



Commercial Contract Law

Transatlantic Perspectives

**Edited by Larry A. DiMatteo,
Qi Zhou, Séverine Saintier, and Keith Rowley**

CAMBRIDGE

Commercial Contract Law

TRANSATLANTIC PERSPECTIVES

Edited by

LARRY A. DIMATTEO

University of Florida

QI ZHOU

University of Sheffield

SÉVERINE SAINTIER

University of Sheffield

KEITH POWLEY

University of Nevada, Las Vegas



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA
www.cambridge.org
Information on this title: www.cambridge.org/9781107028081

© Cambridge University Press 2013

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2013

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

Commercial contract law : transatlantic perspectives / [edited by] Larry A. DiMatteo,
University of Florida, Qi Zhou, University of Sheffield, Séverine Saintier, University
of Sheffield, Keith Rowley, University of Nevada Las Vegas.

pages cm
Includes index.

ISBN 978-1-107-02808-1 (hardback)

1. Contracts – United States. 2. Contracts – Great Britain. 3. Commercial law –
United States. 4. Commercial law – Great Britain. 5. Common law – United
States. 6. Common law – Great Britain. I. DiMatteo, Larry A., editor of
compilation.

K840.C655 2013

346.4102'2–dc23 2012044080

ISBN 978-1-107-02808-1 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs
for external or third-party Internet Web sites referred to in this publication and does not
guarantee that any content on such Web sites is, or will remain, accurate or appropriate.

COMMERCIAL CONTRACT LAW

This book focuses on the law of commercial contracts as constructed by the US and UK legal systems. Leading scholars from both sides of the Atlantic provide works of original scholarship focusing on current debates and trends from the two dominant common law systems. The chapters approach the subject areas from a variety of perspectives – doctrinal analysis, law and economic analysis, and social-legal studies, as well as other theoretical perspectives. The book covers the major themes that underlie the key debates relating to commercial contract law: role of consent; normative theories of contract law; contract design and good faith; implied terms and interpretation; policing contract behavior; misrepresentation, breach, and remedies; and the regional and international harmonization of contract law.

Contributors provide insights on the many commonalities, but more interestingly, on the key divergences of the United States' and United Kingdom's approaches to numerous areas of contract law. Such a comparative analysis provides a basis for future developments and improvements of commercial contract law in both countries, as well as in other countries that are members of the common law systems. At the same time, insights gathered here should also be of interest to scholars and practitioners of the civil law tradition.

Larry A. DiMatteo is the Huber Hurst Professor of Contract Law & Legal Studies at the Warrington College of Business Administration and Affiliated Professor at the Levin College of Law at the University of Florida.

Qi Zhou is a Lecturer at the University of Sheffield, School of Law.

Séverine Saintier is a Senior Lecturer at the University of Sheffield, School of Law.

Keith Rowley is the William S. Boyd Professor of Law at University of Nevada, Las Vegas, William S. Boyd School of Law.

Robert Bradgate

Edward Bramley Professor of Commercial Law Emeritus

This scholarly book brings together commercial and contract law scholars from both the United States and the United Kingdom. The impetus for this project was a symposium held on 9–10 September 2011 to celebrate the lifetime achievements in this field by Robert Bradgate, Edward Bramley Professor of Commercial Law Emeritus at the University of Sheffield, United Kingdom.

Contributors

Peter A. Alces is the Rita Anne Rollins Professor of Law at The College of William & Mary School of Law. He practiced law in Chicago and taught at the University of Texas, Graduate School of Business, and the University of Alabama, School of Law. He has been a visiting professor at the University of Illinois, Washington & Lee University, Washington University, and University of Texas Law Schools. He is the author of a number of books and articles, including *Commercial Contracting*; *The Law of Suretyship and Guaranty*; *Bankruptcy: Cases and Materials*; *Cases, Problems and Materials on Payment Systems*; *The Commercial Law of Intellectual Property*; *Sales, Leases and Bulk Transfers*; *The Law of Fraudulent Transactions*; and *Uniform Commercial Code Transactions Guide*. He was Editor-in-Chief of the *Journal of Bankruptcy Law and Practice*, 1991–2005. He is a member of the American Law Institute and the Association of American Law Schools' Section on Commercial and Related Consumer Law; he was adviser to Restatement (Third) of the Law of Suretyship and Guaranty.

