

IUS COMMUNE CASEBOOKS FOR THE COMMON LAW OF EUROPE

Cases, Materials and Text on
**CONTRACT
LAW**

HUGH BEALE • BÉNÉDICTE FAUVARQUE-COSSON
• JACOBIE RUTGERS • DENIS TALLON
and STEFAN VOGENAUER

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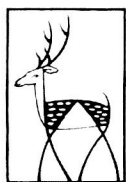
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Walter van Gerven

Cases, Materials and Text on Contract Law

*Hugh Beale, Bénédicte Fauvarque-Cosson, Jacobien Rutgers,
Denis Tallon and Stefan Vogenauer*



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PREFACE

This second edition of *Cases, Materials and Texts on Contract law* in the series of *Ius Commune Casebooks for the common law of Europe* comes at an exciting moment for 'European' contract law. The preface to the first edition stated that the authors hoped

... the book will be used as teaching material in universities and other institutions throughout Europe and elsewhere in order to familiarize future generations of lawyers with each others' legal systems and to assess and facilitate the impact of European supranational legal systems on the development of national laws and vice-versa.

Little did the authors realise that only a few years later, the European Commission would be consulting on whether the fragmentary European contract law contained in various Directives should be replaced or supplemented by European rules on contract law in general, possibly in the form of an Optional Instrument that the parties might choose to govern their contract in place of national law, and would have established a group of experts to draft a model Optional Instrument. (For details, see Chapter 1, section 2.) Nor did they expect that at the national level, major reforms would have been enacted in Germany and would be under very serious discussion in France – both reforms being heavily influenced by developments in 'hard' and 'soft' law at the European level. It becomes all the more important that students should be given some idea of the differing laws and traditions across Europe and of the extent to which we have a 'European' contract law.

Looking at primary sources, both legislation and cases, to see how concrete situations are resolved in the various systems is of great value to students in helping them not only to see how other systems work but to evaluate whether reform or further European legislation, such as an Optional Instrument, is needed. It will also give them a greater understanding of their own laws. Comparing the results of cases with similar facts, and the solutions provided in concrete examples, is at the heart of the 'functional' approach which is one of the keystones of comparative law.

The book continues to concentrate on cases, legislation and 'black-letter' rules of law. We are very aware that such an approach has serious limitations; that there may be deeper differences of philosophy, of '*mentalité*', which may be masked by a superficially similar result. A good comparatist should explore these, which requires a much more rounded study of the traditions and institutions of each legal system than can be offered here. However, we continue to think that a comparison of black-letter rules is the best place to start.

Unfortunately, a book for students cannot cover all the European systems and still remain affordable. The book continues to concentrate on English, French and German law, with more information on Dutch law than in the first edition. Other systems are mentioned only when they have particularly striking solutions to problems as, for example, does Italian law on questions of good faith. We hope that it may be possible to develop the website associated with the book (see <http://www.casebooks.eu/contractLaw/>) to allow colleagues from other Member States to add (or create links to) comparable materials from their own or other jurisdictions.

The second edition has been prepared by a team of five, using a different approach to the first edition: each of us has gone through every chapter to ensure that what is said about the law from his or her country is correctly stated, and we each take collective responsibility for the whole. This change in approach is not intended as a criticism of the first edition. It is a tribute to the authors of the first edition that so much of their work remains in its original form. We are indebted to them all – to the two principal editors who are no longer involved, Professor Arthur Hartkamp and Professor Dr Hein Kötz; and to the contributors of individual chapters, Professor John Harrington, Professor Martijn Hesselink, Hugo van Kooten, Professor Remiert Tjittes and Hester Wattendorf. We are also grateful for their permission to edit and use the material they prepared. In many ways, this edition remains their book as much as ours.

In addition to updating the materials (the most extensive changes result from the revision of the BGB in 2001, but there is much new material from each of the national jurisdictions as well as from the EU), we have added a few ‘classic’ cases from each jurisdiction (a request from one of those who so helpfully commented on their experience in using the first edition). The book has been significantly re-structured to make it easier to follow and use.

