复旦大学法学院《法律专业英语》用书

COMMON LAW

SELECTED READINGS ON CONTRACTS, TORTS & TRIAL PRACTICE

英美法
合同、侵权与审判实务

Lingyun GAO
高凌云 编著

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前　言

“法律专业英语”是复旦大学法学院本科生和研究生的必修课程。《英美法:合同、侵权与审判实务》就是在复旦大学法学院本科生法律专业英语课讲义的基础上编撰而成的,与《英美法案例分析与法律写作》(上海人民出版社2005年10月版)属同一系列的基础教材。后者的对象主要是法学院研究生以及正在从事涉外法律业务的实务部门的人才,而本书则专门针对法学院本科学生以及其他有志于学习英美法律的人士。其中部分内容以讲义的形式使用过两年,反响良好。

目前国内已经出版的有关法律专业英语方面的优秀教材很多,它们大多侧重于英语语言方面的介绍和讨论,对于英文程度相对较低并且从来没有学习过英美法的人来说非常实用。为了避免类似教材的重复,本书没有像其他法律英语教材那样侧重于语言点,也没有编写英语语法填空或翻译等练习,而是将本书的读者定位于已经具备相当的英语知识,同时也掌握了法律基础知识的人,目的在于让读者通过学习用英语编写的法律文章和案例,在提高法律英语水平的同时学到原汁原味的英美法律中部分学科的精髓。因此,本书中包含了大量未经简化的原版案例和尽量全面的有关英美法部分学科的信息,以帮助学生理解原版案例的结构和推理过程,加深学生对英美法律的理解。

全书分为三大部分,第一部分关于英美合同法,第二部分关于英美侵权法,第三部分是英美法审判实务,每部分都自成体系,既可以单独使用,也可以综合使用。本书各章节之间逻辑性强,循序渐进、由浅入深地探讨了英美合同法、侵权法和审判实务的主要内容。除了用在法律专业英语课上外,本书还可以用于英美合同法、英美侵权法和英美审判实务的双语教学。第三部分的审判实务还可以辅佐以模拟法庭来充分理解英美法律的精髓。

高凌云
2006年4月

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PART I

COMMON LAW OF CONTRACT

CHAPTER 1 INTRODUCTION

CONTRACTS are essentially promises, or groups of promises, to do or not to do something in the future. Contracts are found everywhere in our society. If you buy a book, you have a contract with the bookstore. If you work, you have a contract with your employer. If you hire someone to clean your house, you have a contract with the cleaning worker. If you use electricity, gas, or water, you have a contract with the public utility companies. If you use telephone or television, you have a contract with the telephone or television company. If you take bus, you have a contract with the bus company. A marriage is a contract and a divorce settlement is also a contract. There is a contract between a person's parents and the hospital to assist his birth, and a final contract with those who will deal with his remains after he dies. It appears that contracts have close relationship with every one of us in our daily life. What is exactly a contract? This chapter will first explain the definition of "contract," then discuss the sources of law and the classifications of contracts. In the end of this chapter, a famous case will lead you to think and understand the purpose and objective of the law of contract, as well as how it works.

1. Contracts and Contract Law

1.1 Definition of "Contract"

When talking about "contract," people may think of other words like "agreement" or "promise." Do they mean the same thing or things distinguished from each other?

"Agreement" covers much broader concept than that of "contract." Actually, we make agreements all the time. We can have an agreement that you are not a U. S. citizen. We can also have an agreement that the color of the buildings on campus is yellow. We can agree on many other issues such as the correct date and place of your birth, or the date when your cousin got married. We can have an agreement that our friendship will last forever. We can also agree to have a lunch together, go shopping, attend a party, or do some other activities.

These agreements are not contracts. First, a contract must suggest a plan for future action, *i.e.*, something to be done or not done in the future. An agreement on the correct color of the buildings on campus is not such a future plan. Second, a court will recognize a contract as legally binding and if one party breaches it, the court will grant some legal remedies to the non-breaching party. Although an agreement to have a lunch

together or to be friends forever is a future plan, if somehow you decide not to go for the lunch or if you decide to break up with your friend, it seems odd if not absurd if the court would hold you legally responsible, because you do not expect to be legally bound by such an agreement. Even if the court would enforce the agreement and grant remedies to the non-breaching party, it is almost impossible to measure the harm caused by breaching of the friendship or lunch-together agreement. This kind of heart-broken disappointment is not remediable at law, not only because reasonable people do not expect such a disappointed expectation to be remedied, but also because any attempt to measure such a disappointment is speculative. Thus, these social agreements are not "contracts" either.

