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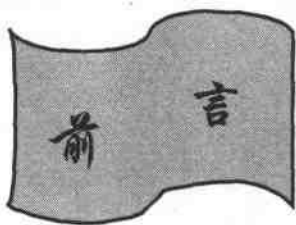
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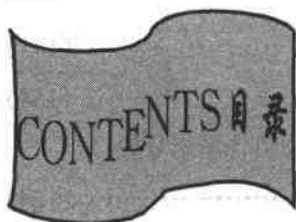
本书每篇文章主要由原文欣赏、参考译文及注释组成。与其他法律英语阅读教材相比,本书具有如下特色:(1)原汁原味。本书的文章均选自英文原著,这不仅有助于读者了解相关国家的法律规定,还能使读者在此基础上掌握比较纯正的法律英语知识。(2)采用英汉对照形式。本书采用英汉对照和篇连脚注的编排方式,更便于读者阅读、学习和查阅。(3)文章所涉内容全面丰富。在具体内容上包括商法总论、公司法、经济法、保险、金融、商业等;在涉及国家上,除重点介绍英美国家法律外,还适当介绍埃塞俄比亚、荷兰、加拿大等国的法律制度。(4)文章大多短小精练,题材丰富,能让读者在最小的空间内掌握尽可能多的法律英语知识。(5)编排体例灵活自由。本书在编排体例上没有严格的前后顺序,读者可根据自己的需要和喜好,自由选择阅读,无须拘泥于目录的编排顺序。

本书适合具有一定英语基础的大学生学习使用,也可供法官、检察官、公安人员、律师、公证人员及其他法律工作者阅读,其他喜爱法律英语的读者亦可选此书作为自学之用。

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陈忠诚

2003年2月于上海



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# 法律英语阅读 商法

☆原汁原味

☆权威翻译

☆英汉对照

☆词汇丰富

☆提高迅速



## 1. Commercial Law

In its narrow sense commercial law (*Handelsrecht*)<sup>1</sup> designates the rules *laid down*<sup>2</sup> by the *German Commercial Code*<sup>3</sup> as applicable to merchants. In a broader sense, it includes other areas of law relating to *mercantile activities*<sup>4</sup>, such as the law of negotiable instruments, and a few important types of *transaction*<sup>5</sup> which are found in general *civil law*<sup>6</sup> but are much used by bankers and other people in commerce. In addition there are distinct areas of law affecting traders and trading, such as *company law*<sup>7</sup>, the law of connected enterprises and *competition law*<sup>8</sup>.

In laying down special rules within the general framework of *private law*<sup>9</sup>, the German Commercial Code or HGB (short for *Handelsgesetzbuch*)<sup>10</sup> is performing two functions. First, it contains *juridical forms*<sup>11</sup> for transactions that are purely commercial, such as the *commission business*<sup>12</sup> or the special form of *agency*<sup>13</sup> known as the *Prokura*<sup>14</sup>. Second, it affords protection to those involved in commerce, where important affairs are often concluded very swiftly; the protection results in part from the rules regarding *business names*<sup>15</sup> and the

1 Handelsrecht; 德语合成词“商法”,意即英语“commercial law”。本文讲的是德国商法。

2 lay down: 规定

3 German Commercial Code; 德国商法典

4 mercantile activity: 商业活动

5 transaction: 法律行为, 业务, 交易

6 civil law: 民法

7 company law: 公司法。按: “company law”在英国比美国常用, 美国常作“corporation law”。



## 商 法

狭义的商法,指适用于商人的《德国商法典》所规定的那些规则。广义的商法,则包括涉及商事活动的诸如票据法之类的其他法律领域和见于一般民法而为银行家和商界其他人士大量使用的、若干重要类型的法律行为。此外,还有一些影响贸易和贸易者的不同的法律领域,如公司法、联合企业法和竞争法等。

《德国商法典》即“哈盖贝”(乃德语“商法典”之略)在私法的总框架内规定了特别的规则,从而发挥了两种职能:第一,它包括纯属商业性的交易(如代办业和德语称之为“仆洛枯惹”的特种代理)的各种法律形式;第二,它为从事于商业者(而商业上重大事务往往是很快就定局的)提供保护——这种保护一部分归功于关于商号和商业登记的规

8 competition law: 竞争法

9 private law: 私法(其对称词为“public law”即“公法”)

10 Handelsgesetzbuch: 德语“商法典”。此词由三个单词合成,各单词首写字母依次为 H、G 和 B,故德国商法典简称“H. G. B.”。

11 juridical form: 法律形式

12 commission business: 代办业

13 agency: 代理

14 Prokura: 一种代理(德语名词,故大写)

15 business name: 企业名称,商号

commercial register, and in part from making the merchant more strictly answerable to *third parties*<sup>16</sup> for his actions and words than a private individual would be.

