法律英语阅读与翻译教程

Legal English: A Coursebook on Reading and Translation

屈文生　石伟 主编

上海人民出版社

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一本以培养与提高法律翻译能力为中心的法律英语教材

（前言）

近几年来，中国大陆的“法律英语”（legal English）教育蓬勃发展。我国多数著名法律院系、部分外国语大学和综合型大学已经为高年级本科生和研究生（包括英语专业和法律专业等）开设了“法律英语”课程。一些有条件的学校对“法律英语”课程进行了细化，将其分为“法律英语视听说”、“法律英语阅读”、“法律英语写作”及“英汉—汉英法律翻译”等科目。与此同时，广大青年学生（特别是法科生和外语系的学生）意识到市场对双语法律人才的需求，学生们在求职时发现，很多涉外律师事务所、跨国企业、外资银行等机构在招聘人才时十分看重应聘者的法律文件翻译能力。基于此，不少大学生将更多的精力和时间投入到法律英语的学习当中。但如何学好和教好“法律英语”，这一直是萦绕在师生们心中的一个问题。

国内先后出版了数十本名为“法律英语”或“法律翻译”的教材，许多专家和学者也已在法律英语、法律翻译教学方面进行了宝贵的探索。但从总体上说，我国的法律英语教学还远远不能满足实践的需要。在教学实践中，法律英语教学和教材的问题主要集中于以下几个方面：首先，法律英语教学在一定程度上成为了“法律英语精读教学”，教师在课堂上大多只注重提高学生阅读与理解的能力，而学生的其他能力，比如实践中极为重要的翻译能力，并没有得到较为全面的培养和提高。其次，法律英语的教学方法较为陈旧，不能很好地适应当今社会发展和实际工作的需要。再次，尽管我国已经出版了很多名为“法律英语”的教材，但教师使用顺手、学生使用舒心的真正实用的高质量教材并不多。最后，教学评估标准存在着模糊性——“提高学生法律英语水平与实际应用能力”本身就是一个模糊的目标；法律英语教与学的科学评估，尚待进一步明确。

为了解决以上问题，编写一部实用的教材是当务之急。本书编者多年来一直从事法律英语的教学和研究，也出版过多部与法律英语有关的教材，但摆在编者面前的一个问题就是：如何使这部教材区别于其他教材，从而更好地满足教师的教学需要和学生的学习需要。结合多年的教学和科研经验，编者将本书定位为“一本以培养与提高法律翻译能力为中心的法律英语教材”。具体而言，本教材在编写过程中，主要注意了下列几个方面：

首先，将教材分为“法律英语”和“法律翻译”两部分，是本教材的一个重要创新。在目前已经出版的法律英语类教材中，就编者的阅读范围内，似乎还未有将“法律英语”和“法律翻译”合二为一的教材出现。本教材并不是将“法律英语”教材和“法律翻译”教材的简单“汇编”。这样安排的原因基于编者的理解：“法律英语”是“法律翻译”的基础，“法律翻译”是“法律英语”的拔高。学生通过本书“法律英语”部分的学习，可较系统地理解和掌握英美法的基础知识、背景和术语，并提高学生的法律英语阅读和理解能力，为“法律翻译”部分的学习打下坚实的基础；而“法律英语”部分的学习，并不是整个学习过程的终点，学生需要在此基础上，提高实践中更为需要的翻译能力。本书编者认为，“法律英语”需要与“法律翻译”很好地结合：单纯地进行“法律英语”学习，学生的法律翻译能力就不会得到系统有效的训练；而假如学生不进行“法律英语”的学习，便直接进入“法律翻译”的课堂，则往往会因没有系统地了解英美法知识以及法律英语术语等原因，无法在学习过程中聚精会神并培养起兴趣，结果收到的可能是“事倍功半”的效果。

其次，课文正文大都配有译文，便于读者自主学习。英语教材如没有译文，通常会给学生的“准确理解”带来很多困难。本书为“法律英语”的11篇主课文均配上了中文译文，并将英文与中文左右排版，方便读者学习（无论是课上跟着老师学，还是在课下自学）。对于“法律翻译”部分的每则翻译实例，亦相应配上了中文或英文翻译；即便是书中的每个翻译练习，读者亦可在参考答案中找到它们对应的译文。编者的建议是，在学习过程中，为了切实提高法律翻译的水平和能力，读者可以先独立自主地将原文译为另一种文字，然后再参照译文进行正误审核，从而深入地理解各篇课文和各个材料。如果学生能认真地翻译本教材中每一篇课文和每一个练习材料，其法律翻译水平一定会有较大的提高。

再次，课文的长度更为适合课堂教学。本教材所选的每篇“正课文”均大约为800—1 000个英文单词，一般适合2—3个课时的教学（每课时45分钟）。总体而言，课文的篇幅较短，编者力图用简短的篇幅对相关的法律知识进行提炼与概括，使学生能在较短的时间内对英美法的相关知识形成一个宏观的印象，并掌握法律翻译常用的格式化语言、基本套路和技巧。还要说明的是，就“法律英语”部分，本教材还为每一课安排了一篇“补充材料”。“补充材料”的材料一般是对“正课文”所涉及知识的补充说明，可供学生课后阅读。教师可根据具体情况，安排教学进度。如果每周2—3课时，每学期以16周计算，两个学期即可完成本书的全部教学内容。

最后，为了检测学生的学习效果，教材还配套设计了一定数量的练习题与期末考试试题。测试是检验教学效果和学生水平的有效手段。现行的法律英语测试多是终结性测试。终结性测试对于检验学生一段时期的学习效果起到不可或缺的重要作用，但是由于学期设

置的局限，无法起到引导学生学习的作用，学生往往在学期末参加法律英语测试，测试的结果无法及时反馈给学生。终结性考试不能完全融入法律英语教学环节，这多少会导致学生学习法律英语的积极性和主动性不高，学生自主学习能力不强。本书编者认为，测试是监测课程教学的工具，测试既为教学服务，又直接影响教学内容和教学方法，对教学可产生一定的反拨作用，这种反拨作用可能有益于教学，也可能妨碍教学。编者认为，法律英语测试应把法律翻译能力提高与否作为一个重要的测试项目。基于此，本书设计的练习与试题分别从不同的角度考查学生对课文的理解、对法律英语核心术语的把握，并重点测试学生的法律翻译水平。通过每一课的练习和测试，学生可以动态地了解自己的学习效果，进而对自己的学习过程和学习方法进行调整，以更好地提高自身的各项能力。编者在教学中使用过这些习题和试卷，并取得了不错的效果。

总之，本教材的课程安排和选编始终围绕着提高学生翻译能力这一目的，始终以便于教师教学和学生使用为宗旨。本教材可以用于“法律英语”教学，也可以用于“法律翻译”教学。本教材在一定程度上是编者多年法律英语教学和科研经验的总结，希望本教材的出版能够有助于我国的法律英语和法律翻译人才的培养！

本书借鉴或吸收了《法律英语综合教程》（清华大学出版社 2005 年）和《法律英语案例探究》（清华大学出版社 2007 年）中张丽、冯婧、邢彩霞、夏元军、李威等老师参编的部分课文，以及其他同行已出版过的一些论文、专著与教材，本书末列出主要参考文献，以致编者谢意。

本书的出版得到华东政法大学教务处及外语学院的大力支持，上海人民出版社解锟编辑为本书出版付出巨大心血，谨致谢忱！编者水平有限，书中内容如有不当之处，敬请读者指正。

主编屈文生、石伟

2011 年 6 月 8 日

本书是华东政法大学教务处 2010 年度本科教学改革与发展项目“以培养与提高法律翻译能力为中心的法律英语教学与测试创新性研究”成果；亦是上海市教委重点课程《法律英语》的建设成果。特此鸣谢！

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第一课 法的概念及其分类

Ⅰ. Text & Its Translation

1. General Introduction

Law is a system of rules and guidelines, usually enforced through a set of institutions. It shapes politics, economics and society in numerous ways and serves as a social mediator of relations between people. **Contract law** regulates everything of life from buying a bus ticket to trading on financial derivatives markets①. **Property law** defines rights and obligations related to the transfer and title of personal and real property. ②**Trust law** applies to assets held for investment and financial security③, while **tort law** allows claims for compensation if a person's rights or property are harmed. If the

Ⅰ. 课文及译文

1. 概述

"法"是指由一整套机构负责执行的规则体系。法以各种方式来勾画出政治、经济和社会的样子，是人际关系的社会调节器。合同法调整生活的方方面面，从公共汽车票的购买到金融衍生品市场上的交易，不一而足。财产法的内容则是与动产和不动产转让及所有权相关的权利与义务。信托法适用于用来投资和金融担保的资产；侵权法允许当事人在权利或财产受损时主张赔偿。

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① financial derivatives market：金融衍生品市场。The financial derivatives market is the financial market for derivatives, financial instruments like futures contracts or options(期货契约或期权), which are derived from other forms of assets.

② personal property：动产。也被称为"personalty"、"personal estate"、"movable estate"等。Any movable or intangible thing that is subject to ownership and not classified as real property. Real property：不动产；也称为"realty"、"real estate"等。Land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land. Real property can be either corporeal(soil and buildings) or incorporeal(easements).

③ security：担保。Collateral given or pledged to guarantee the fulfillment of an obligation; esp., the assurance that a creditor will be repaid(usu. with interest) any money or credit extended to a debtor.

harm is criminalized in legislation, **criminal law** offers means by which the state can prosecute the perpetrator. **Constitutional law** provides a framework for the creation of law, the protection of human rights and the election of political representatives. **Administrative law** is used to review the decisions of government agencies, while **international law** governs affairs between sovereign states in activities ranging from trade to environmental regulation or military action. Writing in 350 BC, the Greek philosopher Aristotle① declared, "The rule of law is better than the rule of any individual."

立法将损害公民权利或财产入罪的，检察机关可依刑法对犯罪者提起诉讼。宪法则是有关创设法律、保护人权以及选举政治代表等问题的纲领性法律。行政法主要用于审查政府机构的裁决；国际法用于约束主权国家之间诸如贸易、环境规制或者军事行动之类的事务。早在公元前 350 年，希腊哲学家亚里士多德就曾断言："法治优于人治"。

Law raises important and complex issues concerning equality, fairness and justice. "In its majestic equality", said the author Anatole France② in 1894, "the law forbids the rich and the poor alike to sleep under bridges, beg in the streets and steal loaves of bread." In a typical democracy, the central institutions for interpreting and creating law are the three main branches of government, namely an impartial judiciary, a democratic legislature, and an accountable executive. To implement and enforce the law and provide services to the public, a government's bureaucracy, the military and police are vital. While all these organs of the state are creatures created and bound by law,

法提出了诸多与平等、公平和正义相关的重要且复杂的议题。法国作家阿纳托尔·法郎士 1894 年曾说，"法律神圣平等，一视同仁，禁止富人也禁止穷人在大桥下睡觉、在大街上乞讨或偷几条面包。"在一个典型的民主国家中，解释和制定法律的中央机构是政府的三个主要部门，即公正的司法部门、民主的立法部门和负责任的行政部门。政府机构、军队和警察在贯彻和执行法律以及向公众提供服务的过程中扮演着重要的角色。虽然上述国家机构均依法律创设并受法律的约束，

① Aristotle：亚里士多德（公元前 384—前 332 年），是古希腊伟大的思想家。著有《政治学》（*The Politics*）、《雅典政制》（*The Constitution of Athens*）等。

② Anatole France：阿纳托尔·法郎士（1844—1924 年），法国著名小说家，1921 年诺贝尔文学奖获得者。

an independent legal profession and a vibrant civil society will support their progress.

2. Classifications of Law

There are several different ways in which laws can be classified, depending on the criteria or characteristics.

a. Substantive Law vs. Procedural Law

Substantive law explains what you can and cannot do. For example, the law states that you cannot murder another human being unless it was in self defense①, you were under duress②, or if you were drugged③ by another person. Unlike substantive law, procedural laws are just the steps that must take place when filing a lawsuit against another party.

b. Public Law vs. Private Law

Law can be divided into two main branches: (1) public law and (2) private law④. Public law is the body of law dealing with the relations between private individuals and the government, and with the structure and operation of the government itself, including constitutional law, criminal law, and administrative law. Private law is the body of law dealing with private persons and their property and re-

但独立的法律职业群体与活跃的市民社会亦促进上述机构的进步。

2. 法的分类

按照不同标准或特征，法可以根据不同的方法进行分类。

(1) 实体法与程序法

实体法规定何为可为之事，何为不可为之事。例如规定不得谋害性命(除非出于自卫、处于受胁迫状态或醉态)的法律即属实体法。与实体法不同，程序法的内容是指一方提起诉讼时应当遵循的步骤。

(2) 公法与私法

法可划分为两大部门：公法和私法。公法是调整个人与政府间关系的法律，同时还调整政府自身框架及其运作，公法包括宪法、刑法和行政法。私法是调整私人、私人财产以及私人之间关系的法律。

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① self defense：自卫；自我防卫。法律允许遭到非法侵害的人对侵害者本人采用适度的反击行为，以求自身免受伤害，但自我防卫要求防卫者要求防卫者有正当理由：(1)他处在非法侵害的紧迫危险之中；(2)为避免这种危险而自卫反击是必要的。In the law of self-defense, the rule that a defendant's use of force is justified if the defendant reasonably believed it to be justified.

② duress：强迫、胁迫。Compulsion by physical force or threat of physical force.

③ drugged：被麻醉的。Drug：administer a drug to(someone) in order to induce a stupor or insensibility.

④ private law：私法；public law：公法。罗马法学家乌尔比安(Ulpianus)最早将法律划分为公法与私法。

lationships.

c. Criminal Law vs. Civil Law

Criminal law or penal law defines breaches of duty to society at large. It is society, through government employees called prosecutors①(such as district attorneys), that brings court action against violators. If you are found guilty of a crime such as theft, you will be punished by imprisonment or a fine②. Civil law, as opposed to criminal law, is the branch of law dealing with disputes between individuals or organizations, in which compensation may be awarded to the victim. For instance, if a car crash victim claims damages against the driver for loss or injury sustained in an accident, this will be a civil law case.

(3) 刑法和民法

刑法规制的是危害整个社会的行为(向社会承担的义务)。社会通过称作"检察官"(如"地区检察官")的政府官员,对违法者提起诉讼。行为人被判有罪(如盗窃罪)的,可被处以监禁刑或罚金刑。与刑法不同,民法调整的是个人间、法人间或个人与法人间的争议,通常受害者会判得赔偿金。例如,车祸中的受害人如向司机主张事故损失或伤害赔偿金的,就是一则民事案件。

d. Common Law vs. Civil law

Common law is law developed by judges through decisions of courts and similar tribunals rather than through legislative statutes or executive branch action. Common law countries prosecute with the concept of "*stare decisis*"③, which means that these countries such as the United States of America make decisions based on precedents. Because each judicial opinion

(4) 普通法与大陆法

普通法是由法官通过法院(及类似裁判机构)的判决发展起来,而非通过立法机关制定的制定法,或者行政机构的决定发展起来。普通法国家实行"遵循先例"的原则,也就是说,美国等普通法国家是基于先例作出裁决的。

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① prosecutor:检察官。*prosecutor*, a legal officer who represents the government in criminal proceedings。

② fine:罚金。*fine*, a sum of money required to be paid as a criminal penalty。

③ *stare decisis*:遵循先例;因循先例。意为遵照执行已决指事项(to stand by things decided)。较高级的法院在处理某一类事实确立一项法律原则后,在以后该法院或其同级、下级法院在处理案件中同类事实时应遵循该已确立的法律原则。该原则被看做是英美普通法制度的核心。Doctrine of precedent. (1) The rule that precedents not only have persuasive authority but also must be followed when similar circumstances arise. This rule developed in the 19th century and prevails today. (2) A rule that precedents are reported may be cited and will probably be followed by courts. This is the rule that prevailed in England until the 19th century.

serves as a precedent① for later decisions, as a result, common law is sometimes called *judge-made law*. Anglo-American law is rooted in the tradition of the common law. In 1881, Justice Oliver Wendell Holmes, Jr.② wrote, "The life of the law has not been logic: It has been experience." Common law developed as a response to the need to find solutions to the pressing issues of the time. Unlike common law, the principle of civil law is to provide all citizens with an accessible and written collection of the laws which apply to them and which judges must follow.

因为每一司法意见都是后来裁决的先例，所以，普通法有时也被称为"法官造法"。盎格鲁-美利坚法律植根于普通法的传统之中。在 1881 年，奥利弗·温德尔·霍姆斯大法官写道，"法律的生命不是逻辑，而是经验"。普通法的发展，是对解决时代紧要问题的需要而作出的回应。与普通法不同，大陆法的原则是向全体公民提供可获得的、成文的法律合集，这些法律对其有约束力，并要求法官严格遵守。

Ⅱ. GLOSSARY

Ⅱ. 词汇表

contract law 合同法
property law 财产法
trust law 信托法
tort law 侵权法
constitutional law 宪法
criminal law 刑法
administrative law 行政法

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① precedent：先例。*precedent*, a decided case that furnishes a basis for determining later cases involving similar facts or issues。

② Oliver Wendell Holmes, Jr.：奥利弗·温德尔·霍姆斯(1841—1935)，美国著名法学家。1902 年经西奥多·罗斯福总统任命为联邦最高法院法官。其传世之作首推《普通法》(*The Common Law*, 1881)和著名论文《法律的道路》(*The Path of the Law*, 1897)后者发表在 1897 年的《哈佛法学评论》(*Harvard Law Review*)上。霍姆斯的"实用主义法学"(legal pragmatism)体现在他的"法律预测说"之上。

international law 国际法

financial derivatives market 金融衍生品市场

personal property 动产

real property 不动产

security 担保(复数形式多指"证券")

precedent 先例

substantive law 实体法

procedural law 程序法

public law 公法

private law 私法

criminal law 刑法

civil law 民法,大陆法

common law 普通法

self defense 自我防卫

duress 强迫、胁迫

stare decisis 遵循先例;因循先例

Ⅲ. SUPPLEMENTARY TEXT

Ⅲ. 补充资料

The history of law is closely connected to the development of civilization. Ancient Egyptian law, dating as far back as 3000 BC, contained a civil code that was probably broken into twelve books. By the 22nd century BC, the ancient Sumerian(苏美尔人) ruler Ur-Nammu① had formulated the first law code. Around 1760 BC, King Hammurabi② fur-

① Ur-Nammu:乌尔纳姆(约公元前 2113 年—公元前 2096 年在位),在约前 2113 年建立乌尔第三王朝,在位期间统一美索不达米亚南部诸城邦,建立起了强大的集权王朝。他在位期间制定的《乌尔纳姆法典》(*The Code of Ur-Nammu*)是历史上最早的一部成文法典,适应奴隶制的发展,主要用来保护奴隶占有和私有制经济,镇压奴隶和贫民的反抗。

② Hammurabi:汉谟拉比,是巴比伦第一王朝的第六代国王(约前 1792 年—约前 1750 年在位),自称"月神的后裔",在位期间统一了两河流域,颁布了《汉谟拉比法典》(*Code of Hammurabi*, *Codex Hammurabi*)。这部法典全文用楔形文字铭刻,除序言和结语外,共有条文 282 条。包括诉讼手续、损害赔偿、租佃关系、债权债务、财产继承、对奴隶的处罚等,更接近于一部民法和刑法。

ther developed Babylonian law, by codifying and inscribing it in stone. Hammurabi placed several copies of his law code throughout the kingdom of Babylon as stelae(石柱), for the entire public to see; this became known as the *Codex Hammurabi*. The most intact copy of these stelae was discovered in the 19th century, and has since been fully transliterated and translated into various languages, including English, German, and French.

The *Old Testament*① dates back to 1280 BC and takes the form of moral imperatives as recommendations for a good society. The small Greek city-state②, ancient Athens, from about the 8th century BC was the first society to be based on broad inclusion of its citizenry(市民), excluding women and the slave class. However, Athens had no legal science or single word for "law", relying instead on the three-way distinction between divine law③, human decree④ and custom. Yet Ancient Greek law contained major constitutional innovations in the development of democracy.

Roman law was heavily influenced by Greek philosophy, but its detailed rules were developed by professional jurists and were highly sophisticated. Over the centuries between the rise and decline of the Roman Empire, law was adapted to cope with the changing social situations and underwent major codification under Justinian Ⅰ⑤. Although codes were replaced by custom and case law during the Dark Ages⑥, Roman law was rediscovered around the 11th century when mediaeval legal scholars began to research Roman codes and adapt their concepts.

In medieval England, royal courts developed a body of precedent which later became the common law. A Europe-wide Law Merchant⑦ was formed so that merchants could

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① *Old Testament*:旧约全书。据犹太教的说法,旧约全书是基督宗教的启示性经典文献,内容和希伯来圣经一致。主要包括摩西五经、历史书、诗歌智慧书、大先知书、小先知书,分四类:律法书,历史书,智慧书,先知书。著名的"摩西十诫"(The Ten Commandments)就在其中。

② city-state:城邦。A sovereign state consisting of an independent city and its surrounding territory.

③ divine law:神法。上帝制定的法律,不同于人制定的法律,有时也分为自然法或者神启法(revealed law)和实在法两类。Divine law is any law(or rule) that in the opinion of believers, comes directly from the will of God(or a god).

④ human decree:人定法。和"神法"相对,是指人制定的法律。

⑤ Justinian Ⅰ:查士丁尼一世(公元 483—565)。公元 528 年下令编纂法典,组成以法学家特里波尼安为首的法典编纂委员会。收集从哈德良(117～138)以来历代罗马皇帝的诏令和元老院的决议,529 年编成《查士丁尼法典》,共 12 卷。随后又收集历代法学家的论著,533 年辑成《法学汇纂》(又译《学说汇编》)共 50 卷;以及《法学阶梯》(又译《法理概要》、《法学总论》),简要阐明法学原理,作为讲授和学习罗马法的教材;565 年又把 534 年到查士丁尼一世逝世所颁布的法令,汇编成《新律》(又译《法令新编》)。这 4 部法典统称《查士丁尼民法大全》,对后世西方各国的法律有重大影响。

⑥ Dark Ages:黑暗时代。在本处特指欧洲历史上的一段时期:公元 476—800 年。

⑦ *Law Merchant*:《商人法》,商法。欧洲中世纪发展而成的一套商业惯例法,对全球商业国家的商船和商人间的交易予以调整。该词是从 *lex mercatoria* 直译而来的英文表达。

trade with common standards of practice rather than with the many splintered facets of local laws. The Law Merchant, a precursor to modern commercial law, emphasized the freedom to contract and alienability① of property. As nationalism grew in the 18th and 19th centuries, the Law Merchant was incorporated into countries' local law under new civil codes. The Napoleonic and German Codes became the most influential. In contrast to English common law, which consists of enormous tomes of case law, codes in small books are easy to export and easy for judges to apply. However, today there are signs that civil and common law are converging. EU law is codified in treaties, but develops through the precedent laid down by the European Court of Justice②.

Ⅳ. EXERCISES

Ⅳ. 练习

1. Answer the following questions.

(1) What is your understanding of the definition of law?

(2) What is distinction between public law and private law?

(3) What is the primary distinction between common law and civil law?

(4) What is the difference between civil law and criminal law?

2. Translate the following terms into English.

(1) 遵循先例

(2) 刑法

(3) 金融衍生品市场

(4) 宪法

(5) 行政法

(6) 人定法

(7) 商人法

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① alienability:可转让性,可流通性。Transferable to the ownership of another。

② European Court of Justice:欧洲法院,总部设在卢森堡,是处理涉及欧盟法律事项的最高法庭。The European Court of Justice(officially the Court of Justice), is the highest court in the European Union in matters of European Union law.

3. Translate the following terms into Chinese.

(1) administrative agency

(2) judicial decision

(3) reasonable care

(4) common law

(5) contract law

(6) commercial law

(7) corporation law

4. Choose the proper terms to complete the following definitions.

Criminal law	Civil law	Public law	Constitution	Reasonable care

(1) _____ is law relating to acts committed against the law which are punished by the state.

(2) _____ is concerned with the constitution or government of the state, or the relationship between state and citizens.

(3) _____ is the degree of care that a person of ordinary intelligence and prudence would exercise under the given circumstances.

(4) _____ is concerned with the rights and duties of individuals, organizations, and associations(such as companies, trade unions, and charities), as opposed to criminal law.

(5) A _____ is a set of fundamental principles or established precedents according to which a state or other organization is governed.

5. Complete the table with words in proper forms and complete the sentences below with words from the table. The first one has been done for you.

Verb	Noun	Adjective
constitute	constitution	constitutional
legislate		
proceed		
convene		
	regulation	
accede		/
elect		
authorize		

(1) The _____ is the body which has the function of making law; normally it is the Parliament or Congress.

(2) It is quite a lengthy process to _____ to the European Community.

(3) European _____ on Human Rights is one of the most notable International human rights instruments.

(4) In 1787, the *Constitutional Convention* _____ to amend the *Articles of Confederation* to give the national government the power to address the country's commercial problems.

(5) Federal form of government is one in which the states form a union and the sovereign power is divided between a central governing _____ and the member states.

6. Translate the following sentences into Chinese.

(1) Law consists of enforceable rules governing relationships among individuals and between individuals and their society.

(2) The term "common law" is also used to distinguish one segment of Anglo-American law from another part called "equity." Today the terms refer to different sets of legal doctrines.

(3) When one person, organization, corporation, or branch of government sues another to obtain a remedy for a supposed injury, the case is a civil case, leading to a possible remedy in money damages or an order to do or not to do a certain act.

(4) Public law defines a person's rights and obligations in relation to government. Public law also describes the various divisions of government and their powers.

(5) Most nations have a written constitution. A major exception is Great Britain. The British constitution is unwritten.

(6) The most obvious distinction between civil law and common law systems is a that civil law system is a codified system, whereas the common law is not created by means of legislation but is based mainly on case law.

(7) Tort law defines a host of duties people owe to each other. One of the most common is a duty to exercise reasonable care① with regard to others. Failure to do so is the tort of negligence.

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① reasonable care:合理注意。reasonable care 也可以称作是"due care"或"ordinary care"。*Reasonable care* is the degree of care that a person of ordinary intelligence and prudence would exercise under the given circumstances. This is the standard of care expected of virtually everyone at all times; a failure to exercise reasonable care is negligence.

Lesson 2 Legal Systems: Common Law and Civil Law

第二课 普通法系与大陆法系

Ⅰ. Text & Its Translation

Every independent country has its own legal system①. The systems vary according to each country's social traditions and form of government. But most systems can be classed as either (1) a common-law system②or (2) a civil-law system③. The United States, Canada, Great Britain, and other English-speaking countries have a common-law system. Most other countries have a civil-law system. Many countries combine features of both systems④. A general distinction can be made between civil law jurisdictions⑤, which codify their laws, and common law systems, where judge made law is not consolidated.

Ⅰ. 课文及译文

每个独立的国家都有其法律体系。法律体系因各国的社会传统和国家结构形式不同而有所不同。然而，大多数法律体系或者可被归入普通法系，或者可被归入大陆法系。美国、加拿大、英国和其他英语国家属于普通法系。其他大多数国家属于大陆法体系。还有很多国家兼有二者的特色。大陆法司法管辖区和普通法系之间存在的主要差异在于，前者将其法律法典化，而对于后者，"法官造法"未得到汇编整合。

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① legal system：可译为"法系"，"法律制度"。作为"法系"，亦可称为"legal family"，"legal tradition"等。历史上的"legal system"，还有 Chinese legal system，Indian legal system，Islamic legal system 等。

② common-law system：普通法法系。common-law system 也称作判例法系(case law system)或英美法系(Anglo-American legal system)，是以英国普通法为基础发展起来的法律制度，主要通行于美国和英联邦国家。

③ civil law system：大陆法系、民法法系。civil law system 也称作大陆法系(continental legal system) 或罗马法系(Roman-law system)。大陆法系或民法法系又分为法国、德国两个支系，法国、比利时、荷兰、意大利、西班牙和拉丁美洲各国属于前者；而德国、奥地利、瑞士则属于后者。

④ 例如日本，日本法在近代属大陆法系，第二次世界大战后受到美国法很大的影响。

⑤ jurisdiction：该术语具有"管辖区域、范围"，或者"司法管辖权"的意思，在此处是指管辖的区域、范围。

1. Common-law System

The common-law system prevails in England, the United States, and other countries colonized by England. It is distinct from the civil-law system, which predominates in Europe and in areas colonized by France and Spain. The common-law system is used in all the states of the United States except Louisiana, where French Civil Law combined with English Criminal Law to form a hybrid system. The common-law system is also used in Canada, except in the Province of Quebec, where the French civil-law system prevails.

Anglo-American common law evolved chiefly from three English Crown courts of the twelfth and thirteenth centuries: the Exchequer,① the King's Bench,② and the Common Pleas.③ These courts eventually assumed jurisdiction over disputes previously decided by local or manorial courts④, such as baronial⑤,

1. 普通法系

英国、美国以及其他过去是英国殖民统治的国家是普通法系国家。普通法系区别与大陆法系，后者在欧洲以及其他过去是法国和西班牙殖民的国家中占统治地位。美国(路易斯安那州除外)各州均采用普通法系，路易斯安纳州的情况特殊，它形成一个由法国民法与英国刑法共同构成的混合体系。在加拿大，除魁北克采用法国式大陆法系外，余下地区均采用普通法系。

盎格鲁-美利坚普通法主要产生于三个英国王室法院：财政诉讼法院、王座法院和普通诉讼法院。上述法院最终取得了原先归地方法院或领地法院(如男爵法院、

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① the Exchequer:(英)理财法院;财政诉讼法院。原为征服者威廉时期王廷(aula regia)的一个部门，属存卷法院(court of record)。其职责是处理有关应向国王政府缴付款项的纠纷。当时这一部门兼理财政及司法。到13世纪末其司法的职责逐渐脱离行政职责，形成理财法院(the Court of Exchequer)。The former government office responsible for collecting revenue and making payments on behalf of the sovereign, auditing official accounts, and trying legal cases relating to revenue.

② the King's Bench:王座法院。The King's Bench(or, during the reign of a female monarch, the Queen's Bench) is the superior court in a number of jurisdictions within some of the Commonwealth realms. The original Queen's Bench, founded in 1215 in the United Kingdom, is one of the ancient courts of England, and is now a division of the High Court of Justice of England and Wales.

③ Common Pleas:皇家民事法院;普通民事诉讼法院。The Common Pleas made a distinction between common and special bail, allowing the former, in cases where the defendant voluntarily appeared to the process, or where the damage expressed in it appeared to be but of a trifling amount, and requiring the latter only, when the plaintiff's demand or the damage he had sustained appeared to be something considerable.

④ manorial courts:(英格兰古法)领地法院，设在领地内的法院，审理租户诉讼案件。

⑤ baronial courts:男爵法院，亦作 court baron，是领地法院的一种。Court baron is an English manorial court dating from the Middle Ages.

admiral's (maritime)①, guild②, and forest courts③, whose jurisdiction was limited to specific geographic or subject matter areas. Equity courts, which were instituted to provide relief to litigants in cases where common-law relief was unavailable, also merged with common-law courts. This consolidation of jurisdiction over most legal disputes into several courts was the framework for the modern Anglo-American judicial system.

海事法院、行会和王室猎场法院，它们的司法管辖权仅限于特定的地区或特定的事项）管辖之纠纷的司法管辖权。衡平法院最初设立的初衷是为了向那些不能获得普通法救济的诉讼当事人提供救济，后来也并入了普通法法院体系。绝大多数法律争议的管辖权现已合并至数个法院管辖，这成为现代英美法院体系的基本框架。

Common-law courts base their decisions on prior judicial pronouncements rather than on legislative enactments. Common-law judges rely on their predecessors' decisions of actual controversies, rather than on abstract codes or texts, to guide them in applying the law. Common-law judges find the grounds for their decisions in law reports④, which contain decisions of past controversies. Under the doctrine

普通法法院是基于先前的司法裁决，而不是依据立法判案的。对于普通法法官而言，引导他们适用法律的是历任法官曾经对事实争议作出的裁决，而不是抽象的法典或者文本。普通法法官从收录历史争议裁决的判例汇编中为他们的裁决寻找依据。依据遵循先例原则，

① admiral's(maritime) courts:海事法院。Historically, there were a number of admiralty courts. From about 1360 the sea coast of England and Wales was divided into 19 districts, and for each there was a Vice Admiral of the Coast, representing the Lord High Admiral. From 1360 to 1875 a Judge served as the "Lieutenant, Official Principal and Commissary General and Special of the High Court of Admiralty, and President and Judge of the High Court of Admiralty". In 1887 the High Court of Admiralty was absorbed into the new Probate, Divorce and Admiralty Division of the High Court. No judges are now appointed for the local courts, and the judicial functions of the Lord High Admiral have been passed to the Queen's Bench Division of the High Court, where they continue to be exercised by the Admiralty Judge and other Commercial Court judges authorized to sit in Admiralty cases.

② guild:同业公会，行会，基尔特。一种为公共目的、相互援助而自愿组建的协会、行会或同业公会。A group of persons sharing a common vocation who unite to regulate the affairs of their trade in order to protect and promote their common vocation; *specif.*, *a voluntary society or fraternity of persons employed in the same trade or craft*, formed for the mutual benefit and protection of its members, who pay a fee(a geld or gild) for its general expenses.

③ forest courts:王室猎场法院。为管理王国各地的王室猎场而设立的法院，以对破坏王室猎物、伤害猎场中的鹿以及其他猎物的行为予以处罚。王室猎场法院于 1688 年废止。William the Conqueror, a great lover of hunting, established the system of forest law. This operated outside of the common law, and served to protect game animals and their forest habitat from destruction.

④ law report:判例汇编。汇编人(reporter)对级别较高的法院审理中的司法程序、案件事实陈述、当事人辩论以及法院判决及理由等予以记录之出版物。

of *stare decisis*, common-law judges are obliged to adhere to previously decided cases, or precedents, where the facts are substantially the same. A court's decision is binding authority for similar cases decided by the same court or by lower courts within the same jurisdiction. The decision is not binding on courts of higher rank within that jurisdiction or courts in other jurisdictions, but it may be considered as persuasive authority.

如果案件的事实基本一致，则普通法法官必须作出与已决案件（或先例）保持一致的裁决。法院的一则判决对于同一法院或同一法域的下级法院在（今后）审理类似案件时构成“有约束力的先例”。该判决对于本法域内的上级法院或其他法域内的法院并无约束力，但可被视为“有说服力的先例”。

Under a common-law system, disputes are settled through an adversarial exchange of arguments and evidence. Both parties present their cases before a neutral fact finder, either a judge or a jury. The judge or jury evaluates the evidence, applies the appropriate law to the facts, and renders a judgment in favor of one of the parties. Following the decision, either party may appeal the decision to a higher court. Appellate courts in a common-law system may review only findings of law,①not determinations of fact.②

在普通法系下，争议的解决靠对抗双方辩论与证据的交锋来实现。当事双方将其案件焦点展示给一个中立的事实裁定人（法官或者陪审团）。法官或者陪审团负责评估证据，对案件事实适用适当的法律，并作出有利于其中一方的判决。判决作出后，任何一方当事人均上诉至更高一级的法院。普通法系的上诉法院（在审理上诉案件时）仅审查原审法院判决中“对适用法律的裁决”，不审查“对争议事实的裁决”。

The lawmaking role of legislatures in common law countries has increased greatly during the 1900's. For example, the United States Congress has made major changes in American contract and property law. The changes have dealt, for example, with such matters as labor-management relations③, workers' wages and

在20世纪，普通法国家的立法机关在制定法律中所起的作用在不断地提升。例如，美国国会对美国合同法和财产法作出了很大程度的修订。修订针对的主要是诸如劳资关系、工人工资

① findings of law：对适用法律的裁决。指对某种事件的法律后果的裁决。
② determinations of fact：对争议事实的裁决。
③ labor-management relations：劳资关系。

hours, health, safety, and environmental protection. Nevertheless, common-law countries have kept the basic feature of the English legal system, which is the power of judges to make laws. In addition, constitutional law① in these countries continues the common-law tradition of defending the people's rights and liberties.

和工作时间、健康、安全和环境保护之类的事项。然而,普通法国家始终保持着英国法律体系的基本特色,即法官造法的权力。此外,这些国家的宪法亦始终保持着保护人民权利和自由的普通法传统。

2. Civil-law System

Civil-law systems are based mainly on statutes②. The majority of civil-law countries have assembled their statutes into one or more carefully organized collections called codes.

Most modern law codes can be traced back to the famous code that was commissioned by the Roman Emperor Justinian Ⅰ③ in the A. D. 500's. Justinian's code updated and summarized the whole of Roman law, which was called the *Corpus Juris Civilis*, meaning Body of Civil Law④. For this reason, legal systems that are based on the Roman system of statute and code law are known as civil-law systems. This use of the term civil law should not be confused with its use as an alternate term for

2. 大陆法系

大陆法系主要是建立在制定法(司法机关制定的法案)基础之上的。大多数大陆法国家将它们的制定法编纂成一部法律,或者将它们的制定法更精细地进行编纂成法典。

大多数现代法典可以追溯到罗马皇帝优士丁尼一世在公元 6 世纪时组织人员编纂的那部著名法典。优士丁尼的法典更新和总结了整个罗马法,它被称为《优士丁尼民法大全》,即《民法大全》。由此原因,基于罗马的制定法体系或法典法体系的法律体系就被称为大陆法体系。术语"civil law"的上述用法不要和该术语作为"私法"的替代性术语的用法相混淆。

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① constitutional law:宪法。在此处"constitutional law"指作为一个部门法的宪法;而 constitution 指特定的成文法形式的宪法。宪法可以分为成文宪法和不成文宪法。成文宪法形成统一的书面法律文件,又称刚性宪法(rigid constitution),其制定和修改均须通过特别程序,不能以一般立法方式变更,如美国宪法,但也得以法院的解释、惯例等为补充。不成文宪法散见于各个制定法、法院的解释、习俗和惯例之中,又称柔性宪法(flexible constitution),如英国宪法。柔性宪法无单独宪法文本,其修订和一般法律的修订程序相同。

② statute:制定法。A law passed by a legislature.

③ Roman Emperor Justinian Ⅰ:罗马皇帝优士丁尼一世(Justinian Ⅰ)。

④ *Corpus Juris Civilis*:《优士丁尼民法大全》或《国法大全》,或译为《罗马法大全》。*Corpus Juris Civilis* 包括四部分,即:*Justinian Code*《优士丁尼法典》,*Institutes*《法学阶梯》,*The Digest*《学说汇纂》、*New Law*《新律》。"

private law.① Civil-law systems include both private law and public law.

(Corpus Iuris Civilis, 1583)

The monumental *Corpus Juris Civilis* commissioned by Justinian still influences the evolution of law in virtually every civil-law country. The roots of civil law are so deeply imbedded in French jurisprudence that French universities did not even teach common law until 1689. It affects legal rules, legal thought, legal classifications, the treatment of legal precedents and techniques, and the organization of court systems.

大陆法法系包括私法和公法。

优士丁尼组织编纂的这部不朽的《国法大全》依然影响着每一个大陆法国家的法律演化。法国的大学在1689年之前一直没有教授"普通法",由此可见大陆法在法国法律体系中所扎根基之深。大陆法影响了(法国的)法律规则、法律思想、法律分类、法律先例和技术的处理,以及法院体系的架构。

One interesting aspect of civil law is that it transfers from place to place more easily than common law. It is sometimes said that there are two branches of civil law: French and German. The civil codes of both countries have proven particularly adaptable. For example, the *French Civil Code* (or *Napoleonic Code*)②, first promulgated by Napoleon Ⅰ in 1804, is the

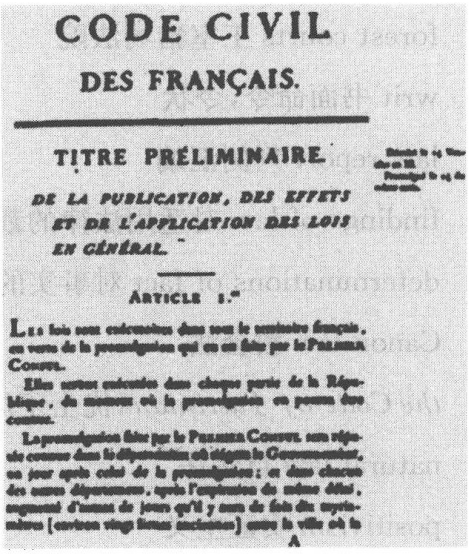
大陆法的一个有趣方面是,它比普通法更容易地从一个地方传播到另一个地方。人们有时会说,大陆法有两个分支:法国和德国。事实证明,这两个国家的民法典具有很强的适应性。例如,拿破仑一世于1804年颁布的《法国民法典》(或者《拿破仑法典》)

① 需要注意的是,"civil law"(民法)这个术语既可指"大陆法",也可指与大陆法上的"公法"相对的"私法"。注意英美法中的"civil law"与大陆法上"民法"这个词并不是同一概念。"Civil law"这个词在我国法律系乃至于整个民法法系中主要是指与刑法(criminal law)或商法(commercial law)相对的作为一个独立部门的民法;而在普通法系中,这样的部门法是不存在的。在普通法系中提到"civil law",通常是指与"common law"相对的"大陆法"。

② *French Civil Code* (or *Napoleonic Code*):《法国民法典》,或称为《拿破仑法典》。《拿破仑法典》是一个非正式的用语,指在拿破仑时代由拿破仑提议通过的诸法典的总称,法语为 *Code Napoleon*。它包括1804年的《民法典》(*Code Civil*)、1806年的《民事诉讼法典》(*Code de Procedure civile*)、1807年的《商法典》(*Code de Commerce*)、1810年的《刑法典》(*Code Penal*),和1811年的《刑事诉讼法典》(*Code d'instruction criminelle*)。不过,有时其中1804年的《民法典》也单独称为"拿破仑法典"(*Napoleonic Code*)。

basis of the laws of Belgium, the Netherlands, Luxembourg, and parts of Germany, Switzerland, and Italy. Spain, Romania, and parts of Africa and South America also borrowed the Code Civil as a guide for local civil codes. In North America, for example, the civil laws of both the state of Louisiana and the Canadian province of Quebec are rooted in the *Code Civil*. Inherited from the Holy Roman Empire①, the *German Civil Code* (*Bürgerliches Gesetzbuch*, *or BGB*), which was enacted in 1900, also reveals the strong influence of Roman civil law. Although its reach has been much narrower than that of the *French Code Civil*, it has been important in such far-reaching sites as Thailand, China, Japan, Eastern Europe, and Greece.

是比利时、荷兰、卢森堡等国以及德国、瑞士和意大利等国部分地区的法律的基础。西班牙、罗马尼亚以及非洲和南美洲的部分地区也借鉴《法国民法典》并作为制定当地民法典的参考。北美的路易斯安那州和加拿大的魁北克省的民法也都源于《法国民法典》。《德国民法典》于1900年颁布，它源于神圣罗马帝国，深受罗马民法的影响。尽管《德国民法典》比《法国民法典》影响到的区域要少，但前者在诸如泰国、中国、日本、东欧和希腊等广大区域内的影响是非常重要的。



CODE CIVIL
DES FRANÇAIS.

TITRE PRÉLIMINAIRE.

DE LA PUBLICATION, DES EFFETS ET DE L'APPLICATION DES LOIS EN GÉNÉRAL.

ARTICLE 1.er

(First page of the 1804 original edition.)

① Holy Roman Empire：神圣罗马帝国(公元962至1806年)，其拉丁文为 Sacrum Romanorum Imperium nationis Germanicae，在西欧和中欧的封建帝国。早期为统一的国家，中世纪后演变为一些承认皇帝最高权威的公国、侯国、伯国、宗教贵族领地和自由市的政治联合体。

Ⅱ. GLOSSARY

Ⅱ. 词汇表

jurisdiction 司法管辖权;法域

the Exchequer 财政诉讼法院

the King's Bench 王座法院

Common Pleas 普通诉讼法院

manorial courts 领地法院

baronial courts 男爵法院

admiral's(maritime) courts 海事法院

guild 同业公会,行会,基尔特

forest courts 王室猎场法院

writ 书面命令,令状

law report 判例汇编

findings of law 对适用法律的裁决

determinations of fact 对事实的决定

Canon law 教会法

the Code of Justinian《优士丁尼法典》

natural law 自然法

positivism 实证主义

codification 法典编纂;法典化

the Code of Hammurabi《汉莫拉比法典》(又译为《汉姆拉比法典》《汉穆拉比法典》等)

the Corpus Juris Civilis《国法大全》(又译为《民法大全》)。

the Napoleonic Code《拿破仑法典》

Ⅲ. SUPPLEMENTARY TEXT

Ⅲ. 补充资料

Common law and equity① are legal systems where decisions by courts are explicitly acknowledged to be legal sources. The "doctrine of precedent", or *stare decisis* (Latin for "to stand by decisions") means that decisions by higher courts bind lower courts. Common law systems also rely on statutes, passed by the legislature, but may make less of a systematic attempt to codify their laws than in a "civil law" system. Common law originated from England and has been inherited by almost every country once tied to the British Empire (except Malta②, Scotland, the U. S. state of Louisiana, and the Canadian province of Quebec).

In medieval England, the Norman Conquest③ led to a unification of various tribal customs and hence a law "common" to the whole country. The common law developed when the English monarchy had been weakened by the enormous cost of fighting for control over large parts of France. King John had been forced by his barons to sign a document limiting his authority to pass laws. This "great charter" or *Magna Carta* of 1215④ also required that the King's entourage of judges hold their courts and judgments at "a certain place" rather than dispensing autocratic⑤ justice in unpredictable places about the country. A concentrated and elite group of judges acquired a dominant role in law-making under this system, and compared to its European counterparts the English judiciary became highly centralized. In 1297, for instance, while the highest court in France had fifty-one judges, the English Court of Common Pleas⑥ had five. This powerful and tight-knit judiciary gave rise to a rigid and inflexible system of common law.

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① equity:此处指"衡平法"。本文对其进行了较为详细地介绍。

② Malta:马耳他,地中海岛国。

③ Norman Conquest:诺曼征服,指 1066 年以诺曼底公爵威廉(William)(约 1028—1087 年)对英格兰的征服。

④ *Magna Carta*:《大宪章》。英国是一个没有成文宪法的国家,其宪法是由一系列的文件和法案组成,其中具有奠基意义的一份,就是在 1215 年 6 月 15 日,由英国国王与贵族们签订的《大宪章》。这张书写在羊皮纸卷上的文件日后成为了英国君主立宪制的法律基石。

⑤ autocratic:专制的,独裁的。

⑥ Court of Common Pleas:皇家民事法院;普通民事诉讼法院。1875 年之前,皇家民事法院是英格兰最重要的三个中央法院之一。1875 年之后,它被并入新的高等法院(High Court of Justice)。

As a result, as time went on, increasing numbers of citizens petitioned the King to override① the common law, and on the King's behalf the Lord Chancellor② gave judgment to do what was equitable in a case. From the time of Sir Thomas More③, the first lawyer to be appointed as Lord Chancellor, a systematic body of equity grew up alongside the rigid common law, and developed its own Court of Chancery④. At first, equity was often criticized as erratic, that it varied according to the length of the Chancellor's foot. But over time it developed solid principles. In the 19th century the two systems were fused into one another. In developing the common law and equity, academic authors have always played an important part. William Blackstone, from around 1760, was the first scholar to describe and teach it. But merely in describing, scholars who sought explanations and underlying structures slowly changed the way the law actually worked.

Ⅳ. EXERCISES

Ⅳ. 练习

1. Answer the following questions.

(1) Throughout the world, what are the two kinds of legal systems that most of countries can be classified into?

(2) Give the names of countries with the characteristics of common law system.

(3) Give the names of countries with the characteristics of civil law system.

(4) In United States and Canada, which state or province has the characteristics of

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① override:撤销,使无效。

② Lord Chancellor:大法官,御前大臣。自公元 605 年起,英国就设立了大法官一职,其历史比首相(Premier)职位更悠久,具有十分特殊和显要的地位。大法官同时还兼任上议院(The House of Lords)的议长、内阁法律大臣(Lord Chancellor in Cabinet),负责任命上诉法院(The Supreme Court of Appeals)和高等法院(The High Court of Justice)的首席法官和全国的高级法官,管理全国的法院系统。2003 年 6 月 12 日,英国首相布莱尔(Tony Blair)对内阁进行了重大改组,撤销了大法官的建制。大法官欧文勋爵(Derry Irvine)是英国最后一任大法官。

③ Thomas More:托马斯·莫尔(1478—1535),曾当过律师、国会议员、财政副大臣、国会下院议长、大法官。1535 年因反对亨利八世兼任教会首脑而被处死。1886 年,在莫尔去世三百多年后,被罗马天主教会的教皇庇护十一世册封为圣人,以其名著《乌托邦》而名垂史册。Thomas More also known by Catholics as Saint Thomas More, was an English lawyer, social philosopher, author, statesman and noted Renaissance humanist.

④ Court of Chancery:衡平法院,御前大臣法院。

civil law system, and why?

2. Translate the following terms into English.

(1) 法律体系

(2) 普通法系

(3) 大陆法系

(4) 法国民法典

(5)《汉莫拉比法典》

(6) 对事实的决定

3. Translate the following terms into Chinese.

(1) Canon law

(2) property law

(3) labor-management relation

(4) findings of law

(5) *Corpus Juris Civilis*

4. Match the given terms with the proper explanation.

A. *Corpus Juris Civilis*

B. *the Napoleonic Code*

C. *The German Civil Code*

D. common-law system

E. civil-law system

(1) It is the first modern legal code to be adopted with a pan-European scope and it strongly influenced the law of many of the countries formed during and after the Napoleonic Wars.

(2) It is the most comprehensive code of Roman law and the basic document of all modern civil law, compiled by order of Justinian I.

(3) It places great weight on court decisions, which are considered "law" with the same force of law as statutes, and common law courts have had the authority to make law where no legislative statute exists.

(4) It is a legal system inspired by Roman law, the primary feature of which is that laws are written into a collection, codified, and not determined by judges.

(5) It serves as a template for the regulations of several other civil law jurisdic-

tions, including Japan, Thailand, South Korea, People's Republic of China, Greece and the Ukraine.

5. Choose the suitable words from the box and fill in the blanks.

is bound to	legal system	principle	precedent	authority	is distinct from

"Common-law system" is a __(1)__ that gives great precedential weight to common law, on the __(2)__ that it is unfair to treat similar facts differently on different occasions. In cases where the parties disagree on what the law is, an idealized common law court looks to __(3)__ of relevant courts. If a similar dispute has been resolved in the past, the court __(4)__ follow the reasoning used in the prior decision. If, however, the court finds that the current dispute __(5)__ all previous cases, judges have the __(6)__ and duty to make law by creating precedent. Thereafter, the new decision becomes precedent, and will bind future courts.

6. Translate the following sentences into Chinese.

(1) Most modern law codes can be traced back to the famous code that was commissioned by the Roman Emperor Justinian I in the A. D. 500's, which was called the *Corpus Juris Civilis*.

(2) The changes have dealt with such matters as labor-management relations, workers' wages and hours, health, safety, and environmental protection.

(3) Although its reach has been much narrower than that of the *French Code Civil*, it has been important in such far-reaching sites as Thailand, China, Japan, Eastern Europe, and Greece.

(4) Some common-law principles proved too precious to change. For example, a long line of hard-won precedents defended the rights and liberties of citizens against the unjust use of government power.

(5) Every state in the United States except Louisiana and every Canadian province except Quebec adopted a common-law system. Louisiana and Quebec were colonized by France, rather than England, and their legal systems are patterned after the French civil-law system.

(6) Civil law holds legislation as the primary source of law, and the court system is usually inquisitorial, unbound by precedent, and composed of specially trained judicial officers with a limited authority to interpret law.

Lesson 3 Judicial System of the United States

第三课 美国法院体系

Ⅰ. Text & Its Translation

Ⅰ. 课文及译文

1. General Introduction

Court organization in the United States is complicated by the form of government, federalism①. Instead of a single, unified court system such as exists in Great Britain or France, the United States actually has fifty-one court systems—the federal courts and the courts of the fifty individual states.

The United States Congress and the state legislatures are free to organize their respective court system to meet their own needs. Not only is the federal court structure different from those in the states, but there is also tremendous diversity among the individual states. A trial court② might be called a district court in

1. 概述

美国的法院组织因其国家结构形式——联邦制——而显得复杂。与英国或法国等国的单一的、统一的法院体系不同，美国事实上有 51 个法院体系——联邦法院体系和 50 个州的法院体系。

美国国会和各州立法机构可自由地组织各自的法院体系，以满足自身需要。不但联邦法院的架构不同于各州的法院架构，各州的法院架构也多有差异。初审法院在甲州称作“地区法院”，

① federalism：联邦制。a principle of government in which several states or countries are united as a single political entity with a common government while retaining a considerable degree of autonomy with respect to their internal affairs。与此相对的是 *Unitarianism*，单一制（集权制）。

② trial court：初审法院，一审法院。亦作“court of first instance”，“instance court”，“court of instance”。A court of original jurisdiction where the evidence is first received and considered.

one state, a superior court in another, and a supreme court in yet another. Most states have a single supreme court; two states, Oklahoma and Texas, have two courts of last resort—one for civil appeals and one for criminal appeals. Such diversity makes it difficult to generalize about the "typical" sate court system.

Each state is free to determine for itself what behavior is forbidden, and each is free to establish reasonable punishment for defined crimes. Consequently, two states may have entirely different definitions of the same criminal act and two entirely different penalties for it.

在乙州可能作为"高等法院",在丙州有可能是"最高法院"。大多数州仅有一个最高法院;俄克拉荷马州和德克萨斯州有两个终审法院,分别管辖民事上诉案件和刑事上诉案件。这种多样性使我们很难概括出一个"典型"的州法院体系。

每个州都可以自由地决定何为法律禁止的行为,且可自由地对法定的罪名确定合理的处罚。因此,对于相同的犯罪行为,两个州可能有着完全不同的界定和两种全然不同的刑罚。

2. State Court System

Although there is no"typical" state court system because federalism allows each state to adopt a court system fitted to its individual needs, a state court system usually includes several levels, or tiers, of courts.① State courts may include(1) trial courts of limited jurisdiction②, (2) trial courts of general jurisdiction, (3) appellate courts, and(4) the state's highest court(often called the state supreme court).

2. 州法院体系

尽管联邦制允许美国各州建立一个适合自身需要的法院体系,因而并不存在一个"典型"的州法院体系,但一般而言,州法院体系包括几个层级,或者说几个审级。州法院可能包括(1)具有有限管辖权的初审法院,(2)具有一般管辖权的初审法院,(3)上诉法院和(4)州最高法院。

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① 在我国,审判权由地方各级人民法院(包括基层人民法院、中级人民法院、高级人民法院)、专门人民法院(包括军事法院、海事法院、铁路交通法院)、最高人民法院行使。它们对应的英文表达为:Local People's Court(Grass-Roots People's Court, The Intermediate People's Court, The Higher People's Court); Special People's Courts(Military Tribunal, Maritime Court, Railway Transportation Court); Supreme People's Court.

② jurisdiction:司法管辖权;*jurisdiction*, a court's power to decide a case or issue a decree。包括"有限管辖权"(*limited jurisdiction*: jurisdiction that is confined to a particular type of case or that may be exercised only under statutory limits and prescription)和"普遍管辖权"(*general jurisdiction*: a court's authority to hear a wide range of cases, civil or criminal, that arise within its geographic area)。

Generally, any person who is a party① to a lawsuit② has the opportunities to plead the case before a trial court and then, if he or she loses, before at least one level of appellate court. Finally, if a federal statute or federal constitutional issue is involved in the decision of the state Supreme Court, that decision may be further appealed to the United States Supreme Court.

通常来说，案件的任何一方当事人都有向初审法院陈述案情的机会，如果他/她败诉，至少还可向其中一级上诉法院陈述案情。最后需要指出，如果州最高法院的判决涉及联邦法律或者联邦宪法问题，那么此项判决可进一步被上诉至联邦最高法院。

(1) Courts of limited jurisdiction③

All state courts have had their jurisdiction limited in some way. The jurisdiction of any court comes from the state constitution or from statutes passed by the state legislature, or both. Courts of limited jurisdiction, as their name implies, are created to handle cases of limited or specialized nature. Court of limited jurisdiction is the first set of state trial courts.

One of the most common courts of limited jurisdiction is the municipal court④. Municipal courts are often limited to minor offenses or misdemeanors⑤. Municipal courts are often

(1) 有限管辖权法院

所有州法院的管辖权都在某种程度上受到了限制。任何法院的管辖权都系来自州宪法或者州立法机关通过的制定法，或同时来自上述二者的授权。顾名思义，有限管辖权法院主要用于处理种类有限的案件或专门案件。有限管辖权法院是一级初审法院。

最常见的有限管辖权法院是市镇法院。市镇法院通常仅限于处理轻微的违法案件或者轻罪案件。市镇法院通常

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① party：当事人，指进行一定事务或诉讼的人。*party*, one by or against whom a lawsuit is brought or one who takes part in a transaction. 本文指诉讼当事人，即原告和被告(人)。

② lawsuit(or suit, suit at law)：诉讼；*lawsuit*, *n.* any proceeding by a party or parties against another in a court of law，例如 enter/bring/file a lawsuit against sb、to proceed against(an adversary) in a lawsuit 均表示"起诉某人"或"对某人提起诉讼"。

③ jurisdiction：管辖权。A court's power to decide a case or issue a decree；包括"有限管辖权"(*limited jurisdiction*: jurisdiction that is confined to a particular type of case or that may be exercised only under statutory limits and prescription)和"普遍管辖权"(*general jurisdiction*: a court's authority to hear a wide range of cases, civil or criminal, that arise within its geographic area)。

④ municipal court：市镇法院，也可翻译为市法院，或者都市法院。亦作 city court。A court having jurisdiction (usually civil and criminal) over cases arising within the municipality in which it sits. A municipal court's civil jurisdiction to issue a judgment is often limited to a small amount, and its criminal jurisdiction is limited to petty offenses.

⑤ misdemeanor：轻罪。亦作"minor crime", "summary offense"。在美国，联邦和州刑法将重罪以下的犯罪均归属于轻罪，一般处以罚金、没收财产或一年一下在地方看守所关押的监禁刑。A crime that is less serious than a felony and is usu. punishable by fine, penalty, forfeiture, or confinement(usu. for a brief term) in a place other than prison(such as a county jail).

referred as "traffic courts" because their main function is to hear cases involving traffic violations within the city limits. Municipal courts frequently have jurisdiction over cases involving violations of city ordinances①.

Another category of courts of limited jurisdiction includes county courts②. Like municipal courts, which are limited to exercising their jurisdiction within city limits, county courts' jurisdiction is limited to county lines. County courts typically have a greater expanse of jurisdiction than municipal courts. In criminal cases, for example, county courts may have jurisdiction over offenses with penalties as great as one year in prison and relatively high fines.

(2) Courts of general jurisdiction

A second level of courts in most state judicial system consists of courts of general jurisdiction. A court of general jurisdiction has the power to hear any case that falls within the general judicial power of the state. That is, a court of general jurisdiction has the authority to render a verdict in any case capable of judicial resolution under the constitution and laws of the state. Courts of general jurisdiction are the major trial courts of the state. They may be called superior courts, district courts, circuit

被称为"交通法院",因为它们的主要职能就是听审一个城市范围内的涉及交通违法的案件。市镇法院通常对涉及违反城市条例的案件具有管辖权。

另外一类有限管辖权法院是县法院。正如市镇法院仅在城市的范围内行使管辖权,县法院在一个县的范围内行使管辖权。县法院通常比市镇法院拥有更广泛的管辖权。比如说,在刑事案件中,对于可判处长达一年监禁刑和可判处相对较高罚金刑的犯罪行为,县法院都可能拥有管辖权。

(2) 一般管辖权法院

在大多数州的法院体系中,第二层级的法院是指一般管辖权法院。一般管辖权法院有权审理属于州一般司法管辖权范围内的任何案件。换言之,一般管辖权法院可根据州宪法和法律,对任何可通过司法解决的案件作出裁决。一般管辖权法院是州的主要初审法院。它们可能亦被称为高等法院、地区法院、巡回

① ordinance:条例。Cities possess ordinance power, that is, the power to enact laws enforceable within the city limits. Such laws include prohibitions against discharging firearms, burning trash, and letting animals run loose within the city limits.

② county court:县法院,州法院的一种。亦作 parish court。A court with powers and jurisdiction dictated by a state constitution or statute. The county court may govern administrative or judicial matters, depending on state law.

courts, or, as in the case of Now York, supreme courts. Court of general jurisdiction is another set of state trial courts.

法院，或最高法院（在纽约州如此）。一般管辖权法院是又一级初审法院。

(3) Appellate courts

All states have some kind of appeals mechanism available for litigants who were unsuccessful at the trial-court level. Most states have created an intermediate appeals court between the trial courts and the states highest court of appeal. The purpose of intermediate appeals is to guarantee the litigants the right to at least one appeal while preventing the state's highest court from having to hear "routine" appeals. These intermediate appellate courts screen out the routine cases so that only the most important cases reach the state's highest court.

(3) 上诉法院

所有的州都有某种上诉机制，初审法院中败诉的诉讼当事人可在此级法院提起上诉。大多数州在初审法院和州最高上诉法院之间设置了中间上诉法院。中间上诉法院的设置既可保证诉讼当事人至少有一次上诉的权利，又可使一州最高法院无须"诉必亲躬"。中间上诉法院筛选审理常规案件，州最高法院则仅审理最为重要的案件。

(4) State Supreme(Highest) Courts

Every state has a highest appellate court, usually called the state supreme court. Many states have chosen to pattern their state's highest court after the U. S. Supreme Court in the number of justices, procedures, and so forth. The highest appellate court in a state is usually called the Supreme Court but may be called by some other names. For example, in both New York and Maryland, the highest state court is called the court of appeals. ① The decisions of

(4) 州最高法院

每个州都有州最高上诉法院，通常被称为州最高法院。在大法官的数量、法院的程序等方面，很多州选择按照美国最高法院的模式去设立其最高法院。州最高的上诉法院通常被称作最高法院，但也可能有其他叫法。例如，纽约州和马里兰州的州最高法院都被称为"上诉法院"。

① The New York Court of Appeals is the highest court in the U. S. state of New York. The Court of Appeals consists of seven judges: the Chief Judge(首席法官；院长)and six associate judges(联席法官)who are appointed by the Governor(州长)to 14-year terms. The Chief Judge of the Court of Appeals is also the head of the State's court system's administration, and is thus also known as the Chief Judge of the State of New York. The Court of Appeals of Maryland is the supreme court of the U. S. state of Maryland. The court is composed of one chief judge and six associate judges.

each state's highest court on all questions of state law are final. Only when issues of federal law are involved can a decision made by a state's highest court be overruled① by the United States Supreme Court.

州最高法院对涉及本州法律的所有问题所作的判决均为终审判决。只有当涉及联邦法律问题时，州最高法院的判决才有可能被联邦最高法院推翻。

State	Court of first instance (general jurisdiction)	Intermediate appellate court	Court of last resort (State supreme court)
Alaska	(District) Superior Court (4 districts)	Court of Appeals	Supreme Court
Arizona	(County) Superior Court (15 counties)	(Division) Court of Appeals(2 divisions)	Supreme Court
California	(County)Superior Court (58 counties)	(District) Court of Appeal (6 appellate districts)	Supreme Court
District of Columbia	Superior Court	(none)	Court of Appeals (previously: Municipal Court of Appeals)
Florida	Florida County Courts(limited jurisdiction)(67 counties) Florida Circuit Courts(general jurisdiction) (20 judicial circuits)	District Court of Appeal (5 districts)	Supreme Court
Georgia	Superior Court (159 counties, divided into 49 judicial circuits); also State Court(not in all counties)	Court of Appeals	Supreme Court
Louisiana	District Court (40 districts)	(Circuit) Courts of Appeal (5 circuits)	Supreme Court (-1813: Superior Court)
Maine	Superior Court	(none)	Supreme Judicial Court
Maryland	Circuit Court (8 judicial circuits)	Court of Special Appeals	Court of Appeals
Massachusetts	Superior Court (14 divisions)	Appeals Court	Supreme Judicial Court
Minnesota	District Court (10 districts)	Court of Appeals	Supreme Court

① overrule:(上级法院)否决或推翻(下级法院的判决);*overrule*, (of a court) to overturn or set aside(a precedent) by expressly deciding that it should no longer be controlling。

（续表）

State	Court of first instance (general jurisdiction)	Intermediate appellate court	Court of last resort (State supreme court)
Nebraska	District Court (12 districts)	Court of Appeals	Supreme Court
Nevada	District Court (9 districts)	(none)	Supreme Court
New Hampshire	Superior Court	(none)	Supreme Court

* (The above table notes the names of the courts in several states of the United States)

3. The Federal Court System

The federal court system is characterized by two types of courts: constitutional and legislative. Constitutional courts are sometimes referred as *Article Ⅲ courts* because they are created under Article Ⅲ① of *Constitution*, which authorizes Congress to "ordain and establish" courts inferior to the Supreme Court. The *Constitution* also states that judges of both the supreme and inferior courts "shall hold their Offices during good Behavior②", which is tantamount to a lifetime appointment, subject to removal only through the impeachment process. Furthermore, Congress may not reduce the salaries of constitutional court judges "during their Continuance in Office." U. S.

3. 联邦法院体系

联邦法院体系的特点在于它有两种类型的法院：宪法设立的法院和立法机关设立的法院。宪法设立的法院有时也被称为"第3条法院"，因为此类法院是根据《宪法》第3条创设的。《宪法》第3条授权国会"规定和设立"级别低于最高法院的法院。《宪法》也规定，最高法院及下级法院的法官"如果行为端正，得以继续任职"，此即为终身任职的规定，法官非经弹劾程序不得被免职。还有，在宪法设立的法院，法官的薪酬在其"继续任职期间"不得被国会消减。

① 美国宪法第3条对司法部门的建立作出了规定。Article Three of the United States Constitution establishes the judicial branch of the federal government. The judicial branch comprises the Supreme Court of the United States and lower courts as created by Congress.

② good Behavior：廉洁行为，品行良好，(正在服刑的罪犯)遵守监规。该词一般指(1)(of federal judges)absence of corrupt or criminal conduct，意思是(联邦法官)没有渎职或刑事犯罪行为。在美国，联邦最高法院、上诉法院和地区法院的联邦法官都是终身制，只有专门法院的联邦法官才是任期制。终身制法官又被称为"第3条法官"(Article Ⅲ Judges)；任期制法官被称为"第1条法官"(Article Ⅰ Judges)。(2)(of a prisoner serving a sentence)compliance with prison rules，指(正在服刑的罪犯)遵守监规。

district courts①, U. S. courts of appeal, and the U. S. Supreme Court are examples of constitutional courts.

美国联邦地区法院、美国联邦上诉法院和美国联邦最高法院都属于宪法设立的法院。

Legislative courts are created by Congress, pursuant to one of its legislative powers. Article I empowers Congress to make all laws "... for organizing, arming, and disciplining the Militia." Under that authority, Congress may establish military tribunals for the purpose of disciplining soldiers. Two major distinctions generally differentiate legislative courts from constitutional courts. First, the judges who serve in the legislative courts do not have lifetime appointments, but instead serve fixed terms of office. The length of the term designated by Congress is often a long one in order to ensure judicial independence. The second distinction is that a legislative court judge's salary is not protected by Constitution, as in the case of constitutional court judges.

立法机关设立的法院是由国会根据其立法权力创设的。宪法第一条授权国会去制定法律,"……以组织、装备和训练民兵"。根据该授权,国会可以管理士兵之目的而设立军事法庭。立法机关设立的法院与宪法设立的法院主要存在两点不同:第一,在立法机关设立的法院中工作的法官并无终身任职资格,仅有一个固定的任职期限。为保证司法独立,国会规定的任职期限通常都比较长。第二,与宪法设立的法院中的法官不同,在立法机关设立的法院中,法官的薪水并无宪法的保证。

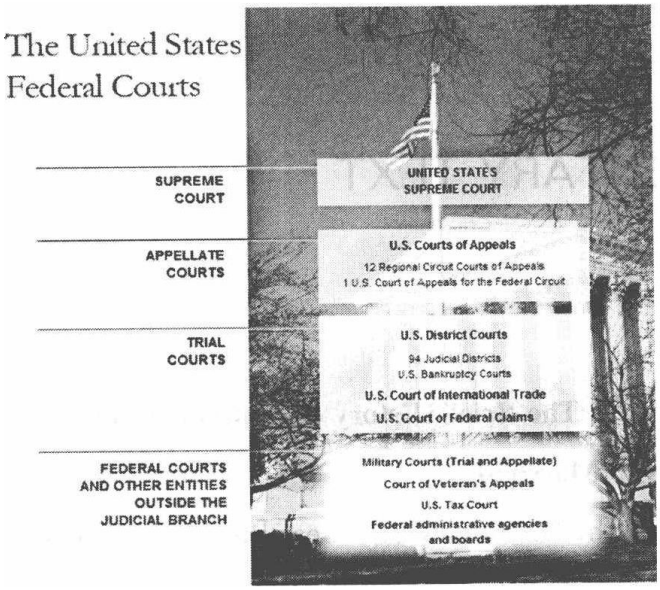
In conclusion, the federal court system is composed of courts created by Congress under either Article I or Article III powers. The federal courts are not "superior" to state courts; rather, they exist alongside state courts. The vast majority of cases are tried in state courts. Nevertheless, the federal courts

总之,联邦法院体系的法院都是国会根据宪法第 1 条或者第 3 条赋予其权力创设的。联邦法院并不比州法院"高级";联邦法院与州法院是并行的。大多案件是在州法院系统内审理。然而,

① 美国共有 94 个联邦地区法院(Federal District Court),一个州至少有一个。通常由一名法官审理一起案件。由于全国共分为 13 个司法巡回区,联邦上诉法院(Federal Court of Appeals)有时又被称为联邦巡回上诉法院(Federal Circuit Court)。这里不搞独任审判,案件通常由 3 名法官组成的合议庭进行。案情重大时,也可由全院法官集体审理,即满席听审(En banc)。与各州一样,案子到了联邦上诉法院,也只有法律审,没有事实审了。

remain an alternative forum that citizens can turn to for relief if state courts prove unresponsive. It is no surprise to discover that southern African Americans preferred to file their civil rights cases in federal rather than state courts, since southern judges were notoriously unsympathetic to African American claims. Despite the confusion caused by federalism, a dual court system provides additional guarantees that justice will eventually prevail.

州法院如不能提供救济的，联邦法院就是公民可以寻求救济的另一个替代性的法院。不难发现，南部各州的非洲裔美国人更愿意在联邦法院，而不是在州法院提起民权诉讼，因为南部各州的法官对非洲裔美国人的权利主张毫无同情心。尽管联邦制使得问题变得十分复杂，但双轨制的法院体系为正义最终可得伸张提供了更多的保证。



(Diagram of the U. S. Federal Courts)

Ⅱ. GLOSSARY

Ⅱ. 词汇表

Federalism 联邦制

trial court 初审法院；一审法院

good behavior 廉洁行为；品行良好

municipal court 市镇法院；市法院；都市法院

misdemeanor 轻罪

ordinance(城市)条例

county court 县法院

constitutional courts 宪法设立的法院

legislative courts 立法机关设立的法院

U. S. district courts 美国联邦地区法院

U. S. courts of appeal 美国联邦上诉法院

U. S. Supreme Court 美国联邦最高法院

courts of limited jurisdiction 有限管辖权法院

courts of general jurisdiction 一般管辖权法院

appellate courts 上诉法院

Ⅲ. SUPPLEMENTARY TEXT

Ⅲ. 补充资料

The Brief History of Supreme Court

Earliest beginnings to Marshall

From 1789 to 1801, the Supreme Court heard few cases. The Court's power and prestige waxed during the Marshall Court(1801—1835). Under Marshall, the Court established the principle of judicial review, including specifying itself as the supreme expositor of the Constitution(Marbury v. Madison) and made several important constitutional rulings giving shape and substance to the balance of power between the federal government and the states. The Marshall Court also ended the practice of each justice issuing his opinion seriatim, a remnant of British tradition, and instead issuing a single majority opinion.

From Taney to Taft

From the 1860s until the 1930s, the court sat in the Old Senate Chamber of the U. S. Capitol①.

① U. S. Capitol:美国国会大厦。

The Taney① Court(1836—1864) made several important rulings, such as Sheldon v. Sill, which held that while Congress may not limit the subjects the Supreme Court may hear, it may limit the jurisdiction of the lower federal courts to prevent them from hearing cases dealing with certain subjects. Nevertheless, it is primarily remembered for its ruling in Dred Scott v. Sandford②, which may have helped precipitate the Civil War③.

Under the White④ and Taft⑤ Courts(1910—1930), the Court held that the Fourteenth Amendment had incorporated some guarantees of the Bill of Rights against the states, grappled with the new antitrust statutes, upheld⑥ the constitutionality of military conscription and brought the substantive due process doctrine⑦ to its first apogee.

The New Deal Era

From 1930 to 1953, the Court gained its own accommodation in 1935 and changed its interpretation of the Constitution, giving a broader reading to the powers of the federal government to facilitate President Franklin Roosevelt's New Deal⑧. During World War Ⅱ, the Court continued to favor government power, upholding the internment of Japanese citizens and the mandatory pledge of allegiance.

Warren and Burger

The Warren⑨ Court(1953—1969) dramatically expanded the force of Constitutional civil liberties. It held that segregation in public schools violates equal protection(Brown v. Board of Education) and that traditional legislative district boundaries violated the right to vote(Reynolds v. Sims). It created a general right to privacy, limited the role of religion in

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① Taney:塔尼,其全名为 Roger Brooke Taney,美国最高法院第五任首席大法官,1836 年起任首席大法官,直至其 1864 年去世。

② 该案是美国最高法院于 1857 年判决的一个关于奴隶制的案件,认为,即便自由的黑人也不是《美国宪法》中所指的公民,所以斯科特无权在联邦法院提起诉讼。该案的判决严重损害了美国最高法院的威望,更成为南北战争的关键起因之一。南北战争后《美国宪法》增加了第十三修正案、第十四修正案和第十五修正案,从而废除了美国的奴隶制,并规定非裔美国人具有平等公民权。

③ Civil War:美国南北战争。

④ White:怀特,其全名是 Edward Douglass White, 1910 年 12 月 19 日至 1921 年 5 月 19 日任美国最高法院首席大法官。

⑤ Taft:塔夫脱,其全名是 William Howard Taft,曾任美国总统(1909—1913 年),卸任后担任美国联邦最高法院首席大法官。

⑥ uphold:支持,赞成。

⑦ due process doctrine:正当程序原则。

⑧ Roosevelt's New Deal:罗斯福新政。

⑨ Warren:沃伦,其全名是 Earl Warren,是美国著名政治家、法学家,担任过美国加利福尼亚州州长,1953 年至 1969 年期间担任美国首席大法官。在担任首席大法官期间,美国最高法院作出了很多涉及种族隔离、民权、政教分离、逮捕程序等著名判例。

public school, incorporated most guarantees of the Bill of Rights against the States and required that criminal suspects be apprised of all these rights by police(Miranda v. Arizona).

The Burger① Court(1969—1986) expanded Griswold's right to privacy to strike down abortion laws(Roe v. Wade), but divided deeply on affirmative action and campaign finance regulation, and dithered on the death penalty, ruling first that most applications were defective, then that the death penalty itself was not unconstitutional.

Rehnquist and Roberts

The Rehnquist② Court(1986—2005) was noted for its revival of judicial enforcement of federalism, emphasizing the limits of the Constitution's affirmative grants of power and the force of its restrictions on those powers. It struck down single-sex state schools as a violation of equal protection, laws against sodomy as violations of substantive due process, and the line item veto, but upheld school vouchers and reaffirmed Roe's restrictions on abortion laws. The Court's decision in Bush v. Gore, which ended the electoral recount during the presidential election of 2000, became controversial.

The Roberts③ Court(2005—present) is regarded by some as more conservative than the Rehnquist Court. Some of its major rulings have concerned federal preemption, civil procedure, abortion, and the Bill of Rights.

Ⅳ. EXERCISES

Ⅳ. 练习

1. Answer the following questions.

(1) Describe briefly the state court system.

(2) Describebriefly the federal court system.

(3) What is the difference between courts of limited jurisdiction and courts of gen-

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① Burger:伯格,其全名是 Warren Earl Burger,第 15 任美国最高法院首席大法官,1969—1986 年任职。

② Rehnquist:伦奎斯特,其全名是 William Hubbs Rehnquist。1986 年 9 月 26 日,经总统罗纳德·里根(Ronald Reagan)任命后,伦奎斯特担任最高法院首席大法官,直至 2005 年 9 月 3 日去世为止。

③ Roberts:罗伯茨,其全名是 John G. Roberts, Jr.,2005 年 9 月,由布什总统提名,参议院批准通过,罗伯茨就任美国联邦最高法院第 17 任首席大法官。他也是美国两个世纪以来最年轻的首席大法官。

eral jurisdiction?

(4) Describe briefly the difference between the judges of constitutional courts and judges of legislative courts.

2. Translate the following terms into English.

(1) 初审法院

(2) 有限管辖权

(3) 普遍管辖权

(4) 民事纠纷

(5) 刑事诉讼

(6) 巡回法院

3. Translate the following terms into Chinese.

(1) state court system

(2) trial court of limited jurisdiction

(3) appellate court

(4) United States Supreme Court

(5) intermediate appellate court

(6) district court

4. Match the given terms with the proper explanation.

A. circuit

B. plead

C. general jurisdiction

D. testimony

E. lawsuit

(1) A court's authority to hear a wide range of cases, civil or criminal, that arise within its geographic area.

(2) Any proceeding by a party or parties against another in a court of law.

(3) Address a court of law as an advocate on behalf of either the plaintiff or the defendant.

(4) Evidence that a complete witness under oath or affirmation gives at trial or in an affidavit or deposition.

(5) A judicial division of the United States—that is, the 13 circuits where the

U. S. courts of appeals sit.

5. Choose the suitable words from the box and fill in the blanks.

legislation	interpret	judicial review	unconstitutional	constitutionality

Every level of the federal courts has the power to __(1)__ the federal Constitution, and federal laws and regulations. The courts also exercise __(2)__ over federal statutes and agency actions, and determine the __(3)__ of federal and state laws. To the extent any statute or agency action is found to be __(4)__, it is invalid. Federal courts also interpret federal __(5)__ and federal agency rules and decisions.

6. Translate the following sentences into Chinese.

(1) Unlike state court judges, who are usually elected, federal court judges—including the justices of the Supreme Court—are appointed by the President and confirmed by Senate for life terms.

(2) The judicial system of the U. S. is a dual court structure consisting of federal and state courts. Coexistence of dual governments(state and federal) gives rise to separate court systems.

(3) Jurisdiction is the authorized power of a court to hear a particular case and render a binding decision.

(4) Whenever the U. S. government is a party, a lawsuit will be tried in the federal system. The U. S. is a party when it brings suit or is named as a defendant.

(5) Heard before United States Supreme Court are appeals from specialized courts and claims arising from decisions of federal administrative agencies.

(6) State trial courts of general jurisdiction have jurisdiction over a wide variety of subjects, including both civil disputes and criminal prosecutions. In some cases, trial courts of general jurisdiction may hear appeals from courts of limited jurisdiction.

(7) Appellate courts usually, do not look at the questions of fact(such as whether a party did, in fact, commit a certain action, such as burning a flag) but at questions of law(such as whether the act of flag-burning is a form of speech protected by the First Amendment to the Constitution).

(8) Appellate courts normally defer to a trial court's findings on questions of fact

because the trial court judge and jury were in a better position to evaluate testimony—by directly observing witnesses' gestures, demeanor, and nonverbal behavior during the trial.

(9) The federal court system is basically a three-tiered model consisting of(1) U. S. district courts(trial courts of general jurisdiction) and various courts of limited jurisdiction, (2) U. S. courts of appeals(intermediate courts of appeals), and(3) the United States Supreme Court.

(10) The United States Supreme Court consists of nine justices. Although the Supreme Court has original, or trial, jurisdiction in rare instances(e. g. , in legal disputes in which a state is a party, cases between two states, and cases involving ambassadors), most of its work is as an appeals court.

Lesson 4 Constitutional Law

第四课 宪 法

Ⅰ. Text & Its Translation

1. General Introduction

Most commonly, the term constitution refers to a set of rules and principles that define the nature and extent of government. Most constitutions seek to regulate the relationship between institutions of the state, in a basic sense the relationship between the executive, legislature and the judiciary, but also the relationship of institutions within those branches. For example, executive branches can be divided into a head of government, government departments/ministries, executive agencies and a civil service①.

Most constitutions also attempt to define the relationship between individuals and the state, and to establish the broad rights of indi-

Ⅰ. 课文及译文

1. 概述

一般而言,"宪法"是指对政府的性质和范围进行界定的一整套规则和原则。大多数宪法的调整对象是国家的机构之间的关系(通常即指行政、立法和司法等部门之间的关系)及上述各部门下属机构之间的关系。比如说,行政部门可以划分为政府元首、政府各部门、行政机关和文职部门。

大多数宪法还会调整个人与国家之间的关系,进而确立个体公民的广泛权利。

① civil service:该术语可以翻译为文职部门,公务员队伍。The term "civil service" has two distinct meanings: (1) A branch of governmental service in which individuals are employed on the basis of professional merit as proven by competitive examinations. (2) The body of employees in any government agency other than the military.

vidual citizens. It is thus the most basic law of a territory from which all the other laws and rules are hierarchically derived; in some territories it is in fact called "Basic Law". Constitutions may also provide that their most basic principles can never be abolished, even by amendment. In case a formally valid amendment of a constitution infringes these principles protected against any amendment, it may constitute a so-called unconstitutional constitutional law.

因此,宪法是一国的根本大法,其他各位阶的法律和规则全都产生于宪法。在一些地区,宪法事实上也被称作"基本法"。宪法可能还会规定,某些宪法最基本的原则即使通过修正案的形式也不得被废除。一旦某一正式有效的宪法修正案违反了这些原则,该修正案就可能构成一个所谓"违宪的宪法(修正)"。

2. Codified Constitution and Uncodified Constitution

(1) Codified constitution

Most states in the world have codified constitutions(also known as written constitutions). Codified constitutions are often the product of some dramatic political change, such as a revolution. The process by which a country adopts a constitution is closely tied to the historical and political context driving this fundamental change. States that have codified constitutions normally give the constitution supremacy over ordinary statute law. That is, if there is any conflict between a statute and the codified constitution, all or part of the statute can be declared *ultra vires*① by a court, and struck down as unconstitutional. In the United

2. 法典化的宪法与非法典化的宪法

(1) 法典化的宪法

世界上大多数国家有法典化的宪法(成文宪法)。法典化的宪法通常是某种巨大政治变革(比如革命)的产物。任何国家采纳一部宪法的过程均与推动此等巨大变革的历史和政治背景紧密相连。拥有法典化宪法的国家通常会赋予宪法超越普通制定法的最高效力。换言之,如果一部制定法和法典化的宪法之间存在着冲突,该制定法的全部或部分内容可以被法院宣布为超越权限,并被认定为违宪。在美国,

① ultra vires:越权,亦作"ultra vires"。这是一个拉丁文术语,其含义是"超越权限",广义指未经授权而实施行为。Unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law.

States, the Supreme Court is the final interpreter of the Constitution and has the power to rule on the constitutionality① of the actions of the other two branches of government② as well as those of the states and other governmental entities. Through judicial elaboration of the meaning of the Constitution, the Court can broaden or limit the powers of the president and the Congress. In so doing, the Court breaths life into the Constitution, making it a "living" document that changes as the nation changes.

联邦最高法院对《宪法》有最终解释权，并有权力对联邦政府其他两个部门、州的各部门及其他政府机构的行为的合宪性作出裁决。通过对《宪法》含义进行详尽的司法解释，最高法院可扩大或者限制总统和国会的权力。最高法院如此赋予《宪法》生命，使其成为一部随着国家的变化而变化的"活的"文件。

Codified constitutions normally consist of a preamble, which sets forth the goals of the state and the motivation for the constitution, and several articles containing the substantive provisions. The preamble, which is omitted in some constitutions, may contain a reference to God and/or to fundamental values of the state such as liberty, democracy or human rights.

法典化的宪法通常由以下几个部分组成：序言（主要规定国家的目标和制定宪法的目的）和正文（若干条实体条文）。在一些宪法中，序言部分可能会被省略。序言也可能提及上帝，兼及国家的自由、民主或者人权等基本价值观。

(2) Uncodified constitution

As of 2010 at least three states have uncodified constitutions: Israel, New Zealand, and the United Kingdom. Uncodified constitutions (also known as unwritten constitutions) are the product of an "evolution" of laws and conventions over centuries. By contrast to codified constitutions, uncodified constitutions include written sources like constitutional statutes

(2) 非法典化的宪法

截至2010年，至少以色列、新西兰和英国等三个国家是非法典化宪法的国家。非法典化宪法（不成文宪法）是法律和传统在数个世纪内"进化"的产物。与法典化的宪法不同，非法典化的宪法包括成文的渊源

① constitutionality：合宪性。The quality or state of being constitutional.
② 此处的"other two branches of government"是指行政部门和立法部门。

enacted by the Parliament① and also unwritten sources, such as constitutional conventions, observation of precedents, royal prerogatives, custom and tradition②. In the days of the British Empire, the Judicial Committee of the Privy Council③ acted as the constitutional court for many of the British colonies such as Canada and Australia which had federal constitutions.

(如议会颁布的宪法性制定法)、不成文的渊源(如宪法性传统,先例、王室特权,习惯和传统等的遵守)。在不列颠帝国时期,枢密院的司法委员会是很多英国殖民地(如拥有联邦宪法的加拿大和澳大利亚)的宪法法院。

3. Functions of Constitutions

3. 宪法的功能

(1) State and legal structure

One of the key tasks of constitutions is to indicate hierarchies and relationships of power. In a unitary state④, the constitution will vest ultimate authority in one central administration and legislature, and judiciary, though there is often a delegation of power or authority to local or municipal authorities. In contrast, a federal form of government is one in which the states form a union and the sovereign power is divided between a central governing authority and the member states. The *U. S. Constitution* delegates certain powers to the national gov-

(1) 国家和法律结构

宪法的一项关键任务在于明确权力的层级和关系。在一个单一制国家中,宪法会将最终权力授予中央政府、立法部门和司法部门,当然它也会向地方政府授权。而联邦制是指一种诸州形成联盟,主权由中央政府和成员州政府分享的政府组织形式。《美国宪法》授予联邦政府特定的权力,

① 以英国宪法为例,议会的制定法 *Northern Ireland Act 1998*(《1998 年北爱尔兰法》)、*Scotland Act 1998*(《1998 年苏格兰法》)、*Government of Wales Act 1998*(《1998 年威尔士政府法》)、*European Communities Act 1972*(《1972 年欧共体法》)及 *Human Rights Act 1998*(《1998 年人权法》)等均为宪法渊源,当然还包括古老的 1215 年《大宪章》、1628 年《权利请书》、1679 年《人身保护令法》、1688 年《权利法案》及 1701 年《王位继承法》等。

② 比如英国总是在星期四举行大选(always holding the General Election on Thursdays)。

③ Privy Council:枢密院。In Britain, the principal council of the sovereign, composed of the cabinet ministers and other persons chosen by royal appointment to serve as privy councilors. The functions of the Privy Council are now mostly ceremonial.

④ unitary state:单一制国家,亦作"(archaically) simple state"。A state that is not made up of territorial divisions that are states themselves.

ernment, and the states retain all powers not delegated to the national government. The relationship between the national government and the state governments is a partnership; neither partner is superior to the other except within the particular area of authority granted to it under the Constitution.

各州保留没有被授予联邦政府的全部权力。联邦政府和州政府的关系是伙伴关系;除在《宪法》授权的特定领域,任何一方都并不优越于另一方。

(2) Human rights

Human rights or civil liberties form a crucial part of a country's constitution and govern the rights of the individual against the state. The United States and France each have a codified constitution with a bill of rights. Perhaps the most important example is *the Universal Declaration of Human Rights*① under the *UN Charter*②. These are intended to ensure basic political, social and economic standards that a nation or intergovernmental body is obliged to provide to its citizens.

(2) 人权

人权或者公民自由权是一国宪法中最为重要的部分,宪法保证公民个人权利不受国家的侵犯。美国和法国法典化宪法都包括有一部权利法案。或许最重要的一个例证是《联合国宪章》中的《世界人权宣言》。这些法案的制定旨在确保国家或者政府间机构须向其公民提供基本的政治、社会和经济标准。

Some countries like the United Kingdom have no entrenched document setting out fundamental rights; in those jurisdictions the constitution is composed of statute, case law and convention. A case named *Entick v. Carrington*③ is a constitutional principle deriving

一些国家(比如英国)并无规定公民基本权利的刚性文件;这些国家的宪法由制定法、案例法和惯例组成。"恩蒂克诉卡林顿"案便确立了一则源于普通法的宪法原则。

① the Universal Declaration of Human Rights:《世界人权宣言》,是联合国大会于 1948 年 12 月 10 日通过(联合国大会第 217 号决议,A/RES/217)的一份旨在维护人类基本权利的文献。由于该文件是由联合国大会通过的,《世界人权宣言》并非强制的国际公约。

② UN Charter:《联合国宪章》,《联合国宪章》被认为是联合国的基本大法,它既确立了联合国的宗旨、原则和组织机构设置,又规定了成员国的责任、权利和义务,以及处理国际关系、维护世界和平与安全的基本原则和方法。遵守联合国宪章、维护联合国威信是每个成员国不可推卸的责任。

③ Entick v. Carrington:该案的全称是 John ENTICK, (Clerk) v. Nathan CARRINGTON and Three Others。这是一个 1765 年作出的判决,案例的索引号为:95 ER 807, (1765) 19 St Tr 1030, [1558—1774] All ER Rep 41, [1765] EWHC KB J98.

from the common law. John Entick's house was searched and ransacked by Sherriff① Carrington. Carrington argued that a warrant② from a Government minister, the Earl of Halifax was valid authority, even though there was no statutory provision or court order for it.

Inspired by John Locke③, the court, led by Lord Camden stated that, "The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. By the laws of England, every invasion of private property, be it ever so minute, is a trespass④ ...." The case hence created the fundamental constitutional principle is that the individual can do anything but that which is forbidden by law, while the state may do nothing but that which is authorized by law.

