

涉外法律文书写作

LEGAL WRITING

熊云英 任小军 编著

Legal Writing
Legal Writing



中国政法大学出版社

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序

2011年12月,教育部和中央政法委员会联合发布了《关于实施卓越法律人才教育培养计划的若干意见》,并于2012年公布了包括北京大学、中国人民大学、清华大学和中国政法大学在内的首批22个涉外法律人才教育培训基地,旨在“培养一批具有国际视野、通晓国际规则”的应用型、复合型法律人才。

四川睿桥律师事务所热心公益,希望为培养卓越涉外法律人才贡献自己的一份力量,因此花费相当的时间和精力编著了《涉外法律文书写作》一书。该书体例别具特色,内容精炼,具有较强的专业性和实用性,源自于涉外法律实务又经过作者深度消化和高度提炼,是真正的优等“制成品”。看得出来,书中的字字句句均是作者的专业知识、经验和心血的结晶。本书除适用于从事或拟从事涉外法律实务工作的人员外,还适用于从事或拟从事法律英语翻译工作的人员,可作为人才培养教材、工具书和自学材料。

《涉外法律文书写作》一书的两位作者,一位是四川睿桥律师事务所涉外部部长熊云英律师,她在涉外法律服务领域具有深厚的理论功底和丰富的实战经验,具有较高的涉外法律服务水平,是具有英语和国际法学的复合专业背景的高端复合型人才。熊云英律师担任四川睿桥律师事务所涉外部部长已数年,在此之前已编著出版两本法律英语书籍。另一位作者是四川睿桥律师事务所主任任小军律师,曾就读中国政法大学法学院博士班,是我的学生。我为学生及其同仁创作的作品的问世感到十分高兴。我祝贺作者已有的成果问世,并期待作者继续努力,为我国尚处在起步阶段的卓越涉外法律人才培养作出更大的贡献,故乐为之序。



中国政法大学 教授/博士生导师
国际法学院分党委书记

2013年6月

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第一章 各类合同之通用条款

一、合同首部

(一) 合同名称及编号

英文的合同名称一般使用 $\times \times$ agreement 或 $\times \times$ contract。例如, lease agreement (租赁协议), loan agreement (借款协议), operating agreement (经营协议), purchase/sales contract (买卖合同), trust agreement (信托协议), supply agreement (供货协议), trademark license agreement (商标许可协议), distribution agreement (经销协议), subscription agreement (股份认购协议), manufacturing service agreement (制造服务协议), employment contract (劳动聘用合同)。此外, 部分英文合同的名称较长, 例如, Employee Inventions and Proprietary Rights Assignment Agreement (员工职务发明创造及专有权利转让协议)。

合同编号不是必需的。如有, 则可表述为 “Contract No. _____”。

(二) 合同当事方及合同订立时间等事项

与中文合同中将合同当事方简称为甲方、乙方、丙方等不同, 英文合同中鲜见 Party A, Party B 这样的说法, 一般是 (1) 依据各合同当事方的地位来指称各方, 例如买卖合同中的 seller/buyer (卖方/买方), 许可合同中的 licensor/licensee (许可人/被许可人), 租赁合同中的 lessor/lessee (出租人/承租人), 劳动聘用合同中的 company/employee (用人单位/员工); 或 (2) 采用合同当事方的字号或名称缩写来指称该当事方。

下面以商标许可协议为例, 详述英文合同中合同当事方的表述方式。

☞ 示例一:

This Trademark License Agreement (“Agreement”) is made and entered into

by and between XX Co., Ltd (“Licensor”) and YY Co., Ltd (“Licensee”) .

虽然“以下(简)称”在英文中的对应表述是“hereinafter referred to as”,但是,表达合同当事方的简称时,如上所述,通常直接在合同当事方后面的括号中写明简称,并使用双引号。

如果合同有三方以上当事人,则可表述为 This Trademark License Agreement (“Agreement”) is made and entered into by and among XX Co., Ltd (“XX”), YY Co., Ltd (“YY”), and ZZ Co., Ltd. (“Licensee”)。

☞ 示例二:

XX Co., Ltd (“Licensor”) and YY Co., Ltd (“Licensee”) agree as follows:

上例不仅写明了合同当事方,还包含“甲、乙双方达成如下协议:”的内容。

☞ 示例三:

This Trademark License Agreement (“Agreement”) is made and entered into in Shanghai as of this 5th day of May, 2012 by and between XX Co., Ltd, a company organized and existing under the laws of the People’s Republic of China having a principal office at _____, telephone number of _____ and legally represented by _____ (“Licensor”) and ...

