高校硕士研究生学科英语系列精品教材

丛书主编　谢艳明
丛书副主编　王娜　胡红萍

高级法学英语

English for Law

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前　言

《高级法学英语》旨在培养学习者借助已有的基础英语为工具学习法学知识，在法学知识的学习过程中，习得专业语言。编写原则既遵循语言学习的内在规律性，又充分体现法学知识的专业特点，重在提高法学硕士研究生的专业英语思辨能力。教材内容不再是一般法学知识的简要介绍性文本，而是以问题为导向的深入探讨和研究。

本教程设计阅读总量为 50 000 个英文单词，生词概率为 2%。单元课文阅读量为 5 000 个英文单词。每单元由课文、生词、注解、练习和法律英语翻译技巧组成。全书共十个单元，每单元课文由三篇各 1 500 词左右的文章组成一个内容完整、主题突出的统一体，有利于学习者贯通知识，进一步深入分析探讨。适合大学英语四级水平以上且有相当法学基础的学习者使用。

课文内容包括普通法系与大陆法系的比较、合同与准合同、商人法与商法、欧洲统一销售法、国际环境法、公平招聘法律问题、跨国离婚法律问题、有子女的父母犯罪量刑问题、英格兰与苏格兰刑事拘留问题、律师的公平正义与司法独立等专题。法学英语翻译基础包括基本翻译技巧：加注、增补、省略、转换、切分、合并，以及句子翻译技巧：状语从句的翻译、定语从句的翻译、被动句的翻译和长句的翻译。单元练习包括阅读理解问题、词汇练习、短文翻译和课文概要写作。

全书由李剑波统稿审校，并编写第一单元至第四单元。胡红萍编写第五单元至第七单元。姚明华编写第八单元至第十单元。教材编写得到中南财经政法大学研究生部研究生创新教育精品教材建设项目的资助。在编写和教材试用过程中得到中南财经政法大学部分法学专业 2013 级、2014 级和 2015 级研究生，部分翻译硕士专业 2013 级和 2014 级研究生以及部分外国语言学及应用语言学专业 2012 级和 2013 级研究生的支持和帮助。在此，一并表示感谢。

编　者

2015 年 7 月

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Unit One
Contract Law

Section A

Understanding of Contract

1 In the eyes of lawyers the word "contract" is used in common speech, simply to refer to a writing containing terms on which the parties have agreed. "Contract" is often used in a more technical sense to mean a promise, or a set of promises, that the law will enforce or at least recognize in some way. British law defines contract as an agreement arising from offer and acceptance. One party makes an offer, and another party accepts that offer. When this has happened (provided that other necessary factors, namely, consideration and intention to contract, are present) there is a contract.

2 In arguing the definition of contract some jurisprudents think neither promise nor agreement is completely satisfactory as a basis for the definition. They claim that the definition of the American Restatement ignores the bargain—the exchange of equivalents which is the essence of a contract. No indication is made in the definition that the typical contract is a two-sided affair, something being promised or done on one side in return for something being promised or done on the other side. Thus to say that a contract can simply be "a promise" is to overlook the fact that there is generally some act or promise given in return for the other promise before that promise becomes a contract. Even to say that a contract may consist of "a set of promises" gives no indication that some of these promises are usually given in return for some others. But it would be wrong to assume that all contracts are genuine bargains in which something is offered on one side for something else of equivalent value on the other.

3 Every promise is an agreement and every set of promises forming the consideration for each other is also an agreement. Agreement implies two or more persons who agree upon the same thing in the same sense. It may create legal obligation or it may not create legal obligation and in this sense not every agreement can become enforceable at law.

4 These scholars also argue that all the definitions in terms of promises or agreements

presuppose that people only enter into contractual relations after they have made some agreement or promise. In fact, this is not always the case. People sometimes simply enter into transactions or relations which are not really based on prior agreements or promises. One obvious example is that of the simultaneous exchange, or sale. A person who buys goods in a supermarket and pays cash for them is exchanging his money for the goods that he buys.

5 There is no doubt at all that this is a legal contract, but it is artificial to regard it as a contract created by agreement or promise. To insist that there must be a prior agreement or a set of promises in such a case is to imply that there is a moment of time—before the handing over of the goods and the money—in which the parties are legally bound to perform their agreement or promises. But it seems very doubtful whether that is the case. Still it must be recognized that it might be very well argued that "in contemplation of law" there is an implied agreement before the actual exchange of goods for money.