We owe many debts of gratitude. First, Professor Dr Gerhard Dannemann and Professor Sir Basil Markesinis have kindly permitted us to reproduce their translations of cases from German law. Secondly, Professor Dannemann and Mr Geoffrey Thomas have permitted us to use their translations of the new provisions of the German *Schuldrecht*. We commend both the French and German Ministries of Justice for publishing English translations of the French codes and the BGB, but on occasions Dannemann and Thomas’ translation is easier to use than the Ministry version. In addition we wish to thank those copyright holders who granted us permission to quote extracts from their work in the first edition of this book and whose permission to do so in this edition is once again gratefully acknowledged. Professor Andrew Burrows and Mr Edwin Peel also granted us permission to use (in chapter 13) extracts from Professor Vogenauer’s essay ‘Interpretation of Contracts: Concluding Comparative Observations’ which first appeared in the volume *Contract Terms* (OUP, 2007). We also wish to express our deepest gratitude to the research assistants who have helped us at various stages of the process: Sarah Brown, Viktor von Essen, Veronika Korom, Hannah Müller, Till Soyka and Tessia Tober. Lastly, many thanks are due to Richard Hart and his staff for their patience with us and their skill and understanding in dealing with a long and difficult manuscript.

Hugh Beale
Bénédicte Fauvarque-Cosson
Jacobien Rutgers
Denis Tallon
Stefan Vogenauer
September 2010

PREFACE

Denis Tallon played a full role in the first stages of preparing this edition. Sadly, ill-health then meant that his participation had to be limited. Nonetheless he has continued to advise and, when he can, to comment on the drafts. We are enormously grateful for his wisdom, his continued interest and support and his friendship.

Hugh Beale
Bénédicte Fauvarque-Cosson
Jacobien Rutgers
Stefan Vogenauer

ABBREVIATIONS

AA	Ars aequi
AALR	Anglo American Law Review
ABGB	Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code)
AC	Law Reports, Appeal Cases, House of Lords and Privy Council (since 1890)
AcP	Archiv für die civilistische Praxis
Ad & E	Adolphus and Ellis' Reports, King's Bench and Queen's Bench (ER 110ff)
AG	Amtsgericht (German first instance court); Aktiengesellschaft (German public limited company)
AGB	Allgemeine Geschäftsbedingung (general terms and conditions)
AGBG	Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (German Standard Terms Act of 1976)
Ala App	Alabama Appellate Court Reports
Aleyn	Aleyn's Reports, King's Bench (ER 82)
All ER	All England Law Reports
All ER Rep	All England Law Reports, Reprint
Anon	Anonymous (names of parties unknown)
App Cas	Law Reports, Appeal Cases, House of Lords and Privy Council (1875–1890)
Arr Cass	Arresten van het Hof van cassatie / Arrêts de Cassation
Art	article
Arts	articles
Ass plén	Cour de cassation, Assemblée plénière
BAG	Bundesarbeitsgericht (German Federal Supreme Court for Labour Law)
B & Ald	Barnewall and Alderson's Reports, King's Bench (ER 109f)
BauR	Zeitschrift für das gesamte öffentliche und zivile Baurecht
BB	Der Betriebsberater
B & C	Barbwall and Cresswell's Reports, King's Bench (ER 107ff)
BCLC	Butterworths Company Law Cases
Beav	Beavan's Reports, Rolls Court (ER 48 ff)
BG	Bundesgericht (Swiss Supreme Court)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGE	Entscheidungen des schweizerischen Bundesgerichts (Decisions of the Swiss Supreme Court)
BGH	Bundesgerichtshof (German Federal Supreme Court)
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
Bing	Bingham's Reports, Common Pleas (ER 130f)
BLR	Business Law Review

