WTO RULES AND CHINESE ECONOMIC LAW ON FOREIGN BUSINESS

中国涉外经济法与WTO国际规则

孙南申　主编

法律出版社
LAW PRESS · CHINA

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法　律　出　版　社
LAW PRESS · CHINA

图书在版编目(CIP)数据

中国涉外经济法与WTO国际规则/孙南申主编.—北京:法律出版社,2002.1
ISBN 7-5036-3646-7

Ⅰ.中… Ⅱ.孙… Ⅲ.①涉外经济法—基本知识—中国—英文②世界贸易组织—规则—基本知识—英文
Ⅳ.①D922.295②F743

中国版本图书馆CIP数据核字(2001)第096867号

出版/法律出版社　　**总发行**/中国法律图书公司
印刷/北京朝阳北苑印刷厂　　**经销**/新华书店
责任印制/李　跃　　**责任校对**/杜　进

开本/A5　　**印张**/14.75　**字数**/394千
版本/2002年6月第1版　　2002年6月第1次印刷

法律出版社地址/北京市西三环北路甲105号科原大厦A座4层(100037)
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中国法律图书公司地址/北京市西三环北路甲105号科原大厦A座4层(100037)
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(010)88414934(科原大厦营业部)　(010)88960092(八大处营业部)
(021)62071679(上海公司)
商务网址/www.china law-book.com

书号:ISBN 7-5036-3646-7/D·3281
定价:28.00元
(如有缺页或倒装,本社负责退换)

编写说明

(一)本书结构

中国涉外经济法与WTO国际规则(英文版)的英文名称为WTO Rules and Chinese Economic Law on Foreign Business。本书是以法律英语形式全面阐述中国现行涉外经济法律制度及WTO协议规则的法律教材。

全书共设30章(Chapter),每章(阐述)一部中国涉外法律、法规或WTO国际协议。每章后均附有法律词汇表及练习题,均是针对正文内容进行。练习题包括:(1)判断题(True or False Drills);(2)填充题(Fill in Blanks with Prepositions);(3)汉译英(Translation from Chinese into English);(4)理解问答题(针对正文内容提问)。此外,每章练习后还附有案例阅读理解(Reading Comprehension for case Study)。案例阅读全部采用实际发生的涉外经济案例和WTO受理的国际贸易争端的材料,并在每个案例后提出涉及本案争议的法律问题,既作为法律英语练习,又针对案件处理的答案。本书的使用面广泛,读者至少可以包括以下方面:(1)高等院校法律专业的本科生与研究生;(2)来华投资与贸易的外国公司的法律事务人员;(3)从事涉外经贸业务的律师及有关部门人员。

(二)本书特点

1. 本书所阐述的中国涉外经济法和WTO国际规则,并非简单将法律文本列出,而是择其要义进行编写,既忠实反映法律文本主要核心内容,又对法律规则进行适当解释,表现为流畅易懂的法律英语,为了避免迅速过时,本书介绍的中国涉外经济法规截止到

2001 年。

2. 本书是在中国加入 WTO 的背景下编写的，入世意味着中国融入经济全球化，国内市场进一步开放，在货物贸易、服务贸易和知识产权三大领域尤其如此。因此，对外经济贸易发展需要了解我国调整规范这些领域的涉外经济法律制度，中国入世后将全面履行 WTO 协议规则，中国现行的涉外经济立法也正在全面修订、补充与完善，因此对 WTO 协议的核心内容进行阐述与解释，使之成为通顺的法律英语，实属十分必要。

(三)分工安排

本书主编已有十年为法律本科讲授专业英语经验，近年来以英文为研究生讲授涉外经济法课程，以此作为研究生课程建设的内容之一，此外，还有四位青年教师及硕士研究生参编此书，他们均具有英语本科毕业及国际经济法硕士学位的背景，并有较高水平的英语应用能力。

本书由南京大学法学院孙南申教授担任主编，承担全书的内容与篇目设计、确定写作原则与方法、进行选题论证、提供法律法规的英文文本，进行写作指导，及对全书初稿进行审查修改，并最终统稿。

