

**“...You don’t pay £100,000 to a lawyer unless you care about something”. The role of emotion in contract law**

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## **Introduction**

As every law student quickly discovers, contracts are ubiquitous in day-to-day life.

From the cup of coffee on the way to work, to the long-awaited purchase of a dream holiday, they represent a key part of the framework through which the private law regulates the lives of individuals within contemporary society. For businesses of all shapes and sizes, contracts are also vital to their trading and survival. From supply and delivery to debt collection, from employment to relationships with consumers, all key elements of commercial life are regulated via this mechanism.<sup>1</sup> At the same time, all of these elements of private and commercial life involve forms of human interaction and behaviour and are thus imbued with emotional dimensions.<sup>2</sup>

However, within contract law, it often seems that contracts and emotion run along parallel lines – never meeting or even colliding.

Despite the pervasive nature of contracts in the ordering and regulation of human interaction, the literature on the role of emotion in contract law is relatively sparse. What discussion of emotion in contract law there is tends to focus either on a very specific form of contract (for example, Berk’s exploration of surrogacy arrangements)<sup>3</sup> or on a particular doctrinal aspect (as with Keren’s discussion of

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<sup>1</sup> This chapter is written with a specific focus on contract law within the United Kingdom (“UK”), particularly England and Wales, whilst also drawing on an international body of literature which indicate parallels within other jurisdictions.

<sup>2</sup> See, for example, Sharon Boden and Simon L. Williams “Consumption and Emotion: The Romantic Ethic Revisited” *Sociology* 36(3) (2002) 493.

<sup>3</sup> Hillary L. Berk “The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor” *Law & Society Review* 49(1) (2015) 143.

affective consideration, focused on donative promises<sup>4</sup> and Radin's consideration of boilerplate clauses).<sup>5</sup> Although contractual transactions are commonly referred to as "contractual relations" or a "contractual relationship", such "relationships" are often discussed and interpreted (within both academia and practice) using a traditional legal framework that focuses on rationality and the allocation of risk.<sup>6</sup> Terms such as "arm's length" explicitly capture this emphasis on distance and structure which contract law seeks to formalise.<sup>7</sup> The underlying assumption appears to be that emotion is either absent or, at best, simply irrelevant. This may well be linked to the broader antipathy that has commonly been viewed as existing between law and emotion, in which emotion is viewed as a barrier to legal reason; introducing bias, warping decision-making, and thus producing unfairness or injustice.<sup>8</sup> Although this view can be demonstrated to be erroneous, and has increasingly been challenged in some areas of law,<sup>9</sup> it still appears to have a stronghold on the analysis of contract law.

Recent developments in neuroscience and psychology have given a clearer understanding of the role and importance of emotion. These challenge the notion of a hierarchy in the brain, with the rational cortex as the master of the irrational limbic system where emotion sits. Instead, these insights demonstrate the ways in which

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<sup>4</sup> Hila Keren, "Considering Affective Consideration", *Golden Gate University Law Review* 40 (2010) 165.

<sup>5</sup> Margaret Jane Radin *Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law* (Princeton and Oxford, Princeton University Press, 2013).

<sup>6</sup> Yuval Feldman "Control or Security: A Therapeutic Approach to the Freedom of Contract" 18 *Touro Law Review* (2001-2002) 503.

<sup>7</sup> Daniel Markovitz "Promise as an Arm's Length Relationship" in Hanoch Sheinman (Ed.) *Promises and Agreements: Philosophical Essays* (Oxford and New York, Oxford University Press, 2011).

<sup>8</sup> Susan A. Bandes (Ed.) *The Passions of Law* (New York, New York University Press, 1999).

<sup>9</sup> See, for example, Heather Conway and John Stannard *Emotional Dynamics of Law and Legal Discourse* (Oxford and Portland, Oregon, Hart Publishing, 2016).

emotion is inter-twined with, and influences, cognition in a far more complex way.<sup>10</sup>As a result, the conceptualisation of rationality and emotion as antithetical, with emotion characterised as irrational and potentially dangerous, is becoming increasingly untenable. There is a growing recognition amongst neuroscientists, psychologists and commentators that a more nuanced understanding of the relationship between emotion and rationality is required to acknowledge and explore the role of emotion in decision-making and choices. Legal scholars Bandes and Blumenthal highlight this when discussing the role of emotions more generally:

{Emotions} influence the way we screen, categorize, and interpret information; influence our evaluations of the intentions or credibility of others; and help us decide what is important or valuable. Perhaps most important, they drive us to care about the outcome of our decision making and motivate us to take action, or refrain from taking action, on the situations we evaluate.<sup>11</sup>

Given the large body of evidence, from neuroscience and other disciplines, that rationality and emotion are, in fact, intertwined and inseparable, and that the law is imbued with emotion, this chapter posits that a broader view of the inter-relationship between emotion and contract law is now required.<sup>12</sup> Emotion is present within contractual transactions and across all stages of the contract, from formation

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<sup>10</sup> See, for example, Antonio Damasio, *Descartes' Error* (London, Vintage, 2006); Phoebe C. Ellsworth, "Appraisal Theory: Old and New Questions" *Emotion Review* 5(2) (2013) 125; Lisa Feldman Barratt *How Emotions Are Made: The Secret Life of the Brain* (London, Macmillan, 2017).

<sup>11</sup> Susan A. Bandes and Jeremy A. Blumenthal "Emotion and the Law" *Annual Review of Law and Social Science* 8(1) (2012) 161, 163-164.

<sup>12</sup> For examples of evidence see the references in n 10. For the seminal collection on law and emotion see Bandes n 8.

through to the disputes which may arise before and after completion. The role emotion does, can, and ought to play should therefore be explicitly acknowledged and explored within both theoretical and practical discussions on contract law, rather than remaining an implicit presence within many current debates and examples. For example, take the discussion over which test should be used to determine whether a contractual agreement exists and whether the most appropriate evidence of the parties' intentions is subjective, based on the individual's intentions, which is the historical standard, or objective, based on the perception of the reasonable person, which is the current standard.<sup>13</sup> The notion of objectivity in this context could arguably be viewed as a mechanism to avoid engagement with emotion, and certainly reinforces the practice of trying to remove emotion, although its explicit justification is usually centred around the difficulties of determining subjective intent.

