eleventh edition

ROUTLEDGE

the modern law of contract

Richard Stone and James Devenney

The Modern Law of Contract

Eleventh Edition

The Modern Law of Contract is a clear and logical textbook, written by an experienced author team with well over 30 years' teaching and examining experience.

Offering a carefully tailored overview of all key topics for LLB and GDL courses, this eleventh edition has been thoroughly updated. The book also includes a number of learning features designed to enhance comprehension and aid exam preparation, including:

- **Understand and remember core topics**: boxed chapter summaries offer a useful checklist for students, while illustrative diagrams help to clarify difficult concepts;
- **Identify important cases and assess their relevance**: 'Key Case' features highlight and contextualise the most significant cases;
- **Reflect on how contract law operates in context**: highlighted 'For thought' features ask students to consider 'what if' scenarios, while 'in focus' features offer critical commentary on the law;
- **Consolidate learning and prepare for assessment**: further reading lists and companion website directions at the end of each chapter direct you to additional interactive resources to test and reinforce your knowledge.

Clearly written and easy to use, *The Modern Law of Contract* enables undergraduate students of contract law to fully engage with the topic and gain a profound understanding of this fundamental area.

Richard Stone is Emeritus Professor of Law and Human Rights at the University of Lincoln.

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THE MODERN LAW OF CONTRACT

Eleventh Edition

Richard Stone and James Devenney

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Preface

The aim of this book is to provide a comprehensive but readable account of what we have termed 'the modern law of contract'. By this we mean the law of contract as applied by the English courts in the early twenty-first century. This we see as being still rooted in the forms of the classical theory of contract (which is generally accepted as dating from the late nineteenth century), but with those forms increasingly being stretched to adapt to the modern world. The inadequacies of the classical model that are thus exposed have been the subject of much commentary and analysis, together with suggestions of better models which might be adopted. Understanding the modern law requires an awareness of these critical analyses and this we have attempted to provide throughout the text. What results is not, however, and is not intended to be, a radical re-reading of this area of law. A quick look at the chapter headings will show an overall structure that will be familiar to all contract lecturers. For the purposes of exposition, many familiar authorities have been used. Throughout, however, and in particular through the footnotes, we have tried to indicate ways in which the classical model of contract may be or is being challenged and developed, whether openly or surreptitiously. We hope that the result is a treatment of the law which is easy to follow (to the extent possible given the complexity of some areas) but which is also sufficiently rich to provide a challenge to more discerning readers. At the very least we hope that such readers will be encouraged to think about and explore new lines of thought on a variety of topics.

The previous editions have been well received by students and lecturers, and there are no major changes to the structure of this edition. The 'In Focus' sections have been retained. These do not for the most part contain new material, but are designed to highlight some of the more discursive sections in each chapter, and to separate these more clearly from the straightforward exposition of the law. Diagrammatic summaries continue to appear at various points in every chapter to provide assistance to students who find visual representations easier to digest than plain text. 'Key Cases' are highlighted. These are intended to be the cases that 'all students of contract law should know' on each topic. This is inevitably to some extent a personal selection, and no doubt other teachers will object that their favourite examples have been excluded. Many of the 'For Thought' questions that appear in each chapter have been revised to take the form of short hypothetical problems, giving them a more practical focus. They are still intended to stimulate students into thinking about issues for themselves, and developing a critical approach to the law – not simply accepting what judges and commentators say as the only possible answer to any particular question. For this reason no answers are provided to these questions.

This edition includes detailed discussion of the Consumer Rights Bill which, at the time we were doing the proofs for this book, was awaiting Royal Assent. We, therefore, refer to the Consumer Rights Act 2015 throughout this book. New case law covered in this edition includes the decisions of the Supreme Court in *Allen v Hounga* (2014) (illegality) and *Pitt v Holt* (2013) (mistake) and some interesting decisions of the High Court and Court of Appeal on good faith and the performance of contracts – *Yam Seng Pte Ltd v International Trade Corp Ltd* (2013) (QB), *Mid Essex Hospital Services NHS Trust v Compass Group UK* and *Ireland Ltd* (2013) (CA) and *Bristol Ground School Limited v Intelligant Data Capture*

Limited (2014) (ch). Readers should note that as regards the use of the terms 'claimant' and 'plaintiff', we have continued the practice of previous editions, which is to use the label that will be found in the report of any particular case (which will depend on when the action was brought). Where the word is used generically, rather than in relation to a particular case, 'claimant' is used.