这则案例源于警长卡林顿对约翰·恩蒂克的一次彻底清查。卡林顿辩称,虽然他的搜查行为尚无制定法依据或法院的命令,但政府大臣哈利法克斯伯爵的手令是其执行搜查的有效依据。

受约翰·洛克的启发,卡姆登勋爵所主持的法庭作出如下判决:"人们参加社会的重大目的在于保护他们的财产。该种权利历来是神圣的和不可更改的,除非这种权利是为了全体人民的利益而被某种公法所剥夺或者削减。根据英格兰法律,对私有财产的任何一次侵犯,尽管是微小的,亦构成侵害……"该案因此创造了一个基本的宪法原则:个人可以做任何事情,但法律禁止的除外;国家只能在法律授权的范围内做事。

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① sheriff:警长;郡长。A sheriff is in principle a legal official with responsibility for a county. In practice, the specific combination of legal, political, and ceremonial duties of a sheriff varies greatly from country to country.

② warrant:手令;授权状。

③ John Locke:约翰·洛克(1632—1704年)。Widely known as the Father of Liberalism, he was an English philosopher and physician regarded as one of the most influential of Enlightenment thinkers. Considered one of the first of the British empiricists, following the tradition of Francis Bacon, he is equally important to social contract theory. 洛克的原文是:The great end of men's entering into society being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society, the first and fundamental positive law of all commonwealths is the establishing of the legislative power, as the first and fundamental natural law which is to govern even the legislative. Itself is the preservation of the society and(as far as will consist with the public good) of every person in it. 对照译文:既然人们参加社会的重大目的是和平地和安全地享受他们的各种财产,而达到这个目的的重大工具和手段是那个社会所制定的法律,因此所有国家最初的和基本的明文法就是关于立法权的建立;正如甚至可以支配立法权本身的最初的和基本的自然法,其目的就是为了保护社会以及(在与公众福利相符的限度内)其中的每一成员。参见洛克的《政府论》(Two Treatises of Government, 1690)下篇第11章《论立法权的范围》(Of the Extent of the Legislative Power)。

④ trespass:侵害之诉。英格兰中世纪的一种诉讼形式,指因自己的身体、财产、权利、名誉或人际关系被侵害而索赔的诉讼。An unlawful act committed against the person or property of another; especially wrongful entry on another's real property.

(3) Legislative procedure

Another main function of constitutions may be to describe the procedure by which parliaments may legislate. For instance, special majorities may be required to alter the constitution. In bicameral① legislatures, there may be a process laid out for second or third readings of bills before a new law can enter into force.

(3) 立法程序

宪法还有一项主要功能是确定议会立法应当遵循的程序。比如说,要修改宪法便需要特定多数的同意。在两院制立法机关中,在一部新的法律生效之前,应有一个对草案进行二读或者三读的程序。

Ⅱ. GLOSSARY

Ⅱ. 词汇表

ultra vires 越权
constitutionality 合宪性
Privy Council 枢密院
referendum 公民复决;全民公决
unitary state 单一制国家
the Charter of Fundamental Rights of the European Union 《欧盟基本权利宪章》
ratified 经批准的;经追认的;经认可的
the Universal Declaration of Human Rights 《世界人权宣言》
sheriff 郡长
warrant 手令;授权状
trespass 侵害之诉
codified constitution 法典化的宪法
uncodified constitution 非法典化的宪法
intergovernmental body 政府间的机构
bicameral 两院制的

① bicameral:两院制的。In the government, bicameralism(Latin bi, two + camera, chamber) is the practice of having two legislative or parliamentary chambers. Thus, a bicameral parliament or bicameral legislature is a legislature which consists of two chambers or houses.

Ⅲ. SUPPLEMENTARY TEXT

Ⅲ. 补充资料

On September 17, 1787, the Constitution was completed, followed by a speech given by Benjamin Franklin①, who urged unanimity, although the Convention decided that only nine states were needed to ratify. The Convention submitted the Constitution to the Congress of the Confederation②.

Article Ⅶ of the proposed constitution stipulated that only nine of the thirteen states would have to ratify for the new government to go into effect(for the participating states). After a year had passed in state-by-state ratification battles, on September 13, 1788, the Articles Congress certified that the new Constitution had been ratified. The new government would be inaugurated with eleven of the thirteen. The Articles Congress directed the new government to begin in New York City on the first Wednesday in March, and on March 4, 1789, the government duly began operations.

Antis' fears of personal oppression by Congress would be allayed by Amendments passed under the floor leadership of James Madison in the first session of the first Congress. These first ten Amendments ratified by the states were to become known as the Bill of Rights③. Objections to a potentially remote federal judiciary would be reconciled with 13 federal courts(11 states, Maine and Kentucky), and three Federal riding circuits out of the Supreme Court: Eastern, Middle and South. Suspicion of a powerful federal executive was answered by Washington's cabinet appointments of once-Anti-Federalists Edmund Jennings Randolph④ as Attorney General⑤ and

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① Benjamin Franklin:本杰明·富兰克林。著名的政治家,从1757年到1775年,他数次次作为北美殖民地代表到英国谈判。独立战争爆发后,他参加了第二届大陆会议和《独立宣言》的起草工作。1776年,富兰克林出使法国,获得了法国和欧洲人民对北美独立战争的支援。1787年,他积极参加了制定美国宪法的工作。

② Congress of the Confederation:邦联议会。独立战争期间,大陆会议于1777年11月通过了《邦联条例》(Articles of Confederation),1778年经各州批准后该条例生效。根据条例,解散了原来的大陆会议,建立了邦联政府,它实际上是一个松散的各州联合体。邦联议会虽是当时美国的最高权力机构,但它只是各州代表的会议,并没有一个主权国家应有的宣战、媾和、签约、发行货币、借债、征兵和征税等权力,它也不是立法机构,它的决议需要征得各州同意;而各州却拥有主权国家所享有的一切权力。

③ Bill of Rights:《权利法案》。《美国宪法》前十条修正案。

④ Edmund Jennings Randolph:埃德蒙·詹宁斯·伦道夫。美国律师、美国独立战争时期和建国初期的政治活动家。他积极参加了制宪运动,在批准联邦宪法和宪法修正案方面做了大量工作。曾于1786—1788年担任弗吉尼亚州州长,是美国历史上第一任司法部长,曾致力于建立完整的司法体系。

⑤ Attorney General:(美国)司法部长、总检察长。

Thomas Jefferson① as Secretary of State②.

What Constitutional historian Pauline Maier calls a national "dialogue between power and liberty" had begun anew.

Ⅳ. EXERCISES

Ⅳ. 练习

1. Answer the following questions.

(1) Please give your understanding of the definition of constitution.

(2) What is the difference between codified constitution and uncodified constitution?

(3) Please describe the characteristics of uncodified constitution.

(4) What are the main functions of constitution?

2. Translate the following terms into English.

(1) 越权

(2) 单一制国家

(3) 法典化的宪法

(4) 非法典化的宪法

(5) 政府间的机构

(6) 制约与平衡

3. Translate the following terms into Chinese.

(1) *the Charter of Fundamental Rights of the European Union*

(2) *the Universal Declaration of Human Rights*

(3) judicial review

(4) executive branch

(5) legislative branch

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① Thomas Jefferson:托马斯·杰斐逊。第三任美国总统,是美国独立战争期间的主要领导人之一,1776 年,参与起草了美国《独立宣言》。此后,他先后担任了美国第一任国务卿,第二任副总统和第三任总统。他在任期间保护农业,发展民族资本主义工业。从法国手中购买路易斯安那州,使美国领土近乎增加了一倍。他被普遍视为美国历史上最杰出的总统之一。

② Secretary of State:(美国)国务卿。

(6) judicial branch

4. Match the given terms with the proper explanation.

A. Judicial branch

B. Federalism

C. Executive branch

D. Separation of Powers

E. Judicial Review

F. Legislative branch

(1) It is used to describe a system of the government in which sovereignty is constitutionally divided between a central governing authority and constituent political units(like states or provinces).

(2) It is a model for the governance of a state, which is ascribed to French Enlightenment political philosopher Baron de Montesquieu.

(3) It is the doctrine under which legislative and executive actions are subject to review by the judiciary.

(4) It is the part of government that has sole authority and responsibility for the daily administration of the state bureaucracy.

(5) It is the part of government with the power to pass, amend, and repeal laws.

(6) It is in charge of the court system. There are three different kinds of courts found in the federal court system.

2. Choose the suitable words from the box and fill in the blanks.

Judicial Power Executive Power executive branch Congress judicial review stipulate

The vesting clause in the United States Constitution Article Ⅱ places no limits on the __(1)__, simply stating that, "The __(2)__ shall be vested in a President of the United States of America." The Supreme Court holds "The __(3)__" according to Article Ⅲ, and it established the implication of __(4)__ in Marbury v. Madison. The Constitution does not __(5)__ the number of Supreme Court Justices, which is set by __(6)__.

3. Translate the following sentences into Chinese.

(1) The president may be impeached by Congress for treason, bribery, or other

high crimes and misdemeanors, but not for political acts.

(2) Article Ⅰ of the Constitution provides for the legislative branch. The duties of the executive branch and the method of electing the president are set forth in Article Ⅱ. The federal judicial system was created by Article Ⅲ.

(3) The drafting and ratification of the Constitution reflected a growing consensus that the federal government needed to be strengthened.

(4) The individual rights guaranteed by the Bill of Rights serve as restrictions on state and federal governments alike.

(5) James Madison and James Wilson once proposed giving a veto power over federal law to a council composed of the president and a "convenient number" of judges.

(6) The problem arises because the Supremacy Clause defines the relationship of federal and state law, not the relationship between the three coequal branches of the federal government.

(7) The federal government is divided into three branches—the executive branch, which enforces the laws; the legislative branch, which makes the laws; and the judicial branch, which interprets the laws.

(8) The Supreme Court was given no express power to review federal legislation. Under the leadership of Chief Justice John Marshall①, however, the Court found an implied power of review in its responsibility to uphold the Constitution.

(9) The concept of federalism recognizes that society may be best served by a distribution of functions among state governments and the national government on the basis of which government is better equipped to perform these functions.

(10) With the system of checks and balances, no one branch of government can accumulate too much power.

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① John Marshall:约翰·马歇尔(1755—1835年),1799年至1800年担任美国众议院议员,1800年至1801年担任美国国务卿,1801年至1835年担任美国联邦最高法院第四任首席大法官。马歇尔是美国联邦最高法院任职时间最长的首席大法官。

Lesson 5 Criminal Law

第五课 刑 法

Ⅰ. Text & Its Translation

Ⅰ. 课文及译文

1. General Introduction

Criminal Law is the body of law that defines criminal offenses, regulates the apprehension, charging, and trial of suspected offenders, and fixes punishment for convicted persons. Substantive criminal law defines particular crimes, and procedural law establishes rules for the prosecution of crime. In a democratic society, it is the function of legislative bodies to decide what behavior will be made criminal and what penalties will be attached to violations of the law.

Capital punishment① may be imposed in some jurisdictions for the most serious crimes. And physical or corporal punishment② may still be imposed such as whipping or caning③, although these punishments are prohibited in

1. 概述

刑法是规定什么是犯罪，有关犯罪嫌疑人之逮捕、起诉及审判，及对已决犯处以何种刑罚的部门法。刑事实体法(刑法)是规定犯罪的法律；刑事程序法(刑事诉讼法)是规定刑事起诉规则的法律。在一个民主社会中，决定何种行为是犯罪行为且处以何种刑罚是立法机关的职能。

在某些法域，死刑可能会被适用于最严重的犯罪行为。而诸如笞刑或者鞭打刑之类的身体刑或者肉刑仍可能被运用，尽管世界上的绝大部分国家和

① capital punishment：死刑。The legally authorized killing of someone as punishment for a crime.

② corporal punishment：肉刑，身体刑。Physical punishment, such as caning or flogging.

③ caning：(作为惩罚的)鞭笞。A beating with a cane as a punishment.

much of the world. A convict may be incarcerated① in prison or jail and the length of incarceration may vary from a day to life.

Criminal law is a reflection of the society that produces it. In an Islamic theocracy, such as Iran, criminal law will reflect the religious teachings of the Koran②; in a Catholic country, it will reflect the tenets of Catholicism. In addition, criminal law will change to reflect changes in society, especially attitude changes. For instance, use of marijuana③ was once considered a serious crime with harsh penalties, whereas today the penalties in most states are relatively light. As public tolerance of marijuana use grew, the severity of the penalties was reduced. As a society advances, its judgments about crime and punishment change.

地区已经废止了这些刑罚。已决犯可能被处以监禁刑，而刑期短则一天长则一生。

刑法是制定该法律之社会的一面镜子。在伊斯兰教国家(如伊朗)，刑法能反映出《古兰经》的教义；在天主教国家中，刑法可反映天主教的信条。此外，刑法的内容会不断变化，以反映社会的变化，特别是社会观点的变化。例如，吸食大麻曾经被视为严重的犯罪行为，曾被处以重刑，而今天，大多数国家对此行为的处罚相对较轻。随着公众对吸食大麻的容忍度的增加，处罚的严厉程度也逐渐降低。随着社会的发展，社会对于犯罪行为的判决和刑罚也随之改变。

2. Elements of a Crime

Obviously, different crimes require different behaviors, but there are common elements necessary for proving all crimes. First, the prohibited behavior designated as a crime must be clearly defined so that a reasonable person can be forewarned that engaging in that behavior is illegal. Second, the accused must be shown to have possessed the requisite intent to

2. 犯罪构成要件

显而易见的是，构成犯罪的行为形式各异，但罪名的成立是有一些共同要件的。第一，犯罪行为必须是法律明文禁止的，如此，普通正常之人才会知道，从事什么样的行为是违法的。第二，检方须证明被告人具有犯罪的意图。

① incarcerate：监禁。Incarceration is the detention of a person in prison, typically as punishment for a crime. People are most commonly incarcerated upon suspicion or conviction of committing a crime, and different jurisdictions have differing laws governing the function of incarceration within a larger system of justice.

② Koran：(伊斯兰教)《古兰经》(又可译作《可兰经》；亦作 Quran)。The Islamic sacred book, believed to be the word of God as dictated to Muhammad by the archangel Gabriel and written down in Arabic.

③ marijuana：大麻；大麻制品；大麻毒品。Cannabis, especially as smoked in cigarettes.

commit the crime. Third, the state must prove causation. Finally, the state must prove beyond a reasonable doubt that the defendant committed the crime.

(1) *actus reus*

The first element of crime is the *actus reus*. *Actus* is an act or action and *reus* is a person judicially accused of a crime. Therefore, *actus reus* is literally the action of a person accused of a crime. A criminal statute must clearly define exactly what act is deemed "guilty"—that is, the exact behavior that is being prohibited. That is done so that all persons are put on notice that if they perform the guilty act, they will be liable for criminal punishment. Unless the *actus reus* is clearly defined, one might not know whether or not one's behavior is illegal.

Actus reus may be accomplished by an action, by threat of action, or exceptionally, by an omission to act, which is a legal duty to act. For example, the act of Cain striking Abel might suffice,① or a parent's failure to give food to a young child also may provide the *actus reus* for a crime.

Where the *actus reus* is a failure to act, there must be a duty of care②. A duty can arise through contract, a voluntary undertak-

第三，检方须证明因果关系的存在。最后，检方证明被告人犯罪的证据须达到排除合理怀疑的标准。

(1) 犯罪行为

犯罪构成的第一个要件是"犯罪行为"。*Actus* 是指行动或行为，*reus* 是指被依法指控犯有某种罪行的人。因此，*actus reus* 的字面意思是"被指控犯罪之人的行为"。任何一部刑事制定法都必须清楚且精准地规定什么样的行为构成犯罪，即到底什么样的行为是被法律禁止的行为。如此，所有的人才得以知悉，如果实施了某一犯罪行为，他们将即会受到刑事处罚。除非法律明确规定了何种行为属犯罪行为，否则谁都不可能知道某种行为是否犯法。

行为人的某一积极作为、构成威胁的行为或未能履行法定义务的不作为（属例外情形），均可构成"犯罪行为"要件。例如，该隐击中亚伯的行为即足以构成这一要件，家长未能向其幼子提供食物的，亦可能成为某一犯罪的行为要件。

在不作为构成犯罪行为的情况下，必须存在一个注意义务。这种义务可以产生于契约、自愿的承诺、血缘关系，

① 此处出现的两个人名 Cain 和 Abel 都是《圣经》中的人物。该隐，亚当与妻子夏娃所生的两个儿子之一，后来该隐因为嫉妒弟弟亚伯，而把亚伯杀害，后受上帝惩罚，成为吸血鬼。

② duty of care：注意义务。A legal relationship arising from a standard of care, the violation of which subjects the actor to liability.

ing, a blood relation, and occasionally through one's official position. Duty also can arise from one's own creation of a dangerous situation.

偶尔也产生于工作特性。该种义务也可能产生于某人自己造成的危险状况。

(2) *mens rea*

(2) 犯罪意图

A second element of a crime is *mens rea*. *Mens rea* refers to an individual's state of mind when a crime is committed. While *actus reus* is proven by physical or eyewitness evidence, *mens rea* is more difficult to ascertain. The jury must determine for itself whether the accused had the necessary intent to commit the act.

犯罪构成的第二个要件是"犯罪意图"。犯罪意图是指行为人犯罪时的心理状态。犯罪行为可通过物证或者目击证人来证明,而犯罪意图则难以确定。陪审团须独立判断被告人是否确有实施犯罪行为的必要意图。

A lower threshold of *mens rea* is satisfied when a defendant recognizes an act is dangerous but decides to commit it anyway. This is recklessness①. For instance, if Cain tears a gas meter from a wall, and knows this will let flammable gas escape into a neighbor's house, he could be liable for poisoning. Courts often consider whether the actor did recognize the danger, or alternatively ought to have recognized a risk. Of course, a requirement only that one ought to have recognized a danger (though he did not) is tantamount to erasing intent as a requirement. In this way, the importance of *mens rea* has been reduced in some areas of the criminal law.

凡被告人认识到行为的危险性,但仍然决定去做这种行为的,即认定其具有了一种较低标准的犯罪意图。此即为放任的心理状态。例如,如果该隐从墙上将煤气表扯下,并且知道这将使可燃的煤气逸入邻居的房间,则该隐可能要对造成的煤气中毒承担责任。法庭通常会考虑,行为人是否认识到了危险,或者说,是否应该认识到这种风险。当然,仅仅要求某人本应该认识到危险(而事实上他并没有认识到),这等同于取消了对犯罪意图的要求。这样,在刑法的一些领域中,犯罪意图的重要性就降低了。

Wrongfulness② of intent also may vary the

意图的不正当性还可能改变某一

① recklessness:放任行为,轻率行为,鲁莽行为。该行为的行为人不希望危害后果的发生,但终未预见结果发生的可能性。

② wrongfulness:不正当性。Not fair, just or legal.

seriousness of an offense. A killing committed with specific intent to kill or with conscious recognition that death or serious bodily harm will result, would be murder①, whereas a killing affected by reckless acts lacking such a consciousness could be manslaughter②.

(3) Causation

The next element is causation. Often the phrase "but for" is used to determine whether causation has occurred. For example, we might say "Cain killed Abel", by which we really mean "Cain caused Abel's death." In other words, "But for Cain's act, Abel would still be alive." Causation, then, means "but for" the actions of A, B would not have been harmed. In criminal law, causation is an element that must be proven beyond a reasonable doubt.

(4) Proof beyond a Reasonable Doubt

In view of the fact that in criminal cases we are dealing with the life and liberty of the accused person, as well as the stigma accompanying conviction, the legal system places strong limits on the power of the state to convict a person of a crime. Criminal defendants

犯罪行为的严重性。具有特定杀害意图的杀害,或者意识到将导致死亡或严重身体伤害的杀害,属于谋杀罪而因放任行为(不具有上述意图)造成的杀人罪可能是"非预谋杀人罪。"

(3) 因果关系

因果关系是另外一个要件。通常,人们会使用"若非—则无"短语去决定是否具有因果关系。例如,我们可能会说,"该隐杀死了亚伯",在这句话中,我们要表达的真实意思是,"该隐引起了亚伯的死亡"。换言之,"若非该隐的行为,亚伯本应继续活着"。那么,因果关系的意思是:"若非"A 的行为,B 本不应该受到伤害。在刑法中,因果关系是一个必须在排除合理怀疑的基础上证明的要件。

(4) 排除合理怀疑的证明标准

刑事案件的结果往往事关被告人的生命和自由,也包括伴随定罪而来的坏名声。考虑到这一事实,对于检方(通过公诉)旨在给嫌疑人定罪的这一权力而言,法律作出许多严格的限制。刑事被告人是被推定无罪的。检方必

① murder:谋杀,谋杀罪。在普通法上,谋杀罪的定义是:有预谋恶意地非法终止他人生命的行为。The killing of a human being with malice aforethought.

② manslaughter:非预谋杀人罪。指无预谋恶意地非法终止他人生命的行为。The unlawful killing of a human being without malice aforethought. Also termed(in some jurisdictions) culpable homicide. 普通法把非预谋杀人罪分为非预谋故意杀人(voluntary manslaughter)和过失杀人(involuntary manslaughter)。involuntary manslaughter 是指 homicide in which there is no intention to kill or do grievous bodily harm, but that is committed with criminal negligence or during the commission of a crime not included within the felony-murder rule;与之相对应,voluntary manslaughter 指 an act of murder reduced to manslaughter because of extenuating circumstances such as adequate provocation(arousing the "heat of passion",激情杀人) or diminished capacity。

are presumed innocent. The state must overcome this presumption of innocence by proving every element of the offense charged against the defendant beyond a reasonable doubt to the satisfaction of all the jurors. This requirement is the primary way our system minimizes the risk of convicting an innocent person.

须证明对被告人所被指控罪名的每一构成要件都排除了合理怀疑，并达到了让所有陪审员满意的程度，才能推翻无罪推定。这就是美国法律保证清白之人入罪风险最小化的主要方法。

The state must prove its case① within a framework of procedural safeguards that are designed to protect the accused. The state's failure to prove any material element of its case results in the accused being acquitted or found not guilty, even though he or she may actually have committed the crime charged.

检方须在保障被告人的程序框架内证明其提出的观点。检方如不能证明构成其观点的任何一个重要要件的，被告人只能是被无罪释放或被宣告无罪，尽管他或她可能确实犯下了其被指控的罪行。

3. Strict Liability

3. 严格责任

In modern society, some crimes require no more *mens rea*, and they are known as strict liability offenses. For instance, under the *Road Traffic Act 1988* it is a strict liability offence to drive a vehicle with an alcohol concentration above the prescribed limit.

在现代社会，一些罪名不要求犯罪意图要件。它们被称为严格责任犯罪。例如，根据《1988 年道路交通法》，在酒精浓度超过规定限额的情况下驾车，就是一种严格责任犯罪。

Strict liability can be described as criminal or civil liability notwithstanding the lack *mens rea* or intent by the defendant. Not all crimes require specific intent, and the threshold of culpability② required may be reduced. For

严格责任可以被规定为刑事或者民事责任，尽管被告人并不具有犯罪意图或者目的。并不是所有的犯罪都要求特定的犯罪意图，所以认定被告人有罪的门槛有可能降低。例如，证明被告

① "case"在法律英语中除表示"案件"外，还有一个重要义项，即"(控方或辩方在法庭提出的)证据或观点"。

② culpability：有罪，有罪性。From a legal perspective, culpability describes the degree of one's blameworthiness in the commission of a crime or offense. Except for strict liability crimes, the type and severity of punishment often follow the degree of culpability. 除法定的严格责任的刑事案件外，行为人如被认为有罪(culpability)，须具有法律要求的蓄意、明知、放任或过失等主观上的犯罪构成要件。

example, it might be sufficient to show that a defendant acted negligently, rather than intentionally or recklessly.

人的行为存在过失即可，而无需证明故意或者放任。

Ⅱ. GLOSSARY

Ⅱ. 词汇表

capital punishment 死刑
corporal punishment 肉刑，身体刑
caning (作为惩罚的)鞭笞
incarcerate 监禁
Koran (伊斯兰教)《古兰经》
duty of care 注意义务
recklessness 放任
wrongfulness 不正当性
murder 谋杀；谋杀罪
manslaughter 非预谋杀人罪
culpability 有罪；有罪性
actus reus 犯罪行为
mens rea 犯罪意图
causation 因果关系
beyond a reasonable doubt 排除合理怀疑
strict liability 严格责任

Ⅲ. SUPPLEMENTARY TEXT

Ⅲ. 补充资料

Law school is the place where lawyers learn all the tricks of their trade.

I sat in on a legal ethics class at Wuthering Heights University①.

The instructor said, "Today we're going to take a hypothetical case. A man named Hatfield is suing his surgeon for malpractice② because his doctor cut off the wrong leg."

"Tina, you're the lawyer for the plaintiff. Tommy, you are the insurance company's defense lawyer. Tina, you go first."

Tina said, "Well, first I have to prove the doctor didn't know one leg from the other. I use charts③, X-rays and slides to show the leg the surgeon removed was a healthy one. To do this, I have to call expert witnesses④ to testify to this effect."

The professor said, "And how do you find the expert witnesses to testify for your client?"

"I will just go to the hospital and ask if I can borrow them."

"No, Tina. You have to pay expert witnesses to testify. Since they are experts, they get $5,000 a day, plus lunch and transportation. Remember, the defense is going to hire their own expert witnesses who will say cutting off the wrong leg happens all the time.

Continue, Tina."

Tina said, "I will put my client on the stand⑤ and he will testify⑥ he could not find work as a dancer after his leg was removed."

"Tommy, you object because that fact is irrelevant."

Tommy said, "I object⑦."

The professor continued, "I will be the judge in this case and say, 'Objection overruled.' I will tell the jury to ignore the defense objection. As soon as the defense lawyer utters it, the jury will ignore the judge's instructions⑧ and remember it. Now, Tommy,

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① Wuthering Heights University:呼啸山庄大学。Wuthering Heights 是英国著名小说家艾米莉·勃朗特(Emily Bronte)的《呼啸山庄》,作者借此生创了一所大学的名字。

② malpractice:通常译为"渎职行为"或"失职行为",通常指医生,律师,会计师等专业人员的失职或不端行为。在美国,有一种"Malpractice insurance",即"渎职责任保险",保险公司承担上述专业人员因疏忽、过失而给当事人带来的损害。

③ chart:表格。A sheet presenting information in the form of graphs or tables。

④ expert witness:专家证人。A witness qualified by knowledge, skill, experience, training, or education to provide a scientific, technical or other specialized opinion about the evidence or a fact issue. 专家证人所作的"专家证言"叫做"expert testimony"。

⑤ put my client on the stand:把当事人推向证人席。A witness stand:证人席。

⑥ testify:证明,作证。

⑦ I object:我反对。I object, your honor 为"法官大人,我反对",有时也直接说"Objection"。法官如果认为反对有效,则说"sustained";如果认为无效,则"overruled"。

⑧ instruction 或 jury instruction:(法律)法官对陪审团的指示,对此陪审团应该遵守。Jury instruction, A direction or guideline that a judge gives a jury concerning the law of the case, often shortened to *instruction*.

it's the defense's turn."

"Ladies and gentlemen of the jury, Hatfield signed a form① giving permission to cut off his leg and did not specify which one. Once he signed the paper it was no longer the surgeon's responsibility."

Tommy said, "I would like to enter② Exhibit③ A."

"What is it?" the professor asked.

"When Hatfield went to college, he flunked Medieval History and was kicked off the football team."

Tina said, "Objection. His school grades have nothing to do with his leg."

The professor said, "Now class, pay attention. This is very import④ for anyone who is defending a client in this kind of a case. You have to smear⑤ his reputation every chance you can. If he is divorced or has unpaid traffic tickets, try to put it into the record. Get the jury to forget the amputation⑥ and look at Hatfield as a money-grubbing, hateful scoundrel."

"I hope you have learned something today. As the great lawyer O. J. Simpson once said, 'Winning is everything.'"

("**Moot Court**" By Art Buchwald)

Ⅳ. EXERCISES

Ⅳ. 练习

1. Answer the following questions.

(1) Describe the characteristics of the criminal law.

(2) What are the elements of a crime?

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① form:格式合同。

② enter:提交,或 submit。

③ exhibit:向法庭提交的作为证据的文件或物品。A document, record, or other tangible object formally introduced as evidence in court.

④ import:意思,重要性。

⑤ smear:中伤。to stain or attempt to destroy the reputation of.

⑥ amputation:[医]截肢(术)。

(3) What is your understanding of *actus reus*?

(4) Does every crime need *mena rea*?

(5) What is your understanding of strict liability in criminal law?

2. Translate the following terms into English.

(1) 专家证人

(2) 注意义务

(3) 放任行为,轻率行为,鲁莽行为

(4) 不正当性

(5) 非预谋杀人罪

(6) 有罪,有罪性

3. Translate the following terms into Chinese.

(1) capital punishment

(2) corporal punishment

(3) *actus reus*

(4) *mena rea*

(5) beyond a reasonable doubt

(6) strict liability

4. Match the given terms with the proper explanation.

A. duress

B. entrapment

C. double jeopardy

D. selective prosecution

E. speedy trial

F. prosecutorial misconduct

(1) Any unlawful threat or coercion used to induce another to act(or not act) in a manner they otherwise would not(or would).

(2) In criminal law, it is constituted by a law enforcement agent inducing a person to commit an offense that the person would otherwise have been unlikely to commit.

(3) It is a procedural defense that forbids a defendant from being tried again on the same or similar charges following a legitimate acquittal or conviction.

(4) The procedural defense entail an argument that persons of different age, race, religion, or gender, were engaged in the same illegal actions for which the defendant is being tried and were not prosecuted, and that the defendant is only being prosecuted because of a bias.

(5) It refers to one of the rights guaranteed by the United States Constitution to defendants in criminal proceedings, which is intended to ensure that defendants are not subjected to unreasonably lengthy incarceration prior to a fair trial.

(6) It is a procedural defense; via which, a defendant may argue that they should not be held criminally liable for actions which may have broken the law, because the prosecution acted in an "inappropriate" or "unfair" manner.

5. Choose the suitable word(s) from the box and fill in the blanks.

involuntary	*mens rea*	justification	threatened	motive	culpability	sentence

A defendant who raises a defense of duress has actually done everything to constitute the *actus reus* of the crime and has the __(1)__ because he or she intended to do it in order to avoid some __(2)__ or actual harm. Thus, some degree of __(3)__ already attaches to the defendant for what was done. In criminal law, the defendant's __(4)__ for breaking the law is usually irrelevant although, if the reason for acting was a form of __(5)__, this may reduce the __(6)__. The basis of the defense is that the duress actually overwhelmed the defendant's will and would also have overwhelmed the will of a person of ordinary courage, thus rendering the entire behavior __(7)__.

6. Translate the following sentences into Chinese.

(1) The procedure for how charges are filed varies from jurisdiction to jurisdiction. Some jurisdictions give the police greater discretion in charging defendants with specific crimes, while others place more power with the prosecutor's office.

(2) A defense consists of evidence and arguments offered by a defendant and his or her attorneys to show why that person should not be held liable for a criminal charge.

(3) Under the law, defense of third persons always requires that the defender be free from fault and that he or she act to aid an innocent person who is in the

process of being victimized.

(4) Crimes are prosecuted by public attorneys representing the community at large, and not by privately retained counsel.

(5) Telling a lie may be a character flaw, but the criminal law punishes only the most harmful lies, e. g. , material misstatements made under oath in judicial proceedings(perjury).

(6) Procedural defenses make the claim that defendants were in some manner discriminated against in the justice process or that some important aspect of official procedure was not properly followed and that, as a result, they should be released from any criminal liability.

(7) In modern penal codes, the line distinguishing felonies from misdemeanors is drawn differently than it was in the past. Generally speaking, an offense punishable by death or imprisonment in a state prison is a felony.

(8) The list of felonies was short: murder, manslaughter, arson, mayhem, rape, robbery, larceny, burglary, prison escape, and(perhaps) sodomy. All other criminal offenses were misdemeanors.

Lesson 6 Defendants' Rights in the Criminal Justice System

第六课 被告人的主要权利

Ⅰ. Text & Its Translation

There are two fundamental aspects of the U. S. criminal justice system①—the presumption that the defendant is innocent and the burden on the prosecution② to prove guilt beyond a reasonable doubt. Furthermore, criminal defendants have other rights too.

1. The Defendant's Right to Remain Silent

The Fifth Amendment to the U. S. Constitution provides that a defendant cannot be compelled in any criminal case to be a witness against himself. In short, the defendant has the right to "sit mute". The prosecutor cannot call the defendant as a witness, nor can a judge or defense attorney force the defendant to testify

Ⅰ. 课文及译文

美国刑事司法制度有两项基本内容:一是推定被告人无罪;二是检方负证明责任,证明被告人有罪须达到排除合理怀疑的标准。此外,刑事被告人还拥有其他权利。

1. 被告人有保持沉默的权利

美国《宪法》第五条修正案规定,被告人在任何刑事案件中都不能被迫做不利于自己的证人(自证其罪)。简单的说,也就是被告人有权保持沉默。如果被告人选择了保持沉默,检察官不能要求其作为证人,法官和辩护律师也不能强迫被告人提供证词。与此不同的

① criminal justice system:刑事司法制度。该词也有"刑事司法系统"的意思,可称为 law-enforcement system。是对参与处理对被告人的刑事指控问题的各种机构的总称,通常它包括三个组成部分:①执法部门(law enforcement),包括警察(police)、行政司法官(sheriffs)、执行官(marshals);②司法程序(judicial process),包括法官(judges)、检察官或自诉人(prosecutors)、辩护律师(defense lawyers);③矫正程序(corrections),包括狱政官(prison officials)、缓刑官员(probation officers)、假释官员(parole officers)。

② prosecution:控诉方,检察机关。The prosecution is the legal party responsible for presenting the case in a criminal trial against an individual accused of breaking the law.

if the defendant chooses to remain silent. By contrast, a defendant may be called as a witness in a civil case.

是,在民事案件中被告可以被传唤为证人。

A defendant in a criminal trial may choose whether or not to give evidence in the proceedings. Further, there is no general duty to assist the police with their inquiries. Although certain financial investigatory bodies have the power to require a person to answer questions and impose a penalty if a person refuses, if a person gives evidence in such proceedings, the prosecution cannot adduce such evidence in a criminal trial.

在刑事审判中,被告人可自主决定是否在庭审中提供证据。就是在警察的调查中,他们也没有义务协助。尽管特定的金融调查机构有权要求人们回答问题,并可以对拒绝回答问题的人员施以处罚,但是,对于从这种程序中获得的证据,检方是不能在刑事审判中使用的。

The Supreme Court ruled that the government cannot punish a criminal defendant for exercising his right to silence, by allowing the prosecutor to ask the jury to draw an inference of guilt from the defendant's refusal to testify in his own defense.① The Court overturned as unconstitutional under the federal constitution a provision of the California state constitution that explicitly granted such power to prosecutors.

最高法院曾裁定,如果刑事被告人行使沉默权,检察机关不得允许检察官令陪审团根据被告人拒绝为自己辩护的行为来作出被告人有罪的推论,不可以此来惩罚被告人。最高法院曾依联邦宪法认定加利福尼亚州宪法有关明确授予检察官此种权力的条款违宪,并最终推翻了该条款。

2. The Defendant's Right to Confront② Witness

2. 被告人有对质证人的权利

The "confrontation clause"③ of the Sixth

《美国宪法》第六条修正案中的"对

① *Griffin v. California* 380 U. S. 609(1965).

② confront:使对质;使对证。confrontation:对质;对证。A fundamental right of a defendant in a criminal action to come face to face with an adverse witness in the court's presence so the defendant has a fair chance to object to the testimony of the witness and the opportunity to cross-examine the witness. 在刑事诉讼中,指被告人有权与对方证人对质。《美国宪法》第六条修正案规定的这一被告人权利使被告人能面对证人,能对其证词提出反对意见,或使证人能辨别被告人。对质权的实质不在于使被告人能见到证人,而是保障被告人具有质询对方证人的宪法权利。

③ confrontation clause:对质条款。指美国宪法第六条修正案,该条保障刑事被告人有权直接与控方证人对质,并向该证人进行交叉询问(cross-examination)。"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

Amendment gives defendants the right to "be confronted by the witnesses against" them. Implicit in this right is the right to cross-examine witnesses—that is, the right to require the witnesses to come to court, "look the defendant in the eye", and subject themselves to questioning by the defense. The Sixth Amendment prevents secret trials, and except for limited exceptions, forbids prosecutors from proving a defendant's guilt with written statements from absent witnesses.

质条款"赋予了被告人与对自己不利的证人对质的权利。这一权利中暗含有交叉询问证人的权利，即被告人有权要求证人出庭，并使证人"看着被告人的眼睛"接受辩护律师的询问。第六条修正案可防止秘密审判的发生；它还可防止检察官在证人不出庭的情况下，仅凭他们的书面陈述即证明被告人有罪，少数特殊情况除外。

Like most of the protections given criminal defendants in the Constitution, the right of confronting witness has its origins in English common law. Until the sixteenth century, the right of confronting witness was nearly absent from the Anglo-American legal tradition. Then, with the introduction of the right to trial by an impartial jury and the firm establishment of the presumption of innocence, the right of confrontation came to be seen as an integral part of the proper defense rights of the accused.

同美国《宪法》为被告人提供的其他大多数保障性权利一样，对质证人的权利起源于英格兰普通法。直到16世纪，对质证人的权利仍然没有出现在盎格鲁-美利坚的法律传统中。之后，伴随着由公正陪审团进行审判的权利的引入，以及无罪推定原则的牢固确立，对质证人的权利也被视为被告人的合理抗辩权不可分割的一部分。

Through cross-examination, defendants are allowed to test the reliability and credibility of witnesses. However, the right of cross-examination also has limits. For example, defendants may be denied the right to ask questions that are irrelevant, collateral, confusing, repetitive, or prejudicial.

通过交叉询问，被告人可检验证人的可靠性和可信性。然而，交叉询问的权利也有限制。例如，对于不相关的、间接的、迷惑性的、重复的，或者有偏见的问题，被告人的这一权利则可被拒绝。

3. The Defendant's Right to a Public Trial①

The Sixth Amendment guarantees public trials in criminal cases. This is an important right, because the presence in courtrooms of a defendant's family and friends, ordinary citizens and the press can help ensure that the government observes other important rights associated with trials.

In a few situations, normally involving children, the court will close the court to the public. For example, judges can bar the public from attending cases when defendants are charged with sexual assaults② against children. In recent years, legislators have been concerned about defendants who escape punishment for sexually molesting③ young children because the children are afraid to testify in the defendant's presence. To address this problem, many states have enacted special rules that authorize judges—in certain situations—to allow children to testify via closed circuit television. The defendant can see the child on a television monitor, but the child cannot see the defendant. The defense attorney can be personally present where the child is testifying and can cross-examine the child.

3. 被告人有获得公开审判的权利

宪法第六条修正案保证了被告人在刑事案件中有获得公开审判的权利。该权利十分重要，因为被告人的家人、朋友及普通民众和新闻界的出席对于确保检察机关遵守与审判相关的其他重要权利有很大的作用。

在一些情况(通常是涉及儿童的案件)下，法庭不会向公众开放。例如，当被告人被指控对儿童进行性侵犯时，法官可以禁止公众旁听案件的审判。近年来，立法者注意到，由于儿童在被告人面前害怕提供证词，不少被告人因此逃脱了猥亵儿童罪的惩罚。为了解决这个问题，许多州颁布了特别规则：在特定情况下，这些规则授权法官允许儿童通过闭路电视向法院提供证词。被告人可以通过电视屏幕看到儿童，而儿童看不到被告人。被告人的律师在儿童提供证词时可以在场，并可以对儿童进行交叉询问。

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① public trial：公开审判。Public trial or open trial is a trial open to public, as opposed to the secret trial.

② sexual assault：性侵犯，指性交以外的各种非法性行为。例如，以身体伤害相威胁，或以造成恐惧、羞辱或精神痛苦相胁迫，而猥亵妇女、儿童或其他男子的行为。

③ molest：骚扰，猥亵。To subject to unwanted or improper sexual activity.

4. The Defendant's Right to be Represented by an Attorney

The Sixth Amendment to the U. S. Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." A judge must appoint an attorney for indigent defendants (defendants who cannot afford to hire attorneys) at government expense only if the defendants might be actually imprisoned for a period of more than six months for the crime. As a practical matter, judges routinely appoint attorneys for indigents in nearly all cases in which a jail sentence is a possibility.

In a series of cases, the U. S. Supreme Court ruled that American indigents do have a right to counsel, but only in criminal cases. The federal government and some states have offices of public defenders which assist indigent defendants, while other states have systems for outsourcing the work to private lawyers. A judge normally appoints the attorney for an indigent defendant at the defendant's first court appearance. For most defendants, the first court appearance is either an arraignment① or a bail② hearing.

4. 被告人有获得律师代理的权利

《宪法》第六条修正案规定,"在一切刑事诉讼中,被告人享有从律师处获得帮助为自己辩护的权利"。如赤贫被告人(无钱聘请律师的被告人)的罪行可能被实际判处6个月以上的监禁刑,法官必须为其指派一名律师,费用由政府负担。在实践中,只要赤贫被告人有可能被判处监禁刑的,法官几乎都会例行地为其指派一名律师。

美国联邦最高法院在一系列案件中裁定,赤贫者有权获得律师的辩护——但仅限于刑事案件。联邦政府和一些州设立了"公众辩护人"办公室,向赤贫被告人提供帮助。而其他的一些州则将此项工作"外包"给私人律师。法官通常会在赤贫被告人首次出庭时为其指派律师。对大部分被告人而言,首次出庭或者是指传讯或者是指保释听证。

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① arraignment:传讯。Arraignment is a formal reading of a criminal complaint in the presence of the defendant to inform the defendant of the charges against him or her.

② bail:保释。Bail is some form of property deposited or pledged to a court to persuade it to release a suspect from jail, on the understanding that the suspect will return for trial or forfeit the bail(and possibly be brought up on charges of the crime of failure to appear).

The job of defense counsel at trial is to prepare and offer a vigorous defense on behalf of the accused. A proper defense often involves the presentation of evidence and the examination of witness, all of which requires careful thought and planning. Good attorneys, like quality craftspeople everywhere, may find themselves emotionally committed to the outcome of trials in which they are involved.

庭审辩护律师的职责是代表被告人准备并提供强有力的辩护。辩护通常包括证据的出示和对证人的询问，所有这些都要求细心的考虑和计划。好的律师，就像技术精湛的工匠一样，会对其代理案件的审判结果倾注极大的感情。

Ⅱ. GLOSSARY

Ⅱ. 词汇表

civil case 民事案件
criminal trial 刑事审判
confrontation clause 对质条款
secret trial 秘密审判
written statements 书面陈述
public trial 公开审判
sexual assaults 性侵犯
cross-examine 交叉询问
indigent defendant 赤贫被告人
arraignment 传讯
bail 保释

Ⅲ. SUPPLEMENTARY TEXT

Ⅲ. 补充资料

The personification of justice balancing the scales of truth and fairness dates back to the Goddess Maat①, and later Isis②, of ancient Egypt. The Hellenic③ deities Themis④ and Dike were later goddesses of justice. Themis was the embodiment of divine order, law, and custom, in her aspect as the personification of the divine rightness of law.

However, a more direct connection is to Themis' daughter Dike, who was portrayed carrying scales: "If some god had been holding level the balance of Dike" is an image in a surviving fragment of the poetry.

Dike is described as almost indistinguishable from Astraea(Astraia) who is depicted with a torch, wings, and Zeus' thunderbolts.

Ancient Rome adopted the image of a female goddess of justice, which it called Justitia. Since Roman times, Justitia has frequently been depicted carrying scales and a sword, and wearing a blindfold. Her modern iconography frequently adorns courthouses and courtrooms, and conflates the attributes of several goddesses who embodied Right Rule for Greeks and Romans, blending Roman blindfolded Fortuna⑤(fate) with Hellenistic Greek Tyche⑥(luck), and sword-carrying Nemesis⑦(vengeance).

Justitia is most often depicted with a set of scales typically suspended from her left hand, upon which she measures the strengths of a case's support and opposition. She is also often seen carrying a double-edged sword in her right hand, symbolizing the power of Reason and Justice, which may be wielded either for or against any party.

Since the 15th century, Lady Justice has often been depicted wearing a blindfold. The blindfold represents objectivity, in that justice is or should be meted out objectively, with-

① Maat:古埃及宗教中的真理正义之神。
② Isis:古埃及宗教中司生育与繁殖的女神。
③ Hellenic:希腊的,希腊人的,希腊语的。
④ Themis:希腊神话中司法律与正义的女神。
⑤ Fortuna:古罗马神话中的命运女神。
⑥ Tyche:古希腊神话中的命运女神。
⑦ Nemesis:古希腊神话中的复仇女神。

out fear or favor, regardless of identity, money, power, or weakness; blind justice and impartiality. The earliest Roman coins depicted Justitia with the sword in one hand and the scale in the other, but with her eyes uncovered. Justitia was only commonly represented as "blind" since about the end of the 15th century.

Instead of using the Janus approach, many sculptures simply leave out the blindfold altogether. For example, atop the Old Bailey courthouse in London, a statue of Lady Justice stands without a blindfold; the courthouse brochures explain that this is because Lady Justice was originally not blindfolded, and because her "maidenly form" is supposed to guarantee her impartiality which renders the blindfold redundant. Another variation is to depict a blindfolded Lady Justice as a human scale, weighing competing claims in each hand.

Ⅳ. EXERCISES

Ⅳ. 练习

1. Answer the following questions.

(1) What are the typical defendant's rights in modern criminal procedure?

(2) How do you understand "the defendant's right to remain silent"?

(3) According to the text, what are the two fundamental aspects of U. S. Criminal Justice System?

(4) In which amendments does *Bill of Rights* provide the procedural rights of defendants?

2. Translate the following terms into English.

(1) 合理怀疑

(2) 双重追诉

(3) 快速审判

(4) 公诉方

(5) 金融调查机构

3. Translate the following terms into Chinese.

(1) criminal procedure

(2) criminal justice system

(3) confrontation clause

(4) sexual assault

(5) cross-examination

(6) public trial

(7) indigent defendants

4. Match the given terms with the proper explanation.

A. bail

B. confrontation clause

C. criminal justice system

D. double jeopardy

E. jury trial

(1) The collective institutions through which an accused offender passes until the accusations have been disposed of or the assessed punishment concluded.

(2) The Sixth Amendment provision guaranteeing a criminal defendant's right to directly confront an accusing witness and to cross-examine that witness.

(3) A trial in which the factual issues are determined by a jury, not by the judge.

(4) The fact of being prosecuted twice for substantially the same offense. Double Jeopardy is prohibited by the Fifth Amendment.

(5) Traditionally, it is some form of property deposited or pledged to a court to persuade it to release a suspect from jail, on the understanding that the suspect will return for trial or forfeit the bail(and possibly be brought up on charges of the crime of failure to appear).

5. Choose the suitable words from the box and fill in the blanks.

interrogations	guilty	refuse	self-incrimination	self-incriminating	torture

The Fifth Amendment protects witnesses from being forced to incriminate themselves. To "plead the Fifth" is to __(1)__ to answer a question because the response could provide __(2)__ evidence of an illegal conduct punished by fines, penalties or forfeiture. Historically, the legal protection against __(3)__ was directly related to the question of torture for extracting information and confessions. In the late 16th and early 17th century in England, anyone refusing to take the

oath *ex officio mero* (confessions or swearing of innocence, usually before hearing any charges) was considered __(4)__. Coercion and __(5)__ were commonly used to compel "cooperation". Puritans, who were at the time fleeing to the New World, began a practice of refusing to cooperate with __(6)__. These protections were brought to America by Puritans, and were later incorporated into the United States Constitution through the Bill of Rights.

6. True or False. Please mark T for true sentences or F for false sentences.

(1) _____ The Sixth Amendment to the U. S. Constitution provides that a defendant cannot be compelled in any criminal case to be a witness against himself.

(2) _____ The prosecutor can call the defendant as a witness, and a judge or defense attorney can force the defendant to testify if the defendant chooses to remain silent.

(3) _____ The "confrontation clause" of the Seventh Amendment of United States Constitution gives defendants the right to "be confronted by the witnesses against" them.

(4) _____ As a practical matter, judges routinely appoint attorneys for indigents in nearly all cases in which a jail sentence is a possibility.

7. Translate the following sentences into Chinese.

(1) The procedure for how charges are filed varies from jurisdiction to jurisdiction. Some jurisdictions give the police greater discretion in charging defendants with specific crimes, while others place more power with the prosecutor's office.

(2) A defense consists of evidence and arguments offered by a defendant and his or her attorneys to show why that person should not be held liable for a criminal charge.

(3) Under the law, defense of third persons always requires that the defender be free from fault and that he or she act to aid an innocent person who is in the process of being victimized.

(4) Procedural defenses make the claim that defendants were in some manner discriminated against in the justice process or that some important aspect of official procedure was not properly followed and that, as a result, they should be released from any criminal liability.

Lesson 7 Contract Law

第七课 合 同 法

Ⅰ. Text & Its Translation

A contract is a legally enforceable agreement between two or more parties with mutual obligations. Contracts can be in writing, orally or verbally agreed upon (parol contracts) or created through the actings of the parties. The remedy at law① for breach of contract is usually "damages" or monetary compensation. In equity②, the remedy can be specific performance③ of the contract or an injunction④. The importance of contract stability is emphasized by Article Ⅰ, § 10 of the *U. S. Constitution*, which

Ⅰ. 课文及译文

合同是相互负有义务的双方或多方当事人达成的、具有法律强制执行力的协议。合同可以以书面形式签订，也可以以口头形式达成(口头合同)或者依双方从事的行为而确立。普通法上违反合同的救济通常是"损害赔偿金"或金钱补偿。在衡平法中，救济可以是合同的实际履行或者禁令。《美国宪法》第 1 条第 10 款强调了合同稳定性

① 此处的 law 是指"普通法"，与"衡平法"(equity)相对。

② 此处的 equity 是指"衡平法"，与"普通法"(common law)相对。在英文法律材料的翻译中，尤其涉及英国的材料中，对于 law 和 equity 的翻译要尤其注意。不能简单地将"law"翻译为"法律"，将"equity"翻译为"公平"，需要根据上下文进行判断。

③ specific performance：实际履行。亦作"specific relief"。The rendering, as nearly as practicable, of a promised performance through a judgment or decree; a court-ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate, as when the sale of real estate or a rare article is involved. Specific performance is an equitable remedy that lies within the court's discretion to award whenever the common-law remedy is insufficient, either because damages would be inadequate or because the damages could not possibly be established.

④ injunction：禁令、禁制令。亦作"writ of injunction"。法院签发的要求当事人做某事或某行为或者禁止其做某事或某行为的命令。A court orders commanding or preventing an action. To get an injunction, the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted.

provides that "No State shall ... pass any ... Law impairing the Obligation of Contracts."

At common law, the elements of a contract are mutual assent and consideration①.

1. Mutual Assent: Offer and Acceptance

At common law, mutual assent is typically reached through offer and acceptance. that is, when an offer is met with an acceptance that does not vary the offer's terms. The requirement is known as the "mirror image" rule. If a purported acceptance does vary the terms of an offer, it is not an acceptance but a counteroffer and, therefore, simultaneously a rejection of the original offer.

Offer and acceptance does not always need to be expressed orally or in writing. An implied contract is one in which some of the terms are not expressed in words. The implied contract is in two kinds of forms.

(1) Contract Implied in Fact. A contract which is implied in fact is one in which the circumstances imply that parties have reached an agreement even though they have not done so expressly. For example, by going to a doctor for a checkup, a patient agrees that he will pay a fair price for the service. If one refuses to pay after being examined, the patient has breached a contract implied in fact.

的重要性,它规定:"任何州不得通过任何损害合同义务的法律"。

在普通法中,合同的构成要件包括合意和对价。

1. 合意:要约与承诺

在普通法中,合意的达成主要通过要约和承诺来实现。换言之,当承诺的内容与要约的条款保持一致时,合同双方即达成合意。这一要件即是所谓的"镜像"规则。(受要约人)作出的承诺如与要约的条款不一致的,是反要约而非承诺,因而同时构成对原要约的拒绝。

要约与承诺并不需要一定通过口头或书面形式来表示。默示合同中的某些条款并不需要通过文字表示。默示合同有两种形式。

(1) 事实默示合同。事实默示合同是指从实际情况推定出来,当事人之间虽未明确表示但却应该已经达成的协议。例如,病人到医生处进行身体检查的行为表明病人同意为此医疗服务支付公平的价款。病人在接受检查后拒绝付款的,即构成对事实默示合同的违反。

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① consideration:对价。Something(such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something,

(2) Contract Implied in Law. A contract which is implied in law is also called a quasi-contract, because it is not in fact a contract; rather, the obligation is created by law in absence of agreement between the parties for reasons of justice and fairness. It is a means for the courts to remedy situations in which one party would be unjustly enriched were he or she not required to compensate the other. ①

For example, a plumber accidentally installs a sprinkler system in the lawn of the wrong house. The owner of the house had learned the previous day that his neighbor was getting new sprinklers. That morning, he sees the plumber installing them in his lawn. Pleased at the mistake, he says nothing, and then refuses to pay when the plumber delivers the bill.

Will the man be held liable for payment? Yes, if it could be proven that the man knew that the sprinklers were being installed mistakenly, the court would make him pay because of a quasi-contract. If that knowledge could not be proven, he would not be liable. Such a claim is also referred to as "*quantum meruit*"②.

(2) 法律默示合同。法律默示合同也被称为准合同，因为它在事实上不是一个合同；义务是出于公平和正义，在没有当事人的契约下由法律创设的。在一方当事人如不向另一方负补偿之义务便构成不当得利的情形下，法院利用这种形式的合同对此等情况提供救济。

举例说明，一位水管工误在他人房屋的草坪上安装了一个自动洒水装置。该房屋所有人在此之前已知其邻居就要安装新的自动洒水装置，且在安装日早晨看到水管工在他家草坪上安装该洒水装置。他对水管工的错误感到高兴因而只字未提，当水管工后来寄到账单的时候，他拒绝付款。

他是否应该付款？答案是肯定的。如果(原告)可以证明该男子已经知道水管工误装洒水装置，法院即可依准合同要求他付款。但如果不能证明该男子事先知情，他将不承担责任。这种主张也被称为"合理服务费请求权"。

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① 法国民法典规定：因误解或故意受领不当受领之物的人，对给付人负有返还其受领之物的义务。不当得利是准合同的一种。

② *quantum meruit*：(1)合理服务费请求权。A claim or right of action for the reasonable value of services rendered. 合理金额，应得额。(2)服务的合理价格，以及在准合同(如不当得利)中计算赔偿额的合理价格。The reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship. (3)在普通法上，计算违约赔偿数额的一个标准。At common law, a count in an assumpsit action to recover payment for services rendered to another person. 该术语作为衡平救济的一种方式，现仍用于返还不当得利之诉中。Quantum meruit is still used today as an equitable remedy to provide restitution for unjust enrichment. It is often pleaded as an alternative claim in a breach-of-contract case so that the plaintiff can recover even if the contract is unenforceable.

2. Consideration: Sufficient and Insufficient

Consideration is something of value given by a promissor to a promisee in exchange for something of value given by a promisee to a promissor. Typically, the thing of value is an act, such as making a payment, or a forbearance to act when one is privileged to do so, such as an adult refraining from smoking.

Consideration must be sufficient, but courts will not weight the adequacy of consideration. For instance, agreeing to sell a car for a penny may constitute a binding contract. All that must be shown is that the seller actually wanted the penny. This is known as the peppercorn rule①. Otherwise, the penny would constitute nominal consideration, which is insufficient. Parties may do this for tax purposes, attempting to disguise gift transactions as contracts.

Past consideration② is not sufficient. Indeed, it is an oxymoron. For instance, the guardian③ of a young girl obtained a loan to educate the girl and to improve her marriage prospects. After her marriage, her husband promised to pay off the loan. It was held that

2. 充分的对价与不充分的对价

对价是允诺人给予受诺人的某种有价值的东西，以交换受诺人给予允诺人某种的有价值的东西。“有价值的东西”通常是一种行为，如付款行为，或某人克制自己去做其原本有权去做的事，比如成年人控制自己不去抽烟的行为。

对价必须是充分的，但是法院并不刻意关心（过问）对价的适当性。例如，以一便士的价格出售轿车可以构成一个有约束力的合同。（买方/原告）只需要表明卖方事实上想要这一便士即可。这就是所谓的“胡椒子规则”。否则，这枚便士仅构成名义上的对价，即不充分的对价。当事人可能出于避税的目的而将赠与交易伪装成合同交易。

过去的对价是不充分的对价。事实上，这是一种矛盾修辞法。例如，一个年轻女孩的监护人向银行贷了一笔贷款，目的是使女孩受到良好教育并能使她将来能够嫁得更好。女孩结婚后，丈夫允诺偿还这笔贷款。一般认为，该

① peppercorn rule：胡椒子规则。一分钱或一粒胡椒子亦可构成一个有价值的对价。

② 过去的对价：以往的对价。合同订立前已完成的行为一般不能作为允诺的对价，因为这不是对新允诺的交换，过去的对价对要约人无益，对受约人也无损，但也有例外，如对已逾时效的旧债已经破产程序解除的债务作出同意还债的新允诺。

③ guardian：监护人。亦作“custodian”。One who has the legal authority and duty to care for another's person or property, especially because of the other's infancy, incapacity, or disability. A guardian may be appointed either for all purposes or for a specific purpose.

the guardian could not enforce the promise because taking out the loan to raise and educate the girl was past consideration—it was completed before the husband promised to repay it.

The insufficiency of past consideration is related to the preexisting duty rule①. For instance, a captain's promise to divide the wages of two deserters among the remaining crew if they would sail home from the Baltic shorthanded, was found unenforceable on the grounds that the crew were already contracted to sail the ship through all perils of the sea.

监护人不能强制执行该允诺，因为用贷款去抚养和教育女孩属于"过去的对价"——该对价在女孩的丈夫允诺对其偿还之前已经完成。

过去对价的不充分性还与既存义务规则相关。例如，船长向船员们允诺，如船员愿意在人手不足的条件下将船从波罗的海驶回本国，愿将两个逃跑船员的工资分给剩下的船员。这个允诺是不可强制执行的，因为船员早已签订合同，允诺将船安全驶回。

3. Classification of Contract

(1) Express contract and implied contract. An express contract is one in which the terms are stated by the parties; it may be either an oral or written contract. An implied contract is one that is inferred from the conduct of the parties.

(2) Bilateral contract and unilateral contract. A bilateral contract is one in which the parties exchange promises to do some future act. For example, you agree with the car dealer that you will pay for your car when you take

3. 合同的分类

(1) 明示合同与默示合同。明示合同是指具体条款由当事人明确规定的合同。这种合同可以是口头的或者书面的。默示合同是一种可以通过当事人的行为推断出来的合同。

(2) 双务合同与单务合同。双务合同是一种由当事人相互允诺进行某种将来行为的合同。例如，你与汽车经销商达成一致：你将在下周取车的时候付款。你们各自允诺在将来进行某种

① preexisting duty rule：既有义务规则。亦作"preexisting-legal-duty rule"。合同法上的一项规则，指如果一方当事人履行或允诺履行其本应履行的义务，该当事人并未因此而遭受损害。其中本应履行的义务，既可以是作为的义务，也可以是不作为的义务。The rule that if a party does or promises to do what the party is already legally obligated to do—or refrains or promises to refrain from doing what the party is already legally obligated to refrain from doing—the party has not incurred detriment. This rule's result is that the promise does not constitute adequate consideration for contractual purposes. For example, if a builder agrees to construct a building for a specified price but later threatens to walk off the job unless the owner promises to pay an additional sum, the owner's new promise is not enforceable because, under the preexisting-duty rule, there is no consideration for that promise.

delivery next week. Each of you has promised to do something in the future: the dealer to deliver the car and you to pay for it. In contrast, a unilateral contract is one in which one party acts immediately in response to the offer.

行为：交易商交付汽车，而你将支付价款。与之相反，单务合同是一种一方立即按照要约作出行为的合同。

(3) Executory contract and executed contract. An executory contract is one in which some or all of the terms are uncompleted—the car deal in above paragraph, for example. An executed contract, then, is one which all terms have been completed. For instance, you have eaten your meal and paid your bill at the restaurant.

(3) 待履行的合同与已履行的合同。待履行合同是一种某些或者全部合同条款没有履行完毕的合同——上文中的汽车交易就是一个例子。而已履行合同是指所有合同条款都已经履行完毕的合同。例如，在餐厅里，你已经吃完了饭，并付了款。

(4) Void, voidable and unenforceable contract. The terms "void, voidable and unenforceable" are relevant in situations where there is a breach of contract or when one party fails to comply with the terms of the agreement.

(4) 无效合同，可撤销合同与不可强制执行的合同。"无效、可撤销和不可强制执行的"这几个术语都与下述情形相关：存在违反合同的情形，或者一方当事人没有遵守协议的条款。

A void contract is a nullity from its beginning, and damages do not result. A voidable contract is one that is binding until it is disaffirmed or canceled by the party with the authority to do so. In many ways, marriage is a contract that either party may rescind by obtaining a divorce. Unenforceable contracts are those that meet the basic common law elements for contracts but lack some other additional legal requirements such as being signed in front of a notary public①.

无效的合同自始无效，也不会产生损害赔偿金问题。可撤销的合同在有权撤销或否认合同的一方撤销或取消之前一直具有约束力。在很多方面，婚姻就是一种任何一方都可以通过离婚来撤销的合同。不可强制执行的合同是指满足了合同的基本的普通法要件，但又缺少一些其他的法定要求(如须在公证人面前签署)的合同。

① notary public：公证人。可以简称为"notary"。A person authorized by a state to administer oaths, certify documents, attest to the authenticity of signatures, and perform official acts in commercial matters, such as protesting negotiable instruments.

Ⅱ. GLOSSARY

Ⅱ. 词汇表

specific performance 实际履行

injunction 禁令，禁制令

consensus ad idem [拉丁文]合意

quantum meruit [拉丁文]合理服务费请求权，服务的合理价格

detriment 损失，损害，不利益

bargain 交易条件；协议，协定

peppercorn rule 胡椒子规则

consideration 对价

guardian 监护人

preexisting duty rule 既有义务规则

mutual assent 合意

offer 要约

acceptance 承诺

contract implied in fact 事实默示合同

contract implied in law 法律默示合同

promissor 允诺人

promisee 受诺人

past consideration 过去的对价

express contract 明示合同

implied contract 默示合同

bilateral contract 双务合同

unilateral contract 单务合同

executory contract 待履行的合同

executed contract 已履行的合同

void contract 无效合同

voidable contract 可撤销合同

unenforceable contract 不可强制执行的合同

Ⅲ. SUPPLEMENTARY TEXT

Ⅲ. 补充资料

There are two common theories that attempt to explain consideration. The first is the "benefit-detriment theory"①, in which a contract must be either to the benefit of the promisor or to the detriment of the promisee to constitute consideration(though detriment to the promisee is the essential and invariable test of the existence of a consideration rather than it can be constituted by benefit to the promisor). The second is the "bargain theory"②, in which the parties subjectively view the contract to be the product of an exchange or bargain. The bargain theory has largely replaced the benefit-detriment theory in modern contract theory, but judges often cite both and unknowingly confuse the two models in their decisions. These theories usually overlap; in standard contracts, such as a contract to buy a car, there will be both an objective benefit and detriment(the buyer experiences a benefit by acquiring the car; the seller experienced a detriment by losing a car) and the subjective experience of entering into a bargain. However, there are certain contracts which satisfy one but not the other. For instance, a deal in which the promisee feels subjectively relieved, but has not actually gained any legal rights, might satisfy the bargain theory but not the benefit-detriment theory. Alternatively, a deal in which an actor takes detrimental③ actions possibly in reaction to an offer, without having viewed the deal as a bargain, would not be viewed as a contract under the law.

The main purpose of the shift from benefit-detriment to bargain theory is to avoid inquiries into whether consideration is adequate. For example, if a person promised you their car for $1.00 because they needed to get rid of it, then the $1.00 might seem adequate. However, if it were your birthday and your friend wrote down "I give you my car in consideration of one dollar," this same consideration would not seem adequate. Thus whether

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① benefit-detriment theory:利益决定理论。Under the benefit-detriment theory of consideration, consideration was a detriment incurred by the promisee in return for the promisor's promise.

② bargain theory:议价理论。This theory states that a promise or performance that is bargained in exchange for a promise is a consideration for the promise.

③ detrimental:有害的。

$1.00 is consideration does not depend on the benefit received but whether the $1.00 had actually been bargained for.

In some jurisdictions, contracts calling for such nominal or "peppercorn" consideration① will be upheld unless a particular contract is deemed unconscionable. However, in other jurisdictions, the court will reject "consideration" that had not been truly bargained for. Occasionally the courts in these jurisdictions may refer to "adequate" or "valuable" consideration, but in reality the court is not examining the adequacy of consideration, but whether it had been bargained for. The traditional notion that courts would not look into the adequacy of consideration, an ancient notion in the English common law, does not square with the benefit-detriment theory(in which courts are implicitly analyzing if the parties are receiving a sufficient benefit) but does square with the bargain theory(in which only the subjective intentions of the parties are considered).

There are three main purposes cited for the consideration requirement. The first is the cautionary requirement: parties are more likely to look before they leap when making a bargain than when making an off-the-cuff② promise of a gift. The second is the evidentiary requirement: parties are more likely to commemorate, or at least remember, a promise made due to a bargaining process. The third is the channeling requirement: parties are more likely to coherently stipulate their specific desires when they are forced to bargain for them. Each of these rationales③ ensures that contracts are made by serious parties and are not made in error.

Ⅳ. EXERCISES

Ⅳ. 练习

1. Answer the following questions.

(1) What are the key elements to form a contract?

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① nominal or "peppercorn" consideration:名义对价,或者"胡椒子"对价。A peppercorn in legal parlance is a metaphor for a very small payment, a nominal consideration, used to satisfy the requirements for the creation of a legal consideration.

② off-the-cuff:即兴地,临时地。

③ rationale:原理。the fundamental reason or reasons serving to account for something.

(2) Please list the terms of various kinds of contracts.

(3) What are the conditions for the acceptance?

(4) Please list the types of implied contract.

(5) What is your understanding of consideration?

2. Translate the following terms into English.

(1) 双务合同

(2) 单务合同

(3) 待履行的合同

(4) 已履行的合同

(5) 无效合同

(6) 可撤销合同

(7) 不可强制执行的合同

3. Translate the following terms into Chinese.

(1) specific performance

(2) *consensus ad idem*

(3) *quantum meruit*

(4) preexisting duty rule

(5) peppercorn rule

(6) contract implied in fact

(7) contract implied in law

4. Match the given terms with the proper explanation.

A. specific performance

B. fraud

C. voidable contract

D. contract

E. consideration

(1) It is defined as an intentional misrepresentation of a material fact made for the purpose of inducing another person to rely upon that fact to do something that would not otherwise have been done.

(2) It is a legally enforceable agreement between two or more parties with mutual obligations.

(3) It is something of value given by a promissor to a promisee in exchange for something of value given by a promisee to a promissor.

(4) It is one of contracts in which one of the parties has a right to elect to avoid or disaffirm his or her obligation, e. g. , a contract entered into by a minor.

(5) It is an order of a court which requires a party to perform a specific act, usually what is stated in a contract.

5. Choose the suitable words from the box and fill in the blanks.

trustee	disaffirm	bargaining	refrain	stronger	fiduciary

Duress and undue influence comprise a category of acts that allows one party to a contract to __(1)__ the contract. Duress is any action that causes individuals to do something that they would not otherwise have done or to __(2)__ from doing something that they would otherwise do. Undue influence is taking advantage of a difference in the __(3)__ capacity of parties that results from a special position that is occupied by one of the parties. Undue influence exists where there is a special obligation on the part of the __(4)__ party to protect the interests of the weaker party. This obligation is referred to under law as a __(5)__ obligation. It exists in relationships such as attorney-client, doctor-patient, executor-beneficiary(under a will), and __(6)__-beneficiary(in a trust arrangement).

6. Translate the following sentences into Chinese.

(1) Damages are computed by taking into consideration what the individual, who is not guilty of the breach, has lost from the other individual's actions, including wages, and such.

(2) A contract entered into between two individuals specifying that a third individual is to receive certain rights is called a third party beneficiary contract.

(3) Despite the presence of an offer and an acceptance, freely given by both parties, and consideration, the law recognizes that contracts are entered into by certain persons shall be voidable by those persons.

(4) A gratuitous promise① is usually not enforceable as a contract. For example, if I promise to give you $500 and you say you will take it, a contract is not

① gratuitous:无偿的,自愿的。*gratuitous*, not involving a return benefit, compensation, or consideration.

formed. A gratuitous promise does not create a meeting of the minds.

(5) A contract that is voidable is one in which one of the parties has a right to elect to avoid or disaffirm his or her obligation, e. g. , a contract entered into by a minor. A void contract is a nullity from its inception.

(6) Breach of contract is a legal cause of action in which a binding agreement or bargained exchange is not honored by one or more of the parties to the contract by non-performance or interference with the other party's performance.

Lesson 8 Tort Law

第八课 侵 权 法

Ⅰ. Text & Its Translation

1. General Introduction

A tort①, in common law jurisdictions, is a wrong② that involves a breach of a civil duty (other than a contractual duty) owed to someone else. It is differentiated from a crime, which involves a breach of a duty owed to society in general. Though many acts are both torts and crimes, prosecutions for crime are mostly the responsibility of the state, private prosecutions being rarely used; whereas any party who has been injured may bring a lawsuit for tort. One who commits a tortious act is called a tortfeasor③.

Ⅰ. 课文及译文

1. 概述

在普通法国家，侵权行为是指违反了对其他人负有的民事义务（非合同义务）的不法行为。侵权行为区别于犯罪行为，后者违反的对象是行为人对整个社会负有的义务。尽管很多行为既可能是侵权行为，也可能是犯罪行为，但对于犯罪行为的起诉通常是国家的责任，由私人起诉的情况很少；然而，任何一个受到伤害的人都可以提起侵权诉讼。实施了侵权行为的人称为侵权行为人（者）。

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① tort：侵权行为。指侵犯法律规定而非合同约定的权利，并导致诉权产生的不法行为或损害行为。该词的复数形式 torts 一般翻译为“侵权法”或者“侵权行为法”。A civil wrong, other than breach of contract, for which a remedy may be obtained, usu. in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another.

② wrong：不法行为。指侵害他人权利，致人损害的行为。它尤其是指侵权行为（tort）。不法行为通常分为两类：一是侵犯个人的不法行为（private wrong），即可以为个人提供救济的不法行为，例如侵权行为、违约行为等；二是公共不法行为（public wrong），即行为人应当对整个社会承担责任的不法行为，例如犯罪、违法行为或其他违反公法规定的行为。Breach of one's legal duty; violation of another's legal right. A wrong may be described, in the largest sense, as anything done or omitted contrary to legal duty, considered in so far as it gives rise to liability.

③ tortfeasor：侵权行为人，侵权行为者。One who commits a tort; a wrongdoer.

A person who suffers a tortious injury is entitled to receive "damages", usually monetary compensation, from the person or people responsible for those injuries. Tort law defines what a legal injury is and, therefore, whether a person may be held liable for an injury he or she has caused. Legal injuries are not limited to physical injuries. They may also include emotional, economic, or reputational injuries as well as violations of privacy, property, or constitutional rights. Tort cases therefore comprise such varied topics as auto accidents, false imprisonment①, defamation②, product liability (for defective consumer products), copyright infringement, and environmental pollution, among many others.

遭受侵权损害的人有权要求造成这些损害的人或人们给付"损害赔偿金",通常是金钱补偿。侵权法的内容包括法定损害的种类及侵权行为人承担侵权责任的情形。法定损害并不仅限于人身损害。法定损害可能也包括感情、经济和声誉损害,以及对隐私权、财产权和宪法权利所造成的侵犯。因此,侵权案件涉及多种不同的主题,比如交通事故、非法监禁、诽谤、产品责任(指对缺陷产品承担的责任)、版权侵害及环境污染等等。

In much of the common law world, the most prominent tort liability is negligence. If the injured party can prove that the person believed to have caused the injury acted negligently, that is, without taking reasonable care③ to avoid injuring others—tort law will allow compensation.

在普通法世界的大部分地区,最为主要的侵权责任就是过失侵权。如果受损害的一方能够证明其认定的引起损害之人实施了过失行为。换言之,未尽到合理注意去义务而对他人造成损害的,侵权法即允许补偿。

Furthermore, tort law also recognizes intentional torts, where a person has intentionally

此外,侵权法的内容也包括故意侵权,行为人故意实施了损害他人行为的

① false imprisonment:非法监禁。A restraint of a person in a bounded area without justification or consent. False imprisonment is a common-law misdemeanor and a tort. It applies to private as well as governmental detention.

② defamation:污蔑;诽谤;中伤;损害他人名誉。Damage the good reputation of someone. (1)The act of harming the reputation of another by making a false statement to a third person. If the alleged defamation involves a matter of public concern, the plaintiff is constitutionally required to prove both the statement's falsity and the defendant's fault. (2)A false written or oral statement that damages another's reputation.

③ reasonable care:合理的注意。In tort law, a duty of care is a legal obligation imposed on an individual requiring that they adhere to a standard of reasonable care while performing any acts that could foreseeably harm others.

acted in a way that harms another, and "strict liability" or quasi-tort, which allows recovery① under certain circumstances without the need to demonstrate negligence. Hence, torts may be divided into Negligence, Intentional Torts, and Quasi-Torts.

即属故意侵权；侵权法的内容还包括"严格责任"或者准侵权行为，它允许受害方在无需证明过失存在的情形下即获得损害赔偿金。因此，侵权行为可分为过失侵权行为、故意侵权行为和准侵权行为等。

2. Negligence

The standard action in tort is negligence. The tort of negligence provides a cause of action② leading to damages, or to relief, in each case designed to protect legal rights, including those of personal safety, property, and, in some cases, intangible economic interests. Negligence actions include claims coming primarily from car accidents and personal injury accidents of many kinds, including clinical negligence, worker's negligence and so forth. Product liability cases, such as those involving warranties③, may or may not be considered negligence actions.

2. 过失侵权行为

侵权诉讼中典型的就是过失侵权行为诉讼。过失侵权诉因的规定主要是用于保护人身安全、财产(正常情形)及无形经济利益(个别情形)等法定权利。过失侵权诉讼案件的诉讼请求多因交通事故及人身伤害事故等提出，人身伤害事故又有多种，包括医疗过失、工人过失等等。产品责任案件(如产品质量担保案件)可能被认为也可能不被认为是过失侵权案件。

(1) "Snail case"

Negligence is a tort which depends on the existence of a breaking of the duty of care owed by one person to another. One well-known

(1) "蜗牛案"

只有某甲对某乙违反了注意义务，过失侵权行为方成立。在"多诺休诉史蒂文森"这则著名的案例中，多诺休夫

① recovery：(通过诉讼判决获得的)赔偿额；赔偿金。An amount awarded in or collected from a judgment or decree.

② cause of action：诉因，诉讼理由。(1)A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person; (2)A legal theory of a lawsuit(a malpractice cause of action).

③ warranty：担保，保证。A warranty is an assurance by one party to the other party that specific facts or conditions are true or will happen; the other party is permitted to rely on that assurance and seek some type of remedy if it is not true or followed.

case is Donoghue v. Stevenson① where Mrs. Donoghue consumed part of a drink containing a decomposed snail while in a public bar in Paisley, Scotland and claimed that it had made her ill. The snail had not been visible, as the bottle of beer in which it was contained was opaque. Neither the friend who bought the bottle for her, nor the shopkeeper who sold it, were aware of the snail's presence. The manufacturer was Mr. Stevenson, whom Mrs. Donoghue sued for damages for negligence. She could not sue Mr. Stevenson for damages for breach of contract because there was no contract between them. Lord MacMillan thought this should be treated as a new product liability

人在一家位于苏格兰佩斯利的公共酒吧喝了半瓶啤酒,后发现酒中有一只腐烂的蜗牛;多诺休夫人主张她因此生病。由于装蜗牛的啤酒瓶是不透明的,因此,看不到里面有蜗牛。不论是给她买酒的朋友,还是出售这瓶酒的店主都没有察觉到蜗牛的存在。多诺休夫人以过失侵权行为为由起诉制造商史蒂文森先生以获得损害赔偿金。她不能以违反合同为由要求损害赔偿,因为他们之间并不存在一个合同。麦克米伦勋爵认为,这个案件应被当作一个新的

① Donoghue v. Stevenson: 多诺休诉史蒂文森案。该案的索引号是:[1932] UKHL 100, 1932 SC 31, [1932] AC 562, [1932] All ER Rep 1。This case was a decision of the House of Lords that established the modern concept of negligence in Scots law and English law, by setting out general principles whereby one person would owe another person a duty of care. It is the origin of the modern law of delict in Scots law and the tort of negligence in English and Welsh law as well as in many other Common Law jurisdictions. 原告多诺休的朋友为她购买了一瓶姜啤(ginger beer),喝过一半之后,原告发现瓶内腐烂的蜗牛(a decomposed snail)。原告多诺休太太是一位三十岁刚出头妇女,是一家苏格兰人商店内的雇员。1928年8月的一个星期天晚上,她去了一家咖啡馆并点了一份"冰激凌漂浮",也就是冰激凌和姜啤。老板(The proprietor)用平底酒杯(tumbler)拿来了一份冰激凌,然后在冰激凌上面倒了一些姜啤,姜啤的瓶上带有"斯帝芬森(D. Stevenson)"字样。多诺休太太喝了一口饮料之后,她的杯里又倒满了姜啤,这时她发现了和酒混在了一起的蜗牛残骸。多诺休太太大吃了一惊,并随即闹了一场严重胃肠炎(gastroenteritis),并在医院里住了好几天院。多诺休太太的律师(solicitor)起诉了"大卫·斯帝芬森"(大卫·斯帝芬森是一家生意兴隆的柠檬姜啤厂业主),要求被告赔偿500英镑损害赔偿金与住院开支(damages & costs)。该案最后到了上议院(the House of Lords),在那里该案得到判决,判决结果是原告胜诉,并随之诞生了议长阿特金(Lord Atkin)著名的"好邻居"原则(good neighbor principle)。议长阿特金判决啤酒商存有过失,判定生产商应对最后消费者(eventual consumer)负"注意义务"(duty of care)。该案的影响在于确立了生产商对最后消费者应负责任的义务。法院判定即便在原告与被告之间并无"合同的利害关系"(privity of contract),被告还是要负"注意义务"。阿特金勋爵的"邻居原则"。这104个英文单词,可能是有史以来从法官口里说出来的最重要的一段话(probably the most important 104 words ever spoken by a judge in the world)。附原文与译文。"The rule that 'you are to love your neighbour' becomes in law 'you must not injure your neighbour' and the lawyer's question 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."(对于"要爱你的邻居"变成法律上"不得伤害你的邻居"的规则,还有律师提出的"谁是我的邻居?"这一问题,需要认真的回答。你必须采取合理注意,去避免那些你可合理预见到的、会对你的邻居造成伤害的作为或不作为。那么法律上,谁是我的邻居呢?答案是:那些能够被我的行为密切和直接影响的人;所以当我在决意作为或不作为时,应合理考虑那些可能受到影响的人们。)

case. Lord Atkin argued that we owe a duty of reasonable care to our neighbors. He quoted the *Bible* in support of his argument, specifically the general principle that "thou shalt love thy neighbor."①

产品责任案件对待。阿特金勋爵认为我们对我们的邻居负有合理的注意义务。他特别引用了《圣经》中"你应该爱你的邻居"这句话来支持他的观点。

(2) Elements of negligence

Negligence is a breach of legal duty to take care resulting in damage to the plaintiff. The legal burden of proving elements of negligence falls upon the plaintiff. The elements in determining the liability for negligence are:

a) The tortfeasor owed a duty of care;

b) There was a breach of that duty;

c) The tortfeasor directly caused the injury, that is, there was proximate cause②;

d) The plaintiff suffered damage as a result of that breach;

There are a number of situations in which the courts recognize the existence of a duty of care. These usually arise as a result of some sort of special relationship between the parties. Examples include one road-user to another, employer to employee, manufacturer to consumer, doctor to patient and solicitor to client.

(2) 过失侵权的构成要件

过失侵权是指(被告)违反了法定的注意义务并对原告造成了损害。原告承担证明过失侵权的构成要件的法定责任。决定过失侵权责任的要件是:

1) 侵权行为人负有注意义务;

2) 侵权行为人违反了注意义务;

3) 侵权行为人直接造成了伤害,换言之,有近因存在;

4) 原告因被告违反注意义务的行为而遭受了损害。

法院在有些情形下会认定注意义务的确实存在。注意义务主要源于当事人之间的某种特殊关系。如司机对司机,雇主对雇员,制造商对消费者,医生对病人,律师对当事人均负有注意义务。

3. Intentional torts

Intentional torts include, among others, certain torts arising from the occupation/use of

3. 故意侵权行为

故意侵权包括很多类型,其中一种是指(被告不当)占有或使用土地或侵

① thou shalt love thy neighbor:你应该爱你的邻居。这句话中出现了古英语单词,thou 等于 you,shalt 是 shall 的第二人称单数形式,thy 等于 your。在现代英语中,这些单词已经不再使用。

② proximate cause:近因。A cause that is legally sufficient to result in liability; an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor.

land and trespass to chattels. Any direct interference, such as entering land without the occupier's consent or dispossessing him of a book, a hat, or a picture is actionable. Several intentional torts do not involve land. Examples include false imprisonment, the tort of unlawfully arresting or detaining① someone, and defamation (in some jurisdictions split into libel② and slander③), where false information is broadcasted and damages the plaintiff's reputation.

害动产的行为。任何如未经占有者同意进入其领地、拿走他人书籍、帽子或画等直接妨碍行为都是可诉的。也有其他几种不涉及土地的故意侵权行为。例如,非法监禁,即非法逮捕并拘押某人的侵权行为,诽谤(一些司法管辖区将其分为文字诽谤和口头诽谤),即被告传递不实信息并因此损害了原告的声誉。

4. Quasi-torts

Quasi-tort means a tort for which a non-perpetrator is held liable. In a quasi tort, a person who did not actually commit a wrong is held liable. For instance, a master will be held liable for a tort committed by a servant under the principle of vicarious liability.

4. 准侵权行为

准侵权行为指由非直接行为人承担责任的侵权行为。在准侵权行为中,实际上未实施侵权行为的人承担责任。例如,主人按照替代责任的原则对仆人的行为需承担责任。

5. Tort Liability

Tort liability is customarily divided into intentional tort liability, negligence liability and strict liability. Strict liability makes some persons responsible for damages their actions or products cause, regardless of any "fault" on

5. 侵权责任

侵权责任通常分为故意侵权责任、过失侵权责任和严格责任等三种。依严格责任,不论当事人是否有过错,他们都要为自己的行为或产品造成的损害负责。举证责任倒置是过失侵权与

① detain:扣押,扣留。(1)The action of detaining, withholding, or keeping something in one's custody. (2)The confinement of a person in custody.

② libel:书面诽谤。恶意地以虚假的、内容不实的书面(文字、图画、符号等)形式公开诋毁和损害他人名声、人格、信誉的行为。Libel is a false, malicious statement published in mainstream media(i. e. on the internet, in a magazine, etc.).

③ slander:口头诽谤。指以言词或其他非永久性形式针对他人所作的虚假或诋毁性陈述,它可以作为诉因而被要求损害赔偿。False or malicious claims that may harm someone's reputation. If the defamatory statements are only spoken, they are called "slander".

their part. Strict liability mainly includes but not restricted to the following situations:

Abnormally Dangerous (ultrahazadous) Activities. Strict liability often applies when people engage in inherently hazardous activities, such as bursting dams, "blow-out" oil wells, testing rocket motors, or blasting on a construction site. If a plaintiff is injured by these activities—no matter how careful the doer was—he/she is liable for the injury.

Products Liability① Strict liability also may apply in the case of certain manufactured products. In strict product liability, typically anyone who is engaged in the stream of the product(from the manufacturer to the wholesaler to the retailer, or all of them) can be held responsible if the product was defective and someone was injured. There is no need to prove negligence but the injured party must prove that the product was defective.

严格责任间的一个重要区别。下列情形适用严格责任(不限于以下几种情形):

高度危险行为:人们从事的极端危险活动(如炸坝、打油井、测试火箭发动机或是爆破建筑物等)适用严格责任。原告被这些行为伤害的,不论行为人有多么小心谨慎,都要为该类伤害承担责任。

产品责任:严格责任也适用于某些工业产品案件之中。依严格产品责任,只要缺陷产品对他人造成损害,该产品生产流通过程中的参与者(从生产商、批发商到零售商,或者他们全体)都可被要求承担责任。受害人不必证明有过失存在,只须证明产品有缺陷。

Ⅱ. GLOSSARY

Ⅱ. 词汇表

tort 侵权行为

wrong 不法行为

① Products Liability:产品责任。*products liability*, the liability imposed on a manufacturer or seller for a defective and unreasonably dangerous product. 产品严格责任的认定不要求原告与销售商或是生产商事先具有合同关系。但原告必须证明产品在购买时就具有瑕疵,并且按规定用途进行正当使用。

tortfeasor 侵权行为人，不法行为人

false imprisonment 非法监禁

defamation 污蔑；诽谤；中伤；损害他人名誉

reasonable care 合理的注意

recovery(通过诉讼判决获得的)赔偿额；赔偿金

cause of action 诉因，诉讼理由

warranty 担保，保证

proximate cause 近因

strict liability 严格责任

trespass 侵犯，侵害之诉

detain 扣押，扣留

libel 书面诽谤

slander 口头诽谤

contractual duty 合同义务

monetary compensation 金钱赔偿

privacy 隐私

constitutional rights 宪法性权利

quasi-tort 准侵权

negligence 过失侵权，过失

intentional torts 故意侵权

Ⅲ. SUPPLEMENTARY TEXT

Ⅲ. 补充资料

Rather than focus on the behavior of the manufacturer(as in negligence), strict liability claims focus on the product itself. Under strict liability, the manufacturer is liable if the product is defective[①], even if the manufacturer was not negligent in making that prod-

① defective:有缺陷的。

uct defective.

The difficulty with negligence is that it still requires the plaintiff to prove that the defendant's conduct fell below the relevant standard of care①. However, if an entire industry tacitly settles on a somewhat careless standard of conduct, then the plaintiff may not be able to recover even though he or she is severely injured, because although the defendant's conduct caused his or her injuries, such conduct was not negligent in the legal sense. As a practical matter, with the increasing complexity of products, injuries, and medical care(which made many formerly fatal injuries survivable), it is quite a difficult and expensive task to find and retain good expert witnesses who can establish the standard of care, breach, and causation.

Therefore, in the 1940s and 1950s, many American courts decided that it was too harsh to require seriously injured consumer plaintiffs to prove negligence claims against manufacturers or retailers. To avoid having to deny such plaintiffs any relief, these courts began to look for facts in their cases which they could characterize as an express or implied warranty② from the manufacturer to the consumer. The *res ipsa loquitur* doctrine③ was also stretched to reduce the plaintiff's burden of proof. Over time, the resulting legal fictions became increasingly strained.

Of the various U. S. states, California was the first to throw away the fiction of a warranty and to boldly assert the doctrine of strict liability in tort for defective products, in 1963. Justice Traynor laid the foundation for Greenman with these words:

"Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person

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① standard of care:注意的标准。In tort law, the standard of care is the degree of prudence and caution required of an individual.

② warranty:担保,保证。一方当事人向另一方当事人所作的承诺,如果存在违约或瑕疵,则向被担保方承担赔偿责任。A warranty is an assurance by one party to the other party that certain facts or conditions are true or will happen.

③ *res ipsa loquitur*:情况不言自明,即事实本身说明过失。该原则起源于罗马法,即从事实推定行为人具有过失。

injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest① to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection."

The year after Greenman, the Supreme Court of California proceeded to extend strict liability to all parties involved in the manufacturing, distribution, and sale of defective products(including retailers) and in 1969 made it clear that such defendants were liable not only to direct customers and users, but also to any innocent bystanders randomly injured by defective products.

Ⅳ. EXERCISES

Ⅳ. 练习

1. Answer the following questions.

(1) Describe your understanding of torts.

(2) What are the three types of torts?

(3) What are the elements of negligence?

(4) What are the main characteristics of intentional tort?

(5) What is the quasi-tort?

2. Translate the following terms into English.

(1) 侵权行为

① public interest:公共利益。即应予认可和保护的公众普遍利益。

(2) 不法行为

(3) 妨害、滋扰

(4) 书面诽谤

(5) 口头诽谤

(6) 隐私

(7) 准侵权

3. Translate the following terms into Chinese.

(1) false imprisonment

(2) proximate cause

(3) contractual duty

(4) constitutional rights

(5) monetary compensation

(6) intentional torts

(7) reasonable care

(8) cause of action

4. Match the given terms with the proper explanation.

A. proximate cause

B. contributory negligence

C. malicious prosecution

D. defamation

(1) The term is used to describe the actions of an injured person that may have also caused or contributed to his injury.

(2) It tends to harm plaintiff's reputation in the community, either by lowering others' estimation of him, or deterring others from associating or dealing with him. Examples include communications which expose plaintiff to hatred, contempt, or ridicule; which reflect unfavorably on his morality or integrity; or which impair his financial reputation.

(3) It may be an act from which an injury results as a natural, direct, uninterrupted consequence and without which the injury would not have occurred.

(4) It consists of maliciously and without reasonable and probable causes instituting groundless legal proceedings, especially criminal prosecutions.

5. Choose the suitable words from the box and fill in the blanks.

approaches	hypothetical	measure	objective	fiction	circumstances	reasoning

A reasonable person is a __(1)__ individual with an ordinary degree of reason, prudence, care, foresight, or intelligence whose conduct, conclusion, or expectation in relation to a particular circumstance or fact is used as an __(2)__ standard by which to __(3)__ or determine something(as the existence of negligence). The reasonable man or reasonable person standard is a legal __(4)__ that originated in the development of the common law. The question, "How would a reasonable person act under the __(5)__" performs a critical role in legal __(6)__, for example, "We have generally held that a reasonable person would not believe that he or she has been seized when an officer merely __(7)__ that person in a public place and begins to ask questions."

