全国高等学校法学专业核心课程案例教学用书

商法判例解读

范 健 主编

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内容提要

本书是全国高等学校法学专业14门核心课程之一——“商法”的案例教学用书，也是教育部面向21世纪课程教材——《商法(第二版)》的配套教材。全书与《商法(第二版)》体例相同，选择了商主体、商事人格权、公司法、破产法、票据法、证券法、保险法、海商法等方面的典型案例进行理论评析。每个案例评析由当事人、基本事实、一审裁判要旨、二审诉辩要旨、本判例的背景及其意义、本判例涉及的相关法律制度、问题及其分析、相关法律条文等内容组成。判例评析后基本上都附有法院判决书原文。本书在陈述案情的基础上，注重诉辩双方的主要观点介绍和对案例的法理分析。本书在编写方法上做出了有别于以往同类教材的尝试，力求使学生在通过案例学习理论的过程中，更加增强对法院商事审判的直观了解。本书可作为法学和经济学、商学专业学生学习商法的案例教材。

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Contents in Brief

This book is a necessary accessory of *Business Law*— a key teaching material for law course, issued by the Education Department. It has the same stylistic and layout as the book *Business Law*. The author has chosen some typical case examples for further theoretical comments, such as business subject, businessman's personality rights, company law, bankruptcy law, receipt law, negotiable securities law, insurance law, sea and business law and so forth. Each case consists of the client, basic facts, gist of the first judgment and that of the second round defend, the background and significance of the legal precedent, legal systems, problems and corresponding analysis, and legal provisions concerned. Original court verdicts are also available after the comments of the legal precedents. In addition to the statement of the case, this book focuses on the introduction of the main ideas of the accuser and defender and legal analysis of the case. Another feature of the text is the difference in compiling from other similar teaching materials. All this attempts to help students have a better and more intuitive understanding of the business trial in the court through case example study. In short, this book provides a textbook of case problem study in business law for both law major and business major students.

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序　言

一

判例乃英美法系国家的最重要的法律渊源，但在大陆法系国家，判例则历来不被视为法律渊源。不过，在大陆法系国家，现在也已逐步重视判例的作用。比如，在法国，侵权法中的无过错责任就是法院在对《法国民法典》第1384条进行解释的基础上通过大量的判例形成的。在德国，最高法院的判决具有先例的约束力。人们已经普遍承认司法行为既是一种智慧行为，也是一种意志行为。根据《德国法院组织法》第137条之规定，法官实际上负有不断发展法律的义务。而如果不能变更法律就谈不上发展法律，由此产生的结果是法典或法规不断受到司法判决的扩充或改变，使司法判决经常创制出新的法律规则。现在，人们研讨法律问题时，司法判决往往起着一种十分重要的作用，而且常常是决定性的作用。在日本，最高法院出版的“判例集”具有一定的约束力。实际上，在现代日本民法中，许多法律制度都是由判例法发展起来的。让与担保便是由判例法发展而来的典型制度。在日本的各种判例集中，列举参照的法律条文时应当标明该判决所依照的条文。但是，在让与担保的判决中却往往记载：“本判决，作为问题并非直接适用民法第369条，是就‘让与担保’作出的判决。”实际上，“有关让与担保的法领域，正是民法典施行以来一百年的这段时期，由判例而形成的。”在商法适用顺位上，日本学者还普遍认为商事判例法应在商事习惯法与民法之前而适用。在西班牙、哥伦比亚、瑞士等国，最高法院在宪法问题上的判决具有约束力。由此可见，至少可以保守地说，即使是在大陆法系国家，判例也在一定范围或一定程度上具有法律约束力。

那么，是否就可以认为大陆法系国家也存在着判例法呢？对此，有人认为，普通法与大陆法都有不同程度的遵循先例的原则，毕竟法律适用要求统一性和确定性，这就是说对类似案件应有类似处理方法，而这也正是法治社会的共同信念。据此，似乎大陆法系国家也早已承认了判例的法律渊源效力了。然而，我们必须注意到，如果说判例在大陆法系国家确实具有一定的一般法律约束力的话，其产生一般法律约束力的范围是受到严格限定的，只是“在一定程度上”产生效力而已。由于种种原因，在法国承认了行政法律判例在法律创制上的效力，在德国宪法判例也被赋予法律效力，但事实上，不管是哪个大陆法系国家，并未在私法领域明确赋予判例以法律效力。

