(国际法双语教学试用教材)

# International Business Law

## (Corporations and Negotiable Instruments)

# 国际商法

## (公司和票据法篇)

顾百忠 编著

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**(公司和票据法篇)**

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# 编 者 说 明

国际法双语教学教材《国际商法》包括三本,即国际商法“合同销售篇”,“公司和票据法篇”,“代理法和产品责任法篇”。国际商法是法学院国际经济法和民商法专业学生和商学院学生必须学的一门法律专业课,而外语又是系统学习、理解国际商法的必要工具,基于这样的目的,我们编著这套教科书,作为双语教学的试用教材,供法学院和商学院大学英语四级以上的学生以及法律工作者学习理解国际商法和法律英语使用。

本书《国际商法》(公司和票据法篇)以介绍英美公司法和票据法为主,全篇包括两部分共十二章。第一部分公司法包括:公司组建和前期责任、公司融资、公司管理、公司董事和高级职员的职责、刺穿公司面纱、越权和派生诉讼、公司股东权利、公司重组和解散、对外州公司的管辖和法律适用等九章;第二部分商业票据法包括:商业单据和可转让票据、转让和正当持票人以及票据当事人方的责任等三章。

全书编写的结构和内容参照英美法学院和商学院同类教科书,内容力求概而全,保持原著的风貌。每章后有模拟案例问题,供学生课堂讨论,旨在加深对有关法律要点的理解和训练英语口头表达能力;每章后的案例直接引自英美法院判例,供学生课后阅读,在课堂上择疑分析,以提高学生综合理解和分析能力;每章后的编者提示,大多涉及普通法法院创立的有关司法原则,以引起学生重视。全书以英文编著,不附任何中文解释,旨在促使学生摆脱对母语的依赖,同时也避免母语解释外国法律的局限所造成的误导,这也应该是法学院双语法律教学应当达到的目的之一。书后附部分涉及公司法和票据法的常用及疑难法律术语,以及美国《统一商法典》第三部分原文,便于学生和使用者查阅。

使用本教材,强调法律和语言的双重培养,因此教师具有法律和外语双重专业基础,将有利于完成双语教学的要求。我们希望,通过一个学期的教学,学生能对英美公司法和商业票据法有一个比较全面的理解,并在实践中,明显提高其英语的口头表达和阅读分析能力。双语教材的编写属于一种新的尝试,在本教材的编写过程中得到本校、院两级领导和本校教务处的大力支持,同行的积极帮助,在此一并感谢。此外,由于编者水平有限,书中错误、不当或遗漏之处在所难免,敬请同行和读者批评指正。

**编者**

**2004 年 9 月**

**华政园**

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# PART ONE Corporation in General

The modern corporation is the most important form of business in the history of the world. Businesses organized as corporations can attain a greater capacity to raise capital. Corporation law allows people to invest their money in a corporation and become owners without imposing unlimited liability or management responsibilities on themselves. In England, the corporate form was used extensively before the 16th century. The famous British trading companies, such as the Russia Company and the Massachusetts Bay Company, were the forerunners of the modern corporation. The British government gave these companies monopolies in trade and granted them powers to govern in the areas they colonized. They were permitted to operate as corporations because of the benefits that they would confer on the British Empire, such as the exploitation of natural resources.

Corporation law in the United States evolved independently of English corporation law since 1776. Early American corporations received *special charters* from state legislatures. In the late 18th century, general incorporation statutes emerged in the United States. North Carolina in 1795 and Massachusetts in 1799 passed statutes permitting incorporation by *any group of persons* meeting the requirement of the statutes. Initially, these and other similar statutes permitted incorporation only for limited purposes beneficial to the public, such as operating toll bridges and water systems. Incorporation was still viewed as a privilege, and many restrictions were placed on corporations, such as maximum limits on capitalization, and restrictions on ownership of real and personal property. In 1837, Connecticut became the first state to permit the formation of corporations for "any lawful purpose."

