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国际商法

**The Law of International
Business Transactions**

第 1 版

Larry A. DiMatteo

Warrington College of Business University of Florida
J. D., The Cornell Law School
L. LM., The Harvard Law School / 著



北京大学出版社

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· 院长寄语 ·

北京大学光华管理学院秉承北大悠久的人文传统、深邃的学术思想和深厚的文化底蕴,经过多年努力,目前已经站在中国经济发展与企业管理研究的前列,以向社会提供具有国际水准的管理教育为己任,并致力于帮助国有企业、混合所有制企业和民营企业实现经营管理的现代化,以适应经济全球化趋势。

光华 MBA 项目旨在为那些有才华的学员提供国际水准的管理教育,为工商界培养熟悉现代管理理念、原理和技巧的高级经营管理人才,使我们的 MBA 项目成为企业发展致富之源,为学员创造迅速成长和充分发挥优势的条件和机会。

为了适应现代人才需求模式和建立中国的一流商学院,北京大学光华管理学院正在推出国际 MBA“双语双学位”培养方案;同时,为了配合北大 MBA 教育工作的展开,光华管理学院与北大出版社联合推出本套《当代全美 MBA 经典教材书系(英文影印版)》,并向国内各兄弟院校及工商界人士推荐本套丛书。相信我们这些尝试将会得到社会的支持。而社会对我们的支持,一定会使光华 MBA 项目越办越好,越办越有特色。

北京大学光华管理学院院长

陈以寿

出版者序言

2001年12月10日中国加入了世界贸易组织,从此,中国将进一步加大与世界各国的政治、经济、文化各方面的交流与合作,这一切都注定中国将在未来世界经济发展中书写重要的一笔。

然而,中国经济的发展正面临着前所未有的人才考验,在许多领域都面临着人才匮乏的现象,特别是了解国际贸易规则、能够适应国际竞争需要的国际管理人才,更是中国在未来国际竞争中所必需的人才。因此,制定和实施人才战略,培养并造就大批优秀人才,是我们在新一轮国际竞争中赢得主动的关键。

工商管理硕士(MBA),1910年首创于美国哈佛大学,随后MBA历经百年风雨不断完善,取得了令世人瞩目的成绩。如今,美国MBA教育已经为世界企业界所熟知,受到社会的广泛承认和高度评价。中国的MBA教育虽起步较晚,但在过去10年里,中国的MBA教育事业发展非常迅速,也取得了相当显著的成绩。现在国内已经有50多所高等院校可以授予MBA学位,为社会培养了3000多名MBA毕业生,并有在读学员2万多人。

目前,国内的MBA教育市场呈现一片繁荣景象,但繁荣的背后却隐藏着种种亟待解决的问题。其中很大一部分问题的成因是因为目前我国高校使用的教材内容陈旧,与国外名校的名牌教材差距较大,在教学内容、体系上也缺乏与一流大学的沟通。为适应经济全球化,国家教育管理部门曾要求各高校大力推广使用外语讲授公共课和专业课,特别是在我国加入WTO后急需的上百万人才中,对MBA人员的需求更是占1/3之多,所以,大力开展双语教学,适当引进和借鉴国外名牌大学的原版教材,是加快中国MBA教育步伐,使之走向国际化的一条捷径。

目前,国内市场上国外引进版教材也是新旧好坏参差不齐,这就需要读者进行仔细的甄别。对于国外原版教材的使用,在这里我们要提几点看法。国外每年出版的教材多达几万种,如果不了解国外的教材市场,不了解国外原版教材的品质就可能找不到真正适合教学和学习的好的教材。对于不太了解外版教材的国内读者来说,选择教材要把握以下几点,即:选择国外最新出版的书籍;选择名校、名作者的书籍;选择再版多次并且非常流行的书籍。综合以上几点来看,目前国内市场上真正出新、出好、出精的MBA教材还是不多的。基于以上认识,北京大学出版社推出了《当代全美MBA经典教材书系(英文影印版)》,本套丛书的筛选正是本着以上提到的几点原则,即:出新、出好、出精。经过北京大学及国内其他著名高校的知名学者的精心挑选,本套丛书汇集了美国管理学界各个学科领域专家的权威巨著,称得上是一套优中选精的丛书。本套丛书现在已经推出了MBA主干课程、会计专业、金融专业课程教程三个系列,共45个品种。以后,我们还将陆续推出更多专业的英文影印版书籍。

致谢

本套教材是我社与国外一流专业出版公司合作出版的,是从大量外版教材中选出的最优秀的一部分。在选书的过程中我们得到了很多专家学者的支持和帮助,可以说每一本书都经过处于教学一线的专家、学者们的精心审定,本套教材的顺利出版离不开他们的无私帮助,在此,我们对审读并对本套图书提出过宝贵意见的老师们表示衷心的感谢,他们是(按拼音排序):

