教育“十二五”创新型规划教材

周凡钰 著

国际商法

International Business Law

北京理工大学出版社
BEIJING INSTITUTE OF TECHNOLOGY PRESS

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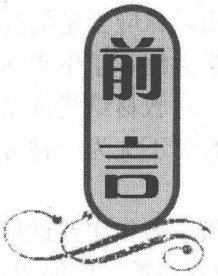

我国教育部在 2001 年提出普通高校进行双语本科教学，在推广双语教学的专业课程的选择上，并非全面铺开，而是按照专业课程的特点逐渐展开，其中法律专业要先行一步。建设重点科目双语课程体系是我国为适应经济全球一体化趋势和需求的积极战略方针。培养既有专业能力又有英语语言能力的复合型人才是现代化先进教育的目标。在经济全球一体化的形势下，国际商务包括国际金融专业的学生首当其冲，在掌握好专业技能的同时，迫切需要提高自己的外语能力，加强外语的交际能力和思维能力，成为新经济形势下的复合型高素质、高能力人才。

不能简单地认为，只要专业课教材选择了国外原版教材就是双语教学了。有些高校双语教学课堂上，教师和学生的主要任务就是翻译国外原版教材，这是因为国外英文原版专业教材难度较大，仅仅把教科书上的内容弄清楚就已经很不容易，难以做到像汉语讲授课程那样自如和充分的讲解和讨论。近年来随着我国高校双语教学的开展，许多国外原版教材被引进我国大学校园。这些教材多是大部头，深奥、晦涩、难懂。是否双语教学就一定要引进国外原版教材呢？这个问题不能一概而论，不能认为外来的就好，更不能不管是否适合国情，拿来就用。外国原版教材也存在诸多弊病：

第一，以《国际商法》为例，法律属于思想意识形态的范畴，必然受其所处环境中的政治、经济和文化等因素影响而具有自己的特点及一定程度上的片面和偏见。外国法学原版教材很少甚至根本没有涉及我国的法律制度，而我们的学生还必须了解我国的法律法规。

第二，东西方文化和思维上的差异，使得原版教材不一定适应中国教师的教学习惯和学生的学习习惯。

第三，原版教材语言深奥难懂，对学生的学习造成障碍，不能充分调动学生的学习积极性，难以充分利用原版教材。

第四，原版教材的内容不一定与我国国内课程要求配套，易造成资源浪费。

第五，引进外国原版教材成本过高，如果复印，容易产生知识产权纠纷。

因此，大力开展教材建设，编写适合我国学生使用的双语教材应当是更好的选择。通过借鉴既能够体现国际先进水平，又贴近我国教学大纲和学生实际情况的国际商法原版教材，并吸收我国国内外法律制度知识，对教材结构体系进行调整，再结合教师自身多年来积累的经验和知识，编写教材不失为一种可贵的途径。

作者在从事国际商务专业学生的“国际商法”课程双语教学多年实践过程中，深刻体会到教师和学生对于通俗易懂的“国际商法”课程双语教材的渴望。在国际化教学背景下，只有编写符合我国国情和需要的、适合商务类学生学习的“国际商法”课程双语教材，才能适应学生已有的知识结构，有利于学生对知识的学习和掌握，不至使双语教学流于形式。

本书特点：

（1）本书主要以英美法律为蓝本，兼顾国内法与国际公约，以判例法为基础，以案说法，用大量简练生动的案例解释法理，使枯燥晦涩的法律条文变得浅显易懂，十分适合商务专业人士和学生阅读和学习。为方便阅读，文中判例和举例都使用斜体。

（2）本书语言简单，尽量避免使用罕见的专业术语，学生阅读过程中，既能对民商法的基本知识有比较系统、全面的了解，又能使英语阅读能力实现较大的飞跃。

（3）每一章节都配有重点单词表，对少数难以理解的句子做了汉语注释，使阅读更加顺畅。

（4）本书是作者多年来在“国际商法”英语教学过程中逐步积累和完善的，凝聚了作者的心血。

本书在编写过程中得到了丹麦尼尔斯布劳克哥本哈根商学院法学教师 Gitte Top 的大量帮助，美国英语教师 James 和 Branda Powell 为本书的校对工作付出了辛劳，在此表示衷心的感谢！由于本人水平所限，书中不足之处在所难免，敬请读者提出宝贵意见，感激不尽。

(Contents)

Chapter One

Introduction

I. Concept of law

Law is a set of rules, created by the state, binding within its jurisdiction and enforced with the authority of the state through the use of sanction.