Limited liability for owners of *non-trading* companies was recognized in the 15th century. For trading *companies*, government-granted charters in England were always accompanied by limited liability on the theory that the government had created a separate person. This limited liability of the owners of trading companies was recognized mainly to prevent an owner's creditors from seizing corporate assets. In practice, many corporate charters expressly granted a corporation the power to assess its owners for money to pay its debts. By the end of the 17th century, individual owners of a trading company were recognized as not being liable for its debts. The American incorporation statutes of the late 18th and early 19th centuries indicate that some states provided for limited liability; others had double liability; and Massachusetts, for example, had unlimited liability for owners of manufacturing Corporations. By 1830, when Massachusetts accepted limited liability, the general principle of limited liability of owners for corporate debts was well established.

The essential features of corporations include: (1) A corporation may be created only by *permission of a government*; (2) A corporation is a legal person independent of its owners and its managers. Its life is unaffected by the retirement or death of its shareholders, officers, and directors. A corporation is a person under the Constitution of the United States. Like natural persons, it is protected from unreasonable searches and seizures and is guaranteed due process and equal protection under the law. It also has free speech rights. It has its own *domicile* and its own place of *residence*, whose locations determine in part whether a state may constitutionally impose its laws on the corporation. (3) A corporation may *acquire*, *hold*, *and convey property* in its own name. A corporation may *sue and be sued* in its own name. Harm to a corporation is not harm to the shareholders; therefore, with few exceptions, a shareholder may not sue to enforce a claim of the corporation. (4) A shareholder has *no right or duty to* manage the business of a corporation. The directors and officers need not be shareholders. *Generally, shareholders owe no fiduciary duties* to the corporation. A shareholder who is not an officer or a director may deal with the corporation as may any other person. A shareholder may be a creditor of the corporation. The shareholders have *limited liability*. With few exceptions, they are not liable for the debts of a corporation beyond their capital contributions to the corporation. (5) Generally, the ownership interest in a corporation is *freely transferable*. A shareholder may sell her shares to whomever she wants whenever she wants. The purchaser becomes a shareholder with the same rights that the seller had. (6) A corporation *pays federal income taxes* on its income. Shareholders have personal income from the corporation only when the corporation makes a distribution of its assets to them, as when the corporation pays dividends to its shareholders.

Corporations may be divided into three classes: (1) corporations for profit, (2) corporations not *for* profit, and (3) *government-owned corporations*. State corporation statutes establish procedures for the incorporation of each of these classes and for their operation. In addition, a large body of common law applies to all corporations.

Most business corporations are ***for-profit corporations***. Their shareholders expect a return on investment in the form of dividends paid by the corporation and increased market value of their shares. Nearly all for-profit corporations are incorporated under the *general incorporation law* of a state. All of the states require professionals who wish to incorporate, such as physicians, dentists, lawyers, and accountants to incorporate under *professional corporation acts*. In addition, the for-profit corporations that especially affect the public interest, for example, banks, insurance companies, and savings and loan associations, are usually required to incorporate under *special statute*.

For-profit corporations range from huge international organizations to small, one-person businesses. General Motors is an example of a ***publicly held corporation*** because its shares are available to public investors. Corporations with few shareholders are usually called ***close corporations***. Generally, publicly held corporations and close corporations are subject to the same rules under state corporation law. Many states, however, allow close corporations greater latitude in the regulation of their internal affairs than is granted to public corporations. A Subchapter S corporation, or ***S Corporation***, is a special type of close corporation. It is treated nearly like a partnership for federal tax purposes. Its shareholders report the earnings or losses of the business on their individual federal income tax returns. An S Corporation election is made by complying with internal Revenue Code requirements, including the requirement that it has no more than 35 shareholders.

***Nonprofit corporations*** include charities, churches, fraternal organizations, mutual insurance companies, some savings and loan associations, and such businesses as the Blue Cross, and Blue Shield companies. These corporations have *members* rather than shareholders, and none of the surplus revenue from their operations may be distributed to their members. Since they generally pay no income tax, nonprofit corporations can reinvest a larger share of their incomes in the business than can for-profit corporations.

