

前言 Preface

当 2009 年底《商法》月刊 (China Business Law Journal) 的编辑第一次向我约稿时, 我们达成的共识是我会先尝试着写五期专栏文章, 如果事情顺利, 专栏得到了读者的积极反馈的话, 我就会继续写下去。起初, 我对写专栏的前景心存怀疑。我认为, 毕竟在以语言和法律为重点的专栏中能够讨论的有用话题肯定很有限。

四年多过去了, 我已写了 40 篇专栏文章, 我很高兴地告诉大家我的灵感仍然如同泉涌。我之前以为会成为负担的工作反而给了我许多做研究和写作的快乐时光。从写第一篇专栏开始, 我最初的热情就从未减退过。事实上, 如今在繁忙日程之外的闲暇时间中, 写专栏已经成为了我最先想到的活动之一。

正如其他项目, 所有的专栏文章和这本书都是团队努力的成果, 在此需要特别感谢许多人:

致向我约稿的《商法》月刊创始主编 Robin Weir, 我非常感谢你的信任, 并使我相信自己已经拥有了“必要的权威和实务经验”可以胜任专栏写作。

致《商法》月刊现任主编 John Church, 非常感谢你让我有了出版这本书的热情以及你给予的睿智和愉快的建议。

致《商法》前任和现任副主编杨春雷、李俊辰, 非常感谢你们在编辑专栏文章和提出修改建议时给予的支持、耐心和专业精神。

致《商法》月刊翻译 Grace Gao、熊璞和张璇, 非常感谢你们精彩的翻译并使专栏文章从双语角度来看的效果非常好。每一位在跨法域和双语的环境中工作的人都能证实, 将英文术语翻译成中文是非常具有挑战性的, 反之亦然, 更不用说解释法律概念是如何在每种语言中进行运用的了。

致《商法》月刊出版人方理和 James Burden、前编辑顾问 Chris Hunter, 非常感谢你们对《商法》尤其是我的专栏给予的无尽支持。

最后一点也非常重要, 致我忠实的读者、同事和我的家人, 非常感谢你们容许和支持我的这份痴迷, 并感谢你们一直以来提出的有益想法和建议。

When the editors of *China Business Law Journal* first invited me to contribute at the end of 2009, it was agreed that I should write a series of five columns on a trial basis, with the expectation that the arrangement would continue if things went well and the column received positive feedback from readers. I was initially sceptical about the prospect of writing a regular column. After all, I thought, there must surely be a limit to the number of topics that could usefully be explored in a column that focused on language and law.

More than four years (and 40 columns) later, I am pleased to say that the fountain of inspiration is still bubbling away! What I had thought might become a burden has instead given me many happy hours of research and writing, and my initial enthusiasm has not waned at all since I wrote the first column. In fact, working on the column has now become one of the first activities to come to mind when I have some leisure time in an otherwise hectic schedule.

The columns, and this book, are the product of a team effort and there are many people to whom special thanks are owed:

To Robin Weir, the founding editor of *China Business Law Journal*, who came up with the idea of asking me to contribute the column, many thanks for your confidence and for convincing me that I had “the necessary gravitas and practical experience” to make the column work.

To John Church, the Journal's current editor, many thanks for matching my enthusiasm in publishing this book, and for your wise and good-humoured counsel.

To Raymond Yang and Richard Li, the Journal's former and current associate editors, respectively, many thanks for your support, patience and professionalism in editing the columns and suggesting revisions.

To Grace Gao, Rhea Xiong Ying and Libby Zhang Xuan, the Journal's translators, many thanks for your brilliant translations and for making the column work so well from a bilingual perspective. As everyone who has worked in a cross-jurisdictional, bilingual context will attest, translating terms from English to Chinese, and vice versa, can be a real challenge, let alone explaining how legal concepts operate in each language.

To Kelley Fong and James Burden, the Journal's publishers, and former executive editor Chris Hunter, many thanks for your ceaseless support. And last but not least, to my faithful readers, colleagues and family, many thanks for tolerating and supporting this obsession, and for your helpful ideas and suggestions along the way.



