INDEX

A New Regulator for a New Millennium
232–3
abusive clauses, intervention by courts
303–5
academic literature 26–9
actual undue influence 174–5
adjustment of contract 14
Administration of Justice Act 1970 (AJA)
courts’ jurisdiction as to mortgages
187–8
mortgage repossession, as to 185
advertisements
control of 353
misleading actions as to 353–4
advice
suitability of 218–19
TCF Outcomes, and 218–19
agency contracts 10–13
aggressive practices
concept 358
CPUTR provisions 220, 358
effect on choice 360–7
effect on decision making 360–4
freedom of choice, and 361–2
meaning 358, 359
overview 358–60
uninformed decision making, and 360–1
Allcard v Skinner 175
annuities for the life of the seller,
regulation 152–4
annulment of contracts 14, 15
Anson, Sir William, academic literature
26–9
Arden, Master of the Rolls,
judgment 163
Argentina, bonds cases 321
Atiyah, Professor P. S., academic
literature 173
Attorney-General for England and
Wales v R 176
auditors
liability for misinformation 314–24
liability in fraud cases 317–18
Australia
Blomley v Ryan 119–20, 166
Commercial Bank of Australia
v Amadio 119–20, 126–7
suretyship cases 119–20
unconscionable dealing, doctrine 166
Yerkey v Jones 180
autonomous action approach to defining
flawed contracts 82–3, 86–7
autonomy
balanced with social justice 386–8
constitutional rights, and 387–8
right to 387–8
social state principle, and 259
‘average consumer’ in benchmarking
367–71
average consumer test 217
Aynès, Professor L., academic
literature 76
Bacon, Francis, academic literature 149
‘bad loans’ case 308–10
Ballow, Henry, academic literature 39,
160–1
bank guarantees, use of 293
bank loan contracts
bank-client relationship,
development 290
mortgages as security 296–300
overview 290–2, 305–7
| Protection of weaker parties | 289–307 |
| Scope for unequal protection | 289 |
| Security for loan | 292–6 |
| Succession law as to | 301–3 |
| Banking Code 2008 | |
| Aggressive practices | 358 |
| Misleading actions as to | 353–4 |
| Misleading omissions, as to | 356–7 |
| Responsible lending | 219 |
| Role of | 209–10, 352 |
| Unfairness, as to | 208 |
| Banking Code Standards Board (BCSB) | |
| 209–10 |
| Banking competition, Cruickshank Report | 214 |
| Banking foreclosure, use of | 294–6 |
| Banking legislation, overview | 310–13 |
| Banking risk management | 292–6 |
| Banks and kickback payments | see kickback payments |
| Barclays Bank v O'Brien | 116–17 |
| Batty v Lloyd | 158 |
| Baxton, John, academic literature | 147 |
| Becks, U., 'reflexive individual' concept | 390 |
| Behavioural economics | |
| Consumer rights information processing | 357–8 |
| Research on decision making | 215–16, 340–1 |
| Transactional risk, and | 123–5 |
| Bellot, Hugh, academic literature | 156 |
| Benbrigge, John, academic literature | 149 |
| Benchmarking, 'average consumer' in | 367–71 |
| Benston, G. J., academic literature | 215 |
| Better Regulation Executive, report on information provision | 215 |
| Bigwood, Professor R. | |
| Academic literature | 167 |
| Transactional neglect theory | 177 |
| Bill v Price | 157 |
| Bills of exchange, use of | 293 |
| Bingham, Lord Justice, judgment | 207 |
| Birks, Peter, academic literature | 120–1 |
| Blackstone, Justice, judgment | 151 |
| Blackstone, William, academic literature | 148 |
| Blomley v Ryan | 119–20, 166 |
| Bond issues | |
| Actors | 311–12 |
| Brokers | 311–12 |
| Case law framework | 310–11 |
| Managers | 311–12 |
| Rating agencies | 312–13 |
| Retailers | 311–12 |
| Underwriters | 311–12 |
| Bonds | |
| Cases | 320–1 |
| Post-obit bonds | 157–8 |
| Borrowing on expectation of future ownership | 32 |
| Bowen, Lord Justice, judgment | 175–6 |
| Bramwell, Lord Justice, judgment | 31 |
| Briault, C., academic literature | 212 |
| Brokers | |
| Bond issues | 311–12 |
| Duty of disclosure | 312–13 |
| Liability for misinformation | 320–3 |
| Brown, Lord Justice Simon, judgment | 181 |
| Browne-Wilkinson, Lord, judgment | 116 |
| Burden of proof | |
| Usurious contracts | 13–14 |
| Wrongful conduct | 111–12 |
| Bürgschaft | |
| Case | |
| Constitutionalisation of unconscionability, as | 251–6, 381–3 |
| Fundamental rights, and | 387–8 |
| Horizontal effect, and | 261–2 |
| Importance | 247 |
| Judicial harmonisation of private law, as | 381 |
| Overview | 249–51 |
| Campbell, David, academic literature | 101–2 |
| Cancellation, right of, and informed decision making | 363 |
| Canon law, prohibition of usury | 147–8 |
| Catching bargains | |
| Cases | 32 |
| Transactional risk, and | 113–15 |
| Chen-Wishart, Mindy, academic literature | 178 |
choice see freedom of choice
Cirio bonds case 308, 320–1
civil law approaches to unconscionability,
effectiveness of 379, 393
class actions 325
clauses abusives legislation 64–5
codification of private law challenges to private law approaches to unconscionability 380
harmonisation through 384–6
coercion
domestic infringement, as 359
factors in 360
freedom of choice, and 361–2
Committee of European Securities Regulators (CESR), recommendations 331–3, 337
Common Frame of Reference for a European Contract Law (CFR) 7–8, 42–5
common law
protection of weaker parties
overview 166–8, 182–3
‘vitiating factors’ 166
torts see torts
transplant of 276
common mistake 168
‘Community infringement’, Enterprise Act provisions 350–1
company financial statements, auditing of 313
compliance, FSA’s expectation of 240–1
compromise agreements, employees’ 115
Comyn, Robert, academic literature 150
conduct of business rules
conformity of contract law to 268
direct invocation 268
growth of 247
pros and cons 268–71
protection of weaker parties 262–6, 388–9
shift of emphasis to 266–8
Conduct of Business Sourcebook (COBS) 208
Conduct of Mortgage Business (MCOB) 191–2