Finally, our thanks to our publishers, Routledge, and in particular Emma Nugent, for their patience and assistance in seeing this edition through to publication, and to our wives, Maggie and Claire, for their support during the writing process. Special thanks must also go to Lizzie Hustwayte.

The law is stated, as far as possible, as it stood on 31 July 2014 (although, as noted above, we were able to take account of the passage of the Consumer Rights Act 2015 at proof stage).

Richard Stone
Elston, Newark

James Devenney
Exeter, Devon
March 2015

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Guide to Using the Book

The Modern Law of Contract is rich in features designed to support and reinforce your learning. This Guided Tour shows you how to make the most of your textbook by illustrating each of the features used by the authors.

7.1 OVERVIEW

This chapter deals with the situations wh
for breach of contract by including exclu
area governed by both common law and
in the latter half of the twentieth century
law rules were developed earlier to deal
parties. The common law is looked at fi

Chapter Overviews

These overviews are a brief introduction of the core themes and issues that you will encounter in each chapter.

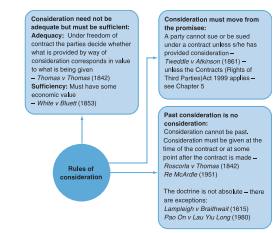

Figure 3.1

Diagrams

Visual learners are catered for via a series of diagrams and tables which help facilitate the understanding of concepts and interrelationships within key topics.

For Thought

*If you are invited to take part in a lot
written agreement as to how the prize*

'For Thought'

'For Thought' boxes encourage discussion on topical issues and help you to critique current law and reflect on how and in which direction it may develop in the future.

2.4.1 IN FOCUS: AGREEM

It has been argued by Collins
courts are not actually looking

> whether or not the negotia
> parties can reasonably sup
> it can be relied upon.[8]

'In Focus'

The 'In Focus' icon highlights sections that offer commentary on and critical evaluation of the law.

Key Case RTS Flexible Systems Ltd (UK Production) (2010)

Facts: The parties were in negotiation work. Work started on the basis of a L intended that there should be a forma ment on many terms, including the pr finalised or signed. On a preliminary is

Key Cases

A variety of landmark cases are highlighted in text boxes for ease of reference. The facts and decisions are presented to help you reach an understanding of how and why the court reached the conclusion it did.

3.16 SUMMARY OF KEY POINTS

- Promises can be enforceable w by consideration, or where the
- Consideration is the primary ba English law.

Chapter Summaries

The essential points and concepts covered in each chapter are distilled into bulleted summaries at the end of each chapter in order to provide you with an at-a-glance reference point for each topic.

11.12 FURTHER READING

- Auchmuty, R, 'The Rhetoric of Equ Chapter 3 in Mulcahy, L and Whee *Law*, 2005, London: Glasshouse P
- Birks, P and Chin Nyuk Yin, 'On th

Further Reading

Selected further reading is included at the end of each chapter to provide a pathway for further study.

COMPANION WEBSITE

Now visit the companion website to:

- Revise and consolidate your knowledge of Ill Choice Questions on this chapter
- Test your understanding of the chapter's key

Companion Website

Signposts to relevant material available on the book's popular Companion Website are included at the end of each chapter.

Guide to the Companion Website

'An excellent resource, which will appeal to students; this is probably the best I have seen for any subject!' *Valerie Humphreys, Deputy Head of School of Law*, ***Birmingham City University***

Visit *The Modern Law of Contract*'s Companion Website to discover a comprehensive range of resources designed to enhance the teaching and learning experience for both students and lecturers.

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A free suite of exclusive resources developed to help you to teach the law of contract.

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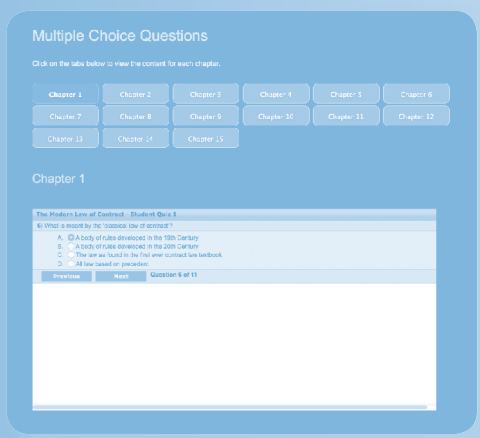
Download a fully customisable bank of questions which test your students' understanding of contract law. These can be migrated to your university's Visual Learning Environment so that they can be customised and used to track student progress.

