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INTERNATIONAL BUSINESS LAW

国际商法

约翰·H·威尔斯 (John H. Willes) 著
约翰·A·威尔斯 (John A. Willes)

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金 婧 肖 敏 史苗苗 刘亚琦 译校

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出版说明

入世使中国真正融入到了经济全球化的浪潮中。中国政府“引进来，走出去”战略，使得中国经济的发展需要大量的“国际化”人才。这就对我国一般本科院校多年来所采取的单一语言（母语）教学提出严峻挑战，财经院校涉外经济类专业实行双语教学改革迫在眉睫。国家教育部2001年第4号文件明确规定：“本科教育要创造条件使用英语等外语进行公共课和专业课的教学，力争三年内，外语教学课程达到所开课程的5%~10%。”国际贸易专业的主要培养目标是培训能够从事国际商务实践操作以及从事关于国际商事研究的涉外实务人才和国际经济高级学者。国际贸易专业涉外性强，创新度高，客观上要求该专业的本科学生要有扎实、娴熟的英语功底，在此基础上透彻地，最好是原汁原味地吸取关于国际经济与贸易专业的前沿理论与实务知识，因此，国际贸易专业实行双语教学无论从理论上还是从实践上而言都具有重大的现实意义。为此，在国际贸易学科建设和教学改革时必须考虑在理论和方法上与国际接轨，只有这样，才能培养出标准统一的国际经济与贸易人才。这就有必要借鉴市场经济发达国家大学的国际贸易专业的课程体系和教学内容。在引进出版过程中，要把好质量关，要经学科领域的专家认真审核选题和内容，要把国外真正高水平的适合国内实际的优秀教材引进来。

适应这一需要，中国人民大学出版社携手国际著名的出版公司，推出适合国际贸易专业的双语系列教材。本系列教材具有以下特点：

第一，体系完整。本套教材精选了一批国外著名出版公司的优秀教材，涉及国际贸易、国际经济学、世界经济、国际商务、国际营销、国际商务谈判等课程，涵盖了国际贸易专业的核心课程。

第二，保持原貌。本套教材在广泛听取一线任课教师的意见基础上，删减了一些相互重复及不适合我国国情的内容，在体系和内容上保持了原教材的特色。

第三，紧扣前沿。本套教材在原著选择上紧扣国外教学前沿，基本上都选择国外最流行教材的最新版本，有利于老师和学生掌握国外教学研究的最新发展趋势。

第四，中文注解。我们邀请了国际贸易专业的一线优秀教师、学者对教材的重点内容、重要概念、主要原理添加了中文注解，并在每章前添加了中文导读，便于双语教学的开展。

本套教材适用于高等院校国际贸易专业的本科教学，同时也适用于国际贸易从业人员及对国际贸易感兴趣的人士。

本套教材在遴选、删减、编审、译校等方面得到中央财经大学国际经济与贸易系刘春生老师的大力协助，在此一并表示感谢。

本套教材是对国际贸易专业双语教学的积极探索，错误和疏漏之处在所难免，恳请广大读者指正。

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审 译 者 前 言

本书系统地介绍了国际法律环境基础、国际商法原则、国际公共组织和协议等国际商法基本知识，并详细介绍了关于进出口、国际直销、国际分销、国际运输管理、国际贸易支付和融资以及国际争端解决等各国国际经济问题的国际法规，最大程度地反映了国际商法学科发展的前沿动态，吸收了国际法学与商学领域的最新研究成果。

本书来源于美国英文原版教材，经编审后增加了忠于原文的中文注解部分。相对于其他的国际商法教材，该书更具有前沿性和实用性。各章节中的案例分析和法律法规原文部分都具有权威性和新颖性，能够加深学生对相应章节内容的理解，同时也能够扩展学生的知识面，激发学习兴趣。

本书具有很强的实际应用性，适合作为应用型本科或大专院校的国际法学和国际商学类专业的教材，也可作为国际法学、国际经济学等相关领域从业人员的参考用书。

Preface

Purpose of This Text and Learning Outcomes

The purpose of this text and its learning outcomes are

- To provide a clear, readable explanation of foundation topics in international business law for students in law and management studies.
- To create an understanding of how and why international business law affects business risks, opportunities, and the profitability of business ventures.
- To equip students with the knowledge and tools required to use international business law in creating effective corporate international business strategies and in executing international business transactions.
- To address the need for law students and future lawyers to understand more about their client's international business objectives.
- To address the need for business students and future businesspersons to understand their legal options and their lawyer's abilities and limitations to accommodate their international business objectives.
- To broaden student understanding of the divergent value systems and legal systems that will be encountered in the practice of international business and international business law.

