

Introduction and fundamental themes

We all make contracts every day. Each time we buy anything—a train ticket, a pair of shoes, a meal—we make a contract. Many of us spend most of our lives performing contractual obligations owed to our employers. We may be conscious of contracting only when we enter into some important transaction, like buying a house or a new car. But the law of contract is always there, to be invoked when something goes wrong. If there is an accident on the railway, the shoes prove defective, or the meal causes food poisoning, a claim for breach of contract may succeed.

The same general principles govern commercial contracts as the everyday transactions mentioned. A case concerning the employment of an opera singer may be an important precedent in a dispute about the hiring of a ship. An advertiser's promises concerning the therapeutic qualities of his smoke ball may be governed by the same principles as the promises of a shipper of goods to the **stevedore** who will load them. These general principles are almost all principles of the **common law**. They are not to be found in any code or statute but are derived from precedent. Consequently, any study of the law of contract must be, to a large extent, a study of the cases which made it. However, there are some important statutory modifications of the common law principles which are examined in this book.¹

In addition, there is a vast amount of legislation relating to particular types of contract. For example, the contract of employment is now heavily regulated by statute. Such contracts are necessarily the subject of specialised works, and it may be that the law is shifting towards recognising a law of contracts (plural) rather than a law of contract (singular), since particular types of contract have generated a particular body of jurisprudence. However, legislation generally assumes the existence of the principles of the common law

¹ Especially the Law Reform (Frustrated Contracts) Act 1943, the Misrepresentation Act 1967, the Unfair Contract Terms Act 1977, the Contracts (Rights of Third Parties) Act 1999, and the Consumer Rights Act 2015.

which continue to apply, except insofar as the statute expressly or impliedly modifies them. An understanding of these principles is therefore essential to an understanding of the specialised law, and a sound appreciation of the principles underpinning the general law of contract remains helpful.

Moreover, questions under almost any other branch of the law may depend on the law of contract. A petrol company's offer to supply a 'World Cup Coin' of minute value to a motorist buying four gallons of petrol is unlikely to give rise to an action for breach of contract; but the effect of the offer in the law of contract determined whether the company was liable for a very large sum in purchase tax.² It would hardly be worth suing a chocolate company for its failure to fulfil its promise to supply a record of 'Rockin' Shoes' for a small sum of money and three chocolate wrappers; but the rights to substantial sums by way of royalties on the record depended on the answer to the question of whether the wrappers were part of the contractual price.³

The outcome of many actions in the law of tort turns on issues of contract. Even in the criminal law, many cases relating to property offences can be properly understood only in the light of contractual principles. The law of contract is a basic subject which must be grasped by anyone who aspires to understand or apply the law.

This introductory chapter will give a brief overview of the fundamental elements of what constitutes a contract. These will all be considered in greater depth in subsequent chapters. This chapter will then conclude by examining some general themes in contract law to which reference will be made throughout the book. The outline provided in this chapter is necessarily brief, and it is to be expected that some of the themes may seem a little difficult in the abstract. That should not trouble any student approaching this subject for the first time; the concepts will become familiar and more easily understood through concrete examples provided in later chapters.

1 Undertakings or promises

The distinguishing feature of contractual obligations is that they are not imposed by the law but undertaken

² *Esso Petroleum v Customs & Excise* [1976] 1 WLR 1, see Chapter 8, Section 2.

³ *Chappell & Co Ltd v Nestlé Co Ltd* [1960] AC 87, see Chapter 7, Section 1(a).

by the contracting parties. The name of the old common law form of action was *assumpsit*—‘he undertook’. The claimant alleged that the defendant undertook to do something and did not do it, or did it badly. Or the claimant alleged that the defendant undertook that something was so and it was not so (for example, the claimant undertook that the car was in good working order and it was not). Whereas contractual duties are voluntarily undertaken, many duties are imposed on us by the law whether we like it or not. If I drive my car on the road I owe an inescapable duty of care to all other road users. If, in breach of that duty, I negligently cause injury to one of them, he may sue me in the tort of negligence. The duty of care is imposed by the general law. By contrast, the only reason why I am bound to go to work in the morning is that I have given an undertaking to my employer to do so; and his undertaking to me is the only reason why I am entitled to my pay at the end of the month.

