法律英语实务

一中外法律文书编译

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EGAL ENGLISH

李斐南 黄瑶 曾报春 任崇正 编译

法律英语实务

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EGAL ENGLISH

李斐南 黄 瑶 曾报春 任崇正 编译 任崇正 林岳澄 校译

·广州·

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图书在版编目(CIP)数据

法律英语实务:中外法律文书编译/李斐南等编译.—广州:中山大学出版社,2005.8 ISBN 7-306-02621-6

I. 法··· Ⅱ. 李··· Ⅲ. 英语—法律文书 Ⅳ. H31

中国版本图书馆 CIP 数据核字 (2005) 第 107966 号

责任编辑:熊锡源

封面设计:楚 天

责任校对:易 正 责任技编:黄少伟

出版发行:中山大学出版社

编辑部电话 (020) 84111996, 84113349

发行部电话 (020) 84111998, 84111160

地 址:广州市新港西路 135 号

邮 编: 510275 传真: (020) 84036565

印刷者:广州市番禺市桥印刷厂

经 销 者: 广东新华发行集团

规 格: 787mm×1092mm 1/16 13 印张 330 千字

版次印次: 2005 年 8 月第 1 版 2005 年 8 月第 1 次印刷

定 价: 23.50元 印数: 1 - 5000 册

我很高兴向广大读者推荐这本《法律英语实务——中外法律文书编译》。这是继 1985年出版的《法学英语》和 1997年出版的《现代法律英语》后又一本法律英语新作。与前两本教材不同的是,本书是一本实用的法律英语教学用书,是法律英语的应用文版。书中取材源于最新的中外法律实践,是各国司法界和法律界当前在实际应用的鲜活精彩的法律文书及案例,且每篇都加了编者按和英汉对照翻译,以期帮助读者更好地理解全文及有关起草细节,力求甚解。

全书分为两大部分。第一部分(上编)是外国法律文书的中译。从目录中可以看出,内容包括外国法院开始审理案件时的起诉状、答辩状、传票送达证明、宣誓书、授权委托书……一直到法院判决书,涵盖了诉讼案件全过程的常用法律文书,还包含了诉讼过程中当事人和律师向法院申请某一具体事项的其他法律文书,加起来共有30多种。第二部分(下编)是中国法律文书的英译,其内容类似第一部分,也同样涵盖了诉讼案从起诉到判决的全过程所常见的法律文书。此外还根据实际需要,选编了涉外仲裁案件中的仲裁申请书、裁决书及要求执行仲裁裁决的申请书等有关仲裁的法律文书。全书在每一部分前还分别有美国法律制度简介及中国法律制度简介,以便中外读者更好地了解本书编入的法律文书的背景,拓展视野。对法律文书的选编,编译者是下了很大功夫的,他们从浩瀚的中外法律文书中严格筛选、精心编排,形成了一套既有代表性又有连贯性的法律文书系列。

本书的翻译也很有特色。由于法律文书的翻译专业性很强,编译者本着认真负责、精益求精的精神和"信、达、雅"的翻译准则努力工作,力求做到严谨、准确、专业。对从事法律文书翻译的读者,无论是英译中还是中译英都有较好的参考价值。本书的四位编译者都是在法律英语方面造诣颇深的专业人士。李斐南和黄瑶是中山大学长期教授法律英语的教师,具有丰富的法律英语教学经验。曾报春和任崇正都是中国的中山大学培养出来的学生,后在美国加州的 LOYOLA 法学院取得法律博士学位,考取当地律师执业资格,并在中美两国从事律师执业和文化交流工作多年,具有丰富的国际法律实务经验。他们四人合作,相得益彰,保证了本书的高质量、高水平。本书有望成为近年来法律英语出版物中的精品。

随着我国加入世界贸易组织和改革开放的深入,需要阅读、理解、应用和翻译的涉外 法律文书越来越多,要求也越来越高。这本书的问世不仅为大学课堂提供了一本新的教 材,而且由于其实用性强,覆盖面广,同时也为中外法律工作者提供一本可供参考、借 鉴、对照的读物。我再次希望新老读者认真读一读这本书,相信一定会有新的惊喜和收获。

