

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）

（第二版）

# 国际贸易法

（英文版）

International Trade Law

(Second Edition)

韩永红 编著



对外经济贸易大学出版社



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# 再版前言

《国际贸易法》(英文版)(第二版)的编写继续遵循“方便使用者”的指导思想,从体例设计、内容安排到语言风格均旨在满足使用者(包括教授者与学习者)的实际需求。为帮助使用者快速了解本书,现将其主要特点简要介绍如下:

一、在体例设计上,本书兼采中外同类著作的优点,从方便教学,方便学习者使用的角度设计。全书正文共设十章:国际贸易的法律环境、国际货物买卖法律制度(I)、国际货物买卖法律制度(II)、国际货物运输法律制度、国际贸易支付法律制度、国际技术转让法律制度、国际电子商务法律制度、世界贸易组织法律制度、各国管理贸易的法律制度、国际商事争议解决法律制度。每章包括“内容大纲”、“热身问题”、“正文”、“小结”和“练习”五个组成部分。“内容大纲”(Chapter outline)可帮助使用者宏观了解本章的内容结构和主要问题,课前对“热身问题”(Warm-up questions)的讨论则可以帮助学习者积累必要的背景知识,激发其学习本章内容的兴趣和探索的热情。“小结”(Chapter summary)是对本章所讨论的主要理论、规则、观点的简要归纳,以帮助学习者回顾本章的主要内容。“练习”(Chapter questions)部分安排了“正误辨析”、“问答题”、“案例题”,个别章节还安排有“选择题”和“开放式讨论题”等多种练习形式,使用者可根据个人情况选择逐一完成或只选做其中部分题目。除上述内容外,全书还包括“前言”、“目录”、“附录”、“法律术语表”、“参考书目”其他五个组成部分。

二、在内容安排上,本书紧扣国际贸易法的法律渊源,既注重对重要国际条约(公约)或示范法的阐释,也看重当今世界主要贸易国家国内法的影响,尤其是中国法律的相应立法状况与立法内容。从而使学习者认识到国际贸易法不仅是国际法更是国内法,在学习国际贸易法的过程中,既要有国际视野,也要关注本土法律资源。针对中国学习者的整体水平,在具体的内容论述中本书对不同问题所费笔墨有所区别。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,以免对学习者的造成不必要的观点混乱性困扰。而对重要内容,本书采用黑体字予以突出,以提醒使用者重点掌握和理解这些内容。同时借鉴英美国家案例教学的优点,在对重要内容进行阐述时,穿插了一些中外经典案例以帮助学习者更好地理解和应用相关的法律规则。

三、在写作语言上,编著者努力使语言既严谨、流畅同时又不失活泼。本书的编著者认为,在以英语为媒介学习法律的过程中,应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,培养学习者条分缕析式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和表达法律问题的能力,本书的正文全部以英语写作,不夹杂任何中文注释。这可能会给本书的部分使用者带来挑战,但这种挑战应该不会导致学习的困难。因为一般而言,对重要法律规则及法律术语的内涵正文部分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,编著者已对每章内容中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”。

本书力图避免外文原版法律教材在体例与内容上“水土不服”的弊端,也致力于努力改进本土法律双语教材较为刻板、生硬的印象,但这一目标的完全实现无疑是一项艰巨的任务。

本书第一版出版以来,得到了读者的认可。在对外经济贸易大学出版社编辑的提议和督促下,编著者基于国际贸易法的新发展,结合读者的反馈意见,对全书进行了修订,对相应内容予以更新、删节和更正。限于编著者学力所限,加之写作时间仓促,本书想必仍难免有错漏之处,谨请读者继续不吝指正。您的意见将帮助本书不断成长!

韩永红

2013年7月于广州白云山下

# Contents

## **Chapter 1 The Legal Environment of International Trade**

- 1.1 Globalization and International Trade
- 1.2 History of International Trade Law
- 1.3 Sources of International Trade Law
  - A. International Treaties and Conventions
  - B. International Trade Customs and Usages
  - C. National Law
  - D. Other Sources
- 1.4 Comparison of Legal Systems
  - A. The Romano-Germanic Civil Law System
  - B. The Anglo-American Common Law System
- 1.5 The Role of International Organizations in International Trade
- Chapter Summary
- Chapter Questions

