

# 国际商法

## 基础教程 (英文版)

INTERNATIONAL  
BUSINESS LAW  
—AN INTRODUCTION  
(IN ENGLISH)

编 著  
Kyle Usrey  
袁 传 有



外教社

上海外语教育出版社

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## 基础教程

(英文版)

上海对外经贸大学  
以培养国际商务人才  
为目标的教学计划  
精心编写

主编  
Ryder Channing  
吴德海



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丁 瑾 燕



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## 图书在版编目(CIP)数据

国际商法基础教程 = International Business Law /  
(美)厄斯雷(Usrey, K. B.), 袁传有编著. - 上海:  
上海外语教育出版社, 2001  
ISBN 7-81080-240-2

I. 国… II. 厄… III. 国际商法-教材-英文  
IV. D996.1

中国版本图书馆 CIP 数据核字(2001)第 050388 号

出版发行: 上海外语教育出版社

(上海外国语大学内) 邮编: 200083

电 话: 021-65425300 (总机), 65422031 (发行部)

电子邮箱: bookinfo@sflap.com.cn

网 址: <http://www.sflap.com.cn> <http://www.sflap.com>

责任编辑: 薛蓓康

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印 刷: 常熟市印刷八厂  
经 销: 新华书店上海发行所  
开 本: 850×1168 1/32 印张 20 字数 516 千字  
版 次: 2001 年 12 月第 1 版 2001 年 12 月第 1 次印刷  
印 数: 3 200 册

---

书 号: ISBN 7-81080-240-2 / F · 001

定 价: 27.50 元

本版图书如有印装质量问题, 可向本社调换

## ***PREFACE***

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This book is about International Commercial Law, sometimes called International Business Law or International Economic Law. The purpose of this book is to give the student an opportunity to learn in English about several topics that are important in international business. The focus of the book is primarily on how international law affects people involved in transactions across international borders. Important international statutes and treaties, as well as widely accepted private international law agreements, are provided as appendices in the back of the book. International law is constantly changing and evolving.

Legal systems in foreign nations differ as do political frameworks within those nations. A businessperson doing business in a foreign country will subject him or her to the laws of the foreign nation when conducting business in another country. Therefore, a person must become familiar with the laws that govern his or her business. Although it would be impossible to put all the business laws of every country in the world into one book, this book provides an overview of American law (with its history of English common law) as an example of how one country has provided a

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strong foundation for commercial law and international trade.

The study of international commercial law is often confusing because there are no single uniform international laws governing all business transactions, nor is there just one single organization that is responsible for providing international business laws. Often the subject matter of international commercial law has its own vocabulary, which the student may find to be much different from the vocabulary he or she has learned in prior English classes. Additionally, the concepts of international law can be intimidating to someone who has no prior experience in the field. This book is designed to make the study of International Business Law as simple as possible, beginning with the most basic topics and then moving on to more complex areas once a base for further understanding has been laid.

Thus, to help students understand the basics of commercial law before progressing onto more difficult topics, the book begins with elementary discussions of the law of contracts, with an emphasis first on the United Nations Convention on Contracts for the International Sale of Goods and then on specialized contracts in export-import transactions. More complex topics of international commercial law, derived from a solid comprehension of the international law of contracts, are then examined in increasingly greater detail in later chapters. Where possible, the book will also include some comparisons of commercial laws in other countries, in both civil and common law jurisdictions. Finally, the book deals with discussions about important international and re-

gional trade organizations and their increasingly important, and sometimes controversial, roles in international trade development and regulation.

To review the information presented, vocabulary lists and comprehension questions are listed at the end of each chapter. In addition, some group class exercises are suggested to help students gain as much as possible from the material. Occasionally some cases are provided to give the student a flavor of how courts have made decisions in business law. We all know that some students learn by reading, others by listening, others by comparing and analyzing, and still others by doing or acting on information given to them (and many learn in combination of all these different ways) — so the review material is presented to help all sorts of learning styles. The teachers that use this book are encouraged to use it as a starting point in developing their own teaching styles to fit the needs of their own particular students in this field of study.

