

# 英文合同解读

## 语用、条款及文本范例

Understanding  
English Contracts

王辉 著



法律出版社  
LAW PRESS CHINA

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**图书在版编目(CIP)数据**

英文合同解读:语用、条款及文本范例/王辉著.

—北京:法律出版社,2007.10

ISBN 978-7-5036-7740-3

I. 英… II. 王… III. 英语—合同—写作 IV. H315

中国版本图书馆 CIP 数据核字(2007)第 147767 号

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责任编辑/卫蓓蓓 王娟

装帧设计/李瞻

出版/法律出版社

编辑统筹/对外合作出版分社

总发行/中国法律图书有限公司

经销/新华书店

印刷/北京中科印刷有限公司

责任印制/沙磊

开本/787×960 毫米 1/16

印张/16 字数/228 千

版本/2007 年 10 月第 1 版

印次/2007 年 10 月第 1 次印刷

法律出版社/北京市丰台区莲花池西里 7 号(100073)

电子邮件/info@lawpress.com.cn

销售热线/010-63939792/9779

网址/www.lawpress.com.cn

咨询电话/010-63939796

中国法律图书有限公司/北京市丰台区莲花池西里 7 号(100073)

全国各地中法图分、子公司电话:

第一法律书店/010-63939781/9782 西安分公司/029-85388843 重庆公司/023-65382816/2908

上海公司/021-62071010/1636 北京分公司/010-62534456

深圳公司/0755-83072995 苏州公司/0512-65193110

书号:ISBN 978-7-5036-7740-3

定价:50.00 元

(如有缺页或倒装,中国法律图书有限公司负责退换)

## Preface

Being a Canadian lawyer working in China over the last ten years, I probably have as much as appreciation as most lawyers on the challenges involved in understanding and producing legal documents in a second language. Needless to say, these documents need to be not only accurate and easily understandable, but also produced at reasonable costs and on a within tight timeframes.

During the earlier stages of my legal practice, the concerns were between English and French versions of documents. All documents filed in the province of Quebec, including with its securities commission, need to be in its official language of French. English version of the same documents, which is preferred by most Canadian and international parties, would be filed or used in the other provinces. One has the choice of either language when dealing with the federal government, which recognizes both as the country's official languages.

Now that I am in China, my concerns focus exclusively on the difference between English and Chinese languages. Most of the documents which we work with involve foreign parties in China or Chinese parties in Canada. Given that the differences between English and Chinese are by far greater than those between English and French, the challenges associated with navigating through the former are also much more monumental.

It is important that all the parties in a transaction have the same understanding of the purpose, structures, and terms and conditions of a transaction. Ideally, the transaction documents, when reviewed and executed, serve this purposes. With the parties having different appreciation of the language, the issues and challenges are obvious.

Typically, each party, and their advisors, would be more familiar and comfortable working with the language of its own country and have more limited

understanding of the other. It goes without saying that they would try to negotiate to have the contract in the language which they are more comfortable with. Where the contract is entered into in more than one language, each of the party would also try to negotiate to have the version in their preferred language to be the primary version, taking precedent over the other version in the face of inconsistencies. Where the parties cannot agree on this issue, we could end up having both versions being of equal effect, or with additional provisions to try to resolve inconsistencies. This tends not to settle anything but simply delay the inevitable pain of having to, through arbitration or other means, retrospectively determine the original intent or the more likely intent of the parties at the time of contract.

Such opportunity to choose may not be always available in China, given that many contracts involving transactions with foreign parties require government approval. Chinese is applied by the regulators in their review and approval the contracts. The Chinese version is hence the “approved contract” by the regulators, in spite of what the contract might otherwise stipulate. The same could also apply for Chinese companies entering into transaction abroad in some cases. More often than not, they have no choice but adopt the foreign language version as the primary version.

Given that the parties often do not have to luxury to have their preferred version of contract as the primary version, it is imperative to not only understand and know exactly what one is agreeing to, but also to ensure that the other party understands and agree to the same things. There is therefore no substitution to have accurate and well drafted documents in each of the languages.

I am always uncomfortable with the concept of “translating” a contract from one language to another. The process is more akin to drafting the same contract in rather than translating it to a different language. It is as challenging as it is important and occupies a great deal of time and efforts of the “translators” It might even end up taking more time to “translate” than to draft the initial version, which contains a great deal of “standard” provisions.

Understanding and translating contracts from or into foreign languages can therefore be one of the most challenging yet least appreciated tasks for lawyers. Not only does the translated version need to be accurate and complete, it also has to be easy to read and understandable; at least no less than the original version. A

good translator of legal documents is therefore worth his or her weight in gold. There is no easy way around it. At a minimum, in addition to the obvious linguistic skill, one must also have some basic knowledge of the legal system and of the two countries, and be familiar with the basic terminology of the industry. Any additional appreciation of the culture, tone, etc, would be icing on the cake.

