

国际商务合同 英语教程

主编 严 明



北京大学出版社
PEKING UNIVERSITY PRESS



黑龙江大学出版社
HEILONGJIANG UNIVERSITY PRESS

本教材获得黑龙江大学“十二五”规划教材立项资助

国际商务合同

教程

主 编 严 明
副主编 吉绍昱 华裕涛 曹 飞



北京大学出版社
PEKING UNIVERSITY PRESS



黑龙江大学出版社
HEILONGJIANG UNIVERSITY PRESS

图书在版编目(CIP)数据

国际商务合同英语教程 / 严明主编. — 哈尔滨 :
黑龙江大学出版社 ; 北京 : 北京大学出版社, 2017.8
ISBN 978-7-5686-0126-9

I. ①国… II. ①严… III. ①国际贸易—贸易合同—
英语—教材 IV. ①F740.4 ②D996.1

中国版本图书馆CIP数据核字(2017)第166231号

国际商务合同英语教程

GUOJI SHANGWU HETONG YINGYU JIAOCHENG

主 编 严 明

副主编 吉绍昱 华裕涛 曹 飞

责任编辑 张 慧

出版发行 北京大学出版社 黑龙江大学出版社

地 址 北京市海淀区成府路205号 哈尔滨市南岗区学府三道街36号

印 刷 哈尔滨市石桥印务有限公司

开 本 787×1092 1/16

印 张 18.25

字 数 378千

版 次 2017年8月第1版

印 次 2017年8月第1次印刷

书 号 ISBN 978-7-5686-0126-9

定 价 45.00元

本书如有印装错误请与本社联系更换。

版权所有 侵权必究

前 言

随着经济全球化进程的不断加快以及国际经济交流合作日益频繁,涉外商务活动中的经济纠纷时有发生。涉外经济纠纷本质上都是法律纠纷,而法律纠纷的常见表现形式多为合同纠纷。准确解读英文商务合同,理清合同双方的权利义务关系已经成为涉外经济与法律工作者必须掌握的一项基本技能。

本教材适合作为商务英语方向的专业课教材,同时也可作为国际贸易、国际经济、国际工商管理等商科和法律专业学生的辅助阅读材料以及英语专业学生的拓展阅读材料。本教材突出法律语言功能特征,将英语语言知识和法律知识有机结合,并配合丰富的练习形式,从而帮助学生掌握国际商务合同的基本结构和语言特点,并能够起草完整、准确的英语合同文本。

本教材具有以下特点:

首先,本教材主要以合同的订立、履行、违约与救济方式四部分为主线,运用比较合同法的基本理论,针对国际合同法规、中国与美国合同法规进行了对比分析,从而总结出对商务合同产生影响的一般法律原则,帮助学生从法律角度理解商务合同的内涵。

其次,本教材通过对英文合同的架构、用语以及条款进行全面详细的归纳,并将核心及常见条款融入各章,针对目标条款的法律效力和语言特征进行讲解分析,从而使合同法规与合同条款起草有机结合到一起,加深学生对商务合同内容的理解。

最后,本教材的练习内容丰富,除针对每章理论内容设计思考题、案例分析等题型外,还以商务合同语料库作为依托,针对常用词和短语的运用,设计了形式多样的练习题,从而帮助学生进一步提高商务英语话语实践能力。

由于编者水平有限,加之时间仓促,教材中难免有一些疏漏之处,恳请广大读者、专家和同行不吝指正。

编者



Chapter 1 Introduction to Business Contract	1
1.1 Nature of Contract	5
1.2 Classifications of Business Contract	11
1.3 Contract Law in Different Legal Systems	15
1.4 Basic Principles of Business Contract	18
Exercises	23
Chapter 2 Contract Formation	29
2.1 Offer	33
2.2 Termination of Offer	44
2.3 Acceptance	50
Exercises	56
Chapter 3 Contract Performance and Discharge	61
3.1 Conditions	65
3.2 Contract Discharge	72
Exercises	87
Chapter 4 Remedies for Contract Breach	91
4.1 Monetary Damages	95
4.2 Remedies in Equity	109
4.3 Restitution	116
4.4 Limitations on Remedies	118

