新编英美合同法英语

◎刘显正／主编

New English Course In English and American Contract Laws

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内 容 简 介

本书参阅和借鉴了大量国内外资料，对英美合同法的产生与发展、合同的定义与分类、合同的基本要素、合同的解释、当事人、履约、违约补偿等方面论述极为详细，且条理清晰，层次分明，要点突出，案例丰富，具有较高的学术价值。作为教科书，该书编写规范，选材丰富，难度适中，便于学习。

本书适用于我国已通过全国大学英语四、六级考试的法学、经济、商贸、金融、法学英语等各类本科生、研究生和法学英语爱好者。对从事涉外经贸的人员和涉外法律工作者亦颇有参考价值。

前　言

在满足社会主义现代化建设和实施依法治国方略对法律人才的需要的过程中，我国的法学教育有了极大的发展，尤其是在我国加入 WTO 以后，许多重点高校把双语教学提到了议事日程上。新的形势要求法学教师使用双语讲授专业课程，这标志着我国的专业英语教学面临着越来越高的要求。许多高校新开设了法律英语课程或增设了法律英语专业，这将为我国的法律外语教学改革带来极大的机遇与挑战。为了适应这一形势的需要，我们特邀中南财经政法大学、中南民族大学、南京航空航天大学、五邑大学、华侨大学、暨南大学珠海学院、湖北行政学院等高校的部分专家学者、法学及法学英语教师编写了《新编英美合同法英语》。

契约制度是西方国家调整市场经济关系的核心法律制度。掌握这方面的知识有助于我们的学生学习和理解涉及市场经济关系的其他各种法律法规，其中包括国际商法和 WTO 的某些法规和文件。

本书参阅和借鉴了大量国内外资料，从中汲取了丰富的营养。作为专业书籍，本书对英美的合同法论述极为详细，且条理清晰，层次分明，要点突出，案例丰富，具有较高的学术价值。作为教科书，该书编写规范，选材丰富，难度适中，便于学习。

本书适用于已通过全国大学英语四、六级考试的法学、经济、商贸、金融、法学英语等各类本科生、研究生和法学英语爱好者。对从事涉外经贸的人员和涉外法律工作者亦颇有参考价值。

本书选择了英美合同法中的七个方面作为重点，编写内容包括合同法的产生与发展、合同的定义与分类、合同的基本要素、合同的解释、当事人、履约、违约补偿。学生能从中学到英美合同法的一些基本理论与案例，也能领略到不同法系之间的差异。相信学生在学完本书后一定能开阔眼界，夯实学习法律英语所要求的基本功，提高自身阅读法律英语原著的能力。

为了方便学生学习，在编排上，书中的多数章节由课文、词汇、讨论、注释和案例组成，书后附有词汇表可供查阅。

本书在编写过程中得到了澳大利亚法学专家山显治先生（Roderick O'Brien）的帮助，完稿后又得到他的审阅。在此对他表示衷心的感谢。

东北大学英语教授李思国先生对主编于 1989 年 3 月出版的《英美合同法概论》

提出过宝贵的意见并作序，在本书出版之际，再次向他表示衷心的谢意。

由于编者水平有限，书中难免仍有一些错误，恳请使用者提出宝贵意见。

编　　者

2004 年 7 月

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CHAPTER 1 DEVELOPMENT OF CONTRACT LAW

1 The development of contract law

1.1 Functions of contract and contract law

In the past, when people went out into the world to find new lands or markets or sources of raw materials, or do other businesses they often tried to employ a form to manifest their intention to establish, change or terminate their legal relations with other people. Such form is contract. As we know, contracts are likely to be made orally or by conduct or in writing as long as two or more individuals, groups, corporations, or organizations have such intention. Contract may take place in some form. For example, before the appearance of money people were accustomed to conclude transaction contracts via barter. Later, with the economic and social development, people began to make their contracts through money exchange. In the modern societies people can even establish their contractual relations via executory exchange of promises. Contracts play an extremely important role in human economic activities such as production, distribution and links in the circulation chain. Without contracts people can do nothing in setting up business, raising capital, constructing plants and buildings, obtaining equipment and raw material, hiring staff and workers, selling products, establishing agencies, shipping and insuring goods, protecting intellectual property, etc., because all these tasks must be conducted in some form of contract. No wonder some legal experts claim that modern societies are contract societies. Without contracts our world would not advance at all.

