

企业如何应对美国的行政查处与民事诉讼？

——从办理一起 337 条款案件谈起

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通过介绍美国 337 条款、美国民事诉讼程序规则—立案阶段，让国内接触到美国行政查处、民事诉讼企业，

- 熟悉如何评估案件的价值与风险，
- 懂得如何聘请美国律师，
- 知道如何与美国律师配合办案。

1. 美国的 337 条款是个什么东西？

19 U.S.C.

United States Code, 2010 Edition

Title 19 - CUSTOMS DUTIES

CHAPTER 4 - TARIFF ACT OF 1930

SUBTITLE II - SPECIAL PROVISIONS

Part II - United States International Trade Commission

Sec. 1337 - Unfair practices in import trade

§1337. Unfair practices in import trade

(a) Unlawful activities; covered industries; definitions

- (1) Subject to paragraph (2), the following are unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provision of law, as provided in this section:
 - (A) Unfair methods of competition and unfair acts in the importation of articles (other than articles provided for in subparagraphs (B), (C), (D), and (E)) into the United States, or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is—
 - (i) to destroy or substantially **injure an industry** in the United States;
 - (ii) to **prevent the establishment of such an industry**; or
 - (iii) to **restrain or monopolize trade and commerce** in the United States.
 - (B) The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that—
 - (i) infringe a valid and enforceable United States **patent** or a valid and enforceable United States **copyright** registered under title 17; or
 - (ii) are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States **patent**.
 - (C) The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that infringe a valid and enforceable United States **trademark** registered under the Trademark Act of 1946 [15 U.S.C. 1051 et seq.].
 - (D) The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or

consignee, of a semiconductor chip product in a manner that constitutes infringement of a **mask work**^{*} registered under chapter 9 of title 17.

- (E) The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consigner, of an article that constitutes infringement of **the exclusive rights in a design** protected under chapter 13 of title 17.

- 1.1 源自美国 1930 年的关税法 Tarriff Act 第 337 条。
- 1.2 是一种行政查处程序 Administrative Investigation Procedure, 而非民事诉公司法程序 Civil Judicial Procedure。
- 1.3 要查处的是: unfair methods of competition and unfair acts in the importation or sale of goods/articles:主要是进口、销售侵犯知识产权的产品, 含专利、商标、著作权、商业秘密(特别强调 mask-work 和 exclusive rights in a design), 等等。
- 1.4 查处机构是美国国际贸易委员会 US-ITC
- 1.5 代表国家与公共利益 Public Interest Review 来查处, 而非处理平等主体之间的民事侵权纠纷。
- 1.6 是对物 In Rem 而非对人 In Personam 的查处, 查物, 不管人是谁、躲在哪里? 来不来接受调查?。
- 1.7 它的目的是把涉案的产品、涉案的货物赶出美国市场/an exclusive order of a limited or general nature, 含临时保护措施: 保税进口/temporay relief: entry only under a bond, 已经进入美国市场必须下架/cease and desist order. 每天十万美元或双倍货值的罚款是次要的。

^{*} Mask Works are defined as a series of related images, however fixed or encoded

1.8 它的查处决定一经作出，立即生效 Any order goes into effective immediately。

1.9 它的查处程序适用美国联邦民事诉讼程序规则/Federal Rules of Civil Procedure，但不像民事诉讼，法官被动审案、耗费时间漫长，行政查处法官（administrative law judge）主动审案，一年或一年半结案。

2. 应对 337 条款，如何事先筑好防护墙、设置好防护网？

推荐一条款，尤其是在和别人合作做产品时，这一条尤为重要。

Warranties & Indemnification.

保证、赔偿

(a) Express Warranty. Contractor shall expressly warrant that all Products sold under this Agreement shall conform to the Product Specifications, be of merchantable quality, fit for the ordinary purposes for which such Products are normally used, free from defects and that all Products will be manufactured in accordance with applicable laws, rules, regulations and orders.

