浙江大學光華法學院

人格權法

專題講座(三):比較法與民法發展

——比較法的方法論與適用——

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一、緒說

- (一)比較法的重要:問題提出
- 1、 侵權法第6條的立法原則及解釋適用
- 2、合同法第51條的爭議
- 3、 合同法第 107 條的特色
- 二、比較法、萬裡長城與民法發展
- (一)比較法與萬裡長城
- (二)比較法與大陸民法發展
- (三)比較法學在大陸的變遷
- (四)由繁榮、沒落到復興

三、比較法方法論

- (一)比較法概念
- (二)比較法是一種方法

- (三)比較法之目的
- (四)比較法的方法
- (五) 民法發展簡史
- 四、比較法的應用
- (一)比較法的實踐
- 1、步驟
- 2、方法
- (二)研究課題
- 1、 侵權法第6條在比較法上的分析
 - (1) 規範模式上的特色
 - (2) 解釋適用
 - ① 人格權益: Wrongful Birth, Wrongful Life
 - ② 財產權益:遺囑無效、電纜案件、商品自傷、侵害他人債權
- 2、 合同法第 107 條在比較法上的分析
 - (1) 比較法基礎:規範特色
 - (2) 解釋適用:
 - ① 甲以 A 物與乙的 B 物互易。
 - 甲的A物在交付前非因甲的過錯滅失時,乙得否向甲請求返還 其已交付的B物?
 - P的A物被丙毀滅,而丙賠以C物時,乙得否向甲請求交付B 物?

(三) 要約拘束力: 要約撤銷

- 1、題目選定
 - (1) 問題的重要性
 - (2) 以案例(事實情況, factual situation) 作為出發點
- 2、大陸法與英美法:規範模式的比較
 - (1) 各國報導
 - ① 德國法
 - 2 法國法
 - ③ 英國法
 - ④ 美國法
 - (2) 比較分析
 - ① 異同比較
 - ② 分析說明
 - ③ 比較目的的運用
 - A. 認識
 - B. 立法
 - C. 司法實務
 - D. 法律整合統一
- 3、私法(契約法)的整合統一
 - (1) 契約法整合統一的發展
 - (2) CISG
 - (3) UNIDROIT PICC

- (4) PECL
- (5) 綜合分析
- 4、大陸合同法的制定及解釋適用
 - (1) 規範模式擇探
 - (2) 合同法的規定
 - ① 第18、19條
 - ② 比較法基礎
 - ③ 解釋適用

五、比較法與法律教育

- (一)法律教育的比較研究
- (二)比較法的教學研究

六、結論

- 1、比較法與民法的發展
- 2、 培養法律人的比較思維能力(comparative reasoning) 及開闊的視野
- 3、 超越萬裡長城,走向世界
- 4、經由羅馬法超越羅馬法(Durch römisches Recht über römisches Recht, 耶林 名言,羅馬法精神)

Novalis : Auf Vergleichen läßt sich wohl alles Erkennen, Wissen zurückführen.

(諾瓦里斯:一切認識、知識均可淵源于比較。)

Samuel Johnson : A generous and elevated mind is distinguished by nothing more certainly than an eminent degree of curiosity ; nor is that curiosity ever more agreeably or usefully employed , than in examining the laws and customs of foreign nations.

(塞繆爾·約翰遜:使豁達而高山心靈卓爾不凡者,定莫過於優雅的好奇心,而 這種好奇心最愉悅且有益運用著,又莫過於觀察外國的法律與習俗。)

壹、緒說

一、問題提出

- (一) 什麼是比較法,具有何種目的?
- (二) 比較法對大陸民法發展作用?
 - 1、立法
 - (1) 民法通則
 - (2) 合同法
 - (3) 物權法
 - (4) 侵權法
 - 2、解釋適用
 - (1) 無權處分
 - (2) 物權行為
 - 3、合同法哪幾個條文最具比較法上的特色?
 - 4、物權法中哪個物權最具中國特色?
 - 5、侵權法一般條款的規範模式
 - (1) 第6條與比較法
 - (2) 解釋適用
 - ① 有何種「等」人格權益?
 - ② 所謂「等」財產權益,是否包括債券?
 - 6、第107條的規範特色及解釋適用

貳、比較法、萬里長城與民法發展

一、比較法與中國萬里長城(翻譯見附錄一 P18)

1 · Savigny 的名言: In 1831 Savigny wrote to his English translator of his pain that England in all other branches of knowledge actively communicating with the rest of the world, should, in jurisprudence alone have remained divided from the rest of the world, as if by a **Chinese wall**.(引自-T.J.Bingham (Lord Justice of the Court of Appeal, England), Changing Perspective of English Law, ICLQ, 41(1992), 514)