Under<sup>17</sup> the Civil Code or BGB (short for *Bürgerliches Gesetzbuch*<sup>18</sup>), a guarantee or the recognition of a debt is valid only if it is in writing ( §. § 766, 780, 781 BGB), but an oral guarantee or recognition of a debt will bind a merchant (350 HGB). Again, a merchant who promises to pay a *contractual penalty*<sup>19</sup> is bound to pay it even if it is very high, whereas under the BGB such a penalty promised by an individual could be reduced by the courts to a 'reasonable amount' ( § 343 BGB). On the other hand, a merchant who performs a service or *effects*<sup>20</sup> a transaction for a customer at the customer's request may claim the standard remuneration even if there is no *contractual provision*<sup>21</sup> for it ( § 354 HGB).

The HGB modifies the general principles of the *law of contracts*<sup>22</sup> in some respects. As a general rule, the *formation of a contract*<sup>23</sup> requires *offer*<sup>24</sup> and *acceptance*<sup>25</sup>, and if the *offeree*<sup>26</sup> does not accept the offer *expressly*<sup>27</sup> or *by implication*<sup>28</sup>, no contract is concluded. Under § 362 HGB, however, if the offeree is a merchant whose business is the management of the affairs of others, he is bound to make it clear if he is unwilling to accept; silence on his part constitutes acceptance. Accordingly, if a customer instructs his *broker*<sup>29</sup> to buy certain *securities*<sup>30</sup>, and the broker neither replies nor effects the purchase, the broker will be *contractually liable*<sup>31</sup>. § 362 HGB is applied only when the offeree's business involves the "management of the affairs of others". Even so, the merchant will be bound to answer the order of offer only if there was already some business connection between the parties or if he offered his services spontaneously. Thus § 362 has no application to simple offers for sale. A tailor need not reply to

16 third party: 第三人

17 under: 根据

18 Bürgerliches Gesetzbuch: 德语“民法典”, 简称 B.G.B. (音译“贝盖贝”)

19 contractual penalty: 违约金

20 effect: 完成, 实现

21 contractual provision: 契约规定

22 law of contracts (亦作“contract law”): 契约法

23 formation of a contract: 契约之成立

则,一部分则是由于下列情况的结果:使商人就其言行对第三人承担的责任比普通人所承担的要大。

根据《民法典》即“贝盖贝”(即德语“民法典”之略)的规定,债的担保和认受,仅以由书面为之者方属有效(贝盖贝第 766 条、780 条和 781 条);但对商人来说,债的担保和认受虽以口头为之者亦有约束力(哈盖贝第 350 条)。又,即使违约金金额很大,答应给付违约金的商人也必须照付;面按贝盖贝的规定,法院可以把其他人等答应的巨额违约金减少至“合情合理的金额”(贝盖贝第 343 条)。在另一方面,应顾客之请替顾客服务或做交易的商人,虽契约上无明文规定,仍可要求按标准计酬(哈盖贝第 354 条)。

哈盖贝在某些方面修改了契约法的一些普遍原则。作为一条普遍的原则,契约必须有要约与承诺始能成立;被要约人如对要约不作明示或暗示的承诺,那就没有订立任何契约。但是根据哈盖贝第 329 条之规定,被要约人如系管理他人事务的商人且又不愿承诺者,务必明确表示——他的沉默就足以构成承诺。据此,如果顾客指示其经纪人买进某些证券而经纪人既不回答又不买进,则经纪人就要承担契约责任。哈盖贝第 362 条仅于被要约人系“管理他人事务”者时始有其适用。即使如此,该商人亦仅于当事人间已有某些业务往来或由他主动提供劳务时才必须对订货或要约作出反应。所以第 362 条对单纯

24 offer: 要约

25 acceptance: 承诺

26 offeree: 被要约人

27 expressly: 明示地

28 by implication: 暗示地

29 broker: 居间人, 经纪人, 掮客

30 securities: 证券(用复数)

31 be contractually liable: 负契约义务

a supplier who offers to sell him more cloth.

