574]

The presumption of undue influence between parent and child can also be applied to other persons who stand *in loco parentis* to the child, such as between uncle and niece,[575] stepparent and stepchild,[576] or elder and younger brother,[577] provided the relationship manifests a power over the child analogous to parental control. Another relationship relevant in this context is that between guardian and ward; guardianship is explained in some detail in chapter V.[578]

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[571] *Etridge* (fn 564) [24]; see also *ibid* [104, 153].

[572] *Wright v Vanderplank* (1855) 2 Kay&J 1, 69 ER 669; *Young v Peachy* (1741) 2 Atk 254, 26 ER 557, the judgment is (also) based on fraud by the father but strongly emphasises the relevance of the parent-child relationship; see also *Cocking v Pratt* (fn 569).

[573] *Lancashire Loans Ltd v Black* [1934] 1 KB 380; *Bullock v Lloyds Bank Ltd* [1955] Ch 317; *Bainbridge v Browne* (1881) 18 ChD 188; *Powell v Powell* [1900] 1 Ch 243: daughter just having come of age divests here inherited property between parents and siblings.

[574] *Bainbridge v Browne* (fn 573); *Powell v Powell* (fn 573).

[575] *Ibid*.

[576] *Powell v Powell* (fn 573); *Kempson v Ashbee* (1874-75) LR 10 ChApp 15.

[577] *Sercombe v Sanders* (1865) 34 Beav 382, 55 ER 682.

[578] *Archer v Hudson* (fn 569); see chapter V, section 1)b)1.

When assessing cases outside the parent-child relationship, minors are not protected better than adults—how inexperienced, uneducated, and easy to be influenced a minor is depends on the individual case, and a seventeen-year-old might well be better informed than some twenty-year-old. However, the Court of Chancery in *Smith v Kay* has proven itself willing to protect a 'young man of fortune' from his ill decisions after persons close to him dragged him into an extravagant lifestyle and induced him to secure their bills of exchange without independent legal advice.[579] As stated obiter, the victim would even have been protected one to two years after reaching majority, 'if the same influence had been obtained and abused, and the same confidence reposed and betrayed'.[580]

d. Unconscionable Bargains

According to the equitable doctrine of 'unconscionable bargains', in general terms, courts allow a claimant to rescind a transaction 'to protect [him] against a weakness'.[581] Historically, this protection was primarily afforded to 'poor and ignorant' persons[582] and to improvident expectant heirs,[583] but its scope has been

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[579] *Smith v Kay* (1859) 7 HL Cas 750, 11 ER 299. Again, showing that the claimant had independent legal advice and that his decision was an 'expression of [his] free will' rebuts the allegation of undue influence, *Etridge* (fn 564) [7]; this need not depend on the age of the claimant.

[580] *Smith v Kay* (fn 579) 311 per Lord Kingsdown; see also *ibid* at p 308 per Lord Cranworth MR.

[581] Burrows, *Restitution* (fn 224) 300.

[582] *Fry v Lane* (fn 399).

[583] See the comprehensive explanation of the precedents in Lord Hatherley's judgment in *O'Rorke v Balingbroke* (1877) 2 App Cas 814, 822 ff. In such cases, the victim essentially disposes of property in possession of which he will come in the event of the death of another person; such an 'interest in remainder' or 'in reversion', depending on the case, would be sold at considerable undervalue in order to obtain immediate cash; for example, see *Earl of Aylesford v Morris* (1872-73) 8 Ch App 484: a typical case of a 22-year-old, having been lent money at

widened over time.[584] Generally, for the doctrine of unconscionable bargains to apply, three requirements must be met: first, the claimant must have been at 'a serious disadvantage to the other (…) so that circumstances existed of which unfair advantage could be taken'; second, 'this weakness of the one party has been exploited by the other in some morally culpable manner'; third, 'the resulting transaction has been, not merely hard or improvident, but overreaching and oppressive'.[585] The protection from the exploitation of weakness naturally raises the question of whether the doctrine of unconscionable bargains can be used to afford further protection to minors, too.[586] The language used in the context of the doctrine seems apt to be applied to minors, but, although several other 'classes' of persons worthy of protection are sometimes named,[587] mention of minors is not usually made in this context.[588] The 'comparative analysis' of this chapter shows

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exorbitant interest rate before the death of his father upon which he would be entitled to large estates; liability was reduced to five percent due to the unconscionability of the transaction with the inexperienced man.

[584] Cf *Backhaus v Backhaus* [1978] 1 WLR 243; *Cresswell v Potter* [1978] 1 WLR 255.

[585] *Alec Lobb (Garages) Ltd and Others v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87, 94 f per Millett QC; affirmed in *Alec Lobb (Garages) Ltd and Others v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173, where especially the requirement of active exploitation of the claimant in a morally culpable manner was emphasised; the exact requirements of the doctrine have been subject to intense judicial and academic discussion, cf only N Enonchong, 'The Modern English Doctrine of Unconscionability' (2018) 34 JCL 211.

[586] As argued by Burrows, *Restitution* (fn 224) 304; we have seen that English law does not avail minors a claim for the restitution of what they have transferred to another person merely on the basis of minority, cf section 2)b)3.a. of this chapter.

[587] See, eg, Enonchong, 'Unconscionability' (fn 585) 229.

[588] Except for the *Minors' Contracts (Consultation Paper)* (1982, fn 26) [2.20] referring to *Evans v Llewellin* (1787) 1 Cox Eq Cas 333, 29 ER 1191, but, there, only an analogy to infants and their protection from (presumed) undue influence by their parents or guardians is drawn.

that the doctrine could be useful for the protection of minors from improvident transactions, too.[589]

e. Further Unjust Factors

So far, only unjust factors which show immediate implications of minority have been explained. However, it should not be forgotten that a minor can plead any other unjust factor just like an adult. Restitution can also be sought on the basis that the claimant laboured under a mistake[590] or was the victim of a misrepresentation[591] or duress[592]. On some occasion, this might well be easier for a minor to prove than for an adult in the same situation, for example, due to lesser cognitive abilities. In relation to these three unjust factors, however, no case can be found in which the minority of the claimant played an immediate role in the sense that it made a *legal-conceptual* difference.

Another reason for restitution being due can be the illegality of a transaction. Certain statutory provisions expressly protect minors, and where such a statute renders a specific transaction with a minor illegal, it also determines whether what has been conferred in pursuance of that transaction must be returned to the other party. The statutes relevant in this context, which aim to protect minors from drugs by prohibiting their sale to minors or restricting minors' access

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[589] See section 3)b).

[590] A mistake for the present purposes is any erroneous belief about facts or the law, *Kleinwort Benson* (fn 512).

[591] A misrepresentation is a form of (induced) mistake, *Peek v Gurney* (1873) LR 6 HL 377; *Goff & Jones* (fn 497) [9-97].

[592] *Pao On v Lau Yiu Long* [1980] AC 614.

to certain premises,[593] do, however, not include provisions as regards restitution. A right to claim restitution of an illegal transaction can also arise at common law, but courts have, historically, been rather restrictive in reversing a transaction solely on the basis that it is illegal. However, they have been more lenient in cases in which the protection of certain 'classes' of persons or the encouragement of participants of the transaction to withdraw from it required restitution.[594] Nowadays, courts have greater flexibility and, in determining whether a transaction must be reversed, should consider the 'purpose of the illegality in question', conflicting policies, and the avoidance of disproportionate results.[595] In typical illegal transactions with minors, such as the sale of tobacco to them, it is mainly the vendor who is in the wrong. The minor, on the other hand, ought to be protected by the law. Although he might have been fully aware of the illegality of the transaction, restitution of what he transferred to an adult in the course of it should generally be allowed for the purpose of deterring adults from transactions of that kind. There is no case supporting this proposition.

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[593] The sale of tobacco to persons under the age of eighteen years is prohibited under s 7 of the Children and Young Persons Act 1933 as amended by the Children and Young Persons (Protection from Tobacco) Act 1991; selling alcohol to minors is restricted by ss 145 to 154 of the Licensing Act 2003.

[594] See the statement by Lord Sumption JSC in his minority judgment in *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 [248].

[595] As phrased by A Burrows, 'A New Dawn for the Law of Illegality' in S Green and A Bogg, *Illegality after Patel v Mirza* (Hart, Oxford 2018) 23, 27.

4. Defences

Even where a claimant can establish that all requirements of his claim in unjust enrichment are met, the claim fails if the defendant can successfully plead a defence.

a. Minority as a Defence

The fact that the defendant is under the age of eighteen years does not generally allow him to escape liability in unjust enrichment. But a minor can plead minority if the claim for restitution would indirectly enforce a promise of his. A similar distinction has already been seen in the context of tortious liability.[596] The courts refer for this purpose to the claim being 'in substance *ex contractu*', if a promise would indirectly be enforced, in contrast to it being 'in substance *ex delicto*', if not.[597] These terms are prone to be misunderstood as references to contract or tort law. It is important to understand that they evolved at a time when English lawyers had not yet developed a clear and precise idea of contract or tort law, not even to mention unjust enrichment or 'quasi-contract'.[598] A claim in tort can be *ex contractu*, and in this chapter it can be seen that claims for unjust enrichment can be *ex contractu* or *ex delicto* in that sense, too. Reference is not made to the doctrinal classification of the remedy that is pleaded. The central question is whether a promise of a minor would directly or indirectly be enforced. Where a

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[596] See chapter II, section 2)c).

[597] *R Leslie Ltd* (fn 70); *Cowern v Nield* (fn 129); *Bristow v Eastman* (1794) 1 Esp 172, 170 ER 317.

[598] See also the explanations in chapter III, section 3)d).

benefit is conferred on a minor, for example, a sum of money lent in exchange for his promise to return the sum plus interest, the minor will neither be liable to fulfil his promise nor to provide restitution (of the unjust enrichment) of the loan.

The difficult but crucial task is to delimitate claims which indirectly enforce a minor's promise from claims which do not. On the one hand, where a benefit has been transferred to a minor in pursuance of the performance of a contract, a claim in unjust enrichment is barred even where the requirements of the claim are otherwise met. For example, in *Cowern v Nield* an advance payment for the delivery of clover and hay had been made to an underage trader. The minor failed to deliver any hay and the clover was rejected by the claimant upon delivery because it was rotten. Despite consideration having failed totally, the action brought for money had and received failed because it was not 'substantially *ex delicto*'.[599] Similarly, money or goods borrowed by a minor cannot be recovered by the lender even where the minor, by misrepresenting himself to be of age, fraudulently induced the (money-)lender to extend credit or lend goods. Restitution would substantially amount to the enforcement of the unenforceable promise to repay the loan or return the goods.[600] Again, the same differentiation applies in the context of tortious liability for fraud.[601] Where, on the other hand, a

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[599] *Cowern v Nield* (fn 129).

[600] See *R Leslie Ltd* (fn 70) which was already discussed in the context of minors' tortious liability as the claim was brought for fraud and, in the alternative, money had and received; note, however, that a loan to a minor for purchasing necessaries has been held binding, provided the money is actually applied for necessaries rather than 'waste[d] and misappl[ied]', *Marlow v Pitfeild* (1719) 1 PWms 558, 24 ER 516. An indebted overdraft account cannot be enforced against a minor, *Thavorn v Bank of Credit and Commerce International SA* [1985] 1 Lloyd's Rep 259. See also *Ballett v Mingay* (fn 190), which is concerned with goods borrowed by a minor.

[601] See chapter II, section 2)c) at fn 191.

minor simply encroached on someone's rights outside the scope of any promise of his, he can be liable in unjust enrichment. For example, a minor has been held liable in an action for money had and received after he embezzled money from his employer; the existence of the employment contract was irrelevant as the return of the stolen money was not linked to it (or any other promise).[602] But even an (intended) performance by the adult party might be recoverable where, for example, a mistaken overpayment of salary has been made to the minor.[603]

The strictness of this defence can seem rather harsh, especially where a minor defrauded another about his minority and willingness to return borrowed money or goods. It should be noted that, nowadays, minors can be ordered to return goods or money under section 3(1) of the Minors' Contracts Act 1987.[604] These concerns are further discussed in the comparative analysis of this chapter.[605]

b. Change of Position

The aim of restitution of unjust enrichment is to disgorge what the defendant gained and retains at the claimant's expense—but not more than that. This entails that, where the defendant has lost the enrichment in some way and there is no substitute for it left in his overall wealth, a claim in unjust enrichment must fail

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[602] *Bristow v Eastman* (fn 597) .

[603] As argued by Häcker, 'Minority' (fn 497) 222 at fn 161.

[604] See section 2)a)2. of this chapter.

[605] See section 3)c) of this chapter.

because restitution would be inequitable.[606] In English law, the subsequent loss of the enrichment is referred to as change of position. For pleading this defence, the defendant must, first, establish a causal relationship between his receipt of the benefit and the change of position and, second, it must be inequitable to require the defendant to provide (full) restitution to the claimant in the particular circumstances.

The causal relationship between the receipt of the benefit and the change of position can be established by the loss of the actual benefit or by incurring expenses in reliance on the validity of the receipt. Products or proceeds gained from the benefit or from disposing of it prevent the defendant from pleading change of position.[607] If the defendant has incurred expenses in reliance on the enrichment, he can only deduct them if the expenses were 'extraordinary' in the sense that he would otherwise not have incurred them.[608]

Once the causal relationship is established, the defendant must show that requiring him to make (full) restitution would be inequitable in these particular circumstances. If he fails to do so, he still has to return his enrichment, despite the fact that it is no longer represented in his wealth, and he will effectively pay for it from his remaining property. Most importantly in the present context, restitution is not inequitable if the defendant was in 'bad faith' in respect of the validity of

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[606] *Lipkin Gorman* (fn 506).

[607] *Lipkin Gorman* (fn 506) 560.

[608] *Lipkin Gorman* (fn 506) 580. The details of the 'causal relationship' are contentious but not further relevant here; cf only *Goff & Jones* (fn 497) [27-32 ff].

the conferral of the benefit on him.[609] Primarily, this applies if the defendant consciously changed his position despite the fact that he knew the facts supporting the claim for restitution against him or was at least aware of the risk that he would not be entitled to the enrichment.[610]

The minority of a defendant could affect the assessment of whether restitution is equitable despite his loss of the enrichment. In particular, the question of whether the defendant was in 'bad faith' as to his entitlement to the enrichment might have to be answered differently in respect of underage defendants. There are two ways in which a defendant's minority could have such an effect. First, a young defendant might actually have a lesser understanding of the underlying situation and thus *factually* no knowledge of the fact that he cannot keep what he received. This aspect is not further discussed here because it is not immediately linked to minority: an old person might suffer a similar impairment. Second, and more importantly, it might be said that restitution is inequitable simply because the defendant, who changed position, is a minor.[611] However, it should be noted that minority already acts as a strict defence to all claims for restitution which are substantially '*ex contractu*'.[612] In such a case, the change of position defence has no further relevance. In any other case, treating minors more favourably than adults in the same situation requires special justification. The furthest-reaching proposition is to allow minors always to plead change of

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[609] *Lipkin Gorman* (fn 506) 580.

[610] *Twinsectra Ltd v Yardley* [2002] UKHL 12, 2 AC 164.

[611] Häcker, 'Minority' (fn 497) 217, 221 ff.

[612] See section 2)b)4.a. of this chapter.

position, even if in 'bad faith' in respect of the fact that they are not entitled to what they received and 'without inquiry into [their] honesty'.[613] With respect, this proposition requires differentiation. In the context of an encroachment on the rights of another, especially where a defendant has gained the enrichment by committing a wrong, restitution is generally still equitable despite the enrichment being 'lost'.[614] This general proposition should be applicable to minors, too, following the rule that, unless a promise would be enforced, minors under English law are generally liable in tort like adults.[615] It seems unnecessary to allow minors to plead change of position 'in a wider set of circumstances'[616] than normally permitted.

The situation is different where something has been transferred to a minor, such as in the case of restitution of a gift or a mistaken payment. Experience shows that minors are prone to squander money with which, for example, their bank account is suddenly credited.[617] Arguably, minors should be treated more leniently in respect of pleading change of position and of assessing whether restitution is still equitable. This proposition is supported by the argument that dealing with a gift or mistaken payment as if the transfer is valid can indirectly render the recipient liable if he is barred from pleading change of position. Minors

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[613] Birks, *Unjust Enrichment* (fn 14) 218.

[614] It is contentious whether a defendant wrongdoer can plead change of position at all; this arguably depends on the wrong in question, but cannot be analysed here in greater detail; see *Lipkin Gorman* (fn 506) 580 per Lord Goff; Birks, *Unjust Enrichment* (fn 14) 213 states that the defence is never available against a claim for restitution for a wrong, whereas the arguments brought forward by him at pp 209 f could equally support the contrary position.

[615] See chapter II, section 2)c).

[616] As argued by *Goff & Jones* (fn 497) [34-17].

[617] An example is *Thavorn v Bank of Credit* (fn 600).

should generally not be held to their decision of dealing with mistakenly or gratuitously received benefits as if the transfer was valid, even if they knew better. Even for the solicited supply of necessary goods or services, only a reasonable price can be claimed if the goods or services were suitable to the minor's position in life and his actual needs at the time. Thus, minors should rather be at liberty to plead change of position in respect of claims for the restitution of voluntary transfers to them where, otherwise, their protection from incurring liability by making a promise would be circumvented.

5. Restitution of Executed Reciprocal Contracts

As already explained in the context of German law, special problems arise where we are concerned with the restitution of executed reciprocal contracts.[618] The performances by parties to a reciprocal contract are 'linked' in a way that one party's claim for restitution cannot be determined without taking into account the other's counter-performance. Under English law, there are two mechanisms which, in conjunction, prevent a party to a reciprocal transaction from claiming restitution without appreciating the fact that his claim is intrinsically linked to the counter-claim.

First, a claim for restitution can only be based on the failure of the defendant's counter-performance in the event of a '*total* failure of consideration'.[619] This means that this unjust factor can only be relied upon if the

[618] See section 1)e) of this chapter.

[619] See section 2)b)3.a. of this chapter.

claimant has not received anything in return, and thus there can be no corresponding claim for counter restitution—the question of how these claims are linked cannot arise.

Second, where a claim is based on a different unjust factor, the contract provides a legal basis for the defendant's enrichment unless the claimant can rescind and thereby avoid it *ab initio*.[620] However, in order to do so, the so-called requirement of *restitutio in integrum* must be met. This requirement was once applied very strictly and proved to be a considerable hurdle but has lost much of its significance with its flexibilization according to its equitable version.[621] It can now be said that the person rescinding the contract must only be able to provide substantial rather than precise restitution.[622] According to the modern understanding, the claimant has to restore the defendant specifically to his precontractual situation, or, if this is no longer possible, he has to compensate the defendant for the difference in value. In the example of the purchase of a stamp used before,[623] if the stamp received by the buyer/claimant is damaged by water and only worth CHF5, instead of CHF10, for the purpose of rescinding the purchase of the stamp and claiming the purchase price of CHF12, a court could order the claimant to return the damaged stamp and compensate the defendant for the loss of its value of CHF5 or to compensate him for the entire value of the stamp. In the case of a minor being party to such a transaction, English law makes

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[620] See section 2)b)2. of this chapter.

[621] See section 2)b)2. of this chapter, at fn 523.

[622] See at fn 524.

[623] See section 2)b)2. of this chapter.

no exception to the *restitutio in integrum* requirement. In the example above, an underage buyer would have to restore the defendant to his position as before the transaction for claiming restitution.

3) Comparative Analysis

In chapters II and III, we have seen the modes and the extent to which minors can incur liability or transfer and acquire rights by their own, voluntary act. In this chapter, the focus has shifted to the question of how the conferral of a benefit by or on a minor can be reversed because it is regarded as undesirable that one of the parties is enriched at the expense of the other. Despite the differences in the approaches to restitution of unjust or unjustified enrichment, both in English and German law, 'minority' affects how transactions with minors can be reversed and is not merely a matter of contracts or transfers of rights. The primary focus of the present analysis is on the question of how the policies which could be identified in the first two chapters resurface again in the context of restitution. On the basis of a precise understanding of the underlying policies—instead of referring broadly to the 'protection of minors'—it is much easier to explain some of the legal differences in the area of unjust or unjustified enrichment.

a) Minority as a Ground for Restitution

In German law, the fact that one of the parties to a transaction is aged seven to seventeen years is reason enough to reverse it unless the parents have authorised the transaction or intentionally provided their child with the necessary funds

('pocket money') for performing its obligations under the agreement.[624] Even the performance of an obligation *to* a minor under a valid contract lacks its legal basis unless authorised by the parents.[625] Only gifts to minors can be valid without parental authorisation under § 107 BGB.[626] This proposition is coherent with the German policy of shifting the control over a child's transactions to its parents: if minors were unable to reverse the fully or partly executed transaction, they would effectively be bound to it. This coherence does not come as a surprise. The law of restitution in German law is an extension of the rules governing minors' contracts. The conceptual reason is the close connection between the validity of a person's legal act, which depends on his contractual capacity, and the question of whether the conferral of a benefit by or on him is supported by a 'legal basis'. What is irrelevant in German law is whether the transaction is beneficial for a minor or not because, for example, he struck a good bargain—it is solely up to parents to decide this, and it does not immediately play a role for the 'protection of minors' under German law. This aspect is emphasised by the fact that the other party, too, can claim restitution on the basis that *the defendant* was underage and *his* parents did not authorise the transaction. The 'protection' of minors under German law is really confined to shifting the control to parents and, otherwise, excluding minors from transactions.[627] The latter point is also linked to the idea in German law that certain 'classes' of persons, including minors, are unable to form the necessary

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[624] If the minor is below the age of seven years, restitution is due without exception, cf chapter II, section 1)a)4.

[625] See chapter III, section 1)c).

[626] Provided the acquisition of the property in question does not exceptionally entail a legal disadvantage.

[627] Keitel, *Minderjährige* (fn 235) 125.

degree of intention required for 'declarations of intention'.[628] Lastly, this policy is reflected in what was described as 'further reasons' for the absence of legal basis. These vitiating factors, in contrast to the manifold unjust factors in English law which are affected by minority, do not take the minority of one party to a transaction into account per se. Either the parents have authorised a transaction or it is void for minority. Only in cases where one of the 'exceptions' to minority applies, such as an employment under § 113 BGB, further factors, such as illegality, can be relevant because minors can act independently of their parents.

In English law, minority itself *is not* an unjust factor; however, it can still be argued that it *should* be. Some authors argue that being underage should allow a claimant to seek restitution as a matter of policy.[629] For assessing this argument, it is first necessary to identify the exact policy underlying minority in English law. A simple reference to the 'protection of minors' is not sufficiently differentiated for this purpose. At times, it has been assumed that 'the policy justification for allowing minors out of contracts—that the minor's consent should not count because one needs to protect the young against foolishness and poor judgement—should surely be fully carried over to restitution of an unjust enrichment'.[630] However, it has been shown that minors' intention is in fact given legal recognition in English law.[631] Chapter II showed that minors can generally enter

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[628] See in this regard already chapter II, section 1)a)3.

[629] Häcker, 'Minority' (fn 497) 199 at fn 26; *Goff & Jones* (fn 497) [24-21]; Virgo, *Restitution* (fn 506) 379; Burrows, *Restitution* (fn 224) 313 f.

[630] Burrows, *Restitution* (fn 224) 313 f, arguing that the failure of consideration should not have to be total; but note that at p 314 Lord Burrows, as he now is, is critical of establishing minority as an unjust factor.

[631] Chapter II, section 3)c)

into and enforce contracts, but most contracts are not enforceable as against them. The protection from liability is disapplied where, in general terms, this is beneficial for a minor. In chapter III, we have seen that minors can also validly transfer rights and, thereby, fulfil any contract, and even gifts by or to minors are generally valid. The policy underlying minority in English law is to protect minors from the enforcement of their promises but not from spending what they 'have in their hands'.[632] Parents' intention, as becomes even clearer in the following chapter, also has no role to play in this context. For this policy consideration to be effective, it is not necessary—but would rather be contradictory—to allow a claim for restitution of unjust enrichment solely based on the fact that the claimant is underage.

But this is not the end of the story. English law exceptionally 'corrects' allocations of rights between persons because equity demands it. On this basis, minority can still come to the aid of underage claimants in that certain unjust factors are more lenient towards them. Take the doctrine of undue influence: in relation to parents (or anyone standing *in loco parentis*), the existence of a relationship of 'trust and confidence' and its abuse by undue influence are presumed, and in relation to other persons judges are at least at ease to infer the relevant relationship of trust and confidence if a suspicious transaction is entered into with a friend and the claimant is young and inexperienced.[633] A similar approach is taken in the context of the so-called doctrine of unconscionable bargains, which was partly developed precisely for relieving young and

[632] See the comparative discussion in chapter III, section 3)b).

[633] See section 2)b)3.c. of this chapter, at fn 579.

inexperienced expectant heirs from perilous transactions under which they disposed of future fortunes at an undervalue.[634] In the following section, it is argued in more detail that this concept should be applied to provide relief for underage claimants more broadly. In contrast to these finely differentiated equitable approaches, German law does not take minority into account in the context of other reasons for an absence of legal basis. Doctrines such as undue influence or unconscionable bargains exist in German law only in a very broad sense, and they do not take minority into account in any form either.

b) A Uniform Ground for Restitution

In German law, restitution is due if the legal basis of a transaction is absent. The incapacity (*Geschäftsunfähigkeit*) or limited capacity (*beschränkte Geschäftsfähigkeit*) of one party to the transaction are possible reasons for the absence of legal basis by rendering the affected person's declaration of intention void.[635] As explained in chapter II, minors are only one 'class' of persons who are subject to limitations on their capacity in German law, and the general mechanism is the same in each other instance.[636] This similarity is carried over to the area of unjust enrichment due to the link between the validity of a person's legal acts and the presence or absence of a legal basis of his transactions. Thus, the reason why restitution can be sought by or from mentally ill, cognitively disabled, drunken, or unconscious persons is conceptually similar. These persons are generally unable

[634] See section 2)b)3.d. of this chapter, in fn 583.

[635] See chapter II, section 1)a).

[636] See section 3)b) of that chapter.

to effect legal acts autonomously and, similar to minors, restitution is due if they (attempt to) fulfil an invalid contract. Thereby, German law does not only have a uniform concept of 'contractual capacity', applying to several 'classes' of persons whose intention is deemed to be vitiated, it also extends that uniform model to restitution of unjustified enrichments in that the incapacity to effect legal provides a ground for restitution because the 'legal basis' is absent.

As pointed out in the previous section, English law only exceptionally corrects the allocation of a benefit between minors and other persons where equity demands it. What is interesting is that the language historically used in the context of unconscionable bargains of 'poor and ignorant' persons can aptly be applied to young persons who lack the proper understanding of a transaction, especially where this weakness is exploited by others. The doctrine allows the rescission of a transaction if the claimant was at a 'serious disadvantage', the defendant exploited this weakness in 'some morally culpable manner', and the transaction is 'overreaching and oppressive'.[637] Noteworthily, the doctrine of unconscionable bargains was (partly) developed to protect so-called 'expectant heirs'.[638] Equitable relief seems similarly appropriate where a minor actually has no proper understanding of a transaction due to his young age and the other party is aware of this fact but nevertheless proceeds with the execution of the bargain. However, nowadays, references in this direction can only occasionally be found in the case

[637] See section 2)b)3.d. of this chapter, at fn 585.

[638] See the explanations in section 2)b)3.d. of this chapter, in fn 583.

law as *obiter dicta*.[639] That the doctrine of unconscionable bargains could offer protection for minors, too, is also not usually discussed in the literature.[640] One reason why the doctrine of unconscionable bargains has not been applied to protect minors (other than 'expectant heirs') might be that in many cases where it could, equitable relief is provided based on the doctrine of presumed undue influence.[641] This doctrine is especially strong in relation to any person who stands *in loco parentis* to a minor; but it can equally be helpful in relation to close 'friends' taking advantage of a young person lured into improvident transactions.[642] Still, the scope of undue influence seems too narrow to protect minors in all relevant cases.

Another instance of equitable relief was explained earlier in relation to 'classes' of vulnerable persons other than minors, especially mentally incapable persons:[643] they too can enter into and carry out contracts;[644] however, if a mentally incapable person had no understanding of a transaction and the other party was aware of this fact, the transaction is rescindable and thereby can be

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[639] 'The classic example of an unconscionable bargain is where advantage has been taken of a young, inexperienced or ignorant person to introduce a term which no sensible well-advised person or party would have accepted', *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, 110 [G] per Browne-Wilkinson J.

[640] See, eg, N Enonchong, *Duress, Undue Influence, and Unconscionable Dealing* (3rd ed Sweet & Maxwell, London 2018) [16-018]. But see the general (ie, not related to unconscionable bargains) call for reform of the 'law on restitution for infancy' by Burrows, *Restitution* (fn 224) 316.

[641] Technically, there is nowadays only one doctrine of undue influence, cf section 2)b)3.c. of this chapter, at fn 567.

[642] See at fn 579.

[643] Drunken or unconscious persons are (probably) treated like mentally ill persons and thus only the latter will be referred to in the remainder of this section; cf Burrows, *Restitution* (fn 224) 317.

[644] See chapter II, section 3)b).

rendered void *ab initio*.[645] In this light, the protection afforded to mentally incapable persons is considerably wider than the protection under the doctrine of unconscionable bargains because no imbalance of the transaction or morally culpable exploitation of a claimant's weakness is required. Despite these differences, the reasoning shown in the context of mental incapacity is very akin to that underlying the doctrine of unconscionable bargains, and the language of the latter is frequently used in cases concerned with mental incapacity and vice versa.[646] In applying the doctrine of unconscionable bargains, courts emphasise that the defendant's knowledge by the defendant of the claimant's weakness amounts to unconscionability and that the bargain being unfair would in no case be sufficient to set it aside.[647] It should also be noted that the doctrine of unconscionable bargains itself is still subject to academic discussion, and especially the requirements as to the defendant's unconscionable conduct are regarded as too strict.[648] Although an 'exploitation' of the claimant's weakness was not apparent in the seminal decision for mental incapacity, *Hart v O'Connor*,[649] it remains possible that a uniform approach for the 'general' doctrine of unconscionable bargains, the protection of minors, and the protection

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[645] *Hart v O'Connor* [1985] AC 1000; *Imperial Loan v Stone* (fn 225); *Molton v Camroux* (fn 225); see chapter II, section 3)b).

