INTERNATIONAL TRADE LAW

国际贸易法

吴淑娟 编

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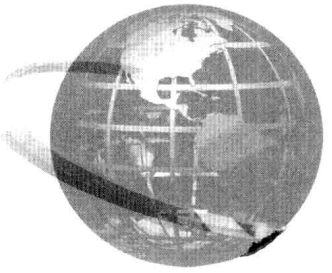

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前　言

国际贸易法是国际经济与贸易专业的主干专业课程。本课程旨在培养学生全面、系统地掌握国际贸易法的基本理论、基本知识，培养学生的法律案件分析能力。这些能力是国际经济与贸易专业学生必须具备的技能。

本教材采用中英双语，主要参照王传丽主编的《国际贸易法》（法律出版社，2005）中国际货物买卖法律制度部分的结构进行编写。围绕我国对外货物贸易过程中所涉及的国际货物买卖合同、国际货物运输、国际货物运输保险、国际货物贸易结算以及国际货物贸易纠纷的解决五大环节而展开，共分六章。第一章绪论，简要介绍国际贸易法的概念、渊源及主体；第二章国际货物买卖合同法，主要介绍国际货物买卖合同的成立、生效条件、合同的履行、风险和所有权的转移以及违约与救济；第三章国际货物运输法，主要介绍了国际海上货物运输法和其他运输方式的相关法律；第四章海上货物运输保险，主要介绍国际海上货物运输中的风险和险种以及保险的赔付；第五章国际结算法律，主要介绍国际货物贸易结算所涉及的结算工具、结算方式等；第六章国际贸易纠纷的解决，主要介绍法律纠纷的预防、解决法律纠纷的步骤、国际商务仲裁以及涉外诉讼。

本教材的特色主要体现在：

1. 结构完整。本教材涉及国际贸易的各个方面，特别是国际货物贸易实务中的主要环节。

2. 表述比较简练。本教材用较多的图表进行说明，学生学习起来比较方便。

3. 案例翔实。本教材几乎每对应一个知识点均有相关的案例进行分析说明。每章结束后还提供了模拟仲裁材料供课堂使用。

4. 注释详细。本教材对比较偏僻或专业的词汇做了详细的

注释。

5. 习题具有互动性。本教材的习题没有采取选择、填空等简单的形式，而是采取讨论的形式，更能发挥学生的主观能动性，有利于师生互动。

本教材实用性强，可供国际经济与贸易专业的本科生、法学专业的本科生、高职高专学生以及对外经贸工作者和法律工作者等人士使用。

本书在编写过程中参考了大量的书籍和教材，在此表示衷心的感谢。

本书的出版得到五邑大学经济管理学院党支部书记刘志坚教授、五邑大学教务处处长董超俊以及华南理工大学出版社毛润政策划总监等人士的大力支持，在此一并表示感谢。

由于作者的水平有限，书中难免有不足之处，敬请各位读者不吝指正。

吴淑娟

2011 年 5 月

CONTENTS

Chapter 1 Brief Introduction

内容提示：本章为国际贸易法概述，内容包括国际贸易法的概念、历史发展、形式渊源以及国际贸易法的主体。本章重点是国际贸易法的概念、形式渊源以及国际贸易法的主体。其中，形式渊源具体的适用次序是案件解决的前提问题，在法律实践中占有十分重要的地位。

1.1 Definition of ITL

The international trade law (hereafter called ITL) is the basis of the international economic laws①. International trade law is a general term for a series of laws and rules regulating trade relations and other relevant relations between countries, international organizations and certain specific regions②. It is a mixture of national laws and international laws governing transactions for goods or services that cross the boundaries. A number of multilateral treaties play important roles in this field, notably the *Convention for the International Sales of Goods* (*hereafter called CISG*), among which some deal with dispute resolutions③ and the acknowledgement and enforcement④ of resulting adjudications from the foreign courts⑤.

International trade law should be distinguished from the broader field of international economic laws. The latter could be said to encompass not only WTO laws, but also laws governing the international monetary system and currency regulations, as well as the laws of international development.

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① 国际经济法
② 某些特定的地区，尤其是指独立关税区
③ 争端解决
④ 承认与执行
⑤ 外国法庭判决

1.2 The Source of ITL

The term "source of law①" means the legal forms② of law or the history of law. So, the source of ITL means the history of ITL or the legal forms of ITL.

1.2.1 The History of ITL

Now, the history of international trade law can be divided into the following four stages.

