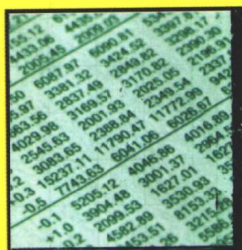


民商法英语学习

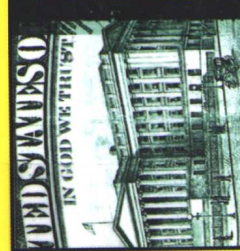
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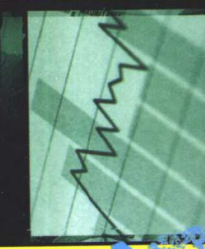
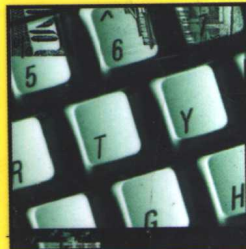
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许光耀



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序 一

沈 四 宝

二十一世纪是东西方文化大交流的辉煌世纪,任何一种单一的文明都不可能孤立地发展。全球化的浪潮将推动多元文化的交糅与融合。《民商法律英语学习》的创刊,恰好体现了这种先进的历史潮流与方向。

自从清末西学东渐,引发法制改革,中国人学习西方法学已逾一个世纪了。由于中华文化历史中一直缺乏法治的传统与文化积淀,其间经历过发展、停滞、倒退与反复,直到最近二十年间,才能以客观、开放、理性的心态对西方法学进行深层审视,并进而充分认识到这种比较与借鉴对于中国法学的重要性。在经济全球化日益深化的今天,中国成功地加入了世界贸易组织的现实,更使中国法学面临着巨大的挑战。必须广泛、深刻地了解国际社会的法律文化与制度,以丰富中国法学;必须熟练地掌握他国相关的法律规范以便于对外交往。而这一切的基础,是法学研究与实务人员的专业英语素质。因此,我衷心地祝贺《民商法律英语学习》的创刊,它不仅有助于提升人们法学专业英语的水平,而且,由于其所包含的丰富的信息与资料,也将成为让中国了解世界法律的纽带和桥梁。这样一种刊物正是大家所长期期待的,我们对她寄予殷切的希望。

序 二

王 军

交流与融合是文明持久发展所不可缺少的条件。法学是具有世界意义的学科,同时又有着鲜明的本土性,如何深刻理解不同国家的法学理论制度,从而有效借鉴、继受、移植他人之所长,是我国法学迫切而又长久的使命。在经济一体化以及中国入世背景下,这种交流将愈加广泛、深刻、具体、频繁。《民商法律英语学习》的创刊,为我们了解西方法学理论与法律文化提供了一个良好的平台,向我们展示西方法学的真实面貌,其设计上,既重视刊物的理论性,又广泛收集实务工作中所常用的文书或资料,更关注各国法律体系中所特有的制度、机构、规则与概念;不仅在内容上广泛覆盖民商法整个领域,而且充分顾及各种写作风格的搭配,以及术语与词汇的难度与密度。编者还考虑到读者的阅读习惯,文章篇幅适度,长短文结合,实现了学术与实务、学习与休闲的结合,将英语学习与法律知识的撷取融为一体,这一尝试正是法学界所迫切需要的。我在此衷心地希望,在编译者的努力下,这本刊物不断将纷繁复杂的西方法律深入浅出地介绍给读者,既成为人们了解西方法律的重要窗口,又成为法律专业英语学习的基本园地,从而更充分地展示其现实意义与价值。

民商法英语学习

English Study of Civil and Commercial Law

[英汉对照·英汉注释]

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The Evolution of Commercial Law*

商法的演变

By Roy Goode

宋 晓** 译注

Commercial law has evolved from the needs and practices of the mercantile community; from opportunities to be grasped and problems to be overcome. It is these that have provided the impetus^① for new types of agreement, new contract structures, new instruments of trade. In some respects the launching of each fresh device has been almost as fraught with hazard as that of a long sea voyage. When it comes to the test, will the courts uphold the new instrument as achieving its intended purposes or will they strike it down, with the prospect of inhibition or even ruination of a flourishing market? It is a tribute to the good sense^② of the judges of old and their successors that, for the most part, they responded to the challenge in a positive and constructive way, through a relaxed approach to commercial contracts and a recognition of the importance of upholding reasonable market practice. It is in no small measure due to them that London can now fairly claim to be the world's leading financial centre.

