

Cambridge University Press

978-1-107-02808-1 - Commercial Contract Law: Transatlantic Perspectives

Edited by Larry A. Dimatteo, Qi Zhou, Séverine Saintier and Keith Rowley

Table of Contents

[More information](#)

Brief Contents

PART I: THE ROLE OF CONSENT	1
1. Transatlantic Perspectives: Fundamental Themes and Debates Larry A. DiMatteo, Qi Zhou, and Séverine Saintier	3
2. Competing Theories of Contract: An Emerging Consensus? Martin A. Hogg	14
3. Contracts, Courts, and the Construction of Consent Thomas W. Joo	41
4. Are Mortgage Contracts Promises? Curtis Bridgeman	67
PART II: NORMATIVE VIEWS OF CONTRACT	83
5. Naturalistic Contract Peter A. Alces	85
6. Contract in a Networked World Roger Brownsword	116
7. Contract Transactions and Equity T. T. Arvind	146
PART III: CONTRACT DESIGN AND GOOD FAITH	179
8. The Duty to Draft Reasonably and Online Contracts Nancy S. Kim	181

Cambridge University Press

978-1-107-02808-1 - Commercial Contract Law: Transatlantic Perspectives

Edited by Larry A. Dimatteo, Qi Zhou, Séverine Saintier and Keith Rowley

Table of Contents

[More information](#)

viii

Brief Contents

- | | | |
|-----|---|------------|
| 9. | Managing Change in Uncertain Times: Relational View of Good Faith
Zoe Ollerenshaw | 201 |
| | PART IV: IMPLIED TERMS AND INTERPRETATION | 223 |
| 10. | Implied Terms in English Contract Law
Richard Austen-Baker | 225 |
| 11. | Contract Interpretation: Judicial Role Not Parties' Choice
Juliet P. Kostritsky | 240 |
| | PART V: POLICING CONTRACTING BEHAVIOR | 287 |
| 12. | The Paradox of the French Method for Calculating the Compensation of Commercial Agents and the Importance of Conceptualising the Remedial Scheme under Directive 86/653
Séverine Saintier | 289 |
| 13. | Unconscionability in American Contract Law: A Twenty-First-Century Survey
Charles L. Knapp | 309 |
| 14. | Unfair Terms in Comparative Perspective: Software Contracts
Jean Braucher | 339 |
| 15. | (D)CFR Initiative and Consumer Unfair Terms
Mel Kenny | 366 |
| | PART VI: MISREPRESENTATION, BREACH, AND REMEDIES | 383 |
| 16. | Remedies for Misrepresentation: An Integrated System
David Capper | 385 |
| 17. | Re-Examining Damages for Fraudulent Misrepresentation: Towards a More Measured Response to Compensation and Deterrence
James Devenney | 416 |
| 18. | Remedies for a Documentary Breach: English Law and the CISG
Djakhongir Saidov | 434 |

Cambridge University Press

978-1-107-02808-1 - Commercial Contract Law: Transatlantic Perspectives

Edited by Larry A. Dimatteo, Qi Zhou, Séverine Saintier and Keith Rowley

Table of Contents

[More information](#)

<i>Brief Contents</i>		ix
19.	The Irrelevance of the Performance Interest: A Comparative Analysis of “Keep-Open” Covenants in Scotland and England David Campbell and Roger Halson	466
	PART VII: HARMONIZING CONTRACT LAW	503
20.	Harmonisation of European Contract Law: Default and Mandatory Rules Qi Zhou	505
21.	Europeanisation of Contract Law and the Proposed Common European Sales Law Hector L. MacQueen	529
22.	Harmonization of International Sales Law Larry A. DiMatteo	559

Cambridge University Press

978-1-107-02808-1 - Commercial Contract Law: Transatlantic Perspectives

Edited by Larry A. Dimatteo, Qi Zhou, Séverine Saintier and Keith Rowley

Table of Contents

[More information](#)