端木正 2005年7月7日

前言

现在奉献给读者的这本《法律英语实务——中外法律文书编译》(以下简称《实务》) 是一本现代法律英语的应用文版,是法律英语与时俱进的新发展。

中山大学法律系(现为法学院)是全国最早开设法律英语课程的院校之一。1979 年中山大学复办法律学系,从1980 年开始招第一届本科生起就开设了这门课作为两年公共英语课的后续课程。二十多年过去了,这门课从来没有停顿过。老教师退休了,年轻教师接着上,这门课已成为有鲜明特色的保留课程。师生们普遍感到学习法律英语对教学、科研及对外交流都有用。

随着改革开放的深入发展,地处改革开放前沿的广东,涉外法律事务成倍增长,涉外法律文书的阅读和翻译也被尖锐地提到日程上来。从 20 世纪 80 年代中期以来,法律系的教师参加了相当一部分广东地方性法规和一些大的涉外案件的翻译。从这些工作中,大家都深深体会到法律的翻译不仅仅是文字上的翻译,而且有其很强的专门性和特殊性,对这个新课题有必要进行深入的研究和探讨。在这样的情况下,在上世纪 90 年代初,我就为国际法研究生开设了《涉外法律文书选读》的课程,以我们遇到过的中外法律文书为教材,专门探讨对这些文书的阅读、理解和翻译。由于这门课用的是鲜活的法律文书,理论联系实际,又采用讨论研究及动手翻译的教学法,深受学生的欢迎。现在的这本《实务》就是从当时采用的资料的基础上发展起来的。时代在前进,法律文书在发展,原来的资料只起了一点抛砖引玉的作用,大量的资料还是在编著过程中加进去的。

我是中大法律系法律英语课的第一位任课老师,也是《法学英语》和《现代法律英语》两本教材的编著者。《实务》的大量编译工作是由黄瑶老师、曾报春律师和任崇正律师做的。黄瑶老师是中山大学国际法硕士,北京大学国际法博士,现在中大任教,多年来一直从事法律英语的教学和研究。曾报春律师是中山大学国际法硕士,美国 Loyola 法学院法律博士 (J. D.),曾有多年美国律师事务所工作经验,现担任广东智洋律师事务所主任,从事涉外法律业务。任崇正律师也是 Loyola 法学院法律博士,也在智洋律师所从事涉外法律业务。因为有了他们三人的努力,才能搜集这么多涉外法律文书资料,才使这本书的内容精彩动人。真是长江后浪推前浪,青出于蓝而胜于蓝!

2004年5月26日至29日,美国的AALS(美国法学院协会)在夏威夷举办名为"Educating Lawyers for Transnational Challenges"的国际会议,邀请了五大洲许多国家的法学教授与会共同商讨如何培养律师应对跨国的挑战。我也被邀请为与会代表,我写的文章就把我们法律英语教学作了重点介绍。会议的组织者对此非常重视,要求我作进一步论述。遗憾

的是因为会议前正是美国领事馆停止签证的时期,等 AALS 通知广州美国领事馆给我特别签证时,只剩下两天时间,已赶不及了,最终我没能赴会。但是我的文章已在 AALS 的网站上发表,并通过 E-mail 与会议沟通交流,我们的经验也与与会者共享。因在开会时《实务》还未出版,因此未介绍这本书,等本书出版后,将进一步与 AALS 交流,介绍我们在法律英语教学中的新成果。他们也要求与会者在会后继续对会议的主题进行探索。

据我了解,现在我国的法律英语教学发展很快,也有不少新书出现,希望我们这本《实务》能成为百花园中的一朵新花,为法律英语的教学与研究,为广大的法律工作者的 实践提供一些新思路和新经验。

最后,这里介绍一下本书参编人员分工情况:

李斐南 负责本书的策划、选材,撰写"前言",并参加"外国法律文书的中译"部分下列法律文书的翻译:证明文件,"徐丽丽的授权委托书","美国衡平法院的终局判决书"(与吴玉娟合译)。

