

国际商法

英文版 第二版

韩永红 编著



对外经济贸易大学出版社



全国高等院校经管专业双语教材
全国高等院校商务英语专业规划教材（本科）

国际商法

（英文版）

（第二版）

International Business Law

(Second Edition)

韩永红 编著

对外经济贸易大学出版社

中国·北京

图书在版编目 (CIP) 数据

国际商法: 英文 / 韩永红编著. —2 版. —北京:
对外经济贸易大学出版社, 2018.3
全国高等院校经管专业双语教材 全国高等院校商务
英语专业规划教材. 本科
ISBN 978-7-5663-1890-9

I. ①国… II. ①韩… III. ①国际商法-高等学校-
教材-英文 IV. ①D996.1

中国版本图书馆 CIP 数据核字 (2018) 第 022594 号

© 2018 年 对外经济贸易大学出版社出版发行

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国际商法 (英文版) (第二版) **International Business Law (Second Edition)**

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责任编辑: 董 黛

对外经济贸易大学出版社
北京市朝阳区惠新东街 10 号 邮政编码: 100029
邮购电话: 010-64492338 发行部电话: 010-64492342
网址: <http://www.uibep.com> E-mail: uibep@126.com

北京时代华都印刷有限公司印装 新华书店经销
成品尺寸: 185mm×260mm 13.5 印张 329 千字
2018 年 3 月北京第 2 版 2018 年 3 月第 1 次印刷

ISBN 978-7-5663-1890-9
印数: 0 001-3 000 册 定价: 32.00 元

出版说明

随着中国与世界日益频繁的经济互动，用国际上的通用语言来思考、交流、工作的能力也越来越受到重视，既具有扎实专业知识又掌握娴熟外语的复合型人才成为现今市场的主要需求。双语教学就是在这种背景下顺应时代的产物。

根据教育部高等教育司的定义，双语教学是指将母语外的另一种外国语言直接应用于非语言类课程教学，并使外语与学科知识同步获取的一种教学模式。双语教学体现了现代教育思想，融外语与学科知识教学于一体，注重提高学生专业外语水平和直接使用外语从事科研的能力；注重促进学生专业知识、外语水平及能力素质的全面发展，增强学生直接使用外语从事国际经贸的涉外能力、适应能力以及国际商务实战技能。

为了适应市场需求和高校教学需要，对外经济贸易大学出版社组织编写了这套全国高等院校经管专业双语教材，主要适用于全国高等院校经管、金融、法律等专业、商务英语专业和英语专业的商务/应用/外贸英语方向的学生。

本系列每本教材的编著均遵循“user-friendly”（方便使用者）的指导思想，从体例安排到语言风格均旨在满足使用者（包括教授方与学习方）的实际需求，力图避免外文原版教材在体例与内容上使中国学习者“水土不服”的弊端。整套教材内容包括《国际贸易理论与实务（英文版）（第四版）》《国际商务谈判（英文版）（第二版）》《国际贸易实务（英文版）（第三版）》《国际贸易实务（英文版）（第二版）辅导用书》《国际金融（英文版）（第二版）》《国际贸易法（英文版）》《国际商务管理概论（英文版）》《基础会计（英文版）（第二版）》《基础会计（英文版）（第二版）教师用书》《新编国际结算与案例（英文版）》《国际商法（英文版）（第二版）》等。本系列教材将从国内高等院校的教学实际出发，随着高校双语教学的发展而扩充完善。

本套教材的编写队伍来自全国重点高等本科院校，编写教师均有着双语实际教学经验，这是本套教材编写质量的重要保证。

对外经济贸易大学出版社

2017年9月

前

言



本书第一版出版以来，有幸得到读者的青睐，被多所院校的法学、国际商务、国际贸易、商务英语等专业选定为“国际商法”双语或全英课程教材。但本书第一版的出版时间距今已近六年，期间国际商事交易的法律规则已有增加或更迭。为反映国际商事交易法律规则的新进展，在吸收读者反馈意见和建议的基础上，我们对本书第一版做出了修订。

