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国际商法

莫世健(JOHN SHIJIAN MO) 著

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国际商法

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## 前 言

《国际商法》是一本为澳大利亚各大学法学院和商学院广泛采用的教科书，由国际著名的法律出版商、Butterworths（现已并入另一更大的著名国际法律出版商和资讯服务公司——Lexis Nexis）出版发行。第一版出版于1997年。第二版出版于2000年。现在的第三版出版于2003年。自1997年始能够连续三版是此书的成功和作者的幸运，也说明国际商法和国际贸易法课程在澳大利亚和其他国家法学教育中已经取得了日益重要的地位。

作为出生于中国大陆的中国人，用英文写一本能够为澳大利亚各大学法学院和商学院同行认可和接受的《国际商法》的旅程伴随着许多坎坷和艰辛。我于1978年考入吉林大学法律系读书，1982年毕业。怀着同许多年轻人一样的对未来的憧憬和梦想，我考取了1982年教育部的出国留学名额，并于1984年到加拿大Dalhousie大学法学院攻读法学硕士学位。1986年毕业后，我取得了澳大利亚悉尼（Sydney）大学法学院的奖学金，并于1986年12月到悉尼大学攻读博士学位。博士期间对中国和澳大利亚的投资法进行了比较研究，我对国际商法和国际贸易法的兴趣始于此。1991年初提交了博士论文后，我在澳大利亚进行了五年的教学、研究工作，教授的课程包括一门名为《国际商法》的课程。由于当时澳大利亚缺乏合适的教材，我必须自己设立《国际商法》的研究体系，并编辑、整理和提供教学资料。《国际商法》一书初稿完成于1994年。非常感谢我的同学好友、现在还在澳大利

亚 Latrobe 大学工作的陈建福博士的积极建议和鼓励，我才能够尽快地落实出版此书的计划。1995 年中旬，我将《国际商法》的修改稿交付给出版商。经过严格的专家评审程序，此书于 1996 年初进入编辑程序。本来 1996 年下半年应当可以出版的，也许是出于市场安排的考虑，出版商决定推迟出版，《国际商法》最终于 1997 年 1 月问世。此时我已经离开了澳大利亚转至香港工作。

《国际商法》出版后，市场反映良好，出版商遂于 1999 年要求我修改出版第二版。准备第二版时我做了很大的努力，将原来 700 页左右的篇幅增加至 1000 页左右。但是出于成本考虑，出版商要求我将第二版压缩至 740 页左右。这样我不得不忍痛割爱，将第二版草稿中的三个章节删除，并删除了涉及空运、保险和 WTO 等大量内容。第二版的销量好于第一版，且为更多的澳大利亚以外的学者专家所接受。修改第三版的工作是于 2002 年在香港完成的，但当第三版于 2003 年 7 月出版时，我已经离开了香港，来到位于北京的中国政法大学国际法学院工作。

出到了第三版的书，多少也可说是个小小的成功。反思片刻，此书成功的原因与其特有的风格、体系、资料安排和其他特点是分不开的。通过正式的中国法和普通法训练，我能够吸收、发挥和结合两种不同法律体系和法律思维的特点和优点，能够从新的角度进行分析思考。这种比较研究的能力对于国际商法和国际贸易法的研究至关重要。

自 2003 年 2 月到中国政法大学工作后，我开始教授《国际经济法》课程，也对国内国际商法、国际贸易法和国际经济法类学科研究的现状有更深入的认识。通过对国内外同类研究的比较，

我认为我的《国际商法》一书与其他同类著作的主要不同包括以下几点：

第一、《国际商法》的整体结构内容适中，比国内一般国际经济法教材所包括的内容要窄些，但比国外同类著作宽些。比国内同类著作范围窄的主要原因是出版商对篇幅和长度的限制。例如，我原本在《国际商法》第二版中包括了对世界上所有主要经济、贸易组织的介绍，但因篇幅所限，不得不删除有关章节。同样，第二版初稿中关于冲突法相关规则的介绍、研究也被删除。导致《国际商法》结构内容窄于国内一般国际经济法教材的另一原因，则是我自己对内容取舍所作的理性选择。例如，我决定在《国际商法》一书中不涉及所谓国际税法内容，主要因为这些内容本身复杂，不可能在简短篇幅内解释清楚，含糊不清的解释只能使读者困惑。我也认为没必要要向读者大量介绍涉及国际证券融资的内容，因为此类内容应当在证券法和公司法范围内对学生作出更合理、清楚地介绍。所以，与国内涉及国际经济法的多数著作相比，《国际商法》一书涵盖的范围要窄。但是，比起国外涉及国际商法和国际贸易法的著作（国外一般不采用“国际经济法”概念体系），《国际商法》涵盖的范围又比同类著作宽些。这也是《国际商法》和国外同类著作不同的主要特点之一。