Contractual and tortious duties frequently overlap, especially where negligence is concerned. A carrier of passengers in a vehicle on the road will of course owe those passengers the duty which he owes to all other road users in tort. But if he is carrying them under a contract, it will be an implied term of the contract that he will exercise due care. The content of the two duties will be the same, so that free riders will be no worse off than those riding under a contract. But contractual duties are often stricter. If the diners in a restaurant are poisoned by the food, notwithstanding the fact that the restaurateur and his staff exercised all proper care, those who have contracted to buy the food have a remedy because the restaurateur has impliedly undertaken that the food is reasonably fit for eating. But any guests who are not parties to a contract have no claim except in the tort of negligence and the restaurateur has not been negligent.

Admittedly, the distinction between contractual and tortious duties is less clear-cut than it may so far have been made to appear. This is because, by statute, some contractual duties are now inescapable as well.⁴ So, just as the motorist who drives on the road cannot evade the obligation to exercise reasonable care as regards other road users, the restaurateur who invites the public to buy food in his restaurant cannot evade the obligation to supply food fit for eating. But the former is a duty in tort and the latter remains a duty in contract.

⁴ See Chapter 15.

The law of contract is about undertakings or promises. It determines which promises are, and which promises are not, binding in law. And it prescribes the remedies available to a person who complains that a binding promise has been broken. The word, ‘promise’, is generally used in ordinary speech to refer to acts to be done in the future and most contracts contemplate future performance by one or more of the parties. However, in the law of contract, ‘promise’ is used in a wider sense to include undertakings about existing facts, such as where the seller of a car promises that it is roadworthy or the occupier of premises promises that he has taken reasonable steps to make them safe. In many contracts, the only, or the only significant, promises relate to a matter of fact, such as where goods are bought in a shop for cash. The acts which the seller and buyer perform—delivery of the goods and payment of the price—are, for all practical purposes, coincident with the formation of the contract and the only promises likely to be relied on in a dispute between the parties are those of the seller relating to the quality of the goods.

2 Deeds

It would be impracticable to make all promises binding in law, and therefore English law, like all other systems, has rules to define the promises which are binding. A promise is not binding unless it is made in ‘a deed’ or given ‘for consideration’.⁵ A person may make any lawful promise binding in law by executing a deed. At common law, a deed was a document which was ‘signed, sealed, and delivered’ but now section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 provides that the execution of a deed by an individual (as distinct from a corporation) no longer requires a seal. It is sufficient that the document:

- (a) makes it clear on its face that it is intended to be a deed, by describing itself as a deed or expressing itself to be **executed** and signed as a deed, or otherwise; and
- (b) it is signed (and ‘signed’ includes making one’s mark) either (i) by the maker in the presence of a witness who attests the signature or (ii) at the maker’s direction and in his presence and the presence of two witnesses who each attest the signature; and
- (c) it is ‘delivered’ as a deed by the maker or his agent. ‘Delivery’ is widely defined to include any act by the maker which indicates that he considers the deed to be binding.

⁵ See Chapter 7.

3 Written and oral promises

The 1989 Act has simplified the making of a deed but the great majority of promises have never been made in this formal way. If the promise is not in a deed, it is binding only if it is given for consideration. Usually, it makes no difference whether the promise is oral or in a document which does not amount to a deed. Contracts of the greatest importance—the sale of diamonds worth a million pounds—may be made by word of mouth or any other conduct signifying an intention to contract. The only question is whether the promise was made for consideration. However, there are exceptional cases where statute provides (a) that a contract is not valid unless it is *made* in writing or (b) it is not enforceable in a court of law unless it is *evidenced* in writing. These are considered in Chapter 9.

4 Bargains

The ‘doctrine’ of consideration is considered in detail in Chapter 7 but it is so fundamental that it must be outlined immediately.

