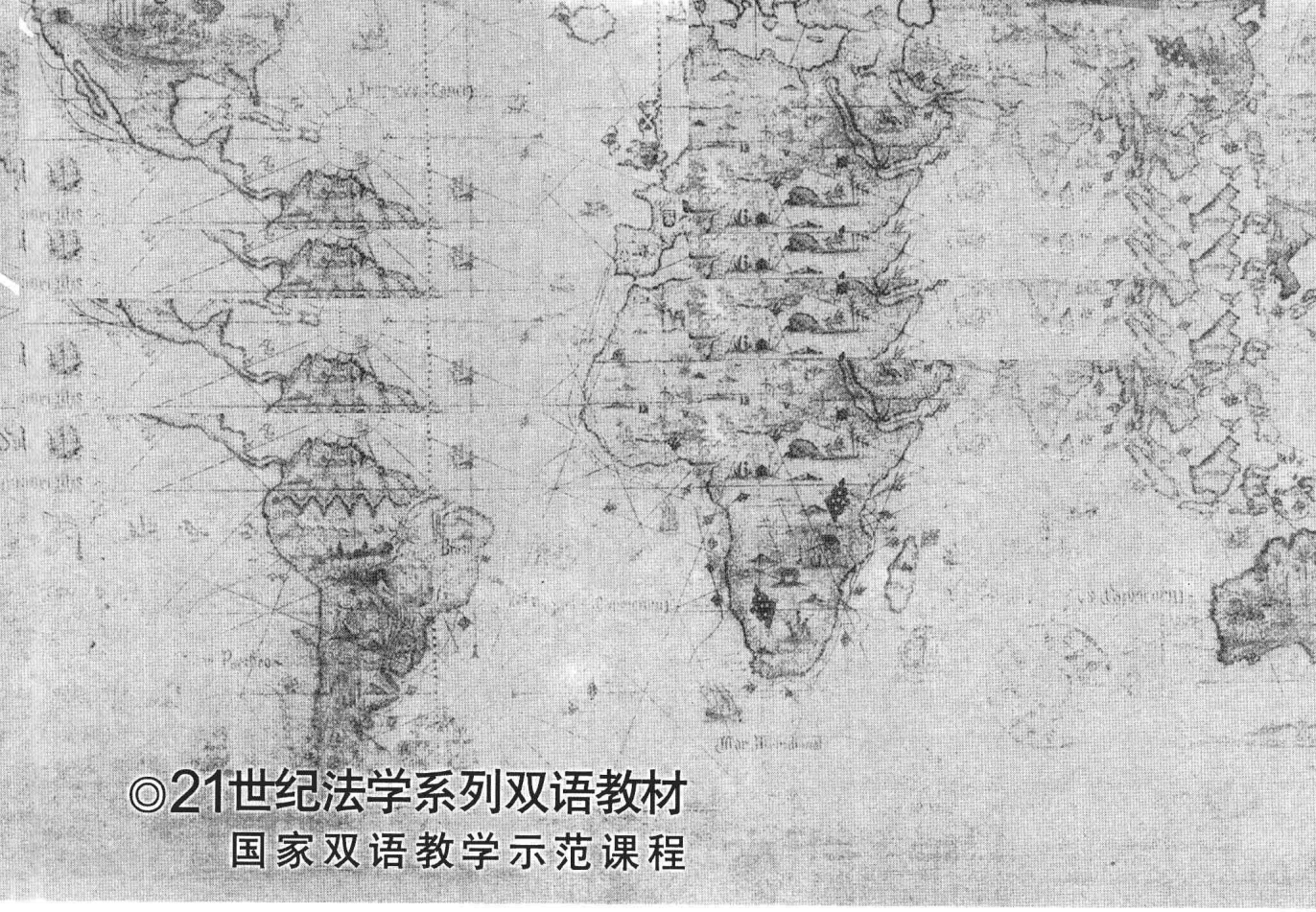
◎21世纪法学系列双语教材

国家双语教学示范课程

外国民商法

主编　李燕

中国人民大学出版社



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序 言

各位读者好，非常荣幸《外国民商法》双语教材与大家见面了！

事实上，从本书起稿开始到完稿之初，我们几位编者都在不停探讨与协商，似乎也是困惑不断。

首先，书名涵盖及辐射的内容太广泛，如何节选有针对性的内容就成为一个焦点话题。诠释“外国”两个字，一般意义上泛指除我国以外的其他国家，从法学意义上限制一下，还是要涵盖世界两大法系英美法系和大陆法系的主要国家。而要把所有这些国家的民商事法律都谈到，显然非编者们能力之所及，本书也无法容纳。我们反复斟酌后从中英文双语课程讲授的角度出发，先锁定研究英美法的相关内容。然而开始分工写作时我们很快明显地体会到了困难，就算只比较英国与美国的民商事制度，无疑也是浩瀚工程，于是我们不得已又退而求其次，从自身研究的视角出发选择了主要围绕美国的有关商事法律来写，因为各国商事法律之间的共通性比较多，有利于借鉴性学习，所以大家看到了本书的这五章内容。当然，毫无疑问，这五章内容远远不能代表外国民商法这个概念。我们编者对此非常汗颜，唯一用来说服自己的理由就是：这本书只是我们编辑外国民商法双语教材的开端，是为暂时满足我们在学校开设这门国家级双语教学示范课程的课堂用书之急需，在接下来的时间里我们还要不断充实研究队伍，加强研究能力，使得有更丰富内容的《外国民商法》双语教材第二册、第三册等能早一些与大家见面。

其次，对于如何确定本书的编写体例，我们也是颇为神伤。比如介绍美国公司法，如果控制字数，势必内容有所忽略，很难满足同学们深入探究的需求；如果予以展开，势必稍不注意就得单列一本书了。一番讨论，反复斟酌后，编者们确定在每一章中采用专题讲解的方式，在控制字数的同时达到部分深入研究的目的。此外，如果将内容完全对应为中文与英文两种语言，无疑就是我们做了一遍中译英和英译中的作业。