— Kyle B. Usrey, 1998  
Yanshan University  
P.R. China

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## CHAPTER ONE

# INTRODUCTION

### Legal Systems That Influence Business in Different Nations

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#### *What is Law?*

Law is difficult to define. Many people have tried to develop a complete and precise definition of law, and many people disagree about the definition of law. Perhaps the best definition of law is “the enforceable rules that govern relationships between individuals and organizations and their society.”

*Jurisprudence* is the study of law and the values that are used in determining what the law is or should be. Legal philosophers believe that logic, ideals, history, religion, and culture help form law. Natural law theorists, such as Aristotle and Saint Thomas Aquinas, believed that law should reflect universal moral and ethical principles, a type of ideal law. Thomas Jefferson wrote in the United States Declaration of Independence over 200 years ago:

*When in the course of human events , it becomes necessary for one people to dissolve the political bands which have connected them with another , and to assume among the powers of the earth , the separate and equal station to which the Laws of Nature and of Nature's God entitle them , a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation .*

*We hold these truths to be self-evident , that all men are created equal , that they are endowed by their Creator with certain unalienable Rights , that among these are Life , Liberty , and the pursuit of Happiness . That to secure these rights , Governments are instituted among Men , deriving their just powers from the consent of the governed .*

Occasional references to natural law are found in United States court decisions, but natural law has been criticized because the concepts of natural law are often disputed since they are regulated and developed by no agreed-upon fixed standard.

Frederick Karl von Savigny helped evolve the historical theory of law, which believes that law develops as a result of a nation's entire history and that lawyers and judges merely interpret the historical direction of the nation. Critics of the historical school of jurisprudence contend that law also helps mold the future and is not just a mirror of a society's past.

A group of people, called legal realists, believe that law is influenced by the beliefs and attitudes of those who decide the law. Oliver Wendell Holmes, a famous United States Supreme Court Justice, once wrote in 1881 in a book called

*The Common Law*, “The life of the law has not been logic, it has been experience,” and law is affected by the “prejudices which judges share with their fellow men.” He believed that law was practical and not fixed, but subject to a society’s changing *morals*, politics, and economics. Consequently, he theorized law evolved in much the same way that Darwin theorized about the evolution of plant and animal species.

Law is based in part on society’s *norms* of behavior. A norm is a model or standard type of behavior that members of a group share as common and acceptable to all. Private norms are norms that will not be enforced by the law, but the deviation from such norms may nevertheless result in some type of informal sanction. Public norms are behaviors that will be enforced by the law. Deviations from public norms can result in public punishment, such as death, imprisonment, or a fine.

### ***Legal Systems and Classification***

A nation’s legal system, which establishes and enforces laws, helps make its social, political, and economic institutions function effectively. The legal systems of foreign nations can differ widely, but generally the laws of most countries can be classified into two types: common law and civil law. Common law systems, sometimes called case law or judge-made law, are derived from English law dating back hundreds of years and are based on the principle of following long-established customs that were written down in impor-

tant court decisions, called *precedents*. These prior court decisions that were written and handed down over time have themselves formed a set of laws that help guide the proper behavior of people, businesses, and other institutions. Common law systems often have legislatures that pass laws as well; in the absence of a precedent or a clear legislative act, common law courts can create a new rule of law. England, the United States, Canada, Australia, New Zealand, and some other countries that were once part of the British Empire all have common law legal systems.

In contrast to common law systems, civil law systems, sometimes called codified law or Roman law, are based on the principle that the only official source of law of a nation is what is specifically written in a code of books called *statutes*. Statutory law in a civil law system can be very complex since the lawmakers in a nation based on that system must write statutes to cover nearly every conceivable legal situation. Civil law systems are less flexible and adaptable, therefore, than common law systems. The laws of civil law systems are less subject to interpretation by courts since they do not rely often on precedents that are the basis of common law systems. Courts in civil law systems still must interpret the statutes that are passed, but, generally, they may not depart from the statutes and develop their own laws. Civil law systems evolved from the legal system of ancient Rome. The best known example of civil law is the French Napoleonic Code, or *Code Napoleon*, which was developed in 1807 by Napoleon Bonaparte and which still exists today. Most European countries, such as France, Germany, Spain, Portugal,

and Italy have their legal systems based on civil law. Additionally, many Latin American, African, and Asian countries that were once colonies of continental European nations have civil law systems. Japan and South Africa have civil law systems. Parts of civil law systems can be found in the courts of countries whose people are predominantly Muslim.