2. 耶林,「羅馬法的精神」(第8版), 1955年, 页8-9。

Jhering, Geist des Römischen Rechts (8.Aufl. 1955) 8-9: The question of the reception of foreign legal institutions is not a question of nationality, but simply one of expediency, of need. No one will fetch a thing from abroad when he has as good or better at home; but only the fool will reject the bark of the chochona because it did not grow in his vegetable garden. 3. Markesinis 教授的預言: I predict that China, currently thirsting for western legal ideas as much as western technology will reach one day a similar stage after it has absorbed in its own way(and not been forced to do so under outside pressures) foreign ideas and assimilated them into its own ancient and modern culture.(引自 Markesinis, Judge as Comparatist, Tulane Law Review, vol.81,178, 2005)

三、大陸民法的發展

- (一) 比較法的基礎:中國特色
- (二) 民法立法與比較法(見下頁)



1911:大清民律:繼受歐陸法(Civil Law),尤其是德國民法

1930:民國民法:繼受歐陸法,尤其是德國民法



2009 (2010): 侵權責任法





(四) 高鴻鈞、賀衛方在比較法叢書總序的序言

"初民社會,各族群獨處一隅,幾與外界隔絕,孤立中遂滋生某種自信,或稱訊"上帝 選民"、"天之驕子",或自謂"吾道獨真"、"惟我德馨"。後偶與外族接觸,亦對"非 我族類",多投以白眼,甚至極盡嘲諷之能事,必欲殲滅而後快。各族群習俗、法律各異。 史存多妻多夫之族,前者"男人奢侈"之放縱,令後者匪夷所思,後者"女人放蕩"之縱容, 使前者難以理解。同樣,禁忌食人之族對"自餐骨肉"之風深惡痛絕,而奉守食人之俗者, 對前者浪費"美味佳餚"之舉卻大惑不解。族群間鳥眼雞般互視野蠻,互斥異端,互為排斥, 互相攻訐。史卷中人類血淋淋之格鬥廝殺慘景,實多出於文化封閉,心理排外。

法,作為習俗結晶、文化符號之一種,其演進標誌人類族群進化之軌跡:由隔離而接觸, 由孤立而群合,由獨行而協作,由排斥而共存。然文化因族群而殊,習俗因族群而異。古希 臘貝殼放逐與古羅馬陪審制,中世紀神明裁判、共誓滌罪與近代罪行法定、無罪推定,伊斯 蘭法一夫多妻制、三休制與天主教會法一夫一妻制、禁止離婚制;印度寡婦殉葬與西方領主 初夜權,英美對抗制與歐陸糾問制,中國古代德主刑輔與伊斯蘭政教合一,美國三權分立與 英國議會主權......凡此種種,或帶有文化類型之印記,或標示族群生活之差異,或反映社會 演進之揚棄。差異由接觸而知,由比較而顯。各族法律,或貌合而神離,或形殊而神似。同 名異物,存名實之辨,異名同物,厘表裏之別。

比較法由是生焉。西有希臘先哲首開先河,中有戰國法家初執牛耳。縱觀古代,法之比 較雖發軔早而源遠流長,然仍顯稚嫩。其零散而缺乏系統,偶然而非恒常,實用而欠學理, 自發而無籌畫,難於自成一體、獨立一門。作為學術科目之比較法,實始於近代。西元十八 世紀,法國孟德斯鳩氏,少習法律,壯則棄官,潛心法學,遍曆奧、匈、德、荷諸國,考辨 諸族習俗,比較古今法律,於風物人情中尋法意,由地理環境中探精神。氏所撰《法意》一 書,為近代比較法學奠基之作。其人頗具傳奇色彩之閱歷,後世傳為佳話。追至西元十九世 紀,比較法學于英、美、德諸國蔚然成風,或設講席以授業,或創專刊以傳道,或建學會以 交流。西元一九零零年,首屆國際比較法大會開於巴黎,標誌比較法學進入國際化階段。然 此階段之比較法學,西方中心論、歐洲文化優越論之類種族主義、文化帝國主義,溢於言表。 西人比較之意旨,多為彰顯西方兩大法系之"文明"、"先進"。形襯非西方法律之"原始"、 "落後"。爾後,種族偏見漸弱,然至今跡猶存。西元二十世紀中葉以來,比較法學著述之 豐,前所未有;功用之廣,遍佈立法、司法;學理之通,惠及法學各科。

吾華夏民族,得益農桑,澤被禮義, "鬱鬱乎文哉"。凡器物技藝、典章制度無不優於 比鄰諸邦,其輝煌文明于古時卓樹一幟。然優而生驕,尊而滋傲,國人遂目比鄰為蠻貊,視 異族為夷狄,或夜郎自大、目空四海,或坐井觀天、管窺欹蠡測。以至有"地生羊"、"小 人國"之訛,有"番國佛朗機""其人好食小兒"之謬。其中不乏搜奇釣異,以娱視聽;道 聞途說,以炫機巧。考其究竟,實多因古時山隔水阻,交通滯塞,言語不通,鮮有接觸。故 直至盛唐,國人眼中之"西天"不過印度,亦不足為怪。其時西人眼中之中國,亦如煙如霧, 若迷若幻。