Overall, this chapter will highlight some of the key ways in which emotion can be identified, conceptualised, and acknowledged within contract law generally and with a particular emphasis on business-to-business transactions. It will begin by considering classical and neo-classical theories to explore the lack of engagement they have with the emotional dimensions of contracting. As both of these theories has a significant ongoing impact on the conceptualisation of contemporary contract law, such an exploration demonstrates the ways in which emotion has been characterised as irrational and frequently excluded from these theoretical discussions, leading to a narrow and unrealistic notion of rationality which excludes its emotional components.

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<sup>13</sup> For a general discussion on subjective and objective approaches see J. M. Perillo "The origins of the objective theory of contract formation and interpretation" *Fordham Law Review* 69 (2000) 427.

The chapter then considers the emergence of relational contract theory and the development of a recent paradigm, conscious contracting, both of which offer potential for the role of emotion in contract law to be explicitly acknowledged and explored. Together these challenge contract law's devotion to such an impoverished and outdated dichotomy and its failure to engage with the evidence on emotion's role within rationality. This chapter will then illustrate the role emotion plays within the practical experience of contracting, drawing on empirical evidence gained from qualitative interviews with solicitors in private practice in England and Wales. The responses in these interviews vividly demonstrate the way emotion pervades commercial life and transactions and, once again, emphasise the need to acknowledge and understand the role of emotion within contract law.

### **Classical contract theory and emotion**

Contract law has neither a complete descriptive theory, explaining what the law is, nor a complete normative theory, explaining what the law should be.<sup>14</sup>

The above quotation highlights the difficulty of identifying the theoretical basis of contract law, particularly when contracts span so many types and forms within contemporary society. However, for the purpose of considering contract law's interaction with emotion, a useful starting point is the division into classical, neoclassical and relational theory by the legal scholar MacNeil (originator of the

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<sup>14</sup> Alan Schwartz and Robert E. Scott "Contract Theory and the Limits of Contract Law" *Yale Law Review* 113 (2003) 541. 543.

relational theory, which will be discussed further below).<sup>15</sup> This division provides insight into the historical reasons for the dearth of interest in emotion by contract scholars, as well as illustrating the inadequacies of this traditional disregard.

The classical theory of contract law, which predominated during the nineteenth century, was focused on a form of atomistic individualism which positioned each party as a rational being able to choose and enter into exchanges best placed to further their economic interests as an expression of their free will.<sup>16</sup> As legal scholar Fried explains, property and tort law acknowledge and preserve the rights of individuals, whilst contract law “facilitates our disposing of these rights on terms which seem best to us”.<sup>17</sup> The formal, abstract doctrines applied by the courts at that time (and which still shape much of contract law and its discourses today) were intended to ensure that the individual’s rights were disposed of (or retained) as the individual intended, without seeking to challenge the basis of the bargain or exchange. Whether or not emotion had played a role within the formation of a contract would largely have been viewed as irrelevant, given the emphasis on facilitating individuals’ freedom to contract and correcting flaws and imprecisions in the contractual language used. The wider context in which emotions, motivations and other imperatives had led to the contract’s formation would be disregarded, with

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<sup>15</sup> Ian R. Macneil “Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law” *72 Northwestern University Law Review* 72 (1972) 854. For discussion of a range of other contractual theories see Brian Coote *Contract as Assumption: Essays on a Theme* (London and New York, Bloomsbury Publishing, 2010).

<sup>16</sup> For a clear summary of this narrative, but also a challenge to the notion that this was a consensus, see Anat Rosenberg “Contract’s Meaning and the Histories of Classical Contract Law” *McGill Law Journal* 59 (2013) 165.

<sup>17</sup> Charles Fried *Contract as Promise. A Theory of Contractual Obligation (2<sup>nd</sup> Edition)* (New York, Oxford University Press, 2015) 2.

the focus concentrated on what legally-enforceable obligations were created or kept.<sup>18</sup>

### **Neo-classical contract theory and emotion**

The modern, neoclassical theory of contract law has retained the core tenets of the classical theory whilst acknowledging its practical limitations, such as inequalities in the bargaining powers of parties (notably between consumers and businesses). That is, the core tenets of the classical theory remain, but are tempered by an acknowledgment of "... communal standards of responsibility to others" through the application of "...policy analysis, empirical inquiry, and practical reason".<sup>19</sup> Illustrations of the impact of this theoretical shift in England and Wales include the increased rights to beneficiaries under contracts provided by the Contracts (Rights of Third Parties) Act 1999, and the protections afforded to consumers under the Consumer Rights Act 2015. These changes demonstrate a growing awareness of the ways in which power imbalances can impact on contractual transactions, with an emphasis on the need for transparency by businesses.<sup>20</sup> There is a growing body of work on the complex cognitive and emotional factors involved in consumers entering into standard form contracts, for example, in the consumer's response to various corporate marketing techniques

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<sup>18</sup> *Photo Production Ltd. Respondents v Securicor Transport Ltd* [1980] A. C. 827, 845.

<sup>19</sup> Jay M. Feinman "The Significance of Contract Theory" *University of Cincinnati Law Review* 58 (1990) 1283, 1288.

<sup>20</sup> See, for example, The Law Commission and the Scottish Law Commission *Unfair Terms in Consumer Contracts: Advice to the Department of Business, Innovation and Skills* (March 2013) [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/06/unfair\\_terms\\_in\\_consumer\\_contracts\\_advice.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/06/unfair_terms_in_consumer_contracts_advice.pdf) (accessed 10th April 2019).

and in their weighing up the risks involved in entering into a transaction.<sup>21</sup> Yet neoclassical theory does not incorporate this work or explicitly acknowledge the emotional vulnerabilities inherent in such dynamics.

The question of the extent to which modern contract theory preserves and prizes freedom of contract has been extensively debated,<sup>22</sup> and there has been a clear shift towards applying the principle of reliance (did a party rely on a promise) as opposed to that of a bargain (promises should be fully enforced) when developing and applying contractual doctrine.<sup>23</sup> However, by preserving the core tenets of classical theory, modern neoclassical theory has arguably continued its disregard for emotion without pausing to question the validity of this response. There is nothing to suggest that contract law's deification of liberalism's classic self-interested, free market-oriented individual has been disrupted. Rather, there is a sense that the playing field is being levelled for those less fortunate to enable them to participate and possibly achieve such status themselves. In any event, business to business transactions have arguably been least impacted by shifts such as the emphasis on consumer protection and reliance precisely because a company as an artificial legal personality provides the embodiment of a rational, self-interested (and emotionless) decision-maker.

