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全国高等院校商务英语专业规划教材（本科）

国际商法^{（英文版）} 辅导用书

International Business Law Reference Book

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Reference Book

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出版说明

随着中国与世界日益频繁的经济互动，用国际上的通用语言来思考、交流、工作的能力也越来越受到重视，既具有扎实专业知识又掌握娴熟外语的复合型人才成为现今市场的主要需求。双语教学就是在这种背景下顺应时代的产物。

根据教育部高等教育司的定义，双语教学是指将母语外的另一种外国语言直接应用于非语言类课程教学，并使外语与学科知识同步获取的一种教学模式。双语教学体现了现代教育思想，融外语与学科知识教学于一体，注重提高学生专业外语水平和直接使用外语从事科研的能力；注重促进学生专业知识、外语水平及能力素质的全面发展，增强学生直接使用外语从事国际经贸的涉外能力、适应能力以及国际商务实战技能。

为了适应市场需求和高校教学需要，对外经济贸易大学出版社组织编写了这套全国高等院校经管专业双语教材，主要适用于全国高等院校经管、金融、法律等专业、商务英语专业和英语专业的商务/应用/外贸英语方向的学生。

本系列每本教材的编著均遵循“user-friendly”（方便使用者）的指导思想，从体例安排到语言风格均旨在满足使用者（包括教授方与学习方）的实际需求，力图避免外文原版教材在体例与内容上使中国学习者“水土不服”的弊端。整套教材内容包括《国际贸易理论与实务（英文版）（第二版）》、《国际贸易理论与实务（英文版）辅导用书（第二版）》、《国际贸易实务（英文版）》、《国际贸易实务（英文版）辅导用书》、《国际金融（英文版）》、《国际贸易法（英文版）》、《国际商务管理概论（英文版）》、《基础会计（英文版）》、《基础会计（英文版）辅导用书》、《新编国际结算与案例（英文版）》等。本系列教材将从国内高等院校的教学实际出发，随着高校双语教学的发展而扩充完善。

本套教材的编写队伍来自全国重点高等本科院校，编写教师均有着双语实际教学经验，这是本套教材编写质量的重要保证。

对外经济贸易大学出版社

2011年10月

前

言



本书是韩永红编著的《国际商法》(英文版)的辅导用书。本书的章节安排与《国际商法》(英文版)一致,设五部分,共计十章。第一部分:概述(国际商务的法律环境);第二部分:商事组织法(个人企业法、合伙企业法、公司法);第三部分:国际货物买卖法(国际货物买卖合同(I)、国际货物买卖合同(II)、国际货物运输保险法、国际支付法);第四部分:国际知识产权法(国际知识产权转让);第五部分:国际商事争议解决法(国际商事争议处理)。

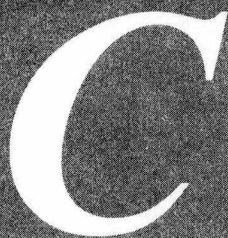
为方便使用者检验和拓展学习效果,本书每章均涵盖多种练习形式,包括“课前阅读资料”(Pre-class Reading)、“正误辨析”(True or False statements)、“课后问答题”(Chapter Questions)、“案例分析”(Case Study)、拓展阅读(Further Material and Case Reading)等内容。此外,本书还包括附录(Appendixes)部分,以方便使用者在学习过程中查阅部分重要的国际条约和国际商事惯例。

在学习国际商法的过程中,学习者可依据自身需要,有选择地完成上述练习。对本书的任何建议和意见可发送至邮箱: unahan722@163.com。

在本书的写作过程中,张朋朋、程德云、张琳琳、赵翠、李连涛同学在“拓展阅读”部分的资料收集方面提供了帮助,周慧民、公平、郭秀华、刘昆仑同学做了部分章节的案例整理工作,杨楠楠、牟泓亨、李俊燕、兰秀峰、苏玲、张振青同学协助完成了部分中文法规的英文初译工作。在此一并予以说明并致谢!

韩永红

2011年9月·广州白云山下



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Part I

Introduction

The Legal Environment of International Business ■ ■ ■ ■

I. Pre-class Reading

International businesses are affected by an external environment as much as they are affected by the competitors. Global factors influencing international business are legal, political, social, technological and economic. Understanding of these factors is important while practicing law in a flat world.

