

# CONTRACT LAW

An Index and Digest  
of Published Writings

Adam Kramer



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PUBLISHING

OXFORD AND PORTLAND, OREGON  
2010

Published in North America (US and Canada) by  
Hart Publishing  
c/o International Specialized Book Services  
920 NE 58th Avenue, Suite 300  
Portland, OR 97213-3786  
USA

Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190

Fax: +1 503 280 8832

E-mail: [orders@isbs.com](mailto:orders@isbs.com)

Website: <http://www.isbs.com>

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Hart Publishing Ltd, 16C Worcester Place, Oxford, OX1 2JW

Telephone: +44 (0)1865 517530 Fax: +44 (0)1865 510710

E-mail: [mail@hartpub.co.uk](mailto:mail@hartpub.co.uk)

Website: <http://www.hartpub.co.uk>

British Library Cataloguing in Publication Data  
Data Available

ISBN: 978-1-84113-574-8

Typeset by Forewords, Oxon

Printed and bound in Great Britain by

TJ International Ltd, Padstow, Cornwall

*For Kathryn*

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## FOREWORD

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It is a rare event to be able to write a foreword for a new type of book. We are now thoroughly familiar with textbooks, monographs, practitioner works, text cases and materials books and journal articles on the law of contract. This book is different in that it indexes leading writings on the law of contract, and does much more than merely list all the significant writings: the author provides a succinct account of the major pieces.

In this electronic age one might be forgiven for asking whether there is a need for a book of this type. After all, it is possible to search electronically for much legal material. However, it is not possible to search electronically for everything with ease. In particular, it can be extremely difficult to find essays which are published as chapters in books. Further, search engines do not differentiate between publications in terms of their quality. Thus, in drawing together in one volume leading contributions to our understanding of the law of contract, this book provides an extremely valuable service.

This book will be of interest to students, academics and practitioners. Its relevance to students and academics is clear. Perhaps less clear is its significance for practitioners. If this book had been produced thirty years ago, its relevance to practitioners would have been questioned. But times have changed. Today the work of academics is cited to and by appellate courts in many of our leading contract cases. It is therefore necessary for counsel to be familiar with the leading academic contributions to the issue that is before the court.

A book of this nature ideally requires an interest in academic legal issues as well as an involvement in legal practice. Adam Kramer fits these requirements perfectly: he is a barrister with a busy practice in commercial chambers, he has spent time as an academic lawyer in a leading law faculty and he continues to produce impressive, scholarly articles on the law of contract. Indeed, one of his essays was recently cited by the House of Lords in *Transfield Shipping Inc v Mercator Shipping Inc* [2008] UKHL 48, a decision that is notable for its references to academic materials of the type to be found in this book.

This book will, I am sure, facilitate the further citation of academic articles in our courts and it will also assist students and academics in their research projects. I look forward to using it in my own research. I hope

that it will be widely consulted and that in time it will provide a model that others working in different areas of the law will choose to follow.

Ewan McKendrick  
*University of Oxford*  
*October 2009*

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## PREFACE

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Whether lawyers (and by this I include academics, practitioners and judges) are aware of a relevant article or chapter of commentary at the right time has more to do with accidents of location, good memory, and downright luck than with the merit of the piece. How often has a crucial article been found while looking for something else, or during an unfocused flick through journals, books of essays or the footnotes of another article? I have found it irritating as a barrister and academic writer to know that there is almost certainly a relevant and helpful article that, despite diligent efforts, I will only become aware of a few weeks after final submission of my skeleton argument or publication of my own article. It is equally unsatisfying as an author of law writings to know that your carefully crafted contribution may well not be as widely read and therefore influential as it deserves.

Of course, there are the electronic indices and the commercial legal information providers, but I have found these variously not comprehensive, unwieldy, insufficiently discerning, uninformative or (for those not in universities) expensive. It is hoped that this book is none of those things.

The purpose of this book, then, is simply to make research by all contract lawyers easier. I have not sought to create an exhaustive database, but rather to include important and well-spread examples of works in each particular topic, knowing that the footnotes within those works will lead to further useful works. I have covered contract law not because it is the area most in need of an index and digest, but because it is the area I know best. Other books on other areas (probably written by other authors) may follow.