Diagrams

Use diagrams from the text in your own lecture presentations with our PowerPoint slides.

For Students

Multiple-choice questions

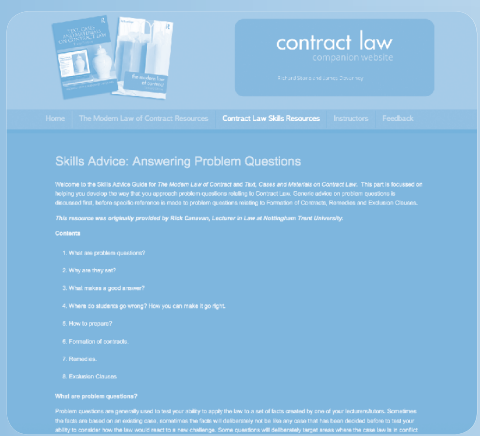


Test your progress by tackling a series of chapter-by-chapter multiple-choice questions. Each answer links you back to the text for further study.

Glossary terms and flashcards

Look up the essential contract law terms in our handy online Glossary or check your knowledge with our interactive Flashcards.

Legal skills guide



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Hone your writing skills by taking on a set of contract law essay and problem questions, and comparing your ideas with the authors' fully worked model answers.

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1.1 OVERVIEW

This chapter is divided into two sections:

First, there is a short introduction to the English law of contract, giving an indication of some of the main issues that arise for discussion in subsequent chapters. The second section undertakes a more thorough analysis of some of the theoretical issues that arise in discussing contract law.

In relation to contractual theory, the order of treatment is:

- What is meant by the 'classical' law of contract? This refers to a body of rules, generally developed by nineteenth-century cases and the first contract textbook writers. It still has great influence in the modern law of contract.
- What is the 'subject matter' of contract law? Is it simply a matter of enforcing promises, or is it concerned with regulating markets or facilitating trade? The 'voluntary agreement' seems to be at its heart.
- Should contracts be looked at as 'discrete', isolated events, or are they part of a continuing relationship between the parties? The work of Macneil, in particular, suggests that a 'relational' analysis is more satisfactory in many situations.
- How is 'contract' distinguished from other areas of law involving civil obligations, such as tort and restitution? The 'voluntary exchange' is one of the distinguishing factors.
- How far is the law of contract governed by general principles, as opposed to specific rules applying to particular types of contract, such as sale of goods, employment, land, credit? It is argued that there is still some room for general principles, though the increasing divide between consumer contracts and those between businesses is reducing their scope.
- What techniques for the analysis of contract can be adopted? Consideration is given to:
  - doctrinal analysis (looking simply at cases and statutes);
  - socio-economic analysis (drawing on other disciplines to help explain the law); and
  - empirical research (investigating what happens in practice between contracting parties).
- How is the EU is having an increasing European influence on English contract law, including proposals for a European contract law?

1.2 INTRODUCTION

The English law of contract is a 'common law' subject. This means that most of its rules and principles are derived from case law, and the application of the doctrine of precedent. There are, however, increasing areas that are affected by statutory provisions, and in particular regulations in the area of consumer contracts that derive from law emanating from the European Union.

The rules forming the English law of contract are, subject to the intervention by statute, applicable to all contracts. The rules of formation, for example, apply to a contract to buy some vegetables in a supermarket as much as to a million pound deal for the supply of goods and services between two multinational corporations. This universality can cause problems where very different types of contracts may have differing requirements, and do not fit easily into 'one size fits all' rules.

Contract law is, as is explained later in this chapter (1.5), concerned with the regulation of agreements, and, in particular, agreements to exchange goods and services for money or other goods or services (or both). Its obligations are generally voluntarily assumed, and on that basis it is distinguishable from the law of tort, which is concerned with obligations that are imposed by the law (e.g. to drive carefully).

What are the issues which arise in trying to regulate agreements, and which are therefore dealt with in more detail in the subsequent chapters of this text?

1.2.1 FORMATION

If agreements are being analysed, the courts need to have some rules for establishing when an agreement has been reached. English law does this not by using formalities in most cases, but by looking simply at what the parties said and did and seeing if these words and actions, viewed objectively, suggest that they had reached an agreement. In particular, courts will normally look for an offer by one party that has been unequivocally accepted by the other party.

