



普通高等教育“十一五”国家级规划教材
面向 21 世纪 课 程 教 材

全国高等学校法学专业 14 门核心课程教材

商 法

Commercial Law

(第三版)

范 健 主 编

高等教育出版社
北京大学出版社



清华大学
教育部
工商管理一级学科博士点
工商管理二级学科博士点

清华大学经济管理学院工商管理系

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程啸 主编

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内 容 提 要

本书是教育部“高等教育面向 21 世纪教学内容和课程体系改革计划”的研究成果，是“面向 21 世纪课程教材”与“普通高等教育‘十一五’国家级规划教材”，同时也是“全国高等学校法学专业核心课程教材”。

本书分为七编：总论、公司法、证券法、破产法、票据法、保险法、海商法。全书立足于我国现行商法制度，以简洁的行文涵括了当前商事立法与商法理论的基本内容，构建了较为完整的商法学体系。本书从第一版到第三版，除就相关新立法及理论上的重大进展予以实质性修订外，尽可能地保持了内容与体系上的稳定性。与第二版相比，因理论发展及立法修订，本书在总论、公司法、证券法、破产法、保险法等部分作了较大幅度的修订，票据法、海商法也作了相应更新与调整，使其体系结构更加完善。在总论部分，就商法的调整对象、商主体的内涵与外延、商行为的内涵与外延等商法基础理论的核心问题作了修订与补充，从而在吸收了近几年商法基础理论研究成果的基础上，使总论部分体系更加完善。公司法与证券法部分则主要针对 2005 年两法的修订，就相关内容作了大幅修订。总论中的合伙企业法部分、分论中破产法部分则以 2006 年 8 月 27 日颁布的《合伙企业法》、《企业破产法》为依据，对原有内容与体系结构均作了大量实质性调整。

为方便老师教学使用，本书配有《商法》(第三版)教学课件，详情请参见书末“教学支持说明”。

A BRIEF INTRODUCTION

This book is the research result of teaching and curricula reform projects for 21st century in higher education, sponsored by China's Ministry of Education, and the coursebook geared to the 21st century, and the eleventh five year coursebook project on law science by Ministry of Education. Besides, it is also one of the core coursebooks for legal majors of the Chinese colleges and universities.

This book is composed of seven chapters: General Introduction, Corporation Law, Securities Law, Bankruptcy Law, Commercial Instrument Law, Insurance Law, and Maritime Law. Based on the existing Chinese commercial law systems, this book gives a detailed explanation of the theories of commercial law by combining with Chinese commercial legislation and adoption of commercial regulations. From the first edition to the third one, this book tries to maintain the conceptual stability in context and structure except substantial amendment on new legislation and essential theoretical development. Comparing with the second edition, this book has made important amendment on chapters including General Introduction, Corporation Law, Securities Law, Bankruptcy Law and Insurance Law. Corresponding renewal and adjustment on Commercial Instrument Law and Maritime Law makes its structure more suitable. In General Introduction, core issues are amended and supplemented, such as objects of Commercial law, connotation and denotation of commercial subjects and commercial acts. These issues have improved the introduction part on the basis of research of the recent previous years on fundamental theories of commercial law. Chapters on Corporation Law and Securities Law have been substantially amended, focusing on the amendments of the two Laws in 2005. The concept and structure of the part on Bankruptcy Law has been dramatically adjusted. Referring to the Partnership Enterprise Law and Bankruptcy Law newly promulgated in August 27th, 2006, substantive amendments have been put into the content and feature of the Partnership Enterprise Law part in General Introduction and Chapter of Bankruptcy Law.

作者简介

范健 南京大学法学院教授、博士生导师。首届中国十大杰出青年法学家(1995年)。主要研究领域为商法、经济法、国际商法。主要著作有《公司法》、《证券法》、《商法基础理论专题研究》、《商法的价值、源流及本体》、《商法论》、《德国商法》、《公司法论》等。

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房绍坤 烟台大学法学院教授、博士生导师。烟台大学副校长。首届国家级教学名师奖获得者。主要研究领域为民法、商法。主要著作有《民商法问题研究与适用》、《民商法原理》、《比较商法》、《用益物权基本问题研究》等。

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邵建东 南京大学法学院教授、博士生导师。江苏省检察院副检察长。主要研究领域为经济法、德国法。主要著作有《德国反不正当竞争法研究》、《竞争法教程》、《德国民法总论》(译著)等。

王建文 河海大学法律系副教授。河海大学商法研究所所长。主要研究领域为商法。主要著作有《公司法》、《证券法》、《商法基础理论专题研究》、《商法的价值、源流及本体》、《商法论》等。

A Brief Introduction to Compilers

Fan Jian Professor, Tutor of doctor of Law School of Nanjing University. He was elected as one of the ten outstanding young legal scholars in China in 1995. His main research fields include commercial law, economic law, and international business law. Major works include Corporation Law, Security Law, Monographic Study on Fundamental Theories of Commercial Law, Value, Source and Noumenon of Commercial Law, Study on Commercial Law, German Commercial Law, Study on Corporation Law and so on.

