PART I: THE ROLE OF CONSENT

1. Transatlantic Perspectives: Fundamental Themes and Debates
   Larry A. DiMatteo, Qi Zhou, and Séverine Saintier

2. Competing Theories of Contract: An Emerging Consensus?
   Martin A. Hogg

3. Contracts, Courts, and the Construction of Consent
   Thomas W. Joo

4. Are Mortgage Contracts Promises?
   Curtis Bridgeman

PART II: NORMATIVE VIEWS OF CONTRACT

5. Naturalistic Contract
   Peter A. Alces

6. Contract in a Networked World
   Roger Brownsword

7. Contract Transactions and Equity
   T. T. Arvind

PART III: CONTRACT DESIGN AND GOOD FAITH

8. The Duty to Draft Reasonably and Online Contracts
   Nancy S. Kim
Brief Contents

9. Managing Change in Uncertain Times: Relational View of Good Faith
   Zoe Ollerenshaw

   PART IV: IMPLIED TERMS AND INTERPRETATION

10. Implied Terms in English Contract Law
    Richard Austen-Baker

11. Contract Interpretation: Judicial Role Not Parties’ Choice
    Juliet P. Kostritsky

   PART V: POLICING CONTRACTING BEHAVIOR

    Séverine Saintier

    Charles L. Knapp

14. Unfair Terms in Comparative Perspective: Software Contracts
    Jean Braucher

15. (D)CFR Initiative and Consumer Unfair Terms
    Mel Kenny

   PART VI: MISREPRESENTATION, BREACH, AND REMEDIES

16. Remedies for Misrepresentation: An Integrated System
    David Capper

17. Re-Examining Damages for Fraudulent Misrepresentation: Towards a More Measured Response to Compensation and Deterrence
    James Devenney

18. Remedies for a Documentary Breach: English Law and the CISG
    Djakhongir Saidov
### Brief Contents

ix

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Authors</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>19.</td>
<td>The Irrelevance of the Performance Interest: A Comparative Analysis of “Keep-Open” Covenants in Scotland and England</td>
<td>David Campbell and Roger Halson</td>
<td>466</td>
</tr>
<tr>
<td></td>
<td><strong>PART VII: HARMONIZING CONTRACT LAW</strong></td>
<td></td>
<td>503</td>
</tr>
<tr>
<td>21.</td>
<td>Europeanisation of Contract Law and the Proposed Common European Sales Law</td>
<td>Hector L. MacQueen</td>
<td>529</td>
</tr>
<tr>
<td>22.</td>
<td>Harmonization of International Sales Law</td>
<td>Larry A. DiMatteo</td>
<td>559</td>
</tr>
</tbody>
</table>
## Contents

**Contributors**  
*page xxi*

*Foreword by Rt. Hon. Lord Justice Maurice Kay*  
*xxvii*

**PART I: THE ROLE OF CONSENT**  
*1*

1. Transatlantic Perspectives: Fundamental Themes and Debates  

I. Legacy of Rob Bradgate  

A. Commercial Contract Law in the United Kingdom and United States  

1. Statutory Interventions into the Common Law  

2. Divergence, Convergence, and Law Reform  

B. Major Themes  

1. Topical Preview  

2. Consent and Promise  

3. Theories of Contract, Networks, and Equity  

4. Discrete and Relational Contracting  

5. Implied Terms and Contract Interpretation  

6. Contract Law's Regulatory Function  

7. Misrepresentation and Breach  

8. Contract and Sales Law Harmonization  

II. Conclusion  

2. Competing Theories of Contract: An Emerging Consensus?  

I. Introduction  

II. The Competing Theories of Contract  

A. Contract as Based upon Promises  

B. Contract as Based upon Agreement  

C. Contract as Based upon the Reliance
D. Contract as Based upon the Assumption of Legally Binding Obligations 27
E. Contract as Based upon the Transfer of Rights 28
F. Contract as Based upon Relationship 28
G. Conclusion on Competing Theories of Contract 30
III. Connections between Competing Theories of Contract 30
IV. Future Developments of Contract Theory: An Emerging Consensus? 36
V. Conclusion 39

3. Contracts, Courts, and the Construction of Consent 41
I. Introduction 41
II. Conflation of Efficiency and Consent 44
III. Illusory Nature of Party-Centrism 50
IV. Candor in the Judicial Construction of Consent 56
V. Conclusion 64

4. Are Mortgage Contracts Promises? 67
I. Introduction 68
II. Why Do People Make Promises? 70
III. Are Contracts Promises? 72
IV. Are Mortgage Contracts Typically Promises? 74
V. If Modern Mortgage Contracts Are Typically Not Promises, Is Strategic Default Morally Acceptable After All? 76
VI. Conclusion 80

