新编法学英语教程

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A LEGAL ENGLISH COURSE

FOR SENIOR LAW STUDENTS

上海外语教育出版社

外教社

BOOK TWO

新编法学英语教程

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上海外语教育出版社

图书在版编目(CIP)数据

新编法学英语教程. 下册/谢立新,马庆林,白小兰编著.
-上海：上海外语教育出版社,2000
ISBN 7-81046-904-5

Ⅰ. 新… Ⅱ. ①谢…②马…③白… Ⅲ. 法学-英语-高等学校-教材 Ⅳ. H31

中国版本图书馆 CIP 数据核字(2000)第 38977 号

出版发行：上海外语教育出版社
（上海外国语大学内） 邮编：200083
电　　话：021-65425300（总机），65422031（发行部）
电子邮箱：bookinfo@sflep.com.cn
网　　址：http://www.sflep.com.cn　http://www.sflep.com
责任编辑：江雷红

印　　刷：上海外国语大学印刷厂
经　　销：新华书店上海发行所
开　　本：890×1240　1/32　印张 8.625　字数 238 千字
版　　次：2000 年 12 月第 1 版　2000 年 12 月第 1 次印刷
印　　数：3 000 册

书　　号：ISBN 7-81046-904-5 / H・700
定　　价：12.70 元

前　言

《新编法学英语教程》是为法学各专业学生在修完《大学英语》后进一步学习基础法学英语知识而编写的，旨在通过这套教材的实践，帮助学生掌握法学英语的基础词汇，了解新的国外法学研究成果并通过教学实践获得运用法学英语的基本技能，形成熟练阅读理解法学文献以及较为严谨的汉译英的能力。

本教程分上、下两册。每册 10 个单元，每个单元分 Text 和 Supplementary Reading Materials 两大部分。每单元的教学需 6 学时，全册约需 60 学时。Text 作为精读文章讲解，课文后面设计了选择型阅读理解练习，供课堂测试用；英译汉练习的目的在于进一步培养学生理解和翻译的能力，可作为课后作业用。Supplementary Reading Materials 作为泛读文章用，文中生词让学生自查，教师在课堂上无需做过细的讲解，重在培养学生独立思考的能力。

全套教程的选材均来自原文。题材结合法学各专业特点，力求内容新颖丰富，文章体裁多样。Text 是每个单元的中心，在课时分配上应有所侧重。补充阅读文章与精读文章相互配合，目的在于加大 Text 的信息量。补充阅读材料基本上是未经删改的原文，教师可根据授课情况有选择地进行讲解。

本套教程作为法学英语的教学内容在西北政法学院及国内部分法学院系试用基础上，广泛听取了一些法学专家和执教本教程同志的意见，从大量最新法学英语材料中筛选补充了内容，并对原有体例作了适当调整，特别是对江雷红同志认真审阅过程中所指出的问题一一作了修正。

在编写过程中，我们参考和引用了国内外一些法学英语材料并邀请部分法学专家教授审阅原文，魏耀章同志工作之余还帮助

校对部分文字错误，在此一并致以诚挚的谢意。

在审定原稿及出版过程中，得到外教社庄智象社长的重视和支持，有幸得到江雷红女士的细致审校，使得该教程在较短时间内问世，在此编者亦表示最真挚的谢意。

由于编者才疏学浅，疏漏舛错，在所难免，诚恳希望读者批评指正。

编　者

2000年6月1日

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Unit 1

Text

Civil Procedure

A typical civil proceeding in a civil law jurisdiction is divided into three separate stages. There is a brief preliminary stage, in which the pleadings are submitted and a hearing judge (usually called the instructing judge) appointed; and evidence-taking stage in which the hearing judge takes the evidence and prepares a summary written record; and a decision-making stage, in which the judges who will decide the case consider the record transmitted to them by the hearing judge, receive counsel's briefs, hear their arguments and render decisions. The reader will observe that the word "trial" is missing from this description. In a very general way it can be said that what common lawyers think of as a trial in civil proceedings does not exist in the civil law world. The reason is that the right to a jury in civil actions, traditionally in the common law world, has never taken hold in the civil law world. This tradition continues most strongly in the United States today, where in most jurisdictions there is a constitutional right to a civil jury. (Elsewhere in the common law world the civil jury has been abolished.)