Problems in this area can arise when the parties are contracting at a distance, by post or email. The delay in communications may mean that one party may have had a change of mind by the time its message is received, and there will be difficult questions relating to when exactly a communication takes effect.

The issues relating to formation are dealt with in Chapter 2.

1.2.2 ENFORCEABILITY

Just because the parties have made an agreement, this does not necessarily mean that it is legally enforceable. English law has a number of methods of deciding whether an agreement is legally binding, but the most important ones are the concept of 'consideration', and the requirement of an intention to create legal relations.

'Consideration' is a complex topic. It involves a requirement that if an agreement is to be enforced by the courts, it must not be one-sided – a contract involves an exchange, and not a gift. In other words, both parties must be contributing something to the deal for it to be enforceable. For example, the contract may be for the transfer of goods in exchange for payment of a sum of money. In this case the payment of the money would be the 'consideration' for the transfer of the goods. If the goods were to be handed over without any payment, this would be a gift, and would fall outside the scope of the law of contract. The courts have developed extensive rules as to what does and does not constitute valid consideration, which will make an agreement enforceable.

In general, attempts to vary an existing agreement must involve consideration if they are to be enforceable. In some limited circumstances a variation of an agreement may be enforceable, where the other party has reasonably relied on a promise that the variation will take place – this is the doctrine of 'promissory estoppel'.

Finally, in relation to enforceability, just because there is agreement and consideration does not mean that an agreement will in all cases be enforceable. There must also be an intention to create a legal enforceable agreement. A domestic agreement between husband and wife under which the husband agrees to pay for all the repairs to their house in exchange for the wife paying for all the food shopping may have the characteristics of offer, acceptance and consideration, but is unlikely to be intended to be legally enforceable. Commercial agreements will, however, normally be taken to be intended to create a legal relationship.

Issues of enforceability are dealt with in Chapter 3 (consideration and promissory estoppel) and Chapter 4 (intention to create legal relations).

1.2.3 CONTENTS OF THE CONTRACT

Once an agreement has been made, disputes may arise as to what exactly its terms were intended to be. Even if the agreement is in writing, there may be arguments that it is not complete, and that other terms should be read into it, or implied. The courts are reluctant to add to agreements in this way, but will do so in certain carefully defined situations. In some circumstances terms may be implied by statute, for example, the Sale of Goods Act 1979 or the Consumer Rights Act 2015.

There may also be arguments as to what exactly particular terms of the contract were intended to mean. Should the courts follow the literal meaning of the words, if there is evidence that something else was actually intended? Currently the courts are taking the view that they should interpret terms of a contract in the light of all the factual

circumstances, and should not be tied to the literal meaning. This flexibility has its advantages, but can cause problems of uncertainty.

A particular type of clause that can cause problems is the limitation or exclusion clause, whereby one party attempts to limit their liability if they break the contract. Such clauses may be entirely reasonable in many cases, but the courts will look at them very carefully, particularly where there is an imbalance in the bargaining power between the parties (as where a large business is attempting to exclude its liability to an individual consumer). They will want to be sure that the clause was properly incorporated into the contract (e.g. that the other party had appropriate notice) and that the clause does cover the situation that has arisen. In addition most exclusion clauses will now be subject to statutory control in the form of the Unfair Contract Terms Act 1977 (as amended by the Consumer Rights Act 2015) and the Unfair Terms in Consumer Contracts Regulations 1999 (to be replaced by the Consumer Rights Act 2015). These invalidate some types of exclusion, particularly in consumer contracts, and make others only enforceable if they are found to be 'reasonable'. For example, attempts to exclude liability for death or personal injury caused by negligence will always be invalid; attempts to exclude liability for other losses caused by negligence will only be valid if they are reasonable.

The terms of the contract are dealt with in Chapter 6 and exclusion clauses in Chapter 7.

1.2.4 REASONS FOR SETTING THE CONTRACT ASIDE

In some circumstances a contract that has been validly formed will be set aside by the courts, because it is found to have some defect. The circumstances that can lead to this are sometimes referred to as 'vitiating factors'.

One example of a vitiating factor is where one party has been misled into making the contract, by relying on a false statement by the other party – that is, by a 'misrepresentation'. A misrepresentation, even if made innocently, can lead to the contract being set aside. If the misrepresentation was made fraudulently or negligently, then compensation can be awarded. Misrepresentation is discussed fully in Chapter 8.