英语能力不强的同学阅读此书，可以很轻松地通过读中文来完成，那么这些同学在课堂上的英文听说读写能力将很难提高。编者中几位都有在美国法学院学习的背景，讨论到这里时，大家比较倾向于借鉴美国法学教育模式，即课堂上的讲授主要以讨论为主，然后辅之以大量的课后阅读。鉴于此，我们在各章的第一部分【Reference】和第二部分【Case Study】采用了原汁原味的英文教材内容，且阅读量相对较大，主要留给同学们在课后阅读及收集信息。可能同学们注意到我们没有在每个专题后面对某些关键的英文单词作中文注解，主要是我们并不想按照法律英语教材的方式编辑此书，我们的目的就是想培养同学们快速阅读英文的习惯，尽可能地提高同学们学习法律英语的适应能力。当然也许还有很多同学从来没有接触过法律英语，为了不让你们觉得这本书很无趣，同时也为了提高同学们在课堂中的对话能力，我们在第三部分【Summary】中用中文对前述英文内容进行了概括和总结，某些专题中还与我国的相关法律规定作了比较，以便让大家对知识点有个准确

的理解。在第四部分【Question】中，为了便于课堂上的集中有效讨论，我们还针对专题内容以中英文方式提了一些思考性问题，以使同学们在课前能有个良好的准备。

下面我们简单谈谈每一章的核心内容，以便同学们对本书有个大体的认知路径：

第一章主要介绍美国公司法。公司法是商事法律制度里非常重要的部门法，因此我们把美国公司法放在第一章重点介绍。这一章的专题内容最多，一共有12个专题，主要涉及美国公司法的渊源、公司治理、债权人利益保护、董事义务与责任、股东诉讼等内容。由于篇幅的限制，股东投票机制、公司收购等有关内容没有放进来，因为如果在不熟悉美国资本市场的前提下去理解这些问题不太容易，所以作了这样的取舍。专题一至六主要是关于美国公司法的基础理论，同学们阅读起来也比较轻松。专题七至十二涉及公司法中的一些制度性问题，因为美国公司法主要为判例法，所以必须通过阅读判例去了解和分析这些制度。我们节选的判例都是与这些制度紧密相连所必须阅读的基本判例，对从来没有接触过英美法系国家判例法的同学来讲，可能有一定的阅读难度，所以我们在【Summary】中用了比较多的中文篇幅作解释，希望能够减轻同学们阅读和理解的压力。