T. T. Arvind was appointed professor of commercial law at the University of Newcastle on September 1, 2012. Prior to that, Dr Arvind was a lecturer in Law at the University of York, School of Law. He is a qualified attorney in India, where he practiced law with a leading commercial practice for many years before coming to Britain to pursue a career in academia. Dr Arvind joined York Law School in 2007, after five years as a lecturer at the University of East Anglia, Norwich. His research focuses on using evolutionary and historical approaches to analyze current legal questions, and specifically on the intellectual, social, economic, and other influences that shape legal change. He recently completed an analysis of the reaction of lawyers and judges in developing countries to the introduction of transplanted harmonised laws, and a study of the factors that influenced the diverse responses of the German states to the Code Napoleon at the beginning of the nineteenth century (for which he won the SLS Best Paper Prize in 2009). He was awarded the ICLQ Young Scholar Prize in 2010.

Richard Austen-Baker is a senior lecturer in Law at the University of Lancaster. He came to academia after practicing as a barrister. His research interests are in common law, particularly contracts (history, theory, and doctrine), commercial law, and the law of torts as well as the common law remedies. He recently published a book in the field of implied terms and is currently expanding his research in the field of relational contract theory.

Jean Braucher is the Roger C. Henderson Professor of Law at the University of Arizona, James R. Rogers College of Law. She serves as Vice-President of the National Consumer Bankruptcy Rights Centre and, since 2010, as Director of the National Association of Consumer Bankruptcy Law. Her research interests are contract and consumer law. Her most recent work is *Contracts: Law in Action* (with Stewart Macaulay, John Kidwell, and William Whitford) (3d ed. 2010 & 2011).

Curtis Bridgeman is the James Edmund and Margaret Elizabeth Hennessey Corry Professor of Law and Associate Dean for Academic Affairs, Florida State University College of Law. His scholarship explores the structure and philosophy of contracts and commercial and bankruptcy law. He has written about contract formalism, the specification of rules of contract law, and the role of planning and practical reasoning in contract law. Bridgeman teaches Contracts, Commercial Law, Creditors' Rights, Jurisprudence, and Philosophy of Private Law.

Roger Brownsword is Professor of Law and Director of TELOS at King's College London and an Honorary Professor of Law at University of Sheffield School of Law. As a researcher, Professor Brownsword writes in the fields of contracts and the common law, legal theory, bioethics and the regulation of technology in the UK as well as Australia, Brazil, Canada, Denmark, France, Germany, the Netherlands, Singapore, and the United States. Most recently, Professor Brownsword has acted as a specialist adviser to the House of Lords Select Committee on Stem Cells and the House of Commons Science and Technology Committee. Professor Brownsword is a member of the Editorial Board of *Modern Law Review*.

David Campbell is Professor of International Business Law at Leeds University School of Law. He holds degrees from Cardiff (BSc Econ), Michigan (LLM), and Edinburgh (PhD). He is a Fellow of the Chartered Institute of Arbitrators. He has taught at various UK law schools as well as in Australia, Hong Kong, New Zealand, Spain, and the United States. His research interests are for remedies for non-performance of contractual obligations as well as regulatory theory.

David Capper is a reader at Queen's University of Belfast School of Law. After practicing at the Bar of Northern Ireland for five years he was appointed to the post of Lecturer in Law at Queen's University Belfast in 1989 and was promoted to

Reader in June 2002. In 1990–91 he was Visiting Assistant Professor of Law at the University of Detroit Mercy in Detroit, Michigan. He is the Queen's University constituency representative on the council of the Society of Legal Scholars in Great Britain and Ireland and was a member 1995–2001 (vice-chair 1997–2001) of the Lord Chancellor's Legal Aid Advisory Committee for Northern Ireland. He also serves as a lay member of the Institute of Chartered Accountants in Ireland's Insolvency Licensing Committee and is company secretary of SLS Legal Publications (NI) Ltd. Since 2001 he has been Editor of the *Northern Ireland Legal Quarterly*.

