

FREE MARKET CONTRACT LAW



The Asia Foundation

PHNOM PENH

KINGDOM OF CAMBODIA

First Edition 1997

FREE MARKET CONTRACT LAW

The Asia Foundation

**First Edition
1997**

This publication was made possible through support provided by the U.S. Agency for International Development under the Cooperative Agreement Number 442-0111-A-00-6509. The opinions expressed herein are those of the author(s) and do not necessarily reflect the views of the U.S. Agency for International Development or The Asia Foundation.

Copyright © The Asia Foundation 1997

First Edition

Except as provided in the Cooperative Agreement Number 442-0111-A-00-6509, this book may not be reproduced in any form without the prior written approval of The Asia Foundation.

Requests for permission to reproduce this book should be directed to:

The Asia Foundation
G.P.O. Box 536
House 59, Street 242
Phnom Penh, Cambodia.

Printed in the Kingdom of Cambodia in 1997
by Phnom Penh Printing Shop
#98 Preah Sihanouk Blvd. Phnom Penh

DEDICATION

This book is dedicated to Cambodians who work in difficult circumstances to promote justice and legal development in their nation.

PREFACE

I. What Is This Book?

This book is an attempt to introduce basic principles of free market contract law, in order to contribute to the legal and economic development of Cambodia. The book is published in Khmer and English. We hope it will be useful to those who learn, teach and practice law. We believe it could be used as a textbook for legal training, both in university-level law courses and in independent legal education programs; as a basic reference for law teachers, students and practitioners; and by members of the general public who wish to learn more about contract law.

We must stress what this book does not try to do. It is not intended to be a scholarly study of contract law. Though the book is substantial, its focus is not on examining every aspect or detail of the subject covered, but on examining fundamental ideas at some length. Moreover, the book does not attempt to summarize or state precisely the law in any particular jurisdiction. It is primarily based on the common law tradition, for reasons explained in detail below. It does not generally focus on the hardest cases, nor on the complex policy concerns such cases may reflect. It does not attempt to develop analytical skills by burying key information in a mass of difficult, oblique, or marginally relevant material. Instead, the book tries to impart some basic legal principles and policy issues, as clearly and simply as accuracy allows.

This book was created as part of the Certificate in Contract Law Program conducted by The Asia Foundation from 1994 to 1996. The Program was provided for students with positions in the Cambodian government, courts, educational institutions, non-governmental organizations, and the private sector. It included substantial training in Cambodian contract law, free market contract law, international contract law, contract forms, drafting and negotiation, and dispute resolution. It was conducted at the request of and in cooperation with the Ministry of Justice of Cambodia, with generous support from the United States Agency for International Development. The Program and this text were developed by a team of Cambodian law teacher-translators, data entry specialists, international attorneys, and others.

II. How Can Readers Use This Book?

We believe this book can be used in a number of ways. The book is intended primarily to assist in legal training, though it could also be used as a reference work or by those who simply wish to learn more about contract law.

We realize that it may be too extensive for some training programs. If that occurs, we have several suggestions. The text tries to work on three levels at once. First, the entire text is intended as a fairly detailed treatment of some general contract law principles. Second, we have attempted to communicate as many basic ideas as possible in Chapter 1 ("Basic Aspects of Contract Law"), which introduces and summarizes the full text. That Chapter could be used as a more concise introduction to the subject. Third, an even more concise summary of very basic aspects of contract law may be found in Sections 1.1-1.2 of Chapter 1. Those first two Sections introduce and summarize Chapter 1 itself. We suggest that readers select the approach that fits their needs.

We hope other elements of the text will also promote easier understanding for those studying law. In order to guide the reader, we have tried to use as many section headings as possible. In addition, rather than merely identify topics in the section headings, we have tried to communicate as much basic information as is practical. These section headings also appear in the Table of Contents. They could be used as a very basic summary of many of the most important ideas in the text.

We have tried to write the book in a straightforward and engaging way. It includes as much explanation of technical ideas as was practical, frequent repetition of key points, emphasis of important words and points through extensive bold and underlined text, and hundreds of basic examples.

In addition, we have included a number of special features that we hope will make the basic aspects of contract law more transparent. These features include the many Illustrations, Case Studies, Definitions, and Additional References, which attempt to present material in a more concise, practical, or graphic manner than the main body of the text can, and to make it easier to use.