第二章主要介绍美国证券法。美国证券法属于联邦法律，与美国公司法为州立法不同。准确意义上讲，这一章实际上只是讲解了美国证券法的基本概念，其实质性的内容比如信息披露义务、反欺诈责任、内幕交易、公募私募发行、披露义务豁免、证券民事赔偿责任、公司收购等诸多问题本章都没有涉及。一则因为篇幅限制，二则因为这些内容相对比较复杂而且递进关系非常明显，很难只节选其中一部分而放弃另一部分的讲解，所以这一章对美国证券法的介绍比较蜻蜓点水，其主要目的也只是让同学们有一个概括性的认识而已。

第三章主要介绍美国银行法。美国虽然是判例法国家，但对于银行业务的调整主要以成文法为依据。但是由于银行业的发展与经济走向联系密切，法官造法也在一定程度上影响成文法的制定和施行，有关银行运营与监管的成文法在其发展过程当中也呈现出前后矛盾或否定后又回归等状况。比如1836年以后，由于行使中央银行职能的“美国银行”受到各州抵制，美国进入了自由开办银行时期。当时立法者的注意力仅在于防止出现大银行对地区经济的垄断。到富兰克林·罗斯福执政期间，则以恢复美国金融系统的信誉和安全为首要任务。1933年银行法（即著名的《格拉斯·斯蒂格尔法》）、1933年和1934年证券法以及Q条例（旨在限制定期存款的最高利率）等等一系列新政立法相继出台，其根本宗旨只有两个字——安全。在这样的历史背景下出台的法律，在鼓励市场竞争和促进金融活跃方面的保守性可想而知。因此，一旦美国经济恢复正常，并逐渐开始新一轮的扩张时，限制银行设立分支机构、限制存款利率以及商业银行与投资银行业务强制分离等的法律规定，便成为金融家们竞相规避的对象。1994年国会通过《里格—尼尔银行跨州经营及设立分行效率法》，取消了对银行跨州经营的管制，极大地刺激了美国银行的收购、兼并业务。1999年《金融服务现代化法案》则完全打破了长达六十多年的分业经营体制，普通的商业银行也可以组建金融控股公司（FHC），参与保险和证券业务。但是安然公司丑闻、“9·11”事件、金融危机等的发生终结了银行业扩张业务高歌猛进的态势，

2002年7月，布什签署了《萨本斯—奥克斯立法案（Sarbanses-Oxley Act）》（也称《企业改革法案》），要求所有在美的上市公司管理人对财务报表出具一份独立的财务报告证明。因此，美国银行法律体系的稳定性是暂时的，变动不居是其发展过程中最突出的特点。美国银行法选读一章主要节选了美国银行法律体系发展脉络中比较重要的节点，从而使同学们了解其全貌更为容易。比如通过货币发行权的沿革可以了解美联储与美国政府之间的关系，揭示独立的货币发行权与经济结构的关系；商业银行的混业经营与中国银行业务对照学习，可以更好地理解金融工具与风险控制彼此依存和发展的关系；银行内部信息管理与监控则是各国银行业务面临的共同难题，对个人财务信息的保护则更为具体充分，对中国银行业发展过程中建立信用与安全形象有很好的借鉴意义；银行并购反垄断更多是政府对银行业重新洗牌进行风险控制，在我国银行业纷纷引入外资并购的情况下学习相关制度很有现实意义；银行控股公司则更多涉及外资银行进入美国时的审查问题，事实上中国部分银行在将业务扩展至美国时已经遇到了相关的审查和监管。因此，此部分内容除了一般内容的介绍外，在选材上更多考虑与中国银行业扩张和完善有关的内容。

