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# Contracts

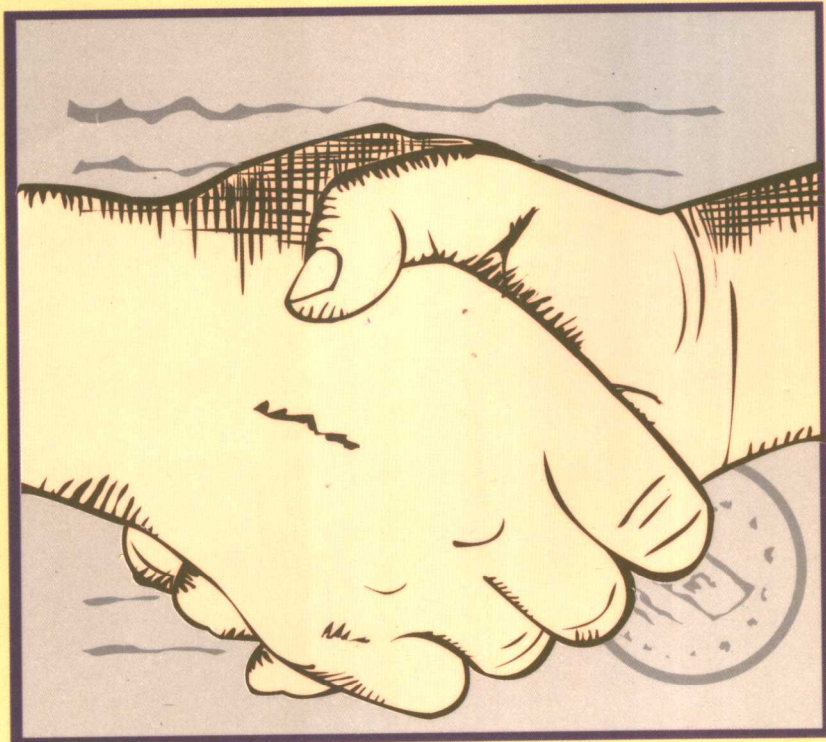
(Second Edition)

EXAMPLES & EXPLANATIONS

## 合 同 法

(第二版)

注译本



Brian A. Blum / 著  
张新娟 / 注

方正书局 策划出品

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CHINA FANGZHENG PRESS

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合同法(注译本)

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# 总序

在人类文明的发展与进步中,中华民族以其悠久的历史传统率先开启了东方文明的大门,古老的中华文明不仅创造出人类历史上最悠久的法律文化,而且在法制思想、法制观念及法律人才的培养上进行了积极的探索与实践。自战国时代著名法家人物邓析开创私家教授法学的传统以来,数千年来,法律教育与法律训练一直为历朝历代所重视,如最早的封建王朝——秦朝就曾经在政府内专门设置执掌法学研究与法学教育的“律博士”,到了三国两晋南北朝时期,律学的发展更是带来了中国古代法律理论的进步和法律人才的大量涌现,隋唐以后,以律典、断案以及律学为“明法”科考内容的选拔官吏制度,充分反映了法学教育在社会中的地位与影响。

人类进入二十世纪后,随着西方法律思想的“西风东渐”,中国的法律教育体系也在融会中西的潮流下形成了一定规模。中华人民共和国成立以后,中央人民政府积极创办新中国的教育事业,发展完善中国的法学教育体制。1950年,国家创办了中国人民大学法律系,这是新中国建立的第一所正规的高等法学教育机构。随后,北京大学法律系、北京政法学院(现中国政法大学)、复旦大学法律系等高等政法院系次第复办和新建,新中国法学教育无论在规模、体系以及内容上均有了显著的发展。虽然在文化大革命期间中国法学教育受到很大冲击,但改革开放以来,随着政治体制和经济体制改革的日益深化,中国的法制建设得到了长足的发展,中国法学教育事业以前所未有的速度飞跃发展,一个从普法教育到专业法律人才培养的完整法律教育体系已经初步建立起来,目前,经教育部认可具有法律专业本科学位授予权的学校已达298所。

