

全国专门用途英语 (ESP) 规划教材

# 法律英语

孙国平 编著



苏州大学出版社  
Soochow University Press

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## 图书在版编目(CIP)数据

法律英语 / 孙国平编著. — 苏州: 苏州大学出版社, 2015. 8

全国专门用途英语(ESP)规划教材

ISBN 978-7-5672-1428-6

I. ①法… II. ①孙… III. ①法律—英语—教材  
IV. ①H31

中国版本图书馆 CIP 数据核字(2015)第 193771 号

书 名: 法律英语  
Legal English

作 者: 孙国平 编著

责任编辑: 汤定军

策 划: 汤定军

装帧设计: 刘 俊

出版发行: 苏州大学出版社(Soochow University Press)

社 址: 苏州市十梓街1号 邮编: 215006

印 刷: 苏州市正林印刷有限公司

网 址: www.sudapress.com

E - mail: tangdingjun@suda.edu.cn

邮购热线: 0512-67480030

销售热线: 0512-65225020

开 本: 787mm×960mm 1/16 印张: 20 字数: 389 千

版 次: 2015 年 8 月第 1 版

印 次: 2015 年 8 月第 1 次印刷

书 号: ISBN 978-7-5672-1428-6

定 价: 49.00 元

凡购本社图书发现印装错误, 请与本社联系调换。服务热线: 0512-65225020

# 前言

苏州大学王健法学院作为“南东吴”之传人,身处东南沿海的改革开放前沿苏州。苏州外资企业众多,涉外法律实务需求旺盛。往昔东吴大学毕业生的特色之一便是其对比法的深刻体悟、强劲的法律外文能力、实务导向的法律教育,这些使他们能够轻松应对各种涉外和国际法律业务。现在我国推行“走出去”战略,大量企业需要通晓中国法律与投资国法律加之英文熟练的高端法律人才,对法律英文操作能力要求甚高。

法律作为经世致用之学科要求法科毕业生必须具备较高的法律从业能力,其中包括熟练的法律英文操作能力。国内目前的法律英语教材大多侧重于知识(knowledge)的传授而忽略技能(skill)的培养,这对于娴熟的法律英文能力培养目标的达成殊为不利,因为学生毕业后有些将从事涉外法律业务,他们需要在法律英文的听、说、读、写、译、辩等方面做好储备,具备良好的口头表达能力、商务谈判能力、法律翻译能力、法律文书撰写能力以及法律辩护能力。编者根据自己学习和运用法律英语的体会结合近年来讲授法律英语的经验,将相关讲义整编成册,期望通过本课程的带动,为我院毕业生未来的从业之路夯实法律英文基础。

本教材注重实际能力的培养,兼顾知识灌输,侧重案例运用,以期使学生熟稔掌握英美国家法律人员必须掌握的法律数据库(如 westlaw.com & lexisnexis.com 等),以及如何如何进行法律翻译、如何阅读英美法案例(how to read cases)、如何分析这些案例(analysis)、如何撰写案例摘要与法律意见书(case briefs and memos)、如何进行法庭辩论(argument)等内容。本教材基本上按照搜(research)一读(reading)一析(analysis)一写(writing)一辩(argument)脉络对法科学生需具备的几项能力进行培养。

学生万子锐、陈丽、刘禹、戚小乐、施骏、杨柳等承担了相关内容的文字输入工作,在此谨表谢忱。今年恰逢苏州大学法学院百年华诞,谨以此教材作为献礼以示致敬。感谢责编汤定军先生专业和辛苦的工作。编者才疏学浅,错讹之处还请大方之家多加指正,以便日后修订。

编者

2015年7月

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## Chapter 1

# Main Features of Legal English

### ► 1. 准确 (Precise or Exact)

正常情况下,起草法律文件时,用词造句务必十分精准(with great exactness),因为一旦笔者的思想、观点、企图落实成文字,即成为法庭判断是非的重要依据。尽管实践中还存在推测意图原则(principle of presumed intent),但其不占主导地位,书面文字仍然是法官解释法律文件的唯一依据。

实务中由于对法律文件文字理解不一,常有纠纷出现。

The Charter required that directors “shall be elected on a vote of the stockholders representing not less than two-thirds of outstanding capital stock of the corporation”.