二

基于私法范畴的商法而产生的商事裁判，当然也不可能具备一般法律约束力。那么，又该如何理解大陆法系国家面对难以预见的市场经济发展形式而采取的立法与司法上的适应性措施呢？我们知道，在每一个现存的法律体系中法律的稳定性和适应性都是一对永恒的、不能解决的冲突倾向。为了解决二者的协调关系，大陆法系与英美法系势必要在一定程度上相互吸收、相互借鉴，使其在保持并进一步发挥各自优点的同时，能够较好地克服各自所固有的缺陷。

于是，《瑞士民法典》公开地承认了法官的造法功能。在德国，《德国民法典》债法的修订中，判例的成果起着相当的作用，诸如缔约过失责任、积极的侵害债权与一般人格权等都是为1896年《德国民法典》所未规定而由司法判例确立起来的。但是，尽管如此，严格地说，大陆法系国家并未在私法领域明确承认判例的法律效力。毕竟，判例法是一种法律渊源，而不是一种适用法律的方法。判例法的精神实质是要求法院将判例作为处理今后相同或相似案件的依据，体现的是其规范效力，在这一层面上它与成文法或制定法具有相同的意义。因此，大陆法系国家私法领域的判例，严格来说，并不是一种法律，而是一种适用法律的方法和制度。

具体到商法领域来说，商事审判中，由于商法所固有的发展性与变动性，成文商事立法更加不可能完全满足其完全调整商事交易实践活动的需要，因而势必需要借助于灵活的法律适用方法。因此，长期以来受到严格遵从的绝对严格规则主义开始松动，法官借助于法典中普遍存在的一般条款，频繁进行创造性司法。而这些创造性司法的结果——商事裁判，客观上也确实对其后发生的相同或相似案件，产生了明显的指导作用。从某种意义上讲，这种能够对其后发生的相同或相似案件产生事实上的法律适用指导的商事裁判，在一定程度上具备了判例的效力，只不过不能直接援引而已。从法律适用的本质上说，法律渊源只不过是法律的外壳，关键在于法官适用法律时必须遵从法律的精神，根据案件事实，依照法律规定或一般法律条款作出合理的裁判。基于此，即使是在大陆法系国家，由于商事活动的发展性与变动性而导致的商法明显的滞后性与不适应性，根据商法的一般规定而作出的创造性商事裁判，必然都会对审理其后发生的同类案件的法官产生一定的影响，从而使其产生能够对其后发生的同类案件形成一定的“约束力”的“法律效力”。当然，这里我们特意加上引号的“约束力”与“法律效力”，与判例法上相同词汇的含义并不相同。其影响力的发生，并非制度性的，而是法官在无法可依的情况下，自觉或不得已地借鉴其法律适用方法的结果。此外，这些可能对法官产生“约束力”的商事裁判，也必然会对商事交易当事人产生影响，使其成为事实上指导商事交易当事人的行为规则。从理论上讲，这

种现象的出现，一定意义上可归因于理性主义哲学思想的破灭与经验主义思潮所产生的广泛影响。这一效力的产生，正如霍姆斯所说："毫不夸张地说，对法院实际上将做什么的预测就是我所说的法律。"或许，这种说法有些令人难以接受，那么日本学者四宫和夫的表述则更能让人接受。四宫和夫认为，裁判之中也潜藏着适用于同类事件的一般性规范。尽管这种规范并非理所当然地约束法官的"法律"，但为求得法令统一解释，将此任务交给最高法院，规定最高法院的审判具备某种形式者，对以后的审判具有法律约束力。于是，判例这一特殊的法律渊源（不同的法院也会有些不同，在这一意义上它不像其他法源那样强而有力）得以成立。另外，如果同一内容的裁判反复进行，特别是在最高法院进行时，审判结果甚至会左右国民的行为方式，或成为习惯。这样，基于经验规则，商事裁判客观上产生了法律效力。

