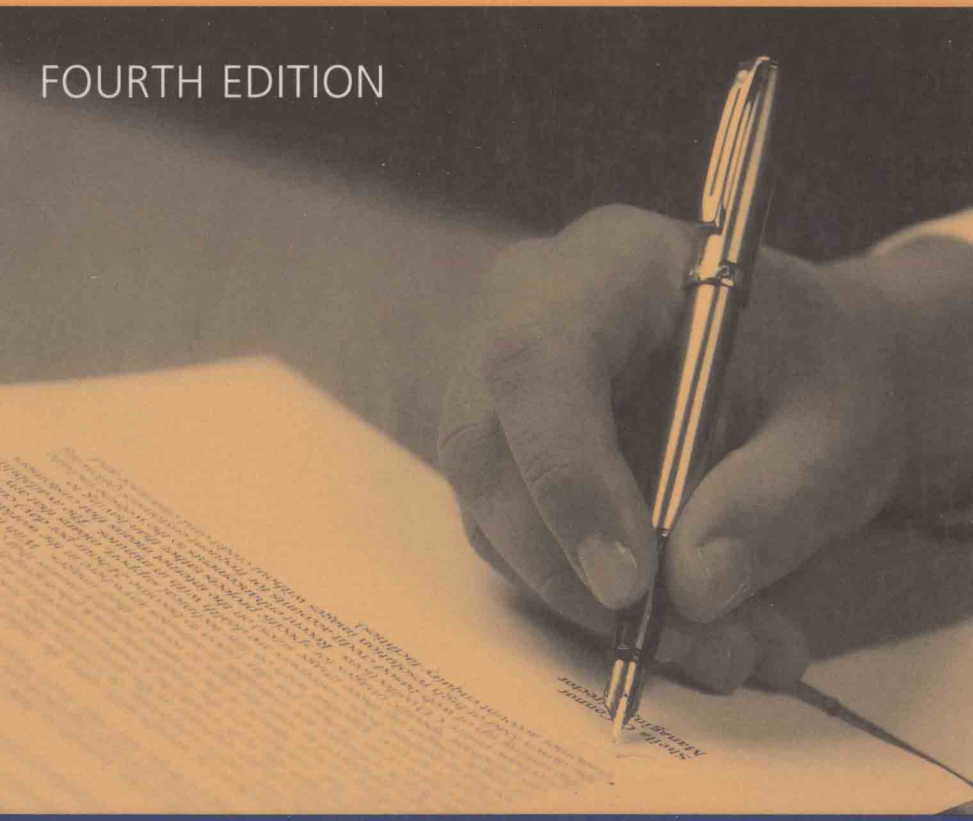
Understanding Contract Law

John N Adams and Roger Brownsword

FOURTH EDITION



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Fourth Edition

LONDON
SWEET & MAXWELL
2004

AUTHORS' PREFACE TO THE FIRST EDITION

There has probably been a greater consensus about the basic syllabus in the law of contract than in any of the other core law courses. This consensus is reflected in the high degree of homogeneity in the ground covered, and the style of the standard text books. Recently, however, this consensus has begun to break down, and students are being introduced to a wide variety of approaches drawn from the considerable amount of sociological and economic literature which has appeared over the last twenty years or more. Whilst some of the economic literature is relatively easy to match with the traditional approach, the sociological literature, selected on what is all too often a "pick-'n'-mix" basis, presents difficulties to students who find themselves confused by the apparent disjucture between the textbook approach and the approach adopted in the readings. One of the objects of this book is to provide students with a sort of map which will allow them to locate the traditional textbook material within a theoretical landscape. Given the vastness of the subject, we have only been able to provide, at best, a rough monitoring map, rather than a walking map. We hope, however, that by building from the traditional textbook approach, and its materials, we will enable students to find their bearings. Whilst we start with our feet very firmly on the ground, we end up heading for the epistemological stratosphere, as we have thought it necessary to provide a critique which will locate the theroies of change, as well as our own analysis, in the methodology of social science generally. The attempt to make this comprehensible may be ambitious, but we believe it to be absolutely necessary, because it is something about which lawyers who turn to social science are too often ignorant.

We would like to thank Professor John Griffith and Professor Brian Simpson for reading various parts of this book, and for their very helpful comments. Also, we would like to thank Margaret Keys and Shirley Peacock for their secretarial assitance. Needless to say, responsibility for the final text, and for errors and omissions, is entirely ours

John N. Adams
Roger Brownsword

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PART I

GROUNDWORK

1

UNDERSTANDING CONTRACT: FIRST STEPS

This book is an introduction to the law of contract, and to theories about the law of contract. The law of contract, roughly speaking, is about the legal rules regulating agreements that the courts will enforce. These rules determine whether a particular transaction, the purchase of this book for example, is contractual, and to this extent they specify the conditions under which agreements may be enforced, and prescribe the remedies available in the event of defective or non-performance.