Shi Shaoxia Professor, Tutor of doctor in Law School of Jinlin University, Dean in China Prosecutor's Institute. His main research fields are commercial law and economic law. His major works include Company Law, Study on State-owned Stock Rights, and A Survey of Economic Law and so on.

Gu Gongyun Professor, Tutor of doctor, Vice Dean of East China Institute of Political Science and Law. His main research fields are commercial law and economic law. Major works include Company Law, Commercial Law, Corporation Law and Security Law.

Fang Shaokun Professor, Tutor of doctor, Vice-Dean of Yantai University. He won the first National Prize on Famous Professors. His main research fields include commercial law and civil law. Major works are Study and Application of Civil and Commercial Law, Theories on Civil and Commercial Law, Comparative Commercial Law, and Basic Issues on Usufructuary Right.

Han Changyin Professor, Tutor of doctor in Law School of Shanghai University of Communications. His main research fields are commercial law and economic law. Major works include Introduction to Economic Law, A Survey of Company Law and American Bankruptcy Law (translation work).

Shao Jiandong Professor, Tutor of doctor in Nanjing University. He is now the vice prosecutor general of the Prosecutor's Office of Jiangsu Province. His main research fields include economic law and German law. Major works include Study on German Anti-Unfair Competition Act, Chinese Competition

Law, German Civil Law (translation work) and so on.

Wang Jianwen Associate Professor in Law Department of Hehai University, Director of Research Institute of Commercial Law in Hehai University. His main research field is commercial law. Major works include Corporation Law, Monographic Study on Fundamental Theories of Commercial Law, Value, Source and Noumenon of Commercial Law, and Study On Commercial Law.

第三版序言

本书自2002年再版以来，至今已过去了四年多的时间。在此期间，正值中国商法大发展的时期，无论是立法还是理论都取得了重大进展。立法方面，最引人注目的无疑为2005年10月27日同时获得通过的新《公司法》、新《证券法》以及2006年8月27日颁布的新《合伙企业法》、《企业破产法》。为配套《公司法》、《证券法》的实施，还修订了《公司登记管理条例》，制定或修订了《上市公司证券发行管理办法》、《首次公开发行股票并上市管理办法》、《证券发行与承销管理办法》、《上市公司收购管理办法》等重要规章。《保险法》也于2002年10月28日作了重大修订。这些新修订或发布的法律、行政法规及部门规章，共同为我国市场经济体制的完善提供了制度支持。

近年来，商法理论方面也取得了突飞猛进的成绩。一大批商法理论著作、教科书相继问世，使我国商法理论在较短的时间内实现了较大跨越。其中，商法总论、公司法、证券法、破产法方面的成果尤为显著。这几个领域，可谓实现了革命性变革，在若干基本理论上取得了重大突破。保险法、票据法、海商法理论也在“波澜不惊”中取得了较大进展。

在立法与理论都有较大变化的背景下，本书再次启动了修订工作。此次修订涉及全书七编内容。在尽量保持原版风格与架构的前提下，因内容上的重大变化以及商法体系上的考虑，全书还是作了较大的调整。第一编总论部分，继续加强了商法基础理论的内容，吸收了近年来形成较大共识的基础理论，如商法的调整对象、商主体的内涵与外延、商行为的内涵与外延等，使商法总论更加完善与成熟。第二编公司法部分，按照新《公司法》展开，章节上由原来的八章调整为七章。原为第五编的证券法部分本次被调整为第三编，章节上维持原来的五章不变，但内容上则依新《证券法》作了较大调整。第四编破产法部分，根据新《企业破产法》作了结构、体系上的重大调整。第五编票据法、第六编保险法、第七编海商法部分，主要是针对相关立法上的变化作了相应调整。除以上内容的调整外，本次修订还依照出版社的统一要求，在每章首尾分别加上了简洁明了的“本章导语”与经精心设计的“练习思考题”，以利于学生预习与复习。

