專 題 研 究

「由公司治理實務談企業經營者法律責任」美國德拉瓦州公司法介紹—董事之受託人義務(專題演講實錄)

美國德拉瓦州最高法院大法官 Randy J. Holland

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主持人：

Justice Holland, Chairman Lu, Lawyer John, Professor Lin, trainees of Academy, ladies and gentlemen, good afternoon.

It's great honor to invite Justice Holland to our Academy. Justice Holland came all the way from the United States and will give us a speech about director legal duties of the Delaware Corporation Law. Also, we have a lawyer John, seasoned lawyer in corporate law of Delaware. Also, we have Professor Lin from Chao Tung University Law School. Especially, I would like to introduce Chairman Lu Dong-ying of Taiwan Corporate Governance Association, who made this seminar possible. Thank you very much.

Justice Holland is Justice of the Delaware Supreme Court. Recently, Taiwan has seen several cases and scandals about financial crimes, environmental pollutions, and undermined food safety. Therefore, we emphasize and take notice of corporate governance as some corporations in Taiwan were involved in this kind of cases. Corporate governance has become an issue of great concern in Taiwan. So it's great to have you share your experience and knowledge about corporate law.

Justice Holland is very famous in the United States, especially in the corporate law field. If you Google, you will easily find his remarkable achievement. Justice Holland graduated from Pennsylvania Law School. He received his master of the law in judicial process from Virginia Law School. He is the youngest justice of Delaware Supreme Court. He received numerous awards about his career achievement. He has held many prestigious positions since he began serving at the Delaware Supreme Court in 1986. Now he is in his third term (with one term being twelve years) of service as the Justice of Delaware Supreme Count. So we are very pleased to have Justice Holland visit our Academy. On behalf of the Academy of the Judiciary, Ministry of Justice, I would like to welcome and extend our deepest gratitude to Justice Holland.

Then, I would invite Chairman Lu Dong-ying to say a few words to us. Thank you.

與會人呂東英：

我用中文講，各位聽得不要那麼辛苦。赫倫大法官、蔡院長，還有遠道的Mr. John、林教授，大家午安，大家好，我是中華公司治理協會義工理事長，呂東英。

我要特別感謝赫倫大法官，連續十年來台灣，這次是第十次了，沒有一位外國賓客如此熱誠，願意為台灣社會現象所引發的法律問題，以德拉瓦州的經驗來跟我們講解，在座各位女士先生，大家都知道徐旭東的SOGO案，辦了十三年還沒了結。

各位知道民國68年有個外匯案嗎？第一銀行有三位職員，官司連續打了28年，後面又有五年的冤獄賠償，我們的法律訴訟過程是如此漫長。我們想到，假如我們能學習德拉瓦州商事法院的制度，不知能夠幫助國人於訴訟過程中省下多少精力與金錢？所以公司治理協會有個小小的願望，願意努力促成商事法院的成立，台灣商人到外面談判、做生意時，敢在契約中要求，以台灣台北商事法院為管轄法院。當商事法院有這樣的效率之後，我們會把這個制度推廣到大陸去，讓大陸司法紛爭所引發的問題，可以像台灣一樣，有效率地解決。

公司治理協會，希望兩岸人民可以有相同的商事紛爭處理程序，所以非常感謝德拉瓦州赫倫大法官願意每年來台，討論台灣面臨的問題。他花了很多精神，以這次為例，他不只是談德拉瓦州怎麼處理公司忠實履行義務，也會分享聯管制度，好比大家熟知的味全案，該案中董事會幾乎無能，以及奇美太陽能面板廠案件，大股東放棄後公司無人看管，類似這樣與聯管制度有關的問題，大法官也將與台灣分享德拉瓦州的經驗。以上簡單說明赫倫大法官對於台灣未來法律建置的莫大貢獻，感謝他。

另外，Mr. John也參與了一件事。目前在台灣，董事責任是一大問題，高等法院判例，所有董事責任都不同，但德拉瓦州怎麼做，不一樣，有盡責的董事，可以免責，這怎麼做？我相信，在大法官本次的演講中，我們可以得到一些啟示。而Mr. John則是幫助協會設置一個「國際公司治理判例資料庫」，讓司法界與學界都可以運用這個資料庫，來提升整體的司法水準，這是公司治理協會努力的目標。謝謝院長給我這個機會，謝謝各位。

主持人：

非常感謝呂理事長的說明，我補充一下，赫倫大法官還特別為台灣法律界的讀者，寫了一本關於德拉瓦州的公司法案例選集，相當難得。今天的專題演講分為兩部份，第一部分，請赫倫大法官向各位演講，第二部分，由各位提問，進行詢答。

今天我們也邀請了一位口譯員，專門為各位提供語言服務。讓我們用熱烈的掌聲，歡迎赫倫大法官。

主講人：

Thank you, President Tsai, Chairman Lu. It’s an honor for me to be here. I did become a judge when I was young in the United States. But I was much older than all of you.

譯：謝謝院長與理事長，非常榮幸可以來到這裡，我確實很年輕就當上法官，但我當時比現在的各位還要年長。

Today I am going to speak about Delaware Corporation Law, in particular, directors’ fiduciary duties. In the United States, we create a system that divides sovereign powers between the fifty states and the national federal government. As a general matter, the federal government and federal law regulate the national securities markets. However, the formation

of corporations is controlled by state law and issues of corporate governance are regulated by the law of the incorporating state.

譯：今天我將與各位分享德拉瓦州的公司法，並特別談談受託人義務。美國憲法建立了一套制度，將五十個州與聯邦政府的權力劃分開來，一般來說，聯邦政府與聯邦法管轄的是全國證券市場，但是公司的設立則是由州法律來管轄，公司治理的相關事務，則是由公司設立所在地的州法律所規範。

Nevertheless, within the United States Constitution's bifurcated system of duel state and federal sovereign powers, there is some overlap. For example, the federal Securities Litigation Uniform Standards Act of 1998 and the Sarbanes-Oxley Act of 2002, adopted some rules about corporate governance that overlap with state law.

譯：儘管如此，在美國憲法各州與聯邦權力互爭的制度之下，其中有些重疊之處，舉例來說，1998年的《聯邦證券訴訟統一標準法》與2002年的《沙賓法》，其中的公司治理規則與州法律就有重疊之處。

The State of Delaware is known as the Corporate Capital of the World. Delaware is the state of incorporation for more than half of all companies whose stock is traded on the New York Stock Exchange and the NASDAQ. It is also the state where more than sixty percent of the Fortune 500 companies are incorporated.

譯：德拉瓦州有世界公司首都之稱，在德拉瓦州有超過一半的公司，都有在紐約證交所與那斯達克上市，另外，財富五百大公司有超過六成也是在德拉瓦州成立的。

The decisions of the Delaware Supreme Court and the Delaware Court of Chancery, that address issues arising under Delaware's corporate law, are cited with approval nationally and internationally. The Court of Chancery is a non-jury trial court with equitable jurisdiction and is responsible for initially developing the law on corporate matters.

