

全国高等院校经管专业双语教材
全国高等院校商务英语专业规划教材(本科)

国际商法

(英文版)

International Business Law

韩永红 编著



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出版说明

随着中国与世界日益频繁的经济互动，用国际上的通用语言来思考、交流、工作的能力也越来越受到重视，既具有扎实专业知识又掌握娴熟外语的复合型人才成为现今市场的主要需求。双语教学就是在这种背景下顺应时代的产物。

根据教育部高等教育司的定义，双语教学是指将母语外的另一种外国语言直接应用于非语言类课程教学，并使外语与学科知识同步获取的一种教学模式。双语教学体现了现代教育思想，融外语与学科知识教学于一体，注重提高学生专业外语水平和直接使用外语从事科研的能力；注重促进学生专业知识、外语水平及能力素质的全面发展，增强学生直接使用外语从事国际经贸的涉外能力、适应能力以及国际商务实战技能。

为了适应市场需求和高校教学需要，对外经济贸易大学出版社组织编写了这套全国高等院校经管专业双语教材，主要适用于全国高等院校经管、金融、法律等专业、商务英语专业和英语专业的商务/应用/外贸英语方向的学生。

本系列每本教材的编著均遵循“user-friendly”（方便使用者）的指导思想，从体例安排到语言风格均旨在满足使用者（包括教授方与学习方）的实际需求，力图避免外文原版教材在体例与内容上使中国学习者“水土不服”的弊端。整套教材内容包括《国际贸易理论与实务（英文版）（第二版）》、《国际贸易理论与实务（英文版）辅导用书（第二版）》、《国际贸易实务（英文版）》、《国际贸易实务（英文版）辅导用书》、《国际金融（英文版）》、《国际贸易法（英文版）》、《国际商务管理概论（英文版）》、《基础会计（英文版）》、《基础会计（英文版）辅导用书》、《新编国际结算与案例（英文版）》等。本系列教材将从国内高等院校的教学实际出发，随着高校双语教学的发展而扩充完善。

本套教材的编写队伍来自全国重点高等本科院校，编写教师均有着双语实际教学经验，这是本套教材编写质量的重要保证。

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2011年10月

前

言



为方便使用者快速了解本书，现将几个相关的主要问题简要说明如下：

一、在体例设计上，本书采取了实用主义的态度，在考虑国际商法理论体系的前提下，更注重中国高校双语教学的需要。关于国际商法的体系，法学界存在不同见解。大陆法系国家大多以传统意义上的商事立法为依据。英美法系国家则秉承实用主义的理念，将国际商务活动所涉及的法律，统统纳入国际商法。因此，国际商法的内容体例并未完全定型，可谓见仁见智。本书编著者将国际商法界定为：调整超越一国国境的主体平等的商事组织及其商事交易关系的法律规范的总和。以此为依据，结合国际商务活动的整个流程，本书正文设五部分，共计十章。第一部分：概述（国际商务的法律环境）；第二部分：商事组织法（个人企业法、合伙企业法、公司法）；第三部分：国际货物买卖法（国际货物买卖合同（I）、国际货物买卖合同（II）、国际货物运输保险法、国际支付法）；第四部分：国际知识产权法（国际知识产权转让）；第五部分：国际商事争议解决法（国际商事争议处理）。每章包括“热身问题”、“正文”和“小结”。课前对“热身问题”（Warm-up questions）的讨论可以帮助学习者累积必要的背景知识，激发学习者的研读兴趣和探索热情。“小结”（Chapter summary）是对本章所讨论的主要理论、规则和观点的简要归纳，以帮助学习者回顾本章的主要内容。为方便使用者检验和拓展学习效果，本书配备《国际商法（英文版）辅导用书》，涵盖法律术语练习（Legal terms）；课后问题（Chapter questions），包括“正误辨析”、“问答题”、“选择题”、“案例题”等形式；拓展阅读（Material and case reading）；附录（Appendixes）等内容。

