

# 商法导论

# Introductory Guide to Commercial Law

李栗燕 编著

国防工业出版社
National Defense Industry Press

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李栗燕　罗峰　徐文彬　编著

国防工业出版社

·北京·

# 内容简介

本书采纳了普通法系教材的部分结构体例，使读者在学习完本书之后，对普通法系的商法有一个概括性的认识。本书以我国2006年实施的新公司法为基础着重编写了公司法部分，体现出了实时性和新颖性。

本书共分8章。包括：商法概述，合伙法，公司法，保险法，银行法，知识产权法，纠纷解决机制和商务谈判。每章内容后都附有案例分析、练习题、思考题和相关课外阅读，帮助学生预习和复习。书后选录了我国相关法律法规的英文译文，便于读者能够进行比较学习，了解异同。

本书最大的特色为全英文编著，适用于法学院和商学院的学生及商法的英文爱好者，目的是为学生创设全英文的学习环境，培养他们用外文思考的能力；另一特色是专业性与趣味性并重，每篇课文后都附有一句法律英语常用句和一个法律英语小幽默，吸引学生兴趣的同时加深他们对日常法律英语的熟练掌握。

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# 前　言

面对经济全球化和科技革命的挑战，中国的法律日趋与国际接轨，法学院培养出的学生不仅要通晓本国法律，还要了解他国法律，熟悉国际公约与惯例，并能在未来的实践中运用一至多门外语处理国际事务。因此，我国法学教育的国际化自不待言，在全社会强调双语教学的大环境下，法学专业的教学目标是把学生培养成能为国际和国内两个市场所欢迎的法律工作者。

在市场经济法律体系中，商法是最基本、最重要的法律门类之一，同时开设于高校的法学院和商学院，具有极强的实用性。日益发展的经济全球化趋势要求世界各国在商事交往中逐渐采用统一的规范，使商法呈现出越来越突出的国际统一性。因此，在法学专业的双语教学体系中，商法教学有着特殊的实际意义。但高质量的双语教学必须使用全英文教材，没有合适的英文教材，双语教学就成了无源之水，无本之木。随便找一本市面上的英语书做教材，多加几节外语课，就称之为“双语教学”，显然是不科学的。如从国外引进原版教材，不仅动辄五六百元一本的教材费，增加了学生的负担，更重要的是，国外原版教材的体系并不适合中国学生。国内的商法英文书籍内容相对滞后，而且与商法的教学体系相差很大，没有能直接应用于教学的。因此，根据双语教学的特点和需要，编写合适的英文教材就成了商法双语教学至关重要的问题。编者为配合双语教学编写该

书，于2005年出国进修期间开始着手，经过对课程教学内容的分析和组合，参照学科体系要求，在兼顾国内现状和发达国家商法体系发展的基础上，参考了二十多本中英文书籍，并结合了国内外新的学术资料，编写了这本全英文的商法导论。

本书采纳了普通法系教材的部分结构体例，目的是使学习者在学习完本书之后，对普通法系的商法有一个概括性的认识。书后选录了我国相关法律法规的英文译文，以便使学习者能够进行比较学习，了解异同。本书以我国2006年实施的新公司法为基础着重编写了公司法部分，体现出了实时性和新颖性。

本书共分8章。第1章为商法概述，介绍商法的一些基本概念和原理；第2章为合伙法，介绍合伙的概念、独资与合伙以及英国的合伙法；第3章为公司法，以公司法为主介绍商事主体法，主要介绍公司的概念、章程、财产、经营规范、董事及高级行政人员的权利义务、中国新公司法等；第4章为保险法，以保险法为主介绍商事行为法，包括保险的历史与发展、保险合同、保险法的主要原则、保险的分类等；第5章为银行法，主要介绍银行法的基本知识、银行的合并及支票；第6章为知识产权法，分别介绍了版权法、专利法和商标法；第7章为纠纷解决机制，主要介绍商事仲裁、民事及刑事审判程序；第8章为商务谈判，介绍商务谈判的规范、形式、技巧、语言。每章后都附有案例分析、练习题、思考题和相关课外阅读，帮助学生预习和复习。

本书的特色为全英文编著，不仅是课程内容、案例、练习，包括疑难字词的释义都是英文，目的是为学生创设全英文的学习环境，培养他们用外文思考的能力；另一个特色是专业性与趣味性并重，考虑到法律英语学习的难度和枯燥，本书使用深入浅出的语言，并在每篇课文后都附有一句法律英语常用句和一个法律



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英语小幽默，吸引学生兴趣的同时加深他们对日常法律英语的熟练掌握。本书配有的教学指导用书正在编写中，可提供课程内容、生词的中文翻译和部分练习的参考答案。

南京航空航天大学法学研究生罗峰编写了本书的第1章和第2节商法的特点和原则部分，并承担了生词的选注、全书校对和第1章至第4章生词的释义；中国石油大学外国语学院讲师徐文彬编写了第3章第10节内容，完成了第5章至第8章生词的释义，其他编写工作由南京航空航天大学李栗燕完成。