Understanding of the concept:

Rules: Rules exist everywhere in human society, because there is no absolute freedom in the world. Rules are commands aimed at regulating behaviour, but not thoughts. Our thoughts enjoy absolute freedom. Carl Marx said, "In law, I don't exist at all except for my behaviour." Rules tell us what we can and cannot do. Our family has family rules, and our school has school rules. All laws are rules, but not vice versa.

Created by the state: Parliament is responsible for creating most of the law applicable in the UK. Such law is contained in Acts of Parliament or statutes. In China, the People's Congress has the power to create law.

Jurisdiction of the state: The law of any country is binding only within its territory.

Enforcement: Law is doomed to be meaningless without the enforcement of state power. A state's three machines (army, police and prison) help the state to enforce its law.

International business law, the usual subject for the students majoring in business, generally covers contract law, the law for the international trading of goods, company law, negotiable instrument law, maritime law, insurance law, law of international technology transfer, industrial property law, international investment law, international financial law, international tax law and law of international dispute settlement.

II. Classifications of law

Law may be classified in many ways. The three chief traditional classifications are as follows.

1. Substantive law and procedural law

The former one prescribes norms of conduct, that is, it prescribes how a person ought to act under certain circumstances, or how a dispute ought to be decided. The great majority of laws are of this type.

The latter deals with the methods or techniques of applying the substantive law. It concerns the rules that courts must follow as a trial and appeals proceed. It includes: civil procedure, criminal procedure and administrative procedure. It provides the rules of jurisdiction of courts, the form of papers, the form of the pleadings, the proofs of disputed facts, the rules to guide courts and juries in arriving at decisions, the mode of appeal or review of a higher court.

2. Civil law and criminal law

Most law is civil. It deals with the ordinary affairs of individuals and prescribes patterns of conduct between them, looking to the avoidance or settlement of their private disputes. The civil courts are designed to compensate people who have been injured by others.

Criminal law deals with antisocial behavior of individuals in which the state has an interest. A criminal proceeding is brought by the state against the accused, seeking to enforce penalties against him. These penalties may be in the form of fines, imprisonment or even death. The criminal courts are designed to punish people who have committed a crime.

The same set of conduct may give rise to both a civil and a criminal suit. For instance, if by reason of his gross negligence a car driver runs over and kills a pedestrian, he may be prosecuted by the state for manslaughter. He may also be sued for damages by the relatives of the deceased.

3. Public law and private law

Public law deals with the rules prescribing the conduct of government officials or the relationship between a citizen and his government. Public law generally covers:

(1) Constitutional law: the mode of organization of government, the obligation of government officers, the limitations on the powers of the government, the protection of human rights and the election of political representatives. Constitution

is the fundamental law of any state.

(2) International law: laws that govern the conduct of independent nations in their relationships with one another. Public international law concerns relationships between sovereign nations.

(3) Administrative law: functions of government boards, bureaus and to review the decisions of government agencies.

(4) Criminal law.

Private law:

Tort law, contract law, company law, partnership law, family law, intellectual property law and corporate law, etc.

III. Legal systems

In today's world, different countries may have quite different legal systems. Generally speaking, there are two legal systems: Continental legal system (Civil law system) and Anglo-American legal system (Common law system).

1. Civil law system

Civil law system established in continental Europe is based on a comprehensive code. Civil law took shape in the thirteenth century in Western Europe, with German law and French law being its representatives. Civil law came from the Roman tradition and was codified in the sixth century in the Justinian Code. Roman law refers to all the laws in the slavery period of the Roman state, from 600 B.C. to 565 A.D. The most important statute laws are "Twelve Tables" and "Justinian Code."

Some well-known remarks on Roman law reflect its position in legal history:

(1) Engels: The Roman law is so perfect that we, the modern men, can hardly modify it substantially.

(2) Inhering (1818—1892, a German): The Romans conquered the world for three times: religion, force and law. And the law conquer lasts the longest.

(3) Well-known English: Rome is the first nation in history that ruled with law.

In the eighteenth century, France codified the law into a civil, commercial, penal, civil procedure and criminal procedure code. Other European countries such as Germany and Switzerland followed with a codification of their laws. The colony of Africa, Asia and Latin America spread the civil law system. However, some countries such as Japan, China simply adopted law based upon the civil law model. The characteristics of civil law are:

(1) To emphasize the importance of written law.

1) All civil law countries divide their laws into public law and private law.

2) Comprehensive codes are made.

