CONTRACT LAW AND PRACTICE

the English System and Continental Comparisons

第四修订版

合同法理论与实践

英国与欧洲大陆国家之比较

[英] 迈克尔·H·温卡普 (Michael H. Whincup) /著

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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的培养。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）覆盖了美国法学校院的主流课程，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，对提高学生理解概念、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。

是为序。

CONTRACT LAW AND PRACTICE

Foreword

The law of each country in this book represents a huge 'sunk cost', made up of several elements. There is the sacrifice of time and skill made over millennia by scholars and judges; the know-how of merchants and their gradual, cross-border, acceptance of customary norms and standards; the efforts made by many legislators to provide a body of codified principles in the fields, at least, of private law and civil procedure. And a further large part of this costly system consists of the institutional machinery of courts, bailiffs and the like which each country has put in place to resolve disputes and to enforce judgments. In the field covered by this volume, the existence of this enormous investment in the national laws means that, within them, any given contract can be made and enforced at a relatively low marginal cost. A few of the basic national rules are *ius cogens*, mandatory: they will apply whatever the parties have agreed. But most of the law discussed here simply supplies default rules which will apply (and so become mandatory) only if the parties have saved their own time, energy (and money) by not devising their own variant. In the traditional view, the number of mandatory rules ought to be as few as possible, since contractual freedom is a good thing, and market efficiency a better.

But where once there were more markets than nations, now there are more nations than markets, and there may be too many legal systems chasing too few contracts. A glance at the website of the International Institute for the Unification of Private Law (uncitral.org) suggests that, at the global level, attention is largely focused on the contracts which merchants make with each other – all those 'upstream' transactions surrounding the purchase and sale of things that do not yet exist: the next cotton crop is already sold, a fact which will make possible the sale of a shirt in a shop at an affordable price. So Uncitral provides Conventions on international sales, their limitation periods, on bills of exchange, guarantees and stand-by letters of credit model laws on international credit transfers; and legal guides on electronic funds transfer and on countertrade. The methods used to produce these measures are inevitably more technocratic than democratic, but this might well mean that, unhindered by national peculiarities, the experts are able to draft laws that are

coherent, comprehensible and capable of wide application. In rather different mode, we have the International Chamber of Commerce which not only drafts model terms for various types of transactions but also provides an arbitration service that enables it to see the results of the adoption of its models.

Meanwhile, the European Union seems so far to concentrate not on commercial but on consumer contracts: virtually the only significant contract law emanating from Brussels has been in this field. In the founding Treaty, the topic was barely mentioned; it emerged in sundry internal market harmonization measures, and it was the Single European Act of 1986 which instructed the Commission, in framing its proposals, to 'take as a base a high level of protection' (now EC95.3). So we now have a dozen or so often detailed Directives aiming to provide such protection in matters like product safety, contract terms, advertising, doorstep selling, credit, package holidays and timeshares.

All these measures, the global-commercial and the Community-consumer, have to be understood, utilized and applied within a national legal matrix. Here, the problem is to absorb the international or community rules into a national legal culture with its centuries of 'sunk cost' in the organization and functioning of the legal order. An attorney who has been tried and tested in the Channel Tunnel project, Maitre Philippe Noel, has given us a wry account of the emotions felt by each team of lawyers as they faced the attitudes and oddities of the other; the hardest thing, he found, was 'to reconcile states of mind' (see 24 International Business Lawyer 25 (1996)). Furthermore, the Member State which gets it wrong now risks an order to pay damages to private citizens for its failure correctly to implement Community law.

No doubt the coming years will see more of these harmonization measures both in contracts for the supply of services to consumers and then perhaps in the more general areas of deals among merchants. The new Europe can – indeed, ought to – tolerate large differences in family customs, inheritance law and the like. But it would seem that, in what the Treaty calls 'an open market economy with free competition' (mentioned twice in article 4), the persistence of distinct national contract laws and techniques jostling each other within the same space causes unnecessary costs to all market participants, suppliers and shoppers alike.

At least this is what is often assumed, although it is worth remembering that the USA seems to manage tolerably well with 50 different systems whose harmonisation (in such matters as the Uniform Commercial Code) is achieved not by federal fiat but by the attraction of the model, offered for adoption by each State of the Union. However that may be, the European Parliament has already resolved that there be a European Code of Private Law and has affirmed that 'unification can be carried out in branches of private law which are highly important for the development of a Single Market, such as contract law ...' (OJEC C 158/401 26 June

1989). Indeed, under the expert aegis of Ole Lando and Hugh Beale, a draft Code of part of contract law has recently seen the light of day (Nijhoff, 1995). It seems safe to say, however, that it will be decades ere such a Code becomes a legal reality. Meanwhile, the lawyers of the different traditions need to be able to understand and communicate with each other as they labour in the growing field of cross-border trade. That this book meets some such need is evident from the fact that a fourth edition is called for so soon.