Sometimes a party will allege that they entered into the contract on the basis of a mistake, and that it should therefore be set aside. The courts are generally reluctant to accept this argument, but will do so if, for example, the contract relates to a cargo in a ship that, unknown to either party, had sunk before the contract was made. Where the other party is aware of the mistake (for example, where they have assumed a false identity in order to encourage the contract), the courts may be more receptive to arguments based on mistake, but still impose fairly restrictive rules as to when the remedy will be available. Mistake is dealt with in Chapter 9.

Issuing threats of violence or other illegal conduct to induce the other party to make a contract will fall under the heading of duress. If proved, the courts will set the contract aside. The concept of duress has been expanded in recent case law to cover, for example, threats of economic action (e.g. to go on strike). As long as the threat involves inappropriate and illegitimate pressure on the other party, it is potentially 'duress'. This concept is dealt with in Chapter 10.

Related to duress is the concept of 'undue influence'. This does not need any threat, but simply a relationship in which one party has influence over the other's decisions, and uses that influence to persuade the person to enter into a contract. If inappropriate influence has been used, then the courts will not allow the contract to be enforced. Examples of situations of potential undue influence include a bank manager over an elderly customer, a solicitor over a client, and in some cases, a husband over a wife. Particular problems can arise where a husband persuades his wife to use their home as security for a business loan from a bank. If the wife later seeks to set her agreement with the bank aside on the basis of her husband's undue influence, can she do so? The courts have struggled to find the appropriate balance between the creditor (bank) and the security (wife) in such situations. The issues arising out of this area are dealt with in Chapter 11.

Clearly the courts would not enforce a contract to commit murder. But this is only a very clear example of a more general rule that the courts will not enforce contracts that involve illegality, or are otherwise contrary to public policy. Difficulties can arise where a contract is on the face of it legal, but can only be performed by one or both parties acting illegally – for example, a contract to buy alcohol, where the seller's licence has expired. The rules for deciding when the courts should set the agreement aside are not always applied consistently, and some of the case law is difficult to reconcile. Illegality is dealt with in Chapter 12.

1.2.5 FRUSTRATION

Sometimes a contract cannot be completed because of circumstances outside the control of either party. For example, the contract is to redecorate a house, and between the making of the contract and performance starting, the house burns down. Where such an event happens, the contract is said to be 'frustrated' and both parties are absolved from future obligations. The main issues in frustration relate to deciding what kind of circumstances are sufficiently serious to frustrate the contract, and in sorting out the effects of frustration. The latter issue is affected by the provisions of the Law Reform (Frustrated Contracts) Act 1943.

Frustration is dealt with in Chapter 13.

1.2.6 PERFORMANCE, BREACH AND REMEDIES

If a party wishes to be paid for their performance of a contract, then they will need to show that they have completed the performance of their obligations under it. Issues may arise as to what constitutes complete performance, and when the other party is entitled to withhold payment until further work is done.

Where a contract has been broken, the party not in breach may seek to terminate the contract. Whether this is possible will depend on the seriousness of the term broken – was it a major term of the contract? In all cases damages will be recoverable for losses that can be demonstrated to have been caused by the breach, subject to rules relating to 'remoteness' (was the loss one that could reasonably be expected to have followed from the breach?) and 'mitigation' (did the party not in breach take all reasonable steps to limit the loss?). Most contract damages will be for economic losses, including lost profits, but in some circumstances damages will be recoverable for non-pecuniary losses (for example, personal injury), including, exceptionally, disappointment and mental distress.

An order to perform a contract ('specific performance') is discretionary, and will not generally be awarded in relation to straightforward commercial transactions, where the payment of damages will constitute an adequate remedy.

Performance, breach and remedies are dealt with in Chapters 14 and 15.

1.3 CONTRACTUAL THEORY

The issues considered in the rest of this chapter are principally concerned with identifying the theoretical bases for the law of contract – what is it, and what is its scope? There are a number of possible approaches to these questions.

