



· 普通高等教育“十二五”规划教材

Commercial Law

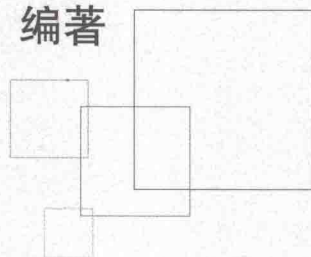
商法

李栗燕 编著



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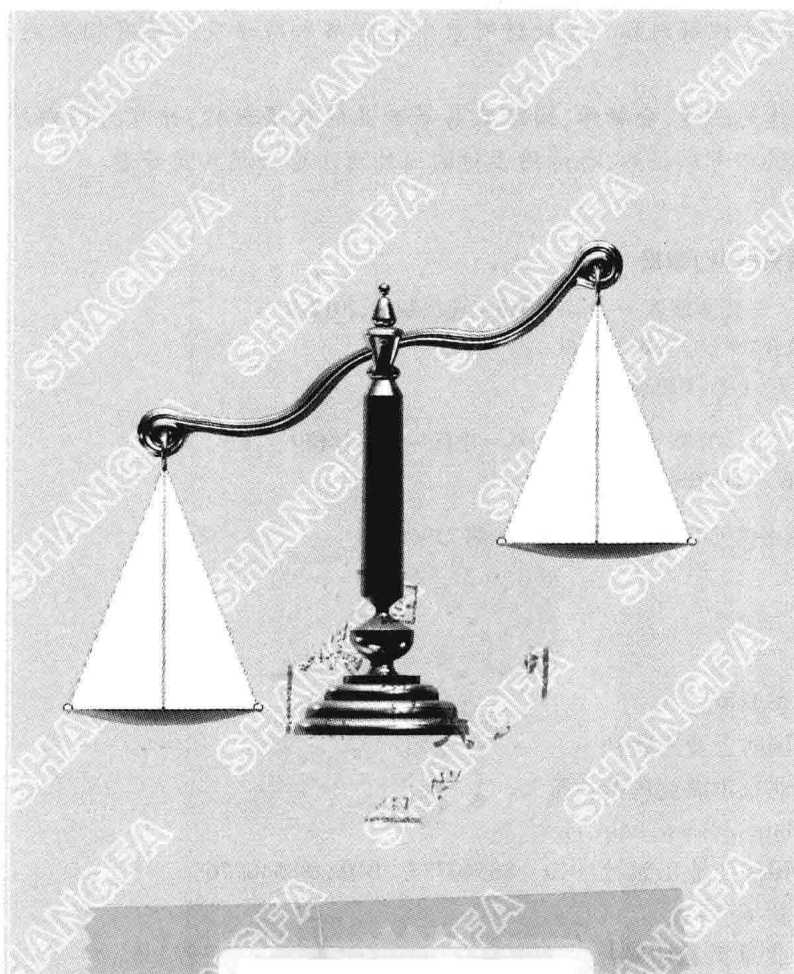


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· 北京 ·

内 容 简 介

在全球化的大背景下,中国的法治建设与时俱进。在我国法学教育方面也应当推陈出新,与国际接轨。基于提升我国法学双语教学水准,培养国际化的法律人才,作者集结历年来的研究成果,编著商法(Commercial Law)双语教材,希望能为我国的法学双语教学提供一本高质量的教材。

全书共由9章内容构成,包括商法概述、合伙企业法、公司法、破产法、票据法、证券法、保险法、银行法、纠纷解决机制。每章在进入正文之前,都附有简短的内容概括,方便学生总体把握章节内容;每章后都附有重点词汇解释、练习题及相关课外阅读材料,帮助学生进一步理解内容。在教材附录中附有书本所涉及的所有相关法条,提供给学生查阅。

本书可作为法学、金融学、国际贸易等专业的双语教程,并可为国内外商事活动的从业人员提供参考和指南,也适用于对国内外商法感兴趣的爱好者。

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随着全球化进程的推进,中国的法制发展也日趋与国际接轨,我国法学教育的国际化自不待言。在全社会强调双语教学的大环境下,法学专业的教学目标是把学生培养成能为国际和国内两个市场所欢迎的法律工作者。

