CONTRACT LAW

Text, Cases, and Materials

SIXTH EDITION

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1

INTRODUCTION

1. THE AIMS OF THIS BOOK

This book has three principal aims. The first is to provide an exposition of the rules that make up the law of contract. To this end it seeks to describe and to analyse the central doctrines of the modern law of contract and to explore the principal controversies associated with these doctrines. It seeks to fulfil this aim through a combination of text, cases, and materials. The function of the text is both to explain and to evaluate the principal rules and doctrines of contract law and to provide a commentary on the leading cases and statutes. The cases chosen for inclusion in the book are the leading cases on the law of contract. I have chosen to rely on longer extracts from a smaller range of cases rather than try to include short extracts from every case that can claim to have made an important contribution to the development of the law of contract. The decision to restrict the number of cases was made for two reasons. First, it is important to allow the judges to speak for themselves. Too great a willingness on the part of an editor to use scissors and paste can create a misleading picture, particularly where the extract consists of the conclusions reached by the judge without setting out the reasoning that led him or her to that conclusion. Secondly, it is important that law students get used to reading cases. The ability to read judgments and to extract from them the principle that is to be applied to the facts of the case at hand is an important skill that lawyers must acquire. They will not acquire that skill if their legal education does not expose them to judgments and instead provides them with books that do all the editing for them. The 'materials' consist of statutes, statutory instruments, re-statements of contract law, extracts from textbooks, and academic articles. I have used the extracts from academic articles largely for the purpose of illustrating particular points or different interpretations of a case. It has not been possible, for reasons of space, to include lengthy extracts from major theoretical writings on the law of contract.

Secondly, the book aims to explore the law of contract in its transactional context. It is not confined to an analysis of the doctrines that make up the law of contract but extends to the terms that are to be found in modern commercial contracts and the principles that are applied by the courts when seeking to interpret these contracts. Many of the 'rules' that regulate modern contracts are to be found, not in the rules of law, but in the terms of the contract itself. The rules of law are often 'default' rules, that is to say they apply unless they have been excluded by the terms of the contract. Many modern commercial contracts do displace the rules that would otherwise be applicable, especially in the case of contracts concluded between substantial commercial entities. These are often substantial documents that make elaborate provision for various eventualities. It is therefore important to have regard to the standard terms that

are to be found in modern commercial contracts (often referred to as 'boilerplate clauses'). The book does not attempt to provide detailed guidance on the drafting of contract clauses. But nor does it ignore drafting issues. On a number of occasions I have included the text of the clause that was in issue between the parties for the purpose of trying to identify the issues that can and do confront lawyers in practice. This is particularly so in relation to the drafting of clauses such as exclusion clauses (see Chapter 13), force majeure clauses (see pp. 393–394, Chapter 12, Section 3(e)), entire agreement clauses (see pp. 398–399, Chapter 12, Section 3(j)), and liquidated damages clauses (see pp. 905–912, Chapter 23, Section 11). It is important to understand why it is that lawyers insert such clauses into their contracts and why, in the case of clauses such as exclusions and limitations of liability, they can be the subject of vigorous negotiation between the parties (or their lawyers).

The third aim is to explore English contract law from a transnational and comparative perspective. This is not a book on comparative contract law but it is no longer possible to ignore the fact that transactions in the modern world are frequently entered into on a cross-border basis. As the Lord Chancellor's Advisory Committee on Legal Education stated in its *First Report on Legal Education and Training* (HMSO, 1996) at para 1.13:

> Legal transactions are increasingly international in character. An understanding of the different ways that civilian lawyers approach common law problems can no longer be regarded as the preserve of a few specialists. Legal education in England and Wales must be both more European and more international.

It should not, however, be thought that the mere fact that the parties to the contract are from different jurisdictions has the inevitable consequence that their contract is regulated by rules that differ from those applicable to purely domestic transactions. The law affords to contracting parties considerable freedom to choose the law that is to govern their contract (see further pp. 394–395, Chapter 12, Section 3(i)) and they will generally select as the applicable law the law of a nation state (usually, but not always, the domestic law of one of the parties to the contract). In the 'choice of law' stakes English law has done remarkably well. The volume of international trade that has been done on contracts governed by English law is enormous. A glance at the law reports will tell you that some of the leading contract cases have been litigated between parties who had no connection with England other than the fact that their contract was governed by English law. The explanation for this undoubtedly lies in this country's great trading history, which has been of great profit to the City of London and to English law, if not to other parts of the United Kingdom. Some commodities markets have had their centres in England and many standard form commodity contracts are governed by English law. London has also been, and continues to be, a major centre for international arbitration. However, it can no longer be assumed that international contracts will continue to be governed exclusively by the laws of a nation state. Developments are taking place at a number of different levels.