Author's introduction

本书是对这四年来《商法》月刊中“商法词汇”专栏文章的汇编。“商法词汇”栏目自创立以来一直专注于三个相互关联的、涉及中国的跨境法律事务方面：语言、法律和法律职业。

关于语言，本书重点在于帮助读者理解法律术语在英语和中文中的意思和用法，包括词源或者衍生术语。

在法律方面，重点在于分析实体法律概念，比较中国法律和普通法法律（或者，有时是大陆法域）的不同态度。

在法律职业方面，重点分析普遍影响律师的问题以及挑战，包括律师的作用和他们需要遵守的职业规范，以及在与中国相关领域执业的律师会面临的特定挑战。

本书目的

本书大致上旨在实现两个目的。首先，最重要的是，本书为律师和其他感兴趣的人士提供了实用的、现成的训练材料。

虽然本书没有全面涵盖商业律师为了有效完成工作而需要了解的所有问题和概念，不过它涵盖了許多体现基本知识和技能的内容。

包括执业多年的人在内的许多律师都能证实，在实践中很容易理所当然地使用某些法律术语和概念，特别是在有现成的文件模板和语言时。

不过，基本法律术语和概念往往是最难向同事和客户解释的。比如，在法律意见书中最常见的短语“合法、有效、有约束力并可强制执行的”，每个词语是什么意思，它们是否有任何形式的重叠？还有许多其他的例子，比如“转让和让与”，“条款和条件”，“修改与变更”，“责任和义务”。

第二个目标在本质上更深层次一些。作为一名在中国大陆执业十年并在双语环境中为跨境交易

This book is a collection of columns published in *China Business Law Journal* under the title “Lexicon” over a period of four years. Since inception, Lexicon has maintained a focus on three interrelated aspects of cross-border legal practice involving China: language; law; and the legal profession.

In relation to language, the focus is on helping readers understand the meaning and usage of legal terminology in English and Chinese, including the etymology, or derivation, of terms. In relation to law, the focus is on exploring substantive legal concepts and comparing the position under Chinese law with the position under common law and, to a lesser extent, the position in civil law jurisdictions. In relation to the legal profession, the focus is on exploring issues and challenges that affect lawyers generally, including the role that lawyers perform and the professional standards to which they are subject, and also the specific challenges that affect lawyers who work in China-related areas of practice.

Objectives of this book

There are two broad objectives that this book is designed to achieve. First and foremost, it provides a practical, ready-to-use source of training material for lawyers and other interested persons. Although it does not deal comprehensively with all of the issues and concepts that business lawyers need to know in order to perform their role effectively, the book covers a broad range of areas that represent fundamental knowledge and skills.

As many lawyers will attest – including those who have been in practice for many years – it is very easy and tempting to take certain legal terminology and concepts for granted, particularly when template documents and language are so readily available and accessible. However, it is often the basic terminology and concepts that are the most difficult to explain to colleagues and clients.

Consider, for example, a phrase that commonly appears in legal opinions: “legal, valid, binding and enforceable”. What does each word mean, and do they overlap in any way? And to what extent does this phrase depend on the laws and juris-

提供法律服务的普通律师，我深切体会到这其中涉及的挑战。

首先，我所接受的普通法法学教育并不能总让我很好地理解中国法律概念背后的逻辑和理念，其中有许多概念都来源于大陆法法域而不是普通法法域。其次，我深刻感受到了语言对法律产生的影响（反之亦然）和律师试图用另一种语言解释外国法律概念所面临的挑战。再次，我认识到了比较法的好处以及一定程度上了解到外国法律能够帮助律师们更好地理解自己本国法律。

重要的是，我还意识到了在外国进行法律实践所享受的巨大好处——即使是在像中国大陆一样发展迅速的法域——以及由此产生的职业自豪感。写“商法词汇”专栏以及出版本书的灵感在很大程度上来自这份职业自豪感以及与法律界同行们分享这份自豪感的愿望。