[646] *De Sena v Notaro* [2020] EWHC 1031 (Ch); *Adare Finance DAC v Yellowstone Capital Management SA* [2020] EWHC 2760 (Comm), 2020 WL 06264468.

[647] *Boustany v Pigott* (1995) 69 P&CR 298, 303 per Lord Templeman, relying on *Hart v O'Connor* (fn 645); cited also in *Adare Finance* (fn 646) [67] per Peter MacDonald Eggers QC and in *Minder Music Ltd v Sharples* [2015] EWHC 1454 (IPEC) [25] per Recorder Michaels.

[648] Enonchong, 'Unconscionability' (fn 585) 224, 229 ff. Historically, the threshold was lower, cf *Cresswell v Potter* (fn 584), 257, and that is the case in other common law jurisdictions such as Australia, cf Chen-Wishart in: *Chitty* (fn 3) [10-175].

[649] *Hart v O'Connor* (fn 645) 1024.

of other 'classes' of vulnerable persons can be developed.[650] The essential question is whether the doctrine should be developed in the direction of the stricter general approach or towards the broader approach applied in the context of mentally incapable persons. An even further-reaching step of reform would be to unite these concepts with that of presumed undue influence under one head and rationale. Some cases decided on the basis of undue influence show considerable similarity in their reasoning to those decided on the basis of unconscionable bargains. For example, for a deed between father and son to stand, it has been held that the son must have had proper understanding of the transaction.[651] And showing that the weaker party had independent legal advice can defeat claims pleaded on the basis of each of these equitable doctrines.[652] Whether and how exactly such a broad reform can be pursued must be determined elsewhere. A very (and potentially too) ambitious attempt in this direction was made by Lord Denning MR in *Lloyds Bank Ltd v Bundy*, developing a principle of 'inequality of bargaining power'.[653] Such a proposal would go much further than finding underlying uniform principles for the protection of different 'classes' of persons who suffer an inherent weakness, and Lord Denning MR's proposition was not supported by the House of Lords.[654] Still, the similarity between the equitable doctrines of undue influence and unconscionable bargains in their principles and

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[650] Whittaker in: *Chitty* (fn 3) [11-076] is equally critical of the distinction between minority and mental illness in this context.

[651] *Berdoe v Dawson* (1865) 34 Beav 603, 605, 55 ER 768, 769 per Romilly MR.

[652] See in respect of undue influence *Lancashire Loans Ltd v Black* (fn 573), 414 f; *Powell v Powell* (fn 573), 246 per Farewell J; *Berdoe v Dawson* (fn 651) 770.

[653] [1975] QB 326, 337.

[654] *National Westminster Bank v Morgan* [1985] AC 686, 708 per Lord Scarman; see also the critical remarks by Chen-Wishart in: *Chitty* (fn 3) [10-181].

language shows that, despite the absence of a *conceptually* uniform approach to the protection of different 'classes' of vulnerable persons, as applied in Germany, a principled and (nearly) uniform approach can be developed on equitable principles. These technically individual doctrines do not necessarily lead to a 'piecemeal' approach, provided they are analysed appropriately and, occasionally, revised.

One thing that ought to be kept in mind when extending the application of the doctrine of unconscionable bargains to minority is that English law, similar to the approach underlying mental incapacity, only *exceptionally* affords minors equitable relief. Consequently, unless this proposition is reversed, there cannot be anything like a presumption that a minor was too inexperienced or uneducated and thereby taken advantage of. However, in an unfortunate case such as *Pearce v Brain*, where a minor exchanged his sound motorbike for a faulty car,[655] it might in the future be possible to show that an adult consciously took advantage of a minor's inexperience, and restitution could be sought by the minor, even though there was no total failure of consideration. Where, however, a minor is not actually in a weaker position than an adult or where the latter acted wholly honestly, there is no reason to argue that, in English law, the minor should be able to rescind the transaction. This is coherent with the policy underlying minority in English law: minors' transactions are generally valid, and they can spend what they 'have in their hands'. Equity intervenes only exceptionally to correct

[655] *Pearce v Brain* (fn 532); see already the explanations of this case in section 2)b)3.a. of this chapter, at fn 552.

allocations of benefits between a party with a certain weakness and another person.

Extending the relief offered to other persons with a certain weakness and lack of understanding would streamline the relevant law in England. It would also take into account what is essentially expressed under German law in § 105 BGB: several 'classes' of persons do share some similarities in their 'weaknesses', and this uniformity might well be relevant in the reversal of transactions to which such a person is party. The fact that unjust allocations of enrichments are exceptionally reversed can still be a sufficient basis for a uniform approach to protecting minors, mentally incapable persons, or other persons suffering from a specific impairment from improvident transactions. This thesis cannot definitely answer whether the basis for this approach should be the protection afforded to mentally incapable persons or the (stricter) general doctrine of unconscionable bargains. Answering this question would require a thorough analysis of the doctrine of unconscionable bargains, taking into account different weaknesses, including, if the present proposition is supported, the 'new' instance of minority. A further point which complicates matters is that, in a fairly recent judgment, the Supreme Court held that the defendant need not actually know of the claimant's mental incapacity but that constructive knowledge in the sense that the defendant ought to have known of it suffices.[656] How this rule is applied in future judgments remains to be seen.[657] It might allow the inference that an adult dealing with a minor had constructive

[656] *Dunhill v Burgess* (fn 227) [25] per Baroness Hale.

[657] See the critical discussion by Whittaker in: *Chitty* (fn 3) [11-078 ff].

knowledge of the latter's ignorance where it was obvious that the minor is underage.

c) Restitution of Executed Reciprocal Contracts

The English and German laws of restitution each have developed approaches to take the 'link' between the parties' performances following a reciprocal contract into account when allowing a party to the transaction to claim restitution of a performance.[658] In the one case, this is effected by only allowing a claim for restitution if the value of the counter-performance is returned, essentially a flexible version of the traditionally strict *restitutio in integrum* requirement; in the other case, the *Saldotheorie* reduces the claim for restitution at the outset.[659]

In contrast to German law, English law does not make an exception to this rule for underage claimants. Minors have to return the value of what they received under a reciprocal contract even though their enrichment has perished. In the example of a minor buying a stamp and the stamp being accidentally destroyed, this means that the minor could, subject to the general requirements, plead change of position against the seller's claim for the restitution of the value of the stamp (CHF10); but, for claiming restitution of the purchase price paid by him (CHF12), for example, based on misrepresentation, the minor would have to offer to return the value of the stamp. Thus, in contrast to the exception made to the *Saldotheorie* under German law, minors are practically held to their decision to enter into an

[658] See sections 1)e) and 2)b)5. of this chapter.

[659] The *Saldotheorie* has also been dubbed the functional equivalent to the *restitutio in integrum* requirement as it is found in common law jurisdictions, von Caemmerrer, 'Mortuus Redhibetur' (fn 480) 637; Häcker, *Impaired Transfers* (fn 22) 111.

agreement and fulfil it. Should English law, too, allow minors to retreat from an executed reciprocal transaction without effectively being bound by the underlying agreement? In other words, should there be an exception to the *restitutio in integrum* requirement in favour of minors?[660]

This issue has been discussed[661] primarily in the context of certain cases[662] in each of which a minor was denied restitution because the failure of consideration was not *total* and, apparently, no other unjust factor could be relied upon to substantiate his claim.[663] While the question of whether the failure of consideration is total depends on a comparison between the defendant's promise and his actions, the question of whether and to what extent *restitutio in integrum* is possible depends on what the claimant has received and the current condition of the received benefit. Both questions are mutually exclusive: if the defendant's failure of consideration is total, the claimant cannot have received anything in the first place. In the relevant cases, the question of whether the minor could have claimed restitution for failure of consideration depends, in turn, on whether claims for restitution for a mere *partial* failure of consideration should be allowed. However, if that were to be answered in the affirmative, the question of whether minors should be bound to provide counter-restitution (in value) would again

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[660] Note that minority itself is not an unjust factor, cf section 2)b)3.b. of this chapter; for claiming restitution, a minor must be able to rely on one of the generally available unjust factors, only some of which are particularly lenient in favour of minors, cf section 3)a) of this chapter.

[661] S Meier, 'Restitution After Executed Void Contracts' in: P Birks and FD Rose, *Lessons of the Swaps Litigation* (Mansfield Press, London 2000) 169, 187; Häcker, 'Minority' (fn 497) 209 ff.

[662] *Valentin v Canali* (fn 557); *Pearce v Brain* (fn 532); *Steinberg* (fn 337).

[663] See already section 3)a) of this chapter.

arise.[664] Harsh results such as in *Pearce v Brain* could be avoided.[665] The justification purported for denying (minors) restitution for mere *partial* failure of consideration is that, 'when an infant has paid for something and has consumed or used it', 'it is contrary to natural justice that he should recover back the money which he has paid'.[666] This argument seems rather doubtful, but the underlying debate is general and not immediately related to minority. This issue cannot be resolved in this thesis.[667]

The general rule both in England and Germany is that the link established by the agreement of the parties must be carried over to the restitution of reciprocal performances. Under German law, the minority of the claimant is a case in which an exception is made to this general rule. The reason for it is two-fold: first, the validity of a bargain with minors depends on their parents' authorisation, which must not be undermined by their children effectively being bound to an unauthorised but executed transaction.[668] Second, minors' ability to form a legally valid intention is generally regarded as impaired; their decision about a bargain

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[664] As already noted by von Caemmerrer, 'Mortuus Redhibetur' (fn 480) 638 in fn 54. In contractual settings, the subsequent question would be in what circumstances a *partial* failure of consideration amounts to a 'fundamental breach', giving the claimant a right to terminate the contract and thereby to strip the enrichment of its legal basis; whether that right is, again, subject to the requirement of counter-restitution being made is not entirely clear; cf Peel, *Treitel* (fn 19) [18-033], indicating that it is, referring to *Boone v Eyre* (1779) 2 W Bl 1312, 96 ER 767; *Duke of St Albans v Shore* (1789) 1 Hy Bl 270, 126 ER 158; *Cornwall v Henson* [1900] 2 Ch 298.

[665] See at fn 537.

[666] *Valentini v Canali* (fn 557), 167 per Lord Coleridge CJ.

[667] Strong voices in the literature argue that *partial* failure of consideration should suffice, Burrows, *Restitution* (fn 224) 324 f, 330 ff; Virgo in: *Chitty* (fn 3) [32-073]; *Goff & Jones* (fn 497) [12-16 ff]; Virgo, *Restitution* (fn 506) 365 ff; Peel, *Treitel* (fn 19) [22-007].

[668] Chapter III, section 3)b).

cannot have sufficient weight to affect their ability to claim restitution.[669] Consequently, the *Saldotheorie* (or any of the alternative approaches proposed in the literature) is not applied to the detriment of a minor (and of mentally ill, cognitively disabled, drunken, or sleepwalking persons).[670]

In the context of English law, both these reasons for making an exception to the general rule do not apply. First, as further explained in the following chapter, parents have no (legal) control over their child's spending except for *factually* retaining property from it. Second, minors' intentions and their ability to enter into transactions and to perform them are not generally regarded as vitiated;[671] only their ability to incur contractual liability is limited.[672] Thus, in the context of reversing an executed reciprocal transaction, it seems not immediately necessary for English law to ignore the underlying agreement merely because a minor is party to it. If a minor has received something in return for his own performance which he seeks to recover, he should be bound to provide counter-restitution and completely reverse the transaction. No exception to the *restitutio in integrum* requirement needs to be made in favour of minors.[673]

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[669] Chapter II, section 3)c).

[670] See the references in fn 486.

[671] See chapter II, section 3)c).

[672] Subject to certain exceptions, as explained in chapter II, section 2)b).

[673] Contra: Häcker, 'Minority' (fn 497) 214.

d) Minority as Policy-Based Protection from Liability

Both English and German law face the challenge of balancing the protection of minors from improvident transactions and the interests of adults dealing with them in good faith. Where people deal with one another and allow others to affect their rights, any special protection afforded to one party of a bargain usually comes at the cost of the other. The protection of minors from incurring liability or disposing of their rights typically means that adults dealing with them are disappointed. Facing a minor, whether knowingly or ignorantly, adults lose out on many of the means which usually allow them to recover property or defeat a claim brought against them. Both under English and German law, good faith in the other party's capacity or, more specifically for the present purposes, the fact that the age of eighteen has been reached is not protected.[674] Despite this fact, each jurisdiction follows a different policy of what the 'protection of minors' means, and this entails that the interests of minors and those of adults dealing with them are balanced differently.

Summing up what has been seen so far in this thesis, 'minority' defeats claims brought against a minor in the following ways: under English law, minority bars not only the enforcement of minors' promises (unless one of the 'exceptions' applies), it also bars any claim for restitution of unjust enrichment or damages in tort if thereby a promise by a minor would indirectly be enforced, also referred to as a claim being 'substantially *ex contractu*'. Even where a claim is 'substantially *ex delicto*', a minor might be able to plead change of position.

[674] *R Leslie Ltd* (fn 70); KG (Berlin), [1964] FamRZ 518, 519.

However, in such cases minors are liable in tort just like adults in the same situation. Also, where a minor's promise is unenforceable, the adult party can apply for an order for restitution under section 3 of the Minors' Contracts Act 1987. In German law, there is no similarly strict defence of 'minority', neither in unjustified enrichment nor in delict. For this reason, there is also no special statutory remedy required for adults to seek relief by application to court. Rather, the plea of disenrichment is modified in favour of minors by generally drawing on their parents' state of mind to determine whether they knew of the absence of basis at the time of the disenrichment. Where a transaction is void because a minor's parents did not authorise it, they will often not know about the transaction at all, and their child is at liberty to plead disenrichment. Only in cases where a minor's behaviour does not justify special protection, as further discussed below, his own knowledge of the absence of basis decides whether he can plead disenrichment, which often means that he cannot. In the following two subsections, two particularly difficult but also interesting cases are discussed in light of the other jurisdiction.

1. The *Flugreise*-Decision

One case which German legal scholars have been particularly troubled with is the seminal *Flugreise*-decision of 1971.[675] As explained, a minor managed to sneak on a plane, sitting among the other passengers without a ticket and was flown from Hamburg to New York City. He was refused entrance to the US and had to return home. An important question was whether he was barred from pleading

[675] BGH, [1971] NJW 609; see already section 1)d)2. of this chapter.

disenrichment in respect of the value of the plane journey to the US because he knew of the absence of legal basis. His parents were ignorant of their son's knaveries and thus their child would generally be allowed to plead disenrichment despite himself being in 'bad faith'. But the Federal Supreme Court held that, where a minor simultaneously commits a delict when encroaching on the other party's wealth, his own state of mind should be decisive. That was important in that the airline had not incurred any loss because no ticket had or would otherwise have been sold for the seat occupied by the minor. Holding him liable in delict was not possible. The minor had to pay the objective value of a plane journey from Hamburg to New York City.

One reason why the approach by the Federal Supreme Court has been subject to criticism is that the law of delict is based on policy considerations distinct from those underlying restitution. As shown, restitution in the context of minority follows the same policy considerations which underly minority in contract law:[676] minors must not effectively be bound to transactions which their parents have not authorised. In contrast, delict is concerned with the question of whether a *loss caused* by a defendant must be compensated. Delict is not concerned with the question of whether a *benefit gained* by a defendant must be returned irrespective of whether the benefit is still present in his wealth. The fact that a minor *concurrently* incurred delictual liability does not say much about whether he ought to be stripped of a benefit gained, as shown neatly by the *Flugreise*-decision: the minor did not occupy a seat for which otherwise a ticket would have been sold, and the airline incurred no loss. The approach as

[676] See section 3)a) of this chapter.

established by the Federal Supreme Court in the *Flugreise*-decision should be rejected.[677]

Some authors try to develop the Federal Supreme Court's approach further by holding that, for delictual considerations to be apt and a minor's own knowledge to be decisive, he must both have committed a delict *and* caused damage to the claimant.[678] This argument misses the point because the crucial question is the attributability of a minor's own knowledge for the purpose of § 819 (1) BGB, which has nothing to do with the question of whether the other party incurred a loss. The claimant might have incurred a great loss and, depending on § 828 BGB, can be able to seek compensation, whereas the minor might have only gained a small, if any, benefit. Without going into further detail on this point, it should be noted that the *ratio* underlying liability for delict is distinct from that underlying unjustified enrichment.[679].

A popular alternative approach to determining when underage defendants should be treated favourably by drawing on their parents' state of mind is drawing a line between situations in which a minor gained his enrichment by a 'transfer' of

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[677] D Medicus, 'Anmerkung zu BGHZ 55, 128' [1971] FamRZ 247, 251 f; Larenz/Canaris, *Bd II/2* (fn 463) 312 at fn 57.

[678] HJ Wieling and T Finkenauer, *Bereicherungsrecht* (5th ed Springer, Berlin 2020) 96.

[679] As emphasised by Medicus, 'Anmerkung' (fn 677) 251; see also the argumentation in AG Kerpen, [2007] BeckRS 4952 [4.(4)]. The same applies, even more so, to the distinction between criminal law and restitution of unjustified enrichment, and proposals to draw on minors' knowledge (at least) where and because they intentionally acted criminally merely blur the underlying policy considerations. But this is exactly one of the arguments relied on in the *Flugreise*-decision, and it found support in the literature, cf L Hombrecher, 'Die verschärfte Haftung Minderjähriger nach § 819 Abs. 1 BGB – Der Flugreisefall (BGH NJW 1971, 609 = BGHZ 55, 128)' [2004] Jura 250, 253, arguing that in such a case minors definitely know that they cannot keep what they received; however, this entirely misses the point: the question is, whether their knowledge can be *attributed* to them for the purposes of § 819 (1) BGB.

the claimant and such where he gained it 'in any other way'.[680] As explained at the beginning of this chapter, German law draws a distinction between restitution of benefits which were gained by the defendant by 'transfer', ie, the purposive conferral of a benefit, usually to fulfil an obligation (which is assumed to exist or later ceases to exist) in a contractual setting, or 'in any other way'.[681] The idea is that, whenever the benefit gained by a minor was *transferred* to him by the claimant, only his parents' knowledge should decide whether their child can plead disenrichment. When a minor receives a benefit in a situation akin to contracting for it, his parents are in control over whether their child is effectively bound. Where, on the other hand, the enrichment is obtained 'in any other way', especially by a minor's encroachment on the claimant's rights, for example, by stealing something, his own state of mind is decisive in the context of § 819 (1) BGB, but in the limits of § 828 BGB.

One problem in applying this approach is that determining whether a benefit was received by a transfer or 'in any other way' can be very difficult. Going back to the seminal *Flugreise*-decision, it has repeatedly been stated that the benefit gained by the minor—the service of transportation—was not a transfer to him in the sense of unjustified enrichment.[682] The airline or, more precisely, its staff on the plane did not recognise the minor when he sneaked inside. Furthermore, it is said to be doubtful whether the airline intended to transport

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[680] Schwab in: *Münchener Kommentar* (fn 211) § 819 [9] at fn 25 f; Pawlowski, *Willenserklärungen* (fn 200) 59.

[681] See section 1)a)1. of this chapter.

[682] Lorenz in: *Staudinger* (fn 444) § 812 [3]; Kellmann, 'Bereicherungsausgleich' (fn 463) 863.

every person on the plane or only those with a valid ticket.[683] Thus, according to some, the minor gained the benefit 'in any other way', and on this basis they agree with the *Flugreise*-decision. However, others argue that, because the minor was not recognisable as a stowaway among the other passengers, the airline intended to transport him, and he received the benefit 'by transfer', which means that his parents' state of mind should have been decisive.[684]

What this discussion really reveals is that the *conceptual* distinction between claims for the restitution of transfers and of enrichments gained 'in any other way' is inappropriate to determine the question of whether minors' or their parents' state of mind should be drawn upon.[685] One reason why it is inappropriate is the obvious difficulty in drawing this conceptual distinction itself; it is not helpful to refer to it due to its uncertainty in 'hard cases'.[686] More importantly, the attempt shows the downside of drawing on a *conceptual* distinction, whereas the question of whether a minor should exceptionally be allowed to plead disenrichment really is a *policy* question: the policy underlying §§ 104 ff BGB of shifting the control over minors' transactions to their parents must reach into the realm of unjustified enrichment to avoid its circumvention.

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[683] Kellmann, 'Bereicherungsausgleich' (fn 463) 863.

[684] Medicus, 'Anmerkung' (fn 677) 251. The former view is nowadays predominant: the airline only wants to confer a benefit on paying customers and thus the minor's enrichment was gained 'in any other way', cf Lorenz in: *Staudinger* (fn 444) § 812 [3]; Hormbrecher. 'Flugreisefall' (fn 679) 252 at fn 16. In one 'modern *Flugreise*-decision' the conferral of a benefit was undoubtedly a performance to the minor, AG Kerpen, [2007] BeckRS 4952, whereas this court classified the original *Flugreise*-decision as a case of an encroachment by the minor on the airline's rights.

[685] As emphasised by C-W Canaris, 'Case Note to BGH Urt. v. 7.1.1971 – Flugreisefall' [1971] JZ 556, 561. But note that courts still follow this differentiation: AG Kerpen, [2007] BeckRS 4952.

[686] See also the criticism by Reuter/Martinek (2016, fn 468) 360 at fn 141; see also Canaris, 'Flugreisefall' (fn 685) 560 f, discussing these difficulties in the *Flugreise*-decision.

Drawing on the conceptual distinction between restitution of transfers and 'non-transfers' is more likely to cause further complications than shed light on the matter.[687] Even more so, the answer to this policy question can hardly depend on, for example, whether a minor hides as a stowaway among other passengers or, unseen, in the luggage compartment of a plane.[688]

In summary, neither the distinction between whether or not a minor committed a delict nor between the restitution of transfers and enrichments gained 'in any other way' are appropriate for determining when the general rules for pleading disenrichment should apply and a minor's own knowledge potentially bars him from pleading disenrichment, rather than his parents'. Interestingly, as early as in 1917 the German Imperial Court held that, where the recipient of a benefit lacks 'contractual capacity' and his knowledge of certain facts has similar consequences as him entering into a 'transactional relationship' ('*rechtsgeschäftlich gestaltetes Verhältnis*'), the knowledge of the recipient does not have sufficient weight and, instead, that of the legal representative must be decisive.[689] The argument brought forward by the Court is relevant in that it focuses on the core *policy* consideration underlying minority in German law: the control over minors' legal relationships is shifted nearly completely to their

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[687] As emphasised by Kellmann, 'Bereicherungsausgleich' (fn 463) 863 f. As a further example for these doctrinal complications, Reuter/Martinek (2016, fn 468) 462 argue that there could never be a performance to a minor in the sense of § 812 BGB without parental authorisation because a transfer to a minor without parental approval cannot have performative effect in relation to an obligation owed to the minor (see already chapter III, section 1)c). But this establishes a link between performance in the sense of restitution and under § 362 BGB which does not exist.

[688] As pointed out by Canaris, 'Flugreisefall' (fn 685) 560 f.

[689] RG, [1917] JW 465, which is concerned with a woman lacking capacity due to legal incapacitation; this meant that she had the legal status of a minor below the age of seven years.

parents (the legal representatives), whereas minors' own intentions do not bear sufficient weight to enable them to effect a valid declaration of intention.[690] Where minors are forced to return a benefit although being disenriched, they are practically bound to a transaction which is invalid precisely because their parents have not authorised it. Thus, where a claim for restitution brought against a minor indirectly binds a minor to an unauthorised transaction, his parents' state of mind is drawn upon to determine whether he can plead disenrichment or is barred from it under § 819 BGB. But, where the claim arises wholly outside a situation in which a minor would have incurred contractual liability (and only with the parents' authorisation), it is appropriate to draw upon a minor's own state of mind.[691] Where this is the case, the commonly held view is that whether a minor himself was in 'bad faith' in respect of his entitlement to the enrichment should be judged according to the limitation on his delictual liability under § 828 (3) BGB.

Applying this approach to the *Flugreise*-decision, the case of a stowaway poses difficulties in that the other party does not even know of the minor and can hardly be said to enter into a transaction with him.[692] However, the risk of being liable for the objective value of the service, practically similar to the ticket price, is essentially the risk of receiving the service on credit rather than having caused a

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[690] See chapter III, section 3)b).

[691] The argumentation of von Tuhr, *Vol 2/1* (fn 35) 364 f is substantially very similar, although he reaches a different conclusion. See also the akin argumentation in KG (Berlin), [1964] FamRZ 518, 519. Where the defendant has not reached the age of seven years and thus has no capacity according to §§ 104, 105 (1) BGB, it can never be his own knowledge which ought to be drawn upon. The knowledge of a (hypothetical) legal representative is even decisive in the context of transactional relationships if the person lacking capacity does not have one, OLG Nürnberg, [1990] WM 307, 308; OLG Schleswig, [2016] NJW-RR 1245 [78].

[692] But note that in the famous *Flugreise*-decision the Federal Supreme Court basically constructed this by assuming that the airline (intentionally) transferred a benefit to the minor, cf section 3)c) of this chapter, at fn 473.

loss to the service provider. The *Flugreise*-decision emphasises this point in that the benefit of the service is lost immediately.[693] Whether the minor can plead disenrichment in that case effectively determines whether or not he must pay the ticket price. Even though the minor only sneaked on the plane, the potential liability for the value of the ticket can be said to reflect the involvement of the typical risks of participating in transactional relationships rather than in social life generally.[694] Lest parents are deprived of their right to reject the authorisation of their child's obligation to pay for the value of the journey, their state of mind should determine whether their child can plead disenrichment.[695] That this is the correct result becomes even clearer when considering that, had the minor simply purchased the ticket without parental authorisation, he could have claimed restitution of the ticket price irrespective of his own liability to return the value of the service rendered to him.

In respect of English law, liability must equally be barred in such a case. By taking a plane journey without a valid ticket, a minor effectively receives the service on credit. His liability for the objective value of the journey would amount to enforcing his (assumed) promise to pay for the service, and thus the claim should be regarded as 'substantially *ex contractu*'. The fact that the other party is

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[693] This is now the predominant way to determine the relevant enrichment, whereas the Court in BGH, [1971] NJW 609 still followed a different approach, see Larenz/Canaris, *Bd II/2* (fn 463) 254 f.

[694] As pointed out by Canaris, 'Flugreisefall' (fn 685) 562.

[695] Liability for *using* furniture in the meantime, ie, before the final rejection of authorising the transaction by the parent, was also dismissed in KG (Berlin), [1964] FamRZ 518. But, once the parent knows of the bargain and has refused to authorise it, the minor is debarred from pleading disenrichment, see BGH, [1977] FamRZ 537, where a minor was liable for the restitution of the value of using the benefit conferred on him.

not aware of his minority is irrelevant both under English and German law.[696] This is emphasised by the fact that restitution of a loan obtained by a minor by fraudulently misrepresenting himself as an adult is barred as a claim *ex contractu*,[697] as further discussed in the following subsection.

2. *R Leslie Ltd v Sheill*: Fraud by Minors

R Leslie Ltd v Sheill is a further example of the complexities involved in determining in which cases minors still deserve special protection.[698] As explained before,[699] a minor fraudulently misrepresented himself as being of age and thereby induced the adult party to lend him money. Claims for damages for breach of contract, restitution of unjust enrichment, or damages for fraud were held to be barred by the defendant pleading minority, as the claims were '(substantially) *ex contractu*'. Whether the minor had changed his position was irrelevant—even if he still had held the entire sum in his hands, he would not have been compelled to return it to the adult *at law*. In the words of Lord Sumner, English law opted 'to safeguard the weakness of infants at large, even though here and there a juvenile knave slipped through'.[700] This approach can obviously lead to very one-sided results. To mitigate the harsh consequences on the part of adult parties, Chancery historically had (equitable) jurisdiction to order minors to return

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[696] *R Leslie Ltd* (fn 70); KG (Berlin), [1964] FamRZ 518, 519.

[697] See section 2)b)4.a. of this chapter, at fn 600.

[698] *R Leslie Ltd* (fn 70).

[699] See chapter II, section 2)c) at fn 183.

[700] *R Leslie Ltd* (fn 70), 612. See in this context also *Barnes v Toye* (fn 83), 413 per Lopes J: 'In fact, a tradesman dealing on credit with an infant does so at his peril (…) unless (…) the goods supplied were necessaries (…).'

what they fraudulently obtained from another.[701] Apart from fraud, such an order required that the benefit received by a minor was still identifiable. It is this equitable jurisdiction that, following the recommendations of the Law Commission, was generalised and consolidated in section 3(1) of the Minors' Contracts Act 1987.[702] As explained, the provision gives judges discretion to order minors to return specific property gained from the other party or property representing it if they refuse to honour a contract under which they received a performance on credit and the judge believes that the order is 'just and equitable'. It is no longer a prerequisite that a minor committed fraud, but it might well be a point of consideration for judges in exercising their discretion. The remedy allows them to take the individual facts of each case into account as well as matters of 'justice' in a wide sense.

Under German law, the first point to note is that minors' delictual liability is not barred outright (for minors aged seven or older), but it is limited only by § 828 BGB.[703] Whether a minor must compensate for an adult's loss primarily depends on whether the minor had the necessary understanding of his responsibility for the delict. With regard to liability in unjustified enrichment, the situation is more complex. Where parents have not authorised their child's transaction, whether or not induced by fraud, restitution of what a minor gained is

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[701] As explained by Lush J in *Stocks v Wilson* (fn 96) 244 ff.

