

## INSTRUCTIONS

Ellie's parents are seeking your help as a young legal professional to advise them on the legal issue that arises from their daughter's case. In view of giving the parents the best legal advice, you set up a meeting with some of your colleagues to discuss your findings and make sure you have not missed anything of relevance.

In preparation for this meeting, you should structure your findings in the following way:

- *First*, you should address the issue you are focusing on.
- *Second*, you should explain the rules that apply to the case at hand – in other words, read the relevant provisions on the basis of which you are going to make your arguments.
- *Third*, you should explain how the rules apply to the case. This is the part where you are meant to develop your arguments and counterarguments based on the facts of the case.
- *Fourth*, you should conclude on the basis of your arguments what the legal consequence is.

→ you can find more information about this in the “Guidance” section below.

In the Guidance section you will find a compilation of information that will help in understanding the legal issues that arise from the task you have been given. A key skill that you develop as a law student is to sift through the relevant information to help you understand the subject matter and to identify useful arguments on which you can build your line of argumentation.

On **Thursday 2<sup>th</sup> December**, you will have an online meeting with your colleagues. The meeting will last approximately 45min where you will have the opportunity to present your findings according to Dutch and German law. Following the presentations of the findings, there will be some time for debate and to discuss the case study with the rest of your colleagues present at the meeting.

## GUIDANCE

### A. An Introduction to Approaching Legal Problems

A suggested approach for analysing hypothetical case studies and preparing for group discussions during the tutorial meetings is to use the **'IRAC' method**. IRAC is a basic tool that will help you to organize your legal analysis and reasoning in a structured and logical way. Although IRAC is a useful starting point, you should note that it is not the only way to organize your legal analysis. As you gain experience during your studies in the European Law School, you will be able to modify the basic IRAC structure to fit the particular legal problem you are dealing with.

**IRAC** stands for **I**ssue, **R**ule, **A**nalysis, **C**onclusion. The IRAC structure assists you to develop a reasoning process to support your legal conclusion.

<b>I</b>	Identify the legal <b>issue</b>	The first part of your analysis is to identify the issue that is to be discussed. What is the legal problem that must be solved? The legal issue is drawn from the relevant facts of the particular factual situation.
<b>R</b>	Identify and explain the relevant legal <b>rule(s)</b>	The next step is to identify and analyse the legal rule(s) that govern the issue to be addressed. It requires more than just identifying which rule or rules apply. You will also need to look at the separate elements or components of the rule(s) and for instance explain what requirements need to be met for the rule to apply, whether there are any exceptions to the rule and under what circumstances the exception applies.
<b>A</b>	<b>Analyse</b> and apply the law to the facts of the case, including potential counterarguments	In this section, you should apply the legal rule to the facts of the case study. You should test the various elements of the rule against the particular facts of the case study, explaining how the element of the rule is, or is not, satisfied in the specific case. You should also address any counterarguments. The analysis part is the core of legal reasoning: this is where lawyers demonstrate their skill at making an argument.
<b>C</b>	<b>Conclude</b> by providing a reasoned answer to the legal issue	After the analysis section in which you applied the rule to the facts, you should state your conclusion on the issue. What is the answer to the issue raised by the factual situation?



#### TIPS!

For the case study, you will find the relevant legal issue already formulated in your instructions. Below you will also find a list of links to international treaties and documents, and cases that contain useful information that address the issue raised. You will also find some additional resources that will help put these provisions in context and to identify different sides of an argument.

## B. PREPARATION

### I. Literature

Below you will find an excerpt from chapter 5 of the textbook “Contract Law” by Jan M. Smits with valuable information on the case study’s legal issue.

## Legal capacity of the parties

A party can only be bound to a contract if it has expressed its (apparent) intention to enter into a legal relationship with somebody else. This assumes that people have control over what they intend and are able to assess what is in their best interest. If someone buys a house, opens a restaurant or decides to participate in the local Beauty Queen election, everyone will assume that these are rational decisions taken by people having full cognitive ability. Luckily the great majority of people indeed have this so-called *legal capacity* (the ability of a natural person to enter into a valid legal transaction), but this is not true for everyone. In the eye of the law some people lack the necessary understanding, judgement or experience to enter into juridical acts, including the ability to bind themselves by contract. Two categories of people qualify for this: certain minors (in particular young children) and people with mental disorders. If these persons conclude a contract with somebody else, most jurisdictions allow the legal representative of the incapacitated person (such as a parent in case of a child) to have this contract invalidated.