为方便读者快速了解本书第二版，现将几个相关的主要问题简要说明如下：

一、在体例设计上，本书采取了实用主义的态度，在考虑国际商法理论体系的前提下，更注重中国高校双语/全英教学的需要。关于国际商法的体系，法学界存在不同见解。大陆法系国家大多以传统意义上的商事立法为依据。英美法系国家则秉承实用主义的理念，将国际商务活动所涉及的法律统统纳入国际商法。因此，国际商法的内容体例并未完全定型，可谓见仁见智。本书编著者将国际商法界定为：调整超越一国国境的商事组织及其商事交易活动的法律规范的总和。以此为依据，结合国际商务活动的整个流程，本书正文设五部分，共计十章。第一部分：概述（国际商务的法律环境）；第二部分：商事组织法（个人企业法、合伙企业法、公司法）；第三部分：国际货物买卖法（国际货物买卖合同 I、国际货物买卖合同 II、国际货物运输保险、国际支付）；第四部分：国际知识产权法（国际知识产权转让）；第五部分：国际商事争议解决（国际商事争议处理）。每章包括“热身问题”“正文”和“小结”。课前对“热身问题”（Warm-up Questions）的讨论可以帮助学习者累积必要的背景知识，激发学习者的研读兴趣和探索热情。“小结”（Chapter Summary）是对本章所讨论的主要理论、规则和观点的简要归纳，以帮助学习者回顾本章的主要内容。

二、在内容安排上，本书兼顾理论性与实用性、全球性与地方性。本书紧扣国际商法的法律渊源，既注重对重要国际商事惯例和国际条约的阐释，也注重主要贸易国家国内法的影响，尤其关注中国相应的立法和司法实践。这使学习者认识到国际商法不仅是国际法亦是国内法，在学习国际商法的过程中，既要有全球视野，也要关注本土法律资源。在论述法律规则的过程中，本书会明确指出相应的法律条款，同时穿插图表和中外经典案例以帮助学习者更好地理解和应用相关法律规则，从而提升本书内容的实务操作性。本书的论述有详有略。对分歧较大的观点，着重阐述通说，对其他观点只做一般性提及，以免对学习者造成不必要的观点混乱性困扰；对重要内容，本书采用黑体字予以突出，以提醒学习者重点掌握和理解这些内容。

三、在写作语言上，本书力图使语言既严谨、流畅同时又不失活泼。本书的编著者认为，以英语为媒介学习法律，应至少致力于实现三个目标：法律知识的获取、法律英语应用能力的提高、法律思维方式的培养。其中法律知识的获取是第一层次的目标，通过大量法律英语的浸润提高学习者在法律工作中驾驭英语的能力是第二层次的目标，培养学习者

逻辑性、批判性的法律思维习惯则是第三层次的目标。为培养学习者直接以英语思考、分析和解决法律问题的能力，本书的正文全部以英文写作，不夹杂任何中文注释。这可能会给本书的少部分读者带来挑战，但这种挑战应该不会导致学习的困难。因为，在大多数情况下，本书正文部分对重要法律规则及法律术语的内涵已做了较为充分的解释，同时为便于学习者进一步展开阅读的需要，编著者已将每章涉及的主要法律术语予以整理并译成中文，统一置于书后“法律术语表”部分。

本书在编著过程中，参考了国内外的一些相关著作和研究成果，在此对这些作者深表谢意，主要参考文献见书后附录。此外，本书的出版得到对外经济贸易大学出版社以及编辑的大力支持，特别是邸蓓蓓编辑的及时督促和提醒使本书的修订得以完成，在此亦深表谢意。

本书力图避免国际商法外文原版著作在体例与内容上“水土不服”的弊端，也致力于改进本土国际商法双语教学用书较为刻板的印象，但这一目标的完全实现无疑是一项艰巨的任务。虽然编著者已努力为之，但鉴于学力有限，加之写作时间仓促，本书想必仍难免错漏之处，谨请读者不吝指正。对本书的任何建议和意见可发送至邮箱：unahan722@163.com。

韩永红

广东外语外贸大学教授、法学博士

2017年9月

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Part I

Introduction

The Legal Environment of International Business ■ ■ ■ □

Warm-up Questions

- (1) How do you understand the importance of international business?
- (2) What are the differences between international business and domestic business?
- (3) What are the risks of doing business internationally?
- (4) As you see it, where can you find the rules and norms governing international business?
- (5) Can you name some international organizations which play a role in regulating international business?