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<sup>21</sup> See, for example, Shmuel I. Becher "Behavioral Science and Consumer Standard Form Contracts" *Louisiana Law Review*, 68(1) 117.

<sup>22</sup> See, for example, P. S. Atiyah *The Rise and Fall of Freedom of Contract* (Oxford, Oxford University Press, 1985).

<sup>23</sup> Melvin A. Eisenberg *The Transformation of Contract Law from Classical to Modern* (New York, Oxford University Press, 2018) 27

## Notions of rationality in classical and neo-classical contract theories

When considering classical and neoclassical contract theories' lack of engagement with emotion overall, it can be seen that both theories are underpinned by concepts of choice governed by a particular concept of rational thinking. Hadfield argues that the notion of "deliberate, rational choice" is of "constitutive importance" in such contract law theories, distinguishing the law of contract from that of tort, where obligations are imposed as a matter of public policy.<sup>24</sup> The concept of rationality is at the heart of much contractual theory, as epitomised by the application of "rational choice" theory, which assumes that individuals use rational self-interest to choose between alternatives and select the one which will maximise their welfare.<sup>25</sup> As legal scholar and former federal judge Posner explains:

Fundamental assumptions, common to nearly all efforts at economic analysis, are that individuals have preferences over outcomes, that these preferences obey basic consistency conditions, and that individuals satisfy these preferences subject to an exogenous budget constraint.<sup>26</sup>

The assumption is that individuals can thus apply rational thought to identify which expected outcome has the greatest utility for them.<sup>27</sup> However, the form of rationality

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<sup>24</sup> Gillian K. Hadfield "An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law" *University of Pennsylvania Law Review* 146(5) (1998) 1235, 1236.

<sup>25</sup> Robert E. Scott "The Death of Contract Law" *University of Toronto Law Journal* (2004) 369, 382; Robert A. Hillman "The Crisis in Modern Contract Theory" *Texas Law Review* 67 (1988) 103, 121.

<sup>26</sup> Eric Posner "Economic Analysis of Contract Law after Three Decades: Success or Failure?," *Yale Law Journal* 112 (2003) 829, 832.

<sup>27</sup> Mark Kelman "Law and behavioral science: Conceptual overviews" *Northwestern University Law Review*, 97(3) (2003) 1347, 1350.

which these (and other) theories appear to envisage is a wholly cognitive creation which eschews any acknowledgment or consideration of emotion and the affective domain.<sup>28</sup> Where the role of emotion is acknowledged, it seems to have been in largely negative terms, with Elster (discussing the beliefs that guide decision-making in rational choice theory) suggesting that emotion will lead to “biased beliefs and low-quality beliefs”. In other words, emotion is being characterised as antithetical to rationality, thus necessitating its removal from the contractual sphere.

In contrast, an example of the inescapable and vital role emotion plays within rationality is demonstrated by “plural rationality theory” which acknowledges the intersection of cognition, emotion and social relationships within preferences and decision-making.<sup>29</sup> A key acknowledgment this theory provides is that, however much a choice, decision or action may be characterised as “rational” and “reasoned,” there will have been an emotional component or influence upon it. It thus re-conceptualises the notion of individual choice, and its underpinning characterisation of rationality, in a way in which acknowledges that contract law is imbued with emotion, although to date there is little evidence of its approach having been drawn upon, let alone integrated into, the realm of classical and neo-classical contract law theories.

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<sup>28</sup> Jon Elster “Emotional Choice and Rational Choice” in *The Oxford Handbook of Philosophy of Emotion*, Ed. Peter Goldie (Oxford and New York, Oxford University Press, 2009) Oxford Handbooks Online.

<sup>29</sup> Marco Verweij, Timothy J. Senior, Juan F. Dominguez D., Robert Turner “Emotion, rationality, and decision-making: how to link affective and social neuroscience with social theory’ *Frontiers in Neuroscience* (2015) <https://doi.org/10.3389/fnins.2015.00332>, 6.

Ignoring this approach, and the wider importance of emotion, leads to a gap within contract theory. Emotion will have a part to play in what contract is made, with whom, at which point, how it is transacted, how the actions or outcomes it envisages are performed (or not performed), whether disputes arise and how these are dealt with. In other words, emotion is present throughout the formation, execution and completion of the contract. To ignore this is to cling to an outdated conceptualisation of contracting which separates rationality and emotion.

### **False dichotomies between rationality and emotion**

The discussion of rational choice theory above demonstrates that, when arguing for an acknowledgment of the role of emotion within contracts, it is important not to set up a false dichotomy in which a purely cognitive vision of rationality is pitted against emotion and affect as a form of irrationality which must be identified to be either eliminated or ameliorated. It is arguable that a more nuanced form of this false dichotomy also occurs when the theory of “bounded rationality” is applied in contract. Bounded rationality challenges the notion that an individual can make a perfectly rational choice, for example, because of the limited time and incomplete information available and/or the complexity of the decisions involved.<sup>30</sup> Perhaps most tellingly, a number of commentators also highlight cognitive limits as further bounding the application of rationality. As early as 1995, Eisenberg argued that:

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<sup>30</sup> Herbert A. Simon “Theories of Bounded Rationality” in *Decision and Organization: A Volume in Honor of Jacob Marschak*, Ed. C. B. McGuire and Roy Radner (1972, Amsterdam, North-Holland Publishing Company) 161.