第四章主要介绍美国不动产法。美国土地与房屋财产私有，与我国土地国家和集体所有制不同，这导致两国不动产相关法律也有着极大的差距。但是，由于不动产作为物的稳定性和稀缺性特征一致，其交易过程还是存在一些共性问题。因此，在选取本部分内容时，我们着重选择了与大陆法系或中国相关法律规定有共性或联系的问题作为节选内容。在权利的获得上，介绍了时效制度、公示公信的登记制度和征收制度；在权利的行使上，选取了规划对使用权的限制、合同约定对使用权的限制以及租金管制（租金管制是对收益权限制的特殊规定，对我国租房市场健康成长有着借鉴意义）。可居住性默示担保在大陆法系和英美法系在宗旨上是相同的，具体制度设计则存在一些不同。通过对美国不动产法律制度重要环节的介绍，同学们能够基本掌握美国不动产制度的主要特点，并了解其与中国法律制度的联系与区别。

第五章主要介绍《国际货物买卖合同公约》。该公约是私法领域自动适用的统一实体法规范，适用简便，实用性强。公约不但在减少国际贸易纠纷、提高交易效率方面发挥了积极作用，而且对国际、地区以及国内层面上的合同立法产生重要影响，如《国际商事合同通则》、《欧洲合同法原则》以及我国《合同法》均深受其影响。第五章以专题形式节选公约八个重要部分，前两个专题涉及公约的适用和解释，后六个专题涉及公约最重要的实体法律制度，包括合同订立、风险转移、符合合同、根本违约、预期违约与违约损害赔偿责任。此外，第五章精选的八个经典案例有三个特点：一是争议性，绝大多数案件经历上诉审；二是权威性，近半数案件由最高法院终审；三是广泛性，案件涉及美、英、德、法、奥等八个国家。需要说明的是，一个真实的案件必然同时涉及多个法律问题，因此同一个法律问题可能在上述案例中重复出现，但总体而言，每个案例各有侧重。

最后，希望同学们能坚持努力，在接下来的日子里学习愉快并有所收获！

李燕于西南政法大学

2011年8月

目录

外国民商法

第一章
Chapter One
美国公司法选读

Topic I The Corporate Form
专题一 美国企业形式概述

【Reference】

The corporation is the standard form of almost all large U. S. firms. Why? The traditional answer is that corporation dominates the partnership as a vehicle for raising capital for large businesses. A general partnership involves personal liability, instability, illiquidity, and diffuse management. By contrast, the chief attributes of the corporate form are generally listed as:

1) limited liability for investors;

2) free transferability of investors interests;

3) legal personality (entity-attributable powers, indefinite life span, and purpose);

4) centralized management.

Which investment contract would you prefer as a small equity participant in a large enterprise?

From a doctrinal perspective, the key attributes of the corporate form all depend, directly or indirectly, on the legal identity of corporations as distinct "persons" apart from their shareholders and directors. State corporation statutes establish this identity and provide the basic rules governing relationships among corporate shareholders, directors, and managers.

In addition to the common features of the corporations, however, there are also cross-cutting differences among corporations that are at least as important as the distinction between corporations and partnerships. Small or "closely-held" corporations (so named because their shares are seldom traded) that incorporate for tax or liability purposes often attempt to avoid other standard features of corporate law that seem inappropriate to their status as "incorporated partnerships". By contrast, corporate

law is generally better suited to large—or at least largish—firms with numerous shareholders ("public" or "publicly-traded" firms). But even here, the fit may not be perfect. You might ask yourself as you read: What would a firm look like that seemed perfectly suited to the implicit factual assumptions behind corporation codes?

The materials in this Part are organized around the basic features of the corporate form. After introducing the basic concepts of corporate law, we will discuss the valuation of corporate securities. Since the corporate form is designed to raise funds on capital markets, it is only fitting that we pause to ask what it means for an investment to have value, and why one form of investment—corporate stock—might seem unusually attractive to investors. After this detour, we turn to the limited liability of corporate shareholders, and the rights of corporate creditors. In Part Ⅱ, we will examine the characteristic structure of centralized authority established by state corporation statutes and the duties that arise from this centralized management structure.