In Part I we prepare the ground by introducing (though at this stage not expanding upon) some of the main themes, including aspects of the historical development of contract; in Part II we concentrate on the modern English law of contract as it is conventionally studied, and attempt to elicit one significant network of values and tensions underlying it; and, finally, in Part III we consider some theories about the transformation of contract. Our first step, however, is to indicate how our approach to contract relates to the traditional presentation of the subject. After that, we draw a thumbnail sketch of the ruling concept of contract.

1. STUDYING CONTRACT

The study of law has been dominated by a particular approach, pejoratively branded by its critics as the "black-letter" approach. Within the black-letter tradition, the study of law is equated with the narrow study of legal rules. The books containing these rules, traditional student texts such as those written by Atiyah (1989), Beatson (2002), Furmston (2001), and Treitel (2003), we parody by referring to them collectively as the "rule-book". The purpose of this device will become apparent in due course. At this stage, however, it should be pointed out that there are in fact significant differences between these texts, and students should not be misled, by the label "rule-book" being applied to them collectively, into thinking that there are not. Moreover, readers should not be

misled into thinking that they are rule-books in the sense, for example, that the books laying down the rules of football or cricket are rule-books. They are books which set out to explain the scheme of concepts employed to categorize, analyse and resolve certain types of dispute. However, to the extent that traditionally to study contract is simply to familiarise oneself with the rules and principles contained in these textbooks, we feel justified in using the admittedly imperfect label "rule-book" as shorthand for them.

The principal objection to the traditional presentation is that it invites an uncritical approach to contract, at best discouraging enquiry, and at worst encouraging misunderstanding. Critics of the standard approach contend that, just as we would not think that someone who could recite British train timetables understood railways, we should not think that an ability to recite the rule-book indicates an understanding of contract.

Like the critics of the traditional approach, we seek to stimulate enquiry and to promote understanding. Given that our book is of an introductory nature, this means that we aspire simply to lay the foundations for a critical approach to the law of contract. However, this does not necessitate working with radically different materials from those to be found within the traditional presentation. On the contrary, our focus is largely the traditional contract materials themselves.

Now, in the light of our concession to the traditional materials, it may be thought that our talk of a critical approach is simply cosmetic. This, however, is not so. We challenge a number of key assumptions, which are taken for granted in the black-letter tradition. Some appreciation of the extent of our departure from the traditional approach can be gleaned from the following comments which will, we hope, clarify the thrust of our approach.

(i) Identifying the law of contract

An inspection of the standard contract textbooks will reveal that whilst these books gloss the law in different ways, they share a high degree of homogeneity both with regard to the body of doctrine that they take to represent as the law of contract, and with regard to the cases that they use to expound that doctrine. Within the traditional presentation, contract has crystallised into an agreed litany of rules, principles and cases, all organised in a somewhat similar way. The traditional approach does not much question the basis for selecting this catalogue of materials.

The materials for the contract rule-book have to be gathered together from a basic stock of legal materials, that is, from statutes and case-law (precedents). The contract rule-book is not self-selecting: statutes and precedents do not come ready-marked for inclusion in the rule-book. The materials traditionally selected for inclusion, however, are drawn almost entirely from case-law; statutes hardly feature at all. Indeed, contract is traditionally viewed as the case-law subject *par excellence*. Yet for many years there has been widespread statutory regulation of agreements (*e.g.* concerning agreements between employers and employees, and landlords and tenants). Accordingly, a simple objection to the traditional selection of materials is that its case-law bias unjustifiably ignores or marginalises many relevant statutory developments. These developments, it may be noted, however, in general presume the scheme of things set out in the rule-book. What we are saying, therefore, is not that the rule-book is redundant, but that the picture it presents is rather of the foundations than of the building. Moreover, just as you cannot lay the foundations of a building properly without knowing what kind of a structure is to be built on top of them, so the foundations laid down in the rule-book do not always support adequately the structures which need to be built on them.

The upshot of these reflections as far as students are concerned is that we have a choice. We can follow the traditional rule-book, or we can accept the critics' invitation to add to it various statutes and other materials which regulate agreements. Of course, this choice is immaterial to legal practitioners seeking to advise clients on their legal position, for here all relevant materials must be taken into account.

For our rather different purpose, the choice must be confronted. Where, as in Parts I and II, we are concerned to understand the origins of the rule-book as traditionally conceived, tensions *within* it, ideologies surrounding it, and its use in dispute settlement, then, necessarily, our focus is the contract rule-book itself. However, where, as in Part III, our enquiry is directed at understanding the transformation of the legal regulation of agreements, we are concerned with a broader concept of contract.

