



I

Introduction

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Main features of contract law

1. CHARACTERISTICS OF ENGLISH CONTRACT LAW

- 1.01 English contract law is organised into topics, as set out in the chapter headings of this work. These form the ‘general part’ of the subject.¹ English contract law assumed its current shape in the nineteenth century, although there was much doctrinal development or legislative change during the twentieth century (remarks to this effect by Brian Simpson,² Patrick Atiyah,³ David Ibbetson,⁴ Michael Lobban,⁵ and Steve Hedley).⁶ As Hedley explains:⁷

Speaking in broad terms, the Victorians invented the idea that the law will enforce contracts as such. They were given a law of contracts, but turned it into a law of contract, with general principles applicable to all agreements. The responsibility for this development is largely that of Leake [1st edition, 1867], Pollock [1st edition, 1876] and Anson [1st edition, 1879], who each produced major textbooks expounding a law of contract and not merely collecting together rules on different types of contracts. The subject matter of contract was overwhelmingly business and consumer transactions; the general principles of contract were thus largely designed for commercial work.

1 Cf Roman law, which comprises a system of particular contracts: B. Nicholas, *An Introduction to Roman Law* (Oxford, 1962), 165 ff.

2 A. W. B. Simpson, (1975) 91 LQR 247, at 250–7, notes especially the influence of textbook writers: see next note.

3 P. S. Atiyah, *Essays on Contract* (Oxford, 1986), 16 ff: ‘[I]t was the nineteenth century which very largely saw the supersession of the importance of special kinds of contracts by the general principles of contract. It was, of course, an Age of Principles.’ P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979), 681 ff, notes the importance of the textbooks by Leake (1867), Pollock (1875) and Anson (1879), especially the latter two; Atiyah’s remarkable historical *magnum opus* surveys the entire intellectual and economic scene; another attractive survey is W. Swain, ‘The Classical Model of Contract: The Product of a Revolution in Legal Thought?’ (2010) 30 LS 513.

4 D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, 1999), chapters 5, 11, 12 and 13.

5 M. Lobban, in W. Cornish, J. S. Anderson, R. Cocks, M. Lobban, P. Polden and K. Smith, *The Oxford History of the Laws of England*, vol. XII, 1820–1914: *Private Law* (Oxford, 2010), 295 ff.

6 (1985) 5 OJLS 391, 402.

7 *Ibid.*

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In modern times, Parliament⁸ and judges⁹ have consistently assumed the existence of a coherent body of general rules applicable to all types of contracts. Other legal systems organise the subject in a similar fashion, distilling general rules and doctrines of ‘contract law’, and distinguishing this unifying or shared body of law from the particular features of specific contracts, such as sale of goods, insurance, hire, employment, etc.

- 1.02 During the last twenty years, much collaborative energy has been spent identifying principles of contract acceptable to legal systems in general, whether common law, civilian or other. In fact, there are three ‘soft law’ codes (see 21.01 ff for details): (1) the global ‘commercial’ contract code, UNIDROIT’s *Principles of International Commercial Contracts* (2004);¹⁰ (2) ‘PECL’, the *Principles of European Contract Law*, by the Commission for European Contract Law;¹¹ and (3) ‘CFR’, the *Common Frame of Reference*.¹² None of these is binding, either in England and Wales or elsewhere. But, on many topics in this book, reference will be made to common features or differences between English law and these ‘soft law’ codes (for example, there are over 170 references to ‘UNIDROIT’ in these pages).
- 1.03 The ‘general part’¹³ of English contract law is a combination of rules and principles. ‘Rules’ tend to be quite specific; ‘principles’ rather more general. Principles (properly so-called) tend to be fundamental standards underpinning many rules. We will consider two such principles below: the principle of ‘freedom of contract’ (at 1.08) and ‘the objective principle’ (at 1.10).¹⁴
- 1.04 Rules can sometimes be subject to exceptions, and such exceptions can proliferate (for example, the cluster of exceptions to the rule in *Woodar’s* case, 17.23 ff). The fact that the courts have recognised a network of exceptions often reveals that the major rule is itself unsatisfactory.