(a) 明示保证： 供货承包方公开明确保证依本协议出售的全部产品符合“产品标准”、适合用于销售、适合此类产品的通常用途、无缺陷，全部产品将遵循有效的、应适用的法律、法规、规章、规定制造出来。

(b) Title, Encumbrances & Claims. Contractor shall represent and warrant that when the Products are delivered to Black & Decker, (i) the title conveyed to such Products shall be free from any security interest or other lien or encumbrance, and (ii) the Products are free from any claim of any third party that the Products infringe, either directly or contributorily, any patent in the U.S. or other country/regime, or that the Products embody or make any use of trade secret rights of third parties. Contractor shall agree to indemnify and hold Black & Decker, its officers, employees, agents and insurers (collectively “Indemnitees”) harmless from and against any and all such claims, liabilities, costs, damages or expenses (including reasonable attorney’s fees) incurred by Indemnitees, in connection with the defense of such claims. If the sale, importation, distribution or use of any of the Products is enjoined, Contractor shall, at Black & Decker’s option (i) procure for Black & Decker and its customers the right to continue using and selling such Products, (ii) modify the process by which the Products are manufactured so as to be non-infringing, (iii) replace such Products with non-infringing goods or materials, or (iv) refund the purchase price to Black & Decker. Black & Decker represents and warrants that Products designed by Black & Decker shall be free from any claim of any third party that the Products

infringe, either directly or contributorily, any patent in the U.S. or other country/regime, or that the Products embody or make any use of trade secret rights of third parties.

(b) 所有权、抵押、请求权：供货承包方声明与保证交付给 BD 的货物：(1) 货物的所有权清楚，没有抵押、担保、留置权、保证之类的权益障碍，(2) 该产品不会引起第三人提出的此类请求，即产品直接地或在某种程度上促成了侵犯美国或其他国家、地区的专利，或吸收、使用了其他人的商业秘密。供货承包方同意保证 BD 及 BD 的高级职员、雇员、代理人、承保人（统称为受赔偿人）免受因应付此类请求而产生任何责任、损失、损害赔偿金、费用、开支（包括合理的律师费），否则，供货承包方应保证给予赔偿。如果产品的销售、进出口、分销、使用被禁止，BD 可以选择：(1) 供货承包方应该为 BD 及其客户取得继续使用和销售该产品的权利，(2) 供货承包方应修改产品制造工艺流程使之不再侵权，(3) 供货承包方用不侵权的材料和产品替代该产品，或 (4) 将货款退给 BD。BD 声明和保证 BD 设计的产品不会引起任何第三人提出的此类请求，即直接地或在某种程度上促成了侵犯美国或其他国家、地区的专利，或吸收、使用了其他人的商业秘密。

(c) Indemnification. To the fullest extent permitted by law, Contractor agrees to indemnify and hold harmless Black & Decker from and against any and all liabilities, losses, damages, judgments, awards, costs, fees, and expenses, including all incidental and consequential damages (including, but not limited to, attorneys' fees and costs of investigation) incurred by Black & Decker resulting from or relating to any claim, notice, allegation, complaint, demand, action, lawsuit, investigation, proceeding, or other process or procedure of any kind (including, but not limited to, those based in whole or part on negligence, product liability, willful misconduct, breach of express or implied warranties, strict liability, deceptive or unfair trade practices, advertising liability, governmental statute or regulation, and the like) between Black & Decker and any third party, parties or any other entity and caused by, arising out of or in any way resulting from the goods, materials, products, or services provided, shipped, furnished or delivered or services performed by Contractor to, for, or on behalf of Black & Decker. The obligations of Contractor under this Section 16(c) shall survive cancellation or termination of this agreement and each purchase order issued hereunder. The obligations of Contractor under this Section 16(c) are independent and do not in any way limit or satisfy the obligations of Contractor to Black & Decker under any other provision of this agreement.