Then what kind of agreements are contracts? For example, an agreement concerning the purchase and sale of a computer is a contract. It is about a plan for a future action and it is not a social agreement. Both the seller and buyer reasonably expect the legal consequences if either of them breaches the agreement. This is a binding agreement enforceable at law and the court could easily measure the loss caused by the breach of the agreement. If the seller breaches the computer contract, the buyer will typically purchase a similar or identical computer from another seller. If the price for the substitute computer is higher than the contract price, the court can order the breaching seller to pay the difference to the aggrieved buyer. In doing so, the buyer will get the computer at the expected price under the original contract. Thus contracts are agreements, but not all agreements are contracts.

A promise is a commitment or undertaking to do or not to do something in the future. An agreement designed to regulate future action requires such a commitment. Similarly, not all promises are contracts. Contracts may be viewed as legally binding promises.

Thus, contract may be defined as "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT(2^{ND}) OF CONTRACTS § 1.

1.2 Sources of the Law of Contract

The general contract law is based largely on common law and statutes. Common law is composed of previously decided cases that are binding precedents. The Uniform Commercial Code(U. C. C.), its Article 2 in particular, is the most important statute governing contract law in the United States.

The UCC is created by two distinguished organizations: The National Conference of Commissioners on Uniform State Laws which promotes uniformity in state laws, and the American Law Institute. It is now law in all of the 50 states governing contracts for the sale of goods, which may be defined essentially as tangible, moveable property.

When discussing the law of contract, we cannot ignore the United Nations Convention on Contracts for the International Sale of Goods

(CISG), which is a uniform law for international sale-of-goods contracts. It is an official treaty of the United States government; therefore, it preempts the general contract law and the contract law of the UCC.

2. Classifications of Contracts

Contracts are divided into various classes based on their characteristics; these classifications are neither all-inclusive nor all-exclusive and the same contract may fall into various different classifications depending on the characteristics which are determinative of the class in question.

A contract may be express or implied. An express contract has its terms, conditions, and promises specifically set forth in words; whereas an implied contract is one where the essential elements are not set forth in words but must be determined from the circumstances, general language, or conduct of the parties.

Contracts may be unilateral or bilateral. A unilateral contract is one in which only one of the parties makes a promise, whereas in a bilateral contract each of the contracting parties makes a promise. If A gives B a book in return for B's promise to give A $50 next week, a unilateral contract is formed. However, if A promises to give B a book in return for B's promise to give A $50 next week, the contract is a bilateral one.

Contracts may be valid or void. A valid contract is one which meets all of the legal requirements for a contract and which will be enforced by the courts. A void contract is a contract which is of no legal force or effect and therefore is really not a contract. For example, a contract to kill someone is null and void and courts will not aid in its enforcement.

Contracts may be unenforceable or voidable. An unenforceable contract is one which generally meets the basic requirements for valid contracts, but which the courts are forbidden by a statute or rule of law to enforce. For instance, under the U. C. C., contracts for the sale of goods with a value of more than $500 must be in writing to be enforceable. If there is no writing to evidence such a contract, the contract is unenforceable. A voidable contract is one which binds one of the parties to the transaction but gives the other party the option of either withdrawing from the contract or of insisting on compliance with the contract. For example, a contract signed between a minor and an adult is voidable to the minor's option.

Contracts may be executory or executed. A contract is said to be executory until all of the parties have fully performed their responsibilities under the contract; at that point it becomes an executed contract.

There are some situations where one person confers benefits on another person under such circumstances that it is clear they were not intended to be a gift and where the other person accepts the benefits even though he has not promised to pay for the benefits. Such a situation does not fall within the usual concept of a contract where a return promise would normally be made; yet the courts often imply a return promise in order to avoid the injustice that would result from allowing the person to retain the benefits without paying for them. It is based on the concept of "*quasi* con-

tract." In such a case the recovery allowed the conferrer of benefits is the amount of the unjust enrichment that would otherwise occur. However, there can be no recovery in *quasi* contract if there is an express contract actually covering the situation nor can there be recovery if under the circumstances the beneficiary is justified in believing that the benefits are a gift or if the benefits are conferred without the beneficiary's knowledge or consent.

