英美法案例精选丛书
英文版

English & American International Commercial Case Law (2nd Edition)

英美商事法

（第2版）

朱建林　编著

对外经济贸易大学出版社
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第二版总序

近年来，随着全球经济一体化进程的加快和我国对外贸易总量的大幅攀升，我国与外国主体间的贸易摩擦和经济纠纷呈现不断上升的态势，与此同时，随着我国大国地位的日益显现，在有关国际组织的法律岗位上，我国应当有数量更多、职位更高的代言人。凡此种种，都对培养能够服务于我国利益的高端国际化法律人才提出急迫的需求；与此同时，也会引发这样的问题：我国的大学在培养此类人才方面应当发挥什么作用？

毋庸置疑的是，能够服务于我国利益的高端国际化法律人才必须是学贯东西的人才，必须具有我国国内法律教育的背景，懂得中国国情和精通中国的法律。因此，作为他们成才的第一步，必须在中国的法律院校接受教育。这就决定了，我国的法学院在培养此类人才方面是可以有所作为的。

接下来的问题是，中国的法律院校应如何在学生接受国内教育的阶段，特别是在大学本科阶段，为他们后来成为高端国际化法律人才，在知识储备和能力培养方面奠定良好的基础？实践证明，高端国际化法律人才在其接受教育的过程中，必须在基础英语、法律专业英语、中国法知识、外国法知识，以及交叉学科知识等多个方面积累知识和扩展能力。由此为今后的出国深造，特别是在特定的专业法律领域的成功发展，奠定坚实的基础。

因此，对法律专业英语的学习是培养高端国际化法律人才的重要环节。进一步说，随着近年来我国法律事务中涉外内容的增加，即使对一般的法律工作人员来说，要胜任日常的工作，通常也需要在相当的程度上具备法律专业英语的能力。

本系列教材是很好的适合于在我国法律院校开展法律专业英语教学的教材。首先，本系列教材是以英美法为内容的教材。目前，英美法不仅在解决国际商事争端的法律体系中明显地占据着主导地位，并且 WTO 争端解决机制的运作模式也是以英美法为基础进行设计的。其次，本系列教材是案例教材。采用这套教材，有助于推动案例教学和法律教学改

革的开展。最后，本系列教材自2007年出版以来，已经为一些法律院校采用。实践证明，这套教材的编写和使用对于我国国际化法律人才的培养已经起到了一定的作用。其效果之一是，由于这套教材中的案例大都是精选的为美国法学院的教材所采用的经典案例，在国内学习过此套教材的学生，借助原来学习的基础，在后来去英美法国家留学的过程中，往往能驾轻就熟，获得较好的成绩。

本系列教材第二版中的各个教材对第一版作了不同程度的改进和完善，进一步提高了质量。在这一版付梓之际，我谨代表作者们对使用本教材的各位教师表示衷心的感谢，并希望在我国的法律院校中，有更多的教师加入我国国际化法律人才培养的教师行列。

对外经济贸易大学
法学院　院长
王　军
2012年7月

第一版总序

自 1984 年设立国际法专业以来，对外经济贸易大学法学院（原国际经济法系）已经走过了 20 个年头。在 20 年的时间里，经过几代人的努力，在培养懂法律、懂经贸和熟练运用外语（英语）的综合型人才、满足国内市场和国际市场的人才需求的道路上，对外经济贸易大学法学院已成为国内外经贸法律教育中一个具有自己特色和风格的人才培养基地和输送站。

对外经济贸易大学法学院的教学特色体系是从“国际商法”开始的，为了适应国际经贸全球化的发展潮流，我们希望，从对外经济贸易大学法学院走出的人才能够从国际化的视角理解和把握我国的法律，并且客观地认识不同国家的法律、国际法律之间的相互作用和影响。为此目的，我院几代教师编辑的教材，包括案例教材，都在强调具有国际化视角的教学和比较研究的重要性。

对外经济贸易大学法学院以独特的教学方法——案例教学和双语教学为代表，旨在通过引导学生对“原汁原味”的英文案例的阅读和研讨，学习不同国家在国际商贸领域的法律原理和规则，也通过对经典案例事实和纠纷场景的分析，帮助学生认识现实生活中经贸活动的规律和特点。