conflicts of interest
information provision, and 392
kickback payments 327–9, 337
management 342–3

consent approach to unconscionability
defining flawed contracts 82, 84
overview 36–7
relational contract theory, as to 103
shortcomings 90
usefulness 89–90

costitutional challenges to private law approaches to unconscionability 379–80
costitutional freedom of contract
acknowledgement of 19
substantive freedom as constitutional principle 9–17

costitutional rights
autonomy, and 387–8
EU fundamental rights, as 25
costitutionalisation of contract law,
vertical and horizontal
constitutionalisation 18

costitutionalisation of unconscionability
Bürgschaft case 251–6, 381–3
overview 381–4
tripartite approach to harmonisation, as part of 398–9

consumer benchmarks, ‘average consumer’ in 367–71

consumer contracts
distributive theories of flawed contracts 84–6
protection measures 114–15
protection of weaker parties 53–5, 61
standard terms and conditions, unfairness 55–7

consumer credit
compliance regime 240–1
economics approach to unconscionability, as to 133–5
harmonisation Directive 384–5
regulation 208
<table>
<thead>
<tr>
<th>INDEX</th>
<th>403</th>
</tr>
</thead>
<tbody>
<tr>
<td>setting aside legislation</td>
<td>34</td>
</tr>
<tr>
<td>statutory provisions</td>
<td>34</td>
</tr>
<tr>
<td>Consumer Credit Act 1974 (CCA)</td>
<td>aggressive practices, as to 358</td>
</tr>
<tr>
<td></td>
<td>equitable mortgages 186</td>
</tr>
<tr>
<td></td>
<td>misleading actions, as to 353–4</td>
</tr>
<tr>
<td></td>
<td>mortgages, as to 185, 192–4</td>
</tr>
<tr>
<td></td>
<td>unfair contracts terms, as to 195, 198–9</td>
</tr>
<tr>
<td></td>
<td>unfair credit relationships, as to 352</td>
</tr>
<tr>
<td>Consumer Credit Act 2006</td>
<td>aggressive practices, as to 221</td>
</tr>
<tr>
<td></td>
<td>regulation under 208</td>
</tr>
<tr>
<td></td>
<td>revised unfairness provisions 198–9</td>
</tr>
<tr>
<td>consumer law</td>
<td>CCA see Consumer Credit Act 1974 (CCA)</td>
</tr>
<tr>
<td></td>
<td>clauses abusives legislation 64–5</td>
</tr>
<tr>
<td></td>
<td>consumer rights Directive 48–9</td>
</tr>
<tr>
<td>CPUTR see Consumer Protection from Unfair Trading Regulations 2008 (CPUTR)</td>
<td></td>
</tr>
<tr>
<td>FSMA see Financial Services and Markets Act 2000 (FSMA)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>mortgages, as to 185</td>
</tr>
<tr>
<td></td>
<td>Unfair Contract Terms Directive 54</td>
</tr>
<tr>
<td></td>
<td>UTCCR see Unfair Terms in Consumer Contracts Regulations (UTCCR) 1999</td>
</tr>
<tr>
<td>consumer legislation, overview</td>
<td>81, 129</td>
</tr>
<tr>
<td>‘consumer outcomes’ (FSA)</td>
<td>consumer expectation, as to 221, 222</td>
</tr>
<tr>
<td></td>
<td>disclosure requirements 216</td>
</tr>
<tr>
<td></td>
<td>guidance 236–7</td>
</tr>
<tr>
<td></td>
<td>measuring outcomes 218, 219, 222–3</td>
</tr>
<tr>
<td></td>
<td>overview 212–13</td>
</tr>
<tr>
<td></td>
<td>post-sale conduct, as to 224</td>
</tr>
<tr>
<td></td>
<td>suitability of advice, as to 218–19</td>
</tr>
<tr>
<td></td>
<td>suitability of products, as to 219</td>
</tr>
<tr>
<td></td>
<td>suitability of targeting, as to 219</td>
</tr>
<tr>
<td>Consumer Protection from Unfair Trading Regulations 2008 (CPUTR)</td>
<td>aggressive practices, as to 220</td>
</tr>
<tr>
<td></td>
<td>consumer benchmarks 367–71</td>
</tr>
<tr>
<td></td>
<td>misleading information, as to 217–18</td>
</tr>
<tr>
<td></td>
<td>mortgages, as to 185</td>
</tr>
<tr>
<td>overview</td>
<td>207–13, 350–1, 371–3</td>
</tr>
<tr>
<td>regulation under</td>
<td>350–73</td>
</tr>
<tr>
<td>consumer rights</td>
<td>behavioural research on information processing 357–8</td>
</tr>
<tr>
<td></td>
<td>information provision 357</td>
</tr>
<tr>
<td>consumers</td>
<td>average consumer test 217</td>
</tr>
<tr>
<td></td>
<td>benchmarking, in 367–71</td>
</tr>
<tr>
<td></td>
<td>decision making, behavioural economics research 215–16</td>
</tr>
<tr>
<td></td>
<td>expectation 221–3</td>
</tr>
<tr>
<td></td>
<td>kickback payments, and 330–1</td>
</tr>
<tr>
<td></td>
<td>mortgages, and see mortgages</td>
</tr>
<tr>
<td></td>
<td>recognition of importance of information 216</td>
</tr>
<tr>
<td></td>
<td>responsibility for decisions 219</td>
</tr>
<tr>
<td></td>
<td>risk, and 389–93</td>
</tr>
<tr>
<td></td>
<td>routes to redress 185, 225</td>
</tr>
<tr>
<td></td>
<td>‘taking advantage’ of 219, 220–1</td>
</tr>
<tr>
<td></td>
<td>views on TCF Initiative 213</td>
</tr>
<tr>
<td>contra proferentem</td>
<td>application of 48</td>
</tr>
<tr>
<td>contract law</td>
<td>coherence, need for 272–3</td>
</tr>
<tr>
<td></td>
<td>conduct of business rules, conformity to 268</td>
</tr>
<tr>
<td></td>
<td>constitutionalisation 18</td>
</tr>
<tr>
<td></td>
<td>consumer protection measures 114–15</td>
</tr>
<tr>
<td></td>
<td>EU Common Frame of Reference (CFR) 7–8, 42–5</td>
</tr>
<tr>
<td></td>
<td>horizontal effect of fundamental rights 259–62</td>
</tr>
<tr>
<td></td>
<td>neo-classical 100–7</td>
</tr>
<tr>
<td></td>
<td>norms in relational contract theory 102, 103</td>
</tr>
<tr>
<td></td>
<td>protection of weaker parties 256–9</td>
</tr>
<tr>
<td></td>
<td>relational contract theory, and 100–7</td>
</tr>
<tr>
<td></td>
<td>unconscionability, and 104–7</td>
</tr>
<tr>
<td></td>
<td>UNIDROIT Principles 140</td>
</tr>
<tr>
<td></td>
<td>contract legislation 81</td>
</tr>
<tr>
<td></td>
<td>contractual risk</td>
</tr>
<tr>
<td></td>
<td>contextual nature of risk 110</td>
</tr>
<tr>
<td></td>
<td>types 100, 107, 109–10</td>
</tr>
<tr>
<td></td>
<td>contractual risk model</td>
</tr>
<tr>
<td></td>
<td>description 109</td>
</tr>
<tr>
<td></td>
<td>relational contract theory, in 107–8, 109–15</td>
</tr>
<tr>
<td></td>
<td>contractual unfairness see unfairness</td>
</tr>
</tbody>
</table>
Control of Misleading Advertisement Regulations (CMAR) 353