第二、《国际商法》采取了理论和案例相结合的分析方法。国际商法和国际贸易法（也包括国内所称的国际经济法）规则多来自于国际条约、国内法和国际商事惯例。仅重复法规条文，有时很难说明规则的真正作用和意义。案例能够更有效地解释规则和说明问题，但案例研究需要时间、资源和正确的研究方法。由

于种种原因，国内的国际经济法和贸易法方面的书很少使用案例。《国际商法》一书收集和使用了大量国际性案例，将对国内读者理解相关规则帮助极大。特别是此书在有限的篇幅内收集了许多关于《联合国国际买卖合同公约》条款的案例，在国内外同类著作中是罕见的。即使与国外同类著作相比，《国际商法》所收集的案例也可谓更多，更全面和国际化，即尽可能使用不同国家、地区和法律体系以英文或者中文公布的资料。

第三、《国际商法》的写作方式和组织结构是以服务读者（user-friendly）为指导的。我不喜欢过多使用晦涩难懂的法律术语，且在使用各种术语时，对术语均力求作出简明扼要的解释。这样非常有利于学生的使用。这是此书在澳大利亚受欢迎的主要原因之一。此书的组织结构也力求逻辑联系合理。在大的章节安排时，我力求将关系密切的章节以逻辑联系先后排序。在各章内的讨论，也力求以最符合逻辑的方式安排问题讨论的顺序。此外，此书注意了国际商事、贸易和其他经济活动的实际需要，并力求尽可能理论结合实际地讨论有关问题。

第四、《国际商法》建立了国际商法课程和同类课程在澳大利亚的课程体系。在澳大利亚和所有普通法系国家和地区，涉及国际贸易、买卖和其他经济交往的课程多分别称为：国际贸易法（International Trade Law）；国际贸易法律和实践（见英国权威著作：Schmitthoff's Export Trade: The law and Practice of International Trade）；国际交易法（International Business Law，或译为国际商法、国际经济法）；国际贸易组织法（Law on International Trade Organizations）；国际贸易规则（International Trade Regulation）；或国际金融法（International Financial

Law) 等。这些课程的涵盖面有时有差别, 有时有重叠, 很难建立理性的指导原则对部分不同名称且内容重叠的课程加以区别和组织。可能鉴于此原因, 我所任教的大学设立了国际商法课程 (International Commercial Law), 却没有合适的教材。我便获得了为国际商法和同类课程建立体系的机会。据我所知, 在出版第一版时, 此书是在澳大利亚同类书中第一个使用《国际商法》标题的书。此书现在为澳大利亚各大学讲授国际商法, 国际贸易法和国际交易法等同类课程的同仁接受, 反映了他们对此书中所建立的体系和内容的认可。

我非常高兴中国法制出版社和 LexisNexis 能够在国内合作出版《国际商法》第三版, 也感谢两个出版社主管人员和领导为此作出的积极努力。此版与刚刚在澳大利亚出版的第三版几乎是同步发行的, 代表了澳大利亚在国际商法和国际贸易法研究领域的最新发展。

在海外生活了近 19 年后, 我选择了回国工作。我期望能用我所掌握的法律知识为祖国法学教育做出点滴贡献。《国际商法》在国内的出版为我多提供了一个为国服务的机会。我欢迎国内外同仁对此书的各种批评、指正和建议, 希望此书的出版提供了一个抛砖引玉的机会, 使我国的国际经济法和国际贸易法研究、教育能够更科学、理性、逻辑和有创造性地发展, 使我国国际经济法和国际贸易法的研究水平能够早日与国际水平同步。

