陈慧芳 王骞／著

国际商法

英文教材

International Business Law

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国际商法

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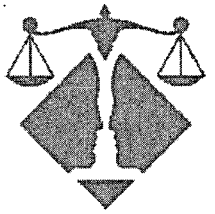

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前言 FOREWORD

随着中国改革开放的深入与全球化趋势的加强，中国的相关法律也不断推向国际。有人认为商法只在英美法以及大陆法的国家存在，在我国的法律框架内还没有构建地位。实际不然，在2003年后的历年国家司法考试中，我国已将商法单独列为一个单元，可见商法已经在我国法律体系中占领一席之地。

《国际商法》这本书，用英文编写，主要原因有三个：一是为了适应国内双语教学的需求。多年来，我国高校的法律双语教学往往使用国外的原版教材。但是原版书常常内容庞杂，重点不够突出，最重要的是原版书基本不会涉及中国法律，更不会将中国的相关法律与英美法以及大陆法进行比较，而我们面对的是中国的学生，学生只学国外的法律，而根本不知中国法律在这些方面的规定，显然没有办法学以致用。即使老师上课加上相关内容，书本上没有，学生学习也不方便。所以，迫切需要一本有中国商事法律内容的国际商法教材，让学生在学习后对国际商事法律有一个全面的了解。二是原汁原味。从理论上讲，商法主要从欧洲大陆产生并发展起来，在讲课时引用相关的原文，对学生理解某些商事规则的产生比较直观，同时也能让学生更加理解这些规则在中国是如何被引用和发展的；三是为了将中

国的法律推向世界。用英语编写国际商法，在方便中国教师用熟悉的讲课体例授课外，也方便了国外需要了解中国法律的朋友，这样不仅扩大了中国法律在国际社会的影响，同时也对国外友人来华投资提供了相应的法律保障。

本书在编写的过程中，尽量突出以下特点：一是综合性。本书所有章节在写作的过程中，都力求在英美法、大陆法以及中国法这三个方面进行阐述，体现这本书的国际性特点，同时让读者有一个综合的学习体例。二是专业性。本书在写作过程中，尽量语言地道、流畅。在讲述相关理论时，尽量原汁原味引用专业术语。

本书作为一本英文写作的国际商法教材，由于作者驾驭英语的能力有限，不足之处在所难免，恳请读者提出修改意见，我们不胜感谢！

陈慧芳　王　骞

2008年7月

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Part 1

Introduction of International Business Law

1.1 Concept and Sources of International Business Law

1.1.1 Concept of International Business Law

Opinions are different between Chinese and foreign concept of international business law. In the opinion of the author, international business law is the sum of legal regulations that regulate different relations between principals in international business transactions. Firstly, "international" in "international business law" does not indicate really something between nation and nation, instead it means transnational. Secondly, the principals in international business denote the parties that have international business rights and bear international business obligations according to law. They can be:

1.1.1.1 Natural Persons

In the laws of different countries and international treaties, the natural persons who have capacity for rights and capacity for conducts are generally accepted to do international business transactions in the name of himself or herself and become international business principals. For instance, it is specifically stipulated in the constitution of our country and the Law of Foreign Investment Enterprises that foreign individuals are permitted to invest in China, or establish various economic cooperation with Chinese enterprises or other economic organizations.

1.1.1.2 Companies and Enterprises

Companies (especially multinational companies), and Enterprises with qualification of legal person and the business organizations (such as partnerships)

without qualification of legal person are obviously the principals of international business.

1.1.1.3 International Organizations

International organizations, especially the global or regional economic organizations established after World War Ⅱ, are also important in international business. Global economic organizations such as World Bank, International Monetary Fund, World Trade Organization and regional economic organizations such as European Union, Asia-Pacific Economic Cooperation, North American Free Trade Agreement often take part in or support establishment of regulations relating to coordination of international business relation, and sometimes directly take part in international business transactions by signing international business contracts with other international business organizations.