Who Should Use This Text?

This text is written with two groups of students in mind: those enrolled at business schools and those at law schools. This dual focus strengthens this text, for it recognizes the reality that businesspersons need to know more about the law, and lawyers need to know more about business, in order to work more effectively together and to succeed in international business transactions.

This point deserves deliberate emphasis. Our experience as international lawyers, international businesspersons, and college and university instructors in both has made it plain that these disciplines have been held separately for too long. We are encouraged to see that this attitude has changed significantly in recent years, and this text is intended to reinforce that change.

Being a lawyer is being a businessperson. President Abraham Lincoln, also a lawyer, said, "Time and advice are a lawyer's stock in trade." He saw no distinction between a lawyer and a businessperson. To the extent that this text aids a law student, it increases in the future his or her ability to advise. To the extent that it aids a business student, it helps minimize his or her need to pay for that time and advice. Indeed, Lincoln would say advice, like time, is money.

Scope of This Text

This text is probably one of the first you have opened on the subject of international business law, and we thank you for the opportunity to share with you our knowledge and experience and the collected knowledge and experience of others.

As you might imagine, international business law is at work when any foreign element is introduced into an otherwise domestic business transaction. Also as you might imagine, like all other areas of the law, this subject can and does spawn entire libraries of books on the subject.

Our text provides an introduction to the most important and most frequently encountered aspects of international business law. These are the various environments of international business law (home country laws, host country laws, and international law and regulation), the primary relationships between players (business enterprises, service providers, and international bodies), and the principal transactions employed in international business (import–export, licensing, and investment).

As an introductory text, it is charged with a heavy responsibility. It cannot deal with all topics, nor can it deal in any detail on the topics it does cover. As a result, we have made many choices, including or excluding material. We have worked to include topics that will be of greatest value to ensure that you complete your course with a good map of the broad range of issues that await you in either advanced courses or later commerce or practice.

A number of good texts are available that cover broadly similar issues and facts. In writing this one, its readability has been uppermost in our minds. As a result, it is written in the plainest possible language, bearing in mind its professional subject. We hope you find it a pleasure to read.

As you might already know, law is a field of study where every rule or hard fact has its exceptions. Rather than deal with each exception in a dreary search that leaves no stone unturned, this text focuses on issues and situations that commonly occur. This does not, however, mean resorting to useless generalities. It means that the discussion of law and business found here does apply in the vast majority of situations, and we leave it to you to raise questions about the exceptions. When a “what if” question arises in your mind, you are probably on the right track toward an exception. Likewise, where a principle of law clearly fits with U.S. legal traditions, you shouldn’t be surprised that it might not square with expectations in France, China, or Saudi Arabia.

We have aimed at including considerable detail in those areas where knowledge of fundamental building blocks is at stake. Less detail is offered on issues that change rapidly, so that you absorb key aspects and fill in what you need when you need it, without having to later “unlearn” the old. Equally, some areas appear only rarely in practice, and these are best served with a knowledge of the basics now, and further study as and when required.

Perspective

The text is written from a largely Anglo-American perspective, both in terms of the common law tradition and those aspects of business generally familiar to Anglo-American students. This is only a starting point, however, as emphasized in the “Themes” section below.

As this is an introductory text, we are aware that our own perceptions and biases will carry weight in setting or altering your own initial perceptions and biases in the subject. This creates the responsibility on us to confine our writing to views that are broadly held across the international business law community, or to note otherwise where divergent opinions exist. We have tried to fulfill this responsibility to the best of our ability, and to make clear that our opinions are our own when we are in the global minority.