莫世健

2003 年 11 月于北京

## 作者简介

1956年4月出生于河北石家庄市，原籍四川，土家族。1982年毕业于吉林大学法律系，获法学学士学位；1986年毕业于加拿大Dalhousie大学法学院，获法学硕士；1991年毕业于澳大利亚悉尼（Sydney）大学法学院，获博士学位；在澳大利亚工作期间兼读了澳大利亚Monash大学法学院的法学学士学位，1995年获得学位，并于同年澳大利亚律师资格。1996年到香港城市大学法学院任教。2003年2月到中国政法大学国际法学院任教。

现任中国政法大学国际法学院教授；中国国际经济贸易仲裁委员会仲裁员；深圳仲裁委员会，大连仲裁委员会和青岛仲裁委员会仲裁员；中国国际商会哈尔滨调解中心顾问；中国国际经济法学会理事；中国国际私法学会理事；中国税务协会（香港）理事。

发表的中英文书籍8本，各类中英文文章140余篇，其中包括：Shipping Law in China，香港、Sweet & Maxwell Asia 1999年出版；Arbitration Law in China，香港、Sweet & Maxwell Asia 2001年出版；“Presumed Power Versus Presumed Right” 1994年 Australian Law Journal 第68卷、第51-64页；“China, the World Trade Organization, and the Agreement on TRIMS” 1996年 Journal of World Trade 第三十卷、第五册，第89-113页；“Settlement of Trade Disputes between Mainland China and the Separate Customs Territory of Taiwan within the WTO”，2003年，Chinese Journal of International Law，第二卷、第一册、第145-174页；《论最密切原则在香港的适用》，《中国国际私法与比较法年刊》、2001年、第四卷、第174-190页；《大中国自由贸易区法律框架研究》、《国际经济法论丛》2002年第5卷，第118-142页等。

# International Commercial Law

**Third edition**

*In memory of my father  
To my mother*

# Preface

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We are now in the year 2003. So much has happened in the past two years since the second edition of this book was published. China has become a WTO member, the EU has been enlarged to 25 countries, and — far less significantly — I am now working in Beijing. The world has certainly become faster, smaller and better; if we are not at the same time depressed with the war in Iraq, the outbreak of SARS in some 30 countries, and the human rights abuses which continue in many societies today.

Much has also happened to the body of law that we regard as international commercial law. New treaties have been made, cases have been decided and legislation has been passed. The trend of international economic interdependence has grown stronger, and so has that of regional economic cooperation. International commerce and trade has become vital for all countries wishing to achieve a fast and significant economic growth within the legal framework of the WTO, which is effectively developing and shaping a new international economic order across the globe. It is hoped that this new edition can appropriately reflect these changes within, of course, the word limit as set by the publisher.

In order to reflect the new developments of international commercial law and to further rationalise the structure of the book, I have made a number of changes to this edition. In terms of structure, I have merged Ch 8 in the second edition with Chs 7 and 9 respectively of this edition. Presently, the book has 12 chapters, instead of 13 (per the second edition). Recent developments and new cases have been added to all chapters of this edition. The major changes are: the Chinese Code of Contract Law concerning international trade in Ch 1; the addition of new cases concerning the CISG in Ch 2; recent developments and new cases in the area of carriage law and international financial law in Chs 4, 5 and 6; recent developments in foreign investment law and discussions on the new OECD Declaration on International Investment and Multinational Enterprises, as well as the present OECD Guidelines for Multinational Enterprises in Ch 8; recent developments of the WTO in Ch 9; recent developments in regional cooperation and free trade arrangements in Ch 10; and recent developments in the areas of dispute settlement, and the addition of recent information on the China International Economic and Trade Arbitration Commission, in Chs 11 and 12. It is hoped that these changes will ensure that this edition is found to be useful, up-to-date, and also concise and user-friendly.

As usual, in the completion of this new edition, I express my sincere thanks to my publisher, LexisNexis Butterworths, and the friendly staff responsible for the project — in particular, Rowena Oldfield, Susan Gintel and Teresa Vaccaro. I also express my gratitude to the editor of this edition, Andrew Wright, for his efficient editorial assistance.

## **International Commercial Law**

During past years of my teaching and researching in the area of international commercial law, I have benefited greatly from various comments made and challenging questions raised by many of my colleagues and students in Australia, Hong Kong and Mainland China. On this occasion, I express my deep appreciation and sincere thanks to them all. Last, but not least, I thank my wife Catherine Shunyu Liu for her love, understanding and support.

*John Shijian Mo*  
*Beijing, PRC*  
*May 2003*

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