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978-1-107-02107-5 - Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law

Jonathan Morgan

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Contract Law Minimalism

Commercial contract law is in every sense optional, given the choice between legal systems and between law and arbitration. Its ‘doctrines’ are in fact virtually all default rules. *Contract Law Minimalism* advances the thesis that commercial parties prefer a minimalist law that sets out to enforce what they have decided – but does nothing else. The limited capacity of the legal process is the key to this ‘minimalist’ stance. This book considers evidence that such minimalism is indeed what commercial parties choose to govern their transactions. It critically engages with alternative schools of thought, that call for active regulation of contracts to promote either economic efficiency or the trust and co-operation necessary for ‘relational contracting’. The book also necessarily argues against the view that private law should be understood non-instrumentally (whether through promissory morality, corrective justice, taxonomic rationality, or otherwise). It sketches a restatement of English contract law in line with the thesis.

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For Sophie

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Let Shephatiah rejoice with the little Owl, which is the winged Cat.

For I am possessed of a Cat, surpassing in beauty, from whom I take occasion to
bless Almighty God.

Let Ithream rejoice with the great Owl, who understandeth that which he
professes.

For I pray God for the professors of the University of Cambridge to attend and
to amend.

Christopher Smart, *Jubilate Agno*

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Preface

This book advocates a minimalist law of contract as the best possible framework for commercial law – the law that best satisfies the preferences of (most) commercial parties. This preference-satisfaction is vital because sophisticated parties can and do opt out of rules – indeed entire laws of contract – that they judge to be suboptimal for them. The minimalist claim is in sharp contrast with calls for the greater regulation of contracts that arise from a number of theoretical perspectives. The basic theses defended here are three in number: first, that commercial contract law has a central *purpose*, namely, to provide a suitable legal framework for trade; secondly, that the nature of commercial contract law is radically *optional*, that is, it exists only as a body of default rules; and, thirdly, that when contract law is as simple, clear and strict – *formalist* – as it can be made, commercial preferences are best satisfied and its rules flourish because opting out from them is infrequent. The book boldly claims that to succeed in its purpose, given its optional nature, commercial contract must be (quite deliberately) unambitious.

The first thesis might seem too obvious to need much discussion. However, the renaissance of non-instrumental theories of private law generally (and the promissory approach to contract in particular) makes some defence of the claim necessary. Part I of the book (Chapters 1 and 2) elaborates a critique of anti-instrumentalism. How then should contract law best fulfil its social purpose? Against the doctrinal tradition of English contract scholarship, it is necessary to turn to the social sciences for illumination. Part II (Chapters 3 to 5) examines the research of economists and sociologists. Law and economics has had great influence, especially in the United States, although its intellectual godfather has noted it is ‘strong on theory if weak on facts’.¹ More realistic approaches, considering the effect of transaction costs on legal institutions and the empirical reality of contracting behaviour, produce strikingly different conclusions. The best-known rival to law and economics is the theory of relational contract. It calls for the ongoing, close commercial relationship to become the paradigm for contract law – in place of the anonymous one-off

¹ R. H. Coase, ‘The new institutional economics’ in E. Brousseau and J.-M. Glachant (eds.), *The Economics of Contracts* (Cambridge University Press, 2002), 46.

transaction. Such relationships pervade the economy. Trust and co-operation are crucial to their success. The selfish behavioural assumptions behind traditional contract doctrine have therefore – it is argued – been falsified. There is a wide gap between real-world contracting behaviour and contract law that relational scholars believe their approach would help to close.

Relational contract theory has proved influential. Even in anti-theoretical England it has not been completely ignored.² After all, the need to infuse legal doctrine with commercial practice has long been the mantra of commercial lawyers – at least since Mansfield’s tenure as Lord Chief Justice (1756–88). The intuition is sound in that commercial preferences must be respected or the law will be an obstacle to the trade that it exists to serve – or shunned and avoided altogether. However, it is a great mistake to infer from relational contract theory (and the empirical studies on which it draws) that commercial parties desire the active promotion of trust through contract law (and the regulation of opportunism and other relational difficulties). Part III of the book (Chapters 6 to 10) defends the radical thesis that formalist legal doctrine is, paradoxically, the ideal complement for the practice of relational contracting.

