Beihang Postgraduate Series
北京航空航天大学“研究生英文教材”系列丛书

New Concept of Contract Law

合同法概论——双语实务版

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内 容 简 介

本书以培养双语合同法及其相关资料的阅读、理解、撰写和翻译能力为主线，以《联合国国际货物买卖合同公约》、《国际商事合同通则》、美国《统一商法典》和《合同法重述》、中国合同法等为基本素材展开对比分析，摘选有代表性的契约法教科书内容，结合案例，讲解合同法的基本原理和专业知识。书中的关键术语、条款和段落均采用中英文对照方式，配有相关法条原文，此外还提供了若干资料的原文选读，书后附有简要英中对照法律词汇。本书力求权威、翔实、专业、全面、系统、实用、方便，并着力介绍实务合同中常用条款的细微区别与联系，是国内第一部百科全书式的合同法双语实战教材，具有独创性。

本书适合法律专业本科或研究生阶段作为双语教学教材使用，也可作为法律工作者研究涉外法律的参考读物。

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前　言

本书是三位作者共同劳动的结晶，既有对中国合同法理论和法规的探讨，对英美合同法理论和判例的翔实分析，又有对国际相关立法的全面展示；除了进行理论和立法研究外，还有关于实务的翔实说明；以作者多年的法律英语翻译写作实务为积淀，始终突出对读者双语能力潜移默化的培养。

作为合同法双语教材，本书权威、翔实、专业、全面、系统、实用、方便。例如，详细介绍实务合同中常用条款的细微区别，如责任限制条款中 disclaimers、waivers、indemnities、exclusions、exemptions、limitations、restrictions、warranties 等之间的区别和联系。

书中展示权威的英美合同法教科书结构，有助于了解英美合同法之基本架构，无疑是英美合同法精要的中英文版。

本书以培养双语合同法及其相关资料的阅读、理解、撰写和翻译能力为主线，以《联合国国际货物买卖合同公约》、《国际商事合同通则》、美国《统一商法典》和《合同法重述》、中国合同法等为基本素材展开对比分析，摘选有代表性的契约法教科书内容，结合案例，讲解合同法的基本原理和专业知识，力求使读者对合同法有一个全面的了解。书中的关键术语、条款和段落均采用中英文对照方式，配有相关法条原文，此外还提供了若干资料的原文选读，书后附录是简要英中对照法律词汇。

对于实务合同中的重要条款，举出实例，如杂项条款、不可抗力条款等，并提供实务条款的中文对照翻译，如责任限制、通知、送达和其他杂项条款等。此外，还有对知识产权条款和电子商务合同核心内容的分析。

除实用价值外，本书亦有理论深度。例如，从比较的视角，区分艰难情形(hard circumstance)、不可抗力(force majeure)、合同落空(frustration)等相关概念；窥视上述各立法之间的关系，如《国际商事合同通则》第 2.1.18 条与《联合国国际货物买卖合同公约》第 29 条之间的关系等；详细探讨英语国家禁反言(estoppel)原则的演化、禁反行为原则、禁反言原则与弃权(waiver)原则之间的关系，系统梳理并展示合同法的相关理论。

本书可谓是第一部将中国合同法与国际和英美合同法立法、判例、学理、实务和翻译体验结合在一起的合同法全书，也是第一部以系统双语教学为核心的合同法实战教科书。

本书的构想已有近十年时间，在最后成稿时因《国际商事合同通则》有修改，故结合学理、判例、法规，重新进行了有机梳理整合，但仍感时间仓促。对于书中的各种不足和谬误，希望有机会再版克服。