全书的具体章节的撰写分工如下：

孙南申 撰写以下七章

1. 涉外合同法律制度；

21. 民事诉讼与执行；

26. WTO 法律结构；

27. GATT 1944(关贸总协定)；

28. GATS(服务贸易总协定)；

29. TRIPS(知识产权协议)；

30. WTO 争端解决机制。

此外，还负责编写全书每章后的案例阅读理解材料。

孙 雯 撰写以下四章，并协助主编修改初稿

5. 保险法；
9. 进出口商品检验法；
16. 企业法人登记管理条例；
20. 外资金融机构管理条例。

李祥俊 撰写以下七章

11. 指导外商投资方向规定；
12. 中外合资经营企业法；
13. 中外合作经营企业法；
14. 外资企业法；
15. 公司法；
17. 外商投资开发经营成片土地管理规定；
18. 外商投资企业清算法。

易在成 撰写以下六章

2. 技术引进合同法；
19. 外汇管理法；
22. 专利法；
23. 商标法；
24. 版权法；
25. 计算机软件保护条例。

彭 岳 撰写以下六章

3. 担保法；
4. 海商法；
6. 对外贸易法；
7. 进口货物许可制度；
8. 出口货物原产地规则；
10. 海关法。

孙南申

2001 年 11 月

Contents

Chapter 1 Contract Law on Foreign Business

On October 1, 1999, the Contract Law of People's Republic of China (hereinafter referred to as the Contract Law) came into force and replaced the original three contract laws, i.e. Economic Contract Law, Foreign Economic Contract Law and Technology Contract Law which were abolished simultaneously.

The 23 chapters of the Contract Law deal with general issues of contract law including formation, effectiveness, performance, amendment, assignment, termination, and breach. The Contract Law also covers the issues raised by 15 specific categories of contract, many of which are of direct concern to foreign investors as well as foreign companies. The Contract Law also contains some special articles dealing specifically with foreign contracts, such as Article 126 on choice of law, Article 129 on lawsuit limitations for international sales contracts and technology import contracts, etc.. In addition, the Contract Law incorporates some terms found in the United Nations Convention on Contracts of the International Sale of Goods (CISG). The CISG, which became effective in China in January 1988, establishes uniform legal rules governing formation of international sales contracts and the rights and obligations of buyers and sellers. It applies automatically to all contracts for the sale of goods between

traders from different countries that have ratified it, unless the parties to the contracts expressly exclude all or part of the CISG or expressly stipulate a law other than the CISG.

Clauses of Contract

The principles of freedom of contract and autonomy of will are the foundation of contract law which excludes the interference of any unit or individual to the content of contract that shall be negotiated by the parties to the contract at their own will. In this way, The Contract Law provides in its Article 12 that "the contents of a contract are to be agreed upon by the parties and shall in general include the following clauses:

(1) name and domicile of contracting parties;
(2) subject-matter of contract;
(3) quantity;
(4) quality;
(5) price or remuneration;
(6) time limit, place and method of performance;
(7) liability for breach of contract; and
(8) approaches to settle dispute.

The Government Approval Process

One of the issues facing contracting parties especially foreign investors is the government approval process which is required for many contracts. The Contract Law makes it clear in Article 44 and elsewhere that approval procedures for the contracts mandated by other laws and regulations will stay in place.

Forms of Contracts

The Contract Law broadens the scope of contract law to include oral as well as written contracts. The Contract Law states that contracts may be concluded in writing, or orally or in other forms. The contracts should be made in writing if regulated by other laws or administrative regulations, or the parties to contracts require so. That is to say, on one hand, the Contract Law entitles the parties to choose the form of concluding contracts; on the other hand, it emphasizes the statutory requirement of written form by other laws and regulations.

For contracts that must be in writing, the Contract Law defines written form to include letters, telegrams telexes, faxes, EDI and e-mail. Even for contracts that are required by laws to be in written form, however, there is an important exception. If performance of a contract's essential obligations of one party has begun, and other party has accepted it the contract is enforceable without a written document (Article 36). Whether or not foreign companies intend to create binding oral contracts, they will need to clarify carefully their intentions to other parties. Article 54 would allow other parties to apply for modification or revocation of the contract on the basis of serious misunderstanding with respect to its conclusion. This provision, however, would be particularly troublesome in the case of oral agreements.