Social factors These factors are related to changes in social structures. They provide insights into behavior, tastes, and lifestyle patterns of a population. Buying patterns are greatly influenced by the changes in the structure of the population, and in consumer lifestyles. Age, gender, etc. all determine the buying patterns and understanding of such changes is critical for developing strategies which are in line with the market situations. In a global environment it is important that business strategies are designed with keeping in mind the social and cultural differences that vary from country to country. Consumer religion, language, lifestyle patterns are all important information for successful business management.

Legal factors These factors that influence international business are related to changes in government laws and regulations. For a successful business operation, it is important that the businesses consider the legal issues involved in a particular situation and should have the capability to anticipate ways in which changes in laws will affect the way they must behave. Laws keep changing over a period of time. From the point of view of business it is important that businesses are aware of these changes in the areas of consumer protection legislation, environmental legislation, health & safety and employment law, etc.

Economic factors These factors involve changes in the global economy. A rise in living standards would ultimately imply an increase in demand for products thereby, providing greater

opportunities for businesses to make profits. An economy witnesses fluctuations in economic activities. This would imply that in case of a rise in economic activity the demand of the product will increase and hence the price will increase. In case of reduction in demand the prices will go down. Business transactions should be developed with keeping in mind these fluctuations. Other economic changes that affect business include changes in the interest rate, wage rates, and the rate of inflation. In case of low interest rates and increase in demand businesses will be encouraged to expand and take risks.

Political factors These factors refer to the changes in government policies. Political factors greatly influence the operation of business. This has gained significant importance. For example, companies operating in the European Union have to adopt directives and regulations created by the EU. The political arena has a huge influence upon the regulation of businesses, and the spending power of consumers and other businesses. Companies must consider the stability of the political environment, government's economic policy etc.

Technological factors These factors greatly influence international business as they provide opportunities for businesses to adopt new innovations and inventions, which helps the business to reduce costs and develop new products. With the advent of modern communication technologies, technological factors have gained great impetus in the business arena. Huge volumes of information can be securely shared by means of databases thereby enabling vast cost reductions, and improvements in service. Organizations need to consider the latest relevant technological advancements for their business and to stay competitive. Technology helps business to gain competitive advantage, and is a major driver of globalization. While designing the business strategies firms must consider if use of technology will allow the firm to manufacture products and services at a lower cost. Firms can select new modes of distributions with the help of technology. It has become easier for companies to communicate with their customers in any part of the world.

For example, international sales contract is the major form of conducting international business. When concluding international sales contract, all the above global factors influencing international business will be considered.

Cultural Aspects—Sensitivity to cultural differences is important in international contracting. Although language should not be a barrier, contract terms must be clearly defined and understood. Attitude toward relationship is a cultural difference in some countries. Contracts based on trust are often relatively short in length, with few contingencies expressly provided. The expectation is that issues can be worked out as they arise with the parties working to maintain the underlying relationship.

Financial Aspects—In managing financial risks that may arise, care should be taken in the specification of the method of payment and the currency in which payment is to be made.

Exchange Markets—Foreign exchange markets allow trading (buying and selling) currencies. In general, trade between countries can occur only if it is possible to exchange the currency of one country for the currency of another country. Exchange of money is not always simple. Losses in international business sometimes center on exchange risk—the potential loss or profit that occurs between the time the currency is acquired and the time the currency is exchanged for another currency.

Financial Instruments Used in International Contracts—Although many financial instruments are available, two commonly used are bills of exchange and letters of credit. A bill of exchange is a written instrument that orders the payment of a certain sum of money to the party specified by the bill. Payment is made at the time specified on the bill or understood from the form of the standardized bill used. A sight bill specifies immediate payment when it is presented for payment. A time bill specifies payment at a later date, usually 30, 90, or 180 days after it is presented for payment or after it is accepted. A letter of credit is an agreement or assurance by the buyer's bank to pay a specified amount to the seller upon receipt of documentation proving that the goods have been shipped and that any other contractual obligations on the seller have been fulfilled. The usual documentation required includes a certificate of origin, an export license, a certificate of inspection, a bill of lading, a commercial invoice.

II. True or False Statements

Decide whether the following statements are true or false and explain why.