三

对于渊源于中世纪商人习惯法的商法而言，急剧地发展变化着的商事交易实践，使其与成文商法之间的距离越发拉大，从而使商法显示出更大的不适应性。而限于成文法修订上的繁琐性，商法又不可能"与时俱进"地得到适时的修订，从而商法在法律适用上矛盾明显大于其他法律部门。譬如，在公司法与证券法方面，由于我国市场经济体制尚处于建设与完善阶段，除了许多既有制度极不成熟外，更有大量法律空白使得大量商事交易活动处于无法可依的状态。因此，我国许多法院的法官就在不作出任何解释的情况下，一再拒绝受理或者驳回该类诉讼请求。但是，这并非一种合适的处理问题的方式，毕竟法院基于其最后的裁判者的角色是无权以缺乏法律规定为由而拒绝受理或驳回相关案件请求的。基于此，赋予商事裁判以判例的效力；似乎显得更加重要。然而，即使是在商法领域，不应实行判例制度的原因仍然存在，或者说至少在现行法律制度下，真正意义上的判例制度并不存在，因此商事裁判仍然不能具备一般约束力。

但是，面对大量无法可依的商事交易活动，既然法律不能置之不问，并且，由于缺乏法律的明确规定，即使商事交易中发生的纠纷得到了受理，也往往会造成相同或相似的案件的审判结果大相径庭，而这种法律待遇上的落差，则是和法律的公平、平等的价值相违背的。此外，对于商事交易中频繁发生相似案件在其第二次发生时又重新作出解释本身就是一种有限的司法资源的巨大浪费。更为严重的是，第二次进行的解释，还往往改变甚至严重歪曲第一次进行的解释。这就使得付出巨大司法成本的同时，却未能得到相应的司法收益。可以说，对于像我国这样存在着严重的法律不确定性并正在走向现代法制的国家来说，判例对经验的积累作用确实是不可低估的。因此，如果我们能够赋予商事裁判以明确的示范性的指导效力，使其后发生的同类案件不得背离该商事裁判的内容，这在现

行法律制度下，对于频繁发生而又日新月异的商事交易活动来说，实属一种合适的折中的解决眼前急迫问题的现实方案。这种商事裁判的法律效力，我们可以称之为商事裁判的示范效力。当然，对于能够产生这种示范效力的商事裁判，应当在制度上作出明确而严格的限制，必须确保每一个被赋予示范效力的商事裁判都是合理而合法的。事实上，我国已有地方法院在进行类似的试验，只不过没有仅仅限定在商事领域而已。

四

在大陆法系国家的法学教学中，法学理论历来处于极其重要的地位。然而，法学乃实践性极强的学科，游离于司法实践的法学理论教学往往难以起到预期的效果，因而诸如案例教学、判解研究等实践性教学方法与研究方法得到了迅速发展，从而使传统的法学教学与研究方法实现了历史性转轨。事实上，司法判例正是理论与实践的最佳结合点。可以说，判例是活活生生的法律，是事实与法律条文相结合产生的法律，其本身凝聚了法官等法律适用者对法律的理解与智慧，具有非常高的理论学习与实践认知价值。一个判例的形成，不仅包含了法官等法律工作者对案件事实的认识，而且也包含了当事人等一般法律主体对案件事实的认识，还包含了相关主体对法律本身的理解，即不同的人从不同的角度对同一法律条文所作的理解。关于案件事实认知与对相关法律的理解相结合，就形成了一种对法律适用的选择。因此，了解判例，不仅了解了法律规则及其应用，还了解了应用法律规则的方法。判例本身包含了对法律制度及法学理论的应用，但更多的是理论探索的结果，对于立法明显滞后于实践的商事判例而言尤其如此。判例形成的过程，往往是法官基于案件事实与法律制度进行创造性司法的过程。因此，对判例进行的学理分析，便是展示法律理论逻辑的过程，是深化法律原则认知的一种有效方法，它可以告诉人们实践法律的依据和认识与应用法律的过程。这样，分析解读判例就成为一种从实例中解剖法律并检验与提升法理水平的有效方式。

商法是实践性最强的法律部门。在反复实践的商行为基础上形成了交易习惯，进而又在对交易习惯确认的基础上形成了商事判例，最终通过商事判例推动了商事立法的形成与发展。基于此，对商事判例的研读，不仅有利于深入认知商法的特性，还有助于认识商法的创造过程，因而具有极强的理论与实践价值。

