Contract Law: Text Cases and Materials (11th edn)
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1. Introduction

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Abstract

This introductory chapter begins by setting out the book's three principal aims: to provide an exposition of the rules that make up the law of contract, to explore the law of contract in its transactional context, and to explore English contract law from a transnational and comparative perspective. The discussions then turn to the scope of the law of contracts; the growth in the use of standard form contracts and the increasing complexity of the form and the content of modern contracts; transnational contract law; and conflicting policies that underpin the law of contract.

Keywords: contract law, English law, standard form, transnational contract law, transaction

1.1 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 cut 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, restatements 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
p. 2 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 (12.3.5); entire agreement clauses (see 12.3.10); and agreed damages clauses (see 23.11). 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 12.3.6), 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 have taken place at a number of different levels.

First, there has been the impact of the period of our membership of the European Union. European Union 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 been relatively small. The most important development has been the European Directive on Unfair Terms in Consumer Contracts, which was first enacted into English law in the Unfair Terms in Consumer Contracts Regulations
p. 3 1994 and is now implemented by Part 2 of the Consumer Rights Act 2015 (see further Chapter 14 where ↵ some of the leading English decisions decided under the applicable implementing legislation are discussed in more detail and the influence of European law on the development of this area of law is noted). Other examples of legislation introduced as a result of our membership of the European Union include the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277); the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134); and the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870). However, the impact of EU law will diminish now that the United Kingdom has left the European Union.

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 four further parts. Section 1.2 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 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.

1.2 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* (31st edn, Oxford University Press, 2020, J Beatson, A Burrows, and J Cartwright (eds)), pp. 1–2 states that:

> [t]he 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.

p. 4 ↵ 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, 15th edn, Sweet & Maxwell, 2020), 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
p. 5 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* 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 6.3). 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 5.3). 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 6.3). 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; 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
p. 6 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 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 generally 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 18.4) 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, Part 2 of the Consumer Rights Act 2015 (Chapter 14), the Unfair Contract Terms Act 1977 (see

13.3), 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 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, 3.3.1). 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, 3.2.3). 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.

p. 7 ↵ 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).

1.3 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 in so far 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 3.3.1). 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 13.1). Although the courts were sometimes able to protect the weaker party by applying stringent rules of interpretation (see 13.2) 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. Part 2 of the Consumer Rights Act 2015, the origin of which can be traced back to a European Directive, gives consumers much broader protection from unfair terms in 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
p. 8 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 12.3.10). 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 12.3.9). Some clauses are examples of attempts to exploit opportunities which the common law affords, as in the case of retention of title clauses (see 12.3.2) and agreed damages clauses (see 23.11). 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 controls 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, 13.3).

1.4 Transnational Contract Law

It is important to see these transactions in their international context. While the law of contract is often described in national terms (so that the focus of this book is principally upon the English law of contract), transactions are not confined by national borders. The increase in significance of cross-border transactions has led to calls for the creation of a law of contract which can straddle national borders. The most significant development over the last fifth years was our membership of the European Union, which until our departure from the EU provided a legal framework within which it was possible to regulate aspects of the law of contract

across the different Member States (in particular in relation to contracts to which consumers are a party). An alternative approach to the development of a suitable framework for transnational transactions is the formulation of uniform rules or principles that do not have the force of law but can nevertheless be adopted by contracting parties. In this connection the Unidroit Principles of International Commercial Contracts assume considerable significance. What are the aims of such a document? 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.

Three points are worth noting about the Unidroit 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
p. 9 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 12.3.6) 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 the English courts have not made use of the Principles in this way. But this may change (and the Unidroit Principles, together with the Principles of European Contract Law, are cited at various points in this book when seeking to consider whether English law should develop in a different direction). Thirdly, the Principles may have an important role to play in terms of the development of a common understanding of the basic rules and principles of the law of contract which may in time lead to the development of an international code of contract law (although it has to be said that the likelihood of such a Code being developed and agreed in the near future is extremely remote).

1.5 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 broader 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.

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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.

p. 11 ↵ 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* [4.1] approach to certainty of terms and the re-alignment of the law in *The Eurymedon* [25.3.4]. 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) [13.3]. 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
p. 12 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* [22.6] which (unsuccessfully) pleaded the unreasonableness of continued performance. Equally, frustration should not entail unfair financial advantage.

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(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 16.5]. 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.

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Further Reading

ADAMS, J AND BROWNSWORD, R, 'The Ideologies of Contract Law' (1987) 7 *Legal Studies* 205.

MCKENDRICK, E, 'English Contract Law: A Rich Past, An Uncertain Future' (1997) 50 *Current Legal Problems* 25.

SIMPSON, AWB, 'Innovation in Nineteenth Century Contract Law' (1975) 91 *LQR* 247.