商法乃是从商业社会的需求和实践中,从有待机遇和有待克服的问题中发展而来。正是这些因素促生了新的协议类型、新的合同结构和新的交易工具。在某些方面,每样新的商业设施的产生过程,就几乎如同远洋航海般险象环生。当它付诸实践的检验,法院是会因为它能实现预想的目的而赞同它,还是予以禁止,从而抑制或甚至毁灭一个旺盛的市场呢?必须称颂历代法官的智慧,他们绝大多数都以积极的、建设性的方式来回应挑战,他们对商业合同采取宽松的政策,并且承认支持合理的商业惯例的重要性。在很大程度上正是因为他们,伦敦在今天才可以理直气壮地声称它是全世界领先的金融中心。

* 本文摘自 Roy Goode(劳埃·古德) Commercial Law in the Next Millennium(《新千年商法》), Sweet & Maxwell 1998, 第 3—8 页。

** 武汉大学法学院国际私法博士生。

It is a characteristic of human behaviour—some would say, of human folly—that we learn primarily from our own experiences, not from those of our predecessors. The history of commercial law is one of constant reinvention of the wheel. Thus the Italians are credited with inventing the bill of exchange, though its forerunner was in use in the ancient city of Karkemish in the seventh century before Christ. English law takes credit for inventing the floating charge^③ in the latter part of the 1800s, yet Roman law possessed a security not so very different in the shape of the *hypotheca*.^④

This constant rediscovery of rules and techniques developed by our ancestors reflects a point of some importance, namely that commercial law evolves from the usages of business, so that the level of its influence and the degree of its subtlety at any one time are a function of the volume of economic activity and the complexity of the practices that drive commercial law. When a highly developed commercial community disappears, its laws and learning disappear with it. Such was the fate of the great Code of Hammurabi (itself derived in no small measure from the Sumerian laws), which, with the collapse of the Ham-

我们从自己的经验中学习,而不是学习先辈们的经验,这是人类行为的特征——某些人却会说,这是人类愚蠢的表现。商业的历史,是一部不断地推陈出新的历史。意大利被公认为发明了汇票,尽管公元前7世纪的古卡克米什城已经使用过汇票的前身。英国法被公认为在19世纪后期发明了浮动抵押,然而罗马法已经拥有一种以抵押协议为形式的债券,它和浮动抵押的差异就不是很大。

由前人发展形成的商业规则和商业技术,不断地被重新发现,这说明了重要的一点,即商法是由商业惯例演变而来的。因此,商法在任何时期的影响范围和精巧程度,取决于大量的经济活动以及经济行为的复杂程度,正是这些推动了商法的发展。一旦高度发达的商业社会消失了,它的法律和知识也就随之消逝。这就是伟大的《汉谟拉比法典》的命运(《汉谟拉比法典》本身在很大程度上源于苏美尔法律),随着汉谟拉比王朝的灭亡,《汉谟拉比法典》便从

murabi dynasty, disappeared from view, not to be rediscovered, except in fragments and partial copies, until the lapse of some 3,800 years. The sophistication of modern commercial law is thus a function of the size and interdependence of modern markets rather than of intellectual progression. Commercial law is about problem-solving, about fashioning the contract structures and other legal tools by which the legitimate needs of the market can be met.

