CHINA LAW CONNECT 中国法律连接

Issue 10 (September 2020)

China Guiding Cases Project
Stanford Law School

第10期 (2020年9月)

中国指导性案例项目
斯坦福法学院

China Law Connect 《中国法律连接》
China Guiding Cases Project
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305-8610

ISSN 2576-1927 (PRINT | 印刷版)
ISSN 2576-1935 (ONLINE | 在线版)

Published by the China Guiding Cases Project of Stanford Law School

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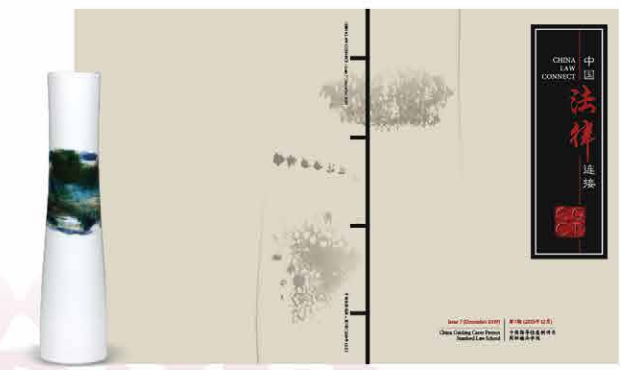

CGCP感谢陶瓷大师陈训成先生允许我们根据他的作品设计2019年出版的期刊封面。

The CGCP thanks master ceramicist Mr. CHEN Xuncheng for allowing us to design the 2019 covers, based on his art pieces.

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编辑短笺*
Editor's Note**

熊美英博士
Dr. Mei Gechlik

尊敬的读者：

本期《中国法律连接》（“《中法连》”）的内容突出反映了一点：尽管在国内外面临着诸多挑战，但是许多中国法官和律师仍不断努力地改善中国的法律体系。

为培养基于案例的法律文化所迈出的另一步

2020年7月，中国最高人民法院（“最高法”）发布了一套规则——《最高人民法院关于统一法律适用加强类案检索的指导意见（试行）》——对指导性案例、最高法判决的案件和中国其他重要的案件的使用等事项作出规定。该指导意见指示所有中国法官检索这些案例或案件，以确定其中是否至少有一个案例或案件与法官面前的待决案件“类似”，而如果是，则相应地适用类似的法律原则。这标志着最高法在一个传统上只关注立法的国家中迈出了另一步来培养基于案例的法律文化。在一篇中法连*聚焦*™的文章中，我分享了我对这套规则的严谨英语翻译和相关注解。未来几年，中国法官将在多大程度上遵循这些规则？这是一个重要的问题，而答案将揭示司法一致性是否可以在中国扎根。

上述规则的确切影响要到未来某个时候才能知道。但是，中国指导性案例项目（“CGCP”）成员所进行的两项研究，已显示了两个指导性案例的重要性，以及它们和相关案件所产生的影响。

指导案例15号与中国如何“刺破公司面纱”

在题为《深入分析一起被使用于数百个后续裁判的指导性案例：指导案例15号对关联公司人格混同的突破性认定是成功的吗？》的评论中，**赵炜（CGCP副执行编辑和昆明一名律师）和谭子文（CGCP编辑和北京一名研究生）**分享他们对171个精选的中国法院裁判的实证研究结果。这些裁判都明确引用了指导案例15号。指导案例15号完善了中国的公司法人人格否认制度，而该制度与英美法律体系中的“刺破公司面纱”原则类似。作出上述精选的后续裁判的法院丰富了指导案例15号的指导内容，使得判定“关联公司人格混同”的标准和相关法律责任更加具体和明确。总体而言，作者得出的结论是“[这]表明了中国指导性案例制度正越趋成熟。”

Dear Readers,

The content of this issue of *China Law Connect* (“*CLC*”) highlights the continued efforts made by many Chinese judges and lawyers to improve China's legal system despite all of the challenges taking place inside and outside the country.

Another Step to Cultivate a Case-Based Legal Culture

In July 2020, the Supreme People's Court of China (the “SPC”) released a set of rules—*Guiding Opinions of the Supreme People's Court on Unifying the Application of Law and Strengthening the Search for Similar Cases (Trial Implementation)*—guiding, *inter alia*, the use of Guiding Cases, cases adjudicated by the SPC, and other important cases in the country. The rules instruct all Chinese judges to search for these cases to determine whether at least one of them is “similar” to a pending case before the judges and, if yes, apply similar legal principles accordingly. This marks another progressive step taken by the SPC to cultivate a case-based legal culture in a country that has traditionally focused on legislation only. In a CLC *Spotlight*™ piece, I share my meticulous English translation of this set of rules and provide key annotations. To what extent will Chinese judges follow these rules in the coming years? This is an important question, the answer to which will reveal whether judicial consistency can take root in China.

The exact impact of the above rules will not be known until a certain time in the future. However, two studies conducted by members of the China Guiding Cases Project (the “CGCP”) show the importance of two Guiding Cases and the influence they and related cases have exerted.

Guiding Case No. 15 and How China “Pierces the Corporate Veil”

In a commentary titled *An In-Depth Analysis of a Guiding Case That Has Been Used in Hundreds of Subsequent Cases: Is Guiding Case No. 15's Ground-Breaking Determination of Commingled Personalities of Affiliated Companies a Success?*, **David Wei Zhao, Associate Managing Editor of the CGCP and a lawyer in Kunming, and Ziwen Tan, Editor of the CGCP and a graduate student in Beijing**, share findings of their empirical study of 171 select subsequent judgments/rulings rendered by Chinese courts that explicitly cited Guiding Case No. 15. This Guiding Case has improved China's system of denying the personality of a corporate legal person, which is similar to the principle of “piercing the corporate veil” in Anglo-American legal systems.

指导案例113号与 “乔丹”商标系列案件

在题为《“乔丹”商标系列案件：对侵权公司的影响和对知名人士带来的启示》的另一评论中，**陈懿（CGCP编辑和北京一名律师）和朱新玥（CGCP编辑和德国一名研究生）**解释“乔丹”商标系列案件的审理思路。在该系列案件中，国际知名篮球明星迈克尔·乔丹（Michael Jordan）对“乔丹”商标和相关的商标作出反对。作者探讨了该系列11起案件和指导案例113号（其基于该11起案件中的一起）对中国法院后续审理类似商标案件的指导意义。作者并提出实用建议，让外国自然人更懂得如何在中国保护其姓名、译名、艺名、这些名字的拼音和其个人的肖像剪影，以及对抗他人恶意注册的企业名称。

来自美国的有用经验教训

在题为《〈六月医疗服务有限公司诉鲁索案〉——寻找指导》的专家*连接*™文章中，美国杰出的出庭律师**马克己先生**分析了美国联邦最高法院的最近审判的一起案件：《六月医疗服务有限公司诉鲁索案》（*June Medical Services, L.L.C. v. Russo*）。马律师讨论了遵循先例原则的真正意思及其赖以建立的基石。在评论结束时，他深思熟虑地指出这一切对力求类案类判的中国司法机关的意义。

我们希望您喜欢本期《中法连》所分享的见解和信息！

敬祝 顺心

熊美英博士
中国指导性案例项目创办人、总监
《中国法律连接》主编辑

The courts rendering the subsequent judgments/rulings have enriched the guiding content provided in Guiding Case No. 15, making the standards for determining “commingled personalities of affiliated companies” and related legal liabilities clearer and more specific. Overall, the authors conclude that “[this] shows that China’s Guiding Cases System is becoming more mature.”

Guiding Case No. 113 and the Series of “乔丹” Trademark Cases

In another commentary titled *The Series of “乔丹” Trademark Cases: The Impact on the Infringing Company and the Implications for Celebrities*, **Yi Chen, Editor of the CGCP and a lawyer in Beijing, and Xinyue Zhu, Editor of the CGCP and a graduate student in Germany**, explain the lines of reasoning used in the adjudication of a series of cases involving the “乔丹” trademark and related trademarks, which were challenged by internationally recognized basketball star Michael Jordan. The authors discuss the guiding significance of the eleven cases in this series of cases and Guiding Case No. 113 (which is based on one of the eleven cases) for Chinese courts when they adjudicate cases that are similar to these trademark cases in the future. In addition, the authors provide practical suggestions to help foreign natural persons better understand how to protect their names, translated names, stage names, pinyin transliterations of all such names, and their portrait silhouettes in China, and how to contest enterprise names maliciously registered by others.

Useful Lessons from the United States

In an Experts *Connect*™ piece titled June Medical Services, L.L.C. v. Russo—*Looking for Guidance*, **Mr. James McManis**, a leading U.S. trial lawyer, analyzes a recent U.S. Supreme Court case, *June Medical Services, L.L.C. v. Russo*, and discusses the real meaning of the *stare decisis* doctrine and the cornerstone upon which it is built. He concludes the commentary with a thoughtful statement about what this all means to China’s judiciary amid its efforts striving to decide like cases alike.

We hope you enjoy the insights and information shared in this issue of *CLC*!

Sincerely,

Dr. Mei Gechlik
Founder and Director, China Guiding Cases Project
Editor-in-Chief, *China Law Connect*

* 熊美英博士，编辑短笺，《中国法律连接》，第10期，第vi页（2020年9月），http://cgc.law.stanford.edu/zh-hans/clc-10-202009。

** Dr. Mei Gechlik, *Editor’s Note*, 10 China Law Connect v (Sept. 2020), http://cgc.law.stanford.edu/clc-10-202009.

Nel mezzo del cammin di nostra vita,
Mi ritrovai per una selva oscura,
Che la diritta via era smarrita.

When I had journeyed half of our life's way,
I found myself within a shadowed forest,
for I had lost the path that does not stray.[1]

Dante's *Inferno*, Canto I

June Medical Services, L.L.C. v. Russo— Looking for Guidance*

James McManis

Abstract

In *June Medical Services, L.L.C. v. Russo*, Chief Justice John Roberts of the Supreme Court of the United States stated that he was bound to follow *Whole Woman's Health v. Hellerstedt*, even though, as one of the three dissenting justices in the case, he continued to believe that it was wrongly decided. The Chief explained that the two cases were alike and "the legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike". The four dissenting justices in *June Medical Services* disagreed, on various grounds ranging from finding that *Whole Woman's Health* was not a similar case to arguing that the earlier decision was poorly reasoned and should be overruled.

Drawing on the different opinions of *June Medical Services* and his insights developed over several decades as a leading U.S. trial attorney, the author of this commentary discusses the real meaning of the *stare decisis* doctrine and the cornerstone upon which it is built. He concludes the commentary with a thoughtful statement about what this all means to China's judiciary amid its efforts striving to decide like cases alike.

Introduction

In July 2013, the state of Texas enacted a law that required doctors performing abortions to have admission privileges at a state hospital within 30 miles of the abortion clinic.[2] On June 27, 2016, the Supreme Court of the United States, in a 5-3 decision of *Whole Woman's Health v. Hellerstedt,* ruled that the law was unconstitutional, finding that it imposed an undue burden on a woman's ability to obtain an abortion.[3] Chief Justice John Roberts was one of the three justices who dissented from the decision.

Meanwhile, in 2014, the legislature in Louisiana passed an almost identical bill, likewise requiring physicians performing abortions to have admitting privileges at a hospital "located not further than thirty miles from the location at which the abortion is performed".[4] When the Louisiana statute was challenged, a United States District Court struck it down in April 2017, based on the *Whole Woman's Health* decision.

In September 2018, the U.S. Court of Appeals for the Fifth Circuit reversed and approved Louisiana's law in a decision that drew some critical comment.[5] As Travis J. Tu, a co-counsel on the case when it was reviewed by the Supreme Court, stated on ABC News in March 2020,

> [T]he Fifth Circuit did things that even law students know appeals courts aren't supposed to do[. It] did not faithfully apply Supreme Court precedent [*Whole Woman's Health*], and just as bad, the Fifth Circuit completely disregarded the trial court's factual findings.[6]

Finally, on June 29, 2020, in the 5-4 decision of *June Medical Services, L.L.C. v. Russo*, the Supreme Court reversed the Fifth Circuit's ruling, relying in part on the doctrine of *stare decisis*.[7]

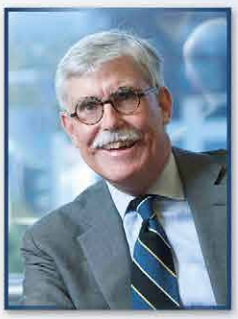
Chief Justice Roberts Felt Bound to Follow *Whole Woman's Health*

In *June Medical Services*, the critical fifth vote to reverse was provided by Chief Justice Roberts in a concurring opinion. The Chief Justice noted that he had joined the dissent in *Whole Woman's Health* and that he continued to believe that case was wrongly decided. Nevertheless, he explained:

> The legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana's law cannot stand under our precedents.

Chief Justice Roberts summarized the reasons for adhering to precedent: it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process". The Chief acknowledged

James McManis
Founder and Partner, McManis Faulkner
Fellow, International Academy of Trial Lawyers ("IATL")
Chair, IATL China Program



James McManis, Founder and Partner of McManis Faulkner, is one of the leading trial lawyers in the United States. After receiving a degree in history from Stanford University, he was awarded a J.D. from Berkeley and began his legal career in San Jose, California, the capital of Silicon Valley. Mr. McManis was trained as a prosecutor and had handled many criminal cases before he entered private practice, where he has tried numerous civil and criminal cases, in both federal and state courts. He has been a member of the Bar for over 50 years. His clients include both Silicon Valley companies and individuals in a wide variety of matters.

Mr. McManis is a Fellow of the International Academy of Trial Lawyers (IATL) and has chaired the Academy's renowned China Program for many years, arranging for lawyers from the State Council Legislative Affairs Office, the National People's Congress, and the Central Party School to come to the United States to study the U.S. legal system. He also served on the executive committee of the IATL and chaired its International Relations Committee.

that reexamination of a precedent may be appropriate at times: "*Stare decisis* is not an 'inexorable command.'" He cautioned, however, that before overruling a precedent, the Court must consider additional factors, "such as [. . .] subsequent factual and legal developments, and the reliance interests that the precedent has engendered".

> ***"Chief Justice Roberts summarized the reasons for adhering to precedent: it 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process'."***

All that said, Chief Justice Roberts concluded that respect for precedent compelled the same result in *June Medical Services* that the Court reached in *Whole Woman's Health*, however much he disagreed with the earlier case (and presumably with the one then before the Court). He noted a number of similarities between the two cases:

1. The two laws were nearly identical.

2. The District Court found that Louisiana's law would restrict access to abortion in just the same way as Texas's law, "to the same degree or worse".

3. *Whole Woman's Health* found the resultant closing of abortion clinics would lead to "fewer doctors, longer waiting times, and increased crowding". Similarly, the District Court found the Louisiana law would lead to "longer waiting times for appointments, increased crowding and increased associated health risk".

4. In Texas, admitting privileges had nothing to do with the physicians' ability to perform medical procedures. Likewise, Louisiana hospitals could deny privileges for many reasons unrelated to the physicians' competency.