譯：德拉瓦州最高法院及衡平法院，對於公司法議題的處理與裁決，是受到海內外敬重與贊同。衡平法院是一個沒有陪審團的審判法院，有公平的司法管轄權，負責初步建構公司事務相關的法律。

The Supreme Court is the highest court in Delaware and hears appeals from decisions by the Court of Chancery. The Court of Chancery is so well respected that a majority of its judgments are never challenged by an appeal.

譯：最高法院則是德拉瓦州的終審法院，審理當事人不服衡平法院判決的案件，衡平法院非常受到敬重，大多數的判決，當事人都沒有再提起上訴。

For the last six years, the Delaware judicial system has been ranked first in the nation for efficiency and fairness in civil litigation by a Harris Poll conducted for the United States Chamber of Commerce.

譯：根據Harris Poll為美國商會進行的一項調查，過去六年來，德拉瓦州的司法體系在民事訴訟的效率與公平性，排名全國第一。

Under the United States Constitution, the decisions of the Delaware courts are final and authoritative on almost all matters of corporate law because of the internal affairs doctrine. The internal affairs doctrine is a venerable choice of law principle which recognizes that only one state should have the authority to regulate a corporation's internal affairs, that is, the state of incorporation. The internal affairs doctrine developed on the premise that, to prevent corporations from being subjected to inconsistent legal standards, the authority to regulate a corporation's internal affairs should not rest with multiple jurisdictions.

譯：在美國憲法之下，德拉瓦州針對公司法相關議題的判決，都具有終局性與所謂的權威性，這是因為有所謂的「內部事務準則」。內部事務準則是一個選法的原則，強調只有公司設立所在地的州法律，可以管轄內部的事務。另外，內部事務準則有個前提，就是為了避免公司受到不一致的法律標準的約束，只有一個管轄區，能夠去管理公司的內部事務，也就是公司設立地點的所在州。

The internal affairs doctrine is not, however, only a conflicts of law principle. Pursuant to the Due Process Clause in the Fourteenth Amendment of the United States Constitution, directors and officers of corporations have a significant right to know what law will be applied to their actions and stockholders have a right to know by what standards of accountability they may hold those managing the corporation's business and affair. Therefore, an application of the internal affairs doctrine is mandated by constitutional principles, except in the rarest situations. For example, when the law of the state of incorporation is inconsistent with a national policy on foreign or interstate commerce.

譯：內部事務準則不只是一個法律衝突的原則，根據美國憲法第十四次修正案的正當程序條款，公司裡面的長官與董事，有權力知道那些法律會約束他們行為。另外，股東也有權利知道，他們可以憑藉什麼樣的標準，去要公司的管理階層負責。因此，內部事務準則的適用性，在憲法原則裡面，是有明定的，但是也有極少數的例外，舉例來說，當公司設立地點的州法律，和美國對於外國或跨州商業活動政策，不一致的時候，就會出現例外。

The internal affairs doctrine applies to those matters that pertain to the relationships between the corporation and its officers, directors and shareholders. In CTS Corp. v. Dynamics Corp. of America, the United States Supreme Court recognized that a State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs. Accordingly, in CTS, the United States

Supreme Court held that it is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares.

譯：內部事務準則適用於公司內部經理人、董事與股東之間的關係，在「CTS Corp. v. Dynamics Corp. of America」這個案件當中，美國最高法院認為促進公司裡面各方關係，與確保公司內部投資人能夠有效對公司事務發表意見，對於一個州來說，是有益的。因此，在這個案件當中，美國最高法院認為，由州來設立公司，劃分權力，以及界定股東應該擁有的權力，這是在商業領域可以接受的。

One of the fundamental tenets of Delaware corporate law provides for a separation of control and ownership. A cardinal precept of the Delaware General Corporation Law's statutory scheme is that directors, rather than shareholders, manage the business and affairs of the corporation. Section 141(a) of the Delaware General Corporation Law states in pertinent part： "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors except as may be otherwise provided in this chapter or in its certificate of incorporation."

譯：德拉瓦州公司法有一個很重要的基礎，將控制權與所有權劃分開來，德拉瓦州公司法中，另一個重要的基礎是，管理公司內部事務的人是董事。在德拉瓦州公司法第141(a)條提到，「除本章或公司章程另有規定之外，本章裡面所提到公司的事務，應該是由董事來管理，或是依照董事的指令來管理。」

The directors' exercise of this statutory power to manage carries with it certain fundamental fiduciary obligations to the corporation and its shareholders. An underlying premise for the imposition of fiduciary duties is a separation of legal control from beneficial ownership. Equitable principles act in those circumstances to protect the stockholder owners' beneficiaries who are not in a position to directly manage the corporation for themselves.

譯：董事在行使管理的法定權力的同時，也要對公司、股東負起受託人義務。受託人義務有個重要的前提，就是所有權與法律控制是劃分開來的，衡平的原則就在這樣的情況之下，去給予沒辦法直接參與公司管理的股東保障。

The directors of Delaware corporations stand in a fiduciary relationship not only to the stockholders but also to the corporations upon whose boards they serve. The directors' fiduciary duties to both the corporation and its shareholders have been described as a triad：due care, loyalty and good faith. Although the fiduciary duties of a Delaware director are unremitting, the exact course of conduct that must be followed to properly discharge that responsibility will change in the specific context of the action the director is taking with regard to either the corporation or its shareholders.

譯：說到受託人義務，董事不僅要對股東負責，也要對公司負責，受託人義務有三個含意：注意義務、忠實義務、善意。雖然董事時時刻刻都要履行受託人義務，為了善盡責任，他們必須採取的具體作為，則會因為董事對於公司或股東的行為的特定情況，而有所不同。

Corporate litigation usually involves a shareholder challenge to a board of directors' business decision. Shareholder lawsuits frequently seek monetary damages for financial harm that was allegedly caused by the directors' actions. Delaware courts are aware that shareholder investments will only be maximized if disinterested directors carefully act in good faith to assess the relative risks and rewards of business matters. Delaware courts recognize, however, that boards of directors would never pursue a rational but risky business strategy, in an effort to increase shareholder wealth, if financial failure would automatically result in their own personal monetary liability.