Cambridge University Press

978-1-107-02808-1 - Commercial Contract Law: Transatlantic Perspectives

Edited by Larry A. Dimatteo, Qi Zhou, Séverine Saintier and Keith Rowley

Table of Contents

[More information](#)

Contents

<i>Contributors</i>	page xxi
<i>Foreword by Rt. Hon. Lord Justice Maurice Kay</i>	xxvii
PART I: THE ROLE OF CONSENT	1
1. Transatlantic Perspectives: Fundamental Themes and Debates	3
I. Legacy of Rob Bradgate	3
A. Commercial Contract Law in the United Kingdom and United States	4
1. <i>Statutory Interventions into the Common Law</i>	4
2. <i>Divergence, Convergence, and Law Reform</i>	5
B. Major Themes	6
1. <i>Topical Preview</i>	8
2. <i>Consent and Promise</i>	8
3. <i>Theories of Contract, Networks, and Equity</i>	8
4. <i>Discrete and Relational Contracting</i>	9
5. <i>Implied Terms and Contract Interpretation</i>	9
6. <i>Contract Law's Regulatory Function</i>	10
7. <i>Misrepresentation and Breach</i>	11
8. <i>Contract and Sales Law Harmonization</i>	11
II. Conclusion	12
2. Competing Theories of Contract: An Emerging Consensus?	14
I. Introduction	15
II. The Competing Theories of Contract	17
A. Contract as Based upon Promises	17
B. Contract as Based upon Agreement	22
C. Contract as Based upon the Reliance	26

Cambridge University Press

978-1-107-02808-1 - Commercial Contract Law: Transatlantic Perspectives

Edited by Larry A. Dimatteo, Qi Zhou, Séverine Saintier and Keith Rowley

Table of Contents

[More information](#)

xii

Contents

D. Contract as Based upon the Assumption of Legally Binding Obligations	27
E. Contract as Based upon the Transfer of Rights	28
F. Contract as Based upon Relationship	28
G. Conclusion on Competing Theories of Contract	30
III. Connections between Competing Theories of Contract	30
IV. Future Developments of Contract Theory: An Emerging Consensus?	36
V. Conclusion	39
3. Contracts, Courts, and the Construction of Consent	41
I. Introduction	41
II. Conflation of Efficiency and Consent	44
III. Illusory Nature of Party-Centrism	50
IV. Candor in the Judicial Construction of Consent	56
V. Conclusion	64
4. Are Mortgage Contracts Promises?	67
I. Introduction	68
II. Why Do People Make Promises?	70
III. Are Contracts Promises?	72
IV. Are Mortgage Contracts Typically Promises?	74
V. If Modern Mortgage Contracts Are Typically Not Promises, Is Strategic Default Morally Acceptable After All?	76
VI. Conclusion	80
PART II: NORMATIVE VIEWS OF CONTRACT	83
5. Naturalistic Contract	85
I. Introduction	86
II. Essential Normativity of Contract Doctrine	87
III. Minimum Content of Natural Contract Law	96
IV. Limits of Empiricism?	99
V. Dualism	101
VI. Is Naturalism Fallacious?	110
VII. So What?	114
6. Contract in a Networked World	116
I. Introduction	116
II. Three Test Cases	119
A. <i>Clarke v. Dunraven</i>	120

Cambridge University Press

978-1-107-02808-1 - Commercial Contract Law: Transatlantic Perspectives

Edited by Larry A. Dimatteo, Qi Zhou, Séverine Saintier and Keith Rowley

Table of Contents

[More information](#)