1. Globalization, which has greatly increased the economic interdependence among countries around the world, is simply an economic concept.
2. *Lex Mercatoria* or *law merchant*, formed in medieval Europe, was a written law and enforced by states.
3. International business customs and usages are not binding on parties unless the parties have incorporated them in the contract.
4. *UNCITRAL Model Law on International Commercial Arbitration* belongs to soft law.
5. The ICC, UNCITRAL and UNIDROIT are non-governmental organizations with a task to unifying the national law on trade.

6. Nowadays in the United Kingdom, the division of courts between common law and equity still exists.
7. Nowadays common law consists of case law and statutes, and in case of discrepancy between case law and statutes, the former will prevail.
8. The international treaties and conventions have unified the rules and norms governing international business, thus national law plays a little role in international business law.
9. International business customs and usages take the form of being oral rather than in writing.
10. Within the EU, if the law of a member state is regarded to be against the EC Treaty, the European Commission will initiate a lawsuit in the European Court of Justice to enforce the member state to bring its law into conformity with the EC Treaty.

III. Chapter Questions

Discuss and answer the following questions according to what you have learned in this chapter, and you are encouraged to use your own words:

1. What are the integral parts of international business?
2. How do you understand the sentence “Factors such as differences in language, culture, economics, politics and laws bring about barriers and costs.”? Give an example to explain such barriers.
3. In your opinion, what’s the influence of globalization on international business and international business law?
4. How will you define the international business law and the coverage of it?
5. What are the main characteristics of civil law legal system and common law legal system? Try to make your comments on these characteristics.
6. Compare the functions of the UNCITRAL with those of the ICC.
7. Unlike the other IGOs, the EU has a supranational power. How will you understand its supranational nature? Can you find any other organization that parallels to the EU in this aspect?
8. What’s your understanding of the statement that Incoterms is not law but important to the international business?
9. What are the three parts of the Uruguay Round Final Act?
10. Do you think China should transplant the principle of precedent of common law into her

legal system? Why or why not?

IV. Case Study

Frigaliment (Plaintiff), a Swiss corporation, entered into contracts to purchase chicken from BNS International Sales Corporation (Defendant), a New York corporation. The English language contracts between them stated: "US Fresh Frozen Chicken, Grade A, Government Inspected, Eviscerated 2 1/2-3 lbs. and 1 1/2-2 lbs. each all chicken individually wrapped in cryovac, packed in secured fiber cartons or wooden boxes, suitable for export: 75 000 lbs. 2 1/2-3 lbs at \$33.00 ; 25 000 lbs. 1 1/2-2 lbs at \$36.50." When the chickens were shipped to Switzerland, Plaintiff found 2-lb sizes were mature stewing chicken or fowls, but not young broiling chickens as they had expected. Plaintiff protested and claimed that in German the term "chicken" referred to young broiling chickens. Defendant pointed out the reference to "US fresh frozen chicken, grade A." The USDA defined the term "chicken" as subsuming different grades of chicken, including broilers and fowl, as well as other types such as capons, stags, and roosters.

1. What's the focus issue in this case?
2. If you were the judge, what kind of chicken did Plaintiff order? Was it "broiling chicken" as the plaintiff argued, or any chickens weighing 2 lbs as the defendant insisted on?
3. What can you infer from this case? What would the parties have done to avoid this ambiguity?

V. Further Material and Case Readings

There is no comprehensive system of laws or regulations for guiding business transactions between two countries. The legal environment consists of laws and policies from all countries engaged in international commercial activity. Early trade customs centered around the law of the sea and provided, among other things, for rights of shipping in foreign ports, salvage rights, and freedom of passage. During the Middle Ages, international principles embodied in the *lex mercatoria* (law merchant) governed commercial transactions throughout Europe. Although laws governing international transactions were more extensive in some countries than others, the customs and codes of conduct created a workable legal structure for the protection and encouragement of international transactions. The international commerce codes in use today in

much of Europe and in the United States are derived in part from those old codes. The other main sources of international commercial law are the laws of individual countries, the laws embodied in trade agreements between or among countries, and the rules enacted by a worldwide or regional organization—such as the United Nations or the European Union. Countries improve economic relations through trade agreements that cover a variety of potential commercial problems. This helps the investment and trade climates among countries. For example, the North American Free Trade Agreement (NAFTA) is a treaty that was ratified by the legislatures in Canada, Mexico, and the U.S. and went into effect in 1994. It reduces or eliminates tariffs and trade barriers among those nations. Although some tariffs were eliminated immediately, many were phased out through the year 2009. The industries most affected include agricultural products, automobiles, pharmaceuticals, and textiles. NAFTA includes a variety of issues not usually found in trade agreements, such as protection of intellectual property and the environment, and the creation of special panels to resolve disputes involving unfair trade practices, investment restrictions, and environmental issues.