Many corporations are owned by governments and perform governmental and business functions. For example, school corporations, water companies, and irrigation districts. Others, such as the Tennessee Valley Authority and the Federal Deposit Insurance Corporation, operate much like for-profit corporations, except that at least some of their directors are appointed by governmental officials, and some or all of their financing frequently comes from government. The TVA and the FDIC are chartered by Congress, but ***government-owned corporations*** may also be authorized by states.

The framers of the U. S. Constitution decided not to provide for the incorporation of general business corporations by the federal government. Therefore, such corporations are incorporated by the individual states. However, leaving incorporation to the states has resulted in competition for incorporation in different states. State statutes vary greatly and a business may incorporate in only one state, yet do business in all the others. Delaware owes its victory to the fact that historically its legislature and its courts have been attentive to business interests and have given corporate management much freedom from shareholder and creditor interventions. Proposals for federal incorporation have dropped from public view in favor of passage of major federal regulatory statutes dealing with the primary concerns of those times. Such statutes include the Interstate Commerce Act in 1887, the Sherman Antitrust Act of 1890, the Federal Trade Commission Act in 1914, the Securities Act of 1933, the Securities Exchange Act of 1934 and the Foreign Corrupt Practices Act of 1977.

To improve the rationality of American corporation law, the American Bar Association's Committee on Corporate Laws has prepared a *model* statute for adoption by state legislatures. It is called the ***Model Business Corporation Act*** (***MBCA***). The MBCA has been amended many times, and it was completely revised in 1984. The revised MBCA is the basis of corporation law in several states, including Virginia and Indiana. Most of its provisions already represent the majority rule in the United States. Other revised MBCA provisions may become majority rules in the near future. Nonetheless, Delaware and several other major commercial and industrial states, such as New York and California, do not follow MBCA.

Several states have special provisions or statutes that are applicable only to close corporations. In 1982, the ABA's Committee on Corporate Laws adopted *the Statutory Close Corporation Supplement to the Model Business Corporation Act*. The Supplement is designed to provide a rational solution to the special problems facing close corporations.

Although nearly all of corporation law is statutory law, including the courts' interpretation of the statutes, there is a substantial body of common law of corporations. Most of this common law deals with creditor and shareholder rights. For example, the law of *piecing the corporate veil*, which will be discussed in a separate chapter, is common law protecting creditors of corporations.

# I. PREINCORPORATION LIABILITIES

Incorporation is started by promoters. A ***promoter*** *is one who incorporates a business, organizes its initial management, and raises its initial capital.* Typically, a promoter discovers a business or an idea that needs to be developed, finds people who are willing to invest in the business, negotiates the contracts necessary for the initial operation of the proposed venture, incorporates the business, and helps management start the operation of the business. To incorporate a business, the persons must comply with the applicable state corporation law.

**1. Promoter and corporation**. A promoter is not an agent of the proposed corporation, because he is self-appointed and the corporation is not yet in existence, but he owes fiduciary duties to the corporation. A promoter is not an agent of prospective investors in the business, because they did not appoint him and they have no power to control him. However, a promoter owes ***a fiduciary duty*** to the prospective investors, including shareholders and possibly creditors. A promoter owes such parties a duty of full disclosure and honesty. For example, a promoter breaches this duty when she diverts money received from prospective shareholders to pay her expenses, unless the shareholders agree to such payment. Also, a promoter may not profit personally by transacting secretly with the corporation in her personal capacity. The promoter's failure to disclose her interest in the transaction and the material facts permits the corporation to rescind the transaction or to recover the promoter's secret profit. On the other hand, the promoter's full disclosure of her interest and the material facts of the transaction to an independent board of directors, which approves the transaction, prevents the corporation from recovering the promoter's profit. When a promoter is a director, approval of the transaction by the board of directors may not be sufficient; the transaction may also have to be intrinsically fair to the corporation.