The Chief Justice concluded:

> *Stare decisis* instructs us to treat like cases alike. The result in this case is controlled by our decision four years ago invalidating a nearly identical Texas law. The Louisiana law burdens women seeking previability abortions to the same extent as the Texas law, according to factual findings that are not clearly erroneous. For that reason, I concur in the judgment of the Court that the Louisiana law is unconstitutional.

Dissenting Justices Cast Doubt on *Whole Woman's Health*

Although Chief Justice Roberts believed the Supreme Court's precedent in *Whole Woman's Health* required him to concur in the judgment of the Court in *June Medical Services*, he was not willing to join the plurality opinion. The plurality justices applied a standard that was described by Justice Kavanaugh in his dissenting opinion as the "cost-benefit standard" of the *Whole Woman's Health* decision. The four dissenting justices and Chief Justice Roberts rejected this standard because they believed that the correct standard was the "undue burden standard" of *Planned Parenthood v. Casey*.[8] In their view, the undue burden standard requires

courts "to weigh the law's asserted benefits against the burdens it imposes on abortion access".

Unlike Chief Justice Roberts, the four dissenting justices went further to challenge *Whole Woman's Health* on various grounds, including that this case was not similar to *June Medical Services* or the case was poorly reasoned and should be overruled (see **Sidebar**).

Justice Alito's Dissent

Justice Alito in his dissent asserted that *stare decisis* was not appropriate, given what he viewed were significant differences between the circumstances of *Whole Woman's Health* and *June Medical Services*. For example, the former was a post-enforcement challenge based on a factual record of the law's effects. By contrast, *June Medical Services* was a pre-enforcement facial challenge that, in Justice Alito's view, lacked adequate evidentiary support—perhaps somewhat of an overstatement since the trial judge had conducted a six-day bench trial on the plaintiffs' request for a preliminary injunction and made factual findings that, as Chief Justice Roberts pointed out, could only be overturned if clearly erroneous.

Justice Alito was also troubled by the issue of standing. The plaintiffs in *June Medical Services* were not the patients themselves but abortion providers. In his view, there was "a blatant conflict in interest between an abortion provider and its patients", preventing the provider from asserting the rights of the patient to give it standing:

> [T]he idea that a regulated party can invoke the right of a third party for the purpose of attacking legislation enacted to protect the third party is stunning.

It is noteworthy that the Supreme Court granted review in *June Medical Services* only after Louisiana added the third-party standing question to the case.

In addition to raising concerns about the evidentiary record in the District Court and the standing of the plaintiffs, Justice Alito believed that a number of factors weighed in favor of overruling past precedent here. Both *Whole Woman's Health* and *June Medical Services* had allowed abortion providers to assert their patients' rights. In Justice Alito's view, these cases could not be reconciled with other established precedents on third-party standing:

> We have stressed the importance of insisting that a plaintiff assert an injury that is particular to its own situation.

Also, there could be no claim of reliance on *Whole Woman's Health* either by women wishing to obtain an abortion or by providers. The women had not relied on the ability of providers to sue on their behalf, nor had providers relied on the special third-party standing rule they had enjoyed.

Justice Alito summed up by concluding:

> The decision in this case, like that in *Whole Woman's Health*, twists the law, and I therefore respectfully dissent.

Justice Thomas's Dissent

In his dissenting opinion, Justice Thomas again emphasized his long-standing position that *Roe* v. *Wade*[9] and the cases following it had not a "shred of support from the Constitution's text". They were "grievously wrong and should be overruled". He noted that the Court had repeatedly upheld the holding in *Roe*, and in each instance had done so on the basis of *stare decisis*. In his concurring opinion, Chief Justice Roberts stated that *stare decisis* is not "an inexorable command". Citing that statement, Justice Thomas pointed out that the Court had overruled other poorly reasoned precedents and argued that the Court should do the same here:

> [T]he fact that no five Justices can agree on the proper interpretation of our precedents today evinces that our abortion jurisprudence remains in a state of utter entropy. […] Because we can reconcile neither *Roe* nor its progeny with the text of our Constitution, those decisions should be overruled.

Sidebar:
Four dissenting opinions in *June Medical Services*

Justice Alito's opinion	Justice Thomas joined, except as to Parts III–C and IV–F; Justice Gorsuch joined; and Justice Kavanaugh joined, but only as to Parts I, II, and III.
Justice Thomas's opinion	No other justice joined
Justice Gorsuch's opinion	No other justices joined
Justice Kavanaugh's opinion	No other justices joined

"The* June Medical Services case *is worthy of study in light of the practice of China's Guiding Cases […]"

Perhaps Justice Thomas had a point. Decided in 1973, *Roe v. Wade* was a 7-2 decision that generated five separate opinions. In 1992, the Court decided *Planned Parenthood v. Casey*, which arguably resulted in seven different opinions, with a plurality opinion jointly written by Justices Souter, O'Connor, and Kennedy. The case was only recognized as precedential because at least two other justices had concurred in each of the six parts of the plurality opinion, although there were different justices joining in each part. *Whole Woman's Health*, which Chief Justice Roberts opined was controlling precedent that required his concurrence in *June Medical Services*, was the subject of four opinions, and as we have seen, *June Medical Services* generated six opinions itself. Under these circumstances, who could say what guidance these precedents provided? *Stare decisis* means "to stand by things decided", but what exactly has been decided on the subject of abortion? There were over 20 opinions endorsing different legal interpretations in just the four cases cited here.

Justice Gorsuch's Dissent

Like his dissenting brethren, Justice Gorsuch had a number of criticisms of the Court's decision in *June Medical Services*. He started by pointing out the many rules that limit the exercise of judicial power, citing the deference due to legislation, the requirement of standing, and the dangers of facial challenges "to invalidate democratically enacted statutes", among other things. He concluded his introduction by saying:

> Today's decision doesn't just overlook one of these rules. It overlooks one after another. […] In truth, *Roe v. Wade*, 410 U. S. 113 (1973), is not even at issue here. The real question we face concerns our willingness to follow the traditional constraints of the judicial process when a case touching on abortion enters the courtroom.

It is clear that in Justice Gorsuch's mind, the rules—including the *stare decisis* doctrine—tend to go out the window in abortion cases.

On pages 18 through 20 of his dissent, Justice Gorsuch touched briefly on the concurring opinion of Chief Justice Roberts and raised a question about the applicability of *stare decisis* in situations where one seems to pick and choose—or perhaps even discover—which principles are deemed controlling. According to Justice Gorsuch, Chief Justice Roberts rejected the "cost-benefit" standard arguably adopted in *Whole Woman's Health* but believed there was an alternative test in that decision that was controlling. Naturally, the Chief Justice disagreed. In footnote 2 of his concurring opinion, the Chief Justice wrote:

> JUSTICE GORSUCH correctly notes that *Casey* "expressly disavowed any test as strict as strict scrutiny." […] But he certainly is wrong to suggest that my position is in any way inconsistent with that disavowal.

And in footnote 3 he further stated:

> JUSTICE GORSUCH considers this is a "nonexistent ruling" nowhere to be found in *Whole Woman's Health*. […] I disagree.

Justice Kavanaugh's Dissent

In his brief dissenting opinion, Justice Kavanaugh pointed out:

> Today, five Members of the Court reject the *Whole Woman's Health* cost-benefit standard.

If so, how can *Whole Woman's Health* be precedent for anything?

Concluding Remarks

The *June Medical Services* case is worthy of study in light of the practice of China's Guiding Cases, *de facto* binding precedents that the country's Supreme People's Court began to release in 2011. Judges in China have been instructed to "reference and imitate" the Guiding Cases when "adjudicating similar cases".[10]

The *June Medical Services* case highlights some of the benefits of adherence to precedent, as pointed out by Chief Justice Roberts in his concurring opinion. Similar benefits are explicitly stated in the preamble of the set of rules governing the practice of Guiding Cases: "unify the application of law, enhance adjudication quality, and safeguard judicial impartiality".[11] Perhaps the greatest benefit of adhering to precedent is assuring that like cases are decided alike, favoring the Rule of Law over relying on what may be the arbitrary opinions of individual judges—what some have called the Rule of Man.

However, the *June Medical Services* case also illustrates some challenges and possible pitfalls related to adherence

to precedent. Among these, as highlighted in several of the dissenting opinions in the case, is the difficulty in determining when cases are really alike. Chinese judges face similar challenges. Since 2015, they have been instructed to apply a Guiding Case if a case being adjudicated "is, in terms of the basic facts and application of law, similar to a Guiding Case".[12] Yet, as confirmed by Chinese judges who attended a conference organized by the China Guiding Case Project (the "CGCP") of Stanford Law School in 2018 (and at which the author had the pleasure to be a panelist), they often wonder how similar must a case be before it is deemed similar to a Guiding Case. They were, therefore, drawn to the conference to learn from a moot court featuring two U.S. judges and a Japanese judge presiding over a trademark dispute.[13]

More specifically, the opinions of *June Medical Services* must prompt one to ask a question: is the meaning of the law—essential to the application of the *stare decisis* doctrine—to be found in a brief comment in a dissenting opinion, in the footnotes of a concurring opinion, or in one of the twenty plus other opinions in the four cases mentioned above? In this regard, Guiding Cases are not quite the same as U.S. precedents. To avoid different readings of the underlying legal principles upon which a Guiding Case is based, each Guiding Case has a section titled "Main Points of the Adjudication", where the Supreme People's Court summarizes the underlying legal principles into one or a few short paragraphs. Nevertheless, the "Main Points of the Adjudication" themselves are found to have been subject to judges' broader or narrower reading, as revealed by the CGCP's empirical research on Chinese jurisprudence evolving increasingly rapidly through Chinese judgments.[14]

In light of these challenges facing the U.S. judiciary, one might as well do as the Romans did in antiquity: call in the augurs whose job was to examine the entrails, not to foretell the future, but to discover whether or not the gods approved of a course of action. Whatever the answers to these questions, one should remain mindful of Chief Justice John Marshall's statement in *Marbury v. Madison*:[15]

> 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.

At the end of the day, both the common law doctrine of *stare decisis* and the Guiding Cases System of the Supreme People's Court must depend on the ability of judges to do their best to reach what all would agree is the goal of any honorable judicial system: to decide like cases alike, without regard to person or party. ■

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* The citation of this Experts *Connect*™ is: James McManis, June Medical Services, L.L.C. v. Russo—*Looking for Guidance*, 10 China Law Connect 1 (Sept. 2020), *also available at* Stanford Law School China Guiding Cases Project, Experts *Connect*™, Sept. 2020, http://cgc.law.stanford.edu/commentaries/clc-10-202009-connect-13-james-mcmanis.

The original, English version of this Experts *Connect*™ piece was edited by Luke Haubenstock, Shanahly Wan, Nathan Harpainter, and Dr. Mei Gechlik. The information and views set out in this piece are the responsibility of the author and do not necessarily reflect the work or views of the China Guiding Cases Project.

1 Dante Alighieri, The Divine Comedy (Allen Mandelbaum trans., 1980).

2 Tex. Health & Safety Code Ann. § 171.0031(a) (West Cum. Supp. 2015).

3 *Whole Woman's Health v. Hellerstedt*, 579 U.S. ___, 136 S. Ct. 2292 (2016).

4 La. R.S. § 40:1061.10(A)(2)(a) (West 2020).

5 *June Medical Services, L.L.C. v. Gee*, 905 F. 3d 787 (2018).

6 Alexandra Svokos, *Supreme Court Set to Hear Critical Louisiana Abortion Case*, ABC News, Mar. 1, 2020, https://abcnews.go.com/US/supreme-court-set-hear-critical-louisiana-abortion-case/story?id=69256978.

7 *June Medical Services, L.L.C. v. Russo*, 591 U.S. ___ (2020). The slip opinion of the Supreme Court is available at https://www.supremecourt.gov/opinions/19pdf/18-1323_c07d.pdf.

8 *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

9 *Roe v. Wade* is the seminal Supreme Court case that first held a woman has a constitutional right to an abortion under certain conditions. *Roe v. Wade*, 410 U.S. 113 (1973).

10 *See* Provisions of the Supreme People's Court Concerning Work on Case Guidance, *People's Republic of China,* Stanford CGCP *Global Guide*™, Aug. 2020, http://cgc.law.stanford.edu/sgg-on-prc-provisions-case-guidance. Article 7 of the Provisions states:

> People's courts at all levels should reference and imitate the Guiding Cases released by the Supreme People's Court when adjudicating similar cases.

For the significance of the term "reference and imitate", see Dr. Mei Gechlik's annotations published in the aforementioned Stanford CGCP *Global Guide*™.

11 *Id.* Preamble.

12 *See* Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance", *People's Republic of China,* Article 9, Stanford CGCP *Global Guide*™, Aug. 2020, http://cgc.law.stanford.edu/sgg-on-prc-detailed-implementing-rules-provisions-case-guidance.

13 *See* The China Guiding Cases Project, *Moot Court:* Huahao Roast Duck Restaurant Co., Ltd. v. Bloom Restaurant LLC, 5 China Law Connect 21 (June 2019), *also available at* Stanford Law School China Guiding Cases Project, CLC *Spotlight*™, June 2019, http://cgc.law.stanford.edu/clc-spotlight/clc-5-201906-others-4-cgcp; The China Guiding Cases Project, *"De-Briefing" a Trademark Appeal: Three Legal Experts Comment on the CGCP Moot Court Decision*, 5 China Law Connect 47 (June 2019), *also available at* Stanford Law School China Guiding Cases Project, CLC *Spotlight*™, June 2019, http://cgc.law.stanford.edu/clc-spotlight/clc-5-201906-others-5-cgcp.

[14] *See, e.g.*, Zhaoyi Song, *Subsequent Cases Have Added Vitality to Guiding Case No. 33's Guidelines on "Malicious Collusion"*, 7 China Law Connect 35 (Dec. 2019), *also available at* Stanford Law School China Guiding Cases Project, China Cases *Insights*™, Dec. 2019, http://cgc.law.stanford.edu/commentaries/clc-7-201912-insights-7-zhaoyi-song; Ruoyu Ren, *Guiding Case No. 82 and 24 Related Subsequent Judgments/Rulings: How to Coherently Apply the Principle of Good Faith in Trademark Infringement*, 8 China Law Connect 1 (Mar. 2020), *also available at* Stanford Law School China Guiding Cases Project, China Cases *Insights*™, Mar. 2020, http://cgc.law.stanford.edu/commentaries/clc-8-202003-insights-8-ruoyu-ren; Zihao Zhou & Chi Che, *Guiding Case No. 8 and 66 Related Subsequent Judgments/Rulings: How to Determine "Whether Serious Difficulty Occurs in the Operation and Management of a Company"*, 8 China Law Connect 17 (Mar. 2020), *also available at* Stanford Law School China Guiding Cases Project, China Cases *Insights*™, Mar. 2020, http://cgc.law.stanford.edu/commentaries/clc-8-202003-insights-9-zhou-che.

[15] *Marbury v. Madison*, 5. U.S. (1 Cranch) 137 (1803).

Nel mezzo del cammin di nostra vita,
Mi ritrovai per una selva oscura,
Che la diritta via era smarrita.