6. Translate the following sentences into Chinese.

(1) The claimant must produce evidence which infers a lack of reasonable care on the part of the defendant.

(2) If harm is foreseeable but occurs in an unforeseeable way there may still be liability.

(3) If the danger of a serious accident outweighs the burden or inconvenience of taking precautions to avoid the accident, the reasonable person would take those precautions.

(4) The burden of proof ordinarily rests on the plaintiff to establish this relationship on a "balance of probabilities".

(5) Our society has many sources of laws: the federal and the state constitutions, legislative enactments, judicial decisions, and executive orders. Statues are laws promulgated by Congress or state legislatures.

(6) Case law, unlike statues, is comprised of court decisions, both at the federal and state levels.

(7) There are two defenses to negligence claims: contributory negligence and voluntary assumption of risk.

(8) Contributory negligence bars a party from recovering for damages if he or she contributed in any way to the injury, but recently has been modified so as merely to reduce damages.

Lesson 9 Company Law

第九课 公 司 法

Ⅰ. Text & Its Translation

1. General Introduction

Company law[①] (also "corporate" or "corporations" law) is the study of how shareholders, directors, employees, creditors,[②] and other stakeholders[③] such as consumers, the community and the environment interact with one another under the internal rules of the firm[④]. Corporate law is a part of a broader

Ⅰ. 课文及译文

1. 概述

公司法(company law,亦作 corporate law,或者 corporation law)是有关股东、董事、雇员、债权人和其他利益相关者(如消费者、社会和环境等)之间如何依据企业内部规则相互发生联系的学问。不过更确切地说,corporate law 只是 companies law 或 law of business

① 根据国内的习惯,一般将"company law"翻译为公司法。然而,将"company"一词翻译为"企业",或者"商事组织"则更为准确。在美国,"company"一词既可以指法人企业,也可以指非法人组织的企业;在英国,"company"一词一般用来指具独立法律人格、享受有限责任的法人组织。*Black's Law Dictionary* (8th ed)将该词定义为:(1)A corporation—or, less commonly, an association, partnership, or union—that carries on a commercial or industrial enterprise. (2)A corporation, partnership, association, joint-stock company, trust, fund, or organized group of persons, whether incorporated or not, and(in an official capacity) any receiver, trustee in bankruptcy, or similar official, or liquidating agent, for any of the foregoing.

② creditor:债权人。(1)One to whom a debt is owed; one who gives credit for money or goods. (2)A person or entity with a definite claim against another, especially a claim that is capable of adjustment and liquidation. (3)A person or entity having a claim against the debtor predating the order for relief concerning the debtor.

③ stakeholder:利益相关者;有时也译为"赌注保管人;争议财产保管人"。(1)A disinterested third party who holds money or property, the right to which is disputed between two or more other parties. (2)A person who has an interest or concern in a business or enterprise, though not necessarily as an owner. (3)One who holds the money or valuables bet by others in a wager.

④ firm:企业。(1)The title under which one or more persons conduct business jointly. (2)The association by which persons are united for business purposes. Traditionally, this term has referred to a partnership, as opposed to a company. But today it frequently refers to a company.

companies law (or law of business associations). In UK, other types of business associations can include partnerships①, trusts②(like a pension fund③), corporations limited by shares④ or companies limited by guarantee⑤ (like some universities or charities). US corporations are generally classified into C corporations, S Corporations⑥, close corporations⑦, public corporations⑧, professional

associations 的一部分，后者的内容更为广泛。在英国，公司的类型还包括合伙企业、信托企业（比如养老金信托公司）、股份有限公司和担保有限责任公司（如大学和慈善组织）。美国的公司一般分为 C 公司、S 公司、封闭公司、专业公司以及非营利公司。

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① partnership：合伙，合伙企业。A voluntary association of two or more persons who jointly own and carry on a business for profit. Under the *Uniform Partnership Act*《统一合伙企业法》, a partnership is presumed to exist if the persons agree to share proportionally the business's profits or losses.

② trust：信托。(1)The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person(the trustee) at the request of another(the settlor) for the benefit of a third party(the beneficiary). For a trust to be valid, it must involve specific property, reflect the settler's intent, and be created for a lawful purpose. (2)A fiduciary relationship regarding property and charging the person with title to the property with equitable duties to deal with it for another's benefit; the confidence placed in a trustee, together with the trustee's obligations toward the property and the beneficiary. A trust arises as a result of a manifestation of an intention to create it.

③ pension fund：养老基金，退休基金。A fund from which pensions are paid, accumulated from contributions from employers, employees, or both.

④ corporation limited by shares：股份有限公司。这是英国法中的称谓，是跟担保有限公司相对立的一种公司形式。这种公司在成立时股东需缴纳一定的注册资本，但不一定要全额缴纳。

⑤ company limited by guarantee：担保有限责任公司，亦作 a private company limited by guarantee。股东的责任以其已在公司章程中作出的保证在公司清算时向公司承担提供资产的数额为限。该公司通常并不需要营业资本，因为其创立并未出于营利目的，而是为了社会或慈善、宗教、艺术等目的。参见薛波主编：《元照英美法词典》，法律出版社 2003 年版，第 267 页。

根据《1985 年公司法》第 1 条第 2 款(Companies Act 1985, s1(2))的规定，保证有限公司指依据股东的承诺（在公司清算时按照章程载明的固定数额向公司承担缴付责任）而成立的有限公司。这类公司一般是不以盈利为目的的，例如慈善团体或者地方性足球俱乐部。因为没有实际资本的投入，所以这类公司成立时，为了维护其运作，通常需要缴纳一定的费用。参见葛伟军：《英国公司法：原理与判例》，中国法制出版社 2007 年版，第 24—25 页。

⑥ S 公司与 C 公司是对应的法律概念，它们都是《美国联邦税收法典》S 节和 C 节中依据双重征税与否的标准，就公司形态所作的划分。S corporation, called also "subchapter S corporation", a small business corporation that is treated for federal tax purposes as a partnership. 专业公司一般采用 S-Corporation 的付税方式，如此可免交公司的联邦所得税。相比之下，C corporation 公司的法律限制较少，但却是双层征税主体。这种税法上的不同待遇实际上是鼓励支持中小企业的法律手段之一。

⑦ close corporation：封闭公司。A close corporation is a corporation whose shares are held by a small number of individuals(as management) and not freely or publicly traded.

⑧ public corporation：公众公司，指股份可以公开流通的公司。A public corporation is also called a public held corporation, a business corporation whose stocks are publicly traded. 与之相对的是 private corporation：私人公司。A corporation founded by and composed of private individuals principally for nonpublic purpose, such as manufacturing, banking, and railroad corporations.

corporations① and non-for-profit corporations②.

The four characteristics of the modern corporation are:

(1) Separate Legal Personality of the corporation (the right to sue and be sued in its own name i. e. the law treats the company as a human being);

(2) Limited Liability of the shareholders (so that when the company is insolvent③, they only owe the money that they subscribed for in shares);

(3) Shares (usually on a stock exchange, such as the London Stock Exchange, New York Stock Exchange);

(4) Delegated Management (in other words, control of the company placed in the hands of a board of directors).

Corporate law is often divided into corporate governance (which concerns the various power relations within a corporation) and corporate finance (which concerns the rules on how capital is used).

现代公司的四个特征是:

(1) 公司有独立法律人格(可以以公司自己的名义去起诉和应诉,即法律将公司视为人);

(2) 股东承担有限责任(当公司无清偿债务能力时,股东仅以其认购的股份为限对公司承担责任);

(3) 发行股票(通常是在证券交易所交易的股票,比如在伦敦证券交易所和纽约证券交易所);

(4) 委托管理(董事会控制公司)。

公司法主要包括公司治理和公司财务管理,前者内容是公司内部的各种权力关系,后者的内容是资本的使用规则。

2. Corporate Personality

One of the key legal features of corporations is their separate legal personality, also

2. 公司人格

公司的一个关键法律特征就在于其独立的法律人格。然而,英国法直到

① professional corporation:专业公司,在美国用来指那些提供专业服务的公司。A professional corporation is a corporation organized by one or more licensed individuals(as a doctor, accountant or lawyer) to provide professional services and obtain tax advantages.

② non-for-profit corporation:非营利性公司,一般为教育或慈善等目的成立的法人组织,享受特别税收优惠。

③ insolvent:无清偿能力的;破产的。也可指在普通交易中停止支付债务的人,或在债务到期时无力支付的人,或根据《联邦破产法》(*Federal Bankruptcy Act*)被确立为无力支付的人。(Of a debtor) having liabilities that exceed the value of assets; having stopped paying debts in the ordinary course of business or being unable to pay them as they fall due.

known as "personhood" or being "artificial persons". However, the separate legal personality was not confirmed under English law until 1895 by the House of Lords in *Salomon v. Salomon & Co., Ltd.*①

1895年才通过上议院审理的"萨洛蒙诉萨洛蒙公司案"确立了公司具有独立的法律人格。

Separate legal personality often has unintended consequences, particularly in relation to smaller, family companies. In a case of 1978 it was held that a discovery order obtained by a wife against her husband was not effective against the husband's company as it was not named in the order and was separate and distinct from him. And in another case, a claim under an insurance policy② failed where the insured had transferred timber from his name into the name of a company wholly owned by him, and it was subsequently destroyed in a fire; as the property now belonged to the company and not to him, he no longer had an "insurable interest"③ in it

独立的法律人格经常会产生意想不到的影响,在涉及较小的家族企业时尤为如此。1978年的一则判例认为,法院判给妻子要求其丈夫"公布(披露)财产的命令"对其丈夫的公司无效,因为该"公布财产令"中并未提及丈夫的公司,丈夫的公司与丈夫是不同的。在另一起案件中,原告凭保险单提出赔偿之诉却败诉,原因是该案中被保险人在投保前已将木材(保险标的)从他的名下转移到一家他本人独自拥有的公司名下,这批木材在后来一场大火中损毁,因为该笔财产当时已属于公司而非他自己,他在这批木材上并无"可保利

① 本案是英国第一个完整论述公司法人属性的案例,从初审法院一直上诉到英国国会上议院。英国的1862年《公司法》规定了公司设立的条件和程序,比如,公司股东的最低人数;股东之间订有章程;股东认购股份;依法注册等等。按照该法规定设立的公司中,股东以认购的股份额为限承担有限责任。独立法人资格和股东有限责任的结合,使投资者开始认识到公司的吸引力。本案的Salomon先生就是发现了公司的优势,将家庭作坊"改制"(transfer)成了股东承担有限责任的公司。公司的股东是其妻子和他的五个儿女。在公司的清算中,发现公司的财产不足以清偿所有债务,当首先清偿Salomon先生的有担保公司债券后,将无以清偿普通债权人的债务。公司的清算人认为,公司只不过是Salomon先生逃避普通债权人偿债要求的"代理人"(agent),进而要求公司首先偿还普通债权人的债务。上议院的法官们(lords)认为,1862年《公司法》的规定是审理本案的唯一依据,公司作为企业法人,它强调的是一种资本的联合,其资本或股本是由股东通过认购股份或股票而筹集形成的,是公司的独立财产的基础。公司以其全部财产对公司的债务承担有限责任,而股东仅以其出资额为限对公司承担有限责任,与公司发生关系的任何第三人在通常情况下都不能直接追索公司的股东。

② insurance policy:保单;保险单。亦作"policy of insurance"或者"contract of insurance",是指载明保险人以保险费为对价,负责赔偿被保险人所可能遭受损失的书面文契。(1)A contract of insurance. (2)A document detailing such a contract.

③ insurable interest:可保利益。被保险人具有的、因承保风险发生而导致损失的利害关系。被保险人对保险标的物必须具有真正的金钱上的利益,才有权对标的物或人进行保险。保险法中自古有"无可保利益则无保险"的法谚,可见其在保险法中的重要地位。A legal interest in another person's life or health or in the protection of property from injury, loss, destruction, or pecuniary damage. To take out an insurance policy, the purchaser or the potential insured's beneficiary must have an insurable interest. If a policy does not have an insurable interest as its basis, it will usu. be considered a form of wagering and thus be held unenforceable.

and his claim failed.

However, separate legal personality does allow corporate groups a great deal of flexibility in relation to tax planning, and also enables multinational companies to manage the liability of their overseas operations. For instance, victims of asbestos poisoning at the hands of an American subsidiary① could not sue the English parent in tort.

There are certain specific situations where courts are generally prepared to "pierce the corporate veil"②, to look directly at, and impose liability directly on the individuals behind the company. The most commonly cited examples are:

a) where the company is a mere façade;

b) where the company is effectively just the agent of its members or controllers;

c) where a representative of the company has taken some personal responsibility for an action;

d) where the company is engaged in fraud or other criminal wrongdoing;

e) where permitted by statute (for example, many jurisdictions provide for shareholder

益",所以他的诉求不能获得支持。

但独立的法律人格在涉及税收规划问题上可以给予公司集团以巨大的灵活性,同时还可使跨国公司更好地处理其海外分支机构所产生的责任。例如,在美国子公司中遭受石棉毒害的受害人,不能因此对该公司的英国母公司提起侵权诉讼。

在一些特定情形下,法院通常会"揭开公司的面纱",直接去寻找公司背后的个人并判决他们承担责任。最为常见的例子有:

1) 公司只是一个虚假的外壳(空壳公司);

2) 公司事实上只不过是其股东或者控制人的代理人(公司沦为股东的工具);

3) 公司代表已就某一行为承担个人责任;

4) 公司从事欺诈行为或者其他刑事不法行为;

5) 法律有规定的(如许多法域规定,公司违反了环境保护法的,股东需

① subsidiary:子公司。Subordinate; under another's control.

② pierce the corporate veil:揭开公司面纱;刺破公司面纱。根据该原则,如果法庭认为成立公司的目的在于利用公司作为手段,从事妨碍社会利益、欺诈或逃避个人责任的活动,法院将不考虑公司的法人资格,直接追究股东或其他行为人的民事或刑事责任。也就是说,法院有权要求公司的有控制权的股东及主要经营者对公司债务承担个人责任(Personal Liability)。但是具体而言,应如何判断公司的责任是否应该,以及何时转移到股东个人身上,是一个相当复杂的事实问题。

liability where a company breaches environmental protection laws);

f) in many jurisdictions, where a company continues to trade despite foreseeable bankruptcy①, the directors can be forced to account for trading losses personally.

3. Corporate Governance

Corporate governance is primarily the study of the power relations between the board of directors and those who elect them (shareholders and employees). It also concerns other stakeholders, such as creditors, consumers, the environment and the community at large. One of the main differences between different countries in the internal form of companies is between a two-tier and a one tier board. The United Kingdom, the United States, and most Commonwealth countries have single unified boards of directors. In Germany, companies have two tiers, so that shareholders (and employees) elect a "supervisory board", and then the supervisory board chooses the "management board". There is the option to use two tiers in France.

4. Corporate Constitution

The United States, and a few other common law countries, split the corporate constitution

要承担责任);

6) 在很多法域,公司如在已预见没有偿债能力的情况下仍然进行交易的,则可强制公司的董事对交易的损失承担个人责任。

3. 公司治理

公司治理主要是指董事会与选举他们的人(股东和雇员)之间的权力关系。公司治理也指其他利益相关者(如债权人、消费者及环境和整个社会)的关系。国与国在公司内部形式上的主要区别在于是采用双层制还是单层制。英国、美国和大多数英联邦国家采用的是单层制董事会。在德国,公司治理结构采用的是双层制,即股东(和雇员)选举一个"监事会",然后由该监事会选择一个"管理委员会"。法国的公司治理结构有时也选择双层制。

4. 公司章程

美国和其他一些普通法国家将公司章程分为两个独立的文件(英国在

① bankruptcy:破产。可指当事人无力偿还到期债务的状况,也可指已依破产法被宣告破产的事实,或者已依破产法被宣告破产的当事人的地位。A statutory procedure by which a(usu. insolvent) debtor obtains financial relief and undergoes a judicially supervised reorganization or liquidation of the debtor's assets for the benefit of creditors.

into two separate documents(the UK got rid of this in 2006). The memorandum of association (or articles of incorporation) is the primary document, and will generally regulate the company's activities with the outside world. It states which objects the company is meant to follow(e. g. "this company makes automobiles") and specifies the authorized share capital① of the company. By-laws are the secondary document, and will generally regulate the company's internal affairs and management, such as procedures for board of directors meetings, dividend entitlements etc. In the event of any inconsistency, the memorandum prevails and in the United States only the memorandum is publicized.

2006年废除了这种做法)。公司组织大纲(或者公司成立章程)是基本文件,其规范的是公司与外部世界的关系。公司组织大纲制定公司目标(如"本公司制造汽车"),并载明公司的授权资本。内部管理细则是一个次要文件,其规范的主要对象是公司内部事务及管理,比如董事会会议程序、股息等。如两个文件发生冲突,则公司组织大纲的效力优先。在美国,只有公司组织大纲才被公开。

It is quite common for members of a company to supplement the corporate constitution with additional arrangements, such as shareholders' agreements, whereby they agree to exercise their membership rights in a certain way. A shareholders' agreement fulfills many of the same functions as the corporate constitution, but it is a contract, it will not normally bind new members of the company unless they accede to it. One benefit of shareholders' agreement is that they will usually be confidential, as most jurisdictions do not require shareholders' agreements to be publicly filed.

对于公司成员而言,通过诸如股东协议之类的协议来补充公司章程是非常普遍的做法。通过这些协议,公司成员同意以某种特定的方式来行使其成员权利。股东协议具有与公司章程相同的功能,但它只是一个合同,通常对公司的新成员不具有约束力,除非他们同意加入此协议。股东协议通常是保密的,这是它的好处之一,因为大多数司法管辖区并不要求公开登记股东协议。

① authorized share capital:授权资本。亦作"authorized capital",或者"nominal capital(名义资本)"。Authorized share capital is the maximum amount of share capital that the company is authorized by its constitutional documents to issue to shareholders. Part of the authorized capital can(and frequently does) remain unissued.

Ⅱ. GLOSSARY

Ⅱ. 词汇表

creditor 债权人

stakeholder 利益相关者

firm 企业

partnership 合伙,合伙企业

trust 信托

pension fund 养老基金,退休基金

corporation limited by shares 股份有限公司

company limited by guarantee 担保有限责任公司

close corporation 封闭公司

public corporation 公众公司

professional corporation 专业公司

non-for-profit corporation 非营利性公司

insolvent 无力偿还者

insurance policy 保单,保险单

policy-holder 保单持有人

beneficiary 受益人

insurable interest 可保利益

subsidiary 子公司

pierce the corporate veil 揭开公司面纱,刺破公司面纱

bankruptcy 破产

dividends 股息,红利,股利

authorized share capital 授权资本

memorandum of association 公司组织大纲

articles of incorporation 公司成立章程

by-laws 内部管理细则

Ⅲ. SUPPLEMENTARY TEXT

Ⅲ. 补充资料

Although some forms of companies are thought to have existed during Ancient Rome and Ancient Greece, the closest recognizable ancestors of the modern company did not appear until the second millennium. The first recognizable commercial associations were medieval guilds①, where guild members agreed to abide by guild rules, but did not participate in ventures for common profit. The earliest forms of joint commercial enterprise under the *lex mercatoria* were in fact partnerships.

With increasing international trade, Royal charters② were increasingly granted in Europe(notably in England and Holland) to merchant adventurers. The Royal charters usually conferred special privileges on the trading company(including, usually, some form of monopoly). Originally, traders in these entities traded stock on their own account, but later the members came to operate on joint account and with joint stock, and the new Joint stock company was born.

Early companies were purely economic ventures; it was only belatedly realized that an incidental benefit of holding joint stock was that the company's stock could not be seized for the debts of any individual member. The development of company law in Europe was hampered by two notorious "bubbles"(the South Sea Bubble③ in England and the Tulip Bulb Bubble④ in Holland) in the 17th century, which set the development of companies in the two leading jurisdictions back by over a century in popular estimation.

But companies, almost inevitably, returned to the forefront of commerce, although in England to circumvent the Bubble Act 1720⑤ investors had reverted to trading the stock of

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① guild:基尔特,同业公会,行会。一种为共同目的、相会援助而自愿组成的协会、行会或者同业公会。An association of persons of the same trade or pursuits, formed to protect mutual interests and maintain standards.

② Royal charters:皇家特许状。指君主根据其皇室特权或者特别的法定权力所颁布特许状,比如设立公司等。A royal charter is a formal document issued by a monarch as letters patent, granting a right or power to an individual or a body corporate.

③ South Sea Bubble:"南海泡沫"。英国在1720年春天到秋天之间发生的一次经济泡沫。

④ Tulip Bulb Bubble:"郁金香泡沫"。"郁金香泡沫"是人类历史上第一次有记载的金融泡沫。

⑤ Bubble Act:《泡沫法案》。英国为应对"南海泡沫"而出台的一部法案。该法案禁止"在未经议会或国王授权的情况下,成立像公司实体那样的联合体,并使其份额可转移和让渡",使英国公司制度的成长向后推迟了100年。

unincorporated associations, until it was repealed in 1825. However, the cumbersome process of obtaining Royal charters was simply insufficient to keep up with demand. In England there was a lively trade in the charters of defunct companies. However, procrastination amongst the legislature meant that in the United Kingdom it was not until the Joint Stock Companies Act 1844① that the first equivalent of modern companies, formed by registration, appeared. Soon after came the Limited Liability Act 1855②, which in the event of a company's bankruptcy limited the liability of all shareholders to the amount of capital they had invested. The beginning of modern company law came when the two pieces of legislation were codified under the Joint Stock Companies Act 1856.

That legislation shortly gave way to the railway boom, and from there the numbers of companies formed soared. In the later nineteenth century depression took hold, and just as company numbers had boomed, many began to implode and fall into insolvency. Much strong academic, legislative and judicial opinion was opposed to the notion that businessmen could escape accountability for their role in the failing businesses. The last significant development in the history of companies was the decision of the House of Lords in Salomon v. Salomon & Co. where the House of Lords③ confirmed the separate legal personality of the company④, and that the liabilities of the company were separate and distinct from those of its owners.

In a December 2006 article, The *Economist*⑤ identified the development of the joint stock company as one of the key reasons why Western commerce moved ahead of its rivals in the Middle East in post-renaissance era.

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① Joint Stock Companies Act:《合股公司法》。英国先后于 1844 年、1856 年和 1857 年颁布《合股公司法》。

② Limited Liability Act:《有限责任法》。英国议会通过的一部制定法,规定公司承担有限赔偿责任。

③ House of Lords:(英国)上议院,贵族院。

④ separate legal personality of the company:公司的独立法律人格。

⑤ *Economist*:此处是指《经济学人》杂志。

Ⅳ. EXERCISES

Ⅳ. 练习

1. Answer the following questions.

(1) What are the characteristics of modern company?

(2) Tell the differences between S Corporation and C Corporation?

(3) What does "limited liability" mean in the context of company law? In other words, who have the limited liabilities?

(4) What documents is the "constitution" of a company?

(5) What is your understanding of "pierce the corporate veil"?

2. Translate the following terms into English.

(1) 股息

(2) 破产

(3) 子公司

(4) 公众公司

(5) 封闭公司

(6) 养老基金,退休基金

(7) 授权资本

(8) 内部管理细则

3. Translate the following terms into Chinese.

(1) corporation limited by shares

(2) company limited by guarantee

(3) non-for-profit corporation

(4) professional corporation

(5) insurable interest

(6) pierce the corporate veil

(7) memorandum of association

(8) articles of incorporation

4. Match the given terms with the proper explanation.

A. dividends

B. non-profit organization

C. liquidation

D. private corporation

E. the articles of incorporation

(1) It is the primary rules governing the management of a corporation in the United States and Canada, and are filed with a state or other regulatory agency.

(2) In law, it is the process by which a company(or part of a company) is brought to an end, and the assets and property of the company redistributed.

(3) It is founded by and composed of private individuals principally for nonpublic purpose, such as manufacturing, banking, and railroad corporations.

(4) It is an organization that does not distribute its surplus funds to owners or shareholders, but instead uses them to help pursue its goals, such as charities, trade unions, trade associations and public arts organizations.

(5) They are payments made by a corporation to its shareholder members. It is the portion of corporate profits paid out to stockholders.

5. Choose the suitable words from the box and fill in the blanks.

shareholders changing property identity distinct form creditor liable for shares

The essence of a corporation is that it has a legal personality distinct from the people who create it. This means that even if the people running the corporation are continuously __(1)__, the corporation itself retains its __(2)__ and the business need not be stopped and restarted with every change in the managers or members of the business. As a limited liability company, not only is the money owned by the corporation regarded as wholly __(3)__ the money owned by those running, but also the members of the corporation are not __(4)__ the debts of the corporation. Members can only be called upon to pay the full price of their __(5)__. After that a __(6)__ must depend on the corporation's money to satisfy his claim. This means that the corporation's __(7)__ is its own and its debts are its responsibility, and the __(8)__ are neither party to the corporation's contracts nor liable for the corporation's debts.

6. Translate the following sentences into Chinese.

(1) If the firm that received a subsidy is a holding company, including a parent

company with its own operations, the Department of Commerce will attribute the subsidy to the consolidated sales of the holding company and its subsidiaries.

(2) A shareholder of a corporation has the amount of his liability limited to the amount payable on the shares he holds.

(3) No shareholder of a corporation is personally liable for the debts, obligations or acts of the corporation. As a separate entity, corporations have several distinguishing characteristics including limited liability, easy transferability of shares, and perpetual existence.

(4) US corporations are generally classified into C corporations, S Corporations, close corporations, professional corporations① and non-for-profit corporations, and in Britain, there are mainly public and private corporations, corporations limited by shares② and corporations limited by guarantee.

(5) Both C Corporation and S Corporation must hold annual meeting of shareholders and meeting minutes must be kept with the corporate records.

(6) The traditional theory is that the shareholders are the owners of the corporation and the role of the directors are to manage the business of the corporation for the benefit of its owners.

(7) The articles of incorporation contain certain important information: the corporation's name, country of registration, objects, amount and division of share capital. The by-laws comprise the regulations governing the running of the corporation. They bind all the members and are valued as "the charter of the corporation".

(8) An essential step in the establishment of a corporation is that the subscribers agree to acquire some shares in the corporation by writing their names at the bottom of the memorandum: by doing this they become the initial shareholders of the corporation.

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① professional corporation:专业公司。在美国用来指那些提供专业服务的公司。A professional corporation is a corporation organized by one or more licensed individuals(as a doctor, accountant or lawyer) to provide professional services and obtain tax advantages.

② corporation limited by shares:股份有限公司。这是英国法中的称谓,是跟担保有限公司相对立的一种公司形式。这种公司在成立时股东需缴纳一定的注册资本,但不一定要全额缴纳。

Lesson 10 Law of International Sales of Goods

第十课 国际货物买卖法

Ⅰ. Text & Its Translation

1. General Introduction

Since World War II international sales of goods has grown extensively, seeing the increasing importance of laws and customs① related to international sales of goods. The laws and customs to sales of goods play a vital role in world economy development, particularly in the integration of world markets.

The key feature of international sales of goods is the fact that it is a sales transaction that crosses national borders. An exporter may sell goods directly to an importer abroad or he may set up a marketing organization abroad and transact business through distributors, agents, branch offices② or subsidiary③ compa-

Ⅰ. 课文及译文

1. 概述

自第二次世界大战以来，国际货物买卖迅速增长，与国际货物买卖有关的法律和习惯的重要性也与日俱增。国际货物买卖法律和习惯对世界经济的发展，特别是对世界市场的整合，发挥着重要作用。

国际货物买卖的关键特色就在于，它是跨越国境的买卖交易。出口商可以直接向国外的进口商销售货物，或者，他也可以在国外建立销售组织，以及通过分销商、代理人、办事处或者子公司来开展业务。由于商贸交易的国际性，除了需要处理国内买卖交易中需

① custom：习惯，惯例；习惯法。指经过长期实践和使用所形成的为历代民众所肯定认可的惯常做法，它在人们的日常生活中一直保持效力，并以不成文的形式对人们产生拘束力。英国的普通法正是建立在习惯基础上形成的法律体系。

② branch office：办事处，分支机构。An office of a firm which is located somewhere other than the firm's main office location.

③ subsidiary：子公司。A subsidiary, in business matters, is an entity that is controlled by a separate higher entity. The controlled entity is called a company, corporation, or limited liability company.

nies. Given the international nature of trading transactions, the parties to these international contracts have to deal with other legal concerns in addition to the basic legal issues addressed in domestic sales transactions.

要关注的法律问题之外，国际合同的当事方还需要处理其他的法律关注点。

As a basic principal, international law comes into effect only when states consent to accept it. The particular consent of a state to be bound by an international law can be found in the declarations of its government, in its domestic legislation, in its court decision, and in the treaties(both bilateral and multilateral) to which it is a party. As to sales of goods, the most important and effective international law is *The United Nations Convention on Contracts for the International Sale of Goods*(CISG).

只有国际法得到有关国家的同意和接受，它才具有效力，这是一项基本原则。国家同意受某一国际法约束的特别同意，可体现在政府宣言、国内立法、法院裁决及其作为一方的双边和多边条约之中。对于货物买卖，最为重要和最有影响力的国际法就是《联合国国际货物买卖合同公约》(CISG)。

Some rules have simply been around for such a long time or are so generally accepted that they are described as customary laws. In the field of international sales of goods, the widely used customary law is the *International Rules for the Interpretation of Trade Terms* (INCOTERMS) which is a codification① of international rules for the uniform interpretation of common contract clauses in sales of goods.

有些规则因为存在了很长一段时间，或是因为被广泛接受，所以被称为“习惯法”。在国际货物买卖领域，最广泛使用的习惯法是《国际贸易术语解释通则》，这一法律编纂的内容是货物买卖通用合同条款的国际统一解释规则。

2. CISG

2.《联合国国际货物买卖合同公约》

The United Nations Convention on Contracts for the International Sale of Goods is a

《联合国国际货物买卖合同公约》是一个规定了统一国际销售法律的条

① codification:法典，法典编纂，法典化。The collection and systematic arrangement, usually by subject, of the laws of a state or country, or the statutory provisions, rules, and regulations.

treaty offering a uniform international sales law that, as of August 2010, has been ratified① by 76 countries that account for a significant proportion of world trade, making it one of the most successful international uniform laws.

约。截至 2010 年 8 月，占世界贸易极大份额的 76 个国家批准了该条约，这使得该公约成为最成功的国际统一法律。

The CISG has been described as a great legislative achievement and the most successful international document so far in international sales law, in part due to its flexibility in allowing Contracting States the option of taking exception to some specified articles. Although a number of countries that have signed the CISG have made declarations and reservations, the vast majority—55 out of the current 76 Contracting States—has chosen to accede to② the Convention without any reservations.

CISG 被视为迄今最为伟大的立法成就，以及国际销售法律领域的最成功的国际文件，这是因为，CISG 灵活地允许缔约国不接受其中的某些特定条款。尽管一部分国家在签署 CISG 时做了申明和保留，但是，绝大多数国家（76 个缔约国中的 56 个）选择不做任何保留地加入公约。

Language is one of the most complex and important tools of international sales. As in any sophisticated business activities, small changes in wording can have a major impact on all aspects of an international treaty. The CISG is written using plain language. Further, it facilitated the translation into six languages so all texts are equally authentic.

语言是国际买卖中最为复杂、重要的工具之一。就像在任何复杂的商业活动中一样，语言的些许改变可能给国际条约的各个方面带来重大影响。CISG 使用通俗易通的语言进行起草。此外，公约还被翻译为 6 种语言，每种文本都有相同的效力。

Greater acceptance of the CISG will come from three directions. Firstly, it is likely that within the global legal profession, the number

CISG 将被更多的国家所接受，原因有如下三个方面：第一，在全球法律界，接受 CISG 知识的新律师的数量很

① ratify：批准。国际法上所指的批准，指缔约方同意受条约的约束而对条约或协定的确认。其名词形式为 ratification。The approval process to a nationally binding agreement such a bilateral or multilateral treaty.

② accede：参加，加入（条约等）。

of new lawyers educated in the CISG is increasing, and the existing Contracting States will embrace the CISG more, appropriately interpret the articles and demonstrate a greater willingness to accept precedents from other Contracting States. Secondly, business people will increasingly pressure both lawyers and governments to make sales of goods disputes less expensive and reduce the risk of being forced to use a legal system that may be completely alien to their own. Both of these objectives can be achieved through use of the CISG. Finally, UNCITRAL① will need to develop a mechanism to further develop the Convention and to resolve conflicting interpretation issues. This will make it more attractive to both business people and potential Contracting States.

可能在不断增加，并且，已有的缔约国将更加信奉公约，合理地解释其条文，并在接受其他缔约国先例上表现出更大的意愿。第二，商人迫切地要求律师都能够让他们在货物买卖争端解决上支出变少，政府能够让他们降低被迫使用完全不同于自己国家法律的外国法的风险。上述两个目标都可以通过CISG的使用来实现。第三，联合国国际贸易法委员会需要形成一种机制来推进公约的发展，以解决公约解释中的冲突。这将使公约对商人及潜在的缔约国更有吸引力。

3. INCOTERMS

Parties to international sales of goods have developed certain special trade terms used commonly to allocate rights and duties between themselves. These trade terms have been expressed through various standard abbreviations and each type of term carries with its specific legal consequences. The most common trade terms are CIF and FOB. However, uncertainties

3. 国际贸易术语解释通则

国际货物买卖的当事方已经形成了一些特定的贸易术语，并且共同使用这些术语去分配他们之间的权利和义务。这些贸易术语通过多种标准的缩写形式表达出来，并且每一类的贸易术语都会产生特定的法律后果。最常使用的贸易术语就是CIF和FOB。然而，不确定性依然存在：合同的准据法

① UNCITRAL：其全称为 United Nations Commission on International Trade Law，联合国国际贸易法委员会。于1966年由联合国大会设立(1966年12月17日第2205(XXI)号决议)，中国是其成员国之一。大会在设立贸易法委员会时承认，各国的国际贸易法律存在差异，给贸易流通造成了障碍，因此，大会把贸易法委员会视作联合国可藉此对减少或消除这些障碍发挥更积极作用的工具。该委员会有助于协调及统一国际贸易法，集中处理四个主要的国际贸易范畴：货品销售、付款、商业仲裁及有关货运的法例。

may still exist because the interpretation of these terms can vary depending on the law governing the contract. For example, the definitions of these trade terms under the US *Uniform Commercial Code*① are different from their definitions in English common law, so to avoid controversy, the parties should specify which set of definitions are to apply. Parties to international sales of goods can choose to adopt the definitions set out in INCOTERMS: *International Rules for the Interpretation of Trade Terms*. INCOTERMS are a series of international sales with terms, published by International Chamber of Commerce(ICC)② and widely used in international commercial transactions. These are accepted by governments, legal authorities and practitioners worldwide for the interpretation of most commonly used terms in international trade. This reduces or removes altogether uncertainties arising from different interpretation of such terms in different countries.

不同，它们对上述贸易术语的解释也会有所不同。例如，美国《统一商法典》对上述贸易术语的定义就有别于英国普通法对它们的定义。因此，为了避免冲突，当事方需要规定使用何种定义。国际货物买卖的当事方可选择采用 INCOTERMS(《贸易术语解释的国际规则》)中规定的定义。INCOTERMS 是国际商会出版的一系列国际销售术语，被国际商事交易广泛使用。它们被世界范围内的政府、法律组织和法律实践者所接受，以解释国际贸易中最常用的术语。这就减少或者消除了因不同国家对贸易术语的不同解释所产生的不确定性。

Article 9 of the CISG provides that parties are also bound by practices established between themselves or those widely used in inter-

CISG 第 9 条规定，当事方受其确立的习惯的约束，或者受其知悉的或应当知悉的广泛用于国际贸易中的习惯

① *Uniform Commercial Code*:《统一商法典》。需要说明的是，尽管其名为“法典”，但其不是议会通过“法律”，而只是一部由统一州法全国委员会和美国法学会的共同制定的“示范法”(model law)。该法典没有“法律”效力，供各州立法机关参考采用。同时需要说明的，该“示范法”的影响巨大，除路易斯安那州之外的 49 个州、哥伦比亚特区和维尔京岛的立法机构都采纳了这部法典。该“示范法”并为各类商事交易活动提供了优良的模式，被美国国内乃至国际商事社会广泛采用和吸收，实现了商法的国际性。它分为 11 章(Article)，以总则(General Provisions)和各分则的形式，对现实中的商事规则和商事惯例进行了归纳和制度层面的架构。它基本消除了各州商法对州际交易因规定不同而造成的障碍，实现了美国商法在州际交易范围内，关于销售、票据、担保、信贷各领域规定的统一。

② International Chamber of Commerce:国际商会。国际商会是为世界商业服务的非政府间组织，是联合国等政府间组织的咨询机构，国际商会于 1919 年在美国发起，1920 年正式成立，其总部设在法国巴黎。

national trade, which they knew or ought to have known. Parties who wish to use INCOTERMS may specify that the provisions of INCOTERMS govern the contract. Hence a sales transaction governed by CISG can incorporate① INCOTERMS as well.

INCOTERMS were created primarily for people inside the world of global trade. Outsiders frequently find them difficult to understand. Seemingly common words such as "responsibility" and "delivery" have different meanings in global trade than they do in other situations. In global trade, "delivery" refers to the seller fulfilling the obligation of sale or to completing a contractual obligation. "Delivery" can occur while the merchandise is on a vessel on the high seas② and the parties involved are thousands of miles from the goods.

INCOTERMS are relating to rights and obligations of the parties to the contract of sale with respect to the delivery of goods sold. They are used to divide transaction costs and responsibilities between buyer and seller and reflect transportation practices. They closely correspond to the UN Convention on Contracts for the International Sale of Goods. The first version was introduced in 1936 and the present dates from 2010. As of January 1, 2011, IN-

的约束。希望使用 INCOTERMS 的当事方可具体说明 INCOTERMS 的规定对他们的合同具有约束力。因此,一个受 CISG 规范的买卖交易也可使用 INCOTERMS。

INCOTERMS 主要是为国际贸易领域内的人们所创设的。国际贸易领域外的人很难理解这些术语。在国际贸易中,诸如"责任"和"交付"之类的看起来平常的单词,具有不同于在其他领域中使用时的含义。在国际贸易中,"交付"是指卖方完成了销售的义务,或者是指完成了合同项下的义务。当货物在公海中的船上,并且有关当事人拒货物千里之外时,"交付"就可以进行。

INCOTERMS 对买卖合同的当事人关于已出售货物交付的权利和义务进行了规定。它们被用来划分买卖双方的交易费用和责任,并反映了运输实践做法。它们与《联合国国际货物买卖合同公约》保持了高度一致。第一版于 1936 年问世,目前的版本于 2010 年出版。自 2011 年 1 月 1 日,《2010 国际贸

① incorporate:并入。To unite(one thing) with something else already in existence.

② high seas:公海。Oceans, seas, and waters outside of national jurisdiction are also referred to as the high seas or, in Latin, *mare liberum* (meaning free seas).

COTERMS 2010 (the 8th edition) has effect. The changes therein affect all of the five terms previously listed in section D.

易术语解释通则》生效。该版对原先 D 组的全部 5 个术语作了修正。

Ⅱ. GLOSSARY

Ⅱ. 词汇表

custom 习惯,惯例

bilateral treaty 双边条约

multilateral treaty 多边条约

customary law 习惯法

international customary law 国际习惯法

law merchant(lex mercatoria) 商人法,商法

international commercial law 国际商事法

codification 法典,法典化,法典编纂

ratify 批准

legislative 立法的

reservation (条约的)保留

International Rules for the Interpretation of Trade Terms (INCOTERMS)《贸易术语解释的国际规则》或译为《国际贸易术语解释通则》

lingua franca 〈拉丁语〉通用语

accede 加入

contracting state 缔约国

delivery 交付

high seas 公海

Ⅲ. SUPPLEMENTARY TEXT

Ⅲ. 补充资料

The eighth published set of pre-defined terms, Incoterms 2010 defines 11 rules, reducing the 13 used in Incoterms 2000 by introducing two new rules("Delivered at Terminal", DAT; "Delivered at Place", DAP) that replace four rules of the prior version("Delivered at Frontier", DAF; "Delivered Ex Ship", DES; "Delivered Ex Quay", DEQ; "Delivered Duty Unpaid", DDU). In the prior version, the rules were divided into four categories, but the 11 pre-defined terms of Incoterms 2010 are subdivided into two categories based only on method of delivery.

General Modes of Transportation①

The seven rules defined by Incoterms 2010 for general modes of transportation are:

EXW②— Ex Works(named place)

The seller makes the goods available at his premises. The buyer is responsible for all charges. This trade term places the greatest responsibility on the buyer and minimum obligations on the seller. The Ex Works term is often used when making an initial quotation for the sale of goods without any costs included. EXW means that a seller has the goods ready for collection at his premises(Works, factory, warehouse, plant) on the date agreed upon.

FCA③—Free Carrier(named places)

The seller hands over the goods, cleared for export, into the custody of the first carrier(named by the buyer) at the named place. This term is suitable for all modes of transport, including carriage by air, rail, road, and containerized/multi-modal sea transport. This is the correct "freight collect" term to use for sea shipments in containers.

CPT④—Carriage Paid To(named place of destination)

The seller pays for carriage to the named point of destination, but risk passes when

① 适用于任何运输方式的术语。
② EXW:工厂交货。
③ FCA:货交承运人。
④ CPT:运费付至目的地。

the goods are handed over to the first carrier.

CIP①—Carriage and Insurance Paid To(named place of destination)

Seller pays for carriage and insurance to the named destination point, but risk passes when the goods are handed over to the first carrier.

DAT②—Delivered at Terminal

Seller pays for carriage to the terminal, except for costs related to import clearance, and assumes all risks up to the point that the goods are unloaded at the terminal.

DAP③—Delivered at Place(named place of destination)

Seller pays for carriage to the named place, except for costs related to import clearance, and assumes all risks prior to the point that the goods are ready for unloading by the buyer.

DDP④—Delivered Duty Paid(destination place).

Water Transportation(solely)⑤

The four rules defined by Incoterms 2010 for sales where transportation is entirely conducted by water are:

FAS⑥—Free Alongside Ship(named loading port)

The seller must place the goods alongside the ship at the named port. The seller must clear the goods for export. This term is typically used for heavy-lift or bulk cargo.

FOB⑦—Free on board(named loading port)

The seller must load the goods on board the ship nominated by the buyer, cost and risk being divided at ship's rail. The seller must clear the goods for export. The buyer must instruct the seller the details of the vessel and port where the goods are to be loaded, and there is no reference to, or provision for, the use of a carrier or forwarder. It does not include air transport.

CFR⑧—Cost and Freight(named destination port)

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① CIP:运费/保险费付至目的地。
② DAT:目的地或目的港的集散站交货。
③ DAP:目的地交货。
④ DDP:完税后交货。
⑤ 仅适用于水上运输的术语。
⑥ FAS:装运港船边交货。
⑦ FOB:装运港船上交货。
⑧ CFR:成本加运费。

Seller must pay the costs and freight to bring the goods to the port of destination. However, risk is transferred to the buyer once the goods are loaded on the ship. Maritime transport only and Insurance for the goods is NOT included. Insurance is at the Cost of the Buyer.

CIF①—Cost, Insurance and Freight(named destination port)

Exactly the same as CFR except that the seller must in addition procure and pay for insurance for the buyer.

Ⅳ. EXERCISES

Ⅳ. 练习

1. Answer the following questions.

(1) How can an international law come into effect?

(2) What is the custom in international sales of goods? Please give examples.

(3) What is the comment to CISG in this text?

(4) Please list the reasons for INCOTERMS being widely accepted all over the world.

2. Translate the following terms into English.

(1)《联合国国际货物买卖合同公约》

(2)《国际贸易术语解释通则》

(3) 联合国国际贸易法委员会

(4) 国际商会

(5) (条约的)保留

(6) 缔约国

3. Translate the following terms into Chinese.

(1) bilateral treaty

(2) customary law

① CIF:成本、保险费加运费。

(3) law merchant

(4) *lingua franca*

(5) high seas

(6) international commercial law

4. Match the given terms with the proper explanation.

1. Lex mercatoria
2. ratification
3. high seas
4. customary law

(1) It is the approval process to a nationally binding agreement such a bilateral or multilateral treaty.

(2) It may be the traditional common rule or practice that has become an intrinsic part of the accepted and expected conduct in a community, and maybe become the kind of "law".

(3) They are the oceans, seas, and waters outside of national jurisdiction.

(4) It is a body of trading principles used by merchants throughout Europe in the medieval period. The system of laws which is adopted by all commercial nations constitutes a part of the law of the land.

5. Choose the suitable words from the box and fill in the blanks.

responsible	beginning with	responsibility	deal with	fulfilled	customs

INCOTERMS are most frequently listed by category. Terms __(1)__ F refer to shipments where the primary cost of shipping is not paid for by the seller. Terms beginning with C __(2)__ shipments where the seller pays for shipping. E-terms occur when a seller's responsibilities are __(3)__ when goods are ready to depart from their facilities. D terms cover shipments where the shipper/seller's __(4)__ ends when the goods arrive at some specific point. Because shipments are moving into a country, D terms usually involve the services of a __(5)__ broker and a freight forwarder. In addition, D terms also deal with the pier or docking charges found at virtually all ports and determining who is __(6)__ for each charge.

6. Translate the following sentences into Chinese.

(1) The definitions of the trade terms under the US *Uniform Commercial Code*① are different from their definitions in English common law, so to avoid controversy, the parties should specify which set of definitions are to apply.

(2) Article 9 of the CISG provides that parties are also bound by practices established between themselves or those widely used in international trade, which they knew or ought to have known.

(3) It has been discussed for a long time, whether the provisions of the CISG exclude the application of parallel national tort law regimes in the case of consequential harm caused by a defect.

(4) It should be established beyond doubt, that an exporter of goods whose principal place of business is in country A does not run different liability risks depending on whether it delivers goods in member state B or member state C.

(5) Given the international nature of trading transactions, the parties to these international contracts have to deal with other legal concerns in addition to the basic legal issues addressed in domestic sales transactions.

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① *Uniform Commercial Code*:《统一商法典》。需要说明的是,尽管其名为"法典",但其不是议会通过"法律",而只是一部由统一州法全国委员会和美国法学会的共同制定的"示范法"(model law)。该法典没有"法律"效力,供各州立法机关参考采用。同时需要说明的,该"示范法"的影响巨大,除路易斯安那州之外的 49 个州、哥伦比亚特区和维尔京岛的立法机构都采纳了这部法典。该"示范法"并为各类商事交易活动提供了优良的模式,被美国国内乃至国际商事社会广泛采用和吸收,实现了商法的国际性。它分为 11 章(Article),以总则(General Provisions)和各分则的形式,对现实中的商事规则和商事惯例进行了归纳和制度层面的架构。它基本消除了各州商法对州际交易因规定不同而造成的障碍,实现了美国商法在州际交易范围内,关于销售、票据、担保、信贷各领域规定的统一。

Lesson 11 Law of the World Trade Organization

第十一课 世界贸易组织法

Ⅰ. Text & Its Translation

1. General Introduction

The World Trade Organization (WTO) is an organization that intends to supervise and liberalize international trade. The organization officially commenced on January 1, 1995 under the *Marrakech Agreement*①, replacing the *General Agreement on Tariffs and Trade* (GATT)②, which commenced in 1948. The organization deals with regulation of trade between participating countries; it provides a framework for negotiating and formalizing trade agreements, and a dispute resolution process aimed at enforcing participants' adher-

Ⅰ. 课文及译文

1. 概述

世界贸易组织(WTO)是一个旨在监督国际贸易,并使其自由化的组织。根据《马拉喀什协议》的规定,世界贸易组织正式于1995年1月1日成立,并取代了于1948年成立的关税与贸易总协定(GATT)。世界贸易组织主要对参与国之间的贸易进行规制。同时,该组织提供了一个对贸易协议进行谈判并使之正式化的平台,也提供了一个旨在强制参加国遵守经本国政府代表签署并经本国议会批准的WTO协议的争端解决程序。世界贸易组织所主要

① *Marrakech Agreement*:《马拉喀什协议》。其全称是 *Marrakech Agreement Establishing the World Trade Organization*。该协议是关贸总协定乌拉圭回合谈判达成的协议,1995年1月1日生效。根据该协议成立了世界贸易组织。它由序言、正文16条和4个附件组成。

② *General Agreement on Tariffs and Trade* (GATT):关税与贸易总协定。GATT是世界贸易组织成立之前,唯一协调和处理国家和地区间关税与贸易政策的多边协定。关税与贸易总协定的宗旨是通过彼此削减关税及其他贸易壁垒,消除国际贸易上的歧视待遇,以便充分利用世界资源,扩大商品生产和交换,保证充分就业以及实际收入和有效需求的增加。关税与贸易总协定自1948年开始临时实施至1995年1月1日世界贸易组织正式成立,拥有47年的历史,截至1994年底,关税与贸易总协定共有128个缔约方。

ence to WTO agreements which are signed by representatives of member governments and ratified① by their parliaments. Most of the issues that the WTO focuses on derive from previous trade negotiations, especially from the Uruguay Round(1986—1994). ②

关注的大多数问题都源于之前的贸易谈判(特别乌拉圭回合谈判)。

The organization is currently endeavoring to persist with a trade negotiation called the Doha Development Agenda(or Doha Round)③, which was launched in 2001 to enhance equitable participation of poorer countries which represent a majority of the world's population. However, the negotiation has been dogged by disagreement between exporters of agricultural bulk commodities and countries with large numbers of subsistence farmers④ on the precise terms of a "special safeguard measure"⑤ to protect farmers from surges in imports. At this time, the future of the Doha Round is uncertain.

目前,世界贸易组织正在努力进行一轮贸易谈判:多哈发展议程(或多哈回合)。该轮谈判于2001年开始,旨在增进占世界大多数人口的贫困国家的公平参与。然而,该轮谈判并非一帆风顺,大宗农产品的出口国与自给农民人口多的国家未能就意在保障农民不受进口猛增影响的"特殊保障措施"问题达成一致。时至当下,多哈回合仍然命运未卜。

The WTO has 153 members, representing more than 97% of the world's population, and 30 observers⑥, most seeking membership.

WTO有153个成员国,代表世界超过97%的人口;还有30个观察员国,其中的大多数在谋求成员国资格。

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① ratify:批准,认可。(1) to confirm by expressing consent, approval, or formal sanction: to ratify a constitutional amendment. (2) to confirm(something done or arranged by an agent or by representatives) by such action.

② round:轮。该术语是指不同地区的很多国家就自由贸易展开的多边谈判。在谈判中,每个国家都有自己的贸易目标。每轮谈判最终都会出台一个将所有协议汇总的"单一协议"。关贸总协定曾经主持七轮多边贸易谈判。

Uruguay Round:乌拉圭回合。在1986—1994年间举行的第七轮全球贸易自由化谈判。这轮谈判的成果之一是成立了世界贸易组织。

③ Doha Development Agenda:多哈发展议程。缩写为DDA。DDA是指多哈世界贸易组织第四次部长级会议上启动的新一轮全球贸易谈判议程。DDA实际上是一个具有开拓性的谈判,世界贸易组织将在经济增长、就业、消除贫困以及促进可持续性发展方面进行谈判,并将发挥更大的作用。

④ subsistence farmers:自给农民;靠自己耕种的农产品生存的农民。

⑤ special safeguard measure:特殊保障措施,与safeguard measure(保障措施)相对,是WTO依据情势变更原则而设置的一种救济手段,其目的是为了弥补成员国由于履行关税减让和取消其他贸易壁垒的义务而产生的损害。

⑥ observer:观察员。WTO的观察员仅向那些同WTO事务有联系的国家(地区)、政府间的国际组织开放。观察员是国家(地区)、国际组织参与其他国际组织事务的主要途径。观察员虽无表决权,但能出席国际组织的有关会议,向派出组织汇报派往组织的活动情况。

The WTO is governed by a Ministerial Conference①, meeting every two years; a General Council②, which implements the Conference's policy decisions and is responsible for day-to-day administration; and a Director-General③, who is appointed by the Ministerial Conference.

WTO的权力机构由部长级会议(每两年举行一次)、总理事会(负责实施部长级会议的政策决议及WTO的日常管理)和总干事(由部长级会议任命)等组成。

2. Principles of the Trading System

The WTO establishes a framework for trade policies; it does not define or specify outcomes. That is, it is concerned with setting the rules of the trade policy games. Five principles are of particular importance in understanding both the pre-1994 GATT and the WTO:

(1) Non-Discrimination. It has two major components: the most favored nation (MFN) rule, and the national treatment policy. Both are embedded in the main WTO rules on goods, services, and intellectual property The MFN rule requires that a WTO member must apply the same conditions on all trade with other WTO members, i. e. "Grant someone a

2. 贸易体系的原则

WTO为贸易政策建立框架,但并不决定或者具体规定结果。换言之,WTO关注的是贸易政策博弈规则的建立。要理解1994年之前的GATT以及之后的WTO,下述5个原则具有特殊的重要性:

(1) 非歧视原则。非歧视原则主要有两个部分:最惠国规则和国民待遇规则。这两个规则根植于WTO关于货物、服务和知识产权的主要规则之中。最惠国规则要求WTO成员必须对其他全部WTO成员适用相同的条件,即"给予某一成员国特殊的优惠,也必须同样地给予其他全部WTO成员

① Ministerial Conference:部长级会议。部长级会议是WTO最高级别的决策机构。The WTO's top level decision-making body is the Ministerial Conference.

② General Council:总理事会。通常由驻日内瓦的大使和代表团团长组成,但有时也包括从成员国首都派来的官员;总理事会每年在日内瓦总部召开几次会议。总理事会也可以"贸易政策审查机构和争端解决机构"的身份而召开会议。Below this is the General Council(normally ambassadors and heads of delegation in Geneva, but sometimes officials sent from members' capitals) which meets several times a year in the Geneva headquarters. The General Council also meets as the Trade Policy Review Body and the Dispute Settlement Body.

③ Director-General:(世界贸易组织的)总干事。由部长级会议任命的总干事负责领导世界贸易组织的秘书处。现任总干事是帕斯卡尔·拉米(Pascal Lamy)。

special favor and you have to do the same for all other WTO members." National treatment means that imported goods should be treated no less favorably than domestically produced goods and was introduced to tackle non-tariff barriers① to trade(e. g. technical standards and security standards discriminating against imported goods).

国”。国民待遇是指进口物品的待遇不应低于国内生产的物品的待遇。国民待遇(规则)的引入是为了消除贸易中的非关税壁垒(例如歧视性地针对进口商品的技术标准和安全标准。)

(2) Reciprocity. It reflects both a desire to limit the scope of free-riding that may arise because of the MFN rule, and a desire to obtain better access to foreign markets. A related point is that for a nation to negotiate, it is necessary that the gain from doing so be greater than the gain available from unilateral liberalization; reciprocal concessions intend to ensure that such gains will materialize.

(2) 互惠原则。互惠原则反映出(GATT 或 WTO)限制最惠国规则可能带来的搭便车范围的意愿和获得更好地进入外国市场的意愿。一个相关的问题是,对于一个参与谈判的国家而言,势必要看到坚持互惠原则可获得的利益大于从单边自由化中所获得的利益;而互惠性让步正可以实现这种利益。

(3) Binding and enforceable commitments. The tariff commitments made by WTO members in a multilateral trade negotiation② and on accession are enumerated in a schedule(list) of concessions③. These schedules establish "ceiling bindings"④: a country can change its bind-

(3) 具有约束力和可强制执行的承诺。WTO 成员国在多边贸易谈判及加入 WTO 之时所作出的关税承诺,都会体现在关税减让表中。关税减让表确立“上限约束”:一个国家只有在与其贸易伙伴谈判之后才可改变其上限约

① non-tariff barriers:非关税壁垒。最为常见的非关税壁垒形式是反倾销措施和反补贴措施。Non-tariff barriers to trade(NTBs) are trade barriers that restrict imports but are not in the usual form of a tariff. Some common examples of NTB's are anti-dumping measures and countervailing duties, which, although they are called "non-tariff" barriers, have the effect of tariffs once they are enacted.

② multilateral trade negotiation:多边贸易谈判。

③ schedule(list) of concessions:关税减让表。

④ ceiling bindings:上限约束;关税水平上限。在 WTO 的框架下,当成员通过消除贸易壁垒来开放其市场时,他们需要保持其承诺。因此,当 WTO 成员通过谈判来取消或者降低其关税时,他们需要承诺去保持其关税减让,并且不得超过此水平。Under the World Trade Organization, when members open their markets through the removal of barriers to trade, they "bind" their commitments. Thus, when they remove or reduce their tariffs through negotiations, they commit to bind the tariff reduction at a fixed level negotiated with their trading partners beyond which tariffs may not be increased.

ings, but only after negotiating with its trading partners, which could mean compensating them for loss of trade. If satisfaction is not obtained, the complaining country may invoke the WTO dispute settlement procedures.

束税率,这就意味着它要对其贸易伙伴的贸易损失进行补偿。如未得到补偿的,提起申诉的国家可以申请启动WTO争端解决程序。

(4) Transparency. The WTO members are required to publish their trade regulations for the review of administrative decisions affecting trade, to respond to requests for information by other members, and to notify changes in trade policies to the WTO. These internal transparency requirements are supplemented and facilitated by periodic country-specific reports(trade policy reviews) through the *Trade Policy Review Mechanism* (*TPRM*)①. The WTO system tries also to improve predictability and stability, discouraging the use of quotas② and other measures used to set limits on quantities of imports.

(4) 透明度原则。WTO成员国需公布其贸易法规,以便于对影响贸易的行政决定的审查,对其他成员国信息需求作出回馈,还可向WTO通告其贸易政策的改变。通过《贸易政策审议机制》发布的定期国别报告(贸易政策审查报告)是对上述国内透明度要求的补充和促进。WTO体系也在努力地提高可预见性和稳定性,不鼓励使用配额和其他限制进口数量的措施。

(5) Safety valves. In specific circumstances, governments are able to restrict trade. There are three types of provisions in this direction: articles allowing for the use of

(5) "安全阀"原则。在特定的条件下,政府可以限制贸易。这方面的条文有三种类型:利用贸易措施实现非经济目标的条款;确保"公平竞争"的条

① *Trade Policy Review Mechanism*:《贸易政策审议机制》(TPRM)是世界贸易组织管辖的一项多边贸易协议。《贸易政策审议机制》规定的审议频率为,在世界贸易市场份额中居前4名的成员每2年审议一次,居前5—20名的成员每4年审议一次,其他成员每6年审议一次,最不发达国家成员可以有更长的审议间隔时间。WTO建立了贸易政策审议机构(TPRB),负责贸易政策审议机制的运作,对各成员的贸易政策进行定期审议。该机制目的在于提高透明度,使各国对其采用的政策有更好的理解,同时也是为了评估这些政策的影响。许多成员国也把审查当作是对自己政策的建设性反馈意见。The *Trade Policy Review Mechanism's* purpose is to improve transparency, to create a greater understanding of the policies that countries are adopting, and to assess their impact. Many members also see the reviews as constructive feedback on their policies.

② quota:配额。此处的"配额"是指"进口配额"。An import quota is a type of protectionist trade restriction that sets a physical limit on the quantity of a good that can be imported into a country in a given period of time. Quotas, like other trade restrictions, are used to benefit the producers of a good in a domestic economy at the expense of all consumers of the good in that economy.

trade measures to attain noneconomic objectives; articles aimed at ensuring "fair competition"; and provisions permitting intervention in trade for economic reasons. Exceptions to the MFN principle also allow for preferential treatment of developing countries, regional free trade areas① and customs unions②.

款;出于经济原因而允许干涉贸易的规定。最惠国原则的例外规定了对发展中国家的优惠待遇、地区性自由贸易区和关税联盟等情形。

3. Agreements of WTO

The WTO oversees about 60 different agreements which have the status of international legal texts. WTO Member countries must sign and ratify all WTO agreements on accession. A discussion of some of the most important agreements follows.

(1) *The Agreement on Agriculture* (AoA) came into effect with the establishment of the WTO at the beginning of 1995. The AoA has three central concepts, or "pillars": domestic support, market access and export subsidies③.

(2) *The General Agreement on Trade in Services* was created to extend the multilateral trading system to service sector. The Agreement entered into force in January 1995.

3. WTO 的协议

WTO 负责监督大约 60 个具有国际法律效力的协议。成员国在加入之时,必须签署并批准全部的 WTO 协议。下面将介绍一些最为重要的协议。

(1)《农业协议》在 WTO 成立之初的 1995 年就已经生效。《农业协议》具有三个核心理念或"支柱":国内支持、市场准入和出口补贴。

(2)《服务贸易总协定》的创设是为了将多边贸易体系扩展至服务业。该协议在 1995 年 1 月生效。

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① free trade area:自由贸易区,简称 FTA。A free trade agreement(FTA) is a trade bloc whose member countries have signed a free trade agreement, which eliminates tariffs, import quotas, and preferences on most(if not all) goods and services traded between them.

② customs union:关税联盟。A customs union is a type of trade bloc which is composed of a free trade area with a common external tariff. The participant countries set up common external trade policy, but in some cases they use different import quotas.

③ subsidies:补助金、补贴。*subsidies*, monetary assistance granted by a government to a person or group in support of an enterprise regarded as being in the public interest. 为政府给予个人或团体以支持被看作是有益于公众的企业的津贴。这里指出口国政府或其他任何公共机构提供的并为接收者(通常为出口企业)带来任何利益的财政资助及任何形式的收入或者价格支持。

(3) *The Agreement on Trade-Related Aspects of Intellectual Property Rights* sets down minimum standards for many forms of intellectual property(IP) regulation. It was negotiated at the end of the Uruguay Round in 1994.

(3)《与贸易有关的知识产权协定》对多种形式的知识产权(IP)的管理制定了最低标准。该协议的谈判时间是在乌拉圭回合临近结束的1994年。

(4) *The Agreement on the Application of Sanitary and Phytosanitary Measures*—also known as the *SPS Agreement* was negotiated during the Uruguay Round, and entered into force with the establishment of the WTO at the beginning of 1995. Under the *SPS agreement*, the WTO sets constraints on members' policies relating to food safety as well as animal and plant health.

(4)《卫生和植物检疫措施实施协议》(也称为《SPS协议》)于乌拉圭回合期间进行谈判,在1995年WTO成立之时开始生效。根据《SPS协议》,WTO对成员国制定的食品安全以及动植物健康的政策作出了限制。

(5) *The Agreement on Technical Barriers to Trade* is an international treaty of the World Trade Organization. The object ensures that technical negotiations and standards, as well as testing and certification procedures, do not create unnecessary obstacles to trade.

(5)《技术性贸易壁垒协定》是世界贸易组织的一个国际条约。其目标在于确保技术谈判和标准以及检测和验证程序不会对贸易产生不必要的障碍。

(6) *The Agreement on Customs Valuation*, formally known as the *Agreement on Implementation of Article Ⅶ of GATT*, prescribes methods of customs valuation that members are to follow. Chiefly, it adopts the "transaction value" approach.

(6)《海关估价协议》(正式名称是《关于实施〈关税与贸易总协定〉第7条的协定》)规定了成员国需遵守的海关估价方法。它所采用的主要是"实际成交价格"的方法。

4. Dispute Settlement

4. 争议解决

Dispute settlement① is the central pillar of

争端解决是多边贸易体制的核心

① dispute settlement:争端解决。

the multilateral trading system, and the WTO's unique contribution to the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The dispute settlement system of WTO is based on clearly-defined rules, with timetables for completing a case.

支柱，同时也是 WTO 对全球经济稳定的独特贡献。如果没有解决争端的手段，一个以规则为基础的体制的效力就会下降，因为它的规则是不能被强制执行的。WTO 程序尤其强调依靠法律进行治理，同时，这也使得贸易体系更加可靠，更具可预见性。WTO 的争端解决体系建立在明确定义的规则之上，并且对完成案件裁决规定了时间期限。

Stage and Time①	
60 days	Consultations, mediation, etc
45 days	Panel set up and panel lists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
Total = 1 year	**(without appeal)**
60—90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
Total = 1y 3m	**(with appeal)**

However, the point is not to pass judgment. The priority is to settle disputes, through consultations if possible. By January 2008, only about 136 of the nearly 369 cases had reached the full panel process. Most of the rest have either been notified as settled "out of court" or remain in a prolonged consultation phase②—some since 1995.

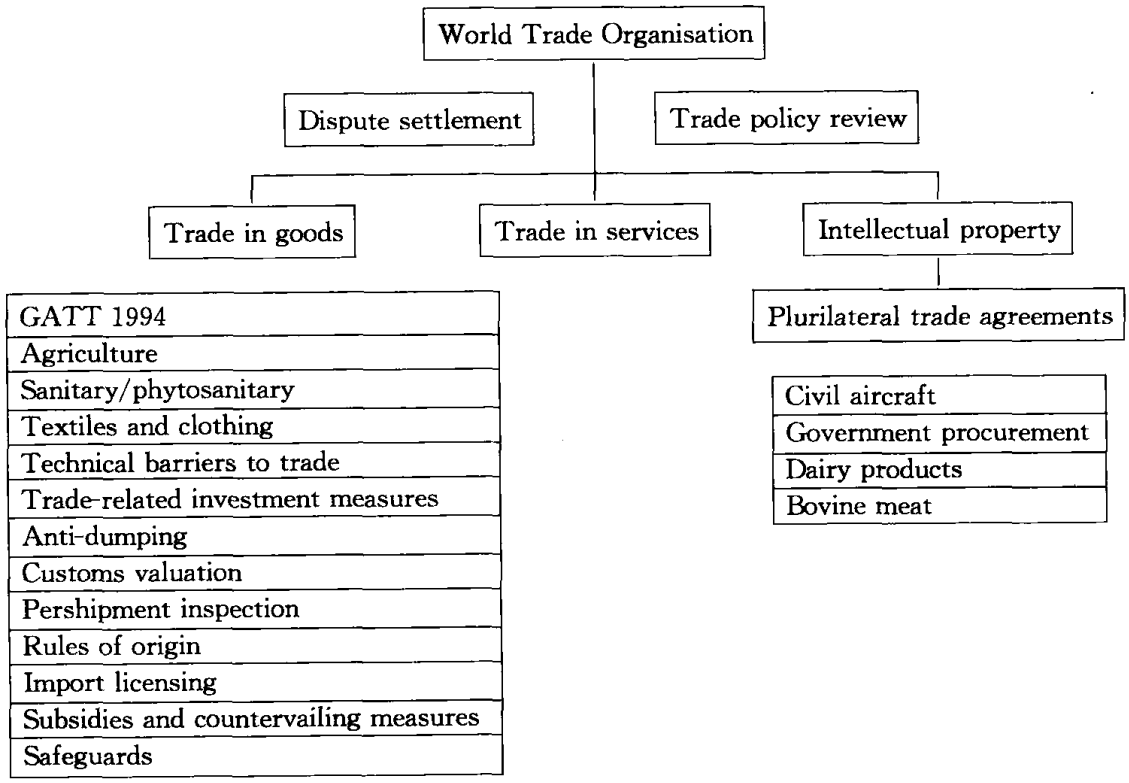
然而，(争端解决机制)的关键并不在于裁决的作出。通过磋商来解决问题才是优先的选择。截至 2008 年 1 月，在接近 369 件案件中，只有大约 136 件完成了整个专家组程序。其余案件大多数或已通过"庭外"和解得以解决或仍处于旷日持久的磋商阶段——一些案件甚至从 1995 年至今仍在进行磋商。

① 需要说明的是，下述表格中的时间是并不是固定不变的。此外，争端的当事方可以选择从任何一个阶段开始其争端解决程序。These approximate periods for each stage of a dispute settlement procedure are target figures — the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.

② consultation phase：磋商阶段。

If the courts find themselves handling an increasing number of criminal cases, does that mean law and order is breaking down? Not necessarily. Sometimes it means that people have more faith in the courts and the rule of law. They are turning to the courts instead of taking the law into their own hands. For the most part, that is what is happening in the WTO. No one likes to see countries quarrel. But if there are going to be trade disputes anyway, it is healthier that the cases are handled according to internationally agreed rules. There are strong grounds for arguing that the increasing number of disputes is simply the result of expanding world trade and the stricter rules negotiated in the Uruguay Round; and that the fact that more are coming to the WTO reflects a growing faith in the system.

如果法院发现它们所处理的刑事案件在不断增加，是否意味着法律和秩序已经被破坏？并不一定。有时候，这也意味着人们更加信任法庭和法治。人们向法院寻求救济，而非通过私了来解决问题。WTO之中的情形在很大程度上就是这样。没有人希望看到国与国之间的争吵。但是，如果发生贸易争端，根据国际普遍接受的规则来处理争议无疑是更为合理的方式。我们有足够的理由相信，不断增多的争议只不过是世界贸易扩张以及乌拉圭回合中形成的更加严格的规则的结果；我们也有足够的理由相信，更多案件进入WTO的事实反映了人们对这个体系的信心在不断增长。



(The organizational structure of the WTO)

Ⅱ. GLOSSARY

Ⅱ. 词汇表

Marrakech Agreement《马拉喀什协议》

General Agreement on Tariffs and Trade(GATT)《关税与贸易总协定》

ratify 批准;认可

Uruguay Round 乌拉圭回合

Doha Development Agenda(DDA) 多哈发展议程

special safeguard measure 特殊保障措施

safeguard measure 保障措施

observer 观察员国

Ministerial Conference 部长级会议

General Council 总理事会

Director-General(世界贸易组织的)总干事

non-tariff barriers 非关税壁垒

multilateral trade negotiation 多边贸易谈判

schedule(list) of concessions 关税减让表

ceiling bindings 关税水平上限

Trade Policy Review Mechanism《贸易政策审议机制》

quota 配额

free trade area 自由贸易区

customs union 关税联盟

subsidies 补助金、补贴

dispute settlement 争端解决

non-discrimination 非歧视原则

reciprocity 互惠原则

transparency 透明度原则

safety valves"安全阀"原则

The Agreement on Agriculture《农业协议》

The General Agreement on Trade in Services《服务贸易总协定》

The Agreement on Trade-Related Aspects of Intellectual Property Rights《与贸易有关的知识产权协定》

The Agreement on the Application of Sanitary and Phytosanitary Measures (*SPS Agreement*)《卫生和植物检疫措施实施协议》(《SPS 协议》)

The Agreement on Technical Barriers to Trade《技术性贸易壁垒协定》

The Agreement on Customs Valuation《海关估价协议》

Ⅲ. SUPPLEMENTARY TEXT

Ⅲ. 补充资料

Disputes in the WTO are essentially about broken promises. WTO members have agreed that if they believe fellow-members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally. That means abiding by the agreed procedures, and respecting judgments.

A dispute arises when one country adopts a trade policy measure or takes some action that one or more fellow-WTO members considers to be breaking the WTO agreements, or to be a failure to live up to obligations. A third group of countries can declare that they have an interest in the case and enjoy some rights.

A procedure for settling disputes existed under the old GATT, but it had no fixed timetables, rulings were easier to block, and many cases dragged on for a long time inconclusively. The Uruguay Round agreement introduced a more structured process with more clearly defined stages in the procedure. It introduced greater discipline for the length of time a case should take to be settled, with flexible deadlines set in various stages of the procedure. The agreement emphasizes that prompt settlement is essential if the WTO is to function effectively. It sets out in considerable detail the procedures and the timetable to be followed in resolving disputes. If a case runs its full course to a first ruling, it should not normally take more than about one year—15 months if the case is appealed①. The

① appeal:上诉。In law, an appeal is a process for requesting a formal change to an official decision.

agreed time limits are flexible, and if the case is considered urgent(e. g. if perishable goods are involved), it is accelerated as much as possible.

The Uruguay Round agreement also made it impossible for the country losing a case to block the adoption of the ruling. Under the previous GATT procedure, rulings could only be adopted by consensus, meaning that a single objection could block the ruling. Now, rulings are automatically adopted unless there is a consensus to reject a ruling—any country wanting to block a ruling has to persuade all other WTO members(including its adversary in the case) to share its view.

Although much of the procedure does resemble a court or tribunal, the preferred solution is for the countries concerned to discuss their problems and settle the dispute by themselves. The first stage is therefore consultations between the governments concerned, and even when the case has progressed to other stages, consultation and mediation① are still always possible.

Ⅳ. EXERCISES

Ⅳ. 练习

1. Answer the following questions.

(1) What's the difference between GATT and WTO?

(2) Please give and explain briefly the principles of world trading system.

(3) What's the aim of *Trade Policy Review Mechanism*?

(4) What is the role of dispute settlement system of WTO?

(5) Please describe the structure of WTO.

2. Translate the following terms into English.

(1) 争端解决

(2) 自由贸易区

(3) 特殊保障措施

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① mediation:调解。Mediation, as used in law, is a form of alternative dispute resolution(ADR), is a way of resolving disputes between two or more parties.

(4) 非关税壁垒

(5) 非歧视原则

(6) 多边贸易谈判

(7) 贸易政策审查机制

3. Translate the following terms into Chinese.

(1) international economic law

(2) *General Agreement on Tariffs and Trade* (GATT) Uruguay Round

(3) Director-General

(4) safety valves

(5) *The Agreement on Trade-Related Aspects of Intellectual Property Rights*

(6) *The General Agreement on Trade in Services*

(7) *The Agreement on Technical Barriers to Trade*

(8) *The Agreement on Customs Valuation*

4. Match the given terms with the proper explanation.

A. trade secret

B. Dispute Settlement Understanding

C. intellectual property

D. non-tariff measures

E. subsidy

F. International economic law

(1) It is an agreement of WTO, which is a central element in providing security and predictability to the multilateral trading system.

(2) Trade barriers restrict imports but are not in the usual form of a tariff, such as anti-dumping measures and countervailing duties.

(3) A term refers to a number of distinct types of creations of the mind for which a set of exclusive rights are recognized, including copyrights, trademarks, patents, industrial design rights and trade secrets.

(4) It is a form of financial assistance paid to a business or economic sector.

(5) It is a formula, practice, process, design, instrument, pattern, or compilation of information which is not generally known or reasonably ascertainable, by which a business can obtain an economic advantage over competitors or customers.

(6) It refers to that normative framework which governs mainly the international economic relations between states, and indirectly and consequentially those between individuals.

5. Choose the suitable words from the box and fill in the blanks.

the Uruguay Round	non-tariff trade barriers	evade	impact	governed

Non-tariff measures have risen sharply after the WTO rules led to a very significant reduction in tariff use. Some __(1)__ are expressly permitted in very limited circumstances, when they are deemed necessary to protect health, safety, or sanitation, or to protect natural resources. In other forms, they are criticized as a means to __(2)__ free trade rules. Many non-tariff measures are __(3)__ by WTO agreements, which originated in __(4)__ (the TBT Agreement, SPS Measures Agreement, the Agreement on Textiles and Clothing), as well as GATT articles. Some of non-tariff measures are not directly related to foreign economic regulations, but they have a significant __(5)__ on foreign-economic activity between countries.

6. Translate the following sentences into Chinese.

(1) Membership in GATT gave countries access to foreign markets but imposed upon them the obligation to keep their own markets open and to reduce trade barriers through the multilateral GATT negotiation.

(2) The WTO, for the first time, offers an internationally accepted neutral and non-confrontational venue for countries to negotiate on a multi-lateral basis for trade activities.

(3) The dispute settlement services offered by the WTO to member countries offers, in theory, an opportunity for disputes to be adjudicated in an open, fair and objective manner therefore allowing countries to conclude disputes in a peaceful and reasonable fashion.

(4) By opening its country to trade China has created closer links with the rest of the world, creating personal as well as business relationships between Chinese and people overseas.

(5) Under the WTO agreements, countries cannot normally discriminate between their trading partners. Grant someone a special favor(such as a lower customs duty rate for one of their products) and you have to do the same for all other

WTO members.

(6) The WTO's intellectual property agreement amounts to rules for trade and investment in ideas and creativity. The rules state how copyrights, patents, trademarks, geographical names used to identify products, industrial designs, integrated circuit, layout-designs and undisclosed information such as trade secrets should be protected when trade is involved.

(7) The Trade Policy Review Mechanism's purpose is to improve transparency, to create a greater understanding of the policies that countries are adopting, and to assess their impact. Many members also see the reviews as constructive feedback on their policies.

(8) Since 1995, the updated GATT has become the WTO's umbrella agreement① for trade in goods. It has annexes dealing with specific sectors such as agriculture and textiles, and with specific issues such as state trading, product standards, subsidies and actions taken against dumping.

(9) The WTO's top level decision-making body is the Ministerial Conference which meets at least once every two years. Below this is the General Council(normally ambassadors and heads of delegation in Geneva, but sometimes officials sent from members' capitals) which meets several times a year in the Geneva headquarters. The General Council also meets as the Trade Policy Review Body and the Dispute Settlement Body.

(10) The Doha Development Agenda(DDA) adds negotiations and other work on non-agricultural tariffs, trade and environment, WTO rules such as anti-dumping and subsidies②, investment, competition policy, trade facilitation, transparency in government procurement, intellectual property, and a range of issues raised by developing countries as difficulties they face in implementing the present WTO agreements.

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① umbrella agreement:总括协定、一揽子协定。an agreement covering rules of several aspects 指 WTO 货物贸易多边协议,该协议项下包括协议的总体解释说明、1994 年的关贸总协定、农业协议、纺织品与服装协议等许多方面。

② subsidies:补助金、补贴;*subsidies*, monetary assistance granted by a government to a person or group in support of an enterprise regarded as being in the public interest。为政府给予个人或团体以支持被看作是有益于公众的企业的津贴。这里指出口国政府或其他任何公共机构提供的并为接收者(通常为出口企业)带来任何利益的财政资助及任何形式的收入或者价格支持。

下　编

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第一课　法律翻译概述

Lesson 1　What Is Legal Translation About

随着经济全球化的进程，世界各国在政治、经济、文化等领域的交往盛况空前。在纷繁复杂的交往过程中，法律扮演着重要的角色：一方面，法律要求国际交往中的各方当事人要遵守其规定；另一方面，法律也为国际交往的顺利进行提供保障。为了深刻理解并严格遵守各国的不同法律制度，对各国法律进行翻译就是一个不可或缺的过程。

作为翻译的一个专门领域，法律翻译在我国扮演着越来越重要的角色。人类历史的进步在很大程度上归功于每个社会都能从别的社会文化中吸取于己有利的养料并融入本国文化。法律文化自然是其中的一个重要组成部分。法律翻译对优秀法律文化的传播的贡献是不可否认的。近代以来，我国上至官方政府、下至民间学者都对外国法律、法学作品进行了大量的译介。法律翻译不仅推动了我国的法制近代化进程，而且对我国译学的发展也作出了积极的贡献。①

在国际交流日益频繁的今天，法律翻译的重要性更是不言而喻的：在国家的立法活动中，对外国法律的翻译和研究几乎成为我国立法活动的重要组成部分；在国际法领域，不论是双边或多边条约，往往是在使用不同语言的国家之间缔结的，特别是在各国使用本国文字缔结条约的权利被使用公认的外交语言（如中世纪时的拉丁文，现代的英语、法语、汉语、俄语、西班牙语、阿拉伯语）②取代以来，语言文字之间的相互翻译成为条约、公约的缔结和国际法遵守中不可或缺的组成部分；在国际贸易中，对交易对象国法律的熟悉，成为保证交易顺利进行的重要条件，甚至在国际留学中（比如到美国去读 LLM 学位），在国内系统地学习

① 屈文生，石伟："论我国近代法律翻译的几个时期"，载《上海翻译》2007 年第 4 期。

② 还有一种提法是"关键外语"（critical languages）。语言没有好坏之别，确有强弱之差，所以有学者根据语言使用的领域把世界上的语言分为边缘语言（peripheral languages）、中心语言（central languages）、核心语言（supercentral languages）和超核心语言（hypercentral languages）。核心语言共有十二种：阿拉伯语、汉语、英语、法语、德语、印地语、日语、马来语、葡萄牙语、俄语、西班牙语和斯瓦希里语；联合国工作语言有六种：英语、法语、俄语、西班牙语、汉语和阿拉伯语；超核心语言只有英语一种。另外，全球作为母语使用人数最多的前十种语言：汉语、西班牙语、英语、印地语（乌尔都语）、阿拉伯语、孟加拉语、葡萄牙语、俄语、日语和德语。参见张治国："中国的关键外语探讨"，载《外语教学与研究》2011 年第 1 期。

留学对象国的被翻译成中文的教材，也对日后的海外留学大有裨益。

一、翻译与法律翻译

简而言之，翻译，是指在准确通顺的基础上，把一种语言信息转变成另一种语言信息的行为，就是“换易言语使相解也”。[①]就其功能而言，翻译实际上是一种特殊形式的信息传播。整个翻译活动实际上表现为一种社会信息的传递，表现为传播者、传播渠道、受者之间的一系列互动关系。

与所有的翻译一样，法律翻译的译文要忠实原文的实质内容，还要尽量流畅通顺。同时，法律翻译又有其自身的特色。Susan Sarcevic 认为，法律翻译并不是用目的语中的概念和制度来替换源语法律体系中的概念和制度的简单过程，而是一种法律转换(legal transfer)和语言转换(language transfer)同时进行的双重工作(double operation)。[②]法律翻译同时涉足三个领域，即法律学界、语言学界和翻译界。因此，法律翻译对译者要求十分苛刻。例如，在英汉、汉英法律翻译中，译者除了要掌握一定程度的中国法律以及普通法知识之外，还要擅长法律英语这一特殊用途英语。法律翻译通常包括的内容很多，如立法性文件的翻译，合同翻译，诉讼类文书翻译，法庭口译，法学论文翻译，涉外公证文书翻译，判例翻译等等。

具体而言，法律翻译具有以下不同于普通翻译的特点：

(一) 从译者的角度而言，译者要具备相当的法律知识，尤其是英美法的相关知识。

世界上有两个主要的法律体系，一个英美法系或普通法法系(common law system)，另一个是大陆法系或民法法系(civil law system)。而法律英语主要反映的是英语国家，即普通法系国家的法律文化，这就要求译者对普通法系与大陆法系基本法律框架、法律制度、法律概念及其差异要有相当的了解，否则就会犯下低级错误。现列举几个例子：

1. consideration

这个词语是英语中常见的单词，其意思为“考虑”。但是，在英美合同法，这是一个含义丰富的术语，是合同成立的基础。我国法律界一般将其翻译为“对价”或“约因”。比如在下面这个简单的句子中：If A signs a contract to buy a car from B for $5,000, A's consideration is the $5,000, and B's consideration is the car. 如果译者不知道该术语在法律中的特

① 贾公彦：《义疏》，转引自冯国华，吴群：“论翻译的原则”，载《中国翻译》，2001 年第 6 期。

② Susan Sarcevic: *New Approach to Legal Translation*, Kluwer Law International, 1997, p. 147. 参见屈文生：“论 Susan Sarcevic 的法律翻译观”，载《外语研究》2009 年第 3 期。

殊含义，而仅仅根据其在普通英语中的含义，将其翻译为“考虑”，其译文就要贻笑大方了。

2. cross-examination/cross-examine

这是英美诉讼制度中的常见术语，英美法系诉讼中的一项重要制度，是有关双方当事人对证人交叉盘问的一整套规范。一般翻译为“交叉质询、交叉询问”。在英美法系国家的庭审中，不管是刑事案件还是民事案件，在通常的诉讼程序，只要有证人出庭，就有可能会接受交叉询问。由于交叉询问是一种专业很强的法庭技术，所以一般对证人交叉询问都是由双方律师进行。比如，在下面这个简单的句子中：The defense may cross-examine the prosecution witnesses. The prosecutor cross-examines the defense witnesses. 如果译者仅根据字面的意思，将 cross-examine 翻译为“十字考试”，这就与原意相距甚远了。

3. negotiable instruments

这个术语是英美票据法中的常见术语，也是国际贸易中的常见术语，一般翻译为“可转让票据”或“可流通票据”，比如支票（check）、汇票（bill of exchange）和本票（promissory note）等。如果在国际商事合同中，仅根据字面意思将其翻译为“谈判工具”，这可能会对交易双方产生严重的后果。同理，如果将 negotiating bank 翻译为“谈判银行”，也是不正确的。一般将该术语翻译为“议付银行”，即购买或贴现汇票的银行。

以上仅举三个例子来说明法律背景知识对于译者的重要性，在其他课文中还有更多的例子，此处不再赘述。

总而言之，法律翻译工作对译者的法律知识有着严格的要求，需要译者具有深厚的法学功底、渊博的法学知识。这是因为各国法律语言的形成和发展都有其深刻、独特的社会政治、经济、文化背景，植根于本民族的历史、传统、风俗、信仰之中，从而要求译者不仅要熟悉和通晓本国的法律文化和法律制度，而且还要了解和掌握与自己所熟悉的迥然不同的法律文化和法律制度，从而使译作达到完美程度。如果遇到无法在译文语言中找到与原文术语相对应的词语时，译者还要使用注释、变通、创意等方法，借助意译或照录原文再加以解释或定义，以求译文的读者能够理解原文所表达的意思和术语的真实含义。

（二）从翻译的材料而言，法律翻译材料文本的语法结构往往较为复杂，并且使用一些特定的词语。

由于法律文本的主要目的是传递信息陈述事实，分析原理，而不是像文学作品那样抒发感情，引起遐想。所以，法律文本往往使用正式文体，书面语体多于口语体。在正式的法律文本中，为了对某一事项进行明确规定和详细说明，往往对中心词进行各种限定。由于对某一法律概念成立的条件限定很多，所以，法律英语的长句居多，短句较少，语法结构往往比较复杂，一个句子中往往会出现多个并列的成分，或者出现多个从句。而且句子结构严谨有

序，语言规范准确。长句结构中各种从句使用频率较高，语序排列固定；非谓语动词短语作定语的多，还常用来代替从句，使得句子简洁。

以《联合国一九七八年海上货物运输公约》(*United Nation Convention on the Carriage of Goods by Sea, 1978*)[①]第 16 条第 1 款有关"提单"的规定为例，该句的英语词汇就有 102 个：

If the bill of lading[②] contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where a shipped bill of lading issues, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person must insert in the bill of lading a reservation specifying these inaccuracies, grounds of suspicion of the absence of reasonable means of checkin.

在这句话中，包括大量的从句和修饰成分：两个并列的由 if 引导的状语从句；在第一个 if 引导的状语从句中，既有现在分词(concerning、issuing)和过去分词(taken、loaded)引导的定语成分，还有一个定语从句(which 引导)和状语从句(where 引导)；主句为 the carrier or such other person must . . . ，在主句中，还有 specifying 引导的修饰成分。

这个条文可译为：**如果承运人或代其签发提单的其他人确知或者有合理的根据怀疑提单所载有关货物的品类、主要标志、包数或件数、重量或数量等项目没有准确地表示实际接管的货物，或在签发"已装船"提单的情况下，没有准确地表示实际装船的货物，或者他无适当的方法来核对这些项目，则承运人或该其他人必须在提单上作出保留：注明不符之处、怀疑的根据或无适当的核对方法。**

除了在正式的法律文本中经常出现这种长句之外，在国际商事合同中，语法结构复杂的长句也比比皆是。例如：

Party A stops to deliver goods if the other party suspends payment to its creditors or generally is unable to pay its debts as and when they fall due or suffers the making of an administration order or has a receiver[③](including an administrative receiver) or manager

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① 简称"汉堡规则"(Hamburg Rules, HBR)。

② bill of lading：提单。简称 B/L。A bill of lading is a document issued by a carrier to a shipper, acknowledging that specified goods have been received on board as cargo for conveyance to a named place for delivery to the consignee who is usually identified.

③ receiver：破产财产管理人。A person appointed by a court, or by a corporation or other person, for the protection or collection of property. Usually the receiver administers the property of a bankrupt, or property that is subject of litigation, pending the outcome of a lawsuit.

appointed over the whole or any part of its assets or if any order is made or a resolution passed for its winding up(except for the purpose of amalgamation① or reconstruction②) or if it enters into any composition or arrangement with its creditors or calls a meeting of its creditors with intent to enter into such an arrangement or composition or if it ceases to carry on business or the other party suffers the occurrence of any similar event.

这个合同条款共127个单词，主句为Party A stops to deliver goods，其他内容都是并列的状语从句，这些从句中又有大量的并列成分和修饰成分。

该合同条款可译为：**甲方当事人(可依下列情形)停止交货：对方中止向其债权人付款或对其到期的债务无法支付或已接到有关部门对其发布的行政命令或其全部或部分财产已被破产财产管理人(包括行政管理人)、新任破产财务管理人接管的；(法院)已对对方做出了停业清算命令或对方已有了停业清算决议(因合并或重组的停业清算除外)的；对方与其债权人达成停业清算协议或安排或召开以达成停业清算协议或安排目的之债权人会议的；对方终止营业或发生类似情况的。**

除了语法结构的复杂性之外，法律文件中常有些平常不大用的词语，例如条约和合同的序言或前言部分，常有以whereas(鉴于)开头的几段，文件的最后则用in witness of(以资证明)等词。文件中常用herein，hereinafter，hereto，hereunder，therein，thereunder等词。例如：

The undersigned hereby agrees that the new products whereto this trade name is more appropriate are made in China.(签署人/本人特此同意在中国生产与本商标名更相称的新产品。)

又如：

In consideration of the mutual promises，covenants and conditions hereinafter set forth，the two parties of the contract hereto agree as follows.(鉴于以下确立的相互允诺，约定和条件，合同双方在此达成如下协议。)

(三)就翻译的效果而言，法律翻译尤其要求准确性。

法律文本所表述的是一种规范，是相关当事人的行为规范，同时也是司法人员的裁决依据。在立法活动中，立法者要通过语言文字的准确运用，体现国家的意志。准确、具体的法律规定可以使司法人员和全体公民能清楚地了解到作为一个国家的公民的权利和义务，以

① amalgamation：合并。In general，amalgamation is the process of combining or uniting multiple entities into one form.

② reconstruction：重组。Reconstruction in law refers typically to the transfer of a company's (or several companies') business to a new company.