8 E.g. the Misrepresentation Act 1967 (9.14) applies to all contracts and to deeds; the Contracts (Rights of Third Parties) Act 1999 applies to all contracts and deeds, except five specific categories (7.35).

9 E.g. Roskill LJ’s judgment in *The Hansa Nord* [1976] QB 44, 71, CA (general concept of ‘innominate term’ applicable to sale of goods transactions).

10 2nd edn, Rome, 2004. M. J. Bonell of the University of Rome, ‘La Sapienza’, has had a remarkable influence upon this influential work; see also his Bonell, ‘Do We Need a Global Commercial Code?’ (2000–3) 5 *Uniform Law Review / Revue de droit uniforme* 469–81; M. J. Bonell (ed.), *The UNIDROIT Principles in Practice: Case Law and Bibliography on the UNIDROIT Principles of International Commercial Contracts* (2nd edn, Ardsley, NY, 2006); S. Vogenauer and J. Kleinheisterkamp (eds.), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (Oxford, 2009), 21.02.

11 O. Lando and H. Beale (eds.), *Principles of European Contract Law* (The Hague, 2000), 21.02.

12 *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference*, ed. Christian von Bar and Eric Clive (6 vols., Oxford University Press/Sellier, 2010), prepared by the ‘Study Group on a European Civil Code’ and the ‘Research Group on EC Private Law (Acquis Group)’: project (3) is in part a revision of project (2).

13 On the ‘general part’, see S. A. Smith, ‘The Limits of Contract’, in J. W. Neyers, R. Bronaugh and S. G. A. Pitel (eds.), *Exploring Contract Law* (Oxford, 2009), 1–24; and, for a civilian perspective, see H. Dedek, ‘Border Control: Some Comparative Remarks on the Cartography of Obligations’, in J. W. Neyers, R. Bronaugh and S. G. A. Pitel (eds.), *Exploring Contract Law* (Oxford, 2009), 2 ff, especially at 36 ff.

14 For a summary of deeper values within contract law, see Martijn Hesselink, ‘European Contract Law? A Matter of Consumer Protection, Citizenship, or Justice?’, in *Liber Amicorum Guido Alpa: National Private Law Systems* (London, 2007), 500, 516–20.

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- 1.05 It must be admitted, however, that it is hard to maintain a clean distinction between rules and principles because of the tendency of judges to refer to some rules or doctrines as ‘principles’. Consider the following examples of this usage. First, in *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge & Co. Ltd* (1915),¹⁵ Viscount Haldane LC said:

[C]ertain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* [a right of action exercisable by a third party] arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam [as a matter of obligation, as distinct from a right of property]. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor’s request.

These so-called ‘principles’ are, respectively, the common law rule that a third party cannot sue upon a contract (this remains the starting point, but statute has now enabled third parties to acquire rights of action, 17.34) and the common law rule that only a person who has provided consideration (an element of bargain) to support a promise can sue the defendant for breach of contract (in the absence of a formal contract known as a ‘deed’) (on deeds, 1.14 and 5.03; generally on the consideration doctrine, see chapter 5).

- 1.06 English contract law is predominantly a case law subject. There are few statutes governing the general part of contract law, although the topics of exclusion clauses and unfair terms in consumer contracts are now dominated by legislation. The main statutes affecting general contract law are: the Law of Property Act 1925 (notably section 49(2), concerning deposits, 19.32); the Law Reform (Frustrated Contracts) Act 1943; the Law Reform (Contributory Negligence) Act 1945; the Misrepresentation Act 1967; the Unfair Contract Terms Act 1977; the Sale of Goods Act 1979; the Supply of Goods and Services Act 1982; the Contracts (Rights of Third Parties) Act 1999; and the Unfair Terms in Consumer Contracts Regulations 1999. There is also the Limitation Act 1980: the limitation periods (see further 1.23) applicable to contractual actions are: six years for ordinary (‘simple’)¹⁶ contracts and twelve years for deeds; for the latter, 5.03.¹⁷ The possibility of codification of contract law is discussed at 21.25.¹⁸
- 1.07 English contract law has a reputation for precision and stability (although it has been fairly stated that finding this ‘precise’ statement often involves expensive legal advice, in order that decades or centuries of case law can be combed).¹⁹ Foreign businesses often

15 [1915] AC 847, 853, HL.