譯：公司的訴訟通常是股東對於董事會的商業決定有所質疑，股東的訴訟通常是尋求金錢賠償，因為他們認為董事的決定，對財務造成傷害。德拉瓦州法院清楚知道，如果股東的投資要能夠最大化，前提是沒有利害關係的董事，必須以善意行事，來去衡量公司業務中的相對風險與報酬。德拉瓦州法院知道，如果財務失利會自動給董事會帶來金錢上的責任，那董事是絕對不可能去採取理性但具有風險的商業策略，來提高股東的財富。

Some business decisions will not result in financial success even though the directors properly discharged all of their fiduciary duties. The business judgment rule seeks to protect and promote the full exercise of the managerial power granted to Delaware directors. The

business judgment rule is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company and its shareholders. The business judgment rule operates as a procedural guide for litigants and as a substantive rule of law.

譯：即使董事沒有善盡受託人義務，所做的商業決策不見得會達到預期效果，經營判斷法則的目的是要保護並促進讓董事能夠充分並自由地行使管理權限，經營判斷法則有一個前提，董事在做決定的時候，必須要得到充分的資訊，而且要出於善意，而且是真的認為他們的行為是符合公司與股東的最大利益，所以經營判斷法則是訴訟當事人很鍾意的一個程序指引，及時實質的法律準則。

As a procedural guide, the business judgment presumption is a rule of evidence that places the initial burden of proof on the plaintiff. To rebut the presumptive applicability of the business judgment rule, a shareholder plaintiff has the burden of proving that the board of directors, in reaching its challenged decision, violated any one of its triad of fiduciary responsibilities： due care, loyalty, or good faith. If a shareholder fails to meet this evidentiary burden, the business judgment rule operates to provide substantive protection for the directors and for the decisions that they have made.

譯：在程序指引方面，根據經營判斷法則，一開始的舉證責任是在原告身上，如果要推翻經營判斷法則的推定適用性，股東（也就是原告）必須要能夠舉證，證明董事會在做商業決策的時候，違反了注意、忠實、善意其中一項受託人義務。如果原告沒辦法舉證，經營判斷法則就會對董事與董事的決定發揮實質的保障作用。

If the presumption of the business judgment rule is rebutted, however, the burden shifts to the director defendants to prove that the challenged transaction was entirely fair to the shareholder plaintiffs. Burden shifting does not create per se or automatic liability on the part of the directors. An initial judicial determination that a given breach of a board's fiduciary duties has rebutted the presumption of the business judgment rule does not preclude a subsequent judicial determination that the board of directors' action was entirely fair.

譯：如果經營推斷法的推定被推翻，則舉證責任將移轉至被告（也就是董事）身上，他們必須證明他們的交易是完全公平的，責任的轉換並不代表董事馬上就會有法律責任，即使一開始，司法認定董事違反了受託人義務，也就是經營判斷法則的推定被推翻，這並不排除之後法院可能認定董事行為是完全公平的可能性。

To avoid substantive liability, notwithstanding the quantum of adverse evidence that has rebutted the business judgment rule's protective procedural presumptions, the board must demonstrate entire fairness. A board discharges that burden by presenting evidence of the cumulative manner in which it otherwise discharged all of its fiduciary duties. The concept of entire fairness has two basic aspects： fair dealing and fair price.

譯：儘管有很多不利事證，推翻了經營判斷法則，董事會如果要避免實質責任，就必須要能夠去證明自己是完全公平的，董事會必須要提供證明，說明在商業決定的過程當中，他們有肩負起所有的受託人義務。完全公平的這個概念，包含兩個部份，一個是公平交易，另一個是公平價格。

In the context of a merger, when the presumption of the business judgment rule has been rebutted, the board of directors' action is examined under the entire fairness standard. Fair dealing relates to when the merger was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. Fair price relates to the economic and financial considerations of the proposed merger, including all relevant factors： assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock.

譯：就拿合併案來說，當經營判斷法則的推定被推翻之後，董事會的行為就會由完全公平的標準來檢驗，公平交易牽涉到的是，合併案的時點，是怎麼開始的，怎麼架構的，怎麼協商的，是如何讓董事知道的，以及如何取得董事和股東的同意。公平價格牽涉到的，是在這個合併案中的經濟與財務的考量因素，其中牽涉到資產、市場價值、獲利、未來前景、其他會影響公司固有或內在價值的因素。

The test for entire fairness is not bifurcated between fair dealing and price. The entire fairness standard requires the board of directors to establish to the court's satisfaction that the transaction was the product of both fair dealing and fair price. In a non-fraudulent transaction, however, price may be the preponderant consideration and outweigh the fair dealing aspects of the merger.

譯：在完全公平的檢驗中，並沒有把公平交易與公平價格截然二分，完全公平的標準要求董事會要能夠向法院證明，這樁交易是公平交易與公平價格的產物，在不具詐欺情事的交易當中，價格可能是最重要的考量點，重要性會比合併案中的公平交易還要來得高。

I will now speak about enhanced judicial scrutiny. The takeover era of the 1980's raised several new legal issues. In Unocal Corp. v. Mesa Petroleum, the Delaware Supreme Court addressed two fundamental questions. First, did the board of directors have the power and duty to oppose a takeover threat that it reasonably perceived to be harmful to the corporate enterprise? Second, was such action entitled to the protection of the business judgment rule? The Supreme Court answered both questions in the affirmative. However, because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, the Delaware Supreme Court recognized there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred upon directors.

譯：接下來要談的是強化司法監督。1980年代，併購案盛行，帶來許多新的法律議題，在「Unocal Corp. v. Mesa Petroleum」案件中，德拉瓦州最高法院處理了兩個基本問題。第一，在面對併購案的威脅之下，如果董事合理認為，這樣的併購案會對公司帶來威脅，他們是否有權利與責任去反對這樣的併購案。第二，董事這樣的行為，是否會受到經營判斷法則的保障。最高法院的答案都是肯定的，但是董事的行為可能主要是出自於個人利益的考量，而不是考量到公司與股東的利益，最高法院認為，有必要強化司法審查，做為門檻，之後再看經營判斷法則的保障，是否適用於董事。

In Unocal, the Supreme Court held that before the business judgment rule applies to the adoption of a defensive mechanism, the initial burden will be on the directors. First, the directors must show that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed. Directors satisfy that burden by showing good faith and reasonable investigation. Second, the directors must show that the defensive mechanism was reasonable in relation to the threat posed. That proof is materially enhanced where a majority of the board favoring the proposal consisted of outside independent directors.

譯：在這個案件當中，最高法院認為，經營判斷法則要適用於這個防禦機制，初步的舉證責任是在董事身上，首先董事必須要能夠證明，他們有合理的理由相信這個併購案對於公司的政策與有效性，是有危險的。董事必須要舉出善意與合理調查的證據，其次董事必須要能夠證明，這樣的防禦機制對於所面臨的威脅，是合理的。如果大多數支持這個提案的董事，都是由外部的獨立董事組成，那這樣的證據則會實質上面得到強化，而變得更有力。

In Revlon, Inc. v. McAndrews, the Delaware Supreme Court held that when the management of a target company determines that the company is for sale, enhanced judicial scrutiny must also be exercised at the threshold, as in Unocal, before the normal presumption of the business judgment rule will apply to the directors' actions. However, the two part inquiry is different. When a corporation is for sale, the question of defensive measures is moot. The directors' role changes from defenders of the corporate enterprise to auctioneers who must attain the best price for the stockholders when the corporation is sold.

