

Study on Experiential Teaching of International Law

—On the Application of Advocacy Teaching of International Law

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1. Introduction

The increase in international exchanges and business nowadays is pushing the demand for international lawyers. Under such circumstance, the goal of legal education has been set as “to train students to think like an international lawyer”. This goal can be achieved by adopting experiential teaching, or in other words, learning by doing. The famous ancient saying goes, “To hear it is better than to ignore it; to see it is better than to hear it; to understand it is better than to see it; to practise it is better than to understand it.”¹ It stands testimony to the importance of experiential teaching in legal education. The experiential teaching of international law not only enables students to learn some foreign laws, but also helps them learn to think and work in the way an international lawyer does.

Of all the lawyering skills, advocacy skills are the most important ones which is the most distinguishing feature that distinguishes lawyers from people of other professions. Therefore, the present thesis studies the effect of experiential teaching of international law in China in training students’ advocacy skills and proposes that such a teaching pattern be applied in other relevant international law courses.

2. Status Quo and Reform of Experiential Teaching of International Law – Introduction of Advocacy Teaching.

2.1 Status quo and the necessity for reform in experiential teaching of international law.

Globalization has led to the increasing demand for international legal services, which have become an important area of lawyers’ work and there is the tendency for its importance to continue to grow steadily. In China, as a result of the rapid development of international business, a large number of Chinese companies involved have been sued by their foreign counterparts. However, since Chinese lawyers, at the moment, are less capable of dealing with these international cases, many Chinese companies have no choice but to hire foreign lawyers. Unfortunately, they are yet to effective legal services due to the language barrier and exorbitant fees. On the law graduates’ part, some want to work with foreign law firms or with domestic law firms that offer international legal services, others to study law or to undertake legal services abroad. Whichever path they follow, they need to be well equipped with necessary INTERNATIONAL lawyering skills so as to fulfill their dreams. But the current curricula in Chinese law schools fail to help students develop these skills. For this reason, it is of urgent need to improve the existing curricula by introducing advocacy teaching of international law and other relevant courses or by offering a separate course on international advocacy skills.

¹ See *Ruxiao*, by Xunzi

2.1.1 Failure in training students' INTERNATIONAL lawyering skills due to absence of experiential courses in international law teaching

At present, international-law-related courses offered by most Chinese law schools are international public law, international private law and international economic law; whose teaching focuses more on theory than practice, leaving untouched the training of advocacy skills which are essential for a potential international lawyer. Although "case study", a popular course in international law teaching in China, is kind of practical, it is not essentially an experiential course in nature, for it does not help a lot with the training of advocacy skills which are the most important lawyering skills. Generally speaking, the case study course aims at explaining theories or rules, with correct answers ready-made for each case. The case study course usually proceeds like this: teachers choose some cases before class based on their own understanding of law, then organize and guide students to discuss the cases in class in pursuit of the consummate result that all students reach a unanimous understanding of law.¹ Such a case study course, though helps students relate theory to practice to some extent, fails to distinguish itself from traditional "knowledge instilling" teaching pattern in legal theory courses and thus hardly helps with training of students' skills, especially their advocacy skills.

2.1.2 Failure of other experiential teaching courses in training students' INTERNATIONAL lawyering skills

Other experiential courses, including legal writing, moot court, legal clinics, and out-of-campus internship, etc., also fail to help students develop international advocacy skills in a comprehensive way. To begin with, such courses as legal writing, moot court and legal clinic are mostly about domestic laws, from which students can hardly be trained on any international lawyering skills. Next, on the part of teaching results, these experiential courses can not achieve the goal of training students' INTERNATIONAL lawyering skills. Firstly, in Chinese law schools, the legal writing course which is supposed to help students develop the ability of writing legal documents, focuses more on getting students acquainted with the legal language and format, rather than on teaching students how to write persuasive legal documents. While in the U.S.A., the course is supplemented by a specially designed advocacy course to teach students how to write legal documents on behalf of one party to a case, instead of being neutral for both parties. For such kind of documents are adversarial, and accordingly there are some additional requirements in writing. Lack of such specific training undermines the international competitiveness of our law students because of the absence of such a supplementary course among Chinese law schools. Secondly, when it comes to the moot court course, although it is, to some extent, helpful in training lawyering skills in that it enables students to represent either the plaintiff or the defendant to carry out courtroom argument, the number of students involved is too limited to effectively improve lawyering skills of the majority of students. What is more, moot court, generally speaking, concentrates on displaying the trial procedures rather than on developing students' lawyering skills, so it actually has very limited effect on students' lawyering skills development. Thirdly, as for legal clinics, limited by the types of cases accepted, sometimes it is difficult for students to receive a comprehensive training of lawyering skills, advocacy skills in particular. For example, students do not have the chance to practice their advocacy skills when the case is a black-and-white one.