The Incorporation Process: Forming a corporation is simple. In Delaware, it involves filing a certificate of incorporation with the Secretary of State and paying a fee. It can be done by anyone and for any lawful purpose.

【Summary】

美国几乎所有的企业都以公司作为企业形式。传统观点认为公司能够迅速积累资本扩大经营。但是相比合伙企业的合伙人无限连带责任、企业不稳定、资金流动性差、松散式的管理，公司具有以下优势：（1）投资者的有限责任；（2）投资者可以自由转让权利；（3）企业法人资格（公司享有民事权利能力，无限的经营期限，以及经营目的）；（4）集中的管理。公司一经设立即具有法人资格，能够独立从事民事活动并承担民事责任。正是这种法律人格的独立性，使民事责任的承担从公司的股东、董事、经理中分离出来。美国各州的公司法即确立了这种有限责任制，并以相关法律规定来规范公司股东、董事、经理的权利义务。

小型公司或封闭公司（公司股东股份无法公开交易）的特点并不适合州公司法规定设立公司的标准。而一般符合法律规定设立的公司都是有较多股东的大型股份有限公司如上市公司等。公司作为一种经营组织形式被设计出来，为什么受到如此多的投资者的青睐，公司股票作为一种投资方式为何如此吸引人？我们必须在了解这些问题之后才能继续讨论股东的有限责任及权利。

设立公司的程序十分简单。以美国特拉华州为例，任何人基于合法的目的都可以向州务卿申请公司营业执照，并交纳一定的公司设立费用。根据我国《公司法》第2条规定，我国所指公司包括有限责任公司和股份有限公司。第3条规定：公司是企业法人，有独立的法人财产，享有法人财产权。公司以其全部财产对公司的债务承担责任。有限责任公司的股东以其认缴的出资额为限对公司承担责任；股份有限公司的股东以其认购的股份为限对公司承担责任。亦是肯定公司具有法人人格，能够独立承担民事责任，而公司股东则承担有限责任。而关于公司设立登记，依

《公司法》第6条规定必须向公司登记机关（工商管理部门）申请设立登记，经审查符合有限责任公司或股份有限公司设立的条件后成立。与公司法制定之初对公司设立采取的准则主义和核准主义相比，已有很大进步。不仅如此，在公司设立的条件、程序等方面也充分体现了自由和方便设立公司的立法主旨。这些均说明我国在对待公司设立方面的态度正在放宽，鼓励采取公司的形式进行商业贸易，从源头上为我们与国际贸易的接轨一步步扫清障碍！

【Question】

Andrea先生独自开办了一家生产空调的B厂，该厂自成立以来经营良好，不久Andrea先生发现了一种新型技术能够使产品成本降低到原来的3/4。但是，Andrea先生需要20万美元的资金来引进这门技术，但是Andrea先生自己目前所有的资金远远不够。

问题：Andrea先生可以通过哪些方式来筹集20万美元的资金？那些借贷方会提出什么要求来作为其提供资金的交换条件？哪种方式更有利于Andrea先生所拥有的B厂的长远发展？

Topic Ⅱ The Sources of Corporate Law
专题二 美国公司法渊源简介

【Reference】

The primary emphasis of corporate law is on the relationship between the corporation, its shareholders, and its directors. There are several sources that define these relationships. Some of these sources are laws; others are regulations promulgated by federal agencies; others are contractual.

However, it is important, to briefly discuss the basic allocation of power laid down by the corporate statutes. Basically, there are three classes of people that share power: stockholders, directors and officers.

Shareholders: The main sources of power for shareholders are that they elect directors. Generally, all directors are elected every year at the annual meeting of shareholders. If shareholders are dissatisfied with the directors, they can

(ⅰ) elect different directors at the next annual meeting; or

(ⅱ) in some circumstances remove directors either at a special meeting or by written consent.

Directors: Directors have the legal power to manage the corporation. This means that directors decide how to run the business operation, how much salary they re-

ceive, and how much is distributed to shareholders in dividends. In managing the business, directors are generally not bound by directions given to them by the shareholders. All directors together form the board of directors or, in short, the board.