Readers that way inclined may also find this book interesting as showing how academic debate and publishing operates. Reading for this book I observed the worst and best of academia. I saw the sometimes justified but sometimes shameful republishing of the same article under different titles on different continents, and the churning out of banal pieces with no apparent purpose. I also saw the writers returning to wrestle with a topic again and again, and insightful contributions to a debate being overlooked by other academics for no good reason, or insightful debates that have been ignored in the courts. It is not always the fittest meme that survives, and

any writer in universities knows that the demands of funding and promotion can steer the topics and destinations of research as much as inspiration and genuine interest. However, although I saw a lot of writing that added nothing or (which is not the same thing) was for other academics and could have no useful application to any point that might arise in a court, I also saw a large body of clever and helpful analysis that might well contribute to a skeleton argument or appellate judgment if only it were known of.

I began this experiment in around 2002, and Richard Hart, always game for a “punt” (his word), contracted it for publication shortly afterwards. I was a lecturer then, building on the increasingly long bibliographies at the end of my lecture notes. I then moved to London, became a barrister, got married, and wrote a book about how to become a barrister (also published by Hart), in that order. This book has progressed, ever so slowly, throughout. However the Alexander Maxwell Scholarship that I was awarded in 2007 allowed me to justify taking time out of my practice to finish this book off, and without that scholarship this probably would never have been finished. The other patrons have been my wife, Kathryn, and our cat, Daisy, neither of whom miaowed when I spent evenings and weekends working through volumes 25–46 of a particular journal rather than spending them at home. Thanks also go to Jamie Edelman for putting me right on a few points, and various friends whose early input helped shape the book.

A final thought: I invite readers not to rage into the abyss at glaring omissions or misunderstandings I have made of their own or others’ works, but to let me know about them ([akramer@3vb.com](mailto:akramer@3vb.com)). If this book works, there will be a second edition eventually, and I can correct the failings of the first and improve the usefulness of the endeavour. (There may also be a companion website to allow for more prompt updating and correcting, an e-book should come out shortly after the print version, and that may be later adapted into an online searchable electronic resource.)

Adam Kramer  
*Gray’s Inn, London*  
May 2009



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## USING THIS BOOK

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### THE SELECTION

The book aims to cover articles, chapters, monographs and other books published in English about contract law in the common law world. From these, I have selected writings on each particular contract law topic that I think are the most useful, original or important, aiming to provide a reasonable coverage of jurisdictions and subject areas. I have presumptively favoured the readily available over the inaccessible, and the recent (because often more useful) over the old.

### THE TIERS

The writings that are included are divided into two tiers.

#### First tier writings

These are recommended as the most useful, original or important.

As well as being listed, most of these first tier writings have been digested in a summary of a few lines.

Where no summary has been provided, this is because the title is all the summary needed, or the text is general and not susceptible to useful summary.

#### Second tier writings

These writings are recommended as useful, original and important, but to a lesser extent than the first tier writings. None of these are digested; they are all merely listed.

Further, in both tiers, those writings that are helpful as a general reference, summary or first port of call (as opposed to writings on a specific point or with a particular thesis) are marked with this symbol: ○

## ARRANGEMENT

The writings are arranged under topic headings, and listed in chronological order within each topic, and author surname order within a particular year.

## CAVEAT

Although the noble dream is of even coverage of all writings about contract law wherever published and in whatever field, the reality is inevitably less even. I do not pretend to have read every contract law writing ever published, and do not profess to have understood every one that I have read. This digest is naturally biased towards England and Wales, if only because of what was readily accessible to me. It is also biased by my sympathies: I am an Oxford-educated, white, male practitioner (barrister) in commercial litigation and black-letter/mid-level theoretical academic. I have little practical experience of transactional contract law and little academic experience of (for example) economic analysis (which, as many readers will know, is the most popular form of contract law analysis in the US). I find some writings easier to understand and therefore value, since they fit more easily into the tradition and conversation in which my own thoughts and work sit. For all of these reasons, I earnestly entreat readers to write in with suggestions for inclusion, with improvements to digests, or with other comments and recommendations.