In light of how recently this scientific foundation has been built, it is not surprising that courts for the most part have not justified the principles governing the limits of contract on the basis of the limits of cognition. Nevertheless, many of these principles...undoubtedly arose and persisted on the basis of a tacit understanding of those limits. Now that the scientific foundation of those limits has been established, it is time to recognize that explanation explicitly, partly to make the principles more transparent to testing, and partly because explicit recognition of the role of the limits of cognition helps to show how we should shape existing principles and what new principles we should develop.<sup>31</sup>

Eisenberg does not explicitly mention emotion, but there is a danger that focusing on the cognitive can be interpreted as conceptualising emotion as a limitation on, or even distraction from, rationality. If emotion is not viewed as cognitive in nature, it arguably becomes characterised as a limitation which much either be rationalised or disregarded as inappropriate.<sup>32</sup> This potential form of dualism, separating cognition and rationality from emotion and perceived irrationality, is no longer appropriate.<sup>33</sup> It is not necessary or even possible to try and delineate the “rational” aspects of a contract from the “emotional” aspects when the two in fact represent integral parts of the decisions and choices made during the contractual

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<sup>31</sup> Melvin Aron Eisenberg “The Limits of Cognition and the Limits of Contract” *Stanford Law Review* 47 (1995) 211, 258.

<sup>32</sup> Dennis K. Mumby and Linda L. Putnam “The Politics of Emotion: A Feminist Reading of Bounded Rationality”, *Academy of Management Review* 17(3) (1992) 465.

<sup>33</sup> For an accessible discussion of the way in which cognition and emotion intertwine, see Damasio n 10. For a discussion of the relationship between different types of emotion and rationality, see Klaus R. Scherer “On the Rationality of Emotions: Or, When Are Emotions Rational?” *Social Science Information* 50(3-4) (2011) 330.

process. Characterising rationality and emotion as inseparable and integrated also means it is still possible, indeed essential, that the concept of rationality remains a valid part of contract's theoretical basis. However, it may well be a different concept of rationality, one which explicitly acknowledges the role of emotion within it.

This conceptualisation of emotion can be seen as akin to Anderson's version of rationality within economics, which views traditional theories as inadequate because they do not acknowledge the role of values, in particular their "socially grounded, pluralistic" nature.<sup>34</sup> Instead, she identifies a rational choice as one which adequately expresses the values of the person doing the choosing.<sup>35</sup> Applying this approach to contract law, Hadfield argues it provides an opportunity to readdress the core questions of whether a promisor should be legally bound and what remedy should apply.<sup>36</sup> She argues for the incorporation of Anderson's values-based theory in a range of contractual situations, suggesting that "Respect for the multiplicity of frames in which a decision to contract can be made often entails looking beyond the fact of choice to the complexity of what it means to choose."<sup>37</sup> This work highlights the importance of exploring the complex interplay between emotion and values that is present within approaches to contract law.<sup>38</sup> However, even more importantly for the purposes of this chapter, if values influence rationality in this way, then surely emotions must do too.

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<sup>34</sup> Elizabeth Anderson *Values in Ethics and Economics* (Cambridge, Massachusetts and London, Harvard University Press, 1993) 16.

<sup>35</sup> Anderson n 33, xii.

<sup>36</sup> Hadfield n 23, 1239.

<sup>37</sup> Hadfield n 24, 1285.

<sup>38</sup> See, for example. K. Kristjánsson *Virtuous Emotions* (Oxford, Oxford University Press, 2018).

This can be seen by drawing on the example Hadfield gives of *Barclays Bank Plc v O'Brien* [1993] 4 All ER 417.<sup>39</sup> In this case, the husband wished to increase a company overdraft and offered the matrimonial home as security. The husband and wife signed the relevant documentation without reading it, with the wife later claiming her husband had put her under undue pressure and misrepresented the effect of the legal charge to her. The House of Lords held that Barclays was under constructive notice of the possibility of undue influence or misrepresentation and therefore the charge was unenforceable. Hadfield suggests that this decision is based on an application of rational choice theory as the wife's signature is not seen as representing her true wishes or viewed as being an assessment of the actual risks and benefits. However, Hadfield argues that the wife's choice is "expressive" of the wife's emotions and motivations at the time of the contract, rather than being "instrumental" in terms of a form of cost-benefit analysis.<sup>40</sup> Therefore, she suggests that the fact the contract is "expressive" should be the starting point for further investigation into reasons why it should (or should not) be enforced, rather than being viewed as rendering the contract unenforceable. For example, the focus could be upon Barclays' reliance upon the wife's signature and whether or not that was reasonable in the circumstances, or it could be developed into a wider enquiry into the balance to be struck between the value of specific institutional protocols and fairness.<sup>41</sup>

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<sup>39</sup> Hadfield n 24, 1245.

<sup>40</sup> Hadfield n 24, 1267.

<sup>41</sup> Hadfield n 24, 1268. For a detailed discussion of emotion and undue influence see John Stannard "The Emotional Dynamics of Undue Influence" in Heather Conway and John Stannard (Eds.) *Emotional Dynamics of Law and Legal Discourse* (Oxford and Portland, Oregon, Hart Publishing, 2016).

In relation to business-to-business transactions, Hadfield acknowledges that “Pride, loyalty, and defiance of the odds all intrude on the commercial actor’s calculus of risks and re-ward” but suggests that an instrumental, risk-allocation framework can still be applied.<sup>42</sup> This lacks a more nuanced approach which distinguishes different forms of commercial contract. For example, in cases where there is a powerful contractor and smaller sub-contractor, there is still a strong argument that such a contract is “expressive” in nature and that therefore the courts need to look beyond a simple conclusion that the weaker party chose to enter into a certain bargain.

A broad and nuanced concept of rationality, such as Hadfield’s, has particular resonance in relation to remedies for breach of contract. Although damages (the payment of financial compensation) is the most common remedy, they can be calculated according to different measures of loss. In addition, there are other equitable remedies such as specific performance (where a party is compelled to complete performance of contractual obligations). Posner suggests that the claimants’ remedy preferences are premised upon a non-emotional rational process of design and selection. However, under a broader conception of rationality that incorporates emotion, a more nuanced approach to designing and awarding remedies is possible. This nuanced approach could take account of the emotional aspects of contracting, not in the sense of vengefully punishing violations, but by ensuring that the parties’ participation in contract-making is not reduced to a crude financial calculation devoid of other preferences, including emotion.<sup>43</sup> One example

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<sup>42</sup> Hadfield n 24, 1269.