## **Chapter 2 International Sale of Goods ( I)**

- 2.1 What Is a Contract?
- 2.2 Classification of Contracts
- 2.3 Essential Elements of a Valid Contract
- 2.4 Sources of Rules Governing International Sale of Goods
  - A. United Nations Convention on Contracts for the International Sale of Goods
  - B. National Law
  - C. Principles of International Commercial Contracts
  - D. International Customs and Usages: Incoterms
- Chapter Summary
- Chapter Questions

### **Chapter 3 International Sale of Goods (II)**

- 3.1 The Sphere of Application of CISG
  - A. Three Requirements for the Application of CISG
  - B. Choice of Law Clauses
  - C. Sales Excluded from CISG
  - D. Contractual Issues Excluded from CISG
- 3.2 General Provisions for Interpretation of CISG
- 3.3 Contract Formation
  - A. The Offer
  - B. The Acceptance
  - C. Battle of the Forms
- 3.4 Seller's Obligations
  - A. Obligations of Delivery
  - B. Obligations of Quality of the Goods
  - C. Obligations of Property Issues
- 3.5 Buyer's Obligations
  - A. Obligations of Payment
  - B. Obligations of Inspection and Notice of Defects
- 3.6 Risk of Loss
- 3.7 Excused Performance
- 3.8 Remedies for Breach of Contract
  - A. Avoidance of a Contract
  - B. Damages
  - C. Specific Performance
  - D. Other Remedies Available under CISG

Chapter Summary

Chapter Questions

### **Chapter 4 International Carriage of Goods**

- 4.1 Carriage of Goods by Sea
  - A. Bills of Lading
  - B. Charterparties
- 4.2 Carriage of Goods by Air

- A. The Warsaw Convention 1929
- B. The Montreal Convention 1999
- 4.3 Carriage of Goods by Road and Rail
- 4.4 Marine Cargo Insurance
  - A. Types of Losses
  - B. Types of Marine Insurance Policies
  - C. Types of Coverage
- Chapter Summary
- Chapter Questions

## **Chapter 5 Payment in International Trade**

- 5.1 Modes of International Payment
- 5.2 Fundamentals of Negotiable Instruments
- 5.3 The Bill of Exchange
  - A. Laws Governing the Bill of Exchange
  - B. Brief Requirements of the Bill of Exchange
  - C. Negotiation of the Bill of Exchange
- 5.4 Documentary Letters of Credit
  - A. Overview
  - B. The Governing Rules: UCP 600
  - C. Basic Legal Principles
- 5.5 Standby Letters of Credit
- Chapter Summary
- Chapter Questions

## **Chapter 6 The International Transfer of Intellectual Property**

- 6.1 Fundamentals of Intellectual Property Rights
  - A. Copyrights
  - B. Patents
  - C. Trademarks
  - D. Trade Secrets ( Know-how)
- 6.2 International Intellectual Property Organizations and Treaties
- 6.3 Regulations on International Licensing



- A. Rules Regulating the Anticompetitive Aspects of International Licensing
  - B. Restrictive Business Practices
  - C. Compulsory Licenses
- 6.4 Regulations of International Franchising
- Chapter Summary
- Chapter Questions

## **Chapter 7 International Electronic Commerce**

- 7.1 Introduction
  - 7.2 Private Contractual Measures Enabling Electronic Commerce
  - 7.3 UNCITRAL Model Law on Electronic Commerce
    - A. In General
    - B. Non-Discrimination Provisions
    - C. Contract Formation Provisions
  - 7.4 China's Legislation on Electronic Commerce
    - A. Development of Electronic Commerce in China
    - B. Electronic Signature Law of the People's Republic of China
  - 7.5 European Union's Law on Electronic Commerce
    - A. Electronic Signature Directive
    - B. Personal Data Protection Directive
  - 7.6 United States' Federal Law—E-SIGN Act
- Chapter Summary
- Chapter Questions

## **Chapter 8 WTO Law**

- 8.1 Historical Development of GATT Law and WTO Law
  - A. The Birth of the General Agreement on Tariffs and Trade (GATT)
  - B. Evolution of the GATT and GATT Law
  - C. The Uruguay Round
- 8.2 Overview of the WTO
  - A. What Is the WTO?
  - B. Membership of the WTO

- C. Structure of the WTO
  - 8.3 WTO Agreements
    - A. WTO Dispute Settlement
    - B. Multilateral Agreements on Trade in Goods
    - C. The General Agreement on Trade in Services( GATS)
    - D. The Agreement on Trade-related Aspects of Intellectual Property Rights ( TRIPS Agreement)
  - 8.4 China and the WTO
    - A. Non-market Economy Status
    - B. Specific Safeguard Mechanism for Products of Chinese Origin
- Chapter Summary
- Chapter Questions