(c) 赔偿：在法律允许的全部范围内，供货承包方同意保证 BD 不会招致任何责任、损失、损害赔偿金、判决、裁决、费用、开支，包括附随的、伴随发生的损害赔偿金（包括但不限于律师费、调查费），它们产生于 BD 与任何其他人之间的权利请求、通知函、指控、起诉、法律行动、要求、诉讼、调查、法律程序或其他任何诸如此类的程序（包括但不限于因部分或完全疏忽大意而引起的责任、产品责任、故意的错误、违反明示的或暗示的保证、严格赔偿责任、欺骗性的或不公平的商业行为、广告责任、违反政府法规），而这些纠纷牵涉到供货承包方为 BD 所供应、交付、提供的货物、材料、产品、服务。此处所述供货承包方义务不因本协议及每一订单的取消、终止而终止。此处所述供货承包方义务是独立的，不对供货承包方本协议下对 BD 的其他义务构成限制或加以弥补冲抵。

(d) Recall. In the event that Black & Decker becomes subject to any investigation or report to a governmental agency or voluntary standards organization relating to compliance with safety regulations or product safety, or becomes subject to any corrective action plan, consent

agreement or order requiring corrective action (including without limitation notice, recall, retrofit, repair, replacement or the refund of purchase price of said products or services, whether at the wholesale, retail or consumer distribution level), whether such corrective action plan, consent agreement or order is voluntary or is a mandate of any governmental agency or voluntary standards organization, or becomes subject to Black & Decker's own investigation relating to compliance with safety regulations, product safety, or excessive reliability issues, as the result of, arising from or in any way related to the goods, materials, products or services provided, shipped, furnished or delivered or services performed by Contractor to, for, or on behalf of Black & Decker, Contractor agrees to defend, protect, indemnify and hold harmless Black & Decker from any and all expenses and liabilities (including without limitation attorneys' fees and expenses, administrative costs and expenses, costs of investigation, notice, corrective action, recall, repair, replacement or the refund of the purchase price) which may be incurred in connection with any such investigation, corrective action plan, consent agreement or order requiring corrective action, or in assuring compliance or aiding or assisting compliance with such mandates. The obligations of Contractor under this Section 16(d) shall survive cancellation or termination of each purchase order and/or agreement.

(d) 产品召回：如果 BD 因遵守安全规则或保证产品安全所需而接受调查、向政府机构报告或向非官方标准组织报告；或因此而必须实施纠错改正计划、达成和解协议、接受要求采取纠错改正行动的命令（包括但不限于通知、召回决定、改良更新、修理、替换、产品或服务的退款，无论它们发生于批发、零售或消费者配送的哪个环节），无论这些行为是自愿的还是政府机构或非政府标准组织强制的；或者 BD 自己因遵循安全规范、产品安全标准、超常可靠性能的需要而自己采取调查行动；而以上措施皆与供货承包方为 BD 或代表 BD 供应的、交付的、提供的产品、材料、服务有关，或者就是因为它们而产生，那么供货承包方应同意采取措施为 BD 抗辩，以使 BD 不招致任何责任、开支（包括但不限于合理的律师费和开支、行政程序费用开支、调查费用、通知决定、纠错改进行动、召回决定、修理、替换、退款），而这些责任、开支可能因为前述调查、纠错改进计划、达成和解协议、接受要求采取纠错改正行动的命令而产生，或由于为遵守法令之目的而提供保证、帮助、辅助而产生。如果 BD 不幸招受了此类责任、开支，供货承包方应保证赔偿。此处所述供货承包方的义务不因订单、本协议的取消、终止而终止。

3. 美国的民事诉讼程序 – 起诉立案阶段/Pleading stage

万一碰到了行政查处、民事诉讼，该怎么办？我们必须对美国的民事司法程序有个基本的了解。

美国的民事司法程序与中国的相比，天差地别，千万不要套用中国的思维。

3.1 起诉阶段的含义 – 原告起诉、被告应诉，最后把案件立下来，以便进入证据阶段。工作内容：递交诉状（含第三人加入起

诉)、应诉(含反请求、反请求答辩),提出各种申请。

RULE 7. PLEADINGS ALLOWED; FORM OF MOTIONS AND OTHER PAPERS

(a) **PLEADINGS**. Only these pleadings are allowed:

- (1) a complaint;
- (2) an answer to a complaint;
- (3) an answer to a counterclaim designated as a counterclaim;
- (4) an answer to a crossclaim;
- (5) a third-party complaint;
- (6) an answer to a third-party complaint; and
- (7) if the court orders one, a reply to an answer.