convergence of public and private law approaches, overview 246–9, 273–4

‘cooling off’ periods 114

core terms in contracts 196, 206–7

corrective justice theories of flawed contracts 84

cost-benefit approach to defining flawed contracts 83

Cotton, Lord Justice, judgments 175

Council of Mortgage Lenders, mortgage exit fees Statement of Good Practice 224

courts

abusive clauses, intervention 303–5

duties as to unequal bargaining power 387–8

jurisdiction as to mortgages 187–8, 201

unfair contracts terms, intervention 303–5

‘cradle to grave’ approach to regulation 351–2

credit agreements 13–14

credit crunch see global financial crisis

credit institutions Directive, meaning of mortgage value 299–300

Credit Lyonnais v Burch 32–3, 35, 121, 180–1

Cruickshank Report on banking competition 214

damages

economic analysis 136–8

misrepresentation 171

misrepresentation, for 170

use of 130

Davidson, J. J., academic literature 207

Day v Newman 163

De Castro, F., academic literature 47, 57–9

deceit, tort of 170

‘decentred regulatory’ approach to mortgage regulation 188–90

decision-making see also informed decision making

aggressive practices, effect of 360–4

behavioural economics 215–16, 340–1

effect of information 341–2

psychology of 340–1

uninformed 360–1

Denning, Lord, judgment 34

Director General of Fair Trading v First National Bank Plc 196, 207

directors

duty of disclosure 311

liability for misinformation 314–24

disclosure see information provision

discrete contract (‘one shot’) academic literature 101–2

meaning 101

relational character 101–2

discrimination

Gender Directive as to insurance 223

Law Review 223

prohibition of 223

unfairness, and 223–4
distributive theories of flawed contracts 84–6

dolo in contrahendo (pre-contractual fraudulent misrepresentation) 55

dolus (fraudulent misrepresentation), prohibition of 49–50
domestic infringement, Enterprise Act provisions 359

duress

problem areas 173

types 172–3

vitiating factor, as 166, 172–3

Earl of Chesterfield v Janssen 159–64

economic analysis of remedies

choice of remedies, question of 131

consumer credit 133–5

damages 136–8

design of standard, question of 131

efficiency, question of 131

invalidation of contract 138–40

model 136–42

overview 129–32, 142–3

questions 131

replacement of unfair terms 141–2

rescission of contract 140–1
economics approach to unconscionability 132–5
economy of contracts principle 22
Edelman, Dr J., academic literature 171
efficiency theories of flawed contracts 87–8
elderly persons, cases 111–12
employees’ compromise agreements 115
employment contracts, distributive theories of flawed contracts 84–6
enforcement of contracts academic literature 26–9
reasons for non-enforcement 39
Enonchong, Professor N., academic literature 167
Enterprise Act (EA) aggressive practices, as to 359
‘Community infringement’ 350–1
domestic infringement, as to 359
Epstein, R., academic literature 130–1
equitable mortgages
comparison with Regulated Mortgage Contracts 187–8
enforcement 200–1
overview 186
routes to redress 199
equity
mortgages, and 195
usurious contracts, and
Earl of Chesterfield v Janssen 159–64
overview 154–9
Erskine, Thomas, academic literature 152–3
Etridge case 115–22, 126–7
EU Common Frame of Reference (CFR) 7–8, 42–5, 272
European Commission
Framework Programmes 1–2
priorities for financial services regulation 384–5
European Convention on Human Rights (ECHR)
application of Article 8 17, 18–19, 24–5
Convention rights as EU fundamental rights 25
direct horizontal effect, and 18–19
European debt market, size of 385
European law
 adoption of Directives 289
challenges to private law approaches to unconscionability 380
Lisbon strategy 384–5
priorities for financial services regulation 384–5
prohibition of kickback payments 328
expectant heir cases 32
expectation, consumer 221–3
fair dealing
information provision, applied to 323
standard 195
Fairfax v Trigg 156–7
fairness see also ‘Treating Customers Fairly’ (TCF) Initiative, unfairness
concept 205–6
conflict with freedom of contract 73–7
consumer credit, and see consumer credit
consumer perception 213
expectation 221–3
‘fairness-oriented’ regulation 351–3
freedom of contract, and 386–7
FSA’s approach see Financial Services Authority (FSA)
indicator of unconscionability, as 106–7
information provision, and see information provision
legislation 206–8
overview 225–6
regulatory regimes 208–13
‘responsibilised’ firms 394
self-regulation, banking 209–10
suitability, and see suitability understanding of 213–25
false and misleading information 216–18
family members in suretyships, protection of 387–9
fees, kickback payments 333–4
Filmer, Robert, academic literature 150
financial scandals 320–3
Financial Services and Markets Act 2000 (FSMA) enactment 231–2
mortgages provisions 185, 190–2 objectives 232–3
Regulated Mortgage Contracts 186 responsibility for decisions 219
Financial Services Authority (FSA) 205–6 coordinated action 188
Conduct of Business Sourcebook (COBS) 208
‘consumer outcomes’ see ‘consumer outcomes’ (FSA)
expectation of compliant outcome 240–1
fairness model overview 227–9 rationale 229–31
global financial crisis, and 390–1 ‘grey list’ terms, guidance 207
guidance 218–19, 222 handbook 191–2, 210, 265
information sharing 188 licensing of mortgage lenders 190
MCOB regime 191–2, 201–3 mortgage exit fees Statement of
Good Practice 224
mortgages, as to 185, 186–7
A New Regulator for a New Millennium 232–3
post-Turner approach 194 presumption of unfairness 238–43
‘Principles for Businesses’ 211–12, 218–19, 233–4
regulatory powers 231–2 research on consumer perception 213
‘responsibilised’ firms, approach to 394
Retail Distribution Review (RDR) 219–20, 222
risk-based approach to regulation 232–3
role of 352 rules 190
TCF Initiative see ‘Treating Customers Fairly’ (TCF) Initiative
Turner Review 194