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## TEXTBOOKS

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### 1.1 GENERAL

#### *Australia*

- JW Carter, *Carter on Contract*, 2 vols, loose leaf (Sydney, LexisNexis, 2002 updated)
- NC Seddon and MP Ellinghaus, *Cheshire & Fifoot's Law of Contract*, 8th Australian edn (LexisNexis, 2002)
- JW Carter, Elisabeth Peden and GJ Tolhurst, *Contract Law in Australia*, 2 vols, 5th edn (Sydney, LexisNexis, 2007)
- Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law*, 3rd edn (Melbourne, Oxford University Press, 2008)
- Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law*, 3rd edn (Sydney, Law Book Co, 2009)

#### *Canada*

- John D McCamus, *The Law of Contracts* (Toronto, Irwin Law, 2005)
- SM Waddams, *The Law of Contracts*, 5th edn (Toronto, Canada Law Book Inc, 2005)
- GHF Fridman, *The Law of Contracts*, 5th edn (Toronto, Carswell, 2006)
- A Swan, *Canadian Contract Law*, 2nd edn (LexisNexis, 2009)

#### *England and Wales*

- J Beatson, *Anson's Law of Contract*, 28th edn (Oxford, Oxford University Press, 2002)

## 2 General

- Patrick S Atiyah and Stephen A Smith, *An Introduction to the Law of Contract*, 6th edn (Oxford, Clarendon Press, 2006)
- M Furmston, *Cheshire, Fifoot & Furmston's Law of Contract*, 15th edn (Oxford, Oxford University Press, 2006)
- Michael Furmston (ed), *The Law of Contract*, 3rd edn (London, Butterworths, 2007)
- Edwin Peel, *Treitel on the Law of Contract*, 12th edn (London, Sweet & Maxwell, 2007)
- Hugh Beale (ed), *Chitty on Contracts: Volume 1: General Principles*, 30th edn (London, Sweet & Maxwell, 2008 plus supplements)  
The pre-eminent contract law textbook, both for coverage (vol 1 is over 2,000 pages) and authority, first published in 1826 from Joseph Chitty's text.

## Europe

- Conor Quigley, *European Community Contract Law: Volume 1: The Effect of EC Legislation on Contractual Rights, Obligations and Remedies* (London, Kluwer Law International, 1997)
- Martijn Hesselink, *An Introduction to European Contract Law* (Oxford, Hart Publishing, 2009)

## Hong Kong

- Betty M Ho, *Hong Kong Contract Law*, 2nd edn (Butterworths, 1994)
- Michael J Fisher and Desmond G Greenwood, *Contract Law in Hong Kong* (Hong Kong University Press, 2007)

## India

- RG Padia, *Mulla on Indian Contract and Specific Relief Acts*, 2 vols, 13th edn (LexisNexis, 2006)
- Avtar Singh, *Law of Contract and Specific Relief*, 5th edn (2009)



*Ireland*

- Robert Clark, *Contract Law in Ireland*, 6th edn (Dublin, Round Hall, 2008)

*Malaysia*

- Dato' Seri Visu Sinnadurai, *Law of Contract*, 2 vols, 3rd edn (Kuala Lumpur, LexisNexis, 2003)

*New Zealand*

- John Burrows, Jeremy Finn and Stephen Todd, *Burrows Finn & Todd's Law of Contract in New Zealand*, 2nd edn (Wellington, LexisNexis, 2002)
- Maree Chetwin, Stephen Graw, Raymond Tiong, *An Introduction to the Law of Contract in New Zealand*, 4th edn (Wellington, Brookers, 2006)

*South Pacific*

- Jennifer Corrin Care, *Contract Law in the South Pacific* (London, Cavendish, 2001)

*USA*

- Arthur L Corbin, Joseph M Perillo et al., *Corbin on Contracts: Revised Edn*, 15 vols (St Paul, MN, West Publishing, 1993 plus supplements)
- Richard A Lord, *Williston on Contracts*, 31 vols, 4th edn (New York, Lawyers' Cooperative Publishing, 1990–1999 plus supplements)
- EA Farnsworth, *Farnsworth on Contracts*, 3rd edn (New York, Aspen Law & Business, 2003 plus supplements)