列強自西祖東,國門洞開,當務之急,救亡圖存。始辦洋務,復議變法,西學東漸, "夷 律"漢譯。五大臣赴洋考察,雖得歐法皮毛,猶存借鑒之誠;眾學子負笈旅歐,任中西文化 參差,亦竟比較之力。數十年間,西學如潮湧入,吾華夏幾千年法統,竟成一曲挽歌!法學 遂興,然非漢家故物;比較因起,實多舶來新憲。修訂法律館、法律學堂、各大學法學院以 及中國比較法學會,相繼成立。沈家本、伍廷芳、梁啟超諸前輩倡行修律立憲,為中國近代 比較法之先行者也。後有諸多學人相繼其業,其中影響較大者,當推吳經熊、王世傑、錢端 升、李祖蔭諸氏。王世傑與錢端升之《比較憲法》及李祖蔭之《比較民法》,影響一代學人, 至今仍飲譽海內。東吳法律學研究院之《中國法學雜誌》,雖未冠比較之名,實為比較法學 之論壇也,其影響遠及美國。此足見比較法學興隆之一斑。親歷其時之長輩學人,憶及當年 盛況,頗多感慨,其情其景,宛在眼前。

自西元二十世紀五十年代,千山萬水,不成障礙,黃種白種,弗為阻隔,孰料意識形態 之藩籬竟難以逾越。資社判分,互為仇讎;中西兩立,幾斷音訊。當此之際,比較法學之命 運自不待言。迨至七十年代重啟牖戶,恍如隔世;再度開眼,宛若夢醒。今是昨非,議補天 之計;劫餘思生,慮長治之道。民主法治之論,遂成治道共識;自由人權之題,遂為時尚話 語。法學園地,比較法學煥發新姿。廿年之間,碩果累累。"

叁、比較法方法論

一、比較法方法論

1·比較法的概念

- (1) Comparative Law
- (2) Rechtsvergleichung(法比較)
- (3) 比較法與外國法研究
- 2.比較法是一種方法
 - (1) 比較法性質的爭論

- (2) 比較法與法制史
- (3) 比較法與社會學(法社會學)
- (4) 比較法與經濟學: Mattei, Comparative Law and Economics(1998); 有沈宗靈教授的中譯本
- (5)比較法與法律傳統: Patrick Gleen, Legal Traditions of the World(3rd ed. 2007)
- 3·比較法的目的
 - (1) 知已知彼:謙卑與尊重
 - (2) 立法借鑒:規範模式的探尋
 - (3) 法律解釋:以比較法作為一種解釋方法:Zweigert,

Rechtsvergleichung als universale Interpretationsmethode,

RabelsZ15(1949/50)5

- (4) 法律整合與統一:歐州私法的趨同與「共同核心」(Common Core)
 的研究課題:(詳見伍) The Common Core Jus Commune of European
 Private Law Project.
- 4・比較法的方法
 - (1) 總體比較與個體比較
 - ① 總體比較:如歐陸法(Civil Law)與英美普通法(Common Law)
 - ② 個別比較:如 causa 與 consideration
 - (2) 立法比較與案例比較(Case Comparison)
 - (3) 法源
 - ① 由法條到判例學說

② Sacco 的 Legal Formats 理論(39 American Journal of Comparative

Law, 1 and 343, 1991)

- (4) 法系理論
- ① 法系理論的功用
- ② 分類標準與法系構成
 - a) 不同的法系分類
 - b) Zweigert/Kötz 的風格分類: Einführung in die Rechtsvergleichung

(3.Aufl.1996), S.62-306.

- (i) 歷史發展
- (ⅲ)特別的法律思維
- (ⅲ)特定的法律制度
- (iv)法源種類及解釋方法
- (v) 意識形態
- ③ 歐陸法(Civil Law)與英美普通法(Common Law)
 - a) 兩個基本法系
 - b) Eurocentric and beyond Europe(歐洲中心與跨越歐洲)
 - c) 由私法到公法
- ④ 歐陸法與英美普通法的混合法系(mixed Jurisdictions)
 - a) 由棄嬰到寵兒
 - b) Palmer(ed.), Mixed Jurisdictions Worldwide. The Third Legal

Family(2001)

- ⑤ 中國法在法系上的歸類
 - a) 法系歸類的相對性
 - b) 中國法的特色
- (5) 功能論

13 / 34

- ① Zweigert/Kötz 的功能論(Funktionalism)
- ② 分析討論:
 - a) Michales, The Functional Method of Comparative Law , The Oxford Handbook of Comparative Law (ed. Reimann/Zimmermann, 2006), p.339
 - b) Graziadei, The Functional Heritage, Comparative Legal Studies: Traditions and Transitions (ed.Legrand/Munday, 2003),p.100.
- (6) 異同比較
 - ① 異同的探尋
 - ② 異同的解釋
 - ③ 異同的功用
 - a) Danemann: Comparative Law, Studies of Similarities of Differences, Oxford Hand Book of Comparative Law (正在翻譯中) p.383.
 - b) Legrand: The Same and the Different, Comparative Legal Studies: Traditions and Transitions, p.240
 - c) Colterrel: Seeking Similarity, Appreciating Difference: Comparative Law and Communities, Comparative Law in the 21st Century (ed. Handing/Őrücü, 2002)