内容及使用方法

本书分为以下三部分：

- (1) 语言与合同起草；
- (2) 法律制度与法律概念；
- (3) 法律职业。

每部分的开篇首先概述本章的专题和主题。这可以帮助读者选择学习的专题以及可以进行学习的专题顺序。在每章专题的最后，都有若干建议讨论问题。

本书的最后附有索引以及根据不同主题编写的专题组目录。

本书可以用于自我训练或者集体练习。此外，读者可以单独选择一章专题或者选择与某个主题相关的一系列专题进行学习。

对于集体练习者来说，本书可以按照下列的方法使用：

- (1) 选择一章专题；
- (2) 参与者用 10 到 15 分钟阅读该章专题；
- (3) 参与者可以在剩下的时间中利用建议讨论的问题进行讨论。

这样的话，读者可以用最少的准备工作，很容易地在一个小时训练时间内完成练习。

dictional practice in respect of which the opinion is issued? Many other examples are considered: “transfer and assign”, “terms and conditions”, “amend and modify”, and “duty and obligation”, to name just a few.

The second broad objective is more esoteric in nature. As a common lawyer who spent a decade practising law in mainland China and working on cross-border deals in a bilingual context, I can testify to the challenges that this often involves. For a start, my common law training did not always equip me well to understand the logic and thinking behind Chinese law concepts, many of which drew more inspiration from the experience in civil law jurisdictions than the experience in common law jurisdictions. Second, I developed a keen sense of the impact of language on law (and vice versa) and the challenges that arise when a lawyer attempts to explain foreign law concepts in another language. Third, I realised the benefits of comparative law and the extent to which an understanding of law in a foreign jurisdiction helps lawyers to develop a better understanding of law in their own jurisdiction.

Importantly, I also came to understand the immense privilege that comes from practising law in a foreign jurisdiction – even one that is developing as quickly as mainland China – and the professional pride that this engenders. The inspiration to write the columns for Lexicon and to publish this book stems largely from this professional pride and the desire to share it with my colleagues in the profession.

Content and how to use

The book is divided into three sections: (1) Language and Contract Drafting; (2) The Legal System and Legal Concepts; and (3) The Legal Profession.

Each section commences with an introduction outlining the topics (chapters) in that section, and the key themes. This should assist readers in choosing which topics to study and also the order in which topics might be studied. Each chapter concludes with a list of suggested discussion points. An index appears at the end of the book, together with a table that groups chapters according to different themes. The book can be used either for self-training purposes or as part of a group training exercise. In addition, each topic can be selected either on a standalone basis or as part of a series of topics that relate to a certain theme.

For group training purposes, the book can be used on the following basis:

- (1) A topic (chapter) is selected;
- (2) Participants spend 10-15 minutes reading the chapter;
- (3) Participants discuss the issues with the assistance of the suggested discussion points.

In this way, the training can be incorporated into a one-hour training session with minimal preparation and fuss.

尤其是建议讨论问题旨在为所有级别的律师提供一个提出自己的看法和经验,从而使其他参与者能够受益的机会。

局限性

和许多律师一样,我会忍不住地在观点中加入限制条件。进行比较法研究无疑会受到一个人自身知识框架的影响。

作为普通法律师,尽管我与中国法律打交道多年并进行了很长时间的研究,但是我的法律知识框架是普通法,其中大部分是英国法。这无疑会造成许多风险。

首先,我可能忽视了其他普通法域中的重要区别,并且/或者误将英国法的规定当作所有普通法域的规定。其次,我对中国法律的分析可能过于局限或者简单。再次,尽管许多专题都提到了大陆法域的规定,但是知识框架是大陆法而不是普通法的人可能会得出不同的结论。

对于这些和其他的风险与不足,我希望可以得到读者的谅解。本书并不试图以权威性或者结论性的方式介绍法律规定,相反本书的重点在于增强大家对法律基本术语和概念的认识。

您的反馈

希望读者和将本书用于训练的人士能够指出本书的缺漏,以便弥补。我非常欢迎您提出任何有关本书有用性的反馈以及如何改进或完善本书的建议。请直接将您的反馈按照下列地址告诉《商法》月刊编委会,以便在下版书中进行修订:

编委会

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The suggested discussion points are designed to provide opportunities for lawyers at all levels to provide input and draw on their experience for the benefit of other participants.

