INDEX

acquis communautaire, 26, 46, 76, 116, 144, 149, 318
INDEX

arbitration boards, 303
aspects of the legal framework, 300–2
awareness of, 305, 309
binding agreements, 301, 305–7, 314
businesses and, 305–6, 308, 311
circular actions, 313–14
costs, 309
county offices of consumer information, 303
efficiency of, 306–7, 314
businesses and, 305–6, 308, 311
consumer associations, 303
costs, 309
county offices of consumer information, 303
efficiency of, 306–7, 314
businesses and, 305–6, 308, 311
consumer associations, 303
costs, 309
county offices of consumer information, 303
efficiency of, 306–7, 314
businesses and, 305–6, 308, 311
consumer associations, 303
costs, 309
county offices of consumer information, 303
efficiency of, 306–7, 314
businesses and, 305–6, 308, 311
consumer associations, 303
costs, 309
county offices of consumer information, 303
efficiency of, 306–7, 314
businesses and, 305–6, 308, 311
consumer associations, 303
costs, 309
county offices of consumer information, 303
efficiency of, 306–7, 314
businesses and, 305–6, 308, 311
consumer associations, 303
costs, 309

Chartbrook Ltd v. Persimmon Homes Ltd, 42
Cherednychenko, Olha, 148–70, 321
Chitty, Joseph, 181
CILFIT doctrine, 274
citizenship, 127–9
Civic Consulting Study on the use of ADR in the European Union, 299
civil law, 6, 172, 195
and common law, 9–10, 34, 83
contract law, 98
definition of ‘contract’, 97
differences between systems, 16
law of precedents, 199
ownership, 89
ownership of land, 91
property in, 80, 83, 99
rack rental, 91
real rights, 92–4
reservation of title, 85
right to performance, 11
Clifford Chance, 111, 113–14
Coase, Ronald, 102, 125
codification, 172–95
advantages of, 194
of Indian contract law, 180–6
and legal certainty, 175
lessons from the eighteenth century, 190–5
and utopianism, 173–7
Colebrooke, H., 184
Collins, Hugh, 28, 127–9, 149–50, 164
Common Core Group, 29
Common European Sales Law, 23, 38–43, 45, 100, 325
business to consumer contracts, 47
and the CISG, 47
consultation process, 105, 112, 114, 116
consumer protection provisions, 76
county offices of consumer information, 303
and the DCFR, 43–4, 47, 319
debate about, 71–6
definition of ‘consumer’, 143
definition of consumer sale contracts, 141
caveat emptor, 13
Chalmers, Mackenzie, 190
Common European Sales Law (cont.)
definition of ‘contract’, 140
different consequences in different Member States, 73
distance contracts, 144
divergent applications of, 74–6
enforcement, 76
extended use of, 71
interaction with other law, 72
interpretation of, 41, 73–4, 137
and legislative intervention, 319
and multilingualism, 132
non-derogability of, 142
optional nature of, 1, 39, 256
remedies available, 60
scope of, 39, 41, 47, 70–2, 77, 319
termnology used in, 138–46, 320
Common Frame of Reference: see Draft
Common Frame of Reference
common law, 172, 174, 208
and civil law, 9–10, 34, 83
good faith, 33
nemo dat quod non habet rule, 187
ownership, 89
personal rights, 94–5
property law, 82
and the real/personal divide, 94
reservation of title, 85
common law systems, preference for, 115
comparative law, 45–61, 147, 318–20
advantages of, 62
and harmonisation, 58
competition law, 289
consent, 9, 12, 15
consumer access to justice, 297, 299
consumer complaints, 295–314
choice for individual redress, 296–8
and enforcement, 297
financial services, 313
Framework Directive on, 67
and lawsuits, 310
mass contracting, 311
and mediation, 310
principles for settlement of, 298
telephone and Internet sector, 311
consumer contracts, 67, 141–4