16 Section 5 of the Limitation Act 1980.

17 Section 8 of the Limitation Act 1980 refers to actions on ‘specialties’, for example, a deed.

18 Noting especially M. Arden, ‘Time for an English Commercial Code?’ [1997] CLJ 516; R. Goode, ‘Removing the Obstacles to Commercial Law Reform’ (2007) 123 LQR 602–17.

19 R. Goode, ‘Removing the Obstacles to Commercial Law Reform’ (2007) 123 LQR 602–17.

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choose English law to govern their transactions by use of ‘choice of law’ clauses: 12.05. Such ‘cross-border’ transactions occur when one or both parties are resident or situated outside England.

2. FREEDOM OF CONTRACT²⁰

- 1.08 This principle, recognised both in English law and in other legal traditions,²¹ permits parties to conclude agreements on a wide range of matters, and on such terms as they wish. The principle embraces the following liberties. First, parties have a general freedom to enter into transactions which are intended (explicitly or otherwise) to create legal obligations. This freedom includes the power to formulate individual terms within such a transaction, or to acquiesce in ‘default’ terms ‘implied’ by statute or common law. Secondly, parties to a transaction can stipulate that it will not be legally binding, 6.05. Thirdly, freedom to contract includes the liberty to compromise a legal dispute, or to waive legal liability. But a contract of compromise must be very clearly worded if it is to extend one party’s prospective liability towards the other, that is, liability which has not yet arisen but which might arise in the future if there were to be a change in the law.²²
- 1.09 Exercise of these interrelated freedoms is subject to the overarching limitations of (1) public policy (5.73 and chapter 20); (2) the parties’ inability to exclude liability for fraud at common law: 15.04; (3) statutory regulation of adhesion clauses (15.08, 15.33); and (4) personal capacity. As regards personal capacity, for persons under eighteen (so-called ‘minors’), for reasons of space the law on this topic can only be sketched in this note;²³ as for mental capacity, it should be noted that, if a party’s insanity is not known to the

20 *Chitty on Contracts* (30th edn, London, 2008), 1-011 ff; P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979); Atiyah’s *Introduction to the Law of Contract* (6th edn, Oxford, 2006); R. Brownsword, *Contract Law: Themes for the Twenty-First Century* (2nd edn, Oxford, 2006), chapter 2; H. G. Collins, *The Law of Contract* (4th edn, Cambridge, 2003); C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, MA, 1981); J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford, 1991); D. Kimel, *From Promise to Contract* (Oxford, 2005), chapter 5; D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, 1999), chapters 7, 11, 12 and 13; S. A. Smith, *Contract Theory* (Oxford, 2004); and M. J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, MA, 1997).

21 M. J. Bonell (ed.), *The UNIDROIT Principles in Practice: Case Law and Bibliography on the UNIDROIT Principles of International Commercial Contracts* (2nd edn, Ardsley, NY, 2006), 69; S. Vogenauer and J. Kleinheisterkamp (eds.), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (Oxford, 2009), 118.

22 *BCCI v. Ali* [2001] UKHL 8; [2002] 1 AC 251, at [19], [21], [35] and [86]; cf the dissent at [73] by Lord Hoffmann; N. Andrews, *English Civil Procedure* (Oxford, 2003), 23.65 to 23.77; see also *Satyam Computer Services Ltd v. Unpaid Systems Ltd* [2008] EWCA Civ 487; [2008] 2 All ER (Comm) 465, at [84].

