

## The Categories and Components of the Contract

### 合同的种类与构成

Contracts are binding agreements that have legal consequences and can be enforced in court. 合同是具有约束力的、能产生法律后果且可被法院执行的协议。Noted contract scholar Samuel Williston defines a contract as “a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” 美国著名合同法学者塞缪尔·威利斯顿 (1861-1963) 将合同定义为 “当事人一旦违反，法律就会给予救济；或法律以某种方式确认履行义务的某项或者某些承诺。” Contracts provide stability and allow society to carry out its transactions in an orderly fashion; however, contracts are not limited to serious business ventures. 合同具有稳定性，并且允许社会以一种有序的方式进行交易。但是，合同并不总是局限于正式的商业活动。For example, siblings who enter into bargains to divide the household chores between them are creating contracts. 例如，一个家庭里的兄弟姐妹分配家务也是订立合同的一种形式。While some contracts are rather elaborate and formal, others are informal and even implied. 虽然有些合同非常复杂和正规，但也有些合同则是非正式的，有些甚至属于默示合同。

Ensuring stability and certainty is the quintessential goal of contracts. 合同的基本目标是保证其稳定性与确定性。Those who enter into these agreements do so with the knowledge that failure to live up to one’s part of the bargain may result in a court order for specific performance or for monetary damages as well as damage to one’s reputation in the community. 订立合同的当事人必须明白，若不履行合同中规定的义务，将导致法院的强制执行或支付违约赔偿金的后果；同时，违约行为也会损害其在该行业的声誉。

The importance of contract stability is emphasized by *Article I, §10 of the U.S. Constitution*, which provides that “No State shall...pass any...Law impairing the Obligation of Contracts.” 美国《宪法》第1条第10款强调了合同稳定性的重要性：“任何州都不得通过任何有损合同履行的法律。” In earlier days, freedom of contract was virtually uncircumscribed by government restrictions; people contracted as they pleased, with the only real restraint being that contracts for illegal purposes

were not enforceable by the courts. 早期，合同可以自由订立，不受政府管理的限制。人们可以根据自己的意愿订立合同，只有一些非法目的的合同才不被法院保护。For example, government contracts secured by bribing a public official cannot be enforced by the corporation offering the bribe. 例如，通过行贿公职人员而订立的合同不得由行贿方履行。That rule is still valid; 这样的规定今天依旧有效。however, other restrictions have been added. 但是，还有一些限制性的条款被加了进来。Consider, for example, employment contracts, which are governed by regulations barring discrimination, requiring minimum wages, limiting hours, and providing workers' compensation, to name only a few. 比如，相关法律关于任何雇佣合同不得存在歧视，必须遵守最低工资、工作时限以及员工补偿等规定。As society becomes more complex and more litigious, legislatures, administrative agencies, and courts at all levels of government are placing greater restrictions on the freedom to contract. 随着社会变得越来越复杂，诉讼也越来越多，各级立法机关、行政机关及司法机关开始对合同自由给予越来越多的限制。Contract law permeates our daily lives in such diverse areas as sales, credit, employment, and various other commercial transactions. 日常生活中的种种行为都能体现出合同法的效力，诸如销售、信贷、雇佣以及其他各种商业活动中。

## I. Contractual Terms of Art 合同专业术语

The field of contracts is an area of law in which mysterious terms of art abound. 合同属于法律的领域，存在一些难以理解的法律专业术语。Contracts may be characterized as express or implied; bilateral or unilateral; executory or executed; and void, voidable, and unenforceable. 合同可以被划分为明示合同或默示合同；双边合同或单边合同；待履行合同或已履行合同；无效合同、可撤销合同或不能强制履行的合同。It will be helpful for you to have some understanding of these terms as you learn about contracts. 了解一些专业术语有助于理解合同。

An *express contract* is one in which the terms are stated by the parties; it may be either an oral or written contract. 明示合同是指双方有明确约定条款的合同，它既可以是口头合同，也可以是书面合同。An example would be your agreement to buy a class ring for the sum of \$200.00 under a written contract. 举个例子，签订书面合同，花费 200 美元购买毕业戒指。An *implied contract* is one which is inferred from

the conduct of the parties. 默示合同是指根据双方行为推定存在的合同。Your conduct in entering a restaurant and ordering a meal gives rise to an implied contract that you will pay the price stated on the menu for the food even though you may not expressly say so to the waiter when you order. 例如，进入酒店并点餐的行为就是一种默示合同，表示点餐者会为自己所点的食物买单，尽管在点餐的时候并没有明确地告诉服务员这一点。In each case, you have entered into a contract, and the only difference is in the type of evidence necessary to establish the contract. 在不同情况下，人们都会订立合同，而唯一的区别在于合同订立的形式。

