合同法双语教材

An Introduction to the LAW of Contract

合同法概论

（双语）

杨秋霞◎编著

- 法律英文原版阅读
- 知识要点中英对照
- 重点难点双语分析

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内容提要

本书按照我国《合同法》的基本原则及法条顺序，以中英文对照的编写方式，对合同法基本制度（总则部分）的知识点进行了系统化阐述。全书共8章，内容包括：合同法概述、合同的订立、合同的效力、合同的履行、合同的变更和转让、合同权利义务的终止、合同的解释、违约责任。每章分为三部分。“本章内容提要”对本章的知识要点进行了概括性介绍。“英文阅读”部分整理了本章所涉合同法相关知识点的海量原版英文阅读材料。“内容解析”部分对本章涉及的知识要点进行了中英文双语解析。

本书是一本合同法双语学习教材，也是一本不错的法律英语学习读物，有助于读者学习合同法相关知识，提升法律英语水平。

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编写说明

教育部在《关于加强高等学校本科教学工作提高教学质量的若干意见》中提出，为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。为适应我国加入 WTO 后的需要，法律等专业更要先行一步，力争三年内，外语教学课程达到所开课程的 5% ~10% 。我校法学院积极响应教育部的号召，2006 年开设双语教学，合同法课是其中之一。由于我国国内一直没有合同法的双语教材，给教学工作带来了很大的困难。为解决这一教学难题，我院鼓励教师自编教材。本书是作者在整理多年来合同法双语教学讲义的基础上编写而成，也是我院校级双语教学示范项目建设成果之一。

合同法作为调整平等民事主体之间的交易关系的法律，主要规范合同的订立、合同的效力、合同的履行、合同的变更、合同权利义务的转让及终止、合同的解释、违约责任等问题，是我国民法的重要组成部分。本书内容涵盖了我国合同法总则中有关合同的基本制度。第 1 章主要包括合同及合同法的基本概念与基本原则。第 2 章主要讲述合同订立的基本概念和基本规则，包括要约、承诺、合同的内容与形式等内容。第 3 章着重讲述合同的效力，包括合同的生效要件，无效合同、可变更或可撤销的合同以及效力未定的合同。第 4 章是关于合同的履行，包括合同履行的原则、合同未约定或约定不明时的履行规则；提前履行；部分履行；第三人履行；合同履行中的抗辩权以及合同的保全等内容。第 5 章涉及合同的变更和合同权利义务的转让两部分，包括合同变更的方式和效力、合同权利转让的有效条件、合同义务转让的必备条件以及合同权利义务的概括转让。第 6 章的内容是合同权利义务关系终止，主要讲述合同权利义务终止的方式，包括合同按约定履行、合同解除、抵消、提存、免除和混同。合同的解除是本章讲述的重点。第 7 章是关于合同的解释，主要讲述了合同解释的必要性以及各种合同解释的规则。第 8 章是关于违约责任，内容包括违约责任的归责原则、违约行为的各种表现形式、承担违约责任的各种方式以及预期违约制度。

鉴于我国国内中文版合同法教材资源非常丰富，本教材主要侧重于英文。根据自己多年的教学实践经验，照顾到不同英文水平读者的需要，在内容的安排上采用了下列方式：

一、按《合同法》的章节顺序编写内容

读者可藉由本书的内容先后顺序，参照《中华人民共和国合同法》的条文，

循序渐进，学习中国合同法的基本制度。

二、每章给出中文提要

本书在每章的开始都用中文给出了每章基本内容的概要，方便查阅内容，同时帮助读者掌握各种的核心内容。

三、对每章进行中英文解析

为了帮助读者克服阅读全英文内容的畏难心理，增强学习的自信心，并可以帮助读者正确理解每个章节、每个段落的内容，作者在每章英文文本之后，用中英文对每章内容进行了相对详细的解析。需要提醒读者的是，中英文的内容解析中的中文不都是对相应英文内容的翻译，而是对内容的解释。有的英文内容作者如果认为读者可以很容易理解，就省略了中文说明。

