Introduction

This is my second volume in the Rethinking Law series. While about half of the first volume was devoted to damage remedies, this one is entirely focused on doctrine regarding damages in the US and UK. Half the chapters concern American law and half English. I must acknowledge that I am an economist, not a lawyer, although I have some experience with American doctrine having taught American contract law for two decades. I come to English law, however, as an outsider.

As I noted in the previous volume, when I began teaching I started with the presumption that contract doctrine was efficient. However, I have come to believe that the doctrine in many instances is not, and is something that good transactional lawyers must overcome. The use of "Rethinking" in the book's title indicates my skepticism about doctrine in both countries. Much of the analysis in this book will therefore be critical of the courts and the treatise writers. I suspect that in some instances I will be wrong; I am, after all, taking on some very smart folks. I do hope that by being provocative I will encourage others to rethink these doctrines and that, in at least some instances, my view will prevail.

This is not a book of comparative law, in the usual sense. Rather, I have taken the same theoretical framework to the law in the two countries. I begin with the presumption, common to both, that parties are largely free to design their contracts as they see fit. Contract law provides a set of default terms, but the parties can contract around them. Both jurisdictions put some limits on the freedom to contract, particularly over remedies. Both, for example, hold that liquidated damages are okay, but penalty clauses are not. Clauses that purport to exclude claims for consequential damages can be subject to close scrutiny, especially in England.

Part I concerns direct damages. A theme running through Part I is that contract law gives a party an option to terminate its obligation contingent on payment of damages. The parties can price that option explicitly in their initial agreement. In effect, the contract remedy sets the price of that option, if the parties have not done so. The default rule in both the US and the UK has been to make the nonbreaching party whole, although in both jurisdictions the meaning of that phrase is not entirely clear. The second theme is fleshing out that meaning. The contract, I argue, is an asset and compensation would entail awarding the nonbreaching party the change in the value of that asset at the

time of the breach. In the simplest case—the seller promises to deliver a commodity on a specific date but fails to do so—the award would be the contract–market differential. Framing the measurement problem in terms of the change in asset value is not particularly useful for this simple problem. However, as the transactions become more complicated, framing the measurement problem in this way becomes extremely useful.

In Part I, I consider a number of issues concerning assessment of direct damages for termination of a contract. One set of concerns is the timing of the assessment: the date of breach versus date of decision; what date should be used following an anticipatory repudiation; should a court take into account postbreach facts when assessing damages? A second issue concerns the claims of the so-called lost volume seller; I will show that by so doing, the courts in both countries have implicitly set an irrational option price, one that bears no relation to the parties' needs. Another problem arising in both countries concerns the treatment of the nonbreacher's contract with a third party. If A contracts with B and B contracts with C, a breach by A raises the question of whether the B–C contract should be taken into account when assessing damages against A. The question arises in a different form in the two countries. In the US it typically concerns a claim by a seller that the middleman is only entitled to its commission, not the larger contract–market differential. In the UK most of the cases look quite different. The first seven chapters in this Part concern the remedy for the termination of the contract. The final chapter does not involve the option to terminate. It entails a detailed analysis of Cardozo's famous decision in *Jacob & Youngs v Kent*.

Part II deals with consequential damages. In the previous volume I argued that whether consequential damages should be recoverable should be governed by the "tacit assumption" test. That test is, unfortunately, explicitly rejected by the UCC. In England, *The Achilleas* has revived the test, although there seems to be some reluctance to follow it. I argued that the difference between the two views comes down to different assumptions about risk allocation:

> In effect the critics of the tacit assumption approach ask "would reasonable business people have *contemplated the possibility*." If they somehow conclude that the contemplation threshold has been met, the plaintiff wins. The tacit assumption approach downplays the possibility question. Even if the threshold had been met, the relevant question is: "how would those same reasonable business people *allocate the risks*?" Thus, both the supporters and critics of [*Globe v Landa*] make a tacit assumption about risk allocation. They just disagree on what that assumption is (Goldberg (2015a, at 90)).

I analyzed two cases to make the point: *Kenford v Erie County* (US) and *The Achilleas* (UK). I will not rehearse those arguments here. I begin with a brief discussion of how the judge maneuvered in *Victoria Laundry v Newman* to

convert the *Hadley* rule from one of tacit agreement to one of contemplation. Contracts commonly include clauses excluding damages for consequential damages. The law in each jurisdiction is explored in two chapters. There are two significant boundaries: (a) direct damages versus consequential damages; and (b) consequential damages that would be recoverable and those which would not. Courts in both countries have taken the criteria for (b) and extended them to (a). This, I suggest, was a mistake. The problem has been particularly bad in the UK, resulting in serious underenforcement of consequential damage clauses there, although recent decisions suggest the law might be moving in the proper direction. This Part concludes with analysis of the so-called new business problem. American law had denied claims for the future lost profits from business that had not yet been established for being too speculative. That bar to recovery has come down in almost every state. I argue that this change is unfortunate. Most claims should be denied, but not on the ground that they are too speculative.