值此三版之际，再次向给本书以关爱的法学界同仁、学子以及高等教育出版社编辑致以诚挚的谢意！

范 健

2006年8月于南京大学

Preclude to the Third Edition

It has been over four years since the republication of this book. During this period, Chinese commercial legislation and commercial theory have made rapid progress. The most eye-catching event in the legislation is no doubt the newly enacted Corporation Law and Securities Law passed on October 27, 2005, together with the Partnership Enterprise Law and Bankruptcy Law promulgated in August 27th, 2006. In order to comply with the last Corporation Law and Securities Law, some important administrative regulations concerning issuance of securities are amended or promulgated, including Regulation on Administration of Company Registration, Administrative Measures for the Issuance of Securities by Listed Companies, and Measures on Administration of Initial Public Offering of Shares and Listing. Insurance Law is also amended on October 28, 2002. All this newly amended or enacted laws and regulations have provided institutional support to the perfection of Chinese market economy system.

In recent years, theories on commercial law have developed by leaps and bounds. The continuously coming out of numerous academic works and textbooks on commercial law has fulfilled the breakthrough in the field of commercial law, esp. in the area of general introduction, corporation law, securities law and bankruptcy law. Theories on insurance law, commercial instrument law and maritime law have also achieved stable progress in recent years.

Under this circumstances, amendment work for this book started again, which was involved in seven chapters of the book. Considering the significant changes of the concept and commercial system, the author has made major adjustment to the context while trying to maintain the original style and structure of the old edition. In General Introduction, core issues of primary commercial theories are strengthened, such as objects of commercial law, connotation and denotation of commercial subjects and commercial acts. The Second Part is on Corporation Law, which is composed of seven chapters instead of eight, has been spread out according to the context of the new Corporation Law. The original fifth part on Securities Law have been adjusted to the Third Part consisted of five chapters, and it is also largely amended according to the new Securities Law. The Fourth Part is Bankruptcy Law, of which the features and system have been significantly amended with reference to newly promulgated Bankruptcy Law. Moreover, the rest parts, including Commercial Instrument Law, Insurance Law and Maritime Law, are made corresponding

II Preclude to the Third Edition

adjustment according to relevant amendment of legislation. As required by the publishing house, brief "introduction to the chapter" and well-designed "exercise and questions" are added to each chapter in this edition for the convenience of the readers.

The publication of the new edition of this book has obtained much support and encouragement from the colleagues in law circle and readers. We express our sincere thanks to them and to the cordial support and help from editors in Higher Education Press for the amendment of this book!

Fan Jian

August 2006, Nanjing University

第二版序言

中国经济体制改革的大潮推动着中国商法制度的建立与发展。中国商法作为一个新兴法律部门，虽然其创设较晚，但其更新发展变化之快是其他法律部门难以比拟的。本书第一版定稿之后，我国商法理论和商事部门法又有了较大的发展，关于商法总论，以及公司、破产、票据、证券、保险等商事部门法，不仅学术研究中提出了许多有价值的新理论、新观点，而且在实践中，有的部门法已被立法机关予以修订，更有行政机关和司法机关就适用上述法律颁布了新的条例、规章和司法解释。为了适应商法理论和商法制度的发展变化，我们于去年下半年开始对本书第一版予以修订。

这一次修订的内容为第一编至第六编。第一编总论部分，根据读者们的热切要求，增加了较多的篇幅，其理论性更加丰富。第二编公司法部分，结合我国公司法理论的最近发展，对全篇的理论体系和结构及主要内容都作了较大调整。第三至第六编，主要增加了法律、法规、行政规章和司法解释的最新规定，并适当增加了相关部门法的新理论。

本教材第一版出版后，得到了法学界同仁和许多读者的肯定和热情鼓励，不少读者还来信就如何完善教材内容提出了很多建议，借此机会，致以诚挚谢意！

本教材此次修订得到高等教育出版社编辑的热忱支持和帮助，特此致谢！

范 健

2002年2月于南京大学

Preclude to the Second Edition

The establishment and development of the system of Chinese commercial law is largely due to the tide of Chinese reform of economic structure. As a new legal branch, Chinese commercial law is progressively taking on a new appearance. This is the uniqueness that other legal branches can hardly catch up with. After the final version of its first edition, there has been major development in both theory and departmental laws in Chinese commercial law. Many of valuable and new theories and viewpoints are put forward in the academic research on the general introduction of commercial law as well as the departmental laws such as company law, bankruptcy law, instrument law, securities law and insurance law. Moreover, in practice, some departmental laws have been amended by the legislative authorities. Meanwhile, new rules, regulations and judicial interpretations are enacted by administrative and judicial authorities on the application of the above mentioned laws. In order to fit the development in theory and system of commercial law, we have started the amendment on the first edition of this book from the second half of last year.