甲方理解成:被选上董事的人需三分之二的股东投票赞成(a candidate to be elected needs the votes of two-thirds of the stockholders)

乙方则认为:选董事时须有三分之二的股东出席(two-thirds of the stockholders must be present at the meeting at which the election is held)

What's the judge's opinion?

一个阿肯色州的美国人临终前写了一个遗嘱,遗嘱写道:

The remainder of the testator's property should be “divided equally between all of our nephews and nieces on my wife's side and my niece”.

问题出在对“between”一词的理解上。立遗嘱人的妻子一方的外甥和外甥女加在一起共有 22 个人。这句话是指立遗嘱人的一半遗产归其妻子一方的 22 个外甥和外甥女,



另一半归其本人一方的外甥女? 还是指将遗产在双方的外甥、外甥女中平均分配呢?

为达准确之目的,常使用下列方法:

- 使用专门术语(下文有述)。
- 重复使用具有绝对含义的词汇,如 all, none, perpetuity, never, unavoidable。
- 使用具有绝对限制含义的短语,如 and no more(仅此而已), shall not constitute a waiver(不构成对权利的放弃), shall not be deemed a consent(不应视为同意)等此类表达方式。

- 使用含义宽泛的短语,如 including but not limited to(包括但不限于), or other similar or dissimilar cause(或其他类似或非类似的原因), shall not be deemed to limit(不应视为限制), without prejudice(不得损害)等。

- 使用详细的告知条款,如 on deposit in the United States mail registered and postage prepaid(在美国邮寄挂号函件,邮资预付)。

- 使用特别定义条款,如 words in the singular include the plural and vice versa(单数形式的词汇包括复数,反之亦然)等表达方式。

- 反复详细定义法律文件、事实情况、限制性条件、适用条件、例外情形、权利要求、表达不满(grievances)等。

To all to whom these presents shall come or may come—Greeting: Know ye that I, \_\_\_\_\_, of \_\_\_\_\_, for and in consideration of \_\_\_\_\_ Dollars, to me in hand paid by \_\_\_\_\_, do by these presents for myself, my heirs, executors, and administrators, remise, release and forever discharge \_\_\_\_\_ of \_\_\_\_\_, his heirs, executors, and administrators, of and from any and all manner of action or actions, cause and causes of action, suit, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, trespasses, damages, judgments, claims, and demands whatsoever, in law or equity, which against him I have had, now have, or which my heirs, executors, or administrators, hereafter can, shall, or may have, for or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the day of the date of these presents, excepting a claim as to \_\_\_\_\_. In witness whereof, etc.

## ► 2. 拘谨(Formal)

造成法律英语的拘谨而非大众化,原因多多,或出于传统的职业习惯,或出于显示自

己与众不同的才华,或出于维护自己的职业尊严和职业利益圈,这些造成了人们常常使用与众不同的词或表达方法。例如,通常情况下,我们说“come here”,而律师往往就用“approach the bench”;我们说“He has become a judge”,而法律界常用“He is on the bench”;我们说“trust each other”,而法学工作者常用“repose in one another”。凡此等等,请看下面的对照表:

通常用法	法学界用法
law teacher	law don
refer	advert
tell	advise
inform	apprise
begin or start	commence
show	demonstrate
building	edifice
bring about	effectuate
use	employ
unfriendly	inimical
work	employment
follow	ensue
for the same reason	by the same token

律师的此种做法招来各界的批评。美国诸多有关学者著书立说,在报刊上撰文要求法律界进行文字改革,呼吁他们“能用小字时不用大字”、“能用短字时不用长字”、“尽量用平实语言(plain English)”。

### ► 3. 费解(Tough)

造成法律英语难学、难懂的原因还有以下几个方面:

#### (1) 经常使用常用词汇的不常用含义

常用词汇

action

不常用含义

a lawsuit (either civil or criminal)

alien	to transfer property to another
assigns	person to whom a right or property is assigned
avoid	to make void
bill	a draft law
brief	a written statement submitted to a court
charge	a form of security
clean hands	without dishonest motives ( as in, "to have clean hands" )
color	apparent legal right ( as in, "under color of law" )
consideration	the main cause for a contract
counterpart	a duplicate of a document
covenant	to make a binding promise
cover	to purchase goods to replace those not delivered because of a breach of contract
damages	the compensation sought for a loss
demise	to lease
depose	to state under oath
demur	not to agree
discovery	disclosure of information by the opposing party in a law suit
distress	the seizure of goods as security for an obligation
draft	an order for payment of money
draw	to sign a draft
endorsement	the signing of one's name on the back of a document
equitable	relating to equity as opposed to law
finding	determination
garnish	to obtain satisfaction of a debt from a third party rather than from the debtor directly
hand	signature
honor	to pay or accept
instrument	a formal legal document
interest	a right or claim to property
issue	living descendants
majority	legal age ( as in, "to reach majority" )
master	an employer
motion	a formal request to a court to seek an order or rule
note	a written promise to pay a debt