national contractual remedies, 59
and professional contracts, 53
‘unbalanced’, 54–5
unfair terms in, 56
Consumer Credit Directive, 47, 205
consumer law, 138–46, 295
customer protection, 33, 48, 54, 119,
144, 293
enforcement of, 76
at a European level, 48, 150
and the German Insurance Contracts
Act, 246
and harmonisation, 49
and land exclusion from the DCFR, 87
and market integration, 152
rights to information, 153–4
scope of, 54
customer rights, 56–8
Consumer Rights Directive, 1, 45–61,
87, 136, 318
Article 20, 60–2
comparative perspective on, 51–62
definition of ‘business premises’, 145
definition of ‘consumer’, 142
definitions of ‘consumer’, ‘professional’ and ‘consumer
contracts’, 51–6, 142
distance contracts, 144–5
exclusions, 52, 88
financial services contracts, 55
and fully targeted harmonisation, 51–62
hierarchy of remedies, 59
and land transactions, 88
limitation period on seller’s liability,
57–8
and multilingualism, 132
national implementation of, 60
passing of risks, 60–2
sales contracts and guarantees,
57–62
scope of, 52, 55, 88
structure of, 51
time for delivery, 58–60
unfair contract terms, 56–7
contract formation, subjective intention
in, 9–10
contract law; see also English contract law, European contract law
agreement, 9
choice of applicable law, 132
codification of, 172–95
commercial and consumer contracts, 36
common law systems, 115
concept of principle in, 7–8
codification of Indian, 180–6
consent, 9, 12
consideration, 184–6, 192
construction of a common terminology, 131–47
consumer contracts, 141–4
contracts for the sale of goods, 141
contracts for the supply of services, 141
contracts of adhesion, 235
definition of a contract of consumer surety, 199
definition of ‘contract’, 96, 139–41
development of, 256–74
differences between Member States, 101
digital content, 146
disclaimer or exemption clauses, 20
distance contracts, 144–6, 243, 248
enforceability of contracts, 19
European contract law, 23–44
Europeanisation of, 45–61
exclusion of land, 78–98
freedom of contract, 30, 35, 148, 202, 206, 267
and good morals and public order, 204
implied terms, 20
insurance contracts, 235–53
in Ireland, 208–34
juridical acts, 96–7
mass contracting, 311
misrepresentation, 16–19
mistake, 12–16, 182, 184
and movable property, 84
need for a common terminology, 133–5
nemo dat quod non habet rule, 187–8
obligations in, 84
off-premises contracts, 144–6
party autonomy, 30
passing of risks, 60–2
penalty, 186
preservation of the contract principle, 59
and property law, 83, 85
special contracts, 85, 98
specification, 10–12, 187
standard bilateral contract, 96
subjective intention in contract formation, 9–10
undue influence, 19
unfair terms, 20, 56–7
unfairness, 19–21
unilateral contracts, 97
will theory, 9, 184, 192, 200
Correia, Laurent, 2
Council of the European Union on Justice and Home Affairs, 1
country of origin principle, 49
Courage case, 278–9, 289
Court of Justice of the European Union, 41
damages, 279, 294
instrumentalisation of private law by, 153
interpretation and application of the Unfair Contract Terms Directive, 273
interpretation of EU law, 134, 317
market access approach, 155, 293
policy decisions, 278
cross-border trade, 124
dispute settlement, 114, 119
and harmonisation, 120
sectoral approach to problems in, 112–13
cultural and linguistic diversity within the EU, 31, 75, 113, 127, 135, 147, 324
damages, 276–94, 323–4
actions against individuals, 278–86, 292
and Article 101 TFEU, 279
and attribution of responsibility, 292
damages (cont.)