我走过人生一半旅途，
发现身处幽暗的森林，
原来我已迷失了正路。[1]

但丁《地狱篇》第一章

《六月医疗服务有限公司诉鲁索案》——寻找指导*

马克已

摘要

在《六月医疗服务有限公司诉鲁索案》（*June Medical Services, L.L.C. v. Russo*）中，美国联邦最高法院约翰·罗伯茨（John Roberts）首席大法官称，尽管他是《整体女性健康组织诉赫勒斯泰特案》（*Whole Woman's Health v. Hellerstedt*）中三位持异议的法官之一，并依然认为该案作出了错误的判决，但他受到约束而必须遵循该案。首席大法官解释称，该两案相似，而“遵循先例的法律原则要求我们，在没有特殊情况下，要以类似方式对待类似的案件”。对此，《六月医疗服务案》的四位持异议的大法官并不同意，其理由不尽相同，包括认为《整体女性健康案》并不是类似案件，甚至认为该案说理欠佳，应被推翻。

本篇评论的作者根据《六月医疗服务案》的不同意见，以及他过去几十年作为美国杰出的出庭律师所形成的见解，讨论了遵循先例原则的真正意思及其赖以建立的基石。在评论结束时，他深思熟虑地指出这一切对力求类案类判的中国司法机关的意义。

引言

2013年7月，得克萨斯州颁布了一项法律，要求进行堕胎手术的医生必须在堕胎诊所30英里范围内的州立医院中享有收治病人入院的特权。[2] 2016年6月27日，美国联邦最高法院在《整体女性健康组织诉赫勒斯泰特案》（*Whole Woman's Health v. Hellerstedt*）中以5比3的比例裁定该法律违反宪法，认为该项法律对女性获得堕胎的能力造成了不适当的负担。[3] 约翰·罗伯茨（John Roberts）首席大法官是对该裁决持异议的大法官之一。

与此同时，在2014年，路易斯安那州的立法机关通过了一项几乎相同的法案，同样要求进行堕胎手术的医生必须在“距堕胎地点不超过30英里”的医院中享有收治病人的特权。[4] 当该路易斯安那州的法律受到质疑时，美国联邦地区法院于2017年4月根据《整体女性健康案》的判决将该法律否决。

2018年9月，美国联邦第五巡回上诉法院推翻了地区法院的判决并批准了路易斯安那州的法律。该决定引起了一些批评。[5] 正如在联邦最高法院复审此案时担任联席法律顾问Travis J. Tu先生在2020年3月的ABC新闻中所述：

> 第五巡回法院做了连法学生都知道所有上诉法院都不应该做的行为。[它]没有忠实地适用联邦最高法院的先例[即《整体女性健康案》]。同样糟糕的是，第五巡回法院完全无视初审法院的事实查明结果。[6]

最后，2020年6月29日，联邦最高法院在《六月医疗服务有限公司诉鲁索案》中以5比4的决定，推翻了第五巡回法院的裁决，其中部分原因是依靠了遵循先例的原则。[7]

罗伯茨首席大法官认为其受约束而必须遵循《整体女性健康案》

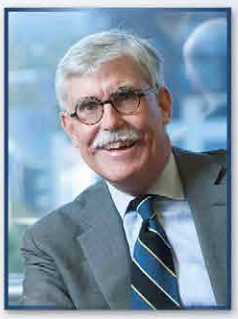
在《六月医疗服务案》中，罗伯茨首席大法官在其同意意见中给出了关键的第五票推翻了第五巡回法院的裁决。首席大法官指出，他加入了《整体女性健康案》的异议，并且仍然认为该案是错误的判决。尽管如此，他解释道：

> 遵循先例的法律原则要求我们，在没有特殊情况下，要以类似方式对待类似的案件。路易斯安那州法律对寻求堕胎所施加的负担与德克萨斯州法律所施加的一样重，并出于同样的原因。因此，在我们的先例下，路易斯安那州法律不能成立。

罗伯茨首席大法官总结了遵循先例的理由：它“促进法律原则的不偏不倚、可预测和一致的发展，促使对司法裁决的信赖，并为司法程序的实际和感知到的诚信做出了贡献”。首席大法官承认，对先例的重新审视有时是适当的：“遵循先例不是‘势不可挡的命令’”。然而，他警告说，在推翻先例之前，联邦最高法院必须考虑其他因素，“例如[...]随后的事实和法律发展，以及该先例已产生的信赖利益”。

综上所述，罗伯茨首席大法官得出的结论是，尽管他不认同《整体女性健康案》的判决（他大概也不认同

马克己
McManis Faulkner律师事务所创办人兼合伙人
国际出庭律师学会（“IATL”）院士、中国项目主席



马克己（James McManis）是McManis Faulkner律师事务所创办人兼合伙人、美国最优秀的出庭律师之一。他先于斯坦福大学取得历史学位，后又在加州大学伯克利分校取得了法律博士学位，继而在硅谷大本营——加州圣荷西，开始了法律职业生涯。马先生作为检察官出身，处理了很多刑事案件，之后开始私人执业，在联邦及州法院代理了不计其数的民事和刑事案件。他成为律师已有50多年。他的客户包括硅谷的公司和个人，业务涉猎范围广泛。

马先生是国际出庭律师学会（International Academy of Trial Lawyers）的院士，他主管该学会知名的中国项目多年，安排国务院法制办公室、全国人民代表大会及中央党校的律师赴美学习美国法律制度。马先生也曾是国际出庭律师学会执行委员会委员及该学会国际关系委员会会长。

其法院当前审理的案件，即《六月医疗服务案》），但对先例的尊重迫使法院对《六月医疗服务案》作出与《整体女性健康案》结果一样的判决。他指出了两案之间的几项相似之处：

1. 两项法律几乎是相同的。

2. 联邦地区法院裁定，路易斯安那州的法律将以与得克萨斯州法律相同的方式限制堕胎，当中的“程度相同或更糟”。

3. 在《整体女性健康案》中，法院发现因案中法律而使堕胎诊所关闭会进而导致“医生人数减少，等候时间延长和更多的拥挤情况”。同样，联邦地区法院发现，路易斯安那州的法律将会导致“预约轮候时间延长，更多的拥挤情况，以及增加相关的健康风险”。

4. 在得克萨斯州，收治病人入院的特权与医生施行医疗程序的能力无关。同样，路易斯安那州的医院可以基于与医生能力无关的许多原因而拒绝给予收治病人入院的特权。

“罗伯茨首席大法官总结了遵循先例的理由：它‘促进法律原则的不偏不倚、可预测和一致的发展，促使对司法裁决的信赖，并为司法程序的实际和感知到的诚信做出了贡献’。”

首席大法官总结道：

> 遵循先例的原则指导我们要以类似方式对待类似的案件。本案的结果由四年前我们的判决所控制，该判决使与本案法律几乎相同的德克萨斯州法律无效。根据没有明显错误的事实查明结果，路易斯安那州法律给寻求堕胎的女性所增加的负担与德克萨斯州法律所增加的相同。因此，我同意法院判决路易斯安那州法律违宪。

持异议的大法官对《整体女性健康案》提出质疑

尽管罗伯茨首席大法官认为联邦最高法院在《整体女性健康案》中的先例使他需要同意该法院在《六月医疗服务案》中的判决，但他不愿意加入复数意见。支持复数意见的大法官采用了卡瓦诺大法官（Justice Kavanaugh）在其异议中描述为《整体女性健康案》决定的“成本效益标准”。四名持异议的大法官与罗伯茨首席大法官都拒绝了这一标准，因为他们认为正确的标准是《计划生育组织诉凯西案》（*Planned Parenthood v. Casey*）中的“不适当的负担标准”。[8] 他们认为，不适当的负担标准要求法院“权衡法律所主张的利益与它对得到堕胎机会所施加的负担”。

与罗伯茨首席大法官不同的是，四名持异议的大法官以各种理由进一步挑战《整体女性健康案》，包括指出该案与《六月医疗服务案》不类似，或者该案的说理欠佳，应被推翻。（见**侧边栏**）。

阿里托大法官（Justice Alito）的异议

阿里托大法官在其异议中主张，鉴于《整体女性健康案》与《六月医疗服务案》之间存在其认为重大的差异，因此遵循先例的原则是不合适的。例如，前者是根据法律效力的事实记录进行的法律实施后的挑战。相比之下，《六月医疗服务案》是法律实施前对该法律的全面挑战，而阿里托大法官认为该挑战缺乏足够的证据支持——这可能有点夸大其词，因为本案的原

审法官根据原告的初步禁制令的请求而进行了为期六天的庭审，并对事实作出了如罗伯茨首席大法官所指的只有在明显错误的情况下才能被推翻的查明结果。阿里托大法官也对诉讼身份的问题感到困扰。《六月医疗服务案》的原告不是病人本身，而是堕胎提供者。阿里托大法官认为，“堕胎提供者与其病人之间存在明显的利益冲突”，该冲突阻止堕胎提供者声称病人的的权利给予其诉讼的身份：

> 被法律规管的一方可以援引第三方的权利以攻击保护该第三方的法律，这种观点令人震惊。

值得注意的是，仅在路易斯安那州在《六月医疗服务案》中增加了关于第三方诉讼身份问题后，联邦最高法院才对该案批准了复审。

除了对联邦地区法院的证据记录和原告的诉讼身份表示担忧外，阿里托大法官还认为，几个因素支持推翻过去的先例。《整体女性健康案》与《六月医疗服务案》都允许堕胎提供者主张其病人的权利。阿里托大法官认为，该两案无法与其他关于第三方诉讼身份的先例协调：

> 我们已强调坚持要求由原告本人主张特定于其自身情况的伤害的重要性。

此外，无论是希望堕胎的女性还是堕胎提供者，都不得声称依靠了《整体女性健康案》。这些女性没有依靠堕胎提供者代她们起诉的能力，而堕胎提供者也没有依靠其享有的特殊第三方诉讼身份的规则。

阿里托大法官总结说：

> 本案的决定正如《整体女性健康案》一样扭曲了法律，因此，我谨对此表示异议。

托马斯大法官（Justice Thomas）的异议

在他的异议中，托马斯大法官再次强调了他长期以来的立场，即《罗伊诉韦德案》（*Roe* v. *Wade*）[9]及遵循该案的案件都没有“从宪法文本中得到丝毫支持”。它们“严重错误，并应被推翻”。他指出，联邦最高法院一再维持《罗伊案》的判决理由，并且每次都是基于遵循先例的原则。罗伯茨首席大法官在其同意意见中表示，遵循先例不是“势不可挡的命令”。托马斯大法官在引用该表述时指出，联邦最高法院曾经推翻了其他理由不充分的先例，并认为该法院在此案应做同样的事情：

> 今天没有五位大法官能够就对我们先例的适当解释达成一致，这事实表明我们关于堕胎的法理仍然处于极度混乱的状态。[...]因为我们无法使《罗伊案》和其后续案例与我们的宪法文本保持一致，所以这些决定应被推翻。

也许托马斯大法官有其道理。《罗伊诉韦德案》于1973年以7比2的比例做出判决，并产生了五个意见。1992年，联邦最高法院对《计划生育组织诉凯西案》作出决定。可以说该案产生了七个不同意见，其中包括由苏特大法官（Justice Souter）、奥康纳大法官（Justice O'Connor）和肯尼迪大法官（Justice Kennedy）共同撰写的复数意见。该案被认为是先例，仅是由于在复数意见的六个部分中，每个部分都至少有其他两位法官的同意，尽管每个部分同意的法官都不尽相同。《整体女性健康案》——罗伯茨首席大法官认为该案是具有控制性的先例，并使他需要在《六月医疗服务案》中作出同意判决——产生了四个意见。而正如我们已经提到，《六月医疗服务案》产生了六个意见。在这种情况下，谁能说出这些先例提供了哪些指导？遵循先例是指“维持已经决定的事情”，但是关于堕胎议题到底决定了什么？仅在这里引用的四个案例中，就有20多个意见支持不同的法律解释。

戈索奇大法官（Justice Gorsuch）的异议

与其他持异议的大法官一样，戈索奇大法官对联邦最高法院在《六月医疗服务案》中的判决也提出了许多批评。他首先指出了许多限制司法权行使的规则，列举了诸如对立法的尊重、对诉讼身份的要求，以及用

侧边栏：
《六月医疗服务案》中四个异议

阿里托大法官（Justice Alito）的异议	托马斯大法官加入此异议，但第III-C部分和第IV-F部分除外； 戈索奇大法官加入此异议；以及 卡瓦诺大法官加入此异议，但仅限于第I、II和III部分。
托马斯大法官（Justice Thomas）的异议	无其他大法官加入此异议
戈索奇大法官（Justice Gorsuch）的异议	无其他大法官加入此异议
卡瓦诺大法官（Justice Kavanaugh）的异议	无其他大法官加入此异议

全面挑战“使以民主方式制定的法律无效”的危险性等等。他在结束其介绍部分时说：

> 今天的决定不仅忽略了其中的一项规则，而是一个接一个地忽略了。[...] 实际上，《罗伊诉韦德案》，410 U.S. 113（1973），在这里不是争议点。我们面临的真正问题是，当涉及堕胎的案件进入法庭时，我们是否愿意遵循对司法程序的传统约束。

显然，在戈索奇大法官的心目中，这些规则——包括遵循先例的原则——倾向于在堕胎案件中被抛之脑后。

在其异议的第18页至第20页中，戈索奇大法官简短地谈到了罗伯茨首席大法官的的同意意见，并提出了一个问题，即在似乎可以让人挑选甚至是发现哪些原则具有拘束力的情况下，遵循先例原则是否还适用。据戈索奇大法官所言，罗伯茨首席大法官拒绝了可以说是于《整体女性健康案》采用的“成本效益”标准，却认为该决定中存在另一项具有拘束力的测试标准。很自然地，首席大法官不同意戈索奇大法官的这一观点。在其同意意见的脚注2中，首席大法官写道：

> 戈索奇大法官正确地指出《凯西案》“明确否定任何与严格审查一样严格的测试标准。”[...] 但是他提出我的立场与这种否定有不符合之处，他当然是错误的。

“鉴于中国指导性案例 [...] 的实践，《六月医疗服务案》很值得研究。”

在脚注3中，他进一步指出：

> 戈索奇大法官认为这是《整体女性健康案》中无法找到的“不存在的裁决”。我并不同意。

卡瓦诺大法官（Justice Kavanaugh）的异议

在他简短的异议中，卡瓦诺大法官指出：

> 今天，本院五名成员都拒绝了《整体女性健康案》的成本效益标准。

如果是这样，《整体女性健康案》又怎能成为某种决定的先例？

结语

鉴于中国指导性案例——中国最高人民法院于2011年开始发布的具有约束力的先例——的实践，《六月医疗服务案》很值得研究。中国法官被指示“审判类似案例时应当参照”指导性案例。[10]

正如罗伯茨首席大法官在其同意意见中指出的那样，《六月医疗服务案》突显了遵循先例的一些好处。在规管指导性案例实践的一套规则的序言中也明确指出了类似的好处：“统一法律适用，提高审判质量，维护司法公正”。[11] 遵循先例的的最大好处可能是确保对类似案件做出类似的判决，有利于法治发展，胜过依赖个别法官可能作出的任意意见（有人称之为人治）。