23 *Chitty on Contracts* (30th edn, London, 2008), 8-002 ff (see also S. Hedley, [2004] CLJ 435, 440-2); (1) a minor is liable for ‘necessaries’ purchased: section 3 of the Sale of Goods Act 1979; *Nash v. Inman* [1908] 2 KB 1, CA; ‘necessaries’ can include certain services (*Chitty on Contracts* (30th edn, London, 2008), 8-013); (2) a minor is bound by a contract of employment or apprenticeship as long as it is on the whole beneficial to him; but this does not extend to a contract to promote the prospects of a talented footballer: *Proform Sports Management Ltd v. Proactive Sports Management Ltd* [2006] EWHC 2903 (Ch); [2007] 1 All ER 542 (the ‘Wayne Rooney’ case); (3) contracts for the sale or purchase of land, or the grant or acquisition of a lease, or for the onerous acquisition of shares, can be repudiated by a minor or, after he reaches eighteen, repudiated within a reasonable time (on the problematic grant of a lease to a minor, see

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other party, the Privy Council in *Hart v. O'Connor* (1985) held that a contract will arise, see 3.61;²⁴ as for 'legal persons', the company must be validly formed.

3. THE OBJECTIVE PRINCIPLE

- 1.10 This principle is a fundamental and pervasive aspect of contract law (for further detail, 3.57 ff). A person's words or conduct must be interpreted in the manner in which another might objectively and reasonably understand them.²⁵ As Lord Reid said in *McCutcheon v. David MacBrayne Ltd* (1964):²⁶ 'the judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other.' Thus, the objective principle concerns the following matters: Is there a contract? If so, on what terms? Has the contract been varied or terminated by consensus? Has a party repudiated the agreement? Has the other party accepted that repudiation? Has a voidable contract been 'affirmed' by a party?

4. OVERVIEW OF CONTRACTUAL DOCTRINES

- 1.11 Contracts are legally enforceable agreements involving two or more parties. The agreement can involve one party assuming an obligation only if the other does something (or refrains from something): a so-called 'unilateral contract'. An example is an offer of reward payable only if the other party supplies desired information. But most contracts involve reciprocal obligations: a so-called 'bilateral contract'; for example, to sell and buy, to insure and pay the premium, to hire out and to pay the hire charge, to work and to pay a salary, etc.
- 1.12 Many contractual obligations are promises to do something, or to pay money, or to transfer property. Occasionally, a party might undertake to refrain from doing something, such as not to work for a rival employer for a specified period. In short, most promises are forward-looking commitments to do, pay, transfer or abstain. But there are two main variations. A contractual assurance need not involve a promise of *future* conduct (or abstention). Thus, a 'warranty' is an assurance that something is the case, or has been the case. Another variation is that a promise need not concern the promisor's own primary

Hammersmith and Fulham London Borough Council v. Alexander-David [2009] EWCA Civ 259; [2009] 3 All ER 1098; (4) all other types of contract (e.g. a contract of insurance or a trading contract, or a contract for a luxury item not within the scope of 'necessaries') are not binding on the minor unless he ratifies the transaction after reaching eighteen: *Chitty on Contracts* (30th edn, London, 2008), 8-042 ff; (5) section 3 of the Minors' Contracts Act 1987 permits the court to order restitution of 'any property acquired by the [minor] under the contract, or any property representing it', even if the minor had not lied about his age, and this provision applies to all contracts other than those at (1) and (2).

24 *Hart v. O'Connor* [1985] 2 All ER 880, PC; however, where the incapax's property is subject to the control of the court, under sections 15 ff of the Mental Capacity Act 2005, transactions which would be inconsistent with the court's control of those assets will be void as against that party; *Chitty on Contracts* (30th edn, London, 2008), 8-073, and *Treitel* (12th edn, London, 2007), 12-056, 12-057.

25 Lord Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 LQR 433.

26 [1964] 1 WLR 125, HL; see also *Shogun Finance Co. Ltd v. Hudson* [2003] UKHL 62; [2004] 1 AC 919, HL, at [183].

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conduct. Thus, a guarantee (5.06, 5.18) is a surety's undertaking (normally) to indemnify a creditor if a debtor fails to satisfy a debt owed, or becoming due, to that creditor.

