

教育部推荐教材

大学专业英语系列教材

# 法学专业 英语教程

(第三版·下)

ENGLISH

主编 赵建 夏国佐



 中国人民大学出版社

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主编 赵建 夏国佐

Faxue Zhuanye Yingyu Jiaocheng (Di-san Ban · Xia)

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## 第三版前言

《法学专业英语教程》是一套专供具有大学英语四级水平的法律专业学生使用的英语教材。它较全面系统地介绍美国民商法的基本情况，又提供了案例阅读，形成了一套精泛读相结合、配有各种口笔头练习的易于操作的全新的法学英语学习体系。使用本教材的学生在循序渐进提高英语水平的同时，可了解美国法律的概貌，掌握各种法律概念的英语表述。正因为此，它自1999年问世以来颇受广大师生的好评。2007年首次修订，更新了部分内容。然而，在过去的五年中，技术发展突飞猛进，经济跌宕起伏变幻莫测，社会变革的深度和广度前所未有，这些变化必然也带动了法律的发展。为使这套教材在内容上紧跟美国法律发展的脚步，出版社提议再次修订，编者本着对使用者负责的态度，欣然接受了这一任务。

本次修订的重点是案例阅读部分。旧版的案例大多在内容上紧扣课文，扩充和诠释了课文内容，但其中一些案例年代久远，对学生的吸引力不大。本次修订，保留了原版的经典案件，但作了删节，使之更简练。同时又增添了不少近五年的新案例，使21世纪以来的案例达到三分之一以上。新增的案例，有涉及轰动全美的“庞氏骗局”的刑事案 *United States v. Madoff*，诠释萨班斯-奥克斯利保护告密者条例的案例 *Tides v. The Boeing Company*，权衡无过错产品质量索赔和保护新兴产业之间的利弊的 *Russell Bruesewitz v. Wyeth LLC*，界定和区分不可申请专利的科学发现和可申请专利的技术成果的 *Mayo Collaborative Services v. Prometheus Laboratories, Inc.* 等。新选的案例不少涉及电信、生物技术等新兴产业和金融保险等当今的热门行业，案例的当事方有不少是学生熟悉的跨国公司，这样必然会增加学生阅读案例的兴趣。更重要的是，案件解决的争议也是我国当今法律界面临的问题，判决意见书多数出自联邦最高法院的法官，他们透彻的分析，也将开阔学生的视野和思路，可以帮助他们为日后从事法律工作打下更为扎实的基础。

由于课文是介绍经久不变的法律基本原则的，除最后一章公司法有新添内容外，其他改动较少。课文的注解和案例阅读中的问题及答案，这次也作了不少修改，使表达更加简练明晰。

编者长期从事英语和法律英语教学，曾赴美国杜克大学法学院进修法律，又有



多年在外国律师事务所从事法律文件翻译的经验，深知学习法律英语的艰辛，更体会到掌握好法律英语对中国改革开放的意义以及对法律工作者自身在拓展业务上的帮助。因此，愿尽自己微薄之力，将本教材修订得更好。但由于能力所限，疏漏错误在所难免，敬请使用者批评指正。

相信经修订的《法学专业英语教程》在保持原有特色的同时更趋完美、更受广大使用者的欢迎。

编者

2012年5月



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# Unit Four

## Negotiable Instruments and Secured Transactions

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### **Lesson One**

Commercial Paper and the Concept of Holder in Due Course

### **Lesson Two**

Check Collection and Allocation of Liability

### **Lesson Three**

The Bank and Its Customer: Rights, Duties and Liabilities

### **Lesson Four**

Secured Transactions

### **Cases for Supplementary Reading**



# Lesson One

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## Commercial Paper and the Concept of Holder in Due Course



# Text



The term commercial paper describes certain types of negotiable instruments that fall under Article 3 of the UCC. These instruments can move freely in trade and commerce as a substitute for money. They developed because of the commercial need for something that would be easily transferable and readily acceptable in lieu of money.

To understand the law of commercial paper, a grasp of the following concepts is essential:

**Types of Negotiable Instruments** Basically, there are two types of negotiable instruments, namely, the promissory note and the draft. A note is a two-party instrument. It is the maker's promise to pay to the order of the named payee<sup>1</sup> or to bearer at some time in the future. A certificate of deposit (CD) is a note made by a bank, because it is the bank's promise to repay a deposit of funds with interest on a certain date. A draft is a three-party instrument. It is an order of the drawer to a third party (drawee-payor) for him to pay to the order of payee, or to bearer, on demand or at a fixed or determinable future time. A draft presupposes a debtor-creditor relationship between the drawer and the drawee.<sup>2</sup> It is an order of the creditor (drawer) to the debtor (drawee) for the latter to pay to the payee or to his order. The check is the most common type of commercial paper. It is a demand draft drawn on the bank by which the drawer orders his bank to pay to the payee. A check drawn by a bank upon itself is a cashier's check.<sup>3</sup>

**Order Papers and Bearer Papers** Negotiable instruments are also known as either order papers or bearer papers. If an instrument is made payable to the order of a person identified with reasonable certainty, it is an order paper. If an instrument is payable to bearer, it is a bearer paper. A bearer paper is payable to whoever bears it.