corrective justice and compensation perspective of, 280–1, 283, 288, 294
as deterre, 278, 281, 283
enforcement-focused regime, 277, 286, 288–9, 323
as an enforcement mechanism, 277–8, 283, 294
Francovich remedy, 277
and national courts, 277
nature and function of damages actions, 276
passing-on defence, 281
proportionality of sanction, 289
punitive function, 294
de Motes Bernet, Maluquer, 300
Denmark, 58
Devenney, James, 63–76, 316
Dietzinger case, 74
Directive 2008/48/EC, 205
Directive on equal treatment in employment, 283–4
Directive on European Contract Law, 124
Directive on the equal treatment of men and women in the access and supply of goods and services, 283
Director General of Fair Trading v. First National Bank Plc, 42, 75, 267–8
discrimination law, 283, 290
distance contracts, 144–6, 243, 248
Distance Selling Directive, 54, 219, 224, 226
Donnelly, Mary, 215–16, 224–5
Doorstep Selling Directive, 74
Draft Common Frame of Reference, 17, 23–44, 78
as an academic proposal for legislative reform, 24–5, 38–43, 103
achievement of, 24, 40, 123
and the acquis communautaire, 66
aim of, 29
ambition of the project, 68, 318
application to juridical acts, 78
application to non-contractual bilateral acts, 97
bases of liability, 287
and the CESL, 43–4, 47, 319
and civil law systems, 21
and comparative analysis, 319
comparative perspective on, 319
compensation-based perspective, 276
consultation process, 116–17, 137
consumer contracts, 53
counterprotection, consumer, 33
corrective justice and compensation perspective of, 276, 287
criticisms of, 25–32, 43, 108
damages actions in, 286–91, 293
debate about, 66
definitions in, 146
‘consumer’, 142
‘contract’, 137, 139–41
immovable property, 79
of the consumer’s purposes, 143
development of a European legal culture, 135–8, 146
discrimination, 290
distinction between principle and policy, 7
drafting style, 27–30, 123
economic argument for, 129
enforcement-focused regime, 289
and English contract law, 4–21
evidence for the need for, 121
exclusion of land, 85, 88, 90, 98, 320
freedom of contract, 206
fundamental principles, 8, 30
and harmonisation, 48, 50, 120
fundamental principles, 8, 30, 104, 120, 205
future role of, 39–40
generality of provisions, 29
impact of, 43–4
implementation of, 124
influence of abstract general rules, 205
information requirements, 144
juridical acts, 206
land, 78, 87–9, 98
INDEX

'legally relevant damage' condition, 287, 290 and legislative intervention, 319 liability for negotiations contrary to good faith and fair dealing, 32–8 misrepresentation, 17–18 mistake, 15–16 mixed contracts, 143 national divergences in implementation, interpretation and application, 106 negligence, 288 negotiations for, 137 non-monetary obligations, 10–11 open-ended legal concepts, 29 as an optional instrument, 69, 104, 109, 137, 146 overriding principles, 8, 30 personal rights, 95–6 policy considerations, 30–2 as a political proposal, 24, 38–43, 103 precontractual liability, 32–8 and property law, 78–9, 88 immovable property, 79–84 movable property, 84–7, 99 property law for goods, 85 and public law, 286 reactions to, 25–32 remedies available, 60, 290 rental of accommodation, 88 as a resource, 22, 40, 44 responses to, 130 from civil law academics, 28 from common lawyers to, 27–8 scope of, 25–6, 69, 78, 140 as a source of law, 44 specific performance, 10 structure of, 26, 32, 68 terminology used in, 138–46, 320 as a tool-box, 42, 123 transaction costs within national jurisdictions, 125 trusts, 95 unfairness, 20–1 welfare outcomes of, 118, 120, 122–3, 126 Drobnig, U., 79 Dudley Field, David, 189, 193 Dupont, Pascale, 2 e-commerce, 111–12, 220 effectiveness, principle of, 280 employment law, 283 Enforcement Directive, 291 England Conduct of Business Sourcebook, 158 Criminal Law Commission, 176 Financial Services Authority, 158 land law, 95 leasehold, 91 ownership of land, 91 policy considerations, 163 rack rental, 91 Real Property Commission, 176 English contract law, 181; see also contract law and codification, 172–95 concept of principle in, 5, 7–8 and continental law, 7 damages, 17 and the DCFR, 4–21 incompleteness of EU law, 65 lack of ordered classification in, 4 misrepresentation, 16–19 mistake, 12–16 precision of, 4–5 principles of universal law, 5 specific performance, 10–12 subjective intention in contract formation, 9–10 unfairness, 19–21 unilateral contracts, 97 English equity, 14–15 damages, 17 discretionary power of, 14 misrepresentation, 16 power of recission, 18 relief against forfeiture, 19 English property law, 80 environmental law, 284 Environmental Liability Directive, 284 Estonia basis for its private law, 196–8 definition of 'consumer', 201
Estonia (cont.)