The general idea is that a promise to make a **gift** is not binding but a bargain is binding. A promise is given for consideration when the **promisor** asks for something in return for his promise and gets what he asks for. The promise is binding because the promisee has ‘bought’ it by giving ‘the price’ asked. ‘I promise that I will give you my car’ is a promise which may be seriously intended and may impose a moral obligation on the promisor but it is not capable of becoming a contractual promise as the promisor has asked for nothing in return. A prompt ‘acceptance’ by the promisee makes no difference. ‘I promise that I will give you my car for your motorbike,’ on the other hand, is an offer capable of becoming a contract. The promisor has specified what he wants in return for his promise and, when the promisee accepts the offer by giving it to him, a contract is made.

An offer to make a contract is a promise with a price tag.

5 Bilateral and unilateral contracts

Sometimes what the promisor wants is a promise from the other party. When he gets what he wants—in this case, the other party’s promise—his own promise is binding. So too is that of the other party. *O* promises *A* that he will employ him from 1 January next year at a salary of £20,000 a year. On 1 October, *A* accepts the offer. He is, of course, thereby promising to perform the duties specified in the job description. Both parties

are now bound. *O* has received consideration in the form of *A*'s promise to do the work specified. *A* has received consideration in the form of *O*'s promise to pay his salary and fulfil all the other duties of an employer. This is called a 'bilateral' contract because each of the two parties has made contractual promises. The formation of bilateral contracts is considered in detail in Chapter 3.

Sometimes, in return for his own promise, the offeror asks not for a promise but for an act. The typical example is the offer of a reward. '£10 to anyone who returns my lost dog.' The offeror is not seeking promises, but action. If *A* finds the dog and returns it to *O* he is entitled to the reward. He has paid the required price for the promise. This is called a 'unilateral' contract, because only one side has made a promise. *A* has not promised to do anything, and is not under any obligation to perform. The contract is only concluded when *A* returns the dog. Of course, there are two parties to a unilateral contract, but only one promisor. The formation of unilateral contracts is considered in detail in Chapter 4.

6 Fundamental themes in contract law

The approach of this book is fundamentally doctrinal. Its aim is to provide a clear, succinct analysis of the English law of contract. Reference to further and more theoretical discussion of aspects of the law can be found in the sections entitled 'Further reading' at the end of every chapter. However, any principled understanding of the current law must rest upon a sound appreciation of the underlying basis of the law. This section will briefly introduce some of the major ideas that are thought to inform the development of contractual principles. Each will be considered further in subsequent chapters.

(a) Freedom of contract

Courts often refer to a principle of 'freedom of contract'. For example, in *Printing and Numerical Registering Co v Sampson*, Sir George Jessel MR said:⁶

if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with

⁶ (1874–75) LR 19 Eq 462, 465.

this freedom of contract.

Freedom of contract suggests that parties are free to agree upon what terms they are willing to be bound. Equally, freedom of contract suggests a freedom not to enter into a contract: contracts should not be forced upon unwilling parties. This reflects the important principle that binding contractual obligations arise because of the parties' consent.

It is clear that parties can, to a large extent, set the terms of the contract. It is also clear that courts do not have a general power to improve the bargain made by the parties.⁷ Nevertheless, the parties' freedom to contract is not absolute, and there are some overarching restrictions on this freedom. For instance, the parties may not be able to exclude certain types of liability,⁸ or contract in a manner which is contrary to public policy,⁹ or impose certain 'penalties' for breach of contract.¹⁰ But such limitations are exceptions to the general principle of freedom of contract, which continues to be taken seriously by the courts.

(b) **Will theory**

The classical explanation for the basis of the law of contract is the 'will theory'. This is often linked to the principle of freedom of contract. It has been famously developed by Professor Fried, who argues that contractual obligations arise because of the promise itself.¹¹ This theory emphasises the autonomy of the parties to mould their obligations to one another, and is consistent with the traditional, liberal approach to contract law.

Some scholars have presented variations on Fried's promise-based model of contract. Kimel, for instance, has argued that contracts are not based on promises but rather are substitutes for them.¹² And Penner has emphasised the bilateral nature of contracts to contend that contracts should be seen as based on agreements

⁷ See eg *Prime Sight Ltd v Lavarello* [2013] UKPC 22, [2014] AC 436 [47] (Lord Toulson).