最后，作者对读者如何使用本书有一个建议。因为本书的重点在于通过英语学习我国合同法的基本制度，尽管章前章后有中文解释，但毕竟篇幅有限，对某些知识点不能深入探究。所以对于那些对我国合同法律制度不太熟悉的读者来说，为了更好地理解掌握合同法的内容，最好选择一本合适的中文版合同法教材作为辅助学习资料。

本书在编写过程中参考了大量相关的中外著作、论文和网上资料，恕不一一列举（主要参考资料附后），在此一并致谢。感谢熊莉编辑对本书的体系安排提出的有益建议以及付出的辛勤劳动。尽管作者在编写过程中尽了最大努力，但由于能力、资料有限，不足之处在所难免，欢迎批评指正。

作者

2012 年 3 月

目　录

Chapter 1 Introduction

第1章 合同法概述

☞ 本章内容提要

本章主要讨论合同的概念、合同的分类及我国合同法的发展历史和基本原则。

在英美法系中，一个通行的定义是：合同是能够直接或间接地由法律强制执行的允诺或一组允诺（promise）。它把重心放在有效行为之一即单方同意表示上。在另一种十分通行的定义中，合同被说成是法律上能够强制执行的协议。这种定义把重心放在合同当事人双方的表示上，采用“协议”（agreement）一词来表明这种双方表示。在大陆法系中，合同被认为是双方当事人之间设立、变更、终止民事权利义务关系的协议。我国合同法中合同的概念采大陆法系协议说。

按照不同的标准可以对合同作出不同的分类：要式合同与不要式合同；诺成合同与实践合同；双务合同与单务合同；有偿合同与无偿合同等。

现行《合同法》颁布之前，我国合同法体系呈现出以《民法通则》为基本法，《经济合同法》、《涉外经济合同法》和《技术合同法》三足鼎立的局面。1999年3月15日，第九届人大第二次会议通过《合同法》。

合同法基本原则体现合同法的基本价值。我国合同法的基本原则主要包括：合同自愿原则；诚实信用原则；公平原则和鼓励交易原则。

本章重点 合同的概念和特征 合同的种类 合同法的基本原则

关键术语

合同（contract） 诺成合同（consensual contracts） 单务合同（unilateral contracts） 双务合同（bilateral contracts） 有偿合同（onerous contracts） 要式合同（formal contract） 合同自愿原则（freedom of contract） 诚实信用原则（principle of good faith）

英文阅读

Introduction*

1.1 The Concept of Contract

1.1.1 Introduction

Contracts are part of everyone's every day life. For example, when a person leases an apartment, buys a home or makes a charge purchase, a contract is involved. But what is a contract?

In traditional Continental civil law system, the two essential elements of a contract are the parties' intent and the expression of such intent by the parties. Article 1101 of the French General Principle of Civil Law states: "A contract is an agreement by which one or several persons bind themselves, towards one or several others, to transfer, to do or not to do something." This reveals that the traditional civil law approaches the contract law from the perspective of the law of obligations.

The common law jurisdictions, on the other hand, view contract from a different perspective. One of the simplest definitions for a contract is a "promise enforceable by law". The promise may be to do something or to refrain from doing something. The making of a contract requires the mutual assent (agreement) of two or more persons, one of them normally making an offer and the other accepting it. If one of the parties (persons) fails to keep his or her promise, the other is entitled to legal recourse against that person.

When the common law and continental civil law definitions of contract are compared, the definition of contract in Continental civil law is more abstract. It is based on expression of the parties' intent (or translated as "expression of will"). The common law, on the other hand, defines it from the perspective of enforceability in a court of law. This reflects the pragmatic approach of the common law, a tradition that can also

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* 本章内容的编写主要参考以下资料: Stephen Graw, An Introduction to the Law of Contract (Fourth Edition), Karolina Kocalevski, 2002; Mo Zhang, Chinese Contract Law, Martinus Nijhoff Publishers 2006; Bing Ling, Contract Law in China, Sweet & Maxwell Asia 2002; [英] Hugh Collins 著, 丁广宇、孙国良编注:《合同法》(第四版), 中国人民大学出版社 2006 年版。

be seen in the common law of tort and other subjects.