It might be asked, for example, what relationships the courts currently regard as being within the scope of the law of contract. Answering this relatively easy question might be of some use, particularly from the practical point of view of deciding how to deal with a dispute between A and B, and whether the courts would be likely to treat it as a contract. The task would, however, be essentially descriptive. If we want to go further and analyse the nature of contract or the contractual relationship, we will need to ask why some situations rather than others are dealt with as contractual, and try to find some rational

basis for distinguishing between 'contract' and 'non-contract'. This is an issue which has been the subject of regular academic discussion over the last 50 years.[1] Moreover, even texts aimed at practitioners are unable to ignore it. *Chitty on Contracts*, the most well-established practitioners' text, has an introductory chapter dealing with the 'nature of contract'. Its more recently published rival, Furmston's *The Law of Contract*,[2] goes even further, including a lengthy first chapter on 'General Considerations' (written by Professor Roger Brownsword).[3]

Our starting point is the concept of the 'classical law of contract', which many would regard as still the dominant approach, certainly within the decisions of the courts on contractual issues.

1.4 THE CLASSICAL LAW OF CONTRACT

It is generally accepted in modern writings on the English law of contract that during the latter half of the nineteenth century, a concept of contract developed, together with an associated body of legal doctrine, which is now referred to as the 'classical law of contract'. This is not necessarily a matter of precise historical accuracy. As Wightman has pointed out,[4] the concept of the classical law can be said to be 'invented' in two senses. First, although based on decisions of the courts, the synthesis of those decisions into a (more or less) coherent body of law was largely the work of the 'treatise writers',[5] whose work decided which cases would be given prominence, and who encouraged the formulation of principles of general application to a wide range of transactions. Second, the recognition of the model of contract law which emerged from the latter part of the nineteenth century as 'classical', with the intention of using that model as the basis for an argument that the requirements of 'modern' contract law were different and that adherence to the classical model was inhibiting its development, is largely the product of the work started by commentators writing in the 1970s.[6]

Whatever the accuracy of the precise historical origins of the classical theory, it is now generally accepted that it is centred around the concept of 'freedom of contract', probably as a reflection of the dominance in the nineteenth century of *laissez-faire* economic attitudes. At a time of the swift industrialisation and increasing commercialisation of society, the best way of allowing wealth to develop was to let those involved in business regulate their own affairs, with the courts simply intervening to settle disputes. The parties to a contract will be governed by rational self-interest,[7] and giving effect to transactions which result from this will be to the benefit of both the parties and society.

1 See, for example, Macaulay, 1963; Gilmore, 1974; Simpson, 1975a; Macneil, 1978; Atiyah, 1979; Wightman, 1996; Collins, 2003; and Brownsword, 2006.

2 First published by Butterworths in 1999; 4th edn, 2010.

3 This chapter was published separately in the title *Contract Law: Themes for the Twenty-first Century*, 2000, London: Butterworths. It is now in its second edition, and cited here as 'Brownsword, 2006'. Unfortunately, the pagination is not the same in the two versions of the text. The references here are therefore to the page numbers in the second edition of Brownsword (i.e. Brownsword 2006). Lord Steyn in the Preface to Furmston, 1999, commented that Brownsword's chapter 'examines the grand themes of our contract law in an impressive style. Nothing quite like it has ever been published in English law.'

4 Wightman, 1996, p 49. See also Brownsword, 2006, pp 46–50, and Swain, 2010. Chapter 5 of Wightman's book, entitled 'The Invention of Classical Contract', provides a useful summary of the development of the classical theory and its main elements. See also Chapter 1 in Beatson and Friedmann, 1995, especially pp 7–17.

5 For example, Powell, whose first edition appeared in 1790, and Anson, whose *Law of Contract* (designed for students) was first published in 1879.

6 See, in particular, Horwitz, 1974; Gilmore, 1974; Atiyah, 1979. Note that Horwitz's view of the historical development of contract was strongly challenged by Simpson, 1979.

7 In other words, each party will seek to organise and operate the contract in a way that produces the maximum 'utility' or benefit to that party.

'Freedom of contract' in this context has two main aspects.[8] The first is that it is the individual's choice whether or not to enter into a contract, and if so with whom – in other words, the freedom *to* contract, or 'party freedom'. The second is the freedom to decide on the content of the contractual obligations undertaken, or 'term freedom'. This allows parties to make unwise, and even unfair, bargains – it is their decision, and the courts will not generally intervene to protect them from their own foolishness.