The text does not generally pursue the most complex legal policy concerns. However, it does try to promote consideration of fundamental questions of legal policy. This occurs primarily through the "Why Is This Important?" boxes. These explore some of the apparent reasons for the legal principles discussed. They also try to provoke discussion about whether the rules presented are appropriate, with an emphasis on the practical effects of those rules and potential alternatives.

This book is based primarily on the common law tradition, for reasons explained in detail below. However, the text also tries to provide a comparative perspective, particularly through the Cambodian Law Perspective and Civil Law Perspective boxes at the end of every Chapter. Although it appears to us that there are few truly significant differences as to substantive contract law among the traditions, these boxes try to explain important differences of which we are aware.

Finally, for those who may wish to use the book as a reference work, we hope the Table of Contents, Bibliography, Glossary and Index will be useful guides to finding information about particular topics. In addition, the many Additional Reference headings within the text direct the reader to other portions of the book which also deal with the matter under discussion.

III. Why Does This Book Take the Approach It Does?

In creating this text, we had to make a number of decisions about what approach to take to various legal and other issues. We should try to explain the most important of these decisions.

First, we should note the comparative aspects of this work, which were mentioned above. As readers probably know, common law and civil law may be the two most influential types of legal systems. We believe there are few truly significant differences between the common law and civil law approaches to basic, substantive contract law. However, the legal principles and approaches in this text are drawn primarily from the common law tradition. Where we found what we felt were important differences between the common law and civil law traditions in an area relevant to this text, we tried to explain them in "Civil Law Perspective" sections at the end of each Chapter. We highlighted what we felt were the most significant differences in the main text.

We also included "Cambodian Law Perspective" sections at the end of each Chapter. We hope this will help readers compare the concepts discussed to current Cambodian law, which has traditionally been more influenced by the civil law and socialist legal traditions. This will be further discussed in Chapter 1 ("Basic Aspects of Contract Law").

There are several reasons for our approach. First, this basic approach--primarily common law but comparative--is what the Ministry of Justice of Cambodia requested for the Certificate in Contract Law Program in early 1994. Second, the common law approach to commercial law is now widely influential in Southeast Asia, particularly within ASEAN, and in many other parts of the world. Finally, given the resources available to the Program, it would not have been efficient for those involved to attempt a different approach.

This text draws primarily on the domestic contract law principles of certain jurisdictions, rather than international contract law principles. That is because the book's primary goals relate to the development of domestic Cambodian contract law and practice. International contract law and practice involve a number of special concerns and issues which those responsible for this text felt would be better treated elsewhere. Some of those concerns and issues are addressed in the text International Contract Law, which was also prepared by The Asia Foundation as part of the Certificate in Contract Law Program discussed above.

This text was written in English and translated into Khmer. Great efforts were made to promote accuracy in the translation, including painstaking Khmer to English oral "read-back" of virtually all of the text. The "read-back" process entailed a translator who had not worked on a portion of the Khmer translation translating that portion back to English orally for someone following on the English original, generally a person who wrote or edited that original. However, because of difficulties involved in creating accurate translations of technical legal material between these languages, there may be some inconsistencies between the Khmer and English texts.

Unlike many legal texts, this book rarely cites particular statutes or other legal authorities, except with regard to Cambodian law. Given the basic development goals of the book, its focus on general principles, and the constraints under which it was prepared, we did not feel it would be practical or productive to attempt a rigorous citation to particular authorities. Such an attempt could have made the work impossible to complete with the resources available, increased its size well beyond reason, and provided little or no benefit to most readers. Obviously, most of the ideas in the book did not originate with the Authors or Editor. The book was based on a number of different written and oral sources of information. The Bibliography near the end of the text lists the written works on which we relied most, although a number of others were also consulted. We would like to express our deep appreciation to those responsible for these works, and also to suggest that interested readers consult them for further information.

IV. How Can Readers Tell Us What They Think?

Although those responsible for this book have done their best given the resources available, this First Edition must in many ways be considered a draft edition. It does not purport to be flawless, or even authoritative. The Asia Foundation would very much appreciate being informed of any errors or problems in the book, in receiving suggestions for improvement, and in any other comments from readers. We know such information can improve this book greatly.