Officers: Officers help the directors to manage day-to-day business operations. Officers have fancy titles (such as President and Chief-Executive Officers). Despite these fancy titles, they are, as a legal matter, bound by directions given to them by the board of directors.

Directors that are also offices of the company are commonly referred to as inside directors. Directors that are not otherwise affiliated with the company are outside directors. Outside directors generally do not spend much of their time in managing the small amount of compensation. Directors and officers are sometimes also referred to as management. Even though, as a matter of law, all directors have equal power, the real power is often exercised by the CEO.

Shareholder management powers. Though directors have the general power to manage the corporation, certain extraordinary decisions require as well the approval of shareholders. These decisions include:

(ⅰ) the dissolution of the corporation;

(ⅱ) a sale by the corporation of all of its assets;

(ⅲ) a merger of the corporation with another corporation;

(ⅳ) an amendment to the certificate of incorporation.

1. State Corporation Law

A. Corporation Statutes

The most important laws on corporations are the state corporation statutes. Each corporation is governed by the state corporation statutes of the state in which the corporation is incorporated. Though these corporation statutes differ from state to state, a century of borrowing and reform efforts by the corporate bar have contributed to a general uniformity of structure. The task of analyzing state law is made even simpler by the fact that one state, Delaware, has emerged as the state of incorporation of choice for the majority of large U. S corporations. In light of the special position of Delaware, we will focus chiefly on the Delaware General Corporation Law, ("DGCL") which is contained in the Statutes, Rules and Forms booklet that you should have purchased.

Consider why it may be that Delaware, one of the smallest states, has become the domicile of choice for public corporations. That companies can essentially incorporate in any state they want is a necessary condition for the prominence of Delaware, but does not explain why so many companies chose Delaware.

To get a sense of what a state corporation statute contains, you should leaf through the table of contents of the DGCL. The first three subchapters relate to the

formation of a corporation. Subchapter Ⅰ (§§101—110) deals with the formation process, the certificate of incorporation and the by-laws. Subchapter Ⅱ (§§121—127) deals with corporate powers and Subchapter Ⅲ (§§131—136) with certain procedural requirements.

The next four subchapters relate to the ordinary aspects of the corporate existence. Subchapter Ⅳ (§§141—145) contains the provisions on directors and officers; Subchapter Ⅴ (§§151—174) on stocks and dividends. Subchapter Ⅵ (§§201—203), while short, is quite important. It contains the section on stock transfer restrictions and the Delaware anti-takeover provision. Subchapter Ⅶ (§§211—230) deals with stockholder voting.

The next five subchapters relate to extraordinary events: Subchapter Ⅷ (§§241—246) deals with changes in the certificate of incorporation or in the equity structure; Subchapter Ⅸ (§§251—263) with mergers; Subchapter Ⅹ (§§271—285) with major asset and dissolutions; Subchapter Ⅺ (§§291—303) with certain aspects of insolvency; and Subchapter Ⅻ (§§311—314) with the raising of the dead.

Subchapter ⅩⅢ (§§321—330) discusses procedures of suing corporations. Subchapter ⅩⅣ (§§341—356) contains special provisions for corporations that are elected to be "close" corporations that want to do business in or become domesticated in Delaware.

B. State Case Law

Case law (and not statutory law) defines the two important duties owed by directors and officers to the corporation and its shareholders: the duty of care (i. e. the duty not to be negligent in managing the corporation) and the duty of loyalty (i. e. the duty to manage the company for the benefit of the shareholders, and not for their own personal benefit).

In Delaware corporate cases are heard by a specialized trial court: the court of chancery. The Chancery Court has five judges and has jurisdiction over all disputes arising under Delaware corporate law (and some others). There are no juries in the Chancery Court. All decisions are thus rendered by judges that have a fair degree of subject-matter expertise. Appeals from the Chancery Court are heard by the Delaware Supreme Court, which has five members and normally sits in panels of three judges.