It is important to realise which conflicting interests are at stake here. Legal incapacity (*incapacité de contracter*, *Geschäftsunfähigkeit*, *handelingsonbekwaamheid*) is an instrument to protect parties who are presumed not to be able to take care of their own interests. It could cause a psychiatric patient, unable to oversee the consequences of his actions, great trouble if he were able to validly buy anything being offered for sale. And a nine-year old would have a bad start in life if its parents were not able to invalidate the €25,000 online loan it obtained from BNP Paribas. But this interest to receive legal protection may conflict with two other interests.

### Protection

First, it would be odd if *all* transactions of a minor or a mentally ill person could be invalidated. Nothing seems to be wrong with a 15-year old buying a copy of Richard Dawkins’ book *The God Delusion*, which is clearly in the interest of the child’s upbringing. This argument is even more acute for adults: to declare them incapable means that they are no longer allowed to be responsible for their own acts, presenting a grave violation of their right to determine which life they want to lead.

### Policy reasons

Second, the law has to balance the interests of the incapacitated person with those with whom they deal. In particular in the case of mentally ill persons, it is not always apparent to the outside world that a party is not capable of making a rational decision. If Mac, on his weekly trip to the town close to the mental institution in which he lives, buys a new car, it may not be clear to the local Mercedes dealer that he is dealing with a patient suffering from a psychiatric disorder. The question then is whether the dealer's reliance that Mac was perfectly able to form his own will should prevail over the need to protect Mac against himself. As we saw before, the law tends to protect the objective reliance of a party: should this reliance be made subordinate to the protection of the mentally weak?

Each jurisdiction balances these interests in its own way, but the starting point is the same everywhere: every natural person has the legal capacity to perform legal transactions. Article 1145 of the French *Code Civil*, a provision practically unchanged since 1804, well reflects this universal principle by saying: 'Any person may enter into a contract, unless he has been declared incapable of it by law.' It is also generally accepted that the two categories of persons mentioned before may lack legal capacity for their incapability of rational decision-making. But the extent to which minors and adults in need of protection are indeed unable to enter into valid transactions differs from one country to another. This chapter looks at these different approaches.

### **Minors**

All European jurisdictions set the age of legal capacity at 18. But this does not mean that a transaction entered into by someone below that age is necessarily invalid. Although in principle the contract of a minor is not binding upon him (meaning that the adult other party cannot claim enforcement), each jurisdiction allows exceptions to this rule.

German law puts emphasis on the consent of the parents as a necessary requirement for a valid contract. In addition, it distinguishes between two different age categories. These are the relevant provisions of the German BGB:

§ 104: 'A person is incapable of contracting if:

1. he is not yet seven years old,
2. he is in a state of pathological mental disturbance, which prevents the free exercise of will, unless the state by its nature is a temporary one.'

§ 105: '(1) The declaration of intent of a person incapable of contracting is void.

(2) Also void is a declaration of intent that is made in a state of unconsciousness or temporary mental disturbance.'

§ 106: ‘A minor (Minderjähriger) who has reached the age of seven has limited capacity to contract under §§ 107 to 113.’

§ 107: ‘For a declaration of intent as a result of which he does not receive only a legal benefit, a minor requires the consent (Einwilligung) of his legal representative.’

§ 108 (1): ‘If the minor enters into a contract without the necessary consent of the legal representative, the effectiveness of the contract is subject to the ratification (Genehmigung) by the legal representative.’

§ 110: ‘A contract entered into by the minor without the approval of the legal representative is deemed effective from the beginning if the minor effects performance under the contract with means that were given to him for this purpose or for free disposal by the legal representative, or by a third party with the ratification of the representative.’

§ 113(1): ‘If the legal representative authorises the minor to enter service or employment, the minor has unlimited capacity to enter into juridical acts that relate to entering or leaving service or employment of the permitted nature or performing the duties arising from such a relationship. (...)’