[702] *Minors' Contracts (Report)* (1984, fn 493) [4.16 ff], with further explanations of the old, more limited equitable remedy.

[703] See chapter II, section 1)c); such liability could stem from fraud under § 823 (2) BGB in conjunction with § 263 of the Criminal Code; it might also result from the minor having intentionally caused damage to the adult, § 826 BGB; the minor could also incur so-called pre-contractual liability, but it would be limited based on the knowledge of the parents.

due because there is no legal basis. However, a minor might still be able to plead disenrichment. Whether he can do so depends, in turn, on whether he knew of the absence of legal basis at the time of the disenrichment. For determining whether this is the case, the state of mind of the minor's parents is drawn upon unless, according to the view expressed in the previous subsection, there is no risk that the requirement of authorising their child's transactions is circumvented by the claim for restitution. Where an adult agrees to lend money to a minor, whether or not he was defrauded, the minor having to repay the (value of the) loan would substantially (but for payments of interest) amount to the enforcement of the obligation to repay. Thus, the parents' state of mind should be decisive and, absent their authorisation of the transaction, it is likely that their child can plead disenrichment. The rescission of the transaction by the adult party for fraud can only become relevant where parents authorised their child to borrow money. In German law, fraud by one party can entitle the other to rescind the transaction and thereby make it void *ab initio*.[704] For fraud to apply, a defendant must have acted with the intention to deceive the other party (*Arglist*) and induce him to the transaction. Generally, there is no reason why an adult should not be entitled to rescind a transaction induced by a minor's fraud.[705] Once the right to rescind is exercised, restitution of any performance pursuant to the transaction is due. However, because the parents authorised the transaction, the adult could also enforce his right to the minor's performance. Rescission, whether for fraud or any other reason, is only relevant if the adult still wishes to avoid the bargain. This

[704] Under §§ 123, 142 BGB; see also already section 1)b)2. of this chapter.

[705] There is also no immediate reason to question minors' ability to form the relevant intention to defraud another, as it is not an instance of the intention to form a declaration of intention and thus not affected by §§ 104 ff BGB.

might be the case where a minor defrauded the other party about another aspect, such as a certain quality of goods. The immediate consequence would be that the minor is liable in unjustified enrichment, and this is the correct result for German law. Because his parents did in fact authorise the transaction, there is no risk that the minor's protection is circumvented in such a case and, consequently, his own knowledge of the absence of legal basis should bar him from pleading disenrichment.

3. Abrogating the *ex contractu* Defence?

The previous subsection showed that the strict 'defence of minority', being applicable where a claim is 'substantially *ex contractu*', can lead to one-sided results. As said, historically, Chancery came to the help of defrauded adults, whereas nowadays section 3(1) of the Minors' Contracts Act 1987 provides a broader and more flexible remedy. Still, one might be tempted to argue that, now that the change of position defence is recognised by English courts,[706] a more appropriate and doctrinally coherent solution could be reached by allowing minors to plead change of position, subject to certain conditions, and abrogating both the 'defence of minority' and section 3(1) of the Minors' Contracts Act 1987. It has been argued before that minors should be allowed to plead change of position more flexibly where their protection from liability could indirectly be

[706] *Lipkin Gorman* (fn 506).

undermined.[707] Otherwise, minors could incur liability indirectly by dealing with what they received as if the transfer was valid.

The strictness of minority as a defence is a direct result of the policy underlying minority in English law: minors are to be protected from the direct or indirect enforcement of their promises, whereas they can transfer rights freely.[708] If the strict 'defence of minority' is to be abrogated—and the change of position defence not to be applied so sweepingly as equally to bar all claims 'substantially *ex contractu*'—the policy underlying the protection of minors in English law would have to be changed. Voices calling for an abrogation of minority as a defence might overlook the policy underlying the protection of minors in English law, barring minors' liability resulting from promises, in contrast to German law, which is not troubled by minors incurring (vast) liability as long as their parents agree. More specifically, unless the underlying policy should be changed, a differentiation similar to that between claims being 'substantially *ex contractu*' or '*ex delicto*' would have to be introduced into the English change of position defence. But this would be conceptually difficult. Wrongdoers are even said to be barred from pleading change of position or, using the terms used in the case law, restitution is still equitable despite the change of position of a defendant if they gained the enrichment by committing a tort. Furthermore, asking for the strict 'defence of minority' to be abrogated (together with section 3(1) of the Minors' Contracts Act 1987) means asking for a change of the policy underlying the protection of minors in English law. This change is rejected here: in German law,

[707] See section 2)b)4.b. of this chapter, at fn 617 and the subsequent explanations.

[708] See chapter II, section 3)a) and chapter III, section 3)b).

the fact that minors can incur liability in the context of transactions is only justified by their parents' control over it. There is no instance of minors incurring contractual liability without their parents' control, and delictual liability, whether or not in a transactional context, is limited by special provisions. In English law, parental control is not available in this respect, as further explained in the following chapter. It would be complicated to introduce it into the system now, and it can be seen that English law has done very well without it so far. Instead, it should be noted that English law would then face a challenge similar to that seen above in relation to German law and the question of when the parents' state of mind should be drawn upon to determine whether their child knows of the absence of legal basis and is barred from pleading restitution. That taking this challenge is advisable for English law and would improve legal certainty or doctrinal coherence seems doubtful.

4. Interests of Adults and Legal Certainty

Rather, the English position can even be praised for being more straightforward for adults dealing with minors than the German. Under English law, adults dealing with minors have a considerable degree of certainty in respect of any benefit received *from* a minor and their entitlement to keep it. Of course, there can always be a reason other than minority why a transaction is vitiated and ought to be reversed. But these reasons are generally not different for minors than for adults in the same situation. Equity only exceptionally corrects an allocation of rights vis-à-vis a minor.[709] This is the case in special relationships such as between

[709] See section 3)a) of this chapter.

parents and their children, or, if the proposal made earlier is followed, where an adult took advantage of a minor in the course of an 'unconscionable bargain'.[710] In such a case, the adult party is not worthy of protection. Essentially, under English law the most effective way for adults to protect their interests is not to perform to a minor in advance but, if possible, insist on advance performance by the minor. One point of uncertainty remains in this context which was discussed in chapter II:[711] minors might be able to enforce a contract having (merely) partly performed their own duties under it, depending on a balance of the benefit for them, their part performance, and the fairness of its value in light of the contract.[712] Absent sufficient authority, it is not possible to determine when this is the case with more clarity.

Under German law, a transaction being void due to minority—or, in fact, any other reason—causes an absence of legal basis, and any transfer in pursuance of the transaction can be subject to a claim for restitution. Minority is—via the concept of the 'legal act'—not only a ground for restitution that the infant party can rely upon but can be relied on by adults, too. Thus, at first sight, it does not matter who performs in advance or whether the transaction is fully executed. If parents ratify a transaction, each party has a fully enforceable right; if not, restitution of anything transferred under the contract can be claimed.

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[710] See section 3)b) of this chapter.

[711] See section 2)a)1. of that chapter.

[712] As held by Lord Ellenborough CJ in *Warwick v Bruce* (fn 76) at 209/360.

However, there is a caveat to this proposition: there are complications in the context of executed reciprocal contracts that adults in this situation should consider. As explained, for the purpose of reversing an executed reciprocal transaction, each claim for restitution is effectively set off against the other according to the *Saldotheorie*.[713] An exception to this is commonly recognised for the protection of minors, and minors are able to claim restitution of what they transferred even though they lost what they received in return (and can plead disenrichment). Under English law, underage claimants too are subject to the *restitutio in integrum* requirement, the 'functional equivalent' to the *Saldotheorie*, and they generally have to return (the value of) what they received from an adult for claiming restitution of a performance under a reciprocal contract. The English policy underlying minority does not require an exception for minors in this regard.[714] *Hellwege* has criticised the fact that an exception to the *Saldotheorie* is made in favour of minors; a full account of his highly conceptualised arguments cannot be provided here.[715] Their essence is that, in certain situations, the exception would lead to an unjustified 'cumulation of risk' on the part of the adult. Taking this criticism into account and following what has just been said about English law, it seems preferable only to make an exception to the *Saldotheorie* where the policy underling the protection of minors demands it, ie, where the contract is void due to the absence of parental authorisation.[716] If the

[713] See section 1)e) of this chapter.

[714] See section 3)c) of this chapter.

[715] Hellwege, *Rückabwicklung* (fn 481) 109 f, 558 f.

[716] The predominant view regards the 'pocket money provision' in § 110 BGB as a special instance of parental authorisation.

legal basis is absent for another reason, whereas the parents authorised the transaction, making an exception in favour of minors and to the detriment of adults dealing with them is not justified.

Finally, adults in England are protected by certain 'exceptions' to minority: they can claim a 'reasonable price' for necessary goods delivered or services rendered to minors.[717] Pleading change of position cannot help a minor against a claim for payment of a 'reasonable price'. Necessary goods or services, following their very nature, incontrovertibly benefit[718] a defendant, preventing him from pleading that they are not represented in his wealth—otherwise they would not be necessaries. The historical roots of the concept of necessaries have been touched upon in chapter II;[719] it is sometimes argued that the concept is 'restitutionary' in character;[720] although this classification seems generally correct, it cannot be discussed here in detail. Integrating 'necessaries' into the (now) established unjust factor approach in English law would be a difficult task.[721] In light of this section, it could be argued that 'necessaries' is only a policy-based exception to the 'defence of minority' that would otherwise defeat an adult's claim for restitution for (total) failure of consideration. In any case, the

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[717] See chapter II, section 2)b).

[718] Being incontrovertibly benefitted prevents a defendant from arguing that a benefit, especially a service, was not of use for him; further details are not required here; see generally Virgo, *Restitution* (fn 506) 78 f.

[719] See section 2)b)1. of that chapter.

[720] Whittaker in: *Chitty* (fn 3) [11-015].

[721] The concept of 'necessaries' predates the development of the action of assumpsit and is used for manifold situations in which a person without 'contractual capacity' is required to contract for necessary goods or services; see D Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP, Oxford 1999) 266, referring to the example of abbots acting on behalf of their monastery; see also PH Winfield, *The Law of Quasi-Contracts* (Sweet & Maxwell, London 1952) 188, 108.

concept of necessaries is useful because not only does it allow adults to claim a reasonable price, but it also makes it more likely that minors can order such goods or services on credit.

Certain legal concepts in German law show parallels to the concept of necessaries. Discussing them here in detail would also exceed the scope of this thesis, but the following should be noted. Where a service is rendered to a minor and the adult claims restitution, the minor cannot plead disenrichment if the service was 'necessary' to him in the sense that he would have had to incur expenses for a similar service in any event. For determining what services are 'necessary' to a minor, his parents' view should be decisive, preventing the circumvention of the policy underlying minors' protection in German law.[722] Another aspect in which the idea of 'necessaries' is relevant is explained in the following chapter as an exception to the limitation of liability imposed on minors by their parents under § 1629a BGB.[723] The German legislator took the English concept of 'necessaries' as an example when introducing the provision.[724] Lastly, German law has the concept of *negotiorum gestio*, governing the situation that one person acts on another's behalf without the latter's consent. The relevant provisions in the BGB contain special rules for minors, and their explanation

[722] See already the explanations in section 1)d)1. of this chapter.

[723] See chapter V, section 1)a)4.

[724] *BT-Drucksache* 13/5624 p 13.

could be interesting in that both the origin of this concept and that of the English 'necessaries' is said to lie in Roman law.[725]

e) 'Contractual Capacity' Terminologically Inapt

Although unrelated to restitution, one final point should be made at the end of this chapter as the explanations required for understanding it have now been given. At the beginning of this thesis, it was stated that it is neither very precise nor useful to speak of the 'contractual capacity' of minors.[726] This statement can now be explained better.

Under German law, minority entails the inability to effect any legal act without some participation by parents, except for the acceptance of gifts, whereas minors below the age of seven years cannot effect legal acts even with the help of their parents. The term '*contractual* incapacity' is inappropriate to catch this notion, which results from the wide scope of application of the concept of legal acts (*Rechtsgeschäfte*). 'Capacity' encompasses any declaration of intention and thus not only the offer or acceptance to *contract* (in the narrower English sense). Voluntary transfers of rights similarly require an agreement of the parties, a contract in the wide understanding under German law, which is equally formed by two corresponding declarations of intentions. Moreover, unilateral declarations such as the rescission of a contract are legal acts, too. The German legal terminology appropriately refers to this wide notion of minority by speaking of

[725] In respect of German law see R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP, Oxford 1996) 435; as regards English law see Simpson, *History* (fn 315) 542 in fn 1.

[726] See chapter I, section 6)a).

Geschäftsfähigkeit, which is short for *Rechtsgeschäftsfähigkeit*, or the 'capacity to effect legal acts'—it is primarily the translation to 'contractual capacity' that fails to reflect the wide scope of minority under German law. Furthermore, in terms of its function in the context of restitution, minority must also be understood as a ground for demanding the restitution of benefits conferred by or on a minor. For German lawyers, this proposition goes without saying because the absence of legal basis approach closely links contract law and the law of unjustified enrichment. A contract that is void according to the rules of contract law must, if executed, be reversed. From a comparative viewpoint, however, this is not as straightforward as it is to German lawyers, and it seems worthwhile to point out that the minority of a party to a transaction—and the lack of parental authorisation—is sufficient for it to be reversed. The term 'contractual capacity' does not sufficiently denote this aspect from an English perspective. There are also several other aspects in the BGB and German private law, generally, where minority under §§ 104 ff BGB is taken into account either directly or as an overriding policy consideration. Not all of these instances can be explained in the course of this thesis. One instance in which this was seen is when, for determining whether an underage defendant is in 'bad faith' as to his entitlement to what he received, debarring him from pleading disenrichment, his parents' state of mind is drawn upon where the policy underlying §§ 104 ff BGB would otherwise be undermined.[727]

[727] Further examples are the limitation of the liability of the *gestor* in the course of *negotiorum gestio* under § 682 BGB or the limitation on minors' liability for breach of pre-contractual duty, cf C-W Canaris, 'Geschäfts- und Verschuldensfähigkeit bei Haftung aus „culpa in contrahendo", Gefährdung und Aufopferung' [1964] NJW 1987.

In English law, the term 'contractual capacity' is also inappropriate to encompass the full meaning of minority, but the reasons are very different. A concept similarly broad as that of the 'legal act' does not exist. Instead, minors are generally able to determine their legal relationships independently. The policy underlying the protection of minors in English law has been identified in this thesis as primarily barring the (direct or indirect) enforcement of their promises. This aspect is central to gaining a precise understanding of minority in English law. In chapter II, it was seen that minors' promises are not (directly) enforceable by claiming damages for breach or demanding specific performance, and a claim in tort does not lie if it would indirectly enforce a minor's (assumed) promise. Furthermore, the present chapter shows that the same principle applies in relation to claims for restitution of unjust enrichment. Historically, there is a single reason for these three bars to claims in contract, tort, and unjust enrichment. It has already been explained that the common root of contract and tort as conceptual categories is the action of assumpsit.[728] As argued by *Simpson*, minority or, then, infancy was recognised as a plea against actions of assumpsit probably because wager of law was not available and infants were seen at too great a risk of being sued for an alleged promise of theirs.[729] The modern law of unjust enrichment is also ultimately rooted in the same action.[730] More precisely, one should say it has its roots in the same *actions*, and these actions are, in a broad sense, still pleaded

[728] See chapter III, section 3)d), at fn 423.

[729] See after fn 427.

[730] Remedies were already available which functionally provided a claim for restitution, but they were superseded by the action of assumpsit which subsequently made it possible to consolidate the situations in which such remedies were given 'within a single form of action', Ibbetson, *Historical Introduction* (fn 721) 269 ff, 280 at fn 104; apart from assumpsit at common law, the role of Chancery's jurisdiction in developing restitutionary remedies should not be overlooked, cf *ibid* 273 ff, 290 f; see also Winfield, *Quasi-Contracts* (fn 721) 3 ff.

when bringing a claim in unjust enrichment in court. Minority as a plea developed long before individual areas of law such as contract, tort, or unjust enrichment were identified. The term '*contractual* capacity' can only be intelligible in English law if the historical background of these areas of law in the action of assumpsit is appreciated. Of course, English law today has developed a clear and distinct idea of separate areas of law, but this only emphasises the fact that '*contractual* capacity' can be misleading in the context of minority. Furthermore, it would be especially misleading (for civilian or German lawyers) to speak of contractual *in*capacity of minors: minority in English law does not mean much more than the protection from the enforcement of promises. As has been argued before, the English understanding of minority is not that the minor's ability to form a legally valid intention is absent.[731] Rather, on the basis of the aforesaid and without going into more historical detail, it seems that minority in English law developed because of procedural niceties and for the purpose of barring the enforcement of (alleged) promises. It is not generally a reason for the invalidity of a transfer of right by or to a minor, and it is not sufficient for allowing the rescission of a transaction and its reversal through a claim for restitution, whether brought by the minor or the adult party.[732]

[731] See chapter II, section 3)c).

[732] As emphasised in section 3)a) of this chapter, certain allocations of benefits are 'corrected' by equity if deemed inequitable or unjust.

V.

Minority, Parents and the State

The preceding chapters have shown how the concepts of 'minority' in English and German law protect minors from improvident transactions by limiting how minors can enter into or perform such transactions or by determining how they can be reversed. In this chapter, the focus shifts to the role which parents and the state play in 'protecting minors'. The most important means of protection for a child are good parenting and education. This applies not only in personal but also in pecuniary matters of a child's life. Such pedagogical aspects of parenting are very important but not further analysed here because they lie outside the scope of a *legal* analysis of minority in a *transactional* context. Instead, the focus is on situations in which parents have a (legal) power to enter into transactions on behalf of their child or (factual) power over property (economically) 'belonging to' their child. In this respect, parents can pose a risk to their children. They are in a very powerful position in which they can act with broad discretion and in the privacy of family life. On the basis of parents' powers, minors can (factually) be made party to a transaction. Therefore, when analysing the protection of minors from improvident transactions from a functional perspective, these aspects have to be taken into account, too. In addition, parents can find themselves in a conflict of interests in relation to the exercise of their powers. The state, whose responsibility it is to safeguard the weak, comes into play in limiting parents' powers over their children's property and penalising abuses of parental powers. Consequently, the

state's role—as far as minors' transactions are concerned—is considered in this chapter alongside that of parents.

1) The Role of Parents

In very general terms, parents guide their children and thereby protect them, but their powers over their children can result in risk regarding the latter's transactions. For the purpose of analysing the role of parents in the context of minors' transactions, the present section differentiates between three questions: first, whether or how can parents impose contractual liability on their child? Second, which (if any) do powers parents have with regard to rights held by their children? Third, whether parents are limited in disposing of rights held by themselves but which 'belong to' their child.

a) Parental Care in Germany

The basis of German parents' powers is the concept of parental care. According to § 1626 BGB, 'parents have the duty and the right to the care of their underage child (parental custody). Parental custody includes the care for the person of the child (*Personensorge*) and the care for the assets of the child (*Vermögenssorge*)'.[733] The latter, second aspect of parental care is relevant in the

[733] The BGB provides for many detailed provisions governing the care over the *person* of the child, especially in §§ 1627 to 1632 BGB, which will not be discussed here. It should also be noted that parents' powers, especially their parental statutory authority as explained below, must be exercised jointly, but it is assumed here that there is no further dispute about such exercise; see for further details J Gernhuber and D Coester-Waltjen, *Familenrecht* (7th ed CH Beck, München 2020) § 61 [1 ff, 25].

context of the protection of minors from improvident transactions, whereas the care for the person of a child is not further discussed in this thesis. The care of parents for their child's assets comprises all measures which aim at sustaining, using or growing the child's assets.[734]

1. Parental Statutory Authority

The most significant aspect of parental care for a child's assets is the concept of 'parental statutory authority' (*elterliche Vertretungsmacht*). According to § 1629 (1) sentence 1 BGB, 'parental care comprises the representation of the child'. It has already been explained in chapters II and III that German parents can authorise their child's legal acts and thereby, for example, cause their child to be liable under a contract or validly to dispose of property. Based on § 1629 (1) BGB, parents can act as agents and effect legal acts on behalf of their child.[735] As explained in chapter II, legal acts are the means by which an individual determines his legal relationships with other persons or objects.[736] The idea of German law is that, instead of acting with parental authorisation, a minor can also be *made* party to a transaction by his parents. Parents can deal with a third party directly and thereby exercise their parental care for their child's assets (or person) more efficiently. For example, they can purchase a mobile phone on behalf of their child who, depending on its parents' intention, can immediately obtain

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[734] P Huber in D Schwab (gen ed), *Münchener Kommentar zum BGB; Bd 10 §§ 1589–1921 BGB* (8th ed CH Beck, München 2020) § 1626 [56].

[735] Certain acts require a person to act himself, such as making one's last will or marrying, cf §§ 2064, 1311 BGB; these issues are not further discussed here.

[736] See section 1)a)2. of that chapter.

ownership of the phone. A service contract with the telecommunications company can simultaneously be concluded on behalf of the child. It should be noted that, for the legal act to take effect for the child, parents must act in the name of their child. Otherwise, only they are bound by it, whereas—according to the nowadays predominant view—dispositions of assets of the child made by parents in their own name are void.[737]

However, there are several limitations on parents' powers which render their (attempt to) act on behalf of their child void.[738] First, parents 'may not make gifts on behalf of the child' except for 'gifts by which a moral duty or duty of decency is complied with', § 1641 BGB.[739] For example, parents can make a small birthday gift of their child's property to a friend of the child. Second, a testator or donor can impose further limitations on parents' powers or even exclude them in respect of a specific gift or inheritance according to § 1638 BGB.[740] Third, there are certain types of transactions in respect of which parents require additional approval from the Family Court for certain types of

[737] Gernhuber/Coester-Waltjen (fn 733) § 58 [60]; Coester in: *Staudinger* (fn 804) § 1626 [194], § 1629 [22].

[738] Apart from the limitations discussed here, it should be noted that parents cannot act on behalf of their children as agents regarding certain personal legal acts, such as for entering into a marriage or for setting up a last will, cf §§ 1311, 2247 BGB.

[739] A moral duty of a child can be fulfilled when forfeiting an encumbrance of land to enable parents to mortgage the land OLG Köln, [1969] OLGZ 263. Gifts made in breach of § 1641 BGB would be void due to § 134 BGB (illegality) and would have to be returned to the child specifically, cf cf LG Duisburg, [2016] BeckRS 16003; OLG Stuttgart, [1968] BeckRS 536.

[740] That measure is practically relevant where a testator wants to ensure that the parents do not profit from or misappropriate the funds, see BGH, [2008] ZEV 330; BGH, [2016] NJW 3032; this construction is especially common in so-called 'divorcee-wills', OLG Brandenburg, [2019] ZEV 151.

transactions, which are explained further below.[741] Fourth, parents are restricted in respect of so-called 'self-dealing' and 'double representation', a provision which has caused much trouble to legal scholars and judges:

Parents are barred from representing their child in transactions with themselves, the other parent, or a close relative as a contractual party (so-called 'self-dealing') or agent (so-called 'double representation').[742] This limitation prevents potential conflicts of interests without regard to the individual transaction. Whether a transaction cannot be entered into does not depend on its benefit for the child.[743] Not even the authorisation of a transaction by the Family Court, where necessary,[744] can overcome these restrictions.[745] To avoid the circumvention of these limitations, parents are also barred from authorising a similar transaction of their child.[746] To enter into a transaction between their child and one of the aforementioned persons, parents would have to file an application for a special officer (*Pfleger*) to take care of the matter and make a decision.[747] The abstract character of this limitation has very far-reaching consequences: transactions might be prevented which are, legally or economically, very

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[741] See section 2)a)1. of this chapter.

[742] According to §§ 1629 (2) sentence 1, 1795, 181 BGB. 'Close relative' means a relative in the vertical line, such as a grandparent.

[743] Huber in: *Münchener Kommentar* (fn 734) § 1629 [48].

[744] As explained below in section 2)a)1. of this chapter.

[745] OVG Lüneburg, [2018] NJW 3798 [6].

[746] BGH, [1981] NJW 109.

[747] The *Pfleger* fills the parents' position to the extent that they are excluded from their care. He manages the relevant assets until the minor reaches the age of majority, § 1909 BGB. The *Pfleger* is chosen by the competent court and acts in addition to the parents, specifically for the limited areas for which he is appointed by the court, § 1630 BGB.

advantageous to the child. For example, gifts to children are a popular means of avoiding inheritance tax but cannot be accepted by them unless 'legally solely beneficial'.[748] One express exception to the restrictions on self-dealing, double representation, or effecting transactions between the child and a close relative is a transfer of rights which merely fulfils an already existing obligation.[749] In addition to that, the predominant view is that parents are not prevented from representing their child by way of self-dealing or double representation if the relevant transaction is 'legally solely beneficial' to their child in the sense of § 107 BGB.[750] As seen in chapter II, minors aged seven years or older can enter into such transactions themselves, especially allowing gifts and transfers of property to minors. It is regarded as coherent with the provision's underlying policy that parents can also enter into these transactions as agents on behalf of their children. However, the combination of these two exceptions has proven problematic. Parents could enter into a contract of gift on behalf of their child, obliging themselves to transfer to the child property which would normally not be 'legally solely advantageous', such as a rental flat (even though the acquisition of the flat might economically be very advantageous).[751] Subsequently, parents could 'merely fulfil' their obligation under the contract of gift, utilising the first

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[748] See chapter II, section 1)b)1.; L Bock, 'Schenkung von Kommanditanteilen an minderjährige Kinder' [2020] DNotZ 643.

[749] According to §§ 1795 (1) no 1, 181 alternative 2 BGB.

[750] BGH, [1986] DNotZ 80. Regarding § 107 BGB see chapter II, section 1)b)1. As further explained in chapter III, section 1)c), the courts are nowadays taking a slightly more pragmatic approach for determining what is legally disadvantageous to the child; for example, parents could gift their child a share in a real estate, even if they are simultaneously granted a life-long right of residence on the estate, cf OLG Zweibrücken, [2006] BeckRS 13403; but if the child was entitled to the share anyway, the granting of the right of residence is not possible.

[751] BGH, [2021] NJW 1673. See the explanations in chapter III, section 1)c), at fn 276.

exception mentioned above for executing the transaction.[752] This legal nicety is closely connected to the principles of separation and abstraction, which strictly distinguish between contracts and transfers.[753] Although initially allowing this loophole,[754] courts soon regarded it as problematic. They fixed it simply by assessing the question of whether the initial contract of gift entails a legal disadvantage for the child by looking at the transaction as a whole, effectively ignoring the principles of separation and abstraction (so-called *Gesamtbetrachtungslehre*).[755] Predictably, this approach was met with a stream of criticism by academia, accusing the courts of undermining these important legal principles.[756] The alternative approach proposed by the literature—although reaching the same results—avoided undermining fundamental legal principles by merely 'teleologically reducing' the ambit of the exception to § 181 BGB: the mere performance of an already existing obligation should only be permissible if the transaction is 'legally solely beneficial' in the sense of § 107 BGB.[757] Eventually, the Federal Supreme Court gave in and changed its view by following

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[752] From the perspective of the parents, the advantage is that they can avoid the application of a special officer (*Pfleger*) in that case, who might even object to the transaction.

[753] See with regard to these principles chapter III, section 1)a).

[754] BGH, [1955] NJW 1353.

[755] BGH, [1972] NJW 2262; BGH, [1981] NJW 109.

[756] H Lange, 'Schenkungen an beschränkt Geschäftsfähige und § 107 BGB' [1955] NJW 1339; H Westermann, 'Anm zu BGH Urt v 10.11.1954' [1955] JZ 243; U Hübner, *Interessenkonflikt und Vertretungsmacht; Eine Untersuchung zur funktionalen Präzisierung des § 181 BGB* (CH Beck, München 1977) 144 f; J Allmendiger, *Vertretungsverbot bei Insichgeschäften, Ergänzungspflegschaft und gerichtliche Genehmigung: rechtsgeschäftlicher Minderjährigenschutz bei Eltern-Kind Schenkungen* (Dunker & Humblot, Berlin 2009) 21 ff.

[757] O Jauernig, 'Noch einmal: Die geschenkte Eigentumswohnung – BGHZ 78, 28' [1982] JuS 576; L Feller, 'Teleologische Reduktion des § 181 letzter Halbsatz BGB bei nicht lediglich rechtlich vorteilhaften Erfüllungsgeschäften' [1989] DNotZ 66, 73 ff; H Köhler, 'Die neuere Rechtsprechung zur Rechtsgeschäftslehre' [1984] JZ 18; BGH, [1981] NJW 109; Larenz/Wolf (fn 35) 892.

the literature.[758] What this shows about German legal thinking is further discussed in the comparative analysis of this chapter.[759]

This subsection already answers the first two of the three questions which have been raised at the beginning of this section, ie, whether and how German parents can enter into contracts on behalf of their children or dispose of rights held by them. By effecting legal acts on behalf of their child, parents can enter into contracts in the name and with effect for their child, and the same applies to (voluntary) transfers or acquisitions or rights.

2. Parental Rights and Duties as to Children's Assets

Apart from such limitations on parents' powers which render their (attempt to) act on behalf of their child void, there are further duties imposed on parents in respect of their parental care for their child's assets. However, breach of these duties does not render the relevant legal act void.[760]

Most importantly,[761] 'upon termination of parental care, or if their care for the assets of the child ends for another reason, parents must surrender the assets to the child and, upon request, account for their management', § 1698 BGB. Until then, 'parents must invest the child's money which is under their management in

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[758] BGH, [2005] NJW 415; BGH, [2005] NJW 1430.

[759] See below, section 3)d)1. of this chapter.

[760] Gernhuber/Coester-Waltjen (fn 733) § 60 [22]; of course, there can be other reasons for the transaction to be void which are not immediately linked to the parent-child relationship, such as illegality under §§ 134, 138 BGB.