本书以判例为起点，通过对案件事实、当事人起诉理由与答辩意见、法院判决要旨叙述，分析本案例的理论与实践意义、法理规则、判决特点以及适用法规之选择，重点突出理论分析，以案论法，在写作上有一定的理论深度，这也是本书区别于一般案例教材的特点。在中国，案例教材建设本属探索性工作，我们有意在此方面作积极探索，希望能藉此推动我国商法应用教材的建设。

本书是与教育部面向21世纪课程教材《商法(第二版)》相配套的教材,体例也以商法教学大纲为主线。本书的主要理论观点基本上都源自《商法(第二版)》教材及其教学参考书《商法论》,且所选案例均为法院实际案例。为了使读者更好地了解法院判决的原貌,基本上在每个案例评析后,附上了该案例判决书原文(三、四两个案例未附判决书原文)。已公开出版的判决书,保留真实姓名,未公开出版的判决书,隐去了真实姓名。本书编写人员基本上为长期从事商法理论研究的高校专业教师和长期从事商法审判实务工作的法官。

本书的编写得到了高等教育出版社的积极指导和帮助,也得到了法院实际部门在提供案例等方面的无私帮助,在此一并表示衷心的感谢!

范　健

2003年9月于南京

Preamble

1

Cases, the most important source of law in the Common Law countries, was traditionally not regarded as a source of law in the Civil Law countries. Nonetheless, the function of cases are gaining more and more recognition in the Civil Law countries, *e. g.* strict liability in the French tort law is formed on the basis of large amount of cases explaining Article 1384 of the Civil Code of France. In Germany, cases tried by the Supreme Court of Germany are legally binding precedence. Judicial actions have been generally recognized as both intellectual and willful. Judges, pursuant to Article 137 of Germany's Organic Law of Courts, are obligated to develop laws by themselves. Laws cannot be developed if they cannot be changed. The development of law pushed forward by courts leads to expansion or changes of codes and laws, creating new legal norms through judgments, which has become increasingly important, sometimes decisive, for judicial decisions and legal researches. In Japan, cases in the Case Collections issued by the Japanese Supreme Court have a certain degree of binding force. In fact, in contemporary Japanese civil law, many legal institutions, such as concessive guarantee, have evolved themselves out of case law. In various Case Collections, articles of laws must be quoted when referenced. On the contrary, judgments on concessive guarantee cases normally opine that"this is a'concessive guarantee'case and is not directly subject to Article 369 of the Civil Code", and "the legal institution of concessive guarantee has based itself on cases tried in the past century since the emergence of the Civil Code one hundred years ago". Japanese writers generally believe that commercial case law should be applied prior to the commercial customary law and the Civil Code. In countries such as Spain, Columbia and Switzerland, judgments made by supreme courts are binding on following constitutional cases. Therefore a conservative conclusion can be made that cases have some sort of binding force even in Civil Law countries.

Does that mean that there exist case laws in the Civil Law states? Some people purport that both the Civil Law and the Common Law states share cer-

tain degree of obedience to precedence since application of law needs to be unified and certain, or put it in another word, same kind of cases should be tried in the same way, which is a common sense of the rule of law societies. From this perspective, it seems that the Civil Law countries have long adopted case law. But attention should be made on the fact that precedence only has binding force in a limited field. For various reasons, France has recognized the legal effect of administrative law cases as prescription of law while constitutional law cases have legally binding force in Germany. But none of the Civil Law countries has rendered cases legally binding force in the private law sector.

2

Commercial adjudications, within the sphere of private law, do not facilitate a legally binding precedence. Then what will the Civil Law states do to adapt their legislative and judicial sectors to the unpredictable changes in the market? We know that in every contemporary legal system, the stability and adaptability of law are constantly conflicting. In order to moderate this conflict, Common Law and Civil Law countries tend to learn from each other to tap their advantages while overcoming the disadvantages.

As a result, the legislative function of judges is openly admitted in the Swiss Civil Code. In Germany, cases became an important source of the revised contractual right law of its civil code. For example, judicial cases have contributed in forming the legal institutions such as liability of negligence in contract conclusion, active infringement of contractual right and general personality right that have not been articulated by the 1896 BGB. Anyway, the civil law countries have never admitted the precedence of private law cases since case law is only a source of law, instead of a means of law application. Case law naturally requires courts to rule similar cases in accordance with the precedence which have some binding force similar to statute law. Therefore, private law cases in the Civil Law countries are, in the restrictive sense, not laws but a measure and institution to apply laws.