6 Promises and agreements undoubtedly lie close to the center of the concept of contract, but there are at least two other ideas which also lie very close to that center. One is that a person who induces another to rely upon him and change his position, ought not to let that person down, and the other is that a person who does a service to another or renders him some benefit, ought generally to be recompensed for his trouble. Contractual obligations are often imposed for one or other of these reasons on persons who have not really promised or agreed to bear them. In order to reconcile this result with traditional definitions of contract, two devices are often employed. One is to rely on the concept of an "implied agreement" or "implied promise"; the other is to argue that the liability being imposed is not "truly" contractual but is in fact a legal liability of a different kind, for instance, a liability in tort.

7 In practice, people can gather some idea of what the word "contract" means from the cases in Bolin Farms v. American Cotton Shippers Ass'n (1973). That year saw a spectacular rise in the price of cotton on the American market. The causes were said to include large shipments to China, high water and flood conditions in the cotton belt, late plantings forced by heavy rains, and the devaluation of the dollar. In the early months of the year, before planting, a cotton farmer will make a "forward" sale contract for delivery to the buyer of all cotton to be raised and harvested on a specified tract at a fixed price per pound, without guarantee of quantity or quality. The farmer can then use this contract to finance the raising of his crop.

8 Early in 1973, cotton farmers made such contracts to sell at a price roughly equal to the price on the market at that time, some 30 cents a pound. By the time the cotton had been raised and was ready for delivery, however, the market price had risen to about 80 cents a pound. Many refused to perform the "forward" contracts that they had made at the lower price, and scores of lawsuits resulted throughout the cotton belt. Not only were the farmers universally unsuccessful, but the decisions evoked little attention.

9 What promises will the law enforce? What remedies were available to the disappointed cotton buyers on the farmers' enforceable promises? The cases here expose three fundamental assumptions made by courts in enforcing promises. One of these is that "law is concerned mainly with relief of promisees to redress breach and not with punishment of promisors to compel performance." A second assumption is that the relief granted to the aggrieved promisee should generally protect the promisee's expectation by attempting to put the promisee in the position in which it would have been had the promise been performed. A third assumption is that the appropriate form of relief is substitutional, in the form of a judgment awarding money damages to be paid to the aggrieved promisee, rather than specific, in the form of a court order directing the promisor to perform its promise.

10 After the above discussion we come to know the "Contract" may be defined as an agreement, a promise or a set of promises, which create legal liabilities rather than moral obligations, enforceable by the law between two or more persons to do or forebear from doing some act or acts; their intentions being to create legal relations and not merely to exchange mutual promises, both having given something, or having promised to give something of value as consideration for any benefit derived from the agreement or the promise except a transaction agreement by deed. Although transactions by deed are legally binding they are not true contracts at all. A transaction by deed derives its legally binding quality from the special way in which it is made rather than from the operation of the contract law.

11 The definition of contract in the Chinese contract law stresses its functions, saying that a contract is the manifestation of intention to establish, change or terminate the civil relationship between two or more parties. Lawfully established contract shall be protected by law. According to this definition a contract is of three features:

(1) Making a contract is a civil juristic act done by both sides. At least two parties shall enter, and express their genuine intention. Otherwise a contract cannot be established.

(2) The purpose to make a contract is to bring out a certain civil juristic effect, including establishing, changing or terminating the civil relationship between the two parties.

(3) Making a contract is a legal act rather than illegal act. Unlawfully established contracts are null or void.

12 In some continental countries, for example, in Germany, the BGB uses an abstract concept of Rechtsgeschaefte, putting contract into a category of legal act which covers intention of the two parties and some other certain lawful conducts. This intention is viewed as an essential requirement to form a contract, therefore, the two parties can not establish a contract if they do not manifest it to each other. In the *French Civil Code* there is a more specific concept of Consensus than that of legal act. Consensus here means the genuine intention of the two parties. Without manifestation of the intention a contract cannot be concluded.

New Words and Expressions

offer *n.* 邀约，发价
acceptance *n.* 接受，承诺
devaluation *n.* 货币贬值
court order 法庭判令
consideration *n.* 对价，约因
forbearance *n.* 克制，抑制
constitute *v.* 构成
recompense *vt.* 赔偿；酬谢
Rechtsgeschaefte （德语）*n.* 法律行为，合法交易
consensus *n.* 合意
equivalent value 对等的价值
simultaneous exchange 同时发生的交易
contemplation of law 法律意图
forward contract 期货合同

Notes

1. BGB 《德国民法典》

BGB (*The Bürgerliches Gesetzbuch*) is the civil code of Germany. In development since 1881, it became effective on January 1, 1900, and was considered a massive and groundbreaking project. The BGB served as a template for the regulations of several other civil law jurisdictions, including Portugal, Estonia, Latvia, Japan, Thailand, South Korea, the People's Republic of China, Brazil, Greece and Ukraine.