15 / 34

(二) 私法統一整合



肆、比較法的應用

一、比較法的實踐:步驟與方法

- (一)為何要對某個法律問題作比較研究
 - 1、研究題目:題目的尋找
 - ① 本國法的掌握
 - 2 外國法的認識
 - ③ 靈感與努力
 - 2、研究目的
 - (1) 立法
 - (2) 解釋
 - (二)法系以及法源
 - 1、選擇哪些國家或地區的法律?
 - (1) 法系的功用
 - (2) 大陸法與英美法
 - (3) 對該法律領域特別發展的國家
 - 2、 法源
 - (1) 法律條文、判例、學說、習慣等
 - (2) 相關資訊的取得及整理
 - (三)各國報導
 - 1、Country Report 的意義和功用
 - 2、完整性
 - 3、問題對稱
 - (四) 對照比較
 - 1、相同 (Similarity) 與差異 (Difference)
- 17 / 34

- 2、 分析與解釋 (Analysis and Explain)
 - (1) 功能性
 - (2) 法律與非法律的關聯背景(Legal and non-Legal Context)
- (五)預設研究目的應用
 - 1、立法:制定或修正
 - 2、解釋適用

二、要約拘束力:要約的撤銷

- (一)題目的選擇
 - 1、契約法上最基本爭論問題
 - 2、 問題說明
 - (1) 要約的意義
 - (2) 要約的生效與撤回
 - (3) 要約拘束力及撤銷性(Gebundenheit, Revocation)
 - 3、案例(Factual situation):一個新的比較研究方法:Common Core 的尋找、 發現與應用

甲於三月一日致函於乙,表示願意以一定價額出賣座落某地的房 屋,乙若欲購買須於三月十日前函覆。乙接獲甲信後,到處探聽 最近房地產動態。甲於三月九日下午獲知有人願以較高價額購買 該屋,即以快件信函告知乙不願出售該屋,於三月十日上午到 達。乙於三月九日上午寄出承諾信函,於三月十日下午到達於 甲。試問:乙得否向甲請求交付該屋。

三、大陸法與英美法

- (一)德國法
 - 1、德國民法相關規定

- (1) 第130條(要約生效)
- (2) 第145條(要約拘束力)
- (3) 第146條(要約消滅)
- (4) 第147條(承諾期間)
- 2. 第145條:
-)第145條:對他人為締結契約而要約者,受其要約的拘束, 但其排除拘束者,不在此限。(Wer einem anderen die Schliessung eines Vertrages anträgt, in an den Antrag gebunden, es sei denn, dass er Gebundenheit ausgeschlossen hat)。
 - (1) 原則: 要約拘束力
 - (2) 要約人得為排除
 - ① 排除拘束力的條款
 - ② 判例學說的見解
 - a) 要約引誘(BGH NJW58,168)
 - b) 承諾前得為撤回(撤銷)(BGH NJW84, 1885)
- (二)法國法
 - 1、法國民法未設規定
 - 2、法國法院判決(以下三則判決,由台大法律學院教授陳忠五協助譯成中 文)

A) 廢棄法院民事第三庭 1968 年 5 月 10 日判決,載於 Bull. Civ., III, n° 209

1963年10月, Riveria Hollyday不動產公司(以下簡稱 R 公司)授予不動產仲 介人 Lepeu (以下簡稱 L)一間位於尼斯之辦公樓房的專屬銷售權,期間至 1963年 11月30日,其後又延長至同年12月31日,價金為47萬法郎,仲介報酬為5%。1963 年10月24日, Fouques (以下簡稱 F)對系爭樓房有興趣,L 乃同意賦予其選擇權, 期間至 1963年12月15日止。F於11月12日以信函向 R 公司表示其可能購買系爭 樓房之交易條件。11月22日,F 明確行使該選擇權,並於11月27日以掛號存證信 函表示其依L 受委託之價格與條件取得系爭樓房,並請求 R 公司與其公證人聯繫, 俾便辦理後續買賣簽約事宜。同日,L 亦以送達書通知 R 公司前往公證人處簽立買賣 契約書。12月3日,R 公司負責人以信函告知L:「此一交易顯然不可能,系爭選擇 權已失效,該公司已回復系爭樓房之自由處分權」。然而,上訴法院仍判命 R 公司必 須支付 F 一筆1萬5千法郎之損害賠償金。

不服上訴法院判決之上訴理由,略以:--上訴法院判決認定,R 公司拒絕辦理其 所提議且已為F所接受之出賣系爭樓房後續事宜,已對F 肇致損害;然而,依該判決 所確定之事實,R 公司在此一出賣提議被接受前,已撤回該提議,而當事人間嗣後雖 然又恢復磋商談判,但一直未能達成合意。