Of the systems of Western Europe, it is those of England and Ireland that are hardest to grasp (Scotland would be no great trouble were it not for the English admixtures). The reasons are many, complex, and disputed, but (in relation to England) the following seem to stand out. First of all the general system is filled with secrets. There are many features that no one talks about: not because they are shameful matters but because, to an insider, they are so obvious that discussing them would be a waste of breath. Yet these are precisely the kind of things that outsiders have no reason to expect. For instance, it is taken for granted that the legislator rarely enacts anything important, in the sense of the basic rules of the system. In England the deliberate and unlawful killing of another person is murder, yet the Mother of Parliaments has never deigned to say so. Next, it is taken for granted that any legislation that looks as if it might enact such basic norms will in fact merely tinker about with fundamental rules that it never states. Open the Homicide Act 1957 – from its title, the outsider would expect to find the crime of murder defined and condemned; instead the Act assumes that murder is a crime, adjusts the punishment for it, and lists a number of cases where deliberate killing is a crime less than murder. Even more bewilderment awaits the rational reader who opens the lengthy Law of Property Act 1925, hoping to find therein a statement of the law of property; or the Supreme Court Acts expecting to find in them something about the system's highest court. And a similar point could be made about many important enactments in the field of general contract law, from the Law Reform (Frustrated Contracts) Act 1944 through the Misrepresentation Act 1967 to the Contract (Rights of Third Parties) Act 1999.

This feature is merely exasperating and time-wasting. But a second difficulty is more serious: it is that the foreign lawyer who looks at English law is confronted, not merely with occasional different rules but with an entirely different way of approaching and understanding the legal order: with, in modern terms, not just different programmes but an entirely different operating system. Hence, as Hans Goldschmidt pointed out in 1937, the more study devoted to the common law by foreign lawyers, the more discouraged they become. Certain technical areas (say, patents or merger regulation) are relatively approachable. But as soon as a question arises that calls for a sense of the legal order as a whole, the answer becomes far from easy, since even knowing where to begin is so often a

mystery. Most native textbooks are written for insiders and so are hard to understand; and even worse are common-law statutes and cases.

But the pages which follow will go a long way towards easing the burden of the non-common-law lawyer, and will incidentally greatly enlighten the native. The outsider will find a lucid and concise description of the basic background of English law, followed by an account of the main stages in the birth, life and death of contractual obligations. The summaries of the other systems at the end of each section provide both enlightenment and ample material for reflection on the English law itself. We are given accounts from the standpoint of the great traditional civil-law models as well as that of the Nordic nations and of the recently re-worked Dutch New Civil Code. Sometimes the brevity of these contributions makes their law look much easier than in practice it must be, but together they provide a set of perspectives on contract law in general and the common-law version in particular. For instance, the standard civil-law texts on contract are likely to begin with a sermon on the autonomy of the will and the sanctity of contractual freedom. Yet it is the common law which seems ready to respect the parties' intentions and allow them to bind themselves in honour only: that is, to keep at bay the entire State apparatus of laws, courts, and bailiffs. On the other hand, the reader will notice that this book's pages on the common law feel no great need to distinguish contracts involving public authorities and the public service from those of purely private interests; that complex commercial transactions between great companies are approached on the same footing as the everyday deals of ordinary people; and indeed that the argument will cross insouciantly all the lines well-known to civil-law systems, and will go straight from an international shipping contract to one involving a local authority's attempts to provide some service for the populace. The reader will also be struck – though this is partly a result of the relative space available – by the way in which (in the absence of enacted general principles) the common law is tied to particular cases: the book cites over 700 of them.

What emerges from a perusal of the whole volume is a confirmation of the major difficulty confronting the future development of a European private law. The great difference seems to lie between the common-law countries and the rest of Europe, and operates most strongly at the level of the legal order's operating system. Yet the tasks of the law of contract, and the problems facing lawyers, are much the same in all the countries featured. Many – probably most – of their solutions are very much alike. This should come as no surprise. 'Nearly all contracts – sale, hire, loan, deposit, partnership – are common to all people, they are *juris gentium*'. The first page of Justinian's first-year textbook told us that.

Bernard Rudden
4 July 2000

Preface

As a firm believer in the ideal of European unity, I would like to think that this book will make a small but useful contribution to the realisation of that ideal. The process of European integration brings with it the need for greater awareness and understanding of one another's ways of living and ways of thought. The need is perhaps most apparent in relation to Great Britain, insular and in a sense isolated, significantly different in much of its history and culture, yet bequeathing a system of law which for better or worse governs more than one-sixth of the world's population and which is the basis of much of the world's commerce.

As the European partnership develops, so English and Continental lawyers and students of law must learn more of each other's legal systems. My object in writing this book has been to try to meet that need with a straight-forward explanation of the basic principles of English commercial contract law, accessible to both English and Continental readers, and at the same time to provide for English students what may well be their first insight into Continental rules. Other comparative materials include references to Scottish, Commonwealth and American practice, and to the United Nations Vienna Convention on Contracts for the International Sale of Goods which has been adopted in almost every country except Great Britain. I have tried to concentrate on matters of practical importance, and wherever possible have given examples of standard commercial usages and discussed their likely effects in law.

I am particularly grateful to my Continental colleagues who with the same philosophy have written commentaries or summaries at the end of each chapter on the relevant rules of seven other Member States of the European Union. The commentaries are intended overall to illustrate the main points of comparison and contrast between the various systems, and thus to provide what I hope may be found interesting and instructive cross-references for practitioners and academics alike.

In this fourth edition I have attempted to state the law as at 1 February 2001.

Michael Whincup
Keele, February 2001

Contributors on the Law of Member States of the European Community

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