2. *French Civil Code* 《法国民法典》

The *French Civil Code* is the *Napoleonic Code* (French: *Code Napoléon*, and officially *Code Civil des Français*) established under Napoléon I in 1804. The code forbade privileges based on birth, allowed freedom of religion, and specified that government jobs should go to the most qualified. It was drafted rapidly by a commission of four eminent jurists and entered into force on 21 March 1804. The Code, with its stress on clearly written and accessible law, was a major step in replacing the previous patchwork of feudal laws. The *Napoleonic Code* was very influential on developing countries outside of Europe, especially in the Middle East, that were attempting to modernize their countries through legal reforms. It is regarded as one of the few documents that have influenced the whole world.

3. Bolin Farms v. American Cotton Shippers Ass'n (1973) 柏林农场诉美国棉花运输联盟案。association 的缩写形式可为 assn. , ass'n. , Assn.

Exercises

I. Questions for discussion.

1. Can a promise or an agreement constitute a contract?
2. "Neither agreement nor promise is completely satisfactory as a basis for the definition of contract." Do you agree with it?
3. What elements does contract possess?
4. Explain "every contract is an agreement but every agreement is not a contract".
5. What is the BGB?

II. Fill in the blanks with the best choice according to the text.

1. A legal contract may be defined as _____.

A. an agreement B. a promise C. a set of promises D. the consent

2. In the case of Bolin Farms v. American Cotton Shippers Ass'n (1973), the court decision of enforcement was based on _____ fundamental assumptions.

A. one B. two C. three D. four

3. In the *French Civil Code*, the Consensus means the genuine intention of the _____ parties.

A. one B. two C. three D. four

4. A person who buys goods in a supermarket and pays cash for them is exchanging his money for the goods that he buys, which is taken as a legal _____.

A. contract B. agreement C. promise D. action

5. The BGB is of _____ legal system.

A. common law B. continental law C. civil law D. case law

III. Fill in the blanks with the words and expressions given below.

indivisible contract	*divisible contract*	*a competent party*
consideration	*delayed payment*	*express contract*
a formal contract	*an oral contract*	*written contract*
illegal contract	*implied contract*	*legality of purpose*
mutual agreement		

1. A person who is of legal age and normal mentality is _____.
2. The rights and obligations of the parties to a contract should be _____.
3. A contract that is created entirely through conversation of the parties involved is _____.
4. The promises exchanged by parties to a contract is _____.
5. A contract that is understood from the acts or conduct of the party is _____.

6. A contract whose meaning is not determined by the conduct of the parties is _____.

7. A written contract that bears a seal is _____.

8. A _____ has several unrelated parts, and each of them can stand alone.

9. The _____ means that a contract cannot violate the law.

10. The _____ is a contract where the related parts depend on one another for satisfactory performance.

IV. Translate the following passage into Chinese.

Making a contract is a civil juristic act done by both sides. At least two parties shall enter, and express their genuine intention. Otherwise a contract cannot be established. The purpose to make a contract is to bring out a certain civil juristic effect, including establishing, changing or terminating the civil relationship between the two parties. Making a contract is a legal act rather than illegal act. Unlawfully established contracts are null or void. Contractual obligations are often imposed on all parties. According to the difference among their appearance, it falls into precontractual obligation, after contractual obligation and the subordinated obligation in contract performing.

Section B

Mistake in Contract Law

1 Generally, a valid contract must be based on real mutual assent. A valid contract must be an agreement reached through consultation. A contract may be vitiated on the ground of existence of mistake, misrepresentation, duress and undue influence.

2 Mistake refers to misunderstanding of one or both parties as to determination of the subject matter, its existence, its quality, the nature of a contract, the identity of the contracting party, or the terms, etc. For example, S delivers an offer to the T (Telegraph) Company to transmit to B which states: "will sell 800,000 laths delivered at your address, two ten net cash." Through fault of the T Company, the message is transmitted as an offer to sell for "two net cash" B accepts without knowing and without having reason to know of the mistake. On the rationale, there may be no enforceable contract between S and B. However, by the better view, B has an enforceable contract at "two net cash". This case indicates that the offeror assumes the risk of a mistake, having chosen his means of transmission. (S may have a cause of action for damages against the T Company depending upon the contract between those parties and applicable regulatory enactment.)