Marco Wang's "*Understanding English Contracts*" certainly does not purport to help one worth his/her weight in gold. There is no doubt so much, much more time and efforts involved. It might nevertheless throw some ideas and stimulate some thoughts along the way.

## **Bob Kwauk**

Managing Partner and Chief Representative  
Blake, Cassels & Graydon LLP, Beijing Office

Member, National Board of Directors of Canada-China Business Council

## 前言：重建巴别之塔

《旧约·创世纪》第十一章记载：古时候，天下人都说一种语言。人们在向东迁移的进修，走到一个叫示拿的地方，发现一片平原，就住下来。他们计划修一座高塔，塔顶要高耸入云，直达天庭，以显示人们的力量和团结。塔很快就建起来了。这惊动了天庭的耶和华。他暗自思忖，现在天下的人们都是一个民族，都说一种语言，他们团结一致，什么奇迹都可以创造，那神还怎么去统治人类？于是耶和华便施魔法，变乱了人们的口音，使他们无法沟通，高塔也无法继续建下去，最终没有建成。

巴别塔故事也许是人类沟通的一出悲剧，英文和中文犹如被耶和华“巴别”的两种语言。对于中国众多从事涉外业务的律师来说，要想运筹帷幄英文合同，绝非易事。笔者借巴别塔故事之寓意，立志为中国的涉外律师破译英文合同之章法、掌握合同起草之要领、品味合同构成之色香、学习法律英语之精髓、打通法律语言之障碍、攀登法律事业之巅峰而重建一座“巴别塔”尽绵薄之力。

笔者奉献给读者的是一部三篇六章的英文合同解读实务用书。其特点在于：

1. 介绍了英文合同的种类、名称；
2. 总结了英文合同的结构、句式和用词特点；
3. 阐释了英文合同的常用语句；
4. 提供了翔实的例句；
5. 剖析了英文合同的一般条款以及特殊条款；
6. 解读了典型英文合同范例；
7. 列举了与合同相关的术语和词汇；
8. 收录了相关法律法规中英文对照。

本书虽为涉外律师所作，但对于从事对外经贸工作、公司法律顾问等实务工作者以及法律英语爱好者亦不失为一本实用的业务参考用书和学习材料。

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**语用篇**

**LANGUAGE  
AND  
USAGE**



# 第一章 英文合同概述

## General Introduction

*In view of all this,  
we are making a binding agreement,  
putting it in writing,  
and our leaders,  
our Levites and our priests are affixing their seals to it.*

(Nehemiah 9:38, *BIBLE* NIV)

因这一切的事，  
我们立确实的约，  
写在册上。  
我们的首领，  
利未人，和祭司都签了名。

(尼西米记 9:38,《圣经》新国际版)

合同,古称契约(港台现仍多用此语)。“契”者即证券,证明买卖、抵押、租赁等关系的文书,如契据、房契等。古代典籍中常见此语,如《易·系辞》就有“后时圣人易之以书契”。“约”者即共同商定的事,共同议定要遵守的条文,如和约、条约等。《三国演义》中就有“昔高祖约法三章,黎民皆感其德”。

西方早在《圣经》中就有关于上帝在西乃山与以色列人立约的记载。诺亚方舟就是借上帝与诺亚的契约而建造的。But with thee will I establish my covenant; and thou shalt come into the ark, thou, and thy sons, and thy wife, and thy sons' wives with thee.<sup>[1]</sup>(但我要与你立约,你以及你的儿子、妻子和儿媳,要与你一同进入方舟。)

## 第一节 合同与协议(Contract and Agreement)

在现代英语合同中,合同一般称为 contract,协议一般称为 agreement。那么 contract 和 agreement 是一回事吗?它们之间又有什么关系呢?《中华人民共和国民事诉讼法》第 85 条规定:“合同是当事人之间设立、变更、终止民事关系的协议。”(A contract shall be an agreement whereby the parties establish, change or terminate their civil relationship.)《中华人民共和国合同法》第 2 条规定:“合同是平等主体的自然人、法人、其他组织之间设立、变更、终止民事权利义务关系的协议。”(Contracts referred to in this Law are agreements between equal natural persons, legal persons and other organizations for the purpose of establishing, altering and terminating mutual civil rights and obligations.)