黄 瑶 负责本书的选材、组织、统稿等事宜,撰写"中国法律制度简介(中英对照)",负责上编的编排和定稿,并参加上编中如下法律文书的翻译:民事起诉状,刑事起诉书(与陈芸芸合译),答辩状,宣誓书,"代表破产者的债权人之授权委托书",律师意见书(与阙占文合译),"美国简式离婚判决书"。

曾报春 负责本书的选材、组织、统稿,撰写"美国法律体制简介(中英对照)",负责下编的编排和定稿,参加下编中"致北京市朝阳区人民法院的答辩状"和"民事判决书和刑事判决书"的翻译,并参加上编中下列法律文书的翻译:"申请由陪审团审理","放弃诉讼请求权","请求撤诉","和解要约","和解通知","重审申请","仲裁协议","无争议事实的陈述","请求法院做出缺席判决"。

任崇正 负责本书的选材和全书的审校工作,并参加"外国法律文书中译"部分"原告对陪审团的指示"文书的解说词编写。

林岳澄 参加上编下列法律文书的翻译:传票及送达证明,"请求法院做出简易判决申请的通知","费用备忘录","质询书","请求提供证人证词和证物","披露请求书","要求提供犯罪前科的信函","对判决履行的确认","原告对陪审团的指示";参加下编下列法律文书的翻译:传票,致中国国际经济贸易仲裁委员会深圳分会的答辩状;参与本书的部分审校工作。

曾 字 参加下编下列法律文书的翻译:请求执行仲裁裁决申请书,受理执行案件通知书,民事裁定书,请求恢复执行仲裁裁决申请书。

陈芸芸 翻译上编中的刑事判决书,并参与翻译刑事起诉书。

吴玉娟 参与翻译"美国衡平法院的终局判决书",并参与书稿清样的校对工作。

阙占文 参与翻译上编中的律师意见书。

李斐南 2005 年 8 月

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引言:美国法律体制简介

Introduction to the U.S.Legal System

The U.S. Constitution which became binding on the U.S. people in 1788 is the origin of U.S. legal system. The federal Constitution comprises seven articles and twenty-seven amendments. Articles I, II, and III set forth the basic structure of the U.S. government. Article I defines congressional lawmaking powers, Article II sets forth the presidential executive powers, and Article III establishes federal judicial powers. The first ten amendments to the U. S. Constitution, known as the Bill of Rights, enumerate certain individual liberties that must be protected against government infringement. The rest of the Constitution contains miscellaneous other provisions, many of which are intended to maintain a dual system of government in which the federal government shares sovereignty with the states.

The U.S. Constitution is the highest law in the land and the foundation on which all U.S. law has been built. It effectively built the dual system of government in which the federal government shares sovereignty with the states. Under the constitution, both the federal government and each state government are divided into executive, legislative, and judicial branches and then form a system of separated power, check and balance among the branches.

1 Sources and Hierarchy of Law

The Constitution

The federal constitution establishes a system of the federal government and defines the boundaries of authority granted to the government. The U.S. 美国的法律体制根源于 1788 年生效的联邦宪法,该宪法有七款条文和二十七条修正案。宪法第一、二、三条规定美国政府的基本结构,其中第一条确立国会的立法权,第二条确立总统的行政权,而第三条确立联邦司法权;宪法的前十条修正案被称为权利法案,列举特定为防止政府侵犯人权而应加以保护的个人权利;宪法的其余部分主要是为保持联邦政府和州共享主权的双轨制的政府体制而设的各项规定。

联邦宪法是美国最高位阶的法律, 是制定美国国内其他法律的基础,它 有效地确立了联邦政府和州共享主权 的双轨政府体制,而且将联邦政府及 各州政府分为行政、立法和司法部门, 从而在联邦和州之间、在各个不同部 门之间构筑起彼此权力独立、相互制 衡的法律体制。

一、美国法律的渊源 及位阶

■宪法

联邦宪法构建了联邦政府体系, 并确定授予联邦政府权限的范围。联 Constitution is the preeminent source of law in U.S. legal system, and all other rules, whether created by the state or federal government, must comply with its requirements. The federal courts have the sole authority to interpret the Constitution and to evaluate the federal constitutionality of federal or state laws.

International Treaties

Treaties entered into by the United States are also considered the supreme law of the land pursuant to the U.S. Constitution, as are federal laws. In the case of a conflict between a treaty and a federal statute, the one that is later in time or more specific will typically control. Treaties are often implemented by federal statutes.