In the first place there is the impact of our membership of the European Union. European law has had a significant impact on the law relating to certain particular types of contract (especially in the context of public procurement) but its impact on the general principles of contract law has, until recently, been relatively small. This is now in the process of change. The Unfair Terms in Consumer Contracts Regulations 1999, enacted in implementation of a European Directive on Unfair Terms in Consumer Contracts, are beginning to bite (see further Chapter 14). The Regulations have now been the subject of analysis by the House of Lords in *Director General of Fair Trading* v. *First National Bank* [2001] UKHL 52, [2002] 1 AC 481 (p. 476, Chapter 14, Section 3) and by the Supreme Court in *Office of Fair Trading* v. *Abbey*

National plc [2009] UKSC 6, [2010] 1 AC 696 (p. 465, Chapter 14, Section 3) and they have also been the catalyst for a re-examination by the Law Commissions of the Unfair Contract Terms Act 1977 (see pp. 417–441, Chapter 14, Section 5). More far-reaching measures may be on the horizon as a result of the proposal to create a Common European Sales Law to facilitate cross-border transactions within Europe and, more broadly, the production of the Draft Common Frame of Reference prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), which could in time form the basis for an attempt to bring about a greater degree of harmonization of European private law in general and European contract law in particular (see further p. 8, Section 4, and C von Bar, E Clive, and H Schulte-Nölke (eds), *Principles, Definitions and Model Rules of Private Law: Draft Common Frame of Reference* (Sellier, 2009)).

At the second level we have internationally agreed conventions such as the United Nations Convention on Contracts for the International Sale of Goods ('the Vienna Convention'). The Convention has been ratified by most of the major trading nations in the world but not by the United Kingdom. The Convention is obviously confined to international contracts for the sale of goods and so is not of general application throughout the law of contract. But it is nevertheless an extremely significant document and it has exercised, and will continue to exercise, considerable influence on the development of the law of contract in various jurisdictions around the world.

At a third level there have been attempts to draft statements of non-binding principles of contract law. There are two notable examples in this category. The first is the Unidroit Principles of International Commercial Contracts and the second is the Principles of European Contract Law. It is important to stress that neither of these documents is legally binding in the sense that it is intended to be ratified by States and incorporated into their law. Rather, in the short- to medium-term these Principles are intended for use by contracting parties and can be incorporated into their contract as a set of terms or, possibly, as the applicable law (at least in the case of arbitration). We shall encounter both sets of Principles at various points in this book.

This introduction is divided into five further parts. Section 2 explores the limits of the subject and in particular the fact that English law does not have a formal definition of a contract. The third section turns to consider some transactional elements of contract law. The fourth section moves on to consider in more detail some aspects of the creation of a European contract law, while the fifth section moves on to consider the possible development of an international contract law. The final section consists of a brief examination of some of the conflicting policies that can be seen at work in the law of contract.

2. THE SCOPE OF THE LAW OF CONTRACT

English law has no formal definition of a contract. In the absence of a Code it has not needed one. Textbook writers frequently commence their books with a definition of the law of contract but the definition is not part of the law itself. Such definitions are indicative or illustrative; they do not purport to be definitive or comprehensive. Two examples suffice to illustrate the point. First, the opening chapter of *Anson's Law of Contract* (29th edn, Oxford University Press, 2010, J Beatson, A Burrows, and J Cartwright (eds)), p. 1 states that:

> The law of contract may be provisionally described as that branch of the law which determines the circumstances in which a promise shall be legally binding on the person making it.

The tentative nature of this statement can be seen from the fact that it is expressly stated to be 'provisional' and it does not attempt to explain why it is that the law regards some promises as legally binding and others not. A second example is provided by *Treitel on The Law of Contract* (edited by Edwin Peel, 13th edn, Sweet & Maxwell, 2011), which begins with the following words:

> A contract is an agreement giving rise to obligations which are enforced or recognised by law. The factor which distinguishes contractual from other legal obligations is that they are based on the agreement of the contracting parties.

Treitel notes that, while this proposition 'remains generally true', it is subject to 'a number of important qualifications'. First, the law is 'often concerned with the objective appearance, rather than the actual fact, of agreement' (see further Chapter 2). Secondly, the proposition that contractual obligations are based on agreement must be qualified because 'contracting parties are normally expected to observe certain standards of behaviour' so that, for example, terms are implied into many contracts as a matter of law rather than as a product of the agreement of the parties (see further Chapter 10). Thirdly, the idea that contractual obligations are based on agreement must be qualified 'in relation to the scope of the principle of freedom of contract'. For example, the judges and Parliament have, in recent years, qualified the scope of the principle of freedom of contract in an attempt to protect the weaker party to a contract.

The lack of an agreed definition of a contract is a product of the way in which contract law in England has evolved. English contract law is unusual in that it did not develop from some underlying theory or conception of a contract but rather developed around a form of action known as the action of assumpsit. What mattered was the procedure, or the form of action, not the substance of the claim. With the abolition of the forms of action by the Common Law Procedure Act 1852, the grip of procedural considerations over substantive law began to decline. At about the same time the practice of writing treatises on the law of contract began to increase and the authors of these texts sought to rationalize the existing mass of case-law in principled terms. In so doing they relied heavily on the works of continental jurists (see generally AWB Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 *LQR* 247). The outcome of this process was a number of influential books, written most notably by Sir Frederick Pollock and Sir William Anson, which sought to set out the general principles of the law of contract. While these authors succeeded in establishing a series of general principles that commanded almost universal acceptance it was still not necessary to frame a precise definition of a contract.