1.1 International Business and Globalization

Simply, international business is the economic system of exchanging goods, services and intellectual property, conducted between individuals and businesses in multiple countries. In other words, international business may be any domestic business operation that includes an international element. Through international business, **goods, services and intellectual property funds** in one country may find a ready market or more profitable market elsewhere. Today international business comprises a large and growing portion of the world's total business. However, international business also creates increased transaction costs and risks. Factors such as differences in language, culture, economics, politics and laws bring about various barriers.

As a matter of fact, international business is as old as the oldest civilization. Throughout the history of mankind, countries traded to obtain needed items from textiles to spices that were not readily available in their own countries. Asia, Middle East, Africa and Europe have been the major marketplaces of trade for hundreds of years. There were famous "silk road", which linked the market of ancient China with Middle East and Europe, and the first international sea trade route established by the Europeans in the sixteenth century. With the advent of great naval power, Portugal and Spain opened the Americas, India, and the Pacific to trade. For more than three hundred years, trade in cotton, corn, horses, weapons and even slaves thrived among Europe,

America and Africa.

Much has changed in the field of international business since the end of World War II. The world today is more economically interdependent than at any time of the history. It is said the twentieth century was the century of emerging globalization. “Globalization” has been one of the most frequently cited terms in economic and legal literatures. In effect, globalization is rather a western economic concept with significant legal connotations. It is foremost an economic process. It is also a political event, as evidenced by the spread of rule of law among nations.^① Although globalization of markets is a process, it appears to be unstoppable. Undoubtedly, with the increasing globalization of economy, we will experience more cross-border activities. Many economists and business experts believe that no trade can be purely domestic in such a globalization process. The reality of the increasing economic interdependence among countries makes all trade international. No longer can an economic or policy change in one country occur without causing reverberations throughout the world’s markets. For example, the deterioration in trade relations between the United States and China can affect the manufacturing plants in Canada or Mexico. The Mad Cow Disease affected far more than the English cattle but the trade in beef worldwide.

Globalization can be attributed to many factors. Natural resources and raw materials are unevenly located around the world. Technology advances in communications has brought people closer than ever and make the world, to some extent, a village on the earth. Most of nations have moved away from pure protectionism of trade and increasingly toward free trade. Recent decades has seen a steady and robust movement towards regional integration, for example, EU and the development of free trade areas such as APEC and NAFTA. Technologies of patents, copyrights, trademarks and know-how are transferred by licensing agreements around the world, as freely as goods and services are sold. Greater political stability in newly emerged economically powerful countries has led to increasing trade volume around the world.

Such greater economic interdependence has required countries to reach agreement on important legal issues. The global economy has been affected by the development of widely accepted international conventions and practices, which provide a reliable and consistent legal environment for international business. Meanwhile, national laws are required to be harmonized and adjusted to new development in international business.

1.2 History of International Business Law

At the beginning, the rules and norms governing international business are basically the creation of merchants. In the twelfth century, medieval Europe experienced a renaissance of

^① See Jost Delbruck. “Globalization of Law, Politics and Markets-Implications for Domestic Law: A European Perspective”. *1 Ind. J. Global Legal Study*. Fall 1993.