譯：在「Revlon, Inc. v. McAndrews」案件中，德拉瓦州最高法院認為，目標公司的管理階層認為公司即將要出售的時候，就必須要先以強化的司法審查做為門檻，就像剛才提到的Unocal案件一樣，之後才去看經營判斷法則是否適用於董事的行為，但是這兩種情況是不一樣的。當一間公司要出售的時候，防禦機制的這個問題，並不具實質意義，董事的角色已經從公司的保護者，變成為股東爭取最好價格的拍賣者。

The key features of an enhanced scrutiny test are： a judicial determination regarding the adequacy of the decision-making process employed by the directors, including the information on which the directors based their decision; and a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing. In either defending against a takeover or engaging in a sale of the corporation, the directors have the burden of proving that they were adequately informed and acted reasonably. If the directors are successful in carrying their initial burden of proof, the burden shifts back to the plaintiffs who have the ultimate burden of persuasion to rebut the presumption of the business judgment rule by showing a breach of the directors' fiduciary duties.

譯：強化司法審查有幾個關鍵特色，司法會介入去認定說，董事的決策是否適當，其中還包括董事在做決策的時候，所仰賴的資訊。另外，司法也會去檢驗，在當時的情況中，董事的行為是否合理，不管是避免公司被收購，或者是參與公司的出售，董事有責任去證明他們有充分的資訊，而且行為是合理的。如果董事成功舉證，那麼舉證的責任就轉到原告的身上，他們必須要能夠證明，董事違反了受託人義務，這樣才能夠推翻經營判斷法則的推定。

I will now speak about the duty of care. To receive the business judgment rule's presumptive protection, directors must inform themselves of all material information and then act with care. In Delaware, the applicable standard of care is gross negligence. The 1985

decision of the Delaware Supreme Court in Smith v. Van Gorkom held that the directors were personally liable to pay monetary damages for gross negligence in the process of their decision making. In 1986, section 102(b)(7) of the Delaware General Corporation Law was enacted by the Delaware Assembly, following a directors insurance liability crisis and the decision in Van Gorkom.

譯：接下來談到的是注意義務。董事如果要得到經營判斷法則的保障，董事就必須要有充分的重大資訊，而且行為必須是合理的，並且要履行注意義務。在德拉瓦州，適用的標準是重大疏失，在1958年德拉瓦州最高法院的「Smith v. Van Gorkom」案件中，最高法院認為，如果董事在決策過程中，出現重大疏失，則他們有金錢損害賠償責任。這個案件結束之後，就產生了董事保險責任危機，之後在1986年，則拉瓦州公司法的102(b)(7)條就通過了。

The purpose of section 102(b)(7) was to permit shareholders—who are entitled to rely upon directors to discharge their fiduciary duties at all times—to adopt a provision in the certificate of incorporation to exculpate directors from any personal liability for the payment of monetary damages for breaches of their duty of care, but not for duty of loyalty violations, good faith violations and certain other conduct. Following the enactment of section 102(b)(7), the shareholders of almost all Delaware corporations approved charter amendments containing these exculpatory provisions with full knowledge of their import. Since its enactment, Delaware courts have consistently held that the adoption of a charter provision, in accordance with section 102(b)(7), bars the recovery of monetary damages from directors for a successful shareholder claim that is based exclusively upon establishing a violation of the duty of care.

譯：102(b)(7)條的目的，是讓股東，因為股東必須仰賴董事來肩負受託人義務，他們可以讓股東在公司章程中，納入一個免責條款，這個免責條款可以讓董事，如果董事違反注意義務的話，不需要負擔金錢損失賠償責任，但這只限於違反注意義務，換言之，違反善意、違反忠實義務與一些其他行為，並不包含在內。102(b)(7)條施行之後，幾乎所有德拉瓦州公司的股東，都將免責條款納入公司章程。在這個條款推行之後，德拉瓦州的法院一致認為，在公司章程中納入這個免責條款，董事就可以是因為違反注意義務，而不需要負擔任何金錢損失的賠償責任。

Accordingly, in Malpiede v. Townson, the Delaware Supreme Court held that if a shareholder complaint asserts only a due care claim, the complaint is dismissable once the corporation's section 102(b)(7) provision is properly invoked. The rationale of Malpiede

constitutes judicial cognizance of a practical reality： unless there is a violation of the duty of loyalty or the obligation to act in good faith, a trial on the issue of entire fairness is unnecessary, because a section 102(b)(7) provision will exculpate director defendants from paying monetary damages that are exclusively attributable to a violation of the duty of care. The effect of the Delaware court's holding in Malpiede is that, in actions against the directors of Delaware corporations with a section 102(b)(7) charter provision, a shareholder's complaint must allege facts that, if true, constitute breaches of loyalty or good faith.

譯：因此在「Malpiede v. Townson」的案件中，德拉瓦州最高法院認為，如果股東只主張董事違反了注意義務，而且公司試用102(b)(7)條的免責條款，則這種控訴會被駁回，其中背後的原因在司法實務上，帶來了新的現實，除非董事違反的是忠實義務或缺乏善意，不然以完全公平的角度去審判，是沒有意義的。這是因為102(b)(7)條已經給予了董事免責責任，他們只要違反注意義務，是可以不必負擔金錢損害賠償。Malpiede案件判決帶來了一個實質影響，如果股東要控告董事違反受託人義務，一定要主張對方是違反忠實義務或缺乏善意。

In the recent Walt Disney Co. Derivative Litigation, the Delaware Supreme Court held that a failure to act in good faith requires conduct that is qualitatively different from, and more culpable than, the conduct giving rise to a violation of the fiduciary duty of care (gross negligence). The Disney decision identified three examples of conduct that would establish a failure to act in good faith： first, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation; second, where the fiduciary acts with the intent to violate applicable positive law, or third, where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his or her duties.

譯：在最近的「Walt Disney Co. Derivative Litigation」案件中，德拉瓦州最高法院認定，缺乏善意的行為，與違反注意義務的行為，本質上是不同的，而且更具有可責性。這個案件的判決當中，點出了缺乏善意行為的三個例子。第一，受託人蓄意從事非出於促進公司利益的行為，第二，受託人是有意圖的去違反適用法律，第三，受託人明知有義務卻蓄意不履行。這就顯示了，他們是有意識忽略自己的義務。

In the Disney decision, the Delaware Supreme Court emphasized that from a legal standpoint, the directors' duties of care and good faith are distinct. The Court noted that

Delaware's legislative history and its common law jurisprudence draw clear distinctions between the duties to exercise due care and to act in good faith, and highly significant legal consequences result from that distinction. The Delaware General Assembly has addressed the difference between bad faith and a failure to exercise due care in two separate contexts.