1.1.1.4 Nations

Nations are either participants in establishing international business laws and regulations or the legislators for domestic business laws concerning foreign investment. In addition, nations could also directly take part in international business transactions in some extent. For instance, loans between governments and issues of government bonds in international bond market. Therefore, nations are a kind of special international business principal. Thus, nowadays international business principals have not been limited to traditional natural persons, corporations and enterprises, and also include more different kinds of principals. Regarding international business transactions, traditional international business is conducted based on tangible goods, however, in modern society with rapid development and continuous enhancement of globalization of world economy, the international business has been rapidly developed in the objects and forms of transaction. Concerning business object in addition to great development of international trade for merchandise, the international exchange of technology, capital and labor force is also becoming more and more frequent, and their importance in international economic exchange is growing. In terms of business forms, in addition to traditional buying and selling, many different business forms have emerged, such as international technique transfer, international investment, international collaboration, international finance, international project contract and international tenancy. Thus, it can be seen that currently international business transactions have not been limited to traditional trade for merchandises, but also has extended to many other economic scope such as trade for technology, service and

investment, financing, etc. Therefore, the international business law has become a comprehensive legal system, covering not only traditional field but also various other categories of law. International Trade Law (including trade for merchandise, trade for technology and trade for service), International Business Contract Law, International Business Organization Law, International Agency Law, International Product Liability Law, International negotiable Instrument Law, International Law of Maritime Commerce, International Investment Law; International Financial Law can be all bring into the category of international business law. Obviously, it is very hard to introduce all these laws in a monograph with limited space. Therefore, only most fundamental aspects of the laws are chosen to be described in this book, including business organizations, business contracts, business agency, product liability, negotiable and instruments commercial arbitration. This book can be used by the readers as an approach to study the international business law.

1.1.2 History and Development of International Business Law

Business law develops with the development of commodity economy. Historically, in as early as ancient Roman Law, there had been the law regarding the regulation of business relation. However, there was no specific business law established at that time. It is generally recognized that the Law Merchant established in European Middle Ages is the origin of modern business law. This Law Merchant was first established in Italy and then in France, Spain, Holland, Germany and England with the world trade center moved to Atlantic coast. It contains laws and regulations regarding contract, limited partnership, maritime transportation and insurance, money order and bankruptcy procedures, etc. Its main characteristics is internationality (It does not apply to only one country) and self-governance (It is a conventional binding rules between merchants, its explanation and application is not determined by professional judge in ordinary court but is determined by a court organized by the merchants themselves). After 17th century, the business law became domestic law for the country and is no longer international law as the state power of European countries turned to be strong enough to regulate various business relations. France promulgated Land Business Regulation (1673) and Maritime Business Regulation (1681) in the Age of Louis XIV; Germany had written laws at that time including Prussia Maritime Business Law (1727), Prussia Commercial Instrument Law (1776), etc. In addition, other European countries also established their own business laws.

After 19th century, the social relation took radical change with the success of bourgeois revolution in Europe. In order to protect capitalist commodity economy and promote business activity, the continental counties in Europe successively started large scale movements activities to establish codes and laws. In 1807, France took the lead to establish unified French Commercial Code based on its Land Business Regulation and Maritime Business Regulation, creating the principle of separation of civil law from commercial law. Later this principle was adopted by many European countries with civil law system. In 1861 Germany followed France and established German General Commercial Code (Also known as German Old Business Law) in addition to Civil Code. In 1897, German Commercial Code was promulgated based on revised old commercial code, this new code exerted considerable influences on many countries of civil law system later. But Japan established an independent commercial code in 1899. It should be pointed out that although France, Germany and Japan adopted the principle of separate civil law and commercial law, the relation between Civil Code and commercial code was the relation between general law and special law. For cases that are not specified in commercial code shall apply to civil code. Moreover, with the development of business activities, the civil law countries also established quite many independent business laws and regulations as the supplement of commercial code. In the countries of common law system, the historical development of business law has different features from that in the countries of civil law system. The counties of common law system traditionally adopted the system of case law. It was not until 19th century, these countries began to establish a few independent business laws and regulations as a supplement of case law. Therefore, the feature of the commercial law system is the commercial case law plus independent business laws. This means that in the countries with common law system, there was no such commercial code in terms of the definition in civil law system countries.

Generally speaking, before 20th century business law was limited to be domestic law. There might be discrepancies and conflicts between the business laws in different countries affecting adversely the development of international business activities. Therefore, beginning from late 19th century and early 20th century, a few international organizations between governments or people made efforts to internationalize and unify the business laws with big success. As a result, a few important international business convention and international business practices arised successively, including Convention on Settlement of Investment Dispute between the Country and the Citizens

in Other Country, Convention of United Nation on International Selling Contract, 2000 General Rule of Explanation of Terms on International Trade, etc. The internationalization and unification of business laws are being enhanced, and international business law is developing very rapidly. However, it should be pointed out that the unification of international business laws could encounter much difficulty because of the differences in history, culture and development of various countries in the world.