⁸ See Chapter 15.

⁹ See Chapter 22.

¹⁰ See Chapter 27.

¹¹ C Fried, *Contract as Promise: A Theory of Contractual Obligation* (2nd edn, OUP, 2015).

¹² D Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart, 2003).

between parties and not promises made by either one of them.¹³ The notion of contract as agreement is important and is considered further in Chapter 5 in particular.

The promise-based model has also been attacked. As a matter of principle, it has sometimes been seen as too individualistic, and contrary to the view that the law should have broader concerns than simply upholding agreements between parties, such as promoting the redistribution of wealth. Further, as a matter of doctrine, there are aspects of the law which the will theory struggles to explain. For instance, it might be thought that since the promisor is often not required to fulfil his promise,¹⁴ the theory is undermined. Alternatives have therefore been proposed. For example, Atiyah argued that contractual obligations really only arise because one party has detrimentally relied upon the promise of the other party.¹⁵ However, it is suggested that the will theory continues to provide a good explanation for large swathes of the law of contract, and lies at the heart of the traditional approach of the common law.

(c) **Economic efficiency**

A major challenge to the will theory comes from those who favour a law and economics approach to contract law. This school of thought argues that the law should strive to be economically efficient. Indeed, Oliver Wendell Holmes, a judge in the US Supreme Court, notably said that ‘The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else.’¹⁶ This goes too far. It is clear that a party does not invariably have a choice whether to pay damages or to perform his obligations. Indeed, in some circumstances a court will order **specific performance**, and thereby force a party to perform rather than pay damages. Parties contract in order to secure performance of a promise, and this should not be overlooked.

On a slightly different tack, but in a similar vein, Judge Richard Posner has written:¹⁷

¹³ J Penner, ‘Voluntary Obligations and the Scope of the Law of Contract’ (1996) 2 *Legal Theory* 325.

¹⁴ See the restrictions on specific performance discussed in Chapter 28, Section 7.

¹⁵ See eg ‘Contracts, Promises and the Law of Obligations’ in P Atiyah, *Essays on Contract* (OUP, 1990).

¹⁶ OW Holmes, ‘The Path of the Law’ (1897) 10 *Harvard Law Review* 457.

¹⁷ R Posner, *Economic Analysis of the Law* (8th edn, Aspen, 2011) 151.

Suppose I sign a contract to deliver 100,000 custom-ground widgets at \$.10 apiece to *A*, for use in his boiler factory. After I have delivered 10,000, *B* comes to me, explains that he desperately needs 25,000 custom-ground widgets at once since otherwise he will be forced to close his pianola factory at great cost, and offers me \$.15 apiece for 25,000 widgets. I sell him the widgets and as a result do not complete timely delivery to *A*, who sustains \$1000 in damages from my breach. Having obtained an additional profit of \$1250 on the sale to *B*, I am better off even after reimbursing *A* for his loss. Society is also better off. Since *B* was willing to pay me \$.15 per widget, it must mean that each widget was worth at least \$.15 to him. But it was worth only \$.14 to *A*—\$.10, what he paid, plus \$.04 (\$1000 divided by 25,000), his expected profit. Thus the breach resulted in a transfer of the 25,000 widgets from a lower valued to a higher valued use.

This famously highlights the idea of ‘efficient breach’. The person who values the goods the most (*B*) obtains the goods. *A* suffers no loss because he is adequately compensated. And I make a profit. As a result, there seems to be no ‘losers’ in this scenario, and everybody is a ‘winner’. Indeed, in a capitalist society this sort of reasoning may be considered to be important for wealth creation.