By comparison with continental Europe, England was slow to develop a corpus of commercial law. It is true that we had a medieval law merchant. But its virtues lay primarily in the speed and informality of its processes, and its relaxed approach to evidence, rather than the development of substantive rules. English merchants lacked the autonomy, and organizational structure of their continental colleagues, with their powerful guilds and their mercantile consuls. The civil law, with its concepts of fairness and good faith, might have exerted a greater influence if the Church and the Court of Admiralty, in which the civilians^⑤ in Doctors' Commons^⑥ practised and which applied the civil law, had not been curbed by the State and by the

人们的视野中消失了,再也没有重现于世,只除了一些残碑断碣,直到约 3800 年后才被重新发现。因此,现代商法的精巧成熟是规模巨大、交相依赖的现代市场的产物,而不是智力进化的结果。商法关乎问题的解决,关乎合同结构和其它法律工具的培育,目的在于满足市场的合理需求。

和欧洲大陆相比,英格兰商法体系的形成相对迟缓。诚然,我们有中世纪的商人法。但英国中世纪商人法的优点,首先在于程序上的迅捷和简便,在于灵活的举证方法,而不在于实体规则的形成。欧洲大陆商人拥有强有力的行会组织和商业律师,而英国商人缺乏他们大陆同行那样的自治权和组织机构。英国教会和海事法院是民事律师协会的民法专家们的执业场所,适用的是欧陆民法,如果它们没有受到国家和普通法院的限制,没有因此而渐渐丧失管辖权的话,那么欧陆民法以其公正观念和诚信观念,或许会产生更大的影响。

courts of common law, so that their jurisdiction was steadily eroded, indeed, jurisdictional battles, and their periodic resolution by the courts, seemed to have almost as much significance as the development of substantive commercial law. This was true even in the 12 years of the Commonwealth, when the Protectorate^⑦ by which we were governed introduced an Act preserving the jurisdiction of the Court of Admiralty in matters relating to freight and bills of lading and other Admiralty matters and an Ordinance^⑧ removing the court's jurisdiction in actions on bills of exchange and accounts between merchants, whilst at the same time requiring each of the three judges to give reasons for his sentences.

Modern historians now discount even the notion that the common law courts applied and absorbed the law merchant; rather, it is thought, did they receive evidence of commercial usage as fact and apply it directly, instead of borrowing from the law merchant. So we must not allow ourselves to be too enslaved by the romance of the law merchant. If the medieval *lex mercatoria*^⑨ laid the foundations, it is the central courts, particularly from the eighteenth century onwards, that have fashioned the body of principles and rules making up modern English commercial law.

的确,管辖权之争,以及法院定期性地解决争议,似乎差不多和实体商法的发展有着同等的重要性。甚至在共和时期的12年内,情况仍然如此。当时,摄政府发布一项法律,在有关运费、提单和其它海事事项方面保留海事法院的管辖权;还发布一项条例撤销海事法院有关汇票、商人账户的诉讼管辖权,同时要求三位裁判法官各自陈述判决理由。

现代历史学家不赞同如下观点,即普通法法院适用并吸收了商法;相反,他们认为普通法法院把商业惯例的证据作为事实予以接受并直接适用,而不是在借用商法。因此,我们不能过多地受制于商人法的浪漫故事。如果是中世纪的商人法奠定了基础,那么就是由中央法院,尤其从18世纪以来,培育了英国现代商法的众多的规则和原则。

A period of change

That an international *lex mercatoria* developed owes little to English merchants. Admiralty law drew heavily on such continental compilations as the *Rolls of Oleron* and the *Consolato del Mare*, which were copied into the *Black Book of the Admiralty*. In the evolution of international trade law the driving force was the Italian mercantile community, and it was from Italy, and from international transactions shaped by Italian usage, that England, like the rest of Europe, drew the inspiration for its own instruments of commerce, such as the bill of exchange and the bill of lading, and the foundations for its law of marine insurance.

How, then, has English commercial law attained its present eminence? I believe that at bottom there are three principal causes. The first is the huge growth of entrepreneurial activity, in which many factors, including the law, have played a part. Commercial law derives its nourishment from commercial transactions. Without trading there would be no commercial law. London has been an international trading centre from Anglo-Saxon times. The growth of capitalism and the competition for do-

英国商人对于国际商法的发展贡献甚微,海商法从欧洲大陆的各汇编集里吸取大量养分,诸如奥利龙和麦雷的汇编,它们都被编进了海商法的黑皮书中。在国际贸易法的演变过程中,最初的动力来源于意大利的商业社会,正是从意大利那里,从意大利的商业惯例塑造的国际交易那里,英国和欧洲其它地区一样,汲取了发明自己的商业手段的创造灵感,例如汇票和提单,以及海商保险的法律基础。