《美国法律重述合同法第二次汇编》(*Restatement(Second) of Contracts, Section 1*)将合同定义为:“A contract is a promise, or a set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”(合同乃为一个允诺或一组允诺。违反此一允诺时,法律给予救济;或其允诺之履行,法律在某些情况下视之为一项义务。)这一定义亦为 Steven H. Gifts 所编著的 *Law Dictionary* 完全引述。但一般而言,contract 乃两个以上当事人间具有法律约束力之协议,或由一个以上当事人所为一组具有法律约束力之允诺。(A contract is a legally binding

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[1] thee 在古英语里表示 you 的宾格形式。thou 在古英语里表示 you 的主格形式,相当于汉语中的汝,尔,你。thy 则是 thou 的所有格形式。shalt 为古英语用法,相当于现代英语中的 shall。

agreement between two or more parties or a set of legal binding promises made by one party or more. See G. C. Lindsay, *Contract*, 3rd Ed. 1992)。这一表述在 L. B. Curzon 编撰的 *Dictionary of Law* 中被概括为“A legally binding agreement creating enforceable obligations”。Chris Turner 在其编撰的 *Contract Law* 中对 contract 所做的定义更为具体明了。他认为“合同”就是“an agreement between two parties by which both are bound in law and which can therefore be enforced in a court or other equivalent forum”。(对合同方具有法律上约束力,可由法院或其他同等管辖地强制执行的协议。)

在 *Black's Law Dictionary*(8th Ed.) 中对 contract 的定义多达 8 项:

- (1) An agreement two or more parties creating obligations that are enforceable or otherwise recognizable at law;
- (2) The writing that set forth such an agreement;
- (3) A promise, or a set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty;  
(作者注:与《美国法律重述合同法第二次汇编》中“contract”的定义相同。)
- (4) Broadly, any legal duty or set of duties not imposed by the law of tort; esp., a duty created by a decree or declaration of a court;
- (5) The body of law dealing with agreement and exchange;
- (6) The term of an agreement or any particular term;
- (7) Loosely, a sale or conveyance;
- (8) Loosely, an enforceable agreement between two or more parties to do or not to do a thing or a set of things; a compact.

至于 agreement, L. B. Curzon 的 *Dictionary of Law* 将其定义为:“A consensus of minds, or evidence of such consensus, in spoken or written form, relating to anything done or to be done.”(是对已做和待做的有关事宜以口头或书面形式做出的相同意思表示或该意思表示的证据。)

*Black's Law Dictionary* (8th Ed.) 对 agreement 下了两个定义:(1) A mutual understanding between two or more persons about their relative duties and obligations regarding past or future performances; a manifestation of mutual assent by two or more persons. (双方或多方就过去或将来的相关职责和义务的履行而达成相互的理解;双方或多方相互达成一致的表现形式。)(2) The Parties' actual bargain as found in their language or by implication from other circumstances, including course of dealing, usage of trade and course of performance. (即当事人通过语言或其他情形暗示而确立的实际约定,包括交

易常例、贸易习惯以及履行惯例。)

Contract(合同)和 Agreement(协议)到底能不能相互替换呢?让我们来看看英文合同相关书籍和词典的说法。

Chris Turner 在其编撰的 *Contract Law* 中将合同的成立表述为三个基本要素,即:(1) Agreement—based on mutuality over the terms, agreement exists when a valid acceptance follows a valid offer; (协议:基于要约与承诺形成对条款的相互一致而存在;)(2) Consideration—given by both sides, the quid pro quo<sup>[1]</sup>, and the proof that the bargain exists; (约因:双方付出的对价及对价存在的证据;)(3) Intention to create legal relations—since a contract is legally enforceable, unlike mere gratuitous promises. (设立法律关系的意愿:合同具有法律上的执行力,不同于纯粹的无偿赠与的允诺。)

这里也是用 agreement 来解释 contract 的,认为合同是一种符合一定条件的协议。

在英语法律用语中虽然多用 agreement 来解释 contract,其实也有偶用 contract 解释 agreement 的情形,如: Agreement... (2) A contract (*The Law Dictionary*)。我们甚至可以找到 agreement 和 contract 在同一句中交替使用的实例。如: If the contract contains an innocent mistake, you can get out of the agreement if the mistake is important.<sup>[2]</sup>

*Black's Law Dictionary* (8th Ed.) 对 agreement 和 contract 的关系做出了精辟的阐述,指出“每一份合同均是一份协议,但是并非每一份协议均构成一份合同”。(Every contract is an agreement, but not every agreement is a contract.) 该辞典进一步指出:“协议一词,就口语意义而言,包括意在影响两人或者多人间相互关系而作出的任何安排,无论该等关系是法律关系还是其他关系。”[In its colloquial sense, the term “agreement” would include any arrangement between two or more persons intended to affect their relations (whether legal or otherwise) to each other.]

综上所述,我们不难看出,汉语的法律用语仅用 agreement 解释 contract,而英语的法律用语往往不很严格,多用 agreement 解释 contract,但也有用 contract 解释 agreement 的情形,虽说大多情况 contract 与 agreement 有所区别,有时候两者还可以作为同义词互换使用。可以说 contract 都是协议,但协议不一定就是 contract。但就广义的协议和合同来讲,还是有区别的:

[1] 拉丁语,即 What for What, 相等的补偿或者报酬;交换条件;对价。

[2] *What Should I Know About Contracts, The State Bar of California*, 2<sup>nd</sup> Ed. 1984.