<sup>43</sup> Eric Posner “Law and the Emotions” *Georgetown Law Journal* 89 (2001) 1977, 2006-2010.

of this could be in the treatment of liquidated damages clauses within commercial contracts. The U. K. Supreme Court case *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67 considered whether such clauses were unenforceable as penalties. The judgment emphasised the importance of demonstrating a “legitimate interest”, extending beyond recovery of loss, to support a claim for enforcement. It is arguable such an interest could be expanded to include one incorporating emotional aspects, including disappointment or anger over the consequences of delays, to enable such a clause to be enforced.

### **Relational contract theory and emotion**

Currently, relational theory is the contractual theory which arguably moves the closest to recognising the role of emotion within contract law.<sup>44</sup> In developing relational theory, MacNeil makes four key propositions: 1) all transactions are “embedded in complex relations”; 2) understanding a transaction requires an understanding of these relations; 3) analysing a transaction requires an acknowledgment and exploration of the relational aspects that “significantly” impact the transaction; and 4) this relational analysis of transactions is more efficient and accurate than focusing on discrete transactional elements alone.<sup>45</sup>

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<sup>44</sup> Macneil, n 15, 856, see also the work of Stewart Macaulay, including “The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules”, *Modern Law Review* 66(1) (2003) 44. It should be noted that MacNeil has more recently chosen to re-name his particular theory as “essential contract theory” to differentiate it from other forms of relational theory (Ian R. Macneil “Contracting Worlds and essential contract theory” *Social & Legal Studies* 9(3) (2000) 431, 432.

<sup>45</sup> Ian R. Macneil “Relational contract theory: Challenges and queries”, *Northwestern University Law Review* 94(3) (2000) 877, 881.

The notion of discrete contracts arguably reflects the approach of classical contract theory by viewing the identity of the parties as irrelevant, commodifying the subject-matter, limiting the sources to be taken into account when interpreting the agreement, providing a limited set of remedies, and drawing clear lines between what is and is not a contractual transaction (for example, through the strict requirements for contract formation).<sup>46</sup> It is also effectively replicated within neoclassical theory because it shares an underlying assumption that the function of contract law is to facilitate such discrete exchanges based on individual choice.

Fundamentally, relational theory provides a fundamentally different view of human nature to that of classical and neoclassical theory; one in which conventional conceptualisations of cognition, reason and rationality cannot capture the realities of contractual relationships.<sup>47</sup> Thus relational theory provides a vehicle to counter classical and neo-classical contract theory's deification of an emotionless (and thus unachievable) notion of rationality as the basis for contract law. Instead, the provision of an alternative conception of human nature offers a route to acceptance of an individual as a messier, less simplistic character than the rational, purely self-interested paragon of perceived rationality who has pre-dominated contract law. The individual is not acting purely to maximise self-gain, but instead is guided by a broader set of norms, governed by the dual notions of solidarity and reciprocity, in a way which challenges implicit assumptions and offers new directions for inquiry.<sup>48</sup>

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<sup>46</sup> Macneil n 15, 863-864.

<sup>47</sup> Ian R. Macneil "Values in Contract: Internal and External" 78 *Northwestern University Law Review* 78 (1983) 340, 348.

<sup>48</sup> Paul J. Gudel "Relational Contract Theory and the Concept of Exchange" *Buffalo Law Review* 46 (1998) 763, 777.

Relational theory has been heavily critiqued on a range of fronts; for example, legal scholar Barnett argues that MacNeil misinterprets the role and importance of consent in contractual relations and fails to appreciate the importance of contractual rights in regulating and preserving underlying property rights.<sup>49</sup> However, relational theory's emergence has potential significance to highlighting the role of emotion in contract law. Its relational emphasis challenges the formalistic approach of classical and neo-classical contract theories and their focus on applying legal rules solely to identify the specific elements of a contract. Its challenge to the notion of contracts as discrete transactions emphasises the broader context in which such agreements are situated and the way in which they are embedded within wider social relations thus arguably necessitating the inclusion of emotion because of its necessary and integral role in such relationships. An example of the application of the formalistic approach can be found in *Walford v Miles* [1992] 2 AC 128, involving the sale of a business, where it was alleged that the defendants had agreed not to deal with any other parties with regard to the sale while negotiating with the plaintiffs. The plaintiffs tried to persuade the court that there was an inherent obligation on the defendants to negotiate the terms of the sale in good faith, but this was rejected on the grounds that acknowledging such a duty of good faith would lead to uncertainty. Taking account of relational theory, a court might instead have concluded that a duty of faith could be determined based on the parties' relationship to date, developing during their negotiations. Where the parties has a previous trading history, this argument could be even stronger, based on the context derived from this relationship.

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<sup>49</sup> Randy E. Barnett "Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract" *Virginia Law Review* 78 (1992) 1175.

As the case above demonstrates, it is significant that relational contract theory has positioned itself as relevant not only to individuals, but also in business-to-business transactions. Here relational theory has had an identifiable impact, at least in terms of business scholarship, challenging the notion that commercial bodies are in some way immune or set apart from the wider context of social relations where emotion (and values) are so often located.<sup>50</sup> An example of the role of emotion in a commercial context can be identified in Blomqvist et al's discussion of smaller and larger companies forming research and development collaborations together. This necessitates a contractual relationship to agree upon the apportionment of intellectual property rights, but it also requires a significant level of trust because of the impossibility of capturing all eventualities within the written contract.<sup>51</sup> Such trust will inevitably require positive emotional responses between the companies' personnel to enable the relationship to develop.<sup>52</sup>

Another example in a commercial setting can be found in the so-called "battle of the forms" cases, where each party will seek to incorporate their own standard contractual terms into an agreement.<sup>53</sup> The decision in the case of *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209 applied the traditional "last shot" approach, whereby the seller's terms were last to pass between the

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<sup>50</sup> Joesetta McLaughlin, Jacqueline McLaughlin and Raed Elaydi "Ian Macneil and relational contract theory: evidence of impact" *Journal of Management History* 20(1) (2014) 44.

<sup>51</sup> Kirsimarja Blomqvista, Pia Hurmelinnab , Risto Seppa"nena "Playing the collaboration game right – balancing trust and contracting" *Technovation* 25 (2005) 497.