[761] The pertinent provisions are §§ 1638 to 1664 BGB, but not all of them are relevant for a comparative legal analysis.

an economically sensible way to the extent that the money is not required for maintenance', § 1642 BGB.[762] According to § 1649 BGB, 'profits from the child's assets which are not needed for the proper management of the assets must be used for the maintenance of the child'. Only, 'to the extent that the profits are not sufficient, income from the child's own labour or from its independent conduct of a business under § 112 BGB[763] may be used' for maintaining the child. A surplus of profits must be used for managing the assets, and only the remainder can be applied 'for [the parents'] maintenance and for the maintenance of underage unmarried siblings of the child, to the extent that this is equitable, taking into account the property and earnings situation of the persons involved'. If the value of an inheritance that is due to a child or a gift made to it exceeds EUR15,000, parents are also obliged to prepare a record of the relevant property, including an assurance that the records are correct, and file it with the Family Court.[764] Thereby, they are prevented from squandering their child's inheritance or gift,[765] but it should be noted that compliance with any of the aforementioned limitations is not generally supervised.[766]

If parents act in breach of one of the aforementioned duties, the transaction is usually valid in relation to the third party. But parents acting in breach of duty

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[762] The standard of skill expected of parents is sometimes quite high, cf LG Kassel, [2003] FamRZ 626; OLG Celle, [2018] FamRZ 106.

[763] Regarding the independent conduct of a business under § 112 BGB see already chapter II, section 1)b)3. and chapter III, section 1)e).

[764] According to § 1640 BGB.

[765] For an instructive case see BayObLG, [1994] FamRZ 1191.

[766] Since a reform of children's law in 1998, Gernhuber/Coester-Waltjen (fn 733) § 60 [21].

can become liable to their child. According to § 1664 BGB, 'in exercising their parental care, parents are liable to their child only according to the standard of care which they observe in managing their own affairs'. That provision is construed both as a limitation on parents' liability as well as its basis. Thus, parents are, for example, not liable to their child for a loss caused by the negligent investment of property if they do not invest their own property prudently.[767]

Most obviously, parents breach a duty owed to their child in the exercise of their parental care if they simply misappropriate their child's assets for their own purposes.[768] Following the explanations above, the substance of the assets must generally be left untouched and only profits can, subject to certain conditions, be applied to maintaining the family.[769] Therefore, it is usually no defence for parents to assert that expenses paid for with a child's funds, such as a family holiday, *also* benefitted their child; such expenses must not be met with a child's funds but with its parents'.[770] More surprising to some parents might be that their failure to invest their child's funds in an 'economically sensible way' can equally cause them to be liable to compensate for the foregone profits. Occasionally, the standard of care set by courts is rather high: a parent put his child's money into a deposit account, whereas a safe deposit with higher a interest

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[767] Liability for gross negligence or wilful conduct is not limited by this provision, cf § 277 BGB.

[768] OLG Brandenburg, [2021] NJOZ 705; AG Detmold, [2018] FamRZ 1756; OLG Frankfurt aM, [2015] NJW-RR 1027; AG Büdingen, [2014] FamRZ 1648: the parents decided to fulfil their alleged claims for damages against their child from the child's funds themselves; OLG Saarbrücken, [2008] BeckRS 4616: father disposes of his child's assets, but the claim is founded on § 816 BGB and not on § 1664 BGB; AG Nordhorn, [2002] FamRZ 341.

[769] See section1)a)1. of this chapter, after fn 762.

[770] See LG Berlin, [2001] BeckRS 16991which is further discussed in the following sub-section; see also AG Karlsruhe, [2014] BeckRS 8070.

rate would have been available; he was liable to compensate for the foregone additional profit.[771]

3. Assets 'Belonging to' Children

The explanations above answered the first two of the three questions posed at the beginning of this section. The third question is discussed in the present subsection. It concerns the fact that parents can hold rights, for example, ownership of money, which (economically) 'belong to' their child. In such a case, they do not act on behalf of their child as agents by statute. Take the case of a birthday gift by a relative to the child for its third birthday, maybe a valuable watch or money in a bank account. The gift will probably be made to the minor's parents, and they acquire ownership of it. Still, one can say that the watch or the funds in the parents' bank account 'belong to' their child. The legal difficulty is that ownership usually entails that one is free to dispose of it, and thus parents are, at the outset, able to dispose of such rights in their own name. However, the question arises whether or how they are limited in or under a duty to refrain from doing so because, in some sense, these rights are their child's. What does it mean that assets 'belongs to' the child instead of the parents?

The answer is that parents are subject to the same duties when dealing with rights 'belonging to' their child as they are when dealing with rights held by their child as 'agents by statute', as explained in the previous subsection. Most importantly, this means that 'upon termination of their parental care (…), parents

[771] LG Kassel, [2003] FamRZ 626.

must surrender the assets to the child and, upon request, account for its management', § 1698 BGB. The importance of this insight becomes clear when considering that it is often arbitrary whether a valuable asset is transferred to a child directly or to parents for them to keep it for their child. From the perspective of the child, it is also irrelevant who legally owns it: what matters is that the assets is preserved (at least) until the child reaches majority. Three cases are discussed below which exemplify the matter.

In one case, a child was harmed by a failed surgery and due to receive insurance payments.[772] Part of the payments—EUR60,000—were paid directly to the mother, who squandered the money for her own benefit. The child later sued its mother for damages under § 1664 BGB. The mother argued, *inter alia*, that she could spend the money because she had ownership of it. The court held, unfortunately without further explanation, that in respect of the EUR60,000 the mother stood in a 'statutory fiduciary relationship' to her child and was obliged on this basis to apply the funds for its benefit.[773]

In a more complex case, a grandmother set up two bank accounts and transferred large sums of money to them.[774] The accounts were in her grandchild's name, but she retained the (physical) savings book. Without going into detail on this point, this meant that she continued to hold the rights to the accounts (she

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[772] LG Berlin, [2001] BeckRS 16991; OLG Saarbrücken, [2012] FamRZ 235: a mother squandered EUR1m of compensation paid to her children for a failed surgery; OLG Düsseldorf, [1992] FamRZ 1097: parents abused their child's damages for a childhood accident for their own purposes; OLG Karlsruhe, [2014] BeckRS 04194.

[773] LG Berlin, [2001] BeckRS 16991 [20].

[774] OLG Frankfurt aM, [2016] BeckRS 15320.

'owned the money') until her death, with which the rights to the accounts would immediately pass to her grandchild.[775] Until then, she could have withdrawn the money anytime and without reason.[776] When the grandmother developed senile dementia, she was subjected to guardianship.[777] The mother of the grandchild acquired possession of the savings books for the two accounts which stood in her child's name and withdrew the money, nearly EUR60,000, only to transfer it to her own bank account. The child did not acquire any rights to the money upon the passing of its grandmother.[778] Eight years later the child, living in a youth care centre, received notice of the former existence of the savings books and successfully claimed damages from its mother under § 1664 BGB. Interestingly, although the child had not become the holder of the rights against the bank at any time, the court held that the mother's duty to administer her daughter's assets included a duty to refrain from interfering with her daughter's 'secured prospect' of acquiring the rights because 'parental care for children's assets is an office held for the benefit of others (*fremdnützig*) with the objective to preserve the child's assets for its use'.[779]

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[775] Under § 331 BGB, the details of which are contentious but not further relevant here; OLG Frankfurt aM, [2016] BeckRS 15320 [33].

[776] The assessment of ownership of an account depends on all facts of the individual case, such as authority to withdraw money or possession of the savings book; see BGH, [2005] NJW 2222; BGH, [2019] NZFam 787.

[777] Her contractual capacity was limited due to her mental illness, as explained in chapter II, section 3)b).

[778] These rights were claims against the bank for the balance of the accounts, which were performed by the bank under § 808 (1) BGB when paying the funds to the mother as the person presenting the savings book.

[779] OLG Frankfurt aM, [2016] BeckRS 15320 [24].

In another case, parents set up a bank account in the name of their child and retained the savings book.[780] Much later, the father withdrew most of the funds, EUR17,300, and used the money for himself. The child claimed damages from the father under § 1664 BGB. The difficult question was whether the parents had already conferred the money (in the form of rights against the bank) on their child or not. The interesting point emphasised by the Federal Supreme Court was that, for whether the parents acted in breach of their duties owed to their child, it did not matter whether they themselves still held the rights to the account or had already conferred them on their child. The decisive question was not who held the rights to the account but the relationship between parent and child: vis-à-vis its parents, the child was entitled to the money. The Court ruled that even if the situation had been that the parents continued to hold the rights to the account, they acted in breach of their 'fiduciary duty' owed to the child.[781] The Court also stated that rights gifted 'to a child' but given to the parents would typically be subject to similar duties.[782]

What this shows is that, for the scope of duties to which parents are subject, it is irrelevant whether they manage rights held by their child (on the basis of their 'statutory authority') or rights held by themselves but 'belonging to' their child. As coined by the Federal Supreme Court, a useful term to denote this similarity and the scope of duties entailed by the parental care for a child's assets

[780] BGH, [2019] NZFam 787.

[781] BGH, [2019] NZFam 787 [24].

[782] *Ibid*.

is that of the 'statutory fiduciary relationship' (*gesetzliches Treuhandverhältnis*).[783]

The essence of the German *Treuhand* is that a fiduciary has the power to dispose of certain rights (the *Treugut*) in his own name but must (at least to some extent) exercise these powers in the interests of a beneficiary (*Treugeber*).[784] In principle, it is nowadays agreed upon that parental care (at least in relation to a child's assets) is a form of *Treuhand*.[785] However, manifold legal issues still require clarification when trying to integrate the 'statutory fiduciary office' of parents in relation to their children into the general concept of the *Treuhand*.[786] That task is hampered by the fact that the concept of the *Treuhand* itself is still subject to ongoing debate and development.[787] Settling these issues here is neither feasible nor useful for the comparative analysis, as it primarily draws on the doctrinal niceties of the *Treuhand* in German law. But a brief explanation of the main issues in this context seems appropriate.

One reason why, historically, parents were not analysed as fiduciaries was that their office is based on statute rather than agreement, and legal scholars hesitated to analyse statutory relationships as fiduciary but, if at all, referred to

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[783] BGH, [2019] NZFam 787 [23 f].

[784] V Rieble in: *idem* (gen ed), *J v Staudingers Kommentar zum Bürgerlichen Gesetzbuch, §§ 662 – 675b* (ed 2017 Sellier – de Gruyter, Berlin 2017) Vorbemerkungen zu §§ 662 ff [40].

[785] BVerfG, [1982] NJW 1375; BVerfG, [1982] NJW 1379; BVerfG, [1983] NJW 2491; BGH, [2019] NZFam 787; LG Berlin, [2001] BeckRS 16991; M Preisner, *Das gesetzliche mittreuhänderische Schuldverhältnis kraft gemeinsamer Elternschaft* (Mohr Siebeck, Tübingen 2014) 253; substantially agreeing is Löhnig, *Treuhand* (fn 199) 118, 120.

[786] See Löhnig, *Treuhand* (fn 199) 159, 175, 237, 254, 462 ff, 512, 519, 527, 557.

[787] For an overview of the general current debate of the *Treuhand* see Löhnig, *Treuhand* (fn 199) and Preisner, *Elternschaft* (fn 785) 255 ff.

them as 'quasi-*Treuhand*'.[788] Furthermore, it was argued that parents did not exercise their powers entirely gratuitously, whereas that was regarded as a key feature of the fiduciary office.[789] However, statutory fiduciary relationships are nowadays recognised in principle and, since a legislative change in 1958, parents cannot dispose freely of profits from their child's assets anymore,[790] being bound to administer them solely in the interest of their child.[791]

A further issue is that, when disposing of rights held by their child based on their 'parental statutory authority', parents must do so in the name *of their child*, not in their own. While this conflicts with the generally agreed idea of the fiduciary acting in his own name, there are voices in the literature which criticise the strictness of this requirement as inconsistent with practice.[792] Also, it is clear that the fiduciary need not hold the relevant rights himself but can merely be authorised to dispose of them.[793] As argued by *Liebich* and *Mathews*, 'parental

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[788] S Grundmann, *Der Treuhandvertrag* (CH Beck, München 1997) 30 in fn 85; D Liebich and K Mathews, *Treuhand und Treuhänder in Recht und Wirtschaft* (2nd ed Herne, Berlin 1983) 48.

[789] Grundmann, *Treuhandvertrag* (fn 788) 36; F Beyerle, *Die Treuhand im Grundriss des deutschen Privatrechts* (Hermann Böhlaus Nachfolger, Weimar 1932) 43 states that guardianship became to be recognised as fiduciary with the insight that a ward's rights are only held in the latter's interest and that the same insight began to be recognised in relation to parents.

[790] E Koch in M Schmoeckel, J Rückert and R Zimmermann, *Historisch-kritischer Kommentar zum BGB; Bd IV Familienrecht §§ 1297–1921* (Mohr Siebeck, Tübingen 2018) §§ 1626–1698b [49, 51].

[791] § 1649 (2) BGB, which was discussed before, can be regarded as a remnant of the former position, cf Löhnig, *Treuhand* (fn 199) 118.

[792] D Liebich and K Mathews, *Treuhand und Treuhänder in Recht und Wirtschaft* (2nd ed Herne, Berlin 1983) 31, 33 ff.

[793] BGH, Urt. v. 5.11.1953, IV ZR 95/53 (available on the database *Juris*) [34].

statutory authority' can be regarded as a variant of that authorisation (*Rechtszuständigkeit*) of the *Treuhänder* in respect of the relevant rights.[794]

One last point should be mentioned in the present context. Apart from holding rights that 'belong to' their child, parents can, of course, take a movable owned by their child into possession, for example, taking away a video game for pedagogical reasons.[795] In such a case, parents should *a fortiori* be subject to the same fiduciary duties as when holding a right to that movable.

4. Limitation on the Imposition of Liability on Minors, § 1629a BGB

In a very rare and technically complex case, a mother of three managed to impose liability of more than DM850,000 jointly on herself and each of her children.[796] On appeal, the Federal Constitutional Court in 1986 overruled the earlier decisions and held that, to the extent that parents can impose liability on their child in an amount which makes it impossible for a child to lead a (financially) independent life after majority is reached, the child's private autonomy is infringed and the concept of parental statutory authority is unconstitutional.[797] The legislator reacted in 1998 by enacting, among other provisions, the new § 1629a

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[794] Liebich/Mathews, *Treuhand* (fn 792) 48.

[795] Gernhuber/Coester-Waltjen (fn 733) § 58 [6]. But they cannot acquire ownership of the movable based on their 'parental statutory authority' due to the limitation on self-dealing, see section 1)a)1. of this chapter.

[796] BGH, [1985] NJW 136.

[797] BVerfG, [1986] NJW 1859; the problem had already long been subject to criticism in the literature, cf J Gernhuber, 'Elterliche Gewalt heute; eine grundsätzliche Betrachtung' [1962] FamRZ 89, 93 f.

BGB.[798] That provision is awfully drafted, and providing a translation would more confusing than helpful. In essence, it allows *former* minors, viz, once majority is reached, to plead that liability was, directly or indirectly, imposed on them during minority, especially by a parent. Former minors' liability for such 'imposed liability' is limited to the specific assets owned by them *at the time* of attaining majority.[799] The relevant obligation can, in other words, not be enforced into assets acquired by a former minor during majority. What this concept entails is an interesting separation of a person's assets into so-called 'old assets' (*Altvermögen*), acquired during minority, and 'new assets' (*Neuvermögen*), acquired thereafter.[800]

Following that terminology, a defendant (former minor) is allowed to plead the insufficiency of his 'old assets' for meeting liability imposed on him during minority. However, a further perilous effect of pleading § 1629a BGB is that the defendant becomes *retrospectively* responsible for having preserved the specific 'old assets' for the benefit of the 'old creditors'. Also, he is obliged to manage 'old assets' in a profitable way and to make their profits available to the creditors, too.[801] The former minor has to give priority to any creditor who

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[798] With the *Gesetz zur Beschränkung der Haftung Minderjähriger*. Further provisions introduced by this act are not relevant here but concern, for example, the position of minors in partnerships.

[799] The provision does not only relate to parents but to any person who imposes liability on a minor, for example, as an agent. The provision is quite complex, but accurately summarised here. Note that liability incurred by the minor's own act, especially a delict, is not limited in that way.

[800] The concept of splitting one's assets in several classes was not new to German law, but in this context its introduction has been criticised strongly, cf K Schmidt, '§ 1629a BGB oder: über den Umgang mit einer rechtstechnisch misslungenen Vorschrift' in W-R Bub et al (eds), *Zivilrecht im Sozialstaat* (Nomos, Baden-Baden 2005) 601.

[801] The former minor is in a position similar to that of a commissioner (*Beauftragter*), §§ 1991 (1), 1978 (1), 662 ff BGB; as such, he can deduct costs incurred through the management of the 'old

demands payment first and cannot turn him down in favour of others.[802] If the former minor breaches one of these duties, he incurs new liability against which § 1629a BGB cannot be pleaded.

There are two exceptions to the rule that § 1629a BGB can be pleaded against liability directly or indirectly imposed on the defendant during minority. First, liability incurred in the course of the independent conduct of a business under § 112 BGB is not in the scope of the provision.[803] Second, liability resulting from a transaction serving 'the personal needs of the minor' (*persönliche Bedürfnisse*) is excluded from the scope of § 1629a BGB. According to the predominant view, what amounts to 'personal needs' is, contrary to the wording, construed solely objectively, ie, irrespective of the standard of living of the individual defendant.[804] Relevant purchases on credit can be everyday goods, such as bicycles or computers,[805] but also medical treatment.[806] The merits of the

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assets' from the profits; see also C Bittner, 'Die Einrede der Beschränkung der Haftung auf das Volljährigkeitsvermögen aus § 1629a BGB' [2000] FamRZ 325.

[802] But if no one demands payment first, there is no priority and the former minor can, for example, pay his parents first if he owes them money.

[803] Liability arising from such a business would otherwise be in the scope of § 1629a BGB because it is based on the initial authorisation of the business by parents and the Family Court; due to the authorisation by the Family Court, the risk arising from the business is regarded as already mitigated; see in respect of § 112 BGB already chapter II, section 1)b)3 and chapter III, section 1)e). § 112 BGB has little practical relevance.

[804] M Coester in: *idem* (gen ed), *J v Staudingers Kommentar zum Bürgerlichen Gesetzbuch, §§ 1626–1633* (ed 2020 Sellier – de Gruyter, Berlin 2020) § 1629a [36]; K Thiel, 'Finanzierung minderjähriger Sportler und die Einrede nach § 1629a BGB' [2002] SpuRT 1, 3; contra: Bittner, '§ 1629a BGB' (fn 801) 327.

[805] As listed exemplarily in the official parliamentary documentation, *BT-Drucksache* 13/5624 p 13.

[806] AG Norderstedt, [2001] BeckRS 10241; but not if the medical care exceeds the minimum standard, AG Leipzig, [2008] FamRZ 84.

limitation on the imposition of liability on minors under § 1629a BGB are further discussed in the comparative analysis of this chapter.[807]

b) Parental Responsibility in England

The rights and duties of English parents in relation to their children have been referred to as 'parental responsibilities' since the enactment of the Children Act 1989. According to section 3(1) of that Act, parental responsibility 'means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'. As in the context of German law before, only the latter 'proprietary' notion of parental responsibility is discussed here, whereas aspects of parents' responsibilities related to the person of their child, such as medical care or education, are not further explained.

As explained at the beginning of this section, three questions can be distinguished to analyse what role parents play in the protection of their children from improvident transactions to which they are 'made party'. First, can parents impose liability on their child? Second, which (if any) powers do parents have with regard to rights held by their children? Third, are parents limited in disposing of rights held by themselves but which 'belong to' their child? These questions are discussed below in respect of the English position. Unfortunately, there is practically no literature in this regard and, potentially linked to this fact, hardly any case law either.

[807] See section 3)d)2.

1. No Statutory Agency of Parents

The German concept of 'parental statutory authority' is alien to English law.[808] Where it is mentioned at all, the idea of introducing it is rejected.[809] The English concept of parental responsibility does not, for example, give parents the power to enter into a contract for their child, and thus parents' signature under their child's contract cannot validate it.[810] If parents wish their child to have a contractually enforceable right, they can (nowadays) enter into a contract for its benefit under section 1(1) of the Contracts (Rights of Third Parties) Act 1999. But this is no instance of agency, as the child will not become party to the contract. Also, minors can appoint an agent, including a parent, but the agent cannot have a wider scope of capacity than the minor as the principal has.[811] This answers the first of the three questions distinguished above. It also indicates the answer to the second question, ie, whether parents can dispose of rights held by their children. Further explanations are necessary in this respect which are, however, only intelligible after the rights and duties of parents in relation to rights held by them but 'belonging to' their child are discussed.

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[808] *R v The Inhabitants of Arnesby* (1820) 3 B&Ald 584, 106 ER 775; E Cooke, '"Don't Spend It All at Once!" Parental Responsibilities and Parents' Responsibilities in Respect of Children's Contracts and Property' in R Probert and others (eds), *Responsible Parents & Parental Responsibility* (Hart, Oxford and Portland, Oregon, 2009) 201, 205; A Fomferek, *Der Schutz des Vermögens Minderjähriger* (Peter Lang, Frankfurt aM 2002) 292; HW Goldschmidt, *English Law from the Foreign Standpoint* (Sir Isaac Pitmans & Sons, London 1937) 165 f. Doubts whether this statement is perfectly true has Müller-Freienfels, *Vertretung* (fn 235) 166, but without citing any case law.

[809] 'Latey Report' (1966, fn 26) [276]; F Pollock and FW Maitland, *The History of English Law; before the Time of Edward I; Vol II* (2nd ed reissued with an introduction and select biography by SFC Milsom, CUP, Cambridge 1968) 443 referring to guardians.

[810] *Proform* (fn 81), 95. Whether the parent is bound himself is a matter of the individual case, *Blackburn v Mackey* (1823) 1 C&P 1, 171 ER 1076.

[811] *G (A) v G (T)* [1970] 2 QB 643, 652.

2. Parental Responsibility as to Children's Property

Section 3(2) of the Children Act 1989 further specifies its preceding subsection and states that parental responsibility 'also includes the rights, powers and duties which a guardian of the child's estate [before the commencement of the Act] would have had in relation to the child and his property'.[812] Subsection (3) continues and states that these rights 'include, in particular, the right of the guardian to receive or recover in his own name, for the benefit of the child, property of whatever description and wherever situated which the child is entitled to receive or recover'.

This essentially means that, since the coming into force of the Children Act 1989, parents in England have similar rights and duties in relation to their children's property as guardians of the estate had before. These powers are (indirectly)[813] defined by the Tenure Abolition Act 1660. Without going into much detail here, the Tenure Abolition Act 1660 abolished feudal tenure and the Court of Wards and Liveries as set up by King Henry VIII. Guardianship of the estate meant the trusteeship of an estate (primarily land) that a minor—typically an orphan—had inherited until he attained majority.[814] According to section 9 of the Tenures Abolition Act 1660, a guardian had the powers and the duty to apply

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[812] In this thesis, reference is usually made to 'rights' instead of the more specific term 'property' due to the contentious scope of the latter, see chapter I, section 6)c); but in light of the wording of the Children Act 1989, reference is made here to 'property'.

[813] See s 7 of the Guardianship Act 1973, referring to s 8 of the Guardianship Act 1971 relying on the Tenure Abolition Act 1660 for the purpose of defining the powers of guardians.

[814] See for an account of the development Law Commission, *Working Paper No 91, Family Law Review of Child Law: Guardianship* (1985) [2.22 ff]; J Seymour, 'Parens Patriae and Wardship Powers: Their Nature and Origins' (1994) 14 OJLS 159, 163 ff. The age of majority was 21 years under the Tenures Abolition Act 1660; see for further details TE James, 'The Age of Majority' (1960) 4 Am J Legal Hist 22.

the profits of the estate to the use of the ward, manage the land as well as the relevant goods and chattels and 'bring such action (…) as by law a guardian in common socage might doe'.[815] The common law governing guardianship of socage was one form of feudal tenure. It is, based on this provision, indirectly and together with the later common law governing guardianship of the estate, applicable to modern parents.[816] The essential feature of guardianship in socage and of the later guardianship of the estate is that a guardian holds (inherited) property of the ward for the latter's benefit, and it has been held that the guardian is in a fiduciary relationship to the ward similar to that of a 'trustee'[817] or a 'kind of trustee'[818].[819]

This answers the third of the questions raised at the beginning of this section: where parents happen to hold rights 'belonging to' their child, for

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[815] Record Commission, *Statutes of the Realm; Vol 5 (1625–1680)* (London, 1810–1825) 259, 260 at marginal number IX; the relevant passage is also accessible in J Denker and C Haworth, 'The property of minors under English law' [2004] 6 Private Client Business 376, 379. Guardianship of the estate was usually held alongside guardianship of the *person* of the ward (with which we are not concerned here) and passed to the nearest relative to which the estate could not descend, Seymour, 'Wardship' (fn 814) 164.

[816] *Family Law Review: Guardianship* (1985, fn 814) [2.22].

[817] Referring to the relationship between guardians and their ward's property as 'strictly that of trustee and *cestui que trust*' is Romilly MR in *Mathew v Brise* (1851) 14 Beav 341, 51 ER 317, 345; *Hylton v Hylton* (1754) 2 Ves 547, 28 ER 349; *Sleeman v Wilson* (1871-72) LR 13 Eq 36, regarding the guardian as a constructive trustee.

[818] *Docker v Somes* (1834) 2 My&K 655, 665, 39 ER 1095, 1098; *Family Law Review: Guardianship* (1985, fn 814) [2.23]; see also the comparison of guardian and ward with trustee and *cestui que trust* in *Hatch v Hatch* (1804) 9 VesJr 292, 296, 32 ER 615, 617; see also the remark by LS Sealy, 'Fiduciary Relationships' (1962) 20 CLJ 69, 70 at fn 6; JD Chambers, *A Practical Treatise on the Jurisdiction of the High Court of Chancery over the Person and the Property of Infants* (Saunders & Benning, London 1842) 11 at (r); Seymour, 'Wardship' (fn 814) 166; Hargrave/Butler, *Coke upon Littleton Vol I* (fn 73) [88b] n 16.

[819] Using the term 'fiduciary' in the context of parenthood, although not very common, is not at all new, cf *Docker v Somes* (fn 818) 665 , 1098 and the obiter dictum by Field J in *Plowright v Lambert* (1885) 52 LT 646, 652, referring both to guardian and ward as well as parent and child; see also LI Stranger-Jones, *Eversley's Law of Domestic Relations* (6th ed Sweet & Maxwell, London 1951) 376 f; HK Bevan, *The Law Relating to Children* (Butterworths, London 1973) 406.

example, following a gift 'to' a three-year-old which is handed to the parents, they hold such rights on trust for their child. Legally holding the relevant property, parents could dispose of it,[820] but in most cases they would incur personal liability in relation to the child, as explained in the following subsection.

3. Parental Duties Relating to Property 'Belonging to' a Child

The essential feature of guardianship in socage, of the estate, and, now, of parents' fiduciary position in relation to property held by them but 'belonging to' is the duty to account for its proper management.[821] The action of account lies at the heart of fiduciary duties in English law.[822] It obliges any fiduciary (or trustee) to account for profits resulting from managing the relevant property, subject to deductions for necessary expenses. This includes the duty to manage the property and reinvest any profits prudently for the child's benefit,[823] failure to invest results in liability to compensate for lost profits.[824] The account requires returning the

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[820] *Lewin on Trusts* (fn 342) [28-001]; although there is no case in relation to personal property in this respect, it should be clear that nowadays general trust law applies in this respect, which offers further protection to the beneficiary, including 'proprietary remedies'; see *ibid* [44-001 ff].

[821] The duty to account of guardians in socage was introduced in ch 17 of the Statute of Marlborough, 1267, cf Record Commission, *Statutes of the Realm; Vol 1 (1235–1377)* (London, 1810–1825) 19, 24; J Getzler, 'Fiduciary Principles in English Common Law' in EJ Criddle, PB Miller and RH Sitkoff (gen eds), *The Oxford Handbook of Fiduciary Law* (OUP, Oxford 2019) 471, 480. Regarding guardianship of the estate see *R v Oakley* (1809) 10 East 491, 494, 103 ER 862.

[822] For an overview of the origins of that remedy in the context of fiduciary duties see Getzler, 'Fiduciary Principles' (fn 821) 471, 473 ff.

[823] *Chugg v Chugg* [1874] WN 185: failure to invest the trust property at all and compensation of four percent annual interest.

[824] *Mosley v Ward* (1805) 11 Ves Jr 581, 32 ER 1214, ordering the 'trustee and guardian' to pay five percent interest; *Chugg v Chugg* (fn 823) in relation to trustees.

property in question, including any profits from its management.[825] Fiduciaries' conduct is assessed against the standard of care which they are required to observe. Guardians were 'bound to use the same care and management that a prudent man would exercise in the conduct of his own affairs' when managing or investing their ward's property.[826] Instead of making investments themselves, fiduciaries can appoint professionals for the management of the beneficiary's property without being liable for their failure, provided they made a responsible choice.[827] Fiduciaries and trustees themselves are not allowed to profit from managing the property in any way to avoid conflicts of interest.[828] Transactions between parent and child are subject to close scrutiny, presuming that the parent unduly influenced the child.[829] At least where possible, it seems advisable for parents to separate their child's and their own property. If a guardian mixed the ward's and his own property, the ward could elect whether he seeks an account of the share in the actual profits or payment of a flat rate payment of interest on his property.[830] Where one guardian assented to another's misappropriation of

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[825] Profits cannot be set off against losses made in breach of a duty, Stranger-Jones, *Eversley's* (fn 819) 489.

[826] *Docker v Somes* (fn 818).

[827] *Vickery v Stephens* [1931] 1 Ch 572, concerned with trustees, generally.