The existence of a jury has profoundly affected the form of civil proceeding in the common law tradition. The necessity to bring together a number of ordinary citizens to hear the testimony of witnesses and observe the evidence, to find the facts, and to apply the facts to the law under instructions from a judge, has

pushed the trial into the shape of an event. The lay jury cannot easily be convened, adjourned, and recovered several times in the course of a single action without causing a great deal of inconvenience and expense. It seems much more natural and efficient for the parties, their counsel, the judge, and the jury to be brought together at a certain time and place in order to perform, once and for all, that part of the civil proceeding that requires their joint participation. Such an event is a trial as we know it.

In the civil law nations, where there is no tradition of civil trial by jury, an entirely different approach has developed. There is no such thing as a trial in our sense; there is no single, concentrated event. The typical civil proceeding in a civil law country is actually a series of isolated meetings of written communications between counsel and the judge, in which evidence is introduced, testimony is given, procedural motions and rulings are made, and so on. Matters of the sort that would ordinarily be concentrated into a single event in a common law jurisdiction will be spread over a large number of discrete appearances and written acts before the judge who is taking the evidence. Comparative lawyers, in remarking on this phenomenon, speak of the "concentration" of the trial in common law countries and the lack of such concentration in civil law countries. In general it can be said that civil lawyers favor the more concentrated system and that the trend in civil law jurisdictions has been toward greater concentration, with the rate of development varying widely. (Austria and Germany seem to be moving most rapidly in this direction.) The tradition, however, continues to be one of relative lack of concentration.

Lack of concentration has some interesting secondary consequences. For one thing, pleading is very general, and the issues are defined as the proceeding goes on; this practice differs consid-

erably from that found in common law jurisdictions, where precise formulation of the issues in pleading and pretrial proceedings is seen as necessary preparation for the concentrated event of the trial. For somewhat similar reasons, the civil law attorney typically spends less time in preparing for an appearance before the court during the evidence-taking part of the civil proceeding. The appearance is usually for the purpose of examining only one witness or of introducing only one or two pieces of material evidence. The pressure to prepare the entire case at the very beginning, felt by the common lawyer preparing for trial, does not exist. The element of surprise is reduced to a minimum, since each appearance is relatively brief and involves a fairly small part of the total case. There will be plenty of time to prepare some sort of response before the next appearance. The lack of concentration also explains the lesser importance of discovery (advance information about the opponent's witnesses and evidence) and pretrial procedures (preliminary discussions with opposing counsel and the judge to reach agreement on matters not really at issue and so on). Discovery is less necessary because there is little, if any, tactical or strategic advantage to be gained from the element of surprise. There is no necessity for pretrial proceedings because there is no trial; in a sense every appearance in the first two stages of a civil law proceeding has both trial and pretrial characteristics.

A second characteristic of the traditional civil law proceeding is that evidence is received and the summary record prepared by someone other than the judge who will decide the case. As we know that contemporary procedural institutions in the civil law world have been strongly influenced by medieval canonic procedures. In the canon law proceeding, evidence was taken by a clerk, and it was the clerk's written record that the judge used in

making his decision. This procedure eventually was modified to place the evidence-taking part of the proceeding under the guidance of a judge, but quite often the case would still be decided by other judges, or by a panel of judges that included the judge who took the evidence. Comparative lawyers customarily contrast this form of proceeding with the custom in the common law system by which the evidence is heard and seen directly and immediately by the judge and jury who are to decide the case. Accordingly, it has become common to speak of the "immediacy" of the common law trial, as distinguished from the "mediacy" of the civil law proceeding. Here again, comparative commentators tend to think of the common law system as preferable, and there is a steady evolution in civil law jurisdictions toward greater immediacy. The "documentary curtain" that separated the judge from the parties during the medieval period and that was then thought to produce a greater likelihood of fair proceedings, unaffected by influence brought to bear on the judges by interested persons, no longer seems necessary. On the contrary, preparation of the record by someone other than the judge who is to decide the case is now seen to be a defect because it deprives the judge of the opportunity to see and hear the parties, to observe their demeanor, and to evaluate their statements directly.