商法作为市场经济法律体系中最基本、最重要的法律分支之一,同时开设于国内外各高校的法学院和商学院,具有极强的实用性。因此,在法学专业的双语教学体系中,商法双语教学有着特殊的现实意义。但是我国目前商法双语教学却面临着适合学生、读者学习的专业英文教程短缺的严峻形势。如果没有合适的英文教材,双语教学就成了无源之水,无本之木。正基于此,编者于2005年出国进修期间开始着手编写全英文的商法教材,以配合商法双语教学。

2006年作者编写出版了《商法导论》教程,介绍了商法的一些基本概念和原理,包括合伙法、公司法、保险法、银行法等方面的主要内容,并介绍了商事程序,商务谈判的规范、形式、技巧、语言,主要着眼于基础性问题的学习和初涉商海的人士的需求。

《商法导论》于2006年付梓至今,已经历时6年,受到了广大读者的热烈好评。在此期间,多所大学纷纷以该教材作为法学核心主干课的双语教材使用,被北京大学、清华大学、北京理工大学等著名高校图书馆所收藏,并获得了若干优秀教学成果奖。教学实践中,师生们在表示喜爱和支持的同时,也对编撰更高水平的教材提出了进一步设想。商法是法学领域内一门实践性、灵活性、变动性很强的应用型法律,因此,编者响应读者们的号召,进一步编写本部《商法》教程,对商法教材进行完善和补充,以促进商法课程建设成为高质量的双语课程。

此次编写,参考整理了最新的英文权威文献资料,精心选择了商事法律的核心内容进行编排,主要特点如下:

一、保证质量与专业水准,减少疏漏误读。在本部《商法》教程编写过程中,为保证全英文的语境、专业法律英语的水准,不仅与法学专业的教授反复研究文本内容,还特地邀请国外来华学者对本书进行阅读和校对,纠正一些外语写作方面的纰漏和误读,力臻无误。

二、在每一章正文前有一小段内容提示。由于本书是全英文语境,对于一些英语水平较为薄弱的学生而言,面对通篇的英文叙述,常常感到茫然甚至抵触。为了帮助读者更准确地把握章节内容和更快地进入英文阅读角色,在每章进入正文前安排了本章简介,以便于在阅读前能够对整章内容有一个宏观了解。

三、调整了教材的体系内容。国内外不少商事法律在近年都有所改动,为了充实和完善商法教材的体系内容,本次编写更新了新近的专业知识内容,如保险法和银行法,还增加了破产法、票据法、证券法等专业性、实用性强的商法内容。

四、有针对性地编排了每章附录的各类练习和注释。为了避免双语教程所附的练习冗长、单词注释篇幅较大挤占正文空间的不足,目前这本《商法》甄选了较有针对性的练习,并筛选了较有法学特色的单词进行注释,增强实用性的同时提升教材的专业层次。

另外,值得一提的是,作者在编写本教程的基础上,还通过收集、整理大量的案例,编撰了一部商法教材的配套英文案例教程,作为商法教材的配套参考教学用书使用。

作者所授的 Commercial Law 是南京航空航天大学双语教学示范课程,本教程是南京航空航天大学“十二五”第一批规划教材建设立项项目成果,同时也是南京航空航天大学优秀青年教师奖教育教学改革项目“应用法学课程双语教学建设研究”(M0939 - 101 - PT)的研究成果。感谢南京航空航天大学和国防工业出版社的倾力支持,感谢温珍芳和加拿大学者 Mitchell Kutney 的悉心协助,希望本教程能为学生和其他读者提供更多的帮助,获得更多读者的喜爱。当然,由于编者的水平有限,不足之处仍然在所难免,谨请读者们继续提出修改意见,我们共同努力使本书更加完善、成熟,编者不甚感激!

编 者
2012 年 3 月

Along with advance of globalization, development of the legal systems in China is being in line with international standards, so is Chinese legal education. Under social circumstance of bilingual teaching, the aim of legal education is to acquaint the legal professionals not only with domestic laws but also with foreign laws.

In the legal system of market economy, commercial law is highly applied and one of the most important legal branches. However, there is a serious predicament in commercial law bilingual education—lack of proper text book. That's exactly the motivation to write the book on *Commercial Law*.

The author has edited a book named *Introductory Guide to Commercial Law*. It has been six years since the book was published in 2006, which got glowing reviews from readers. During this period, the book received several awards of excellent teaching, and has been applied by many universities as bilingual textbook for major legal courses. Also, it was also collected by libraries of some famous universities, such as Peking University, Tsinghua University, and Beijing Institute of Technology, etc. In the teaching practice, teachers and students put forward some proposals when express their favor and support. And commercial law is an applicable law of practicability, flexibility and changeability, responding to the call, the editor revised and supplemented the book, making commercial law course a high quality bilingual course.