When a promoter conveys property to the corporation at a greatly inflated value in payment for shares of the corporation, these shares are called ***watered shares***. If this occurs with the knowledge and consent of all the shareholders of the corporation, and no additional shareholders are contemplated as part of the promotional scheme at the time that consent is obtained, there is no wrongdoing. A problem arises, however, when future shareholders are contemplated. People view it differently, but the trend is to allow recovery of the promoter's profits when the corporation sells additional shares to the public at a price that is more than the promoter paid and that is substantially in excess of the fair market value of the shares.

**2. Preincorporation contracts**. A promoter may purport to make contracts for a corporation before it comes into existence. Such contracts are called ***preincorporation contracts***. Three parties may have liability on such contracts: (1) the corporation, (2) the promoter, and (3) the third party with whom the promoter made the contract.

When a corporation comes into existence, it does not automatically become liable on the *preincorporation* contracts made in its behalf by the promoter. It cannot be held liable as a principal because the promoter was not its agent and the corporation was not in existence when the contracts were made. After incorporation, however, a corporation may agree to become bound on a promoter's preincorporation contracts. An agreement may be found from a corporation's ***adoption*** of the promoter's contracts. Adoption is based on the agency concept that permits a principal to ratify the unauthorized acts of an agent. The corporation accepts this offer when it acknowledges the contract as a binding obligation. For the corporation to adopt a promoter's contract, the corporation must *accept* the contract *with knowledge of all its material facts*. In addition, the contract must be within *the powers* of the corporations. Acceptance may be express or implied. The corporation's knowing receipt of the benefits of the contract is sufficient for acceptance.

Model Business Corporation Act (MBCA) Section 2.04 imposes joint and several liability for all liabilities incurred by persons who purport to act on behalf of a corporation knowing the corporation is not in existence. Therefore, a promoter and her co-promoters are jointly and severally liable on preincorporation contracts the promoter negotiates in the name of the nonexistent corporation. This liability exists even when the promoters' names do not appear on the contract. Promoters are also jointly and severally liable for torts committed by their co-promoters prior to incorporation. If the corporation is *not formed*, a promoter remains liable on a preincorporation contract, unless the third party releases the promoter from liability. Also, the *mere formation* of the corporation does *not* release a promoter from liability. In addition, a promoter remains liable on a preincorporation contract even after the corporation's adoption of the contract, since *adoption* does not automatically release the promoter. The corporation cannot by itself relieve the promoter of liability to the third party; the third party must agree, expressly or impliedly to release the promoter from liability. The promoter, the corporation, and the third party may agree to release the promoter from liability on the contract by a ***novation.*** Usually, novation will occur by express or implied agreement of all the parties.

A few courts have held that a promoter is not liable on preincorporation contracts if the third party *knew of the nonexistence* of the corporation, yet insisted that the promoter sign the contract in behalf of the nonexistent corporation. Other courts have found that the promoter is not liable if the third party clearly stated that he would *look only to the corporation* for performance. When a promoter is liable on a preincorporation contract, the third party also is liable. That means the promoter can enforce the contract against the third party and after adopting the contract, the corporation can enforce the contract against the third party.

A corporation generally is *not required* to compensate a promoter for her promotional services, or even her expenses, unless the corporation has agreed expressly to compensate the promoter. The justification for this rule is that the promoter is self-appointed and acts for a corporation that is not in existence. Nevertheless, a corporation may reimburse the promoter for her reasonable expenses and to pay her the value of her services to the corporation. Corporations often compensate their promoters with shares. MBCA Section 6.21(c) permits the issuance of shares for a promoter's preincorporation services.

