Contents

Table of Cases	xvii
Table of Legislation (Including Law Reform Proposals and Model Laws)	xxxi
Table of Frequently Cited Works	XXXV
List of Contributors	xxxvii
1. Introduction: British and American Perspectives Larry A DiMatteo and Martin Hogg	1
Comparative law approach	1
Challenges to US-British comparative contract scholarship	4
Consent and standard terms Structure of the book	5 7
PART I. CONTRACT THEORY AND STRUCTURE	
2. Saying What We Mean: Fundamental Structural Language	
in Contract Law	13
Martin Hogg	
Introduction	13
Why is fundamental structural terminology used in contract law?	14
Examples of fundamental structural contractual language	15
Obligation and liability	15 20
Conditional and contingent	24
Unilateral and bilateral Conclusions	28
Conclusions	
3. The Death of Consent?	30
Peter A Alces	
Introduction	30
Seminal cases	33 34
Carnival Cruise v Shute	38
Decisions of Judge Easterbrook Arbitration, unconscionability, and consent	45
Constructing consent	52
Normative sense of consent	52
Inferring consent	53
"There oughta be a law!"	55 58
More heat than light	59
Conclusion	39
Reply to Martin Hogg, "Saying What We Mean: Fundamental	
Structural Language in Contract Law" Peter A Alces	61
Reply to Peter A Alces, 'The Death of Consent?' Martin Hogg	65
Editors' Commentary on Chapters 2 and 3	71
(Language and Structure of Contract Law)	/ 1

PART II. CONTRACT FORMATION

4.	The Nature and Timing of Contract Formation	//
	Shawn J Bayern	
	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	80
	of contract formation in modern legal systems	80
	Common law	87
	Other modern legal systems The timing of contract formation	87
	Moving beyond offer and acceptance: The timing of contract formation Conclusion	89
5.	Contract Formation between Distant Parties: The Scottish Experience Hector L MacQueen	90
	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' Hector L MacQueen Reply to Hector L MacQueen, "Contract Formation between Distant Reply to Hector L MacQueen, "Shawe L Bayern	109 114
	Parties: The Scottish Experience" Shawn J Bayern	111
	Editors' Commentary on Chapters 4 and 5 (Formation of Contract)	118
6	. Defects of Consent in English Law: Protecting the Bargain? Séverine Saintier	120
	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 Jeffrey L Harrison	132
	Introduction	132
	The black letter law	133
	The hypothesis and methodology	134
	Four doctrines of legitimacy	135
	Capacity	135

	Contents	xi
	Duress Undue influence Unconscionability	139 142 145
80-	Concluding remarks	146
	Reply to Séverine Saintier, "Defects of Consent in English Law: Protecting the Bargain?" Jeffrey L Harrison	147
	Reply to Jeffrey L Harrison, 'Quality of Consent and Distributive Fairness: A Comparative Perspective' Séverine Saintier	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 Elizabeth Macdonald	157
	Introduction	157
	Background	158 159
	House of Lords, Court of Appeal, and the Supreme Court	162
	Kásler—the European Court of Justice weighs in	165
	Limitations of 'plain intelligible language' Conclusion	168
9	Reassessing Assent-based Critiques of Adhesion Contracts Daniel D Barnhizer	170
	Introduction to particularized assent	170
	Roscoe Pound and the idealization of the horse	170
	Continuum from low-quality to high-quality assent Technological doppelgangers for assent—selective assent	172
	and à la carte contracting	177 181
	Selective assent and contracts of adhesion	101
	Reply to Elizabeth Macdonald, "Inequality of Bargaining Power and 'Cure' by Information Provision" Daniel D Barnhizer	184
	Reply to Daniel D Barnhizer, 'Reassessing Assent-based Critiques of Adhesion Contracts' Elizabeth Macdonald	189
	Editors' Commentary on Chapters 8 and 9 (Inequality of Bargaining Power and Adhesion Contracts)	193
10	O. Good Faith in the Performance of a Contract in English Law Ewan McKendrick	196
	Introduction	196
	Yam Seng Pte Ltd v International Trade Corporation Ltd	196
	The facts	196
	The basis for the implication of a good faith term	197 198
	The influence of comparative law	198
	Recognizing the current role of good faith in English contract law The arguments against the duty are overstated	202

	The scope and the content of the duty The reaction to Yam Seng	202 204 208
	The future	210
11.	History and Theory of Good Faith Performance in the United States	210
	Steven J Burton	210
	History of good faith performance	214
	Theories of good faith performance	217
	Good faith and bad faith distinguished Justifications	218
	Reply to Ewan McKendrick, "Good Faith in the Performance of a Contract in English Law" Steven J Burton	220
	Reply to Steven J Burton, 'History and Theory of Good Faith Performance in the United States' Ewan McKendrick	223
	Editors' Commentary on Chapters 10 and 11 (Good Faith in the Performance of Contracts)	226
	PART IV. CONTRACTUAL INTERPRETATION	
12	2. Interpreting Commercial Contracts: The Policing Role of Context in English Law	231
	Catherine Mitchell	231
	Introduction method and as a contract law movement	233
	Contextualism as an interpretation method and as a contract law movement Contextual interpretation and the policing of contracts	235
	Entered of contextual interpretation that facilitate contract policing	237
	Contextual interpretation: A single-stage of a two-stage process.	238 239
	Choice of context Commercial reasonableness and commercial common sense	0.41
	as interpretative criteria	241
	Why interpretation?	245
1	3. Contractual Interpretation in the Commercial Context	248
	Blake D Morant	248
	Introduction	250
	Context and the modern small business	250
	Small business in the United States Small business in the United Kingdom	252
	Common challenges: US and UK	253
	Contamporary contract theory and the sallelice of context	255 259
	Formalism fairness, and the case for unconsciollability	259
	a the street formalism and small business contracting	261
	remedy" for small business confidences	
	Unconscionability's improved utility—lessons from 03 government	266
	contract law	266
	Rudiments of federal government contracts law Unconscionability in federal government contracts	267
	Lessons learned: Enhanced analysis of context in disputed contracts	269
	Conclusion	270
	UV	