The book we mentioned above focus on the introductory guide to Commercial Law, this time we do much more comprehensive and professional. This new book was revised with references of latest authoritative material, and restructured by selecting core content of commercial law. The major improvements are as follows:

1. Keep professional and high quality. When the author edited the book, legal professors and foreign scholar were invited to read and revise it over and over again.
2. A paragraph of content tips was increased in every chapter proceeds of the text. For those students whose English were not that good, it is a little bit confused or even resent to all throughout writing in English. Therefore, to help the readers understand content of the whole chapter more accurate and get into the mood of English reading faster, the editor arranged brief chapter introduction proceeds of the text.

3. Adjusted the content of the textbook. Many commercial laws at home and abroad are revised recently. To adjust and enrich the content of the text book, the editor updated latest expertise knowledge which including insurance law and banking law, increased professional and practicable commercial regulations, like bankruptcy law, negotiable instrument law, and securities law, etc.

4. In this text book, both practices and word definitions attached to every chapter are meticulously selected to enhance practicability and professionalism.

Furthermore, it is worth to be mentioned that besides of editing the textbook, a case book in English was compiled to go with the textbook by collecting and collating a large sum of legal cases.

The editor wishes that the compilation mentioned above are helpful and favorable to all the readers. Nevertheless, what we have done still leaves much to be desired, we hope the readers may put forward suggestions continuously, and we will work together to make the book more perfect and mature. Thanks a lot!

The author
March 2012

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Chapter 1 Introduction

1

Introduction

Basic analysis of Commercial Law including basic concept, characteristics, basic principles and system of Commercial Law and main analysis of commercial subjects, commercial juristic act, commercial registration, commercial name, commercial accounting books in Commercial Law, etc.

Section 1 Legal Systems and Law



Text

You are about to embark on a study of the subject of law. You may be surprised to discover that the search for an accurate, all-encompassing definition of law has gone on for thousands of years and will not end as long as people continue to think about the subject. Today researchers are studying legal systems throughout the world to make them work better for all of us. While you may not have an exact definition of law in mind as you pick up this textbook, you certainly are affected by law each and every day.

Every nation in the world has a legal system, and law touches each of us as we go about the business of participating in society. If we are to be effective citizens and fully participate in society, it becomes important for each of us to have knowledge about and concern for law.

Legal systems have always been an important part of every society. In thousands of instances each day, the legal system helps us resolve conflicts, provide justice to individuals, and helps solve some of our most pressing problems. Indeed, as our society becomes more complex, we tend to rely more heavily on law to guide our conduct.

Just as individuals look to the law as a guide in their personal affairs, so do business people look to the law in their organization. In the United States today there are more than two million corporations. Many of these corporations are so large that what they do has an impact on the entire world. Examples of firms with a worldwide reach are Ford Motor Company and American Telephone and Telegraph Company. As large as these firms are, they look to the law to help structure their operations. Even though there may be significant differences in the laws of the countries in which these firms do business, the firms' managers expect certain rules imposed by society to be followed when conducting business. Without some shared expectations about how people will behave—as spelled out by a society's legal system—how could a business person expect to run an organization, even for a day?

Why is law investigated?

There are a number of different ways of viewing law, each of which has a particular

strengths and weaknesses. Yet contemporary legal scholars are always searching for new and applicable models of law that might be useful in organizing and analyzing the information that they are continually uncovering. Why are social scientists dissatisfied with the traditional models?

Today's rapidly changing world presents us with issues that were rare or unheard of only a few years ago. This is particularly true in the world of work. In our society, people are calling upon business to have a heightened sense of social responsibility, and law is ever more frequently the vehicle used to move business in that desired direction.

Public law

Law is divided into two main types, public law and private law. Public law concerns the entire community. The two branches of **public law** are constitutional law and criminal law. Constitutional law is a part of the British constitution. It consists of those constitutional rules, which are laid down in **statutes** and judicial decisions, but does not include conventions of the constitution because the latter are not rules of law. Among the matters coming within the scope of constitutional law are the following: the functioning of Parliamentary Ministers and their powers, **civil liberties**, the right to vote, local government, and relationships with **Commonwealth** countries. Most disputes involving constitutional law are settled in the civil or criminal courts, but there are occasions when a court concerned exclusively with constitutional law is used. For example an allegation of **bribery** at a parliamentary election would be tried before a specially convened election court.