Themes

Within the overall goal of a text blending legal and business considerations, there are a number of other critical themes. These go well beyond simply a statement of law and its relationship to international business. These are discussed in the following paragraphs.

Broadening the Individual Perspective

One of the central challenges of international business law is to understand and accept the different perspectives held by persons elsewhere in the world. This text accommodates that

need to observe, analyze, understand, and incorporate differing perspectives by drawing on legal and business principles from around the world. Successful practitioners (in business or law) must look beyond their own borders, to the drivers that influence the behavior of foreign businesses and lawmakers. This exercise in personal growth requires examination, understanding, and acceptance of the history, geography, culture, economics, politics, and, finally, law of foreign lands. If this essential skill is not learned early on, your later business or practice will suffer. Lessons learned solely through experience often carry a very high price tag.

Dynamic and Proactive—Getting beyond the Empty Words

Businesspersons, lawyers, and politicians often speak of dynamic processes and proactive behavior, and then fail miserably at understanding the first and accomplishing the second. This is unacceptable, and this text aims to give you the tools to succeed where others may fail.

International business and law are dynamic processes, meaning that they change over time, often rapidly. Therefore, you cannot expect simple memorization of either law or business facts to turn you into a good professional in either arena. Storing facts costs only cents per megabyte these days, and such limited ability will get you no further than the back-office operation of a corporation or law firm. You must understand these dynamics or you will be left behind, frozen in time. Likewise, your textbook cannot be limited to facts, but must reveal these dynamics.

Something dynamic has a past, a present, and a future; it has come from somewhere, is somewhere, and is going somewhere else. To understand a dynamic such as the law obligates you to know more than just its present state. You must learn where it has come from, its history, and the possible direction that it is headed. A dot on a page is meaningless, while a vector is a dynamic: it has another dot, a line between theory that it has followed, and an arrow for its direction. From the point of view of our textbook, this means providing you with background, context, and history. It must not jump right into the current state of the law—that is territory for a practitioner's loose-leaf updated reference book.

As a student, you must learn where the law has come from to understand its state now, and to understand the direction in which it is going. Second, be aware that the line probably won't go straight ahead forever. All the forces bearing on the law must be understood, to get a more focused picture of what the future may look like. This represents a commitment to multidisciplinary study and the broadened individual perspective, coming to grips with the links that tie the law to business, economics, politics, history, and culture. Any law, anywhere, reflects a blend of local social demands, economic realities, political compromises, and historical experiences. These must be understood to grapple with the future.

It is this knowledge that opens the door to becoming proactive, to position yourself to take advantage of change. Being proactive requires you to anticipate changes in the coming future and adjust your strategies now, to be ready for those changes. This text sets out the dynamic and allows you to make proactive choices. You supply the initiative and courage to make them.

The Business Enterprise and Private Law Viewpoint

International business law has many stakeholders pushing their own interests. Governments desire economic growth; unions worry about jobs, and action groups are concerned about social conditions at home and abroad. Consumers demand goods from around the world at a fair price, while businesses focus on profits. That said, each of these stakeholders has a full slate of secondary interests, some shared and some not. A treatise on the law might canvass a wide range of these stakeholders, but our text is restricted to the factors that bear directly on business enterprise management. With the same intention, we address

international public law (the law between nations) only to the extent that it affects private business transactions and the options and decisions of business enterprises.

Risk Management, Opportunity Identification, and International Business Strategy

No two societies on earth are identical. This simple fact breeds enormous opportunities in global commerce but at the same time creates a wide array of risk factors that require sound management responses. Many of these risks can be avoided or minimized by using and practicing the principles of international business law. These same principles also can be applied to capture or maximize the business opportunities afforded abroad. Going beyond just what the law is and where it is going, our text strives to make clear how and why international business law can be applied to transactions to create the best possible business outcomes.

Successful transactions are vital to international business success, but they must be aimed at a particular overall goal. A corporate international business strategy is required to determine that goal and to map out a pathway for achievement. International business law has an important role to play in setting that strategy, just as much as it provides the tools for tactical success. Our text sets out where legal considerations enter into the strategic decision making of the business enterprise.

