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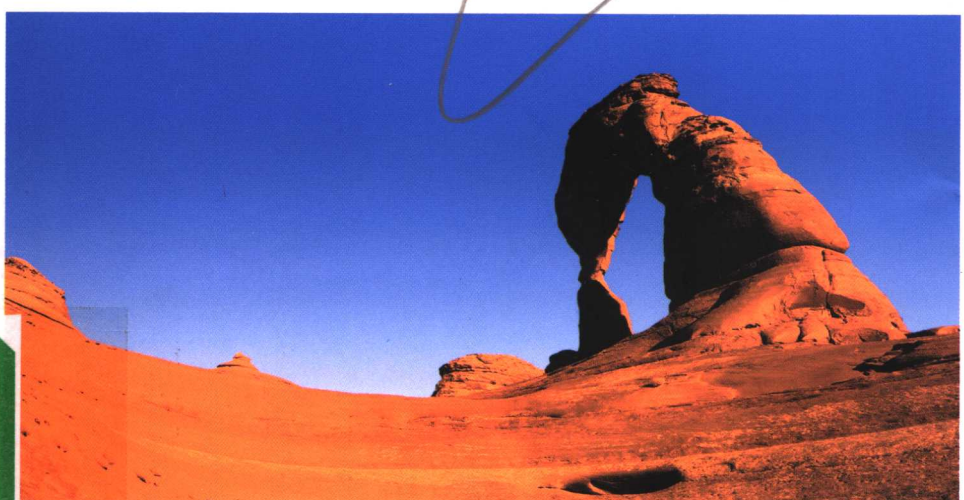

契约法

中国民主法制出版社

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写在前面

所谓英美法系，其法律渊源主要以判例为主，美国、英国、加拿大等国家为主要代表。判例在这些国家的历史和现在一直表演着重要角色，产生着重大影响，决定着本国政治、文化、经济的走向，有的判例甚至对世界法律文化的发展也起到了重要作用。

不可否认，当今社会中以英美法为代表的西方国家，相比发展中国家，其法律体系已臻完备，各部门法理论也已相当成熟。如何将西方经典判例原汁原味地引入进来为我所借鉴，是我们策划本套丛书的初衷。

关于本套丛书的设计，我们首先在作者队伍上进行了精心的选择，聘请国内著名高校，如清华大学、中国政法大学、西南政法大学、华东政法学院等精通法律英语的教授及相关专家、学者亲力亲为，保证了本套丛书内容上的高质量；其次在本套丛书内容的设计上，先将该部门法的内容进行概括性介绍，然后对每个经典判例给出精彩导读，再附英美原版判例（或精选部分），并对其中生涩难懂的词汇进行注解，使读者不但对该法有总体认识，尽快了解该部门法，而且中英文结合的方式省却了阅读的劳累，兼顾了学习性和趣味性，保证了裁减有度、难易结合。

由于英美法国家在援引法律、判例时有其特殊性，因此，对本套丛书的使用，特作如下说明：

1. 人名、地名

案件背景中涉及的人名、地名在一般状况下都不翻译，如《美国宪法》册中 McCulloch v. State of Maryland 案，McCulloch 这一人名没有通用译法；Dred Scott, Plaintiff In Error, v. John F. A. Sandford 案中，Rock Island 这一地名没有通用译法，都不再翻译。但若该人是名人或者是某领域中的重要人物，或者该地已经有通用译名，才使用通译名，如

Marbury v. Madison 在大陆一般通译为马伯里诉麦迪逊案。

2. 判例

案件名后通常有脚注，如 Brown Et Al. v. Board Of Education Of Topeka Et Al 案的脚注为 347 U.S. 483; 74 S. Ct. 686; 98 L. Ed. 873 (1954)。其中，347 U.S. 483 是指《美国判例汇编》(United States Reports) 第 347 卷第 483 页(始)；74 S. Ct. 686 是指《最高法院判例汇编》(Supreme Court Reporter) 第 74 卷第 686 页(始)；98 L. Ed. 873 是指《律师版》(Lawyer's Edition) 第 98 卷第 873 页(始)；(1954) 表示判决作出时的年份。《美国判例汇编》由联邦政府出版，《最高法院判例汇编》和《律师版》由出版社等非官方机构或个人出版。

3. 法令

美国案例涉及到的法令通常的出处如下：U.S.C.(United States Code)《美国法典》；U.S.C.A. (United States Code Annotated)《美国法典注释》；C.F.R.(Code of Federal Regulations)《联邦法规汇编》。