James Devenney was appointed professor of commercial law at the University of Exeter School of Law in 2011. He also held posts at the University of Wales, Cardiff, and the University of the West of England, Bristol. His main research interests are contract law, consumer law, and commercial law. He is currently working on a research project on the European Draft Common Frame of Reference with the Institute of European and Comparative Law at the University of Oxford and Humboldt Universität, Berlin, Germany. He is also involved in a three-year project, Credit & Debt: Protection of Vulnerable Consumers in Private Law (Undue Influence, Unconscionability & Good Faith), which is being funded by the EU.

Larry A. DiMatteo is the Huber Hurst Professor of Contract Law & Legal Studies at the Warrington College of Business Administration at the University of Florida, as well as an Affiliated Professor of Law at the Levin College of Law and at the Center for European Studies both at the University of Florida. He holds a JD from Cornell University, LLM from Harvard Law School, and a PhD from Monash University (Australia). He is the author of numerous books and articles on contract law, international sales law, international patent law, legal history, and legal theory. He is the 2011–12 University of Florida Teacher-Scholar of the Year. He also was awarded a 2012 Fulbright Professorship.

Roger Halson is Professor of Contract Law at the University of Leeds. He has previously taught at Hull, University College London, and Nottingham. He has written extensively in the field of contract law, especially remedies, and his work has been cited by the House of Lords as well as by appellate courts overseas.

Martin A. Hogg is a senior lecturer at the University of Edinburgh, School of Law. Following two years qualifying as a Solicitor with Dundas & Wilson CS in Edinburgh, he was appointed as a Lecturer at the Faculty of Law at Edinburgh in 1995. In 2004 he was appointed Senior Lecturer. He has previously held office as Associate Dean of the Faculty of Law, as well as Director of Undergraduate Studies and Director of Teaching of the Law School. He currently chairs the Law School's Board of Studies. His main areas of research lie in all aspects of the law of obligations, with a current particular emphasis on comparative obligations theory, causation, and the concept

of damage. He is the Scottish Reporter for the *European Tort Law Yearbook*, published annually by the European Centre of Tort and Insurance Law. He also serves as Assistant Editor of *Edinburgh Law Review*.

Thomas W. Joo is a professor of Law at the University of California, Davis, School of Law, specializing in corporate governance, contract law, white-collar crime, and critical race theory. Prior to joining the UC Davis faculty, Professor Joo was a clerk in the chambers of the Honorable Wilfred Feinberg of the U.S. Court of Appeals for the Second Circuit and an associate at Cleary, Gottlieb, Steen, and Hamilton in New York. He currently serves as an Executive Committee Member of the Section on Contracts of the Association of American Law Schools. His most recent work is *Corporate Governance: Law, Theory & Practice* (Carolina Academic Press 2004, 2d ed. 2010).

Mel Kenny is Professor of Commercial Law at De Montfort University. He was previously a Reader at Leicester University School of Law. Mel has worked at the Universities of Leipzig (1990–97), Bremen (1997–2001 and 2005–07), Lucerne (2001–05), Durham (2007–08), and Leeds (2008–10) and joined the De Montfort Law School in 2012. In recent years his research has centered on three highly charged legal topics: the ‘Europeanisation’ of national private law systems and the associated calls for codification and consolidation; the comparative assessment of the treatment of surety agreements across Europe, and the general issue of consumer protection. He is Co-editor of a new series of edited collections, the first volume of which is titled *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable* (Cambridge University Press 2011).

