

## Contract Theory: A View From the Other Side of the Atlantic

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Martijn W. Hesselink, *Contract Theory and EU Contract Law*, in **Research Handbook on EU Consumer & Contract Law** (Christian W. Twigg-Flesner ed., forthcoming), available at [SSRN](#).

Some analyses are particularly suitable for novices, while others suit experts. Few analyses may be of interest to both. [Martijn Hesselink's](#) contribution to a forthcoming [handbook](#) on EU Consumer and Contract Law belongs to the latter category. In this chapter, Hesselink discusses the “mismatch between much of the existing contract theory, on the one hand, and EU contract law on the other.” Ostensibly, this discussion is only relevant to a narrow audience—namely, the rather few (especially in the United States) who are interested in both contract theory and EU contract law. In fact, however, this chapter would benefit anyone interested in contract theory even if they have little interest in EU law—or conversely, anyone interested in EU contract law who may not care much about contract theory. Indeed, reading this chapter may persuade U.S. contract professionals that they *should* take interest in EU law, and convince EU contract people that contract theory is important to understanding their field in a broader context.

Hesselink's chapter consists of three parts. The first part provides a highly useful typology of contemporary theories of contract law. The second delineates EU contract law and describes its basic features. The third part points to the mismatch between most contract theories and EU contract law, and explores its ramifications.

In recent decades, the terrain of contract theory has become increasingly large and complex. Hesselink provides a concise, lucid map of this terrain, based on a series of distinctions. Inter alia, these include the distinction between *contract theories* and *contract law theories* (the latter are the sort that jurists are usually interested in), and between positive, explanatory theories and normative ones (pointing to the existence of hybrid theories that set out to both explain existing law and assess it normatively). Another important distinction, within the categories of normative and hybrid theories, is between those derived from more general, moral or political theories, and *separatist* theories, which view contract law (and private law more generally) as being founded on principles of its own. The former include welfare economics (the normative part of economic analysis), various brands of liberal and libertarian theories, as well as communitarian and discourse theories of contract law. The latter category, i.e., that of *separatist* theories, is epitomized by corrective justice theories of private law. Cutting across these distinctions is the division between *monist* and *pluralist* theories of contract law, which has attracted considerable attention in recent years. Hesselink briefly describes and situates several hybrid or ambiguous theories within this typology—including *functional theories*, *sociological system theories of law*, *interpretative theories*, *critical theories*, and *constitutionalism*.

While some of these distinctions are familiar to anyone engaged in contract theory, others are articulated in a new, insightful fashion. Moreover, while some of the theories Hesselink mentions are well-known in the English-speaking world of legal scholarship, some are less so—thus triggering an interest in ideas developed by civil law and EU scholars.

The second part of the chapter provides a bird's-eye view of EU contract law. This term does not refer to the entirety of contract law norms in European countries, but only to those contained in EU law—namely, to directives, regulations, EU treaties, and general principles recognized by the Court of Justice of the European Union. The directives instruct member states to adapt their local laws to comply with the standards set by the directives—often leading to legislative reforms in national laws. The directives do not deal with contracts between individuals, but mostly with specific issues in particular types of consumer, and some commercial, transactions—such as unfair contract terms, unfair commercial practices, package travel, late payment in commercial transactions, and consumer credit. In each sphere, the directives

do not comprehensively regulate all aspects of the contract, as do national laws. The consumer law directives place special emphasis on elaborate disclosure duties, and on the right to unilaterally withdraw from the contract. Since these directives do not directly confer rights to contracting parties, analytically they are part of public law. However, since their content refers to the relationships between the contracting parties, they concern typical contract issues.

In the third part of the chapter, Hesselink examines the extent to which the fragmented, multi-layered, and incomplete body of EU contract law may be explained and normatively assessed by the familiar theories of contract law. He finds that leading theories (especially the monist ones), such as *contract as promise* and corrective justice, cannot explain or justify EU contract law, and other perspectives, such as economic efficiency, would more likely criticize it on many counts, than endorse it. Hesselink examines the possible implications of this mismatch, including the possibilities that: (1) EU contract law should be abolished; (2) EU contract law is not “contract law” at all; and (3) existing contract theories are deficient. Ultimately, he endorses a pluralistic, democratic theory of contract law. Such a theory would rest on “political principles of justice, including private law justice, that can be accepted by citizens adhering to different faiths, philosophies, values and principles.” He concedes that such principles, “if they can be found at all, will inevitably be of a much higher level of abstraction and generality than familiar contract law rules and doctrines,” and “will leave much room for interpretation and concretization through legitimate political institutions.”

Hesselink does not elaborate on his theory of contract law in the present chapter (he does so in his *Democratic Contract Law*, 11 **Eur. Rev. Contract L.** 81 (2015), available at