北京大学光华管理学院:符国群、贾春新、江明华、李东、刘力、梁钧平、
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本套丛书是对国外原版教材的直接影印,由于各个国家政治、经济、文化背景的不同,原作者所持观点还请广大读者在阅读过程中加以分析和鉴别。我们希望本套丛书的出版能够促进中外文化交流,加快国内经济管理专业教学的发展,为中国经济走向世界做出一份贡献。

我们欢迎所有关心中国 MBA 教育的专家学者对我们的工作进行指导,欢迎每一位读者给我们提出宝贵的意见和建议。

北京大学出版社经济与管理图书事业部

2003 年 10 月

关于本书

适用对象

本教材适用于大学本科生和研究生的国际商法课程。

内容简介

本教材提供了一种独特的实用性很强的交易方法,从交易的开端出发,带领读者走完整个成功交易的过程,并涵盖这一过程中会遇到的所有相关风险和话题。进出口、货物运输、合同义务与合同法、融资、互惠贸易、争端解决、知识产权许可和电子商务等问题在本教材中均有涉及。

作者简介

Larry A. DiMatteo 是佛罗里达大学(the University of Florida)沃灵顿商业管理学院(the Warrington College of Business Administration)的教授,曾任教于迈阿密大学(the University of Miami)商业研究院(Graduate School of Business)。他主要负责教授国际商法、商业法和商业法律环境等方面的研究生课程。DiMatteo 教授在位于布法罗的纽约州立大学(the State University of New York)获得经济学学士和政治学学士学位。在纽约州立大学求学时,他还是美国大学优等生荣誉学会的会员。他在哈佛法学院获法学硕士学位,随后以优异成绩从康奈尔大学法学院毕业,并获法学博士学位。DiMatteo 教授现已著书 3 本,并发表合同法及国际商法方面的法律评论文章数十篇。他以前的著作包括《合同衡平法》(2001 年)、《国际合同法》(2000 年)和《合同理论:合同意图的演进》(1998 年)。他在 *Harvard International of Law Journal*, *Yale Journal of International Law*, *American Business Law Journal*, *Hofstra Law Review* 和 *the University of Pittsburgh Law Review* 等著名期刊上发表过论文。他在 *American Business Law Journal* (第 38 卷)上发表的论文获得了 2001 年 Ralph C. Hoerber 最佳论文奖。DiMatteo 曾任商业法律研究学会(the Academy of Legal Studies in Business)国际法律部的主席。

关键特色

独特的交易方法:本教材提供了一种独特的国际商法学习方法。这种方法的特点就是将重心放在与国际法相关的各种交易上,并加入对伴随风险和各种争端的讨论,非常实用。

精选案例:作者精心挑选了用法庭语言描述的案例,并将这些内容融入教材的主体部分,以便说明各章中所涉及的概念。每一个案例后面紧接着就是一份案例重点列表,用以强化先前提出的要点。

集中关注交易:文中以粗体圆点标出的列表列出了成功进行国际商业交易所必须考虑的合同条款类型、市场调查、基础设施和其他方面的因素,让人一目了然。

法律比较:本教材对不同国家的法律进行了比较,从而可以让学生全面纵览国际法律,并将国际法与美国的法规进行比较。

国际商务:本教材将各章的概念运用到现实世界的商业活动中,叙述法律应用的每一个步骤和实际商业交易的文化背景,这些特征在书中都有体现。

表格:本教材把国际商务中常用的表格和文件作为图表加入书中,学生可以通过填写国际商业交易中使用的法律表格来获得实践经验。

每一章开头的互联网页面照片:以这些互联网页面开头为与教材每一章所涵盖内容相关的特定话题奠定了基础,或描述相关网址。

定量的应用题:章末的问题不仅可以帮助读者理解每一章讨论的国际商业交易,而且有助于他们对这些交易进行分析。

互联网习题:学生可以从网络上找到与章节概念相关的信息,通过章末的互联网习题进行研究并应用他们所学到的技巧。

网址

<http://dimatteo.westbuslaw.com>

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Preface

The international marketplace offers great opportunity for a domestic enterprise seeking to expand. It is also a place where the risks of loss are somewhat unique in character. Accordingly, the American businessperson must become an astute manager of international business risk in order to minimize the chances of financial loss. This book will illuminate the risks of doing business internationally, while providing the student of international business with tools to help minimize those risks.

The legal issues relevant to international business transactions can be seen as a due diligence checklist. The sophisticated international entrepreneur directly addresses the legal issues discussed in this book before transacting international business. The tremendous expansion of international business is a testament to the fact that the legal issues in international business transactions are discernible. Furthermore, the real world often provides solutions to the risks associated with such issues.