freedom of contract, 202
General Part of the Civil Code Act, 198, 204–6
and implementation of EU legislation, 196–206, 321–2
Law of Obligations Act, 198–201 legal tradition in, 197
need to choose a legal system, 197
SMS loans, 203 socio-economic change in, 198, 200
estoppel, 35
Etridge case, 212
European Area of Justice, 103
European Charter of Fundamental Rights, 134, 138
European Civil Code, 1, 26, 78, 124, 127, 317
European common legal tradition, 37
European Consumer Consultative Group, 39
European Consumer Contract Law Regulation, 70
European Consumers’ Organisation, 39
European contract law; see also contract law damages actions in, 276–94 definition of ‘consumer’, 146 development of, 256–74 instrumental to the internal market, 134 interpretation by national courts, 258 pan-European case law methodology on, 274, 323 principles, definitions and model rules of, 23 requirement for a simple invariable rule, 81 scope of, 79 terminology used in, 134–5, 147 transaction cost critique of, 100–30
European law autonomous meaning of, 131 coherence of, 65–6 consolidation of, 63–6 fragmentation of, 64, 72–3, 151, 320 effectives of, 280, 291 incompleteness of, 65 sources of, 64
European Law Institute, 135, 325
European Parliament Committee on the Internal Market and Consumer Protection, 56
Legal Affairs Committee, 104
European private law, 63–76; see also private law awareness of, 43 challenges for legal scholarship, 167–70 coherence of, 68 ‘common heritage’ of, 202 discourse and scholarship on, 148–70 effects in national private law, 155–63 and Estonia’s private law, 196–8 Europeanisation of, 2 future direction of, 318 implications of an instrumentalist conception of, 163–7 interpretation of, 134 judicial collaboration, 317 obstacles to, 206 reform proposals, 317 regulatory function of, 166 transformation of, 316 transposition and enforcement in national law, 208, 214, 316
European Union, 129 alternative dispute resolution, 297 Commissioner for Consumer Affairs, 231 competition law, 280–1 consolidation of law in, 63–6
INDEX

Cultural and linguistic diversity within the EU, 107, 202, 274, 324
differences between Member States, 107, 202, 274
discretion and margins of appreciation, 65
enforcement deficit in, 291
fragmentation and polycentricity, 64
freedom of movement, 285, 293
instability of CJEU judicial policy, 65
integration, 155, 167, 321
law of equal treatment, 290
legal divergence in, 121
legal fragmentation in, 76, 323, 325
Member States’ legislative competence, 48, 63
mutual recognition, 50
and national laws, 64, 68, 202
political aspiration of, 126, 128
principle of multilingualism, 131–3
private law dimension of, 63–76
regulation in, 149–50, 163, 292
sources of EU law, 64
state liability, doctrine of, 65
Expert Group Feasibility Study, 38–43, 70, 76, 104, 137
Expert Group on a Common Frame of Reference in the Area of European Contract Law, 1
Field J, 74
financial services contracts, 313;
see also investment advice, insurance contracts
duties of care and loyalty, 155
financial supervision standards, 205
and national courts, 163
and non-responsible lending, 166
Finland, 57–8
Finlay CJ, 221
Foakes v. Beer, 185
Framework Directive on EC Consumer Contract Law, 67
France
Civil Code 61, 82–3
and the DCFR, 130
financial supervision standards, 162, 165
ownership of land, 91
pre-contracts, 97
property law, 81
real rights, 92
trader’s liability period, 58
unfair contract terms, 56
Francovich remedy, 277–8
freedom of contract, 30, 35, 148, 200, 206, 267
in Estonia, 202
Freiburger Kommunalbauten, 75, 261
Gaius, 79, 92
German BGH, 266
ancillary terms, 266, 269
credit card contracts, 266
fairness of terms, 269
freedom of contract, 267
guaranteed paid item charges, 270
price term exemption, 265
statutory default provisions, 265–6
unpaid item charges, 270
German Civil Code, 27, 34, 83, 93
German Insurance Contracts Act, 322
consumer protection objective of, 246
distance contracts, 243, 248
duties of care and loyalty, 155
duties of care and loyalty, 155
and expectations of prospective policy-holders, 249
impacts of, 254
implications of, 254
information and advice provided to policy-holders, 242
and the Insurance Mediation Directive, 254
insurer’s duty to advise, 242–6, 248–9
and waivers of the right to advice, 248, 252
and waiving the right to advice, 248
and waiving the right to advice, 248
and waiving the right to advice, 248
German law, 33, 115
definition of ‘consumer’, 53

© in this web service Cambridge University Press
www.cambridge.org
German law (cont.)