The amendment covers from Part One to Part Six. With respect to the earnest wish of readers, we add more chapters in Part One—Introduction, to make it more theoretical. In Part Two—Corporation Law, we have made major adjustments to the theoretical system and structure as well as its primary concepts on the consideration of the latest development in Chinese corporation law theory. In the area from art Three to Part Six, we mainly add in it the latest laws, regulations, administrative rules and judicial interpretations as well as the new theories on the relevant branch laws.

The publication of the first edition of this book has obtained much support and encouragement from the colleagues in law circle and readers. Some readers provide us with a lot of suggestions on how to perfect the textbook. We sincerely express our thanks to all of them here!

We express our sincere thanks to the cordial support and help from editors in Higher Education Press for the amendment of this book!

Fan Jian

February 2002, Nanjing University

前 言

在现代市场经济国家，商法是最基本、最重要的法律部门之一，是维系市场经济秩序的主要法律手段。商法学作为一门独立的法学学科，是一个不争的事实。无论大陆法系还是英美法系，无论奉行民商合一还是奉行民商分立，无论是否编纂有商法典，当代世界发达国家，绝大多数都将商法视为一个独立的法律部门，都设有商法学这一独立的法学学科。由于特殊的历史原因，过去多年，商法在我国始终未能获得其应有的地位。近几年来，这种状况大有改善。现在，无论主张民商合一还是主张民商分立，无论对中国是否有必要制定商法典或商法通则这类法律持何种态度，法学家们在商法学科独立性这一点上已经趋于认同，绝大多数学者肯定商法是一门与民法、经济法并列的法学学科，它具有自己的研究范围，它可以构建自己的学科体系，一批以商法命名的著作和教科书相继出版，商法学已经成为中国大学法律系学生的必修课程。

中国商法学的产生和发展是中国商事立法完善的必然结果。在非市场经济时期，国家的立法重心在于强化国家调控经济活动的能力和国家干预经济行为的手段，这一时期，商法的不发达也就在情理之中。1993年之前，我国除颁布了《中华人民共和国海商法》外，其他商事立法几乎空白。1993年以来，全国人大常委会陆续制定了《中华人民共和国公司法》、《中华人民共和国票据法》、《中华人民共和国合伙企业法》、《中华人民共和国个人独资企业法》、《中华人民共和国保险法》、《中华人民共和国商业银行法》、《中华人民共和国证券法》，与此同时，破产法、信托法、合作企业法等其他一系列重要的商事法律、法规也在抓紧制定之中。商事立法的高度发展，已经远远突破了传统经济法和民法的法律体系范围，它向法学理论研究和法学教学提出了新课题。这就是在传统的民法和经济法之外，客观上已经存在一个新的法律部门，商法已经作为一个独立的法律部门而建立起来了。与此同时，以这一法律部门为研究对象的商法学的产生也同样是一种客观的必然。

但是，如何建立商法部门，这是实践向理论提出的课题，是商事立法和司法实践向商法学理论提出的理论创新和发展的要求，它同时直接维系着商法学本身的建立和发展。从各国法律发展的历史和我国近年来立法、司法实践的经验教训中可以看到，商法学的重大理论问题不解决，中国商事立法和司法的健康发展是难以想像的。中国商法部门的诞生为商法学研究留下了广阔的理论空间，例如：商法部门建立的内在逻辑是什么；各商事法律部门之间是否存在可以被人们认识的、对商法部门的建立或商法典的制定具有重要意义的、共同规律性的东西；商法是否存在不同于民法和经济法的内在本质特征；商事部门法是否可以寻求到共同的基点和轴线而走向法典化；现代民法典是否可以完全包容商事规则；中国是否有必要和可能制

