（国际法双语教学试用教材）

International Business Law

(Contracts and Sales)

国际商法

（合同销售篇）

顾百忠 编著

上海教育出版社

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国际法双语教学教材《国际商法》包括三本，即国际商法“合同、销售法”，“商事组织和商业票据”，“代理法和产品责任法”。国际商法是法学院国际经济法和民商法专业学生和商学院学生必须学的一门法律专业课，而外语又是系统学习、理解国际商法的必要工具，基于这样的目的，我们编著这套教课书，作为双语教学的试用教材，供法学院和商学院大学英语四级以上的学生以及法律工作者学习理解国际商法和法律英语使用。

本书《国际商法》(合同销售篇)以介绍英美合同法和销售法为主，全篇包括两部分共十二章：第一部分合同法包括要约，承诺，对价，书面要求规则，缔约能力，合法性，合同责任的免除，履约和违约救济等九章；第二部分销售法包括销售合同的成立，销售合同的履行和违约救济等三章。全书编写的结构和内容参照英美法学院和商学院同类教课书，力求概而全，保持原著的风貌。每章后有模拟案例问题，供学生课堂讨论，旨在加深对有关法律要点的理解和训练英语口头表达能力；每章后的案例直接引自英美法院判例，供学生课后阅读，在课堂上择疑分析，以提高学生综合理解和分析能力；每章后的编者评语，涉及普通法法院创立的有关司法原则，以引起学生重视。全书以英文编著，不附任何中文解释，旨在促使学生摆脱对母语的依赖，同时也避免母语解释外国法律的局限所造成的误导，这也应该是法学院双语法律教学应当达到的目的之一。书后附部分涉及合同法和程序法的常用及疑难法律术语，以及美国《统一商法典》第二部分原文，便于学生和使用者查阅。

使用本教材，强调法律和语言的双重培养，因此教师具有法律和外语双重专业基础，将有利于完成双语教学的要求。我们希望，通过一个学期的教学，学生能对英美一般合同法和货物销售法有比较全面的理解，并在实践中，明显提高英语的口头表达和阅读分析能力。双语教材的编写属于一种新的尝试，在编写过程中得到了院系有关领导和同行的积极帮助，特别是华东政法学院国际法系朱榄叶教授，对书稿进行了审核，并提出了宝贵的修改意见，在此一并感谢。此外，由于编者水平有限，书中错误、不当或遗漏之处在所难免，敬请同行和读者批评指正。

编者

2002 年 9 月

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APPENDIXES

PART ONE Contract in General

There are numerous definitions of the term *contract*. A British contract law definition holds that "A contract is an agreement intended to be legally binding and supported by consideration". *The Restatement* (*Second*) *of Contracts* in the United States defines a contract 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". An intention to create legally enforceable relations which is usually assumed for most commercial agreements but it is not so assumed for domestic and social or family agreements.

Contracts have traditionally been classified as *bilateral or unilateral*, depending on whether one or both of the parties have made a promise. In unilateral contracts, only one party makes a promise, while in bilateral contracts, two promises are made. A *valid* contract is one that meets all of the legal requirements for a binding contract. Valid contracts are, therefore, enforceable in court. An *unenforceable* contract is one that meets the basic legal requirements for a contract but may not be enforceable due to some other legal rule. For example, an otherwise valid oral contract that the Statute of Frauds requires it to be in writing, may be unenforceable due to the parties' failure to reduce the contract to written form. *Voidable* contacts are those in which one or more of the parties have the legal right to cancel their obligations under the contract. They are enforceable against both parties unless a party with the power to void the contract has exercised that power. *Void* contracts are agreements that create no legal obligations because they fail to contain one or more of the basic elements required for enforceability or the contracts are prohibited by laws or against public policy. In an *express contract*, the parties have directly stated the terms of their contract orally or in writing at the time the contract was formed. The mutual agreement necessary to create a contract may also, however be demonstrated by the conduct of the parties. If surrounding facts and circumstances indicate that an agreement has in fact been reached, an *implied contract* has been created. A contract is *executed* when all of the parties have fully performed their contractual duties, and it is *executory* until such duties have been fully performed.