#### German law

The German code here distinguishes between minors below seven years old (§ 104 (1)), who are deemed wholly incapable of making rational decisions (§ 105 (1)), and minors from the age of seven to the age of 18 who still have some possibilities to enter into a valid contract by themselves (§ 106–113). But these possibilities are limited. The first is mentioned, somewhat hidden in § 107: if the minor obtains ‘only a legal benefit’ from the contract it is valid without consent of a parent. However, German law applies this exception in a very strict way: the minor must not incur any obligation. This severely limits the scope of application of the provision. Even if a plot of land is donated to a minor, German courts tend to hold that this is a void contract because obligations will follow from this (such as the duty to pay property tax). The second possibility is provided by § 110. A contract entered into thanks to the money that a minor has received from a parent for a specific purpose or for free disposal (for example weekly pocket money, or money to buy a return ticket to Lloret de Mar) is also valid.

This means that German law puts much emphasis on the consent of a parent or other legal representative. Without this consent, either given before (Einwilligung: § 107) or after (Genehmigung: § 108), the transaction can be invalidated.

Article 1:234 of the Dutch Civil Code states:

1. In so far as the law does not provide otherwise, minors have the legal capacity to perform juridical acts, provided they are acting with the consent of their legal representative.
2. Consent may be granted only permission for a specific juridical act or for a specific purpose.
3. Consent is presumed to have been granted to a minor if it relates to a juridical act of which it is generally accepted practice that it is performed independently by minors of his age.

### Dutch law

On the one hand, Dutch law adopts the German approach that a minor needs parental consent in order to perform a valid juridical act. It even goes further than German law by requiring consent under all circumstances (sections 1 and 2). On the other hand, consent is presumed to have been granted (a presumption that cannot be rebutted by the parents) if a minor performs a juridical act ‘of which it is generally accepted practice that it is performed independently by minors of his age’. This is reminiscent of the French-English approach because the potential benefits of the juridical act will be an important factor in assessing what the societal norms (‘accepted practice’) bring with them. The innovative aspect of the Dutch approach is that the Code explicitly allows for taking into account what is customary for minors of the same age as the minor who performed the juridical act. One can very well argue that a six-year old who buys the latest issue of Donald Duck at a nearby store is presumed to have been granted consent by his parents. This is because it is generally accepted in Dutch society that children of this age can buy a €2 comic book. There is even less doubt in case a 15-year old buys books to be used at school or clothing at H&M. But the younger the child, the bigger the financial burden, and the less the contract facilitates necessities, the less likely it is that societal norms allow a minor to act independently. A 17-year old living 20 km from school buying a second-hand scooter is different from a 15-year old ordering a road bike to be handmade by Pegoretti.

### Adults in need of protection

#### A. Legally incapacitated adults

In several countries, including the Netherlands, the second category of people lacking legal capacity are adults in need of protection. They usually suffer from a mental disability (either because of a psychiatric illness or because of a mental handicap) and are therefore formally declared incapable of entering into valid legal transactions. This so-called *curatelle* (*curatele*,

sometimes translated as *wardship*) is clearly a far-reaching measure: although there may be a need to protect the vulnerable against exploitation by malicious others, it does prevent full participation in legal life and is thereby a grave intrusion on someone's personal autonomy. This explains why the decision to declare someone incapable (Art. 1:378 BW) can only be taken by an independent court and must meet strict requirements in order not to violate the right to respect for private and family life as protected by Art. 8 of the European Convention on Human Rights (ECHR). In civil law jurisdictions the court will also appoint a legal representative who is able to perform juridical acts for the protected person (*curateur, curator*).

### *Curatelle*

The severe consequences of legal incapacity of adults have led several countries to develop less intrusive regimes to protect the vulnerable. German law does so by way of *Betreuung* (§ 1896 BGB), meaning that a custodian (*Betreuer*) is appointed by the court to take care of the affairs of the person in so far as this is necessary. The court can decide that a person can validly perform certain types of juridical acts with the consent of the custodian (the so-called *Einwilligungsvorbehalt*, reservation of consent). But if the person binds himself to a transaction that only confers a legal advantage or concerns a trivial matter, he is bound anyway. § 1903 BGB states to this effect:

- (1) To the extent that this is necessary to prevent a substantial danger for the person or the property of the person under custodianship, the custodianship court orders that the person under custodianship requires the consent of the custodian for a declaration of intention that relates to the group of tasks of the custodian (reservation of consent). (...)
- (3) Where a reservation of consent is ordered, the person under custodianship nevertheless does not require the consent of his custodian if the declaration of intention merely confers a legal advantage on the person under custodianship. To the extent that the court does not order otherwise, this also applies if the declaration of intention relates to a trivial matter of everyday life.

