张学森　主编

国际商法

（英文版）

International Business Law

(English Version)

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前　言
FOREWORD

近几年来，国际商法（International Business Law）已经成为我国高等院校法学专业、国际经济与贸易专业、国际金融专业、国际商务专业、商务英语专业等竞相开设的一门课程；而且，为适应培养一大批国际化专门人才的迫切需要，满足教育部有关双语课程建设的要求，许多高校又纷纷把国际商法作为双语课程来建设和开设。为满足我国高等院校相关专业国际商法双语课程的教学与建设，以及对外经济与贸易实际工作的迫切需要，我们编写了这本《国际商法》（英文版）【International Business Law（English Version）】教材。

《国际商法（英文版）》在编写过程中，无论是在体系安排上，还是内容取舍上，都尽量做到与我们新近出版的中文版《国际商法》[①]形成相辅相成之势，以便于学习者对照使用。因此，本书在内容体系上具有中文版《国际商法》一样的特色：以国际货物买卖为主线，选取与其相关的商事活动环节和领域，渐次展开对国际商事法律制度的研究和叙述，形成了国际商法的一个法律规范体系。这样的内容和体系安排，将更好地适应国际商法双语课程教学与实务工作的需要。

本书十分注重选用权威精准的法律英语语言，特别强调理论与实践相结合，充分体现了国际化、复合型人才培养对国际商法知识与技能的要求，既阐述了国际商法基本理论，又特别侧重实务知识与操作技能的训练，在每个章节安排了案例分析。为便于教学工作的具体开展，本书附录了《联合国国际货物买卖合同公约》（United Nations Convention on Contracts for the International Sale of Goods，CISG）和《统一提单的若干法律规定的国际公约》（International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading，Hague Rules）。因此，本书既可以作为高等院校法学类、财经类专业国际商法双语课程的教材，以及 MBA 或 EMBA 教学用书、各类国际商务与法律培

① 《国际商法》，张学森主编，上海财经大学出版社，2007 年 9 月版，共有 10 章，包括国际商法概论、商事组织法、国际商事代理法、国际商事合同法、国际货物买卖法、国际服务贸易法（以与国际货物买卖有关的法律制度为主）、国际票据法、国际产品责任法、国际知识产权法、国际商事仲裁等。

训的理想读物，也可以作为对外经济与贸易专业实务工作者的参考资料。

本书由张学森担任主编，负责总体策划、提出大纲、组织编写、统稿定稿，孔晓波、王玥参加了编写提纲的前期讨论。各位作者及撰稿分工如下：张学森（第一、三章，第七章第1、2节，第九章第1、2、3节，第十章）；赵莉（第二、六章）；王玥（第四、五章）；孔晓波（第七章第3节，第八章）；林安民（第九章第4节）。另外，何爱华对第三章编写提供了有益帮助。

在本书编写中，我们得到了复旦大学、华东政法大学、上海外国语大学、上海对外贸易学院、上海金融学院等高校研究机构专家学者的大力支持，在此表示衷心感谢。同时，在本书编写过程中，我们参考了大量的论文、著作、教材等学术文献，鉴于本书教材性质，引注或者挂一漏万，在此向广大专家学者表示衷心感谢。

由于水平有限，时间仓促，不足甚至错讹之处在所难免，真诚欢迎批评指正。本书主编的电子邮箱：drzxs@yahoo.cn 或 zhangxs@shfc.edu.cn。

张学森

2008年7月于上海浦东花木

Contents

Chapter One

Introduction to International Business Law

Key Terms

Civil Law codified law based on the Roman code of Justinian; the basis of the legal system of most European and Latin American countries

Common Law law as developed and pronounced by the courts in deciding cases ("case law"), based on the common law of England and judicial precedent

Precedent a prior judicial decision relied on as authority or guide for resolving later, similar cases

International business law law that regulates various affairs of international business transactions and international commercial organizations

CISG (United Nations Convention on Contracts for the International Sale of Goods) treaty providing legal rules governing sales contracts for goods (not services or warranty work) between businesses from two different signatory nations, unless the parties' contract excludes CISG provisions

Trade custom and usage the general rules and practices in international trade activities that have become generally adopted through unvarying habit and common use

As a law subject and a course in law, *International Business Law* is also called *International Commercial Law*, and sometimes *the Law of International Business Transactions*. This book is intended for college students, lawyers, economists and business people seeking to understand the legal aspects of international business transactions, and it is mainly concerned with the rules and norms that regulate the person-to-person relationship between two parties transacting business across national borders.

1.1 Definition of International Business Law

1.1.1 Defining International Business Law

International business law refers to the body of rules and norms that regulates the various activities related with international business transactions, or in other words, all kinds of international commercial relationships, especially the person-to-person relationship between two parties transacting business across national borders. Generally, we can define "international business law" as the body of legal rules and norms that regulates international commercial trade and international business organizations.