There is no international regulatory agency or system of courts universally accepted for controlling international business behavior or resolving international conflicts among businesses or countries. International law can be enforced to some degree through 1) international arbitration, 2) the courts of an individual country, or 3) the International Court of Justice. Certain disputes may be taken to the International Court of Justice (ICJ) for resolution. The ICJ is headquartered at the Hague, Netherlands, and is a part of the United Nations. Only countries have standing to go before the Court; individuals and businesses have no standing to initiate a suit. The countries decide whether to pursue claims on behalf of their citizens. ICJ decisions providing monetary judgments or injunctive relief may be referred to the United Nations Security Council for enforcement. However, the decisions of the above tribunals in resolving international business disputes can be enforced only if the countries involved agree to be bound by them.



Part II

Law of Business Organizations

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Law of Business

Organizations

Chapter 2-4

I. Pre-class Readings

An Introduction to Shares

Definition

"A share is the interest of a shareholder in the company measured by a sum of money, for the purposes of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders." For example, a company set up to run a business will usually have money (and perhaps other assets) put into it by the shareholders in return for shares. e.g. A, B and C set up a company and decide that they will each put in £1 000 as share capital. The simplest way for this to be represented is for the company to issue 1 000 £1 ordinary shares to each of the three shareholders. The company's issued share capital will then be £3 000 divided into 3 000 shares of £1 each. Because the company is a separate legal entity, the company is regarded as selling its shares to the (prospective) shareholders, who pay for them in cash or other assets. Because the creditors of the company can usually only look to the company's assets for payment, share capital is locked into the company and can be returned to the members only subject to strict rules (maintenance of capital). The shareholders are the members of the company and are the owners of it.

Nature of Shares

Shareholding is a complex system of joint ownership. The shareholders jointly own the company. At the same time a share is itself an item of property which (subject to the company's articles) can be transferred by sale or gift. In return for investing in a company a shareholder gets

a bundle of rights in the company which may vary according to the type of shares acquired. Most companies only have one class of shares (ordinary shares) but the law in the UK is extremely flexible and allows any classes of shares to be created. This is done by setting out the different rights attached to the various classes (usually in the company's articles). What rights are attached to the different classes of shares is essentially a matter for the company to determine.

Classes of Shares

1) Non-voting shares

Non-voting shares carry no rights to attend general meetings or vote. Such shares are widely used to issue to employees so that some of their remuneration can be paid as dividends, which can be more tax-efficient for the company and the employee. The same is also sometimes done for members of the main shareholders' families. Preference shares are often non-voting.

2) Redeemable shares

These are shares issued on terms that the company will, or may, buy them back at some future date. The date and terms may be fixed (e.g. that the shares will be redeemed five years after they are issued, perhaps at a price different from their nominal value). This can be a way of making a clear arrangement with an outside investor. They may also be redeemable at any time at the company's option. This is often done with non-voting shares given to employees so that, if the employee leaves the company, his shares can be taken back at their nominal value. There are statutory restrictions on the redemption of shares. The main requirement, like a buy-back, is that the company only redeem the shares out of accumulated profits or the proceeds of a fresh issue of shares (unless it makes a permissible capital). Preference shares are often redeemable.

3) Preference shares

These will usually have a preferential right to a fixed amount of dividend, expressed as a percentage of the nominal (par) value of the share, e.g. a £1, 7% preference share will carry a dividend of 7p each year. It is, however, still a dividend and payable only out of profits. The dividend may be cumulative (i.e. if not paid one year then accumulates to the next year) or non-cumulative. The presumption is that it is cumulative. The dividend is usually restricted to a fixed amount, but alternatively the preference share may be participating, in which case it participates in profits beyond the fixed dividend under some formula. Preference shares are often non-voting (or non-voting except when their dividend is in arrears). They are sometimes redeemable.

They may be given a priority on return of capital on a winding up. Often they will not be entitled to share in surplus capital (i.e. they only get their £1 back on each £1 share).