真诚期盼各位同仁、读者的关爱和指正，不胜感激。

肖建华

2014 年 10 月 10 日于北京

目　　录

第一章　国际合同立法与合同法比较引论

1.1　《联合国国际货物买卖合同公约》

在国际合同立法中，最重要、关系最直接的是《联合国国际货物买卖合同公约》(*United Nations Convention on Contracts of International Sales of Goods*，简称 CISG 或者《公约》)。《公约》由联合国国际贸易法委员会(United Nations Commission on International Trade Law，简称 UNCITRAL 或者"联合国贸法会") 1969 年指定的一个工作小组(working group)草拟，1980 年在维也纳举行的外交会议上获得通过，共 62 个国家的代表出席。《公约》在达到法定批准国家数额后于 1988 年 1 月 1 日正式生效。1986 年 12 月 11 日我国向联合国递交了对该《公约》的核准书，成为该《公约》的缔约国。2013 年 9 月 26 日，巴林加入《公约》，成为该《公约》的第 80 个成员国。

《公约》系成文法，与美国《统一商法典》(*Uniform Commercial Code*，简称 UCC)第二篇性质相似，适用于以货物为标的之买卖契约，且排除消费品买卖(consumer goods)之适用，仅在契约当事人国籍不同(须均为通过《公约》之联合国会员国)时，方可适用。如美国卖方与法国买方订立商用货物(commercial goods)买卖契约时，可适用《公约》。

《公约》全文共四大部分 101 条，并未就契约之实质内容加以规范，仅就国际货物买卖合同之书面形式、成立与否、买卖双方具有何种权利义务、如何履行合同以及违约承担何种责任等作出规定。因此，契约是否因欺诈(fraud)、胁迫(duress)、错误(mistake)而订立，当事人有无缔约能力等契约合法性问题，均无法以《公约》规定作为判断依据。《公约》是迄今最成功的国际贸易统一法之一，具有广泛的适用性，是开展国际贸易必须掌握的规则。我国在制定《合同法》时，充分借鉴并吸收了《公约》的内容。《公约》对消除国际贸易法律障碍、促进我国改革开放发挥了积极的作用。

《公约》根据国际上大多数国家的法律制度规定：合同的订立无须以书面形式订立或证明。如《公约》第 11 条规定：销售合同无须以书面订立或书面证明，在形式方面也不受任何其他条件的限制，可以用包括人证在内的任何方式证明。

ARTICLE 11(CISG)

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

同时，《公约》还允许缔约国提出保留，即声明不受该条约束。中国在加入《公约》时，根据

该公约第 95 条和第 96 条的规定作出了两项保留，一项是“国际私法保留”，另一项是“书面保留”，即对该《公约》第 1 条第(1)款(b)项和第 11 条提出了两项保留意见：

① 不同意扩大《公约》的适用范围，只同意《公约》适用于缔约国的当事人之间签订的合同；

② 不同意用书面以外的其他形式订立、修改和终止合同。

鉴于有些国家法律要求合同必须以书面订立，有的还要求必须双方签字、盖章，当时中国也是采取这种制度，就此，《公约》规定那些采取书面订立合同制度的国家可以对此提出保留。鉴于当时我国适用于国际经济贸易的《涉外经济合同法》要求合同必须以书面形式订立，与《公约》第 11 条不一致，因此我国在递交核准书时，声明不受《公约》第 11 条及与第 11 条内容有关的规定的约束。这一书面保留的含义是：即便在合同受《公约》管辖的情况下，如果合同一方是设立在中国的公司，由于中国政府作了书面保留，那么《公约》规定的合同订立无须以书面形式订立或证明的规定也不得适用。此时，如果根据国际私法规则，合同的适用法律是中国法，那么依据当时中国的法律规定，合同就必须以书面订立，否则合同即属未成立。

中国政府于 2013 年初向联合国秘书长正式交存有关撤回其在《联合国国际货物买卖合同公约》项下“书面形式”声明的申请，目前已正式生效。至此，中国也与绝大多数《公约》缔约国一样不再要求国际货物销售合同必须采用书面形式。这一撤回应引起中国公司的高度重视，因为中国公司已经习惯于订立书面合同。今后必须注意，在国际贸易中如果需要订立书面合同，在谈判交易之前一定要事先向对方声明：只有当事方达成书面合同并经双方签字后，交易才属正式达成。否则，有可能被对方钻空子。

