

# Contents

<i>Preface</i>	<i>page xi</i>
<b>1 Philosophical Problems of Contract Law</b>	<b>1</b>
Suggested Further Reading	3
<b>2 History and Sources</b>	<b>4</b>
A. Roman Law	5
B. English Writ System	6
C. The Range and Limits of Contract Law	10
D. Sources of Contract Law	11
1. Domestic Law	11
2. International Sources	13
E. Theoretical Implications	15
Suggested Further Reading	16
<b>3 Formation</b>	<b>18</b>
A. Offer and Acceptance	18
1. The Nature of Offers	19
2. Timing of Offers and Acceptances	21
3. Offers for Unilateral Contracts	23
4. Objective and Subjective	24
5. Battle of the Forms	25
6. Electronic Contracting and Rolling Contracts	28
7. Open Terms and Agreements to Agree	30
8. Construction Bid Contracts	31
B. Consideration	32
1. Historical Origins	32
2. Current Doctrine	34



C. Statute of Frauds	37
D. Other Grounds for Recovery	40
1. Promissory Estoppel	40
2. Promissory Restitution	42
3. Restitution/Unjust Enrichment	42
E. Formation-Based Defenses	43
1. Misrepresentation and Nondisclosure	44
2. Mistake	46
3. Duress	47
4. Undue Influence	48
5. Minority	49
6. Mental Incapacity	50
7. Intoxication	51
F. Theoretical Implications	51
Suggested Further Reading	52
<b>4 Interpretation</b>	<b>54</b>
A. Objective and Subjective	54
B. Default Rules, Incomplete Contracts, and Implied Terms	55
C. Rules of Interpretation	57
1. Canons of Interpretation	58
2. Plain Meaning	58
D. Parol Evidence Rule	59
1. The Rule(s)	59
2. Trusting Writings versus Trusting Face-to-Face Promises	65
E. Warranties	66
F. Interpretation and Fairness	67
G. Choice of Law and Conflict of Laws	68
H. Theoretical Implications	69
Suggested Further Reading	69
<b>5 Performance</b>	<b>71</b>
A. Conditions	71
1. On-Off Switches	71
2. Excuse of Failure of Condition	72
B. Responses to Current and Future Problems in Performance	74
1. Prior to Scheduled Performance: Anticipatory Repudiation and Adequate Assurances	74
2. Failures in the Middle of Performance	76
3. Modification	77



4. Failure in Completed Performance: Substantial Performance, Divisibility, Restitution	79
C. Impossibility, Impracticability, and Frustration of Purpose	81
D. Good Faith	83
E. Theoretical Implications	85
Suggested Further Reading	85
<b>6 Enforcement and Remedies</b>	<b>87</b>
A. Substantive (Fairness) Constraints and Public Policy	87
1. Fairness Constraints	87
2. Unconscionability	90
3. Public Policy	92
B. Limitations on Remedies	92
1. Causation	93
2. Certainty	93
3. Foreseeability	93
4. Mitigation	94
5. Unrecoverable Damages	98
C. Measuring Damages: Expectation, Reliance, Restitution	99
1. Expectation Damages	99
2. Reliance Damages	100
3. Restitution	101
D. Special Cases	102
1. Cost of Completion versus Diminution of Value	102
2. Restitution for the Breaching Party	104
E. Equitable Remedies	106
F. Agreed Remedies	107
G. Third-Party Rights and Duties	110
1. Third-Party Beneficiary	110
2. Assignment and Delegation	112
H. Bilateral Structure, Corrective Justice, and Optimal Incentives	113
I. Efficient Breach and the (A)morality of Contract Law	115
J. Theoretical Implications	117
Suggested Further Reading	117
<b>7 Special Categories of Contract Law</b>	<b>119</b>
A. Employment Agreements	119
B. Insurance Law	121
C. Landlord-Tenant	122
D. Real Estate Agreements	122



E. Franchise Agreements	123
F. Premarital Agreements	124
G. Government Contracts	125
H. Theoretical Implications	126
Suggested Further Reading	126
<b>8 Modern Contract Law Practices: Questions of Legitimation and Moral Obligation</b>	<b>128</b>
A. The Gap between Ideal and Reality	128
B. Theories of Contract Law	132
C. Theory Meets Practice	136
D. Rethinking Contract Law	138
E. The Moral Obligation to Keep Contracts	141
F. Implications for Government Regulation	144
Conclusion	145
Suggested Further Reading	146
<b>9 How Many Contract Laws?</b>	<b>147</b>
A. The History of General Theory	147
B. The Nature of General Theory	148
C. General Contract Law	152
D. Contract and Law	154
E. Consequences	155
F. Note on Proving a Negative	155
G. Note on Rights and Remedies	156
H. One or Many Theories (Revisited)	159
1. Essential and Accidental	159
2. Deciding between General and Particular Theories	159
3. Why Does It Matter?	160
Conclusion	161
Suggested Further Reading	162
<i>Bibliography</i>	163
<i>Table of Cases</i>	185
<i>Statutes and Restatements</i>	193
<i>Index</i>	197