及违反法律规定的后果。在司法活动中，司法工作的每一个环节都直接关系到案件(尤其是刑事案件)当事人的命运，直接关系到当事人有罪、无罪、轻罪、重罪，关系到人一生的荣辱祸福。司法语言更要客观、准确，否则就可能失之毫厘，谬之千里，从而产生难以想象的后果。在国际商事活动中，一个合同往往涉及高额的资金，如果语言文字不准确，轻则导致交易机会的丧失，重则导致企业的破产。因此，法律语言的规范性特征要求一个译者在翻译法律规则时，要保持法律规则的逻辑结构的严密性。在遣词用语上也要符合法学书面语言的习惯。

比如，《美国宪法》第1条规定：

No Person shall be a Representative① who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

在该条中，对众议员的条件进行了严格界定：age of twenty five Years, seven Years a Citizen of United States, Inhabitant of that State。在翻译的过程中，这些限定性的条件要重点关注，准确翻译：**凡年龄未满二十五岁，取得美利坚合众国公民资格未满七年，于某州当选而并非该州居民者，不得任众议员。**

又如，合同的条款可能会做出下述规定：

This obligation shall include, without limitation, the implementation of appropriate technical and organisational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access and against all other unlawful forms of processing.

在本合同条款中，为了对"obligation"进行全面规定，使用"without limitation"进行说明，并在本条款的最后，使用一个"兜底"规定："all other unlawful forms of processing"，以尽可能全面地对未来可能发生的情况进行规定。本句可译为：**本义务应包括，但不限于，采取适当的技术措施和组织措施保护个人数据不受意外或非法破坏或意外丢失、篡改、未经授权的披露、进入及其他任何非法形式的处理。**

再比如，"当怀特先生死亡时，其住所地是英格兰"。这个简单的中文句子不能译为：When Mr. White died, he lived in England. 因为在法律中，"住所地"是一个具有特定含义的术语，与"居所"、"居住"等术语的含义不同，影响到遗产的分配，其对应的英文术语是：domicile。本句应当翻译成：When Mr. White died, he was domiciled in England.

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① Representative：该词在此处的意思是美国众议院的众议员。

二、法律翻译工具书

在进行法律英语翻译时，一本内容充实、权威的辞典是不可或缺的利器。与之相反，如果辞典的内容存在缺点，则可能对翻译工作造成障碍。一部好的法律翻译工具书起码要具足以下标准：首先，释义必须准确，即其给出的释义词必须能够完全而准确地再现被解释词的词汇含义、语法意义、语体意义、语用意义等。其次，法律辞典应在词条的涵盖上具有广泛性，应将常见的词收集在内，以便查找使用。再次，法律词典最好能对近义词进行比较，以便译者选择使用。最后，法律词典（倘若是英汉或汉英双语词典的话）中的释义应符合汉语的表达习惯。

现在市面上流通着多种英汉双语的法律辞典，比如，法律出版社出版的《元照英美法辞典》、《牛津法律大辞典》、《简明英汉法律词典 》及上海出版社出的兰登书屋的《袖珍英汉法律词典》等等。其中，《元照英美法辞典》全书共 470 万字，所收词条达 5.1 万多个，1 500 多页，该词典得到了大陆、台湾两岸法学界的高度评价，也是从事法律翻译人员的必备辞典。①

还有一些英文原版的法律辞典，比如《布莱克法律词典》(*Black's Law Dictionary*（已出到第 9 版），以及法律出版社引进的《朗文法律辞典》等等。其中，*Black's Law Dictionary* 是内容最为全面，也是最为权威的一本。该辞典收录了超过 43 000 条解释和 3 000 条引文，以及 5 300 多条单词的不同拼写方式和同义词，可以称得上是法律术语的一部大百科全书。

以第 8 版为例，它主要有如下特征：第一，内容更为新颖，词典收录了一些新的法律术语。例如：denial of service attack（拒绝服务攻击）、same-sex marriage（同性婚姻）、cyber piracy（网络侵权；网路盗版）、veggie-libel law（蔬食诽谤）等等。第二，词条的释义更为准确。许多词条之释义援引了西部出版公司众多重要的、权威的著作；此外，词典中的许多词条的释义还与《美国法大全续编》(*Corpus Juris Secundum*）互证。第三，词典新增了大量法律俚语（legal slang）。“smurf”（蓝精灵）②就是一例，smurf 是指“参与洗钱运作的一种人，他们进行 1 万美金以下的交易（以规避法律）”。主编在词典中还指出这一俚语最初源自卡

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① 关于该辞典的编纂，《南方周末》曾在“法律精英的命运与法治的悲怆”（这篇文章是《被遗忘 30 年的法律精英》、《他们被忽视的代价》、《我们在传承》三篇文章的集录，个别文字有变动。作者为万静波、吴晨光，谢春雷，可以从互联网直接搜索获得）一文中详细介绍了这部辞典背后的故事，读来让人唏嘘不已。

② 通过银行洗钱是最常用的一种洗钱方法。针对这种情况，不少国家都规定了现金交易报告制度，比如美国《1970 年银行保密法》规定，超过 1 万美元的现金交易应向金融监管部门报告，不过银行间的资金转移无须报告。被称为 smurf 的人，就是指专门奔走于各银行之间，进行交易额低于需要报告的水平（比如说 1 万美元）的现金交易之人。参见李伟：“洗钱方法研究”，《山东公安专科学校学报》2001 年第 5 期。

通片《蓝色小精灵》中的同名形象。第四，词典的释义更加简洁。主编的释义现代、简洁，但他通常仍会从历史的视角出发，在术语运用的具体语境下给出词语的意义。这种解释在大多数情形下，都极具启发性。①

《布莱克法律词典》是从事法律翻译人员的必备辞典，可以和《元照英美法辞典》对照使用。

在法律英语中，存在着大量的拉丁语法律术语和法律格言，这些法律术语和法律格言言简意赅，内涵丰富。准确地把握这些拉丁语术语和格言，对于译者而言是非常重要的。法律出版社于2009年出版的《拉丁语法律用语和法律格言词典》收录了五千余条拉丁语法律名词、法律专业术语，同时还收录了近一千条常见的拉丁语法律格言、谚语、名言、警句等。该辞典是一部内容全面、资料翔实的参考工具书。

互联网在全球各地已形成了相当的规模，影响已涉及人们的社会生活、休闲娱乐、科学研究等诸多方面。对从事法律翻译的人来说，互联网为其提供了一个极其庞大的信息库/数据库，因此大大促进了他们的翻译工作。互联网上的数据库有的是免费的，有的是收费的。与免费的数据库相比，收费数据库的内容相对全面和权威，此类数据库主要有：

第一，Westlaw法律数据库。Westlaw法律数据库发布于1975年，该数据库具有32 000多个子数据库，内容涵盖美国、英国、澳大利亚、加拿大、欧盟以及我国香港等国家和地区，最长可回溯到18世纪的有关材料。通过该数据库可以获取相关学者的专著，美国、英国、澳大利亚的判例法、法学论文等，还可以通过该数据库使用《布莱克法律字典》。

第二，LexisNexis数据库。LexisNexis(律商联讯)可提供世界范围内的报纸、杂志、商业期刊、行业新闻、税务和财会信息、金融数据、公共记录、立法档案、企业及其管理者的信息。就法律类的信息而言，该数据库可以提供最新的专家评论，美国与英国的立法历史与政治信息，美国、英国、法国、意大利等国的核心法学期刊，美国、欧盟、英国、澳大利亚、加拿大、中国香港地区、马来西亚、新西兰、南非等国家和地区的判例以及立法，等等。

第三，HeinOnLine数据库。该数据库是美国著名的法律全文数据库，涵盖全球最具权威性的近1 300种法律研究期刊，同时包含675卷国际法领域权威巨著，100 000多个案例，1 000多部精品法学学术专著和美国联邦政府报告全文等。该数据库是一个回溯、全文法律数据库，可以回溯到创刊号。

当然，还有其他的收费数据库，这里就不再一一介绍了。很多大学的图书馆都会购买上述数据库，或者选择性地购买其中的部分。

从获取资料的角度，免费的互联网提供的资源可以分成以下几类：

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① 关于该书的更为详细的内容，感兴趣的读者可以参见：屈文生："《布莱克法律词典》述评：历史与现状——兼论词典与美国最高法院表现出的'文本主义'解释方法"，载《比较法研究》2009年第1期。

第一，综合性的网站。许多“百科全书”式的综合性网站提供了大量的免费信息，比如维基英文网(www. wikipedia. org)、answers. com 等本身就是巨大的免费数据库，提供了丰富的信息，相当一部分资料来源比较可靠，并提供了可以参照的脚注。

第二，世界各个大学、科研机构等的网站。随着互联网的发展，各大学和科研机构都已经建立了自己的网站，并将其学术资源电子化和网络化，供读者免费浏览，比如美国康奈尔大学的网站(www. cornell. edu)就提供了有关美国法律的大量信息，包括美国联邦和各州的制定法、联邦和州法院的案例等等。

第三，各政府机构和国际组织的官方网站。比如，美国联邦最高法院(www. supreme-court. gov)、美国众议院网站(www. house. gov)、美国参议院网站(www. senate. gov)、世界贸易组织网站(www. wto. org)等网站都提供了关于该机构或组织的详细信息。

第四，网络化的辞典。与传统的纸质辞典及年轻人中比较流行的电子词典不同，网络辞典的内容更加丰富、更新速度更快、受众群更广。内容比较全面的法律网络辞典网站是 http://dictionary. law. com，这一个全英文的网站；中文网站是 www. cndict. com。这些网站的出现是对传统纸质辞典的巨大挑战。

随着互联网的发展，网络上能够获得的资源和信息会不断增多，从事法律翻译的人员要充分利用网络资源，完善自己的信息和知识体系，从而更好地提高译文的质量。

练　　习

1. 根据课文回答问题。

(1) 请简述法律翻译的作用。

(2) 请举例说明法律翻译的特点。

(3) 请列举你常用的法律类辞典(包括中文、中英双语及英文)，并对其进行评价。

(4) 请列举你常用的法律类网站(包括国内和国外)，并对其进行评价。

2. 请为下列术语选择合适的英文释义。

A. bill of exchange

B. consideration

C. domicile

D. cross-examination

E. negotiable instrument

(1) It is the central concept in the common law of contracts and is required, in

most cases, for a contract to be enforceable. It is the price one pays for another's promise.

(2) In law, it is the interrogation of a witness called by one's opponent.

(3) It is a document guaranteeing the payment of a specific amount of money, either on demand, or at a set time.

(4) It is a written order by the drawer to the drawee to pay money to the payee.

(5) In law, it is the status or attribution of being a permanent resident in a particular jurisdiction.

3. 请将下列汉语句子翻译成英文,注意其中专门术语的表达。

(1) 被告可以通过证明损失系由原告自己或者**不可抗力**因素造成,而免除自己的责任。

(2) **英美法系**司法程序的显著要素就是**交叉询问**。

(3) 如若没有相互的**对价**,就没有合同。

4. 请将下列英文句子翻译成汉语,注意其中专门术语的表达。

(1) The witness will be orally **cross-examined** on his evidence by the defendant's counsel.

(2) We **hereby** certify to the best of our knowledge that the foregoing statement is true and correct.

(3) Neither party to this Agreement shall be liable to the other for any delay or failure in performance which is due to any cause outside its reasonable control or avoidance, **including, without limitation**, the Foreign and Commonwealth Office, Department for Culture, Media and Sports, OFCOM or any other regulatory or Government organisation having jurisdiction over the affairs of either party which prevents the party from meeting its obligations under this Agreement, acts of god, accident, riot, malicious acts of third parties, civil commotion, strike, lockout or industrial dispute by a third party, unavoidable power failure or fire(a "Force Majeure Event").

(4) If performance of the obligations under this Agreement is substantially prevented for a continuous period of one month or more by virtue of a Force Majeure Event, the party not being prevented from performing shall be entitled to terminate this Agreement upon written notice to the other party.

第二课　法律翻译基础：法律语言的特点

Lesson 2　What Are the Typical Features of Legal Language

正如法律英语具有不同于普通英语(General English)的特点一样，法律翻译也具有不同于普通翻译的特点。本课将从词汇的视角切入，继续探讨法律翻译的特点。

人们习惯上将法律人(lawyer)使用的语言称为“legalese”，进而将其译为“高深的法律用语、法律行话”。其实“legalese”并不神秘，外国有学者将其定义为：

“Legalese is language a lawyer might use in drafting a contract or a pleading but would not use in ordinary conversation. In short, legalese is distinct from human talk; it is law talk.”①

从该定义中我们可以看出，法律语言一般不在“普通会话”中使用，它是指“法言法语”。具体而言，法律语言具有以下特征：

一、拉丁语的使用

在普通英语中，拉丁语也时常出现。比如，很多英文表达直接使用“*vice versa*”来表示“反之亦然”，使用“*status quo*”来表示“现状”。但在法律英语中，拉丁语更为常见。法律英语大量使用拉丁语有其深刻的历史渊源，同时，这些拉丁语往往蕴含着深刻的含义，比如，现代法律各国法律所实行的“特别法优于一般法”，就来自于拉丁语格言：Lex specialis derogate legi generali；“后法优于前法”来自于：Lex poster derogate lex priori。②

一些常见的拉丁语列举如下：

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① Laurel Currie Oates: The Legal Writing Handbook, Little, Brown&Company, 1993, p. 669.

② 陈卫佐：《拉丁语法律用语和法律格言词典》，法律出版社 2009 年版，前言第 2 页。

拉丁语	汉　语	拉丁语	汉　语
ab initio	从开始起，自始	affidavit	宣誓作证书，书面证词
ad hoc①	专案、特定	corpus delicti	犯罪构成、犯罪要件
alibi	不在犯罪现场	amicus curiae	法官的顾问，法庭之友
bona fide	善意，善意的	capax doli	犯罪能力
de jure②	法律上	de facto③	事实上的
ex post facto	事后的	habeas corpus	人身保护令
haeres	继承人	inter partes	当事人之间
in rem	对物的	in pesonnam	对人的
mens rea	犯罪意图	actus reus	犯罪行为
qui ne dit mot consent	沉默即为同意	quorum	法定人数
res ipsa loquitur	事情不言自明	testmamenti factio activa	立遗嘱的能力
res judicata④	已决事项	ratio decidendi	判决理由
ubi remedium ibi jus	有救济就有权利	stare decisis	遵循先例原则

拉丁文法律术语很多，对于译者而言，完全掌握拉丁文术语存在很多困难。借助现在已经出版的很多辞典，可以比较有效地解决这个问题，比如第一课中提到的《元照英美法辞典》和《拉丁语法律用语和法律格言词典》。

二、法语词汇的使用

在法律英语的发展历史上，法语对其影响重大。公元 1066 年 1 月，征服者威廉（William the Conqueror）占领英格兰。从此，政界、法庭、军队、教育等领域被讲法语的诺曼人控制，学校用法语上课，贵族官吏等人士理所当然地使用法语。法语词汇大量进入英语，法语持久深刻的影响已使英语的语音、词汇、语法烙上了鲜明的法语印记。⑤在法律英语中，存在着大量的来源于法语的词汇，代表性的词汇有：

① ad hoc arbitration，特别仲裁，专项仲裁，指仲裁事项是特定的争议。ad hoc officer 指特别官员；ad hoc court，特别法庭；专门法庭。

② de jure ownership，法律上的所有权。

③ de facto marriage，事实婚姻。

④ An issue that has been definitely settled by judicial decision.

⑤ 韩晶："法语对英语的影响"，载《长春师范学院学报》（人文社会科学版）2007 年第 5 期。

Word	汉　语	Word	汉　语
assize	巡回审判	advocate	辩护人
amerce	惩罚	arson	纵火罪
arrest	逮捕	accuse	控告
award	裁决	adultery	通奸罪
attorney	律师	bill	法案
bail	保释，保释	bar	法庭，法律界
complaint	控告	convict	宣判……有罪
decree	政令，法令	defendant	被告，被告人
evidence	证据	felon	重罪犯
fine	罚款	forfeit	因犯罪而遭没收的东西
force-majeure	不可抗力	eyre	巡回法庭
imprison	监禁	indictment	公诉书，大陪审团起诉书
juror	陪审员	petit jury	小陪审团
libel	诽谤罪	larceny	偷窃
plaintiff	原告	panel	小组
plead	辩护	warrant	逮捕令
summon	传票	verdict	陪审团裁决
tort	侵权行为	venue	审判地

三、古旧词汇的使用

在法律英语，古英语词汇大量出现，比如，英语中某些副词，“here”和“where”在法律文件中往往当作前缀，与另外一个词构成一个正式法律词汇中的副词。这些词汇经过很长的历史时期之后，依然保持着原来的含义。这些词语的使用一方面增加了法律英语的庄严肃穆；另一方面可以避免重复，使行文准确、简洁。对于常见的词汇，读者要注意把握。例如：

Word	汉　语	Word	汉　语
aforesaid	前述	aforementioned	前述
forthwith	立即	hereinafter	在下文中
hereby	特此，因此，兹	herein	在本文件中
hereinbefore	以上；上文	thereunder	在其下，据此
hereof	在本文件中	thereof	在其中，本文件中
thereafter	其后	whereby	凭此
whereon	在那上面	whereof	关于某事

关于上述词语的用法，举例如下：

1. hereby

(1) The Employer **hereby** covenants to pay the Contractor in the manner prescribed by the Contract.（业主特立此约保证按合同规定的方式向承包人支付合同价。）

(2) I **hereby** resign the office of the President of the Unites States.（本人特此辞去美利坚合众国总统职务。）

2. hereof

例如，合同中常出现此类条款：

The terms, conditions and provisions **hereof.**（本合同的条件和条款。）

This decision shall apply to the crimes committed against Article 9, Article 10 and Article 11 **hereof** by the staff and workers of enterprises other than limited liability companies① and companies limited by shares②.（有限责任公司和股份有限公司以外的企业职工有本决定第9条、第10条和第11条规定的犯罪行为的，适用本决定。）

3. herein

The term "company" mentioned **herein** refers to such a limited liability company or such a company limited by shares as are established within the territory of China in accordance with this Law.（本法所称公司是指依照本法在中国境内设立的有限责任公司和股份有限公司。）

4. hereinafter

该词一般与 to be referred to as, referred to as, called 等词组连用，以避免重复。

When existing Chinese-foreign equity joint ventures③, Chinese-foreign cooperative joint ventures④ and wholly foreign-owned enterprises⑤(**hereinafter** referred to as "enterprise with foreign investment") apply to reorganize themselves into a company, the enterprises with foreign investment shall have a record of making profits for the recent three consecutive years.[已设立的中外合资企业、中外合作企业和外商独自企业(以下简称"外商投资企业")，如申请转变为公司的，应有最近连续3年的盈利记录。]

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① limited liability companies:有限责任公司。
② companies limited by shares:股份有限公司。
③ Chinese-foreign equity joint ventures:中外合资企业。
④ Chinese-foreign cooperative joint ventures:中外合作企业。
⑤ wholly foreign-owned enterprises:外商独自企业。

四、普通词汇的“法律化”：法律术语的使用

作为一种专业英语，法律英语在长时间的使用中，形成了大量的专用术语，这些术语具有不同于普通英语词汇的含义。在法律英语词汇中，有相当一部分来源于日常英语，由于长期被法律人使用，它们在被用于法律文献中时词意已经特定化，因而已成为法律英语中的专业术语。例如：

Word	普通词义	法律词义
alien①	外国的	转让、让予
award	奖品	裁决
action②	行动	诉讼
avoid	避免	撤销
average	平均	海损
bar③	条，棒，酒吧	法庭，律师界，律师
bench④	长凳	法官
brief	简洁的	诉讼案件摘要
case	箱子	案例
client	顾客	当事人
crown	王冠	刑事的
complaint	诉苦、抱怨	控告
consideration	考虑	对价
counterpart	对应角色	副本
damages	损坏	损害赔偿金

① to transfer property to another person to whom a right or property is assigned.

② a lawsuit(either civil or criminal).

③ 具体例子如下：

bar to divorce：受理离婚案件的法庭；

He was a member of the bar：他曾是律师界的一员；

Bar association：律师协会；

Bar esamination：律师资格考；

Bar Association，HongKong：香港大律师公会。

另外，barrister 显然和 bar 是有一定的关系。bar 应为 barrister 的词渊。所以 barrister 传统译为“巴律师”。在香港为“大律师”或“出庭律师”；solicitor 传统译为“沙律师”。在香港为“律师”事“事务律师”。

④ 比如 bench trial；raised to the bench。

（续表）

Word	普通词义	法律词义
instrument①	工具	文契；票据
limitation②	限制	（诉讼或追诉）时效
minor③	较小的，次要的	未成年人
major④	主修，主要的	成年人
party⑤	政党	当事人
review	复习	复查，审查
securities	安全	证券
sentence	句子	判刑
service	服务	送达

五、固定短语的使用

在法律英语，介词短语得到了广泛的应用，这使得法律英语的语法结构严谨。常用的短语主要有：

英　语	汉　语
in testimony whereof ...	以此为证，特此为证
at his request ...	在他的请求下
by the right of representation ...	根据代理权
upon termination of the trust ...	在信托终止时
in reproperty of Tom	有关汤姆的财产
KNOW ALL MEN BY THESE PRESENTS that ...	根据本文件，兹宣布：下列为双方所议定事项

以 in Witness Whereof 为例，该短语常常在合同结尾条款中使用，郑重其事地重申合同的严肃性、重要性；在句子结构上起到承前启后的作用，以引出结语。例如：

① 如 negotiable instrument：指可流通票据、可转让票据。

② limitation of prosecution：追溯时效；statute of limitations：诉讼时效法、追诉时效法；limitation of action：诉讼时效。时效还可用 prescription 一词，如取得时效：positive prescription/acquisitive prescription；消灭时效：negative prescription/extinctive prescription。

③ a person under the legal age.

④ a person comes of age.

⑤ 如 parties to the contract：合同当事人。

In Testimony Whereof, this Contract shall come into effect after the Contract in question is made and signed by the Parties **hereto** in duplicate, and either Party will hold one copy.（本合同由双方代表签字后生效，一式两份，双方各执一份。特此为证。）

六、模糊性词语的使用

第1课中已经论述，法律语言需要精确。在实践中，法律语言在准确的同时也需要模糊。甚至可以说，恰当使用模糊语言是保证法律语言准确性的必要手段之一。例如：

英　语	汉　语	英　语	汉　语
within	以内	below	以下
no less than	不少于	outside	以外
adequate	足够的	approximately	大约
undue interference	不合理的干涉	due care	合理的注意
prudent person	审慎之人	reasonable person	正常人/理性人

七、同义词的重复

法律英语在用词方面的另一特点就是同义词的重复。同义词的重复是指，当表达一个单一概念时，本可以用一个单词而却用了两个或者三个单词。同义重复可以使法律英语更加准确，强调所要表达的意思，使读者记忆深刻。在翻译过程中，一般将同义重复的词组翻译为一个单词。例如：

英　语	汉　语	英　语	汉　语
aid and abet	同谋	attorney or lawyer	律师
acknowledge and confess	承认	annul and set aside	取消，注销，废除
buy or purchase	购买	free and clear	没有义务
cease and desist	终止	heirs and devisees	继承人
part and parcel	重要部分	minor or child or infant	未成年人
null and void	无效的	last will and testament	遗嘱
goods and chattles	财产	provisions and stipulations	规定
terms and conditions	条件	larceny or theft or stealing	盗窃

法律语言的上述特点在很大程度上决定了法律翻译的特殊性。在翻译实践中，译者要特别关注这些特点，才能更好地完成法律翻译任务。为更准确的完成法律翻译，译者需要在翻译实践中不断探索，积累经验，才能做到准确达意。

随着法律语言的发展，时至今日，法律文书中的拉丁词汇、古旧英语词汇也在逐渐减少。在这种潮流之下，从事法律翻译的译者要在保持法律语言准确的前提下，尽量使用简单的词汇进行翻译。

练　　习

1. 请为下列术语选择合适的英文释义。

A. *habeas corpus*

B. affidavit

C. arson

D. *amicus curiae*

E. alibi

(1) It is a formal sworn statement of fact, signed by the author, who is called the affiant or deponent, and witnessed as to the authenticity of the fact.

(2) Someone who is not a party to a case volunteers to offer information to assist a court in deciding a matter before it.

(3) It is the crime of intentionally or maliciously setting fire to structures or wildland areas.

(4) It is a type of defense found in legal proceedings by demonstrating that the defendant was not in the place where an alleged offense was committed.

(5) It is a writ, or legal action, through which a prisoner can be released from unlawful detention.

2. 请将下列汉语句子翻译成英文，注意其中专门术语的表达。

(1) 法人以它的主要办事机构所在地为住所。

(2) 1994 年《行政诉讼法》允许公民对滥用职权或渎职的官员提起诉讼。

(3) 委托他人代为诉讼，必须向人民法院提交由委托人签名或者盖章的授权委托书。

(4) 无效的合同或者被撤销的合同自始没有法律约束力。

(5) 离婚案件有诉讼代理人的，本人除不能表达意志的以外，仍应出庭。

3. 请将下列英文句子翻译成汉语，注意其中专门术语的表达。

(1) We the people of the United States do **ordain and establish** this Constitution for the United States of America.

(2) I do nominate my husband, Black Smith as **Executor** of this my **Last Will and Testament.**

(3) An **appeal** is a request to a higher(appellate) court for that court to **review** and change the decision of a lower court.

(4) The terms **punitive damages** or **exemplary damages** refer to money damages awarded to punish the other's conduct, as well as to deter others from such conduct in the future.

第三课　法律术语的翻译

Lesson 3　Translation of Legal Terminology

在一个法律体系中，术语是构建这个体系的基础。由于法律文本的特殊社会功能，法律翻译必须要保证其准确性和严谨性，其前提就是要保证术语翻译的准确与严谨。因此，在法律翻译中，对术语进行准确的转换是保证法律文本严肃性和权威性的基础。

从总体上讲，我国当代的法律体系是从西方移植的产物。法律翻译在一定程度上促进着我国法律的发展。在我国进行法律翻译的初期(1840 年左右)，对源于外来语言的法律术语的翻译，其困难是今人难以想象的。时至今日，经过一个多世纪的发展，尤其是改革开放之后 30 多年的发展，中国法律的发展为法律术语的翻译提供了各种良好的条件，各种资料(包括法律译著和法律词典)得到了极大的丰富。①随着我国学者对国外法律研究的深入，一般常见的法律术语都得到了较好的翻译，并为法律界所广泛接受。对于初学法律翻译的学生而言，也可以通过各种法律辞典(比如《元照英美法词典》)解决大多数法律术语的翻译问题，在宏观层面上了解法律术语的含义。

上一课在论述法律词汇的特点时，已经或多或少地提及了法律英语术语的汉语译名的翻译。本课并不准备泛泛地探讨法律术语翻译的一般方法，因为绝大多数术语的翻译问题都可以通过权威的英汉、汉英法律词典解决。但是，在术语翻译和学习的过程中，仍存在不尽如人意的地方，个别术语的翻译和使用仍存在不当或者错误。本课将重点通过对若干术语的分析，从文化和功能两个视角分析不当或者错误存在的原因，并提出应对之策。

例 1：common law

在中国法学界，common law 已经被约定俗成地翻译为“普通法”。尽管有学者提出不同的看法，比如，陈忠诚教授主张将 common law 翻译为“共同法”②，台湾东吴大学潘维大

① 蒋安杰：“法学研究三十年：从小溪到河流——倾听华东政法大学校长何勤华教授细数那些难忘的经历”，载《法制资讯》2009 年第 1 期。

② 参见陈忠诚教授的两本书：一是《法窗译话》，中国对外翻译出版公司 1992 年版，第 40—41 页；二是《英汉法律用语正误辨析》，法律出版社 1998 年版，第 110—112 页。

教授主张将 common law 翻译为“习惯法”[①]，但国内的法律词典、法学译著一般还是将该术语翻译为“普通法”，这也从一个侧面说明了“普通法”的译名已经被广泛的接受。

“普通法”的译名被广泛接受，并不意味着“common law”所代表的法律文化已经被使用这一术语的法律人所完全了解。在英美法的背景下，“common law”至少可以在四个层面上使用：

第一，源于司法裁决而非制定法或者宪法的法律集合(The body of law derived from judicial decisions, rather than from statutes or constitutions.)。[②]在这个层面上，common law 是和 statute law(制定法)，written law(成文法)相对的，该术语的意思与 case law(判例法)类似。

第二，基于英格兰法律体系之上的法律集合，与大陆法相异；common law 还指一般意义上的盎格鲁-美利坚的法律概念系统及适用这些概念的法律技术(The body of law based on the English legal system, as distinct from a civil-law system; the general Anglo-American system of legal concepts, together with the techniques of applying them.)。[③]在这个层面上，common law 是和 civil law(大陆法)，Roman law(罗马法)相对的，该术语的意思与 Anglo-American law(英美法)类似。

第三，适用于一国的共同法(General law common to the country as a whole.)。[④]在这个层面上，common law 是与仅在某地适用的 special law(特定法律)相对的，该术语是指 general law，起源于拉丁语 *jus commune*。

第四，普通法法院(而非衡平法法院)创制的法律集合(The body of law deriving from law courts as opposed to those sitting in equity.)。[⑤]在这个层面上，common law 是与 equity law(衡平法)相对的。在英格兰普通法是英格兰法律的三个历史渊源之一，其他两个渊源是制定法和衡平法。这是所谓的“普通法”是指起源习惯法(custom)，以及由国王的法庭所创设和执行的一套法律体系，区别于衡平法院或者大法官法院(Court of Chancery)所创设的法律。在翻译涉及英国法的材料是，经常能碰到一对术语：law and equity。当 law 和 equity 并列出现的时候，一般需要将其翻译为：普通法和衡平法，而不是“法律和衡平法”。

仅从术语翻译的角度，将 common law 翻译为法学界所普遍接受的“普通法”就可以了。但对于英美法的学习者和研究者，这远远不够，因为，在上述四个层面上，每一点都可以生发出很多知识。要想全面地理解 common law 这一术语，就必须深入地学习其背后的法律文化背景知识。在翻译这一术语时，不光要知道将 common law 翻译为“普通法”，还要知道使

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① 潘维大、刘文琦：《英美法导读》，法律出版社 2000 年版，第 4 页。

② Bryan A. Garner: Black's Law Dictionary(8th Edition), Thomson Reuters, 2009, p. 830.

③④ Bryan A. Garner: Black's Law Dictionary(8th Edition), Thomson Reuters, 2009, p. 831.

⑤ Bryan A. Garner: Black's Law Dictionary(8th Edition), Thomson Reuters, 2009, p. 832.

用的是上述四个层面中哪一个层面上的含义。为了解决这一问题，可以对这一术语在不同的语境下，翻译为不同的汉语对应术语，然后在汉语后注明 common law：

序号	含　义	汉语术语
1	源于司法裁决而非制定法或者宪法的法律集合	非成文法(common law)、判例法(common law)
2	基于英格兰法律体系之上的法律集合，与大陆法相异；还指一般意义上的盎格鲁—美利坚的法律概念系统及适用这些概念的法律技术	英美法(common law)
3	适用于一国的共同法	普通法(common law)、共同法(common law)
4	普通法法院(而非衡平法法院)创制的法律集合	非衡平法(common law)

陈忠诚教授也曾主张对 common law 在不同的背景下翻译为不同的汉语译名。[①]需要说明的是，编者此处提出这种术语处理方法的目的并不在于推翻 common law 的被普遍接受的译名，而在于提醒学习者在阅读英美法原版材料的时候，能够真正理解和把握该术语背后的文化内涵。

例 2：consideration

Consideration 是英美法中的一个极有特色的术语，也是英美合同法中的一个核心概念。香港立法语文中多称其为“代价”，国内法学界一般将其翻译为“对价”或者“约因”，也有学者主张将 consideration 翻译为“损益交易”或者“合法价值交易”[②]。在法律界，一般不会有人将 consideration 翻译为“考虑、思考”等。在翻译实践中，“对价”的使用更为广泛，甚至我国法律已经开始使用这一术语，比如《中华人民共和国票据法》第 10 条第 2 款规定：票据的取得，必须给付对价，即应当给付票据双方当事人认可的相对应的代价(The receipt of negotiable instruments must be balanced by a consideration, i. e. a corresponding payment agreed on by both parties.)。

与 common law 术语类似，尽管 consideration 的译名已经被广泛接受，但不同的法律人对该术语所代表的法律内涵的理解可能并不一致。《布莱克法律辞典》(*Black's Law Dictionary*)对该术语给出了两种解释：第一，允诺人(promisor)经议价后接受的诸如受诺人(promisee)做出行动、不行使权利或相对允诺等事项。[③] 第二，泛指“有效对价”(valuable

① 陈忠诚：《英汉法律用语正误辨析》，法律出版社 1998 年版，第 40 页。

② 于丹翎：“英美法中 CONSIDERATION 原则及其相关概念法律术语释义翻译问题的商榷”，载《中国翻译》，2009 年第 3 期。

③ Something(such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, esp. to engage in a legal act. See Bryan A. Garner: Black's Law Dictionary(8th Edition), Thomson Reuters, 2009, p. 922.

consideration)，即支持当事人之间议价交易的充分对价。①

以上文所引《票据法》的规定为例，在该规定中，“对价”被界定为“票据双方当事人认可的相对应的代价”。与《布莱克法律辞典》中的解释相比较，我国法律的这种规定较为简单，“相对应的代价”没有说明当事人之间的“议价”，也没有明确该对价是“有效”对价。因此，我国《票据法》中关于“对价”的规定，还不能于英美法上的 consideration 完全对等。

因此，在学习类似于 consideration 这种内涵丰富并被我国法律界所广泛使用的术语时，如果仅仅对其浅层化、字面化的理解，甚至是想当然的理解，最后在与英美法背景的法律人沟通时，可能会产生误解的。如果这种浅层化和字面化的理解被带入到立法过程，并最终体现在法律文件中的话，可能会给我国的立法，乃至国际交往带来不良的影响。

例 3：lien

Lien 是英美法中的一个重要概念。国内学者一般将其翻译为“留置权”。比如，《元照英美法词典》将 lien 翻译为“留置(权)、质权”，其解释为，“lien 是债权人在特定财产上设定的一种担保权益，一般至债务清偿时为止。债务人如逾期未清偿，债权人可以通过变卖留置物等法定程序优先受偿；衡平法和制定法上的留置权不限于留置物必须在债务人占有之下”②；《牛津法律大辞典》将 lien 翻译为“留置权”，其解释为，“指英格兰法中一个人享有对属于他人的财产予以保留占有直至该占有人针对该他人的请求权得以清偿(为)止的权利”。③由于上述词典的影响，“留置”或“留置权”基本上成为了普遍接受的汉语译名。事实上，这一译名在很大程度上是对英美法 lien 制度的一种的误解。

根据《布莱克法律词典》的解释，lien 是指“债权人对他人财产所拥有的一种法定权利或利益，直至其担保的债务或者义务被清偿为止”。④一般而言，债权人并不占有该财产。⑤ 在英美法上，lien 存在着多种形式，比如，普通法上的 lien(common law lien)，制定法上的 lien(statutory lien)，司法裁决的 lien(judicial lien)。从大陆法的视角进行分析，英美法上的 lien 既包含担保物权等实体性权利，也包括为保障判决得以执行的程序性权利，⑥其内涵大致等于我国法上的担保物权及诉讼保全等措施。⑦因此，就功能而言，英美法上 lien 的范围要远远大于我国法

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① Loosely, valuable consideration; consideration that is adequate to support the bargained-for exchange between the parties. See Bryan A. Garner: Black's Law Dictionary(8th Edition), Thomson Reuters, 2009, p. 925.

② 薛波主编：《元照英美法词典》，法律出版社 2003 年版，第 847 页。

③ 戴维·M. 沃克：《牛津法律大辞典》，李双元等译，法律出版社 2003 年版，第 700 页。

④ A legal right or interest that a creditor has in another's property, lasting usu. until a debt or duty that it secures is satisfied. Bryan A. Garner: Black's Law Dictionary(8th Edition), Thomson Reuters, 2009, p. 2699.

⑤ Bryan A. Garner: Black's Law Dictionary(8th Edition), Thomson Reuters, 2009, p. 2699.

⑥ 孙新强：“大陆法对英美法上 LIEN 制度的误解及 LIEN 的本意探源”，载《比较法研究》2009 年第 1 期。

⑦ 孙新强：“我国法律移植中的败笔——优先权”，载《中国法学》2011 年第 1 期。

律概念中的“留置权”，是“留置权”的上位概念。而我国学界并不是将 lien 作为一个上位概念、一个抽象概念来理解，而是将它的某种表现形式（如“留置权”）理解成了 lien 本身。

诸如 lien 之类的术语，现有的翻译存在着误解和错误。这种错误从根本上讲是对英美法文化的了解不够深入和精细的结果，抑或是大陆法和英美法两种法律观念冲突的结果。法律术语的翻译除了要求语言功能的对等（即字对字翻译和按字面翻译）外，还应照顾到法律功能的对等。所谓法律功能的对等就是源语（Source Language）与译入语（Target Language）在法律上所起的作用和效果的对等。惟有如此才能使译入语精准地表达源语的真正意涵。[①]对于 lien 这样的抽象概念，在我国现有的法律体系中很难找到对应的术语，可以采用释义（paraphrase）的方法进行翻译，即，用目标语言把源语言的意图含义表达出来。比如，可以将 lien 翻译为：担保物权（包括诉讼保全等措施）。再如，可以把“yellow dog contract”翻译为：“黄狗合同”（不准雇员参加工会的合同）。[②]类似的例子还有：

英文术语	汉语译名
blue-sky law[③]	蓝天法（证券交易管理法规）
blue-pencil test[④]	蓝铅笔标准（确定合同中词句效力的司法准则）
blue-ribbon jury[⑤]	蓝带陪审团（最有知识的人组成的陪审团）
blood money[⑥]	血钱（赎罪金，人身赔偿金）
black letter law[⑦]	黑体字法（公认的基本法律原则）
kangaroo court[⑧]	袋鼠法庭（无正规司法程序的非法法庭）
lemon law[⑨]	柠檬法（次品汽车买主保护法，产品质量法）
palm tree justice[⑩]	棕榈树公正（个案裁判）

① 朱定初：“评复旦大学《法律英语》中的译注——兼谈法律专门术语的基本原则”，载《中国翻译》2002 年第 3 期。

② An employment contract forbidding membership in a labor union. Bryan A. Garner: Black's Law Dictionary(8th Edition), Thomson Reuters, 2009, p. 4985.

③ A state statute establishing standards for offering and selling securities, the purpose being to protect citizens from investing in fraudulent schemes or unsuitable companies.

④ A judicial standard for deciding whether to invalidate the whole contract or only the offending words.

⑤ A jury consisting of jurors who are selected for their special qualities, such as advanced education or special training, sometimes used in a complex civil case(usu. By stipulation of the parties) and sometimes also for a grand jury (esp. one investigating governmental corruption).

⑥ A payment given by a murderer's family to the next of kin of the murder victim.

⑦ One or more legal principles that are old, fundamental, and well settled.

⑧ A self-appointed tribunal or mock court in which the principles of law and justice are disregarded, perverted, or parodied.

⑨ 1. A statute designed to protect a consumer who buys a substandard automobile, usu. by requiring the manufacturer or dealer either to replace the vehicle or to refund the full purchase price. 2. By extension, a statute designed to protect a consumer who buys any product of inferior quality.

⑩ palm tree justice：穆斯林国家的的民事法官坐在棕榈树下，不以先例与典籍为依据的司法，指不考虑法律原则和法律规定而作出的裁判。

例 4：condominium

Condominium 是美国财产法中的一个常见词汇。该词由拉丁文“con”（意思是“与其他人（with others）”）和“donminium”（意思是“控制、管理（control）”）组合而成。[①]因此，“condominium”一词是指与一人或多人共同拥有的财产。在上述意义上，“condominium”这一术语是指一种不动产的所有权形式，而不是指任何具体类型的建筑物，此语境下的 condominium 可以翻译成“建筑物区分所有权”或“区分所有权”。同时，condominium 或其复数形式 condominiums 也表示具体的建筑物，此语境将下的 condominium 可以翻译为“区分所有权建筑”。

在美国，condominium 也是一个在二战之后才完全形成的概念和制度。与此同时，condominium 制度也在世界其他国家获得了不同程度的发展。各国的区分所有权成文法的名称各有不同。各国成文法名称上的区别主要体现在对“区分所有权”的不同命名。我国法律中的“建筑物区分所有权”，德国法律中的“住宅所有权”（Wohnungseigentum），法国法律中的“建筑不动产共同所有权”（copropriétédes immeubles batis），澳大利亚、新加坡等国法律中的“分层所有权”（Strata Title），新西兰法律中的“单元所有权”（Unit Title），美国、加拿大等国家法律中的“区分所有权”（Condominium），以及英国“共同持有所有权”（Commonhold）都在法律功能方面具有类似性：即上述名称不同的不动产所有权是不动产上的复合权益，所有人既对不动产中的特定单元拥有排他的所有权和占有权，又对不动产中的共同部分拥有直接或者间接的共有权；作为上述两种权利的衍生权利，所有人还对共同财产拥有管理权；上述权利相互依存，不可分割。

从这个例子可以看出，各国法律在发展的过程中，会形成一些名称不同，在法律功能相似的概念。也就是说，在世界各国法律的发展过程中，现实生活中所面临的问题可能是相同的，为了解决相同的问题，各国可能会形成和制定名称不一，但功能和目的却类似的法律。对于此类术语，需要在把握其法律性质的基础上，去除术语表面的不一致性，进而在本国法律中找到对应的概念。

例 5：administration

（一）“administration”与“executive”的翻译之争

在中文里，我们常将“administration”与“executive”都译为“行政”，有不少学者认为它

① LAWCONDO § 1：1，citing from Webster's Ninth New Collegiate Dictionary(2nd Ed 1987)；American Heritage Dictionary(2nd Ed 1985).

们表示同一个意思。例如，胡兆云说，在英语（尤其是美国英语中），用来表述“行政分支、行政机构、行政部门”的词除了“executive branch”和“executive department”等之外，另一个常用的词就是“administration”。“administration”与“executive branch”和“executive department”指的基本上是同一个机构。从语义学角度看，“行政分支”的义层地位就是“administration”的义层地位，二者的义层地位完全相等①。

但是，“administration”与“executive”并不完全相同。例如，有人认为，“executive power”是“执法权”而不是“行政权”（administrative power）②。景跃进先生的看法是，“administration”与“the executive”都翻译为“行政”，但是，“the executive”是“三权分立”中的“行政”；而“administration”是来源于“政治与行政二分法③”中的“行政”，它与“政治”（politics）相对应④。也就是说，与“the executive”并列的是“the legislative”、“the judicial”；而与“administration”相对应的是“政治”（politics）。

因此，“administration”与“executive”虽然都翻译为“行政”，然而二者的内涵实不相同。笔者赞同景跃进先生的看法：“三权分立”中的行政是大行政（逻辑上既包括狭义的政府概念，也包括官僚制），但是它对行政部门的角色认定却是消极的。“政治与行政”二分法中的行政是小行政（不包括狭义的政府概念，局限于官僚制），但是它对行政的角色认定却要积极得多⑤。

（二）“administration”与“government”的翻译之争

在《新英汉词典》⑥等权威的工具书中，“government”与“administration”二词的中文翻译项下均有“政府”的译法。例如 1985 年版的第 542 页“government”的第一个义项是“政府”；第 15 页对“administration”的一个解释是“行政”；行政机关，局（或署、处等）；另一个解释是“[A-]（总统制国家的）政府”。2000 年世纪版的《新英汉词典》第 17 页对“administration”的一个解释是“行政；行政机关；管理部门；政府；[the A-]美国政府”。近年来，一些媒体报道和学说著作或译作中也频频出现诸如“Bush administration”（布什政府）、“Clinton administration”（克林顿政府）、“Reagan administration”（里根政府）等中英文表达。

由于这里的“administration”与“government”均翻译为中文“政府”，这导致了人们在使用过程中的概念模糊，因此这一现象引来了不少学者的议论。这其中，有代表性的论

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① 胡兆云：“Administration 与 Government 文化语义辨析及其翻译”，《外语与外语教学》2006 年第 9 期。

② 闫海：“规制机构的独立性：分权理论框架下的论证城市经济与微区位研究”，载《全国城市经济地理与微区位学术研讨会论文集》，2004 年，第 217 页。

③ 凡是读过一些行政学著作的人都知道，持“政治与行政两分法”这种观点的主要代表人物是美国学者 F. J. 古德诺（Goodnow）。古德诺所著的《政治与行政》（*Politics and Administration*）一书，既是早期行政学的经典名著，也是政治与行政两分法观点的代表作。但准确地说，“政治与行政”二分理论是由德国政治学家布隆赤里最早提出，后经美国学者威尔逊（Woodrow Wilson）在《行政学研究》（*The Study of Administration*）中的引介和古德诺的系统论证后最终形成的。

④⑤ 景跃进：“‘行政’概念辨析——从‘三权分立’到‘政治与行政二分法’”，载《教学与研究》2003 年第 9 期。

⑥ 先后有 1975 年，1976 年《新英汉字典》，1985 年《新英汉字典》（增补本）和 2000 年《新英汉字典》（世纪版）。

文按时间先后顺序有：中国现代国际关系研究所席来旺教授的《美国“政府”与“行政当局”辨析》①、福建工程学院刘应德老师的《Government 与政府》②、国际关系学院王文华老师的《美国“总统”的“政府”——一个语用学的分析》③、厦门大学胡兆云教授的《Administration 与 Government 文化语义辨析及其翻译》④，等等。

以上几位教授、学者或从政治学、或从法学、或从语言学等视角对上述两词的汉译展开了论述，他们几乎一致向当前流行于媒体报道、学说著述及翻译作品中的“administration”之中文译法“政府”开炮。这就是本书编者所论的“administration”与“government”的翻译之争。不过，令人遗憾的是，这场发生在理论界与实务界的“翻译之争”似乎并未引起出版界太多的回应与注意。

在上述提及的论文中，很多作者的论述确属真知灼见，编者十分赞同，但也有一些观点或说理过程（例如《Government 与政府》一文），编者则不敢苟同。编者能够认同及需要补充的主要观点归纳如下：

其一，“government”和“administration”的涵义偏重不同。客观地讲，二者之间显然存有某种“剪不断，理还乱”的关联。但“government”和“administration”是两个不同的英语单词，前者的主要含义偏重于完整意义上的“政府”，而后者的主要含义却偏重于“行政当局”。“行政当局”是“政府中最为明显的一个组成部分，是行动中的政府（government in action），它代表政府中行政的、实施的、最显著的一边。⑤”

其二：“government”和“administration”的语义范围不同。“government”与“administration”之间存在着某种“上下义关系”（hyponymy）⑥。“government”包括“立法分支”（the legislative）、“司法分支”（the judicial）以及这里的“administration”（administration 相当于 the executive，行政分支）。因而“government”是“administration”的上义词，而“administration”则是“government”的下义词。

其三，理论上“government”和“administration”的对等汉译应有不同。“government”应译为“政府”，“administration”应译为“行政当局”。但实际上，“约定俗成”⑦已然是翻译人

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① 席来旺：《美国“政府”与“行政当局”辨析》，载《世界经济与政治》2002 年第 9 期，第 72—76 页。

② 刘应德：《Government 与政府》，载《上海科技翻译》2004 年第 3 期。

③ 王文华：《美国“总统”的“政府”——一个语用学的分析》，载《国际关系学院学报》2006 年第 2 期。

④ 胡兆云：《Administration 与 Government 文化语义辨析及其翻译》，载《外语与外语教学》2006 年第 9 期。

⑤ Osborne, Stephen P. *Public Management: Critical Perspectives*. New York, N. Y.: Routedge, 2002, p. 55.

⑥ 所谓上下义关系，是“指个体词项与一般词项间的语义关系，即个体词项被包括在一般词项之内”。例如，“花”是“玫瑰”的上义词（hypernym），“玫瑰”是“花”的一个下义词（hyponym）；被包括在同一个上义词项内的词项称作同下义词（co-hyponyms），如被包括在上义词“花”之内的“玫瑰，牡丹，水仙，腊梅”等是同下义词。参见胡兆云：《Administration 与 Government 文化语义辨析及其翻译》，载《外语与外语教学》2006 年第 9 期。

⑦ 所谓“约定俗成”原则，是指译者在翻译人名、地名时，要遵循习惯译法、专名通译的原则。

名、地名、术语时的一个原则。再者，由于在国际交往中，往往把一国的最高行政机关通称为一国的政府，[①]所以，在这种情况下，“政府”也常被译为“administration”。

其四，“government”和“administration”在英美两国的用法不同。一般而言，在美国这一总统制国家，“Administration”指的是某一特定总统（或州长，市长，当地行政首脑）领导下的“行政分支”（executive branch），例如前文所述的“Bush administration”。但是，在英国这一君主立宪制国家，大多数情形下人们不会使用诸如“Blair administration”或今日的“Brown administration”等字眼，他们主要使用的是“Blair government”或今日的“Brown government”这样的表达。

而对于《Government 与政府》一文中的几个观点，编者现提出几点商榷意见。

第一，刘先生通过举例论证的方法，得出结论：“government”不应翻译为“政府”，而应翻译为“国家机关或国家机构”。但笔者不能苟同其观点。

刘先生指出《英汉大词典》[②]中的例句“The **Government** has decided to pass the bill.”翻译为“政府已决定通过该法案”有误。他说：“这就让人不禁要问‘政府有权通过法案吗?’答案当然是否定的，因为不论是中国的政府还是美国或英国的政府都无权通过‘法案’。理由很简单，‘政府’不是‘国家立法机关’。”

在刘先生看来，一国的“立法权”似乎只且仅属于“立法机关”，这是不正确的。以中国为例，全国人民代表大会及其常务委员会是最高国家权力机关，行使国家立法权，这一点不假。但是，除全国人大及其常委会制定法律外，国务院也可以制定行政法规。此外，根据宪法和有关法律规定，国务院部、委员会可以制定规章，省、自治区、直辖市人民政府可以制定规章，省、自治区所在地的市和国务院批准的较大的市的人民政府也可以制定规章。[③]再以英国为例，议会虽然是英国的立法机关，但这并不意味着议会能够制定全部的法律规则，而常常是由议会授权行政机关制定各种行政管理法规，这就是“委任立法”。[④]这是因为英国虽然奉行“三权分立”的原则，在体制上也是由议会行使立法权，政府行使行政权，法院行使司法权，但是，一般认为，英国的分权制度并不十分严格，尤其是立法与行政两种权力的界限不甚明了，因此，（狭义的）政府在立法方面的权限是比较多的，政府对于议会立法的参与、渗透和控制也比较明显。此外，即便在“三权分立”特征明显的美国，立法权也绝非仅属国会独有，因为这里也存在大量的“委托立法”。我们知道，在美国的历史上，1929 年到 1933 年，美国曾经历了一场空前的经济危机，为振兴危机后的美国经济，罗斯福政府实施了“新政”，制定并颁

① 《中国大百科全书》（法学卷），中国大百科全书出版社 1984 年版，第 749 页。
② 陆谷孙主编：《英汉大词典》，上海译文出版社 1993 年，第 750 页。
③ 公丕祥主编：《法理学》，复旦大学出版社 2002 年，第 315 页。
④ 何勤华主编：《英国法律发达史》，法律出版社 1999 年，第 137 页。

布过一系列行政法规。刘先生断然说,“不论是中国的政府还是美国或英国的政府都无权通过‘法案’,显然是武断的,不完全正确的,因为在事实上,无论是中国的政府还是美国或英国的政府都有权通过‘法案’”。

这里还要说明的是,根据权威的工具书《布莱克法律词典》,“bill”的法律意思有二:其一,“a legislative proposal offered for debate before its enactment”,它可以翻译为“法律议案”,也就是指“一项在得到颁布前被提交至立法机关进行讨论的立法建议”。它可以有立法机构的人员提出;也可以由(狭义的)政府提出,也就是“government bill”(政府议案)。其二,“an enacted statute”,可以翻译为“法案”,指“已得到颁布的制定法”,例如“the GI Bill”(退伍军人权利法案)。因此,“the bill”并没有暗含一定须有“立法机关”制定的意思;换言之,政府是可以制定并通过“法案”的。

第二,刘先生认为,汉语中的“政府”一词仅相当于“administration”的内涵和外延。汉语中“政府”的上位概念“国家机关”或“国家机构”才相当于美国“government”的内涵和外延。对于这样的判断,编者也不能完全赞同。

事实上,汉语“政府”有狭义、广义之分;狭义的“政府”仅指“国家权力机关的执行机关,即国家行政机关,例如我国的国务院(中央人民政府)和地方各级人民政府。[①]”广义的“政府”却“泛指国家政权机关总体或国家机构”。而英语中的“government”一词,根据两大权威工具书《布莱克法律词典》和《元照英美法字典》,它是指“行使政权(political authority)的组织,即体现主权的机器。在此意义上,该词用来总称一个国家的政府组织,而不问其职能或级别,也不问其所处理的事务。[②]”这一解释恰说明了将“government”翻译为“政府”并无不妥,因为它完全可以表示广义的“政府”(即“一个国家的政府组织”或“国家机关”或“国家机构”)。

很明显,在刘先生看来,只有将《英汉大词典》中该例句中文译文中的“政府”改译为“国家机关”或“国家机构”才合适,但实际上,实无这个必要。

此外,在美国的法律语境下,首字母大写的“Government”还常常表示“联邦刑事案件中的起诉机关[③]”(the prosecuting authority in a federal criminal case)。在司法实践中,虽然在公诉书上写明的是“United States v. So-and-So”(“美国诉某某某案”),但是在法庭上或法院文书中,“起诉机关”常被称为“the Government”,例如:The Government argues that the search was reasonable.(起诉机关称该搜查属于合理搜查。)最后,government 还有“政体”

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① 中国社会科学院语言研究所词典编辑室编:《现代汉语词典》,商务印书馆 1996 年版,第 1477 页。

② 薛波主编:《元照英美法词典》,法律出版社 2003 年,第 607 页。*Black's Law Dictionary*(7th ed.) St Paul: West Publishing Co., 1999. p. 703.

③ Clapp, James E. *Dictionary of the Law*, New York: Random House, 2000, p. 205.

的意思，例如“monarchical government”是“君主制政体”，“parliamentary government”是“议会制政体”的意思。

综上，刘先生所说的汉语中的“政府”仅是“（狭义的）政府”。当“政府”作狭义解释使用时，它的确相当于英文“administration”。但刘先生简单地说“汉语‘政府’一词仅相当于‘administration’的内涵和外延。汉语中的‘政府’的上位概念‘国家机关’或‘国家机构’才相当于美国‘government’的内涵和外延”这一判断不完全正确。

本书认为，“government”既可翻译为“（狭义的）政府”，也可翻译为“（广义的）政府”。（the）Administration 主要表示的是“政府”项下的“行政分支”，可以翻译为“行政当局”或“行政政府”①，甚至也可以约定俗成翻译为狭义的“政府”。

（三）“administration”与“management”的翻译之争

在行政学和管理学界，“administration”一词的翻译曾在上世纪末在中国引起了不小的争论②，一些学者坚持将“administration”译为“行政（学）”，比如“public administration”一直以来在我国都被翻译为“公共行政（学）”。但是本世纪初，我国刚刚启动的 MPA，即“公共管理专业硕士学位”（Master of Public Administration），却将“Administration”译成了“管理”（由此转变成了一个“MPA”还是“MPM”的翻译问题之争。）这种翻译上的转变，以及对这种转变的解释，由于卷入了同期“公共行政学”与“公共管理学”的学科设置之争而变得相当复杂。

在“公共管理”（新词汇）与“公共行政”（传统词汇）的争论爆发前，后者的研究对象限定于政府，但是到现在，前者的研究对象早已突破政府部门，而且不少学者认为“公共管理”已经越来越多地替代“公共行政”。有人认为“administration”与“management”之间的主要区别在于“行政是高层次的管理，而管理是低层次的行政。③”编者赞同美国学者肯尼思·J. 皮克（Kenneth J. Peak）的看法，即“行政（Administration）既包括管理（management）也包括监督（supervision）。④”因此，与“管理”相对的“行政”应是指日常和例行的行政管理，类似于马克斯·韦伯（Max Weber）所说的“官僚制⑤”（bureaucracy，也翻译为“科层制”）。

（四）其他

通常认为，首字母小写的“administration” 与首字母大写的“Administration”并不相同，

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① 厦门大学的胡兆云教授认为应当将 administration 翻译为“行府”，即“行政政府”的缩略语。参见胡兆云：《Administration 与 Government 文化语义辨析及其翻译》，载《外语与外语教学》2006 年第 9 期。

② 张帆：《“行政”史话》，商务印书馆 2007 年版，第 2—3 页。

③ 张帆：《“行政”史话》，商务印书馆 2007 年版，第 237 页。

④ Peak, Kenneth J. *Justice Administration: Police, Courts, and Corrections Management* (Second Edition), Prentice Hall, 1998, p. 3.

⑤ 马克斯·韦伯总结了官僚制所具有的四个最主要的特征：层级制，连续性，非人格性，专业化。

它们的主要差别在于：首字母大写的“Administration”常表示“行政学”；首字母小写的“administration”则常表示“行政”①。美国佐治亚大学的侯一麟教授也认为小写的“public administration”与大写的“Public Administration”有区别，前者指“公共管理实践”，后者则指“公共管理学科”。当然，如前文所述，首字母大写的“Administration”还常表示“（总统制国家特别是美国的）行政当局”。

“administration”还有其他的含义，如在法律领域内，“遗产管理”的对等翻译是“administration of estates on death”、“破产接管”的对等翻译是“Administrative receivership”；在医药领域，“给药途径”的对等翻译是“Route of administration”；在高等学校，“教务处”的恰当翻译是“Academic administration”，表示“负责管理和监督各教学单位的组织机构”（a branch of an academic institution responsible for the maintenance and supervision of the institution）。

法律翻译工作者在翻译中可能会遇到如“某某市/县工商行政管理局”。编者认为不应译作“Commercial and Industrial Administration Bureau of City（Prefecture）/County x”，而应译为“x City（Prefecture）/ County Administration of Industry and Commerce”。因为“Administration”一词本身便有“executive branch of a government”的意思，即“行政机关、局（署）等”。这方面的例子很多，例如，Food & Drug Administration，就是“食品与药品（管理）局”；再如，General Administration of Customs 就是“海关总署”②。

总而言之，社会的不断发展，以及国际交往的不断增多，必然不断地丰富着中国的法律术语。随着法律英语学习和研究的深入，我们不能简单地满足于对术语的表面理解，而应尽可能地了解术语背后的法律文化背景，了解这些术语所支撑的法律体系。这就需要深入到具体的学科之中进行研究，只有这样才能更加精准地把握法律术语的含义，进而翻译出更加严谨的法律文本。

练　习

1. 选词填空。

precedes	in accordance with	judgment	governs	construing	principle

Historically, the common law is made quite differently from the Continental

① 张帆：《“行政”史话》，商务印书馆 2007 年版，第 104 页。

② 屈文生：《涉外公证翻译中应注意的几个问题》，载《英语知识》2002 年第 4 期。

code. The code __(1)__ judgments; the common law follows them. The code articulates in chapters, sections, and paragraphs the rules __(2)__ which judgments are given. The common law on the other hand is inarticulate until it is expressed in a __(3)__. Where the code governs, it is the judge's duty to ascertain the law from the words which the code uses. Where the common law __(4)__, the judge, in what is now the forgotten past, decided the case in accordance with morality and custom and later judges followed his decision. They did not do so by __(5)__ the words of his judgment. They looked for the reason which had made him decide the case the way he did, the *ratio decidendi* as it came to be called. Thus it was the __(6)__ of the case, not the words, which went into the common law. So historically the common law is much less fettering than a code.

2. 请为下列术语选择合适的英文释义。

A. fact-finder

B. goodwill

C. King's Bench

D. damages

E. warranty

(1) One or more persons—such as jurors in a trial or administrative-law judges in a hearing—who hear testimony and review evidence to rule on a factual issue.

(2) It is a business's reputation, patronage, and other intangible assets that are considered when appraising the business, esp. for purchase.

(3) The court is the highest court of ordinary justice in criminal cases within the realm, and paramount to the authority of justices of gaol delivery, and commissions of oyer and terminer.

(4) Theyare the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong.

(5) An express or implied promise that something in furtherance of the contract is guaranteed by one of the contracting parties; esp. , a seller's promise that the thing being sold is as represented or promised.

3. 请将下列术语翻译为汉语。

(1) adversary system

(2) bench warrant

(3) chief justice

(4) contempt of court

(5) cross examination

(6) direct examination

(7) due process

(8) grand jury

(9) statute of limitations

(10) Circuit Clerk

4. 请将下列术语翻译为英语。

(1) 宣告无罪

(2) 宣誓书

(3) 传讯

(4) 地区法院

(5) 重罪

(6) 轻罪

(7) 伪证

(8) 陪审团裁决

(9) 陪审员

(10) 传票

5. 请将下列汉语句子翻译成英文，注意其中专门术语的表达。

(1) 此规章自公布之日起施行。

(2) 一级谋杀会得到最为严重的刑罚，通常是终身监禁或死刑。

(3) 未取得营业性客运证件的汽车不得从事经营性客运活动。

(4) 违反本规定的行为，由市或者区、县交通行政管理部门负责处罚的，市或者区、县交通行政管理部门可以委托交通行政执法机构进行处罚。

(5) 在中华人民共和国领域和中华人民共和国管辖的其他海域内建设对环境有影响的建设项目，适用本条例。

6. 请将下列英文句子翻译成汉语，注意其中专门术语的表达。

(1) When a trademark has been infringed, the owner of the mark has a cause of action against the infringer.

(2) By the same 1166 statute, jurisdiction over the most important criminal cases, known as pleas of the Crown, was taken from the shire courts and given to the emerging royal courts.

(3) In a very few situations, juries do take part in sentencing decisions. For example, in capital punishment cases in some states, a judge cannot impose the death penalty in a jury trial unless the jury recommends death rather than life in prison.

(4) English common law developed from the rules and principles that judges traditionally followed in deciding court cases. Judges based their decisions on legal precedents—that is, on earlier court rulings in similar cases.

(5) In order to conceptualize this world, I introduce literature on legal pluralism, and I suggest that, following its insights, we need to realize that normative conflict among multiple, overlapping legal systems is unavoidable and might even sometimes be desirable, both as a source of alternative ideas and as a site for discourse among multiple community affiliations.

第四课　法律翻译的若干技巧

Lesson 4　Basic Skills of Legal Translation

由于中英文表达方式的不同，对于同一个事物或概念所用的表达方式也不一样。在翻译的过程中，为了使翻译出的目标语言(target language)更加通顺流畅，有时需要使用一些诸如增词、减词、词性转换之类的技巧。需要说明的是，在法律翻译中，“技巧”所起到的只是“锦上添花”的作用：使译文的表述更加地道、更加通顺、更符合目标语言的表达习惯。“技巧”的学习是为了在练好法律翻译基本功的基础上，使译者的能力有进一步的提高。因此，在学习法律翻译的过程中，学习和练习的重点仍在于基本技能的提高，否则就有舍本逐末之嫌。本课将通过例子对法律翻译中的若干重要技巧进行讲解。

一、减　　译

在法律翻译中，所谓的“减译”是指减去原文中具有的，但目标语言表达不需要，且减去也不影响原文表达意思的词。将中文翻译成英文或把英文翻译成中文时，为了表达通顺的需要，减少词语是一种重要的手段。需要注意的是，“减译”并不意味着可以随意删减原文的内容。在翻译实践中，至于到底应该减少哪类词，或者减少多少个词，并没有特定的规律，需要由译者按照原文和译文的表达及上下文来确定。具体例子如下：

例 1：The respondent shall continue to pay for the child's education **unless and until** the child has reached the age of 18.（被告须支付小孩的学费，直至小孩满 18 岁为止。）

在这句话中，如果将“unless and until”完整翻译出来的话，就是“除非与直至”，这种表述在汉语中显得有点不伦不类。一般将其翻译为“除非……否则”，或者“直至……为止”，将“与”(and)省略。

再看一个例子：The charge on the property will not be lifted **unless and until** all the debts have been repaid.（除非还清所有债项，否则对财产的抵押不会被解除。）

例 2：The contract is **made and entered into** this 14th day of June, 2010, **by and between**

the Buyer and the Seller.(本合同由买方和卖方于2010年6月14日签订。)

在这一句中,可以"减译"的地方有两处。第一,"made and entered into"反映了合同条文表述的严谨性特点,翻译成汉语时无须赘译为"制定并签订",可翻译为"订立"或"签订"。第二,"by and between"在这句话中用来限定范围,以表明合同是在特定的买卖双方之间签订的,可以直接翻译为"由、通过"。

下编第2课(法律翻译基础:法律语言的特点)还列举了其他同上述两个例子类似的同义词重复的例子,此处不再赘述。

例3: If any guarantee is required as security for any external financing of the Company approved by the Board of Directors in accordance with Article 10, and if the Parties agree to provide guarantees in relation to such financing, the Parties shall severally guarantee the obligations of the Company under such external financing in proportion to their respective interests in the registered capital of the Company **at such time as the guarantee is given.**(如果董事会依照第10条批准的公司外部融资需要以保证形式提供担保,如当事方同意对该融资提供保证,则当事方应按当时在公司注册资本中所占份额的比例分别对公司的义务提供保证。)

在原文中"at such time as the guarantee is given"表时间状语,完全翻译出来是"在保证作出之时"。根据上下文意思和逻辑关系可以直接将其翻译成了"当时"。尽管进行了"减译",但并没有改变原文的意思。在经过"减译"后,译文更加通顺,及符合中文的表达习惯。

二、增　　译

与"减译"相对,所谓的"增译"就是指增加原文中没有的、但目标语言表达所需要,且增加也不影响原文表达意思的词。与"减译"的翻译方法类似,在实践中,到底应该增加哪类词或多少个词,并没有特定的规律,需要由译者根据原文和译文的表达来确定。例如:

例1: Court actions fall into two broad categories—**civil** and **criminal.**(法院的诉讼可分为两类:**民事诉讼**和**刑事诉讼**。)

在这一句中,增加了两个"诉讼",才可以使译文的表达更完整。

例2: Any interim or final Investment Certificate shall be signed by the Chairman and the Vice Chairman of the Board and stamped with the Company seal.(临时或正式出资证明书应由董事长和副董事长**联合**签署并加盖公司公章。)

在原文中,并没有出现"联合"的对应词。但是,为了使译文更严谨,在译文中增加了"联

合”一词。

例 3：The contract looks upon party A as having rights and duties thereof.（合同视甲方为**享有**合同权利和**承担**合同义务的主体。）

“享有”和“承担”虽然意思相反，但在该句中都可用“have”一词表达，而汉语则必须通过不同的词才能表达出完整的意思。

例 4：Those found in violation of these Regulations shall be **criticized, disciplined** or **fined** according to different circumstances. For serious cases, punishments shall be given by judicial authorities according to laws.（违反本条例规定的，应视情况，给予**批评教育、纪律处分、或处以罚金**，情节严重的，由司法机关依法惩处。）

在译文中，分别将“criticized, disciplined or fined”翻译为“批评教育、纪律处分、或处以罚金”，从而使译文的表述更加完整。

三、词义的选择

在英语中，一个词语具有多种含义的现象非常普遍。在一般情况下，译者只需按照单词在词典含义就能准确而地道地把原文译出。然而，在一些特殊情况下，如果按照词典的含义进行“死译”的话，译文的表达会让读者感到非常别扭。在这种情况下，译者就必须按照译文的表达习惯，根据上下文选择合适的词义，来表达原文作者的真实含义。例如：

例 1：Unlike **torts** and **contracts**, the criminal law involves public law.（与侵权行为法和合同法不同，刑法属于公法。）

为了与“刑法”对应，需要将“torts”和“contracts”翻译为“侵权行为法”和“合同法”。Torts 既表“若干侵权行为”，也有“侵权行为法”(tort law)之意。类似的，contracts 既可以是 contract 的复数形式，也有“合同法”(contract law)之意。

例 2：Although the words damage and injury are sometimes used synonymously, there is a **material distinction** between them.（虽然损害与伤害有时通用，但是两词有**本质上的区别**。）

在这一句中，“material”并不翻译为“物质的”，而是翻译为“本质的”，或者“重大的”。

例 3：He has the right to vote and to **stand for election.**（他有选举权与**被选举权**。）

此处应把“right to stand for election”翻译为“被选举权”。不少人误将“被选举权”译为“right to be voted”。另外，right to vote 一般译为“选举权”，在台湾多译为“选择权”、“表决权”或“投票权”。

如：中华人民共和国年满十八周岁的公民，不分民族、种族、性别、职业、家庭出身、宗教信仰、教育程度、财产状况和居住期限，都有**选举权和被选举权**。依照法律被剥夺政治权利的人没有**选举权和被选举权**。（All citizens of the People's Republic of China who have reached the age of 18 have the **right to vote and stand for election**, regardless of ethnic status, race, sex, occupation, family background, religious belief, education, property status or length of residence. Those who are stripped of their political rights according to law do not have **the right to vote or stand for election.**）

例 4：Each Party shall have the right to **change** its legal or authorized representative and shall promptly notify the other Party of such change and the name, position and nationality of its new legal or authorized representative.（双方有权**撤换**其各自的法定代表人或授权代表，并应将新法定代表人或授权代表的姓名、职位和国籍及时通知另一方。）

四、词类的转换

在翻译中，词类转换是一个重要的技巧。在实际翻译中，将动词换成名词，将名词改成介词这类灵活的方法往往可救译者于"危难"，一句翻不下去的话，一经转换便起死回生。这说明，词性本身有可能对翻译造成障碍，翻译时不能死盯着原文的词性一。[①]必要时，法律翻译亦需要对词性进行转换。举例如下：

1. 名词转换为动词

例 1：The **development** of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States.[②]（在平等互利的基础上**发展**国际贸易，是促进各国间友好关系的一个重要因素。）

例 2：A court may refuse recognition and enforcement based on the grounds for the **refusal** of recognition and enforcement available pursuant to its law.[③]（法院可以其法律所规定的**拒绝**承认和执行的理由为根据，拒绝给予承认和执行。）

例 3：The **resale** of cultural relics in private collections at a profit shall be strictly forbidden.（严禁将私人收藏的文物进行倒卖牟利。）

例 4：The confidentiality restrictions and obligations imposed by this Section shall ter-

① 叶子南："对翻译中'词性转换'的新认识"，载《中国翻译》2007 年第 6 期。
② 《鹿特丹规则》"序言"部分。
③ 《鹿特丹规则》第 73 条第 2 款。

minate two(2) years after the **expiration** or **termination** of this Agreement.（本条规定的保密限制和义务，在本协议**期满**或**终止**两年后终止。）

例 5：This Contract is **subject** to the **approval** of the Examination and Approval Authority before the same may become effective.（本合同须经审批部门**批准**方能生效。）

例 6：This Convention is subject to **ratification**, **acceptance** or **approval** by the signatory States.（本公约须经签署国**批准**、**接受**或者**核准**。）

2. 形容词转换为副词

The People's Courts, the People's Procuratorates and the Public Security Organs shall, in handling criminal cases, divide their functions, each taking responsibility for its own work, and they shall coordinate their efforts and check each other to ensure the **correct and effective** enforcement of the law.（人民法院、人民检察院和公安机关办理刑事案件，应当分工负责，互相配合，互相制约，以确保**准确有效地**执行法律。）此外，在这一句中，名词"enforcement"被转换成了动词。

五、正译与反译

正译和反译也是法律翻译中的一个重要技巧。所谓正译，就是说，原文从正面讲，就从正面译，原文从反面说，就从反面译。所谓反译，就是从原文相反的方面来进行翻译。一般来说，翻译时主要采用正译法。但有时由于两种语言的词义和语法习惯不同，原文从正面说，译文从正面如找不到恰当的对等，那就要利用反义词加否定的语气进行翻译就是反译。[①]正译好理解。反译要多说几句。一种有意思的说法是："翻译就是反译。翻译工作大部分时间就是反其意而行之。"反译又有"语序、时序之倒反"、"方位、逻辑之倒反"、"量度之倒反"、"文化之倒反"、"价值观念的倒反"、"数字之倒反"等等。[②]就法律翻译而言，这一翻译技巧的使用频率不算高。

例 1：**任何一方**均不对合营公司的债务或其他义务向任何第三人负连带责任。（**Neither/No party** shall be jointly and severally liable to any third party for the joint venture's debts or other liabilities and obligations.）

例 2：**任何一方仅**以其出资额为限对公司承担责任。（**No Party** shall have any liability to the Company except to the extent of its agreed capital contributions.）

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① 张成柱："正译和反译"，载《外语教学》1982 年第 1 期。

② ［澳大利亚］欧阳昱："翻译即反译"，载《中国翻译》2010 年第 3 期。

例 3: The proposal concerning **pollution** was called up in the meeting last week. (有关防止**污染**问题的议案,上周已经在会上提出来了。)

再如"消防队"是"fire brigade"的反译。此类的例子还有很多,比如 arms conference(裁军会议)、gas mask(防毒面具)、Unfair Competition Act(反不正当竞争法)、pornography campaign(扫黄)等。

六、语 序 调 整

为了使译文符合目标语言的表达习惯,在将原文翻译成目标语言时,必须对语序进行调整。与之前的几种技巧类似,语序的调整并没有特别的规律,原文中的词在译文中既可以放在前面,也可以放在后面,甚至可以放在中间。译者需要根据上下文的需要,合理地调整语序。例如:

例 1: The Party A hereby agrees to produce Product promptly after the Effective Date in accordance with the laws and regulations of PRC, and the provisions of this Contract. (甲方同意在本合同生效后,依照中华人民共和国法律法规以及本合同的条款,立即生产产品。)

在原文中,"in accordance with the laws and regulations of PRC, and the provisions of this Contract."等词作为状语被放在句子的后面,在译文中按照中文的习惯,将其被放在了谓语的前面。

例 2: The Party A may sell, transfer or otherwise dispose of all or any part of its interest in the Contract to any third party only with the prior written consent of Party B. (只有在乙方事先书面同意条件下,甲方才可向第三方出售、转让或以其他方式处分其在合同项下的全部或部分权益。)

在原文中,"only with the prior written consent of Party B"等词作为状语成分放在句子后,译文将其放在句首,这种表达更符合汉语习惯。

例 3: The Purchasing Plan of the Company shall be established by the Board of Directors in view of actual market conditions, expected sales volumes, the employees' ability to absorb new technology and any other factors considered important by the Board. (公司的购买计划由董事会在考虑市场实际情况、预计的产品销售额、雇员吸收新技术的能力以及其他董事会认为重要的因素后确定。)

在原文中,"in view of actual market conditions, expected sales volumes, the employees' ability to absorb new technology and any other factors considered important by

the Board."等词作为状语被放在句子的后面，译文将其被放在了句子的中间。

练　习

1. 选词填空。

committed	application	statutory	awarded	rather than	statute

Punitive damages are a settled principle of common law in the United States. They are a matter of state law, and thus differ in __(1)__ from state to state. In many states, including California and Texas, punitive damages are determined based on __(2)__; elsewhere, they may be determined solely based on case law. Many state statutes are the result of insurance industry lobbying to impose "caps" on punitive damages; however, several state courts have struck down these __(3)__ caps as unconstitutional. The general rule is that punitive damages cannot be __(4)__ for breach of contract. But if an independent tort is __(5)__ in a contractual setting, punitive damages can be awarded for the tort. Punitive damages are usually reserved for when the defendant has displayed actual intent to cause harm (such as purposefully rear-ending someone else's car), __(6)__ in cases of mere negligence.

2. 请将下列汉语句子翻译成英文，注意其中专门术语的表达。

(1) 外国记者和外国新闻常驻机构不得进行与其身份和工作性质不符或者危害中国国家安全、统一、社会公共利益的活动。

(2) 为了有效保护和合理利用我国的人类遗传资源，加强人类基因的研究与开发，促进国际间平等互利的合作与交流，制定本办法。

(3) 一方向合营公司部分或全部出资后，由董事会聘请的中国注册会计师验资并按照相关法律要求的形式出具验资报告。

(4) 已满十四周岁不满十六周岁的人，犯故意杀人、故意伤害致人重伤或者死亡、强奸、抢劫、贩卖毒品、放火、爆炸、投毒罪的，应当负刑事责任。

(5) 第二十三条 公民有下列情形之一的，利害关系人可以向人民法院申请宣告他死亡：

(一) 下落不明满四年的；

(二) 因意外事故下落不明，从事故发生之日起满两年的；

（三）战争期间下落不明的，下落不明的时间从战争结束之日起计算。

（6）被判处有期徒刑、拘役、管制而没有被剥夺政治权利的；被羁押，正在受侦查、起诉、审判，检察院或者法院没有决定停止当事人行使选举权利的；正在取保候审或者被监视居住的；正在被劳动教养的；正在受拘留处分的人员，享有选举权和被选举权。

3. 请将下列英文句子翻译成汉语，注意其中专门术语的表达。

(1) This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.

(2) Within 10 days after the effective date of this contract, the Owner shall pay the Contractor as full and complete compensation for accomplishing the Works and assuming all obligations under this contract the contract price in the amount of 10,000 yuan.

(3) Where the seller sells the subject matter which has been delivered to a carrier for transportation and is in transit, unless otherwise agreed by the parties, the risk of damage or loss is borne by the buyer as from the time of formation of the contract.

(4) The adoption of uniform rules to modernize and harmonize the rules that govern the international carriage of goods involving a sea leg would enhance legal certainty, improve efficiency and commercial predictability in the international carriage of goods and reduce legal obstacles to the flow of international trade among all States.

(5) If a Party (the "Assigning Party") proposes to transfer all or any part of its interest in the registered capital of the Company to a third party, the other Party shall have a pre-emptive right to purchase such interest at the price offered to the third party.

第五课　长句的翻译

Lesson 5　Long Legal English Sentences in Translation

在法律翻译中，最难处理的莫过于“长句”。“长句”具有两个典型特点：句子字数多，起码要超过 50 个单词；句子结构复杂，从句和各种修饰性成分较多。在法律英语中，“长句”出现的频率远远多于等其他英语作品。可以说，正确地理解和翻译长句，是法律翻译成败的关键。

对于法律英语中的“长句”，可以通过“拆分—组合”翻译法加以翻译。具体而言，就是要首先按照从宏观到微观的原则，将“长句”拆分成“短句”，进而分析出句子的主体结构；然后再把“短句”翻译出来；最后再把译文组合成通顺的汉语。其中的关键是“拆分”长句和“组合”译文。

在“拆分”长句的过程中，有一些拆分的“标志”：第一，句子中有标点符号的，可以从标点符号的位置，将句子分割开。第二，句子中有“连接词”的，可以将句子从“连接词”处进一步分割；所谓的“连接词”包括表示逻辑关系的词，比如 and，or，but，however 等；引导从句的词，如 that，which，when，where，while 等。第三，句子中有介词短语的，比如 at，for，in 等介词所引导的介词成分，可以对介词成分进行进一步的分割。

在“组合”译文的过程中，要注意其中的逻辑关系，在英—汉法律翻译处理上，最终的译文要符合汉语的表达习惯，达到准确、通顺、易懂的标准。

在法律英语中，“长句”的形成主要体现为以下三种方式：第一，复杂的从句；第二，多个并列结构；第三，多个分句。本课将通过例句具体分析上述三种类型“长句”的翻译及技巧。

一、复杂的从句

通过多个从句来使句子结构复杂化，是增加句子长度的重要方式，例如：

例 1：When the goods have arrived at their destination，the consignee that demands delivery of the goods under the contract of carriage shall accept delivery of the goods at the

time or within the time period and at the location agreed in the contract of carriage or, failing such agreement, at the time and location at which, having regard to the terms of the contract, the customs, usages or practices of the trade and the circumstances of the carriage, delivery could reasonably be expected. ①

这一句共有 83 个单词,具体翻译步骤如下:

步骤 1:"拆分"句子,找出句子的主体结构。

在这一句中,有多个从句:when 引导的状语从句,that 和 which 引导的定语从句。此外,该句中还有 or 和 and 引导的多个并列结构,以及 at 引导的介词成分。经过分析,本句的主体结构是:the consignee shall accept delivery of the goods。

需要注意的是,在 which 引导的定语从句中,有一个插入语:having regard to ...

步骤 2:分别翻译分割后的短句。

When the goods have arrived at their destination:当货物到达目的地时。

the consignee that demands delivery of the goods under the contract of carriage:要求交付货物的收货人。

having regard to the terms of the contract, the customs, usages or practices of the trade and the circumstances of the carriage:应当在考虑到合同条款和行业习惯、惯例或者习惯做法以及运输情形。

at the time and location at which(...) delivery could reasonably be expected:能够合理预期的交货时间和地点。

步骤 3:"组合"汉语译文:**当货物到达目的地时,按照运输合同要求交付货物的收货人应在运输合同约定的时间或者期限内,在运输合同约定的地点接受交货;无约定的,应考虑到合同条款和行业习惯、行业惯例或行业做法以及运输情形,在能够合理预期的交货时间和地点接受交货。**

类似的例子还有:

例 2:Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods

① 《鹿特丹规则》第 43 条。2008 年 12 月 11 日,在纽约举行的联合国大会上,《联合国全程或部分海上国际货物运输合同公约》(United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea)正式得到通过,并且大会决定在 2009 年 9 月 23 日于荷兰鹿特丹举行签字仪式,开放供成员国签署,因而该公约又被命名为《鹿特丹规则》。

are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's skill or judgment. ①

这一句共有 91 个单词,具体翻译步骤如下:

步骤 1:"拆分"句子,找出句子的主体结构。

这句话中有 where 引导的两个条件状语从句,which 引导的两个定语从句,that 引导的一个同位语从句(there is an implied condition that ...),that 引导的两个宾语从句,以及 whether or not 引导的一个状语从句。这句话的主体结构是:there is an implied condition。

步骤 2:分别翻译分割后的短句。

Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought:如果卖方在商业经营过程中出售货物,并且买方明示或默示地将购买货物所用于的特定目的告知卖方。

there is an implied condition:存在下述默示条件。

the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied:根据合同提供的货物将合理地适用于该目的,不论其是否为通常提供的货物所适用之目的。

except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the seller's skill or judgment:除非情况表明买方不依赖卖方的技能或判断,或者买方对卖方的技能或判断产生依赖是不合理的。

步骤 3:"组合"汉语译文:**凡卖方在商业经营过程中出售货物且买方以明示或默示方式将其购买货物的特定目的告知卖方的,存在下述默示条件:(卖方)按照合同提供的货物符合买方的购买目的,不论该目的是否为货物供应通常之目的,除非有情况表明买方不依赖卖方的技能或判断,或者买方对卖方的技能或判断产生依赖不合理。**

二、并 列 结 构

通过多重并列结构可以有效地增加句子的长度,例如:

例 1:Party A and Party B **shall** respectively indemnify Party C, its Affiliates, and/or Staff, and hold each of them harmless in all respects, from and against any claims, de-

① 英国《1979 年货物买卖法》(Sales of Goods, 1979)附表 1(Schedule 1)第 5 条。

mands, suits, or causes of action and any resulting settlements, awards, judgments, costs, expenses, losses, or damages(including without limitation attorney and court fees, value added taxes or similar taxes for which no credit is available under applicable legislation) ("Expenses and Loss") arising out of their own breach of this Agreement(individually or collectively) and/or any act or alleged activity of Party A and/or Party B in any way connected to the Trademark or this Agreement, and **shall** jointly indemnify Expenses and Loss as a result of their joint violation of this Agreement.

这一句共有121个单词,具体翻译步骤如下:

步骤1:"拆分"句子,找出句子的主体结构。

句子中包括很多由and和or构成的并列结构,这些并列结构的翻译并不难。此外,句中还有分词构成的修订成分:arising out of ...

这一句的主体结构是:Party A and Party B shall respectively indemnify Party C, its Affiliates, and/or Staff, and hold each of them harmless in all respects(...) and shall jointly indemnify Expenses and Loss as a result of their joint violation of this Agreement. 这也是一个并列的结构。

步骤2:分别翻译分割后的短句。

Party A and Party B shall respectively indemnify Party C, its Affiliates, and/or Staff, and hold each of them harmless in all respects:甲方和乙方分别赔偿丙方及其下属子公司和(或)工作人员,确保其不受下列损害。

(Party A and Party B) shall jointly indemnify Expenses and Loss as a result of their joint violation of this Agreement:(甲方和乙方)对其共同违反本协议的行为而导致的"费用及损失"负共同责任。

句中的并列结构:from and against any claims, demands, suits, or causes of action and any resulting settlements, awards, judgments, costs, expenses, losses, or damages (including without limitation attorney and court fees, value added taxes or similar taxes for which no credit is available under applicable legislation) ("Expenses and Loss") arising out of their own breach of this Agreement(individually or collectively) and/or any act or alleged activity of Party A and/or Party B in any way connected to the Trademark or this Agreement:任何因甲方和乙方(单独或共同地)违反本协议以及(或)甲方和(或)乙方与商标或本协议有关的行为或被指称的活动引起的任何请求权、要求、诉讼或诉因,以及任何相应的和解协议、裁决、判决、花费、支出、损失或损害(包括但不限于律师与法院受理费、增值

税或类似根据可适用的法律不可赊欠的税务负担)("费用和损失")。

步骤3:"组合"汉语译文:**甲方和乙方分别赔偿丙方及其下属子公司和(或)工作人员,确保其不受下列损害,即任何因甲方和乙方(单独或共同地)违反本协议以及(或)甲方和(或)乙方与商标或本协议有关的行为或被指称的活动引起的任何请求权、要求、诉讼或诉因,以及任何相应的和解协议、裁决、判决、花费、支出、损失或损害(包括但不限于律师与法院受理费、增值税或类似根据可适用的法律不可赊欠的税务负担)("费用和损失")。甲方和乙方对因共同违反本协议的行为应当对费用及损失负共同责任。**

例2: Except for the license granting Manufacturer the right, nothing contained in this Agreement shall be construed as conferring any right to Manufacturer or Vendor to use or register any name, trademark, service mark, logo, slogan, tagline, domain name, or other designation, including any contraction, abbreviation, or simulation of any of the foregoing, in advertising, publicity or marketing activities or for any purpose whatsoever. Any publicity, advertising, etc. with regard to this Agreement which mentions another Party shall be mutually agreed upon in writing prior to use.

这一段共有86个单词,与上一句相比,这一句的翻译比较容易。多个并列的名词的使用,直接增加了这个句子的长度。具体翻译步骤如下:

步骤1:"拆分"句子,找出句子的主体结构。

上述英文中包括两个句子,从"句号"处分割开,然后再分别翻译就可以了。

在第一句中,有except for所引导的状语,以及including所引导的状语。

步骤2:分别翻译分割后的短句。

第一句:

Except for the license granting Manufacturer the right:除授予制造商特许权之外。

nothing contained in this Agreement shall be construed as conferring any right to Manufacturer or Vendor:本协议中的任何内容不得被解释为授予制造商或者卖方如下任何权利。

句中的并列结构:to use or register any name, trademark, service mark, logo, slogan, tagline, domain name, or other designation, including any contraction, abbreviation, or simulation of any of the foregoing, in advertising, publicity or marketing activities or for any purpose whatsoever:在广告、宣传或者营销活动中,或者为任何目的,使用或注册的任何名称、商标、服务标志、标示、口号、宣传词、域名,或者其他标志,包括任何简写、缩写,或者前述任何内容的模仿。

第二句：

Any publicity, advertising, etc. with regard to this Agreement which mentions another Party shall be mutually agreed upon in writing prior to use:与本协议有关的任何提及另一当事方的宣传、广告等，应当在使用前由本协议全体当事人共同书面协商一致。

步骤 3:"组合"汉语译文。**除授予制造商特许权外，本协议中的其他任何内容不得被解释为授予制造商或者卖方如下任何权利：在广告、宣传或者营销活动中，或者为任何目的，使用或注册的任何名称、商标、服务标志、标示、口号、宣传词、域名，或者其他标志，包括任何简写、缩写，或者前述任何内容的模仿。与本协议有关的任何提及另一当事方的宣传、广告等，应当在使用前由本协议全体当事人共同书面协商一致。**

三、分句的翻译

为了完整、严谨地表达一个规定，法律文件往往会在一个句子中表述不同的分句，以使意思表达充分。例如：

In respect of the territories referred to in article 35 of the Constitution of the International Labor Organization as amended by the Constitution of the International Labor Organization Instrument of Amendment, 1946, other than the territories referred to in paragraphs 4 and 5 of the said article as so amended, each Member of the Organization which ratifies this Convention shall communicate to the Director-General of the International Labor Office with or as soon as possible after its ratification a declaration stating:

(a) The territories in respect of which it undertakes that the provisions of the Convention shall be applied without modification;

(b) The territories in respect of which it undertakes that the provisions of the Convention shall be applied subject to modifications, together with details of the said modifications;

(c) The territories in respect of which the Convention is inapplicable and in such cases the grounds on which it is inapplicable;

(d) The territories in respect of which it reserves its decision. ①

这种"长句"具有很大的迷惑性，表面上看结构比较复杂，字数也很多，但是，由于"分句"

① 《结社自由及保护组织权公约》(*Freedom of Association and Protection of the Right to Organize Convention*)第12条。

都已经被单独列出，这就在一定程度上降低了分析句子结构的难度。只需要分别翻译每一个分句，然后再组合译文就可以了。

步骤 1："拆分"句子，找出句子的主体结构。

这句话的主体结构是：each Member of the Organization shall communicate to the Director-General of the International Labor Office

主体结构之后的 stating 作为状语，引导了四个分句。

步骤 2：分别翻译分割后的短句。

In respect of the territories referred to in article 35 of the Constitution of the International Labor Organization as amended by the Constitution of the International Labor Organization Instrument of Amendment, 1946：关于经 1946 年《国际劳工组织组织法修正书》修正后的《国际劳工组织组织法》第 35 条所述领土。

other than the territories referred to in paragraphs 4 and 5 of the said article as so amended：该条修正后第 4 款和第 5 款所述领土除外。

each Member of the Organization which ratifies this Convention shall communicate to the Director-General of the International Labor Office with or as soon as possible after its ratification a declaration：国际劳工组织每一成员于批准本公约时，或于批准后尽速，向国际劳工局局长提出一份声明。

The territories in respect of which it undertakes that the provisions of the Convention shall be applied without modification：不经修改地适用本公约规定的该国领土。

The territories in respect of which it undertakes that the provisions of the Convention shall be applied subject to modifications, together with details of the said modifications：在加以修改的情况下适用本公约规定的该国领土，以及这些修改的细节。

The territories in respect of which the Convention is inapplicable and in such cases the grounds on which it is inapplicable：不适用本公约的领土，以及不适用的原因。

The territories in respect of which it reserves its decision：该国保留决定的领土。

步骤 3："组合"汉语译文：**关于经 1946 年《国际劳工组织组织法修正书》修正后的《国际劳工组织组织法》第 35 条所述领土（该条修正后第 4 款和第 5 款所述领土除外），国际劳工组织每一成员于批准本公约时，或于批准后尽速，向国际劳工局局长提出一份声明，说明：**

（1）不经修改地适用本公约规定的该国领土；

（2）在加以修改的情况下适用本公约规定的该国领土，以及这些修改的细节；

（3）不适用本公约的领土，以及不适用的原因；

(4) 该国保留决定的领土。

在汉语法律文件中,"分句"的表述模式也经常被使用。例如:

违反本规定第六条规定,经营者有下列行为之一的,由市或者区、县交通行政管理部门责令改正,处以每辆车 2 000 元以上 5 000 元以下的罚款:

(一) 未清除客运出租汽车专用车身颜色、专用营运标识或者专用营运设施的;

(二) 未在规定的时间内办理营运证件注销手续的。①

在翻译包括分句的汉语法律文件时,需要注意各分句之间的逻辑关系。该条可以翻译为:

An operator who, in violation of Article 6 of these Provisions, conducts any of the following acts, shall be ordered to make corrections by the municipal or district/county traffic administrative departments and shall be punished with a fine of no less than 2,000 yuan and no more than 5,000 yuan per vehicle.