A **bilateral contract** is one in which the parties exchange promises to do some future act. 双边合同是指双方在未来都要履行一定义务的合同。You agree with the car dealer that you will pay for your new Jaguar when you take delivery next week. 例如，消费者与汽车销售商达成协议后，在下周提取交付的捷豹汽车时，需要支付该车的费用。Each of you has promised to do something in the future; the dealer to deliver the car and you to pay for it. 当事人双方都作出了在将来做某件事情的承诺，即销售商交车，消费者付费。In contrast, a **unilateral contract** is one in which one party acts immediately in response to the offer. 相比较而言，单边合同是指一方对要约者直接承诺采取行动的合同。Assume that you tender a monetary reward for the return of your much-loved, but lost, dog - Sebastian. 假设某人的爱犬塞巴斯蒂安走失了，并为此发了一个悬赏信息。A man, Vincent finds Sebastian and returns him. 一个叫文森特的人发现了这只狗，并将它返还给主人。The response is in the form of immediate action rather than a mutual exchange of promises. 这个回应就是一个直接的行为，而不需要双方交换意愿。

An **executory contract** is one in which some or all of the terms are uncompleted – our car deal, for example. 待履行合同是指部分或者全部条款没有履行完毕的合同，比如说购车。An **executed contract** then is one in which all the terms have been completed. 已履行合同是指规定的条款已经履行完毕的合同。You have eaten your meal and paid your bill at the restaurant or paid Vincent for returning Sebastian to his happy home. 例如，在餐馆就餐并买单的行为，或者狗的主人向文森特支付报酬且高兴地带着爱犬回家的行为。

The terms “void, voidable, and unenforceable” are relevant in situations where there is a breach of contract or when the one party fails to comply with the terms of the agreement. 法律术语“无效、可撤销、不能强制履行”与违反合同或不能履行合同中某些条款的行为联系在一起。A **void contract** is a nullity from its beginning, and damages do not result. 无效合同自始无效，且不存在赔偿问题。For example, a contract to murder someone is void, and the person making the “hit” could not successfully maintain a lawsuit to collect her salary 例如，谋杀合同就是无效合同，杀人凶手不可能通过法律手段获得合同中规定的酬金。 On the other hand, a **voidable contract** is one which is binding until it is disaffirmed or canceled by the party with the authority to do so. 另一方面，可撤销合同是指一直有效的合同，除非该合同被有权的一方当事人否定或者撤消。In many ways, marriage is a contract which either party may rescind by obtaining a divorce. 在许多方面，婚姻属于“可撤销的合同”，因为当事人可以通过离婚的手段撤销该“合同”。Other contracts are deemed to be unenforceable. 其他的合同被认为是不可强制履行的合同。**Unenforceable contracts** are those which meet the basic common law elements for contracts but lack some other additional legal requirement such as being signed in front of a notary public. 不可强制履行的合同是指那些只符合基本的普通法规定的合同，但是缺少额外的法律要件，例如公证员的签字。

## II. Formation of Contracts 合同的订立

The requirements for formulating a contract appear relatively uncomplicated. 订立合同的要求显得相对比较简单。First, there must be two or more parties, each of whom have the legal **capacity** to enter into an agreement. 首先，必须要有两个以上的当事人，每一方都需具有订立合同的行为能力。Second, there must be an **offer** and **acceptance**, or consent, which reflects a mutual understanding between the parties as to the essential elements of the contract. 第二，必须要要有要约和承诺或者是达成合意，这反映出当事人对合同核心条款的相互理解。Third, the agreement must be supported by **consideration** or obligation. 第三，合同必须有对价或者责任来支持。Determining the existence of each of these elements is not as simple as it might appear at first glance. 决定每个因素的存在或许并非像人们第一眼看到的那么简单。

**Parties.** 当事人。Two or more parties must be involved in a contract. 一个合同中必须涉及两个以上的当事人。One cannot enter into a legally enforceable contract with oneself. 一个当事人不能和自己订立合法且有效的合同。Parties to such agreements include both natural and **artificial persons** (corporations). 订立合同的当事人包括自然人和法人。The law creates a legal fiction that corporations are persons. 法律将公司看做法律拟制人(法人)。This allows corporations to sue and be sued and to conduct business transactions as entities without involving individual shareholders. 这就允许法人团体可以起诉或应诉, 可以作为实体从事商业活动而不涉及单个股东。