of course	as a matter of right (as in, "as a matter of course")
paper	an instrument evidencing a financial obligation
party	a person engaged in a transaction; a litigant in a lawsuit
plead	to file pleadings
pray	request for relief addressed to a court
prejudice	a detriment to legal rights (as in, "without prejudice")
prescription	the acquisition of a right over a long period
presents	this formal legal documents (as in, "by these presents")
provided	upon condition (word used to create a proviso)
purchase	to acquire title to land by means other than descent
remove	to transfer to another court
said	mentioned above
save	to except
security	collateral
serve	to deliver legal papers
show	to make clear by evidence
specialty	a contract under seal
tender	an offer of money
tenement	estate in land
utter	to put something counterfeit into circulation
virtue	authority or reason (as in, "by virtue of")
waive	to relinquish

## (2) 经常使用古英语和中世纪英语词汇

古英语(old English)指公元450—1100年间流行的英语;中古英语(middle English)指公元1100—1500年之间常用的英语。

古英语和中世纪英语词汇	现代英文含义
aforesaid	mentioned above; referred to previously
hereafter	from now on; at some future time
hereby	by this document; by these very words
herein	in this thing (such as a document, section, or matter)
hereinabove	in the above thing (such as a provision or document, clause)
hereinafter	later in this document ;
hereof	of this thing (such as a provision or document)

pursuant to	in compliance with; in accordance with; under
thence	from that place; from that time
thereafter	afterward; later
therein	in that place or time
thereto	to that place, thing, issue, or the like
whereas	while by contrast; although
whereby	by which; through which; in accordance with which
whereof	of what; of which; of whom
whilst	during

### (3) 经常使用拉丁语词汇

在英国,人们把拉丁文看成是一个人深造的基础(the basis for advanced learning),对法科学生尤其如此。

#### 拉丁词汇

#### 英文含义

ab initio	from the beginning
ad hoc	for this purpose
ad litem	for the lawsuit
alibi	elsewhere (a defense that the accused was elsewhere when the offense was committed)
amicus curiae	friend of the court
bona fide	good faith
caveat emptor	let the buyer beware
ex parte	from one side
in re	in the matter of
inter alia	among others
prima facie	at first appearance
respondeat superior	let the superior answer (the employer is liable for the acts of his employees)
quorum	of whom (the minimum number of people required for a meeting)
scienter	having knowledge
situs	location
stare decisis	to stand by the decided matters (precedents must be followed)
sui generis	of its own kind
ultra vires	beyond the power

mutatis mutandis all necessary changes having been made

versus against

#### (4) 使用古法语及法律法语中的词汇

法律语言常使用一般词汇表中不会有的古法语及法律法语,或称“盎格鲁诺曼语”(Anglo Norman)词汇。

##### 古法语词汇

##### 含义相当的英语

action

lawsuit

alien

transfer (property)

assigns

assignees (those to whom something has been assigned)

champerty

offense of financing a lawsuit in exchange for a portion of the proceeds

chance-medley

sudden quarrel or right

chose in action

a thing in action, a right to recover a debt

color

reason, pretext

coverture

status and rights of a wife arising from marriage

delict

wrong, offense

demise

grant, lease, death

issue

progeny

laches

neglect to assert a right or claim

lien

an encumbrance on property for the payment of debt

malfeasance

wrongdoing

nonfeasance

not doing, inaction

parol

oral

petty

small, minor

save

except

seisin

possession of real property

specialty

a contract under seal

style

name

suffer

permit

tort

a wrong or injury

remise

to give up

#### (5) 专门术语的使用

• agency

• certiorari

• consideration

• domicile

• discovery

• double jeopardy

- easement
- jurisdiction in personam
- specific performance
- verdict
- rescision
- ex parte
- jurisdiction in rem
- statute of limitation
- will
- variance
- intestate
- principal
- surety
- recuse