While there is no universally agreed definition of a contract, the basic principles of the law of contract can be set out with a large degree of certainty. To conclude a contract the parties must reach agreement, the agreement must be supported by consideration and there must be an intention to create legal relations. The courts generally decide whether an agreement has been reached by looking for an offer made by one party to the other, which has been accepted by that other party: the acceptance, if it is to count, must be a mirror image of the offer (see Chapter 3). The rule that the agreement must be supported by consideration perhaps requires further explanation. The doctrine of consideration is a distinctive, if somewhat elusive, feature of English contract law (see further Chapter 5). The essence of consideration is that something must be given in return for a promise in order to render that promise enforceable. It does not matter how much has been given in return for the promise; that is a matter for the parties to decide. All that matters is that *something*

which the law recognizes as being of value has been given. Thus if I agree to sell my house for £1 that is an enforceable promise because it is supported by consideration. On the other hand a promise to give you my house for nothing is not enforceable, unless contained in a deed (on which see pp. 257–258, Chapter 6, Section 3). In essence therefore the law of contract does not enforce gratuitous promises, although it will occasionally provide protection for a party who has acted to his detriment upon a gratuitous promise via the doctrine of estoppel (see pp. 210–243, Chapter 5, Section 3). While the doctrine of consideration has excited considerable academic interest, it gives rise to few practical problems because it can be avoided either by the provision of nominal consideration or by including the promise in a deed (see further pp. 257–258, Chapter 6, Section 3). The requirement that there be an intention to create legal relations similarly gives rise to few practical problems. This is because there is a heavy presumption in a commercial context that the parties intended to create legal relations. The function of the doctrine is, essentially, to keep the law of contract out of domestic and social relations (see further Chapter 7).

The scope of the contract is generally limited to the parties to it, unless the contracting parties agree to confer a right to enforce a term of the contract on a third party and that agreement satisfies the requirements of the Contracts (Rights of Third Parties) Act 1999. The 1999 Act has made a significant change to the shape of English contract law in that, prior to its enactment, the general rule was that a third party could neither take the benefit of, nor be subject to a burden by, a contract to which he was not a party. This is the doctrine of privity of contract. The rule has been heavily modified in relation to the ability of contracting parties to confer rights of action upon third parties but the 1999 Act has not altered the general rule that a third party cannot be subjected to a burden by a contract to which he is not a party.

The law also polices the terms of contracts and the procedures by which a contract is concluded. Thus a contract may be set aside where it has been entered into under a fundamental mistake (Chapter 16), where it has been procured by a misrepresentation (Chapter 17), duress (Chapter 18), or undue influence (Chapter 19), where its object or method of performance is illegal or contrary to public policy (see the Online Resource Centre which supports this book) or where an event occurs after the making of the contract which renders performance impossible, illegal, or something radically different from that which was in the contemplation of the parties at the time of entry into the contract (Chapter 21). Assuming that a valid contract has been made, a failure to perform an obligation under the contract without a lawful excuse is a breach of contract (Chapter 22). A breach of contract gives to the innocent party a claim for damages, the aim of which is to put the innocent party in the position in which he would have been had the contract been performed according to its terms (Chapter 23). Where the breach is of an important term of the contract the innocent party may also be entitled to terminate further performance of the contract without incurring any liability for doing so (Chapter 22). But the law does not generally require the party in breach to perform his obligations under the contract: specific performance is an exceptional remedy, not the primary remedy (Chapter 24). The law is committed to give a money substitute for performance, not performance itself.

Two points should be noted about this outline. The first is that it purports to be of general application; that is to say the propositions outlined purport to be applicable to all contracts and not just to some. In this sense they claim to be of general application. This claim must not be taken too seriously. The reality today is that many contracts are the subject of specific regulation, so that the general principles of the law of contract are either excluded or are of limited significance. Thus employment contracts, contracts between landlords and tenants, contracts of marriage, and consumer credit contracts are the subject of distinct regulation. While this

regulation builds on the foundation laid by the general principles of the law of contract, the detailed rules applicable to these contracts depart from the general principles in significant respects. This book does not purport to deal with the law relating to specific contracts, such as contracts of employment. That must be left to specialist textbooks. The aim of this book is to provide a foundation for the study of the law of particular contracts by examining the principles that are applicable to all contracts, unless they have been excluded.

