**第五届“华政杯”全国法律翻译大赛初赛试题**

**试题一 (325 words)**

The U.S. Supreme Court has not squarely confronted the death penalty's constitutionality since the 1970s. In that decade, the Court actually ruled both ways on the issue. In *McGautha v. California*,the Court first held in 1971 that a jury's imposition of the death penalty without governing standards did not violate the Fourteenth Amendment's Due Process Clause. But then in 1972, in the landmark case of *Furman v. Georgia*,the Court interpreted the Cruel and Unusual Punishments Clause to hold that death sentences—as then applied—were unconstitutional. In that five-to-four decision, delivered in a *per curiam* opinion with all nine Justices issuing separate opinions, U.S. death penalty laws were struck down as violations of the Eighth and Fourteenth Amendments. The sentences of the “capriciously selected random handful” of those sentenced to die, one of the Justices wrote, are “cruel and unusual in the same way being struck by lightning is cruel and unusual.” Other Justices also emphasized the arbitrariness of death sentences, with some focusing on the inequality and racial prejudice associated with them.

Four years later, the Supreme Court reversed course yet again, approving once more the use of executions. After thirty-five states reenacted death penalty laws in the wake of *Furman*,the Supreme Court upheld the constitutionality of death penalty statutes in *Gregg v. Georgia* and two companion cases. The Court ruled that laws purporting to guide unbridled juror discretion—and requiring capital jurors to make special findings or to weigh “aggravating” versus “mitigating” circumstances—withstood constitutional scrutiny. The Court in *Gregg* emphasized that the Model Penal Code itself set standards for juries to use in death penalty cases. Only mandatory death sentences, the Court ruled that year, were too severe and thus unconstitutional. In its decision in *Woodson v. North Carolina,* the Court explicitly ruled mandatory death sentences, the norm in the Framers' era, were no longer permissible and had been “rejected” by American society “as unduly harsh and unworkably rigid.”

**试题二 (348 words)**

The main features of the Anglo-American civil trial developed in the practice of the English common law courts in medieval and early modern times, as a consequence of the jury system, in which panels of lay persons were used to decide cases. Legal professionals—judges and lawyers—operated the initial pleading stage of the procedure, which was meant to identify and to narrow the dispute between the parties. If the dispute turned on a matter of law—that is, on a question such as whether the complaint stated a legally actionable claim, or whether some particular legal rule governed—the professional judges decided the case on the pleadings. If, however, the pleadings established that the case turned on a question of fact, the case was sent for resolution at trial by a jury composed of citizens untrained in the law. So tight was the linkage between trial and jury that there was in fact no such thing as nonjury trial at common law. In any case involving a disputed issue of fact, bench trial was unknown until the later nineteenth century.

In the early days of the jury system, in the twelfth and thirteenth centuries, jurors were drawn from the close vicinity of the events giving rise to the dispute, in the expectation that the jurors would have knowledge of the events, or if not, that the jurors would be able to investigate the matter on their own in advance of the trial. Medieval jurors came to court mostly to speak rather than to listen—not to hear evidence, but to report a verdict that they had agreed upon in advance. Across the later Middle Ages, the jury ceased to function in this way for complex reasons, including cataclysmic demographic dislocations following the Black Death of the 1340s and the effects of urbanization in producing more impersonal social relations. By early modern times, jurors were no longer expected to come to court knowing the facts. The trial changed character and became an instructional proceeding to inform these lay judges about the matter they were being asked to decide.

**试题三 (358 words)**

Among businessmen and lawyers familiar with commercial practice in complex transactions on both sides of the Atlantic, it is a common observation that a contract drafted in the United States is typically vastly more detailed than a contract originating in Germany or elsewhere on the Continent.

Why are American contracts so much more detailed than European? The Belgian legal writer Georges van Hecke discussed this subject in a stimulating paper that is now a quarter-century old. He offered three explanations. 1. *Perfectionism*.Van Hecke attributed to the American lawyer a drive “for perfection that is not commonly to be found in Europe. The average American businessman is prepared to pay for this perfection in the form of high fees,” while his European counterpart is not. 2. *Federalism*.Van Hecke directed attention to the multiplicity of American jurisdictions. “An American lawyer, when drafting a contract, does not know in what jurisdiction litigation will arise. He must make a contract that will achieve its purpose in any American jurisdiction.” By contrast, the European lawyer “always has in mind the law of one country where the contract is being localized by both choice of law and choice of forum.” 3. *Code law versus case law*.The most intriguing of van Hecke's suggestions is that the different American style of contracting is a manifestation of that seemingly profound difference between Continental and Anglo-American legal systems: The European private law is codified whereas the American is not. Codification, especially in Germany and in the German-influenced legal systems, entailed not only a reorganization of the law, but a scientific recasting of legal concepts. “The European lawyer has at his command a store of synthetic concepts, such as '*force majeure*'. Their exact meaning may not always be perfectly clear, but they do save a lot of space-consuming enumeration.” By contrast, American lawyers draft to combat “the lawless science of their law, that codeless myriad of precedent, that wilderness of single instances.” Thus, van Hecke observes, “when a European and an American lawyer want to express the same thing, an American lawyer needs far more words.” American contracts are prolix because American substantive law is primitive.

**试题四 (344 words)**

In international law, including WTO law, it is well accepted that certain questions of a preliminary character which are independent from the merits may nonetheless stop the proceedings before findings on the merits are made. This eventuality need not be expressly stated in the governing instruments of the judicial body concerned. Questions of jurisdiction and admissibility are both part of the universe of preliminary questions that, while leaving the merits of the case untouched, have the potential to prevent or postpone a final judgment on the merits.

 The difference between jurisdiction and admissibility is a feature of the general international law of adjudication. Besides the International Court of Justice, the European Court of Human Rights (ECHR) and arbitral tribunals have also made this distinction. For example, in *SGS* v. *Philippines,* the tribunal of International Center for Settlement of Investment Disputes found that it did have *jurisdiction* to consider a contractual claim under the so-called "umbrella clause" of the bilateral investment treaty at issue. The tribunal, however, declined to exercise this jurisdiction, concluding that the claim was not *admissible* because of a forum clause in the contract stating that contractual claims must be brought to domestic courts. Importantly, neither the Statute of the International Court of Justice, nor the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, under which *SGS* v. *Philippines* was decided, explicitly includes the distinction between jurisdiction and admissibility. The Dispute Settlement Understanding of the WTO does not contain this distinction either, but that alone is not a reason to disregard the distinction out of hand. In fact, the dichotomy between jurisdiction and admissibility is embedded in the separation between the authority of the tribunal and the more general procedural relationship between the parties. The development of this distinction before the International Court of Justice, and its spillover to the ECHR and arbitral tribunals, indicates that there is a more general role for it in international dispute settlement. Analogously, in our view, the distinction between jurisdiction and admissibility should also be applied in WTO dispute settlement.