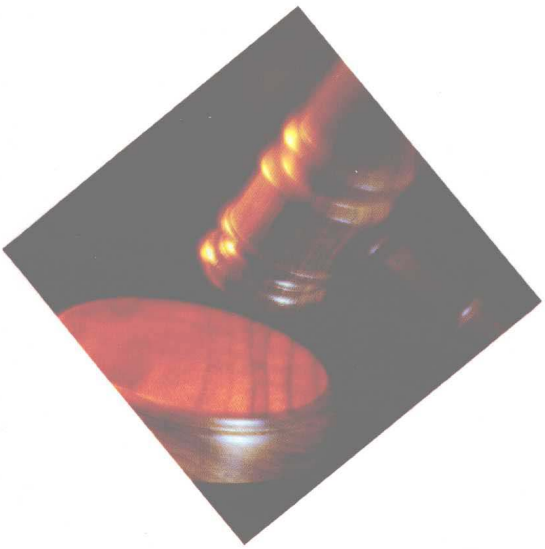
实用职业英语系列丛书

PRACTICAL ENGLISH FOR GRADUATES



LAW ENGLISH

法律英语

胡志勇 主编

上海科学技术文献出版社

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序
Introduction

为了给刚走出校门的大学毕业生提供一种实用、专业的符合本行业特点的英语教材，在国内相关院校的支持下，经过各位编委的共同努力，我们专门编撰了这套《实用职业英语》系列丛书。它是相关专业的职前培训推荐教材，本套丛书的主旨是为他们走上工作岗位提供一套专业性强、相对较为实用的职前培训教材，通过对本套丛书的学习，有利于已经具备一定专业基础的人员在较短时间内迅速掌握本专业的英语本领，为其早日顺利地开展对外业务扎下扎实的英语基本功。

本套丛书第一批暂出六个分册，分别是：会展、物流、新闻、外贸、金融、法律。第二批和第三批将陆续推出，以满足不同专业读者的需要。

本套丛书具有以下几个特点：

一、实用。本套丛书以实际应用为宗旨，简化语法点，系统介绍本专业相关的背景知识，所选的材料以提高读者的实际运用英语水平为目标，以大量的案例、票据等材料为基础编写，每册分为15—18个Unit，每个Unit又分为：Text、Notes、Background、Study四个部分。

二、职业性强。本套丛书所编选的材料新、专业性强。

三、针对性强。本套丛书的课文专门按专业来编写，以讲解分析专业英语为主，突出解析本学科的重点、难点、疑点问题；Question和Dialogue紧扣Text，针对性强；图文并茂；所编选的材料注重时效性、科学性和客观性。

本套丛书由胡志勇同志提出编写思想、设计编写思路、制定详尽的编写体系，并具体指导和领导了各分册的编写工作。在编写过程中，得到了复旦大学、上海交通大学、上海外国语大学、华东师范大学、同济大学、上海财经大学等院校和上海科技文献出版社的支持和帮助。

参加本套丛书编写的人员大多是上海地区高校从事外语教学工作多年的优秀骨干，教学经验丰富，但恐于时间和水平有限，书中难免还有不妥之处，敬请英语界专家同仁和广大读者批评指正。

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前言
Preface

经济社会的飞速发展是我国现阶段的一个最显著特征。经济的发展与社会的进步使得深化改革与扩大开放成为我国最基本的外交政策，在这种背景下，职业外语人才成为各行各业的“香饽饽”。而法律职业外语人才更是成为市场上的“抢手货”。但与这种巨大的市场需要不相适应的是，当前我国在法律职业外语人才的培养和供给方面还存在巨大的缺口，远远落后于我国经济社会发展的总体需要。为此，在国内相关院校的支持下，经过各位编委的共同努力，我们专门编撰了这套《实用职业英语》系列丛书。本册是其中之一。《法律英语》是法律专业职前培训推荐教材，本书的读者对象为刚毕业的大中专学生，对英语法律知识具有一定兴趣的读者，以及参加岗前培训或考取职业资格证书的考生。本书的主旨是为他们走上工作岗位提供一套专业性强、相对较为实用的职前培训教材，使他们通过对本书的学习，拓宽专业方面的知识面；而对于具备一定专业基础的读者而言，本书可以使其熟练掌握阅读法律英语的读写能力，迅速提高其专业外语水平。