In a mediate system, procedure tends to become primarily a written matter. Those in common law countries think of trial as an event during which witnesses are sworn and orally examined and cross-examined in the presence of the judge and jury. Motions and objections are often made orally by counsel, and the judge rules orally on them. In the civil law, on the contrary even the questions to a witness during the civil proceedings are often asked by the judge on the basis of questions submitted in writing by counsel for the parties. Where the practice persists of having

one person receive the evidence and make the record and another decide the case, a written rather than oral proceeding is obviously necessary. A trend toward immediacy in civil proceedings carries with it a trend toward orality, and orality is promoted also by the trend toward concentration. Civil law proceduralists think of the three matters as related to one another, and one frequently encounters discussions in which concentration, immediacy, and orality are advanced as interrelated components of proposals for reform in the law of civil procedure.

Foreign observers are sometimes confused by the fact that, in most civil law nations, questions are put to witnesses by the judge rather than by counsel for the parties. This leads some to the conclusion that the civil law judge determines what questions to ask and, unlike the common law judge, in effect determines the scope and extend of the inquiry. People talk about an "inquisitorial" system of prooftaking, as contrasted with the "adversary" system of the common law. The characterization is quite misleading. In fact, the prevailing system in both the civil law and the common law world is the "dispositive" system, according to which the determination of what issues to raise, what evidence to introduce, and what arguments to make is left almost entirely to the parties. Judges in both traditions have some power to undertake inquiries on their own, and in Germany the law and the judicial tradition encourage the judge to play an active role in the proceedings. Elsewhere, however, civil law judges are more passive. The common law judge is occasionally inclined to intervene, but usually does so only when juveniles or other incapacitated persons are involved in a case, or where there appears to be a clear public interest that the parties are not adequately representing. In similar cases in civil law jurisdictions, a public prosecutor or similar official is required by law to participate in the proceed-

ing as a representative of the public interest. But these are exceptional occurrences, and in the great mass of civil litigation in both traditions the rule is that the parties have considerable power to determine what will take place in the proceedings. Where the civil law judge puts questions to the witness, he does so at the request of counsel, and he ordinarily limits his questions to those submitted by the lawyers.

The practice of putting the judge between the lawyer and the witness does, however, further illustrate the traditional lack of orality in the civil law. Ordinarily the lawyer who wishes to put questions to a witness must first prepare a written statement of "articles of proof", which describes the matters on which he wishes to question the witness. These articles go to both the judge and the opposing counsel in advance of the hearing at which the witness is to be examined. In this way the opposing counsel (and possibly also the witness himself) has advance written knowledge of what will go on at the hearing and can prepare for it. This profoundly affects the psychological positions of questioning lawyer and responding witness at the hearing, and the fact that any questions the lawyer asks must pass through the judge at the hearing reinforces this effect. The familiar pattern of immediate, oral, rapid examination and cross-examination of witnesses in a common law trial is not present in the civil law proceeding.

Cross-examination, in particular, seems foreign to the civil law proceeding. There has never been a jury to influence. There is little effort to discredit witness (in part, perhaps, because parties, their relatives, and interest third persons have been — and in many jurisdictions still are — disqualified from appearing as witnesses). The hearing judge is professionally and impartially interested in getting the relevant facts, and all questions are fil-

tered through the judge. The "offer of proof" determines the scope of the witness's testimony and diminishes the possibility of surprise. Opposing counsel's principal activity in the process often consists only in making suggestions to the judge about the precise wording of the summary of the witness's testimony that goes into the record.