1.1.2 The Meaning of "International"

In private international law, the international nature of a relationship or institution is generally examined with a view to establishing a connection with a particular national legal system. The same is in international business law. The "internationality" of international business law means that its regulating objects are commercial relationships with foreign elements, that is to say that at least one element among the subject, the object and the content of an international commercial relationship is across national borders. Therefore, a commercial transaction is international if:

(1) the parties have their places of business in different States or Countries;

(2) the parties have their nationalities from different Countries;

(3) the commercial activities are performed in a State or District outside the Country or Countries of one or more parties;

(4) the object of the commercial relationship is located in a State or District outside the Country or Countries of one or more parties.

1.1.3 The Meaning of "Commercial"

The fact that international business law regulates internatinal transactions of a commercial nature calls for an explanation. In international business law, a broad interpretation of commerciality should be adopted: an international transaction which is economic in character will be considered to be commercial. This is the universally accepted approach, and adopted by international organizations and dif-

ferent countries.

According to UNCITRAL Model Law on International Commercial Arbitration: "The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial and business co-operation; carriage of goods or passengers by air, sea, rail or road."

In China, the word "commercial" is also given a wide interpretation. According to the statement originally made by China on 22 January 1987 upon accession to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards Convention, China will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law. Article 2 of the Notice of the Supreme People's Court on the Disposal of the Relevant Issues about the Foreign-related Arbitration and Foreign Arbitral Matters by the People's Court points out that the so-called "commercial legal relationships whether contractual or not" refer to economic relationships of rights and obligations arisen from contracts, torts or relative legal regulations, for example, sale of goods, property leasing, project contracting, undertaking of processing, transfer of technology, joint venture, cooperative venture, exploration and exploitation of natural resources, insurance, credit loan, labor, agency, consultant service and guest and cargo transportation by sea, air, railway and road, and product liability, environment pollution, accident at sea and title dispute, but not including disputes between foreign investors and the host government①.

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① 中华人民共和国最高人民法院1987年4月10日《关于执行我国加入的〈承认和执行外国仲裁裁决公约〉的通知》第二条:所谓"契约性和非契约性商事法律关系",具体的是指由于合同、侵权或者根据有关法律规定而产生的经济上的权利义务关系,例如货物买卖、财产租赁、工程承包、加工承揽、技术转让、合资经营、合作经营、勘探开发自然资源、保险、信贷、劳务、代理、咨询服务和海上、民用航空、铁路、公路的客货运输以及产品责任、环境污染、海上事故和所有权争议等,但不包括外国投资者与东道国政府之间的争端。

1.2 Sources of International Business Law

Sources of law are the materials and processes out of which law is developed, and it is believed that only the rules made by sovereignty can be the sources of law. The basic sources of international business law include international conventions and treaties, international customs and usages, and national business laws.

1.2.1 International Treaties and Conventions

1. The Meaning of Treaties

Treaties are binding agreements under international law entered into by actors in international law, namely states and international organizations. A Treaty may also be known as agreement, protocol, covenant, convention, exchange of letters, accord, exchange of notes, memorandum of understanding, etc.. Regardless of the terminology, all of these international agreements under international law are equally treaties and the rules are the same.

Article 2 (1) (a) of the 1969 Vienna Convention on the Law of Treaties states that "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

2. The Binding Effectiveness of Treaties

From the 19th century on, it has been recognized that a sovereign can limit it authority to act by consenting to an agreement according to the principle *pacta sunt servanda*. Therefore, treaties are binding upon the signatory parties.

Pacta sunt servanda (Latin for "agreements must be kept"), a basic principle of civil law and of international law. In its most common sense, the principle refers to private contracts, stressing that contained pacts and clauses are law between the parties, and implies that non-fulfilment of respective obligations is a breach of the pact. The general principle of correct behaviour in commercial praxis — and implies the bona fide — is a requirement for the efficacy of the whole system, so the eventual disorder is sometimes punished by the law of some

systems even without any direct damages incurred by any of the parties.

With reference to international agreements, "every treaty in force is binding upon the parties to it and must be performed by them in good faith". *Pacta sunt servanda* is based on good faith. This entitles states to require that obligations be respected and to rely upon the obligations being respected. This good faith basis of treaties implies that a party to the treaty cannot invoke provisions of its domestic law as justification for a failure to perform.

The only limit to *pacta sunt servanda* is jus cogens (Latin for "compelling law"), the peremptory norms of general international law.

Meanwhile, because international business law is of a private nature, the principle of party autonomy also applies to international business transactions. Under some circumstances, only when the parties of an international business transaction have willingly chosen a treaty, the treaty is binding upon the legal relationship between them. Otherwise, it is not. For example, article 6 of the United Nations Convention on Contracts of International Sales of Goods in 1980 states: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."

3. Treaties in International Business Law

Treaties and conventions related to international business transactions and trade, entered into by states and international organizations, are sources of international business law, and the following are the most important ones:

(1) The United Nations Convention on Contracts of International Sales of Goods in 1980, CISG;

(2) The UNIDROIT Convention on Agency in the International Sale of Goods in 1983;

(3) The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading in 1924, the Hague Rules;

(4) The Convention on the Unification of the Law Relating to Bills of Exchange and Promissory Notes in 1930, the Convention Providing a Uniform Law of Cheques in 1931;

(5) The Convention on the Law Applicable to Products Liability in 1977, the Hague Convention;

(6) The Paris Convention on the Protection of Industrial Property in 1883 and revised in 1979, the Paris Convention;

(7) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1985, the New York Convention.