A qualification

Like many lawyers, I cannot resist the temptation to insert a qualification into my opinion. Comparisons are inevitably influenced by one's own frame of reference. As a common lawyer, albeit one who has worked with and researched Chinese law for many years, my legal frame of reference is the common law, much of which I have treated synonymously with English law. This inevitably creates various risks.

First, there is a risk that I have overlooked important differences in other common law jurisdictions and/or misrepresented English law as being illustrative of the legal position in all common law jurisdictions. Second, there is a risk that my analysis of the position under Chinese law is too limited, or too simplistic. Third, although many topics make reference to the position in civil law jurisdictions, there is a risk that different conclusions might be reached if the frame of reference was civil law rather than common law.

For these and other risks and deficiencies, I ask readers for their understanding (and sympathy). In its defence, the book does not attempt to state the legal position in a definitive or conclusive manner and, instead, places its focus on increasing awareness of fundamental terminology and concepts.

Your feedback

It is hoped that any gaps in the book will be identified and plugged by readers and those who use the book for training purposes. I would welcome any feedback on the usefulness of this book and also suggestions on how it might be improved or refined. Please direct any feedback to the editor of *China Business Law Journal* at the following address so that amendments can be considered for the next edition:

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LANGUAGE
AND
CONTRACT
DRAFTING

語言與合同起草

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起草合同是商事律师为了有效地发挥其作用而需要培养的最重要技能。不过，这也是律师工作中最具有挑战性的一个方面。除了选择正确的专业术语和短语之外，律师还需要思考如何表达某些概念，并达到清晰、简明和准确，从而尽最大可能地降低因合同解释而产生纠纷的风险。此外，律师还必须保证起草的合同从具体条款和作为一个整体来说都是完整的。

在双语环境中工作，需要准备如中英文等两种语言版本的合同时，律师遇到的挑战会增加。就此可以指出许多挑战：第一，许多词语都有专门的法律含义，在其他语言中没有完全对应的词语（比如普通法域中的“平衡”）。

第二，每种语言都有自己的语法规则，这会影响到表达概念的顺序以及句子结构。

第三，每种语言都有许多同义词，或者看似同义的词语（即它们有同样或者看似有同样的含义）。有时候，律师们很难明白那些看似同义的词语是否真正存在区别，以及是否有任何的法律影响（比如中英文中表示义务的不同词语）。

第四，每种语言都有自己表达某些概念的传统（比如中文中的“以上”和“以下”）。

第五，书面语言的正式程度不可避免地会受到使用语言的市场影响（比如英语法域的“简明语言原则”）。

本部分的专题主要讨论与合同起草特别相关的问题。

- **合同抑或协议：孰是孰非？**——探讨中英文的不同术语及其法律意义；
- **签订抑或签署：孰对孰错？**——探讨中英文的不同术语以及何时使用不同的术语；
- **双语合同挑战多多**——探讨双语或多语合同文本带来的挑战，以及如何起草和解释语言 / 文本条款；
- **合同条款的一致性**——探讨为了避免合同条款的不一致而使用的词语和短语；
- **Shall 还是 must: 关于义务的词语**——探讨中英文中表示义务的词语以及这些词语的解释；
- **可以和不得**——探讨英文和中文中表示自由裁量或者准许的词语以及何时使用不同的词语；
- **最大努力还是合理努力？**——探讨何时在合同中使用这些短语以及对这些短语的解释；

Drafting is one of the most important skills that transactional lawyers need to develop in order to perform their role effectively. However, it is also one of the most challenging aspects of the lawyer's role. In addition to choosing the right technical words and phrases, the lawyer needs to think about how concepts should be expressed and strive to achieve a result that is clear, concise and precise so that the risk of a dispute arising in relation to the interpretation of the contract is reduced to the greatest extent possible. In addition, the lawyer has to make sure that the drafting is complete, in terms of each specific provision and also in terms of the contract as a whole.

The challenges increase when lawyers work in a bilingual context, where contracts need to be prepared in two language versions, such as English and Chinese. There are a number of challenges that can be identified in this regard. First, some words have a technical legal meaning that does not have an exact equivalent in the other language (consider, for example, the concept of “equity” in common law jurisdictions). Second, each language has its own rules of grammar, which affect the order in which concepts are expressed and the way in which sentences are structured.