<sup>52</sup> Jennifer R. Dunn, Maurice E. Schweitzer, and Patricia Devine "Feeling and Believing: The Influence of Emotion on Trust." *Journal of Personality and Social Psychology* 88(5) (2005) 736.

<sup>53</sup> Phillip Morgan "Battle of the Forms: Restating the Orthodox" *The Cambridge Law Journal* 69(2) (2010) 230.

parties and therefore applied to the contract. Despite evidence based on a previous trading relationship of over twenty years indicating a different understanding, the Court of Appeal did not view this as strong enough to displace the conventional offer/acceptance analysis. Given the parties' long trading history, a greater acknowledgment of the role of trust, loyalty and other emotional aspects could arguably have been applied to find that the purchaser's terms were instead incorporated on the basis of their past relationship.

The use and discussion of the term "relational" does not necessarily have to include an explicitly emotional element. Indeed, the framing of it within contractual theory is instead largely predicated on social norms and values involving co-operation, reflecting the sociological origins of MacNeil's argument.<sup>54</sup> To date, little research has explored how emotion influences these social norms and their application and interplay within individual contracts. However, emotion must play a significant part in such relations, given its pervasiveness within all interactions and the way it shapes people's attitudes to each other, to decisions, to actions, and to values.<sup>55</sup> For example, when considering which terms are implied on the grounds of custom and trade usage, the distinction drawn between legally-enforceable practices and those followed as a non-binding courtesy in *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria* [1983] QB 856 could be challenged by characterising such non-binding terms as forming part of an emotional context with

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<sup>54</sup> Macneil n 45; Zong Xing Tan "Disrupting doctrine? Revisiting the doctrinal impact of relational contract theory" *Legal Studies* (2018) 1, 5.

<sup>55</sup> Bandes and Blumenthal, n 12.

adherence to these involving specific emotions such as empathy, kindness and friendship or, conversely, non-adherence framed by guilt or shame.

It would also be interesting to explore the parallels with emotion's own (at least partially) socially constructed nature<sup>56</sup> and the overlap with the notion of a "psychological contract" which is commonly discussed in relation to employers and employees.<sup>57</sup> Thus, even at the point where emotion has not been explicitly incorporated into relational theory, it provides a number of valuable lines of argument which support the idea that emotion can and should be incorporated into contractual theory.

### **Relational theory's impact on the framing of contract law**

Relational theory opens up and challenges traditional contract law theory, demonstrated by its emphasis on "contextualisation" and the "implicit dimension" of contractual transactions, outside the confinement of the contractual document.<sup>58</sup> Moreover, this critique is also evident when relational theory is applied to the business-to-business contracts that so often appear frozen within the classical paradigm.<sup>59</sup> However, it is not obvious exactly what impact relational theory should

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<sup>56</sup> James R. Averill "A Constructivist View of Emotions" in *Theories of Emotion*, Ed. Robert Plutchik and Henry Kellerman (New York, Academic Press, 1980).

<sup>57</sup> For a useful summary, see Mark V. Roehling "The origins and early development of the psychological contract construct", *Journal of Management History* 3(2) (1997) 204.

<sup>58</sup> Shida Galletti "Contract interpretation and relational contract theory: a comparison between common law and civil law approaches" *The Comparative and International Law Journal of Southern Africa* 47(2) (2014) 248, 248.

<sup>59</sup> Catherine Mitchell *Contract Law and Contract Practice – Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Oxford, Hart Publishing, 2013).

and could have on the framing of contract law. Tan identifies a school of relational theory that minimizes law's role in contractual transactions to allow for a broader acknowledgment of the practical realities of contractual relations. Another school (represented by MacNeil) seeks to integrate relational norms into a legal framework by which to resolve contractual disputes in court.<sup>60</sup>

Tan identifies three different potential frameworks for this type of integration of relational theory into the courts' decision-making processes, from a "re-interpretive relationalism" which focuses in shifts in normative meaning with little visible doctrinal reform, to "re-orientative relationalism" requiring more visible alterations within the existing documents, through to the more radical "reconstructive relationalism" which would involve a wholesale review and possible re-ordering of the principles of contract law.<sup>61</sup> The first of these could involve a shift or broadening in the meaning of specific contractual terminology, for example, by widening the scope for contractual damages to be awarded for emotional distress, building on the well-worn line of holiday claims where damages have been awarded for stress and inconvenience provided the purpose of the contract is shown to be one of enjoyment (as in the purchase of a package tour).<sup>62</sup> The notion of "re-orientative relationalism" could include a focus on more easily perceptible shifts within the wider existing framework. For example, Keren (in the U.S. context) proposes a rule of "conscious enforcement" to acknowledge the value of promises motivated by affect and allow for legally binding donative promises (which are currently unenforceable for lack of

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<sup>60</sup> Tan n 56.

<sup>61</sup> Tan n 56, 9.

<sup>62</sup> In *Jarvis v Swans Tours Ltd* [1973] Q.B. 233 it was held that the claimant could recover for "mental distress" in a contract to provide "entertainment and enjoyment".

consideration).<sup>63</sup> A wholesale review and re-ordering could involve taking a fundamental contractual concept, such as reliance (referred to in relation to neo-classical theory above), and re-examining its theoretical and practical basis. For example, could and should a reliance-based duty arise as a result of an emotional reliance by a party?<sup>64</sup> This could arguably form a different basis for the undue influence in decision in *Barclay Bank Plc*, moving it away from a reliance on rational choice theory. Another example of its possible impact could be found in the economic duress case of *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714 which considered the difficulty of drawing a line between proper and improper threats to undertake a lawful act (removing the claimant's credit facilities unless a dispute was settled in the defendant's favour). In this instance, the Court of Appeal found the threat to be a proper one, as the defendant genuinely believed the settlement was due to them. However, re-interpreting this on the basis of reliance could lead to a broader conception of improper threats, taking into account the fear, distress and even humiliation possibly caused to the claimant.

### **Conscious contracts**

A recent iteration of relational theory can be found in the notion of conscious contracts. This concept has evolved from what is generally known as the comprehensive<sup>65</sup> or integrative law movement<sup>66</sup> which views law as a "healing profession".<sup>67</sup> Explicitly relational in purpose, conscious contracting involves creating

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<sup>63</sup> Keren n 4.