1. failure to remove the special colors, operation signs and devices for passenger transport motor vehicles for hire; and

2. failure to go through formalities for cancellation of the business license in due time.

总之,法律英语中长句的翻译,必须是在全面、准确理解原文句子结构和逻辑关系的基础上,对句子进行"拆分",并对汉语意思进行"整合"。译者首先要从宏观上统揽全句,将长句"拆分"成短句,然后紧扣原意进行翻译,最后按照逻辑关系把汉语译文"整合"既忠实又通顺的译文。

练　习

1. 选词填空。

compensate	loss	obligation	reparation	negligence	liability

As a legal concept, indemnity has a more specific meaning, namely, to __(1)__ another party to a contract for any loss that such other party may suffer during the performance of the contract. For instance, compensation connotes merely a sum

① 《上海市查处车辆非法客运规定》(2010 年 11 月 1 日上海市人民政府令第 49 号公布)第十四条(违反退出营业规定的处罚)。

paid to make good the __(2)__ of another without regard to the payer's identity or their reasons for doing so. The obligation to indemnify differs from the __(3)__ to pay compensation, or make __(4)__, in that an obligation to indemnify is a voluntary obligation. If C crashes into B's car and damages it and the crash is due to C's __(5)__, most legal systems will impose __(6)__ upon C to pay B for the damage caused. C's obligation to B arises by force of law regardless of whether C subjectively wishes to compensate B.

2. 请将下列汉语句子翻译成英文，注意其中专门术语的表达。

(1) 本规定适用于本市行政区域范围内各类机动车、非机动车非法客运的查处及相关管理活动。

(2) 凡工人及雇主不须经过事前批准手续，均有权建立他们自己愿意建立的组织和在仅仅遵守有关组织的规章的情况下加入他们自己愿意加入的组织。

(3) 乙方原则上不接受超出订货数量的商品。特别情况下，经乙方同意认可，可以提前接受乙方的下一批次的订货。

(4) 除非本协议另行规定，未经其他当事人的书面同意，本协议或者本协议项下的任何权利或者义务不得由任何一方当事人转让、让与或者转托给他人。

3. 请将下列英文句子翻译成汉语，注意其中专门术语的表达。

(1) The Agreement may be executed in multiple counterparts, each of which shall be deemed an original and all of which taken together shall constitute one and the same instrument.

(2) Declarations communicated to the Director-General of the International Labor Office in accordance with the preceding paragraphs of this article shall indicate whether the provisions of the Convention will be applied in the territory concerned without modification or subject to modifications; when the declaration indicates that the provisions of the Convention will be applied subject to modifications it shall give details of the said modifications.

(3) Implied terms about title

① In a contract of sale, other than one to which subsection (3) below applies, there is an implied term on the part of the seller that in the case of a sale he has a right to sell the goods, and in the case of an agreement to sell he will have such a right at the time when the property is to pass.

② In a contract of sale, other than one to which subsection (3) below applies, there is also an implied term that—

(a) the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made, and

(b) the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

③ This subsection applies to a contract of sale in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the seller should transfer only such title as he or a third person may have.

④ In a contract to which subsection (3) above applies there is an implied term that all charges or encumbrances known to the seller and not known to the buyer have been disclosed to the buyer before the contract is made.

⑤ In a contract to which subsection (3) above applies there is also an implied term that none of the following will disturb the buyer's quiet possession of the goods, namely—

(a) the seller;

(b) in a case where the parties to the contract intend that the seller should transfer only such title as a third person may have, that person;

(c) anyone claiming through or under the seller or that third person otherwise than under a charge or encumbrance disclosed or known to the buyer before the contract is made.

第六课　合同翻译(一)

Lesson 6　Business Contract Translation Ⅰ

在经济活动中,合同是最为常见的文件之一。在国际贸易中,以英文撰写的合同被普遍使用。在合同的起草和翻译过程中,译者既需要具有驾驭中文法律文字的能力,而且要有驾驭英文法律文字的能力。合同翻译涉及的内容众多,本书分两课对合同翻译作有重点的介绍。本课从宏观上介绍合同翻译的基本特点以及合同的基本结构;下一课详细介绍具体条款的撰写和翻译。

一、合同翻译的基本特点

(一) 表达准确

法律英语的语言强调准确。合同涉及当事人的权利和义务,稍有不慎可能导致巨大的经济损失,因此,合同中的用词和句子表达都极其考究。例如:

1. 关于情态动词的使用

学过英语的人对于 may, shall, must, may not(或 shall not)等几个情态动词应该是非常熟悉的,但在合同中用这些词时要极其谨慎。这几个词如选用不当,可能会引起纠纷。

在约定争议解决条款时,可以规定:

The parties hereto **shall**, first of all, settle any dispute arising from or in connection with the contract by friendly negotiations.(双方首先应通过友好协商解决因合同而引起的或与合同有关的争议。)

Should such negotiations fail, such dispute **may** be referred to the Court having jurisdiction on such dispute for settlement in the absence of any arbitration clause in the disputed contract or in default of agreement reached after such dispute occurs.(如协商未果,合同中又无仲裁条款约定或争议发生后未就仲裁达成协议的,可将争议提交有管辖权的法院解决。)

第一句规定，出现争议后“应当”先行协商，因此，所以采用了“义务性”的规定，因此使用了“shall”。第二句规定，如果协商解决不了，作为当事人的权利，当事人可以选择诉讼，因此使用了“may”。

如果将本句中的 may 和 shall 的问题调换：第一句的 shall 换用 may 之后：当事人“可以”通过协商解决，这种规定就不是“义务性”的规定了；第二句中的“may”换用“shall”之后，双方的争议就必须诉讼解决，语气比较生硬。

2. 时间的表达

如果将“从 5 月 1 日起到 10 月 1 日止这一期间”的译成“during the period beginning on May 1 and ending on October 1”是不准确的。因为，这段期间应包括 5 月 1 日和 10 月 1 日这两天，所以，应在翻译中补入“both dates inclusive”，将其译为：“during the period beginning on May 1 and ending on October 1, both dates inclusive”，也可译为：“from May the 1st to October the 1st inclusive”。

3. 数量的表达

有时候在合同中不能明确地规定具体的数量，如果简单的使用“about”去翻译的话，就容易产生问题，因为“about”的范围不好确定。在此类条款中，可以使用通用的“溢短装条款”，如：“Quantity: 3% more or less allowed”，即“溢短装 3%”。

(二) 用语更为正式

在合同中，语言要正式，因此，在撰写合同条款时，一般要使用正式的英语词汇来替代非正式的英语词汇。例如：

1. “本合同的取消或提前终止，均不影响履行合同第 10 条和第 11 条规定的义务。”

该条可译为：The obligation(s) under Articles 10 and 11 shall neither be affected by the **rescission/cancellation** of the contract nor by a premature **termination** of the same.

在这句译文中，使用“termination”去表示“终止”，而不是使用“ending”；**rescission 或 cancellation** 也是非常正式的词汇。

2. “合营公司注册资本的增加或转让，应由董事会一致通过后，并报原审批机构批准，向原登记机构办理变更登记手续。”

本句可译为：

“Any increase and **assignment** of the registered capital of the Joint Venture Company **shall** be unanimously approved by the board of directors and be submitted to the original examination and approval authority for approval. The registration procedures for changes **shall** be dealt with at the original registration office”.

在这句翻译中，使用“shall”表示“应”，而不是使用“have to”；使用“be unanimously approved by”表示“一致通过”，而不是“be agreed by”；使用“ be submitted to ... for approval”去表示“报……批准”，而不是使用“be reported to ... for approval”。此外，译文使用“assignment”表示转让，而不是使用“delegation”，这是因为前者的对象一般是某种“权利”，而后者的对象一般是某种“义务”。

3. “本合同应受中国法律管辖，并按中国法律解释。”

本句可以翻译为：This contract shall be governed by and construed in accordance with the law of PRC.

在这句翻译中，使用“construe”去表示“解释”，而没有使用“explain”。

4. “董事长得根据董事会三分之一董事的提议，召集临时董事会议。”

本句可以翻译为：The chairman may **convene** an interim meeting based on a proposal made by one-third of the total number of directors.

在本句翻译中，使用“convene an interim meeting”去表示“召集临时会议”，而没有使用“hold a temporary meeting”。

5. 挖掘中如发现地下电线或管道时，乙方应停止挖掘并将情况通知甲方。

本句可以翻译为：During digging, if cables or pipelines are found, Party B shall stop working and **notify** Party A of the same.

在本句翻译中，使用“notify”去表示“通知”，而没有使用“inform”。

其他的例子还有很多，例如：

汉　语	正　式	更为正式
因为	because of	by virtue of
财务年度末	in the end of the fiscal year	at the close of the fiscal year
在……之前	before	prior to
关于	about	as regards, concerning
事实上	in fact	in effect
开始	start, begin	commencement
停止	stop	cease
主持(会议)	be in charge of	preside
召开	hold, call	convene
其他事项	other matters/events	miscellaneous
理解	understand	construe, comprehend

（续表）

汉　语	正　式	更为正式
赔偿	compensation	indemnities
不动产转让	transfer of real estate	conveyance
停业	end/stop a business	wind up a business, cease a business
依照合同相关规定	according to relevant terms and conditions in the contract	pursuant to provisions contained herein, as stipulated herein
合同任何一方当事人	Neither party to the contract	Neither/No party hereto

（三）专业术语的使用

专业术语的使用可以保证合同条款表达的准确。这些术语是在长期的贸易习惯中形成的，已经为业内人士所广泛接受和使用。

比如前述“不可抗力”的对应术语为 force majeure 或 Act of God；专利许可中的“特许权使用费”的对应术语为“royalty”，该词也译为“版税”；“宽限期”所对应的术语是“grace”。

又如在国际贸易合同中，国际商会的国际贸易术语解释通则（Incoterms）也会被广泛使用。本书其他课文已经对此类术语介绍甚多，此处不再赘述。

需要注意的是，在实践中，为了防止当事方理解上的歧义，合同当事方往往会在合同中对一些“术语”进行专门定义。例如：

Section 1: Certain Defined Terms. As used in this Agreement, the following terms shall have the following respective meanings:（第一条：专门用语。本协议中的下列术语意思如下：）

1. **Market** shall mean North America and South America.（“市场”应当指北美和南美。）

2. **Effective Date** shall mean the date upon which this Agreement takes effect.（“生效日”应当指本协议生效的日期。）

3. **Person** shall mean any natural or legal person, including a corporation, partnership trust, limited liability company or limited liability partnership.（“人”应当指任何法人或者自然人，包括公司、合伙信托、有限责任公司或者有限责任合伙。）

4. **“PRC”** shall mean the People's Republic of China, for the purposes of this Agreement, excluding the Hong Kong Special Administrative Region of PRC, the Macau Special Administrative Region of PRC, and Taiwan.（本协议所称的“中国”是指中华人民共和国，但在本协议中仅指中国大陆，不包括中国香港特别行政区、中国澳门特别行政区与中国台湾地区。）

二、合同的基本结构

不同的合同具有不同的内容,一般而言,一份完整的英文合同通常可以分为五部分:标题(Title),前言(Preamble),正文(Habendum),附录(Schedule)以及证明部分即结尾词(Attestation)。具体内容如下:

部分	主要内容	例　子
标题	概括合同的主要内容	License Agreement(许可协议) Know-how Contract(专有技术合同) Purchase Contract(采购合同) Letter of Intent(意向书) Tenancy Agreement(租赁协议) Collaboration Agreement(协作/合作协议)①
前言	开场白:订立合同的当事方	This agreement/contract is made and entered into this ____ day of ____ (month), ____(year) by and between Party A (hereinafter called "Party A")and Party B(hereinafter called "Party B") (用"by"来表示合同"由谁订定","between"来表示"谁与谁之间的订立"。如果当事人不止两个,也可以用"by and among"来代替。)
	"鉴于"条款	"Whereas Clauses"表示当事人乃是在基于对事实(例如订约目的、背景、原由等)的共同认识,订立此合同。②
	过渡条款	NOW THEREFORE, for and in consideration of the mutual covenants and agreements contained herein, the parties hereby covenant and agree as follows:(鉴于双方就本协议达成一致意见,特达成如下协议:)
正文	合同的主要条款	obligations of the parties(当事方的义务);contract object(标的);quantity(数量);quality(质量);price or remuneration(价款或者报酬);time limit, place and method of performance(履行期限、地点和方式);liability for breach of contract(违约责任);methods to settle disputes(解决争议的方法)。

① 其他的标题还有:Concession Agreement(特许经营协议);Consulting Agreement(咨询协议);Co-operation Agreement(合作协议);Co-operative Joint Venture Agreement(合作经营企业协议);Endorsement Agreement(形象代言协议);Exclusive Distributorship Agreement(独家经销协议);Secrecy Agreement/Agreement of Confidentiality(保密协议);Trademark License Agreement(商标特许/许可协议);Memorandum of Understanding(谅解备忘录)。

② "鉴于条款"的例子:

Whereas the Licensor possesses know-how for the designing, manufacturing, installing and marketing of the Time Machine;鉴于许可方拥有设计、生产、安装以及销售时间机器的专有技术;Whereas the Licensor has the right and desires to transfer the above-signed know-how to the Licensee;鉴于许可方有权且愿意将以上专有技术转让给被许可方;Whereas the Licensee desires to design, manufacture, sell and export the above mentioned Time Machine by using Licensor's know-how. 鉴于被许可方愿意使用许可方的专有技术进行设计、生产、销售以及出口上述时间机器。

（续表）

部分	主要内容	例　子
正文	正文的最后一句	IN WITNESS WHEREOF, the parties hereto have hereunto set their hands the day and year first above written.（当事人已在上述记载之日期签名盖章，特此证明。） IN WITNESS WHEREOF, the parties have executed this Contract in duplicate by their duly authorized representatives on the date first above written（作为协议事项的证据，双方授权代表于上面首次写明的日期正式签署本协议一式两份①）。
附录	补充说明	是对前述合同部分条款的必要补充。不是所有合同都有这一项。
证明部分	证人签名	1. 当事人如果自然人，用“SIGNED by ____”；连接后填写见证姓名的表达部分“In the presence of ____”； 2. 当事人是法人或非法人单位时，授权代表后接的是“SIGNED for and on behalf ____ of ____”，然后才是 In the presence of ____。 与中文合同的显著不同是签章处除当事人外，多了一个 In the presence of ____供证人签字之处。②

练　习

1. 根据课文回答问题。

（1）从表达准确的角度，合同英语具有哪些特点，请举例说明。

（2）从用语正式的角度，合同英语具有哪些特点，请举例说明。

（3）一份英文合同，一般包括哪些部分？

2. 选词填空。

disputes	damages	arbitration	federal	resolved	litigated

In the United States, in order to obtain __(1)__ for breach of contract or to

① 一式几份的表达方式：
一式双份：in duplicate
一式三份：in triplicate
一式四份：in quadruplicate
一式五份：in quintuplicate
一式六份：in sixtuplicate

② 证明部分的另一种表达方式是：
As Witness our Hands this ____ day of ____.
Signed, sealed, and delivered by the above named ____
In the Presence of ____
Signature ____
Address ____
Occupation ____

obtain specific performance or other equitable relief, the aggrieved injured party may file a civil (non-criminal) lawsuit in state court (unless there is diversity of citizenship giving rise to __(2)__ jurisdiction). If the contract contains a valid arbitration clause, the aggrieved party must submit an __(3)__ claim in accordance with the procedures set forth in the clause. Many contracts provide that all disputes arising thereunder will be resolved by arbitration, rather than __(4)__ in courts. Customer claims against securities brokers and dealers are almost always __(5)__ by arbitration because securities dealers are required, under the terms of their membership in self-regulatory organizations such as the Financial Industry Regulatory Authority(formerly the NASD) or NYSE to arbitrate __(6)__ with their customers.

3. 请为下列术语选择合适的英文释义。

A. license

B. assignment

C. tenancy

D. royalties

E. know-how

(1) it encompasses the transfer of rights held by one party to another party. The legal nature of it determines some additional rights and liabilities that accompany the act.

(2) The term is usage-based payments made by one party and another for ongoing use of an asset, sometimes an intellectual property(IP).

(3) It means possession or occupancy of lands, buildings, or other property by title, under a lease, or on payment of rent.

(4) It is practical knowledge of how to get something done and is often tacit knowledge, which means that it is difficult to transfer to another person by means of writing it down.

(5) It may be granted by a party to another party as an element of an agreement between those parties.

4. 请将下列汉语句子翻译成英文,注意其中专门术语的表达。

(1) 货物售出之日后,运费的增加,将由买方负担。

(2) 我们收到的货物是包装在木箱里,与包装指示不符。

(3) 本合同将在双方授权代表签字后正式生效。

(4) 本协定由双方代表于2010年6月2日在中国上海签字。

5. 请将下列英文句子翻译成汉语,注意其中专门术语的表达。

(1) This contract is hereby made and concluded by and between A Co. (hereinafter referred to as Party A) and B Co. (hereinafter referred to as Party B) on May 1st, 2011, in Beijing, China, on the principle of equality and mutual benefit and through amicable consultation.

(2) Now Therefore, in consideration of the premises and the covenants herein, the parties hereto agree as follows:

(3) The present Agreement is written in Chinese and English languages, both texts being equally authentic.

(4) China and Japan have initialed an agreement on cooperation in the peaceful use of nuclear energy, the official New China News Agency reported today.

第七课　合同翻译(二)

Lesson 7　Business Contract Translation Ⅱ

上一课介绍了合同翻译的基本特点以及合同的基本组成部分，本课将继续详细说明如何起草与翻译合同。对于一些格式化的条款，如“鉴于条款”(whereas clause)、过渡条款、证明条款等，在上一课中已经进行了基本介绍，本课不再具体介绍。本课主要就合同的“正文部分”的条款的起草进行介绍。

一、各方义务(obligations of the parties)条款

义务条款是合同的重要组成部分，这是最经常发生争议并进行诉讼的合同条款。其主要内容一般包括：

项　目	主要内容
双方必须履行的义务范围(what both parties to be required to do)	合同当事人主要义务的具体内容
合同履行时间(date of the obligations performed)	各合同当事人履行相应合同义务的具体时间约定
合同履行的质量标准(quality standards of the obligations)	产品质量或服务质量
运输条款(the delivery obligation and the transportation cost)	谁负责运输安排与谁负担运费(合同如果是异地履行的，必然涉及运输问题，本条款处理运输责任与费用问题)
保险及费用(insurances and its cost)	保险费的承担

具体例句如下：

1. The Vendor shall obtain from Manufacturer and shall sell to A Co. and A Co. shall purchase from the Vendor Products in accordance with this Agreement.(依本协议，卖方应从制造商处获得产品并向A公司出售；A公司应从卖方处购买该种产品。)

2. The Parties anticipate that the Vendor will fill at least eighty-five(85%) in a Pur-

chase Order. Any greater shortfall in a quarter shall be the basis for liquidated damages① as set forth in Section 5.2.(各当事方认为卖方能交付订单的百分之八十五。不足程度超过1/4的,按第5.2条规定的违约金条款处理。)

3. Time is of the essence in each order. If any shipment of Products is not made as promised, A Co., without waiving or prejudicing any of its other remedies, may refuse any Products and cancel without any liability any or all future shipments. (每个订单中的"时间"极为关键。如产品的任何一部分未能按约定的时间装运,A公司不需要放弃也不影响其享有的任何救济,可拒绝接受任意该产品,且可以取消随后部分或全部订单,无须承担任何责任。)

二、价格(price)条款

在价格条款中,一般应当明确合同涉及的税费种类,除法定支付主体外,必须明确约定是由哪一方最终承担税费支付责任。例如:

1. The agreed upon prices shall include ocean freight, inland transportation, taxes, packaging, and insurance costs from point of origin to A Co.'s delivery destination and all applicable customs duties and similar charges. Vendor shall be the importer of record on all shipments. Manufacturer represents and warrants that the pricing to Vendor shall be the best pricing offered to any purchasers of the Products. 议定的价格应包括从最初产地到A公司交货终点的海洋运输、内陆运输的费用、税费、包装费、保险费以及所有适用的关税和类似费用。卖方应为所有批次装运货物的"登记进口商"。制造商陈述并保证给予卖方的报价应为向该产品任何买方提供的价格中的最优价格。

2. The price of Agreement Product and the period of validity should subject to the negotiation between Party A and Party B. Once fixed, the price keeps ascertained in the period of validity, unless Party A and Party B negotiate to change. All Agreement Product's price is Shanghai port delivery price in USD(under special circumstances, the price may be Party A's warehouse delivery price). Party A should make great efforts to provide Agreement Product in most competitive market price. 协议产品的价格及其有效期由甲乙双方相

① liquidated damages:约定违约金,预定违约赔偿金。当事人在订立合同时,可以预先估计一方当事人违约所可能造成的损失,在合同中规定违约方应支付的赔偿金的确定数额。Liquidated damages(also referred to as liquidated and ascertained damages) are damages whose amount the parties designate during the formation of a contract for the injured party to collect as compensation upon a specific breach(e.g., late performance).

互商议确定。价格一旦由双方确定,则该价格在有效期内保持确定,除非经甲乙双方协商变更。所有协议产品的价格均为上海港交货 USD 价格(特殊情况可以甲方仓库提货价格结算)。甲方应尽力以最具有市场竞争力的价格提供协议产品。

三、支付条件(payment terms)条款

支付条件条款主要是约定支付合同价款或酬金的时间与方式,以及是否计算利息、逾期付款的处罚方式等等。在合同中,买卖双方对付款时间和付款方式都倍加关心,为了保证货款的安全收付,双方必须对支付条款作出明确的规定。在支付条件条款中,可以规定:何时开始支付(when is payment due),分期支付还是全额支付(whether it is paid in installment or in full,是否计算利息 whether interest is charged),逾期支付处罚(penalty for late payment)等内容。仅举如下几例:

1. 买方应于 2011 年 10 月 1 日以前将全部货款用电汇方式预付给卖方。(The buyer shall pay the total to the seller in advance by Telegraphic Transfer **not later than** October 1, 2011.)

2. The payment method of the first trading year is full payment of price for delivery. From the second trading year, Party A and Party B fix the trading terms for later payment together, under the precondition of long-term distribution and the enlarging marketing amount. (首交易年度采用全额支付后提货的方式。从次交易年度起,甲乙双方以长期经销和扩大营销量为前提,共同确定以后付款交易条件。)

四、合同期间(terms of contract)条款

合同期间是对合同本身的有效期约定。一般需要在合同中明确:"是一次性可以履行完毕的合同,还是需要在一定期间才能履行完毕的合同"(Is it a one-shot situation or will it last for some designed time period)以及"在什么条件下,合同的期限可以重新约定或者说合同的期限可以进一步扩展而继续有效"(How can the term be renewed or extended?)例如:

1. 本协议的初始期限应当自本协议生效之日开始起算,计至该日之后的第 5 个日历年的 12 月 31 日。(The initial term of this Agreement shall be from the Effective Date of this Agreement to December 31 of the fifth calendar year after the effective date.)

2. The Parties may extend or renew the Agreement for additional one-year provided A Co. gives notice of its desire to extend the term no later than twenty-four(24) months pri-

or to the end of the Initial Term or any term extension(Extended Term) and the Vendor does not give written notice within 30 days of receipt that it does not wish to extend the Term.(全体当事人可以将本协议的期限展期或者续签1年,但A公司需在"原定合同期限"结束日前24个月发出表示展期的通知且卖方在接到书面通知后30日内未发出表示不愿展期的书面通知。)

3. If anyone of Party A, Party B or Party C breaches any term of this agreement, the innocent party may terminate this agreement by notifying the counterparts 60 days in advance in written, and this agreement is terminated after the expiration of 60 days.(甲、乙、丙任何一方违反本协议的任何条款,无过错一方提前60天通过书面通知其他方式终止本协议的,本协议在60天期满时终止。)

需要说明的是,合同期间是指合同整体效力的期间,即合同生效时间与失效时间的期间。合同期间与合同履行期限(the time of performance)有重要区别:合同期间的效力指向对象是合同本身:合同期间开始是指合同整体生效,合同期间结束是指合同整体失效。而合同履行期限效力所指向的对象是合同的当事人:货物买卖合同中卖方合同履行期限就是指其交货时间,而买方的合同履行期限就是指其付款时间。

五、保证(warranties)条款

保证是指合同各方当事人的一种声明,比如货物买卖合同中,卖方对合同标的物的品质与性能进行保证,在供货后如发现非如其所述,则可以获得救济或赔偿等。例如:

1. The Vendor warrants that title to the Products is good①, marketable② and free and clear of all taxes; that the Products are free from all defects in design, workmanship, and materials; that the Products were manufactured by Manufacturer at its plant, that the Products are fit for their ordinary intended purposes; that the Products conform to the descriptions on their labeling and packaging; that the Products and their components are new and not previously used, and that the Products are merchantable and of good quality and workmanship.(卖方保证:产品的所有权有效、可转让、无任何税务负担;产品在设计、工艺和

① good title:有效的所有权,指可以被免除合理怀疑的所有权,可被通情达理的买主接受。该种所有权须未涉诉讼,无明显瑕疵或重大疑点。

② marketable title:可转让的产权,指在法律上和事实上无任何负担和瑕疵的产权,可以即时出售或抵押给他人。在产权所有人介绍产权状况后,任何智力正常和具有一般谨慎的买主都不会对这种财产权转让的有效性持合理的怀疑,从而同意签约。

材料上不存在任何瑕疵;产品系由制造商在其工厂生产且符合一般预期使用目的;产品与其标签和包装上的描述相符合;产品及其零部件全新、先前未被使用过,产品适销,品质、工艺好。)

2. Party A hereby represents and warrants to Party B that they are companies duly established and are validly existing, and they have authority to enter into and execute this Agreement and to perform their obligations hereunder. (甲方向乙方声明并保证:公司系合法成立并有效存续,公司有权订立与执行本协议,并履行本协议项下的各项义务。)

需要说明的是,在与美国当事方达成的合同中,保证条款是十分重要的基本条款。许多当事人正是基于某种可靠的事实因素而决定签订特定的合同的。保证条款,使一方当事人综合思考和界定他所赖以决定签订合同的各种事实因素,并要求对方明确地在合同中保证这些事实因素,而且能够依其所声明的保证充分地履行合同。

六、违约责任(liability for default and breach)条款

违约责任条款主要规定了当事人违约的条件,以及另一方当事人因其违约而能够获得取的权利。该条款一般会对合同的违约事件范围(what are the events of default?)、违约的补救期(the period to cure defaults)及违约的后果(What are the consequences of a default?)等事项进行规定。例如:

1. 供货协议由于甲方违反本协议或未履行本协议而未得以订立或生效的,甲方应当承担所有的义务和责任,并赔偿乙方遭受的费用与损失。(Party A takes all responsibilities and liabilities and indemnifies Party B expenses and costs if the Supply Agreement cannot be duly concluded or come into effect due to Party A's breach of this Agreement or failure in duly performing this Agreement.)

2. In addition to the Expenses and Loss under the above Article 7, if Party A breaches this Agreement, they shall pay Party B liquidated damages equal to 30% of the amount of Expense and Loss. (除上述第 7 条规定的费用及损失外,如果甲方违反本协议,甲方应向乙方支付上述"费用及损失"的百分之三十,作为违约赔偿金。)

3. The Buyer must give seller written notice of any claim within 30 days after arrival of goods at port of destination. Unless such notice, accompanied by proof certified by an authorized surveyor, arrives at the seller's office during such 30 days' period, the Buyer shall be deemed to have waived any claim. (买方应在货到目的港 30 天内向卖方提交索赔通知。卖方在此期间如未接到买方索赔通知及公证行开立的公证报告的,视为买方放弃索赔。)

七、争议解决(disputes settlement)条款

由于现实中不可预见的因素,合同不能得到完全履行的情况经常发生,妥善地解决争议可以保证经济活动的正常进行。解决争议的方式主要有诉讼(litigation)、调解(mediation)或仲裁(arbitration)。在国际合同中,仲裁是最为常用的一种方式。例如:

1. 任何本协议引起的或与本协议有关的争议均应提交中国国际经济贸易仲裁委员会,根据申请仲裁时该委员会有效的仲裁规则进行仲裁。仲裁裁决是终局的,对各方均有约束力。仲裁地在北京。(Any dispute arising from or in connection with this Agreement shall be submitted to the China International Economic and Trade Arbitration Commission for arbitration, which shall be conducted in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties. The place of arbitration is Beijing.)

2. If the Parties are unable to settle any dispute arising out of the Agreement in accordance with Section 19, then the dispute shall be submitted to a mutually acceptable neutral advisor for mediation. The cost of mediation shall be shared equally by the Parties. Notwithstanding the foregoing, any dispute with respect to intellectual property rights shall be submitted to the courts and not be referred to mediation in accordance with the provisions contained in this section. (如果全体当事人未能根据第19条解决产生于本协议的任何争议,则应将争议提交至各方共同接受的"中立顾问"处寻求调解。全体当事人应当平均分摊调解的费用。但与知识产权有关的任何争议应当提交给法院解决,而不应当根据本条的规定提交调解。)

3. Any dispute which is not subject to the arbitration provision in Section 10 may then be submitted to the federal or state courts in the State of New York for resolution. (不属于第10条仲裁规定范围内的任何争议,可提交至位于纽约州的联邦或者州的法院解决。)

八、合同终止(termination of contract)条款

合同终止是指合同生效后,未履行完毕前,因出现特定的情况时,提前终止合同的效力。合同终止条款主要包括如下内容:合同终止的条件(situations of termination of the contract),合同终止的后果(consequences of termination)以及合同终止后的责任承担(post-

termination obligations),等等。例如:

1. Party A may terminate this Agreement upon ninety (90) days notice if any of the following occur:(凡发生下列情况之一的,甲方可提前 90 天通过书面通知对方终止本协议:)

(a) The Vendor fails to supply at least 85% of Products ordered by Party A in four or more consecutive calendar quarters; or(卖方连续 4 个或者 4 个以上日历季度未能交付甲方所订购的 85%及以上的产品;或者)

(b) Party A determines that the Vendor or Manufacturer have breached Section 7 of this Agreement; or(甲方认定卖方或者制造商已经违反本协议第 7 条的规定;或者)

(c) Party A has given the Vendor or Manufacturer written notice of a breach, and the breach has not been cured within ninety(90) days.(甲方已向卖方或者制造商发出书面违约的通知,且该违约通知在 90 天内未得到有效处理。)

2. Upon termination, Party A may offset any mutually agreed upon bonuses from prior purchases or other credits due.(本协议一旦终止,甲方可从先前购置的产品或者其他到期债权中冲抵经各方协定妥的奖金。)

3. The termination of the Agreement shall not affect or prejudice any provisions of the Agreement, which are expressly or by implication provided to continue in effect after such termination.(本协议的终止应不影响本协议内任何已明确规定或者默示规定的将在本协议终止后继续有效的条款。)

九、其他规定(miscellaneous)

其他规定条款一般都是一些格式化的条款,主要包括保密(confidentiality)条款、法律适用(governing law/choice of law)、协议修订(modification of agreement)、完整协议(entire agreement)、不可抗力条款(Force Majeure)、签名(signatures)等内容。例如:

1. 法律适用

本协议所有方面均受中华人民共和国法律的约束,并按照该国法律进行解释,法律规定应适用其他司法管辖区之法律的除外。(This Agreement shall be governed in all respects by and construed in accordance with the laws of PRC, excluding those laws that direct the application of the laws of another jurisdiction.)

2. 完整协议

All recitals, articles, exhibits and schedules herein shall form an integral part of this

Agreement. This Agreement, and the recitals, articles, exhibits and schedules hereto, constitute the entire understanding and agreement between the Parties with respect to the subject matters hereof and thereof, and any prior drafts, agreements, undertakings, representations, warranties, and arrangements of any nature, whether in writing or oral, signed or unsigned, relating to such subject matter shall be superseded and terminated. (协议内各引语条款、正文、附件及附表均是本协议的组成部分。本协议包括其引语条款、正文、附件和附表构成双方对协议标的全部理解;任何与标的相关的书面或口头的、已签署或未签署的前期草案、协定、承诺、陈述、保证等均作废。)

3. 保密条款

本协议自终止之日起的两年内,未经另一方书面事先同意,任何一方当事人不得将本协议的内容及其附件或者修订书披露给任何第三人,除非适用的法律另有规定。(Except as may be required by applicable law, neither party shall disclose to any third party the contents of the Agreement, the Exhibits or any amendments hereto or thereto for a period of two (2) years from the date of termination hereof without the prior written consent of the other party.)

练　习

1. 选词填空。

uncertain	enforcement	equitable	the amount of	enrichment	upheld

At common law, a liquidated damages clause will not be enforced if its purpose is to punish the wrongdoer/party in breach rather than to compensate the injured party. One reason for this is that the __(1)__ of the term would, in effect, require an __(2)__ order of specific performance. However, courts sitting in equity will seek to achieve a fair result and will not enforce a term that will lead to the unjust __(3)__ of the enforcing party.

In order for a liquidated damages clause to be __(4)__, two conditions must be met. First, __(5)__ the damages identified must roughly approximate the damages likely to fall upon the party seeking the benefit of the term. Second, the damages must be sufficiently __(6)__ at the time the contract is made that such a clause will likely save both parties the future difficulty of estimating damages.

2. 请将下列汉语句子翻译成英文,注意其中专门术语的表达。

(1) 有关潜在瑕疵,无论买方所提出的索赔时间早晚,卖方均不得拒绝。

(2) 如果卖方已向甲方发出违约的书面通知,并且在 90 天内违约情况未能得到救济,卖方或者制造商可以终止本协议。

(3) 若乙方破产(包括其他类似状况),本协议自甲方书面通知发出之日起即刻终止。

(4) 协议的有效性、履行及其他与协议效力有关的所有事项均适用美国纽约州的法律,其他任何可能适用的冲突法、冲突规定或者冲突规则并不适用。

3. 请将下列英文句子翻译成汉语,注意其中专门术语的表达。

(1) Any failure or omission by Party A in performance of its obligation under this Agreement shall not be deemed a breach or create any liability for damages or other relief if it arises from acts of God, floods, fires, explosions, storms, earthquakes, war, terrorism, rebellion, insurrection, sabotage, or any order or action by any governmental agency, or causes of similar nature. If such failure or omission cannot be remedied within a reasonable period of time, the party awaiting performance shall have the right to terminate this Agreement.

(2) Notices required to be given by one party to another shall be deemed properly given if reduced to writing and personally delivered or transmitted by registered or certified post to the address below, postage prepaid, or by facsimile with confirmation receipt, and shall be effective upon receipt.

第八课　公证文书的翻译

Lesson 8　Translation of Notarial Certificates

公证是公证机构根据自然人、法人或者其他组织的申请，依照法定程序对民事法律行为、有法律意义的事实和文书的真实性、合法性予以证明的活动。[①]公证书是指国家公证机关依法对当事人申请公证的法律行为、有法律意义的文书和事实审查后，进而确认其真实性、合法性而出具的证明文书，如“学历公证书”、“成绩单公证书”、“婚姻公证书”、“收养公证书”、“亲属关系公证书”、“未受刑事处分公证书”、“合同公证书”等。随着我国公民涉外交往（比如移民、留学、旅游等）的频繁，对公证的需求也大量增加。在此背景下，做好公证文书的翻译工作，并保证翻译质量，具有重要的现实意义。

一、公证文书的特点

与其他法律文本一样，在文体风格、词语运用、语法手段等方面，公证文书具有用语严谨、规范等特点。高度格式化是公证书最为突出的特点。具体说明如下：

（一）语言的准确严密

语言的准确严密是对公证文书的最基本要求。公证文书必须忠实原文，这就要求译者必须在准确透彻地理解原文实质的基础上，忠实地表达原文的内容。以实践中常用的学历公证的正文为例：

例 1：学生李明，性别男，一九八五年六月三十日生。于二〇〇四年九月至二〇〇八年七月在本校法律专业四年制本科学习，修完教学计划规定的全部课程，成绩合格，准予毕业。

英文译文为：

Having studied the four-year legal undergraduate program in our university from September 2004 to July 2008, Li Ming (male, born on 22 December 1985) has successfully

① 《中华人民共和国公证法》第 2 条。

completed all the courses stipulated in our teaching plan, and thus being permitted to leave with this graduation certificate.

在译文中,用一句英文完成了对汉语的翻译。在译文中,通过对分词的使用:1. Having studied the four-year legal undergraduate ...

2. being permitted to leave with this graduation certificate

使汉语意思得到了简明的表达,同时,整个句子的逻辑结构也非常严谨。

例 2:兹证明李明(男,1980 年 6 月 30 日出生)于 2000 年 9 月入北京大学化学系学习,学制 4 年,于 2004 年 7 月毕业,并获得学士学位。

英文译文为:

This is to certify that Li Ming (male, born on May 30, 1980) was enrolled in the Chemistry Department of Peking University (4-year course) in September 2000 and graduated with Bachelor's degree in July 2004.

在上述译文中,"入学"被翻译为"be enrolled in",这是一个较为规范的表达方法。如果使用"to start school"则不太规范,该表达主要表示开始进入小学或者中学学习。

例 3:兹证明北京大学毕业文凭上的学校印签和校长张伟的签字属实。

英文译文为:

This is to certify that both the signature of President Zhang Wei and the seal affixed hereto are found to be authentic.

在上述译文中,"属实"被翻译成 "authentic",这种翻译要优于"genuine"。Authentic 一词在法律英语中比较常用。比如:"作准证书"是"Authentic Instrument","作准文件"是"Authentic Document"①。在《布莱克法律辞典》中有例句:the signature is authentic。(署名属实)②由此可见,用"authentic"一词翻译"属实"要更准确一些。

例 4:兹证明李明(男,1980 年 5 月 1 日出生)和王芳(女,1980 年 6 月 1 日出生)于 2005 年 5 月 1 日在北京朝阳区民政局登记办公室登记结婚。

有译者将其翻译为:

This is to certify that Li Ming, who is male and was born on May 1, 1980, and Wang Fang, who is female and was born on June 1, 1980, registered marriage on May 1, 2010 at the registration office of Civil Affairs Department, Chaoyang District, Beijing.

这篇译文的主要缺陷之一在于时态。"registered"一词为动词的过去式,表明的是在

① 程逸群:《英汉-汉英双向法律字典》,中国政法大学出版社 1999 年版,第 28 页,第 470 页。

② Bryan A. Garner: Black's Law Dictionary (8th Edition), Thomson Reuters, 2009, p. 66.

过去登记结婚，并不能证明现在的婚姻状况是离异(divorced)、丧偶(widowed)还是分居(separate)。这种翻译方法并不能满足公证文书的准确严密的要求。因此，可以将时态改为现在完成时态，以表达“一直持续到现在的状态”。此外，上述译文不够简洁。可以修改为：

This is to certify that Li Ming (male, born on May 1, 1980) and Wang Fang (female, born on June 1, 1980) have been married since May 1, 2010 at the registration office of Civil Affairs Department, Chaoyang District, Beijing.

(二) 高度格式化

在实践中，公证文书有固定的结构。公证文书在使用过程中，被不断地完善，一般都已形成某种固定的格式。这在一定程度上给译者带来了便利，译者可以按照相对固定的句式和词语翻译即可。例如上述两个学历公证的正文的表达就是相对格式化的。再如，

例 1：“未受刑事处分公证书”的表达通常是：兹证明李明(性别男，1985 年 6 月 30 日出生)至 2010 年 12 月 20 日在中国居住期间没有受过刑事处分。

该句可以翻译为：

This is to certify that Li Ming (male, born on June 30, 1985) has not had any record of committing offences against the criminal laws during the period of his residence in China until December 20, 2010.

对于“未受刑事处分公证书”的译文可以形成这样的“模板”：

This is to certify that name (male /female, born on month/day, year) has not had any record of committing offences against the criminal laws during the period of his residence in place until month/day, year.

例 2：“委托公证书”的表达通常是：兹证明李明和张伟于 2010 年 5 月 1 日来到我处，在我面前，在前面的委托书上签名(或盖章)。

该句可以翻译为：

This to certify that Li Ming and Zhang Wei came to my office on May 1st, 2010, and affixed their signature(or their seal)in my presence, on the Power of Attorney attached hereto.

除了上述内容外，为了表示公证员的“见证”，一般还会加上下述固定的“套话”：In witness whereof, I have hereunto set my hand and official seal on the day and year first written above.(公证员于上述日期签署以上文书并加盖印章，特此证明。)

对于“委托公证书”的译文可以形成这样的“模板”：

This to certify that name and name came to my office on month/day, year, and affixed their signature (or their seal)in my presence, on the Power of Attorney① attached hereto.

In witness whereof, I have hereunto set my hand and official seal on the day and year first written above.

例 3:"商标注册公证书"的通常表达是:兹证明徐州耐驰蓄电池公司生产的蓄电池上的"耐驰"商标经国家工商行政管理局商标局核准注册,取得第 0304 号《商标注册证》。该商标的专有权属于徐州耐驰蓄电池公司,该商标的有效期为 10 年。

该句可以翻译为:

This is to certify that Naichi Trademark on accumulator produced by Jiangsu Naichi Accumulator Co. registered at trademark office of Industry and Commerce Administration of the People's Republic of China and accepted NO. 0304 Trademark Registration Certificate.

The patent right of the Trademark Registration belongs to Jiangsu Naichi Accumulator Co. with 10 years of validity.

对于"商标注册公证书"的译文可以形成这样的"模板":

This is to certify that _____Trademark on _____(the name of the goods) produced by _____(Name of the Company) registered at trademark office of Industry and Commerce Administration of the People's Republic of China and accepted NO. _____Trademark Registration Certificate.

The patent right of the Trademark Registration belongs to _____(Name of the Company)with _____years of validity.

二、公证文书的翻译

中国通用的公证文书一般由标题、正文和落款三部分组成。下面就这三部分的翻译分别举例说明。

(一) 标题的翻译

公证书可译作"Notarization",或者"Notarial Certificate"。比如,实践中比较常见的公

① Power of Attorney:(授权)委托书。An instrument granting someone authority to act as agent or attorney-in-fact for the grantor.

证文书可以进行如下翻译：

汉　语	英　语
毕业证公证书	Notarization of Diploma
学位证公证书	Notarization of Degree Certificate
成绩单公证书	Notarization of Academic Transcription
亲属关系公证书	Notarization of Family Relation/ Domestic Relation
婚姻状况公证书	Notarization of Marital Status
无刑事犯罪记录公证书	Notarization of No Record of Criminal Offense
收养公证书	Notarization of Adoption
离婚公证书	Notarization of Divorce
未婚公证书	Notarization of Being Single①

当然，在实践中，以上各类公证文书的标题都可笼统地翻译为："Notarization"或者"Notarial Certificate"。

在翻译公证文书的标题时，其英文形式要符合英语标题写作的一般性规范，即标题中不用引号(Quotation Marks)及句号(Periods)；标题要在公证书上方中央位置(Center Top)；公证书标题或者全部大写(Capitalize All Letters)，或者大写标题中每个单词的第一个字母(Capitalize the Very First Letter of Each Word)(但标题中的冠词及少于5个字母的连词、介词不应大写，除非位于句首)。

(二) 正文的翻译

1. "兹证明"的翻译

我国公证文书的正文多以"兹证明……"开头，在实践中，一般将其翻译为：This is to certify that ...

上文已经列举了多个例子，此处不再赘述。此外，在本课"练习"部分还安排了相关的翻译练习。

2. "在……上签名"的翻译

"在……上签名"常见于委托书、遗嘱等公证文书中，将其翻译为"sign one's name on ..."，显得很不正式。一般将其翻译为"affix one's signature to…"。需要注意的是，在

① 婚姻状况大概有五种形：已婚(Married)、鳏居(Widowed)、离异(Divorced)、分居(Separate)和未婚(Single)。"Unmarried"包括"Divorced"，"Widowed"和"Single"。因此，用"Unmarried"来表示"未婚"是容易引起歧义的，最好使用"Single"来表示"未婚"。

翻译中，不要将将该短语写成“affix one's signature on…”，这是一种比较常见的错误。

3. 关于人名和地名的翻译

在公证书文件中，人名和地名的翻译会经常碰到。翻译中国人名和地名的基本的基本原则是“音译”，即用英文字母把中国人名和地名的发音标记出来。需要注意的几个细节问题是：第一，按照顺序拼写出中国的人名即可，不需要将姓放在名的后面，例如，将“李明”拼写成“Li Ming”就可以，不需要拼写成“Ming Li”。第二，对于一些人名按照“从俗”的原则进行拼写，比如，一般将“孔子”拼写为“Confucius”，将“孟子”翻译为“Mencius”。第三，对于地名的拼写方法，要根据《中国地名汉语拼音字母拼写规则（汉语地名部分）》、《关于改用汉语拼音方案拼写中国人名地名作为罗马字母拼写法的实施说明》进行拼写。

建国以来，我国已经陆续推出多种有影响的人名翻译词典类书籍，编者在大量检索的基础上，主要总结出以下几点看法。①

第一，人名翻译词典的编纂主要是“外—汉”方向的，编者尚未见到“汉—外”方向的人名翻译词典。

第二，在现有的外国人名词典中，最有声誉的当是“新华通讯社译名室”在商务印书馆出版的各国“姓名译名手册”。编者按照时间顺序，对全部“译名手册”做了简要归纳和说明。需要说明的是，这些“译名手册”的著作权人有的署名为“新华通讯社译名室”，还有一些署名为“辛华”，后者显然是新华通讯社译名室的“笔名”。

作者及出版社	词典名	版本及出版时间	特色及说明
新华通讯社译名室编，中国对外翻译出版社出版的人名译名词典	西班牙语姓名译名手册	1963 年第 1 版；1973 年再版。	是新华通讯社译名室出版的第一部《姓名译名手册》。本手册后于 1984 年后在新华出版社出版。
	英语姓名译名手册	1965 年 5 月第 1 版；经 1970、1973、1983、1984、1985、1989 数次修订，2004 年 1 月出第 4 版。	适用于一切英语国家、英语民族的姓名。权威、便携，但无解释、无音标。附“常用英语姓名后缀汉译参照表”。曾用名《英语国家姓名译名手册》。《英语姓名译名手册》还曾在“北京外文书店”以非正式出版物出版。
	德语姓名译名手册	1970 年第 1 版；1973 年略有修订；1999 年出修订本。	适用于翻译使用德语的国家、民族（瑞士、卢森堡、匈牙利、罗马尼亚等国使用德语的民族）的姓名时使用。手册中的姓氏、教名不分类别，按拉丁字母顺序混合排列。

① 关于人名词典，参见屈文生：“谈人名翻译的统一与规范化问题——从查理曼，还是查理曼大帝说起”，载《中国科技术语》2009 年第 5 期。

（续表）

作者及出版社	词典名	版本及出版时间	特色及说明
新华通讯社译名室编，中国对外翻译出版社出版的人名译名词典	罗马尼亚姓名译名手册	1981 年第 1 版。	汇集了常见的罗马亚姓氏、教名约三万条。对匈牙利族和日耳曼族的常用姓名也有部分收录。
	俄语姓名译名手册	1982 年第 1 版。	附俄罗斯人的小名与昵称、Н 结尾的连音词干、特殊后缀、外来姓名后缀及俄汉译音表。
	葡萄牙语姓名译名手册	1995 年第 1 版。	适用于翻译使用葡语的国家和民族的姓名时使用。曾于 1970 年在“北京外文书店”以非正式出版物出版。
	法语姓名译名手册	1996 年第 1 版。	适用于翻译使用法语的国家、民族（如加拿大、瑞士、比利时）的姓名时使用。曾于 1970 年在“北京外文书店”以非正式出版物出版。
	世界人名翻译大辞典（上下册）	1993 年第 1 版；2007 修订本。	词典附：世界各国及地区语言、民族、宗教和人名翻译主要依据、55 种语言译音表、威妥玛式拼法与汉语拼音对照表、常用姓名后缀及部分国家（民族）姓名简介。两册共计 3753 页。

在主要国家“姓名译名手册”中，商务印书馆唯独缺乏《日语姓名译名手册》。经编者检索，广东省科学技术情报研究所国外科技编辑部曾于 1978 编写出版过一部《日本姓名译名手册：罗马字—汉字对照》，由科学技术文献出版社出版。新华通讯社译名室除在商务印书馆出版主要国家“姓名译名手册”外，还在中国对外翻译出版社出版《世界人名翻译大辞典》（上下册卷），这也是一部广为认可的、值得参考的译名翻译工具书。

有人曾将新华通讯社译名室比作外国人名进入中国的“海关”。如今的翻译实践中，人们基本上遵循“凡外国的国名、地名、人名、党派、政府机构、报刊等译名，均以新华社的译名为准的原则”。这大概是源于上世纪 60 年代周总理曾经发布的“外国人名译名以新华社为准”指示。

第三，除新华通讯社译名室编纂了部分人名译名词典外，还有不少学者“以个人名义”组织编写了不少这方面的词典。例如：史群的《日本姓名词典》，商务印书馆 1979 年版和 1982 年版；淮鲁的《英语姓名知识手册》，世界知识出版社 1989 年版；高宣扬、许敦煌的《英文姓名宝鉴》，台北书林出版有限公司 1992 年版；李成滋，刘敏主编的《俄英汉英美姓名译名词典》，辽宁人民出版社 1997 年版；赵福堂的《日英汉对译日本人名地名词典》，世界知识出版社 1998 年版；高东明、马涛的《常用英语姓名手册》，石油大学出版社 2001 年版；高玉华、李慎廉、高东明等的《英语姓名词典》，外语教学与研究出版社 2001 年版；宋兰臣等的《常用英美人名词典》，河北教育出版社 2001 年版；王健的《日语世界姓名译名词典》，商务印书馆 2004 年版以及彭曦的《日本常用姓名地名译名辞典》，南京大学出版社 2007 年版，等等。

第四，人名翻译词典可分为“名录型人名翻译词典”和“传记型人名翻译词典”，也可分为

“综合性人名翻译词典”和“专科性人名翻译词典”，还可分为“大型人名翻译词典”、“中型人名翻译词典”及“小型人名翻译词典”。不仅如此，还可以有“应用型人名翻译词典”和“研究型人名翻译词典”。比如说，刘星华的《俄语姓名用法详解》(对外贸易教育出版社 1987 年版)、朱晓刚编著的《英语姓名简史》(商务印书馆 1992 年版)都有较强的学术性，呈现出明显的研究性特征。

关于“专科性人名翻译词典”，编者了解到王瑞的《莎剧中称谓的翻译》(中国社会科学出版社 2008 年版)是国内第一部有关莎剧称谓翻译的专著。陈玉书的《日本造船界姓名译名手册》(中国船舶科学研究中心 1982 年版)、白云晓的《圣经人名词典》(中央编译出版社 2006 年版)均极具特色。

4. 关于标点符号

英语中的标点和汉语中的标点有所区别，在进行公证文书的翻译时要特别注意，因为，公证文书的正文部分的字数相对较少，其中如果出现简单的标点错误的话，则会显得尤其突兀。容易错误的标点及汉英区别，如下表：

名　称	英汉区别
顿号(、)	汉语有(、)，英语中没有顿号，凡是汉语中欲使用顿号的地方，在英语中一律使用逗号代替。
书名号(《》)	汉语有书名号，英语无书名号，英语的书名表示方法：斜体，或者加下划线。
省略号(……)	汉语的省略号为六个点，英语三个点(…)。
感叹号(!)	手写无区别。但是，英语中除了标准的感叹句外(what 和 how 引导的感叹句)，一般不使用感叹号。

(三) 落款的翻译

公证文书的下方一般须注明：

1. 公证员(Notary)的姓名和签名(Signature)或盖章(Seal)；

2. 公证处名称及盖章；

3. 日期。日期的格式一般为月-日-年。

下面请看一份完整的学位公证书的翻译：

学位公证书

兹证明前面北京大学于 2010 年 7 月 1 日发给李明的编号为 0123 的毕业证书与原文一致。该毕业证书上所盖的北京大学印章属实。并证明前面所附的英文译本与中文本内容一致。

中华人民共和国北京市公证处

公证员：张伟

2011 年 5 月 1 日

译文如下：

Notarization of Academic Degree Certificate

This is to certify that the above duplicate copy of diploma with No. 0123 issued to Li Ming on July 1, 2010 by Peking University is in conformity with the original. The seal of Peking University affixed to the above mentioned diploma is found to be authentic. And this is also to certify that the English translated copy attached hereto is in conformity with the content of the Chinese original.

Notary Public: Zhang Wei
Notary Public Office of Beijing
The People's Republic of China
May 1, 2011

上述译文的格式和用语是国内公证机关所经常使用的。与本课第三部分中所列出的外国公证文书相比较，在格式和内容方面有所不同。

外国公证文书一般会在标题部分写上相关证明机构的名称。有学者主张，在国际交流不断增多的背景下，像公证书这类商务应用文的翻译，原则上应尽可能地参考相关文件的原文，参照它们的内容、风格和文字来进行写作和翻译，翻译时要做到达意（习惯的表达方法）、传神（恰当的语言风格）和表形（通用的规范格式）。也就是说，要按照"入乡随俗"的原则，用英语中"约定俗成"的语言和形式来进行创造性的翻译，使翻译出来的材料为说英语的人所喜闻乐见，从而取得良好的效果。[①] 按照这样的标准，并参照本课第三部分所列出的范例，可以将上述译文调整为：

THE PEOPLE'S REPUBLIC OF CHINA
NOTARY PUBLIC OFFICE OF BEIJING

I, Zhang Wei, the Notary Public Officer of Notary Public Office of Beijing, the People's Republic of China, hereby certify:

That the above duplicate copy of diploma with No. 0123 issued to Li Ming on July 1, 2010 by Peking University is in conformity with the original. The seal of Peking University affixed to the above mentioned diploma is found to be authentic. And this is also to certify that the English translated copy attached hereto is in conformity with the content of the Chinese original.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal on this first day of May, two thousand and eleven.

(signature)
Notary Public

需要说明的是，中外公证文书的差异主要体现在格式和个别格式化的用语方面（比如文书

① 恒齐，隋云："商务应用文的英译应与国际接轨"，载《中国翻译》2003年第3期。

开头和最后的格式化语言)。由于历史和传统的差异,各国在公证文书的格式和表述方面都有些许差异,但这并不影响公证文书主要功能的实现。公证文书的核心内容是为了证明某一事项的真实性和可靠性,因此,公证文书的核心部分还在于其"正文"的翻译,要做到严谨、通顺、真实。在实践中,为了更有利于目标语言国读者的理解,以该国通用的格式来翻译和排版就更好了。

三、外国公证文书示例

在格式和内容方面,外国的公证文书与中国的公证文书有所不同。请参见新加坡的授权委托书的公证文书①:

<table>
<tr><td colspan="2">Dated this 15th day of August 2010
日期:2010 年 8 月 15 日
POWER OF ATTORNEY of Li Ming(Assumed Name)
李明(化名)的授权委托书
SHOOK LIN & BOK</td></tr>
<tr><td colspan="2">ADVOCATES & SOLICITORS
MALAYAN BANK CHAMBERS
SINGAPORE
SHOOK LIN & BOK 律师事务所
新加坡马来银行律师事务所</td></tr>
<tr><td>A Power of Attorney given on the 15th day of August two thousand (2000) by me, Li Ming, (holder of Singapore NRIC No. 2141267/H) of 10A, DEF, Singapore 2057.
WHEREAS:
(1) …</td><td>我,李明,于 2000 年 8 月 15 日作出此授权书。李明为新加坡 NRIC No. 2141267/H 的持有人,居住于 10A, DEF,新加坡 2057.
鉴于:
(1) ……</td></tr>
<tr><td>NOW THIS DEED WITNESSETH that I appoint Zhang Wei (Assumed name) (hereinafter called "Attorney") to be my true and lawful attorney and in my name do and execute all or any of the following acts, deeds and things in the People's Republic of China:
(1) …</td><td>现在见证的委托书是我委托张伟(化名)为我的正式与合法的代理人,代理人得以我的名义在中华人民共和国行使和执行下列行为、文书和事务:
(1) ……</td></tr>
<tr><td>And I here by agree to ratify and confirm all that the Attorney or his appointed substitute may do or cause to be done in pursuance of this Deed which I declare shall continue in force until notice of my death or of other revocation hereof shall be actually received by the Attorney or his appointed substitute for the time being acting in exercise of the powers herby conferred.</td><td>我特此同意批准和确认代理人或其指定替代人按照此委托书所做的或将做的行为。我宣布此委托书将继续生效,直至代理人或其指定替代人在履行本委托书授予的权利的过程中收到我的死亡通知或者此委托书的撤销通知为止。</td></tr>
</table>

① 此处的授权委托书的公证文书改编自李斐南等:《法律英语实务——中外法律文书编译》,中山大学出版社 2005 年版,第 50—53 页。

IN WITNESS WHEREOF I have hereunto set my hand and seal the day and year first above written.	在证人面前，本人于文首所示日期签名盖章。
SIGNED SEALED and DELIVERED by the above named Li Ming in the presence of:	当着公证人的面由李明签名盖章 并交付：_____ （李明签名）（盖章）

（签名）
NOTARY PUBLIC（公证员）

Read over and explained to the above named Li Ming by me in Mandarin before he signed this Power of Attorney as hereinafter appearing and she appeared perfectly to understand and approve this Power of Attorney.

李明签署本委托书前，由我用普通话向他宣读并解释，他表示完全理解并同意此委托书。

（签名）
ADVOTAE & SOLICITOR（律师）

（签名）
NOTARY PUBLIC（公证员）

此外，在美国，政府官员或者具有官方地位者对其所知的某一事实可以出具类似于“公证文书”的证明文件。比如，法院的书记员出具证明，证明遗嘱的真实性[①]：

STATE OF MISSISSIPPI)) S. S. Sunflower County)	密西西比州，森弗劳尔县
I, JACK E. HAPPER, JR., Clerk of the Chancery Court of said County, here certify that the foregoing 8 pages and lines contain a true and correct copy of CERTIFIED COPY OF WILL OF A Smith, RECORDED IN WILL BOOK 9, AT PAGE 416 and CERTIFIED COPY OF FINAL DECREE IN ESTATE OF A Smith CAUSE NO. 15, 135 and RECORDED IN MINUTE BOOK 74 AT PAGE 647. — SUNFLOWER COUNTY, MISSISSIPPI as the same appears of record and on file in my said office. Witness my hand and Seal of said Court, this 4th day of AUGUEST, 2010.	我，JACK E. HAPPER, JR.，本县衡平法院书记员，在此证明：以上 8 页记录为真实无误的 A Smith 遗嘱副本，该遗嘱登录在遗嘱簿第 9 卷第 416 页，关于 A Smith 遗产终局裁决的经证明的副本，其案号为 15，135，登录在密西西比州森弗劳尔县的会议记录簿第 74 号第 647 页，以上文件与我办公室卷宗中的记录一致。 本件于 2010 年 8 月 4 日由我亲笔签名并盖章。

（签名）
Clerk（书记员）
By （签名）
D. C.（书记员助理）

① 此处文书改编自李斐南等：《法律英语实务——中外法律文书编译》，中山大学出版社 2005 年版，第 47 页。

练　习

1. 选词填空。

witness	impartial	colonial	bonds	statute	notary

In jurisdictions where the civilian law prevails, such as in the countries of continental Europe, a notary public is a public official who serves as a public __(1)__ of facts transacted by private parties ... and also serves as __(2)__ legal advisor for the parties involved .... In __(3)__ Louisiana, the notary public had the same rank and dignity as his continental civilian ancestor .... Although notaries still constitute a protected profession in present-day Louisiana, holding office for life provided they renew their __(4)__ periodically in compliance with the governing __(5)__, the importance of their function has diminished over the years to the point that it has been said that a Louisiana notary is no longer a truly civilian notary. Indeed, the trained lawyer is nowadays the Louisiana, and American, counterpart of the continental civilian __(6)__.

2. 请为下列术语选择合适的英文释义。

A. compulsory license

B. notary public

C. fee tail

D. violence

E. defense

(1) A person is authorized by a state to administer oaths, certify documents, attest to the authenticity of signatures, and perform official acts in commercial matters, such as protesting negotiable instruments.

(2) It is the use of physical force, usu. accompanied by fury, vehemence, or outrage; esp., physical force unlawfully exercised with the intent to harm.

(3) A defendant's stated reason why the plaintiff or prosecutor has no valid case; esp., a defendant's answer, denial, or plea.

(4) An estate that is heritable only by specified descendants of the original grantee, and that endures until its current holder dies without issue.

(5) It is a statutorily created license that allows certain parties to use copyrighted material without the explicit permission of the copyright owner in exchange for a specified royalty.

3. 请将下列公证书翻译成英文。

收养公证书

收养人:李明,男,1970 年 5 月 1 日出生,现住北京市东城街 1 号。

王芳,女,1970 年 6 月 1 日出生,现住北京市东城街 1 号。

被收养人:李华,男,2000 年 5 月 1 日出生,现住北京市东城街 1 号。

兹证明收养人李明、王芳于 2000 年 10 月 1 日在北京收养弃婴李华。双方共同生活,相互以父母子女相称,并履行抚养义务,已形成事实收养关系。李明是李华的养父,王芳是李华的养母。

中华人民共和国北京市公证处

公证员:张伟

2011 年 5 月 1 日

4. 请将下述证明文件翻译为中文。

State of Mississippi
Office of the Secretary of State
Dick Molpus, Secretary of State

To All Whom These Presents Shall Come:

Be It Known, That JACK E. HARPER, JR., whose name is subscribed to the annexed certificate, was on the day of the date thereof the duly qualified and legally acting CHANCERY CLERK OF SUNFLOER COUNTY in The State of Mississippi, that his attestation to the annexed INSTRUMENT is due from of Law, and made by the proper officer, and that full faith and credit are due to all this official acts.

Witness my signature and seal of the office
This the 14th day of August, 2010.

[Seal]

(signature)

Secretary of State①

5. 请将下列英文句子翻译成汉语,注意其中专门术语的表达。

(1) This power shall be in full force and effect on the date below written and shall remain in full force and effect until May 1, 2011 or unless specifically extended or rescinded earlier by either party.

① 此处文书改编自李斐南等:《法律英语实务——中外法律文书编译》,中山大学出版社 2005 年版,第 46—47 页。

(2) This to certify that the content and approving procedures of the By-laws are in the accordance with the provision of the Company Law of the People's Republic of China.

(3) Notice is hereby given that I have revoked, and do hereby revoke, the above-described power of attorney, and all power and authority thereby given, or intended to be given, to Tom.

(4) This to certify that on this first day of May, 2011, personally appeared before me Tom, known to me to be the person whose signature is subscribed to the foregoing statement.

第九课　法律文书的翻译

Lesson 9　Translation of Litigation and Court Documents

从广义上讲，“法律文书”是指司法机关、当事人及其代理人在诉讼活动中根据法律法规所使用的各类文书的总称。在我国，常见的“法律文书”包括起诉意见书、起诉书、公诉意见书、不起诉决定书、判决书、刑事附带民事判决书、刑事裁定书、刑事自诉状、刑事上诉状、刑事申诉状、辩护词、民事起诉状、民事反诉状、民事上诉状、民事答辩状、民事调解书、行政起诉状、行政答辩状、辩护词、代理词、传票及仲裁文书等等。在英美国家，常见的“法律文书”包括 complaint（民事起诉状）、indictment（刑事起诉书）、answer（答辩状）、summons（传票）、proof of service（送达证明）、Power of Attorney（授权委托书）、civil judgment（民事判决书）、criminal judgment（刑事判决书）等等。由于法律体系和法律文化的差异，我国的法律文书和英美国家的法律文书在格式、表达及内容方面存在着不少差异。

需要说明的是，不论两种法律制度下的法律文书的名称有何不同，但就具体的某一种特定法律文书而言，其实现的功能可能是相同的。以民事起诉状为例，尽管我国的此类法律文书和英美国家的此类法律文书的格式等并不一致，但此类法律文书的功能都是原告就某一争议向法院提起的诉讼请求。此外，在此类法律文书中，原告都需要陈述事实、列出诉讼理由、并提出救济请求。

法律文书所涉及的内容众多，限于篇幅，本课将主要讨论实践中常见的三种法律文书：起诉书、答辩状、判决书，分别就文书的主要内容、特点等进行探讨。

一、起诉状/书

当事人及律师制作的民事起诉法律文书通常称为“民事起诉状”，一般要包括原告、被告、案由、请求事项、事实和理由等内容。美国的民事起诉状一般要包括 plaintiff（原告）、defendant（被告）、jurisdiction（管辖权）、statement of claim（事实简述）、nature of suit（诉讼的

性质)、relief(救济)等内容。①具体如下:

	英　文	中　文
1	THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA CIVIL COMPLAINT	宾夕法尼亚东部地区美国联邦法院 民事起诉状
2	(name) Plaintiff(s)　　Case No. VS. (name) Defendant(s)	(姓名) 原告　　案件编号: 诉 (姓名) 被告
3	COMES NOW, Plaintiff above named and hereby complaints of Defendant and for cause of action alleges: First Cause of Action Second Cause of Action ...	上述原告向法庭呈递起诉书起诉被告,提出如下诉讼理由: 第一案由 第二案由 ……
4	WHEREFORE, Plaintiff prays judgment as follows: First Relief Second Relief ...	为此,原告请求法院作出如下判决: 第一项救济 第二项救济 ……
5	Dated __ __ Signature of Plaintiff(s) __ Attorney for Plaintiff(s)	日期 原告签名 原告的诉讼代理律师

"刑事起诉书"是指控刑事犯罪的正式书面文件。在美国法下,有两个词可以表示"刑事起诉书":indictment 和 information。

"information"指"检察官起诉书"。由检察官制作并提交法院的指控刑事犯罪的正式书面文件。在大多数州,检察官起诉书适用于起诉轻罪(misdemeanors)案件,也有大约一半的州允许用于起诉重罪案件,有的州规定对重罪案件只有被告人放弃大陪审团批准起诉时才可以由检察官起诉书起诉。②

"indictment"是"大陪审团起诉书",它指控刑事犯罪的正式书面文书,原先由大陪审团(grand jury)经宣誓向法庭提出。在美国,该词依然指由大陪审团提出的刑事起诉书,区别于由检察官提出的起诉书(information)。③

关于刑事起诉书的格式,美国《联邦诉讼规则》并没有作出要求,但一份起诉书必备的一个基本要素就是必须列出构成犯罪的基本事实。④

① 李斐南等:《法律英语实务——中外法律文书编译》,中山大学出版社 2005 年版,第 13 页。
② 薛波主编:《元照英美法词典》,法律出版社 2003 年版,第 692 页。
③ 薛波主编:《元照英美法词典》,法律出版社 2003 年版,第 685 页。
④ 李斐南等:《法律英语实务——中外法律文书编译》,中山大学出版社 2005 年版,第 17 页。

在我国的公诉案件中，起诉书是人民检察院依照法定的诉讼程序，代表国家向人民法院对被告人提出正式的犯罪指控，并要求法院对其进行审判的法律文书。在我国的法律背景下，人民检察院提交给人民法院的刑事起诉书是没有经过诸如“大陪审团”之类的组织审议的，将“刑事起诉书”翻译成“information”较为合适。

另外，在我国的刑事起诉书中，“刑事拘留”是比较常见的术语。刑事拘留是刑事诉讼活动中的一种保证性措施，适用于刑事案件中现行犯或者重大嫌疑分子，是即将被追究刑事责任的对象。适用刑事拘留的目的是保证刑事诉讼活动顺利进行。它是公安机关在侦查过程中，遇有紧急情况时采取的临时限制其人身自由的强制方法。关于“刑事拘留”的翻译，可用“custody”、“confinement”、“imprisonment”或“detention”等词来翻译。

1. 关于 custody。在《布莱克法律词典》中，对 custody 提出了三种解释：(1) The care and control of a thing or person for inspection, preservation, or security. (2) The care, control, and maintenance of a child awarded by a court to a responsible adult. (3) The detention of a person by virtue of lawful process or authority. ①这三项解释可依次译为“保管”、“监护”和“拘留”。“in custody”(被监禁)是指对自由的限制，即可指实际关押在监狱的状态，也可指因缓刑(probation)、假释(parole)和取保(bail bond)、个人具结悔过(personal recognizance)而被有条件释放的状态。

2. 关于“confinement”。该术语具有“监禁、拘留、关押”的意思。②《布莱克法律词典》也将该术语解释为：The act of imprisoning or restraining someone; the state of being imprisoned or restrained. ③因此，criminal confinement 可以表示“刑事拘留”，或者“羁押”的意思。

3. 关于“imprisonment”。该术语具有“监禁、拘押；限制人身自由”的意思。④《布莱克法律词典》也将该术语解释为：The act of confining a person, esp. in a prison; the state of being confined. ⑤在该辞典的解释中，“imprisonment”比较强调“在监狱中监禁”。而“刑事拘留”或者“羁押”并不是在监狱中监禁的。因此，“imprisonment”和“刑事拘留”的法律功能并不对等。

4. 关于“detention”。《元照英美法词典》将该术语翻译为“拘留、扣留、阻止、滞留”，并进一步解释为，“如警察认为某人有参与犯罪活动的嫌疑时，可进行阻止并询问。亦指某人在举行听审或开庭审理前暂时拘留的状况”。⑥根据这一解释中，detention 与我国法律中的

① Bryan A. Garner: Black's Law Dictionary (8th Edition), Thomson Reuters, 2009, pp. 412—413.
② 薛波主编：《元照英美法词典》，法律出版社 2003 年版，第 282 页。
③ Bryan A. Garner: Black's Law Dictionary (8th Edition), Thomson Reuters, 2009, p. 318.
④ 薛波主编：《元照英美法词典》，法律出版社 2003 年版，第 670 页。
⑤ Bryan A. Garner: Black's Law Dictionary (8th Edition), Thomson Reuters, 2009, p. 773.
⑥ 薛波主编：《元照英美法词典》，法律出版社 2003 年版，第 409 页。

"刑事拘留"是基本对等的。

《布莱克法律词典》将"detention"解释为:The act or fact of holding a person in custody; confinement or compulsory delay;[①]据该词典,"detention"分三种:(1)investigative detention(侦查阶段拘留):The holding of a suspect without formal arrest during the investigation of the suspect's participation in a crime。(2)pretrial detention(审前拘留):The holding of a defendant before trial on criminal charges either because the established bail could not be posted or because release was denied。(3)preventive detention(预防性拘留):Confinement imposed usu. on a criminal defendant who has threatened to escape, poses a risk of harm, or has otherwise violated the law while awaiting trial, or on a mentally ill person who may cause harm。

二、答 辩 状

在民事案件中,答辩状是指被告或被上诉人针对起诉或上诉的事实和理由,进行回答和辩解的文书,其英文的对应术语是 answer,或者 responsive pleading。在美国法中,被告一般会对原告在起诉书中提及的每一主张(allegation)作出回应,被告可以否认原告诉称的事实与理由,提出答辩意见;同时,被告还可以做出法律方面(包括程序上和实体上)和事实方面的抗辩(defense),提出反请求(counterclaim)、交叉请求/诉讼(cross-claim/cross action)、反诉(counterclaim)或者(被告)向第三人提出索赔起诉(third-party claim)。[②] 比如:

例 1: The Defendant denies the allegations in Paragraph 1 of Plaintiff's Complaint. The Defendant alleges that after the Defendant refused to ship the Goods under the Contract, it is unreasonable that the Plaintiff compensated his buyer to avoid legal disputes and mitigate losses. (被告否认原告起诉书第 1 段的主张。被告认为,在被告拒绝交付合同项下的货物之后,为了避免法律纠纷的发生和损失的扩大,原告对其买方作出补偿的行为是不合理的。)

上述例子是被告否认原告的主张,在中文的答辩状中,也有类似的表述。比如,我们认为:该案与本公司无关,请法院依法撤销原告对我方的诉讼请求。(We believe that this case is of no relevance of our company and pray that the plaintiff's claims against our company should be dismissed.)

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① Bryan A. Garner: Black's Law Dictionary (8th Edition), Thomson Reuters, 2009, p. 480.

② 李斐南等:《法律英语实务——中外法律文书编译》,中山大学出版社 2005 年版,第 24 页。

例 2: The Defendant admits that the Plaintiff does not know the business of the Defendant which is a German company and the contract with his buyer, thus he cannot foresee the losses aroused. (被告承认,原告对被告德国公司所进行的业务并不了解,同时,其对被告与其买方达成的合同并不知情,从而不能预见在这方面发生的损失。)

在美国,答辩状中还可能出现一种"affirmative defense"①,汉语可以翻译为"肯定性答辩;积极的答辩",即被告并不否认原告所主张的事实的真实性,而是提出其他的理由来说明为什么自己不应承担责任的答辩。因此,它并不反驳原告诉求的真实性,只是否认原告在法律上有起诉的权利。

在美国,根据联邦及大多数州的民事诉讼规则,所有的肯定性答辩都必须答辩状中提出,且被告对其所提之事负有证明责任。这些事由包括和解和清偿(accord and satisfaction)、自担风险(assumption of risk)、混合过失(contributory negligence)、胁迫(duress)、时效(prescription)、不容否认(estoppel)等。在刑事诉讼中,构成肯定性答辩的事由包括精神失常(insanity)、醉态(intoxication)、自卫(self-defense)、无意识行为(automatism)、不在犯罪现场(alibi)、受胁迫(duress)等。②

三、判 决 书

判决书分为民事判决书(civil judgment)、刑事判决书(criminal judgment)及行政判决书(administrative judgment)等。民事判决书,可以简称为"判决"(judgment),是指法院对其受理案件的各方当事人的权利和义务或者是否承担问题作出的最后决定。"judgment"有时可与"decision"互换使用。刑事判决书是法院正式宣告的、对已经认罪或者已被证明有罪的刑事被告人处以刑罚的判决。

在法律英语中,还有一个表示"判决书"的术语:decree。"decree"一般是指衡平法院作出的判决,是法院对已查明事实和法律后果所作的宣告。衡平法的判决是法庭在审理和听取各方辩论意见后,根据公平(equity)和良知(good conscience)原则确定诉讼各方权利而作出的裁决和命令,是法院对已查明事实的法律后果所做的宣告。在衡平法中,判决可分为终局判决(final decree)和中间判决(interlocutory decree)两类。③

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① A defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true. Bryan A. Garner: Black's Law Dictionary (8th Edition), Thomson Reuters, 2009, p. 1268.

② 薛波主编:《元照英美法词典》,法律出版社 2003 年版,第 48 页。

③ 薛波主编:《元照英美法词典》,法律出版社 2003 年版,第 381 页。

美国法院的判决书一般包括案件名称、法院和判决日期、案情事实、原告方的诉求、此案先前已经过的审判程序和前审的判决结果、双方各自的辩论观点、现在的待解决问题、本案法官的推理、本案所确立的法律原则、法官的附带评论，等等。有的案件还会附上异议法官的意见(dissenting opinion or dissent)。除了案件名称、法院和判决日期等格式性的部分外，剩余部分一般都属于"法官意见"。

1. 关于案件名称

案件名称，有时也被称为"标题"(style/caption)。案件名是由双方当事人以及 v. 组成，读作"versus"。在美国双方当事人的排列顺序通常是：在初审中原告在前，被告在后；在上诉审中上诉人(appellant)在前，被上诉人(appellee)在后(少数辖区采用前述英国的作法，即上诉审程序的案件名与初审程序中相同)；在联邦最高法院的调卷令程序中申请人(petitioner)在前，被申请人(respondent)在后。

案件名使用斜体字表示，与后面的部分用逗号隔开。引证中的案例名通常使用经过简化的名称，简化案例名称遵循如下规则：

(1) 对于一方有多个当事人的案件(有时以 et al. 或者 and another, and others 等表示)，引证时只保留第一个当事人；

(2) 合并审理的几个案件，只保留第一个案件的案件名；

(3) 当事人名称，对于个人只保留"姓"(例如 Kristin A. Greenawalt，简称 Greenawalt)；

(4) 省略当事人名称中的地名或者无关紧要的词语(例如 City of, State of 等)；

(5) 某些常用词的缩写形式(例如 Environment，简称 Env't，District 简称 Dist. 等)。

例如 Kristin A. Greenawalt v. Indiana Department of Corrections, William K. Kromann, and Kathy J. Lisby 缩减为 *Greenawalt v. Indiana Dept. of Corrections*; United States of America v. Tommie T. Childs 缩减为 *U. S. v. Childs*。①

2. 关于法官意见

法官意见是一份判决书的主体部分。法官一般会严谨而简明地表明其决定，例如：

例 1: This court has jurisdiction over the subject matter and all necessary parties are properly before this court. (本院对争议事项具有管辖权，并且所有需要出庭的当事人均已出庭。)

例 2: For above reasons, the jury instructions here were flawed in important respects. The judgment of the Court of Appeals is reversed, and the case is remanded for further

① 关于详细的英文判例的阅读方法，参见兰磊：《英文判例阅读详解》，中国对外经济贸易出版社 2006 年版。

proceedings consistent with this opinion.（基于上述理由，陪审团的指示在重要问题上存在缺陷。撤销上诉法院的判决，并将案件发回，请根据本意见进行进一步审理。）

例 3: As to Interest claimed by the Plaintiff, the Court dismisses this claim of the Plaintiff because the Plaintiff does not bring forward a specific figure and provide related evidence.

关于原告所主张的利息，鉴于原告并没有提出具体的数额和提供相关的证据，本院不予支持。

例 4: According to the Article 74 of the CISG, the Plaintiff is entitled to recover the difference between the sales price and the resale price. Pursuant to the evidence provided by the Plaintiff, the Court decides that the loss of profit (USD70,000) claimed by the Plaintiff should be supported.（根据《联合国国际货物买卖合同公约》第 74 条，原告有权就合同价与转售价之间差价要求获得赔偿。根据原告提供的证据，本法院认为，原告主张的利润损失 70,000 美元应获得支持。）

对于我国法院作出的判决书，尽管与美国的判决书在内容和形式方面并不完全一致，但一般也要包括法院、原被告、审理经过、事实、判决理由、判决结果等内容。例如：

例 1：原告 A 公司与被告 B 公司损害赔偿纠纷一案，本院受理后，依法组成合议庭，公开开庭进行了审理。上述公司的法定代表人及委托代理人到庭参加诉讼，本案现已审理结束。(The Plaintiff Co. A allegedly suffered damages due to Defendant Co. B and thus the case was brought before this Court. This Court formed a panel in accordance with the applicable law and heard the case in open court. The legal representatives and the authorized legal counsels of the above companies appeared in the Court and the case has been decided.)

例 2：依据本案的事实和应适用于本案的法律，现作出判决如下：

（一）被告向原告赔偿原告蒙受的利润损失 1 000 美元；

（二）被告向原告赔偿原告因补偿买方而蒙受的损失 4 000 美元；

（三）驳回原告的其他诉讼请求。

(Pursuant to the facts and the applicable law of this case, the Court hereby makes the following decisions:

1. The Defendant compensates the Plaintiff USD1,000 for the loss of profit;

2. The Defendant compensates the Plaintiff USD4,000 for the loss in compensating the Buyer;

3. All other claims of the Plaintiff are dismissed.)

例 3:如不服本判决,可在判决书送达之日起十五日内,向本院递交上诉状,并按对方当事人的人数提出副本,上诉至北京市第一中级人民法院。(Any Party dissatisfied with this Judgment shall appeal to the First Branch of Beijing Municipal People's Court via this Court within 15 days form the service of this Judgment in the number of copies corresponding to the number of opposing party.)

练　习

1. 选词填空。

constitutes	possibility	wrongful	duress	threat	damages

Few areas of the law of contracts have undergone such radical changes in the nineteenth and twentieth centuries as has the law governing duress. In Blackstone's time relief from an agreement on grounds of duress was a __(1)__ only if it was coerced by actual (not threatened) imprisonment or fear of loss of life or limb. "A fear of battery ... is no __(2)__; neither is the fear of having one's house burned, or one's goods taken away or destroyed;" he wrote, "because in these cases, should the __(3)__ be performed, a man may have satisfaction by recovering equivalent __(4)__: but no suitable atonement can be made for the loss of life, or limb." Today the general rule is that any __(5)__ act or threat which overcomes the free will of a party __(6)__ duress. This simple statement of the law conceals a number of questions, particularly as to the meaning of "free will" and "wrongful".

2. 请为下列术语选择合适的英文释义。

A. criminal-justice system

B. capacity defense

C. due process

D. degree of crime

E. duress

A. A defense based on the defendant's inability to be held accountable for an illegal act or the plaintiff's inability to prosecute a lawsuit (as/when the plaintiff was a corporation, but has lost its corporate charter.)

B. A division or classification of a single crime into several grades of guilt, according to the circumstances surrounding the crime's commission, such as aggravating factors present or the type of injury suffered.

C. The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case.

D. Strictly, the physical confinement of a person or the detention of a contracting party's property. In the field of torts, duress is considered a species of fraud in which compulsion takes the place of deceit in causing injury.

E. The collective institutions through which an accused offender passes until the accusa-tions have been disposed of or the assessed punishment concluded.

3. 请将下列汉语句子翻译成英文，注意其中专门术语的表达。

(1) 本法院认为，被告的上述违约事实成立，应当赔偿原告因此而蒙受的损失。

(2) 被告人因本案于 2010 年 1 月 1 日被刑事拘留，2010 年 2 月 1 日被逮捕。现被押于北京市第一看守所。

(3) 被告人被拘留后配合海关的调查行为，罪态度较好，主观恶性不大，且不具有从重处罚情节，希望予以从轻处罚。

(4) 关于本案中应当适用的法律，由于本案买卖合同双方的营业地分别位于中华人民共和国和联邦德国，两国都是《联合国国际货物买卖合同公约》(以下简称《公约》)的缔约国，《公约》中的相关规定应适用于本案。

(5) 在本案中，原告主张，被告未依照双方于 2006 年 2 月 27 日签订的合同(以下简称"本案合同")交付货物，从而根本违反了合同义务。依据本案合同第 9 条，被告有义务最迟于 2006 年 5 月 31 日装运合同项下的货物，而被告没有根据该条规定发运任何货物。在 2006 年 5 月 31 日之后，原告也没有发运任何本案合同项下的货物。

4. 请将下列英文句子翻译成汉语，注意其中专门术语的表达。

(1) As a separate affirmative defense to all purported claims for relief, Defendants allege that Plaintiff's claims under Complaint are barred by the equitable doctrine of laches①.

① laches：迟误。指当事人在主张和实现其权利方面的疏忽、懈怠或有不合理的拖延。迟误是衡平法上的一项制度，其依据是"衡平法佐助警醒者，而不佐助懈怠者"这一衡平法原则。

(2) I am over the age of eighteen, suffer on legal disabilities, have personal knowledge of the facts set forth below, and am competent to testify.

(3) The Tribunal finds that the quantity of the Goods under the Contact is 4,000 mts according to Clauses 3 and 4 of the Contract. The Tribunal decides that the tolerance allowed by Clause 4 and Clause 5 of the Contract is only applied to the Goods actually shipped. The Respondent did not deliver the Goods according to the Contract, so the tolerance of the Contract is not applied and the damages should be assessed on the basis of 4,000 mts.

(4) If the defendant does not accept this judgment, he may, within 10 days between the second and tenth day from the day after receiving this Judgment, appeal either through this court or directly appeal to the High People's Court of Shanghai. A written appeal should be submitted with one original and two copies.

第十课　法律法规的翻译

Lesson 10　Translation of Legislative Texts

法律语言的理解与翻译最难之处在于规范性(prescriptive)法律文本的语言，特别是立法语言，人们对此印象最深刻的大概就是其中复杂的法律术语和语法结构。[①] 对于译者而言，立法文件的翻译是一项任务艰巨的工作，要求译者不仅要具有高超的英汉、汉英转换技术，同时也要具备相当的法律知识。为保证法律的权威性，译者在进行立法文件翻译时，必须要保证翻译的准确性、规范性和严谨性。本课将从立法文件句子结构和用词特点入手，通过例句来介绍立法文件的翻译。

一、立法文件的句子特点及翻译

立法文件的语言尤其要求严谨。为了实现这种严谨，立法文件中的句子结构一般都比较复杂，包含大量的从句、并列结构以及分词结构等。这种复杂性在很大程度上会给译者的翻译工作带来巨大的困难。在此前的课文中，已经对翻译的基本技巧，尤其是长难句的翻译技巧及步骤进行了详细介绍，其中的方法和技术，也同样适用于法条的翻译。在翻译此类句子的过程中，译者需要首先从句子分析出各种从句和修饰成分，进而分拆出主体结构，然后再翻译，组织语言，表达出流畅的汉语条文。

例 1：

以国际贸易合同中广泛使用的《1980 年联合国国际货物买卖合同公约》(*United Nations Convention on Contracts for the International Sale of Goods 1980*)[②]为例，在该公约在起草的过程中，为了保证公约能够得到广泛的使用，已经对条文进行了极大的简化，但是，为了达到严谨的目的，大量结构复杂的句子依然保留在公约之中。例如，第 76 条第 1 款：

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① 李克兴、张新红：《法律文本与法律翻译》，中国对外翻译出版公司 2006 年版，第 505 页。

② 1980 年《联合国国际货物买卖合同公约》是在国际货物贸易领域影响最大的公约之一，该公约是在联合国贸易法委员会的组织下，经过多年的努力完成制定工作的。该公约于 1980 年在维也纳的外交会议上通过，并于 1988 年正式生效。中国于 1986 年批准加入了该公约。

If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

该条文中共有 98 个单词,具体翻译步骤可分解如下:

步骤 1:该条文包括两个句子。首先从"句号"处,将该条文分成两个句子,分别翻译。

分句 1:If the contract is avoided ... under article 74.

分句 2:If, however, the party claiming damages ...

步骤 2:在分句 1 中,包括两个 if 条件状语从句,两个并列结构(and 和 as well as),一个分词作后置定语结构(claiming damages, fixed by the contract)。分句 1 的主体结构是:the party may recover the difference between as well as any further damages recoverable under article 74.(要求损害赔偿的一方则可以取得差额以及按照第七十四条规定可以取得的任何其他损害赔偿。)

然后再把其他的内容分别翻译出来:

If the contract is avoided and there is a current price for the goods(如果合同被宣告无效,而货物又有时价)

if he has not made a purchase or resale under article 75(如果没有根据第七十五条规定进行购买或转卖)

the difference between the price fixed by the contract and the current price at the time of avoidance(合同规定的价格和宣告合同无效时的时价之间的差额)

最后,将上述句子组合成通顺的汉语:如果合同被宣告无效,而货物又有时价,要求损害赔偿的一方,如果没有根据第七十五条规定进行购买或转卖,则可以取得合同规定的价格和宣告合同无效时的时价之间的差额以及按照第七十四条规定可以取得的任何其他损害赔偿。

步骤 3:分句 2 的结构较为简单,可以把"however"翻译到句子前部,其他内容按顺序翻译就可以了;但是,如果要求损害赔偿的一方在接收货物之后宣告合同无效,则应适用接收货物时的时价,而不适用宣告合同无效时的时价。

步骤 4:把两个分句的汉语译文整合到一起:

如果合同被宣告无效，而货物又有时价，要求损害赔偿的一方，如果没有根据第七十五条规定进行购买或转卖，则可以取得合同规定的价格和宣告合同无效时的时价之间的差额以及按照第七十四条规定可以取得的任何其他损害赔偿。但是，如果要求损害赔偿的一方在接收货物之后宣告合同无效，则应适用接收货物时的价格，而不适用宣告合同无效时的价格。

例 2：

以《美国宪法》第 5 条为例。

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

该条对宪法的修订进行了规定，共 143 个单词，具体翻译可分解如下：

步骤 1：该条中两个“分号”，先从“分号”处将句子分割成三个分句，分别翻译：

分句 1：The Congress ... may be proposed by the Congress;

分句 2：provided that ... of the first article;

分句 3：and that no state ...