Third, in each language, there are many different words that are synonymous, or appear to be synonymous (i.e. they have, or appear to have, the same meaning). Sometimes it is difficult for lawyers to work out whether there is any real difference between words that appear to be synonymous, and whether there are any legal implications (consider, for example, the different words for obligation in English and Chinese). Fourth, each language has its own conventions in terms of how concepts are expressed (consider, for example, the words *yishang* [以上] and *yixia* [以下] in Chinese). Fifth, the level of formality in written language will inevitably be influenced by the market in which the language is used and spoken (consider, for example, the principles of “plain English” in English-speaking jurisdictions).

The topics in this section focus on issues that are particularly relevant to contract drafting.

- **Contract or agreement: which is correct?** – looks at the different terms in English and Chinese, and the legal impact;
- **Execute or sign: which is correct?** – looks at these different terms in English and Chinese, and when the different terms are used;
- **Language clauses and the challenges they present** – looks at the challenges that arise when contracts are written in two or more languages, and how language clauses are drafted and interpreted;
- **Reconciling contractual provisions** – looks at the words and phrases that are used to avoid inconsistency between the provisions in a contract;
- **Shall or must? Words of obligation** – looks at words of obligation in English and Chinese, and how these words are interpreted;

- **数字、日期与期间**——探讨在合同中准确、清晰表达数字、日期与期间的重要性，以及中英文中用于表达这些概念的不同方式；
- **简明平实的英语和通俗易懂的中文**——探讨普通法法域的简明语言原则，以及中国是否出现了类似的趋势；
- **双重否定：一个争论不休的问题**——探讨中英中双重否定的用法，以及是否应当总是避免使用双重否定；
- **法规名称中英辨析**——探讨中国和普通法法域用于描述成文法的不同用语；
- **赔偿与补偿**——探讨赔偿义务和补偿义务的区别以及在合同起草中的重要性；
- **May and may not** – looks at words of discretion or permission in English and Chinese, and when the different terms are used;
- **Best efforts or reasonable efforts** – looks at when these phrases are used in a contract, and how they are interpreted;
- **Numbers, dates and time periods** – looks at the importance of accuracy and clarity when contracts refer to numbers, dates and time periods, and the different ways that these concepts are expressed in English and Chinese;
- **Plain language in English and Chinese** – looks at the principles of “plain English” in English-speaking jurisdictions, and whether a similar trend has emerged in China;
- **The vexed question of the double negative** – looks at the use of double negatives in English and Chinese, and whether they should always be avoided;
- **Translating the terms used to describe written law** – looks at the different terms used to describe written law in China and in common law jurisdictions;
- **Compensate or indemnify?** – looks at the difference between an obligation to compensate and an obligation to indemnify and the importance of the drafting.



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合同抑或协议孰是孰非？

Contract or agreement: which is correct?

本文探讨的是“contract”(合同)和“agreement”(协议)及其他多个中英文同义词或近义词的含义。

在日常交流中, 这些词语常可互换使用。具体如何选择有时候全凭约定俗成。例如, 不论英文或中文, 我们一般常说“shareholders’ agreement”(股东协议), 而不是“shareholders’ contract”(股东合同)。然而, 这些词语也有着法律意义上的微妙差异, 需要律师和法律译者准确把握。

下文就此对“contract”、“agreement”、“deed”和“instrument”四个英文词进行重点剖析。

Contract 与 agreement

英文词“contract”一般是指双方或多方当事人之间签订的具有法律约束力并可强制执行的协议。正因如此, 才会有“合同法”一说。相比之下, “agreement”的概念更为宽泛, 既可指有法律约束力的协议, 也包括无法律约束力的协议。所以, 在商业关系或交易中, 当事人之间可达成“in principle agreement”(原则协议)或“heads of agreement”(框架协议), 而这两种协议通常不具有约束力。

在英美法系中, 私人合同, 尤其是商业合同, 所适用的管辖法律主要是普通法(即判例法), 而非制定法。而在消费类合同方面, 出于平衡当事人之间不平等的议价能力和保护消费者权益的需要, 其

In this chapter, I consider the meaning of the words “contract” (*hetong* in Chinese) and “agreement” (*xieyi*), and various other words in English and Chinese that are used to convey the same or a similar meaning.