Criminal law is derived from statute and precedence or from judicial decisions. It is concerned with the suppression of behavior that disturbs the peace or well-being of society; its main objects are to punish criminals and to deter others from crime. Criminal law is administered in the criminal courts. A discussion of criminal law and criminal courts will be discussed later.

Private law (also known as Civil Law)

Private law covers a wider field than public law and is concerned mainly with the rights and duties of individuals towards each other rather than towards the state. It is applied in the civil courts. There are many branches of private law; the following are some of the more important.

The law of contract

The law of tort

Family law

The law of **succession**

The law of trusts

The distinction between public and private law is that the former is concerned with matters that affect the state as a community, while the latter is concerned with matters that affect the rights and duties of individuals among themselves. Constitutional law deals with such questions as the supremacy of Parliament, the position of the crown and rights to personal freedom. Criminal law generally aims at punishing criminals and suppressing crime. Civil law is intended to

give compensation to persons injured, to enable property to be recovered from **wrongdoers** and to enforce obligations (contracts and trusts).

Double liability for wrongdoing

In connection with the classification of law there is an important point to be borne in mind. This is that a wrongful act may fall under two headings. For example if Bob runs down Ann while driving his car in a dangerous manner this will be at the same time a crime, since it is forbidden in the interests of the community, and also a tort, because it has hurt Ann in particular. The outcome of such an incident may well be that Bob has to appear before two courts: a criminal court that can send him to prison or order him to pay a fine to the state, and also a civil court that can order him to pay compensation to Ann.

There are various combinations of wrongdoing that can occur, and the combination of crime and tort is just one of them. A wrongful act could, for example be both a breach of contract and a tort, although here only an appearance in a civil court would ensue. On the other hand some types of wrongdoing fall into only one category.

Words and expressions

public law *n.* The body of law dealing with relations between private individuals and the government, and with the structure and operation of the government itself; constitutional law, criminal law, and administrative law taken together. (Cf. **private law** *n.* The body of law dealing with private persons and their property and relationships.)

statute *n.* A law passed by legislative body.

civil Liberties. *n.* Freedom from undue governmental interference or restraint. This term usu. refers to freedom of speech or religion. —Also termed civil rights.

commonwealth *n.* 1. *often cap.* An association of self-governing autonomous states more or less loosely associated in a common allegiance (as to the British crown). 2. *often cap.* A political unit having local autonomy but voluntarily united with the U. S. (used officially of Puerto Rico and the Northern Mariana Islands).

bribery *n.* The corrupt payment, receipt, or solicitation of a private favor for official action.

succession *n.* The acquisition of rights or property by inheritance under the laws of descent and distribution.

wrongdoer *n.* One (as a criminal or tortfeasor) who does wrong.

Section 2 About Commercial Law



Text

Features of commercial law

1. Profiting of Commercial Conducts

All the subjects of commerce set profiting as primary and direct objective for their conducts; accordingly, commercial law is, in first place, designed to protect the attainment of the objective, to minimize the cost of business transactions and institutions. Some major statutes on establishment, change and termination of commercial subjects, commercial registration, trade book, trade name, together with some important principles for commercial conducts such as sale, **agency**, storage, **negotiable instruments**, securities, maritime commerce, etc., must be oriented to profiting. Moreover, profiting is also the foundation of some exclusive principles for commercial law, for instance, flexibility of commercial rules, swiftness, contract form, interest rate, settlement and taxation.

2. Technicality

Civil law provides general rules in ethic sense for civil conducts so that the subjects can determine the nature of their conducts upon their common sense and general ethics without expertise or professional judgment; while commercial law makes the general rules more operational by turning them into applied terms and skills, which is bound to involve more technical knowledge when used to determine the result of subjects' conducts, for instance, the design of company forms, allocation of rights and interests, movement of capital, operation of stock market in company law, the issue, **endorsement**, acceptance and claim in negotiable instrument law.

3. Changeability

Commercial law has to be highly responsive to the fast changing social and economic life and demand of business transactions; therefore, it is more subject to modification compared to other laws. Since the adoption in 1897, The German Commercial Code has been amended for more than 50 times. Japan's company law has experienced amendment almost annually since 1990's. China's company law was adopted in 1993, amended in 1999, and has just seen a material amendment in October of 2005.

