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Preface

My aim in writing the eleventh edition of this book has not changed from the stated aim of previous editions: namely, to provide a clear and straightforward account of the basic rules of English contract law. I have also sought to introduce the reader to some of the debates about the nature, the scope and the functions of the law of contract and to discuss some of the wider controversies which surround certain basic doctrines of English contract law, such as consideration. In discussing these issues I have attempted to build a bridge between this introductory work and some of the more advanced and detailed writings on the law of contract by making frequent reference throughout the book to both the periodical literature and the standard textbooks on the law of contract (full citations are contained in the Bibliography located at the end of the book). My hope is that these references will encourage the reader to pursue the issues raised in this book in greater detail in the writings to which I have made reference.

The text has been fully revised and updated to take account of the numerous developments in the law which have taken place since the publication of the previous edition. The principal change which has occurred since the last edition is the revocation of the Unfair Terms in Consumer Contracts Regulations 1999 and their replacement by Part 2 of the Consumer Rights Act 2015. This has necessitated the introduction of a new Chapter 18 in order to deal with the new law. It has also had a significant impact on Chapter 11 given that the Unfair Contract Terms Act 1977 no longer applies to contracts between a business and a consumer. Other topics where there has been a significant element of re-writing include the discussion of good faith (at Section 12.10) and the principles applied by the courts when seeking to interpret commercial contracts (see Section 9.6).

Finally, I must acknowledge the debts which I have incurred in writing this edition. I am grateful to my daughter Rachel for her assistance with the proofs. I must also acknowledge the assistance which I have derived from colleagues and students who have helped to clarify my thoughts and offered a number of constructive criticisms and suggestions. But my greatest debt continues to be to my wife, Rose, and our children, Jenny, Sarah, Rachel and Katie, who are now joined by AJ, Richard and Sam, and grandchildren Emma and Alfie. I am grateful to them for their encouragement and support.

The book is dedicated to the memory of my grandparents.

I have endeavoured to state the law on the basis of the materials available to me on 31 March 2015.

Ewan McKendrick
University Offices,
Oxford,
31 March 2015

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Chapter 1
Introduction

1.1 Introduction

> If the 'law of contract' were not already entrenched in the traditions of legal education, would anyone organise a course around it, let alone produce books expounding it? (Wightman (1989) 'Reviving Contract', *Modern Law Review*, 52, 116)

The fact that a lawyer can ask such a question would, no doubt, confound laymen. Yet, it is true that the scope, the basis, the function and even the very existence of the law of contract are the subject of debate and controversy among academic lawyers.

But such questioning seems absurd. After all, we enter into contracts as a regular part of life, and generally we experience no difficulty in so doing. Simple cases include the purchase of a morning newspaper or the purchase of a bus ticket when travelling to work. What doubt can there possibly be about the existence of such contracts or their basis? However, behind the apparent simplicity of these transactions, there lurks a fierce controversy. In an introductory work of this nature, we cannot give full consideration to these great issues of debate. The function of this chapter is simply to identify some of these issues so that the reader can bear them in mind when reading the ensuing chapters and to enable the reader to explore them further in the readings to which I shall make reference.

1.2 The scope of the law of contract

A good starting point is the scope of the law of contract. Contracts come in different shapes and sizes. Some involve large sums of money, others trivial sums. Some are of long duration, while others are of short duration. The content of contracts varies enormously and may include contracts of sale, hire-purchase, employment and marriage. Nevertheless, we shall not be concerned with all such contracts in this book. Contracts of employment, marriage contracts, hire-purchase contracts, consumer credit contracts, contracts for the sale of goods, contracts for the sale of land, mortgages and leasehold agreements all lie largely outside the scope of this book. Such contracts have all been the subject of distinct regulation and are dealt with in books on employment law, family law, consumer law, commercial law, land law and landlord and tenant law, respectively. At this stage, you might be forgiven if you were to ask the question: if this book is not about these contracts, what is it about, and what is its value?

The answer to the first part of such a question is that this book is concerned with what are called the 'general principles' of the law of contract, and these general principles are usually derived from the common law (or judge-made law). Treatises on the general principles of the law of contract are of respectable antiquity in England, and can be traced back to Pollock (1875) and Anson (1879). This tradition has been maintained today in works such as Treitel (2011), Anson (2010) and Cheshire, Fifoot and Furmston (2012). One might have expected that these treatises would gradually disappear in the light of the publication of books on, for example, the contract of employment or the contract of hire-purchase, which subject the rules relating to such contracts

to close examination. Yet, textbooks on the 'general principles' of the law of contract have survived and might even be said to have flourished.