(ii) Compartmentalisation in the rule-book

As we have said, the traditional presentation of the contract rule-book follows a more or less standard pattern. One of the features of this pattern is that the materials are arranged in a

compartmentalised fashion. First, there are the materials on "offer and acceptance", then on "consideration", "intention to create legal relations" and "certainty of terms". At a later stage, the materials on "misrepresentation", "mistake", "illegality" and "frustration" are expounded. Finally, the materials on "remedies" are dealt with. Rather like a ticket collector on a railway train, the student of contract moves from one carriage to the next, the materials in each compartment apparently having no closer connection with one another than the passengers in each carriage.

All expositions require some sort of formal structure, but the result of the traditional presentation often is that students do not see connections between different sections of the rule-book. Such connections can be made in a number of ways, but the connection we wish to make is that all sections of the rule-book exhibit symptoms of the tensions arising out of two competing general contractual philosophies. Thus in Part II we attempt to break away from the traditional presentation to the extent that we try to show that a variety of contract disputes are shot through with the same pattern of competing considerations, and that the rule-book materials are underpinned by competing philosophies which are indifferent to the traditional compartments.

(iii) Inconsistency in the rule-book

We can press the metaphor of the railway train a little further. According to the traditional presentation, the rule-book materials, like the passengers on a train, are all travelling in the same direction. The materials in the rule-book must be viewed, in principle, as harmonious. To some extent this makes life easy for the student as inconvenient decisions are dropped out of the rule-book, but, at some stage or another, every student of contract will be put through the exercise of attempting to reconcile certain notorious rule-book precedents which seem plainly to be at odds with one another. As an intellectual exercise, this has merits, but only so long as it does not lead students into believing that there is one seamless web of law.

The traditional rejection of inconsistency in the rule-book and the assumption of reconcilability are not presuppositions of our discussion. As we have hinted already, we see disputes centred on the traditional rule-book as exhibiting various tensions. Sometimes judges are guided by the rule-book, at others by desired results. Sometimes judges' decisions are underwritten by

considerations of commercial convenience, at others by considerations of fairness and reasonableness. One key to understanding contract is to understand the complex interplay between these competing considerations or ideologies (which is not to say, of course, that they are the only ones). Inevitably, these conflicting ideologies inject inconsistent doctrines into the contract rule-book. Attempting to reconcile conflicting precedents, it may be argued, is misguided rather than heroic (which is not to say that careful characterisation of fact situations and the seeking out of *real* differences between cases is a pointless exercise: it is an essential part of the common law tradition—see Llewellyn (1960)).

In our view, it is a mistake to think of contract as a train-load of doctrine chugging along in one direction. Rather, it is carried on several trains, some bound on collision courses with one another.

(iv) Fidelity to the rule-book

The standard presentation usually carries the implication that judicial decisions are governed by the traditional rule-book materials. Whilst we would not deny that the rule-book materials are important, it will be clear from our earlier observations that we cannot accept that judicial decisions are necessarily, in the final analysis, governed by these materials. Our portrayal of contract in Part II presupposes a fundamental tension between a rule-book approach and a result-orientated approach.

Our assumption that judges on occasion deviate from the materials of the traditional rule-book is by no means novel. The central contention of the American legal realist tradition is that judicial decisions can only be understood if they are interpreted less in terms of the "paper rules" than in terms of the "real rules" (see, *e.g.* Llewellyn, 1960; Twining, 1973). Cast in the terminology of American legal realism, our presentation of contract disputes suggests that the paper rules are only sometimes decisive. Where the paper rules are not decisive, the real rules reside either in the facilitation of commerce, or in the promotion of fairness and reasonableness (which ends are different, and not always compatible).

(v) The significance of the rule-book in practice

By rejecting the assumption of judicial fidelity to a consistent rule-book, we have challenged the traditional presentation of contract. Yet, some critics of the traditional approach may complain that even our view of the rule-book fails to be sufficiently

critical. In order to understand contract, such critics will argue, it is not enough to grasp how the traditional rule-book figures in judicial thinking, particularly in the practice of judges in the higher courts. We must grasp the general significance of the rule-book.

Such critics urge that we should study contract "in its social context", and that we should recognise the distinction between the law-in-the-books and the law-in-action. This is somewhat akin to emphasising the possibility of a gap between railway timetables and the actual running of the trains, between the paper timetable and the real timetable. The timetables say one thing, but, as we all know, the trains often run differently.

In the case of contract, the critics are quite right to caution against jumping to conclusions about the practical significance of the rule-book. For example, students tutored along traditional lines may form a view of a world in which victims of breaches of contract invariably litigate their rule-book remedies, and in which agreements are unfailingly drafted in the light of the rule-book. Such a world is, of course, imaginary.