The trend towards increased international trade is likely to continue. It began at the end of World War II with the establishment of the World Bank, International Monetary Fund, United Nations, and the evolution of the General Agreement on Tariffs and Trade (GATT). The trend continued to accelerate with the adoption of the North American Free Trade Agreement (NAFTA), the deepening of the European Union (EU), and the establishment of the World Trade Organization (WTO). It will continue to accelerate with the opening of new markets occasioned by the fall of communism, the culmination of the 2000 trade pact between the United States and the People's Republic of China, and the explosion of e-commerce.

In order to obtain profits in the international marketplace, small to large size companies will have to develop an "international business strategy" in order to stay competitive. This book provides an introduction to the legal issues that need to be addressed in formulating such a strategy.

ABOUT THE AUTHOR

Larry A. DiMatteo is a professor at the Warrington College of Business Administration at the University of Florida. He previously taught at the University of Miami Graduate School of Business. His primary teaching responsibilities have been teaching graduate courses in international business law, commercial law, and the legal environment of business. Professor DiMatteo graduated from with a B.A. in Economics and a B.A. in Political Science from the State University of New York at Buffalo where he was Phi Beta Kappa. He received his J.D., *magna cum laude*, from The Cornell Law School and a LL.M. from the Harvard Law School. Professor DiMatteo is the author of 3 books and more than a dozen law review articles with a primary focus on contract and international business law. His previous books include *The Equitable Law of Contract* (2001), *The Law of International Contracting* (2000), and *Contract Theory: The Evolution of Contractual Intent* (1998). His articles have appeared in the *Harvard International Law Journal*, *Yale Journal of International Law*, *American Business Law Journal*, *Hofstra Law Review*, and the *University of Pittsburgh Law Review*. His article in Volume 38 of the *American Business Law Journal* won the prestigious 2001 Ralph C. Hoerber Award as “best article.” Professor DiMatteo is a past president of the International Law Section of the Academy of Legal Studies in Business.

TRANSACTIONAL APPROACH

The title of this book, *The Law of International Business Transactions*, was selected to distinguish it from the more generic texts on “International Business Law.” As such, it focuses on transactional international business law. The text presents international business transactions with an emphasis on rules and practice. The topics of coverage have been selected to place predominant emphasis on matters that most directly impact private business transactions: export-import, licensing and technology transfer, and sales of services. It is the author’s belief that it is these practical legal aspects of international business that are most relevant to today’s business student. Therefore, extensive coverage of more “macro” issues like expropriation or nationalization, workings of the United Nations, and international monetary policy are abandoned due to the increasingly minor role they play in today’s international business arena. This is not to say that these areas of coverage are not important but that in a relatively stable free trade environment they are unlikely to be of direct importance to the international entrepreneur. Given the time limitations in a standard college course, it is to the basics of transactional business law that this textbook’s coverage is directed.

Managerial Perspective

Throughout the book capsules and materials will be provided to illustrate the law of international business transactions *as practiced*. A variety of methods will be utilized to provide the student with a real world perspective. These methods include case studies, checklists, forms, tables, and summaries.

Capsules and Exhibits

The Chapters contain numerous capsules and exhibits that emphasize the transactional and managerial emphasis of the text. The “Doing Business Internationally”

and “Focus on Transactions” capsules provide checklists and practical information relevant to the international entrepreneur. “Exhibits” expose the student to the forms used in carrying out international business transactions, along with charts and statistics.

Special Features

A number of *hot topics* are included to make the textbook more comprehensive and “cutting edge.” These topics include in-depth coverage of international commercial arbitration; recent interpretations of the United Nations Convention for the International Sale of Goods (CISG); the legal issues of e-commerce and other types of electronic transactions; the expanding recognition of international franchising; the problems of international bribery, including the adoption of the OECD Anti-Corruption Code; the development of international standards such as the International Standards Organization’s ISO 9000 and ISO 14000; and the unique issues pertaining to joint venturing.

Electronic Transactions

The growing importance of electronic means of communicating and contracting in the international business arena is reflected in the allotment of an entire chapter to the topic, along with coverage of electronic developments pertaining to the other substantive topics discussed throughout the book.

Ethics Coverage

Ethical questions in international business can arise in various contexts. These contexts include the ethics of negotiations, disclosure of information, dealing with foreign governments, and the divergence between home country and host country laws. The student will be encouraged to form a mind-set in which ethical behavior will become an inherent part of their approach to international business. An entire chapter is devoted to the topic, along with a number of ethics capsules placed throughout the book.