The contrast between common law and civil law procedure, in terms of the interrelated criteria of concentration, immediacy, and orality, can be illustrated by example. Plaintiff's lawyer may propose (in writing) to the hearing judge that a witness be called to testify. A copy of this "offer of proof" will go to the defendant's lawyer. The defendant's lawyer may object, perhaps because he believes that the proposed witness is disqualified by a family or business relationship with the plaintiff. The hearing judge will then set a hearing, usually a few weeks later, when the lawyers will submit written briefs and orally argue the question. The hearing judge will then take the question under consideration, and eventully, after a few more weeks, will issue his ruling in writing. If the ruling is in favor of the proposed "offer of proof", a date will be set for a further hearing at which the witness's testimony will be taken. In a typical civil action in a common law court, this entire sequence of events — stretching over several weeks or months in a civil law court would be telescoped into less than a minute of oral colloquy between judge and counsel. Plaintiff's lawyer asks the court to call a witness; defendant's counsel objects and briefly states his reason; plaintiff's counsel replies; the judge rules; and the witness, who is waiting in the courtroom, is called and takes the stand.

Suppose the witness in the previous example is called and testifies. The hearing judge will make notes (there is no verbatim record) of the testimony and dictate a summary to clerk. After

the witness and lawyers agree about the accuracy of the summary, the summary will enter the record that goes to the deciding panel of judges. They in turn must base their finding of fact (and justify those findings in writing) on the record. Even if the deciding panel includes the hearing judge, as it does in Italy, the written record strictly limits the determination of facts. The hearing judge's recollection of the witness's hesitancy, furtive demeanor, or patent insincerity — unless reflected in the written summary of his testimony in the record — cannot affect the findings of fact. In the common law, a jury's verdict is summary and requires no specific findings of fact. The witness's demeanor, as well as a variety of other circumstantial factors, can and often will significantly affect the jury's verdict. Where a case is tried in our courts by a judge without a jury, the judge who decides the case is the judge who sees and hears the witness. Our procedure permits, indeed requires, him to base his findings on his observations as well as on the witness's words.

A number of factors explain the substantial differences in the law of evidence between the civil law and the common law tradition. One of the most important of these, again, is the matter of the jury. In civil actions in common law jurisdictions, a variety of exclusionary rules, rules determining the admissibility or inadmissibility of offered evidence, have as their prime historical explanation the desire to prevent the jury from being misled by untrustworthy evidence. An alternative policy, one providing that the common law jury be warned of the unreliability of the evidence but then be allowed to evaluate it on the basis of the warning, has uniformly been rejected. The evidence is totally excluded.

The most obvious example is the "hearsay rule". Suppose a witness states that he overheard a conversation and is asked what

he heard. The immediate response in a trial at common law will be: "Objection, your honor, hearsay." The rule is that the witness may not testify about what someone else said. That person should be brought before the court to testify in person, where his statements may be subjected to cross-examination, his demeanor observed by the jury, and so on. Accordingly, hearsay testimony is totally excluded. The desirability of such a rule, particularly in nonjury trials, is often questioned, and the rule itself is riddled with exceptions; but it survives to complicate trials and keep otherwise competent and relevant evidence out of common law cases.

Such rules do not exist in civil law jurisdictions because of the absence of a jury in civil actions. This does not mean, however, the evidence can be freely introduced without restriction in civil law proceedings. On the contrary, there are a number of restricting and excluding devices. In some civil law jurisdictions, some special parties are disqualified from testifying. The decisory oath is still in effect in many countries (among them France, Italy, and Spain), although its use is primarily tactical. In general, however, the movement for procedural reform has had as its objective what is called "free evaluation of the evidence" by the judge. Such a movement was given great impetus by the rationalist spirit of the revolutionary period, but its thrust has been limited by the general weakness of the civil law judge and by the widespread mistrust of judges among civil lawyers. Nevertheless, proceduralists in civil law jurisdictions generally regard free evaluation of the evidence as the ideal toward which reform should point.

In the United States, if A sues someone, he usually must pay his own lawyer, whether he wins or loses. In civil law countries, as in France, the loser usually pays the winner's counsel