当时中国作出“书面保留”在一定程度上会保护中国进出口企业的权益，否则处于改革开放初期的中国企业很可能在不知不觉中就订立了一份国际合同，蒙受经济损失。中国加入《公约》之时，正是中国涉外经济活动刚刚起步之日，经验不足，明确以书面形式来订立合同对于规范经济活动具有必要性。

1999 年情况开始发生变化。1999 年，我国公布了《合同法》，同时废止了《涉外经济合同法》。《合同法》对合同形式不作要求，合同可以以各种方式成立，该规定已与《公约》第 11 条的内容一致。国内学界和实务界多次建议撤回相关声明，《公约》也允许撤回声明。经认真研究并广泛征求意见，我国政府根据《缔结条约程序法》及《公约》的相关规定，撤回了对《公约》第 11 条及与第 11 条内容有关规定所作的声明。1999 年中国施行的《合同法》接受《公约》的立法模式，在第 9 条中规定“当事人订立合同，有书面形式、口头形式和其他形式”。这样，《合同法》在合同订立形式上的规定就趋同于国际通常的做法。中国撤回书面保留也就不存在国内法上的障碍了。撤回书面保留，意味着今后中国企业与外国企业达成合同不一定必须是书面的，而是可以采取任何形式，包括通过口头或者其他行为达成。

撤回声明，意味着与国内法保持一致，也是中国更加遵循国际惯例的表现，既有利于我们的对外经济贸易发展，也反映了中国的自信。

撤回声明可以视为是与国内法接轨的做法，当时的保留是为了与我国的《涉外经济合同法》相符合，如今的撤回声明是为了与现行《合同法》相符合。撤回声明意义重大，有效解决了国内法与《公约》之间的冲突，使两者对于合同形式的规定及适用趋于统一，为我国进一步发展对外贸易减少了法律障碍，还可以避免外贸经营者和其他国家对我国产生“合同形式的法律适用不平等”的误解。撤回声明有利于我国积极融入国际社会、充分参与经济全球化进程，体现了我国与时俱进、开放自信的大国形象。

实际上在我们的日常生活和某些商业活动中，并非全是以先订立书面合同才开展交易的，大量交易是通过口头进行的。同样，在国际贸易中，不拘泥于合同的形式，根据具体情况，采取灵活的方式开展交易，这样会有利于国际贸易的发展。例如，在必须立即对交易作出决断的紧急情况下，在急需出手或购进货物的情况下，对资信良好可靠的客户，就可以通过电话等方式达成交易，而未必以订立书面合同后才算达成交易。不拘合同订立的形式会使达成交易更加灵活、方便、快捷，也符合商人说话算数、诚实守信的道德水准。

但是某些情况还需坚持书面合同。法律上规定订立合同不拘形式，不等于任何情况下都无须订立书面合同。其实国际间的绝大多数交易还是以书面形式订立的，特别是那些金额较大、货物复杂的交易，或者交易涉及新客户、客户资信欠佳等情况，就更应坚持订立书面合同，而且还要将合同条款订立齐全、完备。

此外，另一项保留，即“国际私法保留”也可以适时撤回，扩大《公约》的适用范围。中国在加入《公约》之时保留了《公约》第1条第1款(b)项，即通过国际私法规则导致国内法适用《公约》的规定，是为了限制《公约》的适用范围。

ARTICLE 1(1)(CISG)

This Convention applies to contracts of sale of goods between parties whose places of business are in different States:…(b) when the rules of private international law lead to the application of the law of a Contracting State.

但是，扩大《公约》的适用范围对中国并无坏处，因为它可以使我国的对外争议解决更加合理。关于“书面形式”的撤回已经为下一个撤回做好了准备，“书面形式”的撤回声明是重要的条约法行为，反映了我国在条约法思维上的与时俱进，对中国条约法的建设非常重要。

可以说《公约》是现代合同法的基本规则和精华，与之相比，我国的相关法律还存在欠缺。如我国的违约损害赔偿制度不承认差价赔偿，这就与《公约》产生了差距，而且对于违约制裁也非常不利。因此，我国需要多从《公约》中汲取有益的东西。

相关选读：

Article 1(1)(a) of the Convention provides that the Convention applies to contracts for the sale of goods between parties whose “place of business” are in different “States” (in the Convention countries are referred to as “States”), when the States are parties to the Convention. Article 1(1)(b) also provides that the Convention applies “when the rules of

private international law lead to the application of the law of a Contracting State," but this provision is not effective in the US because the US has taken an exception to it pursuant to Article 95 of the Convention. Many of the major trading partners of the US are parties to the CISG, including Canada, Mexico, France, Germany, Italy, and the People's Republic of China.