1.1.2 The Definition of Contract in China

The most known term equivalent to contract in Chinese tradition is *Qi Yue* (commonly translated as "agreement"). Interestingly, according to some Chinese legal history scholars, the term "contract" (*He Tong*) actually appeared in ancient China 2000 years ago, but was soon replaced by the term *Qi Yue*. At that time, contract was regarded as a form of *Qi Yue*, and therefore, contract itself was not a *Qi Yue* rather it was used as a mark or symbol evidencing the existence of the *Qi Yue* between the parties. In this sense, "contract" was once translated in Chinese as *Qi Ju*—certificate or written record of *Qi Yue*.

There was no clear definition of contract in China until 1986 when the General Principles of Civil Law was adopted. Nonetheless, because of the civil law tradition, a commonly held concept was that "contract in essence is an agreement" and this concept was accepted in the Chinese contract law legislation. Under Article 85 of the GPCL, a contract is defined as an agreement establishing, modifying and terminating the civil relations between the parties. Following this concept, Article 2 of the 1999 Contract Law further defines contract as an agreement establishing, modifying and terminating the relations of civil rights and obligations between natural persons, legal persons or other organizations of equal status.

The seemingly plain and straightforward definition of contract in article 2 includes the following element.

Firstly, contract is an "agreement". The notion of agreement means that the legal effect of contract arises from the will of the parties, rather than from operation of state law or policy. The essence of contract is the autonomy of parties and freedom of contract. The private, consensual nature of contract also distinguishes it from other major civil law categories such as real rights, personal rights, tort, unjust enrichment, management without mandate, and pre-contractual liability, all of which arise from the operation of law.

Secondly, the parties that can enter into a contract are natural persons, legal persons or other organizations. Natural person refers to Chinese citizens, foreigners as well as stateless person. Other organizations are not defined in the law. However, according to a judicial interpretation of the Supreme People's Court, other organizations would mean to include those organizations that are formed under the law with certain assets and organizational structure, but have no independent civil ability and capacity.

Under the GPCL, legal person is an association that has capacity for civil rights

and civil conducts, and independently enjoys civil rights and assumes civil obligations in accordance with the law. Legal person is different from other organizations in that a legal person independently bears civil responsibilities while an "other organization" does not.

Compared with the previous laws, the definition of contract in the Contract Law was expanded the scope of contracting parties so that the Contract Law virtually applies to contracts made by any person.

Thirdly, the parties to a contract are "equal parties". Whilst this may sound axiomatic, the reference to "equal parties" serves to exclude from the concept of contract those agreement that arise from administrative relationships, the so-called administrative contracts.

Fourthly, contract is an agreement establishing, modifying and terminating relationship of civil rights and duties. This element defines the content of contract. Three theories were suggested during the drafting of the Contract Law. The first theory would define contract as an agreement affecting all kinds of legal rights and duties. Under this broad definition, administrative contract would be included. This definition was rejected by majority of the drafters, as it was seem to disrupt the normative object and content of the Contract Law. An all-embracing concept of contract would render the content of the law unwieldy and complex and its structure confusing. The second theory would define contract as an agreement creating, modifying and terminating obligations. This is the definition adopted by the GPCL and was accepted by all the drafts of the Contract Law. During the discussion of the draft Contract Law within the Standing Committee of the National People's Congress (NPCSC), however, the definition was questioned for being too narrow. It was pointed out that there are in practice contracts that are not concerned with obligations, such as contracts altering real rights (mortgage contract, pledge contract and contract for the assignment of land-use rights), contract altering intellectual property rights and contracts for common undertakings (partnership contract and joint operation contract). Also, the term "obligation" could be misinterpreted to mean "money debt" only. It was thus decided at the meeting of the NPCSC that the reference to "obligations" be changed to "relationship of civil rights and duties.