Under some circumstances, one person may have provided goods or services to another person who benefited from them but has no contractual obligation to pay for them, because there is no contract existed. However, enabling a person to get a free good or service would unjustly benefit him at the expense of the provider. To prevent such unjust enrichment, the courts imply the doctrine of *Quasi-contract*; the doctrine imposes an obligation as a *matter of law* to avoid injustice, not a contract obligation created by voluntary consent. Quasi-contract liability has been imposed in numerous varied situations. In general, however, it is imposed when one party receives *a benefit* from another, who *knowingly* accepts it and retains it under circumstances that make it *unjust* to do so without paying for it. Another very important idea that courts have developed to prevent the unfairness that would sometimes result from the strict application of traditional contract principles is the doctrine of *Promissory estoppel*. In numerous situations one person may rely on a promise made by another even though the promise and surrounding circumstances are not sufficient to justify the conclusion that a contract has been created, because one or more of the required elements is missing. To allow the person who made such a promise (the promisor) to argue that no contract was created would

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sometimes cause injustice on the person who relied on the promise (the promisee), therefore the *reasonable reliance* is protected by law.

As early as in the 15th century the common law courts of England had developed a variety of theories to justify enforcing certain promises. Free market economic ideas had a profound influence on public policy thinking and the dominant theory emphasized the freedom of contracts, and the contracts so made should be absolutely enforced, while the fact that the items exchanged were of unequal value was legally irrelevant. Thus, as long as a person voluntarily entered a contract, it would generally be enforced against him, even if the result was grossly unfair. As most business transactions were conducted in a face to face negotiation with chances to inspect the goods that were relatively simple at that time, if the parties also had relatively equal knowledge about the items they bought and sold, as well as with equal bargaining power, it was probably fair to assume that they were capable of protecting themselves and negotiating an agreement that was fair. Therefore, the common law courts were usually unwilling to hear defenses based on unfairness. The courts developed a contract law consisting of precise, clear and technical rules that were capable of almost mechanical application. The advantage of such a *classical contract law* and its general application was to afford the predictable and consistent results necessary to facilitate private planning under a free market economy.

With the industrial revolution and economic development, regional, and later national markets were highly developed. People often contracted with persons whom they did not know, and for goods that they had never seen. And rapidly developing technology helped to produce much more complex goods which were hardly judge even with an ordinary inspection. Under most circumstances, sellers often knew far more about their products than did the buyers with whom they dealt. Finally, the emergence of large business organizations produced obvious disparities of bargaining power in many contract situations. Contract law is changing to reflect these changes in social reality. Public intervention into private contractual relationships became unavoidable and necessary in 20th century. For examples, employment contracts are governed by a host of laws concerning maximum working hours, minimum wages, unemployment compensation, and retirement benefits. Product liability statutes impose liability on the manufacturers and sellers of products regardless of the terms of their sales contracts. The obvious purpose of much of this public intervention has been to protect persons who lack sufficient bargaining power for a reasonable deal.

Courts have also been increasingly concerned with creating contract rules that produce just results. The precise, technical rules that characterized traditional common law contract are giving way to broader, imprecise standards such as *good faith*, *injustice*, *reasonableness*, and *unconscionability*. The reason for such standards is clear. If courts are increasingly called on to intervene in private contracts in the name of fairness, it is necessary to fashion rules that afford the degree of judicial discretion required to reach just decisions in the increasingly complex and varied situations where intervention is needed. However, imprecise, discretionary *modern contract laws* do not produce the same measure of certainty and predictability that their precise predecessors afforded. And because modern contract rules often impose liability in the absence of the clear consent required by traditional common law contract rules, one price of increased fairness in contract cases has been a diminished ability of private parties to control the nature and extent of their contractual obligations

The Uniform Commercial Code (UCC) was created by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. The Code served several purposes (1) to establish an uniform set of rules to govern commercial transactions which are often conducted across state lines; (2) to solve, realistically and fairly, the common problems occurring in modern commercial transactions; (3) to promote fair dealing and higher standards in the marketplace. All of the states have adopted it except Louisiana, which has adopted only part of the Code. However, many states have varied or amended the Code's language in specific instances, and some Code provisions were drafted in alternative ways, giving the states more than one version of particular Code provisions to choose from. Also, the various state courts have reached different conclusions about the meaning of particular Code sections.

The Code contains nine substantive articles. Many of the provisions of Article 2 exhibit the basic tendencies of modern contract law. Accordingly, they differ from traditional contract law rules in a variety of important ways. The Code is more concerned with rewarding people's legitimate expectations than with technical rules, so it is generally more flexible than classical contract law. The drafters of the Code wanted to promote fair dealing and higher standards in the marketplace, so they imposed a duty of *good faith* in the performance and enforcement of every contract under the Code. Good faith means "honesty in fact", and the parties of contracts cannot alter this duty of good faith by agreement. The Code also recognizes that buyers tend to place more reliance on professional sellers and that professionals are generally more knowledgeable and better able to protect themselves than nonprofessionals. So, the Code distinguishes between *merchants* and non-merchants by holding merchants to a higher standard of responsibility in some cases. The Code defines the term *merchant* on a case-by-case basis. If a person regularly deals in the kind of goods being sold or pretends to have some special knowledge about the goods, or employed an agent in the sale who fits either of these two descriptions, that person is a merchant for the purpose of the contract in question. Finally, the Code expressly recognizes the concept of an *unconscionable contract*, one that is grossly unfair or one-sided, and it gives the courts broad discretionary powers to deal fairly with such contracts.