Special Features

At many points throughout the text, special feature boxes appear. These are intended to challenge your thinking on the spot, to provide you with tips and tricks learned normally through experience, or to provide examples of international business law unfolding in domestic or international media.



The Old Wolf box will contain valuable tips, tricks, and strategies that you can add to your briefcase of tools—short illustrations of the text material as applied in practice, or the consequences of not doing so. They often illustrate the seeds of a problem being planted or the efforts made to avoid or resolve a thorny problem. All are drawn from the collective experience of the authors or other practitioners—sometimes at quite a price! This box also will contain statements intended to challenge conventional wisdom, or advance arguments that are often marginalized or ignored in mainstream discussion. Some can be effectively countered; others present irreconcilable differences or value judgments. They may be wise or foolish, practical or impossible, popular or unpopular, but each represents a sentiment that will be encountered by a practitioner or student.



The Front Page Law box will contain extracts from current news items that illustrate international business law principles at work, or situations that will soon require the intervention of international legal analysis or action.

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- Our reviewers, for their time, effort, and expertise that was so clearly evident in their comments and suggestions, which we have tried to the greatest extent to incorporate, our omissions and inaccuracies being ours alone;
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Foreword

Whether you are a business student or law student (and, undoubtedly, you recognize you are a bit of both), you are entering a demanding field that will challenge you in many ways—personally and professionally. This text will make those challenges plain to you. It also will equip you to deal with their foundations and to grow with them, as they become more complex.

Your interest in studying international business law and your later career will, with diligence, be highly rewarding. You will probably find, as we have, that the personal and emotional rewards will surprise you, motivate you, and even exceed the very significant financial rewards that are offered in this field.

If you are a law student now, your future may go well beyond merely domestic legal matters. If studying this course is any indication, you are interested in international affairs, and that preexisting interest will urge you to keep abreast of international developments, often ahead of both other lawyers and your clients. Sometimes these interests will lead you to new clients, and at other times your interests will attract clients to you. By ensuring that the senior members of your firm are aware of your interests, you may find yourself handed files or tasks that have international dimensions. In time, this field can become your specialty, or an adjunct to your domestic expertise.

If you are a business student now, your future will take on an international dimension even more easily. If your business does not seek out international business opportunities, then foreigners may seek you out, either as a competitor or as an ally. By studying this subject, you are making yourself more capable of dealing with the challenge. More so, you will be in a better position to get the most out of your relationship with an international lawyer. You will better understand the business options and transactions open to you. You will understand the reasons and risks that lie behind the strategies offered up by your lawyer. By being on the same wavelength, you and your lawyer can craft effective solutions together, to give your business the best possible chance of success in the international arena.

No matter who you are, by keeping yourself informed on international developments, and by being able to analyze their potential impact, you may, in the future, have the potential to make strategic offerings to the business at hand, in addition to making tactical offerings of legal or management services. In short, you may become a strategic advisor rather than just a line manager or service provider.

There are many employment options that provide exposure to international business transactions. Be it a law firm, business enterprise, or a multinational firm, many offer work abroad and many domestic firms engage in international transactions. Employment opportunities also exist in government or international organizations, or national or multinational corporations with established business interests abroad.

International training may give you the opportunity to travel the world, from days to years, to meet and work with people from as many backgrounds as you wish, and to engage in continuous personal and professional growth and learning. It is work in a dynamic world of changing environments and changing needs and responses, where powers of observation, knowledge, analysis, planning, and execution will be demanded, and the rewards will be limited only by your efforts.

The above is our point of departure in offering this text to you, the student. With them, we welcome you to the principles and practice of international business law.