In everyday conversation, these words are often used interchangeably. In some cases, the choice depends simply on convention – for example, in both English and Chinese we commonly refer to a “shareholders’ agreement” rather than a “shareholders’ contract”. In other cases, there are subtle technical differences that lawyers and legal translators should understand.

There are four English words that I will consider for this purpose: “contract”, “agreement”, “deed” and “instrument”.

Contracts and agreements

In general, the word “contract” in English is used to describe a legally binding and enforceable agreement between two or more parties. Thus, we talk about contract law, or the law of contract. The word “agreement”, on the other hand, has a broader meaning and can be used either to describe an agreement that is legally binding or an agreement that is not legally binding. Thus, we talk about the parties reaching an “in principle agreement” or entering into “heads of agreement” in relation to a commercial relationship or transaction. Typically, neither of these is binding.

In common law jurisdictions, private contracts are primarily governed by the common law (i.e. judge-made law) instead of statute. This is particularly true in the case of commercial contracts. Consumer contracts, on the other hand, are often regulated by statute as a result of the need to redress the unequal bargaining power between the parties and to protect the rights and interests of consumers. Examples include

管辖法律通常为制定法，例如规范消费信贷合同和住房租赁协议的制定法。

在大陆法系中，合同的准据法通常表现为法典形式，以从各个方面系统地规范私人合同。中国的合同法体系也大同小异，其中以《合同法》作为最高准绳，同时通过附属法律、法规对具体各类合同加以规范。《合同法》第二条对该法的适用范围有如下规定：

本法所称合同是平等主体的自然人、法人、其他组织之间设立、变更、终止民事权利义务关系的协议。

婚姻、收养、监护等有关身份关系的协议，适用其他法律的规定。

For the purposes of this law, a contract is an agreement between natural persons, legal persons or other organisations with equal standing, for the purpose of establishing, altering, or discharging a relationship of civil rights and obligations.

An agreement concerning any personal status relationships such as marriage, adoption and guardianship shall be governed by the provisions of other laws.

值得注意的是，根据上述明文规定，《合同法》的适用对象是平等主体之间的协议，而涉及特殊身份关系（如儿童的收养或监护）的协议不在其列。

合同可以是口头形式，也可以是书面形式，这是法律界众所周知的基本常识。不过，在任何司法管辖区，都会有要求某些合同必须采用书面形式的规定。

在英格兰，要求特定合同采用书面形式的规定始见于1677年颁布的《反欺诈法》(Statute of Frauds)。

顾名思义，《反欺诈法》的宗旨是保护当事人免受欺诈之虞。实现这一宗旨的途径就是规定某些合同必须以书面形式订立。这项规定起初仅适用于土地买卖合同，后来逐渐扩及于保证合同。

基于同种考虑，《合同法》也规定了下列合同必须采用书面形式：

statutes regulating consumer credit contracts and residential tenancy agreements.

In civil law jurisdictions, the law governing contracts is typically embodied in a code, which regulates all aspects of private contracts. To a large extent, this is the approach that has been adopted in China, where the law governing contracts is primarily governed by the Contract Law, with supplemental laws and regulations that regulate specific types of contract. Article 2 of the Contract Law sets out its scope of application as follows:

It is relevant to note that the Contract Law is expressed to apply to agreements between parties of equal standing, and not to agreements that involve a special status relationship (such as the adoption or guardianship of a child).

As all lawyers have learned during their legal studies, a contract may be formed orally or in writing. In all jurisdictions, however, some contracts are required to be in writing.

In England, the requirement for certain contracts to be in writing first appeared in the Statute of Frauds, which was enacted in 1677. As its name suggests, the purpose of this statute was to protect parties from fraudulent conduct. It achieved this by requiring certain contracts to be in writing. Originally, the requirement just applied to contracts for the sale of land; subsequently, it was extended to include guarantees.