Nancy S. Kim is Professor of Law at California Western University School of Law in San Diego. Professor Kim joined the faculty in fall 2004. Prior to that time, she was Vice-President of Business and Legal Affairs of a multinational software and services company. After graduating from law school, she was a Women’s Law and Public Policy Fellow at Georgetown University Law Center and a Ford Foundation Fellow at the UCLA School of Law. Kim is a past recipient of the Wiley W. Manuel Award for pro bono services for her work with the Asian Pacific American Legal Center. Kim currently serves on the executive committee of the Section on Internet and Computer Law of the American Association of Law Schools. Her scholarly interests focus on culture and the law, contracts, women and the law, and technology.

Charles L. Knapp is the Joseph W. Cotchett Distinguished Professor of Law at the University of California Hastings College of the Law. He came to Hastings in 1998 from New York University Law School, where he had been a faculty member since 1964 and was the Max E. Greenberg Professor of Contract Law. Besides his years of service at NYU, he has been a visiting professor at Harvard, the University

of Arizona, Brooklyn Law School, and the University of Copenhagen. His principal teaching and research interest is contract and commercial law. Along with Hastings Professor H. G. Prince and Professor Nathan Crystal, he is the co-author of a widely used casebook, *Problems in Contract Law*, published by Aspen and now in its sixth edition.

Juliet P. Kostritsky is the John Homer Kapp Professor of Law at Case Western Reserve University Law School. She is a member of the American Law Institute. Her research interest includes contract and commercial law and she teaches the courses on contract, property, and commercial paper. Her recent research focuses on the interpretation of contract.

Hector L. MacQueen is a professor of Private Law at Edinburgh University and currently serves as a Scottish Law Commissioner. Professor MacQueen has previously held visiting appointments at Cornell University in the United States, the University of Utrecht in the Netherlands, and Stetson University College of Law. He has been a Fellow of the Royal Society of Edinburgh since 1995 and was elected a Fellow of the British Academy in 2006. In October 2008 he was elected Vice-President (Humanities) of the RSE for a three-year term. Professor MacQueen's work in obligations is mainly concerned with the law of contract and unjustified enrichment. He is the author or co-author of three standard student texts and is the Scottish Editor of the last three editions of *Atiyah's Sale of Goods*.

Zoe Ollerenshaw is a senior lecturer in law at University of Sheffield School of Law. Her research interests are contract and commercial law. She qualified as a Solicitor in 1987 and worked in private practice specializing in commercial law, intellectual property, and IT law for leading international law firms. She returned to academia in 2000. She is a member of the Sheffield Institute for Commercial Law Studies (ICLS).

Keith Rowley is the William S. Boyd Professor of Law at UNLV's William S. Boyd School of Law, where he teaches contract law, commercial law, economics and the law, and law and popular culture. He is an elected member of the American Law Institute and currently serves as chair of the AALS Section on Contracts; as Developments Reporter for the ABA Business Law Section's Uniform Commercial Code Committee; and as U.S. liaison to the Contract, Commercial, and Consumer Law Section of the Society of Legal Scholars. He has previously chaired the AALS Section on Commercial and Related Consumer Law and the Sales Subcommittee of the ABA Business Law Section's UCC Committee.

Djakhongir Saidov is a senior lecturer in law at the University of Birmingham, School of Law. He joined Birmingham Law School in September 2004. Prior to

joining Birmingham, Dr Saidov taught at the Norwich Law School, University of East Anglia. He also practiced law in Tashkent, Uzbekistan. He received his LLB from the University of World Economy and Diplomacy (Uzbekistan) and his LLM with distinction and PhD from the University of East Anglia. His research and teaching interests are in the fields of international commercial law and law relating to international oil and gas operations. His recent publications include *The Law of Damages in International Sales – the CISG and Other International Instruments* (Oxford, Hart Publishing 2008) and ‘A ULIS Echo in the CISG World’ *Lloyd’s Maritime and Commercial Law Quarterly* [2010, pp. 201–07].