But the idea that silence can exceptionally constitute the acceptance of a contract has been extended to other cases by the courts. Under the general law, a contract is not formed by the late acceptance of an offer; the late acceptance constitutes a new offer. But a merchant may be under a duty to answer this new offer, and to make it clear that he does not accept it: his silence is tantamount to acceptance of this new offer. A corresponding rule has been developed by the courts with respect to what is called the commercial *letter of confirmation*<sup>32</sup>. This is a letter which puts in writing what was previously agreed, often orally, between the parties. A merchant who receives such a letter from the other party must answer it if he thinks that it does not reflect their common understanding, and his silence will constitute acceptance of the letter as it stands, unless it differs so widely from the prior negotiations that the sender could not reasonably expect the other party to accept its contents. Under the rule regarding letters of confirmation it is not always clear whether the letter is simply evidence of the prior agreement or constitutes an offer that turns into a contract by silent acceptance. Whichever it is, it makes no difference to the practical result.

The provisions of the HGB on commercial sales are designed to protect the vendor of goods against the silence or cloth of the buyer. One such rule has already been mentioned; the buyer must inspect the goods supplied for defects or disconformity from the normal or agreed quality. He must inform the vendor immediately if he wishes to complain of a defect in the goods, *or*<sup>33</sup> he loses all the rights which would accrue from their defectiveness (§ 377 HGB). The same rule applied if the goods supplied are different in kind or quantity from what was ordered in the contract, unless the difference or deviation was obvious (378 HGB).

The HGB extends the protection enjoyed by the *bona fide purchaser*<sup>34</sup> of *moveable property*<sup>35</sup> under the BGB. § 932 BGB requires that the acquirer believe the vendor to be the owner of the goods, but in commerce merchants are often entitled to sell goods belonging to someone else, for example, when acting as

---

32 letter of confirmation; 确认信(函)

33 or; 否则

的关于销售的要约是不适用的。裁缝不必回答向他发出要约、要卖给他更多布料的供应商。

但是,关于沉默作为例外,能构成契约中的承诺的概念,已经被法院扩大其适用范围于其他场合了。根据一般的法律规定,契约不因对要约作出延迟的承诺而成立——延迟的承诺构成新的要约。不过,一个商人会有义务对这一新要约作出反应并明确表示他并不承诺该要约——因为他的沉默等于是对新要约的承诺。关于被称为商业确认信的那种东西,法院已经定出了一条相应的规则。确认信就是把先前双方当事人间往往是口头达成的协议形成书而。一个从他方收到确认信的商人如果认为该信并不反映双方的共同理解,就必须对该信作出答复,而且他的沉默会构成对该信的原封不动的承诺——但该信件同早先的谈判南辕北辙,以致发信人不可能指望受信人接受该信件之内容者不在此限。根据这条关于确认信的规则,下列情况未必清楚:该信件究竟是早先所达成的协议的证据呢,还是经无言的承诺后就构成契约的一项要约呢?不管是上述情况中的哪一种情况,实际结果是没有出入的。

哈盖贝关于商业上买卖的各项规定,其目的在于保护商品的卖方,以免卖方因买方之沉默或懈怠而蒙受其害。其中有一条规则早已提到过了:买方必须检查——所供应的商品有无瑕疵或是否符合通常的或约定的质量?买方如要对有关商品中的瑕疵提出意见,就必须立即通知卖方;否则,他就会丧失因商品存在瑕疵而取得的一切权利(哈盖贝第 377 条)。同一规则亦适用于下列情况:所供应的商品在品种与数量方面均与契约规定的有出入——但出入或歧异很明显者不在此限(第 378 条)。

哈盖贝也扩大了动产善意买受人根据贝盖贝之规定而享有的保护。贝盖贝第 932 条要求买受人必须确信卖方是商品的所有权人;但

34 bona fide purchaser: 善意的买受人。按“bona fide”系拉丁文,相当于英语“good faith”(参照下文“good faith purchaser”),但“bona fide”不但可作定语,亦可用作状语(如下文中的“he bona fide believed that ...”)。

35 moveable property: 动产(在英美法中多称“personal property”)

a *Kommissionär* <sup>36</sup>. Thus § 366 HGB extends protection to the *good faith purchaser* <sup>37</sup> of goods which he knew the vendor did not own, provided that he bona fide believed that the vendor was entitled to *dispose of* <sup>38</sup> the goods on behalf of their owner. The same rule applies when merchants *pledge* <sup>39</sup> goods or commercial documents.