The American Law Institute published the *Restatement of Contracts* (*First*) in 1932, an attempt to codify and systematize the soundest principles of contract law gleaned from thousands of often conflicting judicial decisions. As the product of a private organization, *the Restatement* (*First*) did not have the force of law, but as the considered judgment of some of the leading scholars of the legal profession, it was highly influential in shaping the evolution of contract law. The *Restatement of Contracts* (*Second*), published in 1979, is an attempt to reflect the significant changes that have occurred in contract law in the years following the birth of the *Restatement* (*First*). The tone of the *Restatement* (*Second*) differs dramatically from that of the *Restatement* (*First*), which is often characterized as a *positivist* attempt to formulate a system of black letter rules of contract law. The *Restatement* (*Second*), in contrast, reflects the "shift from rules to standards" in modern contract law: the shift from precise, technical rules to broader, discretionary principles that produce just results. The *Restatement* (*Second*) plainly bears the mark of the *legal realists* and has been heavily influenced by the UCC. In fact, many *Restatement* (*Second*) provisions are virtually identical to their Code analogues. The *Restatement* (*Second*), like its predecessor does not have the force of law, however, given the influential role played by the *Restatement* (*First*) and the previously mentioned tendency of the courts to employ Code principles by analogy in contract cases, it seems fair to assume that the *Restatement* (*Second*) will serve as a major inspiration for contract law development.

Ⅰ. OFFER

An offer is a definite promise to be bound on specific terms. Section 24 of the *Restatement (Second) of Contracts* defines an offer as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." A person who makes an offer (*the offeror*) gives the person to whom he makes the offer (*the offeree*) the power to bind him to a contract by accepting the offer.

Traditional contract law rules on contract formation are designed to assure that persons are never bound to contracts unless they clearly intend to be bound. Therefore, the basic thing that the courts require for the creation of an offer is some objective indication of present intent to contract. Two of the most important things for a valid offer are the definiteness of the alleged offer, which is different from the mere supplying of information or from invitation to make an offer, and the fact that it has been communicated to the offeree.

1. **Definiteness of terms.** The offer must be definite, not vague or illusory. If an offer fails to state specifically what the offeror is willing to do and what he asks in return for his offer, there is a good chance that the parties are still in the process of negotiation.

Agreements that are incomplete or indefinite because they omit, particularly, material terms or imprecisely state such terms are generally unenforceable in the courts applying traditional contract principles, even if the parties apparently intended to create a binding contract.

2. **Gap filling rules.** With modern contract principles, however, courts often create contractual liability in situations where no contract would have resulted according to common law. Under Article 2 of the UCC sales contracts can be created "in any manner sufficient to show agreement, including conduct which recognizes the existence of a contract" [2-204(1)]. So, if the parties are acting as though they have a contract by delivering or accepting goods or payment, for example, this may be enough to create a binding contract, even if it is impossible to point to a particular moment in time when the contract was created [2-204(2)]. The fact that the parties left open one or more terms of their agreement does not necessarily mean that their agreement is too indefinite to enforce. A sales contract is created if the court finds that the parties *intended* to make a contract and that their agreement is complete enough to allow the court to reach a fair settlement of their dispute ("a reasonably certain basis for giving an appropriate remedy" [2-204(3)]). The Code contains a series of *gap filling rules* to enable courts to fill in the blanks on matters of price [2-305], quantity [2-306], delivery [2-307, 2-308, and 2-309(1)], and time for payment [2-310] when such terms have been left open by the parties. Of course, if a term was left out because the parties were *unable* to reach agreement about it, this would indicate that the intent to contract was absent and no contract would result, even under the Code's more liberal rules. Intention is still at the heart of these modern contract rules.

The Restatement (Second) of Contracts takes an approach to the definiteness question that is quite similar to the Code approach. Where an agreement is sufficiently definite to be a contract, but essential terms are left open, the *Restatement Second* provides that "a term which is reasonable in the circumstances is supplied by the court." Similar to the Code, the *Restatement Second* specifically indicates that where the parties' conduct indicates an intent to contract, a contract may result "even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined."