(b) **MOTIONS AND OTHER PAPERS**.

- (1) *In General*. A request for a court order must be made by motion. The motion must:
 - (A) be in writing unless made during a hearing or trial;
 - (B) state with particularity the grounds for seeking the order; and
 - (C) state the relief sought.

3.2 起诉与诉状:

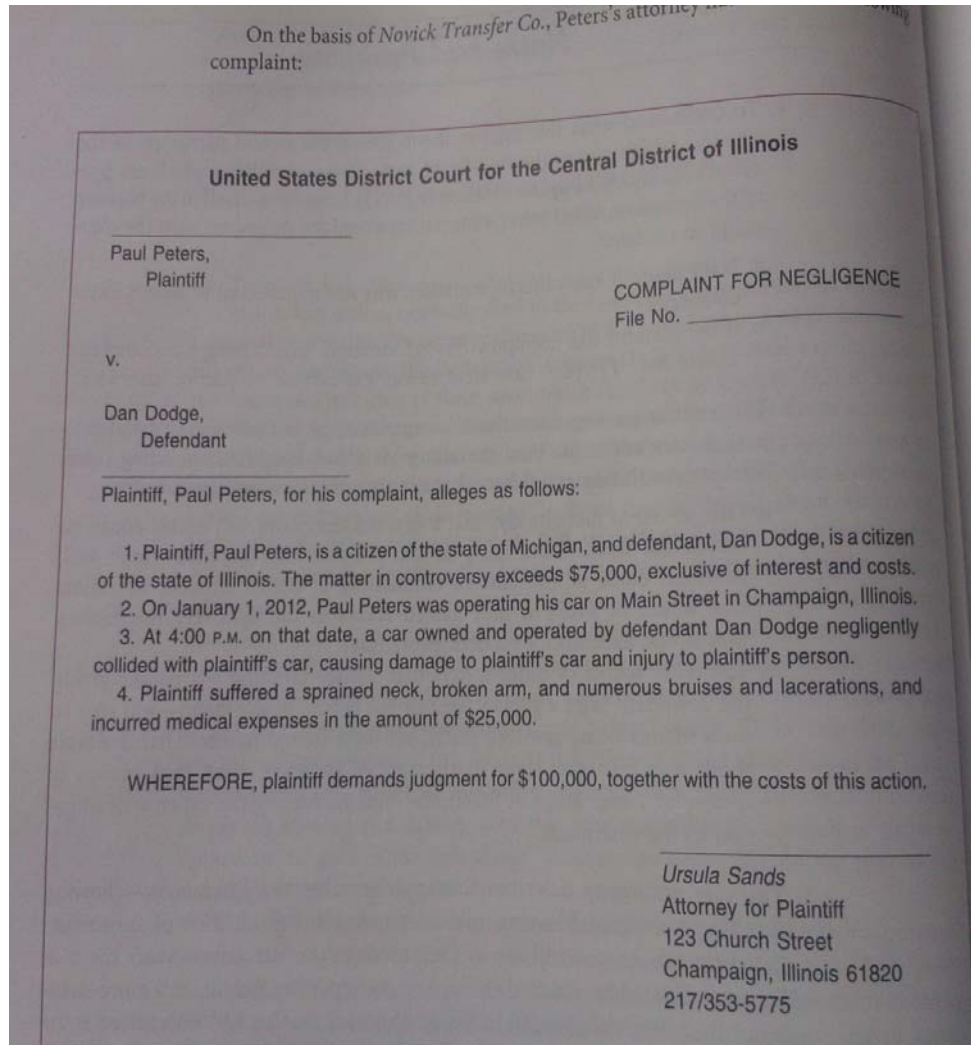
2. 2. 1 诉状的要求: **RULE 8. GENERAL RULES OF PLEADING**