2. Federal Law and Regulations

The main source of the federal law of corporations is the Securities Exchange Act of 1934. The Exchange Act forms the core of a complex regulatory scheme. As part of that scheme, Congress established the Securities Exchange Commission (SEC) and empowered it to enforce the provision of the Exchange Act and to promulgate detailed rules and regulations in a number of areas. For our purposes, the most important of

these regulations are those on voting, acquisitions of corporations, and insider trading.

3. Corporate Contracts

Apart from legal rules, the relationship between shareholders, directors, officers, and the corporation is governed by two documents which are similar to contracts: the certificate of incorporation and the by-laws.

A. The Certificate of Incorporation

Every corporation must have a charter. Indeed, a corporation is formed by filing the charter with the Secretary of State. A charter contains two kinds of provisions: mandatory and optional ones. The provisions that must be contained in it are listed in DGCL § 102 (a). The provisions may be contained in it are listed in DGCL § 102 (b).

B. The By-laws

Almost all corporations also have by-laws. DGCL § 109 specifies how by-laws are adopted or changed and what provisions may be contained in them. Many by-laws provisions are technical and boring.

While some governance provisions must be contained in the charter (see, e. g. DGCL § 141 (k) (|)), others can be either in the charter or by-laws (see, e. g. DGCL § 216) or (§ 141 (d)). If one has the choice, why would a company chose to put provisions into its by-laws rather than into its charter, and vice versa?

The various sources of rights discussed above form a hierarchy. On top of the hierarchy are federal laws and regulations. If state law is inconsistent with federal law, federal law governs. Next are the state corporation statutes and (below) state case law. Then comes the charter. Charter provisions are only valid if they are not inconsistent with federal or state laws. Finally, there are by-laws. By-law provisions are trumped both by federal and state laws and by the charter.

【Summary】

我国公司法的渊源主要有：(1) 由全国人民代表大会常务委员会通过的《公司法》；(2) 相关法律；(3) 国务院及其有关部门的行政法规；(4) 最高人民法院的司法解释；(5) 地方性法规；(6) 公司章程。

美国公司法的渊源主要有：联邦法律法规、州法、判例法、公司章程。

与我国公司法相比，美国的判例法非常发达，在司法实践中可以直接作为判案依据，这是与英美法系判例法传统相适应的，不但是对美国法官审判能力的认同，更表现出对传统的尊重和对经验的继承。此外，美国独特的联邦制的政治架构使得各州可以根据自己的实际情况制定极具针对性的州公司法，其适应性也就显得更强。可以说，正是这种多样合理、层次分明的法律渊源体系孕育了美国公司法的繁荣与发达。但同时我们也不能否认我国采取成文法规定的优势，在两大法系相互融合的

大背景下，法律渊源的相互借鉴将有更广阔的发展空间。

【Questions】

1. 试通过比较美国公司法和我国公司法各自的渊源，思考两种不同的法律渊源对各自的审判体制产生何种影响？

2. 美国这种公司法渊源对我国而言有无借鉴之处？如有，请说明理由。

Topic Ⅲ Certificate of Incorporation of XYZ
专题三 公司章程

【Reference】

FIRST: The name of the Corporation is XYZ Inc.

SECOND: The address of the registered of the Corporation in Delaware is 229 South State Street, City of Dover, County of Kent, and the name of the registered agent of the Corporation at such an address is the United States Corporation Company.

THIRD: The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware.

FOURTH: The total number of shares of all classes of stock which the Corporation shall have authority to issue is eleven million (11,000,000) shares, consisting of:

(a) ten million (10,000,000) shares of Common Stock, par value one cent per share and :

(b) one million (1,000,000) shares of Preferred Stock , par value one cent per share...

FIFTH: A. The business and affairs of the Corporation shall be managed by the Board of Directors, and the directors need not be elected by ballot unless required by the by-laws of the Corporation.

B. The Board of Directors is expressly authorized to adopt, amend or repeal the By-Laws of the Corporation.

C. The number of directors of the Corporation shall not be less than three nor more than fifteen, shall be initially fixed at four and may thereafter be changed from time to time by action of not less than a majority of the members of the Board then in office.

D. The Board of Directors shall be divided with respect to the time for which they