in Estonia, 197, 201
financial instruments, 155
insurer’s duty to advise, 241–2
law of obligations, 34
pre-contracts, 96
property law, 79, 91
real rights, 92
Securities Trading Act, 158
Trennungsprinzip, 93
Germany
case law on banking fees and charges, 258
financial supervision standards, 162
Insurance Contract Act, 241–2
Giliker, Paula, 23–44, 319
good faith and fair dealing, 11, 20, 32–8, 43, 75
definition in the DCFR, 35, 37
in investment services, 161
substantive requirement for, 36
test of, 36
Greece, property law, 79
Green Paper on policy options for progress towards a European Contract Law for consumers and businesses, 1, 38–43, 136, 280, 318
barriers to the functioning of the internal market, 101
consultation on, 104
evidence for harmonisation, 120
options presented in, 68–9, 73, 110, 117
teleology of, 123–5
Gruber case, 143
Hale, Sir Matthew, 4–5
Halson, Roger, 100–30, 320
Harlow, C., 278
harmonisation, 45–8
aims of, 49, 150, 296
and alternative dispute resolution, 296, 314
assumptions underpinning, 324
commitment to, 127–9
concept of the optimal solution, 110, 120, 124, 126–7
for consumer contracts, 38
of consumer law, 295
cost of, 121
debate on in Ireland, 230–2
economic advantages of, 320
of English law with continental systems, 12
and European identity, 127–9, 325
evidence for the need for, 116–22, 126, 130
and financial supervision standards, 161
fully targeted harmonisation, 48–51, 57, 62, 109, 151, 153, 319
and legal certainty, 114
maximum, 48, 50, 55, 62, 123, 208, 214, 317
minimum, 49, 68, 151
and national differences, 110
and new EU Member States, 152–3
of non-contractual liability, 291–4
objectives of, 150
pace of, 101–6
policy considerations, 37, 49
and preservation of cultural and linguistic diversity, 31
questions of interpretation, 37
and races to the bottom or the top, 49
‘set-up’ costs of, 107
spontaneous, 64
surreptitious character of the process, 103, 129
transaction cost argument for, 100–30, 320
and unfair contract terms, 56
uniformity of legislation and adjudication of disputes, 109
welfare outcomes of, 118, 120, 122–3, 126
Henderson, John, 181
Hesselink, Martijn, 40
Hoffmann, Lord, 42
Hohfeld, W.N., 94
Hope, Lord, 42
Horner, Francis, 176
Humphreys, James, 176
Huts, Chantal, 2
immovable property
category of immovables by
destination, 81
definition of, 82
human action test, 79–82
India, 321
Anglicisation of, 177
codification movement in, 177–80
common law in, 182
rule of law, 177
scope for indigenous law in, 179–80
Indian Contract Act 1872, 172–95, 321
consideration, 184–6, 189, 192
definition of ‘contract’, 183
liquidated damages clauses, 186
mistake, 184
and the nemo dat rule, 187
objections to, 193
omission of a Statute of Frauds, 186, 189
problems of interpretation, 192
reactions to, 186–9
Indian Law Commission, 177
Third, 180, 182
Information Technology Service Directive, 54
Institute of Commercial and Corporate Law, 1
insurance contracts, 235–53, 323
complexity of, 236
elements of the insurer’s duty to advise, 238–41
expectations of adequate cover, 236, 254
information asymmetry in, 235, 237, 244
insurer’s duty to advise, 235–53
limitations and exclusions from cover, 236
pre-contract provision of information, 237
product deregulation in, 237
product design of, 236–7
regulation of, 254
remedy of a breach of the duty to advise, 248, 252–3
sequential performance of its parties, 236
waiving the right to advice, 247
Insurance Mediation Directive, 237–8, 322
and the German Insurance Contracts Act, 242, 254
guidance for national legislators, 239
impact of, 240–1
issues left open in, 239
‘know your customer’ rule, 238–42
a minimum harmonisation Directive, 238
obligations of insurance intermediaries, 240–1
obligations of insurers, 240–1
obligations of policy applicants, 244
and the PEICL, 252
prospective policy-holder’s obligations, 239
scope of, 238
and waiving the right to advice, 247
insurer’s duty to advise, 254–5, 323
appropriateness test for advice provision, 246, 249
circumstances for, 243–4
cost of providing advice, 245–7
obligations of insurers, 244
obligations of policy applicants, 244
remedy of a breach of, 247–8
requirements of, 242–5
scope of, 245
transparency of the insurer’s expenses, 246
waiving the right to advice, 247
intellectual property rights, 282, 290
Interfoto Picture Library Ltd v. Stilletto Visual Programmes Ltd, 33
internal market barriers, 49, 101, 118, 285, 293
investment advice
duties of care and loyalty, 155, 157, 159–60, 162
and good faith, 160
harmonised and unharmonised standards, 158
Investment Services Directive, 160
Ireland
commercial law, 210
Ireland (cont.)