上例包含合同各当事方的名称、地址、电话、法定代表人,以及合同的签约日期和签约地点等信息。

此外,如果需要写明生效日期,则表述为“...is entered into and made effective as of March 5, 2012 by and between...”。

关于地址,常用的表述(虽然含义可能略有差异)还有“having its registered office at _____”,“with a place of business at _____”,“with its registered office at _____”,“with an office at _____”,及“with an address at _____”等。

(三) 序言

☞ 示例一:

WHEREAS,

This Agreement intends to set forth a set of basic conditions for the business

relations between the parties hereto. XX desires to provide YY manufacturing services and YY desires to purchase from XX the products contracted hereby. (鉴于, 本协议拟为双方的业务关系制订一套基本的运作条件。XX 愿意为 YY 提供生产制造服务, YY 愿意从 XX 处采购本协议约定的产品。)

NOW THEREFORE, XX and YY hereby agree as follows: (因此, XX 和 YY 达成如下协议:)

上例中, “XX and YY hereby agree as follows” 也常表述为 “The parties hereto (hereby) agree as follows” 或 “It is agreed by the parties hereto as follows”。

└ 示例二:

In accordance with the Contract Law of the P. R. C. and other applicable laws and regulations, in consideration of mutual covenants, and in order to clarify rights and obligations of both parties under this lease, the parties hereto agree as follows: [根据《中华人民共和国合同法》及其他相关法律法规的规定, 为明确出租方与承租方的权利义务关系, 经双方协商一致, 达成如下协议:]

└ 示例三:

In consideration of mutual covenants and regarding XX's engagement of YY as an independent contractor for the specific project of designing and developing a requested website for the purpose of helping establishing XX's image, strengthening advertising and expanding sales channels, the parties hereto agree as follows: [XX 与 YY 双方协商一致, 就 YY 向 XX 提供相关的网站建设, 以帮助 XX 树立自身形象, 扩大宣传, 拓宽销售渠道事宜, 达成如下协议:]

└ 示例四:

In order to clarify rights and obligations of the parties hereto with respect to supply and use of electricity contracted hereunder and to ensure safe, economical, reasonable and orderly power supply and use thereof, and in accordance with the Contract Law of the P. R. C., the Electricity Law of the P. R. C as well as other applicable laws, regulations and rules, the parties hereto hereby agree as follows: [为明确甲乙双方的权利和义务, 保证安全、经济、合理、有序地供电和用电, 根据

《中华人民共和国合同法》、《中华人民共和国电力法》及其他相关法律、法规和规章的规定，经甲乙双方协商一致，达成如下协议：]

二、定义条款

└ 示例：

As used herein, the terms identified below shall have the following meanings:
“XX” shall mean...

常用的与 “As used herein, the terms identified below shall have the following meanings” 类似的表述有：（1）The terms and phrases, unless the context provides otherwise, shall have the following meanings; （2）As used throughout this Contract, the following terms shall have the meanings as set forth below unless otherwise indicated; （3）Unless the context otherwise requires, the following words and phrases contained in this Contract and /or in the Appendices shall have the meanings given to them below。

常用的与 “‘XX’ shall mean ...” 类似的表述还有：（1）“XX” means... (unless expressly stated otherwise); （2）“XX” has the meaning as set forth in Article ____ ; （3）“XX” is set out in Schedule ____ ; （4）“XX” is attached as Schedule ____ ; （5）“XX” is as defined in Article ____ .

三、合同期限

（一）期限

└ 示例一：

The term of this Agreement shall commence on ____ , 2013 and expire on December 31, 2015. In the event that a party intends to terminate this Agreement prior to the expiry date thereof, that party shall give the other party 30 days' written notice of his intention of terminating the Agreement, and the Agreement will be terminated upon mutual agreement of the parties thereafter. [本协议有效期自2013年__月__日起，至2015年12月31日止。一方要求提前终止协议的，应提前30日向对方提出书面要求，双方协商一致后，可提前解除本协议。]

☞ 示例二：

This Agreement shall become effective upon signature and/or seal of both parties and shall continue in force and effect until _____, 2013. This Agreement may be renewed in case that the parties hereto mutually so agree upon expiration of the term of this Agreement. [本协议自双方签字和/或盖章之日起生效, 协议有效期至2013年____月____日止。协议期满后, 经双方协商一致可续签本协议。]

(二) 期限的续展

☞ 示例一：

The term of this Agreement shall be one (1) year and will automatically renew on anniversary of the effective date hereof on an annual basis unless otherwise terminated by either party upon written notice to the other party at least ninety (90) days prior to the expiration of the then-current term. [本协议有效期为1年。除非合同一方当事人在距离到期日至少90天前书面通知另一方当事人不再续期, 否则本协议期限将自动依次延展1年。]

