	Preface	page xiii
	Abbreviations of Court names	xvi
	Table of cases	xviii
	Table of legislation	xxxi
	PART 1 Theoretical and historical introduction	1
1	The concept of promise	3
	1. What is a promise?	4
	(a) A definition of promise	4
	(b) Promise: objectively existing phenomenon or	
	human construction?	8
	 (c) Testing component elements of the definition of promise (i) A promise is more than merely an internal mental process: promises as speech acts demonstrating 	10
	commitment	10
	(ii) A promise is a commitment to a performance	
	of the promisor	21
	(iii) A promise must manifest more than an illusory	
	commitment or one which the promisor is patently	
	unable to fulfil	22
	(iv) A promise must relate to the future	22
	(v) A promise must state a commitment in favour of	
	another party	23
	(vi) Things which are not components of the definition	25
	2. Three crucial qualities of relevance to promises: gratuitousness	
	conditionality, unilaterality	25
	(a) Gratuitousness	26
	(b) Conditionality	30
	(c) Unilaterality	35
	3. Acts having some similarity to, but which are distinct	
	from, promises	38
	(a) Vows	39
	(b) Oaths	41
	(c) Threats	45
	(d) Donation (gift)	46

	(e) Warranties (guarantees)	48
	(f) Agreement	50
	4. Promise as a culturally universal and significant idea	52
	5. Preliminary conclusions	56
2	Promises as obligations: morality and law	58
	1. Introduction: promise as a type of obligation	58
	2. Taxonomies of obligations in morality and law	59
	3. Promises as moral obligations: the practice of promising	62
	(a) Promises as moral, immoral or amoral?	64
	(b) Source of the morality of the practice of promising	67
	(i) Promising as a virtuous act; the natural law tradition	
	Scripture	77
	The canon law	79
	Objections to the morality of promising as	83
	having a natural law/virtue basis (ii) Promising as an act of the will: respect for	63
	personal autonomy	86
	(iii) The 'contract theory' of promising	93
	(iv) Consequentialism (utilitarianism)	95
	(v) Reliance theory	98
	A more limited role for reliance	104
	(vi) Conclusion on the competing theories of the	
	moral value of promises	106
,	4. Powers and sanctions relevant to breach of morally	
	binding promises	106
3	The historical development of promissory ideas	
	in the law	109
	1. Roman law	110
	(a) Formal contracts: the <i>stipulatio</i>	110
	(b) Informal contracts	114
	(c) Conclusion on Roman law	115
	2. Medieval contract law	116
	(a) Continental legal thought	116 119
	(b) English law (i) Debt	120
	(ii) Covenant	121
	(iii) Unilaterality and bilaterality in early English	121
	contract law	123
	(iv) Assumpsit	123
	(v) The doctrine of consideration	125
	3. The Northern natural law school	127
	(a) Hugo Grotius	128
	(b) Samuel von Pufendorf	130
	(c) James Dalrymple (Viscount Stair)	134

		CONTENTS	ix
	4.	Eighteenth and nineteenth centuries	142
		(a) English law	142
		(b) Scots law	147
		(c) Civilian systems	151
		(i) German law	151
		(ii) Robert Pothier	152
	5.	Contract theory and practice in the twentieth century	157
	6.	A revitalised will theory	166
	PA	ART 2 The modern law	175
4		ormation of contract	177
	1.	Wasted pre-contractual expenditure following termination	
		of contract negotiations	179
		(a) A Common law solution to the problem of pre-contractual	100
		expenditure: promissory and proprietary estoppel (i) Promissory estoppel: promissory or	180
		reliance-based principle?	182
		(ii) Promissory estoppel and failed contractual	
		negotiations	185
		(iii) Proprietary estoppel and failed contractual	
		negotiations	188
		(iv) Conclusion on estoppel and pre-contractual	
		expenditure	189
		(b) A civilian solution to wasted pre-contractual	
		expenditure: <i>culpa in contrahendo</i> and bad faith	190
		termination of contractual negotiations (c) A mixed legal system solution to wasted pre-contractual	190
		expenditure: liability from an implied assurance that a	
		valid contract exists	197
		(d) Other solutions to the problem of pre-contractual	
		liability	201
		(e) Conclusion on pre-contractual liability	203
	2.	Pre-contractual duties of disclosure	204
	3.	Offer and acceptance	210
		(a) Offer and acceptance as conditional promise	210
		(b) The traditional offer and acceptance model as a	
		unilateral dictation of terms	212
		(c) Distinguishing offer from conditional promise	213
		(d) Problem cases for a promissory analysis of offer	215
		and acceptance	215 217
	4	(e) Conceiving of offers as binding Enforcement of auction/tender conditions	
			219
	5.	The firm or irrevocable offer (a) Characterising the firm offer	223 223
		(a) Characterising the firm offer (b) Promises of reward	228