## **Chapter 9 National Regulations on Imports and Exports**

- 9.1 Introduction
  - 9.2 China's Regulations on Imports and Exports
    - A. Overview of China's Regulations on Imports and Exports
    - B. The Fundamental Principles and Foreign Trade Dealers
    - C. Regulations on Imports and Exports of Goods and Technologies
    - D. Regulations on Imports and Exports of Services
    - E. Protection of Trade-related Aspects of Intellectual Property Rights
    - F. Maintenance of Foreign Trade Order
    - G. Foreign Trade Investigation and Foreign Trade Remedies
    - H. Promotion of Foreign Trade
  - 9.3 United States Import and Export Controls
    - A. US Import Restraints
    - B. Governance of Exports
    - C. General Prohibitions
    - D. US Section 301 Proceedings: Basic Section 301 , Special 301 , Telecommunications 301 and Super 301
- Chapter Summary
- Chapter Questions

## **Chapter 10 Settlement of International Commercial Disputes**

- 10.1 Methods of International Commercial Dispute Settlement
- 10.2 Settlement of Commercial Disputes through Arbitration
  - A. Overview of Arbitration and International Commercial Arbitration
  - B. Arbitration Clauses
  - C. Arbitration Procedure
  - D. Enforcement of Arbitral Awards: New York Convention
- 10.3 Settlement of Commercial Disputes Involving States through Arbitration
  - A. International Center for the Settlement of Investment Disputes (ICSID)
  - B. Dispute Settlement in the WTO
- 10.4 Settlement of Commercial Disputes through Litigation
  - A. Jurisdiction
  - B. Choosing the Governing Law
  - C. Proving Foreign Law
  - D. Recognizing and Enforcing Foreign Judgment

Chapter Summary

Chapter Questions

## **Appendix I United Nations Convention on Contracts for the International Sale of Goods**

## **Appendix II Uniform Customs and Practice for Documentary Credits UCP 600**

**List of Legal Terms**

**References**



## Chapter 1

# The Legal Environment of International Trade

### Chapter Outline

- Globalization and International Trade
- History of International Trade Law
- Sources of International Trade Law
  - A. International Treaties and Conventions
  - B. International Trade Customs and Usages
  - C. National Law
  - D. Other Sources
- Comparison of Legal Systems
  - A. The Roman-Germanic Civil Law System
  - B. The Anglo-American Common Law System
- The Role of International Organizations in International Trade
- Chapter Summary
- Chapter Questions

*What would this island be without foreign trade, but a place of confinement to the inhabitants, who (without it) could be but a kind of hermits, as being separated from the rest of the world; it is foreign trade that renders us as rich, honorable and great, that gives us a name and esteem in the world.*

*Charles Molloy*

## Warm-up Questions

- 1) How do you understand the importance of international trade?
- 2) What are the differences between international trade and domestic trade?
- 3) In your opinion, where can you find the rules and norms governing international trade?
- 4) Do you know some theories the economists have created to justify and explain international trade?
- 5) Can you name some international organizations, which play a role in regulating international trade?

### 1.1 Globalization and International Trade

Trade consists of the import and export of goods, services and technologies. It is as old as the oldest civilization. Throughout the history of mankind, countries traded to obtain needed items ranging from textiles to spices that were not readily available in their own countries. For example, 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.

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 used catch phrases 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.<sup>①</sup> 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

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

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 turn the world, to some extent, into a single village on the earth. Most nations have moved away from pure protectionism of trade and increasingly towards free trade. Recent decades have 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 through licensing agreements around the world, as freely as goods are sold.

Such greater economic interdependence has required countries to reach an 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 trade. Meanwhile, national laws are required to be harmonized and adjusted to the new development in international trade.

## 1.2 History of International Trade Law

At the beginning, the rules and norms governing international trade are basically the creation of merchants. In the twelfth century, medieval Europe experienced a renaissance of 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 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*. National law has become an integral part of international trade law.

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 trade are needed in the twentieth century. In fact, the international trade 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 Trade Organization, an 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 to 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", provided for the establishment of the World Trade Organization (WTO), which came into existence on January 1, 1995.<sup>①</sup> The principles and rules established by the WTO have been the integral part of modern international trade law.