ABBREVIATIONS

BRH	Jurisprudence Commerciale de Bruxelles / Belgische Rechtspraak in Handelzaken
B & S	Best & Smith's Reports, Queens's Bench (ER 121f)
Building LR	Building Law Reports
Bull civ	Bulletin des arrêts de la Cour de Cassation
Bull Joly	Bulletin Joly Sociétés
BW	Burgerlijk Wetboek (Dutch Civil Code)
c	contre
CA	Court of Appeal (England and Wales), cour d'appel (French appeal court)
Cal 2d	California Reports, 2 nd Series
Camp	Campbell's Nisi Prius Reports (ER 170f)
Cass belg	Cour de cassation (belgique) (Belgian Supreme Court)
Cass civ	Cour de cassation, Chambre civile (with number of chamber)
Cass com	Cour de cassation, Chambre commerciale
Cass crim	Cour de cassation, Chambre criminelle
Cass it	Corte di cassazione (Italian Supreme Court)
Cass mixte	Cour de cassation, Chambre mixte
Cass req	Cour de cassation, Chambre des requêtes
Cass soc	Cour de cassation, Chambre sociale
CB	Chief Baron; Common Bench Reports (ER 135ff)
CB (NS)	Common Bench Reports; New Series (ER 140ff)
Cciv	Code civil (French Civil Code)
Ccom	Code commercial (French Commercial Code)
CE	Conseil d'État (French Supreme Administrative Court)
cf	confer
CFR	Common Frame of Reference
ch	chapter
Ch	High Court of Chancery; Law Reports , Chancery Division (since 1890)
Ch App	Law Reports Chancery Appeals
Ch D	Chancery Division of the High Court of Justice; Law Reports, Chancery Division (1875–1890)
CJ	Chief Justice
Chron	Chroniques
CISG	United Nations Convention on Contracts for the International Sale of Goods
CLJ	Cambridge Law Journal
CLR	Commonwealth Law Reports
Clark ... Ex	Clark's House of Lords Appeal Cases
Clark & Fin	Clark and Finnelly's Reports, House of Lords (ER 6 ff)
CMLR	Common Market Law Review
Cmnd	Command Papers
Co	Company

Com Cas	Commercial cases
Com LR	Commercial Law Reports
Cowp	Cowper's Reports, King's Bench (ER 98)
Cox	S.C. Cox's Equity Cases (ER 29f)
Cox's Crim Cas	E.W. Cox's Criminal Law Cases
C & P	Carrington and Payne's Reports, Nisi Prius (ER 171ff)
CPD	Common Pleas Division of the High Court of Justice; Law Reports, Common Pleas Division (1875–1880)
D	Recueil Dalloz de doctrine, de jurisprudence et de législation (1945–1964); Recueil Dalloz et Sirey de doctrine, de jurisprudence et de législation (since 1965)
Davies's Rep	Davies' Irish Kings Bench Reports (ER 80)
DB	Der Betrieb
DCFR	Draft Common Frame of Reference
De GF & J	De Gex, Fisher & Jones' Chancery Reports (ER 45)
De GM & G	De Gex, Macnaghten and Gordon's Reports, Chancery (ER 42ff)
DH	Dalloz, Recueil hebdomadaire de jurisprudence (1924–1940)
DLR	Dominion Law Reports
Doug KB	Douglas' Reports, King's Bench (ER 99)
DP	Dalloz, Recueil périodique et critique de jurisprudence, de législation et de doctrine (1825–1940)
Drew	Drewry and Smale's Chancery Reports (ER 62)
DS	Recueil Dalloz-Sirey
East	East's Term Reports, King's Bench (E.R 102ff)
E & B	Ellis & Blackburn's Queen's Bench Reports (ER 118 ff)
EC	European Community
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
ECtHR	European Court of Human Rights
ed	editor
edn	edition
eds	editors
EEC	European Economic Community
eg	for example (Latin: <i>exempli gratia</i>)
ELJ	European Law Journal
ER	English Reports
ERCL	European Review of Contract Law
ERPL	European Review of Private Law
Esp	Espinasse's Nisi Prius Reports (ER 170)
esp	especially
et al	and others (Latin: <i>et alii</i>)
et seq	and the following (Latin: <i>et sequens</i>)

