

# Contents

Contributors	xi
Series Editor's Foreword	xiii
Table of Cases	xv
Table of Domestic Legislation	xvii
Table of EC Legislation	xxi
Table of International Legislation and Principles	xxv
<b>1 The Spectre of a European Contract Law</b> <b>STEFAN VOGENAUER</b>	<b>1</b>
<b>2 Harmonisation of European Contract Law: The State We Are In</b> <b>EWAN MCKENDRICK</b>	<b>5</b>
I. How Did We Get Here?	5
II. Why Seek to Create a European Contract Law?	14
1. Increase in Cross-border Transactions	14
2. Differences in Contract Law as a Barrier to Trade	14
3. The Growth in Standard Form Contracts and the Growing Use of Boilerplate Clauses	15
4. National Laws Unsuitable for International Transactions	17
5. The Growth of International Commercial Arbitration	18
6. National Laws Cannot Solve the Problems which Currently Confront Those Who Enter International Transactions	18
III. Why Object to the Creation of a European Contract Law?	19
1. Divergent Laws Do Not Act as a Barrier to Trade	21
2. Such Problems as Do Exist Do not Demand the Creation of a European Contract Law	24
3. The Disadvantages of Harmonisation	26
4. The Virtue of Diversity	27
IV. The Future	28
<b>3 English Law Reform and the Impact of European Private Law</b> <b>HUGH BEALE</b>	<b>31</b>
I. The Impact of Community Law	31
II. The Impact of Domestic European Laws	37

<b>4</b>	<b>The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience</b>	
	<b>MARTIJN W HESSELINK</b>	<b>39</b>
	I. The New Dutch Civil Code	39
	1. Recodification, not Reform	39
	2. Substantive Innovations	40
	3. The Main Characteristics of the New BW	41
	II. The Harmonisation of Contract Law	42
	1. Directives and the New Code	42
	2. Example 1: Standard Terms	43
	3. Example 2: Time-sharing	45
	4. Example 3: Consumer Sales	45
	III. Codification and Harmonisation	48
	IV. The CFR as Codification	52
	1. The EC's Action Plan; the Way Forward	52
	2. Codification in a Substantive Sense	53
	3. National Coherence v European Coherence	57
	V. The Way Forward for National Legislators: Three Codification Strategies	58
	1. Resistance	59
	2. Segregation	63
	3. Surrender	67
	VI. Final Remarks	69
<b>5</b>	<b>Contract Law Reform: The German Experience</b>	
	<b>REINHARD ZIMMERMANN</b>	<b>71</b>
	I. The Modernisation of the Law of Obligations Act	71
	II. Remedies for Breach of Duty	74
	III. Liability for Non-conformity in the Law of Sale	78
	IV. Prescription (or Limitation)	81
	V. Consumer Contract Law	83
<b>6</b>	<b>Constitutional Issues—How Much is Best Left Unsaid?</b>	
	<b>STEPHEN WEATHERILL</b>	<b>89</b>
	I. Introduction	89
	II. Constitutional Ground Rules and Practical Policities	90
	III. The Rise of 'Competence Anxiety'	92