3. **Communication of offer.** An offer must be communicated to the offeree before it becomes effective or valid. But

what forms communicated? Should offerees, for example, be bound by fine print clauses or by clauses on the back of the contract? Originally, the courts tended to hold that offerees were bound by all the terms of the offer on the theory that every person had a duty to protect himself by reading agreements carefully before signing them. The common usage of today's complex standard form contracts, however, make people often sign agreements that they have not fully read or do not fully understand. Modern courts tend to recognize this fact by saying that offerees are bound only by terms of which they had actual or reasonable notice. In other words, if a reasonable person should have been aware of it, it probably becomes part of the parties' contract. Otherwise, the terms would be deemed as not really communicated. This modern approach is to promote fair dealing by refusing to enforce contract terms, mostly unfair terms, which the offeree lacks reasonable notice of them. Disclaimers and exculpatory clauses are particularly likely to be subjected to close judicial scrutiny. Many courts insist on proof that the offeree had actual notice of such terms before they are considered a part of the contract.

4. **Advertisements.** The courts have generally held that advertisements for the sale of goods at specified prices are not offers; instead, they are treated as *invitations to offer*. The same rule generally applies to displayed goods with prices marked, catalogs, price lists, and price quotations, etc., under which the sellers involved may not intend and are unable to give every person who sees their advertisements, or catalog the power to bind them to contract. In some cases, however, particular advertisements have been held to amount to offers. Such advertisements are usually highly specific about the nature and number of items offered for sale and what is requested in return. In addition, many of the advertisements treated as offers have required special performance by would-be buyers or have in some other way clearly indicated that immediate buyer action creates a binding agreement.

5. **Rewards.** Rewards for lost property, for information or for the capture of criminals are generally treated as offers for unilateral contracts. To accept the offer and be entitled to the stated rewards, offerees must perform the requested act—return the lost property, supply the requested information, or capture the wanted criminal. Some courts have held that only offerees who started performance with knowledge of the offer are entitled to the reward. Other courts, however, have indicated the only requirement is that the offeree know of the reward before completing performance.

6. **Auctions and bids.** Sellers at *auctions* are generally treated as making an invitation to offer. Those who bid on offered goods are, therefore, treated as making offers. Acceptance occurs only when auctioneer strikes the goods off to the highest bidder. Thus, the seller may withdraw if the bid price is against the reservation of price. However, when an auction is advertised as being "without reserve", the seller is treated as having made an offer to sell the goods to the highest bidder and the goods cannot be withdrawn after a call for bids has been made unless no bids are made within a reasonable time.

Bids are generally treated as invitations to offer. Those who submit bids are treated as offerors. According to general contract principles, bidders can withdraw their bids at any time prior to acceptance by the offeree inviting the bids; that offeree is free to accept or reject any bid. The general rule may be altered, however; for example, if the advertisement for bids unconditionally states that the contract will be awarded to the lowest bidder, this will be treated as an offer that is accepted by the lowest bidder. Only proof by the lowest bidder is not responsible can prevent the formation of a contract. Also, under some circumstances, promissory estoppel may operate to prevent bidders from withdrawing their bids.

7. **Lapse.** Offerors have the power to determine the terms and conditions under which they are bound to a contract. An offeror may include specific terms in the offer that limit its effective life. Offers that fail to provide a specific time

for acceptance are valid for a reasonable time. What constitutes a reasonable time depends on the circumstances surrounding the offer. Offers involving things subject to rapid fluctuations in value, such as stocks, bonds, or commodities futures, have a very brief duration. The same is true for offers involving goods that may spoil within short period of time. The nature of the parties' negotiations is another factor relevant to determining the duration of an offer. Most courts hold that when parties bargain face-to-face or over the telephone, the normal time for acceptance shall be limited upon the end of such conversation unless the offeror indicates a contrary intention. Where negotiations are carried out by mail, for example, the time for acceptance would ordinarily include at least the normal time for communicating the offer and a prompt response by the offeree. Finally, in cases where the parties have dealt with each other on a regular basis in the past, the timing of their prior transactions would be highly relevant in measuring the reasonable time for acceptance.

8. Revocation. The general common law rule on revocations is that offerors may revoke their offers at any time prior to acceptance, even if they have promised to hold the offer open for a stated period of time. However, several exceptions to this general rule can prevent offerors from revoking:

An *option* is a separate contract in which an offeror agrees not to revoke his offer for a stated time in exchange for some valuable consideration. The offeree who enters an option contract has no obligation to accept the offeror's offer; in effect, he has merely purchased the right to accept the offer for the stated time without fear that the offeror will revoke it. The traditional common law rule on options requires the actual payment of the agreed-on consideration before an option contract becomes enforceable.