- 1.13 Some elements of basic contract law will now be explained. Formation of contract requires analysis in terms of offer and acceptance (chapter 3); certainty (chapter 4); intent to create legal relations (chapter 6); absence of a vitiating factor rendering the contract either void (common law mistake, chapter 10) or voidable (misrepresentation, duress, undue influence or unconscionability, chapter 11).
- 1.14 An agreement must either be supported by consideration (chapter 5) or contained in a 'deed': a deed is a formal written contract, which is normally gratuitous (see also 5.03 ff). The requirements for a valid deed are:²⁷ (1) the statement must be in writing; (2) this document must be declared to be a deed; (3) the document must be signed by the promisor (the 'covenantor'); (4) the document must be witnessed by another; and (5) the document must be 'delivered' (this word is misleading because the covenantor need not physically transfer the deed to the covenantee: it is enough that there is conduct indicating that the covenantor intends to be bound by it).²⁸
- 1.15 In general, contracts do not need to be in writing or comply with special formality (thus, an agreement for the purchase of a £10m ship or a £20m – inevitably over-priced – English footballer can be made without writing). The main exceptions, where a contract must be in writing or formalised, are agreements for the creation or transfer of interests in land (see also 5.07 ff) and guarantees (5.06, 5.18). Many contractual obligations are express, whether oral or written (for an overview, see 12.01 ff). But implied terms (chapter 13) are readily found as a result of statute or common law doctrine.
- 1.16 An agreement might be expressly 'subject to contract' (12.04; also 1.16, 2.07, 4.21, 6.06), so that it does not create any legally binding duties. Or an agreement might be subject to so-called 'conditions precedent' (12.02; see also 1.16, 10.07, 10.10, 14.29). For example, the contract might be contingent upon a third party, such as a government minister or planning authority, giving permission which is vital to the relevant transaction. Sometimes one party might agree to exercise best or reasonable endeavours to apply for such permission (2.10).
- 1.17 A contracting party's unexcused failure to perform, or his defective performance, constitutes a breach (chapter 17). The other party has a range of possible remedies in respect of breach (18.02 for an overview): orders to compel agreed performance (a claim in debt, 18.03; or, exceptionally, recourse to equitable and coercive relief by injunction, 18.20; or

²⁷ Section 1(2) and (3) of the Law of Property (Miscellaneous Provisions) Act 1989; as amended by Article 7(3) of the Regulatory Reform (Execution of Deeds and Documents) Order 2005 (SI 2005 No. 1906); *Treitel* (12th edn, London, 2007), 3-164 ff; *Bolton Metropolitan Borough Council v. Torkington* [2004] Ch 66, CA; *Chitty on Contracts* (30th edn, London, 2008), 1-087.

²⁸ *Treitel* (12th edn, London, 2007), 3-166.

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specific performance, 18.13); claims for damages at common law (18.23); restitutionary claims in respect of the guilty party's unjust enrichment (18.51); declarations that the guilty party is in breach (18.62) (or the award of merely nominal damages, 18.23 at (2), that is, a token amount designed to register that there has been a breach of contract or commission of a tort); self-help measures (forfeiture of a deposit, 19.27); or a stipulated right to liquidated damages (19.02); or a possible right to repossess property (17.40) or to withhold reciprocal performance (17.51 ff).