新中国法学教育是在国家改革开放的大环境下快速发展起来的,中国法学教育界始终以积极主动的姿态,以开放的胸襟,采取走出去、请进来的办法,不断加强与世界各国法律界、法学教育界的沟通、交流与合作,有效地推动了中国的法律教育不断迈向更高层次。其中“中美著名法学院院长联席会议暨中美法学教育的未来”学术研讨会(1998年6月)、“中国——欧洲著名大学法学院院长联席会议暨欧洲一体化与中欧法学教育合作”学术研讨会(2000年6月)、“亚洲法学教育改革与发展论坛”(2001年12月)等一系列国内外法学教育交流活动,在国内外产生了巨大影响,特别是2000年12月举行的“21世纪世界百所著名大学法学院院长论坛暨中国人民大学法学院成立五十周年庆祝大会”,是中国法学教育走向世界具有里程碑意义的国际法学教育盛会,不仅表明中国法学教育的蓬勃发展已为世界各国所肯定,而且架起了东西方法学教育交流合作的桥梁。在中西法律文化的交流和碰

撞中,中国法学教育兼收并蓄,不断吐故纳新,保持着永续发展的势头。

随着经济全球化的发展,特别是中国加入世界贸易组织后,培养精通外语、精通涉外贸易规则的复合型专门人才成为新世纪高等教育的重要目标。为了适应这种新形势,2001年教育部提出在我国高等教育中推行双语教学,无疑是一个具有前瞻性的的重要举措。在中外法律文化交流和日益频繁的新形势下,推行法学领域中的双语教学有利于中国法制体制改革和法学教育的深化;有利于创造一个适应国际规则的中国法律人才成长的环境;有利于中外法律文化的相互吸收与借鉴。目前,全国法律院校纷纷展开双语教学的尝试和探索,并且取得了一定的成效。但是,由于国内尚无一套具有一定权威性和较高水准、可供高等法学教育直接使用的原版教材,使法学双语教育缺少有效的载体,在一定程度上影响了法学双语教学的进一步推行。中国方正出版社副社长、中国人民大学法学院在职博士研究生胡驰同志利用在美国哥伦比亚大学法学院作为期一年访问学者的机会,通过认真细致的调查并邀请专家论证,从美国排名前十位的法学院数十种法学教材中经过精心筛选,选择了一套适应我国法学教育实际的经典法学教材,并从美国以出版法学教材而著名的出版公司 Aspen 处购得版权,邀请专家加以注解,以全新的形式在国内出版,供各法学院校双语教学之用。

这套教材的英文原版部分,无论在内容、容量和形式上比较适合我国法学院校本科高年级学生和研究生研习美国法律和专业英语之用;特别是它每一章节所附的“释例和解析”部分(Examples & Explanations),是每一个作者吸收美国法院多年判例的精华总结整理出的理解和指导该法在实践操作中的精要之所在,因而也是该系列教材的特色之所在,值得我们国内的教材编写者借鉴学习。另外,中国方正出版社此次并没有简单地采用“影印版”的方式引进本系列教材,而是充分考虑到中国学生英美法知识背景相对薄弱、相应方面辅助读物有限等实际困难,特地邀请有关专家学者和一些有英美法留学背景的人士,为本系列教材中的关键词、核心概念和一些具有深远影响的法院判例做了详实准确的注释,同时指引读者在中国法与美国法之间建立一定的联系,活学活用、融会贯通。此举更是为这套教材增添了可观的附加值,值得向各大法律院校的广大在校生和工作在司法第一线的法官、检察官们推荐。

在本套教材即将付梓之际,中国方正出版社嘱吾写几句话,该社襄助法学教育的义举值得赞赏,欣然援笔以为序。

曾宪义

2003年10月20日

(曾宪义教授担任中国人民大学法学院院长、教育部高等学校法学学科教学指导委员会主任委员、中国法学会法学教育研究会会长)

# 《合同法：案例与分析》

## 中文注译版导读

亲爱的中国读者：

本书系为美国法学院一年级学生学习合同法所编著。大多数学生使用本书以对课堂所学和讨论进行补充。《合同法：案例与分析》对一般合同法课程讲解到的概念和原理一一做出解释。书中给出的案例与实际问题的紧密结合，学生可以运用书中的原理解决假设场景中的论题；而书中的案例分析可以指导学生分析和解决问题的方法。

美国合同法来源于英国的普通法。远在英属殖民地在美洲建立之时，英国人就引入了他们所熟悉的法律体系。由于中国的法律体系以大陆法为基础，中国律师与美国律师的思维模式和解决问题的方法就有很大区别。换言之，中国的学生会发现虽然美国合同法的具体条文与中国法中的对应条文十分相似，但这些条文在美国法律体系中制定、确立、应用的方法却迥然不同。本书前三章解释了美国合同法的传统与基本原理。对于那些希望对美国法律传统与中国法律传统差别之处有所了解的中国学生来说，这几个章节特别重要。简介中也强调了美国合同法体系中的一些重要特征。