The second point to note about this outline is that it would generally be recognized by authors of contract textbooks in the late nineteenth century. The formal structure of the law has not changed a great deal. There is less emphasis on matters such as contractual capacity (discussed in more detail on the Online Resource Centre which supports this book) and requirements of form (Chapter 6) but Sir William Anson, who published the first edition of his book on contract law in 1879, would not have dissented a great deal from the outline given earlier (with, perhaps, the exception of the law relating to third party rights of action). A feature of the development of English contract law is that the pace of change has been slow: English law favours incremental rather than revolutionary change. The gradual nature of the change should not, however, be allowed to hide the extent of the changes that have taken place. Some, such as Professor Hugh Collins (see *The Law of Contract*, 4th edn, Butterworths, 2003)), have argued that the law of contract has undergone a transformation from the ideals of the classical law of contract set out by Anson and others. Any such transformation is not reflected in the formal doctrines of the law of contract. Freedom of contract and freedom from contract remain the underlying norms and doctrines such as consideration (but not privity) remain as central doctrines of the law of contract. Nevertheless significant changes have taken place. The modern law of contract pays more overt attention to the fairness of the bargain (both in procedural and substantive terms) than did the law in the nineteenth century. Thus doctrines such as economic duress (see pp. 631–646, Chapter 18, Section 4) and undue influence (see Chapter 19) flourished in the last quarter of the twentieth century. Statute has intervened more widely to regulate the fairness of the bargain (see, for example, the Unfair Terms in Consumer Contract Regulations 1999 (Chapter 14), the Unfair Contract Terms Act 1977 (see pp. 417–441, Chapter 13, Section 3), and the Consumer Credit Act 2006). The commitment to freedom from contract (that is to say the principle that, as long as a contract has not been concluded, the parties are free to withdraw from negotiations without incurring liability for doing so) has also been eroded. The extent of the departure is not at first sight apparent. English law still refuses to recognize the existence of a duty to negotiate with reasonable care, nor does it formally recognize a doctrine of good faith, at least in the context of the negotiation of contracts (see Chapter 15). But careful examination of recent cases demonstrates that the courts have been able to place not insignificant limits on the ability of parties to withdraw from negotiations without incurring any liability for doing so. They have done so largely by drawing upon doctrines from outside the law of contract by, for example, imposing a restitutionary obligation to pay for work done in anticipation of a contract which does not materialize (see, for example, *British Steel Corporation* v. *Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, p. 91, Chapter 3, Section 3(a)). Occasionally, the courts have been able, by a benevolent interpretation of the facts, to find that those who appear to be negotiating parties have in fact concluded a contract (see, for example, *Blackpool and Fylde Aero Club Ltd* v. *Blackpool Borough Council* [1990] 1 WLR 1195, p. 69, Chapter 3, Section 2(c)). Via such covert means the courts have been able to give the appearance that formal contract doctrine has not changed. The reality is otherwise. There can be little doubt that freedom from contract has been whittled away to the extent that the law should now consider whether it has reached the point where it ought to recognize openly what it appears to be doing surreptitiously,

namely recognize that negotiating parties can, in some circumstances, be subject to a duty to exercise reasonable care or to act in good faith.

The subtle, incremental nature of the changes that have taken place is important. It raises the question of the extent of the changes that have taken place in the law of contract and the impact that these changes should have on the structure of the law. It would be possible to organize a book around the ideals or principles that are said to influence the modern law of contract and thus give greater emphasis to ideas such as fairness, co-operation, and autonomy. The approach taken in this book is more conservative. It adheres to the formal structure of the law that we have inherited from our predecessors (both judicial and academic) but at the same time endeavours to reflect the nature of the changes that are taking place both in terms of contract doctrine (for example, the increasing significance of doctrines such as duress (Chapter 18) and undue influence (Chapter 19)) and the questions that have been raised over the future of the doctrine of consideration (Chapter 5) and in relation to the content of modern contracts (see Chapter 12).

3. TRANSACTIONS

To my knowledge there has been no attempt to engage in a systematic analysis of contract forms and styles of drafting in use in this country. One must therefore proceed largely by way of impression. Two points seem worthy of comment by way of introduction.

The first is the growth in the use of standard form contracts. Standard form contracts assume different forms (see, for example, the judgment of Lord Diplock in *A Schroeder Music Publishing Co Ltd* v. *Macaulay* [1974] 1 WLR 1308). These standard forms may be industry wide, an example being the JCT contracts which are in wide use within the construction industry. These contract forms perform useful functions insofar as they lay down industry-accepted standards which save valuable negotiation time. And they give rise to few legal problems, apart from difficulties of interpretation and these depend largely on the quality of the drafting of the contract form itself. Standard form contracts produced by individual businesses have given rise to greater legal difficulties. In the case of inter-business transactions, the use of standard terms of business has given rise to 'battles of the forms' as each business seeks to ensure that its standard terms prevail in the transactions which it concludes (on which see pp. 80–91, Chapter 3, Section 3(a)). Standard form contracts under which businesses seek to impose their terms upon consumers have given rise to greater problems because these terms can be one-sided. A particular problem has been the sweeping exclusion clauses which these contracts frequently contain. The common law largely failed to deal with this problem. Lord Denning did his best but he could not persuade his colleagues to give themselves the power to strike down unreasonable exclusion clauses (see p. 405, Chapter 13, Section 2). Although the courts were sometimes able to protect the weaker party by applying stringent rules of interpretation (see pp. 402–404, Chapter 13, Section 1) or by refusing to incorporate the exclusion clause into the contract (see Chapter 9), the general picture was one of the impotence of the common law. Instead it was left to Parliament to intervene to control the excesses of these standard form contracts. Parliament was slow to intervene. It was not until 1977 that it found the time to enact the Unfair Contract Terms Act 1977, and even then it was via a private member's Bill. Consumers have recently been given greater protection, courtesy of Europe. The Unfair Terms in Consumer Contracts Regulations 1999, passed in response to a European Directive, give consumers much broader protection from unfair terms in standard form

contracts (see Chapter 14). The law has finally adjusted to the existence of these standard form contracts. But it has done so slowly and it may continue to evolve.