### *Betreuung*

Legal incapacity of an adult in the Netherlands and custodianship in Germany in principle lead to the same result as incapacity of a minor: the contract entered into can be avoided (set aside) by the legal representative or is even regarded as void. There are certain exceptions to this rule in cases where the transaction is beneficial to the adult or concerns contracts of daily life (as we just saw with § 1903 BGB; see also Art. 1:381 (3) BW), but usually the other party is bound: the rationale behind the protection of an incapacitated person means that only he can avoid the contract. The argument of the other party that it had no reason to doubt its counterpart's age ('he had a beard and drove a car') or medical condition ('she looked as healthy as Sophie Dahl') plays no role. In case of legal incapacity, the law sacrifices legal certainty and the objective approach in order to protect people not able to exercise their free will. The shop owner who is close to selling a BeoSound 5 audio system to a young looking customer can always ask for an ID. Court decisions incapacitating adults are usually published in a national public register that in some countries is even available online for a quick and easy check.

## B. Other adults

Contracts can obviously also be concluded by people who are not formally declared incapable or in need of a custodian by a court decision, but who do suffer from some mental disorder. In particular if this disorder is only of a temporary nature (depression) or not yet diagnosed (Alzheimer), it is not likely that the patient is formally incapacitated. In addition, people can also be prevented from making a rational decision as a result of a psychosis or blackout, using too much alcohol or drugs, or simply by being stressed or tired. An important question is whether they deserve the same protection as their legally incapacitated partners in misfortune discussed in section A above. A positive answer is clearly not as self-evident as in case of formal legal capacity: in the cases dealt with here, the other party is not able to check a public register. This implies that the interest of the other party relying 'in good faith' on the valid formation of a contract and the interest of the disordered person in need of protection may have to be weighed in a different way.

### *Interests*

The German solution is clearly stated in § 105 (2) BGB: 'Also void is a declaration of intent that is made in a state of unconsciousness or temporary mental disturbance.' The text implies that any reliance of the other party is not relevant: German law protects any person who suffers from a disorder against the other party even if they have no reason to doubt that person's mental abilities. But there is a strict requirement, developed in case law, that the disorder must be so serious that it fully negates the ability to form one's will. Court practice is that the adult, who has to prove that his will was affected by a mental disorder, will provide the judge with expert opinions on his state of mind at the time of contracting. If the person of unsound mind can indeed prove he was prevented from rational decision-making, he can choose whether or not to keep the contract in place. But there is a similar exception as in cases of *Betreuung*, making an everyday transaction perfectly valid:

§ 105a BGB: 'If a person of full age incapable of contracting enters into an everyday transaction that can be effected with funds of low value, the contract he enters into is regarded as effective with regard to performance and, if agreed, counter performance, as soon as performance has been effected and counter performance rendered. Sentence 1 above does not apply in the case of considerable danger to the person or the property of the person incapable of contracting.'

### *Germany*

This generosity on the other party 'in good faith' in case of a not formally incapacitated person can also be found in Dutch law. On the one hand, the Dutch legislator has made it easy on a person of unsound mind to prove that he did not intend to be bound. To this end, Art. 3:34 of the Dutch Civil Code states that in cases where the juridical act is disadvantageous for the mentally disturbed person, he is presumed to have acted under the influence of the mental



disturbance. On the other hand, the other party can always invoke his reasonable reliance on basis of Art. 3:35 BW. If A feels haunted by demons that tell him to sell his mansion as soon as possible and B accepts A's offer to buy the house for €300,000, A cannot invalidate the contract if B did not know, nor had to know, about A's mental inability.

*Netherlands*

## II. Video

In order to deepen your understanding on legal capacity, you will find in the links below, videos by Dr. Kornet further developing the concepts introduced in the readings above. These videos should help you with the structure of your legal advice and your understanding of the functioning of the legal provisions.