	<i>Contents</i>	xiii
B.	<i>OFT v. Lloyds TSB</i>	122
C.	<i>The Eurymedon</i>	124
D.	Reasonable Expectations	126
III.	The Basis for Network Effects: Consumer Contracts	127
A.	The Nature of the Modern Regulation of Consumer Transactions	127
B.	Networks and <i>OFT v. Lloyds TSB</i>	129
1.	<i>The Legislative Approach</i>	129
2.	<i>The Courts' Approach</i>	130
3.	<i>The Boyack Hypothetical</i>	131
4.	<i>Beyond OFT v. Lloyds TSB</i>	132
IV.	The Basis for Network Effects: Commercial Contracts	132
A.	The Nature of the Modern Regulation of Commercial Transactions	133
B.	The “Hoffmannisation” of Contract Law	134
C.	Network Effects and <i>The Eurymedon</i>	138
D.	Beware the Classical Inheritance	139
E.	Big Businesses, Small Businesses, and Shopping Malls	140
V.	The Basis for Network Effects: Private Contracts	142
VI.	Conclusion	143
VII.	Coda	144
7.	Contract Transactions and Equity	146
I.	Introduction	147
II.	Equity in a Contractual Context	150
III.	Equitable Principles and Contract Law	155
A.	Restating the Issue	155
B.	The Contractual Solution	156
C.	The Equitable Approach	164
IV.	The Domain of Equity	169
A.	A Complex Transactional Web	173
B.	The Difficulty of Dealing with the Obligation	174
C.	A Relational Attempt to Deal with this Difficulty	174
D.	Indeterminacy and Vulnerability	175
V.	Conclusion	176
	PART III: CONTRACT DESIGN AND GOOD FAITH	179
8.	The Duty to Draft Reasonably and Online Contracts	181
I.	Introduction	181
II.	Modern Contracts and the Diminishing of Consent	184

Cambridge University Press

978-1-107-02808-1 - Commercial Contract Law: Transatlantic Perspectives

Edited by Larry A. Dimatteo, Qi Zhou, Séverine Saintier and Keith Rowley

Table of Contents

[More information](#)

xiv

Contents

III.	Duty to Read	187
IV.	Code as Law and Form as Function	190
	A. Transactional Hurdles or “Contracts as Checkout Line”	194
	B. Visualization Strategies or “Contracts as Road Signs and Traffic Lights”	198
	C. Sensorial Landscaping or “Contracts as Neighborhoods”	199
V.	Conclusion	200
9.	Managing Change in Uncertain Times: Relational View of Good Faith	
	Faith	201
I.	Introduction	201
II.	Long-Term and Complex Outsourcing Contracts	202
III.	A Limited Recognition of Good Faith	206
IV.	Does the Restricted Approach to Good Faith Accord with Practice?	213
V.	Theory of Relational Contract	214
VI.	A Construct of Good Faith as Seen through a Relational Prism	216
	A. The Extent of the Duty	217
	B. Criticisms of the Construct	218
	C. Should Such a Construct Be Accepted?	219
VII.	Conclusion	220
	PART IV: IMPLIED TERMS AND INTERPRETATION	223
10.	Implied Terms in English Contract Law	225
I.	Introduction	225
II.	The Historical Development of the Implied Term	226
	A. Historical Context	226
	B. Creation of Implied Terms	228
III.	Theoretical Context	233
IV.	Concluding Remarks	238
11.	Contract Interpretation: Judicial Role Not Parties’ Choice	240
I.	Introduction: Challenging Party Choice Theory	241
II.	The Importance of a Judicial Interpretation Rule	249
III.	Faulty Assumptions Underlie the New Formalists’ Opt-in Rule	255
IV.	Reducing Party Costs and Risks	263
V.	The Opt-in Rule Should be Justified Like any Other Common Law Doctrine	268
VI.	Rawlsian Theory, Contextual Evidence, Consequentialist Analysis, Equity, and Probabilistic Models Support a Judicial Interpretation Rule	272

Cambridge University Press

978-1-107-02808-1 - Commercial Contract Law: Transatlantic Perspectives

Edited by Larry A. Dimatteo, Qi Zhou, Séverine Saintier and Keith Rowley

Table of Contents

[More information](#)