Séverine Saintier is a senior lecturer at the University of Sheffield, School of Law. Prior to her current position, Dr Saintier worked in Liverpool University (1997–2003). She joined the Sheffield School of Law as a Lecturer in 2003 and was promoted to Senior Lecturer in 2008. She obtained a *Maîtrise* in international business law, an LLM in English law in 1995, and a PhD in 2001 from Sheffield University. Her research interests are in the areas of commercial, agency, and comparative law. She has contributed the national notes for English law in the Mandate and Representation Title of Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference. Her second monograph in the field of commercial agency (co-authored with Jeremy Scholes) has been used by the House of Lords in the case of *Lonsdale* (2007). Dr Saintier has been the Director of the Sheffield Institute of Commercial Law Studies (ICLS) since 2007.

Qi Zhou is a lecturer at the University of Sheffield, School of Law, in the United Kingdom. Previously, he was a practicing attorney in the People’s Republic of China. His research interests are in the areas of contract law, commercial law, and regulation, as well as law and economics. Dr Zhou is the convener of the contract, commercial, and consumer law group of the Society of Legal Scholars; a member of the Standing Committee of the UK Chinese Law Association; an Assistant Editor of the *Journal of International Trade and Policy*; and a member of the Sheffield Institute of Commercial Law Studies (ICLS). He has researched in such areas as efficient breach, remedies and unconscionable contracts, misrepresentation, and unilateral mistakes.

Foreword

It was a privilege for me to be invited to attend the symposium in Sheffield in September 2011 that has given rise to this book. I imagine the invitation was the result of my long association with the School of Law at Sheffield rather than any perception that I have current expertise in the comparative law of commercial contracts. However, I derived enormous benefit from my attendance.

The sharing of knowledge and expertise among legal experts from different jurisdictions is essential to the development of the law. It is also important that, at a time when the laws of the United Kingdom are more than ever influenced by developments in the European Union, we do not forget the heritage that we share with other common law jurisdictions, particularly in relation to our fundamental concepts and basic principles. One of the most formative and durable influences on my judicial career was the time I and other British judges and lawyers spent with American colleagues in Edinburgh, London, and Washington DC, in 1999 and 2000 as part of the Anglo-American Legal Exchange. The historical similarities in our respective laws bind us together and our more recent divergences enable each of us to see how our own laws and practices may yet develop.

And so to the world of commercial contracts. Notwithstanding their common origins, the laws of the United Kingdom have developed differently from those of the United States. Most noticeably, they have diverged in relation to the duty of good faith and the doctrine of unconscionability. American judges have been more interventionist than their British counterparts. In the United Kingdom, the biggest source of regulation and calibration of unequal bargaining power now derives from obligations imposed on the Member States of the European Union. However, even in areas where there are no or few such obligations, the judicial development of our law does not always replicate the approach of American courts. Thus, for example, our approaches to construction, to implied terms, and to remedies differ significantly.

All this makes the comparative methodology that permeates this book particularly useful. Leading scholars from the United States and from the United Kingdom have come together to bring their varied expertise to bear on these important issues. Their approaches are refreshingly diverse. Some contributions resemble ones with which I was familiar as a Professor of Law thirty years ago. Others, particularly the more theoretical ones, are expressed in a language with which I was previously unfamiliar. Taken together, the contributions provide a unique and extremely valuable set of insights into our respective commercial contract laws. The book will help academics and practitioners on both sides of the Atlantic, and in Continental Europe, to appreciate where there is hope for harmonisation or approximation and where there is not. It is a most stimulating collection that should enhance the understanding of all those concerned with the development of the law of commercial contracts, both within and beyond the academic world.

I congratulate the organisers and the contributors to the September 2011 symposium. It is entirely appropriate that it can now reach a wider audience through this original and excellent book, which is a fitting celebration of the achievements of Professor Robert Bradgate, which inspired it.

