

Contents

<i>Table of Cases</i>	xvii
<i>Table of Legislation (Including Law Reform Proposals and Model Laws)</i>	xxxix
<i>Table of Frequently Cited Works</i>	xxxv
<i>List of Contributors</i>	xxxvii
1. Introduction: British and American Perspectives	1
<i>Larry A DiMatteo and Martin Hogg</i>	
Comparative law approach	1
Challenges to US–British comparative contract scholarship	4
Consent and standard terms	5
Structure of the book	7
PART I. CONTRACT THEORY AND STRUCTURE	
2. Saying What We Mean: Fundamental Structural Language in Contract Law	13
<i>Martin Hogg</i>	
Introduction	13
Why is fundamental structural terminology used in contract law?	14
Examples of fundamental structural contractual language	15
Obligation and liability	15
Conditional and contingent	20
Unilateral and bilateral	24
Conclusions	28
3. The Death of Consent?	30
<i>Peter A Alces</i>	
Introduction	30
Seminal cases	33
<i>Carnival Cruise v Shute</i>	34
Decisions of Judge Easterbrook	38
Arbitration, unconscionability, and consent	45
Constructing consent	52
Normative sense of consent	52
Inferring consent	53
“ <i>There oughta be a law!</i> ”	55
More heat than light	58
Conclusion	59
Reply to Martin Hogg, “Saying What We Mean: Fundamental Structural Language in Contract Law” <i>Peter A Alces</i>	61
Reply to Peter A Alces, “The Death of Consent?” <i>Martin Hogg</i>	65
Editors’ Commentary on Chapters 2 and 3 (Language and Structure of Contract Law)	71

PART II. CONTRACT FORMATION

4. The Nature and Timing of Contract Formation	77
<i>Shawn J Bayern</i>	
Introduction	77
The doctrinal distraction of “offer and acceptance”	77
The interpretive nature of formation analysis	79
Implicit and explicit recognition of the interpretive nature of contract formation in modern legal systems	80
Common law	80
Other modern legal systems	87
Moving beyond offer and acceptance: The timing of contract formation	87
Conclusion	89
5. Contract Formation between Distant Parties: The Scottish Experience	90
<i>Hector L MacQueen</i>	
Contract formation in Scotland: Offer, acceptance, counterpart execution, and agreement	90
Law reform: Scotland in Europe	96
The offer and acceptance model and contract as agreement	97
Communication: Postal and other acceptances	99
Protection against revocation of offers?	104
When is an offer irrevocable?	105
Withdrawal of irrevocable offer?	105
Revoking or withdrawing acceptances?	106
Conclusions	106
Reply to Shawn J Bayern, “The Nature and Timing of Contract Formation”	
<i>Hector L MacQueen</i>	109
Reply to Hector L MacQueen, “Contract Formation between Distant Parties: The Scottish Experience” <i>Shawn J Bayern</i>	114
Editors’ Commentary on Chapters 4 and 5 (Formation of Contract)	118
6. Defects of Consent in English Law: Protecting the Bargain?	120
<i>Séverine Saintier</i>	
Introduction	120
A critical look at some defects of consent under English law	121
Capacity	121
(Economic) duress	124
The future for defects of consent: Unification?	129
Merging the doctrines	129
Statutory intervention?	130
Conclusion	131
7. Quality of Consent and Distributive Fairness: A Comparative Perspective	132
<i>Jeffrey L Harrison</i>	
Introduction	132
The black letter law	133
The hypothesis and methodology	134
Four doctrines of legitimacy	135
Capacity	135

