高等院校**法律专业双语课程**规划教材

International Commercial Contracts: A Textbook

国际商事合同

（英文版）

王秉乾 /编著

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王秉乾：法学博士，对外经济贸易大学法学院教师，研究方向为国际商法、国际经济法、国际贸易法、国际建设工程法等，长期从事相关方面的教学和科研工作，在各类期刊发表论文二十余篇，主持国家社科基金研究项目“中国海外工程承包风险的法律规制研究”及其他若干课题研究项目。已出版研究专著《英国建设工程法》（56 万字，法律出版社 2010 年版）和《英国建设工程合同概论》（22 万字，对外经济贸易大学出版社 2010 年版）、教材《中国对外贸易法》（40 万字，法律出版社 2006 年版，与导师沈四宝教授合著）、《国际商事仲裁》（25 万字，对经济贸易大学出版社 2010 年版）等。

序　言

国际商事合同是国际商事赖以运行的基本制度保证，没有合同法提供交易规则则国际商事就无法进行。在国际商事交易中，一份好的合同的重要性无论如何强调也不过分，因为其不仅是确保合同各方合法利益的主要依据，也是预防与处理未来争议的必要条件。这就要求我们熟悉与掌握有关合同的法律知识与语言。众所周知，在国际商事往来中，历史与习惯所形成的格局是英美合同法占有更为重要的地位，大量国际商事交易不仅在语言上以英语订立，而且在选择处理争议管辖法院或仲裁时也往往选择英美法系国家与地区的司法或仲裁机构（例如我国很多企业在国际商事交易中往往选择普通法系的香港或新加坡作为准据法或争议解决地，也有很多合同选择英国法作为准据法），其原因在于英美合同法已经沉淀、发展了数百年，在国际商事活动中已成为受到广泛接纳与遵守的法律制度。所以我国必须认真研究与运用英美合同法，只有这样才能在商事交往与争议解决中拥有足够的知识储备以占得先机、斗智斗勇。因此，了解和掌握相关的合同法原则、规则与技巧对于正在走向全世界的中国企业而言不是可有可无的事情，而是必然的选择。需要注意的是，这不仅要求知识上的掌握，还要求在语言上能够通过英语来理解与操作。这就要求国际商事合同的学习有必要以英文作为学习的主要工具，唯此才能使学习者在将来的工作中尽快熟悉和掌握国际商事合同的相关实务和理论问题，尽早跨越语言障碍和知识障碍。

《国际商事合同（英文版）》是为培养复合型涉外法律专门人才而编写的法学双语教材。在广泛收集资料、重视国外学者相关论述的基础上，本教材采用了英文为主、中文为辅相结合的方式，对国际商事合同中的重要问题进行了阐述。本教材共分为十五章，力图实现语言地道、论述清晰、重点突出、难度适当，以全面、深入、系统地来阐述国际商事合同的主要内容。本教材注重理论与实践相结合，不仅做到知识上的覆盖，更强调若干重大的法律实务问题，以实现背景、知识、理论与案例的有机统一。为此，本教材内容皆精选自相关国外权威著作对国际商事合同的论述，又根据我国读者的需要做了适当编著，以更适合中国学生学习之用。为了方便学习，本书特意对一些重点内容以汉语做了相关注释，并提供了一些基本的背景性知识介绍，以帮助理解。从实用性角度来看，本书既可以作为高等学校法学、国际贸易、国际企业管理等专业学生的教材，也可以为国家机关、企（事）业单位中从事法律、经济和贸易的相关人员提供有意义的参考。

需要说明的是，学习本课程的目的不仅在于了解相关合同法规则，更重要的是英美法法律思维的培养。由于传统路径依赖的影响，我国遵行的是大陆法系的教育方法，教学中更强调的是老师传授与学生记忆，在推理方式上更重视演绎，系统性很强，但对现实商业问题与案例的研究偏少，这导致学生对现实问题认识与分析的能力不足，难以满足经济全球化对国际化人才的要求。因此，作者希望读者在阅读与学习本书时有必要确立以下一些前提：第一，法律学习培养的最重要素质是批判性思维（critical thinking），即任何结论与前提都可以合理质疑，不轻易接受未经证明的结论，对权威说法也不要无条件接受；第二，对现实商业问题有所认识，合同法处理的都是非常实际的商业问题，其任务是为当事人进行交易提供法律保障，合同所属的行业与具体的人与事都对其有重大影响，若干背景性知识尤其重要，仅凭规则进行逻辑推理是远远不够的；第三，培养辩论的能力（argue）而不是仅仅学习一些论点（arguments），这要求凡事都从多方面看待，能够在法律对抗中自如运用相关材料，而不仅仅是停留在逻辑三段论的层面。非如此不足以真正理解与应用法律。当然，本书在这方面仅仅是抛砖引玉。