3 Mistake must be of fact and not of law. This concept has a technical meaning and does not cover errors of judgment as to value. Thus if A buys an article thinking it is worth £100 when in fact it is worth £50 only, the contract is good. And A must bear loss if there has been

no misrepresentation by the seller. This is what is meant by the maxim caveat emptor (let the buyer beware.)

4 An interesting example of how the judiciary can interpret what some might think to be mistakes of law as mistakes of fact in provided by Solle v. Butcher. In that case Butcher had agreed to lease a flat in Beckenham to Solle at a yearly rental of £250, the lease to run for seven years. Both parties had acted on the assumption that the flat, which had been substantially reconstructed, so as to be virtually a new flat, was no longer controlled by the Rent Restriction legislation then in force. If it were so controlled the maximum rent payable would be £140 per annum. Nevertheless Butcher would have been entitled to increase that rent by charging 8% of the cost of repairs and improvements which would bring the figure up to about £250 per annum, the rent actually charged, if he had served a statutory notice on Solle before the new lease was executed. No such notice was in fact served. Actually they both for a time mistakenly thought that the flat was decontrolled when this was not the case. Solle realized the mistake after some two years, and sought to recover the rent he had overpaid and to continue for the balance of the seven years as a statutory tenant at £140 per annum. Butcher counterclaimed for rescission of the lease in equity.

5 Held: the mistake was one of fact and not of law. The fact that the flat was not within the provisions of the Rent Acts, and this was a bilateral mistake as to quality which would not invalidate the contract at common law. However, on the counterclaim for rescission, it was held that the lease could be rescinded. In order not to dispossess Solle, the court offered him the following alternatives (a) to surrender the lease entirely; or (b) to remain on possession as a mere licensee until a new lease could be drawn up after Butcher had had time to serve the statutory notice which would allow him to add a sum for repairs to the £140 which would bring the lawful rent up to £250 per annum.

6 In practice, such mistakes may come into three categories: mutual (or non-identical bilateral) mistake, common (or bilateral identical) mistake and unilateral mistake.

7 Mutual (or non-identical bilateral) mistake occurs where X offers to sell car A and Y agrees to buy, thinking X is B, in other words, when concluding a contract both parties do not intend the same meaning. In this case, neither should be bound. In Raffles v. Wichelhaus (1864) S agreed to sell cotton to B to arrive on the Peerless. There happened to be two ships named Peerless, one to sail in October, the other to sail in December. The seller tendered the cotton from the December Peerless. The buyer intended to buy cotton from the October Peerless. Therefore it was held that there existed no contract between the parties. At common law the contract made in such a mistake is not necessarily void because the court will try to find the sense of promise. This usually occurs where, although the parties are at cross-purposes, the contract actually identifies the agreement. On the other hand, equity also tries to find the sense

of the promise as identified by the contract, thus following the law. However, equitable remedies are discretionary and even where the sense of the promise as identified by the contract can be ascertained equity will not necessarily grant specific performance if it would cause hardship to the defendant.

8 Common (or bilateral identical) mistake occurs where both parties are mistaken and each makes the same mistake. In practice only common mistake as to the existence of the subject matter of the contract or where the subject matter of the contract already belongs to the buyer will make the contract void at common law. S and B had concluded a purchase and sale contract as to a shipload of maize. They had thought that the maize was on the ship. But in fact, the captain had executed his power to sell out the maize because the maize had begun to rot away. In this case both parties were not bound because of non-existence of the maize. This can be also illustrated in Galloway v. Galloway (1914). A man and woman entered into a separation deed, believing that they were husband and wife. This was not so, because the prior spouse of the husband turned out to be still alive. The separation deed was held to be void, because the marriage, which was the basis of the deed, did not exist.

9 Unilateral mistake. If one of the parties should not have known or did not know of the quality, the main part or the nature of the contract and the other party knew, there is a contract according to the former's misunderstanding. In this situation the former cannot repudiate the contract unless he can prove in evidence that he has been intentionally deceived and induced to enter into the contract he did not intend to. Consider the situation: If an offeror misdirects his offer to the person, the latter cannot accept the offer if he knows or has reason to know that he was not the intended offeree. However, if the offeree neither knows nor has reason to know of the misdirection of the offer the unintended offeree may accept and create an enforceable contract.