II 前 言

定商法典；商法典编纂的难点在哪里等等。与上述商法部门建立的重大理论问题相关的还有一系列商法学的基本问题，如商法调整对象、现代商人概念的最新发展、商行为的概念及其在商事立法中的意义、商法的特殊性、商法的原则、商法的体系、商事法律部门与商法典、商法与民法的区别、商法与经济法的区别、商法的本土化与国际化、商事立法的国际化趋向等等。这些问题在各国商事立法和商法学理论研究中都是颇为复杂的问题。纵观西方国家，尤其是从大陆法系国家私法发展的历史中可以看到，商法起源于商事交易习惯和惯例，不像民法那样起源于罗马法，它是一门实践性法学，从一开始就没有完整的理论，许多国家是先有商事习惯后有商事法律，再有商法理论。商法理论在一定程度上仅仅在于解释法律，而不在于指导、甚至创造立法。与民法相比，商法理论滞后于商事立法从一开始就是普遍存在的问题。一百多年来，许多国家的商法学家们曾作出了巨大努力，力求解决这些问题，但结果并非十分满意。也正是由于理论体系建立方面的原因，世界各国商法体系的建立始终存在着巨大差异，法学家们对此所产生的争议也最大。从各国商法发展的经验中可以看到，商法理论的完善程度对于商法部门的建立，对于商法的发展起着十分重要的作用，商法理论研究的差异在一定程度上导致了商法发达程度的差异。每一个国家的商法都是该国特定法律文化背景的产物，都是该国法的历史传统和他国法的经验相融合的结果。

中国商法的建立，不是外国商法的简单继承和借鉴，它首先是中国现实社会关系的必然产物，其次才是他国经验教训借鉴的结果。尤其是历史发展到今天，商事法律关系已超出传统的范畴，中国商法已不可能是传统商法的简单继承，它必然是在传统基础之上的创新和提高，是一种新的创造，是中国现实法律关系、法律理论和法律经验的产物。

中国商法学研究仍处于起步阶段，现实商事关系的变化与发展在理论上提出了许多新问题。因此，商法学的完善与丰富还有待于理论研究的不断深化。本教材的编写仅仅是我们在这条探索道路上迈出的一步。

本教材是在教育部高教司直接组织领导之下，在高等教育出版社的帮助下，按照《全国高等学校法学专业核心课程教学基本要求》编写而成的。本教材编写过程中得到了我国商法学前辈江平教授、王保树教授、徐学鹿教授、赵中孚教授等的热情帮助和指导。尤其王保树教授和徐学鹿教授帮助审定了全部书稿，提出了许多很好的修改建议，在此表示衷心感谢。借此机会，我们还向为本教材编写和出版予以关心、帮助和支持的其他同志表示衷心感谢，尤其是对高等教育出版社的编辑对本教材出版所付出的辛劳致以由衷的谢意！

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1999年11月于南京大学

Preface

In the modern market-oriented states, commercial law, one of the most important legal branches, is a primary legal means of safeguarding the market economic order. Most of the contemporary advanced countries in the world, whether the continental legal system or common law system, view commercial law as an independent legal branch. They have set up commercial jurisprudence as an independent legal science, whether they have compiled the commercial code or not. In the past decades, commercial law didn't obtained its proper status in China due to special historical reasons. In recent years, the situation has been enormously improved. At present, Chinese legal scholars have reached a consensus on the independence of the commercial jurisprudence, despite different attitudes they hold to the necessity of making a commercial code in China. Most scholars express their positive opinions that commercial law is a branch of legal science, parallel to civil law and economic law. Its own research scope and subject system have been constructed. With the successive publication of works and textbooks on commercial law, commercial jurisprudence has become the compulsory course for students of law schools in China.

The establishment and development of Chinese commercial jurisprudence is the inevitable outcome of the perfection of Chinese commercial legislation. In the period of central economy, the state legislation was focused on strengthening the government intervention in economic activities. As a result, the underdevelopment of commercial law was not beyond the expectation. Before 1993, China had no other commercial laws except Maritime Law of PRC. From 1993 to the present, the Standing Committee of the National People's Congress has made a series of commercial laws, such as Company Law of PRC, Commercial Instrument Law of PRC, Partnership law of PRC, Sole Proprietorship Law of PRC, Insurance Law of PRC, Commercial Banking Law of PRC and Securities Law of PRC. Meanwhile, other important commercial laws and regulations, such as Bankruptcy Law, Trust Law and Cooperative Ventures Law are in drafting process. The fast development of commercial legislation, which has been far beyond the legal scope of traditional civil law and economic law, has set a new task to theoretic legal research and teaching. That is, a new legal branch has appeared beyond traditional civil law and economic law system, and commercial law has been set up as an independent legal branch. At the same time, the establishment of commercial jurisprudence, aimed at making research on the new legal branch, is an inevitable outcome.