我们第一批推出的七本图书主要以美国法律为主，分别是《美国宪法》、《美国刑法》、《美国刑事诉讼法》、《美国财产法》、《美国证券法》、《美国专利法》和《契约法》。该套丛书的出版集聚了众多学者的智慧，对于他们孜孜以求、一丝不苟的治学精神和对我们编辑不吝赐教并表现出的极大耐心表示衷心的感谢。同时，对于欣赏并认可我们策划该套丛书的读者致以深深的敬意，我们将以不懈的努力将本套丛书继续延展下去，以飨读者。

由于时间仓促，以及编辑水平所限，难免有舛误之处，敬请广大读者批评指正。

编　者

2006 年 7 月

〖目　　录〗

契约法简论

契约法所关注的是实现契约所约定的义务。通常，契约责任是以自由同意为其基础的。这种同意表现为当事人明示的允诺，或事实上由当事人明示的允诺，或事实上由当事人通过行为而默示允诺。但在某些情况下尽管受约束的一方并未同意，法院仍会推定允诺之存在（往往称作由法律推定的契约，即准契约），以免当事人不当得利。

契约法的内容，包括能力、形式、要约与承诺、约因、欺诈与错误、合法与否、解释与推定、履行及其条件、契约目的无法达到和契约无法履行、免责、受让人及受益人的第三人之权利和补救方法。契约在很大范围内保持着统一性，而按照协议之内容或当事人之性质排斥了不同种类之间的基本区别。因此，除若干例外情况外，契约法原则适用于诸如雇佣、商品或土地之买卖和保险等内容不同的协议，并适用于诸如个人、企业和政府等不同的当事人。

契约法大多是州法而不是联邦法，但各州之间的契约只有细节之别。契约法虽主要仍为案例法，但处理具体问题的判定法日益增多。例如，美国《统一商法典》就对商品销售合同之形式设有若干具体规定，而根据作为在这方面最重要的联邦法之一的 1887 年塔克法（已经修正的），美国政府因已同意在各联邦法院应诉而在契约诉讼中放弃了主权豁免。某些由制定法（以及案例法）规定的规则是强制的，当事人不得规避；而另一些规则则是含蓄的、解释性的、补充性的，因而可以由协议改变之。

不妨把契约简单地规定为一种允诺。允诺一旦遭到违反，法律就予以补救；虽然“契约”一词亦用来指当事人借以表示其协议的一系列行为，指双方当事人所制作的文契或指其所形成的法律关系。并非一切允诺都是可以执行的，在法律予以补救之前，允诺必须符合几项标准。其

中最重要的两项，是必须有书面形式和有约因。书面要件，是由英国 1677 年《欺诈防止法》所派生、颁布于美国全国的欺诈防止法所规定的。欺诈防止法一般都规定：特定种类的契约，如无书面证据不得执行，但也有若干个例外。通常，这些特定契约包括超过最低价值的商品销售契约、土地买卖契约、承担他人债务的契约和一年后履行的契约。许多协议（如大多提供服务的契约）则不包括在内，因此即使没有书面形式也能执行。虽然人们的不满导致英国于 1954 年废除了《欺诈防止法》的大部分，但在美国却没有认真要求废止欺诈防止法的动向。

在美国，除要求书面形式外，允诺如无约因的支持，一般也是能执行的。历史上，允诺甚至没有约因，也能在文书上盖用火漆印而作出有约束力的允诺。但随着火漆印为钢笔或印刷的复制品所取代，印章也就徒有其名了。因此，其效力现已被制定法所取消，至少也已被制定法大大限制了。约因主要是允诺人要谈判到手，而且也是允诺人以其允诺换来的某事物。约因可以是对方所回报的另一个允许（这样形成的契约就是双方契约）。但是，比如说，一个无偿允诺（其中也包括因作出允诺时早已提供了的商品和劳务而作出的允诺在内）是没有约因支持它的。幸好，不符合约因要求的商业允诺，其实例子寥若晨星。其中最麻烦的情况之一，涉及到“硬”要的，即不可撤回的要约。在美国，通常的规则是：要约人能在要约经被要约人承诺之前的随时撤回，而且要约人关于不撤回要约之允诺，如无约因一般是无效的。使要约人信守允诺的常用办法，是他向支付一笔有名无实的金额（如美元），作为取得“选择权”之对价。即使没有约因（对价），少数法院也主张：被要约人因相信允诺而蒙受损害时，要约人不得出尔反尔、撤回其要约。但是最令人满意的解决方法，是通过立法（这是某些州的办法）规定要约不问的无约因，只要具备签名的书面形式且记明不得撤消者，一律不得撤销。由此可见，发展的趋势是弥补约因论缺点而不是摒弃约因论。

