

国际贸易法律实务

·····张艳◎编著·····

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Legal Practice on the International Trade
国际贸易法律实务

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举报电话:010 - 62752024 电子邮箱: fd@pup.pku.edu.cn

总 序

三十年前,随着改革开放序幕的拉开,中国的法学教育在高等教育中艰难地赢得一席之地,在没有教材、没有法规、没有专著、没有参考资料的艰难局面下,靠着我们前辈的无限热情和不懈努力而蹒跚起步。正如中国人民大学著名史学家戴逸先生所说,那时的法学教育是幼稚的,基本上处于法学教育的启蒙阶段。其表现为老师上课念讲稿,学生上课做笔记,考试背笔记。正如任何大学的长成需要经过幼苗阶段一样,老师的讲授也基本停留在对法学概念的阐释层面。

时至今日,法学学科和法学教育出现了一种全新的局面。目前,全国有近五百所高校设置了法学院系,全国每年招收全日制法学本科生共计十万人左右。在法律规范层面上,社会主义市场经济法律体系已经基本形成,全国人大及其常委会颁布的法律、国务院颁布的行政法规、国务院各部门颁布的政府规章以及最高人民法院、最高人民检察院所作的相关司法解释已经深入到社会生活、经济生活的方方面面,无法可依的局面已经得到彻底改观。在法律研究层面上,几乎有近万部专著出现,面对当下之形势,法学教育何去何从,已是摆在法学教育者面前的一道现实课题。

时值北京市实现教育跨越式发展,建设 100 个市级本科品牌专业的伟大构想之际,我院法学专业作为北京市市级品牌建设专业,提出本科法学教育强化基础,重视应用的教学理念,使学生做到学习平时化,目标具体化。为了实现这一理念,我们除了针对教育部核定的法学专业 14 门核心课程推出北京市法学品牌专业核心课系列特色教材之外,同时推出北京市法学品牌专业实践课系列特色教材,以达到重视应用之目的。

本特色教材的特色在于:第一,在教材的编写体例和内容上,以实务中发生的真实案例为基本素材,同时通过该案例启发学生思考的方向,并提出学生实践的具体要求和目标。从宏观意义上讲,法学是经邦治国之学,法学教育以培养经邦治国之才为己任;从微观意义上讲,法学是维护人权之学,法学教育以培养学生为民请命、为民排忧解难之品格和技能为内容。无论是经邦治国还是为民排忧解难都是解决形形色色的社会问题,而社会问题都集中体现在具体的案例中。因此,以实务中发生的真实案例为素材进行教学是使学生了解社会、认识社会、分析社会和解决社会问题的最佳途径。社会问题是复杂的,对年轻的学生来说,

根据其人生经验和社会阅历往往难以分析、判断,故在教材中编写了启发学生思考方向或路径的内容。学生实践的具体要求和目标使实践课程的目标具体化,是解决学生实践目的、实践步骤、实践内容和实践方法的意义所在。第二,在教材的使用上,不是传统法学教育模式下以教师为中心的讲授,而是以学生为主体的模拟实践行为,老师只是起到组织者和裁判者的作用。模拟实践行为的实现,必然要求学生在课下进行充分的准备,在准备过程中学生会不自觉地将所学理论知识和方法转化为自己的实践能力,这个过程是一个探究法学理论意义的过程,是一个法条分析和运用的过程,是一个剖析社会现象的过程,也是一个由概念法学向问题法学、由理论法学向实践法学转化的过程。学生通过课下的充分准备,将其所准备的材料在课堂上进行展示,这个展示过程必将使学生熟悉法律运用的程序,从而使学生综合运用法律的能力得到提升;在课堂展示过程中,通过老师的点评,指出学生的纰漏和错误,又必将使学生弥补所学之不足,从而进一步激发学生的学习动力。

本系列特色教材全部由北京工商大学法学院长期从事本科教学的教师所编写,是这些教师多年教学经验的总结和教学心得的提炼。本系列特色教材暂定14本,以后根据具体情况逐步增加,暂定的14本教材分别是《庭审实务》、《律师实务》、《税收法律实务》、《房地产法律实务》、《证据法律实务》、《涉外经营管理法律实务》、《法律文书写作》、《法律职业形象设计》(上述8本为中文版)、《国际贸易法律实务》、《国际投资法律实务》、《商标法律实务》、《专利法律实务》、《英美合同法律实务》、《WTO法律实务》(上述6本为英文版)。编写本系列特色教材是一项原创性的工作,没有多少经验可供借鉴,难免出现各种纰漏或不足,诚请社会同仁批评指正。

在本系列特色教材即将付梓之际,应当特别感谢北京市教委,他们对本系列特色教材的出版给予了经费支持。应当特别感谢北京工商大学校长沈愉教授,副校长李朝鲜教授、谢志华教授和张耘教授,教务处长黄先开教授以及文科实验中心的秦艳梅教授,他们对本系列特色教材的策划提出了宝贵意见,并给予了大力支持。应当特别感谢北京工商大学法学院的老师们,他们为本系列特色教材的编写贡献了他们的人生智慧和教学心得。

北京工商大学法学院

北京工商大学文科实验中心

2006年1月3日

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Part One

Introduction to International Trade

Case 1^①

Gaskin v. Stumm Handel GMBH

390 F. Supp. 361 (1975)

United States District Court

(S. D. N. Y.)