PART II: NORMATIVE VIEWS OF CONTRACT 83

5. Naturalistic Contract 85
I. Introduction 86
II. Essential Normativity of Contract Doctrine 87
III. Minimum Content of Natural Contract Law 96
IV. Limits of Empiricism? 99
V. Dualism 101
VI. Is Naturalism Fallacious? 110
VII. So What? 114

6. Contract in a Networked World 116
I. Introduction 116
II. Three Test Cases 119
A. Clarke v. Dunraven 120
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>B. OFT v. Lloyds TSB</td>
<td>122</td>
</tr>
<tr>
<td>C. The Eurymedon</td>
<td>124</td>
</tr>
<tr>
<td>D. Reasonable Expectations</td>
<td>126</td>
</tr>
<tr>
<td>III. The Basis for Network Effects: Consumer Contracts</td>
<td>127</td>
</tr>
<tr>
<td>A. The Nature of the Modern Regulation of Consumer Transactions</td>
<td>127</td>
</tr>
<tr>
<td>B. Networks and OFT v. Lloyds TSB</td>
<td>129</td>
</tr>
<tr>
<td>1. The Legislative Approach</td>
<td>129</td>
</tr>
<tr>
<td>2. The Courts’ Approach</td>
<td>130</td>
</tr>
<tr>
<td>3. The Boyack Hypothetical</td>
<td>131</td>
</tr>
<tr>
<td>4. Beyond OFT v. Lloyds TSB</td>
<td>132</td>
</tr>
<tr>
<td>IV. The Basis for Network Effects: Commercial Contracts</td>
<td>132</td>
</tr>
<tr>
<td>A. The Nature of the Modern Regulation of Commercial Transactions</td>
<td>133</td>
</tr>
<tr>
<td>B. The “Hoffmannisation” of Contract Law</td>
<td>134</td>
</tr>
<tr>
<td>C. Network Effects and The Eurymedon</td>
<td>135</td>
</tr>
<tr>
<td>D. Beware the Classical Inheritance</td>
<td>139</td>
</tr>
<tr>
<td>E. Big Businesses, Small Businesses, and Shopping Malls</td>
<td>140</td>
</tr>
<tr>
<td>V. The Basis for Network Effects: Private Contracts</td>
<td>142</td>
</tr>
<tr>
<td>VI. Conclusion</td>
<td>143</td>
</tr>
<tr>
<td>VII. Coda</td>
<td>144</td>
</tr>
<tr>
<td>7. Contract Transactions and Equity</td>
<td>146</td>
</tr>
<tr>
<td>I. Introduction</td>
<td>147</td>
</tr>
<tr>
<td>II. Equity in a Contractual Context</td>
<td>150</td>
</tr>
<tr>
<td>III. Equitable Principles and Contract Law</td>
<td>155</td>
</tr>
<tr>
<td>A. Restating the Issue</td>
<td>155</td>
</tr>
<tr>
<td>B. The Contractual Solution</td>
<td>156</td>
</tr>
<tr>
<td>C. The Equitable Approach</td>
<td>164</td>
</tr>
<tr>
<td>IV. The Domain of Equity</td>
<td>169</td>
</tr>
<tr>
<td>A. A Complex Transactional Web</td>
<td>173</td>
</tr>
<tr>
<td>B. The Difficulty of Dealing with the Obligation</td>
<td>174</td>
</tr>
<tr>
<td>C. A Relational Attempt to Deal with this Difficulty</td>
<td>174</td>
</tr>
<tr>
<td>D. Indeterminacy and Vulnerability</td>
<td>175</td>
</tr>
<tr>
<td>V. Conclusion</td>
<td>176</td>
</tr>
</tbody>
</table>

### Part III: Contract Design and Good Faith

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>8. The Duty to Draft Reasonably and Online Contracts</td>
<td>181</td>
</tr>
<tr>
<td>I. Introduction</td>
<td>181</td>
</tr>
<tr>
<td>II. Modern Contracts and the Diminishing of Consent</td>
<td>184</td>
</tr>
</tbody>
</table>
## Contents

III. Duty to Read

IV. Code as Law and Form as Function
   A. Transactional Hurdles or “Contracts as Checkout Line”
   B. Visualization Strategies or “Contracts as Road Signs and Traffic Lights”
   C. Sensorial Landscaping or “Contracts as Neighborhoods”

V. Conclusion

9. Managing Change in Uncertain Times: Relational View of Good Faith
   I. Introduction
   II. Long-Term and Complex Outsourcing Contracts
   III. A Limited Recognition of Good Faith
   IV. Does the Restricted Approach to Good Faith Accord with Practice?
   V. Theory of Relational Contract
   VI. A Construct of Good Faith as Seen through a Relational Prism
      A. The Extent of the Duty
      B. Criticisms of the Construct
      C. Should Such a Construct Be Accepted?
   VII. Conclusion