Promoters sometimes use *preincorporation* to ensure that the corporation will have adequate capital when it begins its business. Under the terms of a share subscription, a prospective shareholder offers to buy a specific number of the corporation's shares at a stated price. Generally, corporate acceptance of preincorporation subscriptions occurs by action of the board of directors after incorporation. Under MBCA Section 6.20(a), preincorporation subscriptions are irrevocable for a six month period, in the absence of a contrary provision in the subscription. In addition, unanimous agreement of the subscribers will effect a revocation. Promoters have no liability on preincorporation share subscriptions but a duty to make a good faith effort to bring the corporation into existence. When a corporation fails to accept a preincorporation subscription or becomes insolvent, the promoter is not liable to the disappointed subscriber, absent fraud or other wrongdoing by the promoter.

**3. Incorporation process.** A promoter must decide where to incorporate a business. If the business that is primarily *interstate*, the business may benefit by incorporating in a state different from the state in which it has its principal place of business. Two factors affect the decision where to incorporate: (1) the cost of organizing and maintaining the corporation in the state and (2) the freedom from shareholder and creditor intervention that the state's corporation statute grants to the corporation's management. The steps prescribed by the incorporation statutes of the different states vary, but they generally include the following, which appear in the MBCA:

1. Preparation of articles of incorporation.
2. Signing and authenticating of the articles by one or more incorporators.
3. Filing of the articles with the secretary of state, accompanied by the payment of specified fees.
4. Holding an organization meeting for the purpose of adopting bylaws, electing officers, and transacting other business.

The MBCA specifies that one or more persons, including corporations, partnerships, and unincorporated associations, may serve as the ***incorporators.*** Incorporators have no function beyond lending their names and signatures to the process of bringing the corporation into existence. No special liability attaches to a person merely because she serves as an incorporator.

The articles of incorporation are the basic governing document of the corporation. They state many of the rights and responsibilities of the corporation, its management, and its shareholders. The MBCA lists the matters that must be included in the articles of incorporation:

1) The name of the corporation; 2) the number of shares that the corporation has authority to issue; 3) the address of the initial registered office of the corporation and 4) the name of its registered agent, and the name and address of each incorporator.

In addition, under the MBCA the articles *may* include the names and addresses of the individuals who are to serve as the initial directors; the purpose of the corporation; the duration of the corporation; the par value of shares of the corporation, and the additional provisions not inconsistent with law for managing the corporation, regulating the internal affairs of the corporation, and establishing the powers of the corporation and its directors and shareholders. For example, these additional provisions may contain the procedures for electing directors, the quorum requirements for shareholders' and directors' meetings, and the dividend rights of shareholders.

Under MBCA Section 4.01(b), the name given by the incorporators must be distinguished from the name of any other corporation incorporated or qualified to do business in the state. The name must include the word *corporation*, *incorporated*, *or limited*, or the abbreviation *corp.*, *inc.*, *co.*, *or ltd.* To aid in the selection of a name unlike those of preexisting corporations, MBCA Section 4.02 provides for advance application to the secretary of state for a desired name. If the name is available, it may be reserved for a period of 120 days while the corporation is being formed.

The MBCA does not require the inclusion of a statement of ***purpose*** in the articles. When a purpose is stated, it is sufficient to state, alone or together with specific purposes, that the corporation may engage in "any lawful activity." The MBCA permits a corporation to have ***perpetual existence.*** If desired, the articles of incorporation may provide for a shorter duration.

Most of the state corporation statutes require the articles to recite the ***initial capitalization*** of the business. Usually, the statutes require that there be a minimum amount of initial capital, such as $ 1,000. Since such a small amount of capital is rarely enough to protect creditors adequately, the MBCA dispenses with the need to recite a minimum amount of capital. Instead, the MBCA relies on the rules of ***thin capitalization*** to protect creditors on a case-by-case basis.