The second point to note is that the form and the content of modern contracts have become increasingly complex. Contracts today often include a vast array of clauses which seek to provide for various eventualities which may have an impact upon the performance of the contract. Some of these clauses are designed to take away rights which the law would otherwise give, as in the case of exclusion and limitation clauses (see Chapter 13) and entire agreement clauses (see pp. 398–399, Chapter 12, Section 3(j)). Other clauses are a response to the perceived rigidities of the common law. The common law has generally set its face against court adjustment of contract terms and is reluctant to conclude that hardship can discharge a contract: to meet this problem parties have included within their contracts complex hardship and force majeure clauses which enable the contract to be adjusted, suspended, or terminated in the event of hardship or the dislocation of performance (see pp. 393–394 and 397–398. Chapter 12, Section 3(i) and (k)). Some clauses are examples of attempts to exploit opportunities which the common law affords, as in the case of retention of title clauses (see pp. 391–392, Chapter 12, Section 3(b)) and liquidated damages clauses (see pp. 905–912, Chapter 23, Section 11). It is no easy matter to draft these clauses. On the one hand, they must be wide enough in order to achieve their purpose but on the other hand they must not be over-broad because then they may fall foul of legislative or judicial control over the content of clauses (for example, in the case of exclusion clauses see the powers given to the courts under the Unfair Contract Terms Act 1977, pp. 417–441, Chapter 13, Section 3, and for an example of the role of the courts see the regulation of restraint of trade clauses in cases such as *Mason* v. *Provident Clothing & Supply Co Ltd* [1913] AC 724).

4. EUROPEAN CONTRACT LAW

Legislation in certain specific areas of contract law at EU level to date has covered an increasing number of issues. The European legislator has so far followed a selective approach, adopting directives on specific contracts or specific marketing techniques (such as package travel and distance selling) where a particular need for harmonization was identified.

However, there is now a debate, which has become increasingly intense, over whether or not the harmonization of European private law should be taken further, possibly in the direction of the creation of a European Civil Code. A particular concern of the European Commission has been that the various differences between national contract laws in Europe might act as a barrier to cross-border trade within the Internal Market. This concern was evident in its Communication on European Contract Law to the European Parliament and the Council, dated 13 July 2001. During the same period a considerable amount of work was undertaken by groups of legal scholars (most notably the Study Group on a European Civil Code, chaired by Professor Christian von Bar, and the Research Group on EC Private Law (Acquis Group)) on the possible harmonization of significant areas of European private law. That work culminated in the production of the Draft Common Frame of Reference (known as 'the DCFR') which consists of a set of rules or principles which could form the basis for the harmonization of European contract law (together with other areas of private law). The DCFR has, however, proved to be a controversial document which has attracted mixed reviews from academics and practitioners.

The production of the DCFR is not, and was not intended to be, the last word on the subject. Rather, it is a step along a road that may lead to greater harmonization of European contract

law. The initiative was taken up again by the European Commission on 1 July 2010 when it issued a Green Paper on 'policy options for progress towards a European Contract Law for consumers and businesses' (COM (2010) 348 final). It announced, among other things, the setting up of an Expert Group to study the feasibility of a user-friendly instrument of European Contract Law, capable of benefiting consumers and businesses which, at the same time, would provide for legal certainty. Further, it was stated that the Expert Group would also 'assist the Commission in selecting those parts of the DCFR which are directly or indirectly related to contract law, and in restructuring, revising and supplementing the selected provisions.'

In terms of future developments, the Green Paper put forward a number of options for consideration. At one end of the spectrum was a 'non-binding instrument, aiming at improving the consistency and quality of EU legislation.' A non-binding instrument is one which does not have the force of law. A possible model is provided by the Principles of European Contract Law which have now been incorporated in a revised form in the DCFR. Another version of a non-binding instrument is the so-called 'toolbox' which could be used by the Commission 'when drafting proposals for new legislation or when reviewing existing measures'. A 'toolbox' of this nature has the potential to improve the coherence of European contract law and to improve the quality of European legislation. At the other end of the spectrum is 'a binding instrument which would set out an alternative to the existing plurality of national contract law regimes, by providing a single set of contract law rules.' The most radical option is a regulation establishing a European Civil Code, the scope of which would extend beyond contract law. Only slightly less radical is a regulation establishing a European Contract Law which could replace the diversity of national laws with a uniform European set of rules, including mandatory rules affording a high level of protection for the weaker party.' A further alternative would be to establish a Directive on European Contract Law which could harmonise national contract law on the basis of minimum common standards. The final option is a regulation setting up an optional instrument of European Contract Law. An optional instrument would exist alongside the national law of Member States and would give to contracting parties the choice between domestic (or national) law and the optional instrument. Thus it would 'insert into the national laws of the 27 Member States a comprehensive and, as much as possible, self-standing set of contract law rules which could be chosen by the parties as the law regulating their contracts.'

The option which was put forward for consideration was a variant of the latter option, namely an optional Common European Sales Law (COM (2011) 635 final, dated 11 October 2011). As originally conceived, it would only apply where both parties to the contract agreed to it and so would not have impinged upon freedom of contract. It would have applied primarily to cross-border contracts but it was proposed to give Member States the option to apply it to domestic sales as well. In terms of scope, it would have applied to contracts for the sale of goods, both business-to-consumer sales and business-to-business sales. It would therefore have offered the possibility of a single set of rules for cross-border contracts of sale in all 27 EU countries. As might be expected, the proposal has aroused considerable controversy and opposition, particularly from the UK. As a result of these criticisms the scope of the proposal has been curtailed so that it is now confined only to distance selling contracts. The restriction on the scope of the proposal may, however, increase the likelihood of its being given effect and on 17 September 2013 the Committee for Legal Affairs in the European Parliament voted by 17–3 to support the proposal. This is not to say that it will necessarily be brought into effect as there remain substantial hurdles to be overcome. But the debate around the creation and scope of a possible optional Common European Sales Law will be of vital significance for the

future development of any European Contract Law or the further harmonization of European contract law.