PART IV: IMPLIED TERMS AND INTERPRETATION

10. Implied Terms in English Contract Law
    I. Introduction
    II. The Historical Development of the Implied Term
       A. Historical Context
       B. Creation of Implied Terms
    III. Theoretical Context
    IV. Concluding Remarks

11. Contract Interpretation: Judicial Role Not Parties’ Choice
    I. Introduction: Challenging Party Choice Theory
    II. The Importance of a Judicial Interpretation Rule
    III. Faulty Assumptions Underlie the New Formalists’ Opt-in Rule
    IV. Reducing Party Costs and Risks
    V. The Opt-in Rule Should be Justified Like any Other Common Law Doctrine
    VI. Rawlsian Theory, Contextual Evidence, Consequentialist Analysis, Equity, and Probabilistic Models Support a Judicial Interpretation Rule
VII. Courts, Restatements, and Empirical Evidence Challenge

Party Choice Theory 275
A. Jacob & Youngs: Should Goals Affect Interpretation? 275
B. Residual Uncertainty: Overall Objectives and Prospective Consequences 279
C. When Should Trade Usage Govern Meaning? 282

VIII. Conclusion 284

PART V: POLICING CONTRACTING BEHAVIOR 287

I. Introduction 290
II. The Different Interpretations on the Calculation of “Compensation” between France and UK 293
III. Reconciling Compensation and Indemnity? 303
IV. Conclusion 307

I. Introduction 309
II. Mid-Twentieth-Century Development – the 1950s and 1960s 310
III. Further Development – the 1970s and 1980s 313
IV. Unconscionability at the Dawn of the Twenty-First Century 314
A. Unconscionability as Applied to Mandatory Arbitration Clauses 315
B. Unconscionability in Non-Arbitration Cases – Doctrinal Developments
   1. Adhesion Contracts 320
   2. Sliding Off the Scale 322
   3. Mutuality 324
C. Unconscionability in Action: Recent Examples
   1. Sales and Leases of Goods 326
   2. Service Contracts 327
   3. Domestic Relations 328
   4. Real Estate Transactions 330
   5. Consumer Lending and Credit 333
V. Conclusion 337
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>14. Unfair Terms in Comparative Perspective: Software Contracts</td>
<td>339</td>
</tr>
<tr>
<td>I. Introduction</td>
<td>340</td>
</tr>
<tr>
<td>II. The Challenge to Contract Theory Presented by SFKs</td>
<td>343</td>
</tr>
<tr>
<td>III. US Law Reform and Software Contracts</td>
<td>347</td>
</tr>
<tr>
<td>A. Advance Disclosure and a Step for Active Assent</td>
<td>349</td>
</tr>
<tr>
<td>B. Reducing the Impact of Product Flaws</td>
<td>351</td>
</tr>
<tr>
<td>C. Remedies and Dispute Resolution</td>
<td>352</td>
</tr>
<tr>
<td>D. Protecting Intellectual Property Rights</td>
<td>354</td>
</tr>
<tr>
<td>IV. Unfair Terms in Comparative Perspective</td>
<td>359</td>
</tr>
<tr>
<td>A. ALI Principles and the EU Unfair Contract Terms Directive: Differences</td>
<td>360</td>
</tr>
<tr>
<td>B. ALI Principles and the EU Unfair Contract Terms Directive: Similarities</td>
<td>362</td>
</tr>
<tr>
<td>V. Conclusion</td>
<td>364</td>
</tr>
<tr>
<td>15. (D)CFR Initiative and Consumer Unfair Terms</td>
<td>366</td>
</tr>
<tr>
<td>I. Introduction</td>
<td>366</td>
</tr>
<tr>
<td>II. Evolution of the (D)CFR Initiative</td>
<td>367</td>
</tr>
<tr>
<td>III. Rationale for EU Private Law Consolidation</td>
<td>368</td>
</tr>
<tr>
<td>IV. (D)CFR Initiative and the Effective Policing of Unfair Terms in Consumer Contracts</td>
<td>371</td>
</tr>
<tr>
<td>A. National Judges’ Elaboration of Europeanised Unfairness Standards</td>
<td>373</td>
</tr>
<tr>
<td>B. Judicial Approach to Article 267 TFEU References</td>
<td>375</td>
</tr>
<tr>
<td>C. (Non-harmonised) National Background Rules</td>
<td>377</td>
</tr>
<tr>
<td>D. Towards a Multi-Dimensional Perspective</td>
<td>378</td>
</tr>
<tr>
<td>E. Procedural Dimension: Collective Proceedings</td>
<td>379</td>
</tr>
<tr>
<td>V. Conclusion</td>
<td>381</td>
</tr>
<tr>
<td>PART VI: MISREPRESENTATION, BREACH, AND REMEDIES</td>
<td>383</td>
</tr>
<tr>
<td>16. Remedies for Misrepresentation: An Integrated System</td>
<td>385</td>
</tr>
<tr>
<td>I. Introduction</td>
<td>386</td>
</tr>
<tr>
<td>II. Misrepresentation</td>
<td>387</td>
</tr>
<tr>
<td>III. Rescission</td>
<td>389</td>
</tr>
<tr>
<td>A. Rescission as a Self-Help Remedy?</td>
<td>389</td>
</tr>
<tr>
<td>B. Practical Justice</td>
<td>390</td>
</tr>
<tr>
<td>C. Rescission as of Right</td>
<td>390</td>
</tr>
<tr>
<td>D. Indemnity</td>
<td>392</td>
</tr>
<tr>
<td>E. Compensation</td>
<td>393</td>
</tr>
</tbody>
</table>
Contents