<sup>64</sup> For a discussion on reliance generally, see Stephen A. Smith *Contract Theory* (Oxford and New York, Oxford University Press, 2004).

<sup>65</sup> Susan Daicoff 'Law as a Healing Profession: The "Comprehensive Law Movement"' *Pepperdine Dispute Resolution Law Journal* 6(1) (2005) 1.

<sup>66</sup> J. Kim Wright *Lawyers as Changemakers* (ABA, Chicago, 2016).

<sup>67</sup> Daicoff n 68.

a framework for contracting based upon the vision and principles of the parties involved, be they individuals or businesses.<sup>68</sup> For example, at the start of a contractual relationship the parties may:

... Start the process with a conversation about their purposes, values, principles, plus their hopes and dreams for the relationship. The values conversations are memorialized in the contract because they are important to the creation of the relationship. They don't just cover Who, What, How, and When, but also Why?<sup>69</sup>

The practical consequence of this approach to contracts is that the parties can develop a framework for their transactions which is unique to them and which incorporates their vision for the relationship. They can therefore maximise their sense of autonomy and self-governance whilst at the same time retaining the support of the wider legal framework for contract law. This shared understanding should facilitate a cooperative contractual relationship, whilst the explicit discussion of goals and motivations means that issues can potentially be resolved using a wider range of solutions than the traditional contractual remedies prescribed by law and thus avoiding the emotionally-avoidant model of financial compensation referred to above.<sup>70</sup> The parties could agree an individualised dispute resolution mechanism designed to preserve the relational aspects of their agreement and consider

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<sup>68</sup> Linda Alvaraz *Discovering Agreement: Contracts That Turn Conflict Into Creativity* (ABA, Chicago, 2016).

<sup>69</sup> J. Kim Wright "Conscious Contracts: Bringing Purpose and Values into Legal Documents" <https://jkimwright.com/conscious-contracts-bringing-purpose-and-values-into-legal-documents/> (accessed 13<sup>th</sup> January 2019).

<sup>70</sup> Alvarez n 68; Posner n.26.

remedies based on preferences driven by specific emotions and values (say pride in their reputation or fear of financial losses) or even design clauses with the intention of evoking empathy or guilt as drivers for compliance with the contractual terms.<sup>71</sup>

As is often the case in relational contracts, the focus here is on values, rather than emotion. However, the notion of a holistic approach to contract formation which emphasises the broader relationship between the parties certainly implies an emotional element in a way that traditional “arm’s length” transactions do not. For example, the motivations and goals of the parties will have an emotional component which will thus be built into the contracting process and perhaps even the contract itself. An example of this could be clauses that highlight and protect specific aspects of a transaction in which a party has an emotional investment (such as pride or joy) . Seen as the mutual, collaborative pursuit of a goal, contracting seems to inevitably involve an emotional element, and engender emotional reactions, too.<sup>72</sup>

The scarcity of academic work on the concept of conscious contracting suggests that it is at a relatively early stage of development, although it does have valuable antecedents to draw upon, such as partnering within construction contracts (a form of contractual relationship based on a team approach to building projects which emphasises collaboration and shared values).<sup>73</sup> However, as it becomes more commonly used, it certainly offers new lines of inquiry for those seeking to integrate emotion into the sphere of contract law.

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<sup>71</sup> Hila Keren “Guilt-Free Markets? Unconscionability, Conscience and Emotions” *Brigham Young University Law Review* 2016(2) (2016) 427.

<sup>72</sup> See, for example, Agnes Moors and Maja Fischer “Demystifying the role of emotion in behaviour: toward a goal-directed account” *Cognition and Emotion*, 33(1) (2019) 94.

<sup>73</sup> Sai-On Cheung, Thomas S.T. Ng, Shek-Pui Wong, Henry C.H. Suen “Behavioral Aspects in Construction Partnering” *International Journal of Project Management* 21(5) (2003) 333.

## **Contract law in practice**

What relational contract theory and the concept of conscious contracts have done (as, to a lesser extent, neoclassical theory did previously) is to acknowledge the difference between the theory of contract law and the reality of transactions.<sup>74</sup> Effectively, these approaches seek to integrate the practical with the theoretical, either by creating a private framework through which the parties can construct their contractual relationship (as with conscious contracts) or through seeking to mould existing law to acknowledge a broader, evidence-based conceptualisation of rationality (as with Hadfield's analysis of *Barclays Bank Plc*).<sup>75</sup>

This then leads to the question of whether and to what extent emotion is involved in contract law in practice. The discussion above has already referred to this question on a theoretical level by emphasising that emotion forms a part of reason and rationality. It has also posited, as a consequence of the notion that rationality and emotion are inseparable, that individual parties will have emotional responses during the formation of the contract. However, to explore this further it is necessary to consider the empirical evidence relating to the emotional aspects of contract law.

## **The emotional practice of contract law**

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<sup>74</sup> Macaulay n 44.

<sup>75</sup> Hadfield n 24, 1245; Kathryn Abrams and Hila Keren "Who's Afraid of Law and the Emotions?" *Minnesota Law Review* 94(6) (2010)1997, 2003-2004.

To date the most detailed empirical examinations of emotion in legal practice have focused on those areas of law which contain the most clearly affective elements, notably criminal and family law.<sup>76</sup> In the U. K., this author recently undertook (with the aid of a research assistant) a series of semi-structured interviews with twenty solicitors<sup>77</sup> in England and Wales who specialised in areas of private law practice, including corporate, commercial, and employment law. These participants were identified using a stratified purposive sampling technique based on data freely available from the Law Society of England and Wales' "Find a Solicitor" service,<sup>78</sup> with the aim of obtaining participants with a range of post-qualification experience in a variety of different-sized firms. A thematic analysis (an inductive approach identifying key themes arising from the data)<sup>79</sup> identified that the participants viewed emotion as relevant to their work, even when that work was heavily commercial and transactional, hence the title quote: "You don't pay £100,000 to a lawyer unless you care about something" (Litigation Solicitor 1, 5-10 years PQE). Other references to emotional responses in these legal practice areas included references to clients in commercial litigation being unhappy or angry with their case prognosis, failing to understand legal processes, and "banging their head against the table" (Litigation Solicitor 2, 5-10 years PQE). Although participants acknowledged that these legal practice areas did not always involve raw emotions as family law might, it was clear that the involvement of commercial and business interests did not automatically remove emotion:

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<sup>76</sup> See, for example, Angela Melville and Karen Laing (2007) "I just drifted into it': constraints faced by publicly funded family lawyers" *International Journal of the Legal Profession* 14(3) (2007) 281.