譯：在「Disney」的判決中，德拉瓦州最高法院強調，從法律的角度來看，董事的注意義務與善意是有區別的，法院提到，從德拉瓦州的立法史與司法體系來看，這兩者其實有去區別，善意與注意義務，而且這種區別在司法上是有意義的。德拉瓦州的議會在兩個情況之下，去說明惡意與違反注意義務之間的區別。

The first is section 102(b)(7) which has already been discussed in this paper. That statute authorizes Delaware corporations, by a provision in the certificate of incorporation, to exculpate their directors from monetary damage liability for a breach of the duty of care. That exculpatory provision affords significant protection to directors of Delaware corporations. Section 102(b)(7) has several exceptions, however, including most relevantly, for acts or omissions not in good faith. Thus, a corporation can exculpate its directors from monetary liability for a breach of the duty of care, but not for conduct that is not in good faith.

譯：第一個就是剛才提到的102(b)(7)條，這個條款讓德拉瓦州的公司，在自己的公司章程中納入免責條款，也就是說，如果董事是因為違反注意義務，就可以不用負擔金錢損害賠償責任。所以這個免責條款給德拉瓦州公司的董事相當大的保障，但是也是有例外的，如果非出於善意的作為或遺漏，就是例外，因此董事可以是因為違反注意義務而不用負擔金錢賠償，但如果不是出於善意的話，就不行。

A second legislative recognition of the distinction between fiduciary conduct that is grossly negligent and conduct that is not in good faith, is Delaware's indemnification statute in section 145 of the Delaware General Corporate Law. Under section 145, a director or officer of a corporation can be indemnified for liability (and litigation expenses) incurred by reason of a violation of the duty of care, but not for a violation of the duty to act in good faith.

譯：另外，受託人有重大疏失行為與缺乏善意行為的區別，反映在德拉瓦州公司法第145條的賠付保障事項，根據這個事項，如果董事是因為違反注意責任，所得到的負債，包含如訴訟費用，可以得到補償，但如果是因為非出於善意，或違反善意責任，就不含在內，就沒有辦法得到補償。

I will now talk about loyalty and good faith. In Stone v. Ritter, the Delaware Supreme Court explained the relationship between the directors' duty of loyalty and good faith. That

clarification came in the context of deciding directors' oversight responsibilities. The issue of directors' fiduciary obligations in exercising oversight responsibility was initially addressed by the Court of Chancery in Caremark. Because the Caremark case was not appealed, however, the subject had not been addressed by the Delaware Supreme Court.

譯：接下來我要談談忠實義務與善意。在「Stone v. Ritter」的案件中，德拉瓦州最高法院解釋了董事的忠實義務與善意之間的關係，然後在決定董事的監督責任中，就可以看個明白。董事有監督責任這樣的受託人義務，這個部分在衡平法院有提過，但是「Caremark」這個案件並沒有再上訴，所以德拉瓦州最高法院沒有機會針對這個議題發表見解。

In Caremark, the Court of Chancery held that： generally where a claim of directorial liability for corporate loss is predicated upon ignorance of liability creating activities within the corporation only a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists will establish the lack of good faith that is a necessary condition to liability.

譯：在「Caremark」案件中，衡平法院認為，一般來說，董事要為公司損失負起責任，是建立在他們忽略了監督活動的前提之上，也只有在他們持續而且有系統性地忽略監督責任，像是完全沒有確保在公司內部有所謂的資訊與通報系統，那這就違反了善意義務，因此董事就會有責任。

In Stone, consistent with its opinion Disney, the Delaware Supreme Court held that Caremark articulates the necessary conditions for assessing director oversight liability, to wit： (a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention.

譯：「Stone」案件的見解與「Disney」案件的見解一樣，德拉瓦州最高法院認為，在「Caremark」案件中說明了，要衡量董事監督責任的三個要件：(A)董事完全沒有去實施任何通報或資訊系統的控制；(B)有落實這樣的機制，但是有意識地去監督這些機制的運作，導致沒有辦法得到需要關注的風險或問題的訊息。

In Stone, the Supreme Court held that where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.

That holding required the Delaware Supreme Court to clarify a doctrinal issue that was critical to understanding fiduciary liability under the Caremark standard. It explained that the terminology used in Caremark and in Stone which described the lack of good faith as a necessary condition to liability was intentional.

譯：在「Stone」案件中，最高法院認為，如果董事明知有責任卻沒有任何作為，顯示出他們是有意識地忽略自己的責任，則董事會因為缺乏善意落實受託人義務，而被視為違反了忠實義務。這個見解致使德拉瓦州最高法院必須去說明一個準則性的議題，幫助我們了解在「Caremark」案件的標準之下，什麼是受託人責任。這裡說明了，「Caremark」與「Stone」案件中表示，缺乏善意是責任成立的要件，其中的用語是「intentional」（有意為之）。

The purpose of that phraseology was to communicate that a failure to act in good faith is not conduct that results in the direct imposition of fiduciary liability. In Stone, the Delaware Supreme Court explained that the failure to act in good faith may result in liability because the requirement to act in good faith is a subsidiary element, i.e., a condition, of the fundamental duty of loyalty. Because a showing of bad faith conduct, as described in Disney and Caremark, is essential to establish director oversight liability, it followed that the fiduciary duty violated by that conduct is the duty of loyalty.

譯：這個用語的目的是要表達，缺乏善行不見得會導致受託人義務，在「Stone」案件中，德拉瓦州最高法院解釋，缺乏善行可能會導致責任的成立，這是因為善意的要求是一個輔助要素，是基本忠實義務的一個條件。就如「Disney」與「Caremark」案件中都有提到，惡意是董事監督責任成立的一個要件，因此在這裡董事違反受託人義務，就是忠實義務。

Stone's explanation of what constitutes a failure to act in good faith resulted in two doctrinal consequences. First, although good faith may be described colloquially as part of a triad of fiduciary duties that includes the duties of care and loyalty, the obligation to act in good faith does not establish an independent fiduciary duty that stands on the same footing as the duties of care and loyalty. Only directors' violation of the latter two duties may directly result in liability, whereas a failure to act in good faith may do so, but indirectly. The second doctrinal consequence was a recognition that the fiduciary duty of loyalty is not limited to cases involving a financial or other cognizable fiduciary conflict of interest. It also includes cases where the fiduciary fails to act in good faith. As the Court of Chancery stated in Guttman

v. Huang, a director cannot act loyally towards the corporation unless she acts in the good faith belief that her actions are in the corporation's best interest.