compliance and enforcement mechanisms, 223–30
compliance with EU obligations, 215, 219, 224–6
Constitution, 212, 221
Construction Industry Federation, 226, 228
consumer protection, 214, 225, 229
Consumer Protection Act 2007, 229 and the Consumer Sales Directive, 216
Consumers’ Association of Ireland, 231
contract law, 208–34, 322
Director of Consumer Affairs, 226, 229
employment law, 212
and the English legal system, 209 equitable principles, 211
European Communities Act 1972, 221
European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003, 216, 218
European Communities (Commercial Agents) Regulations 1994, 220
external influences on Irish contract law, 209–14
impact of Europe on contract law reform, 232–4
impact of European Directives on Irish contract law, 214–32
Irish Home Builders’ Association Code of Practice, 227
lack of political interest in contract law reform, 232
law reform, 208, 232–4
Law Reform Commission, 218–19, 232, 322
Law Society of Ireland, 226, 228–9 maximum harmonisation debate in, 230–2
National Consumer Agency, 217, 225–6, 229
Office of the Director of Consumer Affairs, 225
Package Holidays and Travel Trade Act 1995, 230
precedent value of English judicial decisions, 210
Restatement of the Sale of Goods Act 1892, 218
Sales Law Review Group, 231, 233, 322
transposition and enforcement in national law, 221, 223
transposition and enforcement of EU measures in, 214
transposition of contract and consumer Directives in, 215–23
unfair contract terms, 225–6, 228, 230
Unfair Contract Terms Directive, 222
use of regulation rather than legislation to implement EU Directives, 215, 222, 224
Italy, 56, 58, 61
Consumer Code, 60
James, Simon, 27
James, Sir William, 181
Jeremy, G., 184
Jersey Law Commission, 192
Jessel, Sir George MR, 16, 18
Jones, Sir William, 5, 180
Judicature Acts, 14–15 juridical acts, 96–7, 140, 206
justiciae, 32, 63
Justinian, 79, 92
Kärson, Sander, 196–206, 321–2
Kay J, 19–20
Kearns J, 226–7
Kelly, Cliona, 208–34, 322
Kennedy v. Panama, New Zealand and Australia Royal Mail Company, 184
Kenny, Mel B., 63–76, 316
INDEX

Kershaw J, 74
Kufner case, 74
Kull, Irene, 196–206, 321–2
Kuneva, Maglena, 231
land, 80, 82, 96
contracts for the sale of land, 98
investment in, 87
national registration, 86
ownership, 89
Lando Commission on European Contract Law, 249
Lauroba, E., 302
Laval case, 293
law and equity, 14, 18
Law Commission for England and Wales, 105
law of obligations, 317
law of precedents, 199
Law Society of England and Wales, 114
Lawrence, John, 187
Leake, Stephen, 184
Leczykiewicz, Dorota, 276–94, 323–4
legal certainty, 159, 175
legal scholarship, 167–70, 182
contribution to debates, 169, 171
and Europeanisation of private law, 169
and inter-disciplinary research, 169
Legrand, P., 27
lex mercatoria, 64, 139
life assurance, 153–4; see also insurance contracts
Third Life Assurance Directive, 153
Lowe, Robert, 181
Luxembourg, 58
Macaulay, Thomas, 177–8, 193
Macleod, Sir John, 181
Macnaghten, Sir Frances, 178
Macpherson, William, 179–81, 184
Magre, J., 302
Maine, Henry, 179, 187–8, 193
Malcolm Marshall v. Capital Holdings Ltd t/a Sunworld, 229
Mance, Lord, 268–9
Manfredi case, 279, 289
Mansfield, Lord, 185, 189
’market for lemons’, 261–2, 264, 271–4
Markets in Financial Instruments Directive, 54, 155–6, 240, 323
conduct of business rules, 156–8, 161
and national private laws, 162
objectives of, 157
radiating effect of the supervision standards, 158–9
and supervision standards, 161
Marshall case, 290
McGregor, Harvey, 191
McGregor, Laura, 28
Meagher v. Minister for Agriculture, 221–2
Miller, Lucinda, 44
misrepresentation, and damages, 17