Financial Services Ombudsman (FSO) coordinated action 188
complaints handling 200, 210–11, 225
dispute resolution service 185
information sharing 188
financial services regulation
European Commission priorities 384–5
harmonisation, approaches to 385–6
first mortgages see Regulated Mortgage
Contracts flawed contracts autonomous action approach to defining 82–3, 86–7
common features 82
consent approach see consent approach to unconscionability corrective justice theories, problems of 84
cost-benefit approach to defining 83
defining, approaches to 82, 83–4, 88
distributive theories, problems of 84–6
efficiency theories, problems of 87–8
plural theories approach to defining 88–9
types 82–3 unequal bargaining power approach to defining 82
value of choice theory see value of choice theory
wrongful conduct approach to defining 82
floating charges, use of 293
Fonblanque, John, academic literature 160–1
foreclosure, use of 294–6
forfeiture, reliefs 29–30
‘framed’ choices in value of choice theory 91–2, 93
France academic literature 22–3
cases 65–6, 68–7
clauses abusives legislation 64–5
Clin v Boucher 70–3
Constitutional Council, judgments 21–3
constitutional freedom of contract, development 25
consumer law, penalty clauses 64–5
INDEX

economy of contracts principle 22
Fromont v Verdier 73–7
Human Rights Declaration 1789, application of 22–3
la cause, application of 64–5
la lésion, application of 63–4
la réticence dolosive
  application of 67–73
  concept 379
loyalty as protection against unfairness 62–78
penalty clauses, legislation 64–5
Plessis v Glas 69
Point Club Vidéo cases 65–6
remedies 129–30
rescission of contract, use of 140
substantive freedom of contract, development 23
Theuillon v Destemberg 70, 71, 72–3
unconscionability doctrine in French law 62–3
unfairness
  loyalty as protection against 62–78
  measures against 63–73
void contracts 129–30
fraud
auditors’ liability 317–18
la réticence dolosive, application of 67–73
Lord Hardwicke’s five heads of 160 meaning 28–9
fraudulent misrepresentation (dolus)
  pre-contractual (dolo in contrahendo) 55
prohibition of 49–50
freedom of choice see also value of choice theory
aggressive practices
  and 361–2
  effect of 360–7
uninformed decision making, and 360–1
freedom of contract
  broadening concept 383–4
  conflict of principles 7–8
  conflict with other principles 73–7
  constitutional issues 19
  constitutional limitation 387–8

constitutional principle, as 9–17
development 24, 25
distinction of formal and substantive freedom 7–9 see also specific jurisdictions
ECHR basis 24–5
European fundamental right, as 24–5
fairness, and 386–7
guiding principles 8
horizontal effect of fundamental rights, and 18–19
human right, as 9–17
negative and positive freedom 9
protection of weaker parties, and 7
solidarity, and 386–7
substantive understanding 8, 386–7
unconscionability, and 7–25, 386–7
unconscionability as exception to 379
freedom of economic initiative 19
Fry v Lane 111–12, 181–2
fundamental right, substantive freedom of contract as 17, 24–5
fundamental rights cases, in 387–8
EU, of the 25
family suretyship cases, role in 256–9
growing influence as to unconscionability 247
horizontal effect 18–19, 247, 259–62
private law, and 249–62
protection of weaker parties 249–51
shift of emphasis to 256–9
suretyship cases, and 381
unconscionability, and 251–6