Exercises 124

Chapter 5 Translating Business Transactions into Contract Concepts 127

5.1 Introduction 131

5.2 Representations and Warranties 133

5.3 Covenants 141

5.4 Rights 145

5.5 Conditions to Obligations 146

5.6 Discretionary Authority 148

5.7 Declarations 153

Exercises 157

Chapter 6 Structure of Business Contract 161

6.1 Introductory Provisions 165

6.2 Defined Terms and Definitions 166

6.3 Operative Provisions 167

6.4 Substantive Provisions 170

6.5 General Provisions 172

6.6 Signature blocks 173

6.7 Schedules and Exhibits 173

Exercises 177

Chapter 7 Introductory Provision and Definition Provision 181

7.1 Preamble 185

7.2 Recital 195

7.3 Words of Agreement 201

7.4 Definitions and Defined Terms 203

Exercises 207

Chapter 8 Operative Provisions and Substantive Provisions 211

8.1 Operative Provisions 215

8.2 Representations and Warranties 223

Chapter 1

Introduction to Business Contract



As the stated quotation, a contract is a legally binding agreement concerning a bargain, which is essentially commercial in its nature. Even the most common transaction may involve many contracts. Contracts can cover an extremely broad range of matters, including the sale of goods or real property, the terms of employment or of an independent contractor relationship, the settlement of a dispute, and ownership of intellectual property developed as part of a work for hire. In the broadest sense, a contract is simply an agreement that defines a relationship between one or more parties. Nearly every business transaction is based on contract and the expectations the agreed-upon promises create. Therefore, it is essential that you know the legal requirements for making binding contracts. This introductory chapter will familiarize you with the terminology needed to study business contract, the nature of contract, the classifications of contract, and the factors affecting international business contracts.

Learning Objectives

After you learn this chapter, you are expected to be able to:

- ❖ Understand the nature of contract;
- ❖ Explain the difference between contract and agreement;
- ❖ List the essential elements of a valid contract;
- ❖ Identify the different types of contract.

Preview Case Questions

Brooklyn Union Gas Co. (BUG) discovered that gas was being consumed at 369 Euclid Avenue although there was no record of an account or meter at that address. The last account at that address had been closed fourteen years earlier. John Diggs was in possession of the premises at 369 Euclid. BUG sued him for the gas consumed at that location on the basis of a quasi contract for his unjust enrichment. ①

Questions

- 1) Do you think there is contract between BUG and Diggs?
- 2) Was it ethical for Diggs to use the gas when there was no account for his address?

Every business enterprise, whether large or small, must enter into contracts with others in order to conduct its business operation. A commercial contract is merely an agreement made by two or more parties for the purpose of transacting business. Some factors create increased transaction cost and risk, such as differences in language, culture, economics, politics and laws bring about barriers and costs. When one party enters into a commercial contract with an unfamiliar and distant party across a country border, a contract takes on added significance. The creation of an international contract is a more complex process than the formation of a contract between parties from the same country and culture. ②

① John D. Ashcroft. *Law for Business* (17th Edition) [M]. Boston; South-Western Cengage Learning, 2010. p.47.

② Karla C. Shippey. *A Short Course in International Contracts; Drafting the International Sales Contract* (2nd Edition) [M]. Petaluma; World Trade Press, 2002. p.7.

In cross border transactions, the laws and rules may have significant influence on the contracts. Like other types of law, contract law reflects our social values, interests, and expectations. International commercial contracts are not only governed by international contract laws, such as *UNIDROIT Principles of International Commercial Contracts* (hereafter “PICC”), *United Nations Convention on Contracts for Sale of Goods* (hereafter “CISG”), but also governed by regional or domestic contracts, such as *Uniform Commercial Code* (UCC), and *Contract Law of the People’s Republic of China*.