¹ Wang Chenguang and Chen Jianmin: *Experiential Legal Education and Reform of Legal Education*, law science, Volume 7, 2001.

And similar to the moot court course, limited by the types of cases and the students' opportunity in participation in legal clinics, students are not guaranteed of a comprehensive training of various lawyering skills. Fourthly, with regard to out-of-campus internship, on the one hand, it sometimes ends up with students serving as assistants and running errands as designated, which can not help students develop lawyering skills effectively; on the other hand, generally, the lack of explicitly-identified training goals and tasks as well as the lack of particular teaching contents makes the students' internship training an arbitrary one, which is not useful for comprehensive development of their lawyering skills, let alone INTERNATIONAL lawyering skills. In short, that current law school curricula call for an immediate reform so as to train students' international lawyering skills more effectively.

2.2 Reform in experiential teaching of international law: application of advocacy teaching

2.2.1 A brief introduction to advocacy teaching

Advocacy teaching is a kind of legal experiential teaching that is featured by "learning by doing", where students enhance their advocacy skills through simulated exercises. To be more precise, students act as lawyers representing both parties to fight for the maximum benefits for their own clients in specific cases and negotiations. In the role play, students need to apply legal theories in specific cases, to actively collect evidence in order to find out facts and laws that are favorable to them, and to convince judges and the other party. The simulated cases used in advocacy teaching are elaborately designed and facts and evidence of such cases are supposed to be balanced for the benefit of students' advocacy skill training, which is also the advantage of advocacy teaching over legal clinics, because the facts of real-life cases handled in the legal clinic course are sometimes not well balanced and do not serve well for students' advocacy skill training.

Advocacy teaching practices a type of experiential teaching mode which is different from traditional teaching in various aspects. Firstly, its teaching objective is different. Traditional legal courses, including the case study course, aim to explain legal theories or rules, while advocacy teaching is designed for student advocacy skill training. Cases in advocacy teaching, serving as a mere teaching tool, are used far beyond to simply explain legal theories and how they are applied into practice; instead, they are used to further teach students how to fight for the maximum benefits and interests for their clients in specific cases by adopting various advocacy skills. The said advocacy skills are inclusive, referring to such skills as collecting favorable evidence, making favorable statements of facts, finding positive legal based, giving clear presentations before judges and the other party, and responding to questions from judges. Secondly, advocacy teaching has different requirements for both teachers and students. Advocacy teaching is not teacher-dominated but student-oriented, which is based on students' massive pre-class reading on simulated case materials and on relevant advocacy theories and practice. Thirdly, case materials used in advocacy teaching are different from those used in average case study. Generally, course books for case study contain only case briefs and case analyses; however, cases in advocacy teaching serve as a tool for advocacy skill training, therefore, case files abound in various evidence and materials for students to select from and find out which facts and evidence are or are not in favor of themselves in accordance with their roles, so as to shape their own adversarial thinking. Last but not least, its way of teaching is different. Advocacy teaching combines the use of big-class teaching and small-group practice. In big-class teaching, the teacher gives lectures on cases and advocacy skills and then demonstrates these skills in class. For example, the teacher

asks students to point out mistakes that he has made deliberately in his defense, and then the teacher makes correct demonstrations so as to intensify students' impression of advocacy skills. As for small-group practice, students are assigned to act as lawyers to conduct oral argument; and experienced lawyers play the role of judges to assess and comment on the students' performance. Students are also required to reflect on and self-criticize their own performance after the practice. The combined use of big-class teaching and small-group practice is particularly applicable for Chinese legal education in advocacy skill training, for the huge number of law school students makes it impossible for each and every student to have the opportunity to practice skills in class.

The application of advocacy teaching can be very flexible, not only applicable in the advocacy course but also applicable in other traditional law courses. Take international law teaching as an example. A specialized case-based international advocacy skill course may be offered to students to learn and practice such skills in a systematic manner; meanwhile, advocacy teaching may also be introduced into traditional international law courses through students' role-play of lawyers of opposing parties in carefully-chosen cases with balanced facts and evidence, so as to ensure that students can learn and apply law in argument. It is worth pointing out that case files selected for traditional international law courses should be simplified so as to ease students' burden and save time in class.

2.2.2 Advantages of advocacy teaching of international law in training international lawyering skills

Advocacy teaching of international law, on the one hand, overcomes the shortcoming of traditional teaching patterns, lack of experiential teaching; on the other hand, makes up for the imbalance that the existing experiential courses are domestic-law-centered..

