

案例教程影印系列
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第三版 Third Edition

合同法

CONTRACTS

案例与原理 Cases and Doctrine

[美] 兰迪·E·巴尼特 (Randy E. Barnett) / 著



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CITIC PUBLISHING HOUSE

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图书在版编目 (CIP) 数据

合同法: 案例与原理 (案例教程影印系列) / (美) 巴尼特著. —影印本. —北京: 中信出版社, 2003.12

书名原文: Contracts: Cases and Doctrine

ISBN 7-80073-994-5

I. 合… II. 巴… III. 合同法—案例—美国—英文 IV. D971.23

中国版本图书馆CIP数据核字 (2003) 第091670号

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合同法: 案例与原理

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责任编辑: 袁婉君

出版发行: 中信出版社 (北京市朝阳区东外大街亮马河南路14号塔园外交办公大楼 邮编 100600)

经 销 者: 中信联合发行有限公司

承 印 者: 霸州市长虹印刷厂

开 本: 787mm × 1092mm 1/16 **印 张:** 73.75 **字 数:** 1475千字

版 次: 2003年12月第1版 **印 次:** 2003年12月第1次印刷

京权图字: 01-2003-6440

书 号: ISBN 7-80073-994-5/D · 137

定 价: 170.00元

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E-mail: sales@citicpub.com

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总 序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出：“为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%—10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。”

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

伊曼纽尔法律精要 (Emanuel Law Outlines) 美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼，语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

案例与解析 (Examples and Explanations) 由美国最权威、最富有经验的教授所著，这套丛书历经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。

这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

案例教程系列 (Casebook Series) 覆盖了美国法学院校的主流课程，是学习美国法律的代表性图书，美国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

案例举要 (Casenote Legal Briefs) 美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

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PREFACE

In the beginning there was the textbook. It consisted of explanatory text. Students studied contracts largely on their own using treatises such as those by Blackstone and Kent or summaries of these treatises written by learned practitioners. Next came the casebook. It consisted of cases. Casebooks were developed for teaching contracts in the university classroom setting using the "case method." Then came the multivolume modern specialized treatises, the Restatements, the Realist Revolution, the Uniform Commercial Code, and, most recently, an explosion of legal scholarship with an increasing emphasis on legal theory.

As contracts casebook authors struggled to cope with each of these developments, contracts casebooks were transformed into an amalgam of highly edited cases and "squibs," fragments of law review articles, excerpts from the Uniform Commercial Code and the Restatement — and, of course, the ubiquitous "note material." The idea was to integrate the diverse sources of contract law in a single tightly edited volume. However, this evolution from casebook to integrated snippets of material has resulted in several undesirable consequences.

First, contracts teaching materials are now predigested. Practicing lawyers and legal scholars must scan whole cases, whole articles, and whole statutes to glean the information relevant to their problem. Unfortunately, to get everything into a single volume, cases, articles, and other materials are so heavily edited that students are not required to sift through the materials themselves. The scanning has already been done for them by the casebook author. Rather than gleaning the message of a case or an article, the challenge posed to students and professors by today's casebooks is to decipher the casebook *author's* message hidden in the structure of the materials.

Further, because highly edited casebooks inevitably take on a heavy dose of their authors' views of contracts, novice professors are forced either to learn and accept the author's viewpoint or to swim heroically against the tide. Experienced professors with independent minds are less likely to engage in fighting the casebook and are more likely to supplement it with their own materials, perhaps eventually abandoning the casebook altogether. While it is inevitable that the author's views will be reflected in any casebook, the more heavily edited and integrated a casebook is, the more difficult it becomes for teachers to project to students their own views of contract.

Finally, to make room for more cases about complex commercial transactions, contracts casebooks have increasingly abandoned the classic cases that contracts professors still debate to this day. Complicated commercial fact patterns make contracts seem remote from the life experience of average

first-year law students, who are required to take the course but may or may not be interested in pursuing careers practicing commercial law. As a result, contracts professors are at a competitive disadvantage with their colleagues who teach seemingly more engaging first-year subjects such as criminal law or torts.