1. 从成立的宗旨上看,协议十分宽泛,不囿于为了当事人间形成法律或其他关系,即便是为影响当事人的义务也未必形成严格意义上的合同关系,如不动产转让或动产赠与。

2. 从内容、条款上看,合同较为具体、详尽,着眼于微观;而协议则较为原则、粗疏,致力于宏观。实践中往往合作方就某一项目达成协议对有关原则问题做出约定,然后在此基础上签订合同,再全面明确各项具体的细节。

3. 从涉及范围上看,合同的标的往往比较单一集中,也很明确,通常都是一事一议,就事论事;而协议的标的往往比较广泛,一项大型项目的协议往往包括或分解成若干个具体的合同。

4. 从书写格式上看,合同已基本格式化了,大家可以看到许多的合同模板;而协议的格式相对灵活一些,没有什么固定的格式。

狭义的协议则和合同并无分别,只是用语上和习惯上的称呼而已。

## 第二节 合同的种类与名称(Categories and Titles)

一份英文法律文件到底是不是英文合同,就要看它的内容是否符合合同的要求。一般而言,合同不外乎包括人、事、时、地、物五大要素,也就是4W1H (Who, When, Where, What, How),如果你手上的文件内容包括了这五项要素而且签署生效,该文件就应该具有了合同的性质,而不论它是以何面目出现的。常见的英文合同名称可分为以下四大类:

### 一、合同、协议(Contract, Agreement)

文件名称直接标明 Contract 或 Agreement 是最常见的英文合同。《中华人民共和国合同法》第九章至第二十三章就合同种类做了概括,它们分别是买卖合同(Sales and Purchase Contracts);供用电、水、气、热力合同(Contracts for Supply of Power, Water, Gas and Heat);赠与合同(Gift Contracts);借款合同(Loan Contracts);租赁合同(Lease Contracts);融资租赁合同(Lease-Finance Contracts);承揽合同(Contracts for Work);建设工程合同(Construction Project Contracts);运输合同(Contracts of Carriage);技术合同(Technology Contracts);保管合同(Deposit Contracts);仓储合同(Warehousing Contracts);委托合同(Mandate Contracts);行纪合同(Commission Agency Contracts);居间合同(Brokerage Contracts)等十五大类。

常见的协议有委托代理协议(Agency Agreement)、合伙协议(Partnership Agreement)、股份转让协议(Shares Purchase Agreement)、保密协议



(Confidentiality Agreement)、竞业禁止协议(Non-competition Agreement)、聘用协议(Employment Agreement)等。

## 二、意向书(Letter of Intent)

有的文件名称标为“Letter of Intent”(简称 LOI,通常翻译为“意向书”)、“Memorandum of Understanding”(简称 MOU,通常翻译为“谅解备忘录”),甚至只称为“Memorandum”(简称 Memo,通常称之为“备忘录”)。另外,也有标为“Minute of Talks”(会谈纪要)的文件。

这些法律文件往往是当事人双方在商洽合作中形成的,可以称之为准合同文件(quasi-contract)。这些准合同文件从名称上看似乎不是合同或者协议,但如果经当事人签订,即具有一定的法律约束力,甚至当事人会在没有形成正式的合同或协议之前就直接依据这些准合同文件进行实质性合作,从而赋予这些文件合同或协议的性质。由此可见,合同的效力不能被其名称所拘束。如果上述法律文件完整明确地记载了交易的条款,且当事人依据该条款内容履行并达成交易目的,那么这些法律文件就应当被认定为双方达成的合同或者协议。

## 三、契约(Covenant, Indenture, Deed, Compact, Protocol)

Covenant 主要指不动产转让的合同或证明文件。英文合同如果基于传统英美法对价的存在,也会使用这个词来表示双方达成的契约。如: In consideration of mutual premises and covenants herein contained, the parties hereto agree as follows.

Indenture 为契约、契据, corporate indenture 则指公司发行债券的契约文件。

Deed(契据)为签名后盖上印章的书面合约。在合同法中,对价是一个有效合约的必备元素。但若该合约以契据形式签署则被视为满足对价要求。

Compact 多用于国家间的协议、协定。例如,联合国的《全球协定》(Global Compact)。

Protocol 通常翻译为草约或者议定书,往往也是双方会谈结果的文字依据。经双方签字后,即受其约束,对草约内容承担法律责任,如果需要补充、修改、完善,双方还会签订补充的协议。如我们耳熟能详的《中国加入世界贸易组织的议定书》(Protocol on the Accession of China)。