1. Sprouting③ Stage (18th B.C. to 11th Century)

The *Hammurabi Codes*④ (18th B. C.) in Babylon⑤, said to be the earliest known comprehensive codes of law in the world, might be the origin⑥ of ITL. The *Hammurabi Codes* covered wide range of business areas such as sales of goods, price, tariff, and various contracts. Babylon merchants brought business law to the Phoenicians⑦ and other countries in the Mediterranean areas⑧. People of these countries used the Babylon business law in their business, so the cross-boarder trade reached its highest prosperity at that time.

The ancient Rome became increasingly powerful since the 5th century B. C., and the Rome law became almost perfection at the same time. One of the ancient Rome laws was known as the *Law of Peoples*, which regulated the business relationships between Romans and foreigners. Romans conquered Greece in 146th B. C. and absorbed the Rhode law⑨, which was popular in Greece and applied the Rhode law in Greek colonies.

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① 法律渊源
② 法律形式
③ sprouting [ˈsprautiŋ] 萌芽
④ Hammurabi [ˌhæməˈrɑːbiː] Codes 罕默拉比法典
⑤ Babylon [ˈbæbilən] 巴比伦
⑥ 渊源
⑦ Phoenician [fiˈniʃən] 腓尼基人
⑧ 地中海地区
⑨ Rhode [rəud] law 罗德法

2. Forming Stage (11th to 15th Century)

With the rapid development of international trade, the law merchant① played an important role in governing cross-boarder trade in the Middle Ages. The law merchant originated in Venice and was introduced to the western European countries, such as Spain, France, Germany, the United Kingdom, etc.

The characteristics of the law merchant of the time were:

1) Internationalism. The law merchant was widely used by all the European businessmen, so the same rules would be applied whether a merchant was in Milan or in London.

2) Spontaneity②. The law merchant was the result of the European merchant's spontaneous action, and the law merchant had nothing to do with the feudal③ law system of each country.

3) Self-governing④. The parties to the dispute had the right to choose judges that constituted the tribunal⑤, and the law merchant would be applied for certain if the parties to the dispute were European merchants.

3. Nationalization Stage⑥ (15th Century to 2nd World War)

At the beginning of the 15th century, European countries learnt from the commercial practices and absorbed the practices into their national law system. So that they could have jurisdiction over the cross-boarder business cases themselves, making the international commercial laws lost the internationalization and independent status. The examples of the laws made at that time are the 1807 *Code Napoleon*⑦ and the 1861 *German Uniform Commercial Code*⑧.

After the 2nd World War, almost all the countries had their own ITLs. And law-disputes⑨ among countries are unavoidable. Businessmen had troubles when doing

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① law merchant ['mə:tʃənt] 商人习惯法
② spontaneity [ˌspɔntə'ni:iti] 自发性
③ feudal ['fju:dl] 封建的
④ 自治
⑤ tribunal [trai'bju:nəl] 法庭
⑥ 国内化时期
⑦ 拿破仑商法典
⑧ 德国统一商法典
⑨ 法律冲突

business abroad.

4. Internationalization Stage (2nd World War to Now)

After the 2nd World War, particularly after the 1960s, the development of ITL entered into a new stage. The main characteristics of ITL of the time are internationalization and unification. Many international organizations and special institutes succeeded in drafting many conventions, treaties and customs and pushing the application of these documents to avoid law disputes, such as Convention for the International Sales of Goods (CISG), Incoterms, etc.

1.2.2 Legal Forms of ITL

Scholars have different opinions on the legal forms of ITL. However, there are three kinds of forms that are of no disagreement, i. e., international conventions①, international commercial customs② and the relevant national laws, while the international model law is still under discussion.

1. International Conventions

(1) Definition

International convention means, "an international agreement concluded among states in written form③ and governed by international law."④ All those about international trade are included, for example, postal service⑤ or copyright⑥.

(2) Effect

1) To the contracting states⑦, the international convention in force is bounding, unless the contracting states made declaration when signing the convention.

2) To the natural persons⑧ and business in the contracting states, convention is

① 国际公约
② 商业惯例
③ 书面形式
④ For reference: United Nations Convention on International Multimodal Transport of Goods, 1980, Article 1 (8).
⑤ 邮政服务
⑥ 版权
⑦ 缔约国
⑧ 自然人

binding unless its application is excluded①.