As is discussed above, advocacy teaching differs from traditional international law teaching in the teaching objective, the way of teaching, and the requirements for teachers and students. It is these differences that make advocacy teaching an effective way of developing advocacy skills. What's especially important is that the introduction of advocacy teaching into traditional international law courses brings a change to class discussions by overcoming students' vague role identification, which favors student advocacy skill training. In traditional international law courses, including the case study course, are mostly teacher-oriented where teachers explain legal theories or rules directly or through cases. Students, though also engaged in discussions, are likely to digress from the theme, because they do not have a clear sense of role. However, advocacy teaching is student-oriented where students are the leading part with a strong sense of role, while teachers are only to organize class activities, assess students' performance, and help them to make improvement. Rather than telling students what the law is about through cases, teachers guide students to carry out in-depth thinking over laws and to make full use of laws in a specific case according to their own roles in an attempt to fight for the maximum benefits for their clients. In applying advocacy teaching in international law teaching, teachers may select different cases which best serve the course they are teaching so as to achieve the dual objectives for students to develop advocacy skills and to acquire legal knowledge.

Existing experiential courses in China tend to center on domestic laws, due to the difficulties in finding authentic international cases. Under such circumstances, the use of stimulated cases in advocacy teaching is a good alternative. Advocacy teaching, unlike moot court, has expanded the use of such simulated cases not only in the specially designed advocacy course but also in the

traditional international law courses, which is a reason why it is especially beneficial for students' advocacy skill training. Advocacy teaching takes advantage over moot court also in that it is student-oriented, requiring that each student take turns to play the role of lawyer instead of allowing only a limited number of students to act as lawyers while others run errands, as is practiced in moot courts.

3. The Application of Advocacy Teaching of International Law —A Case Study of the Trademark Parallel Import Case in Chinese and American Courts

In the following part, the author will take as an example a trademark parallel import case from international trade law and demonstrate how to apply advocacy teaching to the international advocacy course and shed some light on how such a teaching pattern can be applied in teaching international economic law.

3.1 Case briefing

The plaintiff is the exclusive sales agency of the A Brand garments in Mainland China for A Company, a France-based limited liability company specializing in garments. According to the business franchising contract entered into between the two parties, the plaintiff is the exclusive franchisee of A Brand garments in Mainland China and it is entitled to use A Trademark and relevant signs exclusive to A company (France) in a way that is not explicitly stated. The defendant, B Company, sells in Mainland China A Brand garments imported from a Hong Kong-based C Company, which is the franchisee of A Brand garments in Hong Kong SAR. The plaintiff claims that the acts of the defendant have infringed upon its trademark right and exclusive right, requiring that the Court impose an injunction upon the defendant.

3.2 Reasons and implications for choosing this case.

The parallel import is an issue in international trade, whose legality is controversial. This issue is not governed by any terms or norms in international laws. Domestic laws on this issue vary a lot, so do Chinese laws and American laws. As Chinese legislators are yet to reach an agreement on this issue, we do not expect to find explicit relevant provisions in Chinese laws. This gives students much freedom in argument, enabling them to argue over the issue from diversified perspectives such as jurisprudence, the value of law, the relation between law and economy, rather than simply relying on legal articles and provisions for reference. When it comes to American laws, parallel import cases do exist in the United States; however, these cases are much complicated and with distinctive judge reasoning. Therefore, there is much room for students to debate this issue in the setting of the U.S. legal system. Besides, the lack of Chinese domestic laws concerning parallel import is supplemented by relevant American provisions, which can serve as a reference or guidance for students to argue in the roles of plaintiff and defendant in the setting of a Chinese court.

Why are students asked to play the role of Chinese lawyers and American lawyers respectively in the same trademark parallel import case? As Chinese law and American law differ a lot in terms of sources, legal system, legal writing, and courtroom advocacy skills, students' taking turns to act as Chinese and American lawyers will help them learn advocacy skills of an

INTERNATIONAL lawyer more effectively by bringing them a deep insight into the foreign legal system, which helps them infer the ideas of foreign lawyers and become familiar with a new way of thinking¹. In studying this case, students have to find answers to the following questions: what are the differences in advocacy skills between Chinese and American lawyers and why? What are the differences in judgments between Chinese and American courts and why? What are reasons for the differences in legal provisions and rules on parallel importing between China and the United States? In this sense, this case also helps students learn domestic laws, for having understood that the same legal issue can be treated in different ways in different countries, students will improve their knowledge of domestic laws by viewing them in a wider context.