譯：「Stone」案件在解釋何謂缺乏善意的過程中，確立了兩個準則性的結果。第一，雖然善意是受託人義務的一環，但是善意是沒有辦法和注意義務與忠實義務等量齊觀。只有在董事違反注意義務與忠實義務的時候，責任才可能直接成立，但如果只是缺乏善意，只會間接導致責任的成立。第二個準則性的結果是，忠實義務這個受託人責任，並不限於跟財務或受託人利害衝突的案件，它適用於缺乏善意的案件，在「Guttman v. Huang」案件中，衡平法院表示，唯有當董事秉持善意，認為自己的行為符合公司的最大利益的時候，才有辦法真正履行忠實義務。

I now am going to conclude my remarks. Corporate law has evolved as the Delaware Supreme Court and the Court of Chancery have applied established legal principles in response to each new business context that is presented by the changing needs of a robust modern market economy. Both of those Delaware courts have endeavored to provide boards of directors with clear guidance as they seek to act with due care, good faith, and loyalty in making business decisions on behalf of a Delaware corporation and its shareholders. The best example of such guidance for directors in discharging their fiduciary obligations is the business judgment rule.

譯：最後做個結論，公司法是隨著德拉瓦州最高法院不斷演進，而衡平法院也去適用了確立的法律原則，來因應今天市場經濟之下，不斷變化的需求。德拉瓦州的法院都致力於提供董事會一個清楚的指引，讓他們能夠在行為上履行忠實義務與注意義務，而且秉持善意，站在公司與股東的立場，進行商業決策。關於董事肩負受託人義務的指引，經營判斷法則就是最好的例子。

The business judgment rule is a logical corollary to the fundamental principle, codified in section 141(a) of the Delaware General Corporation Law statute, that the business and affairs of a corporation are managed by its board of directors. At the same time, the Delaware courts' expert and expeditious enforcement of directors' fiduciary duties provides protection for the legitimate expectations of shareholder investors. When shareholders challenge directors' actions, one of three levels of judicial review is applied： the traditional business judgment rule, the Unocal/Revlon standards of enhanced judicial scrutiny, or the entire fairness analysis.

譯：公司的事務應該是由董事會來管理的，有了這個基礎，才有所謂的經營判斷法則，這也反映在德拉瓦州公司法141(a)條中，同時，德拉瓦州專業且快速地落實

董事受託人義務，為股東的合理期待提供了保障。當股東質疑董事的行為時，我們會使用在下列三種司法審查中選一個使用，第一，傳統經營判斷法則，第二，「Unocal/Revlon」的強化司法審查標準，第三，完全公平的審理方針。

謝謝。

提問：

Good afternoon, Justice Holland. I am a trainee of the Academy of the Judiciary. It's my great honor to attend your speech and have the opportunity to raise questions. May I ask three questions?

My first question is, what's your opinion about whether corporate compliance department belongs to the board of directors or managers? Which one is much more effective and proper?

My second question is, in my opinion, I think that the duty of monitoring belongs to the duty of care, but after I read the case of Caremark and the recent Disney case, I found that in the opinion of the Delaware Supreme Court, you held that the duty of monitoring belongs to the duty of loyalty and good faith. I wonder if the fact that the duty of monitor was derived from the duty of loyalty was a result of the section of 102(b)(7) or not.

My third question is whether the business judgment rule is applicable to all three fiduciary duties. There are principles： duty of care, duty of loyalty and good faith. Is the business judgment rule applicable to all of them, or only to duty of care? And even that is applied to in action, such as when the board of directors fail to monitor the wrongdoings of the employees.

Those are my questions. Thank you.

口譯員：

這位同學，可以麻煩你用中文跟大家解釋一下三個問題是什麼，好不好？

提問：

我的第一個問題是，公司的法令遵循部門到底應該歸屬於董事會層級，或設置於

經理階級的底下，比較適當與有效。第二個問題是，監督義務究竟源自於注意義務還是忠實義務，目前看到的案例都認為它屬於忠實義務，是因為剛談到的102(b)(7)條規定，就是為了證明要科予董事責任，所以才被轉換到屬於忠實義務。因為在我們的認知上，未盡到監督義務，應該是屬於注意義務的一部份。第三個問題是，商業判斷法則是否適用於所有的受託人義務，或只適用於注意義務而不適用於忠實義務。這是我的三個問題，謝謝。

主講人：

All of the questions are very good. The first question relates to the relationship between managers and directors.

譯：剛才的問題問得非常好，第一個問題牽涉到管理人員與董事之間的關係。

The directors have the ultimate responsibility but the managers have the day-to-day responsibility.

譯：董事有最高的責任，但是每天公司業務的經營責任則是在管理人員身上。

The directors have an obligation to put a procedure in place that should work and they have an obligation to get reports from the managers if it is not working.

譯：董事有責任去建立一套可以運作的程序，而且如果程序運作不良的話，要從經理人那邊獲得報告。

The second question relates to the Caremark decision by the Court of Chancery which discussed oversight responsibility as a duty of care.

譯：第二個問題是關於衡平法院針對「Caremark」案件的判決，監督責任是否屬於注意義務的一環。

However, in In Stone v. Ritter, the Delaware Supreme Court talked about oversight responsibility as the duty of good faith.

譯：但是在「Stone」一案中，最高法院認為監督的責任是屬於善意的一環。

We must remember that the Court of Chancery's decision in Caremark was decided ten years earlier and even before Stone v. Ritter, we had the Supreme Court case in Disney.

譯：大家要記得的是，「Caremark」案件比「Stone」案件早十年，而且之後有「Disney」案件的出現。

In Disney, we made the distinction as I mentioned in my speech between care and good faith.

譯：而且在「Disney」案件中，我剛在演講的時候提到，注意義務與善意之間的區別。

What we said in Disney is that good faith includes the duty to act if you have a responsibility to act.

譯：在「Disney」案件中，我們有說到，善意是指，你的責任包含特定行為的時候，就必須要去履行。

Every board of directors has a duty of oversight for the entire corporation.

譯：每一位董事都有監督整個公司的責任。

Therefore, if you do nothing, and exercise no oversight, you have not acted in good faith.

譯：所以如果你什麼都不做，不去監督，那就代表你缺乏善意。

If you do something, and there are red flag to tell you there is a problem and you do nothing, then you have not acted in good faith.

譯：如果你有一些作為，但是遇到一些警示訊息出現的時候，卻沒有採取作為，這樣也是缺乏善意。

So, care and good faith come together in this way. If you do nothing, you have not acted in good faith. If you do something and it doesn't work, then you have not acted with care.

譯：這樣我們就可以去理解，善意跟注意義務之間的關係。如果你什麼都不做，就是缺乏善意。如果你有做事情，但沒有成效，就是違反注意義務。

So the cases are really consistent because Caremark talks about care where the corporation did something. Disney and Stone talk about good faith where the question was doing nothing.