本册以最新实用的美国法律英语材料为基础编写，内容涉及美国刑法、环境法、破产法以及知识产权法等各个方面，入选的材料注重时效性、严谨性和客观性，具有实用性强、职业性强及针对性强等特点。

本册共有18个单元，每一课包括Text，Notes，Background，Dialogue以及Exercise（根据课文内容和学生特点，设计10个有代表性的Question）等内容，为提高学生的阅读理解能力，在课文后加注Notes，使学生掌握必要的英文法律词汇，在背景知识中结合课文，介绍相关的知识，每个单元至少有两篇趣味性强的Reading naterial，以扩大学生的阅读量，培养阅读的兴趣。

学生在学习的过程中要多积累法律英语词汇，多看法律类英文报刊或杂志，扩大知识面，为提高专业水平打下坚实的基础。

由于编者时间和水平有限，书中恐有错误或不妥之处，敬请广大读者批评指正。

本册由刘长秋主编。参加编写的还有：杨玉娣、刘士强、韩建军、李爱芹、刘丙传、刘士成、于飞、夏继森、姜林、谭家宝、李国峰等同志。

《实用职业英语》系列丛书编委会

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Unit 1

The Mediation and Arbitration, Alternatives to Resolving Disputes

Text

Typically in the United States most disputes have been resolved through the formal mechanisms of the federal and state court systems, with decision by judges. Developing in the more recent years, parties can agree either in advance of a dispute or when one arises, to use different means to resolve disputes, the primary alternate means being through mediation or arbitration. But why has the American court system in particular been so hesitant to embrace these alternatives? For the answer we must look back in American history to understand the reluctance and why alternatives to the formal court system took so long to develop.

The Traditional System Resolving Disputes

The United States Constitution, adopted soon after American Revolution in 1787 with the supplementing Bill of Rights ratification of 1791, provides for the right to trial

by jury for criminal and civil controversies within both a national system, and the individual states within a federated system. The states, by the U.S. Constitution and as interpreted by the United States Supreme Court, have been free through their elected representatives in their own legislative bodies, to create and adopt their own methods of resolving their disputes. The states, originally 13 and now 50 in number, have continued to follow what existed at the time of the American Revolution — a formal court system with a separate trial level before judges and juries and an appeals' level before judges.

For about the early years there was relatively little change in the American dispute resolution system. The population, while certainly growing, was not so great, the substance and volume of the laws was not so extensive, and the local court systems within the states were for the most part able to address the existing disputes. The governing will of the people' was also not inclined to officially give up the Constitutional right of access to the trials before a judge and by a jury.

Evolving Alternative Waves to Resolve Disputes

By the later 19th century alternative ways to assist and resolve disputes began. With the growing population and the body of laws at the federal and state levels, the court system began to slow and the legislatures responded. As one example, following the German approach of the 1880's, a separate workers' compensation system started to develop within the states for disputes involving workers injured on-the-job. The quasi-judicial experiment was created by the states' legislatures to provide a more quick alternative to the official court system for both deciding whether an injury was job-related and, if so, providing for medical assistance and for lost income.

Disputing parties, by agreeing in their own private contracts, had long had the option to require arbitration in place of going to court. Nonetheless, American courts hesitated to enforce the contractual obligation to arbitrate, as a denial of Federal and states' Constitution rights of access to courts, judges and especially juries. In 1925 the United States Congress therefore passed the federal Arbitration Act to reverse courts long-standing hostility to arbitration agreements signed by the parties.

By the 1930's, with the world-wide Depression and President Franklin D. Roosevelt's "New Deal", the Federal and state governments enacted more laws to regulate the economy which, not surprisingly, led to more legal disputes about the new laws. The legislative branch, through its laws enacted by Congress, created agencies in many different areas and required the Executive branch, the President, to efficiently staff and control the agencies.