The existence of such general principles has, however, been challenged by Professor Atiyah (1986b), who maintains that these 'general' principles 'remain general only by default, only because they are being superseded by detailed *ad hoc* rules lacking any principle, or by new principles of narrow scope and application'. Atiyah argues that 'there is no such thing as a typical contract at all'. He maintains (1986a) that it is 'incorrect today to think of contract law as having one central core with clusters of differences around the edges'. He identifies the classical model of contract as being a discrete, two-party, commercial, executory exchange but notes that contracts can be found which depart from each feature of this classical model. Thus, some contracts are not discrete but continuing (landlord and tenant relationships), some are not two-party but multi-party (the contract of membership in a club), some are not commercial but domestic (marriage), some are not executory (unperformed) but executed (fully performed) and finally some do not depend upon exchange, as in the case of an enforceable unilateral gratuitous promise. Atiyah concludes by asserting that we must 'extricate ourselves from the tendency to see contract as a monolithic phenomenon'.

Atiyah uses this argument in support of a wider proposition that contract law is 'increasingly merging with tort law into a general law of obligations'. But one does not have to agree with Atiyah's wider proposition to accept the point that the resemblance between different types of contract may be very remote indeed. A contract of employment is, in many respects, radically different from a contract to purchase a chocolate bar. The considerations applicable to a contract between commercial parties of equal bargaining power may be very different from those applicable to a contract between a consumer and a multinational supplier (see Chapters 17 and 18).

This fragmentation of the legal regulation of contracts has reached a critical stage in the development of English contract law. The crucial question which remains to be answered is: do we have a law of contract or a law of contracts? My own view is that we are moving slowly in the direction of a law of contracts as the 'general principles' decline in importance.

Given this fragmentation, what is the value of another book on the general principles of contract law? The principal value is that many of the detailed rules relating to specific contracts have been built upon the foundation of the common law principles. So it remains important to have an understanding of the general principles before progressing to study the detailed rules which have been applied to particular contracts. The general principles of formation, content, misrepresentation, mistake, illegality, capacity, duress and discharge apply to all contracts, subject to statutory qualification. These principles therefore remain 'general', but only 'by default'.

1.3 The basis of the law of contract

The basis of the law of contract is also a matter of considerable controversy. Atiyah has written (1986e) that 'modern contract law probably works well enough in the great mass of circumstances but its theory is in a mess'. There are many competing theories which seek to explain the basis of the law of contract (on which see generally Smith, 2004).

The classical theory is the will theory. Closely associated with *laissez-faire* philosophy, this theory attributes contractual obligations to the will of the parties. The law of contract is perceived as a set of power-conferring rules which enable individuals

to enter into agreements of their own choice on their own terms. Freedom of contract and sanctity of contract are the dominant ideologies. Parties should be as free as possible to make agreements on their own terms without the interference of the courts or Parliament, and their agreements should be respected, upheld and enforced by the courts. As Lord Toulson observed in *Prime Sight Ltd v Lavarello* [2013] UKPC 22; [2014] AC 436, [47], 'parties are ordinarily free to contract on whatever terms they choose and the court's role is to enforce them'. However, the will theory cannot explain all of the rules that make up the law of contract. Thus it is not possible to attribute many of the doctrines of contract law to the will of the parties. Doctrines such as consideration, illegality, frustration and duress cannot be ascribed to the will of the parties, nor can statutes such as the Unfair Contract Terms Act 1977 or the Consumer Rights Act 2015.

The will theory has, however, been revived and subjected to elegant refinement by Professor Fried (1981). Fried maintains that the law of contract is based upon the 'promise-principle', by which 'persons may impose on themselves obligations where none existed before'. The source of the contractual obligation is the promise itself. But, at the same time, Fried concedes that doctrines such as mistake and frustration (Chapter 14) cannot be explained on the basis of his promise-principle. Other non-promissory principles must be invoked, such as the 'consideration of fairness' or 'the encouragement of due care'.

But Fried's theory remains closely linked to *laissez-faire* ideology. Fried maintains that contract law respects individual autonomy and that the will theory is 'a fair implication of liberal individualism'. He rejects the proposition that the law of contract is an appropriate vehicle for engaging in the redistribution of wealth. But his theory is open to attack on two principal grounds.