Let us first consider the assumption that victims of breaches of contract litigate. Is this so? There are many kinds of victim of many kinds of breach of many kinds of contract. We can categorise contracts according to their trading context (shipping, building, engineering, commodities, etc.), their subject matter (sale of goods, sale of land, supply of services, etc.), degrees of formality (written or oral), mode (electronic or non-electronic) routineness (*i.e.* whether individual terms were negotiated), duration (*i.e.* whether the contract is to be performed over a period of time as opposed to simultaneous performance), the status of the parties (consumer individuals, companies, etc.), and so on. Out of the many variables around which a contextualising typology could be constructed, we will concentrate on the following three categories (for an extension of this typology, see Chapter 9):

(a) a "private" contract, *i.e.* where neither party makes the contract in the course of a business;
(b) a "consumer" contract, *i.e.* where one party makes the contract in the course of a business, but the other party (the consumer) does not; and,
(c) a "commercial" contract, *i.e.* where both parties make the contract in the course of a business.

Admittedly, the idea of someone making a contract "in the course of a business" is a bit vague (see *Stevenson v Rogers* (1999)), but this threefold categorisation of contracts at least enables us to structure our thinking about which victims of breaches of contract are likely to litigate their rights.

Starting with the parties to a private agreement, the rule-book in fact assumes that domestic and social agreements, as opposed to non-business dealings, are not normally intended to be legally binding. Consequently, private parties who seek legal advice may well abandon the idea of litigation as soon as they are warned that the courts will not lightly find that private agreements are intended to be contractually binding. This, however, makes the bold assumption that private parties are sufficiently litigious to contemplate taking legal advice in the first place. Ordinarily, one would expect the combination of cost, ignorance, and friendship to militate strongly against any such action.

Consumer contracts are a little more complex, for the parties, being of different standing, may each see litigation in a different light. From the point of view of the party who makes the contract in the course of a business, the need for litigation may be avoided by various routine safety devices (*e.g.* taking security for a debt, insisting upon cash on delivery or the use of card-guaranteed cheques, etc.). Beyond this, the policy one takes on pursuing bad debts, or on acceding to customer complaints, will be a matter for cost/benefit analysis and more general considerations concerning one's trading reputation. From the standpoint of the consumer, the inconvenience, uncertainty, mystery, and cost of litigation (actual and feared) all militate strongly against pursuing a contractual remedy through the courts. Consider, for example, what one might do if having purchased a copy of this book one found several pages missing. Suppose one telephoned the bookshop, only to be told politely but firmly:

(i) "It is not the policy of the bookshop to exchange books or to refund money";
(ii) "Complaints cannot be considered without proof of purchase";
(iii) "Complaints should be addressed to the publishers";
(iv) "All books are checked and deemed to leave the shop in perfect condition"; or,
(v) "Books are sold on the basis that the shop accepts no responsibility for their quality or condition. Sorry!"

Can the bookshop duck out of responsibility like this? Is the rule-book on the side of the purchaser or the bookshop in this sort of dispute? Most consumers simply do not know. So what do they do? Put it down to experience, and avoid that particular bookshop in the future? Contact their local Trading Standards Department, or Consumer Advice Centre? Write an outraged letter to a consumer complaints column of a newspaper? Or consult a lawyer? For self-evident reasons, the last option is the least likely to be taken up. Accordingly, consumers litigate this type of dispute only exceptionally.

Finally, we come to commercial agreements. Now, here (as in the case of consumer contracts), the rule-book assumes that the parties intend to enter into legally binding relations. Nevertheless, it would be a mistake to assume that commercial contractors are fond of litigation. Indeed, one of the truisms of the "law in context" school is that businessmen do not normally litigate their disputes. As Stewart Macaulay (1977), the doyen of this school, has put it:

> "In all of these societies [where the relevant research has been conducted, namely, Poland, the USA, Great Britain, Indonesia, Japan, Korea, and Ethiopia]—which differ so greatly in social structure, culture, and political and economic ideology—the picture looks much the same. Industrial managers and merchants seldom litigate to solve their disputes about contract, preferring to use other techniques of dispute avoidance and settlement." (see further, p.507)

But, how does one account for this international commercial aversion to litigation? Clearly, one reason is simply the cost of litigation (and, remember, in English law the general rule is that the loser pays the winner's costs). Another, equally important, reason, as confirmed by a number of well-known studies (see, *e.g.* Macaulay, 1963; Beale and Dugdale, 1975), is that commercial enterprises locked into a mutually beneficial network of economic relationships cannot afford to damage these relationships by litigating their disputes—indeed, in longer-term contractual relationships of this type, one would expect longer-term calculations to discourage short-term opportunism of any kind (whether in the form of litigation or otherwise) in favour of a culture of more co-operative relationships with one's fellow contractors (see Campbell and Harris, 1993). Moreover, it must be remembered that litigation remits the issue to the contract rule-book, a rule-