Federal Statutes

Federal Statutes are created by the legislative branch of the federal government. Statutes can be used to raise revenue, define crimes, create administrative agencies, and generally determine public policy. Federal Statutes are published first in Slip Law, then in the Statutes at Large, and subsequently in the United States Code.

Agency Rules and Executive Orders

Administrative agencies are usually created by legislative action and operate under the control of the executive branch. Federal administrative bodies issue rules and regulations of a quasi-legislative character; valid federal regulations have the force of law and preempt state laws and rules.

Rules and regulations may be issued only under statutory authority granted by Congress. The President also has broad power to issue executive orders. An executive order is a directive from the president to other officials in the executive branch. Proposed and final rules, executive orders, and other executive branch notices are published daily in the Federal Register. No person may be subject to any rule that

邦宪法是美国法律最重要的渊源,无论是州或是联邦政府所制定的任何法律、法规,与联邦宪法冲突的都归于无效。联邦法院是唯一有权解释宪法并审查联邦法律或州法律的合宪性的权威机构。

■国际条约

依照美国宪法,美国参加的条约也被认为是全国最高位阶的法律,相当于联邦法律。在条约与联邦立法相冲突的情形下,适用时间在后或者有特别规定的一方。但条约通常需通过联邦立法确认才能实施。

■联邦法规

联邦法规是由联邦政府立法部门 制定的,旨在提高税收、定义犯罪行 为、设立行政机构,并通常用于决定 公共政策。联邦法规颁布的形式主要 有议案单行法、法规大全和美国法典 三种。

■联邦机构的规章和行政命令

行政机构通常是通过立法行为设立并在行政部门的管理下运作的。联邦行政机构颁布具有准立法性质的规章,生效的联邦规章具有法律效力,并对州法律和法规具有优先性。

联邦行政机构仅可依国会授予的 法定权力而颁布法规和规章。总统也 拥有广泛的权力发布行政命令,行政命令是总统对行政部门其他公务员的指示。试行的及最终的法规、行政命令及其他行政部门的通知每日公布在联邦日志上。任何法规如被要求在联邦日志上公布而未根据要求进行公布

is required to be published in the Federal Register and is not so published. Federal regulations are published in the Code of Federal Regulations. The federal courts have sole authority to review agency rules and actions to ensure that they are legal under the substantive federal statute.

Judicial Opinions

The United States is a common law country. Every U.S. state has a legal system based on the common law, except Louisiana. Common law has no statutory basis; judges establish common law by applying previous decisions (precedents) to present cases. Although typically affected by statutory authority, broad areas of the law, most notably relating to property, contracts, and torts, are traditionally part of the common law. These areas of the law are mostly within the jurisdiction of the states, and thus state courts are the primary source of common law. Federal common law is relatively narrow in scope, being limited primarily to clearly federal issues that have not been addressed by a statute.

■ State Constitutions and Statutes

State constitutions are the supreme law within the state. Although a state constitution may grant greater rights than those secured by the federal Constitution, it cannot provide lesser rights than the federal constitution does. State statutes must conform to the respective state's constitution. All state constitutions and legislation can be preempted by federal legislation or the federal Constitution. Municipal charters, ordinances, rules, and regulations apply only to local issues; either state or federal law typically can preempt them.

2 Federal Court System

According to the federal Constitution, the federal government is granted limited authority, with all

的,将不对任何人产生约束力。联邦 法规以联邦政府行政法规汇编的形式 颁布。联邦法院是唯一有权审查机构 法规及政府机构行为并根据实体联邦 法律来确保这机构法规及政府行为具 有合法性的法院。

■法院判例

美国是普通法国家。除路易斯安娜州属大陆法系外,美国的其他州都属普通法体系。普通法没有成文法基础,法官通过将判例适用到当前交流的影响,但主要与财产、合同及侵对的影响,但主要与财产、合同及侵通法的传统组成部分。这些法律领域,一直是普通法多在州的管辖权范围内,因此州法院是普通法的主要来源。联邦普通法在范围上相对狭窄,主要仅限于成文法调整范围外明确由联邦解决的问题。