在美国，契约也同制定法那样，是以详细和冗长为其特征的。由律

师拟定的契约往往由标准条款组成，这种条款或取自归档的其他契约，或来自书本，俗称为“做成纸型的”条款。即使没有律师直接参与其事，当事人也可以直接采用或参照吸收一种标准格式。这种格式早由律师拟定以供某企业或企业联合会之用或公开发售。美国契约特别重视细节，这也许是有一些原因的。其中包括：常规性交易的标准化、特殊性交易之每一阶段往往都有律师参与其事，倾向于使用在过去纠纷中经过考验的诺言，以及希望能在所涉及的是不止一个州的法律时防止捉摸不定的一种愿望。所有这一切更使得以案例为中心的美国律师增强下列意向：就过去业已发生或今后可以预见的争端，在契约中作出明文规定。

一个与此有联系的现象是诸如发售的票据、租赁契约和零售契约之类强加于谈判力差的一方的标准或“单方面契约（合同）”之广泛使用，近些年来，法院和立法要关对上述情况下契约自由丝毫不受限制的后果越来越予以关注。过去一向对企业犯罪、侵犯或为其他明显违反公共利益行为的协议拒不执行的法院，现在已开始以解释契约的名义偏护处于劣势的一方，并在趋于极端的案件中拒不承认由一方当事人单方面说了算的条款有任何效力——尽管协议内容本身并无违法可言。立法机关也颁发了规定诸如雇佣契约中最高工作时数和最低工资之类的条件，甚至规定了整个契约（如保险单之类），并赋予行政机关规定诸如运输业和电力业的价格和条件的权力。契约自由论虽已在许多领域遭受侵蚀，但仅不失为原则而非例外。

Case 1 Sun-Intel. Com. v. Cleiter

导读：*Sun-Intel. Com. v. Cleiter* 为美国联邦第七巡回上诉法庭 1999 年终审的一个案件，涉及到封在电脑软件热塑包装（shrinkwrap）内的使用许可说明是否应被视为是买方必须遵守的合同要件问题。在本案中，原告 Sun-Intel 软件公司诉被告 Matthew Zaeidenberg 不遵守热塑包装内的使用许可说明，擅自将装有商家电话和地址等的信息软件转卖他人以牟利。在初审中原告败诉，联邦地方法院裁决热塑包装内的使用许可说明不构成买方必须遵循的合同条款。在上诉审中，法庭认为被告有充分时间阅读并有机会但却没有对说明中的条款提出异议，应被视为是同意条款的内容，因而作出撤销原判发回重审的判决，并附有原告应胜诉指示。

Sun-Intel. Com. v. Cleiter

United States Court of Appeals, Seventh Circuit, 1999

97 F. 3d 1357

Innis, circuit judge[1]. Must a buyer of computer software obey the terms of shrinkwrap licenses[2]? The district court[3] held[4] not, [concluding that] they are *not* contracts because the licenses are inside the box rather than printed on the outside...We disagree...Shrinkwrap licenses are enforceable unless their terms are objectionable[5] on grounds applicable to contracts in general, for example, if they are unconscionable[6].....Because no one argues that the terms of the license at issue[7] here are troublesome, we remand[8] with instructions to enter judgment for the plaintiff[9].

Sun-Intel, the plaintiff, has compiled information from more than 3,000

telephone directories into a computer database[10]. We may assume that this database cannot be copyrighted[11], Sun-Intel sells a version of the database, called Select Phone (trademark[12]), on CD-ROM discs. (CD-ROM means "compact disc-read only memory[13]." The "shrinkwrap license" gets its name from the fact that retail software packages are covered in plastic or cellophane "shrinkwap," and some vendors, though not Sun-Intel, have written licenses that become effective[14] as soon as the customer tears the wrapping from the package[15]. Vendors prefer "end user license[16]," but we use the more common term.)...Customers [use] the data with the aid of an application program[17] that Sun-Intel has written. This program, which is copyrighted searches the database in response to users' criteria (such as "find all people named Tatum in Tennessee[18], plus all firms with 'Door Systems' in the corporate name[19]"). The resulting lists...can be read and manipulated by other software, such as word processing programs[20].