Maurice Kay
Vice-President, Court of Appeal Civil Division
Royal Courts of Justice
London

Brief Contents

PART I: THE ROLE OF CONSENT	1
1. Transatlantic Perspectives: Fundamental Themes and Debates Larry A. DiMatteo, Qi Zhou, and Séverine Saintier	3
2. Competing Theories of Contract: An Emerging Consensus? Martin A. Hogg	14
3. Contracts, Courts, and the Construction of Consent Thomas W. Joo	41
4. Are Mortgage Contracts Promises? Curtis Bridgeman	67
PART II: NORMATIVE VIEWS OF CONTRACT	83
5. Naturalistic Contract Peter A. Alces	85
6. Contract in a Networked World Roger Brownsword	116
7. Contract Transactions and Equity T. T. Arvind	146
PART III: CONTRACT DESIGN AND GOOD FAITH	179
8. The Duty to Draft Reasonably and Online Contracts Nancy S. Kim	181

9.	Managing Change in Uncertain Times: Relational View of Good Faith	201
	Zoe Ollerenshaw	
	PART IV: IMPLIED TERMS AND INTERPRETATION	223
10.	Implied Terms in English Contract Law	225
	Richard Austen-Baker	
11.	Contract Interpretation: Judicial Role Not Parties' Choice	240
	Juliet P. Kostritsky	
	PART V: POLICING CONTRACTING BEHAVIOR	287
12.	The Paradox of the French Method for Calculating the Compensation of Commercial Agents and the Importance of Conceptualising the Remedial Scheme under Directive 86/653	289
	Séverine Saintier	
13.	Unconscionability in American Contract Law: A Twenty-First-Century Survey	309
	Charles L. Knapp	
14.	Unfair Terms in Comparative Perspective: Software Contracts	339
	Jean Braucher	
15.	(D)CFR Initiative and Consumer Unfair Terms	366
	Mel Kenny	
	PART VI: MISREPRESENTATION, BREACH, AND REMEDIES	383
16.	Remedies for Misrepresentation: An Integrated System	385
	David Capper	
17.	Re-Examining Damages for Fraudulent Misrepresentation: Towards a More Measured Response to Compensation and Deterrence	416
	James Devenney	
18.	Remedies for a Documentary Breach: English Law and the CISG	434
	Djakhongir Saidov	

19.	The Irrelevance of the Performance Interest: A Comparative Analysis of “Keep-Open” Covenants in Scotland and England	466
	David Campbell and Roger Halson	
	PART VII: HARMONIZING CONTRACT LAW	503
20.	Harmonisation of European Contract Law: Default and Mandatory Rules	505
	Qi Zhou	
21.	Europeanisation of Contract Law and the Proposed Common European Sales Law	529
	Hector L. MacQueen	
22.	Harmonization of International Sales Law	559
	Larry A. DiMatteo	

Contents

<i>Contributors</i>	page xxi
<i>Foreword by Rt. Hon. Lord Justice Maurice Kay</i>	xxvii
PART I: THE ROLE OF CONSENT	1
1. Transatlantic Perspectives: Fundamental Themes and Debates	3
I. Legacy of Rob Bradgate	3
A. Commercial Contract Law in the United Kingdom and United States	4
1. <i>Statutory Interventions into the Common Law</i>	4
2. <i>Divergence, Convergence, and Law Reform</i>	5
B. Major Themes	6
1. <i>Topical Preview</i>	8
2. <i>Consent and Promise</i>	8
3. <i>Theories of Contract, Networks, and Equity</i>	8
4. <i>Discrete and Relational Contracting</i>	9
5. <i>Implied Terms and Contract Interpretation</i>	9
6. <i>Contract Law's Regulatory Function</i>	10
7. <i>Misrepresentation and Breach</i>	11
8. <i>Contract and Sales Law Harmonization</i>	11
II. Conclusion	12
2. Competing Theories of Contract: An Emerging Consensus?	14
I. Introduction	15
II. The Competing Theories of Contract	17
A. Contract as Based upon Promises	17
B. Contract as Based upon Agreement	22
C. Contract as Based upon the Reliance	26