The first is that it is difficult to explain many modern contractual doctrines in terms of liberal individualism or *laissez-faire* philosophy. The growth of standard form contracts and the aggregation of capital within fewer hands has enabled powerful contracting parties to impose contractual terms upon consumers and other weaker parties. The response of the courts and Parliament has been to place greater limits upon the exercise of contractual power. Legislation has been introduced to regulate employment contracts and consumer credit contracts in an effort to provide a measure of protection for employees and consumers. Such legislation cannot be explained in terms of *laissez-faire* ideology, nor can the expansion of the doctrines of duress and undue influence, or the extensive regulation of exclusion clauses which Parliament has introduced (see Chapter 11 and, more generally, see Chapter 18, which examines the law relating to unfair terms in consumer contracts). Conceptions of fairness seem to underpin many of the rules of contract law (see Chapter 17). Such departures from the principles of liberal individualism have led some commentators to argue that altruism should be recognised as the basis of contract law (Kennedy, 1976), while others have argued that the law of contract should have as an aim the redistribution of wealth (Kronman, 1980). We shall return to this issue in Chapters 17 and 18.

A second attack on the promise-principle has been launched on the ground that, in many cases, the courts do not uphold the promise-principle because they do not actually order the promisor to carry out his promise. The promisee must generally content himself with an action for damages. But, as we shall see (in Chapter 21), the expectations engendered by a promise are not fully protected in a damages action. One of the principal reasons for this is the existence of the doctrine of mitigation (see Section 21.10). Suppose I enter into a contract to sell you ten apples for £2. I then refuse to perform my

side of the bargain. I am in breach of contract. But you must mitigate your loss. So you buy ten apples for £2 at a nearby market. If you sue me for damages, what is your loss? You have not suffered any, and you cannot enforce my promise. So how can it be said that my promise is binding if you cannot enforce it? Your expectation of profit may be protected but, where that profit can be obtained elsewhere at no loss to you, then you have no effective contractual claim against me. Your expectations have been fulfilled, albeit from another source.

Although you cannot enforce my promise, it is very important to note that in our example you suffered no loss, and I gained no benefit. Let us vary the example slightly. Suppose that you had paid me in advance. The additional ingredients here are that you have acted to your detriment in reliance upon my promise, and I have gained a benefit. Greater justification now appears for judicial intervention on your behalf. Can it therefore be argued that the source of my obligation to you is not my promise, but your detrimental reliance upon my promise or your conferment of a benefit upon me in reliance upon my promise? Atiyah has written (1986b) that 'wherever benefits are obtained, wherever acts of reasonable reliance take place, obligations may arise, both morally and in law'. This argument is one of enormous significance. It is used by Atiyah (1979) in an effort to establish a law of obligations based upon the 'three basic pillars of the law of obligations, the idea of recompense for benefit, of protection of reasonable reliance, and of the voluntary creation and extinction of rights and liabilities'. The adoption of such an approach would lead to the creation of a law of obligations and, in consequence, contract law would cease to have a distinct identity based upon the promise-principle or the will theory (see further Section 1.4). This is why this school of thought has been called 'the death of contract' school (see Gilmore, 1974). We shall return to these arguments at various points in this book, especially in Chapters 21 and 22.

My own view is that Fried correctly identifies a strong current of individualism which runs through the law of contract. A promise does engender an expectation in the promisee and, unless a good reason to the contrary appears, the courts will call upon a defaulting promisor to fulfil the expectation so created. But the critics of Fried are also correct in their argument that the commitment to individual autonomy is tempered in its application by considerations of fairness, consumerism and altruism. These conflicting ideologies run through the entire law of contract. (For a fuller examination of these ideologies under the titles of 'Market-Individualism' and 'Consumer-Welfarism', see Adams and Brownsword, 1987.) The law of contract is not based upon one ideology; both ideologies are present in the case law and the legislation. Indeed, the tension between the two is a feature of the law of contract. Sometimes 'market-individualism' prevails over 'consumer-welfarism'; at other times 'consumer-welfarism' triumphs over 'market-individualism'. At various points in this book, we shall have occasion to note these conflicting ideologies and the tensions which they produce within the law.

1.4 Contract, tort and restitution

A further difficulty lies in locating the law of contract within the spectrum of the law of civil obligations. Burrows (1983) has helpfully pointed out that the law of obligations largely rests upon three cardinal principles. The first principle is that expectations engendered by a binding promise should be fulfilled. Upon this principle is founded the law of contract. The second principle is that compensation must be granted for the wrongful infliction of harm. This principle is reflected in the law of tort. A tort is a

civil wrong, such as negligence or defamation. Let us take an example to illustrate the operation of the law of tort. You drive your car negligently and knock me down. You have committed the tort of negligence. Harm has wrongfully been inflicted upon me, and you must compensate me. The aim of the award of compensation is not to fulfil my expectations. The aim is to restore me to the position which I was in before the accident occurred, to restore the 'status quo' or to protect my 'reliance interest'.