(3) Examples of Conventions

- the CISG in the area of international sales of goods;
- the *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading in* 1924 (*hereafter called the Hague Rules*)② in the area of carriage of goods by sea;
- the *Paris Convention on the Protection of Industrial Property*③ in 1883 and revised in 1979 (hereafter called the *Paris Convention*) in the field of technical trade;
- WTO's *Understanding of Rules and Procedures Governing the Settlement of Disputes*④ in 1955 (hereafter called WTO's DSU);
- the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*⑤ in 1958 (hereafter called the *New York Convention*), etc.

2. International Commercial Customs

(1) Definition

International commercial custom is a practice or practices that are recognized as law and generally adopted through unvarying habit and common use. Compared with international trade conventions⑥ and usages, international commercial custom has the following characteristics:

- A custom is from practices among businessmen, while a convention is from the agreement between the contracting states⑦.
- A custom is not binding unless stipulated expressly, while a convention is bounding unless excluded expressly.
- A custom has the force of law while a usage has not.

(2) Effect

A custom is not binding unless stipulated expressly. For example, parties to a

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① 排除
② 《1924 年统一提单若干法律规则的国际公约》，简称“海牙规则”
③ 《保护工业产权巴黎公约》
④ 《关于争端解决规则和程序的谅解》
⑤ 《承认与执行外国仲裁裁决公约》
⑥ 惯例
⑦ 缔约国

contract can have a clause in order to apply Incoterms, e. g. "The contract is subject to Incoterms 2000."

(3) Examples

- the *Warsaw-Oxford Rules*① by the International Chamber of Commerce② (hereafter called ICC) in 1932;
- the *International Rules for the Interpretation of Trade Terms*③ revised in 2000 by International Chamber of Commerce (hereafter called Incoterms 2000);
- the *Uniform Customs and Practice for Commercial Documentary Credits*④ revised in 2007 by the ICC (hereafter called UCP600).

3. The National Laws

National law is one of the most important sources of ITL. It refers to all rules and norms made by a state or a nation.

National laws in China, as one part of the sources of ITL, include the *Contract Law*; the *Trademark Law*⑤; the *Law on Chinese-Foreign Joint Ventures*⑥; the *Civil Procedure Law*⑦; *Arbitration Rules of China International Economic and Trade Arbitration Commission*⑧, etc.

4. International Model Law⑨

(1) Definition

International model law means the rules and norms worked out and passed by some international organizations for free choice by individual nations.

(2) Effect

International model law is not international treaties or conventions and is of no certain legal validity⑩. It shall be applied when the parties have agreed that their

① 《华沙-牛津规则》
② 国际商会
③ 《国际贸易术语解释通则》
④ 《跟单信用证统一惯例》
⑤ 商标法
⑥ 中外合资企业法
⑦ 民事诉讼法
⑧ 中国国际经济贸易仲裁委员会仲裁规则
⑨ 示范法
⑩ 确定的法律效力

contract is governed by them.

(3) Examples

- the *Model Law on International Commercial Arbitration by the United Nations Commission on International Trade Law* ① in 1985 (hereafter called UNCITRAL Model Law);
- the *Principles of International Commercial Contract by the International Institute for the Unification of Private Law*② (UNIDROIT) in 1994 (hereafter called UNIDROIT PICC)

5. The Application of the Sources

Of the above-mentioned sources, the bench has to decide which one is to be applied when judging a specific case.

For example, a Chinese company sold 10 tons of beans to a U. S. company at USD 120 per ton FOB (Free on Board) Shanghai. The goods were damaged during transit. The buyer knew about the accident and was not willing to pay. So the seller sued the buyer in a Chinese court. Which law or custom should the bench apply?

The bench should follow the following order:

First, law or custom agreed by the parties. That is because of the principle of will autonomy③.

Second, treaties, which the states that the parties are in respectively have signed. According to the principles of international public law④, all contracting parties must honor⑤ their contracts. So, when the parties of the contract did not have any agreement concerning the application of law, the relevant treaties should be applied.

Third, the relevant national laws. As there are two or more parties from different countries, the problem of law disputes must be settled. The rule of private international law⑥ can kill the problem by setting a standard to decide which law should be applied. As to the above case, the Chinese contract law might be applied

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① 联合国国际贸易法委员会提出的《国际商事仲裁示范法》
② 国际统一私法协会的《国际商事合同通则》
③ 意思自治原则
④ 国际公法
⑤ 遵守
⑥ 国际私法规则

according to the *General Rule of the Civil Law*① Article 145②.

Fourth, the commercial customs. It is because the commercial customs cannot be applied directly without the parties' agreement. But when there is no law applicable, the commercial customs should be applied.