但是，《六月医疗服务案》也说明了与遵循先例相关的一些挑战和可能的陷阱。正如在该案几个异议中所强调的那样，当中的挑战是很难确定案件何时是真正类似的。中国法官面临着类似的挑战。自2015年以来，中国法官得到的指示是如果在审的案件“在基本事实和法律适用方面类似于指导案件”，他们应当适用指导性案例。[12] 可是，正如参加2018年斯坦福法学院中国指导性案例项目（“CGCP”）举办的会议（笔者很高兴是小组成员之一）的中国法官所证实的那样，他们常常想知道与指导性案例相似的案件必须存在哪种程度的相似。因此，他们被该会议所吸引，希望通过模拟法庭来学习。该模拟法庭由两名美国法官和一名日本法官主持，涉及的是一个商标争议案件。[13]

更具体地说，《六月医疗服务案》的众多意见一定促使人们提出一个问题：法律的意义（对遵循先例的原则至关重要）是否可以在异议的简短评论、同意意见的脚注，或者上述四个案件中的二十多个意见之一中找到？在这方面，指导性案例与美国先例并不完全相同。为了避免对指导性案例所依据的基本法律原则有不同的理解，每个指导性案例都有一个标题为“裁判要点”的部分，而最高人民法院在该部分中将基本法律原则总结为一个或几个简短的段落。然而，正如CGCP对中国判决迅速发展出来的中国法理的实证研究所揭示，“裁判要点”本身受到法官广义或狭义的解释。[14]

鉴于美国司法机构面临的这些挑战，人们不如像罗马人在古代所做的那样：召集那些负责检查内脏的预言家，不是为了预言未来，而是要发现众神是否同意采取某些行动。无论上述问题的答案是什么，人们都应谨记约翰·马歇尔（John Marshall）首席大法官在《马伯里诉麦迪逊案》（*Marbury v. Madison*）的发言：[15]

> 毫无疑问，司法部门的职责所在是道出法律是什么。那些将规则适用于具体案件的人，有必要阐明并解释该规则。如果两项法律相互抵触，则法院必须对两者的适用做出裁定。

归根结底，普通法的遵循先例的原则和最高人民法院的指导性案例制度都必须依赖于法官的能力，尽其最大努力达成所有人都认同是任何光荣的司法制度的目标：在不考虑个人或党派的情况下，对类似的案件做出类似的判决。■

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* 此专家*连接*™的引用是：马克己，《六月医疗服务有限公司诉鲁索案》——寻找指导，《中国法律连接》，第10期，第7页（2020年9月），*亦见于*斯坦福法学院中国指导性案例项目，专家*连接*™，2020年9月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-10-202009-connect-13-james-mcmanis。

英文原文由Luke Haubenstock、Shanahly Wan、Nathan Harpainter和熊美英博士编辑。本中文版本由李恺祺、李新豪、林子郁、刘柳茜、孔晶晶、温乐书翻译，并由朱新玥和熊美英博士最后审阅。载于本专家*连接*™的信息和意见作者对其负责，它们并不一定代表中国指导性案例项目的工作或意见。

1 此中文版本是从Allen Mandelbaum准备的英文版本翻译而成。*见*Dante Alighieri, The Divine Comedy（Allen Mandelbaum 译，1980）。

2 Tex. Health & Safety Code Ann. § 171.0031(a)（West Cum. Supp. 2015）。

3 *Whole Woman's Health 诉Hellerstedt*，579 U.S. ___，136 S. Ct. 2292（2016）。

4 La. R.S. § 40:1061.10(A)(2)(a)（West 2020）。

5 *June Medical Services, L.L.C. 诉Gee*，905 F. 3d 787（2018）。

6 Alexandra Svokos，*Supreme Court Set to Hear Critical Louisiana Abortion Case*，ABC News，2020年3月1日，https://abcnews.go.com/US/supreme-court-set-hear-critical-louisiana-abortion-case/story?id=69256978。

7 *June Medical Services, L.L.C. 诉Russo*，591 U.S. ___（2020）。联邦最高法院的判决意见书单行本可见于https://www.supremecourt.gov/opinions/19pdf/18-1323_c07d.pdf。

8 *Planned Parenthood 诉Casey*，505 U.S. 833（1992）。

9 《罗伊诉韦德案》是最高法院开创性的一案，该案首先裁定一名妇女在某些情况下享有堕胎的宪法权利。*Roe 诉Wade*，410 U.S. 113（1973）。

10 *见*中华人民共和国《最高人民法院关于案例指导工作的规定》，斯坦福CGCP*全球指南*™，2020年8月，http://cgc.law.stanford.edu/zh-hans/sgg-on-prc-provisions-case-guidance。该规定的第七条是："最高人民法院发布的指导性案例，各级人民法院审判类似案例时应当参照 "。有关"参照"一词的含义，见熊美英博士刊于前述斯坦福CGCP*全球指南*™ 的注解。

11 *同上*，序言。

12 *见*中华人民共和国《〈最高人民法院关于案例指导工作的规定〉实施细则》，斯坦福CGCP*全球指南*™，2020年8月，http://cgc.law.stanford.edu/zh-hans/sgg-on-prc-detailed-implementing-rules-provisions-case-guidance。

13 *见*中国指导性案例项目，模拟法庭：《花好烤鸭饭店有限公司诉Bloom饭店有限公司》，《中国法律连接》，第5期，第35页（2019年6月），*亦见于*斯坦福法学院中国指导性案例项目，中法连*聚焦*™，2019年6月，http://cgc.law.stanford.edu/zh-hans/clc-spotlight/clc-5-201906-others-4-cgcp；中国指导性案例项目，"简报"一起商标上诉案：三位法律专家对CGCP模拟法庭裁决的评论，《中国法律连接》，第5期，第51页（2019年6月），*亦见于*斯坦福法学院中国指导性案例项目，中法连*聚焦*™，2019年6月，http://cgc.law.stanford.edu/zh-hans/clc-spotlight/clc-5-201906-others-5-cgcp。

14 *见，例如*，宋肇屹，后续裁判为指导案例33号对"恶意串通"的指引增添了生命力，《中国法律连接》，第7期，第43页（2019年12月），*亦见于*斯坦福法学院中国指导性案例项目，中国案例*见解*™，2019年12月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-7-201912-insights-7-zhaoyi-song；任若雨，指导案例82号与24个相关后续裁判：如何于商标侵权领域贯彻适用诚实信用原则，《中国法律连接》，第8期，第10页（2020年3月），*亦见于*斯坦福法学院中国指导性案例项目，中国案例*见解*™，2020年3月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-8-202003-insights-8-ruoyu-ren；周子皓、车驰，指导案例8号与66个相关后续裁判：如何判定"公司经营管理是否发生严重困难"，《中国法律连接》，第8期，第33页（2020年3月），*亦见于*斯坦福法学院中国指导性案例项目，中国案例*见解*™，2020年3月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-8-202003-insights-9-zhou-che。

15 *Marbury 诉 Madison*，5. U.S. (1 Cranch) 137（1803）。

中国指导性案例项目很自豪地组织了许多成功的活动，为国际专家和其他对该项目的工作感兴趣的人士提供了独特的平台。

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The Series of "乔丹" Trademark Cases: The Impact on the Infringing Company and the Implications for Celebrities*

Yi Chen & Xinyue Zhu

Abstract

Through a study of the lines of reasoning used in the adjudication of a series of cases involving the "乔丹" trademark and related trademarks (collectively referred to as "the series of '乔丹' trademark cases"), this commentary discusses, beginning with Guiding Case No. 113, the conditions and feasibility for a foreign natural person to use the Chinese translation and pinyin transliteration of his[1] name as well as his human silhouette as the basis for his claim for the right to counter others' registration of trademarks within the territory of China. Afterwards, the authors describe the commercial impact of these cases on Qiaodan Sports Co., Ltd.

Based on the above analysis, the authors further explore, in light of China's system that calls for searches for "similar cases" before a pending case is decided (i.e., a system that has been strengthened after the release of the *Guiding Opinions of the Supreme People's Court on Unifying the Application of Law and Strengthening the Search for Similar Cases (Trial Implementation)*), the guiding significance of the eleven cases in the series of "乔丹" trademark cases for Chinese courts when they adjudicate cases that are similar to these trademark cases in the future. The authors also provide practical suggestions to help foreign natural persons better understand how to protect their names, translated names, stage names, pinyin transliterations of all of the aforementioned names, and their portrait silhouettes within the territory of China, and how to oppose enterprise names maliciously registered by others.

Introduction

In December 2019, the Supreme People's Court (the "SPC") released Guiding Case No. 113 (*Michael Jeffrey Jordan v. The Trademark Review and Adjudication Board of the State Administration for Industry and Commerce and Qiaodan Sports Co., Ltd., An Administrative Case Concerning a Dispute over the "乔丹" Trademark*).[2] In response to the market trend where individual names are commercialized, the case has confirmed that the right to name can be used as a prior right to oppose trademark registration. The case also extends the protection of the right to name to the Chinese translation of the name of a foreign natural person.

In the "Main Points of the Adjudication" section of Guiding Case No. 13, the SPC has further established that when a foreign natural person claims the protection of the right to name with respect to a specific name, the specific name should meet the following three conditions:

(1) the specific name is, to a certain degree, well-known in China and is known to the relevant public;

(2) the relevant public uses the specific name to refer to the natural person; and

(3) a stable correspondence relationship has already been established between the specific name and the natural person.

Like the "Main Points of the Adjudication" of other Guiding Cases, the "Main Points of the Adjudication" of Guiding Case No. 113 have *de facto* binding force for those courts adjudicating similar subsequent cases.[3]

Clearly, Guiding Case No. 113 is significant. However, the significance of the underlying case upon which the Guiding Case is based—(2016) Zui Gao Fa Xing Zai No. 27 Administrative Judgment—and the other ten cases in the series of "乔丹" trademark cases adjudicated by the SPC (see **below**) must not be ignored. These cases include the SPC's adjudication of legal issues concerning a foreign natural person's opposition to another's use of the Chinese translation of his name and the pinyin thereof for trademark registration, and the SPC's determination of the content of a natural person's right to portrait. According to the *Guiding Opinions of the Supreme People's Court on Unifying the Application of Law and Strengthening the Search for Similar Cases (Trial Implementation)*, which came into effect on July 31, 2020, Guiding Case No. 113 and these

Yi Chen
Editor, China Guiding Cases Project

Yi Chen is an associate at JunHe LLP's Shanghai office. Previously, she was an associate at King & Wood Mallesons (Shanghai) and a junior associate at Hogan Lovells International LLP (Shanghai). Her practice focuses on corporate internal investigations, white-collar crimes, intellectual property ("IP"), cybersecurity and data protection, international commercial arbitration, and commercial litigation. In the area of IP, Ms. Chen has handled a wide range of IP-related disputes and commercial licensing matters, including trademark infringement, infringement of trade secrets, and unfair competition litigation. She has also provided IP services in cross-border mergers and acquisitions to multinational companies within the Internet and technology, chemical, and electronic hardware industries.

Ms. Chen received a Bachelor of Laws degree from Fudan University and a Master of Laws degree from Cornell University. She is licensed to practice law in China and the State of New York in the United States.

eleven cases are within "the scope of a search for similar cases".[4] In the future, in the adjudication of a similar case, the adjudicating court "should reference and imitate" Guiding Case No. 113 "to render a ruling or judgment", while these eleven cases "may be used […] as references for rendering a ruling or judgment".[5]

> ***"From 2016 to 2020, the SPC retried eleven cases in the series of '乔丹' trademark cases and rendered its judgments […]. The trademarks involved can be divided into three categories […]."***

In view of the fact that the eleven cases in the series of "乔丹" trademark cases are deemed to be "similar cases" and will certainly play a role in cases brought before Chinese courts in the future, it is necessary to conduct an in-depth analysis of these cases. This commentary will first summarize the results of the SPC's final adjudication of the trademarks involved in this series of cases as well as the reasoning used by China's highest court. The commentary will then describe the commercial impact of these cases on Qiaodan Sports Co., Ltd. ("Qiaodan Company"). Finally, this commentary will discuss the implications of these cases for celebrities.

The Different Fates of the Disputed Trademarks in the Series of "乔丹" Trademark Cases

From 2016 to 2020, the SPC retried eleven cases in the series of "乔丹" trademark cases and rendered its judgments (see **Sidebar 1**). The trademarks involved can be divided into three categories:

- the "乔丹" trademark (see **Sidebar 1: Nos. 1, 4, and 5**);
- the "QIAODAN" trademark (see **Sidebar 1: Nos. 2, and 7–9**) and graphic trademarks containing "qiaodan" (see

Xinyue Zhu
Editor, China Guiding Cases Project
LL.M. Candidate, Goethe University Frankfurt

Xinyue Zhu is enrolled in the LL.M. program at Goethe University Frankfurt. Prior to studying in Germany, she obtained a Bachelor of Laws degree from the University of International Business and Economics ("UIBE") in China.

Ms. Zhu has interned at Herbert Smith Freehills LLP (Beijing office), Taylor Wessing LLP (Beijing office), King & Wood Mallesons (Beijing office), and Alibaba Group (Data Compliance Legal Department). During her internships, she primarily focused on corporate finance, cross-border mergers and acquisitions, cybersecurity, and data protection. She has also served as a research assistant at the China Society for World Trade Organization Studies and the UIBE Research Center of Global Value Chains.

Sidebar 1:

No.	Judgment No.	Date of Adjudication	Registration No. of Trademark in Dispute	Trademark in Dispute	Class in Which Trademark in Dispute Was Approved for Use (International Classification)[1]	Results of the Adjudication	Current Status of Trademark in Dispute
1	(2016) Zui Gao Fa Xing Zai No. 15	2016/12/08	6020565	乔丹	32[2]	Michael Jordan has the right to name with respect to "乔丹"; the registration of the trademark in dispute has harmed that right to name.	Invalidated
2	(2016) Zui Gao Fa Xing Zai No. 20	2016/12/08	6020566	QIAODAN	32	Michael Jordan does not have the right to name with respect to "QIAODAN".	Registered (New Term: 2019/12/14–2029/12/13)
3	(2016) Zui Gao Fa Xing Zai No. 25	2016/12/08	9292836		35[3]	Michael Jordan does not have the right to name with respect to "qiaodan".	Registered (2012/04/14–2022/04/13)
4	(2016) Zui Gao Fa Xing Zai No. 26	2016/12/08	4152827	乔　丹	25[4]	Michael Jordan has the right to name with respect to "乔丹"; the registration of the trademark in dispute has harmed that right to name.	Invalidated
5	(2016) Zui Gao Fa Xing Zai No. 27	2016/12/07	6020569	乔丹	28[5]	Michael Jordan has the right to name with respect to "乔丹"; the registration of the trademark in dispute has harmed that right to name.	Invalidated
6	(2016) Zui Gao Fa Xing Zai No. 28	2016/12/08	9292824		35	Michael Jordan does not have the right to name with respect to "qiaodan".	Registered (2012/04/14–2022/04/13)
7	(2016) Zui Gao Fa Xing Zai No. 29	2016/12/30	6020571	QIAODAN	28	Michael Jordan does not have the right to name with respect to "QIAODAN".	Registered (New Term: 2020/03/28–2030/03/27)
8	(2016) Zui Gao Fa Xing Zai No. 30	2016/12/30	6020568	QIAODAN	18[6]	Michael Jordan does not have the right to name with respect to "QIAODAN".	Registered (New Term: 2020/03/07–2030/03/06)
9	(2016) Zui Gao Fa Xing Zai No. 31	2016/12/07	6020575	QIAODAN	25	Michael Jordan does not have the right to name with respect to "QIAODAN".	Registered (New Term: 2020/03/14–2030/03/13)
10	(2016) Zui Gao Fa Xing Zai No. 32	2016/12/30	9286585		35	Michael Jordan does not have the right to name with respect to "qiaodan".	Registered (2012/05/14–2022/05/13)
11	(2018) Zui Gao Fa Xing Zai No. 32	2020/03/04	6020578		25	Michael Jordan has the right to name with respect to "乔丹"; the registration of the trademark in dispute has harmed that right to name.	According to the judgment, it will be declared invalid.