惟按,--出賣之要約在有承諾前,原則上固然得予撤回,但於要約人明確表示其 於一定期間內將不撤回之情形,則又不然;--本件原審法院認定,R公司所為至1963 年12月15日有效之要約,已由F以10月24日信函及11月27日掛號存證信函明確 予以承諾,進而論斷F已依R公司對L之授權行使選擇權,構成當事人之合意,於 法有據;--R公司其間如有困難,有意反悔,必須依法提出證明,特別是請求公證人 作成要約已失效之記錄。

據上論結,上訴理由不成立;

基於上開理由,駁回對愛克斯普羅旺斯上訴法院1966年4月1日判決之上訴。

B) 廢棄法院民事第一庭 1958 年 12 月 17 日判決,載於 D. 1959.33

依 Montpellier 上訴法院 1955 年 10 月 12 日判決所認定之事實: Isler (以下簡稱 I)於 1954 年 8 月 11 日以信函告知 Chastan (以下簡稱 C),其預備以 250 萬法郎出 售所有木屋於 C;四日後,C 現場看過木屋,翌日即以電報通知 I,表示接受此一售 屋要約;同月 17 日,C 再以信函確認此一承諾,並表示於簽訂契約書時,將以現金 付款;其後,C 一再催告 I 受領買賣價款並交付木屋鑰匙,均無結果,C 乃於 1954 年 9 月 6 日對 I 提起訴訟,I 則以其業於 8 月 16 日將系爭木屋出售於 Puy (以下簡稱 P),故無法再出售系爭木屋於原告等詞,資為抗辯,而參加本件訴訟之 P 亦於訴訟中 表明,其與 I 之買賣契約於 8 月初即已訂立,並於 1954 年 8 月 14 日正式簽訂蓋有私 章之契約書,同時支付 100 萬法郎之定金。 上開判決(廢棄第一審判決)認為,I所主張,其1954年8月11日之要約,已 於C承諾前構成撤回之相關事實,不足採信;且本件卷證顯示,I之出售要約於1954 年8月17日(即I知悉C明確承諾其要約之日)前,並未被撤回;I自不得舉證證明 其所主張之上開事實;從而,依據民法典第1583條,I之出售提議已為C所接受, 買賣成立。

惟按,--要約在有承諾前,原則上固然得予撤回,但於要約人明示或默示表示其 於一定期間內將不撤回之情形,則又不然;--本件原審判決指出,系爭 1954 年 8 月 11 日構成出售要約之信函,只要尚未被承諾,原則上固然得予撤回,但C於8月9 日曾致函於 I,表示有意於 15 日或 16 日前往現場觀看木屋,而 I 亦於 8 月 11 日回函 表示同意,似此情形,1 已然默示承諾於一定期間內(即至預訂現場看屋之時)維持 其要約之效力,從而 I 如於 8 月 14 日撤回要約,即有過錯,而應負責任;--上訴法院 在分析本件相關事證後,特別是系爭8月14日蓋有私章之契約書,只有一份契約書, 該契約書尚未申請登記,其上僅有 I 單方聲明其出售系爭木屋於 P,P 於其上僅附註 同意此一交易等文字,既未註明日期,亦未提及支付100萬法郎定金之事等等,該法 院綜據該等事證,得出充分、嚴謹、明確、一致的事實推定心證,進而形成絕對確信, 認定 P 所主張之 8 月 14 日買賣契約書,並未簽訂;--I 既然尚未出售木屋於 P,I 即 無任何理由撤回其先前對 C 所作之要約;--從而, I 於 8 月 14 日即尚未能表示其撤回 要約之意思,蓋其於此時根本無此意思,而且,即便是1所發出8月20日之信函, 亦未明確表示此一意思,凡此種種,均顯然可由P與Ⅰ之惡意及其彼此間之串通等, 加以推知;--第二審法官基於其對締約當事人真意如何之事實認定專屬職權,認定系 爭要約尚屬有效,當事人對買賣要素(標的物與價金)達成合意,買賣契約依法成立; --據上論結,原審判決於法有據,並無上訴理由所指違背法令情事。