Filing requirement in critical to the existence of a corporation. The articles of incorporation must be delivered to the office of the secretary of state, and a filing fee must be paid. The office of the secretary of state reviews the articles of incorporation that are delivered to it. If the articles contain everything that is required, the secretary of state stamps the articles "Filed" and returns a stamped copy of the articles to the corporation along with a receipt for the payment of the ***filing fee.*** The *existence* of the corporation begins when the articles are filed. Some states retain the former MBCA rule that proof of a corporation's existence is proved by the secretary of state's issuance of a ***certificate of incorporation***, though the revised MBCA eliminates the certificate of incorporation. Other states require a *duplicate filing* of the articles with an office, usually the county recorder's office in the county in which the corporation has its principal place of business. The purpose of a duplicate filing is to ease creditors' access to the articles.

The Organization Meeting is another key requirement to prove the existence of the corporation. After the articles of incorporation have been approved by the secretary of state, an organization meeting is held. The subject matter of the meeting differs from state to state. The MBCA specifies only that ***bylaws*** shall be adopted and officers ***elected.*** If the meeting is the first meeting of the board of directors, other matters may be considered, such as, adopting a corporate seal, approving the form of share certificates, accepting share subscriptions, authorizing the issuance of shares, adopting preincorporation contracts, authorizing reimbursement for promoters' expenses, and fixing the salaries of officers. The board may also take action on matters appropriate to begin the operation of the corporation, such as authorizing applications for qualification to do business in other states as a foreign corporation. In addition, the board may transact any other business within its powers, such as ordering inventory and hiring employees. A corporation should adopt a ***seal***, a design impressed on documents or affixed to them as proof of authenticity. Many states require that any corporate signing of documents pertaining to real estate (e.g., deeds and mortgages) be authenticated by a seal. If the corporation does not adopt a seal, it may be asked to certify that it has no seal when it executes such documents.

The function of the ***bylaws*** is to supplement the articles of incorporation by defining more precisely the powers, rights, and responsibilities of the corporation, its managers, and its shareholders and by stating other rules under which the corporation and its activities will be governed. The bylaws usually state the authority of the officers and the directors, specifying what they may do and may not do; the time and place at which the annual shareholders' meetings will be held; the procedure for calling special meetings of shareholders; and the procedures for shareholders' and directors' meetings. The bylaws may make provision for special committees of the board, defining their membership and the scope of their activities. They set up the machinery for the transfer of shares, the maintenance of share records, and for the declaration and payment of dividends.

MBCA Section 2.06 gives the incorporators or the initial directors the *power to adopt* the initial bylaws. The board of directors holds the power *to repeal and to amend* the bylaws, unless the articles reserve this power to the shareholders. Under MBCA Section 10.20, the shareholders, as the ultimate owners of the corporation, always retain the power to amend the bylaws, even if the directors also have such power. To be valid, bylaws must be consistent with the law and with the articles of incorporation.

***Close corporations*** face problems that normally do not affect publicly held corporations. Therefore, many states have statutes that attend to the special needs of close corporations. For example, some corporation statutes allow a close corporation to be managed not by a board of directors but by its *shareholders.* Section 3 of the Statutory Close Corporation Supplement to the MBCA permits a corporation with *fewer than 50 shareholders* to ***elect*** to become a close corporation. The Close Corporation Supplement requires the articles of incorporation to state that the corporation is a statutory close corporation. Since application of the close corporation statute is elective, there is no penalty for a corporation's failure to meet the election requirements. The only consequence of a failure to meet the requirements is that the close corporation statutory provisions are inapplicable. Instead, statutory corporation law will treat the corporation as it treats any other general corporation. However, a court may decide to apply *common law* rules applicable only to close corporations whether or not a corporation meets the statutory requirements for treatment as a close corporation.

**4. Defective attempts of incorporation.** Promoters and business managers sometimes make representations to others that they are acting for a corporation, although fewer than all of the conditions for incorporation have been met. For example, the corporation may not have filed its articles of incorporation or may not have held an organization meeting.