[1] *See*《类似商品和服务区分表——基于尼斯分类第十一版（2019文本）》(Similar Goods and Services Classification Table—Based on the Eleventh Edition of the Nice Classification (2019 Text))（国家知识产权局商标局编，知识产权出版社，2019）(Trademark Office of the National Intellectual Property Administration ed., Intellectual Property Press, 2019), http://sbj.cnipa.gov.cn/sbsq/sphfwfl.

[2] Class 32: beer; non-alcoholic beverages; mineral water and soft drinks; fruit drinks and juices; syrups and other non-alcoholic preparations for beverages.

[3] Class 35: advertising; business operation; business management; office affairs.

[4] Class 25: clothing, shoes, hats.

[5] Class 28: games and toys; video game devices; sports and sporting goods; decorations for Christmas trees.

[6] Class 18: leather and artificial leather; animal skins; suitcases and backpacks; umbrellas and parasols; walking sticks; whips, harnesses, and saddles; animal collars, belts, and clothing.

Sidebar 1: Nos. 3, 6, and 10), where "QIAODAN" and "qiaodan" are the pinyin transliteration of the Chinese characters "乔丹" using uppercase and lowercase English letters, respectively; and

- the "乔丹 + black human silhouette" trademark (see **Sidebar 1: No. 11**).

With respect to these three categories of trademarks, the SPC rendered different judgments.

1. The "乔丹" Trademark

In the judgments numbered (2016) Zui Gao Fa Xing Zai No. 15, (2016) Zui Gao Fa Xing Zai No. 26, and (2016) Zui Gao Fa Xing Zai No. 27, the SPC pointed out that Michael Jeffrey Jordan ("Michael Jordan") has a prior right to name with respect to the two characters "乔丹" and that the department in charge of trademark registration was required to render a new ruling regarding the "乔丹" trademark that Qiaodan Company had registered. Ultimately, Qiaodan Company's registration of the "乔丹" trademark was invalidated.

The reasons for the adjudication used by the SPC in the three cases are basically summarized in Guiding Case No. 113. Among them, the logic regarding the protection of the Chinese translation of a foreigner's name by asserting the right to name consists mainly of the following points:

- Article 31 of the *Trademark Law of the People's Republic of China* (the "*Trademark Law*") as amended in 2001 provided:

  > An application for trademark registration must not harm the existing prior right of another […].[6]

- Both Article 99 Paragraph 1 of the *General Principles of the Civil Law of the People's Republic of China*[7] and Article 2 Paragraph 2 of the *Tort Liability Law of the People's Republic of China*[8] clearly state that a natural person has, in accordance with law, the right to name. On this basis, the right to name can constitute a "prior right" provided for in Article 31 of the *Trademark Law*. Where the registration of a trademark in dispute harms the prior right to name of another, the registration of that trademark in dispute should be determined to be a violation of Article 31 of the *Trademark Law*.

- The SPC emphasized: the protection of the prior right to name "involves not only the protection of the dignity of a natural person, but also the protection of the economic benefits embedded in the name of a natural person, especially in the name of a well-known person".

- When a natural person claims, in accordance with Article 31 of the *Trademark Law*, the protection of the right to name with respect to a specific name, the three conditions included in the "Main Points of the Adjudication" of Guiding Case No. 113, as mentioned above, should be met.

- The SPC also emphasized: "[w]hen determining whether a foreigner can claim the protection of the right to name with respect to a part of the Chinese translation of his foreign name, it is necessary to consider the habits of the relevant public in China in addressing foreigners. The protection of the right to name may be claimed, in accordance with law, for a [foreign] name's Chinese translation that meets the aforementioned three conditions".

  In the process of adducing specific evidence, Michael Jordan primarily provided a large number of articles about himself published in relevant newspapers, periodicals, websites, relevant books, and special issues within the territory of China to prove that the media mostly refer to him as "乔丹". Michael Jordan also provided market research reports to prove that "乔丹" was, to a certain degree, well-known within the territory of China and the relevant public had already established a stable correspondence relationship between "乔丹" and himself. At the same time, Michael Jordan cited a special reminder stated by Qiaodan Company in the "Brand Risk" section of the company's *IPO Prospectus* (which reminded investors to note that Michael Jordan has no connection to the company),[9] in order to prove that Qiaodan Company itself also believed that "乔丹" and Qiaodan Company had the potential to be confused and mistaken as being related to one another. This line of reasoning used in adducing evidence received the SPC's approval, and therefore the SPC ultimately determined that Michael Jordan has the right to name with respect to "乔丹".

- In addition, the SPC clearly pointed out: "[u]se is one of the rights that the holder of the right to name has, [but] is not a statutory prerequisite for his claim for protection of his right to name. Where a specific name is protected by law in accordance with the right to name, the claim for rights [made by] the holder of the right to name in accordance with the provisions of the *Trademark Law* regarding prior rights is not affected, even if the natural person does not take the initiative to use [the specific name]". (This point

is included in the "Main Points of the Adjudication" of Guiding Case No. 113). Therefore, the fact that Michael Jordan did not take the initiative to use "乔丹" cannot be used to deny his right to name with respect to "乔丹".

In 2017, the SPC released the *Provisions of the Supreme People's Court on Several Issues Concerning the Adjudication of Administrative Cases Involving Authorization or Confirmation of Trademark Rights* ("*Provisions on the Adjudication of Administrative Cases Involving Authorization or Confirmation of Trademark Rights*").[10] Article 20 Paragraph 2 explicitly states:

> Where a party claims the right to name with respect to **a specific name, such as his pen name, stage name, or translated name**; the specific name is, to a certain degree, well-known; a stable correspondence relationship has already been established [between the specific name] and the natural person; and the relevant public uses the specific name to refer to the natural person; a people's court shall support [the claim]. (emphasis added)

In effect, Article 20 Paragraph 2 has codified, as a generally applicable rule in the form of a judicial interpretation, the logic used in the judgments of the above three cases (i.e., (2016) Zui Gao Fa Xing Zai No. 15, (2016) Zui Gao Fa Xing Zai No. 26, and (2016) Zui Gao Fa Xing Zai No. 27). However, the scope of Article 20 Paragraph 2 is broader. Apart from a translated name, a party may also claim the right to name with respect to his pen name or stage name, provided that the conditions specified in this paragraph are met.

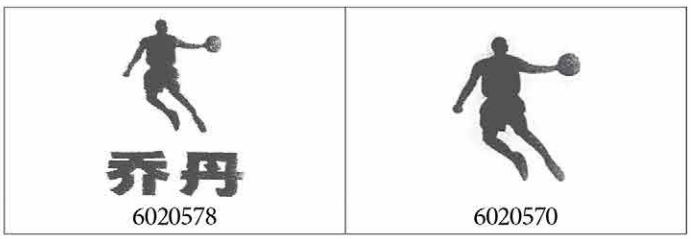
2. *The "QIAODAN" Trademark and the "qiaodan + Graphic" Trademark*

In (2016) Zui Gao Fa Xing Zai No. 20, (2016) Zui Gao Fa Xing Zai No. 29, (2016) Zui Gao Fa Xing Zai No. 30, and (2016) Zui Gao Fa Xing Zai No. 31, the disputed trademark "QIAODAN" is the pinyin of the partial Chinese translation of Michael Jordan's English name, "Michael Jeffrey Jordan". Although the plaintiff, Michael Jordan, applied logic similar to that used in the aforementioned cases involving the "乔丹" trademark, the SPC did not extend the protection afforded to the Chinese characters "乔丹" to the pinyin "QIAODAN". The SPC determined that Michael Jordan did not have a prior right to name with respect to "QIAODAN", on the grounds that the evidence provided by Michael Jordan was insufficient to prove that the relevant public used the pinyin "QIAODAN" to refer to Michael Jordan; nor was the evidence sufficient to prove that there was a stable correspondence relationship between "QIAODAN" and Michael Jordan.

In (2016) Zui Gao Fa Xing Zai No. 25, (2016) Zui Gao Fa Xing Zai No. 28, and (2016) Zui Gao Fa Xing Zai No. 32, the SPC determined that Michael Jordan did not have a prior right to name with respect to "qiaodan". The SPC's reasons were that the evidence provided by Michael Jordan was insufficient to prove that the relevant public used the pinyin "qiaodan" to refer to Michael Jordan; nor was the evidence sufficient to prove that there was a stable correspondence relationship between "qiaodan" and Michael Jordan.

3. *The "乔丹 + Black Human Silhouette" Graphic Trademark*

Figure:



On March 4, 2020, the SPC rendered the (2018) Zui Gao Fa Xing Zai No. 32 Administrative Judgment, determining that the two characters "乔丹" in the No. 6020578 "乔丹 + black human silhouette" trademark (see **Figure, left**) had harmed Michael Jordan's prior right to name. The reasons relied on were basically the same as those used in the above-mentioned cases involving the "乔丹" trademark.

As for whether the "black human silhouette" in the No. 6020578 "乔丹 + black human silhouette" trademark had harmed Michael Jordan's right to portrait, the SPC determined that Michael Jordan could not enjoy the right to portrait with respect to this mark. Therefore, Michael Jordan's claim that the registration of that trademark had harmed his right to portrait could not be established. The SPC's reasons were consistent with those in the (2015) Zhi Xing Zi No. 332 Administrative Ruling that the SPC rendered on December 27, 2017.

The (2015) Zhi Xing Zi No. 332 Administrative Ruling involved the No. 6020570 "black human silhouette" trademark (see **Figure, Right**). Michael Jordan believed that the silhouette was basically the same as the silhouette of his body, but the SPC determined that this alone could not establish that the graphic mark had harmed Michael Jordan's right to portrait. In the ruling, the SPC stated:

> Based on the right to portrait and the nature of portraits, the "portrait" protected by the

> right to portrait should be **identifiable**. It should have **personal features sufficient to enable the public to identify the subject of the right**—the specific natural person—**to whom the portrait corresponds** so that the portrait can clearly refer to the corresponding subject of the right. (emphasis added)

The SPC further mentioned:

> If the mark over which a party claims the protection of the right to portrait does not have sufficiently identifiable facial features, then [the party] should provide sufficient evidence to prove that the mark contains **other personal features sufficient to reflect the natural person that the mark corresponds to and that are identifiable**, such that the public can recognize that the mark can clearly refer to the natural person. (emphasis added)

Specifically, the SPC made the following conclusion about the "black human silhouette" mark involved in the case:

> Except for the silhouette of the body, it does not contain any personal features related to [Michael Jordan]. Moreover, [Michael Jordan] does not enjoy any other legal rights with respect to the action depicted in the mark. Other natural persons can also perform the same or similar actions. The mark is not identifiable and cannot clearly refer to the retrial applicant.

Therefore, Michael Jordan is unable to enjoy the right to portrait with respect to the mark. The registration of the No. 6020570 "black human silhouette" trademark is currently still valid.

The Commercial Impact of the Series of "乔丹" Trademark Cases on Qiaodan Company

The above-mentioned series of "乔丹" trademark cases has had an enormous impact on Qiaodan Company's business. Qiaodan Company was registered and established in Fujian Province, China, in June 2000. "乔丹" was used as a selling point from the very beginning. Consequently, Qiaodan Company experienced rapid expansion. Afterwards, due to the aforementioned series of trademark disputes, the company's initial public offering ("IPO") was blocked and it was necessary to institute various changes to maintain the company's operations.

1. The IPO Encountered Multiple Obstacles

On November 21, 2011, the Issuance Examination Committee of the China Securities Regulatory Commission (the "CSRC") reviewed the IPO of Qiaodan Company.[11] According to *The IPO Prospectus of Qiaodan Sports Co., Ltd. (Declaration Draft)*, Qiaodan Company intended to be listed on the Shanghai Stock Exchange, through which it planned to issue 113 million shares and raise funds of RMB 1.064 billion to be used in four projects: a project for expanding its shoe production base, a project for constructing a research and development design center, a project for constructing a nationwide strategic direct sales store, and an informatization construction project.[12] On November 25, the IPO passed the review of the Issuance Examination Committee.[13]

> ***"[…Qiaodan C]ompany envisioned using '乔丹' as a selling point to make a big splash in the market, but ended up struggling due to a series of related trademark disputes."***

Three years later, the CSRC was asked at a press conference why some companies that passed the review of the Issuance Examination Committee had not yet been approved for issuance.[14] A CSRC spokesperson mentioned in the reply:

> There are some companies which passed the review of [the Issuance Review Committee] but still have special issues, such as **Qiaodan [Company's]** having major pending lawsuits […]. After the relevant restrictive factors are eliminated, the CSRC will proceed with follow-up work in accordance with procedures. (emphasis added)

The "restrictive factors" mentioned above implicate the *Measures for the Administration of the Initial Public Offering and Listing of Stocks*, which provides that an issuer seeking to list its stocks must meet the following requirements:[15]

> The issuer has no major debt repayment risks, and no major contingencies such as guarantees, **litigation**, and arbitration that affect its continued operation. (emphasis added)

Therefore, the lawsuits involving Qiaodan Company's registered trademarks have affected the progress of the company's IPO. In other words, it has been nearly nine years since the IPO passed the review of the Issuance Review Committee of the CSRC, and yet Qiaodan Company has still not officially gone public. It is clear that the company

envisioned using "乔丹" as a selling point to make a big splash in the market, but ended up struggling due to a series of related trademark disputes.

2. Qiaodan Company's Changes to Its Stores and Products

As Qiaodan Company can no longer use the "乔丹" trademark, it was forced to make changes to its stores and products. A look at the operation of the company's stores and publicity clearly reveals that the official website of Qiaodan Company (qiaodan.com) has basically stopped using the two characters "乔丹" (see **below**) and now more often uses the "black human silhouette" mark. Qiaodan Company's product design shows that it no longer uses the two characters "乔丹" on its products, but, instead, uses expressions such as "NLS. BE UNIQUE" and "RUN YOURSELF".