美国是一个联邦制国家。美国宪法仅赋予了联邦政府有限的权力，所以许多重要法律领域的立法权为各州政府所有。合同法属于州立法的一个领域。虽然在联邦法中有一些适用于合同领域的法规，但合同法的大部分法规和法则都由各州制定。这意味着在美国不存在单一的合同法体系，而是 50 个相似而并非完全相同的法律体系。因此，当我们学习美国的合同法时，我们只需学习多数州所接受的一般性规则，同时也要了解到在某些州立法里这些规则会有差异。

中国学生习惯从法典中查找法律条文，但是美国合同法不是一部成文法典。事实上，合同法的大部分甚至不具成文法形式。在立法上，一些法律领域会用法规法令的形式表现，有时也会将部分领域的法律合并成综合性法典，如美国《统一商法典》。然而，大多数情况下，美国合同法是由法院在判决过程中所形成。这是普通法系的一个重要特征。当一个适格的法院对一宗合同案件作出判决，该案件就成为自始之后类似案件的先例。换言之，这个判决就成为法律，在这个案件之后发生的类似的案件都将遵循其判决。这种从特定案例的判决中创造一般法规的方法就是我们所熟悉的归纳推理。因为法院创造法律规则，所以学习美国法律必须阅读和分析大量法院的法庭意见。读者也会注意

到在本书中经常提及法院的法庭意见。

尽管你会发现中美合同法规则中有许多相似之处,但在美国合同法中有时会碰到与中国法截然不同的规则和概念。这些差别中,有的是大陆法和普通法之间由于历史、文化和程序上的不同造成的,例如,在第七章谈到的对价原则是美国法律的核心,但在大陆法中并没有该原则的对应物。同样,在第二章介绍的“普通法与衡平法的区别”贯穿本书,这个区别来源于英国法的特殊历史惯例,对大陆律师来说比较陌生。有一些法规为某些合同规定了订立的形式要求(参见第11章:“有关欺诈行为的法规”);由于在有关合同的诉讼中通常起用陪审团,证据的提出在美国法律系统中具有非常重要的意义,所以一些法规为口头作出的合同条款的证据做出相应规定(参见第12章:“有关口头证据的规则”)。

本书的结构为美国律师所熟悉的编写方法:

- |                   |   |
|-------------------|---|
| <b>第1、2、3章</b>    | 概括地介绍有关合同的法律,并对判例法进行分析。   |
| <b>第4、5章</b>      | 涉及合同的订立。这两章解释了确定合同双方的合意所采用的客观标准,并通过描述要约和承诺的过程解释了合同的产生。                |
| <b>第6章</b>        | 解释了在《统一商法典》下合同订立的原则如何适用于货物销售合同。                                       |
| <b>第7章</b>        | 谈及对价原则,该原则要求达成合同的交易双方之间必须存在交换。  |
| <b>第8章</b>        | 谈及“允诺后不得反悔”。  |
| <b>第9章</b>        | 当一个法律关系具有某些合同的要素,但又不完全符合成立合同的条件时,将恢复原状作为合同责任的替代方法。                    |
| <b>第10、11、12章</b> | 合同解释和对合同形式的要求。这三章阐述怎样解释在合同双方订立合同时所使用的语言和行为的意义,以及什么证据可用于证明合同的存在和合同的条款。 |
| <b>第13章</b>       | 当一方行为不当或订立合同不诚实时,法院有对合同监管的权力。   |
| <b>第14章</b>       | 订立合同的行为能力,以及当合同一方是未成年人或精神上有缺陷的人时所采用的原则。                               |
| <b>第15章</b>       | 解释了当一方或双方受错误事实影响订立合同,以及合同成立后,合同目的落空或者情势重大地改变了合同成立时合同一方的潜在假设之时将会发生什么。  |
| <b>第16章</b>       | 分析了合同的构成,说明了将合同条款划分为允诺与条件的重要性。  |
| <b>第17章</b>       | 讨论违约的问题。违约可分为两种,一种是在履行期限到来前的毁约,另一种是履行期限到来时未恰当履行。                      |
| <b>第18章</b>       | 讨论了一方违约时,另一方可获得的司法救济。   |
| <b>第19章</b>       | 合同中的第三方当事人,在合同成立后就其作为合同指定受益人或受让人要求权利,或者在合同转托时承担义务。                    |