However, care should be taken before endorsing wholeheartedly a view of contract law that rests squarely upon the principles of law and economics.¹⁸ Although it is possible that commercial parties may often desire an efficient outcome when dealing with generic goods in a liquid market, and considerations of efficiency may underpin doctrines such as mitigation,¹⁹ many contract doctrines seem unconcerned with efficiency.²⁰ And non-commercial parties dealing with particular goods or services may not be aware of considerations of efficiency at all. More fundamentally, it is not always clear whether any breach of contract really is efficient. This is because there are often (sometimes hidden) costs associated with breach. As Macneil has put it, “Talking after a breach” may be one of the most expensive forms of conversation to be found, involving, as it so often does, engaging high-price lawyers, and gambits like starting litigation, engaging in discovery, and

¹⁸ See eg D Friedmann, ‘The Efficient Breach Fallacy’ (1989) 18 *The Journal of Legal Studies* 1.

¹⁹ See Chapter 26, Section 2(c).

²⁰ See eg the discussion in Chapter 25, Section 4 and in Chapter 28, Section 2.

even trying and appealing cases.’²¹ There are therefore ‘negotiation costs’, ‘litigation costs’, and ‘assessment costs’ in quantifying damages in complicated scenarios. All these might make a breach of contract an expensive rather than efficient proposition. As a result, it is suggested that even though the approach in the basic example given by Posner is useful in a very simple case, and might help to explain why compensatory damages are generally thought to be sufficient, too much emphasis should not be placed on ‘efficient breach’. After all, a breach of contract is an unlawful act and should not therefore be encouraged.

(d) **Other theories of contract law**

There are many other ways of understanding contract law. In contrast to the individualism of the will theory and the law and economics approach, some argue that contract law’s values are instead rather more paternalistic and designed to promote fairness, trust, cooperation and so on.²² Central to such theories is the role that principles of good faith and unfairness do, and should, play in contract law. As will be seen in Chapter 19, English law is traditionally cautious about adopting overriding principles of good faith, instead adopting a ‘piecemeal’ approach. But the law in this area continues to develop.

Related to this debate is the search for the ‘paradigm’ contract. Some contracts are typically one-off deals, such as buying a house. Other contracts are part of a long term relationship between the parties. An example is a borrower’s relationship with his bank. Not only may a mortgage to finance the purchase of a house last for twenty or thirty years, the mortgage is likely to be taken out with the bank with which the borrower has previously held an account for a number of years. A criticism of individualist theories of contract is that they take as their paradigm the ‘one-off’ or ‘discrete’ contract negotiated at arms length between parties, and marginalise long-term relationships between parties, where issues such as good faith may be more pertinent. Macneil has argued that different norms may apply to ‘discrete’ and ‘relational’ contracts.²³ In contrast,

²¹ I Macneil, ‘Efficient Breach of Contract: Circles in the Sky’ (1982) 68 *Virginia Law Review* 947, 968–9.

²² See eg H Collins, *The Law of Contract* (4th edn, CUP, 2003).

²³ I Macneil and D Campbell, *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet & Maxwell, 2001).

Eisenberg argues that all contracts are relational, so that relational norms should apply to all contracts.²⁴

There is a vast amount of literature on contract theory, covering everything from empirical studies of how businesses use contracts²⁵ to feminist critiques of the subject.²⁶ In general, this book focuses on the legal principles underpinning contract law (often called a ‘black letter’ approach to law) but references to wider literature are included in the ‘Further reading’ sections at the end of each chapter.

(e) **Objectivity in contract law**

It is a fundamental, general principle of contract law that a party’s words and conduct must be interpreted objectively. The key question concerns what a reasonable person would understand that party to mean, rather than asking what that party actually meant. As Lord Reid put it in *McCutcheon v David MacBrayne Ltd*, ‘The judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other.’²⁷ The emphasis on ‘objective’ rather than ‘subjective’ intentions is so important that it is the subject of further examination in Chapter 2, before considering its significance to various substantive doctrines throughout the book.

(f) **Common law and equity**

Equity has certain characteristics that distinguish it from the common law. These derive from the historical origins of the equitable jurisdiction.²⁸ From medieval times, the common law was a formalistic body of rules which were interpreted strictly. Where the common law did not provide a remedy or where the result reached by the common law was harsh, it was possible to petition the King, and later the Lord Chancellor, to provide a remedy through the exercise of his discretion. Eventually, so many petitions came to the

²⁴ M Eisenberg, ‘Relational Contracts’ in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press, 1995).