ABBREVIATIONS

etc	et cetera
EU	European Union
Ex D	Exchequer Division of the High Court of Justice; Law Reports, Exchequer Division and Court of Appeals (1875–1880)
Exch	Exchequer Reports (1847–1856)
f, ff	following page(s)
F 2d	Federal Reporter, 2 nd Series
FF	French Francs
F & F	Foster and Finlason's Nisi Prius Reports ER 175f)
Foro it	Foro italiano
F Supp	Federal Supplement
Gaz Pal	Gazette du Palais
gen ed	general editor
GG	Grundgesetz (German Constitution)
GI	Giurisprudenza italiana
Gif	Giffard's Chancery Cases
Giff	Giffard's Chancery Reports (ER 65f)
Giust civ	Giustizia civile
GmbHG	Gesetz betreffend die Gesellschaft mit beschränkter Haftung (German Limited Company Act)
H & C	Hurlstone and Coltman's Reports, Exchequer (ER 158f)
H & N	Hurlstone and Norman's Reports, Exchequer (156ff)
HL	House of Lords
Hobart	Hobart's Reports, Common Pleas (ER 80)
HR	Hoge Raad (Dutch Supreme Court)
Harv LR	Harvard Law Review
HGB	Handelsgesetzbuch (German Commercial Code)
ibid	in the same place (Latin: <i>ibidem</i>)
ICC	International Chamber of Commerce
ICLQ	International and Comparative Law Quarterly
ICR	Industrial Cases Reports
ie	that is (Latin: <i>id est</i>)
IR	Information rapides
IRLR	Industrial Relations Law Reports
J, JJ	Justice(s)Justices
JCP	Juris-classeur périodique, La semaine juridique
JDI	Journal du droit international ('Clunet')
J Law & Society	Journal of Law and Society
JLS	Journal of Legal Studies
JW	Juristische Wochenschrift
JZ	Juristenzeitung
K & J	Kay and Johnson's Vice Chancellors' Reports (ER 69f)
KB	Law Reports, King's Bench Division (1901–1952)

KBD	King's Bench Division
Knight's LGR	Knight's Local Government Reports
Law Com	Law Commission of England and Wales
LC	Lord Chancellor
Ld Raym	Lord Raymond's King's Bench Reports
LG	Landgericht (German Regional Court)
LJ, LJJ	Lord Justice(s)
Lloyd's Rep	Lloyd's List Law Reports
LM	Lindenmaier-Möhring, Nachschlagewerk des Bundesgerichtshofs
LQR	Law Quarterly Review
LR...App Cas	Law Reports, Appeal Cases
LR...CA	Law Reports, Court of Appeal
LR...Ch App	Law Reports, Chancery Appeal Cases
LR...CP	Law Reports, Common Pleas (1865–1875)
LR...Ex	
(same: LR...Exch)	Law Reports, Exchequer (1865–1875)
LR...HL	Law Reports, English and Irish Appeal Cases and Claims of Peerage before the House of Lords (1865–1875)
LR...QB	Law Reports, Court of Queen's Bench (1865–1875)
LT	Law Times Report
Ltd	Limited Company
M & W	Meeson and Welsby's Reports, Exchequer (ER 150ff)
Mass Foro It	Massimario de Foro Italiano
MDR	Monatsschrift für deutsches Recht
Mich LR	Michigan Law Review
Minn	Minnesota Supreme Court Reports
MLR	Modern Law Review
MR	Master of Rolls
Münchener Kommentar	Münchener Kommentar zum Bürgerlichen Gesetzbuch, 5th edn (Munich, CH Beck, 2006ff)
NJ	Nederlandse Jurisprudentie
NJW	Neue Juristische Wochenschrift
NJW-RR	Neue Juristische Wochenschrift, Rechtsprechungs-Report Zivilrecht
NLJ	New Law Journal
no, nos	number(s)
NSWL R	New South Wales Law Reports
NW 2d	North Western Reporter, 2 nd Series
OJ	Official Journal (of the EEC, EC or EU)
OJLS	Oxford Journal of Legal Studies
OLG	Oberlandesgericht (Higher Regional Appeal Court, Germany)
OLGZ	Entscheidungen der Oberlandesgerichte in Zivilsachen
OR	Obligationenrecht (Swiss Law of Obligations)