This book charts a different course. It contains far fewer cases that are more lightly edited than has become the norm. In addition to commercial transactions, I have favored a mix of classic and very recent cases involving provocative controversies,¹ memorable fact patterns,² and public figures.³ These are cases that lend themselves to discussing both basic contract doctrine and the broad philosophical, economic, and political implications of adhering to these legal rules and principles.

In place of vexatious note material, students will find “Study Guides” before most cases and, after each topic, “Reference” citations to the most popular and respected contract treatises.⁴ In this way, students receive useful questions and suggestions *before* they read a case and ready access to more comprehensive and authoritative explanations of the material than is possible in a casebook. Each section also includes relevant provisions of the Uniform Commercial Code and the Restatement (Second) of Contracts.

For the third edition, my goal was to smoothly integrate a taste of the exciting and controversial issues involving E-Commerce that have arisen in recent years — particularly in the area of mutual assent. You will find cases on “click-through” agreements (*Caspi v. Microsoft Network*, *Ticketmaster v. Tickets.com* and *Specht v. Netscape Communications*), “shrink-wrap” agreements (*ProCD v. Zeidenberg*), terms that follow later (*Hill v. Gateway 2000* and *Klocek v. Gateway*) the statute of frauds and unconscionability (*In re RealNetworks*), and excerpts from the new Uniform Electronic Transactions Act (UETA), Uniform Computer Information Transactions Act (UCITA), and the proposed revisions to the Uniform Commercial Code. These materials raise the question: does this new mode of contracting undermine traditional assumptions or can long-standing contract principles be adapted and applied to the new information revolution?

A case involving the estate of the late actor River Phoenix has been added to the many other celebrity contracts cases, as well as another on whether *Pepsico* can be held to a contract for its advertisement of a *Harrier Jet* for 7,000,000 *PepsiPoints*. Most of this new material has been vetted in the classroom before its inclusion here. Very little has been omitted from the second edition, but some fascinating new background sections have been added including:

1. For example, surrogacy agreements, failed vasectomies, involuntary servitude, palimony claims, sexual harassment, reporters' promises of confidentiality, and children's rights.

2. For example, Chevy Corvettes, Carbolite Smokeballs, custom stereos, oil embargoes, cancelled coronations, football players, opera singers, college catalogues, employment manuals, computer software, and pregnant cows.

3. For example, Shirley Maclaine, Robert Reed, Brooke Shields, Jack Dempsey, Lee Marvin, Lillian Russell, and Elvis.

4. References are provided to E. Allan Farnsworth, *Contracts* (2d ed. 1990), John D. Calamari & Joseph M. Perillo, *Contracts* (3d ed. 1987), John E. Murray, *Murray on Contracts* (3d ed. 1990).

- a “Comparative Law Background” by Professor Dan Barnhizer on The United Nations Convention on Contracts for the International Sale of Goods;
- a “Strategic Background” from Working Group on Electronic Contracting Practices of the ABA on avoiding assent problems in electronic contracts; and
- a “Relational Background” by Professor Debora Threedy on whether the fishing nets were really rotten in the *Alaska Packers* case.

I believe it is safe to say that this casebook contains a larger portion of the scholarship providing context on the famous contracts cases than any other. These “relational background” materials will enrich the students’ understanding of the cases and will stimulate a deeper classroom discussion than will cases or statutes alone. Students actually *enjoy* them! They also illustrate that opinions of appellate courts are often surprisingly incomplete and that one’s sympathies for the parties may shift upon learning more about the facts. In addition, historical, comparative, ethical, economic, statutory, precedential, empirical, commercial, and theoretical “background materials” were selected and edited to engage students with the subject of contracts and spark debate, but also to be accessible. They can be assigned as required or optional reading, or they may be skipped altogether without detracting from doctrinal coverage, thereby greatly shortening the book.