10 The validity of a contract is usually not affected by mistake unless the mistake is fundamental and harmful to the contract. In practice, the following mistakes result in a valid contract. (a) A mistake in intention made by one party, for example, a mistake made in calculation of price. (b) A mistake in judgment, for example, a mistake in estimate of one's ability to perform a contract. (c) A mistake in understanding the meaning of a description of certain products in sale of them.

11 In the light of civil law there are two kinds of mistakes shall vitiate a contract. (a) A mistake in the quality of a subject matter (this quality seen as a substantial one without which the buyer would not have bought). (b) A mistake in identity of the other counter-party which is vital to the conclusion of a contract.

12 It is held in the GBG that a contract shall be rescinded by (a) a mistake in manifestation of the intention and (b) a mistake in form of manifestation of the intention.

New Words and Expressions

caveat emptor 买方自慎；货物售出，概不退还
Peerless *n.* 无敌号货轮
in evidence 举证
arbitration agency 仲裁机构
reality *n.* 真实性
consultation *n.* 协商
identity *n.* 身份
annum *n.* 年
decontrol *v.* 解除对……的管制
vitiate *v.* 使……无效
dispossess *v.* 剥夺

Notes

1. mistake of law 法律错误(合同适用法律方面的错误)

Mistake of law is commonly regarded as the "ignorance of the law is no excuse". If a person does not know that the legislature has passed a law criminalizing something or that a person does know what is against the law, i. e. , does not know what the law forbids, that this ignorance does not operate to relieve the person of criminal responsibility for the commission of the crime. At common law, mistake of law or "ignorance of the law" was no defense.

2. mistake of fact 事实错误(与交易的实际情况不相符合的错误)

Mistake of fact is required that the defendant must have acted or omitted to have acted under an actual and reasonable belief in the existence of the facts. Those facts or circumstances, if true, must have made the defendant's conduct lawful. The defendant's belief must not only be actual (honest) but also a reasonable belief.

Exercises

I. Write T (true) or F (false) for each of the following statements according to what you have learnt from the text.

1. A contract must be an agreement reached through consultation.

2. Mistake must be of fact and not of law.

3. Mistakes may be in three categories: mutual mistake, common mistake and unilateral mistake.

4. A contract shall be rescinded by a mistake in manifestation of the intention and a mistake in form of manifestation of the intention.

5. The validity of a contract is usually affected by mistake unless the mistake is fundamental and harmful to the contract.

6. Bilateral identical mistake occurs where both parties are mistaken and each makes the same mistake.

7. Non-identical bilateral mistake occurs where X offers to sell car A and Y agrees to buy, thinking A is B.

8. If A buys an article thinking it is worth £100 when in fact it is worth £50 only, the contract is illegal.

9. In common law the contract made in such a mistake is not necessarily void because the court will try to find the sense of agreement.

10. In the light of civil law there are many kinds of mistakes shall vitiate a contract.

II. Translate the following passage into Chinese.

The system of mistake is an old system of civil law, and the expression of intention mistake is different from the concept of mistake in Anglo-American law.

The validity of a contract is usually not affected by mistake unless the mistake is fundamental and harmful to the contract. In practice, the following mistakes result in a valid contract: (a) A mistake in intention made by one party, for example, a mistake made in calculation of price. (b) A mistake in judgment, for example, a mistake in estimate of one's ability to perform a contract. (c) A mistake in understanding the meaning of a description of certain products in sale of them.

In the light of civil law there are two kinds of mistakes shall vitiate a contract: (a) A mistake in the quality of a subject matter. (b) A mistake in identity of the other counter-party which is vital to the conclusion of a contract.

Section C

Quasi-Contract

1 The term "quasi-contract", once used to describe the area of law now called "restitution" or "unjust enrichment", is now out of favour. "Quasi-contract" says only that the matter is not contract. So far as it suggests that there is a sort of contract, it deceives, unintelligibly. Quasi-contractual liability should be understood not as part of unjust enrichment, but as a different basis of liability that can help us see what liability for unjust enrichment might be: liability grounded in notions of fairness.

2 The notion of quasi-contract can help us understand what is at stake. whether to impose liability in certain circumstances in which no contract has been made between the parties but when we have good reason to believe that such a contract would have been made if the parties