**Holder** A holder of a negotiable instrument is one in possession of a bearer paper, or one in possession of an order paper which is drawn, issued, or indorsed to him or to his order.

**Negotiability** For an instrument to be negotiable the following statutory requirements for negotiability must be met: (1) It must be in writing and signed by the maker or drawer; (2) It must contain a promise or order; (3) The promise or order must be unconditional, i. e., it should not be controlled by the terms of some other agreement; (4) It



must be a promise or order to pay in money; (5) Sum should be certain, that is, the value of the instrument at any time during the term of the paper can be definitely determined; (6) It must be payable on demand or at a definite time; (7) It must be payable to order or bearer. The words “order” and “bearer” are the magic words of negotiability.<sup>4</sup> They express the maker or drawer’s intention to make the instrument negotiable. If an instrument does not contain either of these words, it may be a valid and enforceable contract, but it is non-negotiable and does not fall under Article 3 of the UCC.

**Negotiation** Even if an instrument satisfies all the requirements of negotiability above, it has to be properly negotiated to retain its negotiability after a transfer. Negotiation means transfer of an instrument by a person other than the issuer in such a way that the transferee becomes a holder.<sup>5</sup> While bearer papers can be negotiated by delivery alone, negotiation of order papers, on the other hand, requires both indorsement and delivery.

**Indorsement** Indorsement is the act of transferring title to a negotiable instrument by having the temporary owner write his name on the back of the document. Indorsement may also refer to the signature of the temporary owner written on the back of an instrument with or without additional words or statements. When the indorsement consists only of the indorser’s name signed on the instrument, it is called a blank indorsement. Order papers that are indorsed in blank become bearer papers payable to bearer. When the indorser wants to specify the indorsee, he includes the words “pay to the order of (the specified indorsee)” in the indorsement and such an indorsement is called a special indorsement. If a paper is indorsed specially after a blank indorsement, it reverts to its status as an order paper, and an indorsement is required for further negotiation. When the indorser wants to impose some restriction on the use of the instrument, he may include the restriction or condition in the indorsement and such an indorsement is called a restrictive indorsement.

To facilitate the flow of commerce and to achieve the goal of negotiability, substantial protection and assurance of payment must be given to any person to whom the paper might be negotiated. Thus, Article 3 of the Code provides that if a holder of a negotiable instrument is a holder in due course, he takes the instrument free from all the claims and personal defenses to the instrument<sup>6</sup>.

To qualify as a holder in due course, the transferee must meet the following requirements. (1) He took the instrument from a holder, i. e., from one who was in actual possession of a paper properly drawn, issued or indorsed to him or to his order, or to bearer. (2) He took the instrument for value<sup>7</sup>, which means that he had rendered performance for the transfer of the instrument. A mere promise for performance is consideration but



does not constitute value. (3) He took the instrument in good faith. If a person takes an instrument under circumstances that clearly indicate a defense to the instrument, he does not take it in good faith. (4) He took the instrument without notice of its defect, namely, without knowledge of any claim or defense to the instrument, that it was overdue or had been dishonored.

If a person meets all these requirements, he is a holder in due course. This means that though he is still subject to the real defenses on the instrument, he is protected against the claims and personal defenses relating to the parties with whom he has not dealt<sup>8</sup>. Personal defenses usually relate to the transaction resulting in the transfer of the instrument and include failure of consideration, breach of warranty and unconscionability. Real defenses involve more serious matters that go to the very existence of the instrument. They include forged signature of the maker or drawer, material alterations, illegality and lack of capacity.

The concept of negotiability can be further explained by noting the difference between the assignment of a contract and the negotiation of a negotiable instrument. Assume that a dealer owes a manufacturer \$ 1,000. The dealer signed an IOU but later found the product he received from the manufacturer defective. If a third party such as a bank purchased the IOU from the manufacturer, it would be subject to the dealer's defense of failure of consideration. The bank, as assignee, would secure no better right against the dealer than the original right held by the manufacturer, the assignor. The bank therefore could not collect \$ 1,000 from the dealer, at least not in full.

In this example, assume that the evidence of the debt is not a simple IOU but a promissory note given by the dealer to the manufacturer and thereafter properly negotiated to the bank. If the bank is a holder in due course, it is in a position superior to that which it would occupy as an assignee<sup>9</sup>. It has better rights because it is free of the personal defenses that are available against the manufacturer. The dealer, therefore, cannot use the defense of failure of consideration and the bank can collect the \$ 1,000.