在此书的编写过程中，对外经济贸易大学法学院 2012 级硕士研究生刘梦云同学做了很多基础性工作，笔者在其中充分体会了师生共同进步的益处，谨表示感谢。另外，笔者特此向对外经济贸易大学出版社提供的帮助与支持表示衷心感谢。

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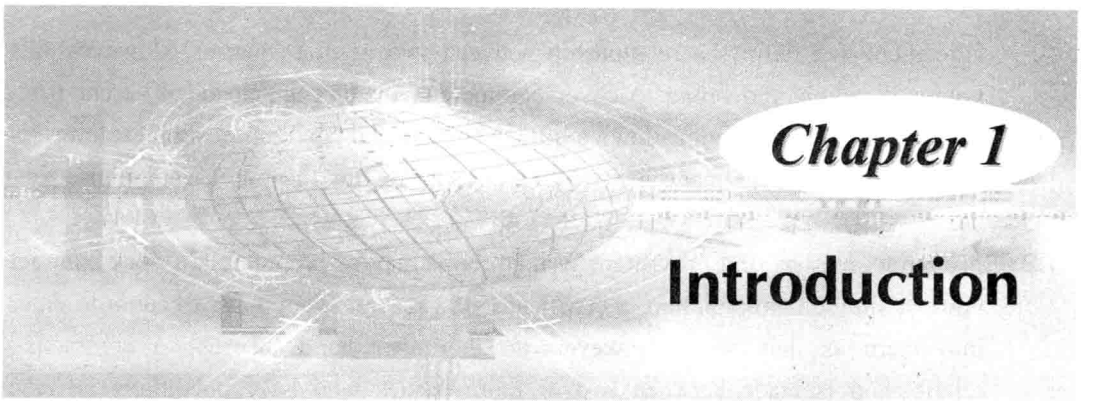

Chapter 1 Introduction

【Chapter Summary】

International commercial contracts have been and remain the foundation of international commerce ever since the beginning of international trade. This chapter offers an outline of international commercial contracts. After offering a general introduction, this chapter discusses the two fundamental principles of contracts—freedom of contract and sanctity of contract. The various sources of contract law are also defined. In the end, the relations between contract law and torts and restitution are briefed too.

【Objectives】

Through this chapter, students are required to understand the framework of international commercial contract and major issues involved, including the principles and sources of law. This chapter is designed to lay a solid foundation for further studies.

【Key Words】

Commercial contracts, promise, promisor, promisee, enforce, freedom of contract, sanctity of contract, expectation interests, reliance interests, restitution interests, CISG, PICC

1 International Commercial Contracts in Brief

1.1 Introduction

1.1.1 Contracts are so much a part of living in a society that nobody can calculate how many contracts are made every day. In the broadest sense, a contract is simply an

agreement that defines a relationship between two or more parties. However, this notion is simply too broad to cover commercial matters which are different from everyday's life. So, to come down a little, a commercial contract, in simplest terms, is merely an agreement made by two or more parties for the purpose of transacting business.

1.1.2 A contract may be oral or written. Written terms may be recorded in a thick contract book, a simple memorandum, a certificate, or a receipt. They have freedom to enter into them as they wish. However, on the other hand, because a contractual relationship is made between two or more parties who have potentially adverse interests, the contract terms are usually supplemented and restricted by laws that serve to protect the parties and to define specific relationships between them in cases of indefinite, ambiguous, or even missing terms.

1.1.3 The creation of an international business transaction and an international contract are a more complex process than the formation of a contract between parties from the same country and culture. In a cross-border transaction, the parties usually do not meet face-to-face, they have different societal values and practices, and their own national laws are imposed by different governments with distinct legal systems. These factors can easily lead to misunderstandings, and therefore the contracting parties should define their mutual understanding in contractual, and preferably written, terms. Thus, the role of a contract in an international commercial transaction is of a special value and importance for the parties involved.

1.2 The definition of contract

1.2.1 It may be safely claimed that contracts affect everybody and the law of contracts affects everyone. International commerce as an inherent and important part of the world trading system necessarily involves contracts and contract law from the most personal type to the most common, standardized commercial transaction. This is not surprising, as contracts provide an essential legal foundation to assure stability and predictability in commercial relationships and law of contracts promise the legal mechanism through which stability and predictability may be achieved.