1.1.3 Sources of International Business Law

The sources of international business law includes international business treaties, international business practices and domestic business laws of various countries.

1.1.3.1 International Business Conventions

The treaties or conventions to regulate international business activities are one of important sources of international business law. Currently, there are many treaties and conventions. Generally speaking, they can be divided into two categories:

Firstly, the substantive conventions to regulate international business activities. For example, Convention of United Nation on International Selling Contract in 1980, Convention of United Nation on Maritime Cargo Transportation in 1978 etc. These substantive conventions account for most part of international business laws.

Secondly, the conventions in the category of procedural laws and regulations. For instance, International Convention on Civil Litigation Procedure in 1905, Convention on Acceptance and Implementation of Foreign Arbitration and Ruling in 1958 and Arbitration Rule of United Nation Commission on the International Trade Law in 1976, etc.

1.1.3.2 International Business Practices

International business practices are another important source of the international business laws. However, differing from international business conventions, they are not made by nations or international organizations, they develope gradually during long time of international business activities. In the early stage of their development, they were not in written forms. Later, with accumulation of experience in international business activities, some nongovernmental organizations with international nature have established behavior criteria and rules among these practices and compiled into written documents for use by relevant parties. For example, 2000 General Rule of Explanation of Terms on International Trade, Uniform Practice of

Documentary Letter of Credit and Uniform Rules for Collection compiled by International Chamber of Commerce; York-Antwerp Rules (Rules on general average adjustment), etc. Although strictly speaking, these business practices do not have legal binding force and are not considered to be laws, the nations generally allow parties involved in a case to selectively use those international business practices. Once a party involved adopts a practice in the contract, the practice used will have binding force on both parties involved.

1.1.3.3 Domestic Business Law in Different Nations

Despite there are great deal of international business conventions and practices, they can not deal with all issues in international business transactions. Moreover, even there is the stipulation for a particular issue in existing conventions or practices, that convention or practice might not be joined or accepted by all nations and regions. Therefore, in quite many occasions the disputes in international business have to be guided by the rules regarding legal conflicts and handled by the business laws in relevant country. Thus, the domestic business laws in various nations are still the important supplement to international business laws. The domestic laws have different forms between civil law countries and common law countries, and which will be discussed in detail in Section 2.

1.2 Two Major Legal Systems

Legal system or legal family denotes the classification of the legal system adopted in various nations based on certain features of laws such as their historical tradition and forms. As far as western countries concerned, the legal system can be divided into civil law system and common law system. There are differences between the two legal systems. These differences inevitably have influence on their domestic business law, because the business law in a nation is inherently part of the nation's legal system; it can not be isolated from the nation's legal system. We all know that currently the domestic business laws in various nations are still important supplement for international business laws, and quite many disputes in international business have to be handled by applying the domestic business law in relevant nations. Now that the domestic business law certainly reflects the features of the nation's legal system. It is necessary to learn about the basic characteristics of the two western legal systems, that is, continental legal system and Anglo-American legal system. When learning

international business law, this will be very helpful to understand the domestic business law in related nations.

1.2.1 Civil Law System

Civil law was established in west Europe, such as France and Germany. In addition to the two countries, many countries in European continent, such as Swiss, Italy, Belgium, Luxemburg, Holland, Spain and Portugal, all belong to the nations of civil law system. In addition, all nations in South America, eastern part of Africa of civil law system, too. Japan also introduced civil law. It is worth mentioning that in the nations belonging to common law system, a few regions in some nations, such as Louisiana State in the United States and Quebec in Canada, adopt civil law system.

1.2.1.1 Structure of Civil Law System

One of the features of civil law system is emphasis on function of written law. In structure it puts emphases on systematization, orderliness, codification and logic. The method it adopts is to classify and arrange various laws and regulations based on a few of big legal categories. The features in structure are reflected either in science of law or in legislation.