F. When Restitutio in Integrum Is Impossible 394
G. Partial Rescission 395
H. Summary of Rescission 399

IV. Damages 400
A. Tort Damages 401
B. Fraudulent Misrepresentation (Deceit) 402
C. Negligent Misstatement 403
D. Negligent Misrepresentation 404
E. Innocent Misrepresentation 409
F. Comparative Perspectives 413

V. Conclusion – Integrating Damages with Rescission 414

17. Re-Examining Damages for Fraudulent Misrepresentation: Towards a More Measured Response to Compensation and Deterrence 416
I. Introduction 417
II. The Crucible of Misrepresentation 417
III. Fraudulent Misrepresentation and Causation 418
IV. Impact on Risk Allocation 422
V. Negligent Contractual Misrepresentation 423
VI. Accentuating the Punishment 424
VII. Exemplary Damages 426
VIII. Proportionality 427
IX. Further Dangers of the Compensation Myth 428
X. Availability of Exemplary Damages for Fraudulent Misrepresentation 430
XI. Wider Considerations 431
XII. Conclusion 432

18. Remedies for a Documentary Breach: English Law and the CISG 434
I. Introduction 435
II. Termination 436
A. Duality of the Rights to Reject and Terminate 436
B. Rejection or Termination 443
C. Rejection and Termination 448
III. Damages 460
IV. Conclusion 464

19. The Irrelevance of the Performance Interest: A Comparative Analysis of “Keep-Open” Covenants in Scotland and England 466
I. Introduction 467
## Contents

II. Scots Law of Keep-Open Covenants 471  
III. Why Would Commercial Parties Ever Seek Literal Enforcement? 479  
IV. Enforcement of Keep-Open Obligations under the English Law 482  
V. The Wisdom of Lord Justice Millet 486  
VI. Supervisory Problems in the Law of Keep-Open Covenants 489  
VII. Commercial Uniqueness Cases 494  
VIII. Advice to English Landlords 495  
IX. Changing the Default Law, Commercial Leasing, and the Irrelevance of the Performance Interest 496  
X. Conclusion 501  

PART VII: HARMONIZING CONTRACT LAW 503  

I. Introduction 505  
II. Default and Mandatory Rules: A Comparison 506  
III. Justifications for the Harmonisation of European Contract Law 509  
IV. Harmonisation of Default Rules 515  
V. Harmonisation of Mandatory Rules 521  
VI. Conclusion 527  

21. Europeanisation of Contract Law and the Proposed Common European Sales Law 529  
I. Introduction: Proposed Common European Sales Law 530  
II. A Historical Scottish Perspective 539  
III. Comparing the Proposed CESL with the UK Sale of Goods Act 545  
A. Implied Terms or Rules 546  
B. Quality Defined 547  
C. Time of Conformity 550  
D. Termination: The Right to Reject 552  
E. Overview 556  
IV. Conclusion 556  

22. Harmonization of International Sales Law 559  
I. Introduction 560  
II. Goal of Harmonizing International Sales Law 560
Contents

A. Substantive Shortcomings 561
   1. Problem of Reservations 562
   2. Problem of Translation 563
B. Uniformity of Application and National Law Bias 564
   1. Nationally Biased Interpretations 564
   2. Uniformity Principle and the Problem of Divergent Interpretations 565
C. Widespread Approval and Widespread Disregard 570

III. Uniformity in Practice and the Problem of Scarcity 571
   A. Civil-Common Law Divide 572
   B. German Role in CISG Jurisprudence 572
   C. Understated Role of Unreported Arbitration Cases 574
   D. Summary 575

IV. Value of the CISG outside the Context of International Harmonization 575
   A. CISG as Customary International Law and as Soft Law 576
   B. Use as a Model National Law 577

V. Conclusion 578

Index 581