本书的编写是一个尝试，它的出版是对商法双语教学资源的充实。由于编者水平有限，纰漏之处在所难免，恳请读者批评指正。

最后，对支持本书编写和出版的南京航空航天大学的同仁和国防工业出版社表示最衷心的感谢。

编　者

2006年6月

# Preface

The entry into WTO poses a great challenge to China's legal education. Law schools are expected to turn out the legal professionals that are acquainted not only with domestic laws but also with foreign laws and international conventions and practices, and that can transact international businesses in at least one foreign language. To attain this objective, many high learning institutes have practiced bilingual teaching programs for law students.

In the legal system of market economy, commercial law is highly applied and one of the most important legal branches. Meanwhile, by the request of unified rules in worldwide business, the growing trend of globalization has been turning commercial law more and more internationalized. Therefore, the bilingual teaching in commercial law is of special significance in the whole program of bilingual teaching for law students. This book is a right addition to the bilingual teaching resources for commercial law.

The textbooks for commercial law differs much in structure in China and the countries of common law system. The structure

of common law system is adopted in this book with a view to providing readers with a general idea of commercial law in those countries of common law system, considering that they have learned China's law. The excerpts of English versions of China's commercial law are appended to the book for readers to compare and study. The text in every section is followed by some essential sentences, jokes, exercises and supplementary reading materials, making the book more interesting and practicable.

This edition is just an experiment for bilingual textbooks and is supposed to be improved in the later use.

Special thanks to Mr. Luo Feng and Mr. Xu Wenbin for their contributions.

The author

June 2006

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# Chapter 1 Introduction

## Section 1 Legal Systems and Law

You are about to embark on a study of the subject of law. You may be surprised to discover that the search for an accurate, all-encompassing definition of law has gone on for thousands of years and will not end as long as people continue to think about the subject. Today researchers are studying legal systems throughout the world to make them work better for all of us. While you may not have an exact definition of law in mind as you pick up this textbook, you certainly are of affected by law each and every day.

Every nation in the world has a legal system, and law touches' each of us as we go about the business of participating in society. If we are to be effective citizens and fully participate in society, it becomes important for each of us to have knowledge about and concern for law.

**The importance of law**

Legal systems have always been an important part of every society. In thousands of instances each day, the legal system helps us resolve conflicts, punish individuals who violate societal norms, and solve some of our most pressing problems. Indeed, as our society becomes more complex, we tend to rely more heavily on law to guide our conduct.

Just as individuals look to the law as a guide in their person-



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al affairs, so do business people look to the law in their business activities. In the United States today there are more than two million corporations doing business. Many of these corporations are so large that what they do has an impact on the entire world. Examples of firms with a worldwide reach are Ford Motor Company and American Telephone and Telegraph Company. As large as these firms are, they look to the law to help structure their operations. Even though there may be significant differences in the laws of the countries in which these firms do business, the firms' managers expect certain rules imposed by society to be followed in doing business. Without some shared expectations about how people will behave—as spelled out by a society's legal system—how could a business person expect to run an organization, even for a day?

**Why is law investigated**

There are a number of different ways of viewing law, each of which has a particular strength or weakness. Yet contemporary legal scholars are always searching for new and workable models of law that might be useful in organizing and analyzing the information that they are continually uncovering. Why are social scientists dissatisfied with the traditional models?

Today's rapidly changing world presents us with issues that were rare or unheard of only a few years ago. This is particularly true in the world of work. In our society, people are calling upon business to have a heightened sense of social responsibility, and law is ever more frequently the vehicle used to move business people in the desired direction.

**Public law**

Law may be divided into two main types, public law and private law. Public law concerns the whole community and every-

body is affected by it. The two branches of public law are constitutional law and criminal law. Constitutional law is a part of the British constitution. It consists of those constitutional rules, that are laid down in statutes and judicial decisions, but does not include conventions of the constitution because, as we have seen, the latter are not rules of law. Among the matters coming within the scope of constitutional law are the following: the functioning of Parliamentary Ministers and their powers, civil liberties, the right to vote, local government, and relationships with Commonwealth countries. Most disputes involving constitutional law are settled in the ordinary civil or criminal courts, but there are occasions when a court concerned exclusively with constitutional law is used. For example an allegation of bribery at a parliamentary election would be tried before a specially convened election court.

Criminal law is derived partly from statute and partly from judicial decisions. It is concerned with the suppression of behavior that disturbs the peace or well-being of the community; its main objects are to punish criminals and to deter others from crime. Criminal law is administered in the criminal courts. A discussion of criminal law and criminal courts will be found in later chapters.

**Private law**(also called Civil law)

Private law covers a wider field than public law and is concerned mainly with the rights and duties of individuals towards each other rather than towards the state. It is applied in the civil courts. There are many branches of private law; the following are some of the more important.