Greater government involvement was also taking place within the states. The states' legislatures considered the suggestions of various interests groups, including the business community at-large and the state Bar Associations of lawyers, about possible alternative

mechanisms to try to resolve disputes. By the latter half of the twentieth century alternative ways to resolve disputes began formally to make their way into, and as part of, the court system primarily at the state level.

The Current Mediation and Arbitration Processes

The reason for the push to allow alternative processes to the formal court mechanism are due to the general perception that: (1) the alternatives are less expensive and time consuming; and (2) the parties themselves can control the process, even selecting rules limiting remedies and damages. Each alternative has as its goal: speed, economy and finality.

Legislatures, responding to citizens' frustration with only the formal trial's process, have enacted statutes permitting alternative methodologies. For example, in Florida, the 1980's statute allows the court to order the parties to mediate first in most civil cases, and also to enforce the parties' contracts to arbitrate disputes.

Mediation

Mediation is defined as a process whereby a neutral third person acts to encourage and facilitate the resolution of a dispute between two or more parties in an informal and non-adversarial process and helps the disputing parties reach a mutually acceptable and voluntary agreement.

A mediation can take place at different times within the formal trial process-at "pretrial", just before the trial begins after all discovery is completed, and in some instances, even after and on appeal. Normally, it is non-binding; the parties can not be forced to agree. While the huge majority of matters referred to mediation do agree, those disputes which don't resolve return to the formal court system for either a judge or a jury to decide.

In almost all instance, what goes on and is said in mediation is confidential and privileged; so much so that by statute and procedure rules of court, even an admission by a party against its own position cannot later be used as evidence at trial if the matter is not resolved. Some of the hallmarks of mediation are that: (1) the mediation process should produce a wise agreement, if agreement is possible; (2) it should be efficient; and (3) the mediation should improve or at least not damage the relationship between the parties. A wise solution should reconcile each party's interest, desires and concerns, not simply their formal positions.

Interests, desires and concerns motivate people; they are the silent movers behind the positions. Your position is something you have decided upon. Your interests are what caused you to so decide in that particular way.

Normally at the beginning, all parties are together with the mediator, and advise the neutral mediator of what's at issue. The mediator will then speak privately in different rooms with each side. The mediator usually starts with the side which is bringing the complaint and then speaks privately with the other side. The mediator will go back and forth between the two sides trying to determine what it will take to resolve the matter, both financially and interest-wise. For example, sometimes an apology, or a promise not to do something in the future, is really the primary issue. Very importantly, the mediator — by law — are immune; meaning that in their efforts to resolve the matter, they can not be blamed for the mediation's failure or their actions within the mediation process.

Arbitration

Likewise, an arbitrator enjoys this immunity. By statute arbitration is a process whereby a neutral third person, or panel, considers the facts and arguments presented by the parties and announces a decision, which may be binding or nonbonding on the parties. Arbitration, more formal and interrelated with the court system, is not confidential and must have some written notation of the process and result.

Arbitration

At the outset, the parties are allowed to select the best neutral arbitrator for their case. One side may believe an arbitrator who "splits the baby in half" is superior, while the other might prefer one who is not afraid to make tough decisions. Also, the arbitrator-candidate pool from which to select can be broader (for example, former judges), or more focused (like a mechanical engineer).

The typical discovery process before trial usually is more limited in arbitration. The parties can minimize the discovery burden, and even specify appropriate language to limit written, electronic and deposition discovery. The arbitrator usually is asked to limit the number of depositions. More significantly, arbitration awards typically cannot be appealed, thereby eliminating costly and time-consuming formal arguments after the arbitrator decides. That is, by using the arbitrator process, the disputing parties can create a quicker process that fits their needs.

An Example

Take methods to resolve environmental disputes for example. When a conflict

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arises, alternative dispute resolution procedures are authorized for disputes arising under Superfund, the Resource Conversation Recovery Act, the Emergency Planning and Community Right-to-Know Act, the Clean Air Act, the Clean Water Act, and the Toxic Substances Control Act. It is an efficient, economical, and effective way to resolve many disputes.