Another special rule of commercial law worth mentioning in conclusion is that a merchant has a particular *lien* <sup>40</sup> in respect of sums due over any goods or instruments belonging to his debtor which came into his possession in the course of normal business relations.

As will be clear from the examples we have given, many provisions of HGB can be understood only in the light of the general rules laid down by the BGB, which it is their function to modify, amplify, or exclude. Thus the HGB contains very few provisions about contracts of sale: the reciprocal duties and rights of buyer and seller are regulated in principle by the BGB (§ § 433 ff <sup>41</sup> BGB). The rule that the merchant who buys goods must inform the vendor immediately if wrong or defective goods have been supplied (§ § 377, 378 HGB) must be set in the context of the rules of BGB concerning the vendor's liability for defects (§ § 459 ff. BGB). So, too, the special protection afforded by the HGB to the good faith purchaser (366 HGB) makes sense only when one knows what is laid down in the property section of the BGB about acquiring a moveable from a non-owner (§ § 932 ff. BGB). And the provisions of the HGB regarding commercial brokers are only modifications of the rules contained in the BGB about the *brokerage contract* <sup>42</sup> (§ § 625 ff. BGB).

But other types of contract, such as the commission contract, although founded on the general contract law contained in the BGB, are so fully regulated in the HGB that we must regard them as separate institutions altogether. The provisions of the HGB on *commercial partnerships* <sup>43</sup> contain rules additional to,

36 *Kommissionär*: (德语) 代理人, 被委托人

37 *good faith purchaser*: 意同“bona fide purchaser”

38 *dispose of*: 处置, 处分 (“私法”概念; 而不是“公法”概念——“受处分”的“处分”)

39 *pledge*: 抵押



是在商业上,商人(如寄售商)往往有权出售属于他人所拥有的商品。因此,哈盖贝第 366 条也扩大范围,保护明知商品非卖方所有的善意买受人——但以买受人善意地确信卖方有权代所有权人处分其商品者为限。该规则亦适用于商人抵押商品或商业单据的场合。

最后,商法中还有一条规则,也是值得一提的。那就是商人由于其债务人所欠款项,对于其债务人所有且在正常业务关系中又由其本人占有的任何商品或单据拥有特定留置权。

由上列各例可以看出:哈盖贝的许多规定,人们只能从贝盖贝所规定的一般规则出发才能理解。哈盖贝对这些规则加以修改、扩大或排斥。因此,哈盖贝很少有条款就买卖契约作出规定——原则上买卖双方对等的权利和义务是由贝盖贝调整的(贝盖贝第 433 条以下)。如供应的商品不对头或系次品(哈盖贝第 377 条、第 378 条),买受商品的商人必须立即通知卖方的规则,必须同贝盖贝关于卖方的瑕疵担保责任的规则(贝盖贝第 459 条以下)联系起来。哈盖贝给予善意买受人的特别保护(哈盖贝第 366 条),也惟有当人们对贝盖贝物权部分内关于向非所有权人取得动产的规定(贝盖贝第 932 条以下)已经了解的时候,才有意义。又,哈盖贝关于商业居间人的规定,只是对贝盖贝内关于居间契约的各项规则(贝盖贝第 635 条以下)的限制而已。

但其他各种契约,如委托代办契约,虽以贝盖贝内一般的契约法为基础,却在哈盖贝中有如此充分的调整,以致我们必须将它们看成完全独立的制度了。对贝盖贝关于民事合伙的规定来说,哈盖贝关于

40 lien: 留置权

41 ff: = "and the following(pages, sections)" 即“及以下各(页、条)”

42 brokerage contract: 居间契约; 中介契约

43 commercial partnership: 商事合伙