As for "QIAODAN", "qiaodan", and the "black human silhouette" trademarks, which have not been identified as infringing on the legal rights of Michael Jordan, Qiaodan Company continues to use them.[16] In addition, in 2019, Qiaodan Company launched the "质燥" (the pinyin transliteration of which is "Zhi Zao") series of products and has registered in many classes of goods multiple trademarks that are in no way related to "乔丹" but are primarily based on the word "质燥" and its corresponding traditional Chinese characters.[17]

Although Qiaodan Company has instituted these changes, it seems that the company has not completely stopped piggybacking on Michael Jordan's fame. Two examples are illustrative. First, Qiaodan Company still, in reliance on rights based on a yet-to-be-revoked trademark containing the two characters "乔丹", filed a lawsuit against Beijing Coolbuy Network Technology Co., Ltd. and Amazon Joyo Co., Ltd., alleging that these two companies used "乔丹" when selling Nike's "aj" sneakers through Tmall, Amazon, and other channels and that such conduct infringed Qiaodan Company's "乔丹" trademark. After hearing the case, both the first-instance court and second-instance court determined that there was no infringement.[18] Second, after multiple trademarks containing only the two characters "乔丹" were declared invalid, Qiaodan Company still attempted to register trademarks using "乔丹" together with other words. However, all of these trademarks have either not been approved or are currently in dispute.

The Implications of the Series of "乔丹" Trademark Cases Being "Similar Cases" for Future Litigation

The series of "乔丹" trademark cases clearly demonstrates the practical value of using the right to name to counter the registration of a trademark. With the exception of the "乔丹" trademark, Michael Jordan's claims that he has prior rights to "QIAODAN", "qiaodan", and the "black human silhouette" did not receive the SPC's support. The reasoning used in these cases, which were adjudicated by the SPC (and, as a result, they are deemed "similar cases"), has referential value to cases that are "similar […] in terms of various aspects, including the basic facts, focal points of the dispute, or issues regarding the application of law".[19] This series of cases has implications for other celebrities, as explained below.

> ***"[…]This is because the vast majority of administrative lawsuits related to confirmation of trademark rights fall under the jurisdiction of the courts in Beijing. [The* Guide of the High People's Court of Beijing Municipality for the Adjudication of Administrative Cases Involving Authorization or Confirmation of Trademark Rights*] provides, to a certain extent, the parties with guidelines for possible defenses and also helps predict the adjudication results. Therefore, the importance of the guide cannot be ignored."***

1. A Foreign Natural Person Should Ensure that the Chinese Translation of His Name Is Uniformly Used Within the Territory of China

Two of the highlights of the series of "乔丹" trademark cases are the extension of the protection of the right to name to all or part of the Chinese translation of the name of a foreign natural person who is, to a certain degree, well-known as well as the explicit affirmation of the need to protect the economic benefits underlying these translated names.

Based on this new development, if a foreign natural person intends to develop his business within the territory of China, he should, from the perspective of establishing a basis for the right to name, make every effort to arrange for a uniform Chinese translation of his name as soon as possible. Although the SPC has already pointed out that "use" is not a prerequisite for claiming the right to name, in practice, the establishment of a stable correspondence relationship often relies on long-term and repeated use, including the use of the translated name by the natural person himself, his use of the translated name in external commercial licensing, and media coverage using the translated name.

In terms of media coverage, the translated names of foreign entertainers, sports stars, and other types of celebrities are sometimes reported quite differently, with WeChat

public accounts, print media, online media, and television media each conducting their own reporting within the territory of China. Therefore, in order to prevent the use of different Chinese translations from weakening the stable correspondence relationship, a foreign natural person who is, to a certain degree, well-known, should establish fame and a stable correspondence relationship in the Chinese language context by using a uniform Chinese translation at the early stage of entering the Chinese market. Then, the prerequisites for establishing the right to name will be met.

2. A Foreign Natural Person Should Ensure that the Chinese Translations of His Pen Name and Stage Name Are Uniformly Used Within the Territory of China

As mentioned above, immediately after the SPC decided a few main "乔丹" trademark cases, it released the *Provisions on the Adjudication of Administrative Cases Involving Authorization or Confirmation of Trademark Rights*. Article 20 Paragraph 2 provides that a natural person may claim the right to name with respect to a specific name, such as his pen name, stage name, or translated name, under the conditions that "the specific name is, to a certain degree, well-known; a stable correspondence relationship has already been established [between the specific name] and the natural person; and the relevant public uses the specific name to refer to the natural person". In fact, Michael Jordan could not successfully claim the right to name with respect to "QIAODAN" or "qiaodan", primarily because he could not provide sufficient evidence to prove that "QIAODAN" and "qiaodan" have a stable correspondence relationship with his identity in China, and that they are used by the relevant public to refer to him.

In the *Jinguizi Case*,[20] the High People's Court of Beijing Municipality decided:

> [...] in administrative cases involving confirmation of trademark rights, the protection of the prior right to name and interest should be comprehensively considered from the following aspects: first, whether the relevant public can establish a correspondence relationship between the specific natural person and the name, stage name, nickname, or other marks involved for identifying the subject [...].

The court ascertained that LIU Chunyan used the stage name "Jinguizi" to host various relatively high-profile children's programs from 1994 to 2014. She made extensive use of the stage name "Jinguizi" in her autobiography, *I Am Jinguizi*, published in 2006, and in the activities in which she participated. The National Library of China search report that she submitted and the honors she received also referred to her as "Jinguizi". Therefore, the High People's Court of Beijing Municipality determined that this evidence did prove that the relevant public had already established a correspondence relationship between "Jinguizi" and LIU Chunyan.

In light of the above, if a foreign natural person who is, to a certain degree, well-known, intends to develop and partake in a range of business activities within the territory of China and wishes to claim the right to name with respect to his pen name, stage name, and pinyin of the Chinese translation of his foreign name, he should make every effort to arrange for the uniform use and media coverage of these specific names as soon as possible. For example, a well-known foreign artist may unify the specific way he is addressed through fan groups within the territory of China, and establish a stable correspondence relationship between the artist and his pen name, stage name, and other specific names through such methods as media coverage and commercial licensing.

A person who is well-known in a foreign country but has not become, to a certain degree, well-known within the territory of China—or a person to whom the relevant public seldom uses a certain specific name to refer—should also promote and use a specific name within the territory of China as soon as possible, so that it can become the basis for the protection of his right to name.

3. Protection of "Portraits" of Celebrities

In the (2015) Zhi Xing Zi No. 332 Administrative Ruling, which was discussed above, the SPC clearly pointed out that a protected portrait silhouette "should be identifiable. It should have personal features sufficient to enable the public to identify the subject of the right—the specific natural person—to whom the portrait corresponds so that the portrait can clearly refer to the corresponding subject of the right."

Likely inspired by the above ruling, on April 24, 2019, the High People's Court of Beijing Municipality issued the *Guide of the High People's Court of Beijing Municipality for the Adjudication of Administrative Cases Involving Authorization or Confirmation of Trademark Rights*.[21] Section 16.15 provides:

> For a party who claims that the application for registration of the disputed trademark harms his prior right to portrait, he shall adduce evidence to prove that the mark of the disputed trademark has **personality features sufficient to enable the relevant public to**

> **identify the specific natural person to whom the mark corresponds** and that, as a result, **a stable correspondence relationship** is formed between the mark and the natural person and the relevant public easily believe that specific connections, such as a license, exist between the natural person and goods marked with the disputed trademark. **Where a black human silhouette does not have the identifiable personality features of a specific natural person and a party claims that it harms his prior right to portrait, [the claim] shall not be supported**. (emphasis added)

Although this adjudication guide is not legislation, in practice, relevant judges and lawyers will most certainly handle these types of cases in accordance with the guide. This is because the vast majority of administrative lawsuits related to confirmation of trademark rights fall under the jurisdiction of the courts in Beijing. The above-mentioned adjudication guide provides, to a certain extent, the parties with guidelines for possible defenses and also helps predict the adjudication results. Therefore, the importance of the guide cannot be ignored.

The above requirements are very clear, but the resulting problem is that profile silhouettes, silhouettes of human poses, and cartoon images may often lack the personality features of natural persons, and, therefore, may not be deemed to constitute an infringement of a person's right to portrait. Thus, if celebrities intend to use their personal portraits for commercial expansion within the territory of China, they should make every effort to form specific connections between the portraits and the natural persons themselves through such methods as media coverage, commercial licensing, and online promotion. In addition, these celebrities should also consider, on the basis of their rights to portraits and through the registration within the territory of China of relevant "portrait" images as trademarks and silhouette designs as art works, establishing a basis for trademark rights and copyright rights. Alternatively, they should consider specifying their specific usage in commercial licenses. Doing either or both of these may serve to counter the malicious registration of trademarks using the celebrities' portrait silhouettes, their cartoon images, or other portraits with inconspicuous personal characteristics.

4. *How Celebrities Oppose Maliciously Registered Enterprise Names*

The "乔丹" trademark and graphic trademarks including the two characters "乔丹" were invalidated. However, Qiaodan Company still uses the two characters "乔丹" in its enterprise name. Under Chinese law, enterprise names and trademarks differ in many aspects, including their constituent elements, registration authorities, scope of use, and remedies. Therefore, the legal principle underlying the series of "乔丹" trademark cases—a celebrity can use his right to name to counter malicious registration of trademarks—cannot be directly used to oppose an enterprise's malicious registration of the celebrity's names as its enterprise name. In that case, do celebrities have remedies to deal with maliciously registered enterprise names?

In practice, holders of registered trademarks and unregistered well-known trademarks may combine the relevant provisions of the *Trademark Law* and the *Anti-Unfair Competition Law of the People's Republic of China*[22] (the *"Anti-Unfair Competition Law"*) and attempt to request, on the basis of unfair competition, that the enterprise with the maliciously registered enterprise name change its name.

Alibaba Group Holding Limited v. Guangdong Tmall Investment Group Co., Ltd. et al. (the "*Alibaba Case*") is a very good example.[23] On the basis of multiple registered trademarks containing the characters "天猫" that are owned by Alibaba Group, the company brought trademark infringement and unfair competition lawsuits against 17 companies, including Guangdong Tmall Investment Group Co., Ltd., for their

Sidebar 2:

Trademark Law of the People's Republic of China

Article 58

Where a registered trademark or an unregistered well-known trademark of another person is used as the characters of an enterprise name to mislead the public and to constitute an act of unfair competition, [the act] shall be dealt with in accordance with the *Anti-Unfair Competition Law of the People's Republic of China*.

Anti-Unfair Competition Law of the People's Republic of China

Article 2

In production and business operation activities, business operators should follow the principles of voluntariness, equality, fairness, and integrity, and should abide by laws and business ethics.

malicious registration of enterprise names containing the characters "天猫" and their prominent use of "天猫" in their regular daily business activities. Using Article 58 of the *Trademark Law* and Article 2 of the *Anti-Unfair Competition Law* as the legal basis for its judgment (see **Sidebar 2**), the Intermediate People's Court of Hangzhou Municipality, Zhejiang Province, decided that the enterprise names registered maliciously by the defendant enterprises constituted unfair competition and the companies should bear various legal liabilities, including being required to halt the use of the trade names and false publicity as well as changing their enterprise names.

It is worth noting that before rendering the judgment, the Intermediate People's Court of Hangzhou Municipality, Zhejiang Province, issued China's first "preservation of acts during litigation" ruling in an intellectual property lawsuit. This ruling required the defendant enterprises to immediately stop, during the litigation, using the disputed enterprise names, and to, within 15 days of the ruling's coming into effect, apply to the relevant departments to change their enterprise names, with the changes to be valid until a judgment in the case came into effect.[24]

To date, there have been no successful cases in which only the right to name is used as the basis of rights for requesting that a court decide that an enterprise name constitutes unfair competition under Article 2 of the *Anti-Unfair Competition Law*, where the enterprise in question was consequently required to change its enterprise and trade names. However, the *Alibaba Case* provides the line of reasoning for protecting rights for celebrities who seek to fight against enterprises that maliciously register the celebrities' various unique names as their enterprise names. Taking into consideration the practice of Chinese courts and the impact of "similar cases" on future court cases, a party's application for a "preservation of acts" ruling during an intellectual property lawsuit is likely to receive the court's support, so long as the application complies with relevant legal provisions.

If the stage names, pen names, Chinese translations of foreign names, and unique names of foreign celebrities have distinctive characteristics, those celebrities should arrange a comprehensive trademark plan as soon as possible. The plan should cover registration of the names on related classes of services and goods and the use of these names in commercial licenses and online promotion, so as to make the relevant registered trademarks become, to a certain degree, well-known. This will enable them to be used to counter others parties' malicious registration of enterprise names.

The preemptive steps described above are especially necessary when there is a relatively large difference between the business activities engaged in by a maliciously registered enterprise and those of a foreign celebrity. Finally, these celebrities should be aware that when a registered trademark is used as the basis for rights, it is often necessary to also determine whether the trademark constitutes a well-known trademark. In practice, vast amounts of evidentiary materials are required to prove the degree to which a registered trademark is well-known.

Concluding Remarks

The disputes surrounding the series of "乔丹" trademark cases lasted for ten years, and the results became clear gradually. This series of cases has significant implications for the protection of intellectual property rights of celebrities who expand their commercial presence within the territory of China.

Due to language differences and unfamiliarity with the law, celebrities, particularly foreign natural persons, often neglect to protect the intellectual property rights of their translated names, stage names and their translations, other specific names, portrait silhouettes, and other names or graphics with unique personal characteristics. With regard to trademark squatting, enterprise name squatting, use of trade names, and all other aspects of intellectual property-related legal actions that may occur within the territory of China, the series of "乔丹" trademark cases highlights for celebrities the various issues that may arise in this area of law. Most importantly, celebrities have learned a valuable lesson from this series of cases: they should try their best to use uniform translated names, stage names and their translations, and other specific names inside and outside China, and should combine the aforementioned elements with portrait silhouettes to build a comprehensive body of fully registered trademarks. ■

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* The citation of this China Cases *Insight*™ is: Yi Chen & Xinyue Zhu, *The Series of "乔丹" Trademark Cases: The Impact on the Infringing Company and the Implications for Celebrities*, 10 China Law Connect 13 (Sept. 2020), *also available at* Stanford Law School China Guiding Cases Project, China Cases *Insights*™, Sept. 2020, http://cgc.law.stanford.edu/commentaries/clc-10-202009-insights-10-chen-zhu.

The original, Chinese version of this China Cases *Insight*™ was edited by Dr. Mei Gechlik. The English version was prepared by Allison Goh, Qi Lei, Xinhao Li, Shanahly Wan, and Haiyun Zhang, and was finalized by Luke Haubenstock, Jeremy Schlosser, Jennifer Ingram, Nathan Harpainter, and Dr. Mei Gechlik. The information and views set out in this China Cases *Insight*™ are the responsibility of the authors and do not necessarily reflect the work or views of the China Guiding Cases Project.

[1] The terms "he", "him", and "his" as used herein are, unless the context indicates otherwise, gender-neutral terms that may refer to "she", "her", "it", and "its".

[2]《迈克尔·杰弗里·乔丹与国家工商行政管理总局商标评审委员会、乔丹体育股份有限公司"乔丹"商标争议行政纠纷案》(*Michael Jeffrey Jordan v. The Trademark Review and Adjudication Board of the State Administration for Industry and Commerce and Qiaodan Sports Co., Ltd., An Administrative Case Concerning a Dispute over the "乔丹" Trademark*), 8 China Law Connect 77 (Mar. 2020), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC113), Mar. 2020, http://cgc.law.stanford.edu/guiding-cases/guiding-case-113.