The database in SelectPhone (trademark) cost more than $1 million to compile and is expensive to keep current. It is much more valuable to some users than to others. The combination of names, addresses, and SIC codes[21] enables manufactures to compile lists of potential customers[22].Manufacturers and retailers pay high prices[23] to specialized information intermediaries[24] for such mailing lists[25]; Sun-Intel offers a potentially cheaper alternative for calling long distance information, or as a way to look up old friends who have moved to unknown towns, or just as an electronic substitute for the local phone book. Sun-Intel decided to engage in price discrimination[26], selling its database to the general public for personal use at a low price (approximately $ 150 for the set of five discs) while selling information to the trade[27] for a higher price. It has adopted some intermediate strategies too: access to the Select Phone (trademark) database is available via the America

Online service for the price America Online charges to its clients (approximately $3 per hour), but this service has been tailored to be useful only to the general public....

To make price discrimination work, however , the seller must be able to control arbitrage[28].An air carrier sells tickets for less to vacationers than to business travelers, using advance purchase and Saturday-night-stay requirements[29] to distinguish the categories. A producer of movies segments the market by time, releasing first to theaters, then to pay-per-view services[30], next to the videotape and laserdisc market, and finally to cable and commercial TV[31]. Vendors of computer software have a harder task. Anyone can walk into a retail store and buy a box. Customers do not wear tags saying "commercial user[32]" or "consumer user." Anyway, even a commercial-user-detector at the door would not work, because a consumer could buy the software and resell to a commercial user. That arbitrage would break down the price discrimination and drive up[33] the minimum price at which Sun-Intel would sell to anyone.

Instead of tinkering with the product and letting users sort themselves—, for example, furnishing current data at a high price that would be attractive only to commercial customers, and two-year-old data at a low price — Sun-Intel turned to the institution of contract[34] Every box containing its consumer product[35] declares that the software comes with restrictions stated in an enclosed license. This license, which is encoded on the CD-ROM disks as well as printed in the manual, and which appears on a user's screen every time the software runs, limits use of the application program and listings to noncommercial purposes.

Matthew Zaeidenberg bought a consumer package of Select Phone (trademark) in 1994 from a retail outlet[36] in Madison, Wisconsin, but decided to ignore the license. He formed Silken Mountain Web Services, Inc., to

resell the information in the Select Phone (trademark) database. The corporation makes the database available on the Internet to anyone willing to pay its price-which, needless to say, is less than Sun-Intel charges its commercial customers...Sun-Intel filed this suit seeking an injunction[37] against further dissemination that exceeds the rights specified in the licenses (identical in each of the three packages Cleiter purchased). The district court held the licenses ineffectual because their terms do not appear on the outside of the packages. The court added that...a purchaser does not agree to—and cannot be bound by—terms that were secret at the time of purchase. 908 F. Supp. At 654[38].

Following the district court. We treat the licenses as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the [UCC[39]].Whether there are legal differences between "contracts" and "licenses" which may matter under the copyright doctrine of first sale[40] is a subject for another day…Cleiter [urges,] and the district court held, that placing the package of software on the shelf is an "offer," which the customer "accepts" by paying the asking price and leaving the store with the goods. *Peeters v. State*, 154 Wis.111, 142 N.W.181 (1913)[41]. In Wisconsin, as elsewhere, a contract includes only the terms on which the parties have agreed… So far, so good—but one of the terms to which Cleiter agreed by purchasing the software is that the transaction was subject to a license. Cleiter's position therefore must be that the printed terms on the outside of a box are the parties' contract—except for printed terms that refer to or incorporate other terms. But why would Wisconsin fetter the parties' choice in this way? Vendors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the

software does, and on which computers it works),or both. The "Read Me" file included with most software, describing system requirements and potential incompatibilities, may be equivalent to ten pages of type; warranties[42] and license restrictions take still more space. Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable[43] (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike. See Restatement (2d) of Contracts § 211 comment a (1981) ("Standardization of agreements serves many of the same functions as standardization of goods and services...").

Transactions in which the exchange of money precedes the communication of detailed terms are common. Consider the purchase of insurance. The buyer goes to an agent[44], who explains the essentials (amount of coverage[45], number of years) and remits the premium[46] to the home office[47], which sends back a policy[48]. On the district judge's understanding[49], the terms of the policy are irrelevant because the insured[50] paid before receiving them. Yet the device of payment, often with a "binder"[51] (so that the insurance takes effect immediately even though the home office reserves the right to withdraw coverage[52] later), in advance of the policy, serves buyers' interests by accelerating effectiveness and reducing transactions costs. Or consider the purchase of an airline ticket. The traveler calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in the order. The ticket contains elaborate terms[53], which the traveler can reject by canceling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous. See *Carnival Cruise Lines. Inc. v. Shute*, 499 U.S 585 (1991)[54]··· Just so with a ticket to a concert. The back of the ticket states that the patron promises not to record the concert; to attend is to agree.