mistake, 12–16
and consent, 15
enforcement by the mistaken party, 15
and relief, 14–15
More, Thomas, 173
Moulton, Lord, 17
movable property, 84–7, 89
multilingualism, principle of, 131–3
obstacles caused by, 132–3
Muñoz v. Fumar, 292–3
Nambyar, P.K., 192
Netherlands effectenlease, 159–60
Financial Supervision Act, 158
Further Regulations on Market Conduct Supervision of the Securities Trade, 160
mis-sellings of investment schemes, 159–61
Securities Transactions Supervision Decree, 160
trader’s liability period, 57–8
O’Connell, Daniel, 176
OFT v. Abbey National, 267
Ogus, Anthony, 10
ownership, definition of, 89
Oxford Centre for Socio-Legal Studies, 114

© in this web service Cambridge University Press

www.cambridge.org
remedy of a breach of the duty to advise, 252–3
scope of, 249
private law, 148; see also European private law
aims of, 149
considerations of justice, 148, 154–5, 159, 162, 166, 170, 321
duties of care and loyalty, 160
ethical-societal conception of, 151, 154, 159, 163
and fundamental rights, 169
instrumentalisation of by the EU, 162, 168
national laws, 170
as an organic entity, 25–6
policy considerations, 148, 150, 163, 167–70
provision of freedom for private parties, 148
and public goals, 165
reasoning of, 148
regulatory financial supervision standards, 157, 161–2
role of private law scholarship, 150
rules of different origin and background in, 202
standards of care and loyalty in investment services, 156, 159
Product Liability Directive, 152
scope of its application, 152–3
Project Europe 2030, 102
property, definition of, 79
property law, 317
consumption of land, 87–9
and contract law, 83, 85
and the DCFR, 78–9
differences between Member States, 79
goods, 84
immovable property, 79–84
and land, 86
movable property, 84–7
obligations in, 83
ownership, 89–90
rights, 89–96, 148
proportionality, principle of, 48, 103, 293–4

Oxford Institute of European and Comparative Law, 114
Palmer, George, 15
Perfumi, Chiara, 131–47, 320
Photo Production case, 211
Pillans v. Van Mierop, 189
Pollock, Sir Frederick, 6–7, 9, 182, 184, 189–90
positivism, 174
Pothier, Robert-Joseph, 5–6, 9, 12–13, 183–4
precontractual liability, 32–8, 43, 319
common form of good faith, 34
in common law, 33
consideration of others, 36
continuing or breaking off negotiations contrary to good faith and fair dealing, 36
general model rules of, 32
Germanic model of, 34
‘no intention to contract’, 36
Romanistic model of, 33
principle, and policy, 7
Principles of European Contract Law, 41, 139, 249–50, 322
Drafter’s Comments, 251
drafting style, 253–4
duty to inform and advise under, 250–2
and the English Supreme Court, 42
evaluation of the insurer’s duty to advise, 253
extent of the insurer’s duty to advise, 251–2
impact of, 254
inconsistency between the applicant’s requirements and the cover offered, 251
insurer’s duty to advise, 251, 254
insurer’s precontractual duties, 250
‘know your customer’ rule, 251
limited information at the formation stage, 250
policy-holder’s expectations, 253
policy-holder’s right to terminate the contract, 252
| Proposal for a Directive on Consumer ADR, 296, 298–9 |
| public intervention, economic argument for, 125 |
| Queen Mary College, University of London, 114 |
| ‘race to the bottom’, 262 |
| Rann v. Hughes, 185 |
| reasonable expectations, 6, 9 |
| Redgrave v. Hurd, 18 |
| Reding, Commissioner, 70, 76 |
| Reich, N., 69 |
| Research Group on Credit, Debt and Consumer Protection, 1 |
| Research Group on the Existing EC Private Law, 26 |
| rights |
| limited proprietary rights, 90–1 |
| ownership, 89–90 |
| personal rights, 95–6 |
| property rights, 95–6 |