First of all, the nations with civil law system all divide their laws into public laws and private laws. The public law denotes generally the laws associated with status of the nation, including constitution, administrative law, procedural law and international public law. Private law denotes generally the laws related to individual's interests, including civil law and business law, etc. The nations of civil law system all use the same legal system and legal concepts in the field of science of law, so that the law in different countries can be accurately and mutually translated, although the languages are different. Thus, after the laws in one nation of civil law system is learnt, it will be quite easily to transfer to other countries of civil law system.

Secondly, the nations of civil law system all advocate compilation of codes. After victory of the French bourgeois revolution, five codes were successively promulgated: Civil Code, Code of Civil Procedure, Commercial Code, Criminal Code and Code of Criminal Procedure. Other countries of civil law system also established similar codes, but the principle for compilation of the codes is not completely the same. Some nations with civil law system compiled civil law and business law respectively to form two independent codes, that is, the principle of separation of civil law and business law was adopted. France, Germany and Japan were the typical instances. However, some

countries of civil law system combine business law with Civil Code, the business law becomes part of Civil Code, that is, and the principle of combination of civil and commercial law was adopted. For example, Italy has only Civil Code, Swiss has only Code of Debts. The two countries did not establish Commercial Code, but put the contents associated with commercial law into Civil Code and Code of Debts, respectively. It should be noted that the separation of civil law from commercial law and the combination of civil law and commercial law are only different principles for compilation of laws, civil law and commercial law are still two different categories of law.

1.2.1.2 Sources of Civil Law System

The nations of civil law system are nations of written laws. The laws in civil law countries include constitution, codes, the laws and regulations, etc. Legal precedents are not formal source. A judgment is only effective for the specific case and does not have binding force when making judgment in other similar cases. This is one of the major differences between civil law system and common law system in the source of law. However, it should be noted that in the past decades, legal precedents actually have been paid much attention in civil law countries, especially the judgment made in the cases for that supreme court has not yet worked out the related stipulations. This kind of legal precedents are very important to the lower court. In order to avoid the risk that the judgment made is rejected by the superior court, the judge in the lower court would often follow the judgment made by the superior court. Therefore, the importance of legal precedents should not be ignored even though civil law countries are nations of written laws.

1.2.2 Common Law System

Common Law system is also called Anglo-American legal system. It was formed in England, and later spread to the United States and the countries and regions that were under colonial rule by England, including mainland Canada, Australia, New Zealand, Ireland, Malaysia, Singapore, and Pakistan. Hong Kong, China is also a region of common law system. This legal system takes United Kingdom and the United States as representatives (This is why it is called Anglo-American legal system) and it differs from civil law system in the structure and source of the laws.

1.2.2.1 Structure of Common Law System

As far as the structure of laws in common law system concerned, the laws are not

clearly classified into public laws and private laws as in common law system. Instead, the laws are divided into common law and equity law. The common law is the legal system established in England during Middle Ages. It was gradually established based on German customary law, and the legal precedents in King's court as British kingdom with centralization of state power was established and consolidated. It was a commonly applicable law in the whole nation. Equity law was a kind of case law developed by British Privy Minister court with the original intention of supplement and correction of the incomplete common law at that time. When assigned by the King to hear a case, the Privy Minister could make judgment according to the principle of "fairness and justice" without binding of common law, the equity law was just formed based on these judgments. Therefore, although common law and equity law are all case laws, they differ in following aspects:

1.2.2.1.1 Different Methods of Remedy

There are only two methods of remedy, that is, compensation with money and return of properties with money compensation as priority. However, some new methods of remedy are developed in equity law, including mainly specific performance and injunction. The specific performance, denotes the remedy decided by court based on equity law that requires the party to perform all obligations according to the stipulations set forth in the contract, if the loss of a party caused by another party's breach of contract can not be compensated by money or the amount of loss can not determined. The injunction is the remedy decided by court based on equity law, that prohibits a party to conduct certain activities in order to prevent illegal activity or breach of contract from happening in advance.

1.2.2.1.2 Different Litigation Procedures

According to common law, a jury should be set up when hearing a case in court with verbal inquiry and verbal defense adopted. However, according to equity law, there is no need to set up a jury when hearing a case in court with litigation procedure in writing adopted. In addition, there are many differences in legal terms between common law and equity law. As discussed above, common law system takes Britain and United States as good examples. American laws are also divided into common law and equity law, the same structure as British laws. However, what is different in structure of laws between British and American laws is that American laws are divided into Federal law and State law, because America is a nation of federation. Application of federal law and State law at the same time is one of the features of American law in