The third principle is that unjust enrichments must be reversed. This principle is implemented by the law of restitution or, to use the terminology which is gradually gaining acceptance, the law of unjust enrichment. There are three stages to a restitutionary claim. First, the defendant must be enriched by the receipt of a benefit; second, that enrichment must be at the expense of the claimant; and, finally, it must be unjust for the defendant to retain the benefit without recompensing the claimant. The last stage does not depend upon the unfettered discretion of the judge; there are principles to guide a court in deciding whether, in a particular case, it is unjust that the defendant retain the benefit without recompensing the claimant (see Burrows, 2010). The classic restitutionary claim arises where I pay you money under a mistake of fact. I have no contractual claim against you because there is no contract between us. Nor have you committed a tort. But I do have a restitutionary claim against you. You are enriched by the receipt of the money, that enrichment is at my expense, and the ground on which I assert that it is unjust that you retain the money is that the money was paid under a mistake of fact.

Contract, tort and restitution therefore divide up most of the law based upon these three principles, and they provide a satisfactory division for the exposition of the law of obligations. This analysis separates contract from tort and restitution on the ground that contractual obligations are voluntarily assumed, whereas obligations created by the law of tort and the law of restitution are *imposed* upon the parties by the operation of rules of law. Occasionally, however, these three principles overlap, especially in the context of remedies (Chapter 22). Overlaps will also be discussed in the context of misrepresentation (Chapter 13) and third-party rights (Chapter 7).

Finally, it must be noted that these divisions are not accepted by writers such as Professor Atiyah. His recognition of reliance-based and benefit-based liabilities cuts right across the three divisions. The writings of Atiyah deserve careful consideration, but they do not represent the current state of English law. Although we shall make frequent reference to the writings of Atiyah, we shall not adopt his analysis of the law of obligations. Instead, it will be argued that the foundation of the law of contract lies in the mutual promises of the parties and, being founded upon such voluntary agreement, the law of contract can, in the vast majority of cases, be separated from the law of tort and the law of restitution.

1.5 Contract and empirical work

Relatively little empirical work has been done on the relationship between the rules that make up the law of contract and the practices of the community which these rules seek to serve. The work that has been done (see, for example, Beale and Dugdale, 1975; Lewis, 1982) suggests that the law of contract may be relied upon in at least two ways. The first is at the planning stage. The rules which we shall discuss in this book may be very important when drawing up the contract and in planning for the future. For example, care must be taken when drafting an exclusion clause to ensure, as far as

possible, that it is not invalidated by the courts (see Chapter 11). Secondly, the law of contract may be used by the parties when their relationship has broken down. Here the rules of contract law generally have a less significant role to play than at the planning stage. The rules of contract law are often but one factor to be taken into account in the resolution of contractual disputes. Parties may value their good relationship and refuse to soil it by resort to the law. Litigation is also time-consuming and extremely expensive, and so the parties will frequently resort to cheaper and more informal methods of dispute resolution. In the remainder of this book, we shall discuss the rules that make up the law of contract, but it must not be forgotten that in the 'real world' the rules of contract law may be only one of many factors taken into account by the parties on the breakdown of a contractual relationship. This is not to suggest that there is no connection between the formal rules of the law of contract and the 'real world' of the parties' relationship. In many cases, the relationship between the parties is governed both by informal understandings (or 'relational norms') and by the formal contract document and the rules of contract law, with the influence of these different factors depending upon the circumstances of the individual case (Mitchell, 2009).

1.6 A European contract law?

The subject-matter of this book is the English law of contract, and so the focus is upon the rules that make up the English law of contract. But it should not be forgotten that we live in a world which is becoming more interdependent and where markets are no longer local or even national but are, increasingly, international. The creation of global markets may, in turn, encourage the development of an international contract and commercial law. There are two dimensions here.