步骤 2：分句 1 包括了 whenever、when、as、provided that 引导的状语从句，which 引导的定语从句。分句 1 的主体结构是：The Congress shall propose amendments to this Constitution or shall call a convention for proposing amendments（国会应提出对本宪法的修正案，或者国会应召集修宪大会）。

然后再分别翻译其他内容：

whenever two thirds of both houses shall deem it necessary（凡两院议员各以三分之二的多数认为必要时）；

on the application of the legislatures of two thirds of the several states（当现有诸州三分之二的州议会提出请求时）；

which, in either case, shall be valid to all intents and purposes, as part of this Constitution(以上两种修正案,即成为本宪法之一部分而发生全部效力);

when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress(如经诸州四分之三的州议会或四分之三的州修宪大会批准,至于采用哪一种批准方式,则由国会议决);

再把上述这些成分组合成通顺的汉语条文:**举凡两院议员各以三分之二的多数认为必要时,国会应提出对本宪法的修正案;或者,当现有诸州三分之二的州议会提出请求时,国会应召集修宪大会,以上两种修正案,如经诸州四分之三的州议会或四分之三的州修宪大会批准,即成为本宪法之一部分而发生全部效力,至于采用哪一种批准方式,则由国会议决;**

步骤 3:分句 2 和分句 3 是两个并列的句子结构,可以一起翻译:

分句 2:但一八零八年以前可能制定之修正案,在任何情形下,不得影响本宪法第一条第九款之第一项、第四项两项;

分句 3:任何一州,没有它的同意,不得被剥夺它在参议院中的平等投票权。

步骤 4:将 3 个分句的译文整合成在一起:

举凡两院议员各以三分之二的多数认为必要时,国会应提出对本宪法的修正案;或者,当现有诸州三分之二的州议会提出请求时,国会应召集修宪大会,以上两种修正案,如经诸州四分之三的州议会或四分之三的州修宪大会批准,即成为本宪法之一部分而发生全部效力,至于采用哪一种批准方式,则由国会议决;但一八零八年以前可能制定之修正案,在任何情形下,不得影响本宪法第一条第九款之第一项、第四项两项;任何一州,没有它的同意,不得被剥夺它在参议院中的平等投票权。

例 3:

在法律条文中,除了像上述两例在一个句子中表达较多内容的模式外,还有一种是通过分项表述来表达较多内容的模式。例如《维尔京群岛 2004 年 BVI 商事公司法》(*BVI Business Companies Act, 2004*)①第 81 条(Members' resolutions,成员决议):

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① 本法律的英文名称是 Virgin Islands BVI Business Companies Act 2004,立法会议(Legislative Council)于 2004 年 12 月 21 日通过,2005 年 1 月 1 日正式生效,取代了《1984 年国际商务公司法》(International Business Companies Act 1984),成为该地区规制海外公司的主要法律。

英属维尔京群岛(British Virgin Islands,简称 BVI)是英国的海外自治领土(overseas territory),为世界著名的离岸公司注册地,吸引着众多跨国公司来此注册。截至 2004 年,有超过 55 000 家公司在 BVI 注册,其离岸公司注册量大约占世界的 41%。通过离岸公司的注册而收取的相关费用是 BVI 的主要收入之一。

(1) **Unless otherwise** specified in this Act or in the memorandum or articles of a company, the exercise by the members of a company of a power which is given to them under this Act or the memorandum or articles shall be by a resolution

(a) passed at a meeting of members held pursuant to section **82**; or

(b) passed as a written resolution in accordance with section **88.**

(2) A resolution is passed if approved by a simple majority or, if a higher majority is required by the memorandum or articles, that higher majority, of the votes of those members entitled to vote and voting on the resolution.

(3) For the purposes of subsection (2),

(a) votes of shareholders shall be counted according to the votes attached to the shares held by the shareholder voting; and

(b) unless the memorandum or articles otherwise provide, a guarantee member and a member of an unlimited company without shares is entitled to one vote on any resolution on which he is entitled to vote.

相对于例 1 和例 2 而言，尽管这一条的单词数(172 词)很多，但由于其每一个分项的条文的结构并不复杂，翻译起来相对容易，只需要分别对每一个分句进行翻译，然后再把汉语译文加以组合就可以了。具体翻译步骤参见上述两个例子，此处不再赘述。该句可以翻译为：

(1) 除非本法、公司组织大纲或公司章程另有规定，公司成员对本法、公司组织大纲或公司章程所赋予权力的行使应当：

(a) 依第 82 条举行的成员会议上通过的决议；或者

(b) 依第 88 条以书面决议通过的决议。

(2) 有权投票且对该决议进行投票的成员以简单多数的方式核准决议的(公司组织大纲或公司章程要求大多数同意的，如大多数成员核准)，决议即通过。

(3) 依第 2 款：

(a) 股东的投票总数应当根据投票股东持有股份而享有的投票数进行计数；以及

(b) 每名担保成员和无限公司无股份的成员对其享有投票权的任何一个决议都有一个投票权，组织大纲或公司章程另有规定的除外。

二、立法文件的特定词语及翻译

在立法文件中，有一些特定的词语经常被使用，进行形成了一些规定的语法结构。

熟悉和把握这些特定的词语的使用方法及翻译翻译，对于提高立法文件的翻译水平大有裨益。

(一) subject to

在法律条文中，“subject to”短语经常得到使用，以上文中提到的《1980年联合国国际货物销售合同公约》为例，该公约中“subject to”总共出现了10次。“subject”可以翻译成“根据……”，“在……的条件下”，“须受……限制/规限”，“须经……”等。

例1：Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval. ①(依本公约规定在签字时做出的声明，须经批准、接受或核准等方式加以确认。)

例2：Subject to its memorandum and articles, a company may make application to the Registrar in the approved form to change its name or its foreign character name. ②(依公司组织大纲或公司章程，公司向登记官递交审批表申请改变公司名称或公司外文名称。)

例3：A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses. ③(销售合同无须以书面形式订立或以书面形式证明，在形式方面也不受任何其他条件的限制。销售合同可用包括人证在内的任何方法来证明。)

例4：LICENCE is granted to Name of Company of Address to operate as a security company for supplying individuals to perform security work type(s):_____ for a period of _____ year(s) from _____ to _____ inclusive, provided that during the above period all prescribed fees are paid as prescribed, and **subject to** the provisions of the *Security and Guarding Services Ordinance* (Cap 460), and to those conditions specified overleaf. [兹向(公司名称)地址为(地址)签发牌照，准许该公司以保安公司形式营办并提供人员执行下列类别的保安工作：牌照有效期为_____年，由_____至_____，首尾两天包括在内，但在上述期间内所有订明的费用须按订明的规定予以缴付，并须受《保安及护卫服务条例》(第460章)的条文及背页所指明的条件所规限。]

汉语法律条文中的“根据……”，“须经……”一般也可以翻译为“subject to”，例如：

例1：投保人变更受益人时须经被保险人同意。④ (The applicant may change the beneficiary **subject to** the consent of the insured.)

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① 《1980年联合国国际货物销售合同公约》第97条第1款。
② 《维尔京群岛2004年BVI商事公司法》第21条第1款。
③ 《1980年联合国国际货物销售合同公约》第11条。
④ 《中华人民共和国保险法》第41条第2款。

例 2:用工单位应当根据工作岗位的实际需要与劳务派遣单位确定派遣期限,不得将连续用工期限分割订立数个短期劳务派遣协议。[①] (The labor service unit shall confirm the time limit of dispatch with the labor dispatch unit **subject to** the actual need of the position, and shall not conclude several short-term labor dispatch agreements by dividing a consecutive labor service period.)

例 3:犯罪嫌疑人会获得免费供应足够的食物和茶点。除属基本需要的衣物外,不得接受从外间送来的任何其它东西。但如其提出要求,则可获准自费得到外间送来的食物,但这些食物须经过检查。(Adequate food and refreshment will be supplied free to a suspect. A suspect is not entitled to receive from outside anything except the basic necessities of clothing. However he or she may, if requesting, be permitted at your own expense to have food from outside to be brought to you subject to inspection.)

例 4:第十六条　加入、退出和恢复中国国籍的申请,由中华人民共和国公安部审批。经批准的,由公安部发给证书。(中华人民共和国国籍法)(Article 16　Applications for naturalization as Chinese nationals and for renunciation or restoration of Chinese nationality are **subject to** examination and approval by the Ministry of Public Security of the People's Republic of China. The Ministry of Public Security shall issue a certificate to any person whose application has been approved. Nationality Law of the People's Republic of China)

(二) where 引导的条件状语从句

在普通英语中 where 一般引导地点状语从句,在法律英语中,where 可以引导原因状语从句。一般可用"凡……"、"……的"或"如(果)……"等来翻译,例如:

例 1: **Where** under a contract of sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled, the contract is called an agreement to sell. [②](买卖合同的货物所有权转移在将来的某个时间发生、或在以后须附有某种条件才可以完成的,称为出售协定。)

例 2: **Where** the name of a company is changed under section 21 or 22, the amendment of the company's memorandum to state the new name has effect on the date of the change of name certificate. [③](公司依第 21 或 22 条变更公司名称的,声明新名称的公司组织大纲修订案在公司名称证书更换之日生效。)

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① 《中华人民共和国保险法》第 59 条第 2 款。
② 英国《1979 年货物买卖法》(Sales of Goods, 1979)第 2 条第 5 款。
③ 《维尔京群岛 2004 年 BVI 商事公司法》第 23 条第 2 款。

汉语法律条文中以"……的"表达"如果"的句子，也可翻译为 where 引导的条件状语从句。例如：

例 1：用人单位与劳动者在用工前订立劳动合同的，劳动关系自用工之日起建立。①（**Where** the employing unit and laborers conclude labor contracts before the use of labor services, the labor relationships shall be established from the date of use of labor services.）

例 2：进口产品的补贴金额，应当区别不同情况，按照下列方式计算：

（一）以无偿拨款形式提供补贴的，补贴金额以企业实际接受的金额计算；

（二）以贷款形式提供补贴的，补贴金额以接受贷款的企业在正常商业贷款条件下应支付的利息与该项贷款的利息差额计算；②

（The total value of a subsidy for imported products shall be calculated using the following methods according to the circumstances of the case:

1. **Where** the subsidy is granted in the form of a gratuitous allocation of money, the total value of the subsidy shall be calculated on the basis of the total amount actually received by the enterprises concerned;

2. **Where** the subsidy is granted in the form of a loan, the total value of the subsidy shall be calculated on the basis of the balance between the amount of interest that would be payable by the enterprise for a loan granted on normal commercial terms and the amount of interest to be paid for the loan actually granted;）

例 3：前款规定的人员，索取他人财物或者非法收受他人财物，犯前款罪的，处五年以上十年以下有期徒刑，并处罚金。（Where a person stated in the preceding paragraph extorts money and goods from others or illegally accepts money and goods from others to commit the aforementioned crime, he or she is to be sentenced to fixed-term imprisonment of not less than five years and not more than ten years, and concurrently be sentenced to a fine.）

例 4：当事人无正当理由逾期不履行行政处罚决定的，按照有关规定公告后，交通行政执法机构可将暂扣车辆依法予以拍卖。拍卖所得扣除拍卖费用、罚款数额后尚有余款的，交通行政执法机构应当通知当事人领取。（**Where** the persons concerned fail to execute the decisions on administrative punishment in due time without due reasons, the traffic administrative law enforcement organs may, after making announcements in accordance with relevant provisions, put up for public auction the temporarily detained vehicles in accordance

① 《中华人民共和国劳动合同法》第 10 条第 3 款。

② 《中华人民共和国反补贴条例》第 6 条。该条共 7 款，限于篇幅，此处不再一一列出。

with laws. Where there is a balance left from the money gained in auctions after deduction of commissions and fines, the traffic administrative law enforcement organs shall notify the persons concerned to collect it.)

(三) provided that

"provided that"是法律英语中的常见短语,主要有两种用法。第一,当"provided that"放在句首时,可以翻译成"如果……,在……前提下",类似于 if 或者 when 引导的条件状语从句。如果"provided that"之前有一个主句,该短语一般翻译为"但,但是"。例如:

例 1:Provided that no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice, a person detained may communicate and consult with a legal adviser.(在不会进行调查或对执法构成不合理延迟或阻碍的前提下,被羁留者可与一名法律顾问通讯和商议。)

例 2:A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party **provided that** the expense incurred is not unreasonable.(有义务采取措施以保全货物的一方当事人,可以把货物寄放在第三方的仓库,由另一方当事人担负费用,但该项费用必须合理。)

例 3: In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements **provided that** any such decision shall be taken by three fourths of the Members unless otherwise provided for in this paragraph.(在特殊情况下,部长级会议可作出决定,豁免成员根据本协定或任何多边贸易协定所规定承担的义务,但任何这种豁免决定应由全体成员的四分之三人作出,除非本款另有规定。)

汉语法律条文中的"但书"条款,也可以翻译为"provided that"。例如:

例 1:反补贴调查,应当自立案调查决定公告之日起 12 个月内结束;特殊情况下可以延长,但延长期不得超过 6 个月。①(An investigation into Anti-subsidy trade measures shall be completed within 12 months of the date on which the decision to initiate the investigation is announced; under special circumstances, the time limit may be extended, **provided that** no extension shall exceed 6 months.)

例 2:商务部应当允许申请人和利害关系方查阅本案有关资料;但是,属于按保密资料处理的除外。②(Ministry of Commerce should allow the applicants and interested parties to

① 《中华人民共和国反补贴条例》第 27 条。
② 《中华人民共和国反补贴条例》第 23 条。

look up the information relating to the investigation, **provided that** the information is confidential ones.)

(四) without prejudice to

在立法文件中,"without prejudice to"一般翻译为"在不损害……的原则下","在不影响……的情况下",或者直接翻译为"不妨害","不影响"。例如:

例 1: If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, **without prejudice to** any claim for damages recoverable under article 74. ①(如果一方当事人没有支付价款或任何其它拖欠金额,另一方当事人有权对这些款额收取利息,但不妨碍其按照第七十四条规定主张可以取得损害赔偿。)

例 2: Where the seller expressly reserves the right of re-sale in case the buyer should make default, and on the buyer making default re-sells the goods, the original contract of sale is rescinded but **without prejudice to** any claim the seller may have for damages. ②(卖方如果在买方未能履行法律义务情形下明示保留再出售权,而未能履行法律义务的买方将货物再出售时,原始的买卖合同解除,但不影响卖方可能对买方提起的损害赔偿之诉。)

(五) otherwise

在立法文件中,otherwise 经常与 unless, or, than 等词语连用。unless otherwise 一般译为"除非……"、"……的除外",通常有;or otherwise 一般译为"或以其他(手段)";otherwise than 一般译为"或其他/除非:"。例如:

例 1: Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not. ③(除非另有协议,货物的风险直到货物所有权转移至买方才从卖方转移至买方;但如货物所有权转移至买方的,不论交付行为是否作出,风险均转移至买方。)

例 2: Under the law of the State where the goods will be resold **or otherwise** used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State. ④(如果双方当事人在订立合同时预期货物将在某一国境内转售或做其他使用,则根据货物将在其境内转售或做其他使用的国家的法律。)

例 3: Any person who by threats, persuasion **or otherwise** induces a witness or a party

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① 《1980 年联合国国际货物销售合同公约》第 78 条。
② 英国《1979 年货物买卖法》第 48 条第 4 款。
③ 英国《1979 年货物买卖法》第 20 条第 1 款。
④ 《1980 年联合国国际货物销售合同公约》第 42 条第 1 款第 1 项。

not to give evidence in any hearing before the Board commits an offence. (任何人藉恐吓、怂恿或以其他手段诱使证人或一方当事人不在仲裁处聆讯中作证,即属犯罪。)

例 4: In a contract to which subsection (3) above applies there is also an implied term that none of the following will disturb the buyer's quiet possession of the goods, namely—

(a) the seller;

(b) in a case where the parties to the contract intend that the seller should transfer only such title as a third person may have, that person;

(c) anyone claiming through or under the seller or that third person **otherwise than** under a charge or encumbrance disclosed or known to the buyer before the contract is made. (适用第(3)款的合同中应含有另一项默示条款,即下列三者应不会妨碍买方对货物的平静占有,这三者是:

(a) 卖方;

(b) 在合同当事人认定卖方可转移第三人的所有权的情况下,该第三人;

(c) 任何通过卖方或从卖方处主张权利之人,或其他非在合同订立之前已经披露给买方或为买方知晓的负有担保或负担之第三人。)

汉语法律条文中的"另有规定除外",可以翻译为"unless otherwise regulated/provided by/specified";其他诸如"除非信用证另有规定"可译为"Unless otherwise stipulated in the Letter of Credit";"除非合同另有规定"可译为"Unless otherwise specified in the contract";"除非合同双方另有协议"可译为"Unless otherwise agreed by the Parties to the Contract";"除非本法另有规定"可译为"Unless otherwise provided by the Law";等等。

例 1: 因不可抗力不能履行合同或者造成他人损害的,不承担民事责任,法律另有规定的除外。[①] (There is no civil liability for non-performance of a contract or for damage done to someone, owing to force majeure **unless otherwise** regulated by law.)

例 2: 本法总则适用于其他有刑罚规定的法律,但是其他法律有特别规定的除外。[②] (The General Provisions of this Law shall be applicable to other laws with provisions for criminal punishments, **unless otherwise** specifically regulated by other laws.)

(六) for the purpose of

"for the purpose of"可以翻译为"为了……目的","为实施××条","就……而言"、"本法/条例所称……"。例如:

① 《中华人民共和国民法通则》第 107 条。

② 《中华人民共和国刑法》第 101 条。

For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.①(就本法而言②,如果货物的任何说明、价格(若相关)以及其他相关情况能达到让理性人满意的标准,则它就是令人满意品质的货物。)

在汉语法律文件中,一般都会在第一条中明确立法目的,可以使用"For the purposes of"来表达其中的"为了……"部分,例如:

例 1:为了扩大对外开放,发展对外贸易,维护对外贸易秩序,保护对外贸易经营者的合法权益,促进社会主义市场经济的健康发展,制定本法。③ (This Law is promulgated **for the purposes of** enhancing the opening-up to the outside world, developing foreign trade, maintaining order in foreign trade activities and promoting a healthy development of socialist market economy.)

例 2:为了规范公司的组织和行为,保护公司、股东和债权人的合法权益,维护社会经济秩序,促进社会主义市场经济的发展,制定本法。④(This Law is enacted **for the purposes of** regulating the organization and operation of companies, protecting the legitimate rights and interests of companies, shareholders and creditors, maintaining the socialist economic order, and promoting the development of the socialist market economy.)

例 3:为了完善律师制度,规范律师执业行为,保障律师依法执业,发挥律师在社会主义法制建设中的作用,制定本法。⑤(This Law is enacted **for the purposes of** improving lawyer system, standardizing the practicing behavior of lawyers, ensuring practice of lawyers in accordance with law and exerting the functions of lawyers in building a socialist legal system.)

例 4:本条例所称的发明创造是指发明、实用新型和外观设计。(**For the purpose of this law**, "invention-creation" means inventions, utility models and designs.)

练　习

1. 选词填空。

expenditure	breaching	damages	implicitly	indemnification

① 英国《1979 年货物买卖法》第 14 条第 2 款第 1 项。
② 也可以翻译为"为本法之目的"。
③ 《中华人民共和国对外贸易法》第 1 条。
④ 《中华人民共和国公司法》第 1 条。
⑤ 《中华人民共和国律师法》第 1 条。

Decisions may recognize that an aggrieved buyer may recover for particular types of expenditure but deny recovery in a particular case. Some decisions explicitly recognize the type of __(1)__ but deny recovery for failure to prove them, lack of causation, or their unforeseeability by the __(2)__ party. Thus one decision recognized the potential recovery of a buyer's advertising costs but declined to award __(3)__ because the buyer failed to carry its burden of proof. Other decisions may __(4)__ assume the right to recover particular expenditures. When deciding on its jurisdiction, one court implicitly assumed that the CISG covers claims by a buyer against its seller for __(5)__ of a sub-buyer's claim for personal injury.

2. 请将下列汉语句子翻译成英文,注意其中专门术语的表达。

(1) 董事长经与副董事长协商后,应确定此次临时董事会议的时间和地点,但是举行该临时董事会议的时间必须在提议提交后十五日到四十五日之间。

(2) 本合同须经审批部门批准方能生效。

(3) 包括工业产品和农产品在内的所有产品,均需符合本协议的规定。

(4) 法律明文规定为犯罪行为的,依照法律定罪处刑;法律没有明文规定为犯罪行为的,不得定罪处刑。

(5) 仲裁将由美国仲裁协会主持并将根据该协会的商事仲裁规则进行。

3. 请将下列英文句子翻译成汉语,注意其中专门术语的表达。

(1) **Subject to** article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer.

(2) In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members **unless otherwise** provided for in this paragraph.

(3) Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under

such penalties as each House may provide.

(4) Standards of Conduct for Directors

(a) Each member of the board of directors, when discharging the duties of a director, shall act: (1) in good faith, and (2) in a manner the director reasonably believes to be in the best interests of the corporation.

(b) The members of the board of directors or a committee of the board, when becoming informed in connection with their decision-making function or devoting attention to their oversight function, shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances.

(c) In discharging board or committee duties a director, who does not have knowledge that makes reliance unwarranted, is entitled to rely on the performance by any of the persons specified in subsection (e)(1) or subsection (e)(3) to whom the board may have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law.

(d) In discharging board or committee duties a director, who does not have knowledge that makes reliance unwarranted, is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (e).

(5) **For the purpose of** the Regulation, computer software(hereinafter referred to as software) refers to computer programs and their related documentation.

第十一课　法学论文的翻译

Lesson 11　Translation of Legal Academic Papers

法学论文的翻译在某种程度上一种思想文化传递的过程，是将西方法学文化向中国传播的过程，亦是将中国的法学文化向西方传播的过程（尽管相较于前者，后者仍相对缓慢、影响力较弱）。法学论文是一种难度较高的学术翻译。与本书其他课文中所列举的翻译类型相比较，法学论文的翻译尤其要求严谨，否则会导致所介绍的学术思想的偏差和谬误。

近几年来，包括法学论文翻译在内的法学学术翻译呈现了一派欣欣向荣的景象。尽管翻译作品的数量大量增加，但质量却不容乐观。[①]法律论文的翻译能否达到一个较高的水平、翻译出的作品能否具有更高的质量，译者是关键。我们认为，译者不但要具有相当的法学理论素养，还要具有较高的翻译能力和英文水平。在翻译实践中，对于原文材料，译者要对其进行深入地理解；对于译文的表述，译者要注意其严谨性和可读性。

一、准确理解原文

要准确理解原文，译者通常要厘清句子结构和逻辑关系。对于句子结构和逻辑关系的分析，其具体的方法与下编第 5 课“长句的翻译”中所介绍的方法类似。例如：

The judge does not merely preside, moreover; he can take the case away from the jury by granting a new trial or, if the evidence is completely one-sided, a directed verdict or judgment notwithstanding the verdict, if the jury seems to him to have screwed up.

本句选自波斯纳（Richard A. Posner）的“证据法的经济分析方法”一文（An Economic Approach to the Law of Evidence），载《斯坦福法律评论》（Stanford Law Review）[②]，是波斯纳的著名论文之一。

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① 有学者指出，当今翻译事业已经呈现出法律知识百货店的景象，但有不少假冒伪劣商品，急功近利是粗制滥造的主要原因。参见邬蕾，焦红艳：“法学翻译：翻译了谁改变了谁”，载法制网，http://www.legaldaily.com.cn/zmbm/content/2010-04/22/content_2119906.htm，2011 年 1 月 3 日。

② 51 Stan. L. Rev. 1 477.

步骤 1:“拆分”句子,找出句子的主体结构。

这一句中有很多标点符合,自然地将句子分成很多分句。这句话中有两个 if 条件状语从句。这句话的主体结构是:The judge does not merely preside, moreover; he can take the case away from the jury by granting a new trial or a directed verdict or judgment notwithstanding the verdict.

步骤 2:分别翻译分割后的短句。

The judge does not merely preside:法官不仅主持审判。

he can take the case away from the jury by granting a new trial:可准予重审案件,而使案件脱离陪审团的审判。

if the evidence is completely one-sided:如果证据完全是一边倒的。

if the jury seems to him to have screwed up:如果法官认为陪审团的做法无章可循。

or a directed verdict or judgment notwithstanding the verdict:或者通过“指示裁断”或“径直裁决”等方式。

步骤 3:“组合”汉语译文。

厘清两个 if 条件状语从句和主句之间的逻辑关系是“组合”汉语译文的关键所在。

在第一个 if 条件状语所描述的情景下,即“如果证据完全是一边倒的”,法官的做法是:可准予重审案件,而使案件脱离陪审团的审判。

在第二个 if 条件状语所描述的情景下,即“如果法官认为陪审团的做法无章可循”,法官的做法是:通过“指示裁断”或“径直判决”等方式,而使案件与陪审团相剥离。

因此,组合后的汉语是:**法官不仅主持审判。此外,如果证据完全是一边倒的,他可通过准予重审案件,或者“指示裁断”或“径直判决”等方式,使案件与陪审团相剥离。**

在本句的理解上,对 granting a new trial(批准或准予重审)、JNOV(径直判决;不顾陪审团裁决之判决)以及 directed verdict(指示裁断;直接依照承审法官的命令而对案件作出判决)等术语的准确理解也是关键。再看几例。

Juries will hear only a fraction of the criminal cases processed in Japan. In 2004, public prosecutors disposed of 2,183,811 cases. 34.5% were sent to summary courts, where punishment is limited to minor fines and short-term imprisonment. 10.9% were referred to family courts. 44.7% received suspensions of prosecutions and 2.9% were not prosecuted for a variety of reasons. In only 6.8% of cases were suspects (148,939) indicted. Of those indicted, only 2.2%, or 3,308 cases, would have received jury trials. The bulk of criminal cases will remain the exclusive province of legal professionals. This is similar to

the U. S. , where juries hear only about 2% of felony dispositions. ①(陪审团只审理日本处理的一小部分刑事案件。2004 年,日本各检察院共处理 2,183,811 起案件。其中 34.5%由简易法庭受理,其作出的处罚仅限于小额罚金和短期监禁。10.9%案件由家庭法院受理。44.7%的案件会被暂缓起诉,2.9%的案件会因多种原因而不被起诉。最终被提起公诉的嫌疑人约为 148,939 人,占全部案件的 6.8%,其中只有 2.2%,也就是 3,308 宗案件会由陪审团审理。可见绝大多数的刑事案件依然由职业法律人专门审理。这与美国相似,仅有 2%的重罪案件由陪审团审理。)

The introduction of lay participants demands faster trials and more accessible court proceedings, and officials have responded with changes to the pre-trial and trial procedures. Previously, trials for serious crimes extended over many months. In 2005, trial courts averaged 2.4 hearings over a 2.8 month period when defendants confessed. In contested cases, 7.3 hearings on average were held over a 9.5 month period. To speed up proceedings and accommodate lay jurors, a new pre-trial was introduced in 2005. The prosecution and defense now consult with the presiding judge before the trial to identify the disputed points for the jury to decide. The focus of trials will also shift from written material to oral argument and live testimony. Currently, prosecutors collect evidence, interview witnesses, procure confessions, note evidence of offender remorse (if any) and compile their findings in a massive dossier that forms the basis for a judge's verdict and sentencing. To ensure that proceedings are accessible to lay jurors, *saiban-in* trials will differ in several respects. In place of dossiers, the prosecution and defense will present their evidence orally. Witnesses and the accused will be cross-examined in public. Prosecutors and defense lawyers have begun honing their public speaking skills and courtrooms have been outfitted with screens and other devices to make the presentation of evidence more accessible to the lay judges. Still, prosecutors will create a dossier (for determining the indictment) and some have discussed providing jurors with shortened versions of it. (非职业人士参与审判的引入,要求更快的审理速度和更为便捷的法庭程序,因此,日本的审前和庭审程序均已作出了相应的改革。原先严重刑事案件经常要拖延数月。2005 年,被告有自白者,初审法院用 2.8 个月时间平均审理 2.4 件案件。在有争议的案件中,9.5 个月的审期平均审理了 7.3 起案件。为了提高诉讼效率并建立一个与非职业陪审员相适应的制度,

① Ingram Weber. The New Japanese Jury System: Empowering the Public, Preserving Continental Justice, *East Asia Law Review*, 2009, pp. 126—176. 中文已由屈文生、李润译出。

日本于2005年引入了新的审前程序。在案件审判前，检方、辩护方需与案件的主审法官协商确定，案件的哪些争议点需由陪审团裁定。庭审焦点也从书面材料转移到口头论辩和证人当庭作证之上。目前的情况是，检方收集证据、询问证人、获取嫌疑人口供、记录嫌疑人的悔过情形(可能有也可能无)，并将其认定的结果制作成卷宗，以作为法官定罪与量刑的依据。为确保审判程序能被陪审员认知，裁判员审判在以下几个方面发生变化：控辩双方均以口头而非卷宗的方式展示证据；证人和被告人公开接受交叉询问；检察官和辩护律师均注重培养自己的公共演说技巧；法庭装有大屏幕和其他设备，以使陪审员更好地熟悉证据展示。不变的是，控方仍制作卷宗(用来确定是否提起公诉)，有法官还提出要使陪审员能获得简明版卷宗。)

在上例中，对于“In contested cases, 7.3 hearings on average were held over a 9.5 month period.”这句话的翻译，有的译者可能想当然地理解为，既然9.5个月审理7.3个案件，那么就可以翻译为“每个月审理不到1个案件”。倘若译者作这样译介，就会曲解原作者的意思。事实上，有研究曾表明，日本初审法院审理每起被告有自白案件的平均时间是2.8个月，无自白案件是9.5个月每起。所以这里的9.5个月是有“典故”的，这里的数据说明：初审法院的审判效率在2005年已有了一定程度的提高。

Legal professionals have long dominated Japanese criminal justice, and prior efforts to reduce their influence have largely failed. The role of lay participants in Japan's first jury system, which ran from 1928 to 1943, was narrowed into impotence by conservatives. Post-war innovations intended to provide a democratic check on judges and prosecutors, such as prosecutorial review commissions and a constitutional provision providing for electoral review of Supreme Court justices, have had little to no impact. Thus, one of the principal questions surrounding the new mixed jury system is whether judges will exploit their role in the panels to marginalize the influence of laypersons on judicial decisions. (日本刑事司法制度长期由职业法律人主导，此前有一些努力曾试图改变这一局面，但均告败。依1928—1943年间日本最早实行的陪审制，陪审员曾参与过司法，但他们发挥的作用因传统因素而日渐式微。而战后为制约检察官而设立的检察院审查委员会和为制约最高法院法官而设计的国民投票审查宪法条款等改革措施，均收效甚微，甚至毫无效果。在这种背景下，人们对日本新陪审制的最主要的担心无疑就在于，法官是否照旧会利用他们在合议庭中的地位而将陪审员对司法判决的影响边际化。)

在上述原文的理解上，“electoral review”的理解十分关键。倘若读者将其理解为“审查选举程序”，则意思就会出现大的偏差。事实上，这是日本宪法中的一则条文，它指的是“国民投票审查”制度。

二、译文需表达通顺

不同的作者具有不同的论文写作风格，有的学者的论文除了叙述严谨、资料翔实之外，往往还有很强的艺术性，使用很多修辞手法，凝聚了很多历史典故，读来很有历史观和美感。例如，

We encountered the *lex naturae*① earlier as an essentially Stoic② creation which was taken over by Christianity for the purpose of constructing a bridge between its own ethics and the norms of the world. It was the law legitimated by God's will for all man of this world of sin and violence, and thus stood in contrast to those of God's commands which were revealed directly to the faithful and are evident only for the elect.

本段文字选自马克斯·韦伯(Max Weber)的《论经济和社会中的法律》(On Law in Economy and Society)，这是马克斯·韦伯的著名论文之一。③在这一句中就使用了比喻的修辞手法，比如，"架起一座桥梁"(constructing a bridge)；还引用了一些宗教背景的用语，比如，"上帝的意志"(God's will)，"上帝的诫令"(God's commands)，"上帝所选之人"(the elect)等。

步骤 1："拆分"句子，找出句子的主体结构。

上述文字由两句话组成，结构本身并不复杂。

对于第一句而言，其中有一个 which 引导的定语从句，其主体结构是：We encountered the *lex naturae* earlier as an essentially Stoic creation。

对于第二句而言，其中有 legitimated by God's will for all man of this world of sin and violence，以及 stood in contrast to those of God's commands 引导的后置定语成分，修饰 law，还有 which 引导的定语从句修饰 commands。其主体结构是：It was the law。

步骤 2：分别翻译分割后的短句。

We encountered the *lex naturae* earlier as an essentially Stoic creation：我们在遥远的古代就接触了主要由斯多葛学派所创造的自然法。

which was taken over by Christianity for the purpose of constructing a bridge between its own ethics and the norms of the world：它被督教传承下来，为了在其自身的伦理与现世的规范之间架起一座桥梁。

It was the law：这一法律。

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① *lex naturae*：自然法。

② 斯多葛学派(the Stoic)是希腊化时代一个有极大影响的思想派别，被认为是自然法理论的真正奠基者。它的创始人是芝诺(Zeno)，由于他讲学的地方是在公共建筑下面的柱廊(stoa)，希腊人称之为斯多葛(stoic)。

③ 转引自郑戈：《法律学术翻译的规范》，载《北大法律评论》(第 2 卷，第 1 辑)，第 314 页。

legitimated by God's will for all man of this world of sin and violence:上帝的意志使其具有正当性,并适用于这个罪恶和暴力的世界上的所有人。

stood in contrast to those of God's commands:对立于上帝的律令。

在这个分句中,如果将 commands 翻译成"命令"就不是特别地严谨,在基督教的背景下,上帝的"commands"翻译为"律令",或者"诫令"比较合适,比如著名的"十诫",其英文就是"Ten Commands"。

which were revealed directly to the faithful and are evident only for the elect:这些律令直接昭示于信徒,并且仅仅显明于上帝所选择的人。

在这个分句中,在上下文的背景下,"the faithful"指的是"信仰基督教的人",或者翻译为"信徒";"the elect"指的是"被上帝所选择的人"。

步骤 3:"组合"汉语译文。

对于上述文字的译文的组合,要注意的是其中的事实逻辑。在这段话的背景下,斯多葛学派首先创造了自然法,其后基督教传承了该学派所创造的自然法。此外,上述文字的"文学色彩"较浓,在表述译文的时候还要注意译文的"可读性"。

译文可以组合为:**我们在遥远的古代就接触了主要由斯多葛学派所创造的自然法,它被督教传承下来,为了在其自身的伦理与现世的规范之间架起一座桥梁。对于这一法律,上帝的意志使其具有正当性,并适用于这个罪恶和暴力的世界上的所有人。这一法律对立于上帝的律令,这些律令直接昭示于信徒,并且仅仅显明于上帝所选择的人。**①

三、译文的表述需严谨

法学论文中存在着大量的专用术语。和其他法律文书的翻译类似,对于法学论文的翻译,要正确地翻译相关术语,才能保证译文的准确和严谨。例如:

Before 1925 there were many different legal estates② and legal interests that could ex-

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① 本句话的翻译参照了郑戈:《法律学术翻译的规范》,载《北大法律评论》(第 2 卷,第 1 辑),第 314 页。

② estate:指一个人在与土地的关系中所处的地位,或他相对于土地的关系,包括其对土地享有的不同种类、不同程度的权利;在口语中则引申为土地本身。薛波主编的《元照英美法词典》(法律出版社,2003 年版)第 490 页至第 494 页对各种类型的 estate 进行了详细地介绍和解释,由于其中绝大多数类型的 estate 都已经成为土地法历史中使用的名词,本文不再赘述。

英国学者 F. H. 劳森和伯纳德·冉德在其所著的《英国财产法导论》(The Law of Propety)一书中认为,estate 在英语中有四种不同的用法:a. 可能指一片土地(如"Osborne estate");b. 可能指土地及其他动产(如"real and personal estate");c. 有时指的是死者遗留下来的全部财产(如"The deceased's estate"),包括有能力偿还的或无能力偿还的债务责任;d. 它还可能意指在一段时间内的对某种财务的占有使用权。如不动产租约(leasehold)是一种定期就结束的财产,而终身财产(life estate)则是某人一生可以享受的财产。参见[英]F. H. 劳森,伯纳德·冉德:《英国财产法导论》,曹培泽,法律出版社 2009 年版,第 17 页。

ist in land①; and a corresponding range of estates and interests that could exist in equity. However, since 1925 only two legal estates in land can exist and the number of legal interests has been limited. The two legal estates are the "fee simple absolute in possession"②— in common parlance "freehold" and the "term of years absolute"③— commonly known as "leasehold". Although commonhold will not be a new form of legal estate in land (it will be a type of freehold ownership with particular statutory attributes), it is a new form of communal land ownership.

上述文字选自一篇名为"共同持有:一个新时代的肇始?"(Commonhold: The dawning of a new age?)的论文④,这篇论文介绍了英国的一种新型共有地产权制度:共同持有地产权(commonhold),这种制度类似我国法律中的"区分所有权"。在上述文字中出现了多个术语,比如"法定地产权"(legal estates)、"法定利益"(legal interests)、"现实占有的绝对非限嗣继承地产权"(fee simple absolute in possession)、"绝对定期地产权"(term of years absolute)、"租赁持有地产权"(leasehold)等等。在翻译的过程中,译者需要查阅辞典、文献,搞清楚上述术语的来龙去脉,才能准确地理解和翻译上述论文。

对于中国读者而言,如果没有系统地研究英美财产法,即使将上述术语都被翻译成汉语了,还是很难理解译文的含义的。因此,为了便于读者的理解,译者在翻译类似中国读者不熟悉的术语时,有必要加入一些脚注、说明性的文字,对术语进行解释,以便于读者理解。

上述文字的结构相对简单,造成翻译困难的主要是其中的各种术语。在厘清各种术语的法律性质后,翻译起来就比较容易了。由于上述文字的语法结构相对简单,就不再按照上述两个例句的模式分步骤翻译了。

汉语译文可以组织为:**在1925年之前,土地上可以存在多种不同的法定利益;并且,相应范围的地产权和利益也可以存在于衡平法上。然而,从1925年起,仅有两项法定地产权可以存在于土地上,同时,法定权益的数量也受到了限制。这两项法定地产权是"现实占有**

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① 仅就字面意思而言,"land"可以翻译为"土地"。需要说明的是,在普通法上,"土地"是指泥土、地下的石头以及地上的空气;土地包括土地之上的生长物,以及"附属于"该土地的建筑物。《1925年财产法》规定,土地包括任何保有(tenure)类型的土地、矿藏(mines)和矿物(minerals)、建筑或建筑的组成部分。参见 S. 205(1)(iv), Law of Property Act 1925;[英]凯特·格林,乔·克斯雷:《土地法》(第四版),法律出版社2003年影印本,第8页。

② the fee simple absolute in possession:现实占有的,永久的(不附带限定条件的),广义可继承的土地自由保有权,是所有各种地产权中最强势,最有权威的一种。所以"the fee simple absolute in possession"的概括含义就是最完全的土地所有权。参见薛波主编:《元照英美法词典》,法律出版社2003年版,第493页。

③ terms of years absolute:这是1925年《财产法》(Law of Property Act 1925)改革之后所保留的两种普通法上的地产权之一,一般就是指租赁地产权(leasehold),但不限于此:可以实际占有或回复地产的形式生效;可以以交租为条件,也可不交租。之所以成为"绝对",是因为其存在的期限是确定的,但这种确定性并不影响该地产可能在约定期限届满之前因出租人重新进入或其他特定事由而终止。参见薛波主编:《元照英美法词典》,法律出版社2003年版,第1337页。

④ 载 *www.pglaw.co.uk/pdf/articles/**Commonhold-the-dawning-of-a-new-age.pdf***, 2011年5月1日。

的绝对非限嗣继承地产权"——通常的说法是"完全保有地产权",以及"绝对定期地产权"——通常被称为"租赁持有地产权"。尽管共同持有地产权并不是一种存在于土地上的新型法定地产权(它是一种具有特定的制定法属性自主持有地产权),但其将是一种新型的共有土地产权。

再举上述"日本新陪审制"一文的数段原文和译文,供读者参考比对。

The Japanese judiciary is a unitary national system. Small claims and minor criminal offenses are overseen by summary courts, which are typically staffed by retired judges and prosecutors or former court administrative officials. District and high court positions are the exclusive province of an individual who has spent his career within the judicial system. District courts serve as the courts of first instance. In all but very minor cases, district court judges sit in panels of three. They are responsible for deciding all matters of fact and law. Criminal judgments can be appealed to one of the eight high courts. The Supreme Court, which functions as a constitutional court and court of last resort, sits atop this hierarchy. By law, Supreme Court justices are appointed by the cabinet. In practice, however, the judiciary selects who will fill a vacancy on the Court and the cabinet rubber-stamps the decision. (日本法院体系属于单一国家体系。小额索赔及轻微刑事案件归简易法庭管辖;简易法院的法官通常由退休的法官、检察官或法院书记官担任。地区法院和高等法院的法官则只有职业生涯在法院体系内人员才有资格担任。地区法院是初审法院。除极其轻微的案件外,地区法院中的一般案件由三名法官组成合议庭审理。合议庭负责审理案件的全部法律和事实问题。刑事判决可向八个高等法院中的一个上诉。最高法院作为宪法法院和终审法院,位于整个法院体系的最顶层。依照法律,最高法院法官由内阁任命。但在实践中,实际由司法机关选拔最高法院法官,内阁仅履行形式上的批准权。)

In keeping with its civil law origins, legislation is the primary source of law. There is only one jurisdiction and criminal procedure is uniform throughout Japan. Criminal law is compiled in two documents, the Code of Criminal Procedure and the Penal Code, which are the primary references for criminal adjudication. Case law is of only secondary importance. The Supreme Court determines how various codes and statutes should be interpreted and establishes conventions for adjudicating cases. (日本以制定法为主要的法律渊源,保持了大陆法系的传统。日本只有一个法域(有统一的司法权),全日本的刑事程序都是统一的。审理刑事案件的主要依据是《刑事诉讼法典》和《刑法典》。判例法的地位次之。最高法院负责解释各法典与制定法并创设惯例,供审判案件所用。)

In addition to exercising judicial power, the Supreme Court is the highest authority on judicial administration. This authority is exercised through the Court's General Secretariat, the most powerful organ of the judiciary. Even among bureaucratic civil law systems, the Japanese judiciary is distinguished by the General Secretariat's persistent regulation and manipulation of judicial careers. Staffed by over a hundred career judges, the Secretariat uses its power to ensure that all aspects of the judiciary, such as fact-finding, application of the law, and sentencing, conform to the standards established by the Supreme Court.
(除行使司法权外,最高法院还是最高的司法行政机关。其行政权限通过最高法院事务总局来实现。事务总局管理与控制职业法官是日本法院体系的特点,虽然官僚主义在各大陆法系国家是普遍的,但日本在这一方面与其他大陆法系国家不同。事务总局由一百多位职业法官组成,保证法院体系的各个方面,诸如案件事实的查明、法律的适用以及定罪量刑等,均符合最高法院设立的标准。)

对于初学者而言,在翻译法学论时,译文质量的提高不是一蹴而就的事情。在法学论文的翻译实践中,要使译文做到"信、达、雅"的标准,一方面需要译者不断地在翻译实践中进行经验的累积,进而总结出法学论文所固有的一些规律;另一方面也需要译者不断地提高自己的法学理论素养,丰富自己的学科知识,避免翻译中因学科知识断裂而出现的"硬伤"。在此基础上,法学论文的译文的质量才可能得到不断的提高。

练　习

1. 选词填空。

chapters	reasoning	multitude	sentiments	conception	individual's

It is true that when medieval writers spoke of natural law as being discoverable by reason, they meant that the best human __(1)__ could discover it, and not, of course, that the results to which any and every __(2)__ reasoning led him was natural law. The foolish criticism of Jeremy Bentham: "a great __(3)__ of people are continually talking of the law of nature; and then they go on giving you their __(4)__ about what is right and what is wrong; and these sentiments, you are to understand, are so many __(5)__ and sections of the law of nature," merely showed a contempt for a great __(6)__ which Bentham had not taken the trouble to understand.

2. 请为下列术语选择合适的英文释义。

A. preventive law

B. natural law

C. prevention doctrine

D. necessity

E. presumption of innocence

(1) A philosophical system of legal and moral principles purportedly deriving from a universalized conception of human nature or divine justice rather than from legislative or judicial action.

(2) A justification defense for a person who acts in an emergency that he or she did not create and who commits a harm that is less severe than the harm that would have occurred but for the person's actions.

(3) The fundamental principle that a person may not be convicted of a crime unless the government proves guilt beyond a reasonable doubt, without any burden placed on the accused to prove innocence.

(4) The principle that each contracting party has an implied duty to not do anything that prevents the other party from performing its obligation.

(5) A practice of law that seeks to minimize a client's risk of litigation or secure more certainty with regard to the client's legal rights and duties.

3. 请将下列英文句子翻译成汉语,注意其中专门术语的表达。

(1) Moreover, when deference is impossible (because some instances of legal pluralism are repressive, violent, and/or profoundly illiberal), procedures for managing hybridity can at least require an explanation of why a decision maker cannot defer. In sum, pluralism offers not only a more comprehensive descriptive account of the world we live in, but also suggests a potentially useful alternative approach to the design of procedural mechanisms, institutions, and practices.

(2) When we speak of "law", "legal order", or "legal proposition", close attention must be paid to the distinction between the legal and the sociological points of view. Taking the former, we ask: What is intrinsically valid as law? That is to say: What significance or, in other words, what *normative* meaning ought to

be attributed in correct logic to a verbal pattern having the form of a legal proposition. But if we take the latter point of view, we ask: What *actually* happens in a community owing to the *probability* that persons participating in the communal activity, especially those wielding a socially relevant amount of power over the communal activity, subjectively consider certain norms as valid and practically act according to them, in other words, orient their own conduct towards these norms? This distinction also determines, in Principle, the relationship between *law* and *economy*.

(3) Criticism of the criminal justice system began to build in the 1970s and 1980s following a series of high-profile death-row acquittals in which innocent defendants endured decades-long imprisonment. Judges came under fire for poor fact-finding and citizen groups calling for criminal juries started to emerge. These citizen groups saw lay participation as a corrective to the limited life experience of judges and as a necessary safeguard for the defendant's rights. In 1987, the Supreme Court acknowledged declining public trust in the judiciary by commissioning studies of foreign jury systems. Encouraged by this decision, the Japan Federation of Bar Associations (JFBA) held national symposiums on juries in the early 1990s and citizen groups recruited people each year to participate in mock trials.

4. 请将下列汉语句子翻译成英文,注意其中专门术语的表达。

(1) 由于律师职业是在中国特定的历史、文化背景下孕育的,其本身必然存在着某种"先天不足"。社会意识中平等观念的不足,必导致律师依附性的相对较强;权利意识的不足,必导致律师维权能力的相对软弱。

(2) 刑事司法权本身就是对刑事案件进行调查并在此基础上做出裁判的权力,由刑事司法权所引发的刑事司法制度究其制度本身,其实就是维系个人自由与社会秩序之间的一种平衡的制度。简而言之,就是协调国家公权力与个人私权利在所涉刑事领域范畴所导致的必然冲突的一种制度。这种制度本身所直接体现的就是对人权的保障和对犯罪的控制。

(3) 矫正的理念来自于刑事实证学派,在刑事古典学派那里是没有矫正可言的:报应主义强调的是惩罚,而功利主义强调的是威吓。在这种情况下,刑罚只不过是惩罚的手段与威吓的工具。刑事实证学派,尤其是刑事社会学派,以李斯特

的教育刑思想而闻名于世。在教育刑思想中，就包含了对犯罪人进行矫正的理念。李斯特曾言："矫正可以矫正的罪犯，不能矫正的罪犯不使为害。"尽管李斯特对于如何对罪犯进行矫正并未深入论述，但我们将李斯特称为矫正理念的首倡者并不为过。相对于报应刑与威吓刑的思想，矫正的理念赋予刑罚以更为积极的意义。基于矫正的理念，罪犯不再是简单的刑罚客体，而且是矫正的对象。尽管并非所有的罪犯都能够通过矫正成为守法公民，但至少对于可矫正者来说，这种使其重新做人的效果是可期待的。因此，矫正的理念使刑罚不仅是排害之器，而且成为致善之道。

附　录

附录一：经典法律案例阅读

如何阅读英文案例

第一部分

案例通常由下列几个部分组成。

一、案例名称(Case Name)；例如：Marbury v. Madison(马伯里诉麦迪逊)，v is short for versus. 是"诉"的意思。

二、判决法院(Court rendering the opinion)；例如：New Jersey Supreme Court(新泽西最高法院)。

三、卷宗号；案号(Citation)；例如：93 N. J324，461 A. 2d 138(1983)，这说明该案出自《新西汇编》第 93 卷，第 324 页，以及《大西洋汇编》第二辑第 138 页，该案判决于 1983 年。此处，A 是 Atlantic Reporter 的缩写。像这种指明两个或两个以上出处的卷宗号叫作："平行卷宗号"，其英语表达为"parallel citation"，意思是"An additional reference to a case that has been reported in more than more reporter. "广义上卷宗号包括上述一、案例名称；二、判决法院。

四、主审法官姓名(Justice wrote the opinion)。

五、判决书(opinion: stating the issue raised, describing the parties and facts, discussing the relevant law, and rendering judgment.)。判决书是整个案例的主体部分，其中包括法律争议(Issue)、双方当事人情况、事实经过、判决采用的相关法律以及判决结果。

判决书的阅读过程之中，要注意以下几点：1. 时态主审法官的意见用现在时态；前审法院的意见用过去时态。2. 主审法官的意见是法院意见。3. 除法院意见外还有两种意见，它们被称为"反对意见"(dissenting opinion or dissent)与"配合意见"(concurring opinion)。

Dissenting opinion: opinion offered by a judge disagreeing with the majority panel of judges' conclusion; "反对意见"指不同意大多数法官判决结论之某一法官的意见；Concurring opinion: opinion written by a judge agreeing with the majority's conclusion but not its reasoning. "配合意见"是指同意大多数法官的意见，但是不同意判决结论的推理之某一法官的意见。

六、法庭投票(Votes of the court)。例如在七名大法官审理的情况下，有几名法官的意见是"维持原判"(affirmance)，有几名法官的意见是"撤销原判、发回重审"(reversal and remandment)。

第二部分

一、什么是 citation?

由于卷宗号这一块涉及内容庞杂，这里再逐一特别说明一下。我们首先来看一下《布莱克法律词典》中 citation 的定义：A reference to a legal precedent or authority, such as a case, statute, or treatise, that either substantiates or contradicts a given position. (p. 237) 7th edition. 由于 a citation is a reference to a legal authority，因此，citation 必须要有一个标准，这样以后的参考者才容易检索的到。正如《布莱克法律词典》所指出的一样，Citation formats exist for **many different types** of legal sources including **cases, statutes and secondary legal materials.** Understanding the basic format for each of these different types of sources will enable the researcher to more independently locate materials in the law library.

案例之中的卷宗号通常包括下列几个部分：

a. 案件双方当事人姓名(the names of the parties involved in the lawsuit)；

b. 包含案件全文的汇编卷号(the volume number of the reporter containing the full text of the case)；

c. 该案例汇编的缩写名称(the abbreviated name of that case reporter)；

d. 案例开始的页码数(the page number on which the case begins)；

e. 案件判决年份(the year the case was decided)；有时还包括

f. 案件判决法院(the name of the court deciding the case)。

举例说明：Hebb v. Severson, 201 P. 2d 156 (Wash. 1948). 在这个例子当中，Hebb 是原告(plaintiff)，Severson 是被告(defendant)。我们可以在《太平洋汇编》第二辑 201 卷的第 156 页(volume 201 of the Pacific Reporter Second Series beginning on page 156)找到这一案例。该案是由华盛顿州最高法院(Washington State Supreme Court)于 1948 年判决的。

二、如何阅读案例(cases)之中的 citation?

确定卷宗号之中的缩略码。请对照下列列表,找出缩略码(abbreviation)的汇编全称(full reporter title).

Abbreviation	Title	汉语汇编名称
A.	Atlantic Reporter	大西洋汇编
A. 2d.	Atlantic Reporter, 2d Series	大西洋汇编第二辑
Cal. Rep.	California Reporter	加利福尼亚州汇编
F.	Federal Reporter	联邦汇编
F. 2d.	Federal Reporter, 2d Series	联邦汇编第二辑
F. 3d.	Federal Reporter, 3d Series	联邦汇编第三辑
F. Supp.	Federal Supplement	联邦补充案例
L. Ed.	U. S. Supreme Court Decisions, Lawyers' Edition	美国最高法院案例汇编,律师版
L. Ed. 2d.	U. S. Supreme Court Decisions, Lawyers Edition, 2d Series	美国最高法院案例汇编,律师版第二辑
N. E.	Northeastern Reporter	东北汇编
N. E. 2d.	Northeastern Reporter, 2d Series	东北汇编第二辑
N. W.	Northwestern Reporter	西北汇编
N. W. 2d.	Northwestern Reporter, 2d Series	西北汇编第二辑
N. Y. S.	New York Supplement	纽约补充案例
N. Y. S. 2d.	New York Supplement, 2d Series	纽约补充案例,第二辑
P.	Pacific Reporter	太平洋汇编
P. 2d.	Pacific Reporter, 2d Series	太平洋汇编,第二辑
S. Ct.	Supreme Court Reporter	最高法院案例汇编
S. E.	Southeastern Reporter	东南汇编
S. E. 2d.	Southeastern Reporter, 2d Series	东南汇编,第二辑
So.	Southern Reporter	南方汇编
So. 2d.	Southern Reporter, 2d Series	南方汇编,第二辑
S. W.	Southwestern Reporter	西南汇编
S. W. 2d.	Southwestern Reporter, 2d Series	西南汇编,第二辑
U. S.	United States Reports	美国案例汇编

再举两例说明：Morgan v. United States, 298 U. S. 468, 56 S. Ct 906, 80L. Ed. 1288 (1936)表示：摩根诉美国，收集在美国案例汇编第 298 卷，第 468 页开始；最高法院案例汇编第 56 卷第 906 页开始；美国最高法院案例汇编律师版第 80 卷，第 1288 页开始，1936 年判决。For example, a popular name for a Supreme Court case is:

	Roe	v.	Wade
Which translates as	Plaintiff	versus	Defendant
	原告 罗	诉	被告魏德

The official citation for this Supreme Court decision is:

	410	U. S.	113
Which translates as	Volume 410	United Stated Reports	Page 113
	410 卷	美国案例汇编	113 页

There are several different publishers for legal documents such as court decisions. (Libraries usually only carry one of these published versions.) These publishers may be referred to in parallel citations for this case.

例如，该案的平行汇编是：

	93	S. Ct.	705
Which translates as	Volume 93	Supreme Court Reporter	Page 705
	第 93 卷	最高法院案例汇编	705 页
Or			
	35	L. Ed. 2d	147
Which translates as	Volume 35	U. S. Supreme Court Reports, Lawyers Edition, 2nd Series	Page 147
	第 35 卷	美国最高法院案例汇编 律师版第二辑	147 页

该案完整的卷宗号(full citation)就是：

Roe v. Wade	410 U. S. 113	93 S. Ct. 705	35 L. Ed. 2d. 147	1972
Case name	Official citation	Parallel citation	parallel citation	Date of opinion

案例1:马伯里诉麦迪逊案(Marbury v. Madison)

第一部分[案例引言]

马伯里诉麦迪逊一案的时代背景是这样的:1800年的美国大选中,第二任总统约翰·亚当斯(John Adams)竞选败给了托马斯·杰弗逊(Thomas Jefferson)。亚当斯代表的是联邦党,杰弗逊则代表的是民主共和党。当时,两党政见相左,派系斗争相当激烈。联邦党虽然在总统大选中败北,但为了日后能够卷土重来,便利用宪法赋予总统的任命联邦法官的权力,极力争取控制不受选举直接影响的联邦司法部门,借以维持联邦党人在美国政治生活中的地位和影响。亚当斯在卸任之前,行使了自己的司法提名权,将尽可能多的联邦党人坐上法官的位子。就在新总统上任的三星期前,联邦党控制的参议院通过法案,新增42个法官职位。威廉·马伯里是其中之一。亚当斯命令约翰·马歇尔(John Marshall),时任国务卿来完成这些任命,但是马歇尔尚未完成任命,托马斯·杰弗逊(Thomas Jefferson)就入主了白宫(White House)。杰弗逊对这些尚未发出去的任命状毫不理会,并命令他新上任的国务卿詹姆斯·麦迪逊(James Madison)不要发那些没有发出去的任命状。于是就有了"马伯里诉麦迪逊"这一著名案例。

该案奠定了美国联邦法院的司法审查权的基础,使最高法院成为宪法的最终解释者。可以说,这是美国政治制度史和人类政治制度史上的一个伟大的里程碑。

托马斯·杰弗逊(1801—1809)在大选中胜出,担任美国第三任总统,他曾是美国《独立宣言》起草者。詹姆斯·麦迪逊,人称"美国宪法之父",后任国务卿、美国第四任总统(1809—1817在位)。约翰·马歇尔后任美国最高法院首席大法官。

第二部分[案例及思考问题]

U. S. Supreme Court

MARBURY v. MADISON, 5 U. S. 137 (1803)①

5 U. S. 137 (Cranch)

WILLIAM MARBURY

v.

JAMES MADISON, Secretary of State of the United States.

February Term, 1803

Chief Justice John Marshall delivered the opinion② of the Court....

In the order in which the court has viewed this subject, the following questions have been considered and decided.

1. Has the applicant③ a right to the commission he demands?

2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of inquiry is,

1. Has the applicant a right to the commission he demands? ...

His right originates in an act④ of congress passed in February 1801, concerning the district of Columbia....

In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office....

It is therefore decidedly the opinion of the court, that when a commission has been signed by the president, the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the secretary of state....

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① 5 U. S. 137 (1803)：美国案例汇编第5卷，第137页开始，1803年判决。U. S.，is short for United States Reports.

② opinion：法院(或法官)判决意见书。依照《元照英美法词典》的解释，一般由作出判决的法庭或法官就其审理的案件所作的阐释其如何达成该判决的书面意见，内容包括案件事实、本案所适用的法律及判决基于的理由、附带意见(dicta)等。

③ the applicant：申请人，在此指原告。

④ 1801年2月27日国会通过《哥伦比亚特区组织法》(The District of Columbia Organic Act)，授权总统可以任命特区内共42名任期5年的治安法官(Justices of Peace)。

Mr. Marbury, then, since his commission was signed by the president, and sealed by the secretary of state, was appointed; and as the law creating the office gave the officer a right to hold for five years independent of the executive, the appointment was not revocable①; but vested in the officer legal rights which are protected by the laws of his country.

To withhold② the commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry; which is,

2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection....

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence③ of our country, it must arise from the peculiar character of the case.

It behoves us then to inquire whether there be in its composition any ingredient which shall exempt from legal investigation, or exclude the injured party from legal redress. ...

But when the legislature④ proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion⑤,

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① revocable: adj. 可撤销的、可撤回的、可取消的。

② withhold: v. 扣留(属于他人或他人主张的财产)。

③ jurisprudence: n. 法学;法理学;法律哲学;法律体系。按照《牛津英语词典》的解释,此处应翻译为"法律或法律制度"较为合适。

④ legislature: n. 立法机关,立法机构。如:parliament; congress; chamber(s); legislative department; city council.

⑤ discretion: n. 裁量权。指公务人员根据授权法的规定,在特定的环境下根据自己的判断和良心执行公务,不受任何他人干涉或控制的权利或权力。

nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy....

It is then the opinion of the Court,

1. That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice of peace for the county of Washington in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3. He is entitled to the remedy for which he applies. This depends on,

(A) The nature of the writ applied for.

(B) The power of this court.

1. The nature of the writ....

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be... "to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined or at least supposes to be consonant to right and justice..."

These circumstances certainly concur in this case....

This, then, is a plain case of a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired, Whether it can issue from this court.

The act① to establish the judicial courts of the United States authorizes the supreme court "to issue writs of mandamus, in cases warranted by the principles and usages of law,

① act：法律；制定法，尤指由立法机关所制定的法律，与 statute 词义相同。此处指《1789 年司法法》。

to any courts appointed, or persons holding office, under the authority of the United States."

The secretary of state, being a person, holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power① of the United States in one supreme court, and such inferior courts② as congress shall, from time to time, ordain③ and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the supreme court shall have original jurisdiction④ in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction."

It has been insisted at the bar, that as the original grant of jurisdiction to the supreme and inferior courts is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals⑤ in which it should be vested.... If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their

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① judicial power:司法权利。

② inferior courts:初级法院;低级法院。指某一特定的司法系统内级别较低,并要接受高级法院令状管理的法院。对于低级法院作出的裁决,当事人有权向高级法院提出上诉。

③ ordain:v. 制定;决定。指制定法律和法令。在美国宪法序言中,该词曾与 establish 成对使用,用以表明该宪法的制定。

④ original jurisdiction:初审管辖权。Jurisdiction,指司法管辖权。

⑤ tribunals:n. 法院;法庭;裁判庭。还可以表示"法官席、(某一司法区内的)全体法官、管辖(裁判)权等"。

jurisdiction shall be original and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance....

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar① that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true; yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause②....

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution, and it becomes necessary to inquire whether a jurisdiction, so conferred, can be exercised....

The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

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① bar:指法庭。

② cause:诉因、诉讼理由;诉讼、案件。

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty....

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions①, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

Questions to Consider:

1. If the Supreme Court of the United States had issued the writ of mandamus, how

① written constitutions:成文宪法。成文宪法形成统一的书面法律文件,又称刚性宪法(rigid constitution),如,美国宪法。它与不成文宪法(unwritten constitution),又称柔性宪法(flexible constitution)相对应。

could it have forced Madison to comply with the order? What would have happened if he had ignored it? (In other words, does the Court have enforcement power?)

2. In the Court's opinion, is Marbury entitled to his appointment?

3. According to the decision, does the Supreme Court of the United States have the authority to issue a writ of mandamus to force Madison to deliver the commission? Explain. Is there any way to reverse the Court's decision?

4. In this case, Chief Justice John Marshall and the Court "gave up some power in order to get more." Explain. What power did they give up? What power did they gain? Why did the Court do this?

5. Why does the judicial branch, as opposed to the executive or legislative branch, have the power of judicial review?

6. What do you think the doctrine of constitutional supremacy?

7. Imagine that Jefferson, rather than Adams, had appointed the Chief Justice of the Supreme Court. Would the outcome of this case, and the future of the country, have been different? Why?

第三部分[判例影响及意义综述]

名垂青史的首席大法官约翰·马歇尔在上任之初就面临一个巨大的挑战，不难想象他当时处境的微妙和困难：如果他支持马伯里的诉求，下令麦迪逊发出委任状，麦迪逊必定不会执行，而法院并没有任何手段来执行这一判决。这将大大削弱法院的权威，并创下法院无权过问行政的先例。如果他驳回马伯里的诉求，这无疑是向世人表明联邦党人已向民主共和党人屈服。本案堪称绝妙的判决就产生于这两难境界之中。

经过一番思索，马歇尔和联邦最高法院的法官们终于想出了一个两全其美的办法——运用了司法审查的方式，来处理这一案件。1803 年 2 月 24 日，马歇尔宣布了由他起草的联邦最高法院的判决书，对此案作了阐述：

首先，必须弄清第一个问题马伯里是否有权得到他所要求的委任状？马歇尔对这个问题作了肯定的回答。他认为，“当一份委任状一经总统签署，任命即为作出；一经国务卿加盖合众国印章，委任状即为完成。”“既然马伯里先生的委任状已由总统签署，并且由国务卿加盖了印章，那么，他就获得了任命；因为创设该公职的法律赋予该官员任职 5 年，不受行政机关干预的权利，所以，这项任命是不可撤销的，而且赋予受任官员各项法律上的权利，依法受到保护。”因此，马伯里有权得到委任状，拒发的委任状，不是法律所授权的行为，而是侵犯了

他的既得权利。

接着，马歇尔又提出并回答了第二个问题，这就是，如果马伯里有这个权利，且这一权利遭到侵犯，其国家的法律是否能为其提供救济？对第二个问题，马歇尔的回答也是肯定的。他认为，“公民自由的实质就在于一旦受到侵害，每个公民都有请求法律保护的权利。政府的首要责任之一就是提供这种保护。”“合众国政府被宣称为法治政府，而非人治政府。如果它的法律对于侵犯既得的法律权利不提供救济，那它当然配不上这一崇高的称号。”因此，拒发委任状很显然侵犯了马伯里的权利，其国家法律应该为其提供救济。

判决宣布到这里，人们自然会认为马歇尔会立即对麦迪逊下达执行职务令，以便让联邦党人皆大欢喜。但出人意料的是，马歇尔笔锋一转提出最关键的第三个问题：“如果法律确实能为马伯里提供救济，那么，是否应由联邦最高法院发出执行职务令？”对此，马歇尔作出了否定的回答。在他看来，虽然联邦法院有权对行政官员发出执行令，但在马伯里这一案件中，这并不是联邦最高法院的责任，因此它无权命令麦迪逊发出委任状，也就是说，马伯里告错了地方。他的论证是这样的：最高法院是否有权发出执行职务令取决于它所管辖的范围。根据美国联邦宪法第 3 条第 2 款的规定，“只有涉及大使、其它公使、领事等外国使节和州政府为一方当事人的案子中享有初审管辖权。在所有其他的案件中，联邦最高法院享有上诉管辖权”。而马伯里既非外国使节也不是州政府的代表，因此最高法院对他的案子并无初审管辖权。同时，在联邦宪法规定的最高法院的固有权限方面，也没有把向行政官员下达执行职务令包括在内。马伯里起诉麦迪逊所依据的《1789 年司法法》第 13 条与联邦宪法第 3 条第 2 款存在冲突。

据此，马歇尔把问题一下子跳到了国会法律的合法性上。在他看来，真正的问题是最高法院究竟是应遵守《1789 年司法法》第 13 条，还是服从《联邦宪法》来作出裁定？马歇尔指出，国会通过的《1789 年司法法》在规定最高法院有权向政府官员发出执行职务令时，实际上扩大了最高法院的管辖权。如果最高法院执行了《1789 年司法条例》，就等于最高法院承认国会可以扩大宪法明确授予它的权力。但事实却是，国会没有这个权力。因为“立法权力受到规定与限制；而且合众国的宪法是成文的，这些限制决不能被混淆或遗忘。假如这些限制可能随时被其意欲约束的权力所超越，那还有何目的去限制这些权力？假如那些限制根本不能约束它们施加的对象，假如法律所禁止的行为和所允可的行为具有同样强制效力，那么具备有限与无限权力的政府之间的鸿沟就会荡然无存。”在给出这个前提后，马歇尔便提出，“这是一个无可争辩的道理：要么宪法制约立法机关所制定的任何与之相抵触的法律，要么立法机关可以通过普通法律改变宪法。这两种选择之间没有中间道路。宪法要么是优先的、至高无上的法律，不得以通常方法加以改变；要么与普通的立法处于同样的地位，像其他

法律一样，立法机关可以随意加以修改。假如前一种选择是正确的，那么与宪法相抵触的法案就不是法律。假如后者是正确的，那么，对人民而言，成文宪法就是一种用于限制那原本无可限制的权利的荒谬之物。”“无疑，每位制宪者的意旨都是要使宪法成为国家的最根本、最高的法律。因此，所有这类政府理论的逻辑结论必定是：任何法案，凡于宪法相抵触者，必归于无效。”

既然违背宪法的法律无效，法官就不能适用它，那么这又必然涉及到另一个基本问题，谁有权认定什么是法律？什么是违宪的法律？马歇尔认为这一权力属于司法机关。“值得强调的是，阐明法律是什么，这乃是司法部门的权限和职责。那些把规则应用到具体案件中去的人，必然要对规则进行阐述和解释。假如两个法律相互冲突，法院必须决定每个法律的运作。所以，如果一部法律是违宪的，而该法律又与宪法都适用于同一具体案件，则法院必须确定，要么适用那普通法律而不顾宪法，要么适用宪法而不顾那普通法律。决定这些相互冲突的规则中究竟何者支配案件之判决。这就是司法职责的根本所在。”出于这一责任，马歇尔宣布，“与宪法相抵触的法案必定归于无效。”也就是《1789 年司法法》第 13 条关于法院向官员发出执行职务令的规定必须予以撤销。

虽然马伯里的治安法官没能当上，但联邦党人与民主共和党人在司法领域中的比拼可谓大获全胜。他通过谴责国务卿违法，从理念上彰显了正义；通过判决国会通过的《1789 年司法法》第 13 条因违宪而无效，确立了联邦最高法院对国会立法的司法审查权。同时，马歇尔巧妙地利用了一个法律技术问题在判决的最后否决了马伯里关于发布执行职务令的诉求，也就给予总统、国务卿一个技术上的小胜，一个台阶。从而避免了他必败无疑的宪法危机。

总之，马歇尔在该案以退为进的判决其实是“醉翁之意不在酒”，确立司法审查理论才是其真正的用意。他在判决中所阐述的司法审查的理论依据是：宪法是国家的最根本、最高的法律，是立法和行政的依据，议会和政府的行为不得与宪法相抵触；法院是解释法律的机关，也是解释和保障宪法的机关，应该有权宣告违宪的法律和法令无效。

马歇尔在美国宪制上打下了他的心灵印记；他在我们的宪法还具有弹性和可塑性之际，以自己的强烈信念之烈焰铁锻铸了它[①]。1939—1962 年间任美国联邦最高法院大法官的弗兰克福特在 1955 年也说道：“在讲英语的法院里，都认为‘马伯里诉麦迪逊案’是成文宪法固有的、不可缺少的特色。”的确，“马伯里诉麦迪逊案”，是美国宪政历程上的一个具有里程碑意义的著名宪法判例，在世界宪政史上具有重要意义。尤其是在宪法原则和宪法制度的

① ［美］卡多佐：《司法过程的性质》，苏力译，商务印书馆 1998 年版，第 107 页。

确立与完善等方面，更是产生了相当的影响。

首先，“马伯里诉麦迪逊案”开创了司法审查制度的先河，奠定了法院作为成文宪法的最高阐释者和守护人地位。司法审查制度对世界其他国家的宪政制度也产生了巨大影响，可以说影响了整个世界宪法监督的进程。不少国家仿效美国，采用司法审查违宪立法的制度。特别是拉美国家和英联邦国家采用这种制度的较多。据统计，全世界约有 60 多个国家采用了这种制度。当然完全照搬美国的也不多，大多数国家还是结合本国国情做了某些适应本国制度的规定。

其次，“马伯里诉麦迪逊案”进一步完善了“宪法至上”的观念。马歇尔在此案中强调：宪法是人民意志的体现，所以它适当地控制着政府的一切权力，包括国会权力的行使。因而宪法高于一切法律，与宪法相抵触的法律是无效的。这就更加明确并完善了“宪法至上”的观念。

最后，“马伯里诉麦迪逊案”所确立的违宪审查制度，进一步完善了“三权分立”的体制，强化了司法权对立法权和行政权的制约，有助于协调国家机关的内部关系，形成比较完整的三权分立的权力结构。美国的宪法和政治是建立在三权分立的基础之上的，三权均衡、三权相互制约是美国宪政所追求的目标。马歇尔提出司法机关有权审查违宪的立法，正好符合这种理论目标。他也是有一定根据的，因为早在 1787 年宪法制定之后正式通过生效之前，以汉密尔顿为首的联邦党人就曾反复论述三权分立的理论。他认为在立法、行政、司法三大机构中，司法是最弱的一个部门，“司法部门既无军权，又无财权，不能支配社会的力量与财富，不能采取任何主动的行动。故可正确断言：司法部门既无强制，又无意志，而只有判断，而且为实施其判断亦需借助于行政部门的力量①。”汉密尔顿认为，必须使法院处于一种完全独立的地位，并掌握对立法机关进行宪法限制的权利。

① [美] 汉密尔顿、杰伊、麦迪逊：《联邦党人文集》，程逢如等译，商务印书馆 1980 年版，第 391 页。

案例 2：中央伦敦财产信托有限公司诉高树房产有限公司案
(Central London Property Trust Limited v. High Trees House Limited)

第一部分[案例引言]

本案是确立英国合同法上的允诺上禁止反言原则(promissory estoppel)的重要判例，由英国当代最著名的法官和法学家丹宁勋爵(Lord Denning)判决，是英国合同法历史上最著名的判例之一，至今仍然发挥着极大的作用。禁止反言原则(estoppel)是英美法上的非常有特色的制度。它包括数种具体的情形，总的说，就是在特定情况下，为了保障对方当事人的正当利益，禁止当事人主张自己原本享有的某项权利或者否认自己曾经作出的陈述(尽管该陈述的确是虚假的或者本应没有法律效力的)。

本案主要的法律背景是，在英美法上，合同的成立除了需要双方当事人的合意之外，原则上还需要有对价(consideration)存在，否则合同就不能被法院执行。可是，在很多情况下，当事人之间达成的协议虽然没有对价存在，但不承认其效力对一方当事人是很不公正的。本案确立的允诺上禁止反言原则，就是承认那些没有对价但符合一定条件的协议有一定的法律效力的法律规则。

在本案中，我们将看到英国法院是如何运用允诺禁止反言的制度限制对价制度以便实现合理公正的结果的。我们还可以看到涉及合同的形式要件时，普通法(common law)和衡平法(equity law)的冲突，对价对合同修改的影响等方面的内容。阅读本案时，还要注意欣赏丹宁勋爵运用英语表达观点的高超技巧。

第二部分[案例及思考问题]

Central London Property Trust Limited

v.

High Trees House Limited

[1947] K. B. ① 130

ACTION tried by Denning J.

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① K. B.：King's Bench，英国高等法院王座法庭。

By a lease under seal① made on September 24, 1937, the plaintiffs, Central London Property Trust Ld., granted to the defendants, High Trees House Ld., a subsidiary② of the plaintiff company, a tenancy of a block of flats for the term of ninety-nine years from September 29, 1937, at a ground rent of £2,500. a year. The block of flats was a new one and had not been fully occupied at the beginning of the war owing to the absence of people from London. With war conditions prevailing, it was apparent to those responsible that the rent reserved under the lease could not be paid out of the profits of the flats and, accordingly, discussions took place between the directors of the two companies concerned, which were closely associated, and an arrangement was made between them which was put into writing. On January 3, 1940, the plaintiffs wrote to the defendants in these terms, "we confirm the arrangement made between us by which the ground rent should be reduced as from the commencement of the lease to £1,250. per annum," and on April 2, 1940, a confirmatory resolution to the same effect was passed by the plaintiff company. On March 20, 1941, a receiver③ was appointed by the debenture④ holders of the plaintiffs and on his death on February 28, 1944, his place was taken by his partner. The defendants paid the reduced rent from 1941 down to the beginning of 1945 by which time all the flats in the block were fully let, and continued to pay it thereafter. In September, 1945, the then receiver of the plaintiff company looked into the matter of the lease and ascertained that the rent actually reserved by it was £2,500. On September 21, 1945, he wrote to the defendants saying that rent must be paid at the full rate and claiming that arrears amounting to £7,916 were due. Subsequently, he instituted the present friendly proceedings⑤ to test the legal posi-

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① a lease under seal:盖印租约,属于盖印合同(contract under seal)的一种,是英美合同法上的一种以特殊形式达成的合同。在英国法律的早期,只有盖印合同才在法律上是可执行的,其他合同(包括一般的书面合同)法院原则上并不承认其效力。盖印合同的达成要求当事人以书面记载,对文本进行蜡封并盖上印章,并且须交付给对方当事人。后来蜡封盖印的形式被简化,通常在合同上印上"seal"或者"L. S. (拉丁文 Locus sigilli 的简写)"即可。盖印合同是正式合同,非正式合同(英美法常称简式合同 simple Contract)后来逐渐被法院承认有执行力,但必须有约因存在。但盖印合同作为正式合同,即使没有约因也可以成立。盖印合同和简式合同还有其他很多方面的区别,但逐渐地都消灭了。在美国已经有很多州通过制定法完全废除了盖印合同,也就是说合同在成立要件上都需要遵循一般规则,不再有盖印合同这一种特别方式。

② subsidary:子公司。在西方国家,子公司是一个独立的公司。和分公司的区别是,分公司是总公司或者母公司的一种分支机构或者仅仅是母公司的一个附属机构,它本身在法律和经济上没有独立性。

③ receiver:清算人。指公司解散过程中,从事清理公司债权、债务和公司财产事宜者。

④ debenture:债券。国内一般把 bond 也翻译为"债券",事实上,在英美法中,bond 指有抵押的债券,debenture 指无抵押的债券。

⑤ friendly prodeedings:友好诉讼,英文也作 friendly suit, amicable action, case agreed on,指双方当事人虽然对于相关事实没有争议,但是对于究竟应当适用什么法律发生了争议。于是,他们达成一个协议,将纠纷提交法院,以通过法院的判决获知有关法律问题的结论。

tion in regard to the rate at which rent was payable. In the action the plaintiffs sought to recover £625, being the amount represented by the difference between rent at the rate of £2, 500. and £1,250. per annum for the quarters ending September 29, and December 25, 1945. By their defence the defendants pleaded (1.) that the letter of January 3, 1940, constituted an agreement that the rent reserved should be 1,250l. only, and that such agreement related to the whole term of the lease, (2.) they pleaded in the alternative① that the plaintiff company were estopped from alleging that the rent exceeded 1,250l. per annum and (3.) as a further alternative, that by failing to demand rent in excess of 1,250l. before their letter of September 21, 1945 (received by the defendants on September 24), they had waived their rights in respect of any rent, in excess of that at the rate of £1,250., which had accrued up to September 24, 1945.

DENNING J. stated the facts and continued:

If I were to consider this matter without regard to recent developments in the law, there is no doubt that had the plaintiffs claimed it, they would have been entitled to recover ground rent at the rate of 2,500l. a year from the beginning of the term, since the lease under which it was payable was a lease under seal which, according to the old common law, could not be varied by an agreement by parol (whether in writing or not)②, but only by deed③. Equity④, however stepped in, and said that if there has been a variation of a deed by a simple contract⑤(which in the case of a lease required to be in writing would have to be evidenced by writing)⑥, the courts may give effect to it as is shown in Berry v.

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① alternative：替代抗辩理由。即如果前一个理由法院不支持，就主张这个理由作为替代。

② an agreement by parol：此处翻译为，字面意思是口头协议，但在普通法上，它指的是没有采取盖印形式的其他协议，包括口头的和书面的，所以丹宁勋爵在括号中说“不论是否采取书面形式”。其意思相当于非正式合同或者简式合同，所以这里译作“非正式的协议”。

③ deed：契据。一种由当事人签字、盖印并交付的书面文据，它记载一项契约或约定，表示当事人同意转移某项义务或确认某项转移地产权利的行为，如租约、抵押证书等。由于盖印合同是正式合同，所以在旧的普通法上，协议对盖印合同的变更也必须通过另一个盖印合同的方式进行。如果双方达成的对盖印合同进行变更的协议在形式上采用的是简式合同，而不是盖印合同，则此变更协议不能生效。这一规则后来受到衡平法的修正。

④ equity：此处指“衡平法”。它是一个多义词，作为法律名词，它最重要的意义是指与普通法(common law)相对应的，由衡平法院在试图补救普通法的缺陷的过程中演变来的。与普通法和制定法(statute)并行的一套法律原则和法律程序体系。构成英格兰法的一大渊源。

⑤ a simple contract：简式合同，非正式合同。

⑥ 一般来说，法律上并不规定哪些合同应当用盖印合同的方式，是由当事人决定将他们认为有必要的合同以盖印合同的方式达成。在这里所说的衡平法原则之下，对于一个盖印合同，原则上可以用书面或者口头的协议加以变更。但是，法律(Statute of Frauds)规定几类合同必须采用书面形式，则如果当事人是用盖印合同方式达成这样一个合同，那么变更它的协议虽不必采用盖印合同方式，但至少必须采用书面形式。

Berry [1929] 2 K. B. 316. That equitable doctrine, however, could hardly apply in the present case because the variation here might be said to have been made without consideration①. With regard to estoppel, the representation made in relation to reducing the rent, was not a representation of an existing fact. It was a representation, in effect, as to the future, namely, that payment of the rent would not be enforced at the full rate but only at the reduced rate. Such a representation would not give rise to an estoppel, because, as was said in Jorden v. Money (1854) 5 H. L. C. 185②, a representation as to the future must be embodied as a contract or be nothing③. But what is the position in view of developments in the law in recent years? The law has not been standing still since Jorden v. Money (1854) 5 H. L. C. 185. There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on. In such cases the courts have said that the promise must be honored④. The cases to which I particularly desire to refer are: Fenner v. Blake [1900] 1

Q. B. 426, In re Wickham (1917) 34 T. L. R. 158, Re William Porter & Co., Ld. [1937] 2 All E. R. 361 and Buttery v. Pickard [1946] W. N. 25. As I have said they are not cases of estoppel in the strict sense. ⑤ They are really promises-promises intended to be binding, intended to be acted on, and in fact acted on. Jorden v. Money (1854) 5 H. L. C. 185 can be distinguished⑥, because there the promisor made it clear that she did not in-

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① consideration:对价。使诺言人产生约束力的、与诺言互为交易对象的东西。可以简单地理解为诺言的回报或诺言的代价。这里是一种典型的欠缺约因的合同。因为对于原告消灭自己的每年1 250英镑租金的允诺,被告没有付出任何对价,只是单纯受对方的恩惠,所以这个新协议是没有约因的。

② Jorden v. Money案的案情是,Money欠Jorden 1 200英镑,Jorden多次向Money表示其愿意免去其债务。因此,基于自己的这个沉重的债务负担已被免除,Money才敢于结了婚。关于Jorden能不能改变主意向Money追讨这笔欠款的问题,英国上议院(英格兰的最高司法机构)判决认为,此债务免除的协议无约因,不构成合同;而普通法上承认的禁止反言原则仅适用于对既存事实的虚伪陈述,而不适用于对未来的意愿所进行的陈述,所以Jorden仍然可以向Money追讨这笔钱。

③ a representation... be nothing:译文是"关于未来的陈述或者体现为合同,或者什么也不是"。

④ honour:此处译为兑现、承兑。

⑤ 本句译为"正如上述,他们并非严格意义上的禁止反言的案例。"传统的禁止反言原则,相应的概念是equitable estoppel(衡平法上禁止反言原则)。本案中,丹宁勋爵多次说本案实际并非禁止反言的案件,指的是它不属于传统的禁止反言案件,而本案确立的原则为promissory estoppel(允诺上禁止反言原则)。

⑥ "Joeden v. Money can be distinguished",此处译为"Jorden v. Money案中的事实与这些判例并不相同"。英美法的核心制度是遵循先例原则(the doctrine of Stare Decisis),一个判例中针对特定事实所适用的法律规则,在以后审理事实实质相同的案件中,应当同样适用。但如果两个案件的事实在实质上并不相同,则自然不应适用相同的法律规则。分析两个案件的事实并认为它们有根本区别,就称为distinguish。

tend to be legally bound, whereas in the cases to which I refer the proper inference was that the promisor did intend to be bound. In each case the court held the promise to be binding on the party making it, even though under the old common law① it might be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel. The decisions are a natural result of the fusion of law②[20] and equity: for the cases of Hughes v. Metropolitan Ry. Co. (1877) 2 App. Cas. 439, 448, Birmingham and District Land Co. v. London & North Western Ry. Co. (1888) 40 Ch. D. 268, 286 and Salisbury (Marquess) v. Gilmore [1942] 2 K. B. 38, 51, afford a sufficient basis for saying that a party would not be allowed in equity to go back on such a promise. In my opinion, the time has now come for the validity of such a promise to be recognized. The logical consequence, no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration: and if the fusion of law and equity leads to this result, so much the better③. That aspect was not considered in Foakes v. Beer (1884) 9 App. Cas. 605. At this time of day however, when law and equity have been joined together for over seventy years, principles must be reconsidered in the light of their combined effect. It is to be noticed that in the Sixth Interim Report of the Law Revision Committee, pars. 35, 40, it is recommended that such a promise as that to which I have referred, should be enforceable in law even though no consideration for it has been given by the promisee. It seems to me that, to the

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① common law：普通法。指起源于英格兰，由拥有高级裁判权的王室法院依据古老的地方性习惯，或是理性、自然、公正、常理、公共政策等原则，通过“遵循先例”(stare decisis)的司法原则，在不同时期的判例基础上发展起来的，具备司法连贯性特征并在一定的司法共同体内普遍使用的各种原则、规则等的总称。在法律实践中，他主要指那些由判例报道(law reporting)加以记录而能够得以援用的部分。作为法律渊源，普通法区别于由立法机关制定颁行的成文法律，实际上由法院即法官创制，又称为“法院/法官创制的法律”。因其根据判例而发展，故实际上是“判例法”(case law)。

关于“Common Law”这个词，从日语中转译而来，人们约定俗成地翻译为“普通法”，但也有学者，如陈忠诚先生在其《法窗译话》(中国对外翻译出版社 1992 年版)一书中认为，把“Common Law”翻译为“普通法”容易滋生歧义——“普通法”可以被理解为“特别法”的对立概念。陈忠诚先生认为将“Common Law”翻译为“共同法”或者“普通法”为好。在我国香港和台湾地区，也有人翻译为“共同习惯法”。

② law：此处指“common law”。

③ 本句可以翻译为：无疑，这一观点在逻辑上的结果是，一个关于只需收到对方进行较小金额的给付就可以算成是实际的较大数额的债务已获清偿的允诺，如果已经被据以实施了，就是有约束力的，约因的缺乏可以不论。并且，如果这是从普通法和衡平法的融合可以推导出的结论，那就更好了。

extent I have mentioned that result has now been achieved by the decisions of the courts. I am satisfied that a promise such as that to which I have referred is binding and the only question remaining for my consideration is the scope of the promise in the present case. I am satisfied on all the evidence that the promise here was that the ground rent should be reduced to 1,250l. a year as a temporary expedient while the block of flats was not fully, or substantially fully let, owing to the conditions prevailing. That means that the reduction in the rent applied throughout the years down to the end of 1944, but early in 1945 it is plain that the flats were fully let, and, indeed the rents received from them (many of them not being affected by the Rent Restrictions Acts①), were increased beyond the figure at which it was originally contemplated that they would be let. At all events the rent from them must have been very considerable. I find that the conditions prevailing at the time when the reduction in rent was made, had completely passed away by the early months of 1945. I am satisfied that the promise was understood by all parties only to apply under the conditions prevailing at the time when it was made, namely, when the flats were only partially let, and that it did not extend any further than that. When the flats became fully let, early in 1945, the reduction ceased to apply. In those circumstances, under the law as I hold it, it seems to me that rent is payable at the full rate for the quarters ending September 29 and December 25, 1945. If the case had been one of estoppel, it might be said that in any event the estoppel would cease when the conditions to which the representation applied came to an end, or it also might be said that it would only come to an end on notice. In either case it is only a way of ascertaining what is the scope of the representation. I prefer to apply the principle that a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply②. Here it was binding as covering the period down to the early part of 1945, and as from that time full rent is payable. I therefore give judgment for the plaintiff company for the amount claimed.

Judgment for plaintiffs.

Solicitors for the plaintiffs: Henry Boustred & Sons. Solicitors for the defendants: Callingham, Griffith & Bates.

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① Rent Restriction Acts:租金管制法。

② 本句可翻译为:我倾向于认为,一个允诺人期望其发生约束力,期望其被据以行事,并且对方也确实据之行事的允诺,在其内容被恰当适用的范围内具有约束力。

Questions to Consider:

1. Why did the plaintiff agree to reduce the rent from £2500 to £1250?
2. What is the amount that the plaintiff wanted to recover?
3. According to the old common law, could a lease under seal be changed by parol?
4. According to tranditional law, should the equity be applied in the case?
5. Why did Lord Denning say "Jorden v. Monay, can be distinguished"?
6. What is your understanding of "promissory estoppel"? Tell the difference between "promissary estoppel" and "equitable estoppel".