我们多年的教学实践已经证明：案例教学对于培养学生发现和归纳问题、分析和处理问题的综合能力，对于培养学生在错综复杂的事实和现象中分清真伪和主次、结合事实和法律推理的能力有直接的促进作用。

除了国际商法以外，对外经济贸易大学法学院国际法专业的另一个教学和研究方向是以 WTO 法律为主的国际经济法（公法）。本套英文案例选编丛书包含了这样两个方面的内容。

我院鼓励教师在教学、科研和法律实践中全面拓展才能和发掘潜力，同时，我们强调：教师的工作应以教学为中心，科研和法律实践应为提升教师的专业素质、提高教学水平而服务。参与本套丛书编写的同志都是我院具有多年教学经验的中青年教师，本套丛书是他们在对自己的教学心得的积累和总结的基础上精心编辑而成的，是他们对多年摸索的教

学方法的总结；本套丛书也是我院几代人的教学成果的延续，更是我院“211 工程”建设成果的组成部分。

20 年来，我们欣慰地看到：对外经济贸易大学法学院的教学风格和特色也得到国家和社会的认可，早在 20 世纪七、八十年代，我院就经批准设有可招收国际经济法专业方向的硕士点和博士点；我院的“国际商法”教材和案例教材也广为流传；2002 年我院的国际法专业被评为国家重点建设学科，现又增设了博士后流动站；学生和教师的规模日益扩大。我衷心希望：我院有更多的教师和学生加入案例教学和双语教学的尝试和探索中来，保持和发展特色，早日走上国际人才培养和学科全面发展的道路。

对外经济贸易大学
法学院　院长
沈四宝
2004 年 7 月

前　言

本书选自英美法院的国际商事判例。这些判例主要涉及货物买卖合同、信用证交易、损害赔偿与救济以及法院对仲裁程序之监督与支持。鉴于这些判例在国际商事领域很具代表性，而且其理由分析、文字表达、逻辑推理等诸多方面都有参考和借鉴作用，本人非常乐意选择这方面的案例，编辑成书并推荐给从事国际商事法律与仲裁工作的同仁，尤其是选修国际商事法的学生，无论是法律本科生，还是研究生和博士生。

本书的编辑成功，应感谢张烨、刘宪来和曹丽军三位。尤其是刘宪来，其打印校对是那样地认真负责。假如没有他们的鼎力相助，要想在短短的时间内完工，恐怕不易。在此感谢，应是重重的，而绝非表面的虚美之辞。

朱建林

2005 年 10 月

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第一部分

买卖合同

买卖合同方面的法律问题，乍看起来似乎不难，也许很多人对此不屑一顾。果真如此？答案却并不一定。二十多年与之打交道的经验告诉我，解决合同争议绝非易事，有时还真让人头疼。以下所选的这类案例，读者不妨一览，看看有关合同履行、权利义务、违约处理、损害救济等问题是如何交代并得出结论的。

案例 1

MANATEE V. OCEANBULK

QUEEN'S BENCH DIVISION

May 1999

In 1995 the plaintiffs (Manatee and Coastal), joint owners of the oil tanker Bay Bridge, entered into negotiation with the first defendants (Oceanbulk) for the sale of that vessel to itself or to a company nominated by Oceanbulk. These negotiations were conducted with the help of the plaintiffs' broker (McQuilling).

There was an issue as to whether these negotiations would ever result in a contract of sale. The plaintiff denied that it did. The defendant argued that it did at the price US$ 9 750 000 with the second defendant (Laura Maritime) as the nominated buyer. The alleged contract was never performed and the defendants alleged that the vessel had a market value of US$ 12 500 000.

The plaintiffs sought a declaration that there was no concluded contract and an injunction to restrain the arbitration which Laura Maritime had commenced in which it claimed for the difference between the contract price

and market value.

The defendants counterclaimed a declaration against the plaintiffs to the effect that a binding contract had been concluded, and in the alternative against McQuilling, who joined as the third defendant to the counterclaim of damages for breach of warranty of authority.