## New Words

negotiable /ni'gəʊʃiəbl/ *a.* 可流通的

instrument /'instrumənt/ *n.* 票据

transferable /træns'fɜ:rəbl/ *a.* 可转让的

lieu /liu:/ *n.* (古) 位置, 替代

promissory /'prɒmɪsəri/ *a.* 约定支付的,  
期票的

note *n.* 票据, 尤指期票

payee *n.* 受款人



bearer /'beərə/ *n.* 持有人  
 certificate /sə'tɪfɪkeɪt/ *n.* 证明书  
 deposit /dɪ'pɒzɪt/ *n.* 存款  
 draw *vt.* 开具, 签发 (汇票、支票)  
 drawer *n.* 开票人  
 drawee /drɔ:'i:z/ *n.* 受票人  
 payor *n.* 付款人  
 presuppose /ˌpri:sə'pəʊz/ *vt.* 预先假定, 推测; 以……为先决条件  
 holder *n.* 持票人  
 indorse /ɪn'dɔ:s/ *vt.* 在背面签字  
 statutory /'stætjətəri/ *a.* 法定的  
 negotiability /niˌgəʊfɪə'bɪləti/ *n.* 流通性  
 negotiation /niˌgəʊfɪ'eɪʃn/ *n.* 流通, 符合

商法的票据转让, 议付  
 transferee /ˌtrænsfə'ri:/ *n.* 受让人  
 indorsement (endorsement) /ɪn'dɔ:smənt/  
*n.* 背书  
 revert (to) /rɪ'və:t/ *vi.* 回复 (到), 归还  
 facilitate /fə'sɪlɪteɪt/ *vt.* 使变得 (更) 容易; 促进  
 unconscionability /ˌʌnˌkɒnʃənə'bɪləti/  
*n.* 不公平  
 forge /fɔ:dʒ/ *vt.* 伪造 (货币、文件), 假冒 (签名)  
 alteration /ˌɔ:ltə'reɪʃən/ *n.* 修改, 涂改  
 illegality /ˌɪlɪ:'gælɪti/ *n.* 非法  
 IOU (“I owe you” 的谐音) 借据

## Phrases & Expressions

holder in due course 善意持票人  
 in lieu of 代替  
 promissory note 期票, 本票  
 certificate of deposit (CD) 存折  
 payable to (the) order (of) 根据 (……的) 指令支付的, 记名的  
 payable to bearer 向持有人支付的, 不记名的  
 payable on demand 见票即付 (的)  
 demand draft 即期汇票  
 cashier's check 银行本票

order paper 记名票据, 指令性票据  
 bearer paper 无记名票据  
 blank indorsement 空白背书  
 indorsed in blank 经空白背书的  
 special indorsement 特殊背书  
 restrictive indorsement 加限制的背书  
 personal defense 相对抗辩 (不能用以对付善意持票人的抗辩)  
 in good faith 诚信地  
 real defense 绝对抗辩 (可用以对付善意持票人的抗辩)

## Notes

1. to the order of the named payee: 按指明的受款人的指令。
2. A draft presupposes a debtor-creditor relationship between the drawer and the drawee:





- 汇票的前提是开票人和付款人之间的债务债权关系。
3. A check drawn by a bank upon itself is a cashier's check: 银行开具的由其自身支付的汇票是银行本票。
  4. The words "order" and "bearer" are the magic words of negotiability: "指令"和"持有人"是使票据具有流通性的奇妙词语。
  5. Negotiation means transfer of an instrument by a person other than the issuer in such a way that the transferee becomes a holder: 议付是指非开票人转让票据并使受让人成为持票人的过程。
  6. ... he takes the instrument free from all the claims and personal defenses to the instrument: 他取得票据不受任何对票据的权利要求和相对抗辩的影响。所谓相对抗辩,是指非因票据本身的瑕疵而是因票据各方当事人在产生该票据的交易中的权利和义务而引起的抗辩。
  7. He took the instrument for value: 他有偿取得票据。在此,"value"不同于"consideration",前者指已作出的履行,后者包括履行承诺。在学习商业票据法时,我们必须记住它源于合同法但又有其特殊性,所以票据交易中类似于合同交易的概念有不同的名词,合同法下的转让称为"assignment",而符合票据法的转让则称为"negotiation",合同中的承诺必须有"consideration",而为取得票据所付的对价则称为"value",合同权利的受让人是"assignee",而经"negotiation"后的票据权利人被称为"holder"(持票人)。
  8. ... he is protected against the claims and personal defenses relating to the parties with whom he has not dealt: 他不受与他未曾有过交易的票据当事人的主张和相对抗辩的影响。如A开票给B,该票经C和D之手后最后流通到E。如E是善意持票人,他将不受A、B、C三人的抗辩或主张的影响。
  9. ... it is in a position superior to that which it would occupy as an assignee: 它(银行)将处于优于合同权利受让人的地位。

## Word Study

### 1. in lieu of 代替

People who can not write often use an inked thumbprint in lieu of signature.

### 2. presuppose *vt.* 预先假定,推测;以……为先决条件

All your plans presuppose that the plane will arrive on time. What if it does not?

An effect presupposes a cause.