

主编/沈四宝 副主编/王 军 焦津洪

国际商法教学案例(英文)选编

SELECTED CASES AND MATERIALS ON
INTERNATIONAL BUSINESS LAW



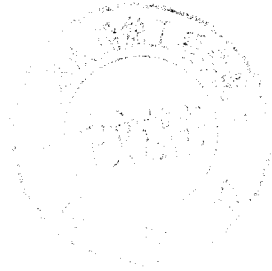
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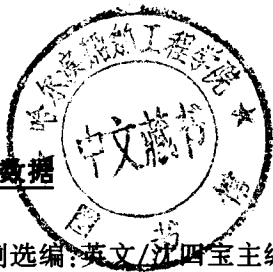


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前 言

由沈达明、冯大同编著的“国际商法”教材自1980年正式出版至今，发行已达50万册之多。该书作为对外经贸院校的基本法律教材，在教学实践中发挥了巨大的作用。可以这样说，该教材的影响力及其作用，已经远远地越过了外经贸校园的书斋，在处理无数起国际经贸纠纷的过程中发挥着其应有的作用。还可以不夸大地说，由沈达明、冯大同编著的“国际商法”一书已经整整地影响了几代学子和外经贸法律工作人员，从而在外经贸法律教学战线上树立了一面鲜明的旗帜。

作为沈、冯两位教授的学生，我们现在编辑的“国际商法教学案例（英文）选编”一书，是对他们独创性工作的一种补充，希望把他们教材中阐述的英美法中的法律概念和法律原则，以案例的方式，更加形象地展现在同学和读者面前，以便在教学中起到应有的辅助作用。

对外经贸大学法学院，在做好一般性的法律基础教学的同时，始终注意形成自己独特的教学体系和教学风格。在教学目标上，我们强调为社会主义市场经济培养三会人才：即培养懂法律，懂经贸，且精通专业外语的法律工作者，使我们的学生能真正地把三种知识融会贯通，在市场经济中，尤其在外经贸法律工作中，得心应手地综合应用这些知识。经过几代人的努力，二十余载的摸索，我们在“国际商法”这面旗帜下，已经培养了大批

受外经贸界欢迎的这类人才。为使我们的工作更上一层楼，在教材编写和教学方法上，我们进一步提倡在主要专业课程中实行案例教学法。

实践证明，案例教学对于培养学生的综合分析能力，处理问题时分清主次和真伪的能力，在实践中运用法律的能力，都起着直接的促进作用。

今天，世界经济正朝着一体化的方向发展，世界贸易组织在近些年的发展和欧元体系的诞生无疑标志着这一发展的步伐的加快，这使整个世界变得越来越小了。对从事法律工作的各行各业的人士来说，这意味着，我们无法再关起门来，只研究我们自己的法律。我们不得不把中国的法律当作整个世界的法律的一部分来看待，我们必须用比较的眼光来了解我们的法和国外的法，必须考虑我们的法与国外的法的相互作用和影响。只有这样，我们的法律知识结构才能与当今社会的需要相适应。

对我国法学院的学生来说，阅读和研究由英美法院作出的判决原文恐怕是了解外部世界法律的不可缺少也无法替代的途径。首先，这些案例是贴近实践的，直接地反映了英美法院对待各种法律问题的态度。其次，借助于每一个案例的背景情况，读者才有可能理解抽象的法律条文和法学理论的含义。再次，时至今日，英美法在国际商事法律领域愈发显得重要和不可忽视。

基于上述理由，我们选编了50多个“原汁原味”的英文案例。这些案例涉及了国际商法的三个核心领域，即公司法、合同法和货物买卖法。所有这些案例都是精心地选出的，它们或者是公认的权威案例，或者是具有典型意义的案例。与此同时，本书还收入了对当今国际贸易具有重要影响的若干法律文献，以方便阅读和教学。

毫无疑问，要阅读和透彻地理解这类英文案例和文献，对每一个人而言，恐怕都是一种挑战。用它们去组织课堂讨论，自然

更非易事。让我们的教师和学生，共同努力和相互勉励，进行这一有益的尝试和探索。

编者

1999年元月于对外经济贸易大学

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第一章 商业组织

第一节 合伙企业

一、合伙的概念及特征

合伙企业是现代社会经济生活中比较活跃的商业组织,美国各州合伙法通常把合伙定义为由两个或两个以上的人作为共同的所有权人,以营利为目的而从事商务活动的商业组织,根据英美法有关合伙法的规定,合伙有普通合伙和有限合伙之别,普通合伙企业有如下几个主要特点:

(一)合伙强调的是人的联合,是保持合伙人独立性前提下的联合,合伙人之间地位平等,在合伙协议没有作出具体规定的情况下,各合伙人对合伙的管理及利润分配权具有相同的权利。

(二)合伙不具有法人资格,属于自然人企业,合伙人对合伙企业债务负无限连带责任,如果合伙企业的财产不足以清偿其债务,债权人有权向任何一位合伙人要求其履行全部债务。

(三)合伙是建立在合伙协议基础上,合伙协议是合伙企业的基石。在英美法系国家,合伙协议可以是书面的也可以是口头的,甚至可以行为来予以证明,合伙协议中应把合伙人之间的权利义务尽量具体地规定下来。但在实践中,合伙协议特别强调合伙人共同经营,共担风险和分享利润这方面的规定。

Grissum v. Reesman

505 S. W.2d 81 (1974)

Nora E. Grissum, plaintiff, filed this suit against Dale Reesman, defendant, who was administrator of the estate of plaintiff's deceased brother, Elwood Grissum. Plaintiff was the sole beneficiary under her brother's will. She was to receive a considerable amount of property under the will and, as a result, state inheritance taxes and federal estate taxes in rather large sums would be due. She asked the court to declare that she and her brother had been partners in a farming operation and that the property in question belonged to the partnership. If the court ruled in her favor, the interest that she had owned in the partnership would not pass to her by her brother's will because it was already hers. Such a holding would save her approximately \$ 57, 000 in taxes. The trial court did hold for plaintiff. The State of Missouri (which was also a defendant because of the matter of state taxes) appealed. The primary question on appeal was whether a partnership had existed.