二、在内容安排上，本书兼顾理论性与实用性、全球性与地方性。本书紧扣国际商法的法律渊源，既注重对重要国际商事惯例和国际条约的阐释，也注重主要贸易国家国内法的影响，尤其关注中国相应的立法和司法实践。从而使学习者认识到国际商法不仅是国际法亦是国内法，在学习国际商法的过程中，既要有全球视野，也要关注本土法律资源。在论述法律规则的过程中，本书会明确指出相应的法律条款，同时穿插图表和中外经典案例以帮助学习者更好地理解和应用相关法律规则，从而提升本书内容的实务操作性。针对内容的重要性差异和学习者间可能存在的水平差距，本书的论述有详有略。对分歧较大的观点，着重阐述通说，对其他观点只做一般性提及，以免对学习者的观点混乱性

困扰；对重要内容，本书采用黑体字予以突出，以提醒学习者重点掌握和理解这些内容。

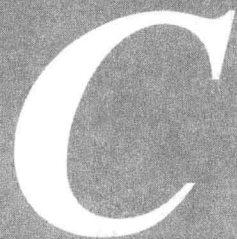
三、在写作语言上，本书力图使语言既严谨、流畅同时又不失活泼。本书的编著者认为，以英语为媒介学习法律，应至少致力于实现三个目标：法律知识的获取、法律英语应用能力的提高、法律思维方式的培养。其中法律知识的获取是第一层次的目标，通过大量法律英语的浸润提高学习者在法律工作中驾驭英语的能力是第二层次的目标，培养学习者逻辑性、批判性的法律思维习惯则是第三层次的目标。为培养学习者直接以英语思考、分析和解决法律问题的能力，本书的正文全部以英文写作，不夹杂任何中文注释。这可能会给本书的少部分使用者带来挑战，但这种挑战应该不会导致学习的困难。因为，在大多数情况下，本书正文部分对重要法律规则及法律术语的内涵已做了较为充分的解释，同时为便于学习者进一步展开阅读的需要，编著者已将每章涉及的主要法律术语予以整理并译成中文，统一置于书后“法律术语表”部分。

本书在编著过程中，参考了国内外的一些相关著作和研究成果，在此对这些作者深表谢意，主要参考文献见书后附录。此外，本教材的出版得到对外经济贸易大学出版社以及编辑的大力支持，在此亦深表谢意。在本书的写作过程中，张朋朋、程德云、张琳琳、赵翠、李连涛、周慧民、公平、郭秀华、刘昆仑、杨楠楠、李俊燕、兰秀峰、苏玲、张振青同学在资料搜集、案例整理方面提供了帮助，在此一并予以说明并致谢。

本书力图避免国际商法外文原版著作在体例与内容上“水土不服”的弊端，也致力于改进本土国际商法双语教学用书较为刻板的印象，但这一目标的完全实现无疑是一项艰巨的任务。虽然编著者已努力为之，但鉴于学力有限，加之写作时间仓促，本书想必仍难免错漏之处，谨请读者不吝指正。对本书的任何建议和意见可发送至邮箱：unahan722@163.com。

韩永红

2011年9月·广州白云山下



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Part I

Introduction

1

Chapter

The Legal Environment of International Business ■ ■ ■ □

Warm-up Questions

- 1) How do you understand the importance of international business?
- 2) What are the differences between international business and domestic business?
- 3) As you see it, where can you find the rules and norms governing international business?
- 4) Do you know some theories the economists have created to justify and explain international business?
- 5) Can you name some international organizations which play a role in regulating international business?

1.1 International Business and Globalization

Simply, international business is the economic system of exchanging goods, services and intellectual property, conducted between individuals and businesses in multiple countries. In other words, international business may be any domestic business operation that includes an international element. International elements create increased transaction cost and risk. Factors such as differences in language, culture, economics, politics and laws bring about barriers and costs. However, these elements also create opportunities. The principal integral parts of international business—**Goods, services and intellectual property** funds in one country may find a ready market or more profitable market elsewhere. Thus today international business comprises a large and growing portion of the world's total business.