The paradigmatic contract which emerges from the classical theory has the following characteristics:

(a) It is based on an exchange of promises.
(b) It is executory. This means that the contract is formed, and obligations under it arise, before either side has performed any part of it.
(c) It involves an 'exchange', so that each side is giving something in return for the other's promise. It is the existence of this mutuality (given effect through the doctrine of 'consideration')[9] which generally gives rise to enforceability.[10]
(d) The content of the contractual obligations is determined by deciding what the parties agreed, or what reasonable parties in their position would have agreed, at the time the contract was made. Later developments are of no significance.
(e) Disputes about a contract can generally be determined by asking what the parties expressly or impliedly agreed (or should be taken to have agreed) in the contract itself. This is sometimes referred to as the 'will theory' of contract.
(f) The transaction is discrete, rather than being part of a continuing relationship.
(g) The role of the court is to act as 'umpire' or 'arbiter', giving effect to the parties' agreement. In particular, it has no role in deciding whether or not the transaction is 'fair'.

There is probably also an underlying assumption that the parties are of equal bargaining power.

The type of contract which most closely fits the above paradigm is probably the commercial contract for the sale of goods, where the buyer and seller agree that at some agreed date they will exchange the ownership of goods of a specified type for a specified sum of money. In practice, however, most contracts are not of this kind, and attempts to apply to them rules which were designed to be suitable for the paradigmatic case are likely to produce tensions and problems. Nevertheless, the classical theory of contract, and its model of the typical contract, can still be seen to cast its shadow over English law. In the latter part of the twentieth century it was the subject of sustained attack by academic commentators, and many judicial decisions can be seen to have moved, in practice at least, from the strict classical formulations. There is still, however, a reluctance to abandon them, and it is frequently the case that the courts, when involved in a development away from the classical model, will continue to use language which suggests that they are being faithful to it.[11] The challenge for the student of the modern law of contract in England is to

8 Brownsword, 2006, pp 50–1. Brownsword also identifies 'sanctity of contract' – the fact that 'parties are to be held to the agreements that they have freely made': ibid, p 53. This seems to be a consequence of freedom of contract, rather than an element in it, however. Such a principle might also apply even in the absence of party freedom and term freedom.

9 For which see Chapter 3.

10 This does not, however, take account of the role of the contract under seal, or deed, where no mutuality is required for a promise to be binding. See further on this, Chapter 3, 3.3.

11 A particularly clear example of this is the Court of Appeal's decision in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1; [1990] 1 All ER 512, in which lip service was paid to the classical formulation of the doctrine of consideration, while in fact the decision departed significantly from it: see further, Chapter 3, 3.9.8.

reconcile the fact that it is still rooted in classical theory, at least in the way in which its concepts are expressed, while at the same time developing away from it. This is the reason why this book has adopted a format and chapter division which is largely traditional. It is within this traditional framework that the courts continue to consider contract cases. The substance of many of their decisions, however, and virtually all the interventions of Parliament, are taking the law in new directions. The form may be 'classical', but the content is 'modern', and this tension must be kept in mind in considering all that follows.

With this background to the development of the English law of contract in mind, we can now turn to the question of what exactly is meant by the 'law of contract'. What is its scope, and what are its boundaries?

1.5 THE SUBJECT MATTER OF CONTRACT LAW

What is the law of contract about? This is a question to which, perhaps surprisingly, there is no clear, universally accepted answer. There are, however, several candidates for the basis of the legal enforceability of contractual obligations. They can be viewed, for example, as a means of:

(a) enforcing promises; or
(b) regulating the market in the provision of goods and services; or
(c) facilitating exchanges (for example, of goods or services for money).

Any of these individually, or some combination of them, can be put forward as being at the root of the law of contract, but none of them is without difficulty.

As we have seen, the idea of the 'promise' is central to the classical law of contract, and some modern commentators are happy to continue to regard this as its distinguishing feature. Burrows, for example, asserts that 'The law of contract is concerned with binding promises. It looks at what constitutes a binding promise and how such a promise is made; at the remedies for breach of such a promise; and at who is entitled to those remedies.'[12] There are, however, severe limitations to an interpretation of contract based on promises. Although some contracts are clearly made by the exchange of promises – for example, 'I promise to build a house for you in accordance with these plans in exchange for your promising to pay me £100,000 on completion of the work' – there are many that do not easily fit this model. In particular, as has been pointed out judicially by Lord Wilberforce, many everyday transactions, such as buying goods in a shop or travelling by bus, do not do so without considerable strain.[13] They can be accommodated at best by taking the view that there is an *implicit* promise involved – for example, that the bus is travelling on the route indicated by its signboard. But in some situations it is difficult to find even a promise of this kind. In the typical shop transaction, a person takes goods to a till and hands over money. The contract has the effect of transferring the ownership of the goods from the seller to the buyer and of the money from the buyer to the seller. What promises are involved in a one-off transaction of this kind, which may well be conducted without any communication between the participants, and indeed increasingly frequently by using a 'self-service' till? The only one that can be identified is that the seller is implicitly 'promising' that the goods are of a satisfactory quality. However, since the obligation to supply goods which are satisfactory is imposed by statute and cannot be avoided in a consumer