The thesis derives from a combination of positive and negative considerations. On the positive side, sophisticated parties are better able to draft optimal contracts than the law can supply optimal default rules. Also, extra-legal sanctions can support relational norms more effectively than the adversarial legal process. More negatively, we must recognise the limited capacity of courts, legislatures and agencies to engage successfully in the active regulation of contracts. Whether their aim is the ‘efficient default rules’ of law and economics, or to uphold trust and co-operation pursuant to relational contract theory, legal institutions will prove inadequate in practice. These limitations tend to be underplayed by the champions of such theories (if not ignored altogether), but a practical approach cannot neglect them. Furthermore, there is evidence that attempts to enforce co-operation by legal sanctions may actually be counterproductive. Even more pertinent for the thesis of the book (which rests on ‘what commercial parties want’) is evidence of contractors’ actual preferences. There is good evidence in favour of minimalism: whether in the choice of jurisdiction in the global market for contract laws, or the design of rules and procedures for ‘private legal systems’ (e.g. trade arbitrations). The final chapter sketches a minimalist critique of contemporary English contract law. The lessons for more ‘contextual’ laws of contract (as in California and many other US jurisdictions), or for the doctrinal system-builders at the pan-European level, would be sharper still.

The argument might risk being misunderstood as reactionary. ‘Formalism’ is more commonly employed as a term of abuse (although really it is just a prudent conclusion from reflecting on the limits of the legal process). It is important to stress, therefore, that, even if this book’s conclusions on the proper shape of

² H. Collins, *Regulating Contracts* (Oxford University Press, 1999).

contract law bear superficial resemblance to the black-letter approach, the argument for their derivation could not be more different. Instead of dogmatic attachment to doctrine for doctrine's sake, the minimalist thesis proceeds by considering the best way, in practice, for contract law to achieve its social goals. It is important to be open about these goals, the method and their derivation – and also to acknowledge that the thesis is ultimately falsifiable. If it could be shown that despite the arguments of this book there is general commercial demand for interventionist, regulatory, relational contract law then the thesis fails. But its falsifiability is its strength. It is in notable contrast with the abstract doctrinal certainties of those who would draft a European Civil Code. The argument for minimalism is pragmatic, and even contingent – the best available explanation for the current research into contract law and practice. Its recommendations are, moreover, themselves only 'defaults': the law should unhesitatingly accept an expressed preference for contextual adjudication and the enforcement of relational norms.

It might seem a remarkable coincidence that traditional common law doctrine fits these sophisticated social-scientific recommendations so well. Has English contract law, like Molière's *Bourgeois Gentilhomme*, been speaking the prose of 'neo-formalism' unawares, all along? Does the common law process inexorably produce efficient rules?³ A more likely explanation is that business preference for the permissive clarity of formal rules is well understood by London law firms (which are consciously promoting their services, and so English law's attractions, in the global market). The elite judges who apply and develop the common law invariably sympathise, being drawn from the ranks of such practitioners as most of them are. Reformers and agencies (such as the Law Commission) that would legislate to curb Freedom of Contract are lobbied ferociously by City lawyers, to preserve the minimalist regime which suits their clients (and therefore their businesses).⁴ The British government is a vigorous promoter of the legal services sector, an adjunct of the City of London's wider economic importance.⁵ So it heeds such calls – as it would presumably accept hypothetical lobbying for a relational or contextual revolution in the law of contract (calls that are, by contrast, notable for their absence). It seems inconceivable that judges, lawyers and lobbyists would be ignorant about the preferences of contract law's commercial customers – or uncharacteristically mute and passive were the law seriously out of line with commercial expectations. On the contrary, the resilient formalism of English contract law is in all probability driven, like this book, by cold calculation of what commercial parties want. The answer is minimalism.

³ G. Priest, 'The common law process and the selection of efficient rules' (1977) 5 *Journal of Legal Studies* 65.

⁴ H. Beale, *Mistake and Non-Disclosure of Fact: Models for English Contract Law* (Oxford University Press, 2012), 106–8.

⁵ E.g. Lord Irvine of Lairg LC, 'The law: An engine for trade' (2001) 64 *MLR* 333.

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