In this textbook, it employs the comparative contract law methodology to study the differences and similarities between the laws of different countries. More specifically, it involves study of the most essential principles and concepts of contract law in different legal systems. Before we look at the numerous rules that courts use to determine whether a particular promise will be enforced, it is necessary to understand these fundamental concepts of contract law.

1.1 Nature of Contract

The business environment is full of agreements between businesses and individuals. While oral agreements can be used, most businesses use formal written contracts when engaging in operations. Written contracts provide individuals and businesses with a legal document stating the expectations of both parties and how negative situations will be resolved. Contracts also are legally enforceable in a court of law. Contracts often represent a tool that companies use to safeguard their resources.

1.1.1 Definition of Contract

Contract has been defined by scholars and legislators from various perspectives. The most classical definition may be the one found in *Black’s Law Dictionary*. It states a contract is “an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law”^①. Under common law, the nature of contract is “a promise” or “a set of promises”. A contract refers to “a promise or a set of promises for the breach of which the law

^① Bryan A. Garner. *Black’s Law Dictionary* (9th Edition) [M]. Eagan: West Group Publishing, 2009.

gives a remedy, or the performance of which the law in some way recognizes as a duty”^①. Under civil law, the nature of contract is a “mutual assent” or “meeting of minds”, which means agreement is reached by parties. A contract is defined as “an agreement on the establishment, alteration or termination of a civil right-obligation relationship between natural persons, legal persons or other organizations as subjects with equal status”^②.

The substance of the definition of a contract is that by mutual agreement or assent, the parties create enforceable duties or obligations.^③ Each party to the agreement obtains certain rights and assumes certain duties and obligations. When such an agreement meets all the legal requirements of a contract, the law recognizes it as binding on all parties. Generally, contract disputes arise when there is a promise of future performance. If one of the parties to the contract fails or refuses to perform, the law allows the other party an appropriate action for obtaining damages or enforcing performance by the party breaking the contract.^④

1.1.2 Difference between Contract and Agreement

A contract must be an agreement, but an agreement need not be a contract. An agreement results whenever two or more people's minds meet on any subject, no matter how trivial. Only when the parties intend to be legally obligated by the terms of the agreement will a contract come into existence. Ordinarily, the subject matter of the contract must involve a business transaction as distinguished from a purely social transaction.

In practice, on most occasions “contract” and “agreement” are synonyms. One thing to note is that not all the business documents agreed by the parties may be a contract or agreement. For example, “memorandum” is a proposed agreement in which two parties negotiate and reach a mutual assent on some terms, and decide that they will subsequently put the entire agreement into a formal written document to be signed by them. Whether the memorandum may be deemed to be a contract will depend on if the parties, by actions or words, have clearly indicated their intention to be bound by the document. A similar problem can arise where the parties sign a so-called “letter of intent”. Such a document memorializes the basic terms on which the parties have agreed, but anticipated further negotiations on more minor issues. Usually the letter of intent indicates that a fuller and more formal agreement will be prepared later. If the parties are unable to settle the supposedly minor issues, what happens

① See § 1. Contract Defined, *The Restatement (Second) of Contracts*. 1981.

② See Article 2 of *Contract Law of the People's Republic of China*. 1990.

③ David P. Twomey. *Anderson's Business Law and the Legal Environment Standard Volume* (21st Edition) [M]. Boston: South-Western Cengage Learning, 2010. p. 268.

④ John D. Ashcroft. *Law for Business* (17th Edition) [M]. Boston: South-Western Cengage Learning, 2010. p. 49.

if one party asserts that the letter of intent is binding, and the other disagrees? Usually it depends on the text whether the parties have shown their intent in the terms of the letter of intent to be bound by the document.