GE Capital Bank 240–1
Gender Directive as to insurance 223
General Guidance on Fitness of Licensed Lenders (OFT) 193–4
Germany
  autonomy see autonomy
  Bürgschaft case see Bürgschaft case
  Commercial Agent case 10–13
  conduct of business rules 264, 267, 268
  constitutional freedom of contract, development 25
Germany (cont.)
constitutional rights 9–10
autonomy, and 387–8
protection of weaker parties 251–6
courts
duties 12–15, 387–8
presumption and procedure 337–9
family members in suretyships,
protection of 271, 388–9
freedom of contract, constitutional
limitation 387–8
fundamental rights, horizontal
effect 247
good faith
courts’ duty to intervene 387–8
principle 280–1
good morals see good morals
inducements, further changes in law
343–4
information disclosure 264
‘junk title’ cases 330–1
kickback payments see kickback
payments
life insurance cases 12
limitations to freedom of contract
12–15
MiFID
harmonisation under 344–8
implementation 337–9
Implementing Directive,
implementation 387
non-professional investors,
protection of 271, 388–9
prenuptial agreement case 12
presumption and court procedure
337–9
private law, concepts 267
protection of weaker parties by
constitutional rights 251–6
remedies 129–30
social state principle 387–8
substantive freedom of contract,
development 9–13, 25
Suretyship case, 12–15 see Bürgschaft
case
suretyship cases 249–51, 381, 387–8
void contracts 129–30
Giddens, A., ‘reflexive individual’
concept 390
global financial crisis
impact 227–9, 390–1
mortgage lending and 194
good faith
application to freedom of contract
16–17, 46–9, 60
courts’ duty to intervene 387–8
defining 67–8
principle 280–1
standard 195
unconscionability, and 67–8, 379
UNIDROIT Principles 278–82
good morals
application to freedom of contract
16–17
courts’ duty to intervene 387–8
unconscionability as 379
Gower, L. C. B., academic
literature 269
Gowland v de Feria 164
Great Peace, The 168
Greece
cases 15–17
civil courts, duties 16–17
constitutional rights 16–17
limitations to freedom of contract
16–17
substantive freedom of contract,
development 15–17
suretyships 16–17
‘grey list’ terms in contracts
FSA guidance 207
UTCCR, as to 206–7
gross disparity principle 282–3
Gwynne v Heaton 162–3
Halsbury, Lord, judgment 29–30
Halsbury’s Laws of England,
commentary in 26–9
Hammond v Osborn 177
harassment
factors in 360
freedom of choice, and 361–2
preventive control 359–60
Hardwicke, Lord
five heads of fraud 160
judgments 150–1, 153, 161–2
harmonisation
approaches to 385–6
Bürgschaft case as judicial
harmonisation of private
law 381
codification of private law, through
384–6
constitutional harmonisation as part of
tripartite approach 398–9
consumer credit harmonisation
Directive 384–5
judicial harmonisation of private law
as part of tripartite approach
398–9
kickback payments 344–8
multi-dimensionality of 275–6
regulatory harmonisation as part of
tripartite approach 398–9
regulatory harmonisation, case for
384–6
tripartite approach, overview 398–9
voluntary approach 275–88
Heathcote v Paignon 163
Hoffmann, Lord, judgment 176
‘honestly, fairly and professionally’
requirement in MiFID 331–3
horizontal effect
acknowledgement of indirect
effect 25
ECHR, direct effect and 18–19
examples of direct effect 18–19
examples of indirect effect 18
freedom of economic initiative,
direct effect and 20–1
fundamental rights, and 259–62
substantive freedom of contract, and
18–19
human right, substantive freedom of
contract as 9–17
Hurley, S., academic literature 96
husband and wife cases 35–6, 116
imbalance between parties see
protection of weaker parties
immoral contracts 14
inadequate consideration, relief for
26–9
indirect horizontal effect of human rights,
acknowledgement of 25
individual conduct model
conception of unconscionability
108–9
description 108
neo-classical, as 108
relational contract theory, in 107–9
inducements
allowable 334–7
CESR recommendations 331–3
conflicts of interest, management of
342–3
distinction of formal and substantive
unconscionability in 339–43
further changes in law 343–4
information, limited use for clients
340–2
kickback payments 331–7
MiFID 331–7
information provision see also advice
asymmetry 215–16, 391–2
behavioural research on consumer
rights information
processing 357–8
bond issues 311–13
conflicts of interest, effect of 392
consumer recognition of
importance 216
consumer rights 357
Cruickshank Report as to 214
disclosure 215–16, 264
duty to disclose
brokers 311–12
directors 311
managers 311–12
overview 309–10
rating agencies 312–13
retailers 311–12
effect on decision making 341–2
fair dealing, applied to 323
fairness, and 214
false and misleading information
216–18
inducements, as to, limited use for
clients 340–2
information provision (cont.)
  inherent gap in 309–10
  kickback payments
  decision making 341–2
  disclosure 329, 334–5
liability for misinformation
  auditors 314–24
  brokers 320–3
  directors 314–24
  overview 324–5
  rating agencies 320–3
misleading omissions, as to 356–7
mortgages
  as to 189
  Key Facts Illustration 191–2
needs test 356–7
report on 215
risk, as to 356–7
informed decision making
  cancellation right, and 363
  risk, and 363–4
transparency model 363
insolvency law issues 41–2
insurance
  Gender Directive as to 223
  payment protection insurance (PPI) 238–43
invalidated contracts
  economic analysis of invalidation 138–40
  use of 130
‘invisible hand’ theory (Adam Smith) 132
Ireland, constitutional rights 24
Italy
  academic literature 20
  Argentine bonds cases 321
  auditors see auditors
  ‘bad loans’ case 308–10
  banking legislation 310–13
  bond issues, case law framework 310–11
  brokers see brokers
  cases 19
  Cirio bonds case 308, 320–1
class action suit, adoption of 325
class actions 325
CONSOB (financial regulator), role of 313, 323–4