There are three primary techniques used by the EPA:

1. Negotiation: a voluntary and informal process, you would present your position to the other party with whom you are having the disagreement and the reasons why there should or should not be a settlement. If no settlement can be reached through private negotiation, other actions can be taken.

2. Arbitration: more formal than mediation, this involves the use of an impartial third party who tells all parties how the matter will proceed. It may be binding or non-binding, as the parties decide at the start. (Non-binding means that the arbitrator's award can be disregarded and you can proceed directly to court; binding means that arbitrator's decision is legally final, no appeal is allowed, and enforceable in court.)

3. Mediation: like arbitration, this involves the mutual selection of a neutral third party who listens to both sides, outlines issues, and helps both sides to seek an agreement that is acceptable to each. Unlike the arbitrator, the mediator does not have the authority to make a decision, although he/she may generate solutions as to how the dispute may be resolved.

In addition, there are other ADR techniques which are, for the most part, combinations or variations of mediation and arbitration: fact finding, allocation, and convening. To understand these techniques and their uses, we recommend that you seek the advice of an attorney who is particularly knowledgeable in ADR.

Other Alternative Processes to Shorten Dispute Resolution

From both and without the formal trial process, legislatures, lawyer groups, and disputing parties continue to search for alternative ways to avoid the longer and more drawn-out trial before jury or judge. The summary judgment, special magistrate, rent-a-judge and collaboration are all the cases.

So, the law in the United States about alternative ways — other than juries and judges — to resolve disputes is still evolving. At the same time, there can be no doubt that these processes, alternative to the official and formal court system, are having an impact.

Notes

alternative [ɔːlˈtɜːnətɪv] *n*. substitute 替代性方案或办法
ratification [ˌrætɪfɪˈkeɪʃən] *n*. sanction, approval 批准
legislature [ˈledʒɪsˌleɪtʃə] *n*. the agency enacting laws 立法机关
enact [ɪˈnækt] *vt*. make laws by a legislature, pass 制定法律、颁布
pretrial [ˈpriːˈtraɪəl] *n*. trial before court 事先审理
discovery [dɪsˈkʌvərɪ] *n*. investigation by the court (法庭)调查
privilege [ˈprɪvɪlɪdʒ] *n*. advantage 特权
reconcile [ˈrekənsaɪl] *vt*. bring together 使和解,使和谐
confidential [kɒnfɪˈdenʃəl] *adj*. secret 秘密的,保密的
neutral [ˈnjuːtrəl] *adj*. indifferent, impartial, unprejudiced 中立的
deposition [ˌdepəˈzɪʃən, diː-] *n*. oath before a court reporter and answers before trial given under questions (法庭)宣誓
evolve [ɪˈvɒlv] *v*. develop, advance (使)进化,(使)发展

1. Developing in the more recent years, parties can agree either in advance of a dispute or when one arises, to use different means to resolve disputes, the primary alternate means being through mediation or arbitration.
近年来,当事人能够同意在纠纷发生之前或发生时采用不同的方式解决纠纷,而主要的方式就是通过调解和仲裁。
2. The United States Constitution, adopted soon after American Revolution in 1787 with the supplementing Bill of Rights ratification of 1791, provides for the right to trial by jury for criminal and civil controversies within both a national system, and the individual states within a federated system.
1787 年美国独立后通过的部分宪法(该法在 1791 年被修改,将《权利法案》作为其补充法)规定了陪审团在国家以及各个州法律框架内对刑事与民事争讼的审判权。
3. The states' legislatures considered the suggestions of various interests groups, including the business community at-large and the state Bar Associations of lawyers, about possible alternative mechanisms to try to resolve disputes.
各州的立法机关吸收了包括大部分商业团体及州律师协会在内的各种利益集团关于建立纠纷解决替代机制的建议。
4. The reason for the push to allow alternative processes to the formal court mechanism are due to the general perception that: (1) the alternatives are less expensive and time consuming; and (2) the parties themselves can control the process, even selecting rules limiting remedies and damages.
诉讼替代机制之所以被允许用于正式庭审机制中是由于以下原因:(1) 诉讼替代机制更