To answer the above questions, let's consider the following situation. Seller plans to sell the assets of its company. After negotiation with Buyer, the two sign a four-page document, which they entitle "Letter of Intent". The letter summarizes the purchase price (\$2 million) and says the arrangement will be subject to and incorporated into a formal *Asset Purchase Agreement* signed by both parties. The letter also states that the purchase will be "subject to the satisfaction of certain conditions including approval by the shareholders and board of directors of Buyer". The parties then fail to agree about what security the Seller will receive to ensure payment. After the Buyer learns that the Seller is now negotiating with a different potential purchaser, the Buyer claims that the "Letter of Intent" is enforceable. The decision should be held for the Seller. Here the text of the letter indicates that the parties did not clearly indicate to be bound by the Letter and they need to further discuss some details (e.g. the letter uses the phrase "subject to" repeatedly). Therefore, no contract shall be deemed to exist between the Seller and the Buyer. The Seller is free to negotiate with any other potential purchaser under such a circumstance.

1.1.3 Essential Elements of a Valid Contract

Business transactions result from agreements. Each party to the agreement obtains certain rights and assumes certain duties and obligations. When such an agreement meets all the legal requirements of a contract, the law recognizes it as binding on all parties. ①There are five basic requirements that need to be satisfied so that a contract is binding and legally enforceable and the validity of any contract could be tested by these requirements.

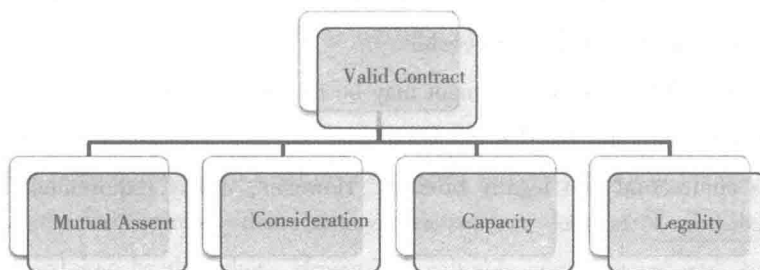


Exhibit 1-1: Requirements of a Valid Contract

① John D. Ashcroft. *Law for Business* (17th Edition) [M]. Boston: South-Western Cengage Learning, 2010. p. 49.

As Exhibit 1-1 stated, the following list briefly describes the four requirements that must be met before a valid contract exists. If any of these elements is lacking, no contract will have been formed.

1) Mutual assent. The parties to a contract must manifest by words or conduct that they have agreed to enter into a contract. The usual method of showing mutual assent is by offer and acceptance, which requires one party must offer to enter into a legal agreement, and another party must accept the terms of the offer.

2) Consideration. Each party to a contract must intentionally exchange a legal benefit or incur a legal detriment as an inducement to the other party to make a return exchange. Any promises made by the parties to the contract must be supported by legally sufficient and bargained for consideration (something of value received or promised, such as money, to convince a person to make a deal).^①

3) Capacity. The parties to a contract must have contractual capacity. Certain persons, such as adjudicated incompetents, have no legal capacity to contract, while others, such as minors, incompetent persons, and intoxicated persons, have limited capacity to contract. All others have full contractual capacity.^②

4) Legality. The contract's purpose must be to accomplish some goal that is legal and not against public policy.

Additionally, even if all of requirements listed above are satisfied, a contract may be unenforceable if the following requirements are not met. These requirements are typically raised as defenses to the enforceability of an otherwise valid contract.

5) Genuine assent. The consent of both parties must be genuine. For example, if a contract was formed because of fraud, undue influence, mistake, or duress, the contract may not be enforceable.

6) Form. The contract must be in whatever form the law requires; for example, some contracts must be in writing to be enforceable.^③

The failure to fulfill either requirement may be raised as a defense to the enforceability of an otherwise valid contract. As the following case shows, a promise meeting all of these requirements is contractual and legally binding. However, if any requirement is unmet, the

^① Kenneth W. Clarkson. *Business Law: Text and Cases* (12th Edition) [M]. Boston: South-Western Cengage Learning, 2010. p.208.