	Contents
14.	Can Judges Use Business Common Sense in Interpreting Contracts?
	The Rt Hon Lord Hodge
	Editors' preliminary note
	Introduction
	Developments in the judicial interpretation of contracts
	The basic rule of interpretation
	Interpretation of contracts in the United States
	Factors affecting the interpretative exercise
	The formality or informality of the process of formation
	The danger of an over-literal approach
	The effect upon third parties
	A long-term contractual relationship
	A purposive approach
	Five propositions of interpretation
	Controlling the cost of litigation
	Convergence and divergence in English and Scottish approaches
	Conclusion
	Reply to Catherine Mitchell, "Interpreting Commercial Contracts:
	The Policing Role of Context in English Law" Blake D Morant
	Reply to Blake D Morant, 'Contractual Interpretation in
	the Commercial Context' Catherine Mitchell
	Editors' Commentary on Chapters 12, 13, and 14 (Contract Interpretation)
	PART V. DAMAGES
15.	. Market Damages and the Invisible Hand David Campbell
	Introduction: Why does the invisible hand work?
	The invisible hand and the principal remedy for breach of contract
	Cover and market damages
	The justification of market damages (1): Vindication of rights
	The justification of market damages (2): Commodities trading
	Conclusion: Self-interest and cooperation in the law of market damages
16	. The Right to Perform after Repudiation and Recover the Contract Price
	in Anglo-American Law
	Mark P Gergen
	How White & Carter would be decided under American law
	now while & Carlet would be decided under Affician law
	The demaga rule for repudiation of a contract to purchase advertising space
	The damage rule for repudiation of a contract to purchase advertising space
	The damage rule for repudiation of a contract to purchase advertising space How English law handles the problem: In praise of the legitimate
	The damage rule for repudiation of a contract to purchase advertising space How English law handles the problem: In praise of the legitimate interest requirement and the wholly unreasonable standard
	The damage rule for repudiation of a contract to purchase advertising space How English law handles the problem: In praise of the legitimate interest requirement and the wholly unreasonable standard Legitimate interest: To avoid an uncompensated loss
	The damage rule for repudiation of a contract to purchase advertising space How English law handles the problem: In praise of the legitimate interest requirement and the wholly unreasonable standard Legitimate interest: To avoid an uncompensated loss Wholly unreasonable
	The damage rule for repudiation of a contract to purchase advertising space How English law handles the problem: In praise of the legitimate interest requirement and the wholly unreasonable standard Legitimate interest: To avoid an uncompensated loss Wholly unreasonable Which approach is better?
	The damage rule for repudiation of a contract to purchase advertising space How English law handles the problem: In praise of the legitimate interest requirement and the wholly unreasonable standard Legitimate interest: To avoid an uncompensated loss Wholly unreasonable
	The damage rule for repudiation of a contract to purchase advertising space How English law handles the problem: In praise of the legitimate interest requirement and the wholly unreasonable standard Legitimate interest: To avoid an uncompensated loss Wholly unreasonable Which approach is better? Conclusion
	The damage rule for repudiation of a contract to purchase advertising space How English law handles the problem: In praise of the legitimate interest requirement and the wholly unreasonable standard Legitimate interest: To avoid an uncompensated loss Wholly unreasonable Which approach is better?

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

Contents	XV
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) Deborah A DeMott	396
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	410
is at an end	410
Conclusion: Agreement and consent	411
Reply to Laura Macgregor, "Defining Agency and Its Scope (I)" Deborah A DeMott	414
Reply to Deborah A DeMott, 'Defining Agency and Its Scope (II)' Laura Macgregor	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
Christian Twigg-Flesner	
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 Aditi Bagchi	439
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

Contents

	D	448
	Democratic degradation	450
	Cumulative externalities	451
	Conclusion: Reforming the legal framework	451
	The idea of contract: Integrated regulative strategy	452
	Evidence	
	Substantive interpretive rules	453
	Reply to Christian Twigg-Flesner, "Standard Terms in Consumer Contracts: The Challenges of Law Reform in English Law" Aditi Bagchi	455
	Reply to Aditi Bagchi, 'At the Limits of Adjudication: Standard Terms in Consumer Contracts' Christian Twigg-Flesner	459
	III Consumer Contracts Consum 2008	
	Editors' Commentary on Chapters 20 and 21 (Law Reform)	462
Inc	dex	465