  constitutional direct horizontal effect 20–1
  constitutional rights 19–20
  duty of disclosure see information provision
  financial scandals 320–3
  fraud, auditors’ liability 317–18
  ‘junk title’ purchases 308
  liability for misinformation see information provision
  limitations to freedom of contract 19–20
  Parmalat bonds case 321
  precontractual liability 322
  public placements, auditing of company financial statements 313
  substantive freedom of contract, acknowledgement of 20–1
  void contract declaration 308
James, R., academic literature 210
Jeffreys, Lord Chancellor, judgment 157–8
Jessel, Master of the Rolls, judgment 171–2
Jones v Morgan 181
judicial harmonisation
  challenges to private law approaches to unconscionability 381
  tripartite approach to harmonisation, as part of 398–9
‘junk title’ purchases
  cases 330–1
  information provision 308
Kahneman, D., academic literature 95–6
Kay, Justice, judgment 33–4
Key Facts Illustration 191–2
kickback payments
  client fees 333–4
  conflicts of interest 327–9, 337
  consumer protection 330–1
description 340–2
decision-making 326–7
disclosure 329, 334–5
distinction of formal and substantive unconscionability in 326–49
fees and costs 333
greater harmonisation, need for 344–8
hidden costs 329–30
inducements see inducements
information provision 329, 334–5, 341–2
meaning 326–7
medicines 328
MiFID and 326–49, 387
overview 326, 348–9
prohibition of
overview 328
medicines 387
quality improvement without
impairment 335–6
reimbursement claims 328–9
Kitto, Justice, judgment 166
Korobkin, R., academic literature 130–1, 134
Kouwenberg v Rabobank 264–5
la cause, application of 65–7
la lésion, application of 63–4
la réticence dolosive
application of 67–73
concept 379
Lamfalussy process
effectiveness of 337
MiFID 331–3
Land of Leather 238–40
Law of Property Act 1925, enforcement
of mortgages 201
Lawley v Hooper 162
lease agreements 283
legal fees cases 71, 72–3
Lehman Brothers collapse, impact 378
liability
misinformation see information
 provision
 modified proportional liability 324
precontractual liability 322
life insurance cases 12
Lisbon strategy 384–5
Lithuania
common law elements 276
good faith 278–82
gross disparity principle 282–3
harmonisation of financial law,
overview 275–88
lease agreements 283
private law reform 276–8
standard terms and conditions
283–5
unfairness provisions 277
UNIDROIT Principles, transplant of
275–6
voidable contracts 285–8
loan securities 292–6
loans disguised as sales, 156–7
Lodge, Thomas, academic literature 155
loyalty
protection against unfairness, as
62–78
unconscionability, and 67–8
Lushington, Doctor, judgments 38–9
Macneil, Ian, relational contract
theory see relational contract
theory
managers, bond issues 311–12
Mansfield, Lord, judgment 150–1
maritime salvage cases,
unconscionability in 38–9
Markets in Financial Instruments
Directive (MiFID) 380
effectiveness as harmonisation
measure 344–8
‘honestly, fairly and professionally’
requirement 331–3
implementation 337–9
Implementing Directive
implementation 387
overview 331–3
importance 247
inducement regime 331–7
kickback payments 326–49
Lamfalussy process 331–3
Level 1 and Level 2 Directives 331–3
overview 265–6
Mazeaud, Professor D., academic
literature 77–8
McKaa, Professor E., academic
literature 68
medicines, prohibition of kickback
payments 328, 387
Mikelenas, Valentinas, academic literature 277
Millet, Lord Justice, judgment 32–3, 176–7
minor’s contracts, personal characteristic risk and 110–12
misleading actions, concept 353–4
misleading information 216–18
misleading omissions, overview 354–8
misrepresentation
  Act of 1967 170
damages 170, 171
rescission of contract 171
torts see torts
  vitiating factor, as 166, 170–2
misselling of unsuitable products, TCF enforcement decisions 242–3
mistake
  common mistake 168
  concept 246
  relief for 256–9
  unconscionability as 379
  unilateral mistake see unilateral mistake
  vitiating factor, as 166, 168–70
modified proportional liability 324
Morris, P., academic literature 210
mortgage cases, overview 29–30, 57–9
mortgage lenders
  global financial crisis, and 194
  licensing 190
  OFT guidance on 193–4
mortgage value, meaning 299–300
mortgages
  AJA provisions as to repossessions 185
  CCA provisions 186
  comparison 187–8
  courts’ jurisdiction 187–8, 201
  debt level 188
  divided market 186–7
  enforcement 200–3
  equitable mortgages see equitable mortgages
  equity, and 195
  exit fees Statement of Good Practice 224
  financial education of borrowers, and 189
  FSMA provisions see Financial Services and Markets Act 2000 (FSMA)
  information provision see information provision
  Key Facts Illustration 191–2
  legislation 185
  lending 189–90
  market regulation aims 188–90
  ‘decentred’ approach 188–90
  licensing 190
  overview 188–94, 201–3
  MCOB regime 191–2, 201–3
  post-Turner approach 194
  Regulated Mortgage Contracts see Regulated Mortgage Contracts
  repossession
    AJA provisions 185
    Protocol 185
    routes to redress 185, 199–203
    security bill of sale, by 293–4
    security for bank loan, as 296–300
    Turner Review 194
  unconscionability and, overview 184–5
  Multiservice Bookbinding Ltd v Marden 181–2
  Murray v Harding 151
National Commercial Bank (Jamaica) Ltd v Hew 176–7
National Consumer Council, report on information provision 215
needs test for information 356–7
negligence, tort of 267
negligent misstatement, tort of 170
Netherlands
  academic literature 17
  conduct of business rules 264–5, 268
  contract law, protection of weaker parties 256–9
  Convention rights 17
  courts, power to test legislation 17
  family members in suretyships, protection of 256–9, 271, 389
fundamental rights and family suretyship cases 256–9

