



法律英语读物

English Readings in Legal Studies

国际
司法
协助

International Legal Assistance

皓明/编



法律出版社

PUBLISHING HOUSE OF LAW

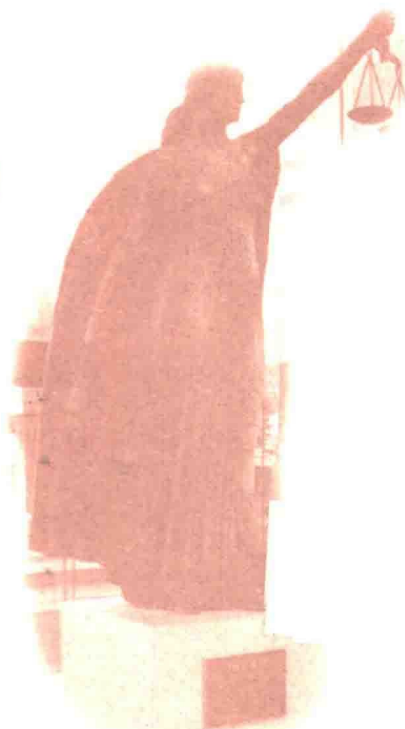
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出版者的话

1755年,在英语——作为一种文字的发展史上,是具有里程碑意义的。这一年,英国的第一部《英语大辞典》问世。她的作者便是英国著名的作家和词典编纂学家撒缪尔·约翰逊(Samuel Johnson)。他在这部大辞典的序言里写下了这样一句话:The great pest of speech is frequency of translation. . . . this is the most mischievous and comprehensive innovation (语言最大的祸害就是频繁的翻译,这是一种最有害且最综合意义上的“再炮制”。)

“炮制”常常会差强人意,甚至于以讹传讹,而法学译作更在一定意义上是件“不可为而为之”的作品。英美法的一些概念、术语实难在汉语中有完美的匹配。于是我们推崇读原文。

原文闪烁着作品本身质朴而灵动的光芒,而地道的语言传送着的是英语中“法言法语”独特的个性化色彩。

少有机会读到英美法学原篇的中国学子们,将会从这套丛书中看到真正的英文法学篇章是个什么样子。这里既有严谨、典型的英美法学学术篇章,也有法庭上唇枪舌剑的审判实录,更有闻名于世的英美法“案例学习”。

这套辑录自90年代以来的“原汁原味”的法学英语读物,我们相信她带给您的会是这样的阅读体验——语言一百分,思想不打折。

1997年12月

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1. Convention on the service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

《民商事司法文书和司法外文书国外送达公约》(简称 1965 年海牙送达公约)是在 1965 年海牙国际私法会议第十次会议上通过的。该公约在国际上首次确定通过各缔约国的中央机关开展司法协助的途径,并且,公约在保证受送达人行使辩护权及为缺席判决提供补救方法等方面的规定也有其显著特点。所以,该公约被认为是文书送达方面规定较为完备的一个公约,参加国较多,对于缔约国间迅速有效地送达司法文书和司法外文书起到了很大作用。我国于 1991 年 1 月正式加入该公约,是我国目前在文书送达方面进行司法协助的主要依据。

鉴于该公约的重要性,遂节选其主要部分作一介绍。通过阅读,一方面可以了解在司法文书送达方面的国际上普遍接受的规定和原则,又可以了解和熟悉公约语言。

CHAPTER I — JUDICIAL DOCUMENTS¹

Article 1

Each contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States and to proceed in conformity with the provisions of ar-

ticles 3 to 6.

Each State shall organise the Central Authority in conformity with its own law.²

Article 2

The authority or judicial officer competent³ under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention,⁴ without any requirement of legalisation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.⁵

Article 3

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 4

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either—

a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.⁶

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of

the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 5

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.⁷

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned⁸ by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 6

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 7

Each contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 8

Each contracting State shall be free, in addition, to use consular channels⁹ to forward documents, for the purpose of service, to those authorities of another contracting State which are designated by the latter for this purpose.

Each contracting State may, if exceptional circumstances so require, use diplomatic channels¹⁰ for the same purpose.

Article 9

Provided the State of destination does not object, the present Convention shall not interfere with—

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 10

The present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding articles and, in particular, direct communication between their respective authorities.

Article 11

The service of judicial documents coming from a contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by—

a) the employment of a judicial officer or of a person competent

under the law of the State of destination,

- b) the use of a particular method of service.