For similar reasons, the Contract Law requires the following contracts to be in writing:

- Loan agreements, except where the loan is between natural persons who have agreed otherwise (article 197);

- 借款合同，但自然人之间借款另有约定的除外（第一百九十七条）；
- 租赁期限六个月以上的租赁合同（第二百一十五条）；
- 融资租赁（第二百三十八条）；
- 建设工程合同（第二百七十条）；及
- 相关法律或行政法规规定必须采用书面形式的合同（第十条）（如《担保法》所述的保证合同、抵押合同和质押合同）。

有趣的是，中国古代法律中关于特定合同应采用书面形式的规定也是屡见不鲜，从合同（特别是土地买卖合同）常用的以下短语中可见一斑：空口无凭，立字为据（意即“鉴于口头陈述不可作为证据，特订立本合同以资为证”）。

Deeds

英文词“deed”（契约）是一个多义词，其含义随语境不同而变化。契约有别于“simple contract”（非盖印合同）。虽然在设定法律权利和义务方面与合同无异，但契约所具有的一些特点决定了其特殊性。首先在于契约签订的方式。契约常被称为“contract under seal”（盖印合同）或“specialty”（盖印文据），是以其正式的方式签署的，并要求有见证人在场见证。

其次，契约与合同的区别还在于对价并非契约的必要条件。换言之，各方之间无需为使契约生效而互相支付对价（亦即提供好处）有关对价的讨论，参见第 162 页《对价》。再次，契约可由一方单独签订，此种形式的契约称为“deed poll”（单边契据），例如一方以另一方为受益人签署的授权委托书，以及个人变更其正式姓名的单方合同。

除以上用法以外，“deed”一词亦可指资产所有权转让文件，常见的用语有“title deed”（业权契据）。

Instruments

与一词多义的“deed”一样，“instrument”（文书）的含义亦随语境的不同而有所变化。“instrument”在广义上是指正式的书面法律文件，例如合同和有法律效力的文件（如“instrument of mortgage”（抵押文书））；在狭义上是指使持有人有权获得一笔付款的文件（如支票、汇票或其他可转让票据）。

- Lease agreements, where the lease term is six months or longer (article 215);
- Financial lease agreements (article 238);
- Construction contracts (article 270); and
- Contracts that are required to be in writing by a relevant law or administrative regulation (article 10); examples include guarantees, mortgages and pledges under the Securities Law.

Interestingly, it was also customary under traditional Chinese law for certain contracts to be in writing, as reflected in the following phrase that often appeared in contracts, particularly contracts for the sale of land: *kong kou wu ping, li zi wei ju* (“this contract is entered into as evidence since a verbal statement cannot serve as evidence”).

Deeds

The English word “deed” (*qiyue* in Chinese) has a couple of different meanings, depending on the context. A deed is different from a “simple contract”. Although it creates legal rights and obligations like any contract, there are a few features that give it a special status.

The first feature relates to the way in which it is executed. Often referred to as a “contract under seal” or a “specialty”, a deed is executed in a very formal manner and is often required to be witnessed. The second feature that distinguishes a deed from a “simple contract” is that a deed does not require consideration. In other words, it is not necessary for each party to provide consideration (i.e. a benefit) to the other party in order to make the deed enforceable (for a discussion about consideration, see the chapter entitled ‘Consideration’, on page 162).

A third feature is that a deed can be signed by one party alone, in which case it is known as a “deed poll”. Examples include a power of attorney that is granted by one party in favour of another party, and a unilateral contract by which an individual may change his or her legal name.

In addition to the usage outlined above, the word “deed” or “deeds” is also used to describe documents that transfer title to assets and often appears in the phrase “title deeds”.

Instruments

Like the word “deed”, the word “instrument” (*wenshu*) has different meanings depending on the context. In its broadest sense, it is used to describe a formal written legal document such as a contract or a document that produces a legal effect (e.g. an “instrument of mortgage”).

In its narrowest sense, it is used to describe a document that entitles the holder to payment of a sum of money (e.g. a cheque, bill of exchange or other negotiable instrument).