[828] This applies even where they seize an opportunity which the minor could not have taken, *Keech v Sandford* (1726) Ca t King 61, 25 ER 223; gifts by the former ward to the guardian shortly after attaining majority were held to be against public policy, *Hylton v Hylton* (fn 817) 350; *Taylor v Johnston* (fn 305) 608 (obiter); *Hatch v Hatch* (fn 818).

[829] *Bainbridge v Browne* (fn 573); *Hunter v Atkins* (1834) Coop temp Brough 464, 47 ER 166; *Hylton v Hylton* (fn 817); See in respect of the equitable doctrine of presumed undue influence between parent and child chapter IV, section 2)b)3.c.

[830] *Docker v Somes* (fn 818), concerned with executors but stating obiter at p 665 that the same rules would apply, *inter alios*, to guardians; *Wedderburn v Wedderburn* (1838) 4 My&Cr 41, 41 ER 16, 18 f, concerned with executors of a will and infant legatees.

property 'belonging to' the ward, both were liable.[831] Furthermore, minors cannot authorise a breach of fiduciary duty, as they cannot authorise a breach of trust.[832] Where the management of property continues after majority is reached, the parents' fiduciary duties continue.[833] An account has to be authorised by the former minor but can be re-opened on the ground that it contains errors[834] or that the former minor had not been independently advised.[835] It should be noted that parents do not only have the right to receive property on behalf of their child,[836] but they are also entitled to the possession of the property and cannot be removed from it by any person.[837]

Some of the case law governing guardianship of the estate seems not immediately applicable to modern parents. Most crucially, a guardian of the estate[838] was only obliged to maintain the ward by applying the profits of the

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[831] Stranger-Jones, *Eversley's* (fn 819) 437.

[832] *Adye v Feuilleteau* (fn 340) 785; *Wilkinson v Parry* (fn 340). See already chapter III, section 2)c).

[833] *Mellish v Mellish* (1823) 1 Sim&St 138, 57 ER 56; *Hatch v Hatch* (fn 818); *Wedderburn v Wedderburn* (fn 830), 21; Bevan, *Law Relating to Children* (fn 819) 406.

[834] *Allfrey v Allfrey* (1849) 1 Mac&G 87, 41 ER 1195, (administrator's) account re-opened seventeen years after it had been approved of.

[835] *Revett v Harvey* (1823) 1 Sim&St 502, 57 ER 199, relating to a solicitor who 'acted as his confidential adviser (…) in the nature of a guardian to him'.

[836] As reiterated by section 3(3) of the Children Act 1989; *M'Creight v M'Creight* (1852) 13 I Eq R 314.

[837] Consequently, they could maintain trespass to protect it, *R v Oakley* (fn 821).

[838] The guardian would probably only be obliged to maintain the ward if he was guardian of his *person*, too; the term 'probably' is used because the distinction between the rights and duties of a guardian of the estate and that of the person of the ward is blurred and in many cases not (necessary to be) delimitated strictly.

latter's property instead of his own money.[839] But nowadays parents are under the duty to maintain their children *per se* and thus have to apply their own funds for that purpose.[840] Potentially, analogically applying section 31 of the Trustee Act 1925 allows concluding that profits from the investment of minors' property can be applied to maintaining them,[841] whereas parents' position as fiduciaries should bar them from fulfilling their own duty of maintaining their child with the substance of their child's property. These aspects cannot be further discussed in this thesis.

4. Property Held by Children

In contrast to the situation of parents holding property 'belonging to' their child on trust, the latter can of course hold property, too. The question discussed in this section is whether parents have any special powers in relation to such rights. As explained already, English parents cannot act on behalf of their child as agents by

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[839] HK Bevan, *Child Law* (Butterworths, London 1989) [4.25]; unlike parents, guardians were also not liable under social security laws to contribute to maintenance based on social welfare, cf *ibid*; Stranger-Jones, *Eversley's* (fn 819) 472, 476.

[840] Following their parental responsibility under section 3 of the Children Act 1989. It is not entirely clear whether parents had always been under a duty to maintain their children; arguing against such a duty is Knowles, *Infants* (fn 340) 121, 123.

[841] According to that provision, a trustee may apply income from trust property towards the maintenance of an underage beneficiary; pursuant to section 32 of the same Act, trustees also have discretion to make advancements where a beneficiary is entitled to the trust property contingently upon his reaching a certain age. That the Trustee Act 1925 is applicable to guardians is taken for granted in the relevant literature, cf Bevan, *Child Law* (fn 839) [4.38]; *Family Law Review: Guardianship* (1985, fn 814) [2.23, 3.76]. There are further statutory provisions which are concerned with the management of land or the administration of the estate of a deceased in which a minor has a beneficial interest, and they might be applicable directly or indirectly to parents, too, see the Settled Land Act 1925, ss 1, 3, 26, 34, 102, 103(3) , 104(8), sch 2 para 2; Administration of the Estate Act 1925, ss 33(3), 39, 41, 42, 47, 51; ss 7(5) , 15(1) and sch 1 of the Trusts of Land and Appointment of Trustees Act 1996.

statute.[842] Certainly, parents often have *factual* control over their children's belongings. They are able to take a movable, such as a video game, into possession, not least to fulfil their responsibilities in relation to the person of their child. But thereby they cannot acquire their child's (best) legal title to that property unless the latter transfers the title to them voluntarily, as explained in chapter III. Does parental responsibility entail that parents have any further-reaching powers in relation to personal property held by their child?

Following the introduction of section 3 of the Children Act 1989, the answer to this question should depend, in turn, on the powers that guardians of the estate previously had in relation to personal property held by their ward (instead of the guardian). Unfortunately, there is no case law answering this question. Potentially, an answer could be found in analogy to the case law governing guardians' powers in relation to estates to which a minor is entitled. It is impossible to discuss this complex area of law here in full detail. Most importantly for the present purposes, Chancery held that 'every person who enters on the estate of an infant, enters as a guardian or bailiff for the infant'[843] if that person takes possession of the estate before the infant,[844] and the same principle was (obiter) held to apply where a minor is later dispossessed.[845] The decisive consequence was that the person could not dispose of the estate but had to account

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[842] See section 1)b)1. of this chapter.

[843] *Dormer v Fortescue* (1744) 3 Atk 124, 130, 26 ER 875, 878 per Lord Talbot.

[844] *Blomfield v Eyre* (1845) 8 Beav 250, 254, 50 ER 99, 100; *Hicks v Sallitt* (1845) 3 De G&M 782, 43 ER 307; *Howard v Earl of Shrewsbury* (1873-74) LR 17 Eq 378, 399; *Morgan v Morgan* (1737) 1 Atk 489, 26 ER 310; *Thomas v Thomas* (1855) 2 K&J 79, 69 ER 701; *Wall v Stanwick* (1887) 34 ChD 763.

[845] *Howard v Earl of Shrewsbury* (fn 844) 400 per Jessel MR.

to the minor for its management. If the analogy can be drawn—for which there is no authority—parents controlling property held by their child have no power to dispose of it, but they must keep it safe for their child and account for its application.

A different way to answer the question posed above is to regard the control of a minor's personal property as part of the custody of the person of the child.[846] Historically, the father of a (legitimate) child had all the power over it, and his custody of his child would only be interfered with in the case of gross moral or religious failure.[847] Furthermore, some sources hold that a guardian's powers as to the custody of a minor were similar to those of the father.[848] However, there is no case law that clearly determines the powers of a father over his child's personal property. Chancery in an Irish case held obiter that (relating to personalty) 'the father is merely guardian of the person and guardian by nature, but in neither capacity has he any power over the property of the infant'.[849]

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[846] Hargrave/Butler, *Coke upon Littleton Vol I* (fn 73) [88b] n 13; *Family Law Review: Guardianship* (1985, fn 814) [2.32] at fn 142.

[847] *Thomasset v Thomasset* (fn 111); *Agar-Ellis* (fn 111); *In the Matter of Mary Ellen Andrews* (fn 881).

[848] Although this is not expressed very clearly (in relation to real or personal property, or to the person of the child?), cf BA Bicknell, *The Law and Practice in Relation to Infants* (The Solicitors' Law Stationery Society, London 1928) 62; MDA Freeman, *Law and Practice of Custodianship* (Sweet & Maxwell, London 1986) 49; Blackstone, *Commentaries Book I* (fn 433) 441, 450 f; sometimes natural guardianship is regarded as synonymous to guardianship generally, see Bevan, *Law Relating to Children* (fn 819) 397 fn 7. Others regarded a father's powers as smaller, Law Commission, *Report on Illegitimacy* (1982, Working Paper No 118) [7.3] at fn 9 or state that a father's powers were never properly defined in the common law at all, cf *Family Law Review: Guardianship* (1985, fn 814) [2.32] at fn 140.

[849] *M'Creight v M'Creight* (fn 836); this view finds support in the literature: Bevan, *Child Law* (fn 839) 34; Stranger-Jones, *Eversley's* (fn 819) 376; *Family Law Review: Guardianship* (1985, fn 814) [1.19, 2.32]; Cooke, 'Parental Responsibilities' (fn 808) 201, 210 f; Bicknell, *Infants*

The gist of both of these approaches is that parents cannot dispose of rights held by their children. Of course, parents can *factually* take their child's property into possession. But where they do so, they hold the property 'like bailiffs' for their child and are accountable for keeping it safe. Arguably, the statement that parents have 'no power over the property' of their child is related primarily to commercial matters, viz, parents cannot sell their child's personal property and pocket the money. However, following their responsibility as to the person of their child and their pedagogical duties, they must be able to dispossess their child of movables: think of an inappropriate video game bought by a child which parents take away from it.[850] The position 'like bailiffs' entails that parents have to account for their child's property which they control and for its proper management, similar to holding property 'belonging to' their child on trust.[851] Following this, parents should be regarded as being subject to similar duties in relation to their child's property, whether they factually control property owned by it or hold property belonging to their child on trust for the latter.[852] The useful term to denote this similarity is the fiduciary position of parents, which nowadays follows from section 3 of the Children Act 1989.

Finally, it should be noted that of the very few scholarly accounts of the present issue, one takes a completely different view. It argues that parents since

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(fn 848) 132, at fn 51 citing cases which are, however, concerned with legacies due to an infant and obsolete in light of s 3(3) of the Children Act 1989.

[850] Contra: Cooke, 'Parental Responsibilities' (fn 808) 201, 210 f, argues that in relation to personal property held by the child, the parents have no parental responsibility and, seemingly, powers at all.

[851] As held in *Blomfield v Eyre* (fn 844) 100.

[852] Contra: Cooke, 'Parental Responsibilities' (fn 808) 210 who argues that property of the child which is not held on trust by the parents is not subject to parental responsibility at all.

1989 can 'dispose of movable property in the name of their minor children',[853] essentially establishing a (partial) 'parental statutory authority'. However, this view is not supported by any authority. Instead, it would be alien to English law to allow parents to act on behalf of their children as agents by statute.[854] It also conflicts with what has been identified as the policy underlying the protection of minors from improvident transactions in English law:[855] minors are protected from liability stemming from a promise, but they can dispose of their rights as they wish.

2) The Role of the State

Both in England and Germany, families are an integral part of society. Their management and concerns, including the upbringing of children, are not regarded as a solely private matter in which parents can have unlimited liberty. The state's control over how parents raise their children can take very different forms, from soft measures such as healthy meals at school, through mandatory school education, to direct limitations on parental powers, which can even result in the complete exclusion of parents from the care for their children.[856] Most of the legal issues around these measures relate to the person of a child and are not discussed

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[853] Denker/Haworth, 'Property of Minors' (fn 815) 382.

[854] See section 1)b)1. of this chapter.

[855] See chapter III, section 3)b).

[856] Such severe direct interferences are only justified where parents severely fail to fulfil the duties owed to their child, ES Scott and B Chen, 'Fiduciary Principles in Family Law' in EJ Criddle, PB Miller and RH Sitkoff (gen eds), *The Oxford Handbook of Fiduciary Law* (OUP, Oxford 2019) 227, 230.

here. However, protecting minors from improvident transactions can justify state intervention, too. It primarily takes the form of measures imposed by courts,[857] and these court measures are looked at in more detail in this section.

a) The Role of the Family Court in Germany

Under the German constitution, the state is both entitled and obliged to supervise the exercise of parental care.[858] For the purpose of fulfilling its role, the state confers some of its powers on courts, especially the Family Court. One means by which courts protect minors from improvident transactions is that certain transactions effected by parents require authorisation by the Family Court. Second, courts can also impose measures for monitoring or intervening with parents' care for their child's assets.

1. Authorisation by the Family Court

Parents are generally trusted to make the right choices for their children.[859] In German law, this includes the control over minors' transactions, whether in the form of authorising minors' legal acts or acting on behalf of minors as agents.[860] But, in respect of certain transactions, the legislature deemed the risk of the parents acting wholly unchecked too high. For the purpose of mitigating the risk

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[857] Administrative bodies play an important role in protecting the person of a child, but they are not relevant for protecting minors from improvident transactions.

[858] According to sentence 2 of article 6 (2) GG.

[859] OLG Stuttgart, [2000] BeckRS 17105.

[860] See especially the analysis in chapter II, section 3)a), and chapter III, section 3)b)1.

of parents making their child party to improvident transactions on behalf of their child, certain transactions require additional approval by the Family Court. Transactions entered into without the necessary authorisation by the Court is provisionally void, subject to its later authorisation.

For determining which transactions require further approval by the Family Court, certain 'types' of transactions are abstractly defined in §§ 1643, 1821, 1822 BGB. Without going into too much detail, Court approval is required for transactions related to rights to land or registered ships, for contracts obliging a minor to dispose of the entirety of his assets (*Vermögen im Ganzen*) or of (parts of) an inheritance, for rejecting an inheritance,[861] for disposing of a business or becoming a member of a company or partnership, and for obtaining a loan on the credit of a minor.[862]

The practically most important 'type' of transaction is § 1822 no 5 BGB, which requires Court approval 'for a lease or another contract which imposes recurring obligations on the child for a period until after its nineteenth birthday'.[863] In essence, the state thereby prevents the imposition of future, recurring obligations on a child for the time after majority is reached. Although this is a very important limitation on parental powers, it was not sufficient to

[861] See §§ 1643, 1822 no 1 BGB; § 1643 (2) BGB.

[862] See §§ 1643, 1822 no 3 and no 8 BGB; according to §§ 1643, 1822 no 11 BGB, Court approval is also required for granting a power of representation (*Prokura*) on behalf of the minor.

[863] Cf §§ 1643, 1822 BGB; note, however, that these provisions are quite detailed and the translation in the text omits many more detailed provisions which are not deemed relevant here.

prevent cases such as that leading to the enactment of § 1629a BGB.[864] Furthermore, it can cause technical problems. The (contentious) predominant view is that contracts of apprenticeship or employment are 'contracts imposing recurring obligations on the child',[865] and it is unclear whether contracts akin to apprenticeships, such as with an agency managing young artists or athletes, also require Court approval.[866] This point has been discussed in one decision but was not definitely determined.[867] Management contracts of young professionals typically include more burdensome provisions on the part of the artist or athlete which would not be expected in a 'normal' apprenticeship or employment.[868] Also, the amounts of money and the importance of management contracts for the future career of a young professional are much higher than in the case of apprenticeships or employment. Management contracts should therefore *a fortiori* require authorisation by the Family Court in addition to that by parents.[869]

One further instance of transactions requiring authorisation by the Family Court has already been mentioned in chapters II and III. According to § 112 BGB,

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[864] See section 1)a)4. of this chapter.

[865] See Gernhuber/Coester-Waltjen (fn 733) § 64 [65]; Kroll-Ludwigs in: *Münchener Kommentar* (fn 734) § 1822 [41]; LG Essen, [1965] NJW 2302. Contra: B Veit in: *idem*, W Bienewald and M Coester (gen eds), *J v Staudingers Kommentar zum Bürgerlichen Gesetzbuch, §§ 1773–1895* (ed 2020 Sellier – de Gruyter, Berlin 2020) § 1822 [116]; A Fomferek, 'Minderjährige Superstars: Die Probleme des § 1822 Nr. 5 BGB' [2004] NJW 410, 411.

[866] A Fomferek, 'Minderjährige Superstars' (fn 865).

[867] OLG Köln, [2001] ZUM 166; that case was concerned with the managing contracts of underage members of the Irish 'Kelly Family' and determined the question of their parents' authority to act on behalf of their children based on German law, whereas Irish law would not have provided for such authority according to an expert opinion sought during the legal proceedings.

[868] See, for example, LG Potsdam, [2021] BeckRS 26936, where the relevant contract was held void for illegality based on the violation of public policy.

[869] Agreeing with that proposition is A Fomferek, 'Minderjährige Superstars' (fn 865) 412.

minors can obtain 'partial contractual capacity' for independently conducting a business with the authorisation both by parents and the Family Court.[870] However, it is not only the initial authorisation of starting the business which requires authorisation. Minors conducting a business also need to obtain the express authorisation of any further transaction which their parents would normally require Court authorisation for. This means that, for entering any long-term contract such as a lease or for obtaining credit, minors need further approval, and this is (probably) the main reason why § 112 BGB has not gained much importance in practice.[871]

2. Court Orders

According to § 1666 BGB, 'if the physical, mental or psychological welfare of the child or its assets are threatened and the parents are unwilling or unable to avert the threat, the Family Court must take the measures necessary to avert the threat'. The Court's measures can be directed against any person who is the source of the threat.[872] For the Court to be allowed (and obliged) to interfere with parental rights, the parents' breach of duty must be sufficiently severe, and a threat must have materialised which is about to occur.[873] For example, parents might incur excessive liability on behalf of their child, or their own financial position is strongly compromised, and it seems likely that they will misappropriate their

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[870] See chapter II, section 1)b)3 and chapter III, section 1)e).

[871] Klumpp in: *Staudinger* (fn 32) § 112 [4].

[872] Lugani in: *Münchener Kommentar* (fn 734) § 1666 [150, 214 f].

[873] OLG Frankfurt aM, [2005] NJW-RR 1382; OLG Stuttgart, [2000] BeckRS 17105.

child's funds.[874] Most importantly, in imposing its orders, the Court must be careful only to intervene with parents' rights as much as necessary, especially before deciding to exclude one or both parents partially or wholly from their care of their child's assets.[875] Unfortunately, this does happen in practice.[876] In such a case, a 'special officer' (*Pfleger*), often a professional guardian, is called upon by the Court and given the powers necessary to fulfil the parents' role.[877]

Apart from the general clause under § 1666 BGB, there are special instruments that the Family Court can utilise to protect a child's assets from being misappropriated. The Court can order parents to record and register assets and their management or, if necessary, a public body to do so.[878] Assets which are mismanaged can be ordered to be invested in a specific way and their withdrawal from a bank account made conditional upon authorisation by the Court.[879] Parents

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[874] OLG München, [1999] BeckRS 30981427; KG (Berlin), [2009] BeckRS 25372.

[875] OLG Brandenburg, [2019] NJOZ 193; BayObLG, [1994] FamRZ 1191: order of a fine conditional upon the future failure of the mother to submit a record of her management of the son's EUR3.5m inheritance after funds of EUR65,000 were already misappropriated by her; OLG Frankfurt aM, [2005] NJW-RR 1382; KG (Berlin), [2009] BeckRS 25372: a mother had filed for insolvency but had been hiding funds via her child's accounts together with money purportedly inherited by the child; the child was exposed to the risk of liability to the mother's creditor's; OLG Köln, [2000] NJW-RR 373: exclusion from parental care over the child's assets on the basis that the parent-child relationship was wholly dysfunctional.

[876] OLG Köln, [2000] NJW-RR 373; KG (Berlin), [2009] BeckRS 25372; AG Aachen, [2017] BeckRS 154739: mother wholly unable to manage land inherited by her and her child from the father; see already section 1)a)1. of this chapter.

[877] See the explanations in section 1)a)1. of this chapter, fn 747.

[878] Under § 1667 BGB.

[879] OLG München, [1999] BeckRS 30981427; BayObLG, [1989] FamRZ 1215; BayObLG, [1983] FamRZ 528: the negligent mismanagement of assets, resulting in the child to lose out on profits, can already amount to a concrete threat to the assets. See also the specific provisions relating to securities, bonds, or other valuables in § 1667 (1) sentence 2 BGB.

who intend to continue the management of their child's assets can also be ordered to provide security for them.[880]

b) The Family Court and the High Court in England

The Crown as *parens patriae* has prerogative jurisdiction over children as their 'father':[881] '[…] idiots and lunatics, who are incapable of taking care of themselves, are provided for by the King as pater patriae, and there is the same reason to extend this care to infants.'[882] The powers and duties resulting from this office are conferred on administrative bodies and courts. Here, as in the context of German law, we are only concerned with the latter. The two relevant instruments at the hands of courts in England for protecting minors from improvident transactions and safeguarding their property are so-called 'section 8 orders' and the 'inherent jurisdiction' of the High Court. Each is explained in turn, and it can be seen that, on paper, English courts can interfere with the rights and duties of parents in relation to their children's property but, in practice, refrain from doing so.

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[880] Under § 1667 (3) BGB.

[881] *Lady Teynham v Lennard* (1724) 4 Bro Parl Cas 302, 2 ER 204, 206; *In the Matter of Mary Ellen Andrews (An Infant)* (1872–73) LR 8 QB 153, 157; *Thomasset v Thomasset* (fn 111) 310; see also *Beverley's Case of Non Compos Mentis* (1603) 4 Co Rep 123 b, 76 ER 1118, 1124 in reference to 'idiots' and 'lunatics'.

[882] *Mr Justice Eyre v Countess of Shaftsbury* (1722) 2 PWms 103, 118, 24 ER 659, 664.

1. ‘Section 8 Orders’

Today, the primary legal framework governing the relationship of children, parents, and the state is the Children Act 1989. There are manifold types of orders available of which the so-called ‘section 8 order’ is a central instrument. Under the homonymous provision of the Act, the High Court or the Family Court[883] can decide any ‘question aris[ing] with respect to the welfare of any child’, subject to an application by a parent.[884] Courts can make an order prohibiting a specific ‘step which could be taken by a parent in meeting his parental responsibility’ (so-called ‘prohibited steps order’) or resolve a ‘specific issue’ by ‘giving directions for the purpose of determining a specific question which has arisen (…) in connection with any aspect of parental responsibility’ (so-called ‘specific issues order’).[885] Orders can also be made provisionally or subject to certain conditions to increase their flexibility.[886] In making its order and determining a ‘question with respect to the administration of a child’s property or the application of any income arising from it’, a court’s ‘paramount consideration’ shall be the child’s welfare.[887]

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[883] See s 92 of the Act.

[884] Or another person listed in s 10(4) of the Children Act 1989. An application is not required if ‘family proceedings’ are already ongoing, see s 10(1) of the Act, or if it can avoid such proceedings in the first place, J Black et al, *A Practical Guide to Family Law* (10th OUP, Oxford 2015) [18.112]. Note that the order shall not be made ‘with respect to a child who has reached the age of sixteen unless it is satisfied that the circumstances of the case are exceptional’, s 9(6) and (7) of the Act. If applicable, the order will cease to have effect upon the sixteenth birthday of the child, s 9(10) and (11) of the Act.

[885] The Family Court can also determine the custody of the person of the child by so-called child arrangement orders; see further Black, *Family Law* (fn 884) [18.133 ff].

[886] See s 11(3) and (7) of the Act; cf Black, *Family Law* (fn 884) [18.189].

[887] According to s 1(1)(b) of the Children Act 1989; in deciding what the child’s welfare comprises, the court must refer to a checklist under s 1(3) of the Act.

What is perhaps surprising is that, although in theory courts in England have powers to interfere with the way in which parents act in relation to rights held by or 'belonging to' their child, there is no case reported in which such a measure would have been taken. It is difficult to determine how courts would make 'section 8 orders' for this purpose. There are only three cases reported in which a 'section 8 order' was issued in respect of a minor's *foreign* property.[888] In each, a widowed mother with an underage child intended to enter into a transaction in relation to land inherited, *inter alios*, by her and her child, and the mother intended to dispose of that property. Because the property was situated in France, Italy and Germany, respectively, the requirements for disposing of land and (part of) an inheritance had to be met, and under each jurisdiction concerned, for effecting the transaction, a parent would be required to act on behalf of the child with authorisation by a court.[889] However, for the question of whether that authorisation should be granted, English law was applicable pursuant to an EU regulation because the mother and her child were habitually resident in England.[890] For the purpose of fulfilling the requirement of authorisation and being able to render the relevant documents to the foreign authorities, the parent

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[888] *Hays v Hays* (fn 17); *In re AC* (fn 17); *Bibi Marium Shanavazi* (fn 17).

[889] In *Hays v Hays* (fn 17), which concerned property in France, the widowed mother intended to sell parts of property inherited by her and her underage daughter; under French law, the court would (apparently) have to appoint a legal representative (typically a parent) to act on behalf of the minor and effect the sale. In *In re AC* (fn 17), which concerned inherited property in Italy, Peel J explains that under Italian law an inheritance has to be accepted formally, whereas minors cannot do so but require an adult (parent) to act on their behalf and the adult, in turn, requires authorisation by a 'tutelary judge', which is granted if the acceptance of the inheritance is in the best interest of the minor, see *ibid* [12]. In *Bibi Marium Shanavazi* (fn 17), which concerned property in Germany, a widow and mother of five children, one of which was underage, intended to sell the undivided inheritance from the deceased father and, for effecting that transaction on behalf of the minor, required court authorisation as explained in this chapter in section 2)a)1.

[890] Council Regulation (EC) No 2201/2003. As explained in *Bibi Marium Shanavazi* (fn 17), the applicability of that regulation remained unaffected by the exit of the UK from EU membership.

in each case applied to the High Court for a 'section 8 order' for the authorisation of the transaction.

Bearing in mind what has been said so far about English law, this application must have rather surprised the judges. There is no requirement of parental or even court authorisation in English law in respect of minors' transactions. However, this did not prevent the judges from holding that each transaction would promote the child's welfare in accordance with sections 8 and 1 of the Children Act 1989, and they granted the order as applied for. Due to the flexibility that the 'section 8 order' gives judges in exercising their powers, the fact that the requirement of authorisation is unknown under English law was of secondary concern.[891] Interestingly, in the first of the three cases, the judge used his discretion to give further directions as to the application of the proceeds of the sale of the minor's share in the inherited property, which ought to be settled on trust for the benefit of the child until it came of age.[892] In the third and most recent of these cases, the mother undertook to apply the proceeds of the sale of her child's share in the immovable property to its 'education, maintenance and benefit'.[893] This shows the potential willingness of courts to protect minors' property from misappropriation by their parents by making a 'section 8 order' even where the property is situated in England. Peel J in *In re AC (A Child)* expressly encouraged parents to make similar applications in the future and stated

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[891] See especially *In re AC* (fn 17) [18].

[892] *Hays v Hays* (fn 17) [53].

[893] *Bibi Marium Shanavazi* (fn 17) [53]. In the second of the cases, the court was merely asked to authorise the acceptance of the inheritance and thus no further directions had to be given, but the court invited the parent to apply for a subsequent order in case the property should be sold.

that they have probably been discouraged by the 'too restrictive' approach in the earlier decision of *Hays v Hays*.[894] The merits of such applications and orders for the protection of minors' wealth are discussed in the comparative analysis below.[895]

2. The High Court's Inherent Jurisdiction

The strongest means of interfering with parental responsibility lies with the High Court, which exercises the Crown's powers and duties in the course of its inherent jurisdiction over children.[896] The High Court can make any minor a ward of court. The effect is that no important step in the life of the child may be taken without the Court's permission.[897] This jurisdiction is extremely flexible and, at least in theory, hardly has any boundaries.[898] Its derivation from the Crown's powers is not merely symbolic:[899] in exercising its powers, the High Court is not concerned with the relationship between parents and their children or third parties; it acts on behalf of the Crown as the guardian of all infants, 'superseding the natural

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[894] *In re AC* (fn 17) [23].

[895] See section 3)e)2. of this chapter.

[896] Historically, the wardship jurisdiction lay with the Court of Chancery until its dissolution with the Judicature Acts 1873 and 1875; see further Seymour, 'Wardship' (fn 814). Subsequently, the High Court's Chancery Division became competent and later, according to s 1(2) of the Administration of Justice Act 1970, its Family Division; for a summary of the development since the late 19th century see S Cretney, *Family Law in the Twentieth Century: A History* (OUP, Oxford 2003) 583 ff.

[897] *Wellesley v Duke of Beaufort* (1827) 2 Russ&M 1, 20, 38 ER 236, 243 ff.

[898] *In re Z (A Minor) (Identification: Restrictions on Publication)* [1997] Fam 1, 23. There are now statutory limits in relation to the custody of the person of the child, cf s 100 of the Children Act 1989.

[899] There is agreement on the fact that the wardship or, as it is also referred to, *parens patriae* jurisdiction derives from the Crown's powers, but the exact development of these powers in Chancery are contentious, cf Seymour, 'Wardship' (fn 814) 179.

guardianship of the parent'.[900] The Court can interfere with parents' exercise of their parental rights and duties if it considers the wellbeing of the child at risk and even make orders that are outside the scope of parental powers, whether against parents or third parties.[901] For example, the Court can order that information is not published about the ward by third parties.[902] Any person acting in conflict with the Court's orders, including the mere failure to seek the prior authorisation of relevant transactions, commits the offence of contempt of court.[903]

3) Comparative Analysis

As shown in this chapter, parents and the state play an important role in protecting minors from improvident transactions. 'Minority' in the context of contracts, transfers of rights, or the reversal of transactions cannot be fully understood without taking the powers of parents over their children's transactions into account. Such powers, in turn, require certain limits and the control of their exercise by the state that, both in Germany and England, fulfils the role of safeguarding vulnerable persons such as minors. The present comparative analysis sheds light on the solutions that English and German law provide for balancing

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[900] *R v Gyngall* [1893] 2 QB 232, 239 per Lord Esher MR; Seymour, 'Wardship' (fn 814) 179 f.