■州宪法和制定法

州宪法是州一级的最高位阶的法律,州宪法授予的权利只可能多于联邦宪法所保护的权利,不能少于联邦宪法保护的权利。州的法规必须符合各州的宪法。联邦宪法或联邦法律对所有州宪法和法律具有优先性。市政宪章、法令、法规和规章仅适用于地方问题,无论州还是联邦法律都对其具有优先性。

二、联邦法院体系

根据联邦宪法的规定,联邦政府 仅有有限的权力,其余的权力由各州

remaining authority reserved to the states. Under this model of shared powers, the U.S. court system has been divided into two separate and distinct court systems that exist side by side. One is the Supreme Court and the federal court system, created by Congress under the authority of the Constitution of the United States. The other system consists of state and local courts established under the authority of the state governments. Ordinarily, federal courts do not hear cases arising under the laws of individual states. However, some cases over which federal courts have jurisdiction may also be heard and decided by state courts. Both court systems thus have exclusive jurisdiction in some areas and concurrent jurisdiction in others.

The structure of the federal court system has varied a great deal throughout the history of the nation. The Constitution merely provides that the judicial power of the United States "be vested in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish." Thus, the only indispensable court is the Supreme Court. Congress has established and abolished other U.S. courts as national needs have changed over time.

If the federal court system is viewed as a pyramid, at the top is the Supreme Court of the United States, the highest court. On the next level are the 13 United States Courts of Appeals. On the following level are the 94 U.S. district courts and the specialized courts. There are various routes a case may take to a federal court. Some cases may originate in a U.S. district court, while others will come from a state court or federal agency.

A person involved in a suit in a U.S. court may proceed through three levels of decision. Generally, the case will be heard and decided by one of the district courts on the first level. If a party is dissatis-

保留和行使。在这种分权模式制约下,全美分为两个并行、各自独立的法院体系,一个是美国国会基于美国宪法的授权而建立的美国最高法院及联邦法院体系,另一个是基于州政府的授权而建立起来的州和地方法院体系。一般说来,联邦法院不审理基于个别州的法律而提起的案件,但联邦法院享有管辖权的案件却也可能由州法院审理和判决。因此,两个法院体系在一些领域享有专门管辖权。

在美国的历史上,联邦法院体系的结构发生过重大变化。联邦宪法仅规定美国的司法权"属于最高法院和国会不时规定和设立的下级法院。"因此,唯一不可缺少的法院是最高法院,而国会根据不同时期国家需要的变化曾经设立或废除其他法院。

如将现有的联邦法院体系视为金字塔,塔顶是美国最高法院,是美国最高级别的法院。下一层是13个上诉法院。再接下来是94个美国地区法院和专门法院。一个案件提交到联邦法院的途径有多种,一些案件可能在地区法院提起诉讼,而其他一些案件则来自州法院或联邦机构。

在联邦法院体系中的案件可能会 经过三个级别的审判过程。一般而言, 在第一个级别,案件会由地区法院进 行审理和判决。如果一方当事人对判 fied with the decision rendered, the party may have the decision reviewed in one of the courts of appeals. If dissatisfied with the decision of a court of appeals, the party may seek additional review in the Supreme Court of the United States; however, the Supreme Court primarily reviews only cases that involve a matter of great national importance and only accepts a small number of cases each term.

■Supreme Court of the United States

The Supreme Court is the highest court of the United States, and the only one specifically created by the Constitution. A decision of the Supreme Court cannot be appealed to any other court. The Supreme Court has original jurisdiction in only two kinds of cases: those involving foreign dignitaries and those in which a state is a party. All other cases reach the Court on appeal from lower courts. A significant amount of the work of the Supreme Court consists of determining whether legislation or executive acts conform to the Constitution. This power of judicial review is doctrine inferred by the Court from its reading of the Constitution, and forcefully stated in the landmark Marbury vs. Madison case of 1803. The doctrine has also been extended to cover the activities of state and local governments.