附:历史上 20 个重要的美国合同法案例

*Allegheny College v. National Chautauqua County Bank*, 246 N. Y. 369 (1927)

*Carlill v. Carbolic Smoke Ball Co.*, 1 Q. B. 256 (1893)

*Drennan v. Star Paving Co.*, 51 Cal 2d 409 (1958)

*Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854)

*Hamer v. Sidway*, 124 N. Y. 538 (1891)

*Hawkins v. McGee*, 84 N. H. 114 (1929)

*Hochster v. De La Tour*, 118 Eng. Rep. 922 (1853)

*Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683 (1965)

*Jacob & Youngs v. Kent*, 230 N. Y. 239 (1921)

*Kingston v. Preston*, 99 Eng. Rep. 437 (1773)

*Lawrence v. Fox*, 20 N. Y. 268 (1859)

*Lucy v. Zehmer*, 196 Va. 493 (1954)

*Masterson v. Sine*, 68 Cal. 2d 222 (1968)

*Parker v. Twentieth Century-Fox Film Corp.*, 89 Cal. Rptr. 737 (1970)

*Raffles v. Wichelhaus*, 159 Eng. Rep. 375 (1864)

*Sherwood v. Walker*, 66 Mich. 568 (1887)

*Taylor v. Caldwell*, 122 Eng. Rep. 309 (1863)

*Webb v. McGowan*, 27 Ala. App. 82 (1935)

*Williams v. Walker-Thomas Furniture*, 350 F. 2d 445 (1965)

*Wood v. Lucy, Lady Duff-Gordon*, 222 N. Y. 88 (1917)

# **CONTRACTS**

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## **Examples and Explanations** *Second Edition*

**Brian A. Blum**

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Northwestern School of Law  
Lewis & Clark College*



**ASPEN LAW & BUSINESS**  
*A Division of Aspen Publishers, Inc.*  
**Gaithersburg                      New York**

*To Fabiola , my companion  
with Love*

# *Preface*

I expect that most readers of this book will be first-year law students who will use it as a resource to assist in learning and understanding the law of contracts—to prepare for class, to unravel and supplement class materials and discussion, and to review and prepare for exams. In deciding on the scope, depth, and approach of the book's coverage, I have aimed at their needs. My focus has been on what is likely to be most appropriate and helpful to a person who approaches contract law as a novice and is trying to assimilate and understand not only the details, but also the larger issues of this complex subject.

In revising this book for its second edition, I have renewed my efforts to provide an accessible and helpful treatment of the law of contracts. I have not changed the focus or approach of the first edition, nor the extent or nature of its coverage. Instead, I have concentrated on matters of detail, altering text and diagrams only to the extent necessary to add clarity, adding fresh examples and explanations, and changing or removing those original examples and explanations that called for refinement.

## **The Style, Approach, and Purpose of this Book**

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Like many other law school courses, contract law is typically taught by means of discussing and debating cases and other materials that have been assigned for reading in advance of the class session. A terrible flood of information is unleashed by this process, and few students can assimilate and appreciate it all by simply studying the casebook and listening in class. Supplementary reading is indispensable to understanding and digesting what is covered in class. To be most useful, such a supplementary text should be written with an awareness of the coverage, depth, and scope of most contracts courses, and with a sense of what students are likely to need by way of additional reading. In writing this book, I have tried to keep that goal in mind. Relying on my own experience as a teacher of contract law, and on the content of casebooks, I have tried to maintain the discussion in this book at the level that may be expected in a typical contracts class.

To achieve this purpose, it is not enough to outline legal rules

or to state doctrine. Although it is surely one of the aims of a contracts class to teach the current rules of law governing contracts, a knowledge of current legal rules is only one of the components of an adequate understanding of contract law. Students are also expected to learn the derivation and development of the rules, their historical and contemporary rationale, the public policies that they are meant to serve, and the way in which they coalesce to form a coherent body of law. Because neither rules nor their underlying policies are static, and are often unsettled and the subject of controversy, students must also be exposed to the uncertainties of the law and must learn to develop the ability to evaluate critically and to form judgments. In addition, like so many other courses in law school, a contracts course serves the goal of exposing students to broader issues of legal process, legal analysis, dispute resolution, and lawyering skills such as drafting, advising, and evaluating the strength of a case. This book attempts to encompass this range of learning.