第三部分[判例影响及意义综述]

在历史上，英国法院曾作出大量的依据禁止反言理论的判决，然而，真正把此理论用于合同法领域，是从这个案件开始的。

本案的事实是，原告中央伦敦财产信托有限公司与被告高树房产有限公司签订了一份盖印租赁合同，原告将一栋公寓楼租赁给被告，租金为每年 2 500 英镑。由于很快就开始了二战，许多人离开了伦敦，所以公寓楼没有被全部转租出去。在当时无法逆转的战争情势下，被告显然不可能将公寓完全转租。两公司的负责人都明白地意识到了这种现实情况。双方协商后，于 1941 年初达成书面协议，将租金从租赁开始时起削减为每年 1 250 英镑。这样，被告按每年 1 250 英镑的数额支付了从 1941 年到 1945 年初的租金。到了 1945 年初时，二战即将结束，公寓楼中的所有公寓都租了出去，但此后被告仍按此数额支付。后来，原告向英国高级法院王座分庭提起了这个诉讼。

丹宁勋爵在本案中的思路是：在本案中至少存在一个表面上的合同，即双方当事人用书面合同修改了原来的蜡封契据。这一做法在过去是没有法律效力的，但现在衡平法承认这一做法是有效的。但原告仍可以主张这一修改没有约束力，因为它是缺乏对价的。在本案中也无法适用衡平禁止反言理论，因为这是对将来的允诺，而不是对既存事实的陈述。现在法律的发展已经出现了一系列案例，在这些案例中出现这样一类允诺：作出允诺的当事人意图使允诺产生约束力，并且其在作出允诺时意识到对方会基于对允诺的信赖而行为，而对方确实付诸行为。法院有时会判决这样的允诺是有约束力的，但其尚未和对价理论联系起来，将其作为对价理论的一种例外。在衡平法上的一些判决表明衡平法不允许当事人违背他们的诺言。将两者联系起来考虑，可以得出这样一个符合逻辑的结果，即承诺接受一个较小的数额来清偿一个较大的数额，在其被付诸行为后，它便具有约束力，无论其是否缺少对价。这样允诺的效力便得到确认了。这就是著名的允诺禁止反言原则。

然而，对于采纳允诺不得反言的制度，英国法院所持的是一种保守的态度。在运用中主要有三点限制：一是受诺人要有损害的存在。这一点是不言而喻的，因为这一规则是救济受诺人的，如果不存在损害当然也就没有运用这一规则的必要。二是禁止反言的期间限制。因为一方当事人作出的允诺是建立在一定条件之上的，如果这一条件不存在时，这一允诺当然不再有效，双方当事人仍按照原来的合同履行各自的义务。在本案中，当战争结束，公寓完全出租时，被告仍要按原租金支付给原告。三是允诺禁止反言的原则不能产生独立的诉权，而只能产生抗辩权。换言之，受诺人不能将这一原则作为剑而主动起诉诺言人，只能将其作为盾阻止诺言人胜诉。在 1951 年的 Combe v. Combe 案中，被告丈夫在与原告妻子离婚时同意每年向她支付一笔赡养费，故原告没有向法院提出令被告支付赡养费的要求。后来，原告因一直未得到赡养费而起诉被告。丹宁判决原告败诉。

允诺禁止反言原则是一条弹性较大的规则，其适用的目的主要是为了防止因缺乏对价而产生不公平的情况。其思想核心为信赖理念，法院可以以此来保护一方因信赖而导致了实际的损害，从而在这种情况下抛弃了对价理论对于合同的约束。应该说，允诺禁止反言理论到现在已经很好地充当了对价理论的润滑剂，其积极作用是值得肯定的。

阅读本案例时还要注意丹宁勋爵的行文技巧，以及运用恰当的词汇表达自己思想的技能。

案例3:米兰达诉亚利桑那州案(Miranda v. Arizona)

第一部分[案例引言]

米兰达诉亚利桑那州案的背景情况是这样的:

1963年3月2日晚,亚利桑那州首府菲尼克斯市的一名女营业员芭芭拉·约翰逊(Barbara Johnson)在下班时被一名男子劫持到城郊并被强奸。根据约翰逊报案时的描述,警察将欧内克斯·米兰达(Ernesto Miranda)列为犯罪嫌疑人,并在3月13日在米兰达家里逮捕了他。在警察局,被害人指认正是米兰达实施了犯罪。随后,经过两个多小时的审讯,米兰达签署了一份书面陈述,承认自己有强奸行为。在该陈述的顶部,有一段事先打印好的文字,表明这份陈述是被讯问人自愿作出的,没有受到威胁,并且被讯问人充分知道自己的法律权利,知道现在所作的任何陈述将会被用作反对自己的证据。但是,整个审讯过程中,米兰达没有被告知有权保持沉默和有权聘请律师。

在州法院审理时,鉴于米兰达未聘请律师,主审法官根据1963年联邦最高法院吉迪恩诉温赖特案(Gideon v. Wainwright, 1963)的判例,指定了一位名叫阿尔文·莫尔(Alvin Moore)的公共辩护律师为米兰达辩护。这位莫尔律师当时已73岁高龄,而且缺乏刑事辩护的经验。但他在开庭时声称,根据宪法第6条修正案以及穷人律师权的判例,嫌犯被捕后,警方就应立即为其提供律师,但本案警方却违反规定,在没有律师在场的情况下审讯米兰达并使其招供。因此,米兰达的供词属于被迫自证其罪,违反了宪法第5条修正案,因而是无效的。但是,亚利桑那州法院以宪法规定的权利尚没有具体规范为由,认定警方获取的米兰达的供词属合法证据,判决米兰达绑架罪和强奸罪成立,分别处以20年和30年监禁,合并执行。

米兰达和莫尔律师不服州法院判决,在两位著名刑事律师帮助下,将此案逐级上诉到联邦最高法院。1966年,联邦最高法院对米兰达案和与其存在类似情形的另外三个案件①一并进行了审理。1966年6月13日,在首席大法官沃伦(Warren)主持下,最高法院以5:4的微弱多数裁决撤销亚利桑那州法院的判决②。

沃伦大法官,1953—1969年任职,历任基层检察官、州司法部长和州长,对当时美国各级检察机关和警方内部的实务运作情况知之甚详。出任首席大法官后,主持作出了一系列

① 即Vignera v. New York, Westover United States和California v. Stewart三个案件。

② 重新审理此案时,虽然控方不能再以米兰达的有罪供述作为证据,但是米兰达仍被判为有罪。1972年,米兰达获假释,靠出售印着"米兰达告诫"并有其亲笔签名的小卡片维持生活。1976年,米兰达在菲尼克斯一家酒吧里赌博时与别人发生争执,被当场刺死,当时他身上还带着两张印有"米兰达告诫"的小卡片。

震撼全美的重大司法判决，严格地限制执法部门的权力，加强对社会弱势群体权利的宪法保护，对20世纪60年代美国的“民权运动”和“权利革命”产生了重要影响。

第二部分[案例及思考问题]

U. S. Supreme Court

MIRANDA v. ARIZONA, 384 U. S. 436 (1966)

384 U. S. 436

MIRANDA v. ARIZONA.

CERTIORARI① TO THE SUPREME COURT OF ARIZONA.

No. 759.

Argued February 28-March 1, 1966.

Decided June 13, 1966.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation② and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution③ not to be compelled to incriminate himself.

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We start here, as we did in Escobedo, with the premise that our holding④ is not an

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① certiorari: [拉丁语]调卷令。在英国，原为特权令状(Prerogative writ)的一种，最早只能由大法官签发，在16世纪时王座法庭也获得了签发该令状的权力。现在则是由高等法院的王座庭签发，据以要求下级法院或法官将某一案件的诉讼记录移送给高等法院审核。在美国，调卷令是上诉法院签发给下级法院要求其将某一案件的诉讼记录移交给其审查的一种特别令状。联邦最高法院将调卷令用作其选择复审案件的工具。在各州的司法实践中则倾向于废除这一令状。

② interrogation:(刑事)讯问。通常指警察通过向被逮捕的或被怀疑有犯罪行为的嫌疑人提问来查明其是否真正犯有罪行的程序。

③ 美国宪法第五条修正案：“无论何人，除非根据大陪审团的报告或起诉书，不受死罪或其他不名誉罪的审判，但发生在陆、海军中或发生在战时或出现公共危险时服役的民兵中的案件除外。任何人不得因同一犯罪行为而两次遭受生命或身体的危害；不得在任何刑事案件中被迫自证其罪；不经正当法律程序，不得被剥夺生命、自由或财产。不给予公平赔偿，私有财产不得充作公用。”

④ holding:裁决。指法庭就其判决来说属关键性的法律问题所作的裁决；或法官就庭审中提出的证据或其他问题所作的裁决。

innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the Escobedo decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—that "No person ... shall be compelled in any criminal case to be a witness against himself," and that "the accused shall ... have the Assistance of Counsel"—rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured "for ages to come, and ... designed to approach immortality as nearly as human institutions can approach it," Cohens v. Virginia, 6 Wheat. 264, 387 (1821).

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Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution① may not use statements, whether exculpatory② or inculpatory③, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination④. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the [384 U. S. 436, 445] process that he wishes to consult with an attorney before speaking there can be no

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① prosecution:控诉方;公诉方,指代表政府提起刑事诉讼追究被告人刑事责任的检察官或律师。

② exculpatory:开脱罪责的;申明无罪的;辩白的。

③ inculpatory:可指控的;可归罪的;连累的。

④ self-incrimination:自证其罪;自我归罪,指在庭审中或在庭审前通过做陈述等表明自己与某一犯罪有关或将使自己受到刑事指控的行为。美国宪法第五修正案和许多州的宪法和法律都禁止政府强迫某人成为对自己不利的证人或提供对自己不利的证据。指控犯罪是政府的职责并承担证明责任,被告人有权不被强迫协助政府证明自己有罪。

questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

I

The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody① or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives②, or a prosecuting attorney③ in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—incommunicado④ interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.

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Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, "Since Chambers v. Florida, [309 U. S. 227], this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." Blackburn v. Alabama, [361 U. S. 199, 206 (1960)]. Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which

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① custody:羁押;拘留;拘禁;监禁;监视。广义上指对自由的限制,而不仅仅是指某人实际关押在监狱里。因缓刑、假释或取保、个人具结悔过获得释放的人都处于"被监禁(in custody)"状态,因此都有权按人身保护程序申请人身保护令状。

② detective:侦查员;私人侦探,其职责在于查找犯罪人或获取难以获得或不能从公开渠道获得的信息,可以是警察,也可以是私人雇佣的人员。

③ prosecuting attorney:(美)控方律师;检察官,经选举或任命在各司法管辖区、巡回审判区或县执行刑事追诉的政府官员,又称州检察官或地区检察官。

④ incommunicado:(西)(犯人)被禁止与外界接触的;只有权与少数特定人员(如监管负责人或犯罪侦查人员)交流的。

document procedures employed with success in the past, and which recommend various other effective tactics. These [384 U. S. 436, 449] texts are used by law enforcement agencies① themselves as guides. It should be noted that these texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering these texts and other data, it is possible to describe procedures observed and noted around the country.

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From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired objective may be attained." When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

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In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring. In No. 759, Miranda v. Arizona, the police arrested the defendant and took him to a special interrogation room where they secured a confession. In No. 760, Vignera v. New York, the defendant made oral admissions to the police after interrogation in the afternoon, and then signed an inculpatory statement upon being questioned by an assistant district attorney later the same evening. In No. 761, Westover v. United States, the defendant was handed over to the Federal Bureau of Investigation② by [384 U. S. 436, 457] local authorities after they had detained

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① law enforcement agency：执法机关。

② Federal Bureau of Investigation (FBI)：(美)联邦调查局。成立于1908年，负责调查除法律、条例规定由其他联邦机构管辖之外的所有违反联邦法律的案件。其管辖范围涉及刑事、民事及国家安全领域，包括间谍、颠覆及其他危害国家安全的破坏活动、绑架、敲诈勒索、抢劫银行、州际赃物转运、公民权事务、州际投机活动、蒙骗政府、袭击或杀害总统或联邦官员等案件。此外，它还是一个服务性机构，提供诸如鉴定指纹、训练警官等服务。

and interrogated him for a lengthy period, both at night and the following morning. After some two hours of questioning, the federal officers had obtained signed statements from the defendant. Lastly, in No. 584, California v. Stewart, the local police held the defendant five days in the station and interrogated him on nine separate occasions before they secured his inculpatory statement.

In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, for example, in Miranda, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in Stewart, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade. To be sure, the records do not evince overt physical coercion① or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner②. This atmosphere carries its own badge of intimidation③. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our [384 U. S. 436, 458] Nation's most cherished principles-that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning. It is fitting to turn to his-

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① coercion:胁迫。指以暴力或使用暴力相威胁。被迫行为在民事上可归于无效;在刑事上可作为一种合法辩护理由。

② examiner:讯问人;询问人,指由法庭委派在案件进行过程中听取证人证言的人;又指法庭任命的对由于在国外、生病或体弱而不能出庭的证人进行询问的人。询问人只记录询问情况,不能对证人的可靠性发表意见。现在司法实践中,除证人不在管辖区范围外,一般不任命专门的询问人。

③ intimidation:胁迫;威胁;恐吓。通常指采用威胁或暴力手段迫使他人做某事或阻止其行使权利的侵权行为或犯罪行为。即加害人故意使被害人陷入即将受到人身伤害的恐惧,这种恐惧不是因受害人胆小所致,但也不必达到使受害人陷入惊惧、恐慌或歇斯底里的程度。也指被胁迫的状态。

tory and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation.

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Thus we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often transcends its origins," the privilege has come rightfully to be recognized in part as an individual's substantive right①, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." United States v. Grunewald, [233 F. 2d 556, 579, 581—582, rev'd, 353 U. S. 391 (1957)]. We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values, Murphy v. Waterfront Comm'n, [378 U. S. 52, 55—57, n. 5 (1964)]; Tehan v. Shott, [382 U. S. 406, 414—415, n. 12 (1966)]. All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," 8 Wigmore, Evidence 317 (McNaughton rev. 1961), to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. Chambers v. Florida, [309 U. S. 227, 235—238 (1940)]. In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." Malloy v. Hogan, [378 U. S. 1, 8 (1964)].

The question in these cases is whether the privilege is fully applicable during a period of custodial interrogation. [384 U. S. 436, 461] In this Court, the privilege has consistently been accorded a liberal construction. Albertson v. SACB, [382 U. S. 70, 81 (1965)]; Hoffman v. United States, [341 U. S. 479, 486(1951)]; Arndstein v. McCarthy, [254 U. S. 71, 72—73(1920)]; Counselman v. Hitchock, [142 U. S. 547, 562 (1892)]. We are

① substantive right：实体权利。指可能影响诉讼结果并且能获得法律保护的重要权利，区别于程序性权利(technical or procedural right)。

satisfied that all the principles embodied in the privilege apply to informal compulsion① exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.

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Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings② and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity

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① compulsion:强迫(行为);受强制(状态)。强迫可以采用体力或其他方式,处于胁迫下的行为对行为人无约束力,但行为人应服从和履行合法的强制性行为。

② proceeding:可指完整的正规的诉讼程序,包括从诉讼开始到作出判决期间所进行的全部行为和步骤;也可指在一个大的诉讼过程中的某一程序阶段或步骤,或指向法庭或其他机构寻求救济的程序手段。

to exercise it, the following safeguards must be observed.

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and [384 U. S. 436, 468] unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it-the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning① and will bode ill when presented to a jury. Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information [384 U. S. 436, 469] as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system②—that he is not in the presence of persons acting solely in his interest.

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① damn：判定（某人）有罪；判定（某人）应受惩罚。

② adversary system：对抗制；辩论式的诉讼制度，指英美法上的诉讼制度。在这种诉讼程序中，强调双方当事人的对抗性，当事人有很大的主动权，且基本不受阻碍，通过双方当事人及其律师询问和交叉询问证人，相互争辩，来推进诉讼进程，揭示案件真相。法官作为中立的裁判者，听取双方的陈述和辩论，而不是积极介入。也称作 adversary procedure。

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel① present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere [384 U. S. 436, 470] warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more "will benefit only the recidivist and the professional." Brief for the National District Attorneys Association as amicus curiae②, p. 14. Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Cf. Escobedo v. Illinois, [378 U. S. 478, 485 , n. 5]. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial. See Crooker v. California, [357 U. S. 433, 443—448 (1958) (DOUGLAS, J., dissenting)].

An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given.

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① counsel:律师;代理律师,指代表当事人参与诉讼或者代表或协助客户处理有关法律事务(如参与谈判、起草文件等)的律师。

② amicus curiae:[拉丁语]法院之友。指对案件中的疑难法律问题陈述意见并善意提醒法院注意某些法律问题的临时法律顾问;协助法庭解决问题的人。

The accused who does not know his rights and therefore does not make a request [384 U. S. 436, 471] may be the person who most needs counsel.

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Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of [384 U. S. 436, 472] circumstantial evidence① that the person may have been aware of this right will suffice to stand in its stead: Only through such a warning is there ascertainable assurance that the accused was aware of this right.

If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney. The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decisions today would be of little significance. The cases before us as well as the vast majority of confession cases with which we have dealt in the past involve those unable to retain counsel. While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice. Denial [384 U. S. 436, 473] of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal② struck down in Gideon v. Wain-

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① circumstantial evidence：情况证据；间接证据，指基于常识可以合理地从中推断除待证事实的情况或事实，而并非个人亲身经历或亲眼所见的事实。也指除证人证言以外的其他形式的证据。在无直接证据的情况下，与待证事实有关联性的间接证据可以被采纳。

② appeal：上诉。在美国，上诉是指请求上级法院对下级法院的裁决或请求法院对行政机关的裁决进行审查，以纠正其错误或推翻其不公正之裁决的行为。在联邦和多数州法院系统中，上诉有两个阶段，即从初审法院上诉至上诉法院，从上诉法院上诉至最高法院。在前一阶段中，提起上诉是当事人的权利，而在后一阶段中的上诉通常不是当事人的权利，即最高法院对是否决定对案件进行复审有裁量权。如美国最高法院，对其决定再审的案件，即签发调卷令。实践中申请获得批准者为数极少。在有些案件中，上诉情况有所不同，如在社会治安案件中，对行政法官的裁决不服可上诉至上诉委员会；对上诉委员会的裁决不服的，可上诉至联邦地区法院。在刑事诉讼中，上诉人不得就陪审团对事实问题作出的裁断上诉，而只能就法官适用法律的错误提出上诉，因此，其上诉审一般只进行法律审，且基本上实行书面审。

wright, [372 U. S. 335(1963)], and Douglas v. California, [372 U. S. 353(1963)].

In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present. As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, [384 U. S. 436, 474] at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time. [384 U. S. 436, 475]

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Escobedo v. Illinois, [378 U. S. 478, 490, n. 14]. This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, [304 U. S. 458 (1938)], and we re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated① evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.

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Whatever the testimony② of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment③ of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.

The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements which are

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① corroborate:证实;确证,指陈述事实使别人所作之陈述的真实性得到信任。如果证人的证言与其他证人的表述相符合,或者与其他已知事实相符合,就得到证实。

② testimony:证人证言。指具备作证资格的证人宣誓或作出确认保证后,在庭审中或在宣誓书或书面证词中以口头或书面形式提供的证据。

③ relinquishment:放弃;抛弃;弃权。

direct confessions① and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, [384 U. S. 436, 477] for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach② his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication③. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement. In Escobedo itself, the defendant fully intended his accusation④ of another as the slayer to be exculpatory as to himself.

The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system⑤ recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point.

Our decision is not intended to hamper the traditional function of police officers in investigating crime. See Escobedo v. Illinois, [378 U. S. 478, 492]. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field

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① confession:认罪供述;供认;供述。指刑事被告人承认受指控罪行的主要事实,通常以书面形式作出并包含有关犯罪行为的详细叙述。

② impeach:置疑;怀疑,指不相信某一证据或其他法律文书的可靠性。

③ implication:推断;默示,它区别于由文字表达的明确意思表示。

④ accusation:控告;指控。

⑤ inquisitorial system:审问制;纠问制,指大陆法系国家中由国家而非私人主动追究犯罪的刑事诉讼制度,与英美法系实行的控告制或对抗制相对。纠问制起源于罗马帝国晚期,到16世纪时被欧洲国家普遍采用。它的一般特征是由法官主导审判活动的进行,法官可以依职权主动决定要进行的所有必要的调查活动,确定调查的范围而不限于当事人所提交的证据,以及主动传唤和询问证人等。此种制度在大多数欧洲大陆国家、日本以及中南美洲普遍采用,在英格兰法中唯一具有此种特征的程序是由验尸官进行的调查。

to be used at trial against him. Such investigation may include inquiry of persons not under restraint①. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of [384 U. S. 436, 478] responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to [384 U. S. 436, 479] protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and

① restraint：管束；监禁；拘押。

waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Ⅳ

A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. See, e. g., Chambers v. Florida, [309 U. S. 227, 240—241 (1940)]. The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness① against himself. That right cannot be abridged.

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In this connection, one of our country's distinguished jurists② has pointed out: "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law."

If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his [384 U. S. 436, 481] client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.

In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances. We also fully recognize the obligation of all citizens to aid in enforcing the criminal laws. This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in

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① witness:证人。对事实或情况有足够了解,被召到法庭提供证言或加以证明的人。无论他的声明是以口头或书面形式作出,经过宣誓或未经宣誓,都可能被法庭采纳为某方面的证据。

② jurist:法学家。并无精确的定义。一般来说,那些非常精通法律的人可称为法学家。法学家可能是法官或执业律师,但更多是指著名的法学学者、法学著作家。在英国英语中,本词指对法律思想及法律著作或文献作出卓越贡献的人。在美国英语中,用法不那么严格,更多指各个层次的法官,甚至指那些从事非学术性活动、广受尊敬的执业律师,美国英语中的一个常见的错误是将"jurist"与"judge"混同。

the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement. As we have noted, our decision does not in any way preclude police from carrying out their traditional investigatory functions. Although confessions may play an important role in some convictions①, the cases before us present graphic examples of the overstatement of the "need" for confessions. In each case authorities conducted interrogations ranging up to five days in duration despite the presence, through standard investigating practices, of considerable evidence against each defendant. Further examples are chronicled in our prior cases. See, e. g. , Haynes v. Washington, [373 U. S. 503, 518—519 (1963)]; Rogers v. Richmond, [365 U. S. 534, 541 (1961)]; Malinski v. New York, [324 U. S. 401, 402 (1945)]. [384 U. S. 436, 482]

It is also urged that an unfettered right to detention② for interrogation should be allowed because it will often redound to the benefit of the person questioned. When police inquiry determines that there is no reason to believe that the person has committed any crime, it is said, he will be released without need for further formal procedures. The person who has committed no offense③, however, will be better able to clear himself after warnings with counsel present than without. It can be assumed that in such circumstances a lawyer would advise his client to talk freely to police in order to clear himself.

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Over the years the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay. A letter received from the Solicitor General④ in response to a question from the Bench⑤ makes it clear that the present pattern of

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① conviction：定罪；有罪判决，指刑事法庭根据被告人的供认、有罪答辩、陪审团作出的有罪裁断，或者经过庭审而作出的被告人犯有受指控罪行的最终判决。

② detention：拘留；扣留；阻止；滞留。如警察认为某人有参与犯罪活动的嫌疑时，可进行拦阻并询问。亦指某人在举行听审或开庭审判前被暂时拘留的状况。

③ offense：违法；犯罪（多指轻罪）。

④ Solicitor General：[美]副总检察长；司法部副部长，指司法部中地位仅低于总检察长或司法部长（Attorney General）的法律官员，由总统经参议院提议并同意后任命。其主要职责是在涉及美国国家利益的案件中代表联邦政府出庭（尤其是在联邦最高法院），决定联邦政府对哪些案件应提出上诉，监督最高法院办理涉及联邦政府事项等。

⑤ bench：法庭；裁判庭；法官。

warnings and respect for the [384 U. S. 436, 484] rights of the individual followed as a practice by the FBI is consistent with the procedure which we delineate today.

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The experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed. The English procedure since 1912 under the Judges'Rules① is significant. As recently [384 U. S. 436, 487] strengthened, the Rules require that a cautionary warning be given an accused by a police officer as soon as he has evidence that affords reasonable grounds for suspicion; they also require that any statement made be given by the accused without questioning by police. [384 U. S. 436, 488] The right of the individual to consult with an attorney during this period is expressly recognized.

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It is also urged upon us that we withhold decision on this issue until state legislative bodies and advisory groups have had an opportunity to deal with these problems by rule making. We have already pointed out that the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it. In any event, however, the issues presented are of constitutional dimensions and must be determined by the courts. The admissibility of a statement in the face of a claim that it was obtained in violation of the defendant's constitutional rights is an issue the resolution of which has long since been undertaken by this Court. See Hopt v. Utah, [110 U. S. 574 (1884)]. Judicial solutions to problems of constitutional dimension have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so. That was our responsibility when Escobedo was before us and it is our [384 U. S. 436, 491] responsibility today. Where rights secured by the Constitution

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① Judge's Rules:[英]法官规则。指导警察讯问犯罪嫌疑人或受到犯罪指控者的规则,例如何时应对被讯问者给予警告,他所说的话将被记录下来和用作证据,以及被告人作书面陈述应采用的形式等。法官规则可能源于 1906 年皇家首席大法官阿尔弗斯通(L. C. J. Alverstone)给伯明翰的警察局长的一封回信,对警察局长提出的就适当的警察侦查行为和讯问犯罪嫌疑人的方式方面给予建议的请求作了回答。1912 年由王座庭的法官制定并通过了 4 条规则,1918 年又增加了 5 条规则。1964 年王座庭全体法官会议通过了一套新的规则。这套规则并不具有制定法或其他性质的效力,但它从整体上规定警察警告和讯问犯罪嫌疑人所适用的原则。只要警察遵守了这些规则,其行为就不会受到批评,所获取的信息也不会不被采纳,相反,若规则未得到遵守,法庭可拒绝采纳被告人的陈述作为证据。现在这些规则已被 1984 年《警察和刑事证据法》第五部分及国务大臣的《程序法典》中有关拘留、待遇和讯问方面的规定所取代。

are involved, there can be no rule making or legislation which would abrogate them.

V

Because of the nature of the problem and because of its recurrent significance in numerous cases, we have to this point discussed the relationship of the Fifth Amendment privilege to police interrogation without specific concentration on the facts of the cases before us. We turn now to these facts to consider the application to these cases of the constitutional principles discussed above. In each instance, we have concluded that statements were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege.

No. 759. Miranda v. Arizona.

On March 13, 1963, petitioner, Ernesto Miranda, was arrested at his home and taken in custody to a Phoenix police station. He was there identified by the complaining witness. The police then took him to "Interrogation Room No. 2" of the detective bureau. There he was questioned by two police officers. The officers admitted at trial that Miranda was not advised that he had a right to have an attorney present. Two hours later, the [384 U. S. 436, 492] officers emerged from the interrogation room with a written confession signed by Miranda. At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and "with full knowledge of my legal rights, understanding any statement I make may be used against me."

At his trial before a jury, the written confession was admitted into evidence over the objection of defense counsel, and the officers testified① to the prior oral confession made by Miranda during the interrogation. Miranda was found guilty of kidnapping② and rape③. He was sentenced④ to 20 to 30 years' imprisonment⑤ on each count⑥, the sentences⑦ to

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① testify：证明；证实；作证。

② kidnap：绑架罪。在美国，绑架罪是指具有下列目的之一的使他人离开或远离其居住所、营业所或将其秘密隐藏于某地的行为：(1)勒索赎金或报酬；以人质作为挡箭牌；(2)为方便犯重罪或犯罪后逃跑；(3)给受害者或他人造成身体伤害或恐吓受害者；(4)以此来干涉国家政治职能。在现代社会中，政治极端分子经常采用绑架手段以取得政府让步，例如释放政治犯等。

③ rape：强奸罪。通常指违背妇女意志，以暴力方式在违背其意志的情况下实行性交的犯罪。现代制定法对该罪的犯罪构成予以扩展，婚姻身份以及被害人的性别现已与犯罪构成无关。

④ sentence：刑事判决。指法院正式宣告对已作有罪答辩或已被定罪的刑事被告人所判处的刑罚的判决。

⑤ imprisonment：监禁；拘押。一种刑罚方法。指将被判处监禁刑的罪犯依收监令予以关押，直到将其释放。亦指对待审的被告的临时拘押。

⑥ count：罪项。刑事起诉书中分别指控被告人犯有一项独立的罪行的部分。

⑦ sentence：(判决所确定的)刑罚。在英美刑法上，刑事判决可判处的刑罚包括监禁刑、缓刑和罚金刑，在美国还包括死刑和暂缓监禁。

run concurrently. On appeal, the Supreme Court of Arizona held that Miranda's constitutional rights were not violated in obtaining the confession and affirmed① the conviction. In reaching its decision, the court emphasized heavily the fact that Miranda did not specifically request counsel.

We reverse. From the testimony of the officers and by the admission of respondent②, it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings the statements were inadmissible. The mere fact that he signed a statement which contained a typed-in clause stating that he had "full knowledge" of his "legal rights" does not approach the knowing and intelligent waiver required to relinquish constitutional rights.

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Therefore, in accordance with the foregoing, the judgments of the Supreme Court of Arizona in No. 759, of the New York Court of Appeals in No. 760, and of the Court of Appeals for the Ninth Circuit③ in No. 761 are reversed. The judgment of the Supreme Court of California in No. 584 is affirmed.

It is so ordered.

Questions to Consider:

1. What are the main contents of the Miranda Warnings?

2. What is the constitutional basis of the Miranda Warnings?

3. What are the main functions of the presence of counsel when the accused is interrogated?

4. If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, but he can not afford a retained attorney, can the authorities ignore or deny his request?

5. If an individual indicates in any manner, at any time prior to or during questioning,

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① affirm:维持(原判)。

② respondent:被上诉人;被告;被申请人。

③ circuit:巡回审判区。在早期往往将全国划分为若干个司法区,法官在其任职的司法区内可巡回到不同地点区开庭审理案件。巡回审判区因此而得名。现在美国联邦司法系统内,全国共分为 11 个司法巡回区,哥伦比亚特区则作为单独的一个巡回区,此外还有一个联邦巡回区。每一巡回区设一联邦上诉法院,受理上诉案件。

that he wishes to remain silent, what shall the authorities do?

6. Who shall take the burden of proof to demonstrate the defendant's waiver of his privilege, knowingly and intelligently, against self-incrimination and his right to retained or appointed counsel?

7. What are the consequences of the authorities' failure to give the Miranda Warnings?

第三部分[判例影响及意义综述]

1964年，针对美国各州和地方警务人员在实际办案过程中罔顾程序、滥用权力现象较为严重的问题，联邦最高法院在马洛伊诉霍根(Malloy v. Hogan, 1964)案中宣布，宪法第五条修正案关于"不自证其罪"的条款属于宪法第十四条修正案中各州应遵循的"正当法律程序"的一部分，犯罪嫌疑人的"非自愿供词"在州法院审判时一概无效。但是，究竟什么样的供词属于"非自愿供词"？各州警方应如何在日常执法过程中防止出现"非自愿供词"？对于这些细节，联邦最高法院在上述案例中并未予以详细说明和具体解释。这样一来，各州警务人员"执法犯法"、侵犯公民宪法权利的状况并无明显改善。与此同时，"民权运动"和"权利革命"在美国社会风起云涌。

在此背景下，以沃伦大法官为首的联邦最高法院多数派决定，借审判米兰达案之机，正式建立一个统一明确、联邦和各州警务人员都必须严格遵守的联邦法规，程序性地保护所有犯罪嫌疑人的沉默权。在分析和讨论案情时，沃伦大法官根据自己长期担任基层检察官的经历，耐心地说服其他几位大法官同意他的观点。他坚持认为，只有施行"米兰达告诫"，才能有效地约束和限制警方权力，防止警察对犯罪嫌疑人进行刑讯逼供和精神恐吓，有效地保护犯罪嫌疑人的基本宪法权利。在判决书中，沃伦大法官特意引用许多警务人员执法犯法的具体事例，详细说明和解释施行"米兰达告诫"的重要意义和必要性。

最后，联邦最高法院以5∶4的微弱多数对米兰达案作出了最终裁决，确立了由沃伦大法官主笔的"米兰达告诫"规则。其重要意义在于：明确规定了沉默权的告知程序，使犯罪嫌疑人在被讯问前能够清楚知道自己享有沉默权；同时，扩展了沉默权的适用时间，犯罪嫌疑人不仅在审判阶段享有沉默权，而且在侦查阶段也可以行使沉默权，即把"特免权带进了警察局"，标志着美国的沉默权制度从"审判的沉默权"发展到了"审讯的沉默权"。当然，也正如沃伦大法官重审该案时所表达的初衷那样，这一明确而具体的程序规则为美国宪法第五条修正案规定的"不得被迫自证其罪"的基本公民权利提供了有力而实在的保障，彰显了美国社会传统的尊重和保护人权与自由的基本价值理念；相应地，它也有效规范和限制了警察所代表的国家公权力的行使，为美国司法制度和宪政制度的完善树立了良好的范例。

“米兰达告诫”规则确立后，美国警察经过一个适应期，最终还是默认了该规则，并习惯性地在衣袋里装上一张印有“米兰达告诫”的小卡片，以备适时之需。其原因或许在于“米兰达告诫”规则得到了美国各级法院的坚决维护，不仅警察违反该规则获得的口供不能在审判中用作证据，而且警方根据该口供获得的其他物证也一律不能采用。

附录二:法庭电影——影像中的正义

一、概　　述

法庭电影(courtroom drama)往往通过对个案的通俗分析,以阐释法律文化。法庭电影以"娱乐化"的方式为大众提供了一种了解法律和法律职业的途径。通过观看法庭电影,尤其是美国的法庭电影,我们可以获得美国法律历史和法律文化的相关知识。

比如,《杀死一只知更鸟》(To Kill a Mocking Bird)等电影就反映了正义与种族观念的傲慢与偏见的冲突;《追魂交易》(Devil's Advocate)等电影反映了法律信仰和生活现实之间的两难抉择;《纽伦堡审判》(Judgment at Nuremberg)、《极度重罪》(High Crimes)等电影反映了责任和良心的磨难;而《左拉传》(The Life of Emile Zola)、《四季之人》(A Man for all Seasons)等电影则反映了政治压力下的司法体制的脆弱。又如《鹈鹕案卷》(Pelican Brief(又译《塘鹅暗杀令》或《绝对机密》))、《连锁阴谋》(Conspiracy Theory)等电影表达的是对政府权力运作的不信任;而《费城故事》(Philadelphia)、《双重危险》(Double Jeopardy)等电影表达了美国人民为权利和为法律(权利)而斗争的价值追求。

除了反映美国法律文化、政治体制、意识形态之外,法庭电影还可以生动地再现法庭辩护中唇枪舌剑的场景:穿着笔挺西装的律师和政府的检察官在严肃的法庭上雄辩滔滔。《好人无几》(A Few Good Men)、《我要求审判》(Nuts)、《真情假爱》(Intolerable Cruelty)、《诱惑法则》(Laws of Attraction)、《律政俏佳人》(Legally Blonde)等众多好莱坞法律电影作品为我们描绘了一场场在法庭上演的引人入胜的辩论对抗赛:律师们唇枪舌剑,旁征博引,慷慨陈词。这一具有强烈冲击效果的诉讼场景吸引了无数的观众,也吸引着他们对法律和律师职业的兴趣和向往。

总之,法庭电影赋予了法律以肉体、血液与灵魂。通过观看和欣赏好的法庭电影,不仅能帮助我们比较直观地了解法律文化的独特性,而且也能大大丰富我们对法律的理解和想象。

二、《杀死一只知更鸟》法庭辩论部分剧本

1. 背景介绍

电影根据哈柏·李(Harper Lee)的同名畅销小说改编。小说于1960年出版,1961年获得普利策奖,1962年就被搬上银幕。时至今日,这部小说已被翻译成40多种文字,发行量超过一千五百万册,成为公认的美国文学经典。

20世纪30年代的美国南部歧视黑人的现象十分严重。一天,阿提克斯·芬奇(Atticus Finch)去法院为黑人汤姆·罗宾逊(Tom Robinson)当辩护律师。白人检察官指控汤姆·罗宾逊强奸了鲍伯·尤厄尔(Bob Ewell)的女儿玛依拉·尤厄尔(Mayella Ewell),阿提克斯·芬奇经过认真调查,发现事实并非如此。于是,在法庭上,他实事求是地进行辩护,把对汤姆·罗宾逊的指控一一加以驳斥,最后他要求判汤姆无罪,并且义正词严地呼吁人们要尊重事实,要维护人类的尊严与平等。可是法官与陪审团都偏信原告的"证词",仍判汤姆·罗宾逊有罪。

2. 法庭询问(examination)的形式

在英美的诉讼法中,法庭询问通常有两种形式,即direct examination(直接询问)和cross-examination(交叉询问、交叉诘问、反反询问)。cross examination是英美法系诉讼中的一项重要制度,是指有关双方当事人对证人交叉盘问的一整套规范。不管是刑事案件还是民事案件,在通常的诉讼程序,只要有证人出庭,都将进行对证人的交叉询问。

由于交叉询问是一种专业很强的法庭技术,所以一般对证人交叉询问都是由双方律师进行。交叉询问首先由申请提出该证人(也称为"己方证人")的当事人(通常是该当事人的律师)对该证人进行询问,称之为"主询问"(direct examination; examination in chief),然后由对方当事人的律师对该证人进行询问,称为"反询问"(cross-examination)。最初询问证人的当事人或律师还可以对证人进行再询问,称为"再主询问"(redirect examination);再主询问之后,也允许实施反对询问的当事人或律师实施再反询问(recross-examination)。

主询问的目的主要是通过对证人的询问,使该证人将有利于己方的有关案件事实反映出来,作出支持自己主张的证言,以取得陪审团或法官的理解。反询问则相反,主要有两个目的:其一,通过反询问,发现证人证词的破绽,以达到证言无效,或使陪审团或法官对该证言持有怀疑的目的,或通过询问以否定证人的作证资格;其二,从反询问中发现或找出有利于自己的事实。虽然对方提供的证人一般总是支持对方主张的,但由于如实作证的证人毕竟是案件事实的见证人,因此,有可能从中发现或找到有利于己方的证言事实,变控方证人

为辩方证人(在民事案件中则是原告证人变为被告证人)。

3. 庭审的具体步骤

步　骤	内　　容
STEP 1	控告方先举证,控告方直接询问控方证人(direct examination of prosecution witnesses by the prosecutor)
STEP 2	辩护方交叉询问控方证人(cross-examination of the prosecution witnesses by the defense)
STEP 3	控方再次直接询问(redirect)
STEP 4	控方举证完毕(The prosecution finishes presenting its case)
STEP 5	辩护方可能会申请法院驳回控方的起诉(The defense makes a motion to dismiss charges. ——Optional)
STEP 6	法官常拒绝辩护方驳回公诉动议(The judge denies the defense motion to dismiss.)
STEP 7	辩护方举证,辩护方直接询问辩方证人(direct examination of defense witnesses by the defense)
STEP 8	控方交叉询问辩方证人(cross-examination of the defense witnesses by the prosecution)
STEP 9	辩方再次直接询问(redirect)
STEP 10	辩方举证完毕(The defense finishes presenting its case)
STEP 11	控方提出证据反驳辩护方(The prosecutor offers evidence to refute the defense case)
STEP 12	就陪审团指示控、辩、审三方达议(The prosecution and defense get together with the judge and craft a final set of instructions that the judge will give the jury)①
STEP 13	控方终结辩论(The prosecution makes its closing argument, summarizing the evidence as the prosecution sees it, and explaining why the jury should render a guilty verdict)
STEP 14	辩护方终结辩论(The defense makes its closing argument, summarizing the evidence as the defense sees it, and explaining why the jury should render a not guilty verdict—or at least a guilty verdict on a lesser charge)
STEP 15	法官向陪审团做出指示(The judge instructs the jury about what law to apply to the case and how to carry out its duties. Some judges "pre-instruct" juries, reciting instructions before closing argument or even at the outset of trial)
STEP 16	陪审团评议(The jury (if it is a jury trial) deliberates and tries to reach a verdict. Most states require unanimous agreement, but Oregon and Louisiana allow convictions with only 10 of 12 votes)
STEP 17	辩护方提出审判后动议(If the jury produces a guilty verdict, the defense often makes post-trial motions requesting the judge to override the jury and either grant a new trial or acquit the defendant)

① The prosecution and defense get together with the judge and figure out what instructions the judge should give the jury.

（续表）

步　骤	内　　容
STEP 18	法官通常会驳回审判后动议(Almost always, the judge denies the defense post-trial motions.)
STEP 19	法官量刑(Assuming a conviction (a verdict of "guilty"), the judge either sentences the defendant on the spot, or sets sentencing for another day)
关键词总结庭审步骤	case in chief: direct examination→cross-examination→redirect→prosecution rests→motion to dismiss→denial of motion to dismiss→defense case-in-chief: direct examination→cross-examination→redirect→defense rests→prosecution rebuttal→settling on jury instructions→prosecution closing argument→defense closing argument→jury instructions→jury deliberations→post-trial motions→denial of post-trial motions→sentencing.

4. 剧本节选

Atticus Finch defends Tom Robinson who is falsely accused of raping Mayella Ewell.

——**direct of Sheriff Tate**——

On the night of August 21st, I was just leaving my office to go home when Bob, Mr. Ewell, came in. Very excited he was, and he said to get to his house as quick as I could. That his girl had been raped. I got in my car and went out there as fast as I could. She was pretty well beat up. I asked her if Tom Robinson beat her like that. She said yes, he had. I asked if he'd taken advantage of her. She said yes, he did. That's all there was to it.

Prosecutor: Thank you.

——**cross**——

Defense: Did anybody call a doctor, sheriff?

A: No sir.

Q: Why not?

A: Well I didn't think it was necessary. She was pretty well beat up. Something sure happened—it was ugly.

Q: Now Sheriff, you say she was mighty beat up. In what way?

A: Well she was beaten around the head. There was bruises already coming out her arms. She had a black eye starting.

Q: Which eye?

A: Well she, her left.

Q: Well, now, was that was her left facing you, or looking the way that you were?

A：I guess that would make it her right eye. It was her right eye, Mr. Pierce. She was beaten up that side of her face.

Q：Which side again, Hank?

A：The right side. She had bruises on her arms. She showed me her neck. There were definite finger marks on her gullet.

Q：All around her neck at the back of the throat?

A：I'd say they were all around.

Judge：Witness may be seated.

——**direct of Bob Ewell**——

Bailiff：Do you swear to tell the truth, the whole truth and nothing but the truth so help you god?

A：I do.

Bailiff：Sit down please.

Q：Now, Mr. Ewell, you tell us, just in your own words what happened on August 21st.

A：Well, that night I was coming in from the wood with a load of kindling and I heard Mayella screaming as I got to the fence. So I dropped my kindling and I run just as fast as I could but I run into the fence. When I got loose I run up to the window and I seen him with my Mayella. (pointing at defendant).

Q：What did you do after you saw the defendant?

A：I run around the house trying to get in but he done run through the front door just ahead of me. But I seen who it was all right. I seen him. And I run in the house and pulled Mayella up and I run for Mr. Teagues just as quick as I could.

Prosecutor：Thank you Mr. Ewell.

——**cross**——

Q：Folks were doing a lot of running that night. Let's see now, you say that you ran to the house, you rant to the window, you ran inside. You ran to Mayella. Since you were doing all this running why didn't you run to the doctor?

A：Wasn't no need to. I saw who done it.

Q：Do you agree with the sheriff's description?

A：I agree with everything Mr. Tate said. Mighty beat up.

Q: All right now, Mr. Ewell. Can you read and write.

A: Yes Mr. Finch, I can read and I can write.

Q: Good. Then would you write your name. Right there. Would you show us?

(Witness writes his name with his left hand.)

Q: You are left-handed, Mr. Ewell.

A: What's that got to do with that, judge? I'm a god-fearing man. Atticus Finch is trying to take advantage of me. You got to watch tricky lawyers like Atticus Finch.

Judge: Quiet, quiet, then. The witness may take his seat.

——direct of victim——

Bailiff: Mayella Ewell. Put your hand on the Bible please. Do you swear to tell the truth the whole truth so help you god?

(Mayella nods.)

Prosecution: Now Mayella suppose you tell us just what happened, huh?

A: Well, Sir, I was sitting on the porch and he come along there was this old shifarobe in the yard and I said. You come in here boy and bust up this shifarobe and I'll give you a nickel and he came on in the yard and went in the house to get the nickel and I turn around before I know it he's on me and I fought and hollered but he had me around the neck and he hit me again and again. And the next thing I knew papa's in the room standing over me hollering, "Who done it? Who done it?"

Prosecution: Thank you Mayella. Your witness, Atticus.

Defense: Now Miss Mayella, is your father good to you? I mean, is he easy to get along with?

A: Just tolerable.

Q: Except when he's drinking. When he's riled, has he ever beaten you?

A: My pa's never touched a hair on my head in my life.

Q: Your saying you asked Tom to come in and chop up a—what was it?

A: A shifarobe.

Q: Was that the first time that you ever asked him to come inside the fence?

A: Yes.

Q: Didn't you ever ask him to come inside the fence before?

A: I might've.

Q: Can you remember any other occasion?

A: No.

Q: You say, "He caught me, he choked me, and he took advantage of me," is that right? Do you remember him beating you about the face?

A: No, I don't recollect if he hit me. I mean yes, he hit me, he hit me.

Q: Thank you. Now will you identify the man who beat you.

A: I will. I most certainly will. Sitting right yonder.

(She points at Tom)

Q: Tom, will you stand up please. Let Miss Mayella have a good long look at you. Tom, will you catch this please? (Atticus throws a glass to Tom, who catches it with his right hand.) Thank you. Now then, this time will you please catch it with your left hand?

Defendant: I can't, sir.

Q: Why can't you?

A: I can't use my left hand at all. I got it caught in a cotton gin when I was 12 years old. All my muscles were tore loose.

Q [to Mayella]: Is this the man who raped you?

A: It most certainly is.

Q: How?

A: I don't know how. He done it he done it.

Q: You have testified that he choked you and he beat you. You didn't say that he sneaked up behind you and he knocked you out cold but that you turned around and there he was. You want to tell us what really happened?

A: (Crying) I got something to say and then I ain't gonna say no more. He took advantage of me and if you fine fancy gentlemen ain't gonna do nothing about it, then you're just a bunch of lousy yellow stinking cowards the whole bunch of you and your fancy airs don't come to nothing. Your manners and your Miss Mayellas, it don't come to nothing, Mr. Finch(She breaks down.)

Judge: Sit down there. Atticus? Mr. Gilmer.

Prosecution: The state rests, Judge.

——direct of accused——

Bailiff: Tom Robinson, take the stand. Do you swear to tell the truth, the whole

truth, and nothing but the truth so help you god?

A: I do.

Bailiff: Sit down.

Q: Now Tom, were you acquainted with Mayella Violet Ewell?

A: Yes sir. I had to pass her place going to it from the field every day.

Q: Is there any other way to go?

A: No sir, none's I know of.

Q: And did she ever speak to you?

A: Why yes, sir. I tipped my hat when I go by. Then one day she asked me to come in and bust up a shifarobe for her. She gave me the hatchet and I broke it up. And then she said I reckon I'll have to give you a nickel, won't I?

Q: I said, "No ma'am, there ain't no charge."

A: Then I went home. Mr. Finch, that was way last spring, way over a year ago.

Q: And did you ever go on the place again?

A: Yes sir.

Q: When?

A: Well, I, I went lots of times. It seemed like every time I passed by yonder, she'd have some little something for me to do, chopping kindling and toting water for her.

Q: Tom, what happened to you on the evening of August 21st, last year?

A: Finch, I was going home as usual that evening, when I passed the Ewell place, with Mayella on the porch, like she said she was. And she said for me to come there and help her a minute. Well, I went inside the fence and I looked around for some kindling to work on, but I didn't see none. And then she said to come in the house, she has a door needs fixing, so I follows her inside and I looked at the door, and it looked all right. Then she shut the door. All the time, I was wondering why it was so quiet-like. Then it come to me. There was not a child on the place. And I said, Miss Mayella, where are the children. She said, they all gone to get ice cream. She said it took her a slap year to save seven nickels, but she done it, and they all gone to town.

Q: What did you say then?

A: Uh, I said something like, uh, "Why Miss Mayella, that's right nice of you to treat 'em." She said, "You think so?" "Well," I said, "I best be going." I couldn't do

nothing for her and she said Oh yes I could, and I asked her what. And she said to just step on the chair yonder and get that box down from on top of the shifarobe. So I done like she told me and I was reaching, when the next thing I know she grabbed me around the legs. She scared me so bad I hopped down and turned the chair over. That was the only thing, the only furniture disturbed in the room, Mr. Finch, I swear, when I left it.

Q: And what happened after you turned the chair over? Tom? You've sworn to tell the whole truth. Will you do it? What happened after that?

A: Mr. Finch. I got down off the chair and I turned around. And she sort of jumped on me and hugged me around the waist. She reached up and kissed me on the face. She said she'd never kissed a grown man before and she might as well kiss me. She asked for me to kiss her back. I said, "Miss Mayella let me out of here." And I tried to run. Mr. Ewell cussed at her from the window, said he's gonna kill her.

Q: And what happened after that?

A: I was running so fast, I don't know what happened.

Q: Tom, did you rape Mayella Ewell?

A: I did not, sir.

Q: Did you harm her in any way?

A: I did not.

——**cross**——

Prosecution (who has had his feet up on his chair, dangling off the side.): Mr. Robinson, you're pretty good at busting up shifarobes and kindling with one hand, aren't you? Strong enough to choke the breath out of a woman and sling her to the floor?

A: I never done that sir.

Q: But you're strong enough to.

A: I reckon so, sir.

Q: Uh-huh. How come you so all-fired anxious to do that woman's chores?

A: Looks like she didn't have nobody to help her. Like I said, she—

Q: With Mr. Ewell and seven children on the place? You did all this chopping and work out of sheer goodness, boy? You a mighty good fella, it seems. You did all that for not one penny?

A: Yes sir. I felt right sorry for her. She seemed—

Q: You felt sorry for her? A white woman? You felt sorry for her?

——**defense closing argument**——

To begin with, this case should never have come to trial. The state has not produced one iota of medical evidence that the crime Tom Robinson is charged with ever took place. It has relied instead upon the testimony of two witnesses whose evidence has not only been called into serious question on cross examination, but has been flatly contradicted by the defendant. There is circumstantial evidence to indicate that Mayella Ewell was beaten savagely by someone who led almost exclusively with his left. And Tom Robinson now sits before you, having taken the oath with the only good hand he possesses, his right. I have nothing but pity in my heart for the chief witness for the state. She is the victim of cruel poverty and ignorance. But my pity does not extend so far as to her putting a man's life at stake, which she has done in an effort to get rid of her own guilt, I say guilt, gentleman, because it was guilt that motivated her. She has committed no crime. She has merely broken a rigid and time-honored code of our society, a code so severe is hounded from our midst, is unfit to live with. She must destroy the evidence of her offense. But what was the evidence of her offense? Tom Robinson, a human being. She must put Tom Robinson away from her.

Tom Robinson was to her a daily reminder of what she did. Now what did she do? She tempted a Negro. She was white and she tempted a negro. She did something that in our society was unspeakable. She kissed a black man. Not an old uncle, but a strong young Negro man. No code mattered to her before she broke it, but it came crashing down on her afterwards. The witnesses for the state, with the exception of the sheriff for Macon county, have presented themselves to you gentleman, to this court, in the cynical confidence that their testimony would not be doubted. Confident that you gentleman would go along with them on the assumption, the evil assumption, that all Negroes lie, that all negroes are all basically immoral beings. All Negro men are not to be trusted around our women. That assumption one associates with minds of their caliber, and which is in itself a lie, which I do not need to point out to you. And so, a quiet, humble, respectable Negro who has had the unmitigated temerity to feel sorry for a white woman has had to put his word against two white people. The defendant is not guilty, but somebody in this courtroom is. Now gentleman, in this country, our courts are the great levelers. In our courts,

all men are created equal. I'm no idealist to believe firmly in the integrity of our courts and our jury system. That's no ideal to me, that is a living, working reality. Now I am confident that you gentlemen will review without passion the evidence that you have heard, come to a decision, and restore this man to his family. In the name of God do your duty. In the name of God believe Tom Robinson.

三、《美国律师协会杂志》推荐的最佳法律电影

ABA journal's List of the 25 Greatest Legal Movies

《美国律师协会杂志》2008 年 8 月号封面文章《25 部伟大的法律电影》一文为读者推荐了一些不错的法律电影,现将名单转列如下:

1. To Kill a Mockingbird(1962)
2. 12 Angry Men(1957)
3. My Cousin Vinny(1992)
4. Anatomy of a Murder(1959)
5. Inherit the Wind(1960)
6. Witness for the Prosecution(1957)
7. Breaker Morant(1980)
8. Philadelphia(1993)
9. Erin Brockovich(2000)
10. The Verdict(1982)
11. Presumed Innocent(1990)
12. Judgment at Nuremberg(1961)
13. A Man for All Seasons(1966)
14. A Few Good Men(1992)
15. Chicago(2002)
16. Kramer vs. Kramer(1979)
17. The Paper Chase(1973)
18. Reversal of Fortune(1990)
19. Compulsion(1959)
20. And Justice for All(1979)

21. In the Name of the Father(1993)
22. A Civil Action(1998)
23. Young Mr. Lincoln(1939)
24. Amistad(1997)
25. Miracle on 34th Street(1947)

附ABA Journal's List of Honorable Mentions

1. The Accused(1998)
2. Adam's Rib(1949)
3. Beyond a Reasonable Doubt(1956)
4. The Caine Mutiny(1954)
5. Class Action(1991)
6. The Client(1994)
7. Counsellor at Law(1993)
8. The Court-Martial of Billy Mitchell(1955)
9. The Devil's Advocate(1997)
10. The Firm(1993)
11. The Fortune Cookie(1966)
12. Ghosts of Mississippi(1996)
13. Intolerable Gruelty(2003)
14. Jagged Edge(1985)
15. JFK(1991)
16. Legally Blonde(2001)
17. Liar, Liar(1997)
18. Michael Clayton(2007)
19. Music Box(1989)
20. North Country(2005)
21. The Pelican Brief(1993)
22. The People vs. Larry Flint(1996)
23. Primal Fear(1996)
24. The Rainmaker(1997)

25. A Time to Kill(1996)

中文出版物中，推荐两部相关书籍。一是朱靖江翻译的《影像中的正义》(伯格曼和艾莫斯著)，海南出版社 2003 年版；第二部是徐昕主编的《影像中的司法》，清华大学出版社 2006 年版。台湾元照出版社 2002 年还出版过一本《看电影学法律》。

附录三:法律英语水平测试模拟试卷

考试日期:　　年　　月　　日

考试时间:__120__分钟

考试形式:闭卷笔试

《法律英语》试卷一

学院:_____班级:_____学号:_____姓名:_____任课教师:_____

题类	一	二	三	四	五	六	总分	阅卷人合分人
得分								

Ⅰ. Identify, explain and or paraphrase the following terms. 10 个阿拉伯数字与 10 个英文字母之间存在唯一对应的关系,请将英文字母代码填写在题后的括号内。错填、多填或未填均不得分。(本大题共 10 小题,每题 2 分,共 20 分)

1. separate property(　　)　　**6.** adultery(　　)

2. bigamy(　　)　　**7.** beneficiary(　　)

3. custody(　　)　　**8.** separation(　　)

4. heir(　　)　　**9.** necessaries(　　)

5. nonsupport(　　)　　**10.** guardian(　　)

A. A situation in which parties are not living together but otherwise have legal duties of husband and wife.

B. The care and possession of minor children of a marriage during a divorce proceeding and after divorce is final.

C. Property owned By either spouse before marriage or acquired during marriage by gift or inheritance.

D. A person appointed by the court to supervise and take care of another.

E. Failure to contribute money, in accordance with one's ability, to the maintenance of a parent as required by law.

F. Goods and services ordinarily required by and appropriate to an incompetent person's station in life, yet not available or provided by parent or guardian.

G. The crime of being married to two or more persons at the same time.

H. Sexual intercourse by a married person with someone other than the offender's spouse.

I. Anyone who has a legal right to inherit the property of another.

J. Anyone who benefits under the terms of a will.

Ⅱ. Choose the suitable word(s) from the box and fill in the blanks. (本题共 10 小题，每题 1 分，共 10 分。不填、错填均不得分)。

invisible	statutory law	mental	alibi	justifications	*actus reus*
defendant	deny	responsible	*mens rea*		

Both _____(1) and the common law provide many defenses to crime. Other than having an _____(2)(which is not technically a defense but a denial), there are three main types of defenses: (A) _____(3), (B) excuses, and (C) procedural defenses. These terms are not easily defined, and the distinction is less than perfect. Justifications refer to situations in which the _____(4) does not deny they did it but that they did it for all the right reasons, an appeal to higher loyalty or ideals(as in self-defense) or more important reasons(as in necessity), for instance. Excuses refer to situations in which the defendant also does not _____(5) they did it but that they are not _____(6) for it(as in insanity or diminished capacity defenses), typically on grounds of lacking volition over their free will. Sometimes, it is said that Justifications involve denying _____(7)(犯罪意图)and Excuses involve denying _____(8)(犯罪行为), but the mind-body connection is complicated in this regard, and this saying can confuse you. Take sleepwalking, for instance, which might be treated as the inability to form mental intent although it is the body(which is asleep). The law also tends to think of _____(9) disorder as brain disorder, to avoid metaphysical debates over whether or not it is possible for something _____(10) like a "mind" to get sick.

Ⅲ. Case Analyses.（本大题共5小题，每小题6分，共30分）请在每小题后的横线上用中文作答。错答、不答、使用英文做答均无分。

Weaver v. American Oil Co.

276 N. E. 2d 144(Ind. 1971)

Opinion:

In this case the appellee oil company presented to the appellant-defendant leasee, a filling station operator, a printed form contract as a lease to be signed by the defendant, which contained, in addition to the normal leasing provisions, a "hold harmless" clause which provided in substance that the leasee operator would hold harmless and also indemnify the oil company for any negligence of the oil company occurring on the leased premises. The litigation arises as a result of the oil company's own employee spraying gasoline over Weaver and his assistant and causing them to be burned and injured on the leased premises. This action was initiated by American Oil and Hoffer(Appellees) for a declaratory judgment to determine the liability of appellant Weaver, under the clause in the lease. The trial court entered judgment holding Weaver liable under the lease.

Clause three [3] of the lease reads as follows:

"Lessor(出租人), its agents and employees shall not be liable for any loss, damage, injuries, or other casualty of whatsoever kind or by whomsoever caused to the person or property of anyone(including Lessee(承租人)) on or off the premises, arising out of or resulting from Lessee's use, possession or operation thereof, or from defects in the premises whether apparent or hidden, or from the installation existence, use, maintenance condition, repair, alteration, removal or replacement of any equipment thereon, whether due in whole or in part to negligent acts or omissions of Lessor, its agents or employees; and Lessee for himself, his heirs, executors, administrators, successors and assigns, hereby agrees to indemnify and hold Lessor, its agents and employees, harmless from and against all claims, demands, liabilities, suits or actions (including all reasonable expenses and attorneys' fees incurred by or imposed on the Lessor in connection therewith) for such loss, damage, injury or other casualty. Lessee also agrees to pay all reasonable expenses and attorneys' fees incurred by Lessor in the event that Lessee shall default under the provisions of this paragraph."

It will be noted that this lease clause not only exculpated the lessor oil company from its liability for its negligence, but also compelled Weaver to indemnify them for any damages or loss incurred as a result of its negligence. The Appellate Court held the exculpatory clause(免责条款) invalid, but the indemnifying clause valid. In our opinion, both these provisions must be read together since one may be used to effectuate the result obtained through the other. We find no ground for any distinction and we therefore grant the petition to transfer the appeal to this court. This is a contract which was submitted(already in printed form) to a party with lesser bargaining power. As in this case, it may contain unconscionable or unknown provisions which are in fine print. Such is the case now before the court.

The facts reveal that Weaver had left high school after one and a half years and spent his time, prior to leasing the service station, working at various skilled and unskilled labor oriented jobs. He was not one who should be expected to know the law or understand the meaning of technical terms. *The ceremonious activity of signing the lease consisted of nothing more than the agent of American Oil placing the lease in front of Mr. Weaver and saying "sign", which Mr. Weaver did.* There is nothing in the record to indicate that Weaver read the lease; that the agent asked Weaver to read it; or that the agent, in any manner, attempted to call Weaver's attention to the "hold harmless" clause in the lease. Each year following, the procedure was the same. A salesman, from American Oil, would bring the lease to Weaver, at the station, and Weaver would sign it. The evidence showed that Weaver had never read the lease prior to signing and that the clauses in the lease were never explained to him in a manner from which he could grasp their legal significance. *The leases were prepared by the attorneys of American Oil Company, for the American Oil Company, and the agents of the American Oil Company never attempted to explain the conditions of the lease nor did they advise Weaver that he should consult legal counsel, before signing the lease.* The superior bargaining power of American Oil is patently obvious and the significance of Weaver's signature upon the legal document amounted to nothing more than a mere formality to Weaver for the substantial protection of American Oil. Had this case involved the sale of goods it would have been termed an "unconscionable contract" under sec. 2-302 of the Uniform Commercial Code as found in Burns Ind. Stat. sec. 19-2-302. The statute reads as follows:

"19-2-302. Unconscionable contract or clause. —(1) If the court as a matter of law find the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination. (Acts 1963, ch. 317, sec. 2-302, p. 539)"

According to the Comment to Official Text, the basic test of unconscionability is whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-side as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection two makes it clear that it is proper for the court to hear evidence upon these questions.

"An 'unconscionable contract' has been defined to be such as no sensible man not under delusion, duress or in distress would make, and such as no honest and fair man would accept. There exists here an 'inequality so strong, gross and manifest, that it is impossible to state it to a man of common sense without producing an exclamation of the inequality of it.' 'Where the inadequacy of the price is so great that the mind revolts at it, the court will lay hold on the slightest circumstances of oppression or advantage to rescind the contract."

"It is not the policy of the law to restrict business dealings or to relieve a party of his own mistakes of judgment but where one party has taken advantage of another's necessities and distress to obtain an unfair advantage over him, and the latter, owing to his condition, has encumbered himself with heavy liability or an onerous obligation for the sake of a small or inadequate present gain there will be relief granted." Stiefler v. McCullough(1933), 97 Ind. App. 123, 174 N. E. 823.

The facts of this case reveal that in exchange for a contract which, if the clause in question is enforceable, may cost Mr. Weaver potentially thousands of dollars in damages for negligence of which he was not the cause, Weaver must operate the service station seven days a week for long hours, at a total yearly income of $5,000-$ 6,000. The evi-

dence also reveals that the clause was in fine print and contained no title heading which would have identified it as an indemnity clause. It seems a deplorable abuse of justice to hold a man of poor education, to a contract prepared by the attorneys of American Oil, for the benefit of American Oil which was presented to Weaver on a "take it or leave it basis".

Justice Frankfurter of the United States Supreme Court spoke on the question of inequality of bargaining power in his dissenting opinion in United States v. Bethlehem Steel Corp. (1942), 315 U. S. 289, 326, 62 S. Ct. 581, 599, 86 L. Ed. 855, 876.

"(I)t is said that familiar principles would be outraged if Bethlehem were denied recovery on these contracts. But is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice? Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other?"

"These principles are not foreign to the law of contracts. Fraud and physical duress are not the only grounds upon which courts refuse to enforce contracts. The law is not so primitive that it sanctions every injustice except brute force and downright fraud. More specifically, the courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of the other . . . '"

The traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality. In such a society there is no danger that freedom of contract will be a threat to the social order as a whole. But in present-day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position. The weaker party, in need of the good or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract(标准合同) has a monopoly(natural or artificial) or because all competitors use the same clauses.

Judge Frankfurter's dissent was written nearly twenty years ago. It represents a direction and philosophy which the law, at that time was taking and is now compelled to accept in our modern society over the old principle known as the parol evidence rule. The pa-

role evidence rule states that an agreement or contract, signed by the parties, is conclusively presumed to represent an integration or meeting of the minds of the parties. This is an archaic rule from the old common law. The objectivity of the rule has as its only merit its simplicity of application which is far outweighed by its failure in many cases to represent the actual agreement, particularly where a printed form prepared by one party contains hidden clauses unknown to the other party is submitted and signed. The law should seek the truth or the subjective understanding of the parties in this more enlightened age. The burden should be on the party submitting such "a package" in printed form to show that the other party had knowledge of any unusual or unconscionable terms contained therein. The principle should be the same as that applicable to implied warranties, namely, that a package of goods sold to a purchaser is fit for the purposes intended and contains no harmful materials other than that represented. Caveat lessee is no more the current law than caveat emptor(买主自慎). Only in this way can justice be served and the true meaning of freedom of contract preserved. The analogy is rational. We have previously pointed out a similar situation in the Uniform Commercial Code, which prohibits unconscionable contract clauses in sales agreements. When a party can show that the contract, which is sought to be enforced, was in fact an unconscionable one, due to a prodigious amount of bargaining power on behalf of the stronger party, which is used to the stronger party's advantage and is unknown to the lesser party, causing a great hardship and risk on the lesser party, the contract provision, or the contract as a whole, if the provision is not separable, should not be enforceable on the grounds that the provision is contrary to public policy. The party seeking to enforce such a contract has the burden of showing that the provisions were explained to the other party and came to his knowledge and there was in fact a real and voluntary meeting of the minds and not merely an objective meeting.

Unjust contract provisions have been found unenforceable, in the past, on the grounds of being contrary to public policy, where a party has a greater superior bargaining position. In Penn. Railroad Co. v. Kent(1964), 136 Ind. App. 551, 198 N. E. 2d 615, Judge Hunter, speaking for the court said that although the proposition that "parties may enter into such contractual arrangements as they may desire may be conceded in the general sense; yet when such special agreement may result in affecting the public interest and thereby contravene public policy, the abrogation of the rules governing common carriers

must be zealously guarded against."

We do not mean to say or infer that parties may not make contracts exculpating one of his negligence and providing for indemnification, but it must be done knowingly and willingly as in insurance contracts made for that very purpose.

It is the duty of the courts to administer justice and that role is not performed, in this case, by enforcing a written instrument, not really an agreement of the parties as shown by the evidence here, although signed by the parties. The parol evidence rule must yield to the equities of the case. The appeal is transferred to this court and the judgment of the trial court is reversed with direction to enter judgment for the appellant.

Givan, DeBruler, Hunter, JJ., concur; Prentice, J., dissents, with opinion.

问题(使用中文作答)：

1. 租约第三条(Clause Three of the Lease)的主要内容是什么？

2. 根据法官的判决意见，Weaver 是否完全理解了租约的规定？

3. 如果美国石油公司(American Oil)的代理人建议 Weaver 去咨询律师，本案的结果是否会有不同？

4. 本案中，法院认为租约内容显失公平的主要事实是什么？

5. 买主自慎原则（"Caveat Emptor"）适用于 Weaver 与美国石油公司之间的合同吗？

Ⅳ. Sentences Translation.（本大题共 5 小题，每小题 3 分，共 15 分）请将英文翻译为中文。请使用恰当的法律术语做答。

1. The defendant has the right to remain silent. If a statement is made, any statement that is made can be used against him/her.

2. The prosecutor cannot call the defendant as a witness, nor can a judge or defense attorney force the defendant to testify if the defendant chooses to remain silent. By contrast, a defendant may be called as a witness in a civil case.

3. Once suspects have been advised of their Miranda rights, they are commonly asked to sign a paper which lists each right. Questioning may then begin, but only if suspect waive their rights not to talk or to have a lawyer present during interrogation.

4. The buyer is not bound to pay the price until he has had an opportunity to examine

the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

5. The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware.

Ⅴ. Sentences Translation. 请将中文翻译为英文。请使用恰当的法律术语做答。(本大题共 5 小题,每小题 3 分,共 15 分)

1. 商业广告的内容符合要约规定的,视为要约。(《中华人民共和国合同法》第 15 条)

2. 合同可以被理解为“一项或一系列允诺,若该允诺被违反,法律将给予救济,或者法律将对该允诺的履行认定为义务。”

3. 刑法概念中最根本的是这样一种假设:犯罪行为伤害的不仅是个人,还损害整体社会。

4. 如果法律不能对它给出使用、出卖或处置和防止侵害的权利,财产便几乎没有价值。

5. 作为独立的主体，公司具有如下几个显著特征：责任的有限性、股权的易转让性以及永久存续性。

Ⅵ. **Writing.（本大题共 1 小题，每题 10 分，共 10 分）**

（请根据下述提示，写一篇120—150 词左右的英文文章）

提纲：

1. 如果你是法官，你将如何判案，影响你判案的因素有哪些？
2. 文章题目自拟，内容须观点鲜明、结构清楚，尽可能使用你已经学到的英文法律术语。

考试日期：　　年　　月　　日

考试时间：120 分钟

考试形式：闭卷笔试

《法律英语》试卷二

学院：_____班级：_____学号：_____姓名：_____任课教师：_____

题类	一	二	三	四	五	六	总分	阅卷人合分人
得分								

Ⅰ. Identify, explain and or paraphrase the following terms. 10 个阿拉伯数字与 10 个英文字母之间存在唯一对应的关系，请将英文字母代码填写在题后的括号内。错填、多填或未填均不得分。（本大题共 10 小题，每题 2 分，共 20 分）

1. executive branch(　　)　　**6.** devolution(　　)

2. federal(　　)　　**7.** defamation(　　)

3. legislation(　　)　　**8.** legislative branch(　　)

4. confederation(　　)　　**9.** allegation(　　)

5. judicial branch(　　)　　**10.** constitution(　　)

A. Laws or written rules which are passed by Parliament and implemented by the courts.

B. The government department that is responsible for determining the constitutionality of legislative and executive actions, and adjudicating rights and duties of others involved in disputes. It interprets and applies the Law.

C. A written document defining fundamental legal principle for governance of the people. It may include grants of power and limitations of power.

D. Passing of power to govern or to make decisions from a central authority to a local authority.

E. The government department that is responsible for carrying laws into effect.

F. Group of independent states or organizations working together for common aims.

G. The government department that is responsible for enacting statutory laws.

H. Refers to the U. S government and its activities. The United States is a federation of 50 sovereign states.

I. In pleading, an assertion of fact; the statement of the issue which the contributing party is prepared to prove.

J. False statement, either oral or written, which tends to injure the reputation of the victim. It may be civil as well as criminal.

Ⅱ. True or False. 本题为判断正误题,对的用代码 T,错的用代码 F,请将代码填写在题前的括号内。不填、错填、填反均不得分。(本题共 5 小题,每题 2 分,共 10 分)

( )**1.** If the victim is dead and has no one to speak on his or her behalf, the agencies of justice won't investigate the crime.

( )**2.** In civil law, a principal may be held responsible for the wrongful act of an agent when the agent acts within the scope of the agency.

( )**3.** A business person can physically assault a financial rival to prevent a hostile takeover of her company.

( )**4.** To convict a person of a crime, we need to follow the preponderance of evidence standard.

( )**5.** The defense has the right to cross-examine prosecution witnesses.

Ⅲ. Case Analyses. (本大题共 5 小题,每小题 6 分,共 30 分)

请在每小题后的横线上用中文作答。错答、不答、使用英文做答均无分。

STORER v. FLORIDA SPORTSERVICE, INC.

Jan. 9, 1961

District Court of Appeal of Florida, Third District

By this **interlocutory appeal** the plaintiff seeks reversal of a partial final decree. The complaint sought a declaration as to the validity of a **concession contract** between Florida Sportservice, Inc. and the Miami Baseball Company, a corporation which was dissolved after plaintiff Storer became the sole owner and transferred its assets to his name. By agreement of the parties, approved by the court, trial was deferred on the issues raised by a counterclaim. After trial of the issues raised by the complaint and answer, the **chancellor** entered the decree now appealed, which adjudged the contract valid and ordered further proceedings on the counterclaim. We affirm.

In our analysis of the pleadings in the case, we pointed out:

'... Here Storer was operating a business which, according to his allegations, he under-

stood was subject to a concession contract made in 1949, to run until September 30, 1959. He then learns of another concession contract given out by the corporation whose stock he has since bought and the terms of which he finds onerous. He alleges facts concerning the execution of the latter contract on which he relies to establish its invalidity . . . '

The essential fact referred to was plaintiff's allegation:

'. . . that the 1956 concession agreement was made by an officer of the corporation, Miami Baseball Company, without authority, and there was no basis upon which the chancellor could hold that the 1956 agreement was valid and binding on Storer and Florida Sportservice, Inc. '

The chancellor's conclusion upon this question was as follows:

'The court determines, declares and decrees that that certain agreement dated February 28, 1956, executed by Miami Baseball Company, a Florida corporation, and the defendant, Florida Sportservice, Inc. , a Florida corporation, (mentioned and referred to in the plaintiff's amended petition and introduced in evidence as the plaintiff's exhibit 3) has been since it was entered into, and is now, a valid and enforceable contract; and that the parties by which such agreement was executed and the plaintiff, George B. Storer, are, and each of them is, contractually bound and obligated by each and all of the terms and provisions of such agreement. '

Therefore, this appeal presents the question: Was there substantial evidence to support the conclusion of law reached by the chancellor?

Without attempting a complete statement of the evidence and the conclusions which could have been made therefrom, it may be stated that there is no real conflict about the fact that prior to February, 1956, Florida Sportservice, Inc. claimed concession rights under two different contracts. The first was an agreement between the former owners of Miami Stadium and Florida Sportservice, Inc. The second was an agreement between their assignors and the owners of the Syracuse, N. Y. , baseball franchise, which franchise was purchased by the Miami Baseball Company.

In the latter part of February, 1956, Benjamin D. Reisman, an attorney who was general counsel for the interests owning Florida Sportservice, Inc. , visited the law offices of John G. Thompson, the Miami Baseball Company's secretary and its attorney. He was accompanied by Mr. Salomon, who was the president of the Miami Baseball Company. They

told Mr. Thompson that they had worked out an agreement. This agreement was to supersede the two prior contracts under which Florida Sportservice was claiming and operating at that time. Mr. Reisman left a draft of an agreement to be used by Mr. Thompson in preparing an agreement for execution. Because the Miami Baseball Company had not settled with the City of Miami the terms of its lease on Miami Stadium and for other unexplained reasons the agreement was not completed and signed until approximately the same time that Mr. Storer announced his intention to buy the stock of the ball club. The agreement was dated back to February 28, 1956, although it was executed December 6, 1956. Mr. Thompson testified that notwithstanding the delay in preparing and executing the agreement 'we all considered we had an agreement,' and that during the 1956 baseball season his company operated under it.

In decreeing the validity of the 20-year concession contract between the corporation and Florida Sportservice, Inc., executed for the corporation by its president and secretary-on December 6, 1956, and dated back to February 28, 1956, the chancellor made no findings on the issues raised by the petition for declaratory decree. Those issues were based on allegations that Storer was not informed of the new concession agreement, and that it was made without the required corporate authority. Inasmuch as there was clearly sufficient evidence before the chancellor to sustain a basic finding upon the issue of corporate authority, we will discuss only that aspect of the case.

The **by-laws** provided that the power of the president to make contracts was subject to approval of the board of directors. However, a large **directorate** was provided for. Twenty-one directors were elected, many of whom were men of local and national prominence whose presence on the board presumably was of more value to the corporation in its public relations than in the conduct of its business. In apparent contemplation of so unwieldly a directorate, the by-laws had provided for appointment of an **executive committee** to conduct the business of the corporation. Such a committee was duly formed, consisting of Salomon, Stein and Cooper. While there were no minutes or records of the meetings or action of the executive committee regarding this contract, the evidence disclosed that the members of the executive committee conferred with regard to the contract, and that it was made with the committee's knowledge and authorization. Therefore, the chancellor was correct in concluding that the concession contract in question was authorized by the executive committee and that the executive committee was duly empowered to so act.

The fact that the authorization of the executive committee was oral and not reduced to writing did not destroy its effectiveness.

问题(使用中文作答)：

1. 本案的上诉人是谁？Storer 和 Miami Baseball Company 是什么关系？

2. "interlocutory appeal"是什么意思？"concession contract"是哪种合同？

3. 1956 concession contract 和以前的 concession contracts 是什么关系？

4. Miami Baseball Company 的"by-laws"是什么？它和 Articles of Incorporation 是什么关系？

5. 针对 1956 concession contract，Miami Baseball Company 的 president 和 executive committee 各起了什么作用？executive committee 和 directorate 是什么关系？

Ⅳ. Sentences Translation. 请将英文翻译为中文。请使用恰当的法律术语做答。(本大题共 5 小题，每小题 3 分，共 15 分)

1. The defendant has the right to remain silent. If a statement is made, any statement

that is made can be used against him/her.

2. If the Grand Jury indicts the individual, the individual has the right to a speedy trial by jury where the state would have to prove their case beyond a reasonable doubt.

3. All disputes arising from the performance of this Contract shall, through amicable negotiations, be settled by the Parties hereto. Should, through negotiation, no settlement be reached, the case in question shall then be submitted for arbitration to the Arbitration Commission.

4. Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.

5. On 3 September 2009, the Chairman of the panel informed the DSB that due to the complexity of the dispute, and the administrative and procedural matters involved, the panel is not able to complete its work in six months.

Ⅴ. Sentences Translation. 请将中文翻译为英文。请使用恰当的法律术语做答。(本大题共 5 小题,每小题 3 分,共 15 分)

1. 我们可以给刑法下一个定义:刑法是现代法律中的一个分支,是惩治对社会、社会成员、财产以及社会秩序造成危害的犯罪行为的法律。

2. 一般而言，可处死刑或州监狱监禁刑的属于重罪；最高可处罚金刑、当地监狱关押刑或最高可并处上述两种刑罚的犯罪属于轻罪。

3. 财产有两种类型：不动产和动产。关于这两种财产类型的大部分法律概念和规则都起源于英国普通法。

4. 公司法传统理论认为股东是公司的所有者，而董事则为了公司所有者利益而经营公司业务。

5. 在公司设立过程中，由于发起人的过失致使公司利益受到损害的，应当对公司承担赔偿责任。（《公司法》第 95 条）

Ⅵ. Writing.（本大题共 1 小题，每题 10 分，共 10 分）

（请根据下述提示，写一篇120—150 词左右的英文文章）

提纲：

1. 你认为好的辩护律师在辩护中应有什么样的表现？他说服的对象是谁？
2. 你认为影响影响陪审团裁决的因素有哪些？
3. 文章题目自拟，内容须观点鲜明、结构清楚，尽可能使用你已经学到的英文法律术语。

考试日期：　　年　　月　　日

考试时间：120 分钟

考试形式：闭卷笔试

《法律英语》试卷三

学院：_____班级：_____学号：_____姓名：_____任课教师：_____

题类	一	二	三	四	五	六	总分	阅卷人合分人
得分								

Ⅰ. Identify, explain and or paraphrase the following terms. 10 个阿拉伯数字与 10 个英文字母之间存在唯一对应的关系，请将英文字母代码填写在题后的括号内。错填、多填或未填均不得分。(本大题共 10 小题，每题 2 分，共 20 分)

1. defendant(　　)

2. allegation(　　)

3. case law(　　)

4. law(　　)

5. statutory law(　　)

6. adjudicate(　　)

7. review(　　)

8. plaintiff(　　)

9. Common Law(　　)

10. Jurist(　　)

A. Judicial reexamination of the proceedings of a court or other body; a reconsideration by the same court or body of its former decision.

B. Rules of conduct applicable to all people and enforceable in court.

C. To decide a matter by legal means; for example, court, mediation, arbitration.

D. The party being sued or tried in either civil or criminal action.

E. The major source of law in the U. S. A. or the UK; based on old English Law.

F. Law established by Congress, state legislatures or any other law making bodies.

G. A person who has a substantial knowledge of law and who has written extensively on legal matters; for example, judges, professors, and so on.

H. The party who initiates an action at law(law suit).

I. Law based on court decisions.

J. A statement or charge made in a pleading which one intends to prove by legal evidence.

Ⅱ. True or False. 本题为判断正误题，对的用代码 T，错的用代码 F，请将代码填写在题前的括号内。不填、错填、填反均不得分。（本题共 5 小题，每题 2 分，共 10 分）

( )**1.** Judicial review is the power and duty vested in the U. S. Congress to declare null and void any statute or act of the federal government or of any state.

( )**2.** Crimes are prosecuted by privately retained counsel, and not by public attorneys representing the community at large.

( )**3.** If the victim is dead and has no one to speak on his or her behalf, the agencies of justice won't investigate the crime.

( )**4.** The prosecutor can call the defendant as a witness; similarly, a judge or defense attorney also can force the defendant to testify if the defendant chooses to remain silent.

( )**5.** Congress may pass a bill; the president may sign or veto it. Congress may override the veto and enact the bill as law.

Ⅲ. Case Analyses. (本大题共 5 小题，每小题 6 分，共 30 分)

请在每小题后的横线上用中文作答。错答、不答、使用英文做答均无分。

Donoghue v. Stevenson[1932] UKHL 100

Facts

On the evening of Sunday 26 August 1928 May Donoghue, née M'Alister, boarded a tram in Glasgow for the thirty-minute journey to Paisley. At around ten minutes to nine, she and a friend took their seats in the Wellmeadow Café in the town's Wellmeadow Place. They were approached by the café owner, Francis Minchella, and Donoghue's friend ordered and paid for a bottle of ginger beer. The owner brought the order and poured part of an opaque bottle of ginger beer into a tumbler containing ice cream. Donoghue drank some of the contents and her friend lifted the bottle to pour the remainder of the ginger beer into the tumbler. It was claimed that the remains of a snail in a state of decomposition dropped out of the bottle into the tumbler. Donoghue later complained of stomach pain and her doctor diagnosed her as having gastroenteritis and being in a state of severe shock.

On 9 April 1929, Donoghue brought an action against David Stevenson, an aerated water manufacturer in Paisley, in which she claimed £500 as damages for injuries sustained by her through drinking ginger beer which had been manufactured by him. Follow-

ing the House of Lords judgement, which dealt with a preliminary matter, the case was settled out of court and so the full facts were not heard in court. The identity of Donoghue's friend is unknown, but that person is referred to as "she" in the case reports (including the first paragraph of the judgement of Lord MacMillan in the House of Lords). Other factual uncertainties include whether the animal(if it existed) was a snail or a slug, whether the bottle contained ginger beer or some other beverage(as 'ginger' in Glaswegian and West of Scotland parlance refers to any fizzy drink) and whether the drink was part of an ice-cream soda.

Legal background

In common law, a person can claim damages from another person where that other person owed the first person a duty of care and harmed that person through their conduct in breach of that duty. This concept existed prior to Donoghue, but it was generally held that a duty of care was only owed in very specific circumstances, such as where a contract existed between two parties or where a manufacturer was making inherently dangerous products or was acting fraudulently.

There was no contractual relationship between Donoghue and the drinks manufacturer or even the café owner, as Donoghue had not ordered or paid for the drink herself. Although there was a contractual relationship between the café owner and Donoghue's friend, the friend had not been harmed by the ginger beer. As ginger beer was not a dangerous product, and the manufacturer had not fraudulently misrepresented it, the case also fell outside the scope of the established cases on product liability. On the face of it, the law therefore did not provide a remedy for Donoghue.

Progress of the case

The writ lodged in the Court of Session on April 1929 alleged that May Donoghue had become ill with nervous shock and gastroenteritis after drinking part of the contents of an opaque bottle of ginger beer, and David Stevenson, the manufacturer, "owed her a duty to take reasonable care that ginger beer he manufactured, bottled, labelled and sealed, and invited her to buy, did not contain substances likely to cause her injury." Donoghue claimed damages of £500.

Counsel for the manufacturer denied that any such duty was owed but, in June 1930, the judge Lord Moncrieff ruled there was a case to answer. Stevenson appealed the ruling

on a number of legal grounds, and the judges of the Inner House granted the appeal in November 1930, dismissing Donoghue's claim as having no legal basis following the authority of their earlier decision in Mullen v AG Barr. One of the judges said that "the only difference between Donoghue's case and the mouse cases was the difference between a rodent and a gastropod and in Scots law that meant no difference at all."

Donoghue was allowed to appeal her case to the House of Lords but, whilst her legal team had agreed to provide their services free, she was unable to put up the security needed to ensure the other side's costs were met should she lose in the Lords. However, as such security would not be required if she could gain the status of a pauper, she petitioned the House of Lords, saying, "I am very poor and am not worth in all the world the sum of five pounds, my wearing apparel and the subject matter of the said appeal . . . ". A certificate of poverty signed by a minister and two elders of her church was attached to the petition, and the House of Lords agreed to grant her pauper status.

Nine months after her petition was granted, Lords Buckmaster, Atkin, Tomlin, Thankerton and MacMillan heard counsels' arguments. Donoghue's counsel-George Morton KC and W. R. Milligan(later a Lord Advocate)-argued that a manufacturer who puts a product intended for human consumption onto the market in a form that precludes examination before its use is liable for any damage caused if he fails to exercise reasonable care to ensure it is fit for human consumption. Stevenson's counsel-W. G. Normand KC(then Solicitor General for Scotland and later a Law Lord), J. L. Clyde(later Lord Advocate and then Lord President of the Court of Session), and T. Elder Jones-argued that there was no authority for such a principle of law.

Judgment

The leading judgment was delivered on 26 May 1932 by Lord Atkin. The most famous section was his explanation of the "neighbour" principle, which was derived from the Christian principle of "loving your neighbour"(found, for example, in James 2:8 and the Parable of the Good Samaritan):

There must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. . . . The rule that you are to love your neighbour becomes in law: you must not injure your neighbour; and the lawyer's question: Who is my neighbour? receives a restricted reply. You must take

reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question ... a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with knowledge that the absence of reasonable care in the preparation or putting up of products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

"A man has a Duty of Care to conduct himself in such a way as to avoid harm to others, where a reasonable man would have seen that such harm could occur".

Lords Thankerton and MacMillan supported Lord Atkin's opinion, with Lords Buckmaster and Tomlin dissenting. Buckmaster said it was impossible to accept such a wide proposition and(anticipating later "floodgates" arguments) that it was difficult to see how trade could be carried on if Lord Atkin's principle was law. Buckmaster also opined, as did Lord Tomlin, that if such a duty of care existed it must cover the construction of every article, not just food: "If one step, why not fifty?" Tomlin referred to the Versailles train crash in 1842 caused by a defective axle, noting that, if Lord Atkin's principle were to be law, every injured party would be permitted to sue the axle manufacturer in such a case.

The case was returned to Scotland for the Court of Session to apply the ruling to the facts of the case. In the event, David Stevenson died within a year of the decision and his executors settled out of court, for less than the original claim of £500.

Significance

Donoghue v. Stevenson was a decision of the House of Lords that established the modern concept of negligence in British law, by setting out general principles whereby one person would owe another person a duty of care. It is the origin of the modern tort of negligence in English and Welsh law and of the delict in Scots law.

As Justice Allen Linden has pointed out, Donoghue is an extension of a principle articulated by Benjamin Cardozo in an earlier case in the United States, MacPherson v. Buick Motor Co., which the judges referred to in Donoghue. MacPherson pioneered the tortious

principle of a general duty of care, the starting point for any action in negligence, though the principles were expressed within the context of product liability only.

Donoghue is perhaps best known for the speech of Lord Atkin and his "neighbour" or "neighbourhood" principle, where he applied Luke 10 to law so that, where an established duty of care does not already exist, a person will owe a duty of care not to injure those whom it can be reasonably foreseen would be affected by their acts or omissions. The effect of this case was not only to provide individuals in the United Kingdom with a remedy against suppliers of consumer products even where the complainant had no privity of contract with those individual or company tortfeasors, but to allow such individuals to bring negligence claims in any circumstance where the conditions for establishing a duty of care were met.

In 1990, the House of Lords revised Lord Atkin's "neighbour" principle to encompass public policy concerns articulated in Caparo Industries Plc. v Dickman([1990] 1 All ER 568). The three-stage Caparo test for establishing a duty of care requires(i) foreseeability of damage,(ii) a relationship characterised by the law as one of proximity or neighbourhood and(iii) that the situation should be one in which the court considers it would be fair, just and reasonable that the law should impose a duty of given scope on one party for the benefit of the other. In other jurisdictions, such as New Zealand, there is now a two-part test for novel fact situations, where the establishment of a duty must be balanced against applicable policy matters.

Because of the significance of the case, in 1996 former Supreme Court of British Columbia Justice Martin Taylor, Vancouver lawyer David Hay and filmmaker Michael Doherty produced an educational documentary of the case. Besides recreating the events leading up to the case and "interviews" with actors playing the significant participants in the case, the production includes a 1995 interview with Lord Denning—then aged 96. This was one of the last interviews with Lord Denning, who died three years later. The film has been exhibited worldwide.

问题(使用中文作答)：

1. 本案起因于什么事实？根据合同法的一般原理，原告和被告之间是否存在合同关系。

2. 原告的主张是什么？支持其主张的主要理由是什么？

3. 本案为什么打到上议院？上议院法官的主要判决是什么？

4. 请分析该案的重要意义，并指出本案推翻了英国法的什么规则？

5. Lord Atkin 确立的“neighbour”原则起源于什么？在后来有什么发展？

Ⅳ. Sentences Translation. 请将英文翻译为中文。请使用恰当的法律术语做答。（本大题共 5 小题，每小题 3 分，共 15 分）

1. a person is not guilty of an offense unless his liability is based on conduct that includes(1) a voluntary act or(2) the omission to perform an act of which he is physically capable.

2. Damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract.

3. On 7 February 2008, the Philippines requested consultations with Thailand concerning a number of Thai fiscal and customs measures affecting cigarettes from the Philippines.

4. The share capital of a corporation can be divided into different classes and each class may have differing rights as to voting, dividends and the return of capital on a winding up.

5. The laws of tort and crime, despite their common origin in revenge and deterrence, long ago parted company and assumed distinctly separate functions.

Ⅴ. Sentences Translation. 请将中文翻译为英文。请使用恰当的法律术语做答。(本大题共 5 小题,每小题 3 分,共 15 分)

1. 如果立法机关已经规定某种行为属于犯罪,即便不能证明过错,被告人还是要承担刑事责任,这就是严格责任。

2. 要求损害赔偿的一方可以取得合同价格和替代货物交易价格之间的差额以及按照第七十四条规定可以取得的任何其他损害赔偿。

3. 如果合同被宣告无效，在宣告无效后一段合理时间内，买方已以合理方式购买替代货物，或者卖方已以合理方式把货物转卖。

4. 美国的公司一般分为C公司、S公司、封闭公司、专业公司以及非营利公司。

5. 19世纪中期，严格责任的早期传统就遭到了“无过错无责任”原则的支持者们的批判。

Ⅵ. **Writing.（本大题共1小题，每题10分，共10分）**

说明：根据以下中文材料提示，从原告律师、被告代理人或法官的任一角度写一篇“麦当劳咖啡烫伤案的启示”的英文文章。

材料一：***Liebeck v. McDonald's Restaurants***, also known as the **"McDonald's coffee case,"** is a 1994 product liability lawsuit that became a flashpoint in the debate in the U. S. over tort reform after a jury awarded $2.86 million to a woman who burned herself with hot coffee. The trial judge reduced the total award to $640,000, and the parties settled for a confidential amount before an appeal was decided. The case entered popular understanding as an example of frivolous litigation; ABC News calls the case "the poster child of excessive lawsuits."

Liebeck's attorneys argued that McDonald's coffee was "defective", claiming that it was too hot and more likely to cause serious injury than coffee served at any other place. Moreover, McDonald's had refused several prior opportunities to settle for less than the $640,000 ultimately awarded. Reformers defend the popular understanding of the case as materially accurate; note that the vast majority of judges to consider similar cases dismiss them before they get to a jury; and argue that McDonald's refusal to offer more than a nui-

sance settlement reflects the meritless nature of the suit rather than any wrongdoing.