■Courts of Appeals

The intermediate appellate courts in the federal judicial system are the courts of appeals. Twelve of these courts have jurisdiction over cases from certain geographic areas. The Court of Appeals for the Federal Circuit has national jurisdiction over specific types of cases. One circuit comprises only the District of Columbia, and each of the remaining 11 circuits comprises three or more states. These courts of appeals review matters from the district courts of their geographical regions, the U.S. Tax Court, and from certain federal administrative agencies.

决不服,可将判决提交上诉法院复审。如果对上诉法院的判决不服,可向美国最高法院寻求再次复审,但最高法院一般仅提审涉及国家重大利益问题的案件,并且每年仅接受为数很少的案件。

■最高法院

最高法院是美国最高级别的法院,也是唯一依宪法专门设立的法院。由最高法院作出的判决不能上诉到其他任何法院。最高法院仅对两类案件享有原始管辖权:涉及外国要人的案件。最后法院受理的所有其它案件均来自己,是不会是一个人的人。最高法院的工作很否合宪。这种司法审查的权力是由最高法院对宪法进行解释而推断出来的法律原则,并在1803年具有里程碑意义的与宪法律原则扩展到对州及地方政府与为合宪性的审查方面。

■上诉法院

上诉法院是联邦司法体系中的中级上诉法院。其中12个法院对特定地理区域的案件有管辖权,联邦巡回上诉法院对专门类型的案件享有全国范围内的管辖权。巡回区中有一个仅包括哥伦比亚特区,其余的11个巡回区中的每一个都包含三个或更多的州。这些上诉法院复审来自其所在地理区域的地区法院、美国税务法院及特定联邦行政机构的案件。

■ District Courts

Below the courts of appeals are the district courts. There are 94 district courts, which are the federal trial courts of general jurisdiction. Each district court serves a geographic area known as a judicial district. Each state has one or more district courts. Most cases and controversies are heard by these courts. The district courts have original jurisdiction in civil cases arising under federal law, criminal cases under federal law, admiralty and maritime cases, and cases between citizens of different states (called "diversity jurisdiction").

Special Courts

Special Courts are known as "legislative" courts because they were created by congressional action. These courts include: Tax Court, Air Force Court of Criminal Appeals, Army Court of Criminal Appeals, Coast Guard Court of Criminal Appeals, Navy-Marine Corps Court of Criminal Appeals, Court of Federal Claims, Court of Appeals for the Federal Circuit, Court of Appeals for the Armed Forces, Court of Appeals for Veterans Claims and Court of International Trade. Some of these courts are trial courts having original but limited jurisdiction (the Tax Court, the Court of Federal Claims, the Court of International Trade). Others are appellate courts of limited jurisdiction.

3 State and Local Court Systems

Each state, as well as the District of Columbia and the Commonwealth of Puerto Rico, has its own independent judicial system that operates independently. The structure of state courts, like that of the federal courts, is in the form of a pyramid. Most states have a three-tiered judicial system composed of a trial-court level (includes courts of general jurisdiction and specialized courts), an appellate court

■地区法院

上诉法院的下一级法院是地区法院。美国有94个地区法院,它们是拥有一般管辖权的联邦初审法院。每个地区法院服务的地理区域称为司法管辖区。每个州都有一个或多个地区法院。大多数的案件及争议都由这些初审法院进行审理。地区法院对下列案件享有原始管辖权:基于联邦法律提起的刑事案件、海事案件和涉及不同州的公民之间的案件(称为越州管辖权)。

■专门法院

专门法院被认为是"法立"法院,因为它们是由国会行为所设立。这些法院包括:税务法院、空军刑事上诉法院、陆军刑事上诉法院、海军一路军陆战队刑事上诉法院、联邦索赔法院、联邦索赔法院、联邦索赔上诉法院、美国军事上诉法院、退伍军人索赔上诉法院、国际贸有原始的初审法院(税务法院、联邦索赔法院、国际贸易法院),其他法院则是享有有限管辖权的上诉法院。

三、州和地方法院体系

美国各州及哥伦比亚特区和波多黎各自由邦,都拥有自己独立运作的司法体系。与联邦法院体系结构相似,州法院体系也是金字塔结构。大多数州拥有三级司法体系,由初审级别的法院(包括一般管辖权法院和专门法院)、上诉法院和终审法院组成。一些州只有一个级别的上诉法院。