Contents

xv

VII.	Courts, Restatements, and Empirical Evidence Challenge Party Choice Theory	275
	A. <i>Jacob & Youngs</i> : Should Goals Affect Interpretation?	275
	B. Residual Uncertainty: Overall Objectives and Prospective Consequences	279
	C. When Should Trade Usage Govern Meaning?	282
VIII.	Conclusion	284
	PART V: POLICING CONTRACTING BEHAVIOR	287
12.	The Paradox of the French Method for Calculating the Compensation of Commercial Agents and the Importance of Conceptualising the Remedial Scheme under Directive 86/653	289
	I. Introduction	290
	II. The Different Interpretations on the Calculation of “Compensation” between France and UK	293
	III. Reconciling Compensation and Indemnity?	303
	IV. Conclusion	307
13.	Unconscionability in American Contract Law: A Twenty-First-Century Survey	309
	I. Introduction	309
	II. Mid-Twentieth-Century Development – the 1950s and 1960s	310
	III. Further Development – the 1970s and 1980s	313
	IV. Unconscionability at the Dawn of the Twenty-First Century	314
	A. Unconscionability as Applied to Mandatory Arbitration Clauses	315
	B. Unconscionability in Non-Arbitration Cases – Doctrinal Developments	320
	1. <i>Adhesion Contracts</i>	320
	2. <i>Sliding Off the Scale</i>	322
	3. <i>Mutuality</i>	324
	C. Unconscionability in Action: Recent Examples	325
	1. <i>Sales and Leases of Goods</i>	326
	2. <i>Service Contracts</i>	327
	3. <i>Domestic Relations</i>	328
	4. <i>Real Estate Transactions</i>	330
	5. <i>Consumer Lending and Credit</i>	333
	V. Conclusion	337

Cambridge University Press

978-1-107-02808-1 - Commercial Contract Law: Transatlantic Perspectives

Edited by Larry A. Dimatteo, Qi Zhou, Séverine Saintier and Keith Rowley

Table of Contents

[More information](#)

xvi

Contents

14. Unfair Terms in Comparative Perspective: Software Contracts	339
I. Introduction	340
II. The Challenge to Contract Theory Presented by SFKs	343
III. US Law Reform and Software Contracts	347
A. Advance Disclosure and a Step for Active Assent	349
B. Reducing the Impact of Product Flaws	351
C. Remedies and Dispute Resolution	352
D. Protecting Intellectual Property Rights	354
IV. Unfair Terms in Comparative Perspective	359
A. ALI Principles and the EU Unfair Contract Terms Directive: Differences	360
B. ALI Principles and the EU Unfair Contract Terms Directive: Similarities	362
V. Conclusion	364
15. (D)CFR Initiative and Consumer Unfair Terms	366
I. Introduction	366
II. Evolution of the (D)CFR Initiative	367
III. Rationale for EU Private Law Consolidation	368
IV. (D)CFR Initiative and the Effective Policing of Unfair Terms in Consumer Contracts	371
A. National Judges' Elaboration of Europeanised Unfairness Standards	373
B. Judicial Approach to Article 267 TFEU References	375
C. (Non-harmonised) National Background Rules	377
D. Towards a Multi-Dimensional Perspective	378
E. Procedural Dimension: Collective Proceedings	379
V. Conclusion	381
PART VI: MISREPRESENTATION, BREACH, AND REMEDIES	383
16. Remedies for Misrepresentation: An Integrated System	385
I. Introduction	386
II. Misrepresentation	387
III. Rescission	389
A. Rescission as a Self-Help Remedy?	389
B. Practical Justice	390
C. Rescission as of Right	390
D. Indemnity	392
E. Compensation	393

Cambridge University Press

978-1-107-02808-1 - Commercial Contract Law: Transatlantic Perspectives

Edited by Larry A. Dimatteo, Qi Zhou, Séverine Saintier and Keith Rowley

Table of Contents

[More information](#)

