

外国商法英语

主编 林小龙

北京理工大学出版社



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内 容 简 介

为了满足我国日益增多的外贸工作者学习专业英语的需要，我们编写了一套《国际商务实用英语》丛书。本丛书是在参阅大量最新的国际商业原著的基础上编写而成的。它具有内容新颖、知识性强，实用性大、语言简练，文笔流畅等特点，是学习国际商务知识、提高商务专业英语水平的好读物。

本书是此丛书之一。其中包括《合同的本质和分类》、《合同的解除》、《商业票据》、《公司的本质》、《知识产权》、《反托拉斯法》、《侵权法》、《产品责任法》和《消费者权益保护法》等 23 篇文章。

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主编 林小龙

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前 言

随着我国市场经济的确立、对外开放的进一步扩大、尤其是我国关贸总协定缔约国地位的恢复，我国的国际经贸交往日益增多，国际市场竞争也日趋激烈，因此，培养大批既懂国际商务专业知识、又精通国际商务英语的复合型人才具有特别重要的意义。鉴于此，我们编写《国际商务实用英语》丛书。该丛书是在参阅大量最新外国商务专业原著的基础上选编而成的。它具有材料新颖、知识性强、实用性大、语言简练等特点，是学习国际商务知识、提高商务专业英语水平的好读物。《外国商法英语》是本丛书之一。

本书由中国环球律师事物所律师、法学硕士林小龙同志任主编、中国民航国际业务司凌洁同志任副主编。参加编著的还有张双根、万其刚、史文才、刘海奕、欧阳勇华、屠年益等同志。在编著过程中，得到了中国人民大学法学院国际经济法专家林毓辉教授、王益英教授和王宗贤教授的指导，谨在此表示衷心的感谢！

由于我们水平有限，错误疏漏之处在所难免，恳请读者批评指正！

编 者

1994. 8. 15

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1. Contracts^①—Nature and Classes

Introduction

Contract can be defined as a legally enforceable agreement between two or more competent persons. 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 upon all parties. If one of the parties to the contract breaches it by failing or refusing to perform, the law allows the other party an appropriate action for obtaining damages or enforcing performance by the party breaching the contract.

Contracts form the very foundation upon which all modern business rests. Business consists almost entirely of the making and performing of contracts.

A contract must be an agreement, but an agreement is not necessarily a contract. Whenever two or more persons' minds meet upon any subject, no matter how trivial, there is an agreement. It is only when the parties intend to be legally

obligated by the terms of the agreement that a contract comes into existence. If it imposes only a social or moral obligation, however, it is not a contract and is not legally enforceable. Ordinarily, the subject matter of the contract must involve a business transaction as distinguished from a purely social transaction.

To be legally enforceable, a contract must contain six elements: (1) offer and acceptance, (2) mutual agreement, (3) consideration, (4) competent parties, (5) legal purpose, and (6) proper form. If one of these elements is missing, the courts will usually refuse to enforce the contract. Each of these elements will be discussed in this chapter.

Offer and Acceptance An offer is a proposal made by one party (the offeror) to another person (the offeree) that indicates a willingness to enter into a contract. An acceptance is an indication made by the offeree that he or she agrees to be bound by the terms of the offer.

Mutual Agreement The parties to a contract must have a clear understanding of what they are undertaking. The contract must show mutual agreement, a meeting of the minds.

Consideration In most cases each party to a contract must promise either to give up something of value that he or she has a legal right to keep or to do something that he or she is not otherwise legally required to do. This exchange of promises is called consideration. If only one party promises something, such as paying a certain sum of money, and the

other promises nothing, then the agreement lacks consideration. Exceptions to the general rule will be discussed later.

Competent Parties The parties to a contract must be competent, that is, capable of understanding what they are doing. They must be of legal age and normal mentality. The functioning of a party's mind must not be impaired by injury, mental disease, or the influence of drugs or alcohol.

Legality of Subject Matter The purpose of the contract must not violate the law. It must have legality of purpose.

Proper Form Certain contracts, such as those involving \$ 500 or more or those that cannot be fulfilled within a year, must be in writing to be enforceable. Other kinds of contracts must not only be in writing but must also follow a prescribed form. These requirements for contracts are known as proper form.