1.3 Subjects of ITL

Without subjects③, there would be no international trade. There are four kinds of subjects: natural man, legal persons④, international organization and states. Though multinational companies⑤ account for a large part of international trade, there are not many laws concerning their obligations. So, we will not focus on them.

1.3.1 Natural Man

Human is called natural man in the legal field. Natural man must have the civil capacity of right⑥ and the capacity for civil conduct⑦ when he is doing business.

According to Chinese laws, a citizen shall have the capacity for civil rights from birth to death and shall enjoy civil rights and assume civil obligations in accordance with the law. And a citizen aged 18 or over shall be an adult. He shall have full capacity for civil conduct, and may independently engage in civil activities and shall be called a person with full capacity for civil conduct. A citizen who has reached the age of 16 but not the age of 18 and whose main source of income is his own labor shall be regarded as a person with full capacity for civil conduct. A minor aged 10 or over shall be a person with limited capacity for civil conduct and may engage in civil activities appropriate to his age and intellect; in other civil activities, he shall be

① 民法通则

② The General Rule of the Civil Law Article 145: If the parties of the contract have no agreements, the law of the closest relationship should be applied. The law of the closest relationship means the place in which parties signed the contract, the place in which the enforcement of the contract is performed, or seller's place.

③ 主体

④ 法人

⑤ 跨国公司

⑥ 民事权利能力

⑦ 民事行为能力

represented by his agent ad litem① or participate with the consent of his agent ad litem.

But not all the states have the same rule. For example, a debtor② is an Englishman and signed a draft③ in China and the place of payment is in France. According to the law of the United Kingdom, the debtor had no capacity for civil conduct. Later on, the bearer of the draft④ disagreed with the debtor on the validity of the draft and submitted the case to the Chinese court. The bench must follow the rule of the above-mentioned law application order to decide the applicable law⑤.

1.3.2 Legal Persons

A legal person is not a real human being but recognized as a civil subject by law. A legal person shall be an organization that has capacity for civil rights and capacity for civil conduct and independently enjoys civil rights and assumes civil obligations in accordance with the law. A legal person's capacity for civil rights and capacity for civil conduct shall begin when the legal person is established and shall end when the legal person terminates.

1.3.3 International Organization

According to 1969 *Vienna Convention on the Law of Treaties*⑥, Article 2, paragraph 1(i), international organization (hereafter called IO) is "an intergovernmental organization⑦". It mainly includes three elements:

- Intergovernmental organization established by nations;

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① 监护人

② 债务人

③ draft [dræft] 汇票

④ 持票人

⑤ If it comes to the use of the Law of the PRC on Negotiable Instruments, Article 96: As regards the capacity for civil conduct of a person liable for a negotiable instrument, the law of his own country shall apply. Where a person liable for a negotiable instrument is regarded as one having civil disability or limited civil ability according to the law of his own country, but as one having full civil ability according to the law of the place of his conduct, the law of the place of his conduct shall apply.

⑥ 《维也纳条约法公约》

⑦ 政府间组织

- Based on the convention concluded by nations;
- Has its own legal personality distinguished from that of member states.

Compared with non-governmental organizations①, IO is governmental; compared with regional organization, such as EU, IO is international; compared with institute, IO is juridical person②.

The base of IO's capacity of rights is its legal personality③. The civil capacity of right and capacity for civil conduct are authorized by the members or contracting states when they signed the convention. When an IO is formed, it has the right to sign contract, to take over or dispose property, to sue④ and has the right of immunity⑤, etc.

1.3.4 States Sovereign Immunity

States are not a common subject. It is only under some circumstances that a state becomes a subject. As businessmen, we must pay attention to the issue of sovereign immunity⑥ when doing business with a state.

State immunity has been recognized as one of the principles of international law since the 19th century and its underlying theory is the principle of equity of state sovereignty⑦. Originally, under customary international law the doctrine of absolute state immunity⑧ applied except that certain European states as Italy and Belgium upheld the doctrine of restrictive state immunity⑨—that is, the immunity is granted to foreign states only in respect of their governmental acts⑩ and not in respect of their non-governmental acts⑪ especially the commercial activities.

Since the 20th century, particularly since the 2nd World War, due to the

① 非政府组织
② juridical [dʒuə'ridikəl] 法人资格的
③ 法律人格
④ 起诉
⑤ right of immunity [i'mju:niti] 豁免权
⑥ 主权豁免
⑦ 国家主权平等
⑧ 国家主权绝对豁免论
⑨ 国家主权相对豁免论
⑩ 统治行为
⑪ 非统治行为