Duress	139
Undue influence	142
Unconscionability	145
Concluding remarks	146
Reply to Séverine Saintier, “Defects of Consent in English Law: Protecting the Bargain?” <i>Jeffrey L Harrison</i>	147
Reply to Jeffrey L Harrison, ‘Quality of Consent and Distributive Fairness: A Comparative Perspective’ <i>Séverine Saintier</i>	149
Editors’ Commentary on Chapters 6 and 7 (Defects of Consent)	152
PART III. POLICING OF CONTRACTS	
8. Inequality of Bargaining Power and ‘Cure’ by Information Requirement	157
<i>Elizabeth Macdonald</i>	
Introduction	157
Background	158
House of Lords, Court of Appeal, and the Supreme Court	159
<i>Kásler</i> —the European Court of Justice weighs in	162
Limitations of ‘plain intelligible language’	165
Conclusion	168
9. Reassessing Assent-based Critiques of Adhesion Contracts	170
<i>Daniel D Barnhizer</i>	
Introduction to particularized assent	170
Roscoe Pound and the idealization of the horse	170
Continuum from low-quality to high-quality assent	172
Technological doppelgangers for assent—selective assent and <i>à la carte</i> contracting	177
Selective assent and contracts of adhesion	181
Reply to Elizabeth Macdonald, “Inequality of Bargaining Power and ‘Cure’ by Information Provision” <i>Daniel D Barnhizer</i>	184
Reply to Daniel D Barnhizer, ‘Reassessing Assent-based Critiques of Adhesion Contracts’ <i>Elizabeth Macdonald</i>	189
Editors’ Commentary on Chapters 8 and 9 (Inequality of Bargaining Power and Adhesion Contracts)	193
10. Good Faith in the Performance of a Contract in English Law	196
<i>Ewan McKendrick</i>	
Introduction	196
<i>Yam Seng Pte Ltd v International Trade Corporation Ltd</i>	196
The facts	196
The basis for the implication of a good faith term	197
The influence of comparative law	198
Recognizing the current role of good faith in English contract law	199
The arguments against the duty are overstated	202

The scope and the content of the duty	202
The reaction to <i>Yam Seng</i>	204
The future	208
11. History and Theory of Good Faith Performance in the United States	210
<i>Steven J Burton</i>	
History of good faith performance	210
Theories of good faith performance	214
Good faith and bad faith distinguished	217
Justifications	218
Reply to Ewan McKendrick, “Good Faith in the Performance of a Contract in English Law” <i>Steven J Burton</i>	220
Reply to Steven J Burton, ‘History and Theory of Good Faith Performance in the United States’ <i>Ewan McKendrick</i>	223
Editors’ Commentary on Chapters 10 and 11 (Good Faith in the Performance of Contracts)	226
PART IV. CONTRACTUAL INTERPRETATION	
12. Interpreting Commercial Contracts: The Policing Role of Context in English Law	231
<i>Catherine Mitchell</i>	
Introduction	231
Contextualism as an interpretation method and as a contract law movement	233
Contextual interpretation and the policing of contracts	235
Features of contextual interpretation that facilitate contract policing	237
Contextual interpretation: A single-stage or a two-stage process?	238
Choice of context	239
Commercial reasonableness and commercial common sense as interpretative criteria	241
Why interpretation?	245
13. Contractual Interpretation in the Commercial Context	248
<i>Blake D Morant</i>	
Introduction	248
Context and the modern small business	250
Small business in the United States	250
Small business in the United Kingdom	252
Common challenges: US and UK	253
Contemporary contract theory and the salience of context	255
Formalism, fairness, and the case for unconscionability	259
Contractual formalism and small business contracting	259
Unconscionability as a “remedy” for small business contractors	261
Unconscionability’s improved utility—lessons from US government contract law	266
Rudiments of federal government contracts law	266
Unconscionability in federal government contracts	267
Lessons learned: Enhanced analysis of context in disputed contracts	269
Conclusion	270

14. Can Judges Use Business Common Sense in Interpreting Contracts?	272
<i>The Rt Hon Lord Hodge</i>	
Editors' preliminary note	272
Introduction	272
Developments in the judicial interpretation of contracts	273
The basic rule of interpretation	274
Interpretation of contracts in the United States	275
Factors affecting the interpretative exercise	276
The formality or informality of the process of formation	276
The danger of an over-literal approach	277
The effect upon third parties	277
A long-term contractual relationship	277
A purposive approach	278
Five propositions of interpretation	280
Controlling the cost of litigation	280
Convergence and divergence in English and Scottish approaches	282
Conclusion	282
Reply to Catherine Mitchell, "Interpreting Commercial Contracts: The Policing Role of Context in English Law" <i>Blake D Morant</i>	284
Reply to Blake D Morant, 'Contractual Interpretation in the Commercial Context' <i>Catherine Mitchell</i>	286
Editors' Commentary on Chapters 12, 13, and 14 (Contract Interpretation)	290

PART V. DAMAGES

15. Market Damages and the Invisible Hand	297
<i>David Campbell</i>	
Introduction: Why does the invisible hand work?	297
The invisible hand and the principal remedy for breach of contract	298
Cover and market damages	302
The justification of market damages (1): Vindication of rights	307
The justification of market damages (2): Commodities trading	309
Conclusion: Self-interest and cooperation in the law of market damages	310
16. The Right to Perform after Repudiation and Recover the Contract Price in Anglo-American Law	313
<i>Mark P Gergen</i>	
How <i>White & Carter</i> would be decided under American law	314
The duty to mitigate and the power to continue performance on repudiation	314
The damage rule for repudiation of a contract to purchase advertising space	319
How English law handles the problem: In praise of the legitimate interest requirement and the wholly unreasonable standard	321
Legitimate interest: To avoid an uncompensated loss	321
Wholly unreasonable	325
Which approach is better?	328
Conclusion	330
Reply to David Campbell, "Market Damages and the Invisible Hand" <i>Mark P Gergen</i>	333