譯：我們可以看到這些案件其實相當一致。「Caremark」案件的重點是注意義務，這間公司是有做事情，但是在「Disney」案件「Stone」案件中，重點是善意，是什麼東西也沒做。

The third question was about the business judgment rule. The business judgment rule applies to all fiduciary duties. Care, loyalty and good faith. All three.

譯：第三個問題是講到經營判斷法則的適用性，它適用於所有的受託人義務，包含注意義務、忠實義務、善意。

102(b)(7) only applies to care.

譯：102(b)(7)條只適用於注意義務。

The important point about 102(b)(7) is that only the shareholders can adopt a provision that excuses the directors violation of care, not the courts, not the legislature. Only the shareholders can put that in the corporation charter.

譯：102(b)(7)條的重點在於，只有股東能夠將董事的免責條款納入公司章程。法院、立法機關是沒有權力這麼做的。

Thank you for your questions.

譯：謝謝你的提問。

提問：

Thank you, honorable justice for your informative speech. My name is Doreen. I am the prosecutor from Special Investigation Division of Supreme Prosecutors' Office. I am so glad to know the difference between the triad's responsibilities. But I am curious that is the three responsibilities based on the premise that there is a separation between the shareholders and the directors, which means that I am curious that are the directors prohibited from being the shareholders? In Taiwan, directors can also be shareholders of the company, which causes a lot of problems as you can imagine. This is my first question.

My second question is that I am curious about the burden of proof. Remember that you mentioned the plaintiff (shareholders) can file action against the directors once they violate their duties. But what if the shareholders can not collect all evidence because evidence is assumed to be possessed by the directors. Isn't that burden of proof too heavy for shareholders? The action might fail as a result.

Those are my questions. Thank you.

譯：剛才有兩個問題，第一個是說，剛才有提到董事是無法擔任股東，但是在台灣，股東也可以擔任董事。第二個問題是關於舉證責任，如果股東要控告董事，但起初股東有舉證責任，但多數事證事在董事身上，那這個舉證責任是否太沉重？

主講人：

Your questions are very good. The first question relates to can directors also be shareholders, can the directors own stock. And the answer in Delaware is not only yes but

many people think it's better for the directors to own stock.

譯：很好的幾個問題。第一個問題是說董事可否為股東，在德拉瓦州，不僅可以，而且很多人認為，讓董事成為股東是件好事。

But the origin of the Delaware law about being a fiduciary is that the directors are running the corporation for all shareholders.

譯：我們談到受託人義務，一開始是因為我們的董事是為了股東來管理該公司。

And fiduciaries can take risks but all the risks have to be reasonable.

譯：受託人可以採取一些有風險的決定，但是這些風險必須是合理的。

Therefore, the Delaware courts think if you are dealing with other people's money, even if you have some money invested, you must be held to a higher standard.

譯：德拉瓦州的法院認為，董事是在管理其他人的錢，所以即便其中包括董事自己的錢，董事的行為仍會受到較高標準的要求。

The second question is if the burden of proof is on the shareholder is that an impossible burden for the shareholder to ever have enough evidence to prove a breach of fiduciary duty.

譯：第二個問題是，股東因為舉證責任，必須去證明董事違反了受託人義務，但舉證對股東而言是否太困難。

There are two answers to where shareholders get information. The first is with filings with the Securities and Exchange Commission because most of these companies are publicly traded companies.

譯：這就牽涉到股東取得資訊的幾種方式，第一個是可以從證券交易委員會這邊取得資料，因為這些公司大部分都是上市公司。

The second source of information is provided by the Delaware Corporate Law in section 220.

譯：第二個取得資訊的管道是來自德拉瓦州公司法第220條。

That section of the Delaware Law provides that any shareholder can get access to books and records of the corporation if you have a legitimate purpose.

譯：根據這個德拉瓦州法律，如果股東有合理的理由，就可以取得公司的帳冊。

So for example, you can ask for minutes of the meetings of the directors. You can ask for correspondence.

譯：舉例來說，你可以要求取得董事會的開會紀錄、通訊紀錄。

The third source of information would be if there was either a criminal investigation or a regulatory investigation, the shareholders can get that information also.

譯：第三個資訊來源是，股東也可以取得犯罪調查或監管調查資料。

Thank you.

譯：謝謝。

提問：

我用中文問，剛才大法官演講中提到，受託人義務的對象包含股東與公司，在德拉瓦州，是否曾經發生過這兩者是衝突的？換句話說，在追尋公司利益與股東利益之間，如果產生衝突的話，德拉瓦州的法院會用什麼樣的方式去指引，告訴公司或董事怎麼做？

第二個問題是，近年來台灣企業發生許多問題，我想請問，德拉瓦州如何建構關於公司社會責任的理論基礎，用什麼樣的標準去要求公司。

第三個問題是，台灣今年通過閉鎖性股份有限專節，閉鎖性公司與公開公司相較之下，比較沒有經營與所有分離的情況，在此情況下，我們用什麼方式去要求董事的相關責任？相關的經營判斷法則是否還適用？

以上請教這三個問題，謝謝。

主講人：

The first question is about a conflict between the corporation and the shareholders.

譯：第一個問題是跟公司與股東之間的利益衝突有關。

The Delaware Court has rules for all situations.

譯：德拉瓦州法院，針對各種情況，有不同規則。

First, if the conflict is with a controlling shareholder, then the controlling shareholder must demonstrate entire fairness as I explained in my remarks.

譯：第一個衝突與控制股東有關，就像我剛才演講的時候說的，控制股東必須證明他們是完全公平的。

Second, if you are a small shareholder, and you feel the directors have breached their fiduciary duties and caused you to lose money, you can bring a private lawsuit.

譯：第二，如果你是小股東，覺得董事違反了受託人義務，導致你金錢上的損失，你可以提起訴訟。

口譯員：

可以再說明一下第三題，關於閉鎖型公司的問題嗎？

提問：

比較沒有經營與所有分離的情況，所以想了解，經營判斷法則有沒有辦法在這個情況適用？對於董事的責任苛求是否有所不同？

口譯員：

請問一下，閉鎖性公司是你的第二或第三個問題？

提問：

第三個。

口譯員：

那再說明一次你的第二個問題好嗎？

提問：

德拉瓦州如何建構其企業社會責任理論，我想了解相關的標準。

主講人：

You second question is about corporate social responsibility. The answer is that Delaware

corporations can be socially responsible, but it is not required.

譯：第二個問題是關於社會企業責任，德拉瓦州的企業可以負有社會責任，但並不是強制的。

However, by that I mean corporations can spend money to be socially responsible, and if they are criticized that being socially responsible is wasting money, they are allow to say we are making a business judgment that being socially responsible is good for the corporation and its shareholders, and therefore, that is what most corporations do.