4. Integration

Commercial law is a compound of private law and public law. On the one hand, commercial law is deemed special law of civil law and hence classified as private law; on the other, it contains numerous compulsory rules revealing government's will, displaying the characteristics of public law. The regulation on the registration of corporations is a case in this point.

5. Internationalization

Commercial law originated from the customs in cross-boundary business transactions and bore international features since its birth. Today the increasingly globalized business activities call for unified game rules, making this feature of commercial law even more prominent. More

and more international conventions and treaties are adopted to direct international business. Domestic commercial laws in many countries have gradually shared the similar or identical clauses.

Principles of commercial law

1. Protect fair dealing

(1) The subjects to commercial transactions are of equal status. Each party may enter into a transaction of his free will, and no one may force the other party to accept a transaction unwillingly.

(2) All the subjects shall act in fairness and **good faith**, legitimately enforce rights and fulfill obligations, do no harm to a third party's and public interest.

2. Facilitate efficient transactions

(1) Brief and convenient transaction. Commercial transactions are commonly done in **solemn** and **literal** manner, and the contents are often predetermined by compulsory rules.

(2) Shorter period for limitation of an action. In order to stabilize commercial relations and enhance transaction efficiency, the period for limitation of action is normally shorter than the ordinary period in civil law. For instance, in the Maritime Law of People's Republic of China (PRC), the limitation period arising from towage contract is one year from the date when the right-holder know or ought have known the infringement.

(3) Standardization of transaction. It includes the standardization of transaction form and object. The container transport, air ticket and railway ticket are typical example of the former, and the corporate shares, **corporate bonds** and negotiable instruments are typical example of the latter.

3. Promote transaction security

(1) The parties to transactions are obliged to fully disclose the transaction information and notify others of progress and any changes to the transaction.

(2) Any fraud and unfair competition is prohibited.

(3) Compulsory rules, with requirement for publicity, externalism and strict liability are employed to secure the safe transactions.

German commercial law

In its narrow sense, commercial law designates the rules laid down by the German Commercial Code as applicable to merchants. In a broader sense, it includes other areas of law relating to mercantile activities, such as the law of negotiable instruments, and a few important types of transactions which are found in general civil law, but are more used by bankers and other people in commerce. In addition, there are distinct areas of law affecting traders and trading, such as company law, the law of connected enterprises and competition law.

In laying down special rules within the general framework of private law, the German Commercial Code or HGB (short for Handelsgesetzbuch) is primarily for performing two functions.

First, it contains juridical-forms for transactions that are purely commercial, such as the commission business or the special form of agency known as the Prokura. Second, it provides 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 and the commercial register, and in part from making the merchant more strictly answerable to third parties than a private individual would be.

American Uniform Commercial Code

The present law concerning commercial transactions—the subject of the Uniform Commercial Code—had its modern origins in the law merchant, that is, the system of rules, customs and usages generally recognized and adopted by merchants and traders which constituted the law for the regulation of their transactions and the solution of their controversies. By the end of the seventeenth century the law merchant had become assimilated by the common law. It should be noted that in the eighteenth century many landmark commercial law cases were decided by Lord Mansfield, England's foremost commercial judges.

The code is to be liberally construed and applied to promote its underlying purposes and policies, which are:

- (1) to simplify, clarify and modernize the law governing commercial transactions.
- (2) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties.
- (3) to make uniform the law among the various jurisdictions.

In addition, the text of each section of the UCC should be read in the light of the purpose and policy of the rule or principle in question (as also of the Code as a whole) and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.

The official Comments of the National Conference of Commissioners on Uniform State Laws and The American Law Institute will be of considerable assistance in determining purposes and policies of the UCC among several jurisdictions. Further, the Permanent Editorial Board for the UCC (PEB) issues supplemental commentary on the UCC from time to time.

In order to permit the continued expansion of commercial practices the drafting philosophy of the Code was: open-ended drafting, with room for courts to move in and readjust over the decades.

Freedom of contract is a principle of the Code. The effect of its provisions may be varied by agreement. Thus, many Code sections contain gap-filling rules which apply unless the parties otherwise agree. This principle of freedom of contract is subject exceptions. First there is the general exception that the obligations of good faith, diligence, reasonableness and care prescribed by the Code may not be disclaimed by agreement [9]. Second, certain sections explicitly preclude variance. Third, some sections are not explicit but it is implicit that they not be varied. Further, certain contracts and clauses thereof may not be enforceable due to unconscionability.