5. TRANSNATIONAL CONTRACT LAW

Rather than seek to impose uniform solutions on nation states, an alternative is to formulate uniform rules or principles that can be adopted by contracting parties. In this connection the Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law assume considerable significance. What are the aims of these documents? The Preamble to the Unidroit Principles states:

> These Principles set forth general rules for international commercial contracts.
>
> They shall be applied when the parties have agreed that their contract be governed by them.
>
> They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.
>
> They may be applied when the parties have not chosen any law to govern their contract.
>
> They may be used to interpret or supplement international uniform law instruments.
>
> They may be used to interpret or supplement domestic law.
>
> They may serve as a model for national and international legislators.

Article 1:101 of the Principles of European Contract Law provides:

> (1) These Principles are intended to be applied as general rules of contract law in the European Communities.
>
> (2) These Principles will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them.
>
> (3) These Principles may be applied when the parties:
>
> (a) have agreed that their contract is to be governed by 'general principles of law', the 'lex mercatoria' or the like; or
>
> (b) have not chosen any system or rules of law to govern their contract.
>
> (4) These Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so.

Three points are worth noting about these Principles. First, they are not legally binding. They are intended for incorporation into contracts by contracting parties. The type of situation in which use may be made of the Principles is the case where parties who come from different parts of the world cannot agree upon which law is to govern their contract. In such a case they may agree to use the Principles as a set of neutral terms. While the parties can incorporate the Principles as a set of contract terms, they may not be able to incorporate them into the contract as the applicable law. Within Europe, parties to litigation must choose the law of a nation state as the applicable law (see pp. 394–395, Chapter 12, Section 3(f)) so that the choice of the Principles will take effect subject to the national law that is found to be applicable to the contract applying the usual conflict of law rules. Secondly, the Principles may possibly have a role to play when developing national rules of contract law. To date courts have not made use of the Principles in this way. But this may change. One example, discussed at a later point in

the book (see p. 383, Chapter 11, Section 5), is the possible use of the Principles of European Contract Law in the development of the rules or principles relating to the interpretation of contracts. Thirdly, the Principles may have an important role to play in terms of the production of a future European or international code of contract law. If the Principles are found to work in arbitration and litigation when used by the parties on a voluntary basis, it may be that in time they will then go on to form the basis for a more ambitious instrument (such as the proposed optional Common European Sales Law, discussed earlier).

6. CONFLICTING POLICIES

The aim of this final section is to sketch out some of the conflicting policies that underpin the law of contract. The classical law of contract is based upon freedom of contract and sanctity of contract; that is to say it is up to the parties to decide for themselves the terms of their contract and the task of the court is to give effect to the agreement that the parties have reached. But the law of contract was never committed to freedom of contract to the exclusion of all other policies. The law has always had a concern for the fairness of the bargain and the protection of the weak. Thus children have very little contractual capacity and the courts have refused to enforce contracts that are illegal. In the former case the demands of freedom of contract give way to the need to protect the inexperienced and the vulnerable, whereas in the case of illegal contracts freedom of contract has to bow to public policy considerations. The law attempts to strike a balance between the conflicting demands of freedom of contract, on the one hand, and fairness on the other hand. These conflicting policies have been labelled 'market-individualism' and 'consumer-welfarism' by Professors Adams and Brownsword. The following extract sets out the essence of these two policies. It also draws on cases that will be discussed at later points in the book. The reason for including this extract at this stage in the book is to convey the general idea that conflicting policies are at work in the law of contract. The aim is not to descend into the details of that conflict and its resolution.

J Adams and R Brownsword, 'The Ideologies of Contract Law' (1987) 7 *Legal Studies* 205, 206–213

I THE IDEOLOGIES OF THE CONTRACT RULE-BOOK

There is an important academic debate about just where the boundaries of the law of contract lie, about which mix of statutes and cases constitutes the law of contract. Functionalists will argue that the law of contract is about the regulation of agreements, and so any legal materials concerned with the regulation of agreements should belong within the law of contract. Traditionalists, however, take a narrower view, the view implicit in the standard contract textbooks. Here, a well-known litany of cases (together with a few statutes), organized in a very similar way from one book to another, is taken to represent the law of contract. Without entering into this debate, let us follow the narrower view and assume that the contract rule-book comprises just those materials which traditionalists take for the law of contract.

Our contention, as we have said, is that these materials are to be interpreted in the light of two basic ideologies, Market-Individualism and Consumer-Welfarism. Accordingly, we devote this part of the article to mapping out the salient features of these two contractual ideologies, and to illustrating their linkage to particular doctrines and ideas current in the contract rule-book.

1. Market-Individualism

The ideology of Market-Individualism has both market and individualistic strands. The strands are mutually supportive, but it aids exposition to separate them. We can look first at the market side of this ideology and then at its individualistic aspect.