譯：我的意思是說，企業可以花大錢對社會履行責任，但如果因此被批評為浪費錢，企業可以說，自己做了一個經營判斷，認為這樣對於企業與股東是好事，所以很多的企業都有這麼做。

The third question is about the new closedly held corporation law in Taiwan.

譯：第三個問題是跟台灣最近的閉鎖性公司有關。

As I mentioned in my speech, the law of incorporation is the law of each of the fifty states.

譯：我剛才於演講中提到，公司設立的法律，是屬於美國各州。

Therefore, in the United States, all fifty states do not treat closed corporations the same way.

譯：所以說在美國五十州，對於閉鎖型公司的做法，不見得完全一樣。

Tomorrow, I am going to speak to the judges about that subject for many hours.

譯：明天我預計會花幾個小時，跟法官們討論這個主題。

In that regard, I have prepared written remarks, and I am sure it would be possible for anyone to get the remarks to read them to see how Delaware handles closed corporations and how other states handle closed corporations to provide guidance for what the judges in Taiwan may want to do.

譯：為了這個主題，我已經準備了一個書面演講，希望大家都可以取得資料。資料內容是關於德拉瓦州與其他州如何處理閉鎖性公司的問題，相信這對於台灣的法官而言，是個很重要的指引。

Thank you for your questions.

譯：謝謝你的提問。

口譯員（譯自主講人）：

要跟大家宣布一個好消息，我在台灣的演講是不會有任何考試來考大家的。

主講人：

Only the lawyers from Delaware will take the test.

譯：只有德拉瓦州律師才需要接受考試。

提問：

I am Johan from Taipei District Prosecutors' Office. I have a quick question on the timing of the shareholder lawsuit against companies. As we know that normally when something bad happened to the company and caused damage to the shareholder, the shareholders will need to decide whether or not to sue the company. On the other hand, shareholders know that if they brought the suit, their stock prices would drop immediately. In practice, for example in Taiwan, normally if something bad happens and there's media coverage, or even after the prosecutor has taken action to investigate, that's normally the situation, the timing of shareholder lawsuit in Taiwan. So I wonder in the Delaware jurisdiction, when do the shareholders usually bring a lawsuit against the company?

I think it's related to the second question as earlier you mentioned the shareholders can get criminal investigation information, but how? That's my follow-up question.

And a little third question from my colleagues. Is the presumption of the business judgment rule also applicable in criminal cases?

譯：問了三個問題，第一個問題，股東要控告公司時，通常在什麼時間點，一般來說，出事之後，為股東帶來損害，股東就會提起訴訟，我們都知道，如果股東對公司提告，股價會大跌，在台灣的實務上，事情發生之後，上了新聞版面，檢調也開始了，這時候股東就會控告公司。我想知道，德拉瓦州的控告時點為何？第二個問題，跟之前的一些提問有關，股東如何取得刑事調查資料？第三個問題，經營判斷法則的推定，是否適用於刑事案件？

主講人：

I will answer the last question first. And the answer is the business judgment rule does not apply to criminal cases.

譯：先回答最後一個問題，經營判斷法則並不適用於刑事案件。

I believe the second question was how shareholders get access to criminal information.

譯：第二個問題是問，股東如何取得刑事調查的資訊。

In the United States, if someone is charged with a crime, there is normally an indictment that lists all of the charges and that is a public record.

譯：在美國，如果有人被告，通常會有起訴書，詳列所有的起訴罪名，這些起訴書屬於公開資料。

Naturally, if you plead not guilty, the trial is public.

譯：如果你不認為自己有罪，就得面臨公開的審判。

However, if you plead guilty, there is usually a document called a plea agreement, which is public.

譯：但如果你承認有罪，通常會有個「認罪協議」，這也是公開的資訊。

Your first question is very interesting. It's something that Delaware courts deal with every year.

譯：你的第一個問題很有趣，德拉瓦州法院每年都會處理到這樣的問題。

The question is that if something bad happens and it is known publicly, when does the shareholder files the lawsuit.

譯：第二個問題是，出事之後，股東什麼時候會提告。

I want to go back to my speech where I talked about the internal affairs doctrine that says the law of Delaware must apply everywhere in the fifty states if a shareholder sues the director.

譯：我要回到我剛才談的公司內部準則，如果股東對董事提告，則德拉瓦州法律在美國任何一州都適用。

Let's use an example of General Motors, which is a corporation with shareholders in all fifty states.

譯：我們就拿通用汽車為例，他們的股東遍布全美五十州。

The shareholders in all fifty states can read the newspaper, and they will go to a lawyer in their state. They won't necessarily come to Delaware.

譯：散佈於美國各地的股東，如果從新聞得知消息，可以直接去找各州的律師，不用到德拉瓦州來。

And they can file a lawsuit in any of the fifty states but the Delaware law will apply but they can file in any of the fifty states.

譯：他們可以在任何一州提告，德拉瓦州的法律都適用。

The Delaware courts have made it very clear that the shareholder complaint must set forth particularized facts.

譯：德拉瓦州的各個法院清楚表示，股東的訴狀一定要有精確的事實。

I mentioned that Delaware courts deal with this every year because if a corporation has a big problem, the attorney's fee is based on the recovery for everyone, not just your single shareholder.

譯：我剛提過，這是德拉瓦州法院每年都會碰到的問題，因為如果一間公司出了大問題，律師費用的計算是以所有人的賠償費用為計算基準，而不是單一股東。

Therefore, there are lawyers in all fifty states that wants to be first to file the lawsuit.

譯：所以，美國各州的律師都希望成為第一個提告的人。

That is not a good idea if you don't do an investigation.

譯：如果你都沒有做調查，這不是個好主意。

There are many Delaware cases that say this lawsuit is based on a newspaper article, not facts. And the lawsuit is dismissed.

譯：在德拉瓦州，有許多案件的提告內容是根據新聞報導，而非事實，所以這種提告就會被駁回。

And the decision will say why didn't you look at the SEC filings? Why didn't you file a 220 action? Why didn't you look at the public documents?

譯：判決中會說，你為什麼不去看證管會的資料？為什麼不以220的方式起訴？為什麼不參考可取得的公開資料？

Your last point was about the stock value. The experience is that filing a lawsuit doesn't affect the stock value. It is the bad publicity that affects the stock value.

譯：最後一個問題，是關於股價。經驗顯示，訴訟不會影響股價，會影響股價的是公司的形象。

謝謝。

主持人：

We will have to stop here now because we're on a tight schedule. 我們非常感謝赫倫大法官今天來司法官學院演講，我們捷足先登，他明天才要到司法院法官學院去演講，我們今天有這個榮幸，先給我們這個寶貴經驗，分享他的成就，我們再度熱烈掌聲感謝他。