英国商法是如何获得目前的辉煌成就的?我认为有三个根本原因。首先是企业家的经营活动大幅度增加。对此,诸多因素发挥了积极作用,其中包括法律。商法从商业交易中获取自己的养分;没有贸易,就没有商法。自从盎格鲁—萨克逊时代以来,伦敦就一直是国际贸易的中心。随着资本主义的发展以及国内、国际业务的竞争的加剧,新的交易手段和商业技术层

mestic and international business have led to a never-ending stream of new business instruments and techniques and to the evolution of specialist and sophisticated markets, each with its own communication system, its trading rules and its procedures for clearance and settlement. London has an international reputation for its highly developed specialist markets in commodities, short-term and long-term debt, equities, financial derivatives, foreign exchange, and transport and insurance services. These markets, the contracts they generate and the determination of the disputes that arise from them, form the bedrock of modern commercial law. London also benefits from an accident of geography, in that the country is happily located in a time zone that bridges the gap between New York and Tokyo.

The second cause is political and financial stability. Commercial law cannot flourish except in an environment which is financially stable and in which there is confidence in the organs of government and in the judiciary.

The third and crucial factor is the attitude of the legislature and the courts, If entrepreneurial activity is to be undertaken and to flourish, the legal system

出不穷,市场变得更加专门化、更加成熟,每种市场都拥有自己的交换体系、自己的贸易规则和自己的清理结算程序。伦敦因其各类高度发达的专门市场而享誉世界,其中包括货物市场、长期或短期债务市场、证券市场、金融衍生市场、外汇市场,以及运输和保险服务市场。各类市场,以及因各类市场而产生的合同,以及因合同纠纷而产生的争端解决机制,它们共同形成了现代商法的基础。伦敦还得益于天然的地理优势,因为它所在时区正好沟通了纽约和东京。

其次是英国的政治稳定和金融稳定。只有在金融稳定的环境里,在政府机关和司法机关得到信任的环境里,商法才能高度发展。

第三个也是决定性的因素是立法和法院的态度。如果企业家的经营活动不断活跃,对其进行调整的法律体系

which accommodates it must be flexible and responsive to rapid change. Paternalism may give protection, but it stultifies initiative and inhibits the risk-taking and the receipt of profits which are essential to the health of a market economy. With the abandonment of mercantilism and the grant of overseas state trading monopolies, paternalism gave way to private enterprise. It is a fact that in the development of our legal techniques for the accommodation of business transactions the legislature has, rather remarkably, played almost no part at all. A striking illustration of the non-interventionist policies of the State is that, except from some rather desultory provisions in the Bank Charter Act 1844, banking in the United Kingdom was not regulated by any legislation whatsoever until 1979. The whole system of control worked on the basis of the moral suasion exercised by the Governor of the Bank of England.

Now, as we approach the next millennium, we find commercial practice in a period of change unprecedented in its pace and scale. Transferable documents, heralded long ago as a breakthrough in facilitating dealings in goods, securities and money, have more recently been seen

必须富有弹性,并对迅速的变化作出反应。家长式的管理或许可以保护他们,但会抹杀他们的创新精神,还会阻止他们从事商业冒险和追求利润,而这却是健全的市场经济的本质所在。放弃重商主义,赋予海外贸易的国家垄断权,家长式的管理便让位于私人企业。事实上,在调整商业交易的法律技术的发展过程中,立法显然几乎没起什么作用。国家实行不干预政策,其中一个显著的例子是,除了在1844年的《银行特许法》中有几个零散的干预条款之外,银行业在英国不受任何立法規制,这种情况一直延续到了1979年。整个控制体系的基础是大英银行总裁的道德劝化。