In determining the application of the Convention, the places of business of the parties to the contract are determinative, rather than their nationality, residence, or place of incorporation. If a party has multiple places of business, the place of business that has the "closest relationship to the contract and its performance" controls(Article 10(a)). If a party has no place of business, then the party's "habitual residence" control(Article 10(b)).

A number of transactions are excluded from the CISG. See Articles 2～6. In particular, note that the CISG does not apply to consumer transactions (Article 2(a)); to contracts in which the predominant part of the sale involves services (Article 3(2)); and to contracts involving real estates (Article 1(1)). Unlike the UCC, the CISG does not apply to liability of the seller for death or personal injury caused by goods (Article 5). The Convention also governs only formation of a contract and the rights and obligations arising from the contract. It does not cover defenses against enforcement of the contract, such as duress, fraud, mistake, and unconscionability (Article 4(a)). Because of this "gap" in the coverage of the CISG, other bodies of law must be consulted when such issues arise. In particular, the UNIDROIT Principles of International Commercial Contracts, which are also reprinted in this book, deal with such issues and were drafted to supplement the CISG.

Article 6 of the Convention provides that the parties may exclude the application of the Convention or "derogate from or vary the effect of any of its provision". If a buyer and seller with places of business in different countries that are parties to the Convention agrees to a sales contract that is silent about the applicability of the Convention, the Convention applies. Thus, it is important for lawyers to be aware of the applicability of the Convention and to evaluate its substantive provisions to decide whether a contract of sale should exclude the applicability of the Convention entirely or modify any of its provisions.

The CISG is in many respects the international equivalent of Article 2 of the UCC. If a sale of goods takes place between businesses in the US, Article 2 of the UCC applies. On the other hand, if the sale takes place between companies that have their places of business in countries that are parties to the Convention, then the CISG rather than the UCC applies. For example, if an Italian manufacturer of shoes has a contract dispute with an American retailer, the CISG applies unless the parties have excluded its application by contract.

While the CISG is analogous to the UCC, many significant differences exist. For

example, the UCC places a greater emphasis on formality than the CISG. The UCC contains both a statute of frauds (反欺诈条款) (UCC § 2-201) and a parol evidence rule (口头证据规则) (UCC § 2-202), while the CISG does not have either provision.

The CISG has been in force for more than 20 years and the number of reported decisions applying the Convention, within the US and the foreign states, has steadily grown.

1.2 《国际商事合同通则》

另一部重要的准国际合同立法是《国际商事合同通则》(*Principles of International Commercial Contracts*, 简称 PICC 或者《通则》)。《国际商事合同通则》是政府间国际组织国际统一私法协会(UNIDROIT)1994 年制定并颁布的特殊国际法律重述。其目的是通过对合同法的一般原则加以阐释,反映世界各大法系的主要特点,构建一个能够在国际商事交易中获得广泛适用的合同法体系。它是一部具有现代性、广泛代表性、权威性与实用性的商事合同统一法,可为各国立法所参考,为司法、仲裁所适用,是起草合同、谈判的工具,也是合同法教学的参考书。

2004 年,对《通则》进行了微调,增加了代理、第三人利益合同、抵销等新内容。2011 年 4 月,《通则》2010 修订版在国际统一私法协会理事会第 90 次会议上获得一致通过。与 2004 年版本相比,2010 年版变化不大。第一,条文数量从 2004 年的 185 条增加到 211 条;第二,在具体制度上,增加了恢复原状、非法合同、合同条件等内容,修订了一些制度;第三,在体系上,增加了第 11 章"多方债权人和债务人"。这次修订,极大地丰富了《国际商事合同通则》的内容,其适用无疑是国际商事法律朝着统一化方向迈出的一大步。