The problem with the third theory is that such a definition would apparently include agreements on family and personal status agreements that most jurists believe involving special moral and policy considerations and are thus different from ordinary contracts. A second paragraph of article 2 was finally added by the Law Committee during the plenary National People's Congress session, so that agreements concerning civil status such as

marriage, adoption and guardianship are excluded from the purview of the Contract Law. These agreements are governed by the GPCL and special Laws.

1.1.3 Advertisements of Rewards

It is important to know whether an advertisement of rewards constitutes a unilateral juristic act or a contract in Chinese law. Assume that Don tenders a monetary reward for the return of his much-loved but lost dog called Sebastian. Mary finds Sebastian and returns him. If Mary is not aware of the advertisement, will she be entitled to the reward? If the advertisement constitutes a contract, Mary will be entitled to the reward only if she reads the newspaper before she returns the lost property. On the other hand, if it is a unilateral juristic act, she will be entitled to the reward regardless of her knowledge of the advertisement. If Mary is of limited civil capacity, says a child of 6, will she be entitled to the reward? If the advertisement constitutes a contract, she will not be entitled to it, because she has no sufficient civil capacity to enter into a contract. However, if it is a unilateral juristic act, she is arguably entitled to the reward.

Advertisements of rewards for the return of lost or stolen property are commonly regarded as offers at common law. What is the position of Chinese contract law? Article 112 of the Property Law of PRC (also translated as the "Real Right Law") confirms the validity of advertisements of rewards: "The right holder of the object, when obtaining a lost-and-found object, shall pay the person who finds the object or the related department such necessary expenses as the cost for safekeeping the object. Where a right holder promises to offer a reward for finding the object, he shall, when claiming the object, perform the obligation of granting the reward. Where the person who finds the object misappropriates the lost object, he/she shall be deprived of the right to ask for paying the expenses he/she has paid for safekeeping the object." Article 3 of Interpretations of the Supreme People's Court on Certain Issues concerning the Application of Contract Law of the People's Republic of China (II) also confirms the validity of advertisements of rewards: "In case the reward offeror make a public announcement to pay the person who finishes a certain activity and the said person request such payment upon the completion of such activity, the people's court shall uphold such request, unless the reward has one of the circumstances as prescribed in Article 52 of the Contract Law."

An advertisement of rewards used to be generally regarded as a unilateral juristic act in China.

1.2 Types of Contracts

Generally, contracts are of two types: consumer contract and business or commercial contract.

The essential difference between a business contract and a consumer contract is this element of negotiation. Consumer contracts usually "take it or leave it", with no element of bargaining involved. When a consumer buys a shirt, a pair of shoes, or a meal in a restaurant, the color, design, and price are generally fixed and not negotiable.

This essential difference between business or commercial contracts and consumer contracts, has led to rules being developed to safeguard the rights of consumers whose lack of bargaining power denies them the rights they would otherwise enjoy under strict contract law.

Under the Contract Law, contracts are categorized in several ways.

1.2.1 Formal Contracts and Informal Contracts

The essential differences between the two are the degrees of formality involved in their creation and the bases of their enforceability.

Formal contracts are those that must be made pursuant to certain legal formalities, such as in writing, registration or notarization. On the other hand, informal contracts are those that may be made orally or in any other manner.

Modern civil law adopts the principle of autonomy, allowing much freedom of the parties to decide the form of contracts. Most contracts are informal contracts.

1.2.2 Verbal Contracts and Written Contracts

Verbal contracts are made orally, or in sign language as used by the deaf. The problem of verbal contracts is often the lack of evidence in proving the existence or terms of the contract. Therefore, this form of contract may not be suitable for transactions involving substantial sums of money or complicated contractual terms.

Where the parties conclude a contract in written form, the contract is formed when it is signed or stamped by the parties. Article 11 of the Contract Law defines "written form" to mean any form in writing such as documents, letters and electronic data text (including a telegram, telex, fax, electronic data exchange and email) that can tangibly express the contents contained in it.