The plaintiff claimed directly against McQuilling in third party proceedings contending that if the contract did exist then McQuilling had exceeded its authority and was liable to the plaintiff for breach of contract. McQulling denied that the plaintiff was entitled to an indemnity or any other relief on the ground that there was no concluded contract of sale, no acting beyond its authority and in any event ratification of waiver of any excess of authority.

The plaintiff contended:

1. the negotiations proceeded throughout on the basis that the terms would be "otherwise NSF - 87 (i. e. Norwegian sale form, 1987 revision) to be mutually agreed and to incorporate agreed terms and conditions". This meant the parties would not be bound until the detailed provisions to be incorporated into a memorandum of agreement (MOA) on the NSF - 87 form, which had been agreed;

2. one of the terms of defendants' opening offer was "sellers warrant vessel approved by all major oil companies". The plaintiff never agreed to this term and the defendants' requirement regarding the oil companies' approvals were left unresolved on June 28, 1995;

3. there were two subjects (buyers' inspection and approval of classification records and the buyers' inspection and approval of onboard condition survey) which were never lifted; and

4. par. 11 (c) of the alleged "final confirmation of sale" states "Buyers conclusion /confirmation of sale by telex/fax." This wording the plaintiff submitted was inconsistent with the allegation that a contract had already been concluded and emphasized the fact that there was no final agreement between the parties.

The central issue was whether or not these negotiations resulted in a binding contract of sale.

——**Held by Q. B.** (**Com. Ct.**) (**CRESSWELL, L.**) that:

1. the defendants' opening offer was expressed to be a "firm" offer in the sense that it was based on main terms but subject to agreement of further terms and conditions; hence "otherwise NSF – 87 to be mutually agreed and to incorporate agreed terms/conditions"; there was good commercial sense in seeking to agree on commercial terms first since if main terms could not be agreed there was no point in going further; if main terms were agreed the parties would thereafter proceed to seek to agree further terms and conditions; there would be no concluded agreement until all further terms and conditions had been agreed;

2. the recap telex at the end of the day, June 28, recorded what had been agreed to date as to certain main terms; the objective intentions were that negotiations would continue until all further terms and conditions have been agreed;

3. amendments additions and deletions to NSF – 87 remained to be agreed; and the fact that there was no concluded contract of sale at the end of the day on June 28 was confirmed by the words in par. 11 (c) of the recap telex "after conclusion/confirmation of sale by telex/fax";

4. the question of major oil company's approval remained unresolved and there remained for further negotiations what other if any, oil company's approvals were required by the defendants;

5. the defendants agreed that if there was a binding contract for sale of the vessel it was the obligation of the broker to seek to document the sale strictly in accordance with what had been agreed; and the terms of the defendants' first draft MOA showed that the defendants took the view on June 29 that the negotiations were continuing;

6. the oral exchanges between the brokers on June 28 proceeded on the basis that main terms would be agreed first and negotiations would follow as to appropriate amendments, additions and deletions to NFS – 87; and at no stage were the detailed provisions of NFS – 87 considered;

7. there was no intention to create legal relations at the time of the recap telex; the questions of major oil company's approval were still being negotiated and mutual agreements of amendments, additions and deletions to

NSF－87 had yet to take place;

8. par. 11（b）of the recap（no drydock clause but buyers' right to place divers at time of delivery for inspection of underwater parts; and if any damage found, same to be made good to class satisfaction at sellers, time and expense prior to delivery）was unworkable without further detail provided by subsequent negotiations; the objective intentions of parties on June 28 were to record in a recap fax the extent to which certain main terms had been agreed by the end of that day;

9. the exchange between the brokers on June 28 did not result in final agreement capable of giving rise to a binding contract.