trade and commerce. Merchants traveling by caravan or camel met at trade fairs to exchange goods such as wine, fruit, and porcelain. To meet the demand of trading over long distance, primary banking systems and new legal instruments (forerunners of today's bank checks) were created to facilitate the payment. Over time, the merchants developed a set of customs for exchanging goods and it is an unwritten code on how to bargain, barter, and sell goods at trade fair or city market. For example, it is a widely accepted consensus that if one bought the goods at trade fair and later discovered the goods had been stolen, the innocent buyer will incur the loss anyway. By relying on these customs, merchants would know what was expected of both parties to a transaction and how to avoid and resolve a dispute. Formally these customs became known as the *lex mercatoria* or *law merchant*, and they were "enforced" by the merchants themselves. That is, considering their reputation and the importance of maintaining permanent good business relationships, merchants will follow these customs in transactions. As trade spanned greater distances and involved more complicated skills, merchants took on greater risks, and transactions required more complex legal rules. By the eighteenth century, the courts recognized the *law merchant* and made it a part of the common law in England. In the continent of Europe, the *law merchant* was incorporated into stricter legal codes, for example, the *French Civil Code of 1804* and the *German Civil Code of 1896*.

As the business world became more complex, and with the dawn of air travel and worldwide communication, a clearer and uniform set of modern rules governing international business are needed in the twentieth century. In fact, the international business law has grown and shaped up significantly in the twentieth century, especially after World War II. The leaders of the nations fighting against Germany, Italy and Japan realized a push to arrange a comprehensive network of multilateral agreements to settle the world's political and economic problem. In July 1944, they met in Bretton Woods determining to create a system of rules and obligations that would promote trade liberalization and multilateral economic cooperation. Under the Bretton Woods system, the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD or World Bank) were established. However, the International business Organization, a institution planned to establish, was only resulted in the *General Agreement on Tariffs and Trade* came into effect in 1947 (GATT 1947). Its articles established rules governing customs procedures, quantitative restrictions, subsidies, anti-dumping and countervailing duties, and state trading. Its contracting parties agreed to honor the most-favored-nation principle and the principle of national treatment. Unlike proposals discussed immediately after World War II, the GATT had no provisions dealing with employment, international investment, restrictive business practices, or international commodity agreements. A small secretariat (the GATT Organization) was set up in Geneva, Switzerland to oversee the operation of the GATT Agreement.

The contracting parties of the GATT 1947, which were most of the states allied with the United States and Europe during the Cold War, regularly participated in multilateral trade negotiations (or "Rounds") to negotiate trade concessions. And finally "The Final Act

Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations”, which provided for the establishment of a World Trade Organization (WTO) came into existence on January 1, 1995.

The *Uruguay Round Final Act* is made up of three parts. The first part, the formal Final Act itself, is a one-page “umbrella” that introduces the other parts. The second part of the Final Act is the WTO Agreement and its annexes. The 14 Agreements on Trade in Goods (including GATT 1994), the *General Agreement on Trade in Services* (GATS), the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and the *Trade Policy Review Mechanism* (TPRM) are binding on all members of the WTO. The Four Plurilateral Trade Agreements (*Agreement on Trade in Civil Aviation*, *Agreement on Government procurement*, *International Dairy Agreement* and *International Bovine Meat Agreement*) ^①are only binding on those members that have accepted them. The third and final part consists of the Ministerial Declarations and Decisions. (See **Exhibit 1-1: Outline of the Uruguay Round Final Act**)

Exhibit 1-1: Outline of the Uruguay Round Final Act

I . FINAL ACT

II . AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION (WTO AGREEMENT)

Annex 1A: Agreements on Trade in Goods

1. General Agreement on Tariffs and Trade 1994
2. Uruguay Round Protocol to the General Agreement on Tariffs and Trade 1994
3. Agreement on Agriculture
4. Agreement on Sanitary and Phytosanitary Measures
5. Agreement on Textiles and Clothing
6. Agreement on Technical Barriers to Trade
7. Agreement on Trade-Related Investment Measures
8. Agreement on Implementation of Article VI [concerning antidumping]
9. Agreement on Implementation of Article VII [concerning customs valuation]
10. Agreement on Preshipment Inspection
11. Agreement on Rules of Origin
12. Agreement on Import Licensing Procedures
13. Agreement on Subsidies and Countervailing Measures
14. Agreement on Safeguards.

Annex 1B: General Agreement on Trade in Services

Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights

^① The latter two Agreements were terminated at the end of 1997.