The Code makes a major change in the common law rules governing the revocability of offers by recognizing the concept of a *firm offer* [2 – 205]. To be a firm offer, an offer must be made by a *merchant* in a *signed writing*, which contains *assurances that* the offer will be held open and not revoked. A firm offer is irrevocable for the time stated in the offer. If no time is stated, it is irrevocable for a reasonable time. Regardless of the terms of the offer, the outer limit on a firm offer's irrevocability is *three months*

The general rule that an offeror can revoke at any time prior to acceptance causes special problems when applied to offers for *unilateral contracts*. Because the offeree in a unilateral contract must fully perform the requested act to accept, the application of the general rule would allow an offeror to revoke after the offeree had begun performance but before he had had a chance to complete it. To prevent injustice to offerees who rely on such offers by beginning performance, two basic approaches are available to modern courts. Some courts have held that once the offeree has begun to perform, the offeror's power to revoke is suspended for the amount of time reasonably necessary for the offeree to complete performance. Section 45 of the *Restatement Second* takes a similar approach for offers that unequivocally require acceptance by performance by stating that once the offeree begins performance, an option contract is created. The offeror's duty to perform his side of the bargain is conditional on full performance by the offeree. This approach clearly protects the offeree, but from an offeror's standpoint it is less than desirable because the offeree has no duty to complete the requested performance.

Another approach to the unilateral contract dilemma is to hold that a bilateral contract is created once the offeree begins performance. This is essentially the position taken by Section 62 of the *Restatement Second*, which states that when the offer invites acceptance either by a return promise or performance, the beginning of performance operates as an acceptance and a promise by the offeree to render complete performance. This approach protects both the offeror and the offeree, but may be contrary to the actual intent of the parties, neither of whom may wish to be bound to a contract until achieving complete performance .

In some cases, the doctrine of *promissory estoppel* can operate to prevent offerors from revoking their offers prior to acceptance. Section 87(2) of the *Restatement Second* says:

An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice. Promissory estoppel has often been used to prevent revocation in the bidding context. For example, A, a general contractor, is bidding for the contract to build a new department store for B. C as a subcontractor, submits to A with the lowest price for computer systems of the department. A uses C's figure in computing the bid it submits to B. A's bid is accepted by B, but before A can notify C and accept C's bid, C attempts to revoke the bid, while the next lowest bid that A received for the computer system work was much higher than C's. Considering these facts, some courts would hold that C is estopped from revoking. A has, in the above hypothetical case, *relied* on C's bid by basing its offer to perform, in part, on A's bid. And A will suffer injustice if C is allowed to revoke.

The general rule is that revocations are *effective* only when they are actually received by the offeree. Many courts have also held that if the offeree receives reliable information indicating that the offeror has taken action inconsistent with an intent to enter the contract proposed by the offer, such as selling the property that was the subject of the offer to someone else, the offer is terminated. The only major exception to this general rule concerns offers to the general public. Because it would be impossible in most cases to reach every offeree with a revocation, therefore, it is generally held that a revocation made in the same manner as the offer is effective when published, without proof of communication to the offeree.

9. Rejection. An offeree may expressly reject an offer by indicating that he is unwilling to accept it. He may also implied reject it by making a *counteroffer*, an offer to contract on terms materially different from the terms of the offer. As a general rule, either form of rejection by the offeree terminates his power to accept the offer, and make the offeror free to offer to make another offer to a different offeree. If either party manifests an intent to keep the offer open despite a rejection, many courts hold that no termination has occurred. If the offeror indicates in the offer that it will continue in effect despite a rejection, there is no need to fear that he will rely on rejection terminating the offer. Likewise, if the offeree indicates that he rejects the offer at the present time but will take it under advisement in the future, there is no basis for reliance by the offeror. One further exception to the general rule that rejections terminate offers concerns offers that are the subject of an option contract. Some courts hold that a rejection does not terminate an option contract and that the offeree who rejects still has the power to accept the offer later, so long as the acceptance is effective within the option period. As a general rule, rejections, like revocations, are effective only when actually received by the offeror. Thus, an offeree who has mailed a rejection could still change her mind and accept if she communicates the acceptance before the offeror receives the rejection.

10. Death or insanity. The death or insanity of either party to an offer automatically terminates the offer without notice. A meeting of the minds is obviously impossible when one of the parties has died or become insane.

11. Destruction of subject matter. If, prior to an acceptance of an offer, the subject matter of a proposed contract is destroyed without the knowledge or fault of either party, the offer is terminated, and subsequent acceptance would not create a contract.

12. Intervening Illegality. An offer is terminated if the performance of the contract it proposes becomes illegal by

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