(a) **CLAIM FOR RELIEF**. A pleading that states a claim for relief must contain:

- (1) a short and plain statement of the grounds for the court's **jurisdiction**, unless the court already has jurisdiction and the claim needs no new jurisdictional support—管辖权
- (2) a short and plain statement of the claim showing that the pleader is entitled to relief(**state a claim**)—简单陈述:说明违反行为存在,或其有权请求法律救济(Within a judicial forum, the failure to present sufficient facts which, if taken as true, would indicate that any violation of law occurred or that the claimant is entitled to a legal remedy)
- (3) a demand for the relief sought, which may include relief in the alternative or different types of relief—具体的诉讼请求

一份起诉状只要求满足以上三点法院就会受理。表面上看,这与我国民事诉讼法对起诉与案件受理的要件也差不多。

3. 2. 2 诉状样本



在以上诉状中，当然原告应该会附上一份简单的证据：

比如：看医生的病历、交通事故记录。但这不是必须的。

经比较，美国的诉状与起诉：

- 由律师代签、代办
- 不查验原告身份(律师应该不敢冒牌, 并且无权代理)
- 不要证据原件, 也不要求系统的证据, 只要告诉被告:

因为什么事情起诉你。更不要要求支持赔偿金额的证据。赔偿金额也可以笼统写一个数字, 比如: 暂定多少, 大约多少, 具体依据证据证明后确定。

- 但是，管辖权一定要讲清楚。
- 标明案由

3.2.3 一个具体案件的起诉、立案过程

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原告的立案（案件登记）过程：2月13号递交诉状，2月24号将诉状登记立案（拿案号），当天拿传票，2月26号将传票与登记后的起诉状交寄送达。

原告的请求：（1）defective TVs liquidation loss of 450,000.00, to be proven at trial.(2)Replacement of TVs in excess of \$100,000.00, to be proven at trial. (3)Purchase of repair parts in excess of 135,000.00, to be proven at trial. (4) Special Damages: loss of business reputation in excess of \$1,000,000.00, to be proven at trial.

原告的证据：订单及相应的交易约定

诉状与传票的送达：代理律师办理

3.2.4 美国的民事诉讼起诉的特点：老百姓有冤屈，就来法院诉说（讲故事/Story-Telling）。讲故事，不要带什么证据。实行诉状登记制，而非诉状审查制或立案审查制。只收几十元或百来元的起诉登记费，不收“案件受理费”，更不会按照

争议标的来抽成。真正体现司法为民，衙门大开，接纳各种纠纷，化解社会矛盾，构建和谐社会。

3.3 立案阶段应诉 Responsive pleading: 请求驳回起诉 Motion to Dismiss

RULE 12.

(a) TIME TO SERVE A RESPONSIVE PLEADING.

(1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(b) **Motion to Dismiss:** A party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction/对事没有管辖权

(2) lack of personal jurisdiction/对人没有管辖权

(3) improper venue/审判地点不对

(4) insufficient process/程序错误

(5) insufficient service of process/送达有错

(6) failure to state a claim upon which relief can be granted/没有法律和事实依据，包括过了时效

.....

(e) MOTION FOR A MORE DEFINITE STATEMENT/申请明确诉讼请求及明确相应的事实与法律.

(f) MOTION TO STRIKE/请求删除某些诉状内容（多余的、攻击性）或撤销某些诉讼请求（没有法律和事实依据、不受法律保护的）.

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总结:

1. 要有高度的防范意思，江湖险恶。利益伴随风险与陷阱。
2. 遇到是非不要怕。有理走遍天下。在美国靠诉讼吃饭的生意人和律师大有人在，没有是非，他们就没有饭吃。许多诉讼和诉讼请求，虚得很。