[3] *See* Judge GUO Feng, *On the Issue of the Application of the Supreme Court's Guiding Cases*, 1 China Law Connect 19 (June 2018), *also available at* Stanford Law School China Guiding Cases Project, June 2018, http://cgc.law.stanford.edu/commentaries/clc-1-201806-23-guo-feng. In the article, Judge Guo Feng explains:

> […] the Case Guidance System would exist in name only if Guiding Cases were not granted a certain effect. Because Guiding Cases are granted ***de facto* binding effect**, if a judgment or ruling that differs [with a Guiding Case] is rendered in a similar case, the judgment or ruling is subject to the risk of being amended when the upper-level court adjudicates the appeal of the case. (emphasis added).

See also Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance", *People's Republic of China*, Stanford CGCP *Global Guide*™, Aug. 2020, http://cgc.law.stanford.edu/sgg-on-prc-detailed-implementing-rules-provisions-case-guidance.

[4] *See* Guiding Opinions of the Supreme People's Court on Unifying the Application of Law and Strengthening the Search for Similar Cases (Trial Implementation), *People's Republic of China*, Stanford CGCP *Global Guide*™, Aug. 2020, http://cgc.law.stanford.edu/sgg-on-prc-guiding-opinions-search-similar-cases (hereinafter "*Guiding Opinions on the Search for Similar Cases*"). The Guiding Opinions provide:

> 4. The scope of a search for similar cases generally includes:
>
> (1) Guiding Cases released by the Supreme People's Court;
>
> (2) typical cases released by the Supreme People's Court, and cases that have been adjudicated by [the Supreme People's Court …].

See also Dr. Mei Gechlik, Guiding Opinions of the Supreme People's Court on Unifying the Application of Law and Strengthening the Search for Similar Cases (Trial Implementation) *and Related Annotations*, 10 China Law Connect 71 (Sept. 2020), *also available at* Stanford Law School China Guiding Cases Project, CLC *Spotlight*™, Sept. 2020, http://cgc.law.stanford.edu/clc-spotlight/clc-10-202009-others-8-mei-gechlik.

[5] *Id.* The Guiding Opinions provide:

> 9. Where a similar case that has been retrieved is a Guiding Case, a people's court should reference and imitate it to render a ruling or judgment, unless [the Guiding Case] is in conflict with a new law, administrative regulation, or judicial interpretation or is replaced with a new Guiding Case.
>
> Other similar cases that have been retrieved may be used by a people's court as references for rendering a ruling or judgment.

[6] The final judgment upon which Guiding Case No. 113 is based explicitly cites Article 31 of the *Trademark Law* as amended in 2001 (note: the retrial applicant of this case first requested that the Trademark Review and Adjudication Board, the retrial respondent, revoke the registration of the "乔丹" trademark on October 31, 2012, when the 2001 version of the *Trademark Law* was still in effect). The 2013 amendment renumbered the provision as Article 32, which remains the same in the currently effective version of the law. *See*《中华人民共和国商标法》(*Trademark Law of the People's Republic of China*), passed and issued on Aug. 23, 1982, effective as of Mar. 1, 1983, amended four times, most recently on Apr. 23, 2019, effective as of Nov. 1, 2019, http://www.sipo.gov.cn/zcfg/zcfgflfg/flfgsb/fl_sb/1140931.htm.

[7]《中华人民共和国民法通则》(*General Principles of the Civil Law of the People's Republic of China*), passed and issued on Apr. 12, 1986, effective as of Jan. 1, 1987, amended on and effective as of Aug. 27, 2009, http://www.npc.gov.cn/zgrdw/npc/lfzt/rlys/2014-10/28/content_1883354.htm.

[8]《中华人民共和国侵权责任法》(*Tort Liability Law of the People's Republic of China*), passed and issued on Dec. 26, 2009, effective as of July 1, 2010, http://www.gov.cn/flfg/2009-12/26/content_1497435.htm.

[9]《乔丹体育股份有限公司首发招股说明书(申报稿)》(*The IPO Prospectus of Qiaodan Sports Co., Ltd. (Declaration Draft)*), *infra* note 12.

[10]《最高人民法院关于审理商标授权确权行政案件若干问题的规定》(*Provisions of the Supreme People's Court on Several Issues Concerning the Adjudication of Administrative Cases Involving Authorization or Confirmation of Trademark Rights*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 12, 2016, issued on Jan. 10, 2017, effective as of Mar. 1, 2017, http://www.court.gov.cn/zixun-xiangqing-34732.html.

[11]《发审委2011年第263次工作会议公告》(*Announcement of the 263rd Work Meeting of the Issuance Examination Committee in 2011*), issued by the China Securities Regulatory Commission on Nov. 21, 2011, http://www.csrc.gov.cn/pub/newsite/flb/flfg/bmgz/zhl/201507/t20150731_281986.html.

[12]《乔丹体育股份有限公司首发招股说明书(申报稿)》(*The IPO Prospectus of Qiaodan Sports Co., Ltd. (Declaration Draft)*), issued by the China Securities Regulatory Commission on Nov. 21, 2011, http://www.csrc.gov.cn/pub/zjhpublic/G00306202/201111/t20111121_202116.htm.

[13]《发审委2011年第263次会议审核结果公告》(*Announcement of Examination Results of the 263rd Meeting of the Issuance Examination Committee in 2011*), issued by the China Securities Regulatory Commission on Nov. 25, 2011, http://www.csrc.gov.cn/pub/zjhpublic/G00306202/201111/t20111125_202314.htm.

[14] 中国证监会(China Securities Regulatory Commission), 2014年11月28日新闻发布会(*Press Conference on November 28, 2014*), www.csrc.gov.cn, http://www.csrc.gov.cn/pub/newsite/zjhxwfb/xwfbh/201411/t20141128_264381.html.

[15]《首次公开发行股票并上市管理办法》(*Measures for the Administration of the Initial Public Offering and Listing of Stocks*), Article 28, passed by the China Securities Regulatory Commission on May 17, 2006, issued on May 17, 2006, effective as of May 18, 2006, amended three times, most recently on and effective as of July 10, 2020, http://www.csrc.gov.cn/pub/zjhpublic/zjh/202007/P020200710623477821356.pdf. Prior to the first amendment in 2015, Article 28 was numbered as Article 35.

[16] For example, readers can refer to the logos on the webpage of the flagship store of Qiaodan Sports Co., Ltd., https://qiaodan.tmall.com.

[17] Trademark No. 43500807,《中国商标网》(China Trademark Web), http://wcjs.sbj.cnipa.gov.cn.

[18] *See* 吴桐(WU Tong), 卖"aj"标"乔丹"侵权吗?(*Is Selling "aj" Marked with "乔丹" Infringing Rights?*),《北京知识产权法院网》(Beijing Intellectual Property Court Online), July 20, 2020, http://bjzcfy.chinacourt.gov.cn/article/detail/2020/07/id/5360654.shtml.

[19] *Guiding Opinions on the Search for Similar Cases*, *supra* note 4. The Guiding Opinions provide:

> 1. The [term] "similar case" referred to in this [set of] Opinions means a case that is similar to the pending case in terms of various aspects, including the basic facts, focal points of the dispute, or issues regarding the application of law, and that has been adjudicated by a people's court and has come into effect.

In addition, the document also provides:

> 9. Where a similar case that has been retrieved is a Guiding Case, a people's court should reference and imitate it to render a ruling or judgment […].
>
> Other similar cases that have been retrieved may be used by a people's court as references for rendering a ruling or judgment.

[20] (2019) 京行终7285号行政判决 ((2019) Jing Xing Zhong No. 7285 Administrative Judgment), rendered by the High People's Court of Beijing Municipality on Nov. 12, 2019.

[21] 北京市高级人民法院知识产权庭 (Intellectual Property Tribunal of the High People's Court of Beijing Municipality),《北京市高级人民法院商标授权确权行政案件审理指南》(*Guide of the High People's Court of Beijing Municipality for the Adjudication of Administrative Cases Involving Authorization or Confirmation of Trademark Rights*), April 24, 2019, http://bjgy.chinacourt.gov.cn/article/detail/2019/04/id/3850624.shtml.

[22]《中华人民共和国反不正当竞争法》(*Anti-Unfair Competition Law of the People's Republic of China*), passed and issued on Sept. 2, 1993, effective as of Dec. 1, 1993, revised on Nov. 4, 2017, effective as of Jan. 1, 2018, amended on and effective as of Apr. 23, 2019, http://www.fdi.gov.cn/1800000121_23_74874_0_7.html.

[23] (2017) 浙01民初1681号民事判决 ((2017) Zhe 01 Min Chu No. 1681 Civil Judgment), rendered by the Intermediate People's Court of Hangzhou Municipality, Zhejiang Province, on Nov. 13, 2018.

[24] (2017) 浙01民初1681号之一民事裁定 ((2017) Zhe 01 Min Chu No. 1681 Zhi Yi Civil Ruling), rendered by the Intermediate People's Court of Hangzhou Municipality, Zhejiang Province, on Dec. 19, 2017.

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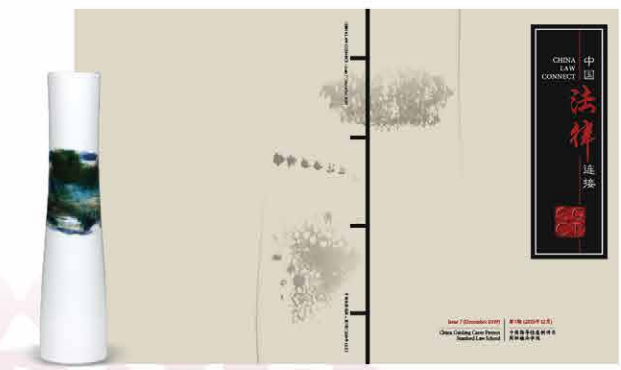


CGCP感谢陶瓷大师陈训成先生允许我们根据他的作品设计2019年出版的期刊封面。

The CGCP thanks master ceramicist Mr. CHEN Xuncheng for allowing us to design the 2019 covers, based on his art pieces.

“乔丹”商标系列案件：对侵权公司的影响和对知名人士带来的启示*

陈懿、朱新玥

摘要

本文通过研究“乔丹”商标系列案件的审理思路，从指导案例113号出发，探讨了外国自然人就其姓名中文翻译、拼音、人形剪影作为请求权的基础，在中国境内对抗他人商标注册的条件与可行性。随后，作者指出这些案件对乔丹体育股份有限公司（“乔丹公司”）的商业影响。基于以上分析，作者进一步探讨在《最高人民法院关于统一法律适用加强类案检索的指导意见（试行）》发布后而加强的中国“类案”检索制度下，11起“乔丹”商标系列案件对中国法院后续审理类似案件的指导意义。作者并提出实用建议，让外国自然人更懂得如何在中国境内保护其姓名、译名、艺名、这些名字的拼音和其个人的肖像剪影，以及对抗他人恶意注册的企业名称。

引言

2019年12月，最高人民法院（“最高法”）发布指导案例113号《迈克尔·杰弗里·乔丹与国家工商行政管理总局商标评审委员会、乔丹体育股份有限公司“乔丹”商标争议行政纠纷案》。[1] 该案针对个人姓名商业化的市场趋势，确认了姓名权可以作为在先权利对抗商标的注册，并将姓名权的保护扩展到了外国自然人姓名的中文翻译。最高法在指导案例113号的“裁判要点”部分更确立了外国自然人就特定名称主张姓名权保护时，该特定名称应当符合以下三项条件：

（1）该特定名称在[中]国具有一定的知名度，为相关公众所知悉；

（2）相关公众使用该特定名称指代该自然人；

（3）该特定名称已经与该自然人之间建立了稳定的对应关系。

与其他指导性案例的裁判要点一样，指导案例113号的裁判要点对法院在审理类似的后续案件有事实上的拘束力。[2]

显然，指导案例113号有其重要性。但是，该指导性案例所基于的案件——（2016）最高法行再27号行政判决——以及其他10起最高法审理的“乔丹”商标案件（见下文）的重要性亦不能被忽略。这些案件涵盖最高法对关于外国自然人对抗他人以其姓名中文翻译、其姓名中文翻译的拼音作出商标注册的法律问题的审判以及对自然人肖像权所涵盖内容的判断。根据2020年7月31日起施行的《最高人民法院关于统一法律适用加强类案检索的指导意见（试行）》，指导案例113号和这11起案件都在“类案检索范围”内。[3] 今后，在类似的案件审判中，审理的法院“应当参照”指导案例113号“作出裁判”，而对这11起案件而言，审理的法院亦“可以作为作出裁判的参考”。[4]

鉴于11起“乔丹”商标系列案件可以作为“类案”而对日后审判发挥一定作用，因此有必要对其作出深入分析。本文会先总结最高法对该系列案件所涉及的商标的最终审判结果和理由，继而指出这些案件对乔丹体育股份有限公司（“乔丹公司”）的商业影响。最后，本文将讨论这些案件为知名人士所带来的启示。

“乔丹”商标系列案件的争议商标命运有所不同

从2016年到2020年，最高法再审11起“乔丹”商标系列案件并作出判决（见**侧边栏1**）。当中涉及的商标可以分三大类：

- “乔丹”商标（见**侧边栏1：序号1、4和5**）；
- “乔丹”英文拼音大写“QIAODAN”的商标（见**侧边栏1：序号2、7–9**）和包含拼音小写“qiaodan”的图形商标（见**侧边栏1：序号3、6和10**）；及
- “乔丹+黑色人形剪影”商标（见**侧边栏1：序号11**）。

对这三大类商标，最高法作出了不同的判决。

1. “乔丹”商标

对于“乔丹”商标，最高法于（2016）最高法行再15号、（2016）最高法行再26号和（2016）最高法行再27号中作出判决，指出迈克尔·杰弗里·乔丹（“迈

陈懿
中国指导性案例项目编辑

陈懿是君合律师事务所上海分所的律师。此前，她曾在金杜律师事务所上海分所担任律师和霍金路伟国际律师事务所（Hogan Lovells International LLP）上海办公室担任初级律师。陈律师的主要工作领域是公司内部调查、白领犯罪、知识产权、网络安全与数据保护、国际商事仲裁和商业诉讼等。在知识产权领域中，她曾参与处理各类知识产权争议和商业许可，包括商标侵权、商业秘密侵权及不正当竞争争议解决，并为多家网络科技、化学工业、电子硬件跨国企业提供跨境并购中的知识产权服务。

陈律师在复旦大学获得法学本科学位，随后在康奈尔大学（Cornell University）获得美国法硕士学位（Master of Laws）。她具备中国和纽约州法律执业资格。

克尔·乔丹”）对“乔丹”两字享有在先姓名权，主管商标注册的部门需要对乔丹公司注册的“乔丹”商标重新作出裁定。最终，“乔丹”商标的注册无效。

最高法在该三起案件中所用的裁判理由基本归纳于指导案例113号。其中，关于外国人姓名的中文翻译通过姓名权保护的逻辑主要包括如下几点：

- 2001年修正的《中华人民共和国商标法》（“《商标法》”）第三十一条规定：“申请商标注册不得损害他人现有的在先权利”。[5]