(*en. wikipedia. org/. . . /Liebeck_v. _McDonald's_Restaurants*)

材料二："麦当劳咖啡案"1994 年 7 月开庭，起初，陪审团也觉得此案滑稽可笑，荒谬绝伦，以为原告只是被烫出了几个水泡而已，琐事一桩，不足挂齿。可是，当陪审团看了医生的诊断报告和受害者的伤情照片后，皆感惊心动魄，极度震撼，这个貌似荒诞不经的烫伤案，显然非同寻常，不可低估。

在法庭上，一个至关重要的问题是，麦当劳咖啡烫伤顾客的事故是司空见惯的家常便饭？还是偶尔发生的个别现象？在控方律师要求下，法官下令，麦当劳必须公开内部秘密文件和统计数据。令陪审团大吃一惊的是，这些文件和数据显示，在 1982 至 1992 年的 10 年期间，麦当劳总共遭到七百余起咖啡严重烫伤事故的投诉，其中有数十起造成顾客外阴部、腹股沟、大腿内侧等"敏感部位"烫伤，给当事人造成了极大的身心痛苦。尽管联邦法院从未正式立案审理这些投诉，但暗地里，麦当劳平均每年花费五万美元，偿付因咖啡烫伤引起的庭外和解以及给受害者赔偿一点儿象征性的"安慰费"。（节选自《一杯价值百万美元的咖啡》，载《书屋》2007 年第 4 期，作者陈伟）

答题要求：

1. The Essay shall be written in **ENGLISH** only.
2. This is **not** a translation test. A literal translation of the above Chinese into English may result in loss of score.
3. The length of the essay shall be **NO LESS THAN 120 WORDS.**

考试日期：　　年　　月　　日

考试时间：120 分钟

考试形式：闭卷笔试

《法律英语》试卷四

学院：_____班级：_____学号：_____姓名：_____任课教师：_____

题类	一	二	三	四	五	六	总分	阅卷人合分人
得分								

Ⅰ. Identify, explain and or paraphrase the following terms. 10 个阿拉伯数字与 10 个英文字母之间存在唯一对应的关系，请将英文字母代码填写在题后的括号内。错填、多填或未填均不得分。（本大题共 10 小题，每题 2 分，共 20 分）

1. interrogation(　　)

2. Attorney General(　　)

3. avoid(　　)

4. bench(　　)

5. beyond a reasonable doubt(　　)

6. breach(　　)

7. gratuitous promise(　　)

8. unilateral contract(　　)

9. duress(　　)

10. negotiable instrument(　　)

A. A group of judges hearing a case and judging on a case.

B. Interviewing as commonly employed by officers of the police and military.

C. The main legal advisor to the government, and in some jurisdictions he or she may in addition have executive responsibility for law enforcement or responsibility for public prosecutions.

D. To nullify, upon some legal ground, an obligation or transaction to which one is a party; especially, in a situation where one party to a contract lacked the capacity to contract.

E. Highest level of proof, used mainly in criminal trials.

F. A violation of legal duty.

G. A specialized type of "contract" for the payment of money that is unconditional and capable of transfer by negotiation. Common examples include cheques, promissory notes and bills of exchange or draft.

H. A promise made without consideration, generally not enforceable.

I. Any unlawful threat or coercion used ... to induce another to act[or not act] in a manner[they] otherwise would not[or would].

J. It is one-sided contract where only one party(known as offeror) makes a promise to pay in exchange for an act or work done by another party(known as the offeree.)

Ⅱ. True or False. 本题为判断正误题，对的用代码 T，错的用代码 F，请将代码填写在题前的括号内。不填、错填、填反均不得分。(本题共 5 小题，每题 2 分，共 10 分)

( )**1.** A void contract is a nullity from its inception.

( )**2.** A contract entered into by a person who lacks contractual capacity will not be voidable by the person who lacks the capacity.

( )**3.** In tort cases, the burden of proof ordinarily rests on the defendant.

( )**4.** To convict a person of a crime, we need to follow the preponderance of evidence standard.

( )**5.** The defense has the right to cross-examine witnesses.

Ⅲ. Case Analyses. (本大题共 5 小题，每小题 6 分，共 30 分)

请在每小题后的横线上用中文作答。错答、不答、使用英文做答均无分。

LUCY et al v. ZEHMER et al

196 Va. 493, 84 S. E. 2d 516 Va. 1954

It was W. O. Lucy and J. C. Lucy, complainants, institute this suit against A. H. Zehmer and Ida S. Zehmer, his wife, defendants, to have specific performance of a contract by which it was alleged the Zehmers had sold to W. O. Lucy a tract of land owned by A. H. Zehmer in Dinwiddie county containing 471.6 acres, more or less, known as the Ferguson farm, for $50,000. J. C. Lucy, the other complainant, is a brother of W. O. Lucy, to whom W. O. Lucy transferred a half interest in his alleged purchase.

The instrument sought to be enforced was written by A. H. Zehmer on December 20, 1952, in these words: "We hereby agree to sell to W. O. Lucy the Ferguson Farm complete for $50,000.00, title satisfactory to buyer," and signed by the defendants, A. H. Zehmer and Ida S. Zehmer.

The answer of A. H. Zehmer admitted that at the time mentioned W. O. Lucy offered him $50,000 cash for the farm, but that he, Zehmer, considered that the offer was made

in jest; that so thinking, and both he and Lucy having had several drinks, he wrote out "the memorandum" quoted above and induced his wife to sign it; that he did not deliver the memorandum to Lucy, but that Lucy picked it up, read it, put it in his pocket, attempted to offer Zehmer $5 to bind the bargain, which Zehmer refused to accept, and realizing for the first time that Lucy was serious, Zehmer assured him that he had no intention of selling the farm and that the whole matter was a joke. Lucy left the premises insisting that he had purchased the farm.

December 20 was on Saturday. Next day Lucy telephoned to J. C. Lucy and arranged with the latter to take a half interest in the purchase and pay half of the consideration. On Monday he engaged an attorney to examine the title. The attorney reported favorably on December 31 and on January 2 Lucy wrote Zehmer stating that the title was satisfactory, that he was ready to pay the purchase price in cash and asking when Zehmer would be ready to close the deal. Zehmer replied by letter, mailed on January 13, asserting that he had never agreed or intended to sell.

Thereupon complainants brought this suit. The issue is whether the agreement was entered into with contractual intent or was merely a joke.

BUCHANAN, J., delivered the opinion of the court.

In his testimony Zehmer claimed that he "was high as a Georgia pine," and that the transaction "was just a bunch of two doggoned drunks bluffing to see who could talk the biggest and say the most." That claim is inconsistent with his attempt to testify in great detail as to what was said and what was done. It is contradicted by other evidence as to the condition of both parties, and rendered of no weight by the testimony of his wife that when Lucy left the restaurant she suggested that Zehmer drive him home. The record is convincing that Zehmer was not intoxicated to the extent of being unable to comprehend the nature and consequences of the instrument he executed, and hence that instrument is not to be invalidated on that ground.

The evidence is convincing also that Zehmer wrote two agreements, the first one beginning "I hereby agree to sell." Lucy told him he had better change it to "We" because Mrs. Zehmer would have to sign it too. Zehmer then tore up what he had written, wrote the agreement quoted above and asked Mrs. Zehmer, who was at the other end of the counter ten or twelve feet away, to sign it. Mrs. Zehmer said she would for $50,000 and signed it. Zehmer brought it back and

gave it to Lucy, who offered him $5 which Zehmer refused, saying, "You don't need to give me any money, you got the agreement there signed by both of us."

He appearance of the contract, the fact that it was under discussion for forty minutes or more before it was signed; Lucy's objection to the first draft because it was written in the singular, and he wanted Mrs. Zehmer to sign it also; the rewriting to meet that objection and the signing by Mrs. Zehmer; the discussion of what was to be included in the sale, the provision for the examination of the title, the completeness of the instrument that was executed, the taking possession of it by Lucy with no request or suggestion by either of the defendants that he give it back, are facts which furnish persuasive evidence that the execution of the contract was a serious business transaction rather than a casual, jesting matter as defendants now contend.

In the field of contracts, as generally elsewhere, "We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts."

The mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party.

An agreement or mutual assent is of course essential to a valid contract but the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind. So a person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement.

Reversed.

问题(请用中文回答问题)：

1. 请简述本案的基本事实。

2. 本案的争议点是什么？

3. 被告为什么先后签了两份协议？

4. 法官在其判决意见中列举了哪些事实(列举两个即可)，其目的何在？

5. 法官判决存在买卖土地的协议的原因是什么？

Ⅳ. Sentences Translation. 请将英文翻译为中文。请使用恰当的法律术语做答。(本大题共 5 小题，每小题 3 分，共 15 分)

1. A contract has been defined as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty".

2. The prosecutor cannot call the defendant as a witness, nor can a judge or defense attorney force the defendant to testify if the defendant chooses to remain silent.

3. The Separation of Powers devised by the framers of the Constitution was designed to do one primary thing: to prevent the majority from ruling with an iron fist.

Based on their experience, the framers shied away from giving any branch of the new government too much power.

4. Instead of amending the *Articles of Confederation*, however, the convention created the Constitution and a completely new type of federal government, which the delegates believed was much better to resolve the problems of the nation.

5. It is clear that many delegates to the Constitutional Convention wanted the Supreme Court to review the constitutionality of state legislation.

Ⅴ. Sentences Translation. 请将中文翻译为英文。请使用恰当的法律术语做答。(本大题共 5 小题,每小题 3 分,共 15 分)

1. 刑法的目的是震慑和惩罚威胁社会安全与秩序的犯罪行为。

2. 合同被定义为“在两人或多人之间达成的包括一个或双方允诺的协议,法律将强制其履行或以某种方式认定其履行为一项义务”。

3. 《宪法》授予联邦政府特定的权力,各州保留没有授予联邦政府的全部权力。

4. 国会联邦法院的管辖权，但是，美国最高法院有权决定联邦政府其他两个部门的行为违宪。

5. 美国宪法第五条修正案规定被告人在任何刑事案件中都不能被迫做不利于自己的证人。

Ⅵ. Writing.（本大题共 1 小题，每题 10 分，共 10 分）

说明：根据以下中文材料提示，写一篇“米兰达规则的启示”的英文文章。

材料一：1963 年，美国一个 23 岁的无业游民米兰达因涉嫌强奸和绑架妇女在美国亚利桑那州被捕，警方要求米兰达供述罪行，经过简单的审讯，米兰达认罪并在供词上签字。经过法院审理，陪审团裁定米兰达罪名成立，当庭法官判决其入狱 20 年。庭审中检控方的一个重要证据就是米兰达的认罪供词，但米兰达的律师则坚持认为米兰达在警方未告知他有沉默权这一宪法赋予每个公民的权利的前提下所做出的供词应属无效，且警方的行为已侵犯了米兰达的宪法权利。此案上诉至美国联邦最高法院，最高法院九位大法官以 5∶4 一票之差裁决地方法院判决无效，原因是警方程序违法。

材料二：埃内斯托·米兰达是名有前科的中学退学生，因强奸一名未成年少女而被捕。从 1963 年 3 月 2 日天一亮，警员们就轮番盘问这名年轻的墨西哥裔美国人。他们的目的是：供词。承办此案的警察事后说：“我记得我们几个人对他连续讯问，我们拼命使他供认。”

米兰达最终在书面供状上签下字。法庭上，警方承认没有告诉他有权获得律师或提醒他可以不回答警方的提问。后来，最高法院作出裁决，因警方违背宪法权利而推翻原审，米兰达一案在没有供词的情况下重新审理，米兰达被判有罪。最高法院在推翻第一次裁决时，创立了里程碑式的米兰达规则。（参见高一飞：《期待佘祥林案催生中国“米兰达卡片”》，载《律师文摘》2005 年第 4 期）

材料三：米兰达规则是美国法上一个具有重要价值的规则，它是 20 世纪最著名、最有影响力的法律裁决之一。但是，“米兰达规则”本身是以 5 票对 4 票的微弱多数通过的，联邦最高法院内部存在尖锐的分歧。怀特大法官在他的反对意见中指出：“在不计其数的案件中，本院的这一规则将使杀人犯、强奸犯或者其他罪犯重新回到街道或产生他的环境中，随时继

续犯罪。因此，人的尊严不仅没有增加，反而损失了。真正担心的还不是这一新的判决对于……刑法的灾难性后果，而在于它对于那些依赖公共权力保护的人们的影响……”美国联邦最高法院宣布“米兰达”案判决时，引起了强烈的政治反响。警察和地区检察官们把它视为对其控制犯罪能力的当头一棒，多数新闻媒体的评论也持反对态度。（法律百科全书）

答题要求：

1. The Essay shall be written in **ENGLISH** only.
2. This is **not** a translation test. A literal translation of the above Chinese into English may result in loss of score.
3. The length of the essay shall be **NO LESS THAN 150 WORDS.**

附录四:法律英语水平测试模拟试卷答案

试 卷 一

参 考 答 案

第一题答案

1. separate property(C)
2. bigamy(G)
3. custody(B)
4. heir(I)
5. nonsupport(E)
6. adultery(H)
7. beneficiary(J)
8. separation(A)
9. necessaries(F)
10. guardian(D)

第二题答案

(1) statutory law

(2) alibi

(3) justifications

(4) defendant

(5) deny

(6) responsible

(7) *mens rea*

(8) *actus reus*

(9) mental

(10) invisible

第三题答案

1. 该条款是一个免责条款。(2 分)其主要内容是规定承租人将免除出租人所有的发

生于该出租财产内的过失责任。(2分)出租人可以主张依该免责条款免除其发生在出租财产内的赔偿责任。(2分)

2. 原告没有能力理解该合同的条款:(2分)他只读了一年半的中学,不是那种懂得法律和能够理解技术性条款的含义的人。进一步说,也没有人对他解释过这份租约,使他能够抓住其中重要的法律条文;被告也没有劝告原告在签字之前找律师咨询一下。这些事实使原告不能在理解合同的基础上作出签字的决定。(4分)

3. 如果美国石油建议原告去咨询律师,判决的结果可能不同。(3分)因为,被告已经向原告作出了足够的提示,如果原告没有咨询律师,其责任可能就由原告自己承担了。(3分)

4. 本案中,法院认为租约内容显失公平的主要事实是,原告每周必须工作7天,一年的总收入仅仅是5 000—6 000美元,而为了支付这次事故所导致伤害的医疗费,原告可能要花费几千美元。这就是本案的实质性显失公平所在。(6分)

5. 买主自慎规则,并不适用于本案。本案中的租约本身构成了"显失公平合同",违反了制定法的规定。(6分)

第四题答案

1. 被告人有保持沉默权。如果被告人做出陈述,则任何做出的陈述都有能对他/她不利。(3分)

2. 检察官不能请被告人作证,如果被告人选择保持沉默,法官和辩护律师也不可以强迫被告人提供证言。相反,民事案件中的被告可以被要求作为证人。(3分)

3. 一旦犯罪嫌疑人被告知其米兰达权利之后,通常要在列清每项权利的文件上签字。但只有犯罪嫌疑人放弃同律师谈话或放弃在讯问过程中有律师在场的权利后,讯问才可开始。(3分)

4. 如果合同涉及货物的运输,卖方可以在支付价款后方可把货物或控制货物处置权的单据移交给买方作为发运货物的条件。(3分)

5. 卖方所交付的货物,必须是第三方不能根据工业产权或其他知识产权主张任何权利或要求的货物,但以卖方在订立合同时已知道或不可能不知道的权利或要求为限。(3分)

第五题答案

1. A commercial advertisement is deemed an offer if its contents meet the requirements of an offer. (Contract Law of People's Republic of China, Article 15)(3分)

2. A contract has been defined as "an agreement between two or more persons consisting of a promise or mutual promises which the law will enforce or the performance of which the law in some way recognizes as a duty". (3分)

3. Fundamental to the concept of criminal law is the assumption that criminal acts in-

jure not just individuals, but society as a whole. (3 分)

4. Property would have little value if the law did not define the right to use it, to sell or dispose of it, and to prevent trespass on it. (3 分)

5. As a separate entity, corporations have several distinguishing characteristics including limited liability, easy transferability of shares, and perpetual existence. (3 分)

第六题评分标准

根据内容、文字、句子和法律术语使用,采用通篇分档计分,计分标准如下:

8—10 分:内容切题,包括提纲的全部要点;表达清楚,文字连贯;句式有变化,句子结构和法律用语正确。文章长度符合要求。

5—7 分:内容切题,包括提纲的全部要点;表达比较清楚,文字基本连贯:句式有一定变化,句子结构和法律用词无重大错误。文章长度符合要求。

3—4 分:内容切题,基本包括提纲的要点;表达基本清楚;句子结构和法律用词有少量错误。文章长度符合要求。

1—2 分:基本按题写作,但只有少数句子可以理解。

0 分:文不切题,语句混乱,无法理解。

试 卷 二

参 考 答 案

第一题答案

1. executive branch(E)
2. federal(H)
3. legislation(A)
4. confederation(F)
5. judicial branch(B)
6. devolution(D)
7. defamation(J)
8. legislative branch(G)
9. allegation(I)
10. constitution(C)

第二题答案

1. F
2. T
3. F
4. F

5. T

第三题答案

1. MIAMI BASEBALL COMPANY 是一家位于佛罗里达州已经解散的公司，在它解散之前，本案原告 STORER 得到该公司的全部资产并成为该公司唯一的股东。(3 分)

本案的上诉人是 George B. Storer。因为原告的诉讼请求部分没有得到初审法院支持，即法院主张 1956 年的特许协议有效，所以原告又提出上诉。本案上诉人就是初审原告。(3 分)

2. 本案所提及的 INTERLOCUTORY APPEAL——在初审诉讼程序尚未完成时提出部分上诉(中间环节的部分上诉)。(3 分)

CONCESSION CONTRACT 是特许合同，或称为特许协议。一般是特许权所有人或持有人同意授权他人(合同另一方当事人)在一段时间内在特许地区获得专属使用权的合同。(3 分)

3. 1956 年 2 月之前的两个特许协议(特许合同)。FLORIDA SPORTSERVICE, INC。按照该两个不同的特许协议主张特许权利。第一个协议的当事人是 MIAMI STADIUM 和 FLORIDA SPORTSERVICE INC 的所有人(复数)，第二个协议的当事人是前一个合同当事人的受让人和 SYRACUSE, N. Y. 的所有人，后一家公司拥有棒球特许权，该特许权有 MIAMI BASEBALL COMPANY 购买。对于 1956 年之前的两个合同，双方当事人无异议。1956 年的特许协议取代了以往的两个特许协议。它是 20 年有效的特许协议。(6 分)

4. MIAMI BASEBALL COMPANY 的 BYLAWS 是公司细则，是按照公司大纲制定的，不得违反公司大纲的基本原则，可有公司董事会修改，不必对外公开。这是英美公司法及公司实践的特点。(6 分)

5. 1956 年的特许协议是由 MIAMI BASEBALL COMPANY 的总裁(PRESIDENT) SALOMON 先生签署的，按照该公司的细则(BYLAWS)，总裁有权代表公司签署合同并得到公司董事会的批准。董事会下设的执行委员会(EXECUTIVE COMMITTEE)已经依照正当程序成立。虽然只是口头批准公司总裁对外签署的特许协议，没有书面确认，但是初审法院认为口头批准不影响协议的有效性。(3 分)

公司董事会(DIRECTORATE)由 21 位董事组成，主要是对外处理公司的公共关系，而董事会下设的执行委员会(EXECUTIVE COMMITTEE)才是公司内业务的决策机构，该委员会批准，即相当于公司董事会批准。(3 分)

第四题答案

1. 被告人有权保持沉默。一旦他作出任何陈述，则这些陈述均可用作对其不利的证据。(3 分)

2. 如果大陪审团对行为人提起公诉，行为人有获得有陪审团快速审判的权利，在这种情况下，检察机关的举证责任须达到排除合理怀疑的标准。(3 分)

3. 对于因履行本合同所发生的一切争议，本合同双方应通过友好协商解决，如协商无法解决争议，则应将争议提交仲裁委员会进行仲裁。(3 分)

4. 一方当事人违反合同应负的损害赔偿额，应与另一方当事人因他违反合同而遭受的包括利润在内的损失额相等。(3 分)

5. 2009 年 9 月 3 日，专家组主席通知争端解决机构，鉴于争端的复杂性，且涉及行政和程序事项，专家组未能在 6 个月内完成其工作。(3 分)

第五题答案

1. We can define criminal law as branch of modern law which concerns itself with offenses committed against society, members thereof, their property, and the social order.

2. Generally speaking, an offense punishable by death or imprisonment in a state prison is a felony; an offense for which the maximum punishment is a monetary fine, incarceration in a local jail, or both, is a misdemeanor.

3. There are two types of property: real property and personal property. Most of the legal concepts and rules associated with both types of property are derived from English common law.

4. The traditional theory is that the shareholders are the owners of the corporation and the role of the directors are to manage the business of the corporation for the benefit of its owners.

5. If the company's interest is harmed in the course of its establishment due to the negligence of the sponsors, being liable to the company for damages. (Company Law of People's Republic of China, Article 95)

第六题评分标准

根据内容、文字、句子和法律术语使用，采用通篇分档计分，计分标准如下：

8—10 分：内容切题，包括提纲的全部要点；表达清楚，文字连贯；句式有变化，句子结构和法律用语正确。文章长度符合要求。

5—7 分：内容切题，包括提纲的全部要点；表达比较清楚，文字基本连贯；句式有一定变化，句子结构和法律用词无重大错误。文章长度符合要求。

3—4 分：内容切题，基本包括提纲的要点；表达基本清楚；句子结构和法律用词有少量错误。文章长度符合要求。

1—2 分：基本按题写作，但只有少数句子可以理解。

0 分：文不切题，语句混乱，无法理解。

试 卷 三

参 考 答 案

第一题答案

1. defendant(D)

2. allegation(J)

3. case law(I)

4. law(B)

5. statutory law (F)

6. adjudicate(C)

7. review(A)

8. plaintiff(H)

9. Common Law(E)

10. Jurist(G)

第二题答案

1. F

2. F

3. F

4. F

5. T

第三题答案

1. 本案起因于 Donoghue 喝了朋友买来的啤酒后发现酒瓶里有一只死了的蜗牛，她感到十分难受，于是起诉啤酒生产商。(3 分)。

根据合同法的一般原理，原告与被告之间在法律上不存在合同关系。二者间存在侵权法律关系。(3 分)。

2. 原告主张被告以 500 英镑赔偿其由于饮用啤酒而患上的肠胃炎及遭受的精神创伤。(3 分)原告的理由是，被告有义务采取合理谨慎的措施，使得其生产并用于被告消费的啤酒之内不含有使得被告受到伤害之物。(3 分)

3. 苏格兰最高法院(Court of Session)判决驳回原告诉讼请求，但裁定允许原告上诉到英国上议院。(3 分)

上议院 Atkin 法官判决：必须关爱邻人的法则成为法律，你不能伤害自己的邻居。你必须尽到合理的注意，避免可以预见到的可能伤害邻人的积极或消极行为。谁是我的邻人？

答案似乎是那些被我的行为切近而直接影响的人，由此我应当在决定自己积极或消极的作为时，合理地对他们受到的影响加以考虑。(3 分)

4. Donoghue v. Stevenson 的重要意义在于：通过该案，上议院确立了英国法中现代过失侵权的概念，建立了一个人对另一个人负有的注意义务的一般原则。该案是英国法及威尔士法中现代过失侵权、苏格兰法中不法侵权的源头。该案使得英国的个人原告即使在和个人或公司被告之间没有合同关系之时，也可以向消费品的提供者要求赔偿。个人若欲从过失侵权中获得救济，只需证明注意义务的存在。(4 分)

该案推翻了英国法之前规定注意义务只存在如合同关系双方、生产者生产因内在缺陷而具有危险性的产品或生产者有欺诈行为等十分特别的情况。(2 分)

5. Atkin 爵士确立的"neighbour"原则起源于基督教"须爱你的邻人"的原则。(2 分)

1990 年上议院在 Caparo 案中基于公共政策的考虑建立了"合理注意"的存在所需的三个条件：1. 损害可以被预见。2. 双方的关系在法律上具有接近性或邻里关系的特征。3. 法院应当认为在此种情形下，法律为了一方的利益而加于另一方一定限度的责任符合公平、正义、合理的原则。(4 分)

第四题答案

1. 行为人行为并不构成犯罪除非他的责任基于下列行为(1)自愿行为，或(2)事实上可以行为而懈怠的不作为。

2. 损害赔偿不得超过违反合同一方在订立合同时，对违反合同预料到或理应预料到的可能损失。

3. 在 2008 年 2 月 7 日，菲律宾请求与泰国就泰国对影响来自菲律宾香烟的一系列财政和关税措施进行磋商。

4. 公司的股本可以划分为多个类别，每个类别的股份拥有不同权利，如表决权、股息权以及清算时分配剩余资产的权利。

5. 尽管侵权法与刑法同是源于对违法行为的报复以及阻却，但二者早就彼此分离，各自起着截然不同的作用。

第五题答案

1. criminal liability can be imposed if a legislature has defined a certain behavior as criminal even if fault cannot be proven—that is, strict liability.

2. The party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

3. If the contract is avoided, the buyer has bought goods in replacement or the seller has resold the goods in a reasonable manner and within a reasonable time after avoidance.

4. US corporations are generally classified into C corporations, S Corporations, close corporations, professional corporations and non-for-profit corporations.

5. By the middle of the 19th century, an earlier tradition of stricter liability had been repudiated in favor of the principle "no liability without fault".

第六题评分标准

根据内容、文字、句子和法律术语使用，采用通篇分档计分，计分标准如下：

8—10 分：内容切题，包括提纲的全部要点；表达清楚，文字连贯；句式有变化，句子结构和法律用语正确。文章长度符合要求。

5—7 分：内容切题，包括提纲的全部要点；表达比较清楚，文字基本连贯；句式有一定变化，句子结构和法律用词无重大错误。文章长度符合要求。

3—4 分：内容切题，基本包括提纲的要点；表达基本清楚；句子结构和法律用词有少量错误。文章长度符合要求。

1—2 分：基本按题写作，但只有少数句子可以理解。

0 分：文不切题，语句混乱，无法理解。

试 卷 四

参 考 答 案

第一题答案

1. interrogation(B)

2. Attorney General(C)

3. avoid(D)

4. bench(A)

5. beyond a reasonable doubt(E)

6. breach(F)

7. gratuitous promise(H)

8. unilateral contract(J)

9. duress(I)

10. negotiable instrument(G)

第二题答案

1. T

2. F

3. F

4. F

5. T

第三题答案

1. 本案原告为 W. O. Lucy and J. C. Lucy，被告为 A. H. Zehmer and Ida S. Zehmer。(2 分)原告要求被告实际履行于 1952 年 12 月 20 日签署的协议：以 50 000 美元的价格出售位于 Dinwiddie 县的土地。而被告以签署协议时醉酒为由，否认其具有出售土地意图，拒绝履行协议。(4 分)

2. 本案的争议点为：原被告之间是否真实地存在着一个买卖土地的协议。(6 分)

3. 第一份协议只有 A. H. Zehmer 的签名，而 Lucy 要求最好有被告夫妇二人的签名，(3 分)于是就有了被告夫妇二人签名的第二份协议。(3 分)

4. 事实：在签署协议之前，原被告讨论了大约 40 分钟；被告撕毁了第一份协议，并签署了第二份协议；讨论了销售的内容；规定了对所有权的检查；被签署协议的完整性。(3 分)

目的是为了证明，原被告双方之间存在着买卖土地的真实意图，进而存在着一个买卖土地的合同。(3 分)

5. 在合同领域，法官需要查明的是当事人表明意图的外在表示，而不是其隐秘的或未表示的意图。如果通过合理的判断可以从当事人的言语和行为推断出意图，那么当事人的合意就不是很重要。(4 分)

在本案中，当事人的行为使一名合理的第三人了解其出售土地的意图，因此，原被告之间的协议是有效的。(2 分)

第四题答案

1. 合同被定义为："一项或一系列允诺，若该允诺被违反，法律将给予救济，或者法律将对该允诺的履行认定为义务。"

2. 如果被告人选择了保持沉默，检察官不能要求其作为证人，法官和辩护律师也不能强迫被告人提供证词。

3. 由宪法制定者所创设的权力分立原则主要目的是为了避免多数人的铁拳统治。基于其自身的经验，制定者避免将太多权力赋予新政府中的任一部门。

4. 然而，本次会议没有修订《邦联条例》，反而创造了《宪法》和一个完全新型的联邦政府。代表们认为这种政府能够更好地处理国家的问题。

5. 清楚的是，制宪会议的很多代表希望最高法院能够审查州立法的合宪性问题。

第五题答案

1. The objective of criminal law is to deter and punish the commission of acts that

threaten society's safety and order.

2. A contract has been defined as "an agreement between two or more persons consisting of a promise or mutual promises which the law will enforce or the performance of which the law in some way recognizes as a duty".

3. The Constitution delegates certain powers to the national government, and the states retain all powers not delegated to the national government.

4. Congress determines the jurisdiction of the federal courts, but the United States Supreme Court has the power to hold acts of the other branches of the federal government unconstitutional.

5. The Fifth Amendment to the U. S. Constitution provides that a defendant cannot "be compelled in any criminal case to be a witness against himself."

第六题评分标准：

根据内容、文字、句子和法律术语使用，采用通篇分档计分，计分标准如下：

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1—2 分：基本按题写作，但只有少数句子可以理解。

0 分：文不切题，语句混乱，无法理解。

附录五：上编练习题参考答案

上编参考答案

Lesson 1

1. 答案略

2. (1) *stare decisis*

(2) criminal law

(3) financial derivatives market

(4) constitutional law

(5) administrative law

(6) human decree

(7) Law Merchant

3. (1) 行政机构

(2) 司法裁决

(3) 合理注意

(4) 普通法

(5) 合同法

(6) 商法

(7) 公司法

4. (1) Criminal law

(2) Public law

(3) Reasonable care

(4) Civil law

(5) constitution

5.

legislate	legislation/legislature	legislative
proceed	procedure	procedural
convene	convention	conventional
regulate	regulation	regulatory
accede	accession /accedence	(无)
elect	election	elected
authorize	authority/authorization	authorized

(1) legislature

(2) accede

(3) Convention

(4) convened

(5) authority

6. (1) 法是由具备强制执行性的规则所组成的，其调整的是个人与个人以及个人与社会之间的关系。

(2) "普通法"这一术语还用来区分盎格鲁-美利坚法中被称为"衡平法"的另一部分。今天，这两组术语用来指两种不同的法律原则。

(3) 当一方为自然人、组织、公司或是政府部门对另一方提起诉讼以获得伤害救济时，这类案件属于民事案件，其结果可能是金钱损害赔偿救济，或是要求完成某一行为或禁止某一行为。

(4) 公法调整的是个人同政府的权利与义务关系。公法还规定政府的组成结构及其各自的权力。

(5) 大多数国家都有成文宪法，英国是个例外。英国宪法是不成文宪法。

(6) 大陆法与普通法之间最明显的区别是，大陆法属于成文法，而普通法并非通过立法途径创立，它主要是建立在判例法之上。

(7) 侵权行为法规定的是人与人之间负有的众多义务；其中一个最为常见的义务是，行为人要对他人尽到合理注意义务；不能够尽到合理注意义务的，即构成过失侵权。

Lesson 2

1. 答案略

2. (1) legal system

(2) common-law system

(3) civil-law system

(4) *Napoleonic Code* 或 *French Code Civil*

(5) Code of Hammurabi

(6) determinations of fact

3. (1) 教会法

(2) 财产法

(3) 劳资关系

(4) 对适用法律的裁决

(5)《优士丁尼民法大全》,《国法大全》,《罗马法大全》

4. (1) ——*French Code Civil*

(2) ——*Corpus Juris Civilis*

(3) ——common-law system

(4) ——civil-law

(5) ——*The German Civil Code*

5. (1) legal system

(2) principle

(3) precedent

(4) is bound to

(5) is distinct from

(6) authority

6. (1) 多数现代法典可以追溯到罗马皇帝优士丁尼一世在公元6世纪时组织人马编纂的著名法典,它被称为《民法大全》。

(2) 变更针对的主要是诸如劳资关系、工人工资和工作时间、健康、安全和环境保护之类的事项。

(3) 尽管《德国民法典》比《法国民法典》影响到的区域要少,但前者在诸如泰国、中国、日本、东欧和希腊等广大区域内的影响是非常重要的。

(4) 某些普通法原则被证明是颠簸不破的,不能变更;那些来之不易的保护公民权利和自由不受政府权力滥用的先例即属此例。

(5) 除路易斯安那州之外的美国各州和除魁北克省之外的加拿大各省均继受了普通法体系。路易斯安那和魁北克过去是法国而不是英国的殖民地,因此,它们的法律体系都仿照法国的大陆法体系而建立。

(6) 大陆法系将成文法视为法律的基本渊源,其法院通常采用纠问制模式,不受先

例的约束；人员由经过专门训练的司法官员构成，只有有限的解释法律的权力。

Lesson 3

1. 答案略

2. (1) trial court

(2) limited jurisdiction

(3) general jurisdiction

(4) civil dispute

(5) criminal prosecution

(6) circuit court

3. (1) 州法院体系

(2) 具有有限管辖权的初审法院

(3) 上诉法院

(4) 联邦最高法院

(5) 中级上诉法院

(6) 地区法院

4. (1) ——general jurisdiction

(2) ——lawsuit

(3) ——plead

(4) ——testimony

(5) ——circuit

5. (1) interpret

(2) judicial review

(3) constitutionality

(4) unconstitutional

(5) legislation

6. (1) 州法院法官通常由选举产生，与此不同的是，联邦法院的法官(包括最高法院的大法官)由总统任命产生，并须经参议院的同意。

(2) 美国法院体系为双轨制，包括联邦法院体系和州法院体系。美国二元政府(州政府和联邦政府)的并存是该国法院体系并立的原因。

(3) 司法管辖权是指法院获得的审理特定案件并做出具有约束力判决的权力。

(4) 美国政府成为案件的一方当事人时，该案件即由联邦法院体系受理。当美国政

府提起诉讼或被列为被告人时，便成了案件的一方当事人。

(5) 联邦最高法院还审理专门法院的上诉案件和和不满联邦行政机构裁定的上诉案件。

(6) 具有一般管辖权的州初审法院对多种争议事项存在管辖权，既包括民事纠纷又包括刑事诉讼。在一些案件中，一般管辖权的初审法院可以审理来自有限管辖权初审法院的上诉案件。

(7) 上诉法院通常并不复核事实问题(比如当事人实际上是否实施了某一行为，如焚烧国旗)，而只复核法律问题(比如焚烧国旗行为是否系“宪法第一修正案”所保护的一种“表达自由”的形式)。

(8) 正常情况下，上诉法院会认可初审法院对事实问题的裁定，因为在初审庭审上，初审法院的法官和陪审团通过直接观察证人的言行举止和非语言行为，能更好地评价证人证言。

(9) 联邦法院体系基本上是三级(审判)模式，包括：(1)联邦地区法院(属于一般管辖权初审法院)和各有限管辖权法院，(2)联邦上诉法院(中级上诉法院)，(3)联邦最高法院。

(10) 联邦最高法院由九名大法官组成。虽然最高法院对极少数案件具有初审管辖权(如一方当事人为州政府的法律纠纷、两个州之间的法律纠纷以及涉及大使的法律纠纷)，但其主要履行的还是作为上诉法院的职责。

Lesson 4

1. 答案略

2. (1) ultra vires

(2) unitary state

(3) codified constitution

(4) uncodified constitution

(5) intergovernmental body

(6) checks and balances

3. (1)《*欧盟基本权利宪章*》

(2)《*世界人权宣言*》

(3) 司法审查

(4) 行政部门

(5) 立法部门

(6) 司法部门

4. (1) ——Federalism

(2) ——Separation of Powers

(3) ——Judicial Review

(4) ——Executive branch

(5) ——Legislative branch

(6) ——Judicial branch

5. (1) Executive branch

(2) Executive Power

(3) Judicial Power

(4) judicial review

(5) stipulate

(6) Congress

6. (1) 总统也许会因叛国、受贿及其他重罪或轻罪而受到国会弹劾，但其政治行为却不受弹劾。

(2)《宪法》第一条规定了立法部门；第二条规定了行政部门的义务，以及选举总统的方法；第三条创设了联邦司法体系。

(3)《宪法》的起草与修订均反映出了一种越来越普遍的共同看法：联邦政府的权力当时需要加强。

(4)《权利法案》中保障的个人权利是对州政府和联邦政府权力的限制。

(5) 詹姆斯·麦迪逊和詹姆斯·威尔逊曾提议，对联邦法律的否决权应归一个由总统以及“合适人数”的法官组成的委员会。

(6) 问题的出现是因为“最高条款”仅规定了联邦及州法院的关系，但没有就联邦政府三个相互平等的部门之间关系的规定。

(7) 联邦政府由三大部门组成，即保证法律得以执行的行政部门、制定法律的立法部门以及负责解释法律的司法部门。

(8) 最高法院则没有被赋予明示的审查联邦立法的权力。但是，在马歇尔首席大法官的领导下，法院得到了一种默示的审查权来维护宪法的权威。

(9) 联邦制制度设计认为，在确定哪个政府更好地具备履行职能的条件的基础上，通过分配州政府与联邦政府之间的职能，可使社会获得最好的服务。

(10) 通过权力制约与平衡制度，政府的任一部门都不可能集中过多的权力。

Lesson 5

1. 答案略

2. (1) expert witness

(2) duty of care

(3) recklessness

(4) wrongfulness

(5) manslaughter

(6) culpability

3. (1) 死刑

(2) 肉刑,身体刑

(3) 犯罪行为

(4) 犯罪意图

(5) 排除合理怀疑

(6) 严格责任

4. (1) ——duress

(2) ——entrapment

(3) ——double jeopardy

(4) ——selective prosecution

(5) ——speedy trial

(6) ——prosecutorial misconduct

5. (1) *mens rea*

(2) threatened

(3) culpability

(4) motive

(5) justification

(6) sentence

(7) involuntary

6. (1) 提起刑事指控的具体程序因法域而异。在指控被告人犯有特定罪行方面,有些法域授予警察以较大的自由裁量权;而有些法域则赋予检察机关更大的权力。

(2) 抗辩事由系由被告人及其律师出示的、证明为何被告人不应对刑事指控承担责任的证据和理由组成。

(3) 根据法律，第三人防卫通常要求防卫人无过错，而且前提是他(她)是对无辜的人在遭受侵害时给与帮助。

(4) 刑事诉讼是由代表社会的公诉人提起，而非由私人聘用的律师提起。

(5) 说谎可能是一个性格缺陷，但是刑法只惩罚最具危害性的谎言，比如说，司法程序中经宣誓后所作出的重大虚假表述(伪证罪)。

(6) 依程序性抗辩事由，由于被告人在司法程序中遭受了某种程度的歧视待遇，或者(行政或司法机关)未能遵守某些法定程序的重要环节，被告人因而应免于承担任何可能的刑事责任。

(7) 现代刑法典中规定的区别重罪与轻罪的界限与过去法典中的界限并不相同。一般而言，可处死刑或州监狱监禁刑的犯罪属于重罪。

(8) 重罪的种类并不多，包括谋杀罪、非预谋杀人罪、纵火罪、重伤罪、强奸罪、抢劫罪、偷盗罪、夜盗罪、逃狱罪、以及(也许有)反自然性行为罪。除此之外所有的刑事犯罪均是轻罪。

Lesson 6

1. 答案略

2. (1) reasonable doubt

(2) double jeopardy

(3) speedy trail

(4) prosecution

(5) financial investigatory bodies

3. (1) 刑事诉讼程序

(2) 刑事司法系统

(3) 对质条款

(4) 性侵犯

(5) 交叉质询

(6) 公开审判

(7) 贫穷的被告人

4. (1) ——criminal justice system

(2) ——confrontation clause

(3) ——jury trial

(4) ——double jeopardy

(5) ——bail

5. (1) refuse

(2) self-incriminating

(3) self-incrimination

(4) guilty

(5) torture

(6) interrogations

6. (1) F

(2) F

(3) F

(4) T

7. (1) 提起刑事指控的具体程序因法域而异。在指控被告人犯有特定罪行方面,有些法域授予警察以较大的自由裁量权;而有些法域则赋予检察机关更大的权力。

(2) 抗辩事由系由被告人及其律师出示的、证明为何被告人不应对刑事指控承担责任的证据和理由组成。

(3) 根据法律,第三人防卫通常要求防卫人无过错,而且前提是他(她)是对无辜的人在遭受侵害时给与帮助。

(4) 依程序性抗辩事由,由于被告人在司法程序中遭受了某种程度的歧视待遇,或者(行政或司法机关)未能遵守某些法定程序的重要环节,被告人因而应免于承担任何可能的刑事责任。

Lesson 7

1. 答案略

2. (1) bilateral contract

(2) unilateral contract

(3) executory contract

(4) executed contract

(5) void contract

(6) voidable contract

(7) unenforceable contract

3. (1) 实际履行

(2) 合意

(3) 合理服务费请求权，服务的合理价格

(4) 既有义务规则

(5) 胡椒子规则

(6) 事实默示合同

(7) 法律默示合同

4. (1) ——fraud

(2) ——contract

(3) ——consideration

(4) ——voidable contract

(5) ——specific performance

5. (1) disaffirm

(2) refrain

(3) bargaining

(4) stronger

(5) fiduciary

(6) trustee

6. (1) 损害赔偿金是根据非违约方因违约一方的行为而遭受的损失来计算的，可以包括工资等费用。

(2) 两方当事人订立的、规定第三人获得某种权利的合同称为第三人受益合同。

(3) 尽管有些合同已具备了要约、承诺、契约自由以及对价等要件，法律规定，如果这些合同系由某些特定主体所订立，则仍可由他们撤销。

(4) 无偿允诺通常不能被作为合同而具有可强制执行性。比如，假如我允诺给你500美元，而且你说你接受，合同并没有成立。无偿允诺并未形成一个合意。

(5) 可撤销的合同是指合同一方有权选择使其义务无效或否认其义务的合同(如未成年人订立的合同)。无效合同自始自效。

(6) 违反合同是一个法定诉因，它是指合同的一方或多方当事人拒绝履行合同，或者干涉其他当事人履行合同，从而使具有约束力的协议或利益交换未能被履行的行为。

Lesson 8

1. 答案略

2. (1) tort

(2) wrong

(3) nuisance

(4) libel

(5) slander

(6) privacy

(7) quasi-tort

3. (1) 非法监禁

(2) 近因

(3) 合同义务

(4) 宪法性权利

(5) 金钱赔偿

(6) 故意侵权

(7) 合理的注意

(8) 诉因,诉讼理由

4. (1) ——contributory negligence

(2) ——defamation

(3) ——proximate cause

(4) ——malicious prosecution

5. (1) hypothetical

(2) objective

(3) measure

(4) fiction

(5) circumstances

(6) reasoning

(7) approaches

6. (1) 原告须举出能够证明被告未尽到合理注意义务的证据。

(2) 损害结果如是可以预见的,即便损害发生的方式是不可预见的,侵权责任可能同样会存在。

(3) 如果某一严重危险事件的危害超过预防其发生的负担或不便,理性人会采取预防措施。

(4) 举证责任通常由原告承担,原告依"或然性权衡"标准证明被告的过失行为与原

告的损害之间的关系。

(5) 在我们的社会中，存在着多种法律渊源：联邦宪法以及各州宪法、立法机关制订的法案、司法判例、以及行政命令。制定法是指由国会或州立法部门颁布的法律。

(6) 判例法是由联邦一级法院判决与州一级法院判决共同构成的，这与制定法不同。

(7) 过失侵权诉讼有两大抗辩理由：共同过失以及自愿承担风险。

(8) 假如原告系同被告共同造成了损害的发生，则该共同过失可使原告不能获得损害赔偿金，但共同过失理论在最近已被修正：具有共同过失的，仅可降低原告损害赔偿金的数额。

Lesson 9

1. 答案略

2. (1) dividends

(2) bankruptcy

(3) subsidiary

(4) public corporation

(5) close corporation

(6) pension fund

(7) authorized share capital

(8) by-laws

3. (1) 股份有限公司

(2) 担保有限责任公司

(3) 非营利性公司

(4) 专业公司

(5) 可保利益

(6) 揭开公司面纱

(7) 公司组织大纲

(8) 公司成立章程

4. (1) ——the articles of incorporation

(2) ——liquidation

(3) ——private corporation

(4) ——non-profit organization

(5) ——dividends

5. (1) changing

(2) identity

(3) distinct form

(4) liable for

(5) shares

(6) creditor

(7) property

(8) shareholders

6. (1) 如果获得补贴的公司是控股公司(包括自己也经营的母公司),商务部将认定该控股公司及其各子公司的销售总额存在补贴。

(2) 公司股东就其持有股份的应缴股本金,对公司承担责任。

(3) 公司的股东并不对公司的债务、义务以及行为承担个人责任。作为独立的主体,公司具有如下几个显著特征:责任的有限性、股份的易转让性以及永久存续性。

(4) 美国的公司一般分为C公司、S公司、封闭公司、专业公司以及非营利公司。在英国,公司主要为公众公司和私人公司,股份有限公司和担保有限公司。

(5) C公司和S公司每年都必须召开股东大会,会议记录必须存入公司备案。

(6) 公司法传统理论认为股东是公司的所有者,而董事则为了公司所有者利益而经营公司业务。

(7) 公司成立章程包括特定的重要信息:公司名称、注册地、公司宗旨、股本总额及比例。内部细则包括规范公司运作的规定。两种文件对所有成员都具有约束力,并具有"公司的宪章"的效力。

(8) 成立公司必不可少的一个步骤就是,认购人在公司成立章程末尾签名,作出认购公司部分股份的承诺:通过此行为,他们成为公司的原始股东。

Lesson 10

1. 答案略

2. (1) *The United Nations Convention on Contracts for the International Sale of Goods* (CISG)

(2) *International Rules for the Interpretation of Trade Terms* (INCOTERMS)

(3) United Nations Commission on International Trade Law(UNCITRAL)

(4) International Chamber of Commerce (ICC)

(5) reservation

(6) contracting state

3. (1) 双边条约

(2) 习惯法

(3) 商人法，商法

(4) 〈拉丁语〉通用语

(5) 公海

(6) 国际商事法

4. (1) ratification

(2) customary law

(3) high seas

(4) Lex mercatoria

5. (1) beginning with

(2) deal with

(3) fulfilled

(4) responsibility

(5) customs

(6) responsible

6. (1) 美国《统一商法典》对贸易术语的定义有别于英国普通法对它们的定义。因此，为了避免冲突，当事方需要规定使用何种定义。

(2) CISG 第 9 条规定，当事方受其确立的习惯的约束，或者受其知悉的或应当知悉的广泛用于国际贸易中的习惯的约束。

(3) 就缺陷造成的间接损害而言，长期以来，人们一直在讨论这样一个问题：《联合国国际货物买卖合同公约》的有关规定是否可以排除相应的国内侵权法规则的适用。

(4) 毫无疑问的是，应当确定确立下述原则：主营业地位于甲国的出口商不应因其向乙成员国或者丙成员国出售商品而承担不同的责任风险。

(5) 由于商贸交易的国际性，除了需要处理国内买卖交易中需要关注的法律问题之外，国际合同的当事方还需要处理其他的法律关注点。

Lesson 11

1. 答案略

2. (1) dispute settlement

(2) free trade area

(3) special safeguard measure

(4) non-tariff barriers

(5) non-discrimination

(6) multilateral trade negotiation

(7) *Trade Policy Review Mechanism*

3. (1) 国际经济法《关税与贸易总协定》

(2) 乌拉圭回合

(3) (世界贸易组织的)总干事

(4) "安全阀"原则

(5)《与贸易有关的知识产权协定》

(6)《服务贸易总协定》

(7)《技术性贸易壁垒协定》

(8)《海关估价协议》

4. (1) ——Dispute Settlement Understanding

(2) ——non-tariff measures

(3) ——intellectual property

(4) ——subsidy

(5) ——trade secret

(6) ——International economic law

5. (1) non-tariff trade barriers

(2) evade

(3) governed

(4) the Uruguay Round

(5) impact

6. (1) 关贸总协定成员国的资格可使一国进入外国市场,但该国同时负有开放本国市场并通过关贸总协定多边谈判来减少贸易壁垒的义务。

(2) 世界贸易组织首次为各国磋商多边贸易活动提供了一个得到国际认可的、中立

的、而非对抗性的舞台。

(3) 从理论上来说,世界贸易组织给成员国提供的解决争议服务,可为纠纷的公开、公平和公正解决提供机会,进而使各国能以和平、合理的方式解决纠纷。

(4) 通过开放贸易,中国与世界其他国家建立了更加紧密地联系,使中国人和外国人建立了个人以及商业上的联系。

(5) 依世界贸易组织协议,各国通常不能歧视其贸易伙伴。如给与一方以特殊优惠(比如给与某种产品以较低的关税税率),就必须给与其他所有世界贸易组织成员以同样的优惠。

(6) WTO 知识产权协议是有关思想和创造力贸易与投资的规则。这些规则保护的对象是与贸易有关的版权、专利、商标、用来识别商品的地理名称、工业设计、集成电路布图设计以及未公开的信息包括商业秘密等。

(7) 贸易政策审查机制的目的在于提高透明度,使各国对其采用的政策有更好的理解,同时也是为了评估这些政策的影响。许多成员国也把审查当作是对自己政策的建设性反馈意见。

(8) 从 1995 年开始,升级后的 GATT 成为 WTO 货物贸易的总括协定。它增加了处理一些特定产业(如农业和纺织业)和一些特定问题(如国营贸易、产品标准、政府补贴以及反倾销诉讼)的附件。

(9) WTO 最高级别的决策机构是部长级会议,该会议至少每两年举行一次。部长级会议之下是总理事会,通常由驻日内瓦的大使和代表团团长组成,但有时也包括从成员国首都派来的官员;总理事会每年在日内瓦总部召开几次会议。总理事会也可以"贸易政策审查机构和争端解决机构"的身份而召开会议。

(10)《多哈发展议程》增加了一些谈判和其他工作的内容,如非农业关税、贸易与环境、WTO 规则(如反倾销与反补贴)、投资、竞争政策、贸易促进、政府采购的透明度、知识产权,以及发展中国家提出他们在实施目前 WTO 协议中所面临的一系列问题。

附录六：下编练习题参考答案

下编参考答案

第 1 课

1. 答案略

2. (1) ——consideration

(2) ——cross-examination

(3) ——negotiable instrument

(4) ——bill of exchange

(5) ——domicile

3. (1) The defendant can excuse himself by showing that the loss was owing to the plaintiff or the **act of God/*Force Majeure*.**

(2) A distinctive element of the Anglo-American judicial procedure is the **cross-examination.**

(3) If mutuality of **consideration** is not present, there is no contract.

4. (1) 被告的律师将会就证人所提供的证据对其进行口头交叉质询。

(2) 就我们所知，上述声明内容真实无误。特此证明。

(3) 本协议的任何一方如系因超出其合理控制或合理规避之外的原因造成履行延迟或履行不能的，均不对另外一方承担责任；这里的“原因”包括但不限于：外交与英联邦办公室/文化媒体及体育部/通信监管机构(OFCOM)或其他对任何一方的事务具有管辖权的监管或政府组织阻碍其履行本协议项下义务、不可抗力、意外事件、动乱、第三方恶意行为、内乱、罢工、第三方停工或工业纠纷、不可避免的能源中断或火灾(“不可抗力事件”)。

(4) 本协议项下义务的履行因不可抗力事件而严重受阻连续达一个月或更长时间

的，义务履行未受阻碍的一方有权书面通知对方终止本协议。

第 2 课

1. (1) ——affidavit

(2) ——*amicus curiae*

(3) ——arson

(4) ——alibi

(5) ——*habeas corpus*

2. (1) A legal person's domicile shall be the place where its main administrative office is located.

(2) The 1994 Administrative Procedure Law allows citizens to sue officials for abuse of authority or malfeasance.

(3) When a person appoints another to act on his behalf in litigation, he must submit to the people's court a power of attorney bearing his signature or seal.

(4) An avoided contract or a rescinded contract has no legal restraint from the time when it is concluded.

(5) In a divorce case in which the parties to the action have been represented by their agents ad litem, the parties themselves shall still appear in court in person, unless they are incapable of expressing their own will.

3. (1) 我们美国人民为美国制订并确立了这部宪法。

(2) 现指定我的丈夫布莱克·史密斯作为本人的遗嘱执行人。

(3) 上诉就是请求上一级法院(上诉法院)审查及变更下级法院裁决的行为。

(4) 惩罚性赔偿金或惩戒性赔偿金是(法院)裁定一方以惩罚其行为且可达到以儆效尤之目的金钱赔偿金。

第 3 课

1. (1) precedes

(2) in accordance with

(3) judgment

(4) governs

(5) construing

(6) principle

2. (1) fact-finder

(2) goodwill

(3) King's Bench

(4) damages

(5) warranty

3. (1) 对抗制

(2) 法官逮捕令

(3) 首席大法官

(4) 藐视法庭

(5) 交叉询问

(6) 直接询问;主询问

(7) 正当程序

(8) 大陪审团

(9) 诉讼时效法

(10) 巡回法院书记员

4. (1) acquittal

(2) affidavit

(3) arraignment

(4) district court

(5) felony

(6) misdemeanor

(7) perjury

(8) verdict

(9) Jurors

(10) subpoena

5. (1) This Regulation shall come into effect on the date of promulgation.

(2) Murder in the first degree receives the severest penalty, often life imprisonment or capital punishment.

(3) Motor vehicles with no business license for passenger transport shall not be used to undertake profitable passenger transport activities.

(4) The municipal or district/county traffic administrative departments may entrust the traffic administrative law enforcement organs to administer administrative punish-

ments for those who violate any of these Provisions and shall thus be punished by the municipal or district/county traffic administrative departments.

(5) The Regulation shall be applicable to building of construction projects having impacts on the environment within the territory of the People's Republic of China and other territorial sea areas under the jurisdiction of the People's Republic of China.

6. (1) 当商标被侵犯时，商标持有人有对侵害人提起诉讼的诉因。

(2) 依照同一部1166年制定法，对最为重要刑事案件，即“王室之诉”，司法管辖从郡法院转移到了新出现的皇家法院。

(3) 在极少数情形下，陪审团会参加刑罚的裁量。例如，在有些州的死刑案件中，法官在陪审团审判的情况下不能对被告人处以死刑，除非陪审团建议适用死刑而不适用无期徒刑。

(4) 英国普通法的发展依靠法官依传统在裁决法院案件时遵循的规则和原则。法官的裁决建立在法律先例之上，先例就是指法院在先前类似案例上的判决。

(5) 为了对这个世界有个概念，我介绍了关于法律多元主义的文献；顺着它们的思路，我提出，必须认识到多元、交错的法律制度间的规范性冲突是不可避免的，有时甚至可能是有益的。它既是各类替代性思路产生的根源，又是多元的社群成员的话语阵地。

第4课

1. (1) application

(2) statute

(3) statutory

(4) awarded

(5) committed

(6) rather than

2. (1) Foreign journalists and permanent offices of foreign news agencies may not engage in any activities incompatible with their status or the nature of their profession, or detrimental to China's national security, unity or social and public interests.

(2) These measures are formulated for the purpose of effectively protecting and rationally utilizing human genetic resources in China, strengthening human gene research and development, and promoting international cooperation and ex-

change on the basis of equality and mutual benefit.

(3) When a Party has made all or any part of its contribution to the registered capital of the Company, a Chinese registered accountant appointed by the Board shall verify such contribution and issue a capital contribution verification report in the form required under Applicable Laws.

(4) A person who has reached the age of fourteen but not the age of sixteen who commits the crimes of intentionally killing another or intentionally injuring another, even causing serious injury or death, and the crimes of rape, robbery, drug trafficking, arson, explosion, and poisoning shall bear criminal responsibility.

(5) Article 23. Under either of the following circumstance, an interested person may apply to the people's court for a declaration of a citizen's death:

① if the citizen's whereabouts have been unknown for four years or,

② if the citizen's whereabouts have been unknown for two years after the date of an accident in which he was involved.

③ If a person's whereabouts become unknown during a war, the calculation of the time period in which his whereabouts are unknown shall begin on the final day of the war.

(6) Those who have been convicted to prison terms, are serving short-term forced labor under detention or have been put under surveillance but have not been stripped of their political rights; those who are in custody, under investigation, being charged and tried but the procuratorate or the court has not decided to suspend their rights of election; those who are on bail, or in residences under surveillance; those who are being reeducated through labor and those who have been punished with detention have the right to vote and stand for election.

3. (1) 本公约自开放供签署之日起对所有未签署国开放以便其加入。

(2) 在本合同生效后 10 天内，业主应向承包商支付合同价格金额 10 000 元，作为承包商完成该工程并承担本合同规定的所有义务的全部报酬。

(3) 出卖人出卖交由承运人运输的在途标的物，除当事人另有约定的以外，毁损、灭失的风险自合同成立时起由买受人承担。

(4) 采用统一规则，更新和协调涉及海运区段的国际货物运输规则，将增强法律确定性，提高国际货物运输效率和商业可预测性，减少所有国家之间国际贸易流

通的法律障碍。

(5) 如果一方("转让方")拟将其在合营公司注册资本的部分或全部转让给第三方,另一方有以与转让方向第三方提出的同等价格优先购买的权利。

第 5 课

1. (1) compensate

(2) loss

(3) obligation

(4) reparation

(5) negligence

(6) liability

2. (1) These Provisions apply to the investigation and handling of illegal passenger transport by all kinds of motor and non-motor vehicles and related administrative activities within the administrative areas of this Municipality.

(2) Workers and employers shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.

(3) In principle, Party B does not accept the goods exceeding the quantity of orders. Under special circumstances, Party B may accept the product of Party B's next order in advance, subjecting to Party B's agreement.

(4) Except as otherwise provided for in the Agreement, neither the Agreement nor any right or obligation hereunder may be transferred, assigned or delegated by any Party without the prior written consent of the other Parties.

3. (1) 本协议的签订可以采用一式多份的方法,并且,其中的每一份将被视为一份原件,全部合同文本在一起将构成一份并且相同的法律文书。

(2) 在按照本条上述各款向国际劳工局局长提出的声明里,应说明本公约规定是否将不经修改地,或在加以修改的情况下,对有关领土适用;倘若声明里说明本公约规定将在加以修改的情况下适用,则应说明这些修改的细节。

(3) 所有权默示条款

(1) 除下列第(3)款适用的买卖合同外,买卖合同中的卖方承担一项默示条款——发生现实交付买卖中的卖方,应具有销售货物的权利;出售协定中的卖方,应在财产所有权转移时具有销售该货物的权利。

(2) 除下列第(3)款适用的买卖合同外,买卖合同中的卖方还承担另外一项默示条款,即:

(a) 货物上应不存在,且在货物所有权移转前应一直不存在,任何在合同成立前未向买方披露的或买方不知悉的担保或负担;

(b) 买方应能平静地占有货物,除非受到货物所有人、其他已向买方披露的或已为买方知悉的对货物享有担保或负担权益之人的妨碍;

(3) 本款适用于从合同能够看出,或根据合同的情况可以推断出的、卖方意在移转他或第三人拥有的所有权的买卖合同;

(4) 适用第(3)款的合同中应含有一项默示条款,即卖方知悉而买方未知悉的全部权利担保或负担在合同订立之前已向买方披露;

(5) 适用第(3)款的合同中应含有另一项默示条款,即下列三者应不会妨碍买方对货物的平静占有,这三者是:

(a) 卖方;

(b) 在合同当事人认定卖方可转移第三人的所有权的情况下,该第三人;

(c) 任何通过卖方或从卖方处主张权利之人,或其他非在合同订立之前已经披露给买方或为买方知晓的负有担保或负担之第三人。

第 6 课

1. 答案略

2. (1) damages

(2) federal

(3) arbitration

(4) litigated

(5) resolved

(6) disputes

3. (1) ——assignment

(2) ——royalties

(3) ——tenancy

(4) ——know-how

(5) ——license

4. (1) Any increase in freight after the date of sale shall be forthe buyer's account.

(2) The goods we received are packed in wooden cases contrary to our instructions.

(3) This Contract shall come into force after the signatures by the authorized rep-

resentatives of both parties.

(4) The present Agreement is signed on June 2, 2010, in Shanghai, China by authorized representatives of the two Parties.

5. (1) A公司(以下称甲方)与B公司(以下称乙方)于2011年5月1日在中国北京,本着平等互利和友好协商的原则,特签订本合同。

(2) 兹以上述各点和契约所载条款为对价,订约双方协议如下。

(3) 本协定用中文和英文两种文字书写,两种文字具有同等效力。

(4) 新华社电,中国和日本今对利用核能初步草签了协议。

第7课

1. (1) enforcement

(2) equitable

(3) enrichment

(4) upheld

(5) the amount of

(6) uncertain

2. (1) The Seller shall, nevertheless be responsible for latent defects of the merchandise regardless of any delay of Buyer to give such written notice of claim.

(2) Vendor or Manufacturer may terminate this Agreement if Vendor has given Party A written notice of a breach, and the breach has not been cured within ninety(90)days.

(3) If Party B goes bankruptcy(including other similar conditions), this agreement is terminated from the date of Party A's sending of written notice.

(4) The validity, performance, and all matters relating to the effect of the Agreement shall be governed by the laws of the State of New York without giving effect to any conflict of law, provision or rule that might also be applicable.

3. (1) 因不可抗力、洪水、火灾、爆炸、暴风雨、地震、战争、恐怖行动、叛乱、暴动、阴谋破坏、或者任何政府机构的任何命令或行动等原因造成甲方不能履行或未履行本协议项下义务的,不应认定违约或产生任何赔偿或救济的责任。如上述"不能履行"或"未履行"未能在合理时间内得到救济的,则等待履行的一方终止本协议。

(2) 一方当事人依协议须向另一方当事人发出的通知,符合如下条件的当被视为已恰当地发出:以书面形式发出且亲自递交或以挂号邮寄、保证邮寄的方式寄送

至如下地址(邮资已付)或以传真方式发送并确认对方已收到,通知收到即生效。

第 8 课

1. (1) witness

(2) impartial

(3) colonial

(4) bonds

(5) statute

(6) notary

2. (1) ——notary public

(2) ——violence

(3) ——defense

(4) ——fee tail

(5) ——compulsory license

3.

Notarial Certificate of Adoption

Adoptive parents: Li Ming male, born on May 1, 1970, now resides at No. 1, Dongcheng Street, Beijing City.

Wang Fang, female, born on June 1, 1970, now resides at No. 1, Dongcheng Street, Beijing City.

Adoptee: Li Hua, male, born on May 1, 2000, now resides at No. 1, Dongcheng Street, Beijing City.

This is to certify that the adoptive parents Li Ming, Wang Fang adopted the abandoned infant Li Hua at Beijing on October 1, 2000. And since then Li Ming, Wang Fang will live together with Li Hua, call each other by the name of parents and children, and will fulfill their duties determined by law. Since then the adoptive relationship has been established, and Li Ming is Li Hua's adoptive father, Wang Fang is Li Hua's adoptive mother.

Notary Public: Zhang Wei

Notary Public Office of Beijing

The People's Republic of China

May 1, 2011

4.

密西西比州 州务卿办公室 **Dick Molpus**,州务卿
致各相关人士: 所附证明的签署人 JACK E. HARPER, JR.,在签署之日是具有正式资格从事法律行为的密西西比州森弗劳尔县衡平法院的书记员,他对所附文件的证明,其形式合法,并且是适当的官员行为,他的一切公务行为忠实可信。
本件于 2010 年 8 月 14 日签字并加盖办公室印章,特此为证。 [印章] (签名) 州务卿

5. (1) 本权利在以下载明日完全生效,并一直持续到 2011 年 5 月 1 日或持续到双方当事人规定的延展期或提前撤销期。

(2) 兹证明该公司内部细则的内容及通过程序符合《中华人民共和国公司法》的规定。

(3) 在此我通知撤销,且强调完全撤销上述授权委托书,以及根据授权委托书授予或旨在授予汤姆的一切权力和权限。

(4) 兹证明汤姆于 2011 年 5 月 1 日来到我处,在我的面前,在前面的声明书上签名。

第 9 课

1. (1) possibility

(2) duress

(3) threat

(4) damages

(5) wrongful

(6) constitutes

2. (1) capacity defense

(2) degree of crime

(3) due process

(4) duress

(5) criminal-justice system

3. (1) The Court decides that the aforesaid facts establish the Defendant's breach of the Contract and the Defendant shall compensate the Plaintiff for losses suf-

fered.

(2) In suspicion of her involvement in the present case, the accused was detained on January 1, 2010, arrested on February 1, 2010, and is now detained in the First Detention House of Beijing.

(3) After being brought to justice, the accused actively cooperated with the customs officers in investigation and adopted a positive attitude toward confession. In consideration of the slightly malicious intent of the accused and the absence of circumstances for severe punishment, the defense counsel pleads for a lighter punishment to be imposed upon the defendant by this Court.

(4) As to the applicable law applied in this case, the United Nations Convention on Contracts for the International Sale of Goods, 1980 (hereinafter as "Convention") shall be applied, owing to the business places of the sales contract's parties in this case are in the People's Republic of China and the Federal Republic of Germany respectively which are contracting states of the Convention.

(5) In this case, the Plaintiff claims that the Defendant did not deliver the goods according to the Contract signed by the parties on 27 February 2006(hereinafter as "the Contract") and fundamentally breached the Contract of this case. Pursuant to Clause 9 of the Contract, the Defendant was obliged to ship the Goods of the Contract to the Plaintiff by 31 May 2006. However, the Defendant failed to ship any quantity of the Goods on 31 May 2006, or at anytime thereafter.

4. (1) 作为对所有要求的救济请求的独立积极抗辩,被告认为,依据衡平法上的迟误原则,法院应拒绝原告起诉状中的诉讼请求。

(2) 本人已经超过 18 岁,具有法律上的行为能力,对以下所述事实,本人能以自己所知提供证词。

(3) 仲裁庭注意到,根据本案合同第 3 条和第 4 条,本案合同项下货物的数量为 4 000 mts。仲裁庭认为,尽管第 4 条和第 5 条规定了数量浮动的范围,但是,此规定仅适用于实际交付的货物。由于被申请人并没有根据本案合同实际交付货物,本案合同中规定的数量浮动范围并不适用,因此,应以 4 000 mts 作为计算损害赔偿的基础。

(4) 如不服本判决,可在接到判决书的第二日起十日内,通过本院或者直接向上海

市高级人民法院提出上诉。书面上诉的，应当提交上诉状正本一份，副本二份。

第 10 课

1. (1) expenditure

(2) breaching

(3) damages

(4) implicitly

(5) indemnification

2. (1) The Chairman, following consultation with the Vice Chairman, shall decide on the timing and location of such interim Board meeting, **provided that** such interim Board shall be held not less than [fifteen(15)] days and not more than [forty-five(45)] days following delivery of such request.

(2) This Contract **is subject to** the approval of the Examination and Approval Authority before the same may become effective.

(3) All products, including industrial and agricultural products, shall **be subject to** the provisions of this Agreement.

(4) **Where** an act is expressly defined in laws as a criminal act, it shall be determined and punished as a criminal act in accordance with the law; **where** an act is not expressly defined in the laws as a criminal act, it shall not be determined and punished as a criminal act.

(5) The arbitration is to be administered by the American Arbitration Association and is to be conducted **in accordance with** the Commercial Arbitration Rules thereof.

3. (1) 在第四十九条的条件下，卖方即使在交货日期之后，仍可自付费用，对任何不履行义务做出补救，但这种补救不得造成不合理的迟延，也不得使买方遭受不合理的不便，或无法确定卖方是否将偿付买方预付的费用。

(2) 在特殊情况下，部长级会议可做出决定，豁免成员根据本协定或任何多边贸易协定所规定承担的义务，但任何这种豁免决定应由全体成员的四分之三人作出，除非本款另有规定。

(3) 参众两院应各自审查本院的选举、选举结果报告和本院议员的资格，每院议员过半数即构成可以议事的法定人数；不足法定人数时，可以一天推一天地延期开会，并有权依照各该议院所规定的程序和罚则，强迫缺席的议员出席。

(4) 董事行为准则

(a) 董事会成员履行董事义务，应(1)诚信行事；和(2)以其合理认定的符合公司最大利益的方式行事。

(b) 董事会成员或董事会委员会成员，在知悉与其决策职能相关的信息，或专注于其监管职能时，应以相同职位者在类似情形下合理认定应有的谨慎来履行义务。

(c) 董事履行董事会或董事会委员会义务时，有权信赖(e)款第(1)项或(e)款第(3)项所规定之人员：该人员可接受由董事会以正式或非正式行为转授的权力或义务，以履行相关法律允许转授的一项或多项董事会职能；除非该董事具备相关知识致使此种信赖失去合理性。

(d) 董事履行董事会或董事会委员会义务时，有权信赖(e)款所指之人整理、提供的信息、意见、报告或报表，包括财务报表及其他财务数据；除非该董事具备相关知识致使此种信赖失去合理性。

(5) 本条例所称的计算机软件(以下简称"软件")是指计算机程序及其有关文件。

第 11 课

1. (1) reasoning

(2) individual's

(3) multitude

(4) sentiments

(5) chapters

(6) conception

2. (1) ——natural law

(2) ——necessity

(3) ——presumption of innocence

(4) ——prevention doctrine

(5) ——preventive law

3. (1) 此外，当无法实现上述遵从时(因为法律多元主义的一些例子是专制、残暴、与/或极不自由的)，为掌控混杂性而设的程序至少可以要求决策者解释为何无法实现此种遵从。总之，多元主义不仅更全面地描述与解释了我们生活的这个世界，还为程序性机制、机构及实践的设计提供了一种有潜在价值的替代路径。

(2) 当我们谈及"法律"、"法律杖序"或"法律命题"的时候，必须特别注意法学和社会

学观点之间的差异。如果采取法学的观点，我们会问：什么能够具有作为法律的内在效力？也就是说：应当按照正确的逻辑赋予一种具有法律命题之形式的句式以什么样的意义或规范含义。但是，如果我们站在后者的观点上来考虑问题，我们就会问：由于存在着这样的可能性，即：参与社会活动的人们，特别是那些对社会活动具有相当的社会影响力的人们主观上认为某些规范有效，并且实际上确实按照这些规范来行动、也就是使自己的行为以这些规范为取向，这样，在一个共同体中实际上会发生什么事情？从原则上讲，这种差异也决定着法律与经济之间的关系。①

(3) 上世纪七八十年代，多名死刑犯被无罪释放；他们原本无辜，但却忍受了长达数十年的监禁之苦，这引发了人们对日本刑事司法制度的批判。法官受抨击的主要原因在于其薄弱的事实调查环节，公民团体对于刑事陪审团的呼声开始出现。这些公民团体认为陪审团参与案件能弥补法官生活经验的不足，也是被告人权利的必要保障。最高法院于 1987 年承认司法公信力下降，并着手立项研究国外的陪审制度。受这一决定的鼓励，日本辩护士联合会(Japan Federation of Bar Associations)在上世纪 90 年代早期召开数次陪审制全国研讨会，公民团体每年还招募人员参加模拟审判。

4. (1) Born in the particular context of Chinese history and culture, the legal profession itself must exist some "inherent shortages". Deficiencies in equal sense of social consciousness will necessarily result in lawyers' comparatively strong anaclisis, while lack of rights awareness will certainly render the lawyers relatively less capability to maintain legal rights.

(2) Criminal Jurisdiction per se is a power to investigate the criminal cases and make judgment on this base. Criminal judicial institution based on criminal jurisdiction per se is an institution to keep the balance between individual freedom and social order. In short, criminal judicial institution is an institution to harmonize inevitable conflicts caused by nation's public power and individual private power in criminal field. The direct embodiment of this institution is the safeguard of human rights and the control of crime.

(3) The concept of correction comes from the Positive School of Criminology and there was no such a concept like correction in the time of the Classical School of Criminol-

① 译文选自郑戈：《法律学术翻译的规范》，载《北大法律评论》(第 2 卷 · 第 1 辑)，第 312 页。

ogy, as we know that what the retributivism emphasizes is the punishment and the deterrence is what the utilitarianism pointed to. Under that circumstance, criminal punishment is nothing but a mere means of sanction or a vehicle of deterrence. The Positive School of Criminology, Sociological School of Criminology in particular, is well known of Von Liszt's thoughts of education transformation, in which the idea of correcting the criminals is covered. Liszt once said that "To correct those correctable criminals, and make sure those uncorrectable give up committing crimes." Although Liszt didn't give full exposition of the theory as how to correct the criminals, it couldn't make us feel improper to regard him as the founding father of the concept of correction. As compared to the concepts of retributive punishment and deterring punishment, the concept of correction gives more positive sense to criminal punishment. A criminal is not simply an object of punishment, but an object of correction. Although not every criminal can be corrected to be a law-abiding citizen at last, the chance of rehabilitation to be a good people for a criminal is highly possible. Thus, the concept of correction can not only make the criminal punishment a vehicle to combat the evil but also a way to gain virtue.

附录七："华政杯"全国法律翻译大赛初赛试题及参考译文

"华政杯"全国法律英语翻译大赛初赛试题

第一题：公司法

STANDARDS OF CONDUCT FOR DIRECTORS

(a) Each member of the board of directors, when discharging the duties of a director, shall act: (1) in good faith, and (2) in a manner the director reasonably believes to be in the best interests of the corporation.

(b) The members of the board of directors or a committee of the board, when becoming informed in connection with their decision-making function or devoting attention to their oversight function, shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances.

(c) In discharging board or committee duties a director, who does not have knowledge that makes reliance unwarranted, is entitled to rely on the performance by any of the persons specified in subsection(e)(1) or subsection(e)(3) to whom the board may have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law.

(d) In discharging board or committee duties a director, who does not have knowledge that makes reliance unwarranted, is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection(e).

第二题:合同法

Implied terms about title

(1) In a contract of sale, other than one to which subsection(3) below applies, there is an implied term on the part of the seller that in the case of a sale he has a right to sell the goods, and in the case of an agreement to sell he will have such a right at the time when the property is to pass.

(2) In a contract of sale, other than one to which subsection(3) below applies, there is also an implied term that—

(a) the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made, and

(b) the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

(3) This subsection applies to a contract of sale in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the seller should transfer only such title as he or a third person may have.

(4) In a contract to which subsection(3) above applies there is an implied term that all charges or encumbrances known to the seller and not known to the buyer have been disclosed to the buyer before the contract is made.

(5) In a contract to which subsection(3) above applies there is also an implied term that none of the following will disturb the buyer's quiet possession of the goods, namely—

(a) the seller;

(b) in a case where the parties to the contract intend that the seller should transfer only such title as a third person may have, that person;

(c) anyone claiming through or under the seller or that third person otherwise than under a charge or encumbrance disclosed or known to the buyer before the contract is made.

第三题:WTO 与反垄断法

The United States, after threatening unilateral action under the much criticized Section 301 of the Trade Act of 1974, brought the matter to the WTO. The facts presented

by the United States Trade Representative were sharply contested. But even if these facts had been conceded, the United States would have faced a serious problem: neither trade law nor antitrust law provided a forum or context for examination of the whole problem. The alleged private restraints were subject to the jurisdiction of the Japan Fair Trade Commission(JFTC), but the JFTC, not unpredictably, found no antitrust violation. Japan's trade-restraining statutes, alone, were the basis for the US case at the WTO, but they were only a piece of the picture. A dispute resolution panel concluded that Japan's laws did not run afoul of the GATT rules. Whether the laws seriously harmed trade and competition was not relevant. The GATT's prohibitions against trade-restraining laws are narrow. They do not prohibit measures simply because they unreasonably restrain trade. The US challenge failed because(i) the trade-restraining laws of the Japanese government were not new restraints of which the United States had no notice at the time Japan agreed to reduce its trade protection(i. e. the existence and enforcement of the laws did not defeat United States' reasonable expectations) and(ii) the measures did not discriminate against foreigners; they were neutral on their face.

第四题:法学理论

In order to conceptualize this world, I introduce literature on legal pluralism, and I suggest that, following its insights, we need to realize that normative conflict among multiple, overlapping legal systems is unavoidable and might even sometimes be desirable, both as a source of alternative ideas and as a site for discourse among multiple community affiliations. Thus, instead of trying to stifle conflict either through an imposition of sovereigntist, territorially-based prerogative or through universalist harmonization schemes, communities might sometimes seek(and increasingly are creating) a wide variety of procedural mechanisms, institutions, and practices for managing, without eliminating, hybridity. Such mechanisms, institutions, and practices can help mediate conflicts by recognizing that multiple communities may legitimately wish to assert their norms over a given act or actor, by seeking ways of reconciling competing norms, and by deferring to other approaches if possible. Moreover, when deference is impossible(because some instances of legal pluralism are repressive, violent, and/or profoundly illiberal), procedures for managing hybridity can at least require an explanation of why a decision maker cannot defer. In sum, pluralism offers not only a more comprehensive descriptive account of the world we live in,

but also suggests a potentially useful alternative approach to the design of procedural mechanisms, institutions, and practices.

第二届"华政杯"全国法律英语翻译大赛初赛试题

试题一:(合同法与侵权法)

Contracts also generate general duties of care in dealing with the rights, objects of legal protection and legally protected interests of the contractual partners. Such "collateral" obligations do not normally have any relation to the content of the respective "primary" performance obligation and can therefore in principle become significant in every type of contract. The more ambitious a legal system is in the development of such contractual collateral obligations for the protection of interests already existing independent from the direct performance expectations formed by the contract, the more practical weight is given to the respective concurrence of actions rules, which give details of the relationship of contractual liability with parallel tortuous liability. The narrower the scope of contractual duties is, the narrower the overlaps with the area of application of tort law turn out to be. The consequence is in turn, that the area of application of the respective legal principles governing concurrence of actions becomes narrower. A concurrence of actions rule which grants in principle contractual liability priority of application over tortuous liability, has to keep the area of contractual liability narrow in the interest of protecting the victim, if tort law is more favorable to an injured party in an individual case than contract law.

试题二:(财产法)

Subject to the provisions of the Declaration and other provisions of law, a unit owner:

(1) may make any improvements or alterations to his unit that do not impair the structural integrity or mechanical systems or lessen the support of any portion of the common interest community;

(2) may not change the appearance of the common elements, or the exterior appearance of a unit or any other portion of the common interest community, without permission of the Unit Owners Association(hereinafter called "Association");

(3) after acquiring an adjoining unit or an adjoining part of an adjoining unit, may re-

move or alter any intervening partition or create apertures therein, even if the partition in whole or in part is a common element, if those acts do not impair the structural integrity or mechanical systems or lessen the support of any portion of the common interest community. Removal of partitions or creation of apertures under this paragraph is not an alteration of boundaries;

(4) may subdivide a unit into two or more units. Subject to the provisions of law, upon application of a unit owner to subdivide a unit, the Association shall prepare, execute, and record an amendment to the Declaration;

(5) The amendment to the Declaration must be executed by the owner of the unit to be subdivided, assign an identifying number to each unit created, and reallocate the allocated interests formerly allocated to the subdivided unit to the new units in any reasonable manner prescribed by the owner of the subdivided unit.

试题三：(法律史)

For much of our history, the United States was not a lender but a borrower of law. The United States is a common-law system; and the common law was, in its origins, essentially English. In the first part of the nineteenth century, American courts looked to English law for inspiration, to English jurists and treatise writers. Case law was peppered with citations of English cases. Notable scholar-judges, like James Kent and Joseph Story, also read, absorbed, and tried to import into American law key aspects and insights of European legal thought. The British influence declined throughout the nineteenth century; and in the twentieth century it was all but dead. American cases rarely cite foreign materials. Courts occasionally cite a British classic or two, a famous old case, or a nod to Blackstone; but current British law almost never gets any mention. In the twentieth century German philosophy had some residual influence; and Karl Lewellyn, for one, absorbed a good deal of German legal culture. It is fair to say, however, that American lawyers and jurists have been, on the whole, extremely parochial. At some crucial points, scholars and states people did look abroad. English law influenced the shape of the workers' compensation statutes; key phrases were lifted almost verbatim from the English act. The English act, in turn owed something to legislation adopted earlier in Bismarck's Germany. The English Companies Law of 1929 and a Securities Act of 1933 were real influences on the text of the Securities and Exchange Act. Commercial statutes similarly were indebted to British models.

试题四:(公司法与国际经济法)

(i) In general. The Department of Commerce(hereinafter called "Department") normally will attribute a subsidy to the products produced by the corporation that received the subsidy.

(ii) Corporations producing the same product. If two(or more) corporations with cross-ownership produce the subject merchandise, the Department will attribute the subsidies received by either or both corporations to the products produced by both corporations.

(iii) Holding or parent companies. If the firm that received a subsidy is a holding company, including a parent company with its own operations, the Department will attribute the subsidy to the consolidated sales of the holding company and its subsidiaries. However, if the Department finds that the holding company merely served as a conduit for the transfer of the subsidy from the government to a subsidiary of the holding company, the Secretary will attribute the subsidy to products sold by the subsidiary.

(iv) Input suppliers. If there is cross-ownership between an input supplier and a downstream producer, and production of the input product is primarily dedicated to production of the downstream product, the Department will attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations(excluding the sales between the two corporations).

(v) Transfer of subsidy between corporations with cross-ownership producing different products. In situations where paragraphs(b)(6)(i) through(iv) of this section do not apply, if a corporation producing non-subject merchandise received a subsidy and transferred the subsidy to a corporation with cross-ownership, the Department will attribute the subsidy to products sold by the recipient of the transferred subsidy.

(vi) Cross-ownership defined. Cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. Normally, this standard will be met where there is a majority voting ownership interest between two corporations or through common ownership of two(or more) corporations.

首届"华政杯"全国法律英语翻译大赛
初赛参考译文

【第一篇译文】

董事行为准则

(a) 董事会成员履行董事义务，应(1)诚信行事；和(2)以其合理认定的符合公司最大利益的方式行事。

(b) 董事会成员或董事会委员会成员，在知悉与其决策职能相关的信息，或专注于其监管职能时，应以相同职位者在类似情形下合理认定应有的谨慎来履行义务。

(c) 董事履行董事会或董事会委员会义务时，有权信赖(e)款第(1)项或(e)款第(3)项所规定之人员：该人员可接受由董事会以正式或非正式行为转授的权力或义务，以履行相关法律允许转授的一项或多项董事会职能；除非该董事具备相关知识致使此种信赖失去合理性。

(d) 董事履行董事会或董事会委员会义务时，有权信赖(e)款所指之人整理、提供的信息、意见、报告或报表，包括财务报表及其他财务数据；除非该董事具备相关知识致使此种信赖失去合理性。

【第二篇译文】

所有权默示条款

(1) 除下列第(3)款适用的买卖合同外，买卖合同中的卖方承担一项默示条款——发生现实交付买卖中的卖方，应具有销售货物的权利；出售协定中的卖方，应在财产所有权转移时具有销售该货物的权利。

(2) 除下列第(3)款适用的买卖合同外，买卖合同中的卖方还承担另外一项默示条款，即：

(a) 货物上应不存在，且在货物所有权移转前应一直不存在，任何在合同成立前未向买方披露的或买方不知悉的担保或负担；

(b) 买方应能平静地占有货物，除非受到货物所有人、其他已向买方披露的或已为买方知悉的对货物享有担保或负担权益之人的妨碍。

(3) 本款适用于从合同能够看出，或根据合同的情况可以推断出的、卖方意在移转他或第三人拥有的所有权的买卖合同。

(4) 适用第(3)款的合同中应含有一项默示条款，即卖方知悉而买方未知悉的全部权利

担保或负担在合同订立之前已向买方披露。

(5) 适用第(3)款的合同中应含有另一项默示条款,即下列三者应不会妨碍买方对货物的平静占有,这三者是:

(a) 卖方;

(b) 在合同当事人认定卖方可转移第三人的所有权的情况下,该第三人;

(c) 任何通过卖方或从卖方处主张权利之人,或其他非在合同订立之前已经披露给买方或为买方知晓的负有担保或负担之第三人。

【第三篇译文】

在威胁将依备受诟病的《1974 年贸易法》第 301 条采取单边行动之后,美国将该事项提交到了世界贸易组织。美国贸易代表呈递的事实受到了强烈反对。然而,即便这些事实得到承认,美国还会面对一个严重的问题:贸易法或反垄断法均未提供审查整个问题的平台或相关背景。美国声称的私人受限问题由日本公平交易委员会(JFTC)管辖,但不出所料,JFTC 认定其不违反反垄断法。只有日本关于贸易限制的立法成为美国所提交案件的依据,但它们在整个问题中只能起部分作用。争端解决小组认为日本的法律与《关税及贸易总协定》(GATT)规则并无冲突。故不涉及这些法律是否严重损害贸易与竞争的问题。GATT 中关于禁止进行贸易限制立法的规定适用范围较窄。其并不仅仅因为一些措施不合理地限制贸易就禁止它们。美国的指控之所以失败,原因在于(1)日本政府的贸易限制法并非是美国在日本同意减少贸易保护时没有注意到的新限制措施(即法律的存在与实施并未使美国失去合理期待),以及(2)这些措施并未区别对待外国人;它们在表面上是中立的。

【第四篇译文】

为了对这个世界有个概念,我介绍了关于法律多元主义的文献;顺着它们的思路,我提出,必须认识到多元、交错的法律制度间的规范性冲突是不可避免的,有时甚至可能是有益的;它既是各类替代性思路产生的根源,又是多元的社群成员的话语阵地。因此,各类社群不应通过领域内最高权威的确立或普适性的大一统方案来压制冲突,而可以寻求(而且愈来愈多地是在创造)一系列程序性的机制、机构及实践,来掌控——而非消除——这种混杂性。这些机制、机构及实践承认各类社群有正当理由期待对特定行为或行为人主张其规范,寻求互相对抗的规范间的协调方式,或遵从其他替代性路径,故其有助于调和冲突。此外,当无法实现上述遵从时(因为法律多元主义的一些例子是专制、残暴、与/或极不自由的),为掌控混杂性而设的程序至少可以要求决策者解释为何无法实现此种遵从。总之,多元主义不仅更全面地描述与解释了我们生活的这个世界,还为程序性机制、机构及实践的设计提供了一种有潜在价值的替代路径。

第二届"华政杯"全国法律英语翻译大赛初赛参考译文

【第一题参考译文】

合同在规定缔约伙伴的权利、法律保护的客体及受法律保护的利益时，也产生一般的注意义务。此种"附随"义务通常与各方的"主要"履约义务的内容无关，因此，基本上在各类合同中都变得很重要。在此类附随义务的发展过程中，一项法律制度越是注重以此来保护独立于合同确立的直接履约期待权而存在的权益，就越会重视行为竞合的规则，该规则会对合同责任与相应侵权责任之间关系作出详细的规定。合同义务的范围越窄，它与侵权法竞合的地方就越窄。规范行为竞合的法律原则的适用范围也就会变得越窄。如果在某一个案中适用侵权法可能比合同法更有利于受损害方，那么，原则上规定合同责任优先于侵权责任适用的行为竞合规则，须从保护受害人的利益角度出发，使合同责任的适用固定在有限的范围内。

（试题一：合同法与侵权法，选自 The interaction of contract law and tort and property law in Europe: a comparative study）

【第二题参考译文】

依据《公告书》（类似于《物业管理规约》——译者注）的规定和其他法律规定，单元所有权人：

（1）可以对其单元进行修缮或改变，但不得损害共同利益社区的结构的整体性、机械系统，或减少共同利益社区的任何部分的承重结构；

（2）未经单元所有权人协会（以下简称"协会"）允许，不得改变共有部分的形状，或者单元的外观，或共同利益社区其他任何部分的外观；

（3）在获得相邻单元或相邻单元的相邻部分的所有权后，可以拆除或改变（横亘单元间的）任何隔墙，或在该隔墙上开口，即使该隔墙的全部或部分属于"共有部分"，惟上述行为不得损害共同利益社区的结构的整体性，机械系统，或减少共同利益社区的任何部分的支撑。本款所谓隔墙的拆除或在隔墙上开口不属于对边界的改变；

（4）可以将一个单元分割为两个或两个以上的单元。依法律规定，协会接受单元所有权人请求分割单元的，应做好《公告书》修订条文的准备、签署和登记工作；

（5）对《公告书》的修订须由提出分割请求的单元所有权人签署，新划分的单元都应有一个识别号码，以被分割单元所有权人规定的任何合理方式将之前分配给被分割单元的利

益重新分配给分割后的新单元。

(试题二:财产法,选自 UNIFORM COMMON INTEREST OWNERSHIP ACT 1994)

【第三题参考译文】

在美国历史上的很长一段时期里,美国并不是法律的输出者,而是引入者。美国是一个普通法系国家,而普通法基本上是源于英国的。19 世纪初叶,美国法院向英国法、英国法学家和法学专著的作者寻求灵感。案例法中大量引用英国案例。著名的学者型法官詹姆斯·肯特和约瑟夫·斯托里等人还阅读和吸收欧洲法律思想中的重要方面与见解,并努力将它们输入到美国法之中。英国的影响在 19 世纪期间就已减弱,到 20 世纪则几乎消亡。美国的案例极少援引外国资料。法庭偶尔援引一两个经典的判例,某一著名的古代案例,或是表示赞同布莱克斯通的观点,但对现行的英国法则几乎绝口不提。在二十世纪,德国哲学仍有些许影响,例如,卡尔·卢埃林就吸收了不少德国的法律文化。但是平心而论,美国律师和法学家整体上完全本土化了。在一些特定的方面,学者和美国人民的确借鉴外国的做法。英国法影响了"劳工赔偿法"的制定:关键用语几乎一字不差地从英国法案中搬来。反过来,英国的这则法案则曾受到俾斯麦时期的德国法律的影响。英国《1929 年公司法》与《1933 年证券法》对《证券交易法》的内容产生了实际影响。商事制定法也同样借鉴了英国的范例。

(试题三:法律史,选自弗里德曼的专著:"American Law in the 20th Century")

【第四题参考译文】

一、(一般规定)商务部一般认定获得补贴的公司所生产的产品存在补贴。

二、(生产相同产品的公司)如果两个(或两个以上)具有交叉所有权的公司均生产涉案商品,商务部将把其中任何一家公司或两家公司获得的补贴认定为两家公司生产的产品均存在补贴。

三、(控股公司或母公司)如果获得补贴的公司是控股公司(包括自己也经营的母公司),商务部将认定该控股公司及其各子公司的销售总额存在补贴。但是,商务部如确认控股公司仅是补贴从政府流向其子公司的渠道,商务部部长会认定该子公司销售的产品存在补贴。

四、(投入供应商)如果一家投入供应商与一家下游生产商之间具有交叉所有权,且投入品的生产主要用于下游产品的生产,商务部将会把投入生产商获得的补贴认定为两家公司生产的投入品和下游产品的销售总和中存在补贴(不包括两公司之间的买卖)。

五、(生产不同产品但具有交叉所有权的公司与公司之间的补贴转移)凡不适用本条第(b)(6)(i)至(iv)款情形的,如果生产非涉案商品的一家公司获得补贴,但已将该补贴转移至另一家与其具有交叉所有权的公司,则商务部将会认定接受被转移补贴的后一家公司所

生产的产品存在补贴。

六、(交叉所有权)当一家公司可以按照使用自己资产的方式，去使用或指示另一家(或几家)公司的单独资产时，该两家或多家公司存在交叉所有权。通常，如两个公司之间存在多数决所有权利益，或两个(或更多)公司之间存在共同所有权，则认定满足交叉所有权标准。

(试题四：公司法与国际经济法，选自美国反补贴税法351条。)

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