☞ 示例二：

If the Distributor is in compliance with all requirements of this Agreement, the Distributor shall have the option to request to extend the Term and shall notify the Company in writing whether it will exercise such option at least 3 months prior to the expiration of the Term. The Company shall notify the Distributor in writing of their approval to extend the Term. The approval for extension will be contingent upon both parties agreeing on sales and performance goals for the extension term. [经销商在协议期限内未出现违反本协议的情形的, 有权要求续展协议期限, 但需于距离协议期限届满之日至少三个月前书面通知公司其是否行使该项权利。公司同意续期的, 应书面通知经销商。本协议双方未能就续展期限内的销售额和业绩目标达成一致的, 公司有权撤销前述关于协议续期的书面同意。]

四、合同的终止与解除

(一) 合同终止与解除的情形

└ 示例一：

This Agreement terminates upon the occurrence of any of the following events:
(a) a party is declared bankrupt; (b) a party is involved in legal proceedings or seeks protection pursuant to any bankruptcy or insolvency law; (c) a receiver or similar officer is appointed over any of the assets of a party; (d) a party dissolves; or (e) a party compromises and makes any voluntary arrangement with its creditors.
[出现以下情形之一的, 本协议终止: (a) 一方破产; (b) 一方涉诉或依法申请破产保护; (c) 一方的任何资产被接管; (d) 一方解散; 或 (e) 一方与债权人和解或达成任何主动偿债安排。]

└ 示例二：

A party may terminate this Agreement upon the occurrence of any of the following events:

(a) the business license of the other party is revoked or the other party is dissolved or bankrupted;

(b) any of the representations and warranties made by the other party is not true;

(c) if an order is entered by any court approving an involuntary petition seeking reorganization of the other party, or appointing a liquidator, receiver, trustee or custodian or appoints a liquidation committee for any substantial portion of its assets or business;

(d) if for any reason the other party voluntarily or involuntarily suspends transaction of its business or ceases to function as a going concern;

(e) if there is an adverse change in the financial position of the other party so as to jeopardize the conduct or operations of its business as determined by the terminating party in its sole discretion; or

(f) change in ownership of the other party.

[一方出现下列情形之一的, 另一方可解除本协议:]

- (a) 一方被吊销营业执照、解散或破产的；
- (b) 一方做出的任何陈述和保证为虚假陈述和保证的；
- (c) 任何法院作出裁决，批准对一方进行重组的申请或指定清算人、接管人、信托人或监管人，或为其任何实质部分资产或业务指定清算委员会的；
- (d) 一方由于某种原因主动或被动终止经营活动或停止日常活动的；
- (e) 解除合同的一方以其独立判断认为，另一方的财务状况发生不利变化以致威胁到该方的经营活动的；或
- (f) 一方的所有权发生变更的。]

☞ 示例三：

Licensor shall have the right, at its option, to terminate this Agreement and license granted hereunder by notice in writing to Licensee provided that:

- (a) Licensee has a receiver appointed of the whole or any substantial part of its assets or if any order is made or a resolution passed for the winding up of Licensee;
- (b) Licensee becomes insolvent or makes an assignment for the benefit of creditors or any arrangements pursuant to bankruptcy law or if Licensee discontinues business or ceases to do business, other than due to a change of company name;
- (c) Any drafts, notes or checks drawn or endorsed by Licensee under this Agreement have been dishonored other than by bank error; or
- (d) Licensee breaches any clause of this Agreement and fails to remedy such breach within 30 days after receipt of written notice from Licensor requiring remedy of that breach.

[出现下列情形之一的，许可人有权自行选择书面通知被许可人终止本协议及本协议项下的授权许可：

- (a) 被许可人的行为导致有权机关指定他人接管其全部或任何实质部分财产，或被许可人被责令终止营业或通过决议决定终止营业；
- (b) 被许可人资不抵债，或为债权人利益进行财产转让或依据破产法的规定作出任何安排，或被许可人停止开展经营活动或歇业（但公司名称变更后不再以原公司名称开展经营活动的除外）；
- (c) 本协议项下由被许可人签发或经被许可人背书的汇票、本票或支票被拒付，但因银行方面的错误而被拒付的除外；或

(d) 被许可人违反本协议的任何条款并且未能在收到许可人要求其采取补救措施的书面通知之日起 30 日内对该违约行为进行补救。]

☞ 示例四:

Either party may terminate this Agreement immediately upon written notice to the other party if, following execution of this Agreement, there isn't any project during a period of three (3) months. This Agreement shall also terminate on the first occurrence of any of the following events:

- (a) bankruptcy, insolvency or suspension of payment of any party.
- (b) breach by any party of any of the terms and conditions set forth herein.
- (c) mutual agreement by the parties.