In commercial adjudications, enacted commercial laws cannot fully and elasticallyadapt themselves to meet the need of commercial development due to the commercial law's inherent nature of flexibility. This makes other law applications possible and puts the strict formalism that has been obeyed so far under challenging. Judges utilize the general principles and articles of the civil code to

forge a creative judiciary, which results in commercial adjudications offering guidance to future cases. To some extent, these adjudications are somewhat binding precedence that cannot be directly quoted. From the perspective of the nature of law application, sources of law are only the appearance while the principles and norms of law are really binding upon judges. Therefore, the creative commercial adjudications based on general norms of the Civil Law countries, inevitably influence the judges in deciding following cases and establish sort of "legally binding force", because enacted commercial laws cannot be so flexible to adapt themselves to the changing commercial regime. Here quotation marks are added because they are still different from the legally binding case law and their impact is not institutional. These adjudications may also cast influence upon parties to commercial transactions who may choose to abide by the rules established in the adjudications. The emergence of these creative adjudications may be traced to the decay of the rationalism philosophy and the general acceptance of empiricism. For instance, Justice Holmes once noted that "It is not exaggerating to say that law is the expectation for what the court will actually do". If Holmes' statement is not so acceptable, a famous Japanese jurist has placed a more pleasant argument, saying that general norms also exist in individual adjudications. Though these norms may not appear to be binding, once the Supreme Court recognizes these norms with a unifying effort, they may well become binding precedence. Henceforth, cases are recognized as a special source of law. Apart from that, repeated decisions on similar cases, especially the ones presented to the Supreme Court, will probably influence the behaviors of nationals and may even help to form customs. As a result, commercial adjudications based on empirical rules will become objectively binding norms.

3

Originated from the customary merchants' law in the Medieval times, commercial law has lengthened its distance with the enacted commercial laws due to its ever-changing nature. Enacted laws are not so easy to be revised, thus making commercial law more complex and sometimes confusing than other legal fields. In contemporary China, the market economy has not fully developed itself with many institutions such as corporate law and security law fairly premature, leaving many commercial transactions unfettered by law. Meanwhile, courts in China are not supposed to dismiss these cases on the ground that

there are no applicable rules, but in fact they do it constantly without giving any explanations. This shall not be deemed as a proper way to solve legal disputes, making it somehow urgent to render commercial adjudications legally binding force. But negative reasons also exist. China still does not have the institution of case law and the condition may not be ripe enough.

Under current situation, many similar cases have seen quite different results due to the lack of unified rules and this has made the judiciary less desirable in terms of justice and fairness. Repeated explanation on similar cases are also squandering social resources. To make it worse, later explanations may distort the correct ones. In fact, case law ought to have a undeniable importance in formatting legal fabric, especially in such developing countries as China which is still characterized by uncertainty in many legal fields. If a model or guiding power is to be imposed on commercial adjudications, so that similar cases will not be decided differently, this should be deemed as a proper compromise under current situation to solve the conflict between swift commercial activities and static laws. The legal force of these commercial adjudications may be labeled as a model force of commercial adjudications, which is also subject to limitations to ensure that every single ruling is reasonable and lawful. In fact, many local courts in China have already carried out such kind of reforms, which are not necessarily restricted in the field of commercial law.

4

Legal theories have always been a very important aspect of legal education in the Civil Law countries. But no one can deny that legal science is also aimed at solving concrete problems and legal theories deviating from legal practices may not have fruitful effects. Therefore practical teaching and research methods such as case study have been adopted these years to reform the traditional way of legal education. In fact, case study is the best intersection of theory and practice. Cases, combining facts and laws, as well as the legal understanding of judges, parties and counsels, are in deed lively laws and are highly valuable for research and study. Choices are made for law application with combined perception of facts and laws. Therefore case study may help to understand not only the laws and their application, but also the means of application. The emergence of a case is by and large a process of creative judiciary with judges digesting both the law and the facts. Thus the analysis on cases is the exposure of logics