为经济和省时；并且(2) 当事人自己能够对纠纷解决的过程进行掌控，甚至可以选择有限救济和赔偿的规则。

5. Mediation is defined as a process whereby a neutral third person acts to encourage and facilitate the resolution of a dispute between two or more parties in an informal and non-adversarial process and helps the disputing parties reach a mutually acceptable and voluntary agreement.
调解是指由中立的第三人介入两个或更多当事人之间的非正式且非敌对的争诉，并促成纠纷解决，帮助争端当事人达成相互接受的自愿协议的活动。
6. By statute arbitration is a process whereby a neutral third person, or panel, considers the facts and arguments presented by the parties and announces a decision which may be binding or nonbonding on the parties.
根据法律，仲裁是指由中立的第三人或小组根据法律及当事人陈述的理由，做出对当事人或许有约束力或依赖其自觉执行的裁定的活动。

Background

Alternative Dispute Resolution ("ADR") refers to any means of settling disputes outside of the courtroom. ADR typically includes arbitration, mediation, early neutral evaluation, and conciliation. As burgeoning court queues, rising costs of litigation, and time delays continue to plague litigants, more states have begun experimenting with ADR programs. Some of these programs are voluntary; others are mandatory. The two most common forms of ADR are arbitration and mediation.

Mediation is a process of alternative dispute resolution in which a (generally) neutral third party, the mediator, assists two or more parties to help them negotiate an agreement, with concrete effects, on a matter of common interest; generally speaking, it is any activity in which an agreement on any matter is facilitated by an impartial third party, usually a professional, in the common interest of the parties involved.

Mediation applies to different fields, with some common peculiar elements and some differences, for each of its specialties. The main fields of mediation include commerce, legal disputes and diplomacy, but forms of mediation appear in other fields as well. Mediation in marriage technically belongs in the category, although it has followed its own peculiar history since the times of ancient Greeks: compare marriage counseling.

Mediation is a non-binding form of dispute resolution that works well for minor disputes. The mediator engages in shuttle diplomacy to formulate a solution that is acceptable to both sides. It has one major disadvantage. If the mediator fails to find a

common ground, the dispute will move back to the litigation track. As a result, it works well for minor disputes. It doesn't work as well with intractable disputes or unreasonable parties.

Arbitration is a binding form of dispute resolution. It permits parties to submit their dispute to an independent third party who functions much like a judge. The arbitrator listens to the facts and then renders a judgment. It has one drawback, the arbitration is conducted much like a trial, and isn't as conducive reaching a reasonable business compromise to a business dispute.

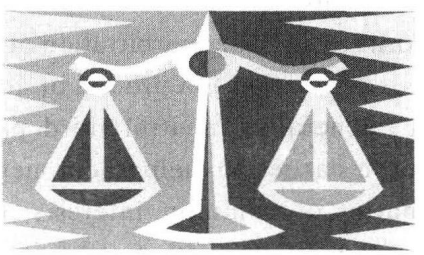
Binding Mediation. This one's our favorite, a melding of mediation and arbitration. It starts out with non-binding mediation. If the parties are unable to reach a mutually satisfactory compromise, it converts to binding arbitration. The mediator can continue on as the arbitrator... one who has been educated on the true needs and wants of the parties, as well as who is being reasonable and who is not. The prospect of this escalation encourages reasonableness at the mediation stage. The background information permits the mediator/arbitrator to better construct fair and reasonable remedies, taking into account practical business realities.

Dialogue

A: What's the text mainly about?

B: It's about alternatives to resolving disputes in the United States.

A: What are the traditional mechanisms settling disputes in the United States?



B: As far as I know, most disputes have been resolved through the formal mechanisms of the federal and state court systems, with decision by judges.

A: Well, there are two judicial systems revolving disputes in the United States, aren't there?

B: Yes, there are. The one is a national system and the other is a federated system.

A: What made alternative ways to assist and resolve disputes begin by the 19th century?

B: It was the growing population and the body of laws at the federal and state levels, which made the court system began to slow.

A: Why do more and more people prefer mediation and arbitration to judicial approach?