One possible consequence of defective incorporation is to make the promoters, the managers, and the purported shareholders *personally liable* for the obligations of the defectively formed corporation. This may include both *contract and tort* liability. For example, an employee of an insolvent corporation drives the corporation's truck over a pedestrian. If the pedestrian proves that the corporation was defectively formed, he may be able to recover damages for his injuries from the promoters, the managers, and the shareholders. A second possible consequence of defective incorporation is that a party to a contract involving the purported corporation may claim nonexistence of the corporation in order to avoid a contract made in the name of the corporation. The courts have tried to determine when these two consequences should arise by making a distinction between ***de jure*** corporations, ***de facto*** corporations, ***corporations by estoppel***, and corporations so defectively formed that they are treated as being ***nonexistent.***

A ***de jure*** corporation is formed when the promoters substantially comply with each of the *mandatory conditions precedent* to the incorporation of the business. They need not have complied with *directory provisions. Mandatory provisions* are those that the corporation statute states "shall" or "must" be done or those that are necessary to protect the public interest. *Directory provisions* are those that "may" be done and that are unnecessary to protect the public interest. Statutes provide that the incorporators shall file the articles of incorporation with the secretary of state. This is a mandatory provision, other mandatory provisions include conducting an organization meeting. Directory provisions include minor matters, such as the adoption of a seal and the inclusion of the incorporators' addresses in the articles of incorporation. If a corporation has complied with each mandatory provision, it is a ***de jure*** corporation and is treated as a corporation for *all purposes.* The validity of a ***de jure*** corporation cannot be attacked, except in a few states in which the state in a *quo warranto proceeding* may attack the corporation for noncompliance with a *condition subsequent to incorporation*, such as a failure to file an annual corporation report.

A ***de facto*** corporation exists when the promoters fail in some material respect to comply with all of the mandatory provisions of the incorporation statute, yet comply with most such provisions. There are three requirements for a ***de facto*** corporation:

1. There is a *valid statute* under which the corporation could be organized.
2. The promoters or managers make an *honest attempt* to organize under the statute.
3. The promoters or managers *exercise corporate*. That is, they act as if they were acting for a corporation.

Generally, failing to file the articles of incorporation with the secretary of state will prevent the creation of a de facto corporation. However, a ***de facto*** corporation will exist despite the lack of an organization meeting or the failure to make a *duplicate* filing of the articles with a county recorder. A ***de facto*** corporation is treated as a corporation against either an attack by a third party or an attempt of the business itself to deny that it is a corporation. The state, however, may attack the claimed corporate status of the business in a *quo warranto* action.

When people hold themselves out as representing a corporation or believe themselves to be dealing with a corporation, a court will estoppl those people from denying the existence of a corporation. This is called ***corporation by estoppel.*** For example, a manager states that a business has been incorporated and induces a third person to contract with the purported corporation. The manager will not be permitted to use a failure to incorporate as a defense to the contract, because he has misled others to *believe reasonably* that a corporation exists. Under the *doctrine of estoppel*, each contract must be considered individually to determine whether either party to the contract is estopped from denying the corporation's existence.

Section 56 of a former version of the MBCA states that the issuance *of a certificate of incorporation* by the secretary of state is *conclusive* proof of incorporation, except against the state, which is permitted to bring a *quo warranto* action challenging corporate status. Some courts have held that the old MBCA eliminates the concepts of de facto corporation and corporation by estoppel. Some courts have held that a failure to obtain issuance of a certificate is conclusive proof of the *nonexistence of* the corporation. The revised MBCA of 1984 in Section 2.03 adopts essentially the same rule as old Section 56. It states that incorporation occurs when the articles are filed. The *filing* of the articles, as evidenced by the return of a copy of the articles stamped by the secretary of state, accompanied by a filing fee receipt, is *conclusive* proof of the existence of the corporation, except in a *quo warranto* proceeding brought by the state.