Although this book contains much textual discussion of the rules and policies of contract law and of the themes mentioned above, it is not a traditional treatise. Its purpose is not to provide a highly detailed and comprehensive exposition of the law of contracts, with exhaustive citation of authority. Its principal aim is the clear and accessible explanation of the fundamentals of the law, with a particular concentration on what information is likely to be helpful for a student who approaches the subject for the first time. For this reason, it tries to articulate assumptions and to express doctrine and policy accurately, while avoiding finicky distinctions and qualifications that are more likely to confuse than to elucidate. This path sometimes presents the danger of oversimplification, but that seems to be a worthwhile sacrifice to gain the advantage of clarity and a focus on the larger issues.

As part of the effort to clarify legal principles and the relationships between contracting parties, I have used diagrams extensively. I believe that visual representations can be a great help in clarifying and reinforcing verbal exposition.

## **The Use of Examples and Explanations**

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It is difficult to learn the law by studying abstract principle. Concrete examples are needed to place doctrine in context and to show how it operates to affect behavior and to resolve disputes. Examples are therefore used extensively in the text itself to illustrate concepts under discussion. In addition, a distinctive feature of this book is the use of "examples and explanations," which take

up a substantial part of each chapter. Their purpose is not only to provide further illustration and wider discussion of the subject matter of the text, but also to give students a means of self-testing on the topics covered. The “examples” pose questions based on hypothetical facts, and the “explanations” analyze and offer a resolution of the problems. As a general rule, the “examples and explanations” do more than simply provide a means of reviewing what has been stated in the text. To resolve them adequately, one must use reasoned argument and must thoughtfully apply the principles set out in the text. You will therefore benefit the most from them if you do not merely read through them, but rather take the time to formulate your own answer to an “example” before reading its “explanation.” This will allow you to test your knowledge and understanding of the material, to practice identifying issues, and to develop skills in composing and organizing answers to the kind of questions commonly found in exams.

## **The Organization of this Book in Relation to your Contracts Course**

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There are a number of different ways to organize a contracts course, and the casebooks reflect quite a diverse approach to the sequence in which material may be covered in class. It is therefore quite possible that your contracts course will not follow the same sequence as the chapters in this book. (For example, some courses begin with remedies for breach of contract, which is not covered here until Chapter 18, and some begin with consideration doctrine, which is not reached until Chapter 7.) This book has been written with an eye on the divergent ways in which the topics of contract law are presented in class, so a student should have no trouble reading chapters out of order. To use this book in the same sequence as your contracts course, simply refer to the table of contents or index to find the part of the book that deals with the subject under discussion in class. Cross-references are included in each chapter to help give you an idea of where to find allied topics or further reference to the subject under discussion.

## **A Recommendation About Chapters 1 Through 3 and the Glossary**

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Irrespective of the organization of your class, I do recommend,

however, that you read Chapters 1, 2, and 3 as soon as possible. These short chapters are intended as an introduction to some of the root principles of contract law and legal analysis. They contain basic information and guidance on core concepts, terminology, and case analysis that may not be articulated fully or at all in your class materials or discussion. A little time spent in working through these chapters at the beginning of the semester may save you needless puzzlement and confusion. Also, you should refer to the glossary at the end of the book for short definitions of terms that may be unfamiliar to you.

## The Use and Citation of Authority in this Book

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To make this book as readable and accessible as possible, I have kept citation of authority to a minimum. You will find none of the detailed footnotes and citations that you would expect in a treatise or law review article. However, some sources of authority are such an integral part of the process of learning contract law that to omit them would impede understanding. These sources are referred to constantly throughout the book. They are:

1. The RESTATEMENT (SECOND) OF CONTRACTS (referred to in the book in abbreviated form as Restatement Second), a compendious and highly influential formulation of the rules of contract law.
2. Article 2 of the Uniform Commercial Code (UCC), a statute governing contracts for the sale of goods.
3. Court opinions, a vital source of law in our system. Although a case (or string of cases) could be cited for (and often against) almost every proposition in this book, I have been very selective in using caselaw. In the text itself, I refer only to a handful of cases that have achieved monumental status in the law of contracts. I cite and discuss cases regularly but selectively in the "explanations." These cases are not used simply to support conclusions, but have been chosen either because they are good illustrations of the issue under discussion or because they provide an interesting contrast to the facts of the problem. Because I feel that it is helpful for students to be familiar with at least some of the cases used in the "explanations," I have preferred cases that are included in casebooks, and especially those that are

important or popular enough to be found in several case-books. You should therefore not be surprised to find that you have studied a number of the cases discussed in this book.

*Brian A. Blum*  
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