Eager, Justice

... The theory of plaintiff's case was and is that a partnership was created orally between her brother and herself, back in the 1930s, to operate the farmland then owned or to be acquired, to accumulate property, and to share the benefits 50 - 50. . . . These two continued to farm the land together until Elwood's death in 1970. There was ample evidence that Nora did the cooking, housework and all related chores, kept the books for the operation, did most of the banking, wrote all checks and paid all the bills, fed the livestock, sorted cattle and hogs and, at times, did actual, hard

farm labor. This continued through all the years. She was regularly consulted about the purchase of livestock and land; she frequently (or usually) accompanied her brother on trips for the purchase or sale of livestock, and such deals were made by agreement. The farm truck bore the legend: "Elwood & Nora Grissum Farms - Boonville Mo." Elwood had this placed on the truck. A sign was placed by Elwood over the harness shed bearing the [same] legend. . . . This was visible to anyone approaching the house from the highway. . . . Elwood Grissum told sundry people, over the years, both in the presence of Nora and out of her presence, that they were partners on a 50 - 50 basis. A nephew of Elwood. . . who worked with him a great deal over a period of many years, asked Elwood why they could not "go partners"; the reply was that Elwood could not do so because he already had a partner, his sister. This nephew was told at sundry times that the arrangement was a partnership; on more than one occasion he heard Nora ask Elwood when he was going to fix up the business so that she would be protected, and his answer was that they would go in and fix it up if they ever got time. In other conversations, Elwood stated on many occasions to other farmers, his doctor, and perhaps others that (in substance) he and his sister were partners in their farm enterprise "50 - 50," or "all the way through," or that they "owned the whole thing together," or were partners in everything. Some of these statements were made on various occasions to the same individuals. One was made so as to include that real estate. Nora, at times, made similar statements in her brother's presence. On one occasion Elwood told his nephew that he thought Nora should "come up" with her partnership half of the work (apparently meaning farm labor), and the nephew replied

that she was doing more than her half. Elwood and Nora discussed and decided together on livestock deals and the general operation of the farm. The statements relating to the partnership extended back at least as far as the 1940s and they continued to within a very few weeks of Elwood's death. Nora and Elwood told their banker that everything they had was a "joint venture." All entries into the safety deposit box, except one in 1949, were made by Nora. On one occasion Elwood stated that he would have to consult Nora before buying some cattle because she was his partner; he later bought them.

A joint bank account was opened in the names of Elwood and Nora Grissum in June, 1967, with a deposit of \$13, 128. 68, proceeds of the farm operations. Prior to that time the account had been kept in the name of Elwood Grissum. The joint account was continued until Elwood's death with all farm money deposited in it. When money was borrowed Elwood signed the notes alone. The farm insurance was applied for and issued in both names... from at least as early as 1957 and presumably before. It was stipulated that Elwood filed individual federal income tax returns... from "about" 1966 through 1969.... We are not advised what was done before that. For the year 1970, four returns were filed: an individual return for Elwood to the time of his death, a partnership return, a fiduciary return, and an individual return for Nora. The point of all this is that Elwood did, for some years prior to his death, report farm income on individual returns. We shall discuss this later.... [L]and was acquired in the name of Elwood in 1937 (presumably from his father and mother), in 1942, 1946, 1947, 1948, and 1952.... It is obvious that most of these tracts were purchases

made to increase the farming operation. The occupancy and operation of the farm or farms started in the depression in the 1930s, with one eighty - acre tract; at Elwood's death the [property value] had increased to approximately \$ 286,000. During all this period Nora had lived and worked on the farm. It is certainly true that both Elwood and Nora derived all their living expenses from the operation of the farm, for no other source of income is indicated. It also seems obvious that neither drew down any profits, as such, but that all excess went into the expansion of the farm operation and (some) beginning in January, 1969, into joint certificates of deposit. . . .

[A] partnership agreement may be implied from conduct and circumstances; . . . evidence of a sharing of profits constitutes prima facie evidence of the existence of a partnership and in the absence of other evidence becomes conclusive; . . . the parties are not required to know all of the legal incidents of a partnership. . . ; a partnership consists of a factual relationship between two or more persons who conduct a business enterprise together. We note further that when the essentials of such an agreement have been established, expressly or by implication, it is not to be avoided because of uncertainty or indefiniteness as to minor details and, in the absence of express agreement, it will be presumed that profits are to be shared equally. . . .

The element of profits and a sharing of profits is essential. It is important to note here that although the operation was prosperous, neither party ever drew down any profits, but put all money over and above farm expenses and living expenses into additional equipment and land, until in 1967 and 1969 when they established