	6.	Options	230
	7.	Letters of intent and preliminary contracts	235
		(a) An intent to contract	236
		(b) A preliminary contract, envisaging a further contract	236
		(c) An expectation of a formal contract	237
		(d) An expression of intention to do something other	
		than contract	238
		(e) A genuine unilateral promissory intention	239
	8.	Error in formation of contract	239
		(a) Choosing the policies which inform the rules on error	240
		(b) Constructing workable classifications which implement	
		the policies chosen	242
		(i) Roman law	242
		(ii) The Common law	244
		(iii) The mixed legal systems	248
		(iv) German law	251
		(v) An ideal approach to promissory error?	254
	9.	Extortion in the formation of contract	257
		(a) English law	260
		(b) The mixed legal systems	261
		(c) German law	265
		(d) Conclusion on extortion	265
	10.	Implied terms	266
	11.	Consideration	274
	,	(a) The Common law	274
		(b) The mixed legal systems	276
		(c) German law	278
		(d) Model law	279
	12.	Requirements of form: unwarranted restrictions	1
		on promising?	280
5	Th	nird party rights	284
	1.	The challenge to third party rights in contract	284
	2.		292
		Third party rights in modern contract law	297
	5.	(a) The Common law	297
		(b) The mixed legal systems	301
		(c) German law	308
		(d) Model law	311
		(e) Conclusion on third party rights under contract	312
	4.	Assignment	313
		(a) English law	316
		(b) The mixed legal systems	316
		(c) German law	318
		(d) Model law	319

		CONTENTS	xi
	5.	The problem of transferred loss (a) English law (b) The mixed legal systems (c) German law	320 320 329 330
	6.	Conclusion on third parties	332
6	C	ontractual remedies	334
	1.	The 'interests' protected by remedies	334
	2.	Mutuality of promises and withholding of performance (a) The Common law (b) Mixed legal systems (c) German law (d) Model law	337 340 341 345 347
	3.	Specific performance	348
		(a) English law(b) Mixed legal systems(c) German law(d) Model law	349 352 355 358
	4.	Perfect or substantial performance of contractual promises	358
		(a) Contracts for services	359
	_	(b) Sales of goods	363
		Injunction (interdict)	365
	6.	Damages (a) Contractual damages and interests other than the performance interest (b) Damages for mere breach of contract, or for fault? (c) English law (d) Mixed legal systems (e) German law (f) Model law	368 372 376 379 382 387 392
	7.	Liquidated damages: penalty clauses (a) English law (b) Mixed legal systems (c) German law (d) Model law	394 395 397 401 403
	8.	Termination of contract for non-performance (a) Historical origins of the right to terminate (b) English law (c) Mixed legal systems (d) German law (e) Model law	403 405 405 406 410 412
	9.	Restitution following termination for non-performance	414
		(a) English law(b) Mixed legal systems	414 416

		(c) German law	419
		(d) Model law	421
	10.	Good faith and contractual remedies	421
7	Th	ne renunciation of contractual rights	428
	1.	Terminology	428
	2.	Bilateral or unilateral renunciations	429
	3.	Characterising undertakings not to enforce contractual rights	431
	4.	Express contractual or promissory renunciation of rights	432
		(a) The Common law	432
		(b) Mixed legal systems	434
		(c) German law	437
	5.	Forbearance, promissory estoppel and personal bar	439
		(a) The Common law	440
		(i) Forbearance at common law	440
		(ii) Forbearance in equity: promissory estoppel	441
		in English law (iii) Promissory estoppel in American Common law	443
		(iv) Conclusion on promissory estoppel in	110
		the Common law	445
		(b) Mixed legal systems	445
		(i) South Africa	445
		(ii) Louisiana	446
		(iii) Scotland	447
	9	(c) German law	448
	6.	Model law and renunciations of rights	449
	P	ART 3 The future	451
8	T	ne future of promise in contract law	453
	1.	The restricted role of promise in the modern law	453
	2.	Future possible development of the law	455
		(a) General remarks	455
		(b) The Common law	460
		(c) The mixed legal systems	462
		(d) German law	463
		(e) The development of supranational model law	464
	3.	Conclusion on the future of promise	466
	B	ibliography	468
		nder	482