1.2.2 However, when it comes to define contracts, various points of view may come forward and leave no definitive answer to this starting issue, though such variances generally would not affect the practical operation of contracts in the real commercial

life. For example, in English tradition, contracts are defined as "a promise or set of promises which the law will enforce",[①] which is substantially echoed by the Restatement (Second) of Contracts of American jurisprudence in section 1 that states "A contract is 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." Obviously, this definition is based upon the recognition of promise and enforceability as the starting logic for contract, which is the result of the case law tradition and development.

1.2.3 On the other hand, the civil law has long believed that contract is a matter of "meeting of mind" and thus replaced the tangible "promise" with an abstract idea. Such a difference has created a long-standing academic debate typical of the different approaches and contexts in which laws of different nations try to make out the nature of contracts, though it is not a major concern for the purpose of this book. As this book is mainly devoted to the discussion of contractual issues in international commerce and against the Anglo-American law background, the definition of promise enforceable in law is more often the choice, but this does not imply that the civil law approach is not the right way.

1.3 The philosophical foundations of contract

1.3.1 Contracts have profound foundations in human life and human institutions. Contracts serve both public and private interests alike, the former being the foundation for law to take contracts into its legitimate sphere of action and the latter being the rationale for individuals to put a high premium on an agreement for their own best interests. In this regard, many philosophical discussions have been offered, but up to now no general consensus has been reached, which is of course not a surprise at all. In summary, the exponents of different schools of thought have tended to base their focus upon the following aspects: the human will either as a source of sovereignty or of moral compulsion, private autonomy, reliance, and economic analysis, etc. [②]

1.3.2 In the first place, the theories of the sovereignty of the human will and the sanctity of promise have derived their persuasion from natural law traditions. Looking back, in the heyday of the Enlightenment era, there was widespread belief in, and great stress

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① H.G. Beale (general editor), Chitty on Contracts, 30th edn, Sweet & Maxwell, 2008, Vol.1, para. 1-001.

② Calamari and Perillo's Hornbook on Contracts, Hornbook Series, 5th Edition, West, 2003, § 1.4.

was placed upon, the existence of inalienable rights which preceded government. It postulates that the very government itself was based upon a social contract that derived its binding force from the sovereignty of the individual wills of the contracting parties. People have the free will to contract or not. They are free to do contracts. For this, US Chief Justice John Marshall once commented that "If, on tracing the right to contract, and the obligations created by contract, to their source, we find them to exist anterior to, and independent of society, we may reasonably conclude that those original and pre-existing principles are, like many other natural rights brought with man into society; and, although they may be controlled, are not given by human legislation." ① Thus, it may be claimed that "I am bound because I intend to be bound." Intention is therefore rightly regarded as the cornerstone of contract law.

1.3.3 Secondly, certain people tend to take the theory of private autonomy as the foundation. This explains the foundation of contract law as a sort of delegation of power by the State to its citizens. Recognizing the desirability of allowing individuals to regulate, to a large extent, their own affairs, the State has conferred upon them the power to bind themselves by expression of their intention to be bound, provided, always, that they operate within the limits of their delegated powers. This power, arguably, comes from the law of the State rather than the law of nature.

1.3.4 The third group people favors the reliance theory of contracts and attaches the foundation of contract law not to the will of the promisor to be bound but in the expectations generated by, and the promisee's consequent reliance upon, the promise. It moves attention away from the will of the promisor to an emphasis upon the balance of interests exemplified by reliance generated by the promise. Accordingly, it is clear that under modern law a contract, once made, is binding and an action for breach may be started although the contract is repudiated before it induces any action or inaction in reliance upon it.

1.3.5 In the last place, since the 1970s, a group of scholars have approached contracts from the perspectives of economic analysis, with Richard Posner taking the leading role. Economists of the Chicago School have found traditional contract rules to be generally sound, but they offer a new perspective from which contract rules may be

① Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 345, 6 L.Ed. 606 (1827).

assessed against economics and hence justified or modified. According to them, people allocate society's scarce resources through the exchange process and voluntary exchange occurs in a free-market context because the parties try to maximize their economic welfares and give up resources in return for more valuable resources. Such exchange is socially desirable because it moves resources to better uses and increases the allocative efficiency, increasing overall economic efficiency. Thus, the pursuit of self-interest would promote the interests of general society. They accordingly espouse broad autonomy for individuals to make their own market choices instead of excessive intervention which may distort rather than promote economic efficiency.①

1.3.6 Whatever their respective merits might be, such theories provide valuable and diffuse perspectives to help us understand contract, although they may occasionally produce contradictory inferences and start long-standing debates. Sir Frederick Pollock once wisely commented: "The law of Contract may be described as the endeavor of the State, a more or less imperfect one by the nature of the case, to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right-mindedness. … He who has given the promise is bound to him who accepts it, not merely because he had or expressed a certain intention, but because he so expressed himself as to entitle the other party to rely on his acting in a certain way." ② It follows that a contract does serve a few purposes and has done the job well enough to support the both domestic and international commerce. This is enough for the business community.