12 Burrows, 1998, p 3: see, also, Fried, 1981.
13 See Lord Wilberforce in *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd, The Eurymedon* [1975] AC 154, p 167; [1974] 1 All ER 1015, pp 1019–20.

contract,[14] it is not necessary to use the language of 'promises' to explain this aspect of the transaction.

Even in commercial transactions, as the case in which Lord Wilberforce made the statement quoted above itself demonstrated, there are also some situations where contractual rights and liabilities are assumed to exist, but it is difficult to see that there has been any making of promises. The parties in the case which Lord Wilberforce was discussing assumed that stevedores unloading goods from a ship would have the benefit of an exemption clause contained in a contract between the owners of the goods and the carriers. No explicit promise of this kind was made to the stevedores, however. Indeed, in contracts of this type, the identity of the stevedores might well be unknown at the time the contract was entered into. The court resolved this effectively by 'imputing' a promise from the owners to the stevedores, via the agency of the carriers, that they would have the benefit of the clause.[15]

On the other hand, there are clearly some situations where promises *are* at the heart of the contractual obligation. Contracts for the purchase and sale of commodities on the futures market plainly depend on the assumption that promises will be kept or that, if broken, compensation will be payable. Another example is the doctrine of promissory estoppel,[16] which is based on the fact that it requires a person who makes a promise to be held to it, even though there is no consideration given for it.

The conclusion must be, therefore, as Brownsword has pointed out, that although it is possible to use 'promise' as a necessary definition of contract, this is only so if we include 'express, implicit and imputed promises'.[17] 'Promise' is not a sufficient condition, however, since there are situations in which clear and explicit promises are not enforced. In general, for example, promises that are neither supported by consideration nor contained in a deed will not generally be treated as binding on the promisor.[18] In other areas where apparently gratuitous promises have been held to be binding, such as in the case of *Williams v Roffey Bros & Nicholls (Contractors) Ltd*,[19] the courts have been at pains to find 'consideration', even if this has involved 'stretching' this concept so as not to be seen to be departing from the orthodoxy that gratuitous promises are not binding.

Furthermore, there are agreements that appear to have all the hallmarks of the archetypal classical contract – that is, an exchange of promises and consideration – which will nevertheless not be treated as binding. This may arise where there is no 'intention to create legal relations'.[20] This may be because the arrangement has been made in a domestic context.[21] It can also arise, however, in a commercial context where it has been made clear that the agreement is 'binding in honour only'.[22] In both types of case, the courts are giving effect to what they see as being the intentions of the parties. This area,

14 See Sale of Goods Act 1979, ss 13 and 14, and the Unfair Contract Terms Act 1977, s 6, discussed in Chapter 6, 6.6.11 to 6.6.14, and Chapter 7, at 7.7.19.

15 For further discussion of this case, see Chapter 5, 5.12.1.

16 See Chapter 3, 3.11.

17 Brownsword, 2006, pp 24–5.

18 See, for example, *Foakes v Beer* (1884) 9 App Cas 605 (Chapter 3, 3.13.1 to 3.13.3); and *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] QB 833; [1989] 1 All ER 641 (Chapter 10, 10.4.2). The main exception to this principle is to be found in the concept of promissory estoppel: *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130; [1956] 1 All ER 256. Even here it should be noted that the gratuitous promise became unenforceable once the conditions which gave rise to its being made had disappeared (that is, the Second World War had come to an end). See further, Chapter 3, 3.11 and 3.13.3.

19 [1991] 1 QB 1; [1990] 1 All ER 512. This case is discussed in detail in Chapter 3, 3.9.9.

20 See Chapter 4.

21 For example, *Balfour v Balfour* [1919] 2 KB 571 – arrangement for a husband to provide financial support for his wife during the marriage (as opposed to following its break-up). See below, Chapter 4, 4.3.

22 For example, *Rose and Frank Co v JR Crompton and Bros Ltd* [1923] 2 KB 261. See below, Chapter 4, 4.4.