These essential elements of a contract will be discussed in more detail later. At this point, it is necessary only to remember that an agreement, to be legally enforceable, must contain these six elements.

Contracts may be classified in several ways, depending on the manner in which they are created, expressed, or performed. Every contract may be placed in the following classifications:

1. Valid contracts, void agreements, and voidable contracts
2. Express and implied contracts
3. Formal and simple contracts

4. Executory and executed contracts

5. Unilateral and bilateral contracts

Valid Contracts, Void Agreements, and Voidable Contracts

Agreements classified according to their enforceability are valid contracts, void agreements, or voidable contracts.

A valid contract is one that will be enforced by the courts. Such a contract must fulfill the following definite requirements:

1. It must be based upon a mutual agreement by the parties to do or not to do a specific thing.

2. It must be made by parties who are competent to enter into a contract that will be enforceable against both parties.

3. The promise or obligation of each party must be supported by consideration given by each party to the contract.

4. It must be for a lawful purpose; that is, the purpose of the contract must not be illegal, such as the unauthorized buying and selling of narcotics.

5. In some cases, the contract must meet certain formal requirements, such as being in writing or under seal.

These five requirements are the criteria by which one may test the validity of any contract. If the agreement fails to meet one or more of these requirements, the agreement may be void or the contract may be voidable.

An agreement that is of no legal effect is void. An agreement that is not enforceable in a court of law does not come within the definition of a contract. A void agreement

(sometimes referred to as a void contract) must be distinguished from an unenforceable contract. If the law requires a certain contract to be in a particular form, such as a deed to be in writing, and it is not in that form, it is merely unenforceable, not void. It can be made enforceable by changing the form to meet the requirements of the law. An agreement between two parties to perform an illegal act is void. Nothing the parties can do will make this agreement an enforceable contract.

Basically, a voidable contract would be an enforceable agreement; but, because of circumstances or the capacity of one party, it may be set aside by one of the parties. The distinguishing factor of a voidable contract is the existence of a choice by one party to abide by or to reject the contract. A contract made by an adult with a person not of lawful age (legally known as a minor or infant) is often voidable by the minor. Such a contract is enforceable against the adult but not against the minor. If both parties to an agreement are minors, either one may avoid the agreement. Until the party having the choice to avoid the contract exercises the right to set the contract aside, the contract remains in full force and effect.

Express and Implied Contracts^② When contracts are classified according to the manner of their formation, they fall into two groups—express and implied contracts. An express contract is one in which the parties express their intentions by words, whether in writing or orally, at the time

they make the agreement. Both their intention to contract and the terms of the agreement are expressly stated or written. Terms which are customary in business, however, do not need to be stated in an express contract in order to be binding.

An implied contract is one in which the duties and the obligations which the parties assume are not expressed but are implied by their acts or conduct. The adage "actions speak louder than words" very appropriately describes this class of contracts. The parties may indicate so clearly by their conduct what they intend to do that there is no need to express the agreement by words to make it binding.

Formal and Simple Contracts^③ A contract which must be in a special form or be created in a certain way is a formal contract. Formal contracts include contracts under seal, recognizances, and negotiable instruments.

When very few people could write, contracts were signed by means of an impression in wax attached to the paper. As time passed, a small wafer pasted on the contract replaced the use of wax. The wafer seal was in addition to the written signature. This practice is still used occasionally, but the more common practice is to sign formal contracts in one of these ways:

Jane Doe (Seal); Jane Doe [L. S.]

Today, it is immaterial whether these substitutes for a seal are printed on the document, typewritten before signing, or the persons signing write them after their respective

names. In jurisdictions where the use of the seal has not been abolished, the seal implies consideration.

In some states, the presence of a seal on a contract allows a party a longer time in which to bring suit if the contract is broken. Other states make no distinction between contracts under seal and other written contracts. The Uniform Commercial Code abolishes the distinction with respect to contracts for the sale of goods.

Recognizances, a second type of formal contract, are obligations entered into before a court whereby persons acknowledge they will do a specified act that is required by law. The persons acknowledge that they will be indebted for a specific amount if they do not perform as they agreed. One type of recognizance is the obligation undertaken by a criminal defendant to appear in court on a particular day.