The first relates to our membership of the European Union; the second is the wider move towards the creation of a truly international contract law. The first issue relates to the impact which membership of the European Union is likely to have on our contract law. As yet, membership has had relatively little direct impact, but this is unlikely to remain the case. An example of its potential impact is provided by the European Directive on Unfair Terms in Consumer Contracts (93/13/EEC) which was first enacted into UK law in the form of the Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159). These were then revoked and re-enacted in the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) which in turn were revoked and re-enacted in Part 2 of the Consumer Rights Act 2015. These rules give to the courts greater powers to strike down unfair terms in consumer contracts which have not been individually negotiated. The purpose which lay behind the Directive, as stated in Article 1, was 'to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in consumer contracts'. The Directive and the Regulations will be discussed in more detail in Chapter 18, but the issue which concerns us at this point is the potential which European Union law has to intrude into domestic contract law. Some clue as to the likely reach of EU law can be found in what is now Article 114 of the Treaty on the Functioning of the European Union, which gives the European Parliament and the Council of the European Union the power to adopt measures which have as their object 'the establishment and functioning of the internal market'. This Article formed the legal basis for the Unfair Terms Directive, as can be seen from its preamble where it is stated:

> whereas in order to facilitate the establishment of a single market and to safeguard the citizen in his role as consumer when buying goods and services by contracts which are governed

> by the laws of other Member States than his own, it is essential to remove unfair terms from those contracts.

It can be argued that differences between the substantive laws of Member States do act as a restriction on intra-Community trade because contracting parties are generally unsure of the legal rules which prevail in the different Member States and are therefore more hesitant about contracting with people or companies in other Member States. For example, an English supplier selling goods to an Italian customer will generally want to ensure that the contract is governed by English law because he is ignorant of the legal position in Italy. Conversely, the Italian customer will wish to ensure that the contract is governed by Italian law for the reason that he does not know the law in England. This gives rise to what lawyers call the 'conflict of laws'. If the law was to be the same in each Member State, these problems would not arise, and a further barrier to intra-Community trade would be removed.

The Unfair Terms Directive remains the principal example of the intervention of European law into domestic contract law. But there are other examples and we are beginning to seek the makings of a European law of consumer contracts. Recent examples include the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277), the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) and the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870).

There have also been attempts to develop a much more expansive role for European law and its institutions in the regulation of contract law. On 1 July 2010, the European Commission issued a Green Paper on 'policy options for progress towards a European Contract Law for consumers and businesses' (COM (2010) 348 final). This is the latest stage in a process which has been ongoing for more than a decade.

A range of options is currently on the table. At one end of the spectrum is a 'non-binding instrument, aiming at improving the consistency and quality of EU legislation'. A non-binding instrument is one which does not have the force of law. A possible model is provided by the Principles of European Contract Law. The Principles were drawn up by the Commission on European Contract Law (a non-governmental body of lawyers drawn from the Member States). The Principles were divided into 17 chapters: general provisions, formation, authority of agents, validity, interpretation, contents and effects, performance, non-performance and remedies in general, particular remedies for non-performance, plurality of parties, assignment of claims, substitution of new debtor: transfer of contract, set-off, prescription, illegality, conditions and capitalisation of interest. Reference will be made to the Principles at various points in this book. Another version of a non-binding instrument is the so-called 'toolbox' which could be used by the Commission 'when drafting proposals for new legislation or when reviewing existing measures'. A 'toolbox' of this nature has the potential to improve the coherence of European contract law and to improve the quality of European legislation.

At the other end of the spectrum is 'a binding instrument which would set out an alternative to the existing plurality of national contract law regimes, by providing a single set of contract law rules'. The most radical option is a regulation establishing a European Civil Code, the scope of which would extend beyond contract law. Only slightly less radical is a regulation establishing a European Contract Law which 'could replace the diversity of national laws with a uniform European set of rules, including mandatory rules affording a high level of protection for the weaker party'. While this

displacement of national rules of contract law would promote the cause of the harmonisation of contract law, it is unlikely that many European States will be willing to take this step in the short to medium term. A further alternative would be to establish a Directive on European Contract Law which 'could harmonise national contract law on the basis of minimum common standards'. Such a Directive might be of particular benefit to consumers, but it is probably an awkward half-way house that will not find general acceptance. For some, it would be too limited because it does 'not necessarily lead to uniform implementation and interpretation of the rules', while for others the setting of minimum common standards would represent an unwarranted intrusion into national contract law.

The final option canvassed in the Green Paper is a regulation setting up an optional instrument of European Contract Law. An optional instrument would exist alongside the national law of Member States and would give to contracting parties the choice between domestic (or national) law and the optional instrument. Thus, it would 'insert into the national laws of the 27 Member States a comprehensive and, as much as possible, self-standing set of contract law rules which could be chosen by the parties as the law regulating their contracts'. The setting up of such a parallel system would not be without difficulty. It would add another level of complexity (given that the optional instrument would exist alongside the various domestic laws of Europe), and it would only have effect if selected by the parties. Contracting parties are probably more likely to select national law in preference to a new, optional instrument. But, if progress is to be made towards the creation of a European contract law, the optional instrument is probably an essential first step on that road.