Common law and civil law systems are not completely separate, however. Many common law countries have aspects of civil law in their legal systems. For example, in the United States criminal law is statutory law (like that in a civil law system), defining specific crimes that will result in punishment. Thus, in the absence of a criminal statute the courts in the United States cannot develop a new law for a new crime. Although France is based on a civil law system, in the French code of laws there are no specific sections dealing with contract formation, so those concepts have been developed by case law precedents in a way that is similar to how they have been developed in common law countries. Furthermore, many non-Western countries have legal systems that are very different from traditional common law and civil law nations. In many Islamic countries, the statutes are often heavily influenced or based on religious commandments of the Koran. Nations whose legal systems are based primarily on religious authority are called theocracies.

Sometimes laws within a country are classified into *substantive* and *procedural* law. Substantive law includes laws that define, create, and regulate rights and duties of the public. Procedural law involves the rules for enforcing substantive law rights. Moreover, laws may be classified into

public law, which concerns the relationship between government and individuals, and private law, which involves relationships between individuals. Criminal law regulates relationships between individuals and society, and often provides the floor or base for human behavior in a society. Sometimes law is classified as mandatory, meaning these laws must be obeyed by persons affected by them, while other laws may be seen as optional, which may be accepted or modified by parties. Criminal law, property law, and tax law are mandatory; some parts of contract law, though, are optional. Individuals, businesses, and other entities can aspire to act in ways that are beyond the minimum requirements of the law. For example, a law that states that someone is not required to obey a contract does not preclude that person from still abiding by the agreement, anyway, as a result of a moral obligation. (This will be explained more in Chapter 2 on contracts.)

### ***Written Sources of Law, Courts, and Lawyers***

The written document that provides the legal foundation for most countries in the world is usually called a constitution. Today, many nations declare in their constitutions that their national law is derived from the people that are governed by it. The United States Constitution declares in the Preamble, "We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves

and our posterity, do ordain and establish this Constitution for the United States of America." The Constitution of the People's Republic of China pronounces in Article 2, "All power in the People's Republic of China belongs to the people." The United Kingdom has no single document as a constitution, but refers to its constitution as a series of basic documents, including the Magna Carta (dating back to 1215), the Bill of Rights of 1689, and other written material, which, when read together, provide for guaranteed liberties and certain freedoms to the English people.

Most nations have several different branches of government authority that exercise some power in dealing with the law. The American legal system has three branches: the legislative branch (consisting of the House of Representatives and the Senate) which passes laws; the executive branch (which is lead by the President) which administers and enforces the laws; and the judicial branch (composed of the Supreme Court of the United States and many lower courts) which interprets the laws. Some nations, such as the United States, have federal systems of government power, which means that government powers are divided between national and state/provincial/community governments. Other nations have centralized governments, called unitary systems, where all government power is based in one central group with no independent local governing units, although power can be assigned or apportioned to local or regional groups.

Judges in most countries have as their primary function to resolve disputes, sometimes called lawsuits or litigation, among individuals, groups, and institutions. In America,



the United States Supreme Court can declare a statute passed by Congress illegal if it violates the United States Constitution, in cases brought before it by any individual, business, other institution, or government body. In the United Kingdom, however, the courts cannot invalidate laws passed by its legislature, called Parliament. French courts also lack the power to review legislative action, but a special constitutional council can invalidate laws in conflict with its constitution. German laws can be reviewed for their agreement with Germany's Constitution, but only in a special court and only in cases brought by a government body, and not by individuals.

Some countries have specialized courts to deal with special disputes. France has established specialized commercial law courts to deal with business disputes, and many other nations with commercial civil codes have done the same. Even though England is a common law nation, it also has specialized commercial courts with judges whose expertise is in business law. In America, there are no special commercial courts, with the possible exception of the Bankruptcy Courts, which handle many cases involving businesses and business bankruptcies, but which also handle individual bankruptcies.

The procedures used in resolving disputes of the law can vary quite a lot between nations. The role of lawyers differs widely, as well, from country to country. It is believed that the United States has more lawyers per capita than any other country in the world with the possible exception of Iceland. The definition and role of a lawyer is not uniform in every