[901] As *In Re B (A Minor) (Wardship: Medical Treatment)* [1981] 1 WLR 1421, where the parents refused a potentially lifesaving operation on their disabled child; see further *Butler v Freeman* (1756) Amb 302, 27 ER 204; *Wright v Naylor* (1820) 5 Madd 77, (1820) 56 ER 824; *Powel v Cleaver* (1789) 2 BroCC 499, 29 ER 274, 283; *Creuze v Hunter sub nomen Cruise v Hunter* (1790) 2 Cox 242, 30 ER 113.

[902] *Al Maktoum v Al Hussein* [2020] EWCA Civ 283, EMLR 15; 'Latey Report' (1966, fn 26) [202 f]; Seymour, 'Wardship' (fn 814) 180 f with ample reference.

[903] D Ealy et al, *Arlidge, Eady & Smith on Contempt* (5th ed Sweet & Maxwell, London 2017) [11-350].

parents' and the state's powers vis-à-vis minors' autonomy and the safeguarding of their property.

a) Coherence between Parental Powers and Minors' Capacity

Parents are responsible for the upbringing of their children. In a wide sense, the protection of minors from improvident transactions and the proper management of their monetary affairs can be regarded as part of the upbringing and education of a child. Such education requires that children or, rather, teenagers must directly or indirectly be able to determine in which transactions they participate to gain experience in life. However, it would not be considered good parenting if a child is simply given large sums 'to play with'. Instead, parental powers have to be 'aligned' with the autonomy of the child. For the present purposes, this means that parental powers in relation to property or assets of children need to be coherent with the limitations on the capacity of minors to enter into transactions themselves.

The general policy which German law follows for protecting minors from the consequences of contracts or transfers of rights is to shift the control over minors' transactions to their parents. Parents have to authorise any legal act of their child.[904] Only 'legally solely beneficial' transactions can be entered into by minors without any participation of their parents.[905] That shift of control can be seen again in the context of the law of restitution. 'Minority' in the sense of the

[904] Provided the child is aged seven years or older, cf chapter II, section 1)a)4. Regarding the identification of that policy see chapter III, section 3)b)1.

[905] See chapter II, section 1)b)1.

parents not having authorised their child's transaction is—via the concept of the 'legal act'—a reason for restitution to be due without further regard to the merits of the individual transaction for the minor. Restitution is also 'two-sided', viz, the adult party can equally claim restitution simply because the transaction is not approved of by the minor's parents.[906] Parents' state of mind can also be decisive for whether or not their child can plead disenrichment.[907] In that light, parents' 'parental statutory authority' to act as agents on behalf of their child is an extension of the nearly complete shift of control over their child's transactions to them and of the nearly complete exclusion of minors' discretion in that respect. German parents' powers complement minors' (in-)capacity well, viz, they align with the underlying general policy.

In English law, the policy for protecting minors by limiting their capacity has been identified as rendering minors' promises unenforceable as against them,[908] whether directly or indirectly,[909] but other than that minors can enter into contracts and effect transfers of rights. The idea that parents require legal (rather than factual) control in respect of their children's transactions is alien to English law. The same applies to the question of claims for restitution aiming at reversing minors' transactions. There is no special unjust factor of 'minority'. Instead, minors' own decision to part with a benefit is legally valid similar to that of

[906] See chapter IV, section 1)b)1.

[907] See chapter IV, section 1)d)2.

[908] See chapter II, section 2)a)1.

[909] Cf chapter II, section 2)c), and chapter IV, section 2)b)4.a.

adults.[910] Following that, the fact that parents under English law have no power to act on behalf of their child as agents is coherent with the limited powers which they have in respect of their child's transactions. They cannot enter into contracts on behalf of their child as agents by statute,[911] and they have no powers to dispose of rights held by their child.[912]

b) Reasons for the Extensive Powers of German Parents

Considering the risks and legal complexity which are associated with parental powers, one might wonder why German law gives parents such vast powers over their children's transactions. As explained, these powers do not only counterbalance the restrictions on minors' capacity. Manifold provisions are necessary to limit them and to mitigate the risk which parents can pose to their children that, in turn, have to be checked upon by the state. At the same time, one might wonder why it did not occur to English judges or legislators that similar powers should be installed in England.

One reason for the extensive scope of the 'parental statutory authority' in German law is 'conceptual'. The concept of the 'legal act' (*Rechtsgeschäft*) is the starting point for voluntary changes in a person's legal relationships with other

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[910] These statements, including references to minors' contracts and transfers, are subject to exceptions for very young minors, whose capacity is (probably) subject to further restrictions, cf chapter II, section 2)a)4., and chapter III, section 2)d), and to individual instances of equity treating minors more favourably than an adult in the same situation, see chapter IV, section 3)a).

[911] See section 1)b)1. of this chapter.

[912] See section 1)b)4. of this chapter.

persons or objects (*Rechtsverhältnisse*),[913] and limitations on the ability to effect legal acts are the legal technique of limiting a person's 'contractual capacity'. For the purpose of balancing minors' incapacity, parents have, at the outset, authority to effect legal acts on behalf of their child, a general rule which is only limited by certain 'exceptions'. Using the concept of the legal act as a 'hinge' for determining both minors' capacity and parents' statutory authority is conceptually sensible because it ensures coherence between the scope of transactions governed in each instance. The concept of the legal act as employed here and, in fact, the design of the 'General Part' of the BGB as a whole are representative of a tendency of German law to attempt to solve any possible case in advance and, for that purpose, to introduce very abstract legal concepts. Both the design of minors' contractual capacity and parents' statutory authority are a product of this tendency.

Another important reason for the concept of 'parental statutory authority' in German law is historical and should briefly be explained here. Under Germanic laws—before the reception of Roman law in the form of the *ius commune*—minors[914] were able to enter into contracts and incur liability, but they had a right to rescind it even after majority was reached.[915] The risk that the transaction is

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[913] As explained in chapter II, section 1)a)2.

[914] There was only one (age) limit, which evolved from being set at puberty to between 18 and 25 years, depending on the jurisdiction, cf Knothe, *Geschäftsfähigkeit* (fn 239) 101 ff.

[915] Within a year and a day (depending on the law), cf H Mitteis, 'Der Rechtsschutz Minderjähriger im Mittelalter' in *idem*, *Die Rechtsidee in der Geschichte; Gesammelte Abhandlungen und Vorträge* (Hermann Böhlaus Nachfolger, Weimar 1957) 621, 630; Knothe, *Geschäftsfähigkeit* (fn 239) 110; O von Gierke, *Deutsches Privatrecht, Erster Band, Allgemeiner Teil und Personenrecht* (Dunker & Humblot, Leipzig 1895) 386; W Kraut, *Die Vormundschaft; nach den Grundsätzen des Deutschen Rechts; Zweiter Band* (Dieterichsche Buchhandlung, Göttingen 1847) 4 f, 10.

rescinded upon majority undermined legal certainty and deterred adults from dealing with minors.[916] The reception of Roman law, as emphasised by *Knothe*, resolved this particular issue by adopting the concepts of the *tutela* and the *cura*. Under post-classical[917] Roman law, persons below the 'age of puberty' (twelve years for boys and fourteen for girls, *impuberes*) who were not anymore subjected to the powers of the head of the family (*patria potestas* of the *paterfamilias*) would have a *tutor*, protecting them and their assets.[918] *Impuberes* were generally only able to enter into transactions which were 'legally solely beneficial' for them;[919] but, if they had a *tutor*, the latter could authorise transactions and thereby validate them.[920] From puberty onwards, a person (not subject to *patria potestas*) was not limited in the ability to enter into and perform transactions. For additional protection, the further age limit of 25 was introduced and taking advantage of so-called *minores* penalised.[921] Additionally, the *praetor* subsequently introduced further measures for protecting *minores*, including the reversion of improvident transactions,[922] unless the transaction was authorised by a *curator*,[923] who also

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[916] Knothe, *Geschäftsfähigkeit* (fn 239) 110 f; the father or guardian could not authorise the contract itself, Kraut, *Vormundschaft* (fn 915) 10.

[917] The incremental developments leading to the presently mentioned concepts of *tutela* and *cura* cannot be explained here in detail; cf M Kaser, R Knütel and S Lohsse, *Römisches Privatrecht* (22nd ed CH Beck, Munich 2021) § 24 [8], § 73 f.

[918] The *paterfamilias* did not function as a *tutor*, Knothe, *Geschäftsfähigkeit* (fn 239) 33, 36.

[919] Knothe, *Geschäftsfähigkeit* (fn 239) 30 f.

[920] Knothe, *Geschäftsfähigkeit* (fn 239) 33 f; an unauthorised contract would only oblige the other party, *ibid* 36, and, although he could not authorise it, the *paterfamilias* too could sue on the contract, *ibid* 43.

[921] By the *lex Laetoria* of around 200 BC, Kaser/Knütel/Lohsse, *Römisches Privatrecht* (fn 917) § 75 [2].

[922] *In integrum restitutio*, Knothe, *Geschäftsfähigkeit* (fn 239) 62 ff.

became responsible for managing the minor's assets generally.[924] Building upon the *tutela* and *cura*, the *ius commune* developed a uniform concept of guardianship which allowed the authorisation of a minor's contract and thereby provided legal certainty for the parties involved.[925] Guardianship under the *ius commune*—in contrast to Roman law—also became a form of direct agency, according to which the *Muntherr* could act in the name and on behalf of a minor.[926] This form of guardianship and agency is at the root of the modern concept of 'parental statutory authority'.[927]

Without an abstract concept such as the 'legal act' as a basis for determining transactional capacity, it seems less likely that a jurisdiction excludes a person's capacity or that parents are attributed powers over their child's transactions as sweepingly as under German law. Instead, what we can see in English law is the tendency to solve legal problems as they arise and thereby

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[923] Not legally technically, but if the *curator* consented with the transaction, additional protection of the minor at the cost of the adult party was unlikely, Knothe, *Geschäftsfähigkeit* (fn 239) 77. At a later stage, *consensus curatoris* developed to be a general requirement for the validity of a minor's legal acts, Knothe, *Geschäftsfähigkeit* (fn 239) 79, 92; Kaser/Knütel/Lohsse, *Römisches Privatrecht* (fn 917) § 24 [8], § 75 [4].

[924] Knothe, *Geschäftsfähigkeit* (fn 239) 73.

[925] Knothe, *Geschäftsfähigkeit* (fn 239) 116, 124; von Gierke, *Deutsches Privatrecht* (fn 915) 387.

[926] Knothe, *Geschäftsfähigkeit* (fn 239) 116 f. In Roman law, apart from the fact that a general notion of agency in the modern understanding was inexistent, minors subject to *patria potestas* generally had no own property, but the *paterfamilias* held the family property (with the exception of special *peculia*); the latter would act in his own name and on his own behalf. The *tutor* or *curator* of a minor *sui iuris* could likewise not act on behalf of the minor but only authorise or consent to his acts. See generally as regards the development of parental care from guardianship which, in turn, was adopted from earlier codifications and the *ius commune*, Repgen in: *HKK BGB Bd IV* (fn 40) §§ 1773–1895 [18, 35, 37, 184].

[927] Mugdan, *Band 1* (fn 42) 381 f; Mugdan, *Die Gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich, Band 4: Familienrecht* (R v Decker's Verlag, Berlin 1899) 405 ff; Repgen in: *HKK BGB Bd IV* (fn 40) §§ 1773–1895 [4, 316]; Koch in: *HKK BGB Bd IV* (fn 40) §§ 1626–1698b [32, 35].

create (case) law to the extent necessary. Furthermore, English law very early adopted the idea that, in general terms, contracts for 'necessaries' should bind minors, lest they be practically excluded from such transactions.[928] More importantly, English law never limited the ability of minors to enter into transactions as widely as German law and thus balancing minors' incapacity by giving parents powers is not an issue, as minors can generally enter into and perform transactions. The problem which Germanic laws posed to legal certainty did not arise. As *Pollock* and *Maitland* put it: 'A comprehensive law of guardianship was the less necessary, because, according to our English ideas, the guardian is not a person whose consent will enable the infant to do acts which he otherwise could not have done.'[929] Only where it was considered important that someone else takes care of a child's affairs, 'steps have been taken to ensure that the property shall not be vested in the infant, but in someone of full age who holds it on trust for him'.[930] Thus, authorisation by parents for the purpose of furthering legal certainty was never required, and it was never necessary that guardians or parents act on behalf of minors (in respect of personal property). The mere fact that adults could not rely on minors' promises without advance performance and thus, for example, should better not extend credit to them seems to have been accepted by English lawyers.[931] For traders in England, the crucial rule was and is not to deal with minors on credit, but an executed transaction does not have to be

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[928] Hargrave/Butler, *Coke upon Littleton Vol II* (fn 73) [172a].

[929] Pollock/Maitland, *History, Vol II* (fn 809) 443, mentioning in a marginal note the absence of a *curator* in English law; in that regard see immediately below.

[930] WW Buckland and AD McNair, *Roman Law and Common Law* (2nd ed rev by FH Lawson, CUP, Cambridge 1952) 53.

[931] See in this regard already the discussion in chapter IV, section 3)d).

reversed merely because the other person turns out to be underage—which was difficult to ascertain in former times and, in a world of online commerce, still can be.[932]

c) Relationship between Parents and their Children's Property

The relationship between parents and their children's property is important for the extent to which parents control their children's transactions. That control can both serve minors' protection or pose a risk to them, as discussed further below. For the purpose of analysing this relationship, two scenarios are distinguished in the present chapter. The first is that a child holds rights itself. For example, a gift can be made to a child. At an older age, teenagers might earn a salary from their first job or even start trading. In the second scenario, a parent holds rights, but these 'belong to' the child. For example, a gift by a relative is made to a child but, due to the child's young age, the gift is handed over to its parents for it to be kept until the child attains majority.

As regards the first scenario, the general rule is that an owner is free to dispose of his property as he wishes. That this statement does not hold true in respect of minors under German law has already been shown in chapter III. In summary of what has been said there, parents have full legal control over the transactions which their child can enter into in respect of its property. The only relevant transaction that minors (if aged seven or older) can bring about without

[932] The statement that transactions with minors were legally certain should be read in light of the fact that this thesis is only concerned with transfers of rights to personal property and not realty; minors cannot hold a legal estate in land since the enactment of s 1(6) of the Law of Property Act 1925 but, historically, there were further complications where a minor would attempt to dispose of rights to land.

any parental control is the acceptance of gifts (including the acquisition of property). Even pocket money provided to a child at its 'free' disposal is always *legally* bound by its parents' (hypothetical) intentions.[933] Of course, parents can also take movables of their child into their possession and thereby exercise *factual* control over them.[934] For example, if a teenager (validly) bought a video game with pocket money and acquired ownership of it, his parents can still take it away for pedagogical reasons. In addition to what could be seen in chapter III, the present chapter has shown that parents can deal with property owned by their children without the latter doing anything. There are certain limitations on this, especially as regards rights to land.[935] But a video game taken away for pedagogical reasons could simply be sold off and transferred by parents on behalf of their child without more if they do not deem the game appropriate. The parents would act in breach of duty and be liable to their child under § 1664 BGB—although realistically this would not be enforced. However, as regards the control over property, the *functional* scope of ownership which German minors have is very narrow.

In contrast to the German position, minors under English law are free to dispose of their personal property, as explained in chapter III. Minors can spend what they 'have in their hands' and even assign intangibles. If minors under English law acquire money as a salary, gift, or by finding it, they can spend it freely. Parental authorisation is not a requirement for minors' transactions to take

[933] If the predominant view is followed, cf chapter III, section 1)d).

[934] See section 1)a)1. of this chapter.

[935] In respect of which dispositions would require authorisation by the Family Court, cf section 2)a)1. of this chapter.

effect. In this light, English parents' control does not *legally* reach into the pockets of their children, and their control over their children's spending is based on what funds they *factually* make available.[936] Minors under English law have control over their property unless that control is *factually* limited by their parents by taking something away from them. Of course, English parents could take away a video game that their child bought but they do not approve of, or they might be in control of their ten-year-old's savings account. However, due to their fiduciary office and not much different from the German position, a situation in which parents would be allowed to sell the game off without incurring personal liability seems rather unlikely. However, it should be noted that not every asset can be taken into possession or otherwise controlled. In cases such as *Chaplin*, where the son of famous actor Charles Chaplin assigned his (future) copyright in a scandalous book about his childhood, the inability of parents to restrict their child's dispositions of rights can, depending on the perspective, be detrimental for a child.[937] That case could not have occurred under German law. But it is coherent with the English policy that minors are free to dispose of their rights but merely protected against the direct or indirect enforcement of their promises.

As regards the second scenario, the position in English law is clear. Parents hold rights 'belonging to' their child on trust for its benefit and, as such,

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[936] See in respect of the underlying policy already chapter III, section 3)b)1.

[937] *Chaplin* (fn 21); see already the explanations of this case in chapter III, section 2)b), especially at fn 332.

stand in a fiduciary relationship to their child and its property.[938] This position could also arise by way of (express) declaration of trust: a grandfather might hand his golden watch to the parents for them to keep it safe for their child until it reaches majority. But even without such an express declaration, the fiduciary position of English parents arises by statute according to section 3 of the Children Act 1989. Under German law, the concept of the trust is alien. But German parents equally stand in a fiduciary relationship to their child and property held by them which (economically) 'belongs to' it. That relationship, contrary to trust law in England, is still not well recognised in the legal literature. But even in England the fiduciary position of parents has only recently attracted more attention.[939] Determining the details of English and German parents' fiduciary position is not possible here, but certain aspects are worth highlighting.

The primary purpose of using the label 'fiduciary' is to denote the fact that in situations which are, from the perspective of the interests of the child, quite similar, similar principles should be applied.[940] Thereby, more coherent and principled development of the relevant law is possible. From a comparative viewpoint, it has also become clear in this chapter that English and German

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[938] The relevant language of trust and confidence was used much more loosely than today until long into the 19th century, Sealy, 'Fiduciary Relationships' (fn 818); Getzler, 'Fiduciary Principles' (fn 821) 471.

[939] S Altman, 'Are Parents Fiduciaries?' (2021) 21-44 USC Legal Studies Research Paper Series 1: parents 'resemble trustees'; L Smith, 'Parenthood Is a Fiduciary Relationship' (2020) 70 U Toronto LJ 395 at fn 111; ES Scott and B Chen, 'Fiduciary Principles in Family Law' in Criddle/Miller/Sitkoff (gen eds), *Fiduciary Law* (fn 821) 227, 229: the parent-child relationship 'shares much in common' with guardianship and trusts. Opposing the view that parents are fiduciaries are Nolan/Davies, 'Torts and Equitable Wrongs' (fn 299) [17.328]; J Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 LQR 302, 304 f mentions the parent-child relationship 'despite the absence of any custody of property', which is not entirely correct, as this thesis shows.

[940] 'If like matters arise let them be decided by like, since the occasion is a good one for proceeding *a similibus ad simila*', Woodbine, *Bracton* (fn 433) 21 (f. 1).

parents' duties in relation to their child's property are quite similar: they must return any property held by them but 'belonging to' their child upon majority, and the same applies to property held by a child but (factually) controlled by its parents. Until then, they must manage it prudently and account for such management. Negligently incurred losses must be compensated for, but parents need not be more diligent than they are in managing their own affairs. A difference appears in respect of profits arising from the management of a child's assets: parents under German law can apply such profits to the benefit of their child and the whole family based on a specific order.[941] In English law, no provisions can be found to this effect. Instead, where parents are trustees of property 'belonging to' their child, they are strictly prevented from taking advantage of their position and should be barred from applying profits from the management of their children's property for their maintenance or even that of the family, and they are barred from taking opportunities which would benefit their child's property.[942] In German law, the view that parents are barred from taking such opportunities has not been expressed so far but could be based on the parents' position as *Treuhänder*.[943] A further example of how trust law is more favourable for minors than the position of German parents as *Treuhänder* is the protection of property 'belonging to' a child but held by its parents from the latters' creditors. Property held on trust by English parents is not available to their

[941] See section 1)a)2. of this chapter, at fn 762.

[942] Following *Keech v Sandford* (fn 828).

[943] Following the so-called 'corporate opportunity doctrine', Löhnig, *Treuhand* (fn 199) 371 ff.

creditors in the event of their bankruptcy.[944] Whether the same applies to rights 'belonging to' a child but held by its parents as *Treuhänder* under German law is doubtful,[945] but they should similarly be protected from the parents' creditors.[946] Another example of the value of shedding more light on fiduciary relationships involving minors and their property is the identification of the role of the state. As seen in this chapter, the state has an important role in protecting minors from improvident transactions. In German legal literature, the state—through courts—has been analysed as a 'supervisory fiduciary' (*Überwachungstreuhänder*) in relation to the family.[947] The state in England takes a similar interest in the protection of minors from improvident transactions, as emphasised further below.[948] Potentially, a similar role could be ascribed to the Crown as *parens patriae*.

Having said that, it should be noted that applying the label of 'fiduciary' cannot itself serve as a basis for introducing new rules into the parent-child relationship. The concept of the 'fiduciary', both in England and Germany, is not

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[944] See ss 283(3)(a) and 306 of the Insolvency Act 1986.

[945] Due to the requirement of a direct transfer of the rights by the beneficiary to the fiduciary (*Unmittelbarkeit*), except where the latter keeps the funds separate, BGH, [1971] NJW 559; this requirement has come under scrutiny, Rieble in: *Staudinger* (fn 784) Vorbemerkungen zu §§ 662 ff [48 f]; Liebich/Mathews, *Treuhand* (fn 792) 35 f.

[946] For example, the relevant rights could be regarded as a 'special estate' (*Sondervermögen*), establishing a conceptually coherent basis for the protection of such property in the event of the parents' bankruptcy; the concept of the *Sondervermögen* is analysed in detail by Löhnig, *Treuhand* (fn 199) 720 ff, 750 ff.

[947] Löhnig, *Treuhand* (fn 199) 247, 250.

[948] See section 3)e) of this chapter.

sufficiently certain and coherent to be prescriptive.[949] However, what the aforementioned similarities show is that the fiduciary position of parents in relation to their children's property has great potential for further legal development, both at a national and a comparative level of legal discussion.[950]

d) Merits of Parental Powers Relating to Minors' Transactions

Both in England and Germany, parents' powers over their children serve the welfare of their children.[951] Parents are trusted to fulfil this function due to their natural ties with their child and their family as a whole. However, there are cases in which parents fail in the exercise of their powers or even abuse them. In this section, the scope of parental powers in English and German law is critically assessed, and a possible solution for mitigating risks arising from these powers is proposed.

1. Evaluation of the Concept of Parental Statutory Authority

Over time, the German concept of parental statutory authority has again and again been subject to strong criticism, of which the judgment by the Federal

[949] And because there is not *one* concept of fiduciary relationships, PD Finn, *Fiduciary Obligations* (The Law Book Co Ltd, Sydney 1977) 1, 'it is meaningless to talk of fiduciary relationships as such'. For current literature in respect of English law see EJ Criddle, PB Miller and RH Sitkoff, 'Introduction' in *idem* (gen eds), *Fiduciary Law* (fn 821) xix; emphasising the uncertainty of the matter especially as regards parents' position is Altman, 'Are Parents Fiduciaries?' (fn 939) 3 f.

[950] The concept of the *Treuhänder* is typically regarded as the concept being closest to that of the trust and has been subject to considerable comparative legal analysis; cf the seminal work by H Kötz, *Trust und Treuhand* (Vandenhoeck & Ruprecht, Göttingen 1963); RH Helmholz and R Zimmermann, 'Views of Trust and *Treuhand*: An Introduction' in RH Helmholz and R Zimmermann (eds), *Itinera Fiduciae* (Dunker & Humblot, Berlin 1998) 27.

[951] N Lowe and G Douglas, *Bromley's Family Law* (12th ed OUP, Oxford 2021) 360 ff; Gernhuber/Coester-Waltjen (fn 733) § 60 [1].

Constitutional Court in 1986 can be regarded as the strongest instance.[952] It declared the concept of parental statutory authority unconstitutional *to the extent* that it allows parents to impose excessive liability on their children. Following that decision, it was even proposed to abrogate the concept entirely.[953] But this view has no support anymore in the current literature.[954] Abrogating the concept entirely would disturb the coherence between minors' incapacity and parents' powers.[955] Also, it would require redrafting considerable parts of the 'General Part' of the BGB, likely causing frictions in the conceptual structure of the BGB or even the whole of private law. Rather, the decision by the Federal Constitutional Court should be read as having implicitly approved of the parental statutory authority—except for parents' ability to impose excessive liability on their child. The introduction of § 1629a BGB was not the ideal response to the judgment of the Federal Constitutional Court but still better than a more radical change in §§ 104 ff BGB.

Müller-Freienfels criticised the ability of parents to impose liability on their children already in 1955, especially where this liability takes effect past the child reaching adulthood. In his comparative legal analysis, the author proposed that parents should only have authority to bind their child contractually with effect

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[952] BVerfG, [1986] NJW 1859; see section 1)a)4. of this chapter.

[953] T Ramm, 'Die gesetzliche Vertretung durch die Eltern: überholt und verfassungswidrig' [1989] NJW 1708 who primarily criticised legal representation by parents for being a remnant of 'Imperial times'.

[954] The predominant view clearly is that, apart from extreme cases, 'parental statutory authority' is both constitutional and appropriate, see only K Schmidt, 'Die gesetzliche Vertretung durch die Eltern: notwendig und verfassungsmäßig' [1989] NJW 1712.

[955] See the analysis in section 3)a). of this chapter.

during minority and that, after majority is reached, only transactions should take effect which are in the interest of the (former) minor.[956] His argument relied on the need to safeguard the autonomy of minors,[957] and a similar reference was indeed later made by the Federal Constitutional Court in 1986.[958] If excessive liability is imposed on a minor, his (financial) freedom as an adult can be limited to such a degree that his autonomy is infringed. Interestingly, as argued by *Repgen*, the reasoning among lawyers during the 19th century under the influence of enlightenment and natural law was the opposite: guardianship by parents or others was regarded as enabling persons who are otherwise unable to determine their legal relationships to express their personality.[959] What these two conflicting views show is that the debate about the contractual capacity of minors and other 'classes' of vulnerable persons is closely related to a legal-philosophical debate about these persons' autonomy.[960] That debate can neither be repeated nor developed here. However, understanding the wide scope of capacity and, in some sense, the autonomy which is afforded to minors under English law can and should inform debates about future legal reform in Germany.

The description of the German concept of 'parental statutory authority' and the limitations on it in this chapter are also a further instance of the tendency

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[956] Müller-Freienfels, *Vertretung* (fn 235) 370 f. Note that this would essentially negate the 'affirming' effect which the introduction of the Roman law concept of the *curatel* intended to introduce for improving legal certainty and availing minors creditworthiness, cf section 3)b) of this chapter.

[957] Müller-Freienfels, *Vertretung* (fn 235) 370.

[958] BVerfG, [1986] NJW 1859.

[959] Repgen in: *HKK BGB Bd IV* (fn 40) §§ 1773–1895 [10 f].

[960] 'Persons' because the debate is similarly concerned with the capacity and autonomy of other 'classes' of vulnerable persons, such as those suffering mental illness.

of German law to attempt to govern every possible case in advance by drafting very abstract provisions. Subsequently, these abstract provisions prove too wide or inappropriate in certain cases, requiring exceptions which, in turn, can require counter-exceptions, resulting in 'doctrinal ping-pong'.[961] At first sight, parents' powers to bring about transactions with effect for their child are as wide as the scope of the concept of the legal act. However, parents are not trusted by the state to effect every possible legal act without further control by courts. Certain types of transactions have to be 'carved out' of the scope of parental powers and require further authorisation by the Family Court.[962] For determining these transactions, again, solely abstract and legal-technical definitions are used which do not take the merits of the individual transaction for that minor into account.[963] The limitation on the imposition of liability on minors under § 1629a BGB is another example. It has been subject to strong criticism in the literature for the conceptual frictions it causes.[964] The provision's apparent practical irrelevance over the course of the last 20 years stands in interesting contrast to the number of books and journal articles concerned with it.[965] A further example is the debate about the limitation on parents' statutory authority under § 181 BGB.[966] This provision aims at preventing any risk of conflict between parents' and their children's interests abstractly. But—unsurprisingly—reality shows that there is not always such a

[961] See already chapter II, section 3)d), and chapter III, section 3)d).

[962] See in respect of §§ 1643, 1821, 1822 BGB section 2)a)1. of this chapter.

[963] D Brüggemann, 'Der sperrige Katalog: §§ 1821, 1822 BGB: Anwendungskriterien – Grenzfälle' [1990] FamRZ 5.

[964] See only Bittner, '§ 1629a BGB' (fn 801) 327.

[965] For an overview see Coester in: *Staudinger* (fn 804) § 1629a [1].

[966] See section 1)a)1. of this chapter.

conflict in all the cases governed by the provision. Thus, exceptions are provided for cases which are not normally regarded as risky. However, these exceptions are, again, drafted abstractly and in technical terms, instead of looking at the merits of the individual transaction, and counter-exceptions are necessary. The amount of work required to find a construction of the provision which is both consistent with the legal system and leads to the desired results is astonishing.[967] The courts did not hesitate to undermine the highly regarded principles of separation and abstraction.[968] Academia criticised the courts accordingly, and the latter, feeling the need for doctrinal coherence, changed their view to constructing a 'teleological reduction', whilst reaching exactly the same results. Against the background of English law, German law can give the impression of oscillating between the unreachable ideal of systematic coherence and the reality of life, which is too manifold to be caught by the legislature.

2. Parents' Role in Minors' Creditworthiness

As stated above, one reason for the introduction of wider parental authority in German law was the improvement of legal certainty about the validity of minors' transactions, thereby protecting third parties and promoting minors' creditworthiness.[969] Reaching this objective might have been considerably compromised by the introduction of § 1629a BGB in 1998. As explained, the provision allows former minors to plead that liability imposed on them during

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[967] See, for example, the monograph by Hübner, *Interessenkonflikt und Vertretungsmacht* (fn 756).