基於上開理由,駁回上訴。

21 / 34

應負損害賠償責任。

C) 廢棄法院社會庭 1972 年 3 月 22 日判決,載於 D. 1972, 468

依據本件爭訟程序及事實審法官所認定之事實,醃製食品公司 Société salaisonnière du Centre(以下簡稱 S)對外張貼徵才啟事。在 S 要求下, Vandendriesche (以下簡稱 V)從 Brest 出發,前往 Saint-Mathieu,到 S 公司所在地,面談可能受雇 擔任生產線領班事宜。1970年3月3日,S致函於V,確認該公司已作成雇用V之決 定,但附帶詢問 V 是否同意該公司所提之雇用條件,並告知 V,該公司期待其開始上 任之日期以及寄達 V 工作證之日期。3 月 14 日,S 再致函於 V,以該公司迄未收到 V 之同意受雇函,且該公司董事會剛決定近期內不再雇用員工為由,表示取消其「徵才 啟事」。Brest 勞資爭議委員會 1970 年 7 月 22 日裁決,肯定 V 之損害賠償金請求,理 由是:--本件勞資關係之中斷,並未發生在試用期間;--任何要約,在未經承諾前, 均包含相對人合理思考之期間;--即便如 S 所稱,其撤回徵才要約之真正理由,係因 未收到相對人之承諾,其撤回之舉亦屬過於倉促,蓋V保持沈默達9日,不能視為拒 絕要約;--S 先作出雇用之承諾,嗣又以經濟狀況有變,不再雇用新員工為由,拒絕 雇用 V,即應負其責任。對此,S表示不服,認為上開理由均屬矛盾、臆測、假設之 詞,其因此所作成之裁決,欠缺法律依據,蓋唯有「契約」,才能確定拘束當事人一 方,只要當事人雙方意思尚未達成一致,任何單方之意志,尤其是要約,自然均得由 當事人一方予以撤回;而且,負責企業正常營運之雇主,乃企業內部營運組織之最佳

裁量判斷者,在毫無惡意損害他方之情形下,其於試用期間屆滿前中斷勞資關係,不

惟按,--原裁決指出,V固然無法證明其所主張,已於1970年3月11日以一般 信函通知S,表示其願意於該月23日起開始工作,但自V收到S之雇用通知,至V 收到S之反悔通知,僅有9日期間,此一期間,在S並未事先表示預定承諾期間下, 並未逾越S應該賦予V思考與回答所需時間,而且,在此一期間內,S董事會基於經 濟狀況變化而不再雇用新員工,進而撤回系爭要約之決定,不能據以對抗信賴其雇用 決定,並已辭去先前工作且花費旅行費用之V;--S未能證明當事人間有試用期間之 約定,既然當事人間之勞資關係已於試用前中斷,且S輕率地發出要約,肇致他人損 害,事實審法官基此認定,S在諸此情況下撤回其先前對V所作之徵才要約,難以不 構成過錯,其據此作成之裁決,於法有據,尚無上訴理由所指摘之情事。

基於上開理由,駁回上訴。

(三) 英國法

/ Dickinson v. Dodds [1876] 2 Ch. D. 463 (C. A.)

On Wednesday, the 10th of June, 1874, the Defendant John Dodds signed and delivered to the Plaintiff, George Dickinson, a memorandum, of which the material part was as follows: – "I hereby agree to sell to Mr.George Dickinson the whole of the dwelling-houses, garden ground, stabling, and outbuildings thereto belonging, situated at Croft, belonging to me, for the sum of \pounds 800. As witness my hand this tenth day of June, 1874.

"£800 (Signed) John Dodds".

"P.S. – This offer to be left over until Friday, 9 o'clock, A.M. J.D. (the twelfth), 12th June, 1874.

"(Signed) J. Dodds."

The bill alleged that *Dodds* understood and intended that the Plaintiff should have until Friday 9 A. M. within which to determine whether he would or would not purchase, and that he should absolutely have until that time the refusal of the property at the price of £800, and that the Plaintiff in fact determined to accept the offer on the morning of Thursday, the 11th of June, but did not at once signify his acceptance to *Dodds*, believing that he had the power to accept it until 9 A. M. on the Friday.

In the afternoon of the Thursday the Plaintiff was informed by a Mr. Berry that Dodds had been offering or agreeing to sell the property to Thomas Allan, the other Defendant. Thereupon the Plaintiff, at about half-past seven in the evening, went to the house of Mrs. Burgess, the mother-in-law of Dodds, where he was then staying, and left with her a formal acceptance in writing of the offer to sell the property. According to the evidence of Mrs. Burgess this document never in fact reached Dodds, she having forgotten to give it to him.

On the following (Friday) morning, at about seven o'clock, Berry, who was acting as agent for Dickinson, found Dodds at the Darlington railway station, and handed to him a duplicate of the acceptance by Dickinson, and explained to Dodds its purport. He replied that it was too late, as he had sold the property. A few minutes later Dickinson himself found Dodds entering a railway carriage, and handed him another duplicate of the notice of acceptance, but *Dodds* declined to receive it, saying, "You are too late. I have sold the property."

It appeared that on the day before, Thursday, the 11th of June, *Dodds* had signed a formal contract for the sale of the property to the Defendant Allan for £800, and had received from him deposit of £40.

The bill in this suit prayed that the Defendant *Dodds* might be decreed specifically to perform the contract of the 10th of June, 1874; that he might be restrained from conveying the property to *Allan*; that *Allan* might be restrained from taking any such conveyance; that, if any such conveyance had been or should be made, *Allan* might be declared a trustee of the property for, and might be directed to convey the property to, the Plaintiff; and for damages.