Reply to Mark P Gergen, ‘The Right to Perform after Repudiation and Recover the Contract Price in Anglo-American Law’ <i>David Campbell</i>	338
Editors’ Commentary on Chapters 15 and 16 (Damages and Repudiation)	342
PART VI. SPECIALTY CONTRACTS	
17. Three Sales Laws and the Common Law of Contracts <i>Qi Zhou and Larry A DiMatteo</i>	347
Introduction	347
Legal landscape: UCC, SoGA, and Scottish sales law	348
Scottish law of sales	349
SoGA and UCC: Differences and influences	350
History, enactment, and revisions	351
Goals and purposes	351
Coverage and comprehensiveness	352
Divergence between UCC and American common law	353
Basic principles and transformation	354
Freedom of contract	354
Reasonableness standard	354
Regulatory principles: Duty of good faith and doctrine of unconscionability	355
Good faith in English law	356
Case studies	358
Contract formation	358
Transfer of title and transfer of risk	359
Right to reject	362
Unconscionability, inequality of bargaining power, and exploitation of weakness	362
Contextual interpretation	364
Warranty law	367
Impact of sales law on common law	376
Conclusion	377
Editors’ Commentary on Chapter 17 (Sales Law)	379
18. Defining Agency and Its Scope (I) <i>Laura Macgregor</i>	381
Introduction	381
Context: The use of agency to solve problems in other areas of the law	381
Nature of agency law in Scotland	382
Historical development of agency in Scotland	382
Formation of agency in Scots law	383
Nature of agency in English law	384
Problem for a contractual analysis: The agent’s lack of contractual capacity	385
The conflict between the agency contract and the concept of fiduciary duties	386
Nature and source of fiduciary duties	386
Contracting-out of fiduciary duties	387
Conflicts produced by the differing sources of agency law	389
The Scottish advocate	389

Holding information on the principal's behalf	390
Holding funds on the principal's behalf	392
Conclusion	394
19. Defining Agency and Its Scope (II)	396
<i>Deborah A DeMott</i>	
Introduction	396
Defining agency	400
Definitional elements applied	400
The parties' own characterization	401
The scope of an agency relationship	402
Inclusions and exclusions from scope of relationship	403
Art auctions and agency relationships	404
Broader theoretical implications	406
Consent to conduct otherwise in breach	407
Agents for multiple parties	408
Terminal agreements: Releases of claims when an agency relationship is at an end	410
Conclusion: Agreement and consent	411
Reply to Laura Macgregor, "Defining Agency and Its Scope (I)"	
<i>Deborah A DeMott</i>	414
Reply to Deborah A DeMott, 'Defining Agency and Its Scope (II)'	
<i>Laura Macgregor</i>	418
Editors' Commentary on Chapters 18 and 19 (Agency Law)	422
PART VII. LEGAL REFORM	
20. Standard Terms in Consumer Contracts: The Challenges of Law Reform in English Law	427
<i>Christian Twigg-Flesner</i>	
Introduction	427
Regulating standard terms in consumer contracts	427
Regulating standard terms in English law—from common law to statute	428
Common law	428
Statutory law	429
The impact of EU law	431
Reform of the law on standard terms in consumer contracts	435
The law reform process	436
Conclusion	438
21. At the Limits of Adjudication: Standard Terms in Consumer Contracts	439
<i>Aditi Bagchi</i>	
Introduction	439
Legal status of standard terms in the United States	441
Theoretical treatment of standard terms	443
Consent	443
Cognitive error	444
Market failure	446
Substantive unfairness	447

Democratic degradation	448
Cumulative externalities	450
Conclusion: Reforming the legal framework	451
The idea of contract: Integrated regulative strategy	451
Evidence	452
Substantive interpretive rules	453
Reply to Christian Twigg-Flesner, “Standard Terms in Consumer Contracts: The Challenges of Law Reform in English Law” <i>Aditi Bagchi</i>	455
Reply to Aditi Bagchi, ‘At the Limits of Adjudication: Standard Terms in Consumer Contracts’ <i>Christian Twigg-Flesner</i>	459
Editors’ Commentary on Chapters 20 and 21 (Law Reform)	462
<i>Index</i>	465