### (6) “行话”(argot)的使用

“行话”是普遍适用于某一团体(如律师团体)的特定词汇或短语。

- abet
- adhesion contract
- circumstantial evidence
- grandfather clause
- issue of law
- negotiate instrument
- rescind
- accessory
- adverse possession
- foreclosure
- insider trading
- latent defect
- plea bargain
- without prejudice
- accomplice
- cause of action
- forum-shopping
- issue of fact
- legal fiction
- promissory estoppel

### (7) 经常使用官样文章用语

- Before me, the undersigned, a notary public
- By virtue of the authority vested in me
- From the beginning of the world to the date hereof
- In witness of these things
- In witness, this instrument is executed as of the day and year first written above
- In witness whereof I have hereunto set my hand and caused the seal of ... to be affixed
- Know all people by these presents
- To whom it may concern

## ► 4. 模糊 (Ambiguous)

法律人士常用模糊语言,或出于不愿明确地表达自己的立场与观点,或出于表示礼貌和对他人的尊重,或为不至于将自己的手脚捆住,诸如此等,视情况而定。

Unless this account is paid within the next ten days, it will be necessary to take appropriate action.

本句中的“take appropriate action”是“start legal proceedings”,“bring suit”,还是别的,不清楚。此外,常见的词或短语还有:adequate, all reasonable means, due care, due

process, improper, reasonable care/man/speed, satisfactory, serious misconduct, undue influence 等。

## ► 5. 冗长 (Lengthy)

法律英语多冗长,一旦遇见,不必方寸大乱,忍耐与专注乃是必备条件,先细读数遍,理出主句来。

If the Vendor fails to apply for and obtain any necessary extension of time for completing the Development under Sub-Clause (2) and fails to complete the Development by the expiry date of the Building Covenant Period, the Purchaser shall be entitled unless the completion of the sale and purchase herein has taken place, in addition to any other remedy that he may have, to give the Vendor notice in writing in that behalf to rescind this Agreement and upon service of such notice, this Agreement shall be rescinded within 7 days thereafter and the Vendor shall repay to the Purchaser all amounts paid by the Purchase hereunder together with interest thereon at the rate of 2% per annum above the prime rate specified by Hong Kong and Shanghai Banking Corporation Limited from time to time the date or dates on which such amounts were paid to the date of repayment, the repayment of such amounts and interest to be in full and final settlement of all claims by the Purchaser against the Vendor hereunder.

Mellinkoff 所说的“赘言”(tautology),即通过使用双式词(doublets)、对句(couplets)以及三联轴(triplets)的表达方式反复地表达一个意思或使用同义词。那么为何法律语言显得冗长?对此存在多种解释。

(1) 在英语发展过程中,经常出现两种或多种语言并存的情况。与英语有最密切联系的语言是拉丁语和法语,而拉丁语实际上在法律语言中处于一种权威性的地位。在法律语言中,拉丁语垄断了13世纪和14世纪两个世纪,此后拉丁语依然作为法律的书面语言被使用着。甚至在法律法语的使用最为盛行的14世纪、15世纪,拉丁语依旧在法律语言中被广泛地使用。在14世纪,法语成为英国法律的通用语言,并一直作为法律语言被使用至15世纪的末期。



源自拉丁语	古英语
doner	giver
homicide	manslaughter
testify	witness
testament	will

此外还有:

- able (古法语) and willing (古英语)
- acknowledge (古英语) and confess (古法语)
- act (法语或拉丁语) and deed (古英语)
- bills (古法语) and notes (古英语)
- breaking (古英语) and entering (法语)
- conjecture (中古法语或拉丁语) and surmise (中古法语)
- deem (古英语) and consider (古法语)
- depose (古法语) and say (古英语)
- encumbrance (古法语) or burdens (古英语)

在这些语意重复的词语中,一些是为了进一步阐明词义,一些是为了强调,而另一些则是为了符合当时使用两种语言的习惯。

(2) 语意重复的做法另外是出于头韵的考虑(the power of alliteration)。

“alliteration”是通过重复使用一个语音(一般来说是辅音)以使赘言式的语意重复保留在法律语言之中,如:

- aid and abet
- to have and to hold
- part and parcel
- safe and sound
- remise, release and forever quit claim
- rest, residue and remainder

(3) 大量使用近义词,如:

- able and willing
- annul and set aside
- authorize and empower