思考题

1. 就拟议中的船舶买卖交易进行商谈，虽然往来函件不断，但商谈结果是否构成有约束力的合同？

2. 哪一项条款还需进一步磋商后才能达成有效合同？

3. “6月28日”的函件往来磋商的本意是什么？

案例2

TRASIMEX V. ADDAX

COURT OF APPEAL

July 1998

By the contract dated Aug. 4, 1994, evidenced by telex of that date and amended by telex dated Aug. 5, 1994 the plaintiff sellers sold to the defendant buyers 22 500 tonnes min. ——25 000 tonnes max. of jet aviation fuel. The contract provided inter alia that any terms not specially covered were to be governed by INCO Terms 1990 plus latest amendments. The INCO Terms 1990 provided inter alia by c. i. f. cl. A5 that the seller must——

Subject to the provisions of B5, bear all the risks of loss of or damage to the goods until such time as they have passed the ship's rail at the port of

shipment. . .

And by cl. B5 that the buyer must——

Bear all the risks of loss of or damage to the goods from time they have passed the ship's rail at the port of shipment.

The contract as amended contained the following term relating to the product, its quality and origin:

EC qualified Jet Fuel ex Ras Lanuf meeting DERD 2494 specifications latest issue and Joint Fuelling Systems Check List Issue 14.

Seller will make best endeavors to have ASA 3 or Stadis 450 placed on board the vessel in drums. That term had been altered in the amended contract from its original form.

DERD 2494 was the specification for aircraft turbine engine fuel and was recognized by the Civil Aviation Authority as the specification for use in civil aircraft.

ASA 3 or Stadis 450 was an additive designed to dissipate so-called static electricity to which jet fuel was prone in certain handling conditions because of its inability to conduct electricity. The additive was known as a state dissipator additive (SDA).

The jet fuel was shipped on board Red Sea by the sellers on Aug. 6 and 7, 1994. Its origin was the Ras Lanuf refinery and it was EC qualified. At the time of shipment no SDA had been added to the fuel. Its electrical conductivity was therefore 0 ps/m (pico-Siemens per metre)

Following shipment the SDA loaded in drums was added to the fuel on board the vessel. Too much was added, with the result that the product then possessed an electrical conductivity measurement of well over 450 ps/m.

Under DERD 2494 and the Joint Fuelling Systems Check List Issue 14 (the checklist which incorporated the DERD 2494 specification) the limits provided for electrical conductivity were between 50 (minimum) and 450 (maximum) ps/m. The fuel was therefore outside those limits both at the time of shipment (because no SDA had been added at that time) and after admixture of the SDA on board (because too much SDA had been added). However DERD 2494 provided in note 11 concerning the electrical conductivity limits:

... the limits apply at the point, time and temperature of delivery to the user. The check list contained an essentially identical remark.

Disputes arose between the parties and the following preliminary issues were ordered to be tried:

1. Was (a) the contract on c. i. f. terms and/or (b) the contract subject to INCO Terms 1990 c. i. f. Section cl. B5?

2. Under the contract did the risk of the loss of and damage to the goods pass to the buyers on shipment (namely at vessel's manifold)?

3. (a) Was there any contractual description of the goods? (b) If so what was that description?

4. Was any of the matters set out in par. 2. 1 to 2. 3 of the point of defense an express or implied term of the contract?

5. If the answer to 4 was yes were any such terms subject to the facts and matters set out in par. 2 (2) to 2 (4) of the point of reply?

6. (a) Was the sellers' obligation in relation to the additive, and/or complying with any implied term of the contract which limited to the obligation to use best endeavors to place additive on board the vessel? (b) Was the adding of additive to the goods contractually contemplated by both parties to take place after delivery (namely after shipment)? (c) Was the risk of adding additive after delivery on to buyers, or between buyers and sellers?

7. Were the sellers in breach of any terms of the contract found to exist in 4 or 5 above by reason of the non-addition or incorrect addition of additive?

There was a further issue between the parties as to whether for the purpose of the sale "user" in note 11 of DERD 2494 was referred to as buyers. If as the sellers submitted, it did not, and a "user" was only an end-user i. e. an airline or aircraft, then the question was whether there was any obligation on a seller to an intermediate buyer of DERD 2494 jet fuel to deliver a product which contained an appropriate admixture of SDA.

——Held, by Q. B. (Com. Ct.) (Rix, J.), that:

1. the full terms of the originally agreed contract were admissible; the original product clause was part of a completed and binding contract and the