[如果自本协议签订之日起三个月内没有任何项目,任何一方都可以书面形式通知另一方立即终止本协议。出现下列情形之一的,本协议亦终止:

- (a) 任何一方发生破产、资不抵债或暂停履行付款义务的。
- (b) 任何一方违反本协议规定的任何条款(和条件)的。
- (c) 经双方一致同意的。]

(二) 合同终止与解除的效力

☞ 示例一:

Any termination of this Agreement shall be without prejudice to any remedy of the terminating party for the recovery of any money then due to it under this Agreement or in respect to any antecedent breach of this Agreement, and without prejudice to any other right of the terminating party including, without limitation to, damages for breach to the extent that the same may be recoverable, costs and expenses (including attorney's fees) incurred by the terminating party in enforcing its rights hereunder.

[本协议终止的,不影响终止合同的一方依据本协议的规定要求支付到期费用或就在先发生的违约行为主张损害赔偿的权利,也不影响该方所享有的其他权利,包括但不限于依法可主张的违约损害赔偿以及终止合同的一方行使本协议项下的权利所产生的开支和费用(包括律师费)。]

☞ 示例二：

Upon termination of this Agreement:

(a) Supplier's rights granted to it under this Agreement shall immediately terminate, and Supplier shall immediately discontinue all use of the Tools and immediately cease to manufacture, market or sell the Products;

(b) Supplier shall, if Buyer has paid in full the costs relating to the manufacture of the Tools, (i) return to Buyer all the Tools; (ii) return to Buyer and/or destroy (including erasure from all computer memories under its control), as Buyer may direct, all materials in any medium (both originals and copies) embodying the Tools and (iii) certify in writing to Buyer, within ____ days following Buyer's request, that all such materials have been returned or destroyed;

(c) Supplier shall render an immediate accounting of all amounts due or to become due hereunder in respect of the sale by Supplier of the Products to Buyer and Buyer shall pay such amounts in accordance with this Agreement. Any contested amounts shall be set off against the final payment and shall be held until agreement is reached between the Supplier and Buyer;

(d) the obligations of Buyer under this Agreement shall cease forthwith;

(e) each party hereto understands that the rights of termination hereunder are absolute. Neither party shall incur any liability whatsoever for any damage, loss or expenses of any kind suffered or incurred by the other party (or for any compensation to the other party) arising from or incident to any termination of this Agreement by such party which complies with the terms of the Agreement whether or not such party is aware of any such damage, loss or expenses; and

(f) in the event of any termination, Buyer may elect to continue or terminate any order then pending. Where Buyer has given 3 months' termination notice pursuant to this Agreement, all outstanding orders as of the date when the termination notice is given shall remain valid and Buyer shall continue taking delivery of the Products so ordered.

[本协议终止后：

(a) 本协议授予供应商的权利即刻终止，供应商应立即停止使用工具并

立即停止生产、经销和销售相关产品；

(b) 如果买方已就工具的生产全额支付了相关费用，则供应商应 (i) 将所有工具返还买方；(ii) 按买方的指示和要求，向买方返还并/或销毁（包括从其控制的计算机内存中删除所有相关资料）以任何形式存在的包含工具的所有材料（包括原件和复印件）；并且 (iii) 于买方提出要求之日起____日内向买方提交关于已返还或销毁前述所有材料的书面保证；

(c) 对于供应商售予买方的产品，供应商应立即提供本协议项下所有到期或将到期款项的账目，买方应根据本协议的相关规定支付相应款项。买方提出异议的款项应从最终付款金额中扣除，暂不予支付，直至供应商和买方达成相关协议；

(d) 买方在本协议项下承担的义务立即终止；

(e) 协议各方均认识到，本协议所规定的解约权是一项绝对权利。任何一方依据协议规定行使解约权而另一方因此遭受任何损害、损失或产生任何费用的，无论解约方是否知晓该损害、损失或费用，解约方均不对该损害、损失或费用向另一方承担任何赔偿（或补偿）责任；且

(f) 协议被解除的情况下，买方有权选择继续保留或终止尚未完成的订单。如果买方已依据本协议的规定提前三个月通知解除协议，则发出解约通知日存在的所有尚未完成的订单均应为有效订单，买方应继续接收该订单项下的产品。]

五、陈述与保证

（一）双方陈述与保证

└─ 示例一：

Each party hereto represents and warrants the following: (a) it is a corporation duly organized, validly existing and in good standing under the laws of its jurisdiction of incorporation and has the full right, power and authority to enter into this Agreement and to perform all of its obligations hereunder; (b) neither the execution, delivery nor performance of this Agreement by it shall, with or without the giving of notice or passage of time, or both, conflict with, or result in a default or loss of rights under, any material agreement or understanding to which it or any of its affiliates is a party