What is contract law? Generally speaking, contract law is part of the law of obligations. It is concerned with obligations people incur to others as a result of the relations and transactions they become involved in. Broadly, it is a part of private law, because the law of obligations deals primarily with duties owed by some members of the public to others and these obligations are exclusively enforceable by the persons they are owed to. A person, who wishes to complain of a breach of contract, must enforce his rights in the courts without the assistance of any public authority. Where do obligations

arise? They arise from a variety of sources such as the social relationships (between members of a family or between neighbors), the employment relationship and so on. Traditionally obligations have been classified in two categories: obligations which are self-imposed and obligations which are imposed from outside. Contract law is that part of the law dealing with self-imposed obligations. (Other important parts of the obligation law are the law of torts and the law of restitution.) According to the definition of contract law, people naturally have their rights to choose what obligations they wish to assume. In the very primitive societies obligations were normally thought to arise from custom and status, rather than free choice. In modern collectivist societies, where legal sense is blunted, and individual rights of free choice are less respected, the role of contract law may be less significant, at least in practice. But in highly developed societies, contract law has played a larger role and more extensive rights of free choice are traditionally respected. Contract law has been maintaining the economic and social order.

Special terms

law of tort	侵权法
law of restitution	赔偿法
links in the circulation chain	流通环节
establishing agencies by agreement	委托代理
intellectual property	知识产权

Words

barter	以物易物
transaction	交易，买卖
enforceable	有强制力的
assume	承担
maintain	维护

Discuss

1. What is the function of contract?
2. What is the definition of contract law?

1.2 Rise and fall of free choice

In the development of English law, contractual ideas came into greater prominence from the sixteenth century. In the process of the formation of the contract law we can see the influence of a considerable number of factors, especially of the moral factor and the

economic or business factor. It is not surprising to find that behind the contract law there lies the simple moral principle that a person should fulfill his promises and abide by his agreements. But this is not to say that a moral principle can be translated into a legal rule, for it was not until the late sixteenth century that we acquired something resembling a general law of contract, and when this came it was mainly under the impetus of the business or economic factor.

With the economic development of modern societies the need for contract law becomes far more pressing. The division of labor, which is such a fundamental feature of modern societies, creates a contract or increasing demand for the transfer of property from some members of the community to others and for the performance of services by some members of the community for others. The legal machinery by which these transfers of property and performance of services are carried out is broadly speaking the law of contract. On the other hand, economic development leads to the growth of the institution of credit. The emergence of a complex credit economy means that in the process of transferring property and performing services, people have necessarily to rely to a far greater extent than before on promises and agreements not only in commercial matters, but in all walks of life. "Wealth, in a commercial age, is made up largely of promises" explains the reason why the development of the contract law has been so largely associated with the development of commerce.

Later, as the eighteenth-century theories of natural law (which meant that men had an inalienable right to make their own contracts for themselves) and the nineteenth-century philosophy of *laissez-faire* (which similarly meant that the law should interfere with people as little as possible) were applied to the law of contract, and the whole contract law took root in the belief of freedom of contract. Freedom of contract indicated at least two ideas that:

(1) Contracts were based on agreement or mutual assent.

(2) The creation of a contract was unhampered by external control such as government or legislative interference. Freedom of contract meant that the parties to a contract were at least in theory, able to choose and agree upon their respective rights and duties as set out in the contract. It also meant that the parties should keep to the terms of the contract at all costs, and courts should enforce it.

All men of full age and competent understanding should have the utmost liberty of contracting. And contracts when entered into freely and voluntarily should be held sacred and enforced by courts of justice. But there were, of course, certain limits on this sanctity. Manifestly, contracts entered into under the influence of fraud, or duress, or contracts designed to violate the criminal law, could not be enforced. In practice, some legislation

was as much a violation of the sanctity of contract as an interference with freedom of contract.

In the nineteenth century the emphasis on agreement and the intention of the parties was so great that the contract law tended to be elevated into the central position in the law of obligations as a whole. This led to two developments:

(1) There was a reluctance to impose obligations on those who had not voluntarily assumed them, and

(2) Where obligations were imposed there was a tendency to treat them as contractual. The emphasis on agreement and the intention of the parties led to another consequence that contracts were binding and enforceable as soon as they were made, that is, as soon as they were agreed upon. This is a fundamental principle of the contract law.