如今,在即将进入新千年之际,我们发现商业实践正处于其速度与规模上前所未有的变革时期。很久以前,可转让文书是商业先驱,它突破性地促进了货物交易、证券交易和货币交易,近来却愈益被认

as a serious obstacle to progress as exporters, banks, exchanges and clearing systems found themselves engulfed by a tidal wave of paper, with all the attendant^⑩ risk, cost of issue and storage, and delay and inconvenience of transmission. With the advent of new technology securities are becoming dematerialised or immobilised in depositary institutions; negotiable instruments are giving way to electronic funds transfers; physical cash will soon be displaced by the electronic purse; the paper-based bill of lading and letter of credit may one day be consigned to oblivion. Trading on the Internet is already with us, creating huge business opportunities but posing potentially enormous problems for law and for regulators. The increasingly abstract nature of markets, in which a variety of complex derivatives can be traded separately from the underlying physical transactions, raises in acute form the question how to distinguish trading and hedging^⑪ from gambling^⑫ and speculation^⑬. The conversion of non-tradable into tradable assets through securitisation brings in its train a sharper conjunction of consumer and commercial law than we have known in the past as consumer receivables^⑭ become transferred into special purpose vehicles and unitised or given as security

为严重阻碍了商业发展,因为出口商、银行、交易系统和清算系统发现他们已被潮水般的文书所淹没,同时还有伴有风险、发行和储藏成本,以及传送的迟延、不方便。随着新技术的出现,债券正成为无纸化,或凝结于储蓄机构中。流通票据正让位于电子资金划拨。现金将很快被电子资金所取代。有纸提单和信用证或许会在某天消失。网上交易已来到我们身边,正在创造大量的商机,但也给法律和管理者提出了大量的、潜在的难题。市场越来越具有抽象性,在这样的市场里,种种复杂的衍生工具可以脱离有形的基础交易而单独进行交易,这就引发了一个尖锐的问题,即怎样将贸易和套头交易与赌博和投机区分开来。原本不可交易的财产,通过证券化途径转变为可交易的财产,其后果是把消费者和商法更加紧密地结合在一起,超过了我们以往所知的紧密程度,因为消费者应收账款可转让给特定用途的媒介,并予以成组化,或为发行公共票据和公债券提供担保。所谓的市场全球化带来了新的挑战。如果公司

for public issues of notes and bonds. The so-called globalization of the markets brings new challenges. Who should control activities of a corporation incorporated in one country which are conducted in another? Should we expect competition between regulators of different countries or a convergence of regulatory regimes?

Finally, both domestically and internationally commercial law is being profoundly influenced by political change. We have seen an almost worldwide movement from planned economies to mixed economies and from state control to privatisation, with important implications for the security of transactions and for the relative significance of public and private rights. Within the next few years we shall have monetary union in Europe, with or without the early participation of the United Kingdom, and we will have to confront the legal and political effects of the single currency.

在一国设立,却在另一国经营,那么谁来对该公司的活动进行控制?我们希望不同国家的管理者相互竞争,还是希望组建统一的管理体制?

最后,无论是国内商法还是国际商法,都正在遭受政治变化的深刻影响。我们已经目睹了一场几乎是世界性的运动,即从计划经济向混合经济转变,从国家控制向私有化转变,与之息息相关的是保障交易安全,明确公权利和私权利的相互关系。在接下来的几年里,我们将迎来欧洲货币联盟,无论英国在其早期是否参加,我们将面临单一货币带来的法律和政治后果。

注释:

- ① impetus, 动力。
- ② good sense, 判断力强, 机智。
- ③ floating charge, 浮动抵押。
- ④ Hypotheca, hypothec, hypotheke, 抵押。
- ⑤ civilian, 民法专家, 罗马法专家。
- ⑥ Doctor's Commons, (伦敦)民事律师公会。
- ⑦ Protectorate, 摄政府, 1653—1659 英国克伦威尔父子摄政时期。
- ⑧ Ordinance, 这里译为条例。从前的制定法的一种, 不须经上、下议院、君主的三重通过或赞

许,而只经过一重或二重通过,所以不称法令(Act),而称条例。

⑨ *lex mercatoria*, 商法, 商事法。

⑩ *attendent*, 附随的。

⑪ *hedge*, 套头交易(指为避免损失而买进现货卖出期货,或反之)。

⑫ *gamble*, 赌博。

⑬ *speculation*, 投机。

⑭ *receivable*, 应收款项, 应收票据。