1.4 The functions of contract

1.4.1 In addition to philosophical implications, a contract does serve important functions, or it may be claimed that contracts are highly practical by nature in that a contract is very useful. ③

1.4.2 Firstly, a contract helps secure that the legitimate expectations created by a promise of future performance shall be fulfilled, and failing that should give rise to legal liabilities. In this respect, in addition to other devices like personal relations and moral persuasions, a contract does offer the last defense line for the fulfillment of

① Posner, Law and Economics, 4th edn., 1992, ch.4.

② Pollock, Principles of Contract, 4th ed. 1888, p9.

③ J. Beatson, Anson's Law of Contract, 28th ed., Oxford University Press, 2002, p3.

such promises by providing legal remedy. In this manner, a contract helps people do forward planning for the future and make provisions for future contingencies. In the business world, the more complex the transaction, the greater need for careful and detailed planning so as to make a good contract. A contract would fix the value of a possible exchange and calm down a worried mind.

1.4.3 Secondly, a contract may define the respective responsibilities of the parties to a contract and the standard of performance to be expected. This is vital for each party to understand his tasks and what measures he should take as a response to the transaction that has found expression in a contract. This implies that a contract needs to pay attention to details in order to be specific and ascertainable.

1.4.4 Thirdly, a contract may properly allocate economic risks in a transaction for the parties concerned in advance. Business is always risky and there is no guarantee against business failures. So the parties to a contract would try to provide certain terms for contingencies that may cause unexpected losses. For example, a long-term construction contract may contain a term which may allow a specified increase in price in order to offset increased labor and materials costs. Other common terms in this regard include allocation of risks of fire, earthquake and strike, etc.

1.4.5 Lastly but not the least, a contract may tell the parties how to respond to failures of performance that may arise occasionally. Breaches are of many types and demand a mechanism for control. A contract may provide the proper way out. On one hand, a contract may include a clause of "liquidated damages" which may specify an amount to be paid by the breaching side, which may effectively save the trouble of arbitration or litigation. On the other hand, a contract is the most important basis by which a tribunal may judge the intentions and behaviors of the parties and decide the measure of damages or other legal remedies available. All these elements tell that a contract is the instrument which may reconcile the conflicting interests of the parties and bring them into a common effort for mutual benefit.

1.5 The various interests protected by contract law

1.5.1 Contract law is useful as it may offer indispensable protection for the parties involved in a contract, and there are a group of interests falling into the ambit of contract law and they are the logical starting points for law to provide sufficient remedies.

1.5.2 The first and primary interest protected by contract law is the expectation interests of

performance, as the benefits of exchange in a contract are derived from the full performance of a promise. Thus, once a promise is breached and the expectation interests are consequently injured, a court will usually consider it legitimate and lawful to award damages to the injured party with a purpose to put the injured party in the same position as it would have been had the contract been duly performed. For example, the primary expectation interests in a commercial sale contract would be the profits. Thus, if there is a breach of a sale contract, a court would usually consider that the assessment of damages should be measured against the expected profits plus other costs. The damages awarded are thus a kind of substitute for the performance of the other party's obligation which should have caused the profits, whether by the payment of a debt already due or by the rendering of other forms of performance.[①] This is legally and philosophically important as such an approach may encourage people to enter into contracts and have confidence about the consequences of breaches.

1.5.3 The second and supplementary interest protected by contract law is the reliance interests which entitles the injured party to damages for the loss incurred in reliance on the promise. [②] This is especially important when the expectation interests are hard to calculate exactly in certain cases. The theory for this head of interest lies in the fact that a party to a contract has to often incur expenses for the performance and, if there is a breach, such expenses may be the proper foundation to calculate the losses for damages.

1.5.4 The third interest protected by contract law is restitution interest. This interest is often recognized when a contract is discharged as the result of a breach that may leave a windfall or unjust enrichment for a party, so this party will be compelled to restore the benefit or equivalent value thus acquired to the other party. However, contract law books would not usually touch too much upon this interest as the law of unjust enrichment or law of restitution would come to dominate such legal issues involved.

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① J. Beatson, Anson' Law of Contract, 28th edn., Oxford University Press 2002, p9.

② L. Fuller and William R. Perdue, Jr., "The Reliance Interest in Contract Damages", Yale Law Journal, Vol.46, No.1 (1936) pp. 52-96.