(2) Cases are not binding on later judgments.

2. Common law system

Common law system, represented by English law, is composed of four parts: case law, equity law, statute and EU rules.

Case law: Common law is called Judge-made law, evolving through case precedents. It originated in the Norman Conquest[①], which took place in 1066. After the Normans conquered England, the Anglo-Norman sent their judges on a tour all over the country to try cases. The King's judges then made their decisions by relying on the traditions and conventions of the Anglo-Saxons. In doing this, their verdicts in dealing with specific cases have been regarded as precedents by law courts. The doctrine of judicial precedent holds that judges in lower courts are absolutely bound to follow decisions previously made in higher courts.

In this way Common law system is established in England and its former colonies, such as the USA, Canada, Australia, India, Singapore, Malaysia, Pakistan and New Zealand.

The doctrine of precedent (also known as stare decisis) provides that a judge or magistrate is bound by (must follow) an earlier case decision of another court if:

(1) that court is a higher court in the same hierarchy as the lower court; and

(2) the facts of the case before the higher court are the same as or very similar to those involved in the lower court case.

Judges or magistrates are not bound by decisions regarding the same or similar facts by another court if the decisions were made:

(1) outside their hierarchy;

(2) at the same level;

(3) below their level.

Besides, judges are free to make use of these non-binding decisions that are known as persuasive precedents.

The disadvantages of the system of precedent:

(1) The system of precedent does mean that English law is very bulky. There are hundreds of thousands of precedents and it can be very hard for a lawyer to find the law he is looking for.

(2) Precedent suffers from another disadvantage, and that is, bad decisions can

live on for a very long time. If a bad decision was made, then it could be changed only by Parliament, which was generally far too busy to interfere unless grave injustice was being caused.

The disadvantages of the system of precedent are outweighed by two major advantages:

(1) The device of distinguishing a case means that the system of precedent is not entirely rigid. A judge who is lower down the hierarchy can refuse to follow a precedent by distinguishing it on its facts. This means that the judge will say that the facts of the case he is considering are materially different from the facts of the case by which he appears to be bound. This device of distinguishing gives a degree of flexibility to the system of precedent.

(2) The second and more important advantage of precedent is that it causes high quality decisions to be applied in all courts. These decisions can then be applied by much busier and less experienced lower court judges, who do not have to consider whether the legal principles behind the decisions are right or wrong.

Equity law: Equity law might be regarded as a supplementary means to deal with cases not covered by Common law. Justice is administered through a separate court—the Court of Chancery. Common law system requires that a person who wants to make a claim to the court have a "writ" from Chancellor. But the "Provisions of Oxford" (1258) prohibited the creation of new writs. The king ordered the Chancellor to hear new cases, and the Chancellor has the right to ignore the Common law, and hear the cases in accordance with the principle of fairness and justice. Thus the equity law appeared. One distinctive feature is the absence of jury, and a more flexible procedure. While the law courts were generally restricted to the award of money damages as relief, the Court of Chancery could issue an injunction, forbidding specified acts in order to prevent further injury. Or it could decree specific performance, ordering performance of an obligation. A defendant who disobeyed could be punished by fine or imprisonment for contempt of court.

Statutes and EU rules: There is no doubt that, in theory, statute is the strongest source of law. However, we shall shortly see that in practice even the power of a statute can be subject to EU law or subject to another very important statute, the Human Rights Act 1998, for instance. The UK joined the EU[②] in 1973. The UK Parliament passed the European Communities Act 1972. Under this statute the UK agreed to apply EU law in UK courts. It was also agreed that if there was any conflict between EU law and UK domestic law, then the EU law would prevail.

It is possible that eventually it will come to replace English law.

IV. Resolving legal disputes

This topic explains the institutions and processes about the resolution of legal disputes. It aims to give an overview of the workings of the legal system, and the court structure and the procedures by which a civil action may be brought. The great majority of civil disputes are settled by private agreements assisted by an arbitrator. If a private agreement fails to be made, litigation or suit has to be the unwilling choice.

Civil litigation procedures

(1) A lawsuit is begun by filing a document known as a "statement of claim" or "complaint" with the court. The complaint is normally prepared by the claimant's attorney and states the facts of the matter being complained about and the nature of the damages being claimed by the claimant. E.g. If the claimant believes that the other party has breached a contract, the claimant will describe the contract and the reasons why the claimant believes that the other party has breached the contract and the amount of damages which was caused by the breach.