As a discipline or branch of law, the international trade law in its modern perception has

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<sup>①</sup> As for the GATT and WTO, more information will be found in Chapter 8 of this book.

been largely defined by Clive Schmitthoff.<sup>①</sup> Schmitthoff defined the fundamentals of international trade law such as its sources and coverage. He provided a delimitation of international trade law in the book of *Schmitthoff's Export Trade* “. . . the law of international trade covers an unusually wide spectrum of business activity. It includes The International Sale of Goods; Marketing Organization Abroad; Finance of Export; Insurance of Exports; Transportation of Exports; International Commercial Dispute Settlement; Construction and Long Term Contracts; and Customs Law. ” In a more conceptual manner he added “International trade transactions relate to the exportation of goods and services from one country to another. . . These transactions are referred to as export transactions. The conduct of export transactions can be divided into two categories: transactions founded on the contract for the international sale of goods and those having as their object the supply of services abroad, such as the construction of works and installation in another country. ” Although the above statements were made in the 1960s, today’s definition and coverage of international law are still substantially based on them. It is generally agreed that international trade law is the body of rules and norms that regulates the cross-border transactions in goods, services and technologies between parties. The term “parties” include natural persons, legal persons, and international organizations. Under a few circumstances, states may also be a party to international transactions in the capacity of commercial not sovereign entity. Besides, states also play a unique role in regulating and supervising the international trade between private parties in its capacity of a sovereign.

Schmitthoff saw the international trade law as a separate body of legal rules and one of the outstanding features of the legal development. He argued it is a remarkable fact that the law of international trade shows a striking similarity in all national systems, thus some efforts should be made to achieve the uniformity of rules governing international trade in nations. It was directly motivated by his enduring efforts, the United Nations Commission on International Trade Law ( UNCITRAL ), an organization aiming to facilitate the harmonization of the law for international trade, was established in 1966. And more information about this organization will be provided in 1.5 of this Chapter.

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<sup>①</sup> Clive Schmitthoff ( 1903 – 1991 ) , born in Germany , is an outstanding legal expert of Britain. He is regarded to be the most important founder of modern international trade law. His books included but not limited to *The Sale of Goods* , *The English Conflict of Laws* , *Legal Aspects of Export Sales* and , most notably , *Schmitthoff's Export Trade* . The latter made its first appearance in 1948 and continued through ten editions. The tenth edition of Schmitthoff's *Export Trade* was edited by Leo D' Arcy , Carole Murray and Barbara Cleave and published by Sweet & Maxwell in 2000. Some of his essays have been translated into Chinese by professor Zhao Xiuwen and published in 1992.



### 1.3 Sources of International Trade Law

The modern international trade law is derived from many sources. Before determining the sources of this law, it is necessary to know the meanings of “sources of law”. Strictly speaking, the concept of sources of law (*fontes juris*) has two meanings: substantive sources and formal sources. The former refers to the substance of the principles and rules of law—what the law is, what the regulation is; the latter denotes constitution, treaty, statute, or customs that provide authority for legislation and for judicial decisions. The latter meaning is more often used in legal literature. In this sense, sources of international trade law include international treaties and conventions, international trade usages and customs, national law, and other sources such as resolutions of international organizations and soft law.

#### A. International Treaties and Conventions

Treaties are legally binding agreements between two (bilateral treaties) or more states (multilateral treaties). Conventions are legally binding agreements between states sponsored by international organizations, such as the UNCITRAL. In the field of international trade, the purpose of some treaties is to liberalize trade between the contracting states such as the GATT. Another group of treaties or conventions aims at unification of law. They introduce common substantive rules for regulating the transactions between individuals and companies. Most unifying law treaties or conventions only provide rules for situations with an international dimension, for example, international transportation or international sale of goods. The provisions of the treaties or conventions become part of the national law of the contracting states. For a specific treaty or convention, only the contracting states are bound by it. A number of treaties are, for instance, not yet in force or are at present only applied by a limited number of countries. For that reason many unifying law treaties or conventions achieve only a limited or a regional unification.

There are some important international treaties or conventions as the sources of international trade law. They include but not limited to: *the United Nations Convention on Contracts for the International Sale of Goods* (CISG 1980) in the area of international sale of goods, *Convention on the Unification of Certain Rules of Law Relating to Bills of Lading* (Hague Rules 1924), *the Warsaw Convention* and *the Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal Convention 1999) in the area of international transportation, *the International Convention on the Protection of Industrial Property* in 1883 and