(1) The market ideology

According to Market-Individualism, the market place is a site for competitive exchange. The function of contract is not simply to facilitate exchange, it is to facilitate *competitive* exchange. Contract establishes the ground rules within which competitive commerce can be conducted. Thus, subject to fraud, mistake, coercion and the like, bargains made in the market must be kept. In many ways, the line drawn between (actionable) misrepresentation and mere non-disclosure, epitomizes this view. There are minimal restraints on contractors: the law of the market is not the law of the jungle, and this rules out misrepresentations. However, non-disclosure of some informational advantage is simply prudent bargaining—contractors are involved in a competitive situation and cannot be expected to disclose their hands. In line with these assumptions, the market-individualist philosophy attaches importance to the following considerations.

First, security of transactions is to be promoted. This means that where a party, having entered the market, reasonably assumes that he has concluded a bargain, then that assumption should be protected. This interest in security of contract receives doctrinal recognition in the objective approach to contractual intention, the traditional caution with respect to subjective mistake, and the protection of third party purchasers. Ideally, of course, security of transactions means that a party gets the performance he has bargained for, but, as the market reveals an increasing number of transactions where performance is delayed, the opportunities for non-performance increase. To protect the innocent party, contract espouses the expectation measure of damages (it is the next best thing to actual performance), and in the principle of sanctity of contract (which we will consider under the individualistic side of Market-Individualism) it takes a hard line against excuses for non-performance.

Secondly, it is important for those who enter into the market to know where they stand. This means that the ground rules of contract should be clear. Hence, the restrictions on contracting must not only be minimal (in line with the competitive nature of the market), but also must be clearly defined (in line with the market demand for predictability, calculability etc). The postal acceptance rule is a model for Market-Individualism in the sense that it is clear, simple, and not hedged around with qualifications which leave contractors constantly unsure of their position. Similarly, the traditional classification approach to withdrawal encapsulates all the virtues of certainty, which are dear to Market-Individualism.

Thirdly, since contract is concerned essentially with the facilitation of market operations, the law should accommodate commercial practice, rather than the other way round. Deference to commercial practice is evident in the market-individualist doctrine of incorporation of terms by reasonable notice, as it is in the *Hillas* v. *Arcos* [p. 126, Chapter 4, Section 1] approach to certainty of terms and the re-alignment of the law in *The Eurymedon* [p. 988, Chapter 25, Section 3(d)]. Also, we should not overlook the import of the commonplace that many of the rules concerning formation (e.g. the rules determining whether a display of goods is an offer or an invitation to treat) simply hinge on convenience. This may well be a statement of the obvious, but the obvious should never be neglected. Contract's concern to avoid market inconvenience is a measure of its commitment to the market-individualist policy of facilitating market dealing.

(2) The Individualistic Ideology

A persistent theme in Market-Individualism is that judges should play a non-interventionist role with respect to contracts. This distinctive non-interventionism derives from the individualistic side of the ideology. The essential idea is that parties should enter the market, choose their fellow-contractors, set their own terms, strike their bargains and stick to them. The linchpins of this individualistic philosophy are the doctrines of 'freedom of contract' and 'sanctity of contract'.

The emphasis of freedom of contract is on the parties' freedom of choice. First, the parties should be free to choose one another as contractual partners (i.e. partner-freedom). Like the tango, contract takes two. And, ideally the two should consensually choose one another. Secondly, the parties should be free to choose their own terms (i.e. term-freedom). Contract is competitive, but the exchange should be consensual. Contract is about unforced choice.

In practice, of course, freedom of contract has been considerably eroded. Anti-discrimination statutes restrict partner-freedom; and term-freedom has been restricted by both the common law (e.g. in its restrictions on illegal contracts) and by statute (e.g. the Unfair Contract Terms Act 1977—UCTA) [p. 417, Chapter 13, Section 3]. Moreover, the development of monopolistic enterprises, in the public and private sector alike, has made it impossible for the weaker party actually to *exercise* the freedoms in many cases. For example, if one wants a British family car, a railway ride, telephone services etc. the other contractual partner is virtually self-selecting. Similarly, where the other side is a standard form or a standard price contractor, the consumer has no say in setting the terms. Nevertheless, none of this should obscure the thrust of the principle of freedom of contract, which is that one should have the freedoms, and that the law should restrict them as little as possible—indeed, it is consistent with the principle (in a widely held view) that the law should facilitate the freedoms by striking down monopolies.

Although the principle of partner-freedom still has some life in it (e.g. in defending the shopkeeper's choice of customer), it is the principle of term-freedom which is the more vital. Term-freedom can be seen as having two limbs:

(i) The free area within which the parties are permitted, in principle, to set their own terms should be maximized; and,

(ii) Parties should be held to their bargains, i.e. to their agreed terms (provided that the terms fall within the free area).

. . .

The second limb of term-freedom is none other than the principle of sanctity of contract. By providing that parties should be held to their bargains, the principle of sanctity of contract has a double emphasis. First, if parties must be held to *their* bargains, they should be treated as masters of their own bargains, and the courts should not indulge in *ad hoc* adjustment of terms which strike them as unreasonable or imprudent. Secondly, if parties must be *held* to their bargains, then the courts should not lightly relieve contractors from performance of their agreements. It will be appreciated that, while freedom of contract is the broader of the two principles, it is sanctity of contract which accounts for the distinctive market-individualistic stand against paternalistic intervention in particular cases.