As a matter of fact, international business is as old as the oldest civilization. Throughout the history of mankind, countries traded to obtain needed items from textiles to spices that were not

readily available in their own countries. Asia, Middle East, Africa and Europe have been the major marketplaces of trade for hundreds of years. There were famous “silk road”, which linked the market of ancient China with Middle East and Europe, and the first international sea trade route established by the Europeans in the sixteenth century. With the advent of great naval power, Portugal and Spain opened the Americas, India, and the Pacific to trade. For more than three hundred years, trade in cotton, corn, horses, weapons and even slaves thrived among Europe, America and Africa.

Much has changed in the field of international business since the end of World War II. The world today is more economically interdependent than at any time of the history. It is said the twentieth century was the century of emerging globalization. “Globalization” has been one of the most frequently cited terms in economic and legal literatures. In effect, globalization is rather a western economic concept with significant legal connotations. It is foremost an economic process. It is also a political event, as evidenced by the spread of rule of law among nations.^① Although globalization of markets is a process, it appears to be unstoppable. Undoubtedly, with the increasing globalization of economy, we will experience more cross-border activities. Many economists and business experts believe that no trade can be purely domestic in such a globalization process. The reality of the increasing economic interdependence among countries makes all trade international. No longer can an economic or policy change in one country occur without causing reverberations throughout the world’s markets. For example, the deterioration in trade relations between the United States and China can affect the manufacturing plants in Canada or Mexico. The Mad Cow disease affected far more than the English cattle but the trade in beef worldwide.

Globalization can be attributed to many factors. Natural resources and raw materials are unevenly located around the world. Technology advances in communications has brought people closer than ever and make the world, to some extent, a village on the earth. Most of nations have moved away from pure protectionism of trade and increasingly toward free trade. Recent decades has seen a steady and robust movement towards regional integration, for example, EU and the development of free trade areas such as APEC and NAFTA. Technologies of patents, copyrights, trademarks and know-how are transferred by licensing agreements around the world, as freely as goods and services are sold. Greater political stability in newly emerged economically powerful countries has led to increasing trade volume around the world.

① See Jost Delbruck. “Globalization of Law, Politics and Markets—Implications for Domestic Law: A European Perspective”. *1 Ind. J. Global Legal Study*. Fall 1993.

Such greater economic interdependence has required countries to reach agreement on important legal issues. The global economy has been affected by the development of widely accepted international conventions and practices, which provide a reliable and consistent legal environment for international business. Meanwhile, national laws are required to be harmonized and adjusted to new development in international business.

1.2 History of International Business Law

At the beginning, the rules and norms governing international business are basically the creation of merchants. In the twelfth century, medieval Europe experienced a renaissance of trade and commerce. Merchants traveling by caravan or camel met at trade fairs to exchange goods such as wine, fruit, and porcelain. To meet the demand of trading over long distance, primary banking systems and new legal instruments (forerunners of today's bank checks) were created to facilitate the payment. Over time, the merchants developed a set of customs for exchanging goods and it is an unwritten code on how to bargain, barter, and sell goods at trade fair or city market. For example, it is a widely accepted consensus that if one bought the goods at trade fair and later discovered the goods had been stolen, the innocent buyer will incur the loss anyway. By relying on these customs, merchants would know what was expected of both parties to a transaction and how to avoid and resolve a dispute. Formally these customs became known as the *lex mercatoria* or *law merchant*, and they were "enforced" by the merchants themselves. That is, considering their reputation and the importance of maintaining permanent good business relationships, merchants will follow these customs in transactions. As trade spanned greater distances and involved more complicated skills, merchants took on greater risks, and transactions required more complex legal rules. By the eighteenth century, the courts recognized the *law merchant* and made it a part of the common law in England. In the continent of Europe, the *law merchant* was incorporated into stricter legal codes, for example, the *French Civil Code of 1804* and the *German Civil Code of 1896*.

As the business world became more complex, and with the dawn of air travel and worldwide communication, a clearer and uniform set of modern rules governing international business are needed **in the twentieth century**. In fact, the international business law has grown and shaped up significantly in the twentieth century, especially after World War II. The leaders of the nations fighting against Germany, Italy and Japan realized a push to arrange a comprehensive network of multilateral agreements to settle the world's political and economic problem. In July 1944, they