《国际商事合同通则》除 211 项条文之外,还有相关注释,本书若没有特别说明,所引用的内容即为 2010 年版《国际商事合同通则》。

《国际商事合同通则》旨在为国际商事合同制定一般规则,在当事人约定其合同受《国际商事合同通则》管辖时,应适用《国际商事合同通则》;在当事人约定其合同适用法律的一般原则、商人习惯法或类似措辞时,可适用《国际商事合同通则》;在当事人未选择任何法律管辖其合同时,可适用《国际商事合同通则》;《国际商事合同通则》可用于解释或补充国际统一法文件;《国际商事合同通则》可用于解释或补充国内法;《国际商事合同通则》也可作为国内和国际立法的范本。

《国际商事合同通则》从统一法分类宽泛的角度看,既可以被称为示范法、统一规则,也可以被称为国际惯例。从实用的角度看,一国在制定或修订合同法时可以把它作为示范法,参考、借鉴其条文;合同当事人也可以选择它作为合同的准据法(proper law,适用法律),作为解释合同、补充合同、处理合同纠纷的法律依据。此外,当合同的适用法律不足以解决合同纠纷所涉及的问题时,法院或仲裁庭可以把它的相关条文视为法律的一般原则或商人习惯法,作为

解决问题的依据，起到对当事人的意思自治以及适用法律的补充作用。

相关选读 1：

The International Institute for the Unification of Private Law (UNIDROIT) has been working since the 1920s to promote harmonization and modernization of rules governing international transactions. In 1994, after more than a decade of work, the Institute published the Principles of International Commercial Contracts. UNIDROIT published a new edition of the principles in 2004, with additional chapters, revisions of some provisions, and updating of the text to adapt to the growth in electronic contracting.

Just as there is a similarity between the UCC and the CISG in that both have the force of law, so there is a parallel between the Restatement of Contracts of the US and the UNIDROIT Principles. The UNIDROIT Principles, like the Restatements, have been prepared by a respected private organization and do not have the force of law. But a striking different exists. While the Restatements are based on the common law, the UNIDROIT Principles represent a blend of legal traditions, drawing heavily on both the civil law and the common law. As a result, a common law lawyer reading the principles will find much that is familiar, only to be jarred by an encounter with a foreign concept.

At the inception, commentators identified a number of roles that the UNIDROIT Principles could play in international commercial transactions. First, the UNIDROIT Principles may be an important resource for drafters of international commercial contracts. Parties to such contracts often include a "choice of law" provision to avoid uncertainty about the law that governs a cross-border transaction. Because parties in different countries may be reluctant to agree to apply the law of the country of the other party to the contract, the UNIDROIT Principles may provide a neutral source of law for incorporation in the contract. Second, the Principles can play a significant role in dispute resolution. If the UNIDROIT Principles have been incorporated in a contract, they will provide the rules of decision. If the contract is silent on choice of law, or if it has a general choice of law provision ("lex mercatoria", "general commercial law", or similar provision), the dispute resolution body (whether an arbitration panel or a court) could turn to the UNIDROIT Principles to resolve the dispute. In those cases in which the CISG applies because the contracting parties have places of business in states that are parties to the Convention, the UNIDROIT Principles could still play a role in supplement the CISG when the Convention does not deal with a particular issue. Finally, the UNIDROIT Principles have the potential to be an influential source for law reform. By drawing on what the drafters consider the best rules of the civil and common law, they have provided a set of standards to which legislatures in various countries

can turn when considering modernization of their law.

The UNIDROIT Principles have made a considerable start toward these goals. The UNIDROIT Principles have been cited by many arbitral tribunals and several courts, received substantial attention from scholars, and have even had influence on states engaged in reform of commercial law. A database on the UNIDROIT Principles, as well as the CISG, has been established by the Rome-based Centre for Comparative and Foreign Law Studies and allows access to arbitral and court decisions which cite the UNIDROIT Principles[①].