Except some rules relating to the contractual capacity of minors and illegal contracts, the bulk of the actual rules of the contract law was based on the intention of the parties, because in most cases it was open to the parties to vary or exclude the operation of these rules by express agreement. But the emphasis on intention and "implied agreements" often misled courts and writers who failed to see that a good deal of the contract law was concerned with obligations arising from what they did, and not merely from what they agreed or promised. As to the second idea we can find the influence of political and economic theories at work.

On the other hand, freedom of choice was in a very restricted sense. It was freedom in the sense that nobody was bound to enter into any contract at all if he did not choose to do so. It was freedom in the sense that in a competitive society everyone had a choice of persons with whom he could contract, and it was freedom in the sense that people could make virtually any kind of contract on any terms they chose. Freedom in the first sense was certainly very largely true except in a very few cases indeed that a person was under a legal obligation to enter into a contract. Freedom in the second sense was restricted by the reduction of industrial and commercial competition caused by ever large monopolies in the public utilities including the railways. Freedom in the last sense was also restricted because such freedom overrode public interest—public policy. Legislative interference began to play a not unimportant role from an early date. For example, the *Truck Act* (1831) was passed to protect employees from the practice of being paid in kind instead of in cash and the *Gaming Act* (1845) enacted that wagers should no longer be capable of enforcement as contracts.

Later, the idea of freedom of contract was weakened. Firstly, change in social and economic conditions indicated that this idea was becoming a very different thing from

what it was claimed to be. Secondly, as the rules relating to contracts were elaborated, the sheer complexity of the law grew such that the theory that most of the rules were based on the parties' intention became more and more a transparent fiction. The doctrine of "frustration" may be taken to illustrate this tendency. Under this doctrine, a contract may be treated as terminated if it becomes impossible to perform it through some extraordinary event occurring without anybody's fault. Thirdly, as the detailed rules regulating most specific contracts, such as sale, agency, insurance and so forth, were worked out, the law tended to become more standardized. This again indicated that the real intention of the parties became less and less important. Fourthly, social and economic pressures which might virtually force a person to enter into a contract for a living also indicated that there was no choice and no competition in many circumstances. Finally, inequality in bargaining power, for instance, the bargaining strength of the employer was usually far greater than that of his men when trade unions were prohibited altogether or were still in their infancy.

Special terms

come into greater prominence	崭露头角
institution of credit	信贷制度
inalienable right	不可剥夺的权利
laissez-faire	放任自流
capacity of infants	未成年人订约的能力
the bulk of...	大量
at work	起作用
Truck Act	实物法案

Words

assembling	相似，类似
impetus	冲击
transfer	转移
unhampered	不受阻碍的
sanctity	神圣
utility	设施
override	破坏
wager	打赌
sheer	全然的
frustration	受挫，落空

virtually	实际上
terminate	终止

Discuss

1. Why do we say that the development of the contract law has been associated with the development of commerce?
2. Define freedom of choice.
3. By what was the idea of freedom of contract weakened?

1.3 New situations in the development of modern contract law

When we turn to consider modern developments, we have found that most of changes in political thought, in social and economic conditions, and in the law do not represent an entirely new departure, but are a continuation of a process of preceding period, or even a reversion to older tradition. For example, the paternalist ideology of much modern law is in many respects closer to that of the eighteenth century than that of the nineteenth century. On the one hand, freedom of contract remains even in the classical sense in the purely business area, on the other hand the classical law of contract no longer accords with the facts of the modern world in many situations. The coherence of the classical contract law has been being destroyed. There are three particular factors which have been speeding such process. The first is the emergence and widespread use of the standard form contracts, or contracts of adhesion, the second is the declining importance attached to free choice and intention as grounds of legal obligation, and the third, which is the factor of growth of consumer protection, has been the emergence of the consumer as a contracting party (and perhaps still more as a litigant). These three factors are interrelated.

The emergence of the standard form contract is inevitable because social and economic changes have brought great pressures to average people as well as a steady tendency towards larger and larger industrial and commercial organizations, culminating in many cases in monopolies or near monopolies. These organizations are always bound to offer standard terms and conditions to the public. Most people have to enter into such a contract if they want to make a living. For example, although nobody can compel a man to travel by train, if he wants to do so he must do so on the terms imposed by the railway authorities. He can not negotiate his own terms. However, such standard-form contracts have the advantages of saving time, trouble and expenses in bargaining over terms and the advantage that a legal decision in one case will very likely provide a guide to disputed problem in other cases. So these standard-form contracts have been widely used in every

walk of life. For instance, commercial agreements for the sale of goods will normally be recorded in "order form", "acknowledgments" with printed clauses; contracts for the carriage of goods by sea will usually be recorded in a printed "bill of lading"; insurance contracts are nearly always recorded in printed policies and so on.