[968] See the explanations at fn 755.

[969] See section 3)b) of this chapter.

minority should only be enforced against their so-called 'old assets', ie, assets which were present upon reaching majority.[970]

On paper, § 1629a BGB seems like a disaster to any person interested in establishing a business relationship with a minor. Take the case of young athletes, musicians or entertainers. Their coaches, producers or managers invest in their career at a time when no royalties are foreseeable yet, expecting profits in years to come. If minors can disregard the contract later, maybe because they are now famous and offered a better deal, adults might be unwilling to invest in minors in advance. The effect of § 1629a BGB is precisely that long-term contracts entered into during minority can be disregarded at any point after attaining majority—even if once authorised by the Family Court. The consequences are not always ideal for minors. Having pleaded § 1629a BGB, they have to surrender assets amassed during minority and can even incur personal liability for mismanaging such 'old assets'. Still, in theory one might expect minors to try pleading § 1629a BGB to escape such contracts, which often involve high royalties for managers or producers.[971] However, only one case can be found in which a young adult pleaded § 1629a BGB to that effect in such a context.[972] A young dancer tried to escape liability for her fees at a dancing academy; it was held that the training served her 'personal needs', an exception to the provision,[973] and the plea was dismissed. However, even considering that pleading § 1629a BGB can be barred,

[970] See section 1)a)4. of this chapter.

[971] As feared by A Fomferek, 'Minderjährige Superstars' (fn 865); Thiel, 'Finanzierung' (fn 804).

[972] LG Hamburg, [2011] BeckRS 83.

[973] As explained in section 1)a)4. of this chapter, the plea of § 1629a BGB cannot be made against liability resulting from a transaction that served the 'personal needs' of the minor.

it is odd that young defendants do not even make that plea.[974] An akin phenomenon could be observed in the United States. Without going into much detail, minors in California and New York could disaffirm contracts to which they were party, which was regarded as problematic in the entertainment industry.[975] For the purpose of improving both legal certainty and minors' protection, courts were given the power to make minors' contracts in the entertainment industry binding upon application. Interestingly, neither parents nor employers were keen to utilise this measure.[976] Potentially, the *legal* aspects are not as decisive here as one might wish. Escaping liability if being sued simply ruins one's relations with the parties involved, risking or even ending a career. Under German law, § 1629a BGB might be sharing a similar fate, and it remains to be seen how the provision is applied in the future, especially in respect of the width of its exception of contracts serving a minor's 'personal needs'.[977]

Under English law, parental or court authorisation is not available to improve minors' creditworthiness. This has not prevented minors from trading.[978] But English judges realised the detrimental side of barring the enforcement of minors' promises and established certain 'exceptions' pursuant to which minors

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[974] For example, in BAG, *Arbeitsrechtliche Praxis BGB*, § 611 Berufssport Nr. 23 (2013), a young football player demands restitution of a penalty of EUR40,000 which he paid, but he could have pleaded § 1629a BGB before paying in the first place.

[975] B Davis, 'A Matter of Trust for Rising Stars: Protecting Minors' Earnings in California and New York' (2006) 27 J Juv L 69, 70, 76.

[976] And the legislator eventually decided to make seeking court approval mandatory, Davis, 'Rising Stars' (fn 975) 72.

[977] Given the number of cases, its greatest relevance seems to have emerged by its analogous application against claims for restitution of wrongfully received social welfare payments; see only LSG Hamburg, [2021] BeckRS 10463; BSG, [2019] NJW 1701; BSG, [2013] NJOZ 127.

[978] See, for example, *Cowern v Nield* (fn 129).

can incur contractual liability where the transaction is, in general terms, for their benefit.[979] That minors can be bound is especially relevant where the identity of the individual minor matters, such as in the case of a young athlete or musician.[980] This solution has the disadvantage that determining what is 'beneficial' for an individual minor might be straightforward in many everyday cases, but it can be very difficult and uncertain, especially where larger sums are at stake. The solution adopted by German law of having important transactions being authorised by parents and the Family Court—but for the (theoretical) impediment by § 1629a BGB—leads to a greater degree of legal certainty and thereby creditworthiness of minors. On the other hand, such court authorisation also comes at the cost of time and administrative effort, including uncertainty in the meantime. Conducting an individualised assessment of minors' transactions has not overstrained English judges' capacities. Quite the contrary, sensible solutions can be reached even in rare cases.[981]

A further means for minors to gain creditworthiness is the provision of security by parents for their child's obligations. § 1629a (3) BGB clarifies that the enforcement of securities given for minors' obligations is not limited by the provision. Such security typically takes the form of a personal guarantee. Historically, under English law, providing security for transactions of minors was difficult. The wording in the relevant documents could be interpreted by judges as

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[979] Hargrave/Butler, *Coke upon Littleton Vol II* (fn 73) [172a].

[980] See cases such as *Doyle v Whyte City Stadium* (fn 140); *Roberts v Gray* (fn 140); *Denmark Productions* (1967, fn 166) (overruled on a ground not related to minority in *Denmark Productions* (1969, fn 166)); *Proform* (fn 81).

[981] See especially the cases of young boxers or billiards players mentioned in chapter II, section 2)b)3.

either an indemnity or a guarantee. A guarantee was accessory to the (unenforceable) principle liability of the minor and therefore worthless.[982] By contrast, the enforceability of an indemnity was not linked to the enforceability of the minor's contract.[983] Without going into more detail on the point, section 2 of the Minors' Contracts Act 1987 clarified the law and rendered guarantees given in respect of minors' obligations enforceable, subject to other grounds of invalidity. Thus, under English law parents can improve their children's creditworthiness by providing security just like German parents.

3. Mitigating the Risk of Parental Authority

The duties that English and German parents have to observe in managing their children's property are quite similar.[984] But, as similar as these duties are, it is striking that only in Germany a vast number of cases is reported in which a child sues one or both parents for the misappropriation of property.[985] By contrast, there is not a single case reported in this context in England.

The relevant German cases concern minors in manifold circumstances. The misappropriation of property is not a problem troubling only those endowed with fortunes. In several cases, a child received damages and payments by

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[982] See *Yeoman Credit Ltd v Latter* [1961] 1 WLR 828; more precisely, the contract was held 'void' (and thus the guarantee too), but that followed a misconception of the Infants' Relief Act 1874, cf the criticism by Furmston, 'Infants' Contracts' (fn 101) 645 and, generally, the explanations in chapter II, section 2)a)3.; see also *Coutts & Company v Browne-Lecky* [1947] KB 104, holding the guarantee for a minor's overdraft account void.

[983] *Coutts & Company v Browne-Lecky* (fn 982) 110.

[984] See in respect of these duties section 1)a)1. and section 1)b)1. of this chapter.

[985] See the cases listed in fn 768–771.

insurance companies for an accident or failed surgery amounting to sums of EUR3,500, EUR360,000 and nearly EUR1,000,000.[986] The money was paid to one or both parents in cash for the benefit of the child, but the parents squandered the money nearly entirely for a new house or flat, holidays, clothing, restaurant visits, etc. They were unfit for safeguarding the funds which were suddenly available to them, whether due to their own financial situation or their inability to understand the difference between their child's and their own funds. Apart from these striking examples, there are also those cases in which parents plainly withdraw money from their child's savings account, in some of which the child did not even intend to demand the funds back.[987] These cases show that the duties imposed on parents need not necessarily deter them from breaching them. In that light, calling for stricter limitations on parents' powers does not seem helpful. The reality is that parents always have great *factual* control in the privacy of family life—and, on principle, this is nothing which ought to be changed. However, the question is whether stronger measures against such abuses of power are justified in some situations and, if yes, how such measures can be designed. At least where larger sums are concerned, additional measures can be justified or even mandatory, as can be argued on the basis of cases concerning children with disabilities due to accidents or failed surgery. As explained before, the Federal Constitutional Court in Germany in 1986 held that the scope of 'parental statutory authority' is unconstitutional due to a violation of children's autonomy *to the extent that* it allows parents to impose liability on their child in an amount which

[986] LG Berlin, [2001] BeckRS 16991; OLG Saarbrücken, [2012] FamRZ 235; OLG Karlsruhe, [2014] BeckRS 04194.

[987] As in respect of additional EUR50,000, which the child did not even claim, as explained in BGH, [1998] FamRZ 978.

prevents their child from leading an independent life as an adult.[988] Damages awarded to children due to an injury or even disability caused by an accident or failed surgery are calculated on the basis of the additional cost which will accrue due to the harm. Functionally, future costs which will definitely accrue are not different from current liability, and that liability is only compensated by the damages awarded to the child. In such cases, a child will never gain the sums which are necessary for it to lead a (financially) independent life as an adult. In this light, the misappropriation of the funds by parents can be unconstitutional if sums are concerned that are intended to compensate for injuries and disabilities, such as in the two cases mentioned above where a parent squandered EUR360,000 and nearly EUR1000,000, respectively.

Following these explanations, two questions arise. First, what are the reasons for the absence of similar case law in England? Second, how can further measures of protection be designed? It seems unlikely that English minors never have larger funds or that their parents always behave perfectly well in managing them. Apparently, holding parents liable for their misconduct is not sufficient to prevent cases of gross misconduct, as Germany shows. One reason for this issue could be the emotional and physical dependency of children on their parents—which in itself is not concerning and is the case both in England and Germany. The German cases exemplify another problem. Children primarily have a claim for compensation against their parents subsequent to the misappropriation of property. If the parents are not sufficiently solvent later on—as in the cases concerning the sums of EUR360,000 and nearly EUR1000,000 mentioned

[988] See the explanations in section 1)a)4. of this chapter.

above—the claim is worth little.[989] The crucial aspect of protecting children from improvident transactions entered into by their parents is *preventing* abuses of power where large funds are at stake. This insight is, at least to some extent, an answer to both questions posed above. In England, misappropriations of payments following litigation are prevented by not making the funds available to parents in the first place. According to rule 21.11(1) of the Civil Procedure Rules 1998,

> where in any proceedings money is recovered by or on behalf of or for the benefit of a child (…); or money paid into court is accepted by or on behalf of a child (…), the money shall be dealt with in accordance with directions given by the court under this rule and not otherwise

and, according to subsection 2 of the rule,

> directions (…) may provide that the money shall be wholly or partly paid into court and invested or otherwise dealt with.

Money paid into court can be ordered to be invested in a specific way, for example, in bonds, or it can be (partially) paid out for the benefit of the child, for example, for its education.[990] The child is entitled to receive the funds upon reaching majority.

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[989] In English law, at least where parents hold their child's property on trust, the latter can have a claim against third parties, too, and 'trace' its title to misappropriated trust property; tracing has briefly been mentioned in chapter IV, section 2)a)2. In German law, the disposition of property by parents is usually valid unless lacking the required authorisation by the Family Court or being void for illegality under §§ 134, 138 BGB, especially in case of gifts violating § 1641 BGB; in such a case, additional proprietary claims are available to minors.

[990] See paras 8 and 9 of the Practice Direction to CPR Pt 21 – Children and Protected Parties.

Now, while this is certainly a very useful scheme to protect minors from transactions which parents effectively enter into with funds 'belonging to' their child, it only explains part of the story. Minors can earn considerable salaries as young athletes, musicians, or even entrepreneurs, and that a trust fund is set up for the income is not always ensured. A reason for the misappropriation of minors' property by parents seems to be that many parents are not aware of the legal separation of their and their children's property and the duties entailed by it. Not knowing the law does not bar liability, but its enforcement is unlikely where the law is unknown to all parties involved. This is particularly problematic in England, as the complex discussion of parental responsibility in relation to children's property has shown.[991] Even where there is a dispute about the management of a child's property in England, it is less likely that proceedings are brought in respect of it because the rights and duties of parents in relation to their children's assets are largely unknown even among academics and judges. It is unlikely that solicitors, barristers or any other person responsible in this regard would direct a claimant to the possibility of a parent having breached his fiduciary duties and being subject to a claim for an account. Further ways of protecting minors from misappropriations of their assets by parents should be considered.

Ironically, both English and German courts already have an array of instruments at hand for the protection of minors' property, which are further discussed below.[992] But a common issue in both jurisdictions is that intervening with parents' rights is only regarded as appropriate where parents have *already*

[991] See section 1)b) of this chapter.

[992] See section 3)e) of this chapter.

shown severe failure to comply with their duties.[993] Breaches of duty in cases involving larger sums of money are not *prevented*, unless parents have already shown to be incapable of managing them. Even more important in practice is that, for a court to take action, it must first take notice of misconduct. There are no measures in place by which parents' management of their children's property or even their upbringing are generally supervised—and general supervision to that effect by the state is undesirable. In any case, it would, again, only allow taking action once a breach of duty has occurred or is imminent.

A different approach has been taken in the United States. As already mentioned, in California and New York, safeguarding the earnings of young prodigies in the entertainment industry has been an issue. An additional problem faced there is that some parents have proven to be a risk to the vast funds earned by their children. This problem has been addressed by legislation already in the first half of the 20th century.[994] In response to a major scandal,[995] a share of the gross income from a child performer's earnings under a contract must be settled in a separate trust account for the benefit of the child.[996] If parents fail to establish an

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[993] See in respect of German law Gernhuber/Coester-Waltjen (fn 733) § 62 [4]; under English law, there is only case law related to the person of the child for supporting this proposition, cf *Thomasset v Thomasset* (fn 111); *Agar-Ellis* (fn 111); *In the Matter of Mary Ellen Andrews* (fn 881) 158; also, making a 'section 8 order' requires an application to a court, unless 'family proceedings' are already ongoing, cf section 2)b)1. of this chapter, fn 884.

[994] Davis, 'Rising Stars' (fn 975).

[995] Involving then child-actor Jackie Coogan, hence the term 'Coogan Trust Account', cf s 6753(a) of the California Family Code.

[996] 15% of the gross earnings under s 6752(b)(1) of the California Family Code; s 7-7.1 of the NY Estates, Powers & Trusts Act; see also s 35.03(3.) of the NY Arts and Cultural Affairs Law. Settlement of earnings on trust was only made mandatory in California in 2000, after a flexible approach had proven to be circumvented easily both by employers and parents, Davis, 'Rising Stars' (fn 975) 72 f; S Din, 'Chapter 667: Instituting Proper Trust Funds and Safeguarding the Earnings of Child Performers from Dissipation by Parents, Guardians and Trustees' (2004) 35

account, the employer must forward the share of the earnings to a trust managed by a public body for the benefit of the minor.[997] The funds held on trust have to be invested safely by the responsible financial institution.[998]

A schedule similar to that in the US could be advantageous to minors in England and Germany, although a detailed proposal cannot be made in this thesis. The number of underage athletes or musicians earning large sums should not be underestimated, even though neither country has an industry comparable to Hollywood. In such cases, parents often have advisors, and considerable funds do not come as a surprise—although the scandals in the US show that this does not prevent parents from misappropriating their children's money. As regards Germany, the schedule would be even more important in the context of damages for an accident or failed surgery being paid to a parent. Such payments are made without prior preparation or the involvement of advisors.

English law, as the cradle of the trust, is already acquainted with such schedules. The relevant court order could be made under section 8 of the Children Act 1989.[999] As an alternative to establishing a trust account with a bank, a relative could take a role similar to the historical guardian of the estate. Payments to parents could be made in accordance with sections 31 and 32 of the Trustee

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McGeorge L Rev 473; S McAleavey, 'Spendthrift Trust: An Alternative to the NBA Age Rule' (2010) 84 St John's Law Rev 279, 294 ff proposes the implementation of a similar concept in basketball.

[997] See s 6752(b)(9)(A) of the California Family Code; s 7-7.1(2.) of the NY Estates, Powers & Trusts Act.

[998] See s 6753(3) of the California Family Code.

[999] See in respect of such orders section 2)b)1. of this chapter.

Act 1925 in the amount available and necessary to serve the minor's needs.[1000] For example, in the case of a young athlete, this might be the salary for a coach or travelling expenses. The discretion of trustees in providing funds to parents or their children also means that neither parents nor their children have an enforceable right to the funds. Thus, their creditors cannot enforce a claim against these funds in the event of their insolvency.[1001] In addition, the High Court can make an order under section 53 of the Trustee Act 1925 in respect of any trust under which a minor is a beneficiary for trust property to be applied for his maintenance. Furthermore, the Court can order the sale of property under section 57 of that Act. These measures are especially useful for small trusts whose income is insufficient to support a minor in a meaningful way.[1002] The diversion of income or large single payments would revive a crucial aspect of the concept of the guardian of the estate. Although the Law Commission had good reasons for recommending its abrogation by the Children Act 1989,[1003] the concept had the advantage of allowing the separation of the custody of the child and the management of financial matters, avoiding conflicts of interests within the family.[1004] Shifting the management of property to professionals is also likely to result in better returns compared to the management by the average parent, and it

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[1000] See section 1)b)3. of this chapter, at fn 841.

[1001] Comparable to the concept of the so-called 'protective trust', cf s 33 of the Trustee Act 1925; *Lewin on Trusts* (fn 342) [6-181].

[1002] *Ex parte Green* (1820) 1 Jac&W 253, 37 ER 372; *Ex parte Chambers* (1829) 1 Russ&M 577, 39 ER 221; *Ex parte Swift* (1828) 1 Russ&M 575, 39 ER 221.

[1003] *Family Law Review: Guardianship* (1985, fn 814) [3.76].

[1004] The idea that property inherited by or gifted to minors should not be managed by those who have a right to inherit the child's property is very old, cf Bateson, *Borough Customs Vol II* (fn 2) cxxxv, 145 ff.

ensures that profitable funds are not withdrawn for trifling reasons such as a family holiday.[1005]

Under German law, the closest to a trust for the benefit of the child would be a fiduciary *Treuhand*-account for the benefit and in the name of the child. It could institutionalise the management of property transferred to children, for example, as income from very profitable professional engagements or from compensation received after an accident. Although the range of possible court orders is broad, an order to direct funds to a third person or public body would be without precedent and require the legislature to take action. As in the US, it seems preferable to allow parents to set up a specifically designated account with a bank of their choice, with the bank being informed about restrictions on the withdrawal of funds and instructed to invest them in an economically sensible way. In Germany, the introduction of the schedule would be even more advantageous than in England because the risk of the funds being available to creditors of the child would be mitigated. In contrast to England, German parents can impose considerable liability on their child, as infamously shown in the case decided by the Federal Constitutional Court in 1986, which eventually led to the enactment of § 1629a BGB.[1006] However, that provision merely limits the enforcement of liability imposed on the child during minority to the assets which the child had upon reaching majority. Thus, the child's assets can still be reduced to zero,

[1005] A (failed) attempt in this direction was the Child Trust Fund under the homonymous Act of 2004; the scheme was terminated in 2010 for fiscal reasons following the financial crisis; cf the critical remarks by Cooke, 'Parental Responsibilities' (fn 808) 211 f; see further N Wikeley, 'Child trust funds - asset based welfare or a recipe for increased inequality?' (2004) 11 JSSL 189. A new replacement scheme is the Junior Individual Savings Account (ISA), cf <https://www.gov.uk/junior-individual-savings-accounts> accessed 27 July 2022.

[1006] See section 1)a)4. of this chapter.

whereas the possibility of incurring further liability by mismanaging the 'old assets' or committing a delict is not excluded.[1007]

In summary, the problem of parents entering into improvident transactions on behalf of their child or performing them with property 'belonging to' their child can be very severe and, at least as regards German law, amount to a violation of the constitution. To mitigate the risk of parents' abuse of their powers effectively, certain breaches of duties must be prevented in the first place. A suitable schedule for this purpose would be the introduction of a separately held and managed account with all or part of the relevant funds of the child, with suitable payments being made to parents over time as needed.

e) Merits of Measures Taken by Courts

Both in England and Germany, parents are not always trusted to exercise their powers over their child's transactions freely. The state takes control by giving courts certain powers. Generally, three types of measures can be identified. First, courts can merely monitor parents' exercise of their powers, not (yet) giving any directions. Second, court authorisation can be required for a specific transaction to take effect, and courts have discretion in granting it. Third, courts can direct how parents should exercise their powers, including, as a measure of last resort, the partial or even complete exclusion of parents from their powers in relation to their child's transactions. This subsection compares the design of these measures in

[1007] See, again, section 1)a)4. of this chapter; in respect of German minors' limited liability in delict see chapter II, section 1)c).

England and Germany and analyses their merits for the protection of minors from improvident transactions.

1. Monitoring

One instance of the Family Court monitoring parents' conduct can expressly be found in German law: parents are required to register an inheritance of their child exceeding EUR15,000 in value or if the testator gave directions to this effect.[1008] The Family Court can also order an inventory of a child's assets to be filed with the Court if the wealth of the child appears to be at risk. The German Family Court is not confined to these measures and can make orders as it sees fit for the protection of a child's assets, provided these measures are required for protecting them and appropriate on the whole.[1009]

English law does not have specific provisions in this respect. However, the so-called 'section 8 order' under the Children Act 1989 can function as a general clause that, at least in theory, allows making any kind of order that the Family Court considers apt, provided it serves the child's welfare according to section 1 of the Act.[1010] However, for the Court to take action, the order has to be made in ongoing family proceedings or applied for by a person with parental responsibility.[1011] It should be noted that, in contrast to the equivalent general clause under German law, there are no cases reported in England that are

[1008] See § 1640 BGB and the explanations in section 1)a)2. of this chapter.

[1009] See § 1666 BGB.

[1010] See ss 8, 10(1)(b) of the Children Act 1989.

[1011] This is slightly generalised, cf s 10(4) of the Children Act 1989.

concerned with 'section 8 orders' in relation to the protection of children's property—which could also merely mean that there is no litigation in respect of their validity.[1012] Under German law, the Family Court does not have to await family proceedings or an express application by a responsible person but, instead, must act upon becoming aware of a threat to the child's welfare, including the protection of its assets.[1013] Which of these two 'trigger points' for initial court orders to monitor the management of children's property by parents proves more suitable for protecting minors could only be assessed on the basis of empirical research.

2. Authorising

German law requires certain types of transactions which are entered by parents on behalf of their child to be authorised by the Family Court. These types are defined abstractly and without regard to the merits of the individual transaction. Until being authorised, the transaction is (provisionally) void.[1014] What is significant about this measure of protection, in contrast to those measures actively imposed by a court, is that it is permanently in place, ie, without any threat to a child's welfare having materialised in the individual case. This has the advantage of *preventing* abuses of power even before a child's property is at risk. However, it has a limited scope of application and causes additional effort for parents to effect

[1012] But there are three cases in which parents have been given permission to effect certain transactions with regard to their child's property, as noted in fn 1027 below and in section 2)b)1. of this chapter.

[1013] Gernhuber/Coester-Waltjen (fn 733) § 62 [5, 25].

[1014] See section 2)a)1. of this chapter.

transactions, even in cases where a transaction is economically very beneficial for their child, such as gifting a rental flat for the avoidance of inheritance tax.[1015] In other cases, such as long-term contracts involving recurring obligations,[1016] difficulties can arise for minors who intend to begin a career as a young professional, such as musicians or athletes.[1017]

To English law, such permanent requirements to seek court approval are alien. In respect of liability being imposed on a child by its parents, court approval is simply not required because English parents cannot impose liability on their child at all. They also cannot dispose of rights held by their children, although they can factually take their child's movables into possession. Despite acting tortiously, they could proceed to disposing of them, although they cannot dispose of their child's (best) title. While this is something that should be prevented, the requirement of seeking court approval would not be effective for that purpose. Transfers of property *to* a child do not require court approval either, whereas that does not seem problematic. Under German law, transactions restricted in this regard are primarily transfers of (rights to) land, especially in the form of rental flats. Minors under English law cannot hold a legal estate in land and thus the issue cannot arise.[1018] Parents (or any other person) could only settle rights to land—or, in fact, any other right—on trust for the benefit of the minor, and there is no reason why that should require court approval. Transfers of personal

[1015] Jauernig, 'Eigentumswohnung' (fn 757).

[1016] See §§ 1643, 1822 no 5 BGB; 'long-term' here means that the contract is in place longer than the child's nineteenth birthday, see section 2)a)1. of this chapter.

[1017] See section 2)a)1. of this chapter, especially at fn 866.

[1018] According to s 1(6) of the Law of Property Act 1925.

property to a minor do not entail sufficient risk for requiring their assessment by a court, which would also be impossible in practice.

There is one way in which the authorisation of transactions by English courts could be beneficial for minors. Provided the authorisation would make the transaction binding, it could render minors more creditworthy in specific situations. This issue has already been touched upon in a previous section in relation to the role of parents.[1019] Interestingly, we have seen that English courts are already prepared to authorise transactions affecting minors' property where foreign (civil) law requires court authorisation.[1020] The reasoning of the judges in each of the three reported cases included an assessment of whether the transaction promotes the child's welfare in accordance with section 1(1) of the Children Act 1989. English courts are also acquainted with an individualistic assessment of whether a contract is 'on the whole beneficial' for minors.[1021] Due to this individualistic rather than abstract and legal-technical approach, problems arising in German law in this context could be avoided.[1022]

3. Intervening

Courts can directly intervene in the way in which parents enter into transactions in respect of their children or their property. Such intervention can take the form of

[1019] See section 3)0d)2. of this chapter.

[1020] See section 1)b)1. of this chapter.

[1021] See chapter II, sections 2)b)2. and 3.

[1022] See section 2)a)1. of this chapter.

an order to do something, an injunction to refrain from doing something, or the exclusion of one or both parents from their parental powers, in full or in part.

Both in England and Germany, general clauses are in place for the purpose of court intervention in the context of a child's property. They have in common that flexible orders can be made with the central objective of safeguarding a child's welfare. In English law, the 'section 8 order' under the Children Act 1989 can be regarded as such a general clause. In German law, orders to this effect can be made under § 1666 BGB. Again, an order by the German Family Court does not require a specific application or even ongoing family proceedings; in England, an order can be made by the Family Court or the High Court in the course of family proceedings or upon application of a person with parental responsibility, limiting the flexibility of courts to some extent when intending to prevent a threat to a minor's property.

For courts to intervene in the management of minors' assets, German law expressly mentions certain orders, for example, as to how funds should be invested, that they can only be withdrawn with court approval, or that a parent must provide security for them.[1023] The exclusion of parental powers in relation to a child's property must always be the last resort.[1024] The German Family Court can do so in part or in full. The central requirement is that there is an immediate threat to the child's assets and that the threat cannot be mitigated by less intrusive

[1023] See § 1667 BGB.

[1024] Gernhuber/Coester-Waltjen (fn 733) § 62 [7 f].

measures.[1025] Where both parents are excluded fully or in part from their parental care of the child's assets, a special officer (*Pfleger*) must be called upon to fulfil this role.[1026] Whether English law would allow similar measures under section 8 of the Children Act 1989 cannot be said with certainty due to the lack of relevant case law, but it seems likely that it does.[1027]

The most striking instance of court interference, from a comparative legal perspective, is the old wardship jurisdiction of the Court of Chancery, now referred to as the High Court's 'inherent jurisdiction with respect to children'.[1028] A similar concept does not exist in German law. In the past, it served not only as an interesting legal topic but produced fascinating and entertaining cases.[1029] The High Court's inherent jurisdiction could usefully be applied to protect minors in more complex cases, especially such involving valuable property. The wardship jurisdiction is, amid its vast effect of making any relevant step in the life of the ward subject to court approval, a measure of last resort for safeguarding children against parents who seriously breach their fiduciary duties owed to their child. From a different perspective, the wardship jurisdiction can also provide certainty where parents do not feel prepared to manage their child's property, considering

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[1025] Gernhuber/Coester-Waltjen (fn 733) § 62 [9].

[1026] See § 1909 BGB and the explanations in section 1)a)1. of this chapter, fn 747.

[1027] The flexibility of the provision was emphasised by the judges in the three relevant cases which are concerned with the provision with regard to a minor's property, see *Hays v Hays* (fn 17); *In re AC* (fn 17) [21]; *Bibi Marium Shanavazi* (fn 17).

[1028] See the explanations in section 2)b)2. of this chapter.

[1029] See, for example, *Hill v Turner* (1737) 1 Atk 516, 26 ER 326; a response to cases such as *Hill* was the enactment of the Clandestine Marriages Act 1753, cf R Probert, *Marriage Law and Practice in the Long Eighteenth Century; A Reassessment* (CUP, Cambridge 2009) 206 f.

their strict liability as fiduciaries. In such a case, they could apply for their child to be made a ward of court.

There is no modern case in which a child was made a ward of court for the purpose of protecting its property from mismanagement by guardians or parents. Ironically, the wardship jurisdiction was developed precisely for safeguarding the interests of wealthy orphans, and this remained its primary purpose until the beginning of the 20th century.[1030] Its exercise changed considerably with the development of a more egalitarian society and, more importantly, a change in the perception of the function of the wardship jurisdiction.[1031] Additionally, in response to very high numbers of wardship applications, the High Court ruled that it exercises its inherent jurisdiction only if measures under the Children Act 1989 are insufficient to protect a minor.[1032] Still, nothing prevents the Court from re-establishing wardship as a 'backup option' where the regular means at the hands of the Family Court are insufficient. However, it seems not very likely that the wardship jurisdiction would be used again in the context of protecting minors from improvident transactions. With the 'section 8 order', courts, including the

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[1030] See Cretney, *Family Law* (fn 896) 584 f; 'Latey Report' (1966, fn 26) [200], also referring to the 'pretty young ward in Chancery' of the Lord Chancellor's song in *Iolanthe*, an opera by A Sullivan and WS Gilbert; the song referred to is called 'The Law is the true embodiment' and mocks the Chancery's diligent efforts to protect the young aristocracy; increasing the Crown's revenue was the primary intention of Henry VIII when establishing the Court of Wards and Liveries in 1541, upon whose dissolution with the Tenures Abolition Act 1660 the Court of Chancery fulfilled its role (or, potentially, took it back), cf Seymour, 'Wardship' (fn 814) 169 ff.