Another project that has paralleled the emergence of the UNIDROIT Principles has been the work of the Commission on European Contract Law in preparing the Principles of European Contract Law (PECL). The Commission on European Contract Law is an independent body of experts from each Member State of the European Union that began its work in 1982. An introduction to the PECL prepared by the Commission on European Contract Law reflects that one primary anticipated purpose of the Principles is to play an important role in the possible development of a code of common European contract law[②]. The Principles of European Contract Law are stated in the form of articles with a detailed commentary explaining the purpose and operation of each article. While there was some reciprocal influence during the drafting of the UNIDROIT Principles and the PECL, one important difference between the two publications is that the former applies only to commercial transactions while the latter also applies to consumer contracts. Ultimately, the future impact of the PECL remains uncertain.

相关选读 2: Introduction to the 2010 edition of the UNIDROIT Principles

The new 2010 edition of the UNIDROIT Principles, like the 2004 edition, is not intended as a revision of the previous editions. As amply demonstrated by the extensive body of case law and bibliography reported in the UNILEX database, the UNIDROIT Principles continue to be well received generally and have not given rise in practice to any significant difficulties of application. Consequently, the content of the 2004 edition has been altered only marginally: only five provisions have been amended, i. e. Article 3 (now 3. 1. 1), 3. 19 (now 3. 1. 4), para. 2 of Article 3. 17 (now 3. 2. 15), para. 1 of Article 7. 3. 6 (now 7. 3. 6) and para. 2 of Article 7. 3. 6 (now 7. 3. 7), and of these only the last three have been amended in

① See http://www. unilex. info.

② The introduction and full text of the Principles of European Contract Law can be found at the Commission's website: http://frontpage. cbs. dk/law/commission_on_european_contract_law/.

substance so as to justify their transformation into separate articles; as to the Comments[①], significant changes have been made only with respect Comments 2,3 and 4 to Article 4.

The main objective of the third edition of the UNIDROIT Principles was to address additional topics of interest to the international business and legal communities. Thus 26 new articles have been added dealing with restitution in case of failed contracts, illegality, conditions, plurality of obligors and of obligees.

As a result, the 2010 edition of the UNIDROIT Principles consists of 211 articles (as opposed to the 120 articles of the 1994 edition and the 185 articles of the 2004 edition) structured as follows: Preamble (unchanged); Chapter 1: General Provisions (unchanged); Chapter 2, Section 1: Formation (unchanged), Section 2: Authority of agents (unchanged); Chapter 3, Section 1: General provisions (containing former Articles 3. 1 (amended), 3. 2, 3. 3 and 3. 19 (amended)), Section 2: Ground for avoidance (containing former Articles 3. 4 to 3. 16, 3. 17 (amended), 3. 18 and 3. 20, and a new Article 3. 2. 15), Section 3: Illegality (new); Chapter 4: Interpretation (unchanged); Chapter 5, Section 1: Content (unchanged), Section 2: Third Party Rights (unchanged), Section 3: Condition (new); Chapter 6, Section 1: Performance in general (unchanged), Section 2: Hardship (unchanged); Chapter 7, Section 1: Non-performance in general (unchanged), Section 2: Right to performance (unchanged), Section 3: Termination (containing former Articles 7. 3. 1 to 7. 3. 5, 7. 3. 6 (amended) and a new Article 7. 3. 7), Section 4: Damages (unchanged); Chapter 8: Set-off (unchanged); Chapter 9, Section 1: Assignment of rights (unchanged), Section 2: Transfer of obligations (unchanged), Section 3: Assignment of contracts (unchanged); Chapter 10: Limitation periods (unchanged); Chapter 11, Section 1: Plurality of obligors (new), Section 2: Plurality of obligees (new).

In presenting the first edition of the UNIDROIT Principles the Governing Council expressed its confidence that the international legal and business communities to which the Principles were addressed would appreciate their merits and benefit from their use. The success of the second edition did not fall short of the Governing Council's expectations. It is hoped that the 2010 edition of the UNIDROIT Principles will be as favorably received as the previous editions and become even better known and more widely used throughout the world.

① The comments on the articles are to be seen as an integral part of the Principles.