For those professors who wish to teach contract theory by means of excerpts from legal scholarship, the new edition of the anthology *Perspectives on Contract Law*⁵ is designed to mesh harmoniously with the organization of this casebook. In contrast to the complex and sometimes idiosyncratic organization of some other casebooks, a great effort was made to adhere to a comprehensible *modular* organization reflecting the cause of action for breach of contract: Enforcement, Mutual Assent, Enforceability, Performance and Breach, and Defenses. While starting with enforcement or remedies is sometimes controversial (and I explain why I chose to do so in the introduction to Chapter 2), the modular construction of the casebook permits professors easily to reorder these topics as they see fit.

Randy E. Barnett

December 2002

5. Randy E. Barnett, *Perspectives on Contract Law* (2d ed. 2001).

ACKNOWLEDGMENTS

This book would not have been possible without the assistance of a great many persons. First are the wonderful people at Little, Brown and now Aspen Publishers. Their commitment to excellence by means of repeated peer reviews of the original proposal and successive drafts immeasurably improved the final product. Special thanks are due to Carol McGeehan, who originally conceived of this project, Betsy Kenny, who ably assisted her in shepherding it from conception to completion, and Tony Perriello, who deftly edited the manuscript for the first edition. I owe a great debt as well to the professors who gave selflessly of themselves as anonymous reviewers of the manuscript: Lisa Bernstein, Lissa Broome, Scott Burnham, George Cohen, Richard Craswell, David Dow, Henry Gabriel, Steve Knippenberg, Andrew Kull, Warner Lawson, Gregory Maggs, Dennis Patterson, Laura Stein, and Elizabeth Warren. Although I do not know who of them suggested which improvements to the text, I do know that, as a group, they functioned for me as a coauthor — looking over my shoulder to ensure that the book responded to the diverse needs and preferences of other contracts teachers. In addition, I received helpful suggestions from Ian Ayres, Sheldon Halpern, Alexander Micklejohn and Anthony Jon Waters. Several professors who used earlier editions of this casebook made a great many excellent suggestions for its improvement: Mark Chinen, Marcus Cole, Adrienne Davis, Mark Drumbl, Harold Dubroff, Mark Gergen, Grace Giesel, Henry Greely, Matthew Harrington, Michael Kelly, Kristin Madison, Carol Rose, Peter Siegleman, Robert Shepherd, Jim Smith, Eric Talley, Kellye Testy, William Vukowich, Kathy White, Christopher Wonnell, and, especially, David Snyder, who co-authored Chapter 13 and helped revise Chapter 14. My eagle-eyed BU colleague Mark Pettit (and contracts teacher *extraordinaire*) performed an enormous service by noting numerous typos and mistakes in the second edition, which have (hopefully) now been corrected.

Many improvements to previous drafts of this book were stimulated by class discussion with my contracts students at Northwestern University, Harvard Law School, and Boston University School of Law. Finally, I wish also to thank my extraordinary research assistants: Dan Brown at Chicago-Kent College of Law (Class of 1994), at Boston University, Saba Khairi (Class of 1995), Kristin Taylor, Andrew White, Kathleen Eagan (Class of 1996), Leslie Ravestein (Class of 2000), Lourdes German (Class of 2004) and, at Harvard Law School, Jaime Byrnes (Class of 2004). In addition to their other contributions, these students are solely responsible for researching and writing the wonderful judicial biographies that sets this casebook apart by giving readers a sense of the men and women who struggled both to decide the cases before them and to justify their decisions. The idea to include judicial biographies in

a casebook was innovated by Professor Curtis R. Reitz and a few of his biographies are included here as well. The cases and materials on legal ethics in Chapters 6, 7, and 16 were suggested by the W. M. Keck Foundation's project on legal ethics, which is administered by Geoffrey Hazard, Jr. and Susan Koniak. Finally, I wish to express my gratitude for the research support I received from the Boston University School of Law.

I also wish to thank the following authors and publishers for permitting me to include excerpts from these works:

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