²⁵ See eg H Beale and T Dugdale, ‘Contracts between Businessmen’ (1975) 2 *British Journal of Law and Society* 45.

²⁶ See L Mulchany and S Wheeler (eds), *Feminist Perspectives on Contract Law* (Cavendish, 2005).

²⁷ [1964] 1 WLR 125, 128, HL (citing *Gloag on Contract* (2nd edn) p 7).

²⁸ See J Baker, *Introduction to Legal History* (4th edn, OUP, 2002) 97–116.

Chancellor that it was necessary to establish a separate court, known as the Court of Chancery, to deal with them. The law that was applied in this court became known as equity.

In the *Earl of Oxford's case*,²⁹ Lord Chancellor Ellesmere recognised that equity's function was 'to soften and mollify the extremity of the law', and where there is a conflict between equity and the common law, equity should prevail. Since equitable relief depended upon the Chancellor's discretion, results could be unpredictable; for some time it was thought that 'Equity varies with the length of the Chancellor's foot.'³⁰ However, this no longer reflects the current state of the law. Equity has become more rule-based and principled, mainly because the equity jurisdiction was transferred from the Chancellor to judges, whose decisions had value as precedent for future decisions so that like cases could be treated alike. Moreover, it is no longer necessary to seek relief from the common law courts and then petition the Chancery courts.³¹ The Judicature Acts of 1873 and 1875 abolished the common law and Chancery courts and replaced them with a single High Court. The effect of this legislation was to fuse the administration of common law and equity. The Judicature Acts emphasised that equity, as a body of law, could be applied in any court.³² It is important to appreciate that although the common law and equity have been fused as a matter of *procedure*, the *substantive* body of law produced in the Chancery courts remains vital, and the *function* of equity remains the same. Principles of equity, just like principles of common law, are developed by judges in a principled, incremental manner. Equity is crucial to understanding fundamental aspects of common law systems.

In the contractual realm, equity plays a significant role, particularly as regards remedies.³³ It is important to appreciate that equitable doctrines only apply where the application of the common law rules would be

²⁹ (1615) 1 Ch Rep 1.

³⁰ F Pollock (ed), *Table Talk of John Selden* (Selden Society, 1927) 43.

³¹ This was a time-consuming, expensive, and inefficient way of conducting litigation; for literary criticism, see Charles Dickens, *Bleak House* (1853) commenting on the fictional case of *Jarndyce v Jarndyce*.

³² See now the Senior Courts Act 1981, s 49.

³³ See eg Chapter 14 (rectification) and Chapter 28, Section 7 (specific performance).

too harsh. As a matter of technique, it is therefore crucial to apply the common law before considering equitable relief. So, for example, the common law of interpretation should be analysed before the equitable doctrine of rectification,³⁴ and the common law of consideration should be applied before considering promissory estoppel.³⁵

(g) Contract law within private law

Contract law is only one area within the private law of obligations.³⁶ It has already been seen in Section 1 that contract should be distinguished from tort law, although contractual and tortious duties may arise concurrently. Contract law should also be distinguished from unjust enrichment. Claims in unjust enrichment are not based on a civil wrong. For example, if *A* transfers to *B* £100 by mistake, then we might think (without any further facts) that it would be unjust for *B* not to pay back £100 to *A*. *A* can therefore sue *B* for restitution of an unjust enrichment. Yet neither *A* nor *B* may be at fault at all. Moreover, the remedy in unjust enrichment is the reversal of the enrichment transferred to *B*; unjust enrichment is concerned with reversing gains. This is different from contract law, which generally awards compensation for loss, and views a breach of contract as a wrong.

It is important to appreciate that contract law does not exist in a vacuum in private law. The boundaries of contract law might be influenced by how broad an approach to tort and, in particular, unjust enrichment is considered appropriate. Unjust enrichment is generally thought to be subsidiary to contract,³⁷ and this has led to some tension about whether unjust enrichment is an appropriate remedy in situations where a contract has ‘failed to materialise’ and has not come into existence,³⁸ or where a contract has been terminated for

³⁴ Chapter 24.