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目 录

第一部分 国际商务及国际商法的环境	1
第一章 国际法律环境基础	2
历史观点及其对未来的影响	2
社会地理学观点：全球视角	9
文化观点	12
政治及经济观点：治理与繁荣	14
观点的融合	17
世界主要法系	18
第二章 国际法原则	35
国际法的范围	35
国际法的渊源	37
国家主权	44
主权豁免及国家行为原则	45
无豁免权的司法管辖权	51
法律和法院的选择	68
外国判决的承认与执行	80
第三章 公共组织及国际公约	83
发展的制度框架	83
联合国	84
《关税及贸易总协定》及世界贸易组织	86
第二部分 国际商务法律事务	129
第四章 进口	141
入境签证及单证	141
入境手续及检查	144
进出口商品分类标准	147
原产地证明	152
估价	161
清算	163
拒绝证书	163
第五章 商品出口直接销售	168
出口贸易的重要意义	168

出口商的出口权	171
出口权 1: 国际贸易机构	173
出口权 2: 直接销售	174
出口权 3、4: 海外代表与贸易代理	201
出口许可与单证	214
第六章 货物运输与物流	262
介绍	262
物流与商人法	263
贸易术语与国际商会国际贸易术语解释通则	264
国际商会国际贸易术语解释通则条款	269
国际商会国际贸易术语解释通则及货物风险和所有权的转移	273
国际海上货物运输	281
国际陆地货物运输	299
国际航空货物运输	301
第七章 国际支付与国际金融	305
介绍	305
非正式国际支付方式	307
正式国际支付方式	308
外汇风险	336
现金流转的属性变化	341
国际金融及收益的返还权	341
对国际贸易的政府财政支持	342
第三部分 以强有力的承诺处理海外市场	347
第八章 国际分销	348
介绍	348
代理制度与分销权的比较	350
出口权 4: 分销中的代理	351
出口权 5、6: 外国分销商	361
分销合同中适用的商业和法律问题	374
不同的分销合同	386
第九章 知识产权与许可	391
介绍	391
国内法中的专利权、版权及商标权	391
国际公约中的专利权、版权及商标权	399
许可证协议的商业动机	406
合同中的商业风险	408
特许权使用管理费与版权费	422
许可证协议解析	425

第十章 选择性争议解决方法	433
介绍	433
协商谈判	434
调解	434
国际商事仲裁	440

Contents

PART ONE THE ENVIRONMENT OF INTERNATIONAL BUSINESS AND LAW 1

Chapter 1 The Foundations of the International Legal Environment 2

- The Historical Perspective and Its Impact on the Future 2
- The Sociogeographic Perspective: Taking a World View 9
- The Cultural Perspective 12
- The Political and Economic Perspective: Governance and Prosperity 14
- Bringing Perspectives Together 17
- Major Legal Systems of the World 18

Chapter 2 Principles of International Law 35

- The Scope of International Law 35
- Sources of International Law 37
- Sovereignty 44
- Sovereign Immunity and the Act-of-State Doctrine 45
- Jurisdiction Where No Immunity 51
- Choices of Law and Forum 68
- Recognition and Enforcement of Foreign Judgments 80

Chapter 3 Public Organizations and International Agreements 83

- A Developing Institutional Framework 83
- The United Nations 84
- The GATT and WTO 86

PART TWO INTERNATIONAL BUSINESS LAW TRANSACTIONS 129

Chapter 4 Importing 141

- Entry Clearance and Documentation 141
- Entry Application and Inspection 144
- Classification and the Harmonized System 147
- Country of Origin and Certification 152
- Appraisement 161
- Liquidation 163
- Protest 163

Chapter 5 Direct Sale of Goods Exports 168

- The Significance of the Export Transaction 168
- Strategic Market Entry Options for Exporters 171
- Export Option 1: The International Trading House 173
- Export Option 2: Direct Sales 174
- Export Options 3 and 4: Overseas Representative versus Sales Agent 201
- Export Licensing and Documentation 214

Chapter 6 Transportation and Logistics 262

- Introduction 262
- Logistics and Lex Mercatoria 263
- Terms of Trade and INCOTERMS 264
- INCOTERMS Provisions 269
- INCOTERMS and Issues of Risk and Title 273
- Carriage of Goods by Sea 281
- Carriage of Goods by Land 299
- Carriage of Goods by Air 301

Chapter 7 Trade Payment and Finance 305

- Introduction 305