JAMES, L.J., after referring to the document of the 10th of June, 1874, continued: -

The document, though beginning "I hereby agree to sell," was nothing but an offer, and was only intended to be an offer, for the Plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not. Unless both parties had then agreed there was no concluded agreement then made; it was in effect and substance only an offer to sell. The Plaintiff, being minded not to complete the bargain at that time, added this memorandum -"This offer to be left over until Friday, 9 o'clock A. M., 12th June, 1874." That shews it was only an offer. There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o'clock on Friday morning: but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract if, until 9 o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere nudum pactum was not binding, and that at any moment before a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. Well, that being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, "Now I withdraw my offer." It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retractation. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case. beyond all question, the Plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, "I withdraw the offer." This is eveident from the Plaintiff's own statements in the bill.

The Plaintiff says in effect that, having heard and knowing that *Dodds* was no longer minded to sell to him, and that he was selling or had sold to some one else, thinking that he could not in point of law withdraw his offer, meaning to fix him to it, and endeavouring to bind him, "I went to the house where he was lodging, and saw his mother-in-law, and left with her an acceptance of the offer, knowing all the while that he had entirely changed his mind. I got an agent to watch for him at 7 o'clock the next morning, and I went to the train just before 9 o'clock, in order that I might catch him and give him my notice of acceptance just before 9 o'clock, and when that occurred he told my agent, and he told me, you are too late, and he then threw back the paper." It is to my mind quite clear that before there was any attempt at acceptance by the Plaintiff, he was perfectly well aware that *Dodds* had changed his mind, and that he had in fact agreed to sell the property to *Allan*. It is impossible, therefore, to say there was ever that existence of the same mind between the two parties which is essential in point of law to the making of an agreement. I am of opinion, therefore, that the Plaintiff has failed to prove that there was any binding contract between *Dodds* and himself.

(四)美國法

1、 英國普通法上的基本原則: Dickinson v. Dodds (1876)

(2.) Uniform Commercial Code

§ 2-104 Definitions "Merchant" (...) (1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill. (...)

§ 2-205. Firm Offers. An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

(3) Restatement Second, Contracts 2d vom 17. 5. 1979

§ 25. Option Contracts

An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer.

§ 36. Methods of Termination of the Power of Acceptance

- An offeree's power of acceptance may be terminated by
- (a) rejection or counter-offer by the offeree, or
- (b) lapse of time, or
- (c) revocation by the offeror, or
- (d) death or incapacity of the offeror or offeree.

(2) In addition, an offeree's power of acceptance is terminated by the non-occurrence of any condition of acceptance under the termins of the offer.

§ 37. Termination of Power of Acceptance Under Option Contract

Notwithstanding §§ 38-49, the power of acceptance under an option contract is not terminated by rejection or counter-offer, by revocation, or by death or incapacity of the offeror, unless the requirements are met for the discharge of a contractual duty.

§ 42. Revocation by Communication from Offeror Received by Offeree

An offeree's power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract.

§ 43. Indirect Communication of Revocation

An offeree's power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect. § 63. Time When Accpetance Takes Effect

Unless the offer provides otherwiese,

(a) an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror; but

(b) an acceptance under an option contract is not operative until received by the offeror.

§ 87. Option Contract

(1) An offer is binding as an option contract if it

(a) is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time; or

(b) is made irrevocable by statute.

(2) An offer which the offeror should resonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

四、對照比較、分析解釋

(一) 异同比較

- 1、德國法:要約有拘束力(原則);要約人得排除之
- 2、 法國法: 要約無拘束力; 但是約定為有拘束力
- 3、 英國法:除有對價 (Consideration)外,要約無拘束力
- 4、 美國法:原則上同於英國;但 UCC 设有特別規定
- 5、案例解說
- (二)分析说明
 - 1、 道德性
 - 2、 要約相對人的保護 (交易安全); 投機的可能性
 - 3、 要約人的自由與保護

五、比較目的上的應用

- (一) 绪说
 - 1、認識目的:更了解本國法律

- 2、立法
- 3、司法實務

(二)私法(契约法)的整合

- 1、私法(契约法)整合的发展
- 2、 整合的难题及方法整合
 - (1) 採多數相同性的規定
 - (2) 採某種規範模式(較佳選擇)
 - (3) 設折中性的規定
 - (4) 自創規定
- 3 · CISG

Article 15

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Article 16

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

4 VINIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL

CONTRACTS 2004

ARTICLE 2.1.3

(Withdrawal of offer)

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches

the offeree before or at the same time as the offer.

ARTICLE 2.1.4

(Revocation of offer)

(1) Until a contract is concluded an offer may be revoked if the revocation reaches

the offeree before it has dispatched an acceptance.

(2) However, an offer cannot be revoked

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

5 • THE PRINCIPLES OF EUROPEAN CONTRACT LAW

Article 2:202: Revocation of an Offer

(1) An offer may be revoked if the revocation reaches the offeree before it has dispatched its acceptance or, in cases of acceptance by conduct, before the contract has been concluded under Article 2:205(2) or (3).

(2) An offer made to the public can be revoked by the same means as were used to make the offer.