Article 12

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.¹¹

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 13

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 14

Where a writ of summons¹² or an equivalent document¹³ had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that—

- a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

- b) the document was actually delivered to the defendant or to his residence¹⁴ by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article,

may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled—

a) the document was transmitted by one of the methods provided for in this Convention.

b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document.

c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities¹⁵ of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 15

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment¹⁶ if the following conditions are fulfilled—

a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

b) the defendant has disclosed a *prima facie* defence to the action on the merits.¹⁷

An application for relief¹⁸ may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This article shall not apply to judgments concerning status or capacity of persons.¹⁹

Notes

- 1 Judicial document 司法文书
- 2 Each state shall organise the Central Authority in conformity with its own law 缔约国的中央机关应按照本国法律组成。
- 3 the authority or Judicial officer competent 主管机关或司法官员
- 4 the model annexed to the convention 公约附件格式
- 5 in duplicate 一式两份
- 6 be served by delivery to an addressee who accepts it voluntarily (文书)送达给自愿接收的收件人
- 7 certificate of service (记录送达执行情况)送达证明书
- 8 countersign 连署;会签
- 9 consular channels 领事途径(送达)
- 10 diplomatic channels 外交途径(送达)
- 11 infringe sovereignty or security 有损主权和安全
- 12 a writ of summons 传票
- 13 equivalent document 类似文件
- 14 residence 住所、居所
- 15 competent authority 主管机关
- 16 the Judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the Judgment 法官有权恢复被告因上诉期满而丧失的上诉权
- 17 the defendant has disclosed a prima facie defence to the action on the merits 被告的主张在表面上并不是毫无根据的
- 18 an application for relief 恢复上诉权的申请
- 19 status or capacity of persons 人的身份或能力

2. The Comparision of the Enforcement of Asian Judgments in American Courts and the Enforcement of American Judgments in Asian Courts

本文借助案例,从承认与执行外国判决的各个方面,全面地分析、评述了美国法院执行亚洲法院民、商事判决的法律规定及实践,并对亚洲几个国家和地区有关执行外国法院判决的法律及实践作了介绍及评述。因本文篇幅较长,遂节选并分成几部分介绍给大家。第一部分:美国法院执行亚洲法院判决的情况;第二部分:美国判决在日本法院的执行情况;第三部分:美国判决在香港法院的执行情况。

一、Enforcement of Asian Judgments in American Courts

Unlike some countries, such as China which has a bilateral treaty with France, the United States has no formal treaties or agreements with any other country for the enforcement of foreign judgments in American courts. Notwithstanding the lack of such formal agreements, American courts-both national and state-have regularly enforced the judgments of foreign courts for well over 100 years. In *HILTON V GUYOT*, the United States Supreme Court set forth the

basic policy regarding enforcement of foreign judgments. The Court said:

We are satisfied that, when there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation¹ or voluntary appearance of the defendant², and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh³, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.⁴

While all Justices agreed with the above statement, the majority added an additional requirement for the enforcement of a foreign country judgment-reciprocity or mutuality⁵. In that case, the Court declined to enforce a French judgment because French courts had refused to recognize American judgments. Thus the position of the American Supreme Court coincides with the law of most Asian countries, including China and Japan-a court of one country will enforce the judgments of another country only if that country would recognize and enforce its judgments.

American courts regularly enforce judgments from other countries, both common law countries such as Britain, and civil law countries such as Germany and Japan. There are also several reported American court decisions enforcing judgments rendered in Hong Kong in favor of Hong Kong parties and against American parties. Although

there seems to be a belief in China that American courts do not or will not enforce Chinese court judgments, there is simply no evidence this is true. Extensive research has failed to reveal a single recent published decision where an American court has been presented with a PRC judgment for enforcement. Indeed, in *HUGHES DRILLING FLUIDESV. M/V LUO FU SHAN*, an American Federal Court showed its respect for the courts of the Peoples' Republic of China by requiring an American company to resolve its dispute with the Guangzhou Maritime Transport Bureau of China in China in accordance with its choice of forum agreement. The federal district court was satisfied that Chinese courts would honor and apply any contractual choice of law⁶ provisions between litigants. This decision can be interpreted as evidence that American courts are willing to recognize the competence and fairness of PRC courts and, therefore, would, if so requested, recognize and enforce a judgment rendered by a Chinese Peoples' Court, provided that Chinese court would honor and enforce American court judgments on a reciprocal bases.⁷

A. Choice of Law

As does, for example, Malaysia, and Australia the United States has a dual system of courts⁸, national or federal courts and state courts. Although there is no requirement to do so, most enforcement cases are brought in Federal Courts and require a choice between federal and state law in measuring the effect of a foreign judgment⁹ in the federal court. Some courts, noting that relations between the United States and foreign sovereigns are committed to the federal government under the Constitution, have concluded that state law should not be used in determining the effect of a foreign judgment. Several well respected commentators have also questioned the use of state law in determining the preclusive effect of a foreign judgment. However, the majority of lower federal court cases clearly hold that federal courts