Offer and Acceptance

This will be a great convenience for foreign investors or companies from countries that are signatories to the CISG, as their sales contracts will already reflect these concepts. The Contract Law will make international sales contract practice more consistent with other forms of contract encountered in China.

Under the Contract Law, an offer must be definite and manifest the party's intent to be bound if the other party accepts (Article 14). It is effective when it reaches the offeree (Article 16). Offers may be withdrawn or revoked before or at the same time they are received by the offeree (Articles 17, 18). They are irrevocable if the offeror provides a term during which they will remain open; or if the offeror otherwise indicate that they are irrevocable; or if the offeree has reasonable grounds for believing that the offer is irrevocable and begins to make preparation for performance (Article 19) Acceptance must be apparent which indicates the offeree's consent to an offer (Article 21). Contract is established when acceptance become effective and acceptance is effective upon receipt by the offeror. Acceptance may be effective by performance if the offer expressly requires that or in accordance with business transaction practice (Article 25,26).

On the key issue of acceptances that modify the terms of the original offer, the Contract Law follows the approach of the CISG. An acceptance with material changes constitutes a counteroffer (Article 30). An acceptance with non-material changes is effective unless the offer is conditioned on the offeree making no changes or the offeror objects promptly (Article 31). In the absence of objections, the contract is formed on the terms of the acceptance. The definition of materiality basically follows the CISG.

Fairness Principle

Parties who seek to address contract issues by the use of standard terms must proceed cautiously under the Contract Law, which subjects the use of standard terms to the overriding principle of fairness. Fairness in this context includes substantive and procedural components. The party using such standard terms must call the other

party's attention to the clauses containing the exemption from or restriction of its contract liability, provide explanations of their meaning upon request and seek specific agreement; otherwise, the standard terms are without legal effect (Article 37). Standard terms that undermine a party's significant rights and duties are ineffective (Article 39). In cases where the standard terms are unclear, they are to be interpreted against the drafter's interest (Article 41).

Agency System

1. The provisions of apparent authority

The Contract Law provides that when agents exceed their authority or continue to sign contracts after termination of their agency, their agreements are effective unless there is no reason for the third party to trust that the actors have the power of agency. (Article 49). It also provides that when company representatives exceed their authority, their agreements will be effective unless the third party know or has reason to know of the representative's lack of authority (Article 50).

The above provisions include the rule of apparent authority which is also applied to the agent problem of sales contract involving foreign elements. Apparent authority occurs when conducts of the principal make the third party believe that the "agent" is authorized to act on the principal's behalf, and in view of this apparently existing authority, the third party enters into legal relationship with the agent. Article 49 lists several typical kinds of apparent authority including: the agent without authority, the agent exceeding exist authority, or the third party reasonably believes that the agent has authority after the termination of agency. Due to the absence of stipulation of apparent authority in original contract law and Civil Law, problems

arising from apparent authority can not be settled properly through judicial methods, which contribute to the expansion of the scope of void contracts and does harm to stability of contract relationship as well as the protection of safety of transaction. The provisions concerning apparent authority in the NCL provide definite legal ground for the recognition of validity of economic contracts involving foreign elements formed through apparent authority.

2. The provisions on "the partially disclosed principal"

Article 402 provides: "Where the agent, in his own name, enters into a contract with the third party under the authority of the principal, and the third party has the knowledge of the agency relationship between the principal and the agent at the time of entering into the said contract, the said contract will directly bind the principal and the third party, unless truthful evidence shows that the said contract binds only the agent and the third party." In accordance with this provision, when a professional trade company acts as agent of domestic enterprise with the foreign company, so long as: (1) when entering into the contract, he makes an announcement to the foreign party that he is acting only as an agent, or states that he has the agency relationship with a domestic client, which is satisfying the requirement that the third party should has knowledge of the agency relationship; (2) he enters into the contract with the foreign party in his own name and; (3) the rights and obligations are directly assumed by the domestic client and the foreign party, the foreign trade agency contract shall directly bind the principal and the third party. Neither will the foreign trade company undertake the substantive obligations, nor enjoy the rights under the contract.

3. The provisions on "the undisclosed agent"

Article 403 regulates the undisclosed agent. In accordance with