<sup>77</sup> In the UK-context, the role of a "lawyer" is divided into two professions – solicitors and barristers.

<sup>78</sup> <http://solicitors.lawsociety.org.uk/>.

<sup>79</sup> V. Braun and V. Clarke "Using thematic analysis in psychology" *Qualitative Research in Psychology* 3(2) (2006) 77.

I have found that clients engaged in commercial litigation also tend to get very... are deeply involved in it on a personal level, that they don't just see it as something that, you know, their company is doing and they can stand back from. Often we're dealing with the owners of the company and they, yes, are, are heavily involved at all levels (Litigation Solicitor 3, 20-30 years PQE)

There is clearly much more empirical work needed to explore how parties' emotional involvement plays out in the contractual arena. However, there are also further bodies of literature which add credence to the idea that emotion has a role to play within the realities of contracting. For example, Fenton O'Creevy et al's (2011) qualitative study of traders within four investment banks in the City of London found that emotion played a "central role" even within an environment strongly associated with traditional concepts of rationality.<sup>80</sup> Based on their findings, the authors argue for:

... the value of a more nuanced understanding which considers the role of emotions in decision making, the differential impact of various emotion regulation strategies, the conditions under which "gut-feel" support effective decision making and the role of empathic responses in understanding the behavior of other actors.<sup>81</sup>

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<sup>80</sup> Mark Fenton-O'Creevy, Emma Soane, Nigel Nicholson and Paul Willman "Thinking, feeling and deciding: The influence of emotions on the decision making and performance of traders" *Journal of Organizational Behavior* 32(8) (2011) 1044, 1056.

<sup>81</sup> Fenton O'Creevy et al n 63, 1056.

There is a clear resonance here for contract law, particularly in commercial and business transactions, again illustrating the need to explicitly acknowledge and explore the role of emotion to ensure that contracting parties and contract practitioners can understand and identify such influences appropriately.<sup>82</sup> The results of this could be personal, including those involved in contracting becoming more aware of how to proactively regulate their own emotions within transactions and disputes and use their intuitive thinking processes more effectively, avoiding potential biases and erroneous decision-making. In wider terms, it could also lead to the construction of contracts which better encapsulate the relationship and values of the parties, providing a framework for constructive and on-going relationships.

### **The consequences of emotion in contract law**

Acknowledging the inter-relationship between emotion and contract law allows practitioners, academics, and educators to explore how emotion does, can and should shape and influence contract law and contractual transactions, not to mention the development and resolution of contractual disputes. That is not to say that such an acknowledgment is likely to prove wholly positive. As Tan indicates with regard to relational theory, taking the time to understand the potential impact of a new framework “is not to say that all of these potential ramifications should be indiscriminatingly welcomed”.<sup>83</sup>

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<sup>82</sup> Further supporting vidence can also be obtained from the field of dispute resolution, for example in relation to mediation see James Duffy “Empathy, Neutrality and Emotional Intelligence: A Balancing Act for the Emotional Einstein” *QUT Law & Justice Journal* 10(1) (2010) 44.

<sup>83</sup> Tan n 58, 19.

In the case of emotion and contract law, there are likely to be objections and consequences to be dealt with at two overlapping levels. First, there will be concerns raised specifically in relation to contract law, whether theoretical or practical. For example, Beale asserts that a relational focus may jeopardize contract enforcement:

... I hesitate to say that English courts should always start with a broad enquiry into the nature of the relationship and the commercial expectations of the parties, rather than with the documents. We might achieve greater accuracy but at the possible cost of making it harder to enforce agreements even when the terms of the agreement appear clear on the documents.<sup>84</sup>

Similar concerns could be raised over the balance to be struck when considering emotion. One can debate whether an objective “reasonable person” standard can and should be used when assessing emotion, how doctrines such as duress should be employed to measure emotion, and whether emotion should play a role in considering undue influence, good faith and the many other issues that contracts bring into play.

At the same time, there are also more general questions raised by law and emotion scholarship to be navigated in this new arena. For example, Sanger has discussed the danger that emotion becomes inauthentic in legal settings. Her

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<sup>84</sup> Hugh Beale “Bridging the Gap: A Relational Approach to Contract Theory” *Journal of Law and Society* 41(4) (2014) 641, 649.

argument is that, where an emotion begins to be required by law, the danger is it will lose the very authenticity which made it worthy of note in the first place. This may particularly be the case where its inclusion has been “well advertised” and it therefore becomes scripted.<sup>85</sup> Whilst Sanger is referring to victim impact statements (in the U. S. context), versions of this argument could easily apply within the civil law should emotion become explicitly included in contractual doctrines. For example, if damages were to be more widely awarded for emotional distress, it can be imagined that claimants (or their representatives) would seek as a matter of course to include standard wording to portray any contractual breach as causing worry, anxiety and upset.

## **Conclusion**

Overall, this chapter is not arguing for a specific way to recognize emotion, or for a particular theoretical or practical conceptualisation. Instead, it has sought to problematize how emotion is often at best disregarded, and at worst ignored or regarded as an obstacle within contract law. At a theoretical level, the concepts of rationality prized within classical and neoclassical theory can be challenged as incomplete because they do not acknowledge emotion. Whilst relational contract theory has shifted discussion towards a recognition of the implicit and the unwritten factors influencing contract law, particularly in relation to values and social norms, emotion has not been explicitly investigated. On a practical level, evidence can demonstrate that the parties to a contract, even in a business-to-business transaction, will have emotional input and involvement which should be understood

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<sup>85</sup> Carol Sanger “The Role and Reality of Emotions in Law”, *William & Mary Journal of Women and the Law* 8(1) (2001) 107, 110.

and explored. If contracts are ubiquitous in everyday and commercial life, emotion is all-pervasive within all spheres of human existence. Therefore, to assume the two run separately and parallel without further investigation is to ignore and devalue a rich area for scholarship and debate.

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