Please send any such information to:

The Asia Foundation
Law Program
G.P.O. Box 536
House 59, Street 242
Phnom Penh, Cambodia
E-mail: tafcb@pactok.peg.apc.org
Fax: (855) 23-362-344
Phone: (855) 18-810-243

Alternatively, information may be sent to:

The Asia Foundation--Cambodia
c/o The Asia Foundation
P.O. Box 193223
465 California Street 9th Floor
San Francisco, CA 94104 USA
<http://www.asiafoundation.org>
Fax: (1) 415-392-8863
Phone: (1) 415-982-4640

V. Who Created This Book?

Free Market Contract Law is the result of work by a number of persons, from The Asia Foundation and elsewhere. The Certificate in Contract Law Program was founded in early 1994 by Dr. James Klein, then Representative, and J. Ken Bingham, then Law Instructor, of The Asia Foundation. Their vision and guidance are also primarily responsible for the creation of this book. A fuller list of those Asia Foundation personnel who contributed substantially to the book:

Run Saray, Law Teacher-Translator	Translation; Editing
Ly Much, Law Teacher-Translator	Translation; Editing
Koc Sarun, Law Teacher-Translator	Translation; Editing
Seng Phally, Law Teacher-Translator	Translation; Editing
Sok Sorith, Law Translator	Translation; Editing
Koy Neam, Law Program Officer	Translation; Editing; General Guidance
Keo Charavuth, Data Entry Specialist	Data Entry
Mam Sovannara, Data Entry Specialist	Data Entry
Heng Sathya, Data Entry Specialist	Data Entry
Moul Sethik, Asst. Law Program Officer	General Assistance
Dr. James R. Klein, Representative	Vision; Leadership
Dr. Jon L. Summers, Representative	Vision; Leadership
J. Ken Bingham, Law Instructor	Co-Author (Chapters 2, 8) Contributing Author (Chapter 1) General Guidance
Michele-Ann Okolotowicz Law Instructor	Contributing Author (Chapters 3, 5) Reviewer (Chapters 3-10)
Matthew Rendall, Law Instructor	Contributing Author (Chapters 4, 7) Reviewer (Chapters 2, 5, 7, 8)
Max Howlett, Law Instructor	Reviewer (Chapters 3-6)
Dinesh Nandan, Legal Intern	Contributing Author (Chapter 6) Reviewer (Chapters 5-7)

Granville Martin, Legal Intern

Reviewer (Chapters 5-7)
Legal Researcher (Chapter 10)

Harry Jacobs Summers
Law Instructor
and Law Program Officer

Author (Chapters 9-11)
Primary Author (Chapters 1, 3-7)
Co-Author (Chapters 2, 8)
Editor (Chapters 1-11)

We also wish to thank all the other personnel at The Asia Foundation who assisted in the production of the book.

Many others made significant contributions to this book. First, the book would not have been possible without the generous support of the United States Agency for International Development (USAID) / Cambodia under the terms of Grant Agreement Nos. 442-0111-G-00-2382 and 442-0111-A-00-6509. We also wish to thank the approximately 200 Cambodians who were participants in the Certificate in Contract Law Programs between 1994 and 1996. They contributed to the development of this text through discussion both in and out of class. The book benefited from the consistent support of the Program by the Minister of Justice of Cambodia, H.E. Chem Snguon, and the Ministry of Justice, and by the Minister of Education of Cambodia, H.E. Tol Lah, and the former Minister of Education of Cambodia, H.E. Ung Huot, and the Ministry of Education. In 1994, the University of San Francisco School of Law sent two Legal Interns and a Law Instructor in part to assist with the book. Lany Trinh and the Khmer Socio-Economic Development Research Association provided helpful research about contracts in Cambodia. Margo Grant and Sarika Studio made videos of many of the Case Studies, and helped us understand how they could work better. Sandra Jacobs Summers donated a great deal of her time to the completion of this text. The book benefited from her extensive assistance in desktop publishing and graphics, as well as her valuable editorial and general policy advice. Finally, we wish to thank everyone else who assisted us in any other way.

Harry Jacobs Summers

Editor