(2) When the complaint is filed in the court, the clerk of the court issues a "summon" to notify the defendant that a complaint has been filed against him and that he should file a response to the complaint with the court. The complaint is sent to the defendant together with the summons. The defendant's lawyer will read it, consider the legal position and draw up the "defense." This is an answer to the statement of claim and sets out the defendant's point of view.

(3) Preparations will then be made for the trial. The case is allocated to the relevant track.

(4) The interlocutory stages. This is the period between issue of claim and hearing when detailed preparations for the hearing are made. At this time there may also be requests for information, disclosure and the issue of interlocutory injunction.

1) Request for information: One party may require the other to provide further clarification of the particulars of his claim or defense.

2) Disclosure: The documentary evidence must be made available to the other party at this stage. Surprise attack on evidence is forbidden.

3) Issue of interlocutory injunctions: Injunctions are orders from the court which may stop the defendant from doing something or require him to do

something. A Freezing Injunction may be required to prevent the defendant from transferring his assets abroad or concealing them so as to avoid compensating the claimant. An injunction may be to prevent the defendant from causing or continuing to cause serious damage to the claimant prior to the court hearing.

(5) The trial of the case. In court, the task of each lawyer is to do two things: He must seek to convince the court that his version of the facts is the correct one, and he must try to persuade the court that his version of law to be applied to those facts is correct. He establishes his version of the facts by calling witnesses of his own and by cross-examining the witnesses of the other side. If the arguments presented by one side are only slightly better than those of the other, this will be sufficient to secure success.

The English system of trial is adversarial, which is characterized by "silent judges, fighting parties." This means that the lawyers on either side are adversaries, who fight against each other trying to win judgment for their clients. The judge supervises the battle between the lawyers, but does not take part. Most other countries have an inquisitorial system of trial, where the judge is the inquisitor, determined to discover the truth. A French examining magistrate, for example, has enormous powers. He takes over the investigation of a criminal case from the police and can interrogate witnesses. He can also compel witnesses to give evidence. When a French case reaches court, it is often all but decided. By contrast, no one can ever be certain of the outcome of an English trial. The lawyers will fight each other on the day and either side might win.

(6) Executing the judgment. A claimant who is successful at trial has won a major battle but not the war. If awarded damages, the claimant has the status of a judgment creditor, but this does not in itself compel the defendant to pay—the claimant may have to return to the court to take steps to enforce the judgment. This may be done in any of the following ways:

1) A writ of fieri facias: The claimant is entitled to seize goods of the value of the debt from the defendant's premises.

2) A charging order: This prevents the defendant from disposing of any assets.

3) Attachment of earnings: The defendant's employer may be required to pay a proportion of the defendant's earnings to the claimant.

4) A garnishee order: This enables the claimant to gain control of funds belonging to the defendant but held by a third party (bank).

Alternative dispute resolution

Taking a case through the courts may be costly and difficult, a happier outcome may be achieved by using an alternative method of dispute resolution. The following strategies are:

1. Arbitration

Arbitration is a process of resolving a dispute or a grievance outside a court system by presenting it for decision to an impartial third party. The parties voluntarily submit their dispute to a third party and agree to be bound by the resulting decision. Both sides in the dispute usually must agree in advance to the choice of arbitrator and certify that they will abide by the arbitrator's decision.

In medieval Europe arbitration was used to settle disputes between merchants. It is now commonly used in commercial, labour-management, consumer disputes and international disputes. Disputes of contract and property can be arbitrated. Such disputes as marriage, adoption, custody, inheritance and administration cannot be arbitrated.

Many disputes arise out of contracts, particularly contracts of insurance and partnership contracts, and very often the parties to such contracts agree with one another that they will not take any dispute to court. They agree instead to arrange for somebody with the appropriate type of business experience to take the place of a court. Each party chooses an arbitrator and the two parties jointly appoint an arbitration chairman. This chairman may be a lawyer or a judge from the ordinary court system. Any person acceptable to the parties may act as their arbitrator. In practice they will tend to choose somebody with skill and experience in the relevant field. Cases regarding disputes, which by agreement between the parties shall be decided by arbitration, shall be dismissed by courts of law. In the contract, term of arbitration must be included: the name of the institution of arbitration must be clarified.

Advantages of arbitration:

(1) It ensures privacy for the parties.

(2) Problems will be solved relatively cheaply, speedily, more conveniently.

(3) One arbitration is final—once a decision has been reached, there is no further appeal process.

(4) The arbitrators' expertise in the business field enables them to understand the issues.