IV. The Commission's Communications and Questions of Legal Competence	95
V. Three Reasons for the Commission's Reticence	97
VI. Conclusion	103
<b>7 The European Community's Competence to Pursue the Harmonisation of Contract Law—an Empirical Contribution to the Debate</b>	
<b>STEFAN VOGENAUER &amp; STEPHEN WEATHERILL</b>	<b>105</b>
I. Introduction	105
II. The Quiet Evolution of European Contract Law	106
III. The Commission's Trio of Communications	108
IV. Establishing Competence: the Perceived Views of European Business	113
1. Previous Attempts to Evaluate the Attitudes and Expectations of Market Participants towards a European Contract Law	114
2. The Business Survey Conducted in Early 2005: Respondents and Methodology	117
3. Results of the Survey	119
V. Conclusions: Where To Go Next	136
Appendix A: Background Information	140
Appendix B: Questionnaire	143
<b>8 Harmonisation of and Codification in European Contract Law</b>	
<b>GUIDO ALPA</b>	<b>149</b>
I. Contract Law between General and Special Rules	149
II. Freedom of Contract and Market Regulation	152
III. New Scenarios of Contract Law	156
IV. Recodification Initiative: from 'Decodification' to 'Recodification'	158
V. Conclusion	169
<b>9 Contracts and European Consumer Law: an OFT Perspective</b>	
<b>SIR JOHN VICKERS</b>	<b>171</b>
I. Introduction	171
II. Contracts and the Harmonisation of Competition Law	172
III. Contracts and the Harmonisation of Consumer Law	173
1. Unfair Terms in Consumer Contracts	174
2. The Unfair Commercial Practices Directive	177

3. Consistency of Law Enforcement	180
IV. Conclusions	183
<b>10 The Commission's Communications and Standard Contract Terms</b>	
<b>ULF BERNITZ</b>	<b>185</b>
I. European Private Law and Standard Terms and Conditions	185
II. The Commission's Communications from the Viewpoint of Standard Terms and Conditions in B2B Contracts	187
III. The Relation to Lex Mercatoria and the Work of Non-governmental Organisations	191
IV. Elimination of Legal Obstacles to the Use of EU-Wide Standard Terms and Conditions	193
V. Two Final Points	195
<b>11 Non-Legislative Harmonisation: Protection from Unfair Suretyships</b>	
<b>AURELIA COLOMBI CIACCHI</b>	<b>197</b>
I. The Advantages of non-legislative Harmonisation	197
II. Unfair Suretyships and Case-law Convergence	198
III. 'Cryptotypes' in Unfair Suretyship Law	201
IV. Disparity of Surety Protection Standards in Europe	202
V. Harmonisation of Standards of Protection through Horizontal Effect of Fundamental Rights and Constitutional Principles?	203
<b>12 Harmonisation of European Insurance Contract Law</b>	
<b>DANIELA WEBER-REY</b>	<b>207</b>
I. Introduction	207
II. History of European Insurance Contract Law	212
1. First Generation of Insurance Directives—Freedom of Establishment	213
2. The Directive Proposal of 1979/80	214
3. Four Major Judgments of the European Court of Justice	216
4. Second Generation of Insurance Directives—Freedom to Provide Services	217
5. Third Generation of Insurance Directives—Completion of the Single Market	218
III. Current Status of European Insurance Contract Law	220
1. General	220
2. Law Applicable to Insurance Contracts	221
3. Possible Solutions	222

IV. Model of an Optional European Contract Act	223
V. Reactions to a Harmonised European Insurance Contract Law	226
1. Views on the Current Status of European Insurance Contract Law and a Possible Optional Instrument	226
2. Possible Contents of an Optional Instrument	230
3. Conclusion	232
VI. Pros and Cons of a Possible Harmonisation	233
1. Pros	233
2. Cons	233
VII. Outlook	234
<b>13 European Contract Law – What Does It Mean and What Does It Not Mean?</b>	
<b>DIRK STAUDENMAYER</b>	<b>235</b>
I. Introduction	235
II. What is an Optional Instrument in the Area of European Contract Law and What Is It Not?	236
1. The Debate around Optional Instruments	236
2. Relationship with Private International Law and the Legal Nature of the Optional Instrument	238
3. Contents and Scope of an Optional Instrument	240
III. The Common Frame of Reference	241
1. Objectives of the Common Frame of Reference	242
2. The Preparation of the Common Frame of Reference	243
<b>14 Harmonisation of European Contract Law—the United Kingdom Government’s Thinking</b>	
<b>BARONESS ASHTON OF UPHOLLAND</b>	<b>245</b>
<b>15 Concluding Observations</b>	
<b>DAVID EDWARD</b>	<b>249</b>
<b>Index</b>	<b>253</b>