(1) The law of contract.

(2) The law of tort.

(3) Family law.

(4) The law of succession.

(5) The law of trusts.

The distinction between public and private law is that the former is concerned with matters that affect the state as a community, while the latter is concerned with matters that affect the rights and duties of individuals among themselves. Constitutional law deals with such questions as the supremacy of Parliament, the position of the crown and rights to personal freedom. Criminal law generally aims at punishing criminals and suppressing crime. Civil law is intended to give compensation to persons injured, to enable property to be recovered from wrongdoers and to enforce obligations (contracts and trusts).

**Double liability for wrongdoing**

In connection with the classification of law there is an important point to be borne in mind. This is that a wrongful act may fall under two headings. For example if Bob runs down Ann while driving his car in a dangerous manner this will be at the same time a crime, since it is forbidden in the interests of the community, and also a ton, because it has hurt Ann in particular. The outcome of such an incident may well be that Bob has to appear before two courts: a criminal court that can send him to prison or order him to pay a fine to the state, and also a civil court that can order him to pay compensation to Ann.

There are various combinations of wrongdoing that can occur, and the combination of crime and tort is just one of them. A wrongful act could, for example be both a breach of contract and a tort, although here only an appearance in a civil court would ensue. On the other hand some types of wrongdoing fall into only one category.

**Sentence:**

No crime without law making it so; no penalty without law making it so.

**Joke:**

How Much Is 2+2?

A university committee is selecting a new dean. They have narrowed the candidates down to a mathematician, an economist, an accountant, an engineer, a physicist, and a lawyer. Each is asked this question during their interview: "How much is two plus two?"

Mathematician (answers immediately) :"Four."

Economist(thinks for several minutes and finally answers): "Four, plus or minus one."

Accountant: "I think it's either 3 or 4. Let me run those figures through my spreadsheet one more time."

Engineer(excuses himself, and makes a series of measurements and calculations before returning to the board room and announcing) : "Four."

Physicist (excuses himself, makes for the library, and does a great deal of research. After a consultation with some agencies of the government and many calculations, he also announces): "Four."

Lawyer(stands up, pulls the drapes; dims the lights, and motions silently for the committee members to gather close to him. In a hush, conspiratorial tone, he replies):" How much do you want it to be?"

**Words and expressions:**

**community** *n.* (1) An neighbourhood, vicinity, or locality. (2) A society or group of people with similar rights and interests.

**public law** *n.* The body of law dealing with relations between private individuals and the government, and with the structure and operation of the government itself; constitutional law, criminal law, and administrative law taken together. (Cf. **private law** *n.* The body of law dealing with private persons and their property and relationships.)

**statute** *n.* A law passed by legislative body.

**civil liberties** *n.* Freedom from undue governmental interference or restraint. This term usu. refers to freedom of speech or religion. Also termed civil rights.

**Commonwealth** *n.* (1) *often cap.* An association of self-governing autonomous states more or less loosely associated in a common allegiance (as to the British crown). (2) *often cap.* A political unit having local autonomy but voluntarily united with the U. S. (used officially of Puerto Rico and the Northern Mariana Islands).

**allegation** *n.* The act of declaring something to be true; something declared or asserted as a matter of fact, esp. in a legal pleading; a party's formal statement of a factual matter as being true or provable, without its having yet been proved.

**bribery** *n.* The corrupt payment, receipt, or solicitation of a private favor for official action.

**succession** *n.* The acquisition of rights or property by inheritance under the laws of descent and distribution.

**compensation** *n.* Making an appropriate and usu. counterbalancing payment to; something that makes up for a loss.

**wrongdoer** *n.* One (as a criminal or tortfeasor) who does wrong.

## Section 2 About Commercial Law

**Features of commercial law**

1. Profiting of Commercial Conducts

All the subjects of commerce set profiting as primary and direct objective for their conducts; accordingly, commercial law is, in first place, designed to protect the attainment of the objective, to minimize the cost of business transactions and institutions. Some major statutes on establishment, change and termination of commercial subjects, commercial registration, trade book, trade name, together with some important principles for commercial conducts such as sale, agency, storage, negotiable instruments, securities, maritime commerce, etc., must be oriented to profiting. Moreover, profiting is also the foundation of some exclusive principles of commercial law, for instance, flexibility of commercial rules, swiftness, contract form, interest rate, settlement, taxation, etc.

2. Technicality

Civil law provides general rules in ethic sense for civil conducts so that the subjects can determine the nature of their conducts upon their common sense and general ethics without expertise or professional judgment; while commercial law makes the general rules more operational by turning them into applied terms and skills, which is bound to involve more technical knowledge when used to determine the result of subjects' conducts, for instance, the design of company forms, allocation of rights and interests, movement of capital, operation of stock market in company law, the issue, endorsement, acceptance and



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