3.3 Teaching pattern and content

Advocacy teaching belongs to experiential teaching, in which students play the key part, taking turns to play the role of lawyer representing the plaintiff or the defendant, writing the statement of complaint or defense, and engaging in mock courtroom argument. Teachers play a secondary role, only responsible for designing and organizing class activities. Generally speaking, the class on the foregoing case goes along with the following steps: firstly, the teacher gives a brief introduction to issue of trademark parallel import, and holds discussions among students over legal provisions and policy orientation on this issue. In addition, comparison can be made in terms of the different provisions between Chinese and American laws and the corresponding courtroom strategies that could be adopted in Chinese and American courts. The teacher may also employ the technique of BRAINSTORMING to prepare students for oral argument by encouraging students to think about respective reasons for allowing and banning parallel import. The second step is writing the statement of complaint and defense. Students are allowed to discuss with classmates or to consult teachers, but are forbidden to read others' writing in case they would copy from others. The teacher may comment on students' writing and give suggestions for improvement. The final step is oral argument where students will have oral argument before the teacher, group by group. This is different from moot court: without going through other complicated courtroom proceedings, students may jump to oral argument directly. Oral argument, on the one hand, helps students develop the ability to make public speeches; on the other hand, helps students learn how to establish their own standpoint to respond to questions raised by the other party.

4. Challenges Facing Advocacy Teaching of International Law and Solutions

It is a common practice to offer advocacy courses in American law schools; while in Chinese law schools, this area is still a blank to be filled in. Therefore, in applying advocacy teaching of International Law in China, many difficulties and challenges must be faced up as follows:

4.1 Difficulties in compiling suitable simulated cases and solutions

Due to differences in domestic and foreign legal systems, it is difficult to select cases that are suitable for students and debatable under both of the two legal systems. Besides, the cases should be neither too simple nor too complex, which makes the case compiling a very demanding job. Familiarity with both legal practice and legal systems in the two different countries is a must to qualify a compiler of such cases. However, the author is confident that all these difficulties and

¹ See Valcke, Global Law Teaching, 54 J. Legal Educ. 177(2004)

challenges may be overcome by taking the following steps: firstly, recruit law practitioners as compilers to guarantee the balanced quality of compilers; secondly, it is better for law schools to cooperate with judicial departments and to conduct surveys as so to get first-hand information; moreover, law schools may also cooperate with the bar association in compiling textbooks. Such kind of cooperation has already been practiced in the United States. In 1971, American Bar Association set up the NITA¹, the abbreviation for National Institute of Trial Advocacy, which has organized the compilation of a large number of textbooks on training of advocacy skills, and the textbooks have been widely used². It is believed that Chinese bar associations are also more than willing to cooperate with law schools to contribute to the compilation of textbooks in this field.

4.2 Insufficiency in law school teachers and solutions

Only a small proportion of university law school teachers are engaged in legal practice. To solve the problem in the long run, we can learn from the US practice to require law school teachers to acquire essential experience of legal practice. Two ways can be adopted to address the current problem of the insufficiency in advocacy teachers: on the one hand, to recruit experienced legal practitioners to law school teachers; on the other hand, to enhance on-the-job training for current law school teachers so as to equip them for advocacy course teaching.

4.3 Excessive burden upon teachers and solutions

Advocacy teachers are facing extra work burden. Take examination as an example. Advocacy examination is different from examinations of other courses, including both written and oral examination. That means in addition to correcting and marking a large amount of students' legal writings, teachers need to spare time for students' oral examination. In solving this problem, the successful practice in the United States can be used for reference that practicing lawyers are employed as part-time tutors, and excellent students of the course are appointed as group leaders to take part of the teacher's job. In this way, American law schools teachers may ease their burden by working with these part-time tutors and student "teachers" to fulfill their teaching tasks.

4.4 Language barrier and solutions

Teachers qualified for advocacy teaching of International Law should be proficient in English and have a good command of legal systems of other countries. Unfortunately, only a limited number of current law school teachers have satisfied these standards. However, as more and more graduates studying abroad have joined law schools in recent years, the language barrier is no longer a serious challenge. Besides, the same challenge can also be mitigated by training current law school teachers. On the students' part, they may be required to take part in a language competence test to make sure that language barrier should not be an obstacle in their study.

5. Conclusion

¹ Purposes of this Institute are: (1) developing young lawyers' advocacy skills; (2) finding effective ways and means for training of professional advocacy skills; (3) training teacher resources in this area for law schools and encourage them to offer courses in this area. The American Bar Association Section of Legal Education and Admissions to the Bar, Report and Recommendations of the Task Force on Lawyer Competency, "The Role of the Law Schools", 1979, p. 9. cf. Wang Chenguang: *The Purposes of Legal Education*. Legal System and Social Development. 2002 (6)

² *Ibid.*

Application of advocacy teaching of international law is conducive for training students' INTERNATIONAL lawyering skills. There is no doubt that promotion and popularization of such a teaching pattern are facing the pains in compilation of textbooks and integration of teaching recourses, which, though difficult to overcome, will eventually be removed with the reform in legal education. To conclude, application of advocacy teaching of international law will definitely push the development of experiential teaching of international law in China.