^② Richard A. Mann. *Business Law and the Regulation of Business* (10th Edition) [M]. Boston: South-Western Cengage Learning, 2010. p.172.

^③ Kenneth W. Clarkson. *Business Law: Text and Cases* (12th Edition) [M]. Boston: South-Western Cengage Learning, 2010. p.208.

promise is non-contractual.

CASE 1-1: STEINBERG V. CHICAGO MEDICAL SCHOOL (1976)^①

FACTS

Robert Steinberg applied for admission to the Chicago Medical School as a first-year student and paid an application fee of \$15. The school, a private educational institution, rejected his application. Steinberg brought an action against the school, claiming that it did not evaluate his and other applications according to the academic entrance criteria printed in the school's bulletin. Instead, he argues, the school based its decisions primarily on nonacademic considerations, such as family connections between the applicant and the school's faculty and members of its board of trustees and the ability of the applicant or his family to donate large sums of money to the school. Steinberg asserts that by evaluating his application according to these unpublished criteria, the school breached the contract it had created when it accepted his application fee. The trial court granted the defendant's motion to dismiss, and Steinberg appealed.

DECISION

Trial court's dismissal reversed and case remanded.

OPINION

Dempsey, J. A contract is an agreement between competent parties, based upon a consideration sufficient in law, to do or not do a particular thing. It is a promise or a 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. A contract's essential requirements are: competent parties, valid subject matter, legal consideration, mutuality of obligation and mutuality of agreement. Generally, parties may contract in any situation where there is no legal prohibition, since the law acts by restraint and not by conferring rights. However, it is basic contract law that in order for a contract to be binding the terms of the contract must be reasonably certain and definite.

A contract, in order to be legally binding, must be based on consideration. Consideration has been defined to consist of some right, interest, profit or benefit accruing to one party or some forbearance, disadvantage, detriment, loss or responsibility given, suffered, or under-taken by the other. Money is a valuable consideration and its transfer or payment or promises to pay it or the benefit from the right to its use, will support a contract.

^① Richard A. Mann, Barry S. Roberts. *Smith and Roberson's Business Law* (16th Edition) [M]. Boston: South-Western Cengage Learning, 2014. pp.173-174.

In forming a contract, it is required that both parties assent to the same thing in the same sense and that their minds meet on the essential terms and conditions. Furthermore, the mutual consent essential to the formation of a contract must be gathered from the language employed by the parties or manifested by their words or acts. The intention of the parties gives character to the transaction, and if either party contracts in good faith he is entitled to the benefit of his contract no matter what may have been the secret purpose or intention of the other party.

Steinberg contends that the Chicago Medical School's informational brochure constituted an invitation to make an offer; that his subsequent application and the submission of his \$15 fee to the school amounted to an offer; that the school's voluntary reception of his fee constituted an acceptance and because of these events a contract was created between the school and himself. He contends that the school was duty bound under the terms of the contract to evaluate his application according to its stated standards and that the deviation from these standards not only breached the contract, but amounted to an arbitrary selection which constituted a violation of due process and equal protection. He concludes that such a breach did in fact take place each and every time during the past ten years that the school evaluated applicants according to their relationship to the school's faculty members or members of its board of trustees, or in accordance with their ability to make or pledge large sums of money to the school. Finally, he asserts that he is a member and a proper representative of the class that has been damaged by the school's practice.

The school counters that no contract came into being because informational brochures, such as its bulletin, do not constitute offers, but are construed by the courts to be general proposals to consider, examine and negotiate. The school points out that this doctrine has been specifically applied in Illinois to university informational publications.

We agree with Steinberg's position. We believe that he and the school entered into an enforceable contract; that the school's obligation under the contract was stated in the school's bulletin in a definitive manner and that by accepting his application fee—a valuable consideration—the school bound itself to fulfill its promises. Steinberg accepted the school's promises in good faith and he was entitled to have his application judged according to the school's stated criteria.

INTERPRETATION

An agreement meeting all the requirements of a contract is binding and legally enforceable.