Where a particular type of contract is required to be made in writing by legislation, and the parties only make the contract orally, it will still be valid under some circumstances. Article 36 of the Contract Law provides that where a contract is to be concluded in written form as required by relevant laws and administrative regulations or as

agreed by the parties, and the parties fail to conclude the contract in written form, but one party has performed the principal obligation and the other party has accepted it, the contract is considered validly formed. Article 37 further provides that where a contract is to be concluded in written form, if one party has performed its principal obligation and the other party has accepted it before signing or sealing of the contract, the contract is considered validly formed. The above rules prevent a party from denying the contract if the other party has performed his own contractual obligation.

In recent years, Chinese academics have been advocating that, as long as both parties can demonstrate a consensus, the contract should be regarded as valid.

1.2.3 Unilateral Contracts and Bilateral Contracts

In common law, an unilateral contracts is a contract in which one party promise to pay in exchange for performance, if the potential performer chooses to act.

In a unilateral contract, one side is bound to perform it. A typical unilateral contract is a contract, in the sense that one party binds himself by a conditional promise leaving the other party free to perform the condition or not, as he pleases.

A bilateral contracts is a contract in which the parties exchange promises for each to do something in the future.

In a bilateral contract both parties shall equally execute their promises respectively. Either party shall perform his own duties and have his own rights. An example of typical bilateral contract is a contract for sale of goods—the buyer promises to pay for certain goods whereas the seller promises to gender them.

In china, a bilateral contract is one in which both parties enjoy some rights and bear obligations respectively. In a contract for sale of goods, the seller's right is to receive payment and his obligation is to deliver the goods. The buyer's right is to receive goods and his obligation is to pay the price for the goods. Most contracts are bilateral. A unilateral contract is one in which only one party bear obligations. A typical example of a unilateral contract is a contract for a gift.

The major distinction between unilateral contracts and bilateral contracts lies in the right of defence. Articles 66 to 69 of the Contract Law specify three types of right of defence that are only applicable to bilateral contracts.

1.2.4 Express Contracts and Implied Contracts

An express contract is a contract in which all elements are specifically stated (offer, acceptance, consideration), and the terms are stated. Rights and duties of parties are clearly expressed so that the parties may perform it correctly and avoid misunderstanding. Once a dispute arises, the court can promptly settle it by judging who's

right and who's wrong according to an express manifestation of their intentions.

An implied contract is a contract which is found to exist based on the circumstances when to deny a contract would be unfair and/or result in unjust enrichment to one of the parties. An implied contract is distinguished from an "express contract".

1.2.5 Titled Contracts and Untitled Contracts

A titled contract is one to which the Contract Law gives a name, such that it is subject to the part entitled "Specific Provisions" (Chapters 9 to 23) of the Contract Law. There are 15 types of contract specified under the Specific Provisions.

All other types of contracts are known as untitled contacts.

According to the Contract Law, where there are no express provisions in the Specific Provisions or in any other legislation for a certain contract, the provisions in the General Provisions (Chapters 1 to 8) shall apply, but reference may be made to the most similar provisions contained in the Specific Provisions or in any other legislation. Here, "the most similar provisions" are those provisions applicable to the types of contracts most similar to the subject contract; for example, the provisions for sales contracts (Chapter 9 of the Contract Law) may be applicable to a contract for transfer of state land use rights.

1.2.6 Gratuitous Contracts and Onerous Contracts

A gratuitous contract is a contract in which one party promises to do something with out receiving anything in return. An onerous contract is a contract in which each party obligates himself or herself in exchange for the promise of the other.

1.2.7 Consensual Contracts and Real Contracts

A consensual contract is a contract formed merely by consent. Contracts are divi ded into those which are formed by the mere consent of the parties, and therefore they are called consensual, such as sale, hiring and mandate; A real contract is a contract in which it is necessary that there should be something more than mere consent, such as the loan of money, deposit or pledge, which, from their nature, require the delivery of the thing, whence they are called real.

1.3 The Contract Law

1.3.1 What is Contract Law?

Contract law is initially concerned with determining what promises or agreements the law will enforce or recognize as creating legal rights.

Contract law's focus on promises and agreements distinguishes it from the two other major areas as private law: property law and tort law. Promises and agreements look to