1.2.2 International Trade Custom and Usage

1. The Meaning of International Custom

Custom and usage refers to the "general rules and practices that have become generally adopted through unvarying habit and common use"①. And, international trade custom and usage means the general rules and practices in international trade activities that have become generally adopted through unvarying habit and common use.

According to Article 38 (1) (b) of the Statute of the International Court of Justice, "International custom" is, "as evidence of a general practice accepted as law"②. International trade customs and usages are international customs in international business law. As for trade usage, it is considered as any system, custom, or practice of doing business used so commonly in a vocation, field, or place that an expectation arises that it will be observed in a particular transaction. Article 9 (2) of CISG states: "The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."③

To study international business custom, it is necessary to differentiate between the following three concepts: custom, usage and general practice. Generally, a custom of some kind comes from a usage, and a usage develops from a general practice. In nowadays, almost all international business customs are in written form, and they are usually made or codified by international organizations or inter-

① Bryan A. Garner, Blach's Law Dictionary, 8th ed. West Group, 2004, p.413.

② 《国际法院规约》第38条(1)(b):"国际惯例,作为通例之证明而经接受为法律者"。

③ 《联合国国际货物买卖合同公约》第9条第2款:"在国际贸易上,已为有关特定贸易所涉合同的当事人所广泛知道并为他们所经常遵守。"

national conferences. International business custom may be in the form of a model law, uniform rules, standard contract, etc..

2. The Binding Effectiveness of International Custom

As rules and principles developed gradually from the international business practices in the long-run, international trade customs are, by nature, not law: neither international treaties or conventions, nor national legislations. An international trade custom does not have any legal binding effect until the parties of an international business transaction choose it to apply to their contract, and the court and arbitration institution may decide or enforce accordingly.

In some countries, the court has the right to interpret the contract between the two parties according to relative trade custom or usage or practice. In China, paragraph 2 of article 142 of the General Principles of the Civil Law of the People's Republic of China states that: "International practice may be applied to matters for which neither the law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions."

3. Customs and Usages in International Business Law

Till now, the most important trade customs are those made by the International Chamber of Commerce①, the following are the most widely recognized and accepted ones in international business transactions:

(1) The ICC Official Rules for the Interpretation of Trade Terms in 2000, Incoterms 2000

Incoterms are standard trade definitions most commonly used in international sales contracts. Devised and published by the International Chamber of Commerce, they are at the heart of world trade. ICC introduced the first version of Incoterms — short for "International Commercial Terms" — in 1936. Since then, ICC expert lawyers and trade practitioners have updated them six times to keep

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① The International Chamber of Commerce, the World Business Oaganization, was founded in 1919 with an overriding aim that remains unchanged: to serve world business by promoting trade and investment, open markets for goods and services, and the free flow of capital. The ICC is the world's only truly global business organization responds by being more assertive in expressing business views. Refers to <www.iccwbo.org>, last visited on June 19, 2008.

pace with the development of international trade.

Versions of Incoterms preceding the 2000 edition may still be incorporated into future contracts if the parties so agree. However, this of course is not recommended because the latest version is designed to bring Incoterms into line with the latest developments in commercial practice.

The English text is the original and official version of Incoterms 2000, which have been endorsed by the United Nations Commission on International Trade Law (UNCITRAL). Authorized translations into 31 languages are available from ICC national committees.

Incoterms are internationally accepted commercial trade terms which determine the passing of risk and the passing of costs under an international contract of sale. The terms tell each party to the contract what their obligations are for the carriage of goods from the seller to the buyer, for insurance and for export and import clearances. In addition, should a dispute arise, Incoterms are the only international trade terms recognized in a court of law. It is strongly recommended that express reference is made in the contract using the words "Incoterms 2000" to avoid confusion with any previous version of Incoterms.

There are 13 Incoterms and they are divided into four major groups: "E", "F", "C" and "D" terms. The first letter is an indication of the group to which the term belongs. Each group means additional responsibilities and costs for the exporter. For example, the most commonly used terms under each of these groups are: EXW (Ex Works), FOB (Free on Board), CIF (Cost, Insurance and Freight), DDU (Delivered Duty Unpaid), and CPT (Carriage Paid To).

Incoterms are not implied into contracts for the sale of goods. If you desire to use Incoterms, you must specifically include them in your contract. Further, your contract should expressly refer to the rules of interpretation as defined in the latest revision of Incoterms, for example, Incoterms 2000, and you should ensure the proper application of the terms by additional contract provisions. Also, Incoterms are not "laws". In case of a dispute, courts and arbitrators will look at: (1) the sales contract, (2) who has possession of the goods, and (3) what payment, if any, has been made.

Incoterms Do...

Incoterms 2000 may be included in a sales contract if the parties desire the