<i>Contents</i>	xvii
F. When <i>Restitutio in Integrum</i> Is Impossible	394
G. Partial Rescission	395
H. Summary of Rescission	399
IV. Damages	400
A. Tort Damages	401
B. Fraudulent Misrepresentation (Deceit)	402
C. Negligent Misstatement	403
D. Negligent Misrepresentation	404
E. Innocent Misrepresentation	409
F. Comparative Perspectives	413
V. Conclusion – Integrating Damages with Rescission	414
17. Re-Examining Damages for Fraudulent Misrepresentation: Towards a More Measured Response to Compensation and Deterrence	416
I. Introduction	417
II. The Crucible of Misrepresentation	417
III. Fraudulent Misrepresentation and Causation	418
IV. Impact on Risk Allocation	422
V. Negligent Contractual Misrepresentation	423
VI. Accentuating the Punishment	424
VII. Exemplary Damages	426
VIII. Proportionality	427
IX. Further Dangers of the Compensation Myth	428
X. Availability of Exemplary Damages for Fraudulent Misrepresentation	430
XI. Wider Considerations	431
XII. Conclusion	432
18. Remedies for a Documentary Breach: English Law and the CISG	434
I. Introduction	435
II. Termination	436
A. Duality of the Rights to Reject and Terminate	436
B. Rejection or Termination	443
C. Rejection and Termination	448
III. Damages	460
IV. Conclusion	464
19. The Irrelevance of the Performance Interest: A Comparative Analysis of “Keep-Open” Covenants in Scotland and England	466
I. Introduction	467

Cambridge University Press

978-1-107-02808-1 - Commercial Contract Law: Transatlantic Perspectives

Edited by Larry A. Dimatteo, Qi Zhou, Séverine Saintier and Keith Rowley

Table of Contents

[More information](#)

xviii

Contents

II.	Scots Law of Keep-Open Covenants	471
III.	Why Would Commercial Parties Ever Seek Literal Enforcement?	479
IV.	Enforcement of Keep-Open Obligations under the English Law	482
V.	The Wisdom of Lord Justice Millet	486
VI.	Supervisory Problems in the Law of Keep-Open Covenants	489
VII.	Commercial Uniqueness Cases	494
VIII.	Advice to English Landlords	495
IX.	Changing the Default Law, Commercial Leasing, and the Irrelevance of the Performance Interest	496
X.	Conclusion	501
	PART VII: HARMONIZING CONTRACT LAW	503
20.	Harmonisation of European Contract Law: Default and Mandatory Rules	505
I.	Introduction	505
II.	Default and Mandatory Rules: A Comparison	506
III.	Justifications for the Harmonisation of European Contract Law	509
IV.	Harmonisation of Default Rules	515
V.	Harmonisation of Mandatory Rules	521
VI.	Conclusion	527
21.	Europeanisation of Contract Law and the Proposed Common European Sales Law	529
I.	Introduction: Proposed Common European Sales Law	530
II.	A Historical Scottish Perspective	539
III.	Comparing the Proposed CESL with the UK Sale of Goods Act	545
	A. Implied Terms or Rules	546
	B. Quality Defined	547
	C. Time of Conformity	550
	D. Termination: The Right to Reject	552
	E. Overview	556
IV.	Conclusion	556
22.	Harmonization of International Sales Law	559
I.	Introduction	560
II.	Goal of Harmonizing International Sales Law	560

Cambridge University Press

978-1-107-02808-1 - Commercial Contract Law: Transatlantic Perspectives

Edited by Larry A. Dimatteo, Qi Zhou, Séverine Saintier and Keith Rowley

Table of Contents

[More information](#)

<i>Contents</i>	xix
A. Substantive Shortcomings	561
1. <i>Problem of Reservations</i>	562
2. <i>Problem of Translation</i>	563
B. Uniformity of Application and National Law Bias	564
1. <i>Nationally Biased Interpretations</i>	564
2. <i>Uniformity Principle and the Problem of Divergent Interpretations</i>	565
C. Widespread Approval and Widespread Disregard	570
III. Uniformity in Practice and the Problem of Scarcity	571
A. Civil-Common Law Divide	572
B. German Role in CISG Jurisprudence	572
C. Understated Role of Unreported Arbitration Cases	574
D. Summary	575
IV. Value of the CISG outside the Context of International Harmonization	575
A. CISG as Customary International Law and as Soft Law	576
B. Use as a Model National Law	577
V. Conclusion	578
<i>Index</i>	581