**good faith, concept** 379

*Kouwenberg v Rabobank* 264–5

**mistake**

concept 379

relief for 256–9

non-professional investors, protection of 271, 389

private law, concepts 267

protection of weaker parties, contract law 256–9

Snijders, H. J. 17

**substantive freedom of contract, development** 17

**suretyship cases**

approach to protection in 383

fundamental rights, role of 381

overview 17

Nicholls, Lord, judgments 35, 117–18

Nobles, R., academic literature 211

non-professional investors, protection of 387–9

North, Lord Keeper, judgment 157, 158–9

Northington, Lord, judgment 29–30

notice of wrongdoing, cases 117–18

*Nott v Hill* 158–9

Nottingham, Lord, judgment 156–7, 158–9

nullity *see* annulment of contracts

**Office of Fair Trading (OFT)**

bulletins 195–6

coordinated action 188

consultations 193–4

guidance 195–6

guidance on licensed lenders 193–4

information sharing 188

licensing of mortgage lenders 190

mortgages, as to 185, 186–7

role of 208

‘watch-dog’ role 195–6

*Office of Fair Trading v Abbey National Plc* 196–7

Ombudsman *see* Financial Services Ombudsman (FSO)

‘one shot’ contract *see* discrete contract (‘one shot’)

Ord, Mark, academic literature 150

**pactum commissorium, prohibition of**

49–50, 60

**pacta sunt servanda, application of**

47, 50

Pareto efficiency of contracts 132–5

*Parmalat* bonds case 321

payment protection insurance (PPI), TCF enforcement decisions 238–43

penal bonds, relief from 31

penalty clauses

*clauses abusives* legislation 64–5

efficiency of 134

penal bonds 31

personal characteristic risk contractual risk, as 107

unconscionability, as to 110–12

personal securities 292–3

plain and intelligible language’ requirement for contract terms 196–7

Plowden, F., academic literature 153

plural theories approach to defining flawed contracts 88–9

**Poland**

adoption of Directives 289

bank-client relationship, development 290

bank guarantees, use of 293

bank loan contracts *see* bank loan contracts

bills of exchange, use of 293

cases 23–4

constitutional freedom of contract, development 25

constitutional rights 23–4

courts’ intervention

*abusive clauses* 303–5

unfair contracts terms 303–5

floating charges, use of 293

foreclosure, use of 294–6

growth of financial market 289–90

limitations to freedom of contract 23–4

loan securities 292–6

mortgage value, determining 300

mortgages

security bill of sale, by 293–4

security for bank loan, as 296–300
INDEX

Poland (cont.)
registered pledges, use of 293
substantive freedom of contract, development 24
succession law 301–3
sureties, use of 292–3
tenancy agreement case 23–4
unfair contracts terms, provisions 303–5
Pollock, Sir Frederick, academic literature 26–9, 32
‘poor and ignorant persons’, cases 111–12
Portland Building Society v Dusangh 181
Posner, E., academic literature 130–1
post-obit bonds, cases 157–8
post-sale conduct 224–5
Powell, John Joseph, academic literature 28
Pre-Action Protocol for Possession
Actions based upon Mortgage Arrears (Protocol) 272–3
courts’ jurisdiction as to mortgages 187–8
overview 185
precontractual liability 322
prenuptial agreements 12
pressure, use of 220–1
presumed undue influence 174, 175–8
presumption and court procedure 337–9
‘Principles for Businesses’ (FSA) 211–12, 218–19, 233–4
Principles of European Contract Law (PECL)
overall view 272–3
standard terms and conditions 284–5
transplant of provisions 277
voidable contracts 287
Principles of European Law on Service Contracts (PEL SC) 272–3
private law
approaches to unconscionability areas of challenge 379–81
challenges to 379–86
codification challenges 380
constitutional challenges 379–80
contrasted with public law 379–81
convergence with public law 246–74
European law challenges 380
judicial harmonisation challenges 381
codification 380
concepts of unconscionability 246
conduct of business rules, and 262–73
fundamental rights, and 249–62
reform 276–8
products, suitability of 219
project aims 377
problems of research 377–8
propositions 395–6
property sales
cases 68–73
disguised as loans 156–7
Protection from Harassment Act (PFHA) 1997, ‘stop now orders’ 359–60
protection of weaker parties see also unequal bargaining power
approaches to 386–9
common law, under see common law
conduct of business rules 262–6, 388–9
consumer contracts 53–5, 61
contract law 256–9
differing levels 388–9
extent of protection 246, 256–9, 387
family members in suretyships 387–9
fundamental rights, and 249–51
identifying vulnerable groups 217–18
limitations to freedom of contract 49–50, 60
non-professional investors 387–9
overview 7, 26–45
risk, and 389–93
usurious contracts 50–2
psychology of decision making 340–1
public law
approaches to unconscionability
contrasted with private law 379–81
convergence with private law 246–74
-growing influence as to unconscionability 246
public placements, auditing of company financial statements 313
quality improvement without impairment, kickback payments 335–6

Race Relations Act 1976 as to provision of goods and services 223

Ramsay, I., academic literature 53, 215–16

rating agencies
bond issues 312–13
duty of disclosure 312–13
liability for misinformation 318–20
real securities
overview 292
use of 293

Redgrave v Hurd 171–2
‘reflexive individual’ concept 390
registered pledges, use of 293

Regulated Mortgage Contracts
comparison with equitable mortgages 187–8
overview 186
routes to redress 199

relational contract theory
application of 101, 102
common contract norms 102
consent and agreement in 103
contract law, and 100–7
degree of necessary protection from unfair terms, issue of 106
development 100
individual conduct model 107
insights as to unconscionability 102
meaning of relational contract 101
non-doctrinal basis 103–4
peripheral nature of unconscionability 105
social dimension of contract norms, and 103
transactional focus 104
transactional risk, and 125–6
unconscionability, as to 100–7
unconscionability models 107–15
relational risk
contractual risk, as 107
unconscionability, as to 112–13
undue influence and 112–13

reliefs
forfeiture, from 29–30
penal bonds, from 31

remedies
economic analysis of see economic analysis of remedies
types 130
variation between jurisdictions 129–30
replacement of unfair terms economic analysis 141–2
use of 129–30
rescission of contract economic analysis 140–1
misrepresentation, for 171
use of 130
‘responsibilised’ firms, overview 394
responsibility
allocation 394
models 394–5
self-responsibility, emphasis on 393–4
unconscionability, and, overview 393–5
responsibility and choice in value of choice theory 92–3, 95–7
‘responsible lending’ concept 219
Retail Distribution Review (RDR) 219–20, 222
retailers, bond issues 311–12
Richards v Brown 150–1
Rigby, Lord Justice, judgment 31

risk
information provision as to 356–7
informed decision making and 363–4
risk-based approach to regulation by FSA 232–3
systemic risk and presumption of unfairness 238–40
unconscionability, and 389–93
risk management by banks 292–6
Romilly MR, judgment 114
Royal Bank of Scotland v Etridge (No. 2) 115–22, 126–7, 176, 178–9

sale of property see property sales
Sale of Reversions Act 1867 114
sale of reversions legislation 114
Scanlon, T.M., academic literature 89
Scarman, Lord, judgment 173
INDEX