2.1 Case 1: *Hawkins v. McGee*

Common law is case law; the cases previously decided by the courts are binding to the courts themselves and the lower courts within the same jurisdiction. Therefore in common law countries, law students must read cases because they are the law! The following is a famous case decided based on the common law of contract. When we read a "case," we actually read the "opinion" written by the judge or judges. Pay attention to the format of the judicial opinion. The heading of the opinion shows the court that reviewed the case, the case name composed of the names of the two parties, the citation of the case which helps the readers to locate the text of the opinion in the case reports, and the date when the opinion was made. Then comes the main body of the opinion, starting from the name of the judge who wrote the opinion.① The party who initiated the lawsuit is called "plaintiff," while the party who was sued against is called "defendant." Read the case below, and try to understand what happened to the plaintiff and whether he got any remedies for his suffering. Then think about the contract formulated in the case and summarize how Judge Branch decided the case. If you feel a little bit difficult to figure out what happened, there is an explanation of the background of this case following the opinion.

Supreme Court of New Hampshire
Hawkins v. McGee②
84 N. H. 114, 146 A. 641
June 4, 1929

BRANCH, J.

1. The operation in question consisted in the removal of a considerable quantity of scar tissue from the palm of the plaintiff's right hand and the grafting of skin taken from the plaintiff's chest in place thereof. The scar tissue was the result of a severe burn caused by contact with an electric wire, which the plaintiff received about nine years before the time of the transactions here involved. There was evidence to the effect that before the operation was performed the plaintiff and his father went to the

① For more about how to read a common law case, *see* LINGYUN GAO, COMMON LAW CASE ANALYSIS & LEGAL WRITING Ch. 2 (Shanghai People's Publishing House, 2005).

② "Hawkins v. McGee" is the case name, indicating the two parties' names and who sued whom; the following line includes two citations to this same case, which help the readers find the original case opinion in different case reports. For more about case citations, *see* LINGYUN GAO, COMMON LAW CASE ANALYSIS & LEGAL WRITING (Shanghai People's Publishing House 2005).

defendant's office, and that the defendant, in answer to the question, "How long will the boy be in the hospital?" replied, "Three or four days, not over four; then the boy can go home and it will be just a few days when he will go back to work with a good hand."① Clearly this and other testimony to the same effect would not justify a finding that the doctor contracted to complete the hospital treatment in three or four days or that the plaintiff would be able to go back to work within a few days thereafter. The above statements could only be construed as expressions of opinion or predictions as to the probable duration of the treatment and plaintiff's resulting disability, and the fact that these estimates were exceeded would impose no contractual liability upon the defendant. The only substantial basis for the plaintiff's claim is the testimony that the defendant also said before the operation was decided upon, "I will guarantee to make the hand a hundred per cent perfect hand or a hundred per cent good hand."② The plaintiff was present when these words were alleged to have been spoken, and, if they are to be taken at their face value, it seems obvious that proof of their utterance would establish the giving of a warranty in accordance with his contention.

The defendant argues, however, that, even if these words were uttered by him, no reasonable man would understand that they were used with the intention of entering "into any contractual relation whatever," and that they could reasonably be understood only "as his expression in strong language that he believed and expected that as a result of the operation he would give the plaintiff a very good hand." It may be conceded, as the defendant contends, that, before the question of the making of a contract should be submitted to a jury, there is a preliminary question of law③ for the trial court to pass upon, *i. e.* "whether the words could possibly have the meaning imputed to them by the party who founds his case upon a certain interpretation," but it cannot be held that the trial court decided this question erroneously in the present case. It is unnecessary to determine at this time whether the argument of the defendant, based upon "common knowledge of the uncertainty which attends all surgical operations," and the improbability that a surgeon would ever contract to make a damaged part of the human body "one hundred per cent perfect," would, in the absence of countervailing considerations, be regarded as conclusive, for there were other factors in the present case which tended to support the contention of the plaintiff. There was evidence that the defendant repeatedly solicited from the plaintiff's father the opportunity to perform this operation, and the theory was advanced by plaintiff's counsel in cross-examination of defendant that he sought an opportunity to "ex-

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① Do you think this statement is a promise therefore leading to a contract? Why didn't Judge Branch think so? Do you agree?

② Is there any difference between this statement and the first one? Why did Judge Branch think this one a promise which formed a contract while the first one not? Do you agree? Why and why not?

③ At common law, the court will decide the question of law while the jury will decide the question of fact.