Negotiable instruments are a third type of formal contract. They include checks, notes, drafts, and certificates of deposit.

All contracts other than formal contracts are informal and are called simple contracts. A few of these, such as an agreement to sell land or to be responsible for the debt of another, must be in writing in order to be enforceable; otherwise they need not be prepared in any particular form. Generally speaking, informal or simple contracts may be in writing, may be oral, or may be implied from the conduct of the parties.

A written contract is one in which the terms are set

forth in writing rather than expressed orally. An oral contract is one in which the terms are stated in spoken, not written, words. Such a contract is usually enforceable, but it is not as satisfactory as a written contract. When a contract is oral, disputes may arise between the parties as to the terms of the agreement. No such disputes need arise about the terms of a written contract if the wording is clear, explicit, and complete. For this reason most businesspeople avoid making oral contracts involving matters of very great importance.

Executory and Executed Contracts^④ Contracts are classified by the stage of performance as executory contracts and executed contracts. An executory contract is one in which the terms have not been fully carried out by all parties. If a person agrees to work for another for one year in return for a salary of \$ 950 a month, the contract is executory from the time it is made until the twelve months expire. Even if the employer should prepay the salary, it would still be an executory contract because the other party has not yet worked the entire year, that is, executed that part of the contract.

An executed contract is one that has been fully performed by all parties to the contract. The Collegiate Shop sells and delivers a dress to Benson for \$ 85, and Benson pays the purchase price at the time of the sale. This is an executed contract because nothing remains to be done on either side; that is, each party has completed performance of each

part of the contract.

Unilateral and Bilateral Contracts^⑤ When an act is done in consideration for a promise, the contract is a unilateral contract. If Smith offers to pay \$ 100 to anyone who returns her missing dog and Fink returns the dog, this would be a unilateral contract. It is unilateral (one-sided) in that only one promise is made. A promise is given in exchange for an act. Smith promises to pay anyone for the act of returning the dog. A bilateral contract consists of a mutual exchange of promises to perform some future acts—one promise is the consideration for the other promise. If Brown promises to sell a truck to Adams for \$ 500 and Adams agrees to pay \$ 500, then the parties have exchanged a promise for a promise—a bilateral contract.

Quasi Contract One may have rights and obligations imposed by law when no real contract exists. This imposition of rights and obligations is called a quasi contract. Rights and obligations will be imposed only when a failure to do so would result in an unjust enrichment of one person at the expense of another. For example, suppose a tenant is obligated to pay rent of \$ 300 a month but by mistake hands the landlord \$ 400. The law requires the landlord to return the overpayment of \$ 100. The law creates an agreement for repayment even though no agreement exists. For the landlord to keep the money would mean an unjust enrichment at the expense of the tenant.

Words and Expressions

offer <i>n.</i>	要约
acceptance <i>n.</i>	承诺
offeror <i>n.</i>	要约人
offeree <i>n.</i>	受要约人
breach <i>n.</i>	违反, 不履行
consideration <i>n.</i>	合同对价
legal age	法定年龄
prescribe <i>vt.</i>	规定
unauthorized <i>adj.</i>	未经授权的
valid <i>adj.</i>	有效的
void <i>adj.</i>	无效的
adage <i>n.</i>	谚语, 格言
recognizance <i>n.</i>	保证书
negotiable instrument	流通票据, 可转让证券
indebted <i>adj.</i>	负债的, 有偿还义务的
prepay <i>vt.</i>	预付
expire <i>vi.</i>	期满
executory <i>adj.</i>	将来生效的或实施的
voidable <i>adj.</i>	可以判决无效的, 可以作废的

Notes

①Contracts: 合同是双方或多方当事人为一定目的而签

订的具有权利与义务内容的协议。只有符合法律合同才能强制执行。合同从不同方面有多种分类。

②Express and Implied Contracts: 明示和默示合同

③Formal and Simple Contracts: 要式和不要式合同

④Executory and Executed Contracts: 待执行的合同和已执行的合同

⑤Unilateral and Bilateral Contracts: 单方承担义务的合同和双边合同