- 1.18 A party's non-performance or defective performance might be excused by an exclusion clause (chapter 15) or under the common law doctrine of frustration (chapter 16). Frustration applies if the contractual situation has been drastically affected by a change of circumstances subsequent to the agreement's formation. It will not be enough that one party has experienced unforeseen price increases, even if they are very large. Nor is it enough that other changes have occurred which severely hamper his performance, or which render the transaction highly unattractive to him.
- 1.19 The agreement *at* common law does not confer rights of enforcement on a third party (for a summary, 7.01). Nor does it impose obligations on a third party (for a summary, 7.02). The main qualifications upon these fundamental propositions of 'privity of contract' are: a third party might acquire rights, including a right to require performance, by a trust of a promise (7.12); and the Contracts (Rights of Third Parties) Act 1999 (7.34) might enable the third party to take the benefit of the contract and sue the promisor for non-performance, or the third party might be permitted under the same Act to take the benefit of an exclusion clause. Alternatively, the benefit of the contract might be assigned. If so, the assignee acquires a direct right of action against the promisor (chapter 8).
- 1.20 An agreement can be reconstituted or varied in various ways:
- (1) by waiver or estoppel, at common law or in equity, suspending or modifying the agreement (5.33 ff);
 - (2) by a variation supported by consideration;
 - (3) by a variation formalised by deed;
 - (4) by the substitution of a new agreement between the same parties in one of two ways:
 - (a) either by 'transaction' novation, in which the first contract is replaced by a second contract between the same parties; or
 - (b) by 'new party' novation, in which one of the parties to the original contract is substituted by a new third party; thus a contract between A and B is replaced by a contract between A or B and C, a new party (8.12 at (1)).

On these two forms of novation, see the remarks in *Scarf v. Jardine* (1882) by Lord Selborne LC.²⁹

²⁹ (1882) LR 7 App Cas 345, 351, HL, *per* Lord Selborne LC.

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1.21 An agreement can be discharged or terminated in various ways: first, by performance in full (unhappily for lawyers, the commonest situation); secondly, a contract might be terminated without a breach by either side, if a party exercises a right to cancel the contract explicitly or implicitly contained in the agreement (on termination clauses,³⁰ 16.30, 17.04); thirdly, by the occurrence of an event covered by an *express* 'condition subsequent' clause contained in the contract ('conditions subsequent', 10.11); fourthly, by reason of supervening illegality or frustration which brings the contract to an end by operation of law (chapter 16); fifthly, by consensual termination of the agreement; sixthly, by merger of outstanding obligations in a judgment.³¹ The seventh way in which a contract might be terminated involves an innocent party choosing to end the contract because of the other's serious breach. This topic is complex (17.18 ff). The innocent party has the choice of ending the contract if: (1) the other party has repudiated the agreement, by unequivocally declaring or indicating that he does not intend to perform his obligations; or (2) the other party has committed a breach of a condition (a promissory term which is so labelled by the parties, or so classified by statute or judicial decision, or which must be construed as such, having regard to its importance); or (3) a clause which, when breached, is expressly classified by the agreement as equivalent to a condition; or (4) there is a really serious breach of an innominate term so as to deprive the innocent party of substantially the entire expected performance.

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1.22 Many contractual obligations are strict in the sense that a party can be in breach of agreement even though he has exercised all reasonable care to try to satisfy his obligation. However, some contractual obligations are less demanding and merely require the exercise of reasonable care, or a similar standard (see 17.06 and 18.42). Normally in a contract for the performance of professional services, the performing party will owe merely an obligation to exercise due care, rather than to guarantee the success of the task: 17.06.

The distinction between 'a duty to achieve a specific result' and 'a duty of best efforts' is drawn within the (non-binding) UNIDROIT's *Principles of International Commercial Contracts* (2004), Article 5.1.4 and 5.1.5.³³

1.23 In some situations, the relationship underlying the agreement simultaneously involves a common law or extra-contractual duty to exercise reasonable care (generally on the imposition of duties of care in tort in respect of economic loss, 5.17). There might then be overlapping rights and duties in contract and in tort. This is true of many professional

30 S. Whittaker, 'Termination Clauses', in A. Burrows and E. Peel (eds.), *Contract Terms* (Oxford, 2007), chapter 13.

31 *Director General of Fair Trading v. First National Bank plc* [2002] 1 AC 481, HL.

32 A. S. Burrows, *Understanding the Law of Obligations* (Oxford, 1998), chapters 1, 2 and 8.

33 2nd edn, Rome, 2004; see M. J. Bonell (ed.), *The UNIDROIT Principles in Practice: Case Law and Bibliography on the UNIDROIT Principles of International Commercial Contracts* (2nd edn, Ardsley, NY, 2006), 255–60; S. Vogenauer and J. Kleinheisterkamp (eds.), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (Oxford, 2009), 548–54.