Background and Facts

The plaintiff, a U. S. citizen, entered into contract with the German firm of Stumm Handel, the defendant. The contract presented to the plaintiff was written entirely in German. Without being able to speak or read German, the plaintiff signed the contract. He never received an English language version. At the time of the signing of the contract, however, the terms of the contract were explained to him in English. One of the terms of the contract, known as a "forum selection clause", provided that any disputes that might arise between the parties would be settled in the courts of Germany. Later, when the parties reached a disagreement, the plaintiff brought this action against the defendant in the United States, contending that his failure to understand German rendered the forum selection clause invalid.

Cannella, District Judge

With regard to such translation, Gaskin asserts that "I was never informed that

① "International Business Law and Its Environment", by Richard Schaffer, Beverley Earle and Filiberto Agusti, West Thomson Learning, p. 33.

by executing the contract, I was consenting to the Republic of West Germany as the forum within which I must submit all controversies” and that “had I known this, I would not have agreed to the same, as such an obligation is onerous and unconscionable, and a deterrent to bringing any actions whatsoever.” . . . We find that in making the foregoing assertions, Gaskin flies in the face of well-settled contract law principles and has failed to sustain his burden.

It is a settled proposition of contract law in this state and nation that “the signer of a deed or other instrument, expressive of a jural act, is conclusively bound thereby. That his mind never gave assent to the terms expressed is not material. If the signer could read the instrument, not to have read it was gross negligence; if he could not read it, not to procure it to be read was equally negligent; in either case the writing binds him.” (citations omitted) . . .

While Mr. Gaskin’s apparent “blissful ignorance” with regard to the contract under which he was to render his labors to the defendant strikes us as highly incredible as a matter of common sense, we take note of certain facts which are relevant to the disposition of this matter. It must be remembered that Mr. Gaskin is not an ignorant consumer, unlearned in the language of the contract, who has become entangled in the web of a contract of adhesion through the overreaching or other unconscionable practices of the defendant. The contract at bar does not involve the credit sale of a refrigerator or color television set, but rather compensation of some \$36,000 per annum for Mr. Gaskin’s services as the manager in charge of the defendant’s New York operations which were to be conducted under the name Stumm Trading Company. His office (Park Avenue, New York City) is not located in an area which would have precluded his easy access to a competent translation of the involved document. There existed no emergency condition or other exceptional circumstances at the time plaintiff entered into this contract; conditions which might now serve to excuse his present plight. . . .

Thus, we find that the instant transaction was a commercial arrangement of a nature which warranted the exercise of care by Mr. Gaskin before his entry into it and that his conduct with regard to this undertaking can only be characterized as negligent, the consequences of which he must now bear. . . .

We, therefore, decline to exercise our jurisdiction over this cause in deference to the contractual forum. An order dismissing this action will be entered.



Decision: The Court dismissed the plaintiff's action, holding that the plaintiff's failure to speak or read German was not grounds for invalidating any of the provisions of the contract.

Questions:

1. How many risks are there in the international transaction, compared to the domestic sales?
2. Why was the plaintiff's action dismissed?

注释:

国际商务的管理就是风险的管理,这里的风险包括语言和文化差异、货币和汇兑风险、法律差异、政治风险等等。对付风险有以下几种途径:一是事先的计划和评估以减少风险;二是将风险转移给交易的他方;三是转移给保险公司。

1. The first part of the document is a list of the names of the persons who have been appointed to the various offices of the city government.

2. The second part of the document is a list of the names of the persons who have been appointed to the various offices of the city government.

3. The third part of the document is a list of the names of the persons who have been appointed to the various offices of the city government.

4. The fourth part of the document is a list of the names of the persons who have been appointed to the various offices of the city government.

5. The fifth part of the document is a list of the names of the persons who have been appointed to the various offices of the city government.

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9. The ninth part of the document is a list of the names of the persons who have been appointed to the various offices of the city government.

10. The tenth part of the document is a list of the names of the persons who have been appointed to the various offices of the city government.

Part Two
Sales Contracts

Case 2^①

The Printing System and Software Case **Germany Federal Supreme Court (*Bundesgerichtshof*)** **4 December 1996**

Facts

Plaintiff [seller's assignee] demands payment of the purchase price from defendant [buyer] for a computerized printing system including software arising out of an assigned right.

On November 11, 1992, the [buyer], located in Vienna, ordered a printing system called “dynamic page printer” from Company A [hereinafter seller], located in P. near N. for the total price of DM [Deutsche Mark] 65,100. The unit consisted of a thermal transfer printer, a color monitor, a computer and a software package. [Seller] confirmed the order by letter dated November 22, 1992. With respect to the warranty, the order confirmation contained the following arrangement, which indisputably became part of the contract:

“The warranty covers software and hardware as a unit. The warranty period is 6 months and starts with the non-defective functioning of the system. The start of the warranty period is calculated from the installation and operational handover.

① <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/961204g1.html#ta>.