B: Because either mediation or arbitration has the same features of speed, economy and finality, which meets the demand of the parties.

A: Are there only two alternatives, that is, mediation and arbitration, the text has mentioned in the United States?

B: No, no. Besides mediation and arbitration, at least four alternatives are mentioned in

the text. And what's more, the law in the United States about alternative ways to resolve disputes is still evolving.

A: What is "alternate dispute resolution"?

B: Alternate dispute resolution, or "ADR" involves the use of mediation or arbitration, instead of — or in addition to — the courts, to resolve a controversy. Those who favor ADR claim that the process is often faster, less traumatic, and less expensive than traditional litigation, and can produce a better or fairer result.

A: What is mediation?

B: Mediation involves a structured meeting with a person known as a "mediator" who tries to assist the parties resolve a dispute. The mediator is usually a lawyer or a retired judge. The parties generally share the expense of hiring the mediator. Mediators frequently ask each of the parties to prepare a written statement in which they set out their version of the dispute. The mediator reviews it and gives the parties a chance to tell their story at the mediation. After learning about the dispute, the mediator will try to get the parties to adjust or settle their dispute based upon his or her assessment of the merits of the claims.

A: What basic steps are involved in mediation?

B: As with arbitration, the process starts by informing the other parties of the existence of the controversy. After failing to reach a settlement through private negotiation, the parties may agree to meet with a mediator in an effort to reach settlement. Mediation is an informal process where all parties participate in solving the problem. The mediator helps to identify, clarify, and discuss the events that led to the controversy. Mediation is centered on an educational process, where the mediator helps the parties to determine the facts of the situation, and to understand how similar matters have been resolved. The mediator tries to help the parties reach an agreement, but does not have the authority to compel participation in the process, and does not issue an award. The entire process is non-binding.

A: What is arbitration?

B: It is a process in which one or more arbitrators hear evidence from the parties to a dispute and then issue an "Award" that decides who gets what. In some instances the arbitrator may also accompany the Award with an Opinion explaining the reasoning that led to the Award. Arbitration is different from mediation. The Award and Opinion cannot be reviewed by a court, and there is no appeal. Arbitration is a substitute for a trial and review of a trial court's decision by appellate courts.

A: Is arbitration binding?

B: All arbitration results in binding Awards, unless the parties agree to advisory arbitration. If the agreement says "arbitration", without any modifier, the decision is binding. The parties to an arbitration agreement can, however, mutually agree to withdraw the case from arbitration at any time before an Award is issued by the

arbitrator. If they withdraw the case the arbitrator loses her authority to decide it.

A: Thank you very much!

B: You're welcome.

Exercise

Ⅰ. Questions

1. Do you know why the American court system in particular has been so hesitant to embrace these alternatives?
2. From the article, what kind of dispute-resolution system do the American states follow traditionally?
3. When did the alternative ways to assist and resolve disputes begin in the United States?
4. When did the United States Congress pass the federal Arbitration Act?
5. What's the reason for the push to allow alternative processes to the formal court mechanism?
6. What's the difference between mediation and arbitration?
7. Is arbitration more formal and interrelated with the court system than mediation?
8. From the text, if one of the parties dissatisfied with the arbitration, can he appeal to the court?
9. How many alternative processes do you know to shorten dispute resolution in the United States? What are they?
10. How do you evaluate the alternative processes mentioned above?

Ⅱ. Translate the following sentences into English

1. 根据双方在其合同中同意的仲裁以意向,争议当事人当然有权选择以仲裁而不是诉讼来解决纠纷。
2. 在大多数情况下,调解都是不公开进行的。
3. 调解是一种没有法律约束力的纠纷解决方式,通常更适宜用以解决那些小纠纷。
4. 一方当事人可能喜欢选任那些"钉是钉,铆是铆"的仲裁员,而另一方当事人则可能会更愿意选择那些不惧于解决复杂纠纷的仲裁员。
5. 因此,在美国,有关替代性纠纷解决机制的法律依旧在发展。

Ⅲ. Reading Material

1. Resolutions of Disputes

When we mention techniques to resolve disputes, we often refer to legal techniques,

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