scope of work 2–3
second mortgages see equitable mortgages
securities for loans 292–6
security bill of sale, mortgage of goods by 293–4
Selborne, Lord, judgment 37–8
Select Committee on Usury Laws (1818) 164–5
self-regulation, banking 209–10
self-responsibility see responsibility
setting aside
  academic literature 26–9
  consumer credit transactions 34
  unconscionable transactions 33–4
undervalue 32, 34
undue influence 32–3
share sales cases 73–7
Sheridan, L. A., academic literature 157
Shiffrin, Seana, academic literature 86–7
Slovenia
  academic literature 15
  cases 11, 13
  constitutional rights 14–15
  courts’ duties 14–15
  credit agreement case 13–14, 15
  formal and substantive freedom of contract distinguished 15
  limitations to freedom of contract 14–15
  remedies 14, 15
  substantive freedom of contract, development 12–15
  usurious contracts 13–14
Smith, Adam,’invisible hand’ theory 132
social justice, balanced with autonomy 386–7
Social Justice Manifesto, overview 7–8
social policy reasons for non-enforcement 40–2
social state principle and autonomy 259, 387–8
solidarity and freedom of contract 386–7
Spain 59–61
  constitutional rights 24
  consumer contracts
    protection of weaker parties 53–5, 61
    standard terms and conditions 55–7
  good faith provisions 46–9, 60
  legislation as to unconscionability, overview 46, 59–61
  mortgages 57–9
  protection of weaker parties
    consumer contracts 53, 60
    limitations to freedom of contract 49–50, 60
    overview 50–2
  unfair contracts terms 57–9
  unfairness
    forbidden contracts 49–50
    mortgages 57–9
    standard terms and conditions 55–7
  usurious contracts provisions 50–2, 61
Spurgeon v Collier 29–30
standard terms and conditions
  core terms 196
  PECL provisions 284–5
  ‘plain and intelligible language’ requirement 196–7
  use of 195
  UTR as to 196–8
  ‘stop now orders’ as to harassment 359–60
Story, Joseph, academic literature 34
succession law as to bank loan contracts 301–3
suitability
  advice, of 218–19
  fairness, and 218–20
  products, of mis-selling of unsuitable products 242–3
  overview 219
  targeting, of 219
sureties
  approach to protection 383
  family members, protection of 387–9
fundamental rights, role of 249–51, 381
transactional risk, and 115–22
use of 292–3
‘taking advantage’ of consumers 219, 220–1
targeting, suitability of 219
taxonomy of unconscionability 81
tenancy agreement case 23–4
third parties, guarantors as cases 35–6
CFR provisions 42–3
undue influence see undue influence
Thurlow, Lord, judgment 161, 162–3
torts
deceit 170
misrepresentation, for 170
negligence 267
negligent misstatement 170
transactional neglect theory (Bigwood) 177
transactional risk
behavioural economics and 123–5
catching bargains, and 113–15
contractual risk, as 107
identifying, approaches to 122–6
identifying common elements 123
identifying role of 100
implications 122–7
incidence 122–6
nature 122–6
overview 127–8
regulation 121–2
relational contract theory see relational contract theory
relation contract theory and 125–6
suretyships, and 115–22
tort 99–100
unconscionability, and 99–128
undue influence and 115–22
‘Treating Customers Fairly’ (TCF) Initiative
aggressive practices 358
‘consumer outcomes’ see ‘consumer outcomes’ (FSA)
consumer views 213
‘cradle to grave’ approach 352
development 231–5
enforcement decisions 238–43
evidence of breach 207
FSA’s approach 212–13
importance 205
measuring outcomes 218, 219
misleading actions 353–4
misleading omissions 356–7
move to 212
overview 231–8, 243–5
publications 234–5
regulatory regime 211–12
requirements 235–8
Tudor, O. D., academic literature 159–60
Turner Review 194
Tversky, A., academic literature 95–6
unconscionability
application of 129
approaches to 36–45, 82–9
causes 309
CFR provisions 42
civil law 393
common law approaches 379
commonality of elements 397
concept 1, 246
conference 1–2
corporationisation 381–4
contract law see contract law
courts see courts
defining
problems of 79–81
reasons for haziness in 80–1
distinction of formal and substantive 80, 105–6, 326–49
economic analysis of remedies 129–43
economic approaches 132–5
enforcement 129
exception to freedom of contract, as 379
fairness as indicator 106–7
fragmented approaches 246, 397–8
freedom of contract see freedom of contract
fundamental rights see fundamental rights
unconscionability (cont.)
good faith see good faith
harmonisation of approaches see harmonisation
individual conduct model
conception 108–9
justifications 79–98, 130–1
loyalty see loyalty
mistake see mistake
models 107–15
'mopping up' role 89
mortgages see mortgages
network of approaches, development of 398
overview of approaches 82
relational contract theory, as to 39–40
relational contract theory insights 102
relational risk as to 112–13
remedies see remedies
responsibility, and see responsibility risk see risk
standard 130–1
taxonomic issues 81
transactional risk, and see transactional risk
unfairness, as 62–3
value of choice theory see value of choice theory
unconscionable dealing as vitiating factor 166, 180–2
unconscionable financial transaction, meaning 247–9
unconscionable transactions, setting aside for 33–4
undervalue
cases 111–12
setting aside for 32, 34
statutory provisions 32

undertakers, bond issues 311–12
undue influence
academic literature 120–1
actual 174–5
cases 117–18
concept 246
domestic infringement, as 359
factors in 360
overview 174
presumed 174, 175–8
relational risk, and 112–13
setting aside for 32–3
transactional risk, and 115–22
uninformed decision making, and 360–1
vitiating factor, as 166, 174–80
unequal bargaining power
approach to defining flawed contracts 82
courts' duty to intervene 387–8
gross disparity principle 282–3
Unfair Commercial Practices Directive (UCPD)
aggressive practices see aggressive practices
context 351–3
coverage 351–3
'cradle to grave' approach 351–3
implementation 198, 350–1
misleading actions 353–4
Unfair Contract Terms Act (UCTA) 1977
enactment 81
overview 206
unfair contracts terms, courts’ intervention 303–5
unfair credit relationships, CCA provisions 352
Unfair Practices Regulations (UPR) 2008, provisions 198
unfair terms
CCA provisions 195, 198–9
Consumer Credit Act 2006 provisions 198–9
legislation 206, 303–5
unfair terms regulations
core terms, as to 206–7
fair dealing standard 195
unilateral mistake
overview 168
unconscionability, and 168–70
uninformed decision making, aggressive
practices and 360–1
United States
class action suit 325
Community Reinvestment Acts 224
modified proportional liability 324
remedies 129–30
replacement of unfair terms 129–30
unconscionability, enforceability
of 129
Uniform Commercial Code
(UCC) 129
void contract declaration 129–30
unjust enrichment approach to
unconscionability 38–9
usurious contracts
equity, and see equity
overview 13–14
post-obit bonds, 157
regulation 50–2, 61
sales disguised as loans 156–7
usury laws
canon law 147–8
development 147–51
history of regulation 147–65
Middle Ages 147–8
repeal 164–5
Select Committee of 1818 164–5
Tudor 148–9
value of choice theory
accountability for choices 91
advantages over other theories 89,
90–1
determining responsibility under 95–7
factors in applying 94–5
‘framed’ choices 91–2, 93
overview 94, 97–8
principle of value of choice 92–3
‘reflective individual’ concept, and 390
relationship between choice and
responsibility 92–3, 95–7
responses to flawed contracts, and
93–4
unconscionability, and 79–98
video hire cases 65–6
‘vitiating factors’ for common law relief 166
void contracts 14, 129–30, 168, 308–9
voidable contracts 168
PECL provisions 287
UNIDROIT Principles 286, 287
vulnerability see protection of weaker parties

Weatherill, S., academic literature 54
White, F.T., academic literature 159–60
Williams v Bayley 32–3

Wilson, Thomas, A Discourse upon Usury 148
Wiseman v Beake 158
wrongful conduct
academic literature 99
avoidance 118–19
burden of proof 111–12
cases 117–21
flawed contracts, defining 82
notice, doctrine of 117–18
overview 37–8
role of 120–1

Yerkey v Jones 180