Now such standard form contracts have become one of the major problems of the modern contract law. In most cases, there may be no opportunity and no freedom to negotiate one's own terms even if one thinks these standard terms unfair or unreasonable. The terms are laid down by one party, and the other may have no choice but to accept them or go without, that is, "take it or leave it". From the very nature of the case, these terms are liable to be far more favorable to the organization supplying the goods or services in question than to the individual receiving them. The organization has every advantage over the individual. It usually had the advantage of large resources, of the best legal advice and draftsmanship, of being able to litigate, if it comes to that, without having to worry unduly about the cost and of knowing that the individual, squirm as he may, cannot really do without its services.

One extremely common and troublesome feature of standard contracts is the presence of an "**exemption clause**", which often provides that the organization is not to be liable in virtually any circumstances whatsoever. This inequality is undermining the theory that contracts depend on mutual agreement. Legally such "exemption clause" may give rise to a few questions: (a) Can it be part of the contract? (b) When can it become part of the contract? (c) Can judge annul it for breach of "good faith" or public policy? When there arises a balance between the interests of two parties it might be desirable if the courts could redress the balance.

In settling disputes from standard form contracts, the trend has been to recognize the weak bargaining power of the individual and the strong position of the business supplier or manufacturer. The rules which have developed to protect both parties to a contract sometimes cause confusion, but in essence they are very much based on the 19th-century concept of freedom of contracts. In England, though the common law does not acknowledge that courts have any power to do so, courts may tend to treat these contracts with their sanctity as would be due to them if the whole contract had in truth been negotiated by agreement between the parties, and few English statutes are talking about invalidity of the unfair terms, yet the English courts may claim that the party who breaches the contract fundamentally cannot invoke the exemption clause as an excuse. The American courts may refuse to enforce any unconscionable clause or general condition going against public policy. American *Uniform Commercial Code* (*UCC*)

s2-302 stipulates that the court may refuse to enforce the contract, if the court, as a matter of law, finds the contract or any clause in it unconscionable at the time it was made. It may enforce the remainder of the contract or it may limit the application of any unconscionable clause as to avoid any unconscionable result. In practice, the German federal courts may annul the general condition (which means the condition on which a contract is made requires the other side to agree to it) that is not arranged on the principle of "good faith" in the interest of both parties. The French courts claim that the general condition violating the law of torts is invalid. French law limits exemption clause.

As to the consequence of the declining importance attached to free choice and intention as sources of obligation we have found the occurrence of a number of fundamental shifts in the law and legal thinking. There are increased signs of a willingness on the part of the courts to make a contract for the parties. There are increasing signs of a reluctance to award pure "lost expectation" damages except perhaps in straightforward commercial cases. Where actual loss is caused to a person because he has reasonably relied on what another has said or done, and has changed this position for the worse, the tendency to protect him by an award of "reliance damages" is stronger.

As to the growth of consumer protection many of the statutory changes in the law of contract have been designed with the express purpose of redressing the balance between the weak and the strong, and the organized and the unorganized. Innumerable examples could be cited of such statutes. For example, the *Rent Acts,* the *Consumer Credit Act,* the *Trade Description Act*. The *Unfair Contract Terms Act* [1977] is the most important *Consumer Protection Act* dealing with contractual rights. This *Act* greatly restricts the use of "exemption clauses" whereby contracting parties protect themselves from legal liability.

Nevertheless, there are signs of some recent disenchantment with the result of some types of consumer protection legislation, and parallel signs of a revived faith in the workings of the free market. The problem centers round the fact that if the consumer is too well protected it may simply become unappealing for suppliers to produce what he wants. For example, the rent regulation is widely thought to have hurt the very people it was designed to protect. So good tenant protection will lead to the consequence that few people are prepared to invest in providing houses for rent. Therefore, legislation is not always directed at redressing the balance between the weak and the strong, or at destroying the operation of the free market, but upholding it.

The concept of freedom of contract, in every sense, has been profoundly modified by changes in social and economic conditions, by changes in ideology, and by changes in the law itself. The result of these modifications is that agreement and intention while still