(3) However, a revocation of an offer is ineffective if:

(a) the offer indicates that it is irrevocable; or

(b) it states a fixed time for its acceptance; or

(c) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

六、大陸合同法的制定及解釋適用

- (一) 規範模式的探尋
- (二)合同法的規定

1、現行規定

第十六条 【要约的生效】要约到达受要约人时生效。

采用数据电文形式订立合同,收件人指定特定系统接收数据电文的,该数据电 文进入该特定系统的时间,视为到达时间;未指定特定系统的,该数据电文进入收 件人的任何系统的首次时间,视为到达时间。

第十七条 【要约的撤回】要约可以撤回。撤回要约的通知应当在要约到达受要约 人之前或者与要约同时到达受要约人。

第十八条 【要约的撤销】要约可以撤销。撤销要约的通知应当在受要约人发出承 诺通知之前到达受要约人。

第十九条 【要约不得撤销的情形】有下列情形之一的,要约不得撤销:

(一)要约人确定了承诺期限或者以其他形式明示要约不可撤销;

(二)受要约人有理由认为要约是不可撤销的,并已经为履行合同作了准备工作。

第二十条 【要约的失效】有下列情形之一的,要约失效:

(一) 拒绝要约的通知到达要约人;

- (二) 要约人依法撤销要约;
- (三)承诺期限届满,受要约人未作出承诺;

(四)受要约人对要约的内容作出实质性变更。

第二十一条 【承诺的定义】承诺是受要约人同意要约的意思表示。

第二十二条 【承诺的方式】承诺应当以通知的方式作出,但根据交易习惯或者要 约表明可以通过行为作出承诺的除外。

- 第二十三条 【承诺的期限】承诺应当在要约确定的期限内到达要约人。
 要约没有确定承诺期限的,承诺应当依照下列规定到达:
 (一)要约以对话方式作出的,应当即时作出承诺,但当事人另有约定的除外;
 (二)要约以非对话方式作出的,承诺应当在合理期限内到达。
- 2、比較法的基礎:採取 CISG、Unidroit 的規定
- 3、解釋適用:
 - (1) 實務上案例
 - (2) 比較法上的解釋適用

伍、法学教育与比较法

一、法律教育的比較研究

- Merryman, Legal Education There and Here: A Comparison, in: The Loneliness of the Comparative Lawyer(1999), pp.53-75.
- 2、 大陸法律教育在比較法上的觀察

二、比較法的教學與研究

- 1、 重要的課題
- 2、 相關論文
 - (1) Otto Kahn-Freund, Comparative Law as an Academic Subject(1996), 82LQR 41.
 - (2) Markesinis , A Subject in Search for an Audience (1973) 53 MLR
 - (3) Markesisnis, Comparative Law in the Courtsroom and Classroom (2003).

[英]Basil S. Markesinis:《比较法:法院与书院》,苏彦新,胡德胜合译,清 华大学出版社 2008 年版。中文書評:石茂生,张伟:《我们究竟需要什 么样的比较法——评马克西尼斯的<比较法:法院与书院>》,載於《環球 法律評論》,2009 年 04 期,第 147 頁到 152 頁。

(4) Samuel, Comparative Law as a Core Subject (2001)21 Leg. Stud. 444.

- 3、比較法的課程與教學
 - (1) 開設比較法導論的課程
 - ① 大學部或研究所
 - ② 必修或選修
 - ③ 共同授課,尤其是研究所
 - (2) 教學研究(第四講題:案例比較研究)
 - ① 由總論到各論
 - ② 案例比較研究
 - ③ 納入本國法的課程的講授內容(Roscore Pound 的建議)
 - (3) 教材及著作
 - ① 二本基本重要著作
 - 1) Zweigert/Kötz, Einführung in die Rechtsvergleichung

(3.Aufl.1996):英文版 An Introduction to Comparative Law(3rd. ed. by Tony Weir, 1998);中译本, 潘汉典,米健 高鸿钧、贺卫 方译,潘汉典校订,比较法总论(根据德文第二版第一册,贵 州人民出版社,1992)

 Sir Bail Markesinis and Hames Unberath: The German Law of Torts. A Comparative Treatise (4th ed. 2002)

- ② 歐洲法整合的相關著作
 - 1) 教科書: Ees van Dam, European Tort Law (2006)
 - 2) 案 例 法 : Common Law of Europe (Casebook, 如 Gerven/Lever/Larouche, Tort Law(2000)
 - Mauro Bussani, Vernon V. Palmer (ed.): Pure Economic Loss in Europe (Cambridge University Press, 2003). 《歐洲法中的純粹經 濟損失》: 張小義、鐘洪明譯,林 嘉審校,法律出版社 2003 年 版。
- 4、撰述一本包括中國法比較的教科書
- 5、外文的重要
 - (1) 英文
 - (2) 德文
 - (3) 日文
 - (4) 其他

陆、結論

- 1、比較法與民法的發展
- 2、 培養法律人的比較思維能力(comparative reasoning) 及開闊的視野
- 3、 超越萬裡長城, 走向世界
- 4、經由羅馬法超越羅馬法(Durch römisches Recht über römisches Recht, 耶林 名言,羅馬法精神)