³⁵ Chapter 7.

³⁶ See generally A Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Hart, 1998).

³⁷ Chapter 28, Section 4.

³⁸ Chapter 5.

repudiatory breach,³⁹ for instance.

(h) **International influences on contract law**

English law is subject to international influences, and these will be noted throughout the book. Most significantly, English law is subject to various Directives and Regulations from the European Union, especially as regards consumer and employee protection, and these have had a considerable impact upon the common law.

However, the United Kingdom is now in the process of leaving the European Union. Unfortunately, at the time of writing, virtually nothing is clear about Brexit. The Government has proposed a ‘Great Repeal Bill’ (or, more prosaically, the European Union (Withdrawal) Bill), which will incorporate all European Union legislation into national law. It will then be possible for such legislation to be amended or replaced in the future. In any event, some European Union Directives are already given effect in English law through Acts of Parliament (such as parts of the Consumer Rights Act 2015) and, regardless of Brexit, those Acts will remain in force until amended or repealed in the normal way.

It is currently envisaged that Parliament will legislate to give pre-Brexit judgments of the Court of Justice of the European Union the same precedential value in English law as Supreme Court decisions. That would mean that, while English courts could develop a distinctive approach to legislation derived from the European Union in the future, only the Supreme Court itself will be able to sanction divergence from a pre-Brexit ruling from the Court of Justice. It is impossible to foresee at this stage what Brexit’s long term consequences will be on English contract law, though there are predictions that it will lead to a weakening of protections for consumers and employees.⁴⁰

International ‘soft law codes’, which can be adopted by parties if they choose, have also developed,⁴¹ and

³⁹ Chapter 24.

⁴⁰ C MacMillan, ‘The Impact of Brexit upon English Contract Law’ (2016) 27 King’s Law Journal 420.

⁴¹ See eg UNIDROIT’s *Principles of International Commercial Contracts* (2010) and, more locally, the *Principles of European Contract Law* (see O Lando and H Beale (eds), *Principles of European Contract Law* (Kluwer, 2000)).

this increases the choice of legal regimes available to (generally commercial) parties. There is a powerful view that contract law is ripe for a degree of harmonisation, and perhaps even codification, across national boundaries; after all, this could make international transactions easier because all parties would understand that the same principles apply regardless of location. On balance, however, it is suggested that this view should be resisted. Parties can choose which law governs their agreement, and it might be thought beneficial for parties to have a choice between different legal systems. Indeed, English law has proven to be particularly popular amongst commercial parties all over the world. This is because the common law of contract has proven itself to be (relatively) predictable, certain, and responsive to the needs of reasonable businessmen. The attractiveness of English law has brought a great deal of money and business to the City of London. Such advantages should not readily be discarded.

Further Reading

D Friedmann, 'The Efficient Breach Fallacy' (1989) 18 *The Journal of Legal Studies* 1

Challenges the theory that contract law promotes economic efficiency, as that theory overlooks potentially significant costs in negotiations and litigation and cannot explain a number of features of the positive law (this article can also be read in conjunction with Chapters 26 and 28).

P Atiyah, 'Contracts, Promises and the Law of Obligations' in P Atiyah, *Essays on Contract* (OUP, 1990).

Argues that contract theory is dominated by out-of-date values based on freedom of contract, and that the distinction between contract and tort is less marked than has traditionally been supposed.

J Penner, 'Voluntary Obligations and the Scope of the Law of Contract' (1996) 2 *Legal Theory* 325

Argues that the moral basis of contract is agreement, not promise, and considers the broader implications of this theory on the scope of contract law.

C Fried, *Contract as Promise: A Theory of Contractual Obligation* (2nd edn, OUP, 2015).

Analyses the philosophical foundations of contract law and argues in favour of a moral basis grounded in the parties' promises.

C MacMillan, 'The Impact of Brexit upon English Contract Law' (2016) 27 *King's Law Journal* 420

Considers the impact of Brexit upon existing contracts and the future development of contract law, arguing that, amongst other things, Brexit may lead to a weakening of contractual protections for both consumers and employees.