If people attempt to organize a corporation, but their efforts are so defective that not even a corporation by estoppel is found to exist, the courts have generally held such persons to be partners with unlimited liability for the contracts and torts of the business. However, most courts impose the unlimited contractual liability of a partner only on those who are *actively engaged in the management* of the business or who are responsible for the defects in its organization. Tort liability, however, is generally imposed on everyone-the promoters, the managers, and the purported shareholders of the defectively formed corporation. The law of defective incorporation is confusing when you consider that many of the defective incorporation cases look like promoter liability cases, and vice versa. A court may have difficulty deciding whether to apply the law of promoter liability or the law of defective incorporation to preincorporation contracts. Therefore, that modern corporation statutes have attempted to eliminate this confusion by adopting simple rules for determining the existence of a corporation and the liability of its promoters, managers, and shareholders.

Section 146 of a former version of the MBCA imposes joint and several liability on those persons "who assume to act as a corporation without authority to do so," when a certificate of incorporation has not been issued. The revised MBCA of 1984 in Section 2.04 clarifies the liability of shareholders when there is a defective attempt to incorporate. It imposes joint and several liability on those persons who purport to act on behalf of a corporation and know that there has been no incorporation. Section 2.04 would impose liability on promoters, managers, and shareholders who both (1) *participate* in the operational decisions of the business and (2) *know* that the corporation does not exist. Knowledge that articles of incorporation have not been filed is sufficient to establish knowledge that the corporation does not exist.

Section 2.04 would, however, release from liability shareholders and others who either (1) take no part in the management of the defectively formed corporation or (2) mistakenly believe that the corporation is in existence. Consequently, *passive* shareholders have no liability for the obligations of a defectively formed corporation even when they know that the corporation has not been formed. Likewise, managers of a defectively formed corporation have no liability when they believe that the corporation exists.

提示：

对于因为疏忽造成公司注册手续不完全，法院有时采取谅解态度，将这些公司称作"既成事实公司"(de facto corporation)和"法律上的公司"(de jure corporation)，从而给股东有限责任的保护。根据普通法，"既成事实公司"一般需要符合三个条件：(1) 公司注册手续至少在表面上遵守了公司法的规定；(2) 注册手续之缺陷是善意造成的；(3) 公司已经开始运作。而成为"法律上的公司"的客观标准是必须已经遵循法律规定的"强制性"(mandatory)条款，例如，成立公司必须有公司的章程等；允许存在对法律"指导性"(directory)条款规定的背离，譬如，遗漏了注册人的地址和董事名单等。在实际运用这些规则时，强调注册人非故意性错误的补救和公平原则。此外，"禁止反言公司"(corporation by estoppel)则从另外一个角度保护疏忽大意的公司创办人和股东，不支持与该公司打交道的一方，因"意外"发现该公司尚为完全注册而获得不应该有的额外赔偿。

应该看到，法院根据个案的具体情况，对公司注册中的缺陷采取灵活态度，坚持公司法确立的有限责任，创造性地适用法律，这正是普通法的优越之处。可是，法律界许多人士对此有不同看法，特别是对"既成事实公司"和"禁止反言公司"，由于主观意志判定的色彩太明显，在许多州遭到反对。例如，在纽约州，除非"既成事实公司"已经确定，法院一般不承认"禁止反言公司"的理论。

### QUESTIONS FOR EXERCISE

1. Susan Stap, a professional tennis player, contracted to play tennis for the Chicago Aces Tennis Team of the World Team Tennis League. The contract, obligating the Chicago Aces to pay Stap a base salary and certain bonuses, was made on January 24, 1974. The contract stated that the "Chicago Aces Tennis Team, Inc. (Club), employs Susan Stap (Player) to perform in or on behalf of the Club's participation in World Team Tennis." Throughout the remainder of the contract, the designations "Club" and "Player" were used in provisions concerning compensation, benefits, and employment duties. The contract was signed by Stap and by the "Chicago Aces Tennis Team, Inc., by Jordan H. Kaiser, Pres." The Chicago Aces were not incorporated until May 1974. On June 1, 1974, an amendment to the contract changed Stap's bonuses. The amendment was