[1031] A rather singular example for the change in 'function' is *Re Dunhill* (1967) 111 SJ 113; see also the 'Latey Report' (1966, fn 26) [192 ff] and Cretney, *Family Law* (fn 896) 583 ff.

[1032] *A v B* [2021] EWHC 1716 (Fam) [9–11]. Generally, any matters linked to family law should primarily be dealt with by the Family Court, cf A MacFarlane, *President's Guidance; Jurisdiction of the Family Court: Allocation of Cases within the Family Court to High Court Judge Level and Transfer of Cases from the Family Court to the High Court* (24 May 2021) <https://www.judiciary.uk/wp-content/uploads/2021/05/PFD-Guidance-Jurisdiction-of-the-Family-Court-May-2021.pdf > accessed 27 July 2022.

High Court, have a very flexible instrument at hand whose impact on parents' relationship with the child is less intrusive. Similar considerations apply in Germany, where the general clause under § 1666 BGB provides sufficient flexibility. More importantly, the present explanations show how the warship jurisdiction is a particular product of the Court of Chancery's equitable jurisdiction, which is, in this general form, unfamiliar to German courts. Additionally, both in England and Germany, more intrusive measures are more difficult to justify. The protection of minors' property is, although it can have a considerable impact on children's lives, usually not as critical as the protection of the person of a child, in respect of which the inherent jurisdiction of the High Court is still applied in practice.[1033]

[1033] See the striking example of *Re M (Medical Treatment: Consent)* [1999] 2 FLR 1097.

VI.

Conclusion

This thesis does not make or even defend one particular proposition. Instead, several insights are offered about transactions of minors in the context of contract law, transfers of rights, restitution of unjust(ified) enrichment, and the role of parents or the state. Still, this thesis offers one core insight: the identification of the policies underlying the 'protection of minors' from improvident transactions in English and German law and how these policies are reflected in different areas of law. This insight is primarily a product of comparative legal analysis. There is little national legal literature on either side of the Channel which identifies these policies as clearly as the comparative analysis in this thesis. Many legal writings or cases make reference to the 'protection of minors' in each jurisdiction without further identifying what that really means. That this is not only a theoretical exercise is shown by the manifold legal issues which can be decided or better understood on the basis of a precise idea of the policy which each jurisdiction follows in contrast to the other. The following section briefly revisits and summarises the relevant policies in English and German law. The subsequent sections highlight additional comparative legal aspects which were pointed out throughout this thesis.

1) Policies Underlying Minority

Trying to protect minors from improvident transactions must focus on avoiding the harmful consequences of a minor's decision on his wealth and on preventing adults from taking advantage of the inexperience of minors whilst still enabling minors to participate in transactions and, thereby, social life generally. A blunt exclusion of minors from participating in transactions would eventually be to their detriment as they could not gain the experience necessary for leading a successful life as an adult. The approaches taken by English and German law in reaching a balance of these aspects are very different, and the differences are primarily caused by the differing understandings of what it means 'to protect minors' in a transactional context.

In simple terms, English law follows the policy that minors' promises are not enforceable as against them, whether directly or indirectly. Apart from that, minors can enter into valid contracts and perform them. Transfers of rights by or to minors are generally valid. The gist of the English approach is that minors can spend 'what they have in their hands' and even transfer intangible rights, but they can only exceptionally incur liability for 'necessaries' or where it is 'on the whole for their benefit'.

In German law, protecting minors from improvident transactions means shifting the control over any voluntary changes to minors' legal relationships (*Rechtsverhältnisse*) with their parents. Even where parents provide their child with 'pocket money' at its 'free disposal' under § 110 BGB, the validity of any

transaction performed with such funds ultimately depends on its parents' intentions.

a) Liability of Minors

German law does not allow minors of any age to incur liability voluntarily without any participation of their parents, whereas parents can authorise their child to incur liability without quantitative limitation. Conceptually, the most striking aspect of German private law is the basis of this sweeping rule. The concept of 'legal acts' (*Rechtsgeschäfte*) functions as a 'hinge' between persons' 'contractual capacity', ie, their ability to effect legal acts, and their ability to effect voluntary changes to their legal relationships with others. By drawing on the validity of legal acts, the law determines the validity of transactions abstractly. At the outset, any possible transaction is affected and subject to the requirement of parental authorisation. The 'exceptions' of pocket money under § 110 BGB or of 'legally solely beneficial' declarations of intention (*Willenserklärungen*) under § 107 BGB do not allow minors to incur liability independently. Parents can give their children greater discretion with 'partial capacity' for contracts of service under § 113 BGB or for conducting a business independently under § 112 BGB—whereas the latter hardly has any relevance in practice, and each provision ultimately depends on parents' will or even on additional authorisation by the Family Court.

English law, too, establishes a sweeping rule governing minors' contracts when barring the enforcement of their promises outright. The English approach goes even further in that it does not allow parents to authorise their children's

contracts. Although this can exclude minors from useful transactions, it is also straightforward for minors and adults dealing with them. English law also exceptionally allows minors to incur liability by entering into contracts. Contracts for necessary goods or services bind minors to pay a 'reasonable price' upon supply of the goods or services, and a service contract 'on the whole for the benefit' of minors can bind them like adults. Parents have no control in this regard, although they can, of course, have factual influence over their child and might be a factor which should be taken into account when assessing whether a transaction is 'beneficial'. Still, their views and interests can be entirely opposite to those of their children's, and the views of their children prevail in determining whether a transaction should take effect, as prominently seen in *Chaplin v Leslie Frewin (Publishers) Ltd*.

Liability is not always incurred entirely voluntarily, even in a transactional context. It is worth understanding the ability of minors to be liable for committing a wrong in that regard. English law extends its approach of barring the enforcement of promises to this area of law by also barring any claim for damages in tort that would indirectly enforce a promise of the minor, and the same approach is taken in respect of claims for restitution of unjust enrichment. The 'defence of minority' in these three legal areas has a common origin in the action of assumpsit. In German law, the policy of shifting the control over minors' liability in a transactional context to their parents is not extended to delict. But the common denominator of 'delictual capacity' (*Deliktsfähigkeit*) and 'contractual capacity' (*Geschäftsfähigkeit*) in persons' ability to act with legal effect at all (*Handlungsfähigkeit*) entails one similarity. Minors below the age of seven cannot effect legal acts even with the authorisation by their parents because their

intentions are not recognised by the law as sufficiently valid. Minors below the age of seven also cannot incur delictual liability because their understanding of their responsibility is regarded as absent. Minors above that age can incur delictual liability, even in the context of transactions, based on their individual understanding of their responsibility for a wrong. In English law, such an additional age limit is unknown. But it should be noted that in the case of fault-based liability, for example, negligence, the tortfeasor's individual abilities matter, and the results between English and German law need not be that different where English minors' liability is not barred outright.

With no additional age limit, English law applies the same set of rules to, for example, a three-year-old and a seventeen-year-old. This could be regarded as problematic in that the balance between protection and autonomy that the law governing minors' transactions should strike is certainly different for both ages. This 'problem' is, from the perspective of English law, mitigated in that, first, the approach is precisely to bar the enforcement of minors' promises outright, without further inquiry; second, the exceptions to this rule take into account the individual circumstances of minors, which of course, include their age. Only in rare cases has this approach proven problematic, such as *Mills v IRC*, and in this regard very young minors in England could benefit from additional protection. The approach suggested by Lord Denning MR and supported in this thesis does explicitly *not* follow the German approach of setting up a strict age limit. It establishes a flexible rule which results in something that German lawyers would criticise and reject as 'relative contractual capacity'. However, this approach is in line with existing concepts under English law, its flexibility and individualised assessment of all facts of the case and, most importantly, the policy underlying the protection

of minors in English law of generally allowing them to enter into and perform transactions instead of regarding their (legal) volition as impaired.

b) Transfers of Rights

The German abstract concept of the legal act and the fact that both contracts (in the narrower English sense) and transfers of rights require an agreement between the parties to a transaction means that minors' 'contractual capacity' equally applies to dispositions of rights. Thereby, uniform and abstract rules apply both in contract and property law. A reader who has understood the German concept of minority in the context of contract has already gained a very good understanding of it in the context of transfers of rights. Again, it is the parents who have nearly complete control over transfers both by or to their child. Only gifts to minors aged seven years or older can be accepted by them without parental control—provided the gift does not exceptionally entail a legal duty, such as ownership of a rental flat.

Minors under English law can freely 'spend what they have in their hands', and even intangible rights can be assigned without parental control. There remain doubts as regards transfers by sale alone and transfers effected by deed; but, in line with the general policy underlying minority in English law, these modes of transferring rights should be regarded as available to minors, too.[1034] Equity can correct allocations of rights of minors which are regarded as 'unjust', and the application of the *non est factum* defence on the part of young minors

[1034] See chapter III sections 2)a)3. and 2)a)4. Also, the ability of minors to declare trusts could not be analysed in this thesis, cf chapter III, section 2)c).

provides further protection. Parents can, of course, factually take their child's property into their possession and thereby limit its spending, but this is not strictly a legal limitation.

c) Restitution of Minors' Transactions

The question of how transactions can be reversed according to the law of restitution of unjusti(ified) enrichment is relevant for understanding how minors are protected from effectively being bound to a transaction for two reasons. First, there can be cases in which minors' dispositions of rights are not barred by their 'contractual capacity' but should be reversed on different grounds. Second, the fact that minors are legally prevented from engaging in a certain transaction and making a detrimental decision does not always mean that they obey these restrictions or that no adult would take advantage of minors irrespective of legal limitations.

For English law, minority is conceptually extended to the area of restitution in that minors' promises must not be indirectly enforced by an adult's claim for restitution; again, this fact stems from the common historical roots in the action of assumpsit. The general policy that minors can enter into contracts and perform them means that there need not be an unjust factor of minority which would allow minors to claim restitution of what they transferred to another merely because they were underage—although any other unjust factor can be applicable just like it is for adults. There is an important caveat to this proposition: equity protects minors in situations in which they are particularly vulnerable. In certain transactions, it is presumed that the recipient of a benefit from a minor unduly

influenced the latter by taking advantage of a special relationship of 'trust and confidence' between them. This especially pertains to minors' transactions with parents or anyone standing *in loco parentis*, even after majority is reached. Additionally, based on the protection provided for mentally incapable persons and, historically, to 'poor and ignorant' people as well as young 'expectant heirs', it has been argued that minors should be protected from unconscionable bargains, too. In general terms, this protection would be provided to minors who *actually* have a lesser understanding of the subject matter of the transaction and where the other party is aware of that fact. There are some uncertainties about this proposition which still require refinement by academics and judges, should this approach be adopted. From a comparative viewpoint, it is (again) significant in that it establishes what German lawyers would reject as 'relative contractual capacity', as a minor's understanding primarily depends on the complexity of the transaction. For English lawyers, this is not at all concerning. This thesis has shown how well acquainted English judges are with an individualised assessment of all facts of a case and that this need not lead to unacceptable degrees of legal uncertainty.

In German law, the control of parents over their child's transactions is extended to the area of restitution of unjustified enrichment in two ways. First, 'minority' per se, in the sense that parents have not authorised a contract and their child's 'legal act' is void, can cause a claim for restitution to be due, which both the minor and the adult party can rely upon. The absence of the legal basis of an enrichment, at least as far as restitution of 'transfers' is concerned, is immediately linked to the validity of the relevant legal acts and thus to 'contractual capacity' in the sense of the ability to effect legal acts. As in the context of contracts or

transfers of rights, it is irrelevant whether a transaction entails a benefit for the individual minor for determining whether it should be reversed. Second, the policy that the control over minors' transactions is shifted to parents is extended to the law of unjustified enrichment in that, for determining whether a minor can plead disenrichment, his parents' knowledge of the absence of legal basis at the time of the disenrichment is decisive instead of his own. Having to provide restitution despite one's loss of the enrichment can practically bind a defendant to an executed transaction. By drawing on parents' state of mind, they are again in control. Because restitution is, subject to other reasons for the invalidity of a transaction, only due where the parents have not authorised a transaction, they will usually not know about it in the first place, and their child can plead disenrichment. Of course, there are situations in which this additional protection of minors is not justified. The complex approaches developed by academics and judges for determining when this is the case either draw on entirely different policy considerations or solely on doctrinal distinctions instead of focussing on giving effect to the policy underlying the protection of minors from improvident transactions in German law. This thesis provides an approach to solving this issue that is more coherent with the underlying policy considerations and does not rely on doctrinal differentiations that need not always be relevant for determining when minors deserve additional protection.

d) Interests of Third Parties

When protecting minors from the consequences of their transactions, their protection usually comes at the cost of the other party. Generally, minors are deemed worthy of that protection due to their inherent weaknesses and the ability

of adults to take care of their own interests. But there needs to be some balance. Even more so, there can be cases in which minors abuse the protection that the law affords them.

In English law, adults can generally rely on the validity of an executed transaction even where the other party is underage and irrespective of whether the transaction is, in general terms, beneficial for a minor. The latter aspect only comes into play if an adult performs in advance and has to rely on one of the 'exceptions' to the general rule that minors' promises are unenforceable. Additionally, adults can claim restitution according to section 3 of the Minors' Contracts Act 1987, which historically evolved from Chancery's willingness to strip fraudulent minors of benefits which they obtained from innocent adults. Still, given the discretion of judges under that provision, it seems advisable for adults under English law not to deal with minors on credit. Other than that, they can rely on the validity of a transaction. Only in exceptional cases does equity intervene and reverse an executed transaction, for example, because an adult unduly influenced a minor or, according to the proposition made in this thesis, entered into an unconscionable bargain with a minor who has no sufficient understanding of the transaction. Recent judicial developments suggest that the latter could take effect where an adult *should* have known of a minor's weakness, but that remains to be seen.

Under German law, the situation is more complicated for adults. On the one hand, they can rely on a minor's parents' authorisation of a transaction. Authorisation can be communicated directly to the other party, too. On the other hand, parents can still revoke their consent until a transaction is concluded, even

through ‘internal’ communication with their child. At the same time, adults are bound even by an unauthorised but provisionally void transaction unless and until they request a decision by the minor’s parents about the ratification of the transaction. Where a (provisionally) void transaction is performed, the adult party, too, can bring a claim for restitution on the ground that the legal basis of the minor’s enrichment is absent. However, the value of an enrichment that an adult party has received from a minor is subtracted from the adult’s claim according to the so-called *Saldotheorie* even if he is disenriched.[1035] If the minor is no longer enriched, he is likely able to plead disenrichment if his parents had no knowledge of the transaction or the exchange of performances. Additionally, the *Saldotheorie* is not applied on the part of minors where they claim restitution from the adult party. A German adult must deal with his parents directly to rely on the validity of a transaction with a minor.

2) Very Young Minors

German law has adopted the age limit of seven to establish a further ‘status’ of minors who are completely unable to effect legal acts and, thereby, to make any change to their legal relationships with other persons. The policy of shifting the control of children’s transactions to parents is followed even more strictly here—although one might wonder to what extent minors of that age would otherwise *practicably* be able to enter into relevant transactions. What is significant in this regard is that, until majority is reached, English law has no further age limit to

[1035] According to the view held in this thesis, but the point is not uncontentious.

protect very young minors from the consequences of improvident bargains. Attempts have been made by judges—and further developed in this thesis—to provide additional protection by applying the *non est factum* doctrine more flexibly. The scope of this equitable doctrine would have to be extended in that it normally only applies to written documents, whereas the protection of minors from the consequences of entering contracts or transferring rights requires more flexibility. That approach still does not establish a certain age limit, but that is not at all necessary. Instead, the scope of protection would depend on the individual minor's understanding of a transaction in each case.

3) Other 'Classes' of Vulnerable Persons

The German concept of the legal act is the basis for uniform rules which underly minors' capacity to contract and to transfer or acquire rights. It is also the basis of the capacity of other 'classes' of vulnerable persons who suffer certain inherent weaknesses that make it generally undesirable that they are held to their decisions. Such weaknesses can be temporary, as in the case of persons affected by drugs, or permanent, for example, following dementia. At the outset, German law renders legal acts by these persons void. This uniform but sweeping approach entails the problem that similar limitations on the ability of these persons are not always appropriate. In many cases, the balance between these persons' protection from improvident transactions and their autonomy is off. This discrepancy is linked to the different policies which underly the protection of these different 'classes' of persons, and which arguably should not have resulted in similar conceptual approaches. Additional intervention by the German legislature—following severe

academic criticism—resulted in mentally incapable persons being merely 'limited' in their ability to effect legal acts autonomously, comparable to minors aged seven or older. English law was never confronted with a similar problem because it never attempted to apply similar conceptual approaches to different 'classes' of persons with inherent weaknesses. Instead, it is noteworthy that both minors and mentally incapable persons can generally enter into and perform transactions. Their ability to form the necessary legal intention is, unlike in German law, not generally regarded as compromised. This is especially highlighted by the fact that mental incapacity allows rescinding a transaction only where the claimant knew about the actual lack of understanding and, on this basis, acted unconscionably. The power to rescind the transaction ultimately does not stem from the defendant's weakness but from the inequitable conduct of the claimant. Criticism similar to that in Germany, arguing that the once sweeping exclusion of mentally incapable persons from making changes to their legal relationships autonomously was unconstitutional, cannot be found in the English legal literature.

4) The Role of Parents

This thesis shows that the protection of minors from improvident transactions cannot merely be established by limiting their own ability to enter into and perform them. Parents have the greatest influence over their children, and their role in protecting their children needs to be appreciated not only in respect of personal matters such as education but in the context of transactions, too. That role is two-fold. Parents guide their children and are an important factor in

enabling them to participate in transactions and, thereby, in social life. In particular under German law, the safest option for adults wanting to enter into transactions with minors is to deal with their parents. Due to their far-reaching powers and the privacy of family life, parents can also pose a risk to their children. When dealing with their child's property, they can enter into and perform transactions which practically affect their child. German parents can even incur liability or transfer rights on behalf of their child as agents on the basis of their 'parental statutory authority'. Thus, the role of parents requires a balance between the powers necessary for the upbringing of a child and certain limitations on them.

That role is best coined by the 'fiduciary position' which parents have in relation to their children and their property. Both in England and Germany, this position is imposed by statute. The recognition of parents' fiduciary office is still not broadly recognised in the relevant literature and has great potential for future development. An important advantage shown in this thesis is that it allows denoting parents' duties in two legally distinct situations which, at least from the perspective of their child, should be treated similarly. Parents have factual or, in Germany, even legal control over property held by their children. But they can also hold property themselves that (economically) 'belongs to' their child. In England, the latter situation causes a trust under which the property is held by parents as trustees for the benefit of their child. Trust law could inform the German law governing the fiduciary position of parents in many ways, such as regarding the protection of minors' property from their parents' creditors. Details in this regard could not be further developed in this thesis. However, it could be shown how similar the content of English and German parents' duties in relation

to their children's property is. They are not allowed to deal with such property as with their own but must manage it prudently for the benefit of their child, and they must return the property, including profits, to their child once it attains majority.

The significant difference between the positions of English and German parents is not the duties which they have to observe but the scope of powers they have. Under German law, the sweeping incapacity of minors is counterbalanced by a far-reaching ability of parents to enter into transactions on behalf of their child based on their 'parental statutory authority'. To English law, this concept is alien, and English parents cannot even make their child's contract enforceable by signing it. The crucial point is that such powers are not necessary: they would not enable minors to do anything which they are otherwise unable to do except for incurring liability by making a promise. Incurring liability is not relevant in the every-day life of minors. A certain degree of creditworthiness is provided by the concept of 'necessaries' and contracts that are 'on the whole beneficial' for minors.

The merits of the German approach can also be doubted when looking at the manifold cases in which parents abuse their powers and squander their child's assets. The ability of German parents to impose liability on their children has led to very unfavourable results in the past, as famously shown 1986 when the Federal Constitutional Court held parents' powers to be partly unconstitutional. However, considering the importance of parents' powers for counter-balancing minors' incapacity, abrogating the concept would be very cumbersome and, in any case, require an entirely new approach to protecting minors—which is rejected in this thesis. Instead, it was seen that both English and German law

might benefit from the introduction of further measures which *prevent* abuses of power rather than penalising them. In the privacy of family life, which should generally remain undisturbed, holding parents accountable for their breaches of duty is not always feasible. A way of making misappropriations of minors' property less likely is to separate the control over such property from the interest in using it, effectively re-establishing a similar separation that English law once had in the form of guardianship of the estate and still has in the form of trusts. In England, payments to minors following legal proceedings must already be made into court, and judges can make directions as to the investment of such funds. While a similar scheme would certainly be advantageous for German minors, more comprehensive protection could be reached by introducing the US approach underlying the so-called 'Coogan trust', an account in the name of a minor into which a certain proportion of payments due to him must be paid and to which the minor has access upon reaching majority.

5) The Role of the State

The welfare of children is not solely a private matter. Both in England and Germany, the state takes an interest in the welfare of children, including minors' protection from improvident transactions. The misappropriation of assets owned by a child can even amount to a violation of the German constitution. This applies not only where liability is imposed on a child by its parents but also where funds intended to compensate specific future liability of their child are squandered by them.

English and German courts have the discretion to interfere with parents' care for their children, including the care for the property of a child. Such measures can take softer forms, such as supervision or registration, but they can also take very strong forms, including the exclusion of parents from their care for their children. In each case, courts should opt for the least intrusive measure, although there is no modern case law in the context of minors' property in England which would allow determining how courts would exercise these powers. It is potentially the greater clarity of the relevant legal provisions in Germany which cause more litigation in this regard, but this point remains uncertain. In Germany, the requirement of certain transactions to be authorised by the Family Court leads to further involvement of the state in minors' transactions; however, that requirement is only necessary for limiting the powers of parents which their English counterparts do not have in the first place. Thus, similar measures are unnecessary in England. Only in respect of giving English minors more creditworthiness in special situations such as a young athlete signing a management contract, court authorisation could be a useful means in English law, too.

Considering once again the fiduciary relationships around children and their property, it has been argued in the German legal literature that the state is in a 'supervisory fiduciary position' (*Überwachungstreuhänder*) in relation to minors and, if so, that proposition could sensibly be incorporated into English law. On that basis, principled state intervention with parental rights concerning minors' transactions can be justified and legally conceptualised. As seen in this thesis in the context of minors who receive payments of damages or a salary as young actors or athletes, there is a considerable risk stemming from the powerful

position of parents and their ability to misappropriate property in the privacy of family life, making it essential that any harm is *prevented* and not only penalised.

6) Further Aspects

There are further interesting insights about English and German law which have repeatedly shown through in the comparative analyses of this thesis and are worth summarising.

a) Abstract vs Individual Protection

A significant difference between English and German law is the design of the provisions governing 'minority'. Generally speaking, German law attempts to govern all possible future situations or problems in advance through abstract provisions which can be applied to any case. The most significant instance of this approach in this thesis is the concept of the legal act. 'Contractual capacity' draws on the validity of a person's legal acts, and parents' 'statutory authority' gives them the authority to effect legal acts on behalf of their child as agents. A general problem with this 'abstract design' is that legal concepts must be broad enough to encompass all possible cases. Exceptions become necessary for taking hard cases into account, but their equally abstract design requires counter-exceptions, resulting in what has been dubbed 'doctrinal ping-pong'. This effect could be seen in chapter II, where the design of §§ 108 f BGB was criticised, but further instances have been explained, such as the 'teleological reduction' of § 181 BGB or the restrictions on parents' wide powers to effect legal acts of any kind on

behalf of their child.[1036] By contrast, English lawyers are not only willing to take the individual facts of any case into account, including the standard of life of a minor or his professional prospects as a boxer or billiards player, but they are also able to deal with the additional amount of work which such nuanced approaches cause, whilst not compromising legal certainty too much. In this light, the case law system can be praised for its pragmatic and efficient way of protecting minors while maintaining legal certainty and allowing minors to participate in transactions and, thereby, social life.

b) Legal Terminology and Clarity

The highly conceptualised and abstract German approach should not be dismissed too quickly. That would underestimate the great legal scholarship, especially of late 19th century Germany, which enables lawyers today to apply similar rules to manifold situations on uniform principle—or simply to open a commentary and immediately know where to look for an answer. The general merits of German legal scholarship cannot be discussed here, but one point has become clear in the context of minority early on in this thesis. Stating a general rule of 'minority' in German law was straightforward, as one can essentially deduce it from a few provisions in the BGB. As regards English law, not only was it necessary to retrieve many cases, analyse them, and establish their common principle; the usage of terminology both in the legal literature as well as the cases themselves has proven inconsistent in this context and cannot be relied upon. It was necessary to look at the legal consequences of each case, as far as they could be determined

[1036] See the explanations in chapter II, section 3)d) and in chapter V, section 1)a)1.

with precision, and to find a common denominator for what the 'general rule' is which underlies minority in English law—and not even that was possible with absolute certainty.

While this might be brushed aside as a mere inconvenience, it should be noted that the accessibility and clarity of the relevant legal provisions *might* affect the degree of protection that minors are provided in English law. Absent any further methodological or even empirical research, this point remains a hypothesis; however, the question arose why there is an absence of case law in England in respect of minors' property which has been misappropriated by their parents. To some extent, the reason is that payments to minors following legal proceedings have to be made into court. But this can only explain some of the relevant German cases. A lack of clarity of the law, even after the consolidation of the case law with the Children Act 1989, *could* be another reason for the lack of litigation in this respect.

c) 'Functional Equivalence' and 'Contractual Capacity'

As stated in the introductory chapter, a starting point for this thesis was an assumed 'functional equivalence' between the concepts of minority in England and Germany. The method of so-called 'functionalism' proposes to take two (basically) functionally equivalent concepts in two jurisdictions and compare how (well) these concepts fulfil their functions. As has been seen over the course of this thesis, the idea of 'protecting minors'—the primary function of minority in England and Germany—is fundamentally different in both jurisdictions. In light of these differences, the functions or objectives underlying 'minority' in the

context of private law could be said not to be equivalent in England and Germany. Even in two culturally quite akin jurisdictions, strongly differing ideas of 'protecting' minors prevail. Two points should be noted in this context. First, the fact that the initial assumption of 'functional equivalence' proved partly incorrect has not diminished the comparative legal insight which could be gained. As outlined in the introduction, 'functional equivalence' is not regarded here as a precondition to comparing two legal concepts in the first place. Second, it should again be noted that the findings of this thesis are primarily based on a doctrinal analysis of the legal provisions and relevant cases, and any differences between English and German law could only (attempted to) be explained by reference to the relevant statutory provisions, case law, and certain further-reaching legal aspects such as the legal historical development of certain provisions. By contrast, an analysis of non-legal contexts such as social, cultural, economic, or political aspects could not be conducted. Admittedly, this leaves considerable room for further exploration. For example, the sometimes peculiar provisions found in the context of minority partly follow very specific societal requirements: minors as the 'next generation' of a family have long been in the limelight when it comes to preserving substantial family wealth or even a noble title;[1037] also, the financial (and financing) potency of young students could have (and arguably still has) considerable bearing on their social stance and, eventually, professional prospects.[1038] Legal historical aspects such as the composition of juries in England played a role in determining to what extent minors at university or in military

[1037] HJ Habakkuk, *Marriage, Debt, and the Estate System; English Landownership 1650-1950* (OUP, Oxford 1994) 8 ff

[1038] S Chaouche, *Student Consumer Culture in Nineteenth-Century Oxford* (Palgrave Macmillan, Cham (Switzerland) 2020) 197 ff.

service could incur liability to maintain a higher standard of living than currently affordable to them.[1039] Furthermore, one could ask to what degree the law as analysed in this thesis really was (or is) reflected in practice: take the case of an English parent signing a contract for his or her child; theoretically, the contract cannot be binding on the child, and the other party must ensure that the contract includes the parent as a party to it. However, it seems unlikely that in practice a parent would bail on his child should the latter be unable to fulfil a transaction that is important in its life, such as a contract for education or telecommunications. With one eye again on 'functionalism', this could mean that the practical results of 'minority' in English and German law are quite similar, despite their differing legal bases.[1040]

Closely linked to the (initial) assumption of 'functional equivalence' between 'minority' in English and German law is the fact that, in comparative legal literature, both concepts are often referred to by the term 'contractual capacity (of minors)'. Even at a national level of discussion, the fact that the idea underlying the 'protection of minors' *might* be very different is not mentioned. Even more so, there are few explanations which go further than speaking of 'protection' as an objective per se. The crucial point that should be understood by lawyers who are not acquainted with the other jurisdiction is the difference in the policy which underlies the protection of minors from improvident bargains and

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[1039] Cf the HL Deb 9 June 1874, vol 219 cc1225-6, accessible here: < https://api.parliament.uk/historic-hansard/lords/1874/jun/09/second-reading>, accessed 10 October, 2022.

[1040] A phenomenon which has been referred to as a 'presumption' that 'as a general rule developed nations answer the needs of legal business in the same or in a very similar way', Zweigert/Kötz, *Introduction* (fn 8) 40.

the conceptual differences resulting from that. In respect of the latter, it is important to note that, in German law, the concept of 'contractual capacity' applies both to contracts in a narrow sense as well as to any other agreement (under private law) due to the concept of the 'legal act' and, additionally, that it applies to several 'classes' of vulnerable persons. In England, contractual (in-)capacity of *minors* primarily entails that a person's promise cannot be enforced, whether directly or indirectly, but otherwise agreements can be entered into and performed. Other persons with inherent weaknesses are protected by entirely different legal concepts. However, it is not argued here that using the term '*contractual* capacity' should be avoided. That would not be a useful proposition, given the common usage of the term. But the discussion in the literature would benefit from making these aspects more explicit. This certainly holds true for comparative legal literature, and even the discussion at a national level can benefit from greater awareness of the different understandings of or policies underlying a legal concept which one feels well acquainted with—until studying a foreign jurisdiction.

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