### Links:

- [https://youtu.be/i6-grWN\\_Hno](https://youtu.be/i6-grWN_Hno)
- [https://youtu.be/Ub\\_QikODdUY](https://youtu.be/Ub_QikODdUY)
- <https://youtu.be/NdrHgnPIO9Q>

## C. LEGAL SOURCES

### I. Civil Code of Germany – Bürgerliches Gesetzbuch (BGB)

§2. Majority (Volljährigkeit) begins on the completion of the eighteenth year of age.

§ 104. A person is incapable of contracting if:

1. he is not yet seven years old,
2. he is in a state of pathological mental disturbance, which prevents the free exercise of will, unless the state by its nature is a temporary one.'

§ 105. (1) The declaration of intent of a person incapable of contracting is void.

(2) Also void is a declaration of intent that is made in a state of unconsciousness or temporary mental disturbance.

§ 105a. Where a person of full age incapable of contracting enters into an everyday transaction that can be effected with funds of low value, the contract he enters into is regarded as effective with regard to performance and, if agreed, counter performance, as soon as performance has been effected and counter performance rendered! Sentence 1 does not apply in the case of considerable danger to the person or the property of the person incapable of contracting.

§ 106. A minor (Minderjähriger) who has reached the age of seven has limited capacity to contract under §§ 107 to 113.

**§ 107.** For a declaration of intent as a result of which he does not receive only a legal benefit, a minor requires the consent (Einwilligung) of his legal representative.

**§ 108. (1)** If the minor concludes a contract without the necessary consent of the legal representative, the effectiveness of the contract is subject to the ratification [Genehmigung] of the legal representative.

**(2)** If the other party requests the representative give a declaration regarding his ratification, the declaration can only be made to the other party; a declaration or refusal of ratification made to the minor before the request is ineffective. The ratification can only be declared before the expiry of two weeks after receipt of the request; if it is not declared, it is held to have been refused.

**(3)** If the minor has attained full legal capacity, his ratification takes the place of the ratification of the representative.

**§ 109. (1)** Until the ratification of the contract, the other party is entitled to withdrawal (Widerruf). The withdrawal may also be made to the minor.

**(2)** If the other party knew of the minority, he may only withdraw if the minor contrary to the truth claimed the consent of the legal representative; he may not withdraw in this case either if, when the contract was concluded, he knew of the lack of consent.

**§ 110.** A contract concluded by the minor without the approval [Zustimmung] of the legal representative is held to be effective from the beginning if the minor effects performance under the contract with means that were given to him for this purpose or for free disposal by the legal representative or with his approval by a third party.

**§ 111.** A unilateral legal transaction undertaken by a minor without the necessary consent of the legal representative is ineffective. If the minor undertakes such a legal transaction with regard to another person with this consent, the legal transaction is ineffective if the minor does not present the consent in writing and the other person rejects the legal transaction for this reason without undue delay. Rejection is excluded if the representative had given the other person notice of the consent

*[§ 112 is omitted.]*

**§ 113. (1)** If the legal representative authorises the minor to enter service or employment, the minor has unlimited capacity to perform legal acts that relate to entering or leaving service or employment of the permitted nature or performing the duties arising from such a relationship. Contracts for which the representative requires the approval of the family court are excepted.

**(2)** The authorisation may be withdrawn or limited by the representative.

**(3)** Where the legal representative is a legal guardian [Vormund], the authorisation may, if he refuses it, be substituted by the family court upon request by the minor. The family court has the authority to substitute where this is in the interest of the minor under guardianship.

**(4)** In cases of doubt, the authorisation provided for an individual case is deemed a general authorisation to enter relationships of the same kind.

**§ 1896. (1)** If a person of full age, by reason of a mental illness or a physical, mental or psychological handicap, cannot in whole or in part take care of his affairs, the custodianship court, on his

application or of its own motion, appoints a custodian for him. The application may also be made by a person incapable of contracting. To the extent that the person of full age cannot take care of his affairs by reason of a physical handicap, the custodian may be appointed only on the application of the person of full age, unless the person is unable to make his will known.

**(1a)** A custodian may not be appointed against the free will of the person of full age.

**(2)** A custodian may be appointed only for groups of tasks in which the custodianship is necessary. The custodianship is not necessary to the extent that the affairs of a person of full age may be taken care of by an authorised person who is not one of the persons set out in & 1897 (3), or by other assistants for whom no legal representative is appointed, just as well as by a custodian.