Each party involved in the contract must have the legal capacity to enter into the agreement. 合同中涉及的当事人必须具有订立合同的行为能力。Incapacity may result from the age of the individual or from a party's being mentally incapable of understanding the ramifications of the contract. 个人的年龄或者无法理解合同后果等因素可能导致无行为能力。 At common law, a person under the age of 21 was considered an infant, or minor. 根据普通法, 21岁以下的人被视为儿童或未成年人。 Today, many states establish the age of majority at 18, the age at which citizens may vote. 现在, 美国许多州确定的法定年龄为18岁, 这也是公民享有选举权的年龄。 State laws often provide that minors may enter into contracts but that they retain the ability to withdraw from the agreement. 州法规定, 未成年人可以订立合同, 但是他们同时享有撤销合同的权利。 Assume that Patricia age 17, buys a \$750 stereo, but upon bringing it home and discussing the matter with her parents, she decides to return the stereo to the store. 假设帕特丽夏今年17岁, 她用750美元买了一部立体声音响, 但是当回家与父母讨论此事后, 她决定将音响退还给商店。 As a minor, she may disaffirm the contract, and the store must take the stereo back if there is a timely disclaimer on her part. Minors are under an obligation to return any consideration received under the contract. 作为未成年人, 帕特丽夏可以撤销这一合同; 而且, 假如她这一方及时告知商店, 那么商店就必须将该音响收回。 未成年人有责任返回其基于合同获得的利益。 The fact that minors may void contracts causes many people to refuse to contract with them. 这一事实导致许多人不愿意与可以撤销合同的未成年人签订合同。 Minors who contract for necessities such as

food, shelter, and clothing are not usually permitted to avoid such agreements after the goods or services have been delivered; 未成年人签订的购买衣物、食品、住处等必需品的合同一般不允许在货物交付或者服务提供后撤销。however, the minor is liable only for the reasonable value of the goods or services, which may not be the same as the contract price. 但是, 未成年人仅对交付货物或者提供服务的合理价格承担责任, 这一价格不一定与合同约定的价格一样。**Emancipation**, or the removal of one's disabilities as a minor, can occur by court order, by entry into the armed forces, or by marriage, according to state law provisions regarding emancipation. 根据州法律关于自立的规定, 人们可以通过法院的判决、参军, 或婚姻等方式使自己具有自立或确定行为能力。

**Mutual assent.** 相互同意。Cases less frequently turn on the question of whether there are two parties to the contract or whether the parties had legal capacity than on the issue of mutual assent. 关于合同是否有双方当事人或者当事人是否有行为能力的问题, 涉及到第一种情况的案件非常少。The question is whether the two parties have a true “meeting of the minds”; that is, “the parties must reach an agreement on the same bargain on the same terms and at the same time.” 问题在于双方当事人是否真的在“想法上达成一致”, 即“当事人必须就交易价格、内容及时间达成一致。” The mutual agreement is generally measured on an objective standard, and the subjective intent of the parties is usually irrelevant. 合意是一个客观标准, 当事人的主观意图通常与此无关。Courts examine the language of the contract and construe it by the usual meanings of the words. 法院通过文字的意思来理解并解释合同。A great jurist, Learned Hand, clearly stated this principle of judicial construction when he wrote, “If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there was some mutual mistake, or something else of that sort.” 一位著名的法学家勒恩德·汉德曾经清楚地阐述了司法解释的这一原则: “但是, 假如 20 名主教可以证明, 当双方当事人在使用文字的时候都想要表达出一些法律规定以外的意思, 除非存在一些共同的过错或者其他类似的问题, 否则他就会一直坚持自己的观点。” For this reason, complex contracts often contain sections that clearly define certain terms. 因此, 复杂的合同通常都包含有若干专门定义某些术语的条款。It is critical that both parties have the

same understanding of the terms. 双方当事人对这样的专业术语有同样的理解，也至关重要。To illustrate, merchants involved in international trading would specify the currency for payment as U.S. dollars rather than merely as dollars, which could drastically affect the amount paid if some other nation's dollars were involved. 举例来说，涉及国际贸易的商人会明确指出用“美元”而非仅仅用“元”来作为他们现金支付的币种，因为如果涉及其他国家的货币“元”，那么就可能会严重影响应支付的金额。The test used by the courts to measure the party's intention is whether a reasonable person in the position of the other party would also interpret the words and actions in the same light.法官会站在各方的角度以一个正常人的思维来理解合同中的文字和当事人的行为，通过这一方法来衡量当事人的意图。