Sources and References

The text reflects an earnest attempt to expose the student to a sampling of foreign law. National laws from approximately a dozen and a half countries are referenced and used for purposes of illustration. There are a numerous references throughout the text to a number of primary sources. All references to the Uniform Commercial Code or UCC are references to the law of the United States. The book also makes ample use of a variety of European Economic Community (EEC), European Community (EC), and European Union (EU) directives and regulations. I often refer to this body of law, apologetically, simply as EU Regulations. The reader may refer to the footnotes for the proper citations. In order to emphasize the nature of national laws’ impact upon international business transactions, the laws of the European Union, the People’s Republic of China, and the Russian Federation have been singled out for extra attention. These three bodies of law were also selected because of the importance of these markets in world trade. The use of national law serves to illuminate the typical issues found in international business transactions.

Case Law

A concerted effort has been made to “update” the case law in order to provide a more contemporary flavor to the text. Over 70 of the cases are from 1990 to the present; of those, 37 cases were decided no later than 1997. Of course, some older cases remain because of their power as precedents or as clear illustrations of a given legal principle. Along with a presentation of American law, more than a dozen cases have been selected from the countries of Great Britain, Hungary, Germany, New Zealand, Holland, Canada, and the European Union, along with a number of International Chamber of Commerce Arbitration cases.

Style and Structure

A premium has been placed upon readability by the use of clear narrative, carefully edited case summaries and articles, and concise use of tangential materials. Also, in the spirit of the practical-managerial focus of the book, more in-depth insight is offered in certain areas so that the student is exposed not only to the *why* a given rule of law has evolved, but also *how* it is applied in practice. The chapter coverage allows for the use of the chapters as individual modules or as blocks of chapters. The first seven chapters can be viewed as foundational in that they provide the legal environment of international business, including: International Business Risks, International Business Ethics, Strategies for Doing Business Internationally, International Dispute Resolution, National and International Trade Regulation, and International Contract Law. Chapters 8-11 focus upon the legalities of exporting-importing, covering International Sales Law, the Documentary Transaction, Transport of Goods, and International Trade Finance. Chapter 12 provides coverage of the growing area of the international sale of services. Chapters 13 and 14 pertain to the important area of technology transfer and the international licensing of intellectual property rights. Finally, Chapter 15 provides coverage of the evolving area of electronic transactions that cuts across all of the ways of doing business internationally.

Internet Exercises

A number of Internet exercises have been placed in the end-of-chapters’ problems section. These provide important web sites that students can use for reference or to answer a question or project posed. These projects can be used in individual or group assignments.

Key Terms

Learning the terminology of international business is an important part of any international business law course. The key terms used in the chapters are listed at the end of each chapter. Definitions of terms are provided in the text and in a special glossary found on the book’s web site at <http://dimatteo.westbuslaw.com>.

Case Highlights

Following each case is a capsule listing principles of law, concepts, and business practices highlighted in the case. Some of the highlights summarize the reasons why the case was inserted into the textbook. Other highlights alert the student to

the fact that most legal disputes involve multiple issues. Many of these “external” highlights are examined elsewhere in the textbook. The instructor may also use these points as a starting point for a more in-depth discussion of the multiple issues of the case.

Chapter Problems

Each chapter concludes with problems appropriate for classroom discussion. The Instructor’s Manual provides the answers and relevant case citations to the problems, along with other ideas for class discussion. The Test Bank provides additional essay questions that provide an additional source for discussions.

Appendices

The Appendices selected are to be actively used by the student. Appendix A provides the text of the Convention for the International Sale of Goods (CISG) and should be referred to in conjunction with Chapter 8’s law of sales. Selected provisions of the Uniform Commercial Code (UCC) appear in Appendix B. These are the provisions listed in the Comparative Law Capsule comparing the CISG with the UCC. Appendix C is the Agreement Establishing the World Trade Organization. This is supplemental to the material in Chapters 5 and 6 on trade regulation. Students’ interested in the WTO should read this foundational document to better understand the scope, governance, and purpose of this international trade organization. Appendix D is selected provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS Agreement is discussed in Chapter 13. A review of TRIPS will help the student better understand the reach of intellectual property law. Finally, the Hague Rules that are the central focus of Chapter 10 should be referred to when there is an issue of carrier liability.

Instructor’s Manual and Test Bank

The Instructor’s Manual provides additional source materials including a chapter-by-chapter bibliography, Chapter topics and objectives, lecture outlines, answers to end-of-chapter problems, and additional student in-class and take-home exercises. The Manual also provides supplemental material, such as statutes. These materials can be used in preparation for class or given as handouts. The Test Bank provides 750-short answer (true-false and multiple choice) questions, along with approximately 75 essay questions.

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