**(3)** The assertion of rights of the person under custodianship vis-à-vis the person authorised by him may also be defined as a group of tasks.

**(4)** The decision on the telecommunications of the person under custodianship and on the receipt, opening and withholding of his post are included in the group of tasks of the custodian only if the court has expressly ordered this.

[188 1897-1902 are omitted.]

**§ 1903. (1)** To the extent that this is necessary to prevent a substantial danger for the person or the property of the person under custodianship, the custodianship court orders that the person under custodianship requires the consent of the custodian for a declaration of intent that relates to the group of tasks of the custodian (reservation of consent). §§ 108 - 113, 131 (2), and section 210 apply mutatis mutandis.

**(2)** A reservation of consent may not extend to

1. declarations of intent directed towards the entering into a marriage or life partnership,
2. dispositions upon death,
3. the contestation of a contract of inheritance,
4. the rescission of a contract of inheritance by contract, and
5. to declarations of intent for which a person of limited legal capacity does not require the consent of his legal representative pursuant to books 4 and 5.

**(3)** Where a reservation of consent is ordered, the custodian nevertheless does not require the consent of his custodian if the declaration of intent merely confers a legal advantage on the person under custodianship. To the extent that the court does not order otherwise, this also applies if the declaration of intent relates to a trivial matter of everyday life.

**(4)** §1901 (5) applies mutatis mutandis.

## II. Civil Code of the Netherlands – Burgerlijk Wetboek (BW)

**Article 1:233.** Minors are those persons who have not yet reached the age of eighteen, or been declared of age through application of Article 253ha.

**Article 1:234. (1)** A minor is, as far as he acts with the approval of his legal representative, capable of performing legal acts, unless statute provides otherwise.

**(2)** Approval can only be given for a specific legal act or specific purpose.

**(3)** Approval is deemed to have been given to the minor where it concerns a legal act of which it is generally accepted practice that minors of his age perform it independently.

**Article 1:378. (1)** An adult may be placed under guardianship by the local court [kantonrechter] if he temporarily or permanently fails to look after his own interests properly or if he endangers his own security or that of others as a result of

a. his physical or mental state, or

b. habitual abuse of alcohol or drugs,

and an appropriate safeguard for these interests cannot be achieved by means of a less far-reaching measure.

**(2)** Where it is to be expected that, with regard to a minor, one of the grounds for guardianship referred to in the previous paragraph shall exist at the moment he becomes an adult, the guardianship may already be ordered prior to adulthood.

**(3)** The court before which a request to grant a provisional or conditional authorisation, an authorisation for medical observation, an authorisation for continued abode within the meaning of the Special Receptions in Psychiatric Hospitals Act [Wet bijzondere opnemingen in psychiatrische ziekenhuizen], or an authorisation within the meaning of article 33 (1) of that Act is pending is also competent to hear a request for placement under guardianship.

**Article 1:381. (3)** A person placed under guardianship is capable of performing legal acts with the approval of his guardian insofar as the latter is competent to perform these legal acts for the person placed under guardianship. Authorisation may only be given for a specific legal act or for a specific purpose. Authorisation for a specific purpose must be given in writing.

**Article 3:32. (1)** Every natural person is capable of performing legal acts, unless the law provides otherwise.

**(2)** A legal act by an incapable person is voidable. A unilateral act of an incapable person, that is not directed at one or more specific persons is however void.

**Article 3:33.** A legal act requires a will directed towards a legal effect which has been manifested by a declaration.

**Article 3:34. (1)** If someone whose mental capabilities have been permanently or temporarily disturbed, has declared something, a will corresponding to the declaration is deemed to be lacking, if the disturbance prevented a reasonable evaluation of the interests involved with the act, or if the declaration is made under the influence of the disturbance. A declaration is presumed to be made under the influence of the disturbance, if the legal act was disadvantageous for the mentally disturbed person, unless the disadvantage was not reasonably foreseeable at the time of the legal act.

**(2)** Such lack of will renders the legal act voidable. A unilateral legal act that was not directed at one or more specific persons becomes void for lack of will however.

**Article 3:35** Against he who has interpreted another's declaration or conduct, in accordance with the sense that he could reasonably have attributed to it in the given circumstances, as a declaration of a particular scope directed towards him by that other, the lack of a will corresponding to this declaration cannot be invoked.