| proprietary rights, 94 |
| real rights, 92–4 |
| right in personam and right in rem, 92–5 |
| security rights, 90–1 |
| trusts, 95 |
| Rome I Regulation, 55, 68 |
| Romilly, John, 180 |
| Romilly, Samuel, 176 |
| rule of law, 211 |
| Ryan, Sir Edward, 180 |
| Savigny, F.C. von, 6 |
| Scaife v. Falcon Leisure Group (Overseas) Ltd, 230 |
| Schillig, Michael, 256–74, 323 |
| Schwab, Andreas, 137 |
| Scottish Law Commission, 42, 105 |
| Single European Insurance Market, 237 |
| Slovenia, trader’s liability period, 58 |
| SMEs, role in the internal market, 55 |
| Smith v. Hughes, 10 |
| Smits, J.M., 37 |
| SMS loans, 203 |
| social solidarity, 30 |
| Spain |
| Catalan mediation system, 300–2 |
| concept of ‘consumer’, 31 |
| consumer mediation system, 295, 300–2 |
| consumer protection, 300 |
| definition of ‘consumer’, 52, 311 |
| online mediation of small claims, 310 |
| regulation of the consumer arbitration system, 301 |
| Royal Decree on civil and commercial mediation, 310 |
| small claims, 310 |
| trader’s liability period, 58 |
| Sparkes, Peter, 78–98, 320 |
| specific performance, 10 |
| Stephen, James Fitzjames, 188–9, 193 |
| Steyn, Lord, 32, 265, 267 |
| Study Group on a European Civil Code, 26, 67 |
| subsidiarity, principle of, 48, 103, 325 |
| surety protection, 72, 200 |
| Swain, Warren, 172–95, 321 |
| Tereszkiewicz, Piotr, 235–53, 323 |
| Teubner, G., 37 |
| Third Life Assurance Directive, 153 |
| Tiersiomier case, 81 |
| Timesharing Directive, 47 |
| tort liability, 13 |
| transaction costs, 102 |
| transaction costs of cross-border commerce, 101–2, 120, 124, 256 |
| evidence for, 110–16 |
| foundations of the argument for, 125–7 |
| and market failure, 117 |
| transparency, 20, 36, 221 |
| Trento Group, 29 |
| Trstenjak, Advocate-General, 41 |
| Tweddle v. Atkinson, 185 |
| UK Housing Alliance (North West) Ltd v. Francis, 75 |
| Ulmer, P., 259, 262 |
| unfair contract terms, 56–7 |
Unfair Contract Terms Directive, 42, 73, 75, 142, 151, 236, 256–74
case law on, 260
competitive behaviour of markets, 272–3
consumer rights approach, 257–8, 265
criteria for delineation of price terms, 269
criteria for pricing in, 257–8, 263
free markets and competition approach, 257, 259, 265, 269
implementation in Ireland, 222, 226
interpretation and application of, 259
interpretation
by the CJEU, 273
by the German BGH, 266
by national courts, 274
by the UK Supreme Court, 267–71
objectives of, 258, 261, 273
‘plain intelligible language’ criterion, 272
price term exemption, 257, 273–4, 323
price terms and the ‘market for lemons’, 271–4
provision of an effective control measure, 263
rationales of, 258–64
requirement of transparency, 268
unfairness, 19–21
UNIDROIT principles, 139
United Kingdom
Civil Code, 61
definition of ‘consumer’, 53
House of Lords European Union Committee, 130
Law Commission, 53, 56, 113
Law of Property Act 1925, 82–3
Office of Fair Trading, 264, 273
Small Claims Mediation Service, 310
Supreme Court, 267–71
Unfair Terms in Consumer Contract Regulations 1999, 264
unjust enrichment, 16
US Second Restatement of Contracts, 15
US Uniform Commercial Code, 107–8
Van Caenegem, R.C., 172
venire contra factum proprium, 35
Viking case, 293
Viola, I., 306
Von Bar, C., 79
Waddams, Stephen, 4–21, 318–19
Walker, Lord, 268
Weatherill, S., 325
Webb v. Webb, 95
welfarism, 30, 120
White, Fedelma, 215–16, 224–5
White Paper, 281; see also Catalan White Paper on Mediation
Whittaker, Simon, 27–8
will theory, 9, 183–4, 192, 200
Wilmot J, 185
Winstanley, Gerrard, 173
World Bank Doing Business survey, 114
World Legal Information Institute, 213
Zimmermann, Reinhard, 37, 43