That first step was taken in the form of a Common European Sales Law ('CESL') which was proposed by the European Commission (COM (2011) 635 final). But the proposal has encountered numerous objections and such is the strength of these objections that it seems unlikely that it will be implemented. The proposal originally encompassed cross-border contracts for the sale of goods, the supply of digital content and related services but its scope has been significantly narrowed as the proposal has undergone consideration. It is now confined to distance contracts and will focus on contracts concluded online. While the proposal has secured the support of the European Parliament, the opposition to it remains substantial, including opposition from the UK government. Even in the unlikely event that such a limited optional instrument secures approval, it will not displace national contract law and so the future of English contract law is safe at least for the medium term.

1.7 An international contract law?

A broader vision of the future is concerned with the internationalisation of contract law. There are, essentially, two different ways of proceeding. The first is the production of non-binding statements of principle or model contracts; the second is the attempt to impose mandatory uniform rules on the international community.

The first category consists of non-binding statements of principle and model contracts or standard contract terms. We shall give one example from each category. The most important example of a non-binding statement of principles is to be found in the UNIDROIT Principles of International Commercial Contracts. The Principles were first published in 1994 and are now in their third edition. The third edition, agreed in 2010, consists of 211 Articles, and each Article is accompanied by a brief commentary setting

out the reasons for its adoption and its likely practical application. These Articles are not intended to be imposed upon the commercial community in the form of mandatory rules of law. They are non-binding principles which, it is hoped, parties to international commercial contracts will incorporate into their contracts either as a set of contract terms or as the law applicable to the contract. While national courts are presently either unwilling or unable to recognise the Principles as a valid choice of law and thus the law applicable to the contract, the same cannot be said of arbitrators. The UNIDROIT Principles now have a significant role to play in international commercial arbitration. They are particularly useful where parties from different parts of the world are unable to agree on the law applicable to the contract: the UNIDROIT Principles offer a neutral set of Principles which may be acceptable to both parties to the contract.

Standard contract terms also have an important role to play in international commerce. Two prominent examples are the INCOTERMS (a set of standard trade terms sponsored by the International Chamber of Commerce) and the FIDIC (Fédération Internationale des Ingénieurs-Conseils) Conditions of Contract for Works of Civil Engineers, which have achieved widespread acceptance in international sales and international construction contracts respectively. There can be little to object to in such developments because they seek to bring about harmonisation through persuasion rather than imposition. Their alleged weakness is, however, the fact that they are not mandatory. They can therefore be ignored or amended by contracting parties and thus are a rather uncertain method of seeking to achieve uniformity.

In an effort to ensure a greater degree of uniformity, it has been argued that there is greater scope for mandatory rules of law. But the attempt to impose uniform terms on the commercial community has given rise to considerable controversy. The most notable example of an international convention in this category is provided by the United Nations Convention on Contracts for the International Sale of Goods, commonly known as the Vienna Convention or CISG. Unlike earlier conventions, the Vienna Convention does not enable states to ratify the Convention on terms that it is only to be applicable if the parties choose to incorporate it into their contract. It provides that, once it has been ratified by a state, the Convention is applicable to all contracts which fall within its scope (broadly speaking, it covers contracts for the international sale of goods) unless the contracting parties choose to contract out of the Convention or of parts thereof. The Convention has been in force since 1988 and, although the United Kingdom has not yet ratified it, it has been ratified by many major trading nations, such as the United States, France, Germany and China. Supporters of such Conventions argue that they promote the development of international trade by ensuring common standards in different nations. Contracting parties can then have greater confidence when dealing with a party from a different nation, and such uniformity should result in lower costs because there will be no need to spend time arguing about which law should govern the transaction, nor will there be any necessity to spend time and money seeking to discover the relevant rules which prevail in another jurisdiction.

But such Conventions have also been the subject of considerable criticism. It is argued that they do not achieve uniformity because national courts are likely to adopt divergent approaches to their interpretation (some courts adopting a literal approach, others a purposive approach). In this way, the aim of achieving uniformity will be undermined. The Vienna Convention took many years to negotiate and, even now, over 30 years after agreement was reached, it has not been adopted by all the major trading nations of the world. Furthermore, it is not at all clear how the Convention will be