ABBREVIATIONS

P	Law Reports, Probate, Divorce, and Admiralty Division of the High Court of Justice (1890–1971)
p, pp	Page(s)
P 2d	Pacific Reporter, 2 nd Series
Palandt	Bürgerliches Gesetzbuch, 69th edn (Munich, CH Beck, 2010)
para, paras	paragraph(s)
Pas	Pasicrisie belge (Belgium)
PC	Judicial Committee of the Privy Council
P & CR	Planning (Property) and Compensation Reports
PECL	Principles of European Contract Law
Plc	Public limited company
QB	Queen's Bench Reports (1841–1852) (ER 113ff); Law Reports, Queen's Bench Division (1891–1901, since 1952)
QBD	Law Reports, Queen's Bench Division (1875–1890)
QC	Queen's Counsel
Qd R	Queensland Reports
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RDC	Revue des contrats
Rec	Recueil des décisions du Conseil d'État statuant au Contentieux, du Tribunal des conflits, des arrêts des cours administratives d'appel et des jugements des tribunaux administratifs
regs	Regulations
Rep	Coke's King's Bench Reports (ER 76f)
resp	respectively
RG	Reichsgericht
RGDC/TBBR	Revue générale des droit civil / Tijdschrift voor Belgisch Burgerlijk Recht
RGLJ	Revista General de Legislación y Jurisprudencia
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
RIDC	Revue internationale de droit comparé
RIW	Recht der internationalen Wirtschaft
Roll Abr	Rolle's Abridgement
RPC	Reports of Patent, Design and Trade Mark Cases
RT	Revue Thémis
RTD civ	Revue trimestrielle de droit civil
RTD com	Revue trimestrielle de droit commercial
RvdW	Rechtspraak van de Week
RW	Rechtskundig Weekblad
S	Recueil Sirey
s, ss	Section(s)
SA	Société anonyme

SC (HL)	Session cases – Cases decided in the House of Lords
Seuff A	Seufferts Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten
Sez un	Sezione Unite (United Section of the Corte di cassazione)
SGA	Sale of Goods Act 1979 (UK)
SLT	Scots Law Times
Sm LC	Smith's Leading Cases in Various Branches of the Law
So	Southern Reporter
StGB	Strafgesetzbuch (German Penal Code)
Str	Strange's King's Bench Reports (ER 93)
TEC	Treaty Establishing the European Community
TFEU	Treaty on the Functioning of the Union
TGI	Tribunal de grande instance (French first or second instance court)
The Times	The Times
TLR	Times Law Report
TR	Durnford and East's Term Reports (ER 99ff)
Trib civ	Tribunal civil (French first instance court)
Tul LR	Tulane Law Review
Tyr	Tyrwhitt's Exchequer Reports
UCC	Uniform Commercial Code (USA)
UCTA	Unfair Contract Terms Act 1977 (England)
UNIDROIT PICC	Unidroit Principles of International Commercial Contracts
UTCCR	Unfair Terms in Consumer Contracts Regulations 1999 (England)
UWG	Gesetz gegen den unlauteren Wettbewerb (German Unfair Competition Act)
v	versus
VersR	Versicherungsrecht
Ves Sen	Vesey Senior's Law Reports, Chancery (ER 27ff)
viz	namely (Latin: <i>videlicet</i>)
VOB/AVOB/B	Verdingungsordnung für Bauleistungen Teil A und B (German contracting rules for the award of public work contracts, part A and B)
vol, vols	volume(s)
VOL/AVOL/B	Verdingungsordnung für Leistungen, Teil A und B (in Abgrenzung zur VOB sind keine Bauleistungen erfasst)
Wash 2d	Washington Reports, 2 nd Series
Wis 2d	Wisconsin Reports, 2 nd Series
WLR	Weekly Law Reports
WM	Wertpapier-Mitteilungen
WN	Weekly Notes
Yale LJ	Yale Law Journal
YB...Edw	Year book ... Edward

ABBREVIATIONS

ZEuP	Zeitschrift für Europäisches Privatrecht
ZGB	Zivilgesetzbuch (Swiss Civil Code)
ZIP	Zeitschrift für Wirtschaftsrecht
ZPO	Zivilprozessordnung (German Code of Civil Procedure)