Avoiding and settling disputes

Law has developed because individuals and society need certain standards that govern relationships among individuals and between people and their government. Philosophers have set down their own definitions of law. Some are simple; others are more complex. Oliver Wendell Holmes contended that law was a set of rules that allowed one to predict how a court would resolve a particular dispute: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.” Aristotle saw law as a rule of conduct. Plato believed law was a form of social control. Cicero contended that law was the agreement of reason and nature, the distinction, between the just and the unjust. The British **jurist** Sir William Blackstone described law as “a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong.”

The central theme of each of these definitions revolves around disputes—the settlement or avoidance of disputes.

Costs and benefits of settling versus those of going to court

Going to court is an expensive endeavor. There are lawyers to pay, unless the dispute can be handled in **small claims court**, court fees must be paid. Often these costs can be avoided by settling the dispute rather than going to court.

Another major benefit of settling is that certainty is exchanged for uncertainty. You never know what the outcome will be if you go to court. You may win, you may lose. **Settlement** offers the parties the opportunity to negotiate a partial victory for each side. The dispute is resolved immediately, and the outcome is certain. On the other hand, if the matter goes to court, the final outcome is decided by the court.

To settle requires compromise; it involves giving up a right or a duty believed to be owed by the other. These are the costs of settling if it is believed that a full recovery can be obtained by going to court. Sometimes, the costs of going to court seem small when compared to the concessions that must be made to settle.

Often, the best course of action is to settle and to use the information obtained to avoid future disputes. The dispute may have arisen because the terms of a contract were not clearly specified, or it may be the result of dealing with an unreliable individual. Disputes of the first type can be avoided in the future by making the contract more explicit. Disputes of the second type can be avoided by requiring payment in advance or by refusing to deal with such unreliable individuals in the future.

Law in business

A person who is involved in business is also involved in the law concerning business. Making contracts and using negotiable instruments—both of which are legal concepts—are the essence of business. Business and law are closely associated. The growing importance of law in

business is shown by the rapid increase in the use of lawyers by people in business. In recent years, the number of corporate counsel, the full-time lawyers who are employed by corporations, has been growing faster than the number in any other category of **attorneys**. Law firms that serve primarily business people have also been expanding at a great rate.

In the past quarter-century there has been a qualitative as well as a quantitative change in the concern for business managers with law. In earlier times, business managers generally employed lawyers only in emergencies. A lawyer might be engaged if a summons to appear in court was received, or if a businessperson could not collect a debt that was due, or if a supplier's goods were defective and no settlement could be reached. Lawyers are still sought out when such things happen today. However, more and more, business managers employ lawyers to help them plan to avoid such emergencies and to comply with a rapidly growing mass of legal rules imposed on business operations by government bodies. This use of lawyers by business people is called preventive law, a term that appears to have been coined by Louis M. Brown, a California lawyer and professor of law at the University of Southern California.

The objectives of preventive law are to arrange business plans and methods to increase business profits by:

- (1) avoiding losses through fines and damage judgments, and
- (2) reaching business goals through enforceable contracts while avoiding government prohibitions.

Preventive law involved seeks the advice of a lawyer in the business planning process rather than wait until trouble develops. It looks for ways to change plans to reach an intended business objective with less legal risk. It further aims to minimize the possibility of failure if the business has to go to court.

Almost every business transaction involves legality and risks. People in business need to be generally familiar with the law applicable to their activities.

The practice of preventive law requires a knowledgeable lawyer. The client needs to understand the legal system and the applicable law well enough to be able to communicate with the lawyer. As a client you need to know what information is relevant and necessary to the lawyer's opinion. A legal opinion is no better than the information upon which it is based. Clients also often apply legal advice to situations not contemplated by the lawyer. This can lead to a lawsuit, or it may discourage the client from doing something that is clearly legal. This problem is especially likely to occur in applying a broad statute like the Sherman Act, which forbids certain anti-competitive trade practices.

Law is an important part of the culture in any society. Law reflects the values, history, and current problems of a society. To learn something about law as an institution, how it functions in society and some of its basic concepts is essential to a fully understanding society itself.

Words and expressions

agency *n.* A consensual fiduciary relationship in which one party acts on behalf of and under