The mutual understanding usually follows negotiations in which parties argue back and forth as to the terms of the contract. 相互理解通常需要当事人根据合同内容反复进行协商。When one party (the *offeree*) accepts the terms offered by the other (the *offeror*), the negotiations are completed and the contract may then be drafted in final form.当一方（受要约方）接受了另一方（要约方）的条件，那么协商就完成了，之后他们可能会以最终的形式起草合同。

**Consideration.** 对价。Valid contracts are accompanied by *consideration*. 有效的合同总是离不开对价。Consideration is not limited to money but instead is usually defined in terms of an exchange of benefits or detriments; that is, the parties agree to do something they are not legally obligated to do or refrain from carrying out some activity that they are bound by law to do.对价并不仅限于金钱，它还可以是利益或者损害的交流，即当事人同意做没有法律义务去做或者实施一些法律没有限制的行为。 This consideration may include the exchange of mutual promises, such as one party's agreeing to perform household tasks this week in exchange of money or goods, such as trading one car for another. 对价可以包括相互意思的交流，例如一方当事人同意做一周家务的条件来换取金钱或物品，或者用一辆车来换另一辆车。The consideration must be the result of the bargaining, and past consideration is not sufficient. 对价必须是当事人双方协商的结果，过去的对价还不够。The fact that one party did a favor for another last week is not valid consideration for this week's contract.一方在上周做的为另一方做事的事实对于本周的合同来讲属于无效的对价。 Generally, even economically inadequate consideration will be sufficient to

support the bargain, but the key is that both parties must suffer a detriment. 一般来说, 即使缺乏经济上的对价, 当事人双方也可以达成有效的合意, 但关键的问题在于双方必须要承受一定的损失。Again, the courts are very hesitant to correct the foolish error or bad judgment of the parties if there has been no fraud or duress involved in the bargaining. 进一步讲, 如果谈判中不存在欺诈或者胁迫, 法官也不会更正一些愚蠢的错误或者一方当事人错误的判断。

In determining the formation of a contract, courts look to three factors; the capacity of the parties, the offer and acceptance, and consideration. 法官主要通过三个因素来决定合同的构成: 当事人的行为能力、要约和承诺以及对价。These factors are measured by an objective-person standard, which often requires the judge or the jury to reconstruct the negotiations. 这些因素需要用一个人相对人的标准来判断, 经常要求法官或者陪审团多次重启谈判。This is often difficult, particularly in the case of oral contracts. 这些通常很困难, 尤其是在口头合同中。Oral contracts are as valid as written contracts, with a few exceptions, as we will discuss later; and simple contracts are as valid as the most laboriously drawn ones. 除了我们下面要讨论的少数特例外, 口头合同与书面合同一样有效。简单的合同与最复杂的合同一样有效。

Parties often enter into contracts without realizing the full ramifications of their actions; therefore, it is imperative that both parties read the entire written contract and carefully consider all aspects of it. 当事人通常在没有充分考虑其行为的后果时就订立合同, 因此, 双方当事人阅读整个合同全文并仔细考虑合同的各个因素, 就显得很有必要。To illustrate, suppose that Samantha buys an automobile from a dealer with the understanding that she is to make monthly payments to him. 举例来说, 假设萨曼塔以分期付款的方式从销售商那里购买一辆汽车。However, a provision may allow *assignment* (a present transfer of a contractual interest to a third party) of the contract to a financial institution or to someone else without the permission of the obligor. 但是, 法律可能允许合同转让给金融机构(合同的利益转让给第三人); 或者, 但不竟债务人同意转给其他人。Samantha could owe the bank or some other unknown party; this frequently occurs with notes for consumer goods, which may be considered assets of the business and are often sold. 萨曼塔可以向银行或第三方借款。这种事情经常发生在票据消费中, 这些票据可以作为企业的资产

并进行买卖。Another example would be hiring a particular carpenter and then discovering that he had assigned the contract to someone else. In order to avoid the possibility of assignment, the contract should clearly state that it is not assignable. 另一个例子是，雇佣了某一个具体的木匠后，发现对方已将合同转让给了第三人。为了避免转让的可能性，合同中应该明确约定该合同不可转让。