The law is littered with examples of the principle of sanctity of contract in operation. It is the foundation for such landmarks as the doctrine that the courts will not review the adequacy of consideration; the principle that the basis of implied terms is necessity not reasonableness; the hard-line towards unilateral 'collateral' mistake, common mistake and frustration; the cautious reception of economic duress; the anxiety to limit the doctrine of inequality of bargaining

power; the resistance to the citation of relatively unimportant uncertainty as a ground for release from a contract and the reluctance to succumb to arguments of economic waste or unreasonableness as a basis for release from a bargain. The principle of sanctity of contract is a thread which runs through contract from beginning to end, enjoining the courts to be ever-vigilant in ensuring that established or new doctrines do not become an easy exit from bad bargains.

2. Consumer-Welfarism

The consumer-welfarist ideology stands for a policy of consumer-protection, and for principles of fairness and reasonableness in contract. It does not start with the market-individualist premise that all contracts should be minimally regulated. Rather, it presupposes that consumer contracts are to be closely regulated, and that commercial contracts, although still ordinarily to be viewed as competitive transactions, are to be subject to rather more regulation than Market-Individualism would allow. The difficulties with Consumer-Welfarism appear as soon as one attempts to identify its particular guiding principles (i.e. its operative principles and conceptions of fairness and reasonableness).

Without attempting to draw up an exhaustive list of the particular principles of Consumer-Welfarism, we suggest that the following number amongst its leading ideas:

(1) The principle of constancy: parties should not 'blow hot and cold' in their dealings with one another, even in the absence of a bargain. A person should not encourage another to act in a particular way or to form a particular expectation (or acquiesce in another's so acting or forming an expectation) only then to act inconsistently with that encouragement (or acquiescence)....

(2) The principle of proportionality: an innocent party's remedies for breach should be proportionate to the seriousness of the consequences of the breach....We can also see this principle at work in regulating contractual provisions dealing with the amount of damages. Thus, penalty clauses are to be rejected because they bear no relationship to the innocent party's real loss (they are disproportionately excessive) and exemption clauses are unreasonable because they err in the opposite direction.

(3) The principle of bad faith: a party who cites a good legal principle in bad faith should not be allowed to rely on that principle....

(4) The principle that no man should profit from his own wrong: ...

(5) The principle of unjust enrichment: no party, even though innocent, should be allowed unfairly to enrich himself at the expense of another. Accordingly, it is unreasonable for an innocent party to use another's breach as an opportunity for unfair enrichment: hence, again, the prohibition on penalty clauses, the anxiety about the use made of cost of performance damages, and perhaps the argument in *White & Carter* [p. 796, Chapter 22, Section 6] which (unsuccessfully) pleaded the unreasonableness of continued performance. Equally, frustration should not entail unfair financial advantage.

(6) The better loss-bearer principle: where a loss has to be allocated to one of two innocent parties, it is reasonable to allocate it to the party who is better able to carry the loss. As a rule of thumb, commercial parties are deemed to be better loss-bearers than consumers.

(7) The principle of exploitation: a stronger party should not be allowed to exploit the weakness of another's bargaining situation; but parties of equal bargaining strength should be assumed to have a non-exploitative relationship. The first part of this principle, its positive

interventionist aspect, pushes for a general principle of unconscionability, and justifies the policy of consumer-protection. The latter (qualifying) aspect of the principle, however, is equally important, for it invites a non-interventionist approach to commercial contracts.

(8) The principle of a fair deal for consumers: consumers should be afforded protection against sharp advertising practice, against misleading statements, against false representations, and against restrictions on their ordinary rights. Moreover, consumer disappointment should be properly compensated.

(9) The principle of informational advantage: representors who have special informational advantage must stand by their representations; but representees who have equal informational opportunity present no special case for protection. The positive aspect of the principle of informational advantage is protective, but its negative aspect offers no succour to representees who are judged able to check out statements for themselves.

(10) The principle of responsibility for fault: contractors who are at fault should not be able to avoid responsibility for their fault. This principle threatens both exemption clauses which deal with negligence; and indemnity clauses which purport to pass on the risk of negligence liability.

(11) The paternalistic principle: contractors who enter into imprudent agreements may be relieved from their bargains where justice so requires. The case for paternalistic relief is at its most compelling where the party is weak or naïve. Although the consumer-welfarist line on common mistake and frustration suggests a general concern to cushion the effects of harsh bargains, it is an open question to what extent Consumer-Welfarism would push the paternalistic principle for the benefit of commercial contractors.

As we have seen, some of these ideas can generate novel doctrines such as equitable estoppel and unconscionability. However, Consumer-Welfarism also attempts to feed reasonableness into such existing contractual categories as implied terms, mistake, and frustration (thereby opening the door to the employment of the particular principles of the ideology). Whilst Lord Denning's attempts to make such a move in respect of implied terms and frustration have failed, the equitable doctrine of common mistake continues to enjoy support [that support has since been withdrawn, see p. 557, Chapter 16, Section 5]. The most spectacular doctrinal success, however, has been with exemption clauses which are, of course, generally regulated now under a regime of reasonableness by UCTA.

Consumer-Welfarism suffers from its pluralistic scheme of principles. Where a dispute clearly falls under just one of its principles, there is no difficulty; but, as soon as more than one principle is relevant, there is potentially a conflict. Without a rigid hierarchy of principles, the outcome of such conflicts will be unpredictable, as different judges will attach different weights to particular principles. It follows that Consumer-Welfarism is unlikely ever to attain the unity and consistency of its market-individualist rival.

FURTHER READING

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