- 《中华人民共和国民法通则》第九十九条第一款[6]和《中华人民共和国侵权责任法》第二条第二款[7]均明确规定，自然人依法享有姓名权。在此基础上，姓名权可以构成《商标法》第三十一条规定的“在先权利”。争议商标的注册损害他人在先姓名权的，应当认定该争议商标的注册违反《商标法》第三十一条的规定。

- 最高法强调：对在先姓名权予以保护，“不仅涉及对自然人人格尊严的保护，而且涉及对自然人姓名，尤其是知名人物姓名所蕴含的经济利益的保护”。

- 自然人依据《商标法》第三十一条的规定，就特定名称主张姓名权保护时，应当满足上文提及已包含于指导案例113号的“裁判要点”部分的三项条件。

- 最高法亦强调：“在判断外国人能否就其外文姓名的部分中文译名主张姓名权保护时，需要考虑我国相关公众对外国人的称谓习惯。中文译名符合前述三项条件的，可以依法主张姓名权的保护”。

> *“从2016年到2020年，最高法再审11起“乔丹”商标系列案件并作出判决[...]。当中涉及的商标可以分三大类[...]。”*

在具体举证过程中，迈克尔·乔丹主要通过提供中国境内有关报纸、期刊、网站、相关书籍、专刊上刊登的大量关于他的文章用以证明媒体多以“乔丹”指代他。迈克尔·乔丹亦提供市场调查报告，证明在中国境内“乔丹”具有一定的知名度，且相关公众已将“乔丹”与迈克尔·乔丹建立稳定的对应关系。同时，迈克尔·乔丹援

朱新玥
中国指导性案例项目编辑
德国法兰克福大学法学硕士生

朱新玥目前正攻读德国法兰克福大学的法学硕士项目。远赴德国前，她获得对外经济贸易大学（University of International Business and Economics；“UIBE”）法学学士学位。

朱新玥曾在英国史密夫斐尔事务所（Herbert Smith Freehills LLP）北京代表处、德国泰乐信律师事务所（Taylor Wessing LLP）北京代表处、金杜律师事务所北京办公室和阿里巴巴集团数据合规法务部实习。她主要的实习领域为公司融资、跨境并购和网络安全与数据保护。她也曾在中国世界贸易组织研究会、UIBE全球价值链研究院（UIBE Research Center of Global Value Chains）担任科研助理。

侧边栏1：

序号	判决号	裁判日期	争议商标注册号	争议商标	争议商标核定使用（国际分类）[1]	裁判结果	争议商标目前状态
1	（2016）最高法行再15号	2016/12/08	6020565	乔丹	32[2]	迈克尔·乔丹对“乔丹”享有姓名权；争议商标的注册损害该姓名权。	无效
2	（2016）最高法行再20号	2016/12/08	6020566	QIAODAN	32	迈克尔·乔丹对“QIAODAN”不享有姓名权。	注册（新期限：2019/12/14–2029/12/13）
3	（2016）最高法行再25号	2016/12/08	9292836		35[3]	迈克尔·乔丹对“qiaodan”不享有姓名权。	注册（2012/04/14–2022/04/13）
4	（2016）最高法行再26号	2016/12/08	4152827	乔　丹	25[4]	迈克尔·乔丹对“乔丹”享有姓名权；争议商标的注册损害该姓名权。	无效
5	（2016）最高法行再27号	2016/12/07	6020569	乔丹	28[5]	迈克尔·乔丹对“乔丹”享有姓名权；争议商标的注册损害该姓名权。	无效
6	（2016）最高法行再28号	2016/12/08	9292824		35	迈克尔·乔丹对“qiaodan”不享有姓名权。	注册（2012/04/14–2022/04/13）
7	（2016）最高法行再29号	2016/12/30	6020571	QIAODAN	28	迈克尔·乔丹对“QIAODAN”不享有姓名权。	注册（新期限：2020/03/28–2030/03/27）
8	（2016）最高法行再30号	2016/12/30	6020568	QIAODAN	18[6]	迈克尔·乔丹对“QIAODAN”不享有姓名权。	注册（新期限：2020/03/07–2030/03/06）
9	（2016）最高法行再31号	2016/12/07	6020575	QIAODAN	25	迈克尔·乔丹对“QIAODAN”不享有姓名权。	注册（新期限：2020/03/14–2030/03/13）
10	（2016）最高法行再32号	2016/12/30	9286585		35	迈克尔·乔丹对“qiaodan”不享有姓名权。	注册（2012/05/14–2022/05/13）
11	（2016）最高法行再32号	2020/03/04	6020578		25	迈克尔·乔丹对“乔丹”享有姓名权；争议商标的注册损害该姓名权。	根据判决书，将被宣告无效

[1] 见《类似商品和服务区分表——基于尼斯分类第十一版（2019文本）》（国家知识产权局商标局编，知识产权出版社，2019），http://sbj.cnipa.gov.cn/sbsq/sphfwfl。

[2] 第32类：啤酒；无酒精饮料；矿泉水和汽水；水果饮料及果汁；糖浆及其他制饮料用无酒精制剂。

[3] 第35类：广告；商业经营；商业管理；办公事务。

[4] 第25类：服装，鞋，帽。

[5] 第28类：游戏器具和玩具；视频游戏装置；体育和运动用品；圣诞树用装饰品。

[6] 第18类：皮革和人造皮革；动物皮；行李箱和背包；雨伞和阳伞；手杖；鞭，马具和鞍具；动物用项圈、皮带和衣服。

引乔丹公司《首发招股说明书》（见**下文**）中的“品牌风险”中自述的特别提醒（即：提醒投资人注意其与迈克尔·乔丹并不存在联系），以证明乔丹公司本身亦认为“乔丹”与乔丹公司存在混淆、误认的可能。该举证思路得到了最高法的认可，故最终认为迈克尔·乔丹就“乔丹”享有姓名权。

- 此外，最高法明确指出：“使用是姓名权人享有的权利内容之一，并非姓名权人主张保护其姓名权的法定前提条件。特定名称按照姓名权受法律保护的，即使自然人并未主动使用，也不影响姓名权人按照商标法关于在先权利的规定主张权利”（这点包含于指导案例113号的“裁判要点”）。因此，迈克尔·乔丹未主动使用“乔丹”不能否定其对“乔丹”享有姓名权。

2017年，最高法发布《最高人民法院关于审理商标授权确权行政案件若干问题的规定》（“《商标授权确权行政案件规定》”），[8] 其中第二十条第二款明确规定：

> 当事人以其**笔名、艺名、译名等特定名称**主张姓名权，该特定名称具有一定的知名度，与该自然人建立了稳定的对应关系，相关公众以其指代该自然人的，人民法院予以支持。（强调后加）

第二十条第二款事实上将上述三起案件（即：最高法于（2016）最高法行再15号、（2016）最高法行再26号和（2016）最高法行再27号）的判决逻辑作为普遍适用的规则以司法解释的形式固定下来。但是，第二十条第二款涉及的范围更广，除了译名外，当事人也可以在符合该款所定的条件下，以其笔名或艺名主张姓名权。

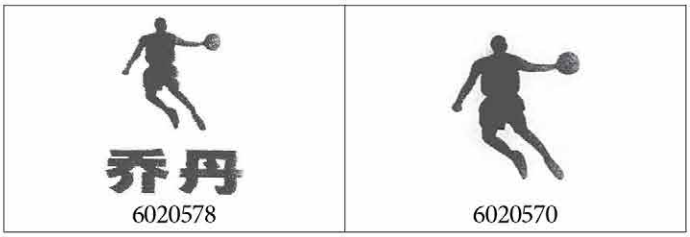
2.“QIAODAN”商标和“qiaodan+图”的商标

在（2016）最高法行再20号、（2016）最高法行再29号、（2016）最高法行再30号和（2016）最高法行再31号中，系争商标“QIAODAN”是迈克尔·乔丹英文姓名“Michael Jeffrey Jordan”的部分中文译名“乔丹”的拼音。尽管原告采取了类似于上述涉及“乔丹”商标的案件的逻辑，但最高法并未将文字“乔丹”的保护延伸到拼音“QIAODAN”。最高法认定迈克尔·乔丹对“QIAODAN”不享有在先姓名权，理由在于迈克尔·乔丹提供的证据不足以证明相关公众将拼音“QIAODAN”用于指代迈克尔·乔丹，也不足以证明两者之间存在稳定的对应关系。

在（2016）最高法行再25号、（2016）最高法行再28号和（2016）最高法行再32号中，最高法认定迈克尔·乔丹对“qiaodan”不享有在先姓名权。最高法的理由也是因为迈克尔·乔丹提供的证据不足以证明相关公众将拼音“qiandan”用于指代迈克尔·乔丹，也不足以证明两者之间存在稳定的对应关系。

3.“乔丹+黑色人形剪影”图形商标

图：



6020578　　6020570

2020年3月4日，最高法作出（2018）最高法行再32号行政判决，认定第6020578号“乔丹+黑色人形剪影”商标（见**图左**）中的“乔丹”两字损害了迈克尔·乔丹的在先姓名权。当中理由与上述涉及“乔丹”商标的案件的理由基本一样。

关于第6020578号商标中的“黑色人形剪影”是否损害了迈克尔·乔丹的肖像权，最高法认定迈克尔·乔丹不能就该标识享有肖像权。因此，迈克尔·乔丹关于该商标的注册损害其肖像权的主张不能成立。最高法的理由与其于2017年12月27日作出的（2015）知行字第332号行政裁定一致。

（2015）知行字第332号行政裁定涉及第6020570号“黑色人形剪影”商标（见**图右**）。迈克尔·乔丹认为该剪影与其身体轮廓基本相同，但最高法认为，仅这一点无法认定该图形标识损害了迈克尔·乔丹的肖像权。在该裁定中，最高法提出：

> 根据肖像权以及肖像的性质，肖像权所保护的“肖像”应当具有**可识别性**，其中应当包含**足以使社会公众识别其所对应的权利主体**，即特定自然人的**个人特征**，从而能够明确指代其所对应的权利主体。（强调后加）

最高法进一步认为：

> 如果当事人主张肖像权保护的标识并不具有足以识别的面部特征，则应当提供充分的证据，证明该标识包含了**其他足以反映其所对应的自然人的个人特征，具有可识别性**，使得社会公众能够认识到该标识能够明确指代该自然人。（强调后加）

具体到案涉的“黑色人形剪影”标识，最高法作出这样的结论：

> 除身体轮廓外，其中并未包含任何与[迈克尔·乔丹]有关的个人特征。并且，[迈克尔·乔丹]就该标识所对应的动作本身并不享有其他合法权利，其他自然人也可以作出相同或者类似的动作，该标识并不具有可识别性，不能明确指代再审申请人。

因此，迈克尔·乔丹不能就该标识享有肖像权。第6020570号“黑色人形剪影”商标目前仍然注册有效。

“乔丹”商标系列案件对乔丹公司的商业影响

上述的“乔丹”商标系列案件对乔丹公司的商业影响巨大。乔丹公司于2000年6月注册成立于中国福建省，自创业伊始便以“乔丹”作为卖点。乔丹公司确实因而经历了快速扩张。之后，却因上述一系列商标争议，该公司的首次公开发行（“首发”）受阻，并需要作出不同改变来维持经营。

1. 首发遭遇重重障碍

在2011年11月21日，中国证券监督管理委员会（“证监会”）的发行审核委员会审核乔丹公司的首发。[9]根据《乔丹体育股份有限公司首发招股说明书（申报稿）》，乔丹公司拟登陆上海证券交易所，计划发行1.13亿股，募集资金10.64亿元，用于4个募投项目：鞋生产基地扩建项目、研发设计中心建设项目、全国战略直营店建设项目、信息化建设项目。[10] 11月25日，发行审核委员会通过该首发。[11]

三年后，证监会于一个新闻发布会被问及为何一些已通过发行审核委员会的企业，仍未被核准发行。[12]证监会发言人回答中提到：

> 还有个别过[发行审核委员]会企业存在特殊事项，如**乔丹[公司]**存在重大未决诉讼[...]。我会将在相关受限因素消除后，按程序推进后续工作。（强调后加）

以上所指的“受限因素”涉及《首次公开发行股票并上市管理办法》。该办法规定发行人上市必须满足以下要求：[13]

> 发行人不存在重大偿债风险，不存在影响持续经营的担保、**诉讼**以及仲裁等重大或有事项。（强调后加）

因此，乔丹公司的注册商标诉讼影响了其首发进程。换言之，该首发获得通过至今已将近9年了，乔丹公司仍未能正式进行首发。可见，该公司原想以“乔丹”作为卖点在市场上大展拳脚，却因一系列相关商标争议而步步维艰。

2. 乔丹公司对店铺和产品作出改变

由于不能用“乔丹”商标，乔丹公司不得不对其店铺和产品作出改变。从店铺经营和宣传来看，乔丹公司的官方网站（qiaodan.com）已基本不再独立使用“乔丹”两字（见**下文**），并多以“黑色人形剪影”标志为主。从产品设计来看，乔丹公司不再在产品上使用“乔丹”两字，而是使用诸如“NLS. BE UNIQUE”、“RUN YOURSELF”等字样。对于未被认定为侵害迈克尔·乔丹合法权利的“QIAODAN”、“qiaodan”和“黑色人形剪影”商标，乔丹公司则仍在继续使用。[14] 同时，2019年以来，乔丹公司亦通过推出“质燥”系列产品，在多个类别上注册了多个与“乔丹”无关、以文字“质燥”及其对应繁体字为主要内容的商标。[15]

尽管乔丹公司作出以上改变，其似乎并未完全放弃攀附迈克尔·乔丹的知名度。两个例子正好说明这点。首先，乔丹公司仍以其未被撤销的含有“乔丹”二字的商标作为权利基础，向酷买网（北京）科技股份有限公司、亚马逊卓越有限公司提起诉讼，指称这两家公司在天猫、亚马逊等渠道销售耐克公司旗下“aj”球鞋时使用了“乔丹”字样，该行为侵害了其“乔丹”商标。一审、二审法院审理该案后，均认定不构成侵权。[16] 此外，在诸多仅包含“乔丹”二字的商标被宣告无效后，乔丹公司仍尝试以“乔丹”加其他文字的方式注册商标，但均未获得授权或处于被异议中。

“乔丹”商标系列案件作为“类案”对未来诉讼的启示

“乔丹”商标系列案件鲜明地展示出以姓名权对抗商标注册的实用价值。除“乔丹”商标外，迈克尔·乔丹针对“QIAODAN”、“qiaodan”和“黑色人形剪影”的在先权利主张均未获得最高法的支持。作为“类案”，这些最高法审判的案件的裁判逻辑对于其他“在基本事实、争议焦点、法律适用问题等方面具有相似性”的案件，具有参考价值。[17]这系列案件亦为知名人士带来了以下启示。

1. 外国自然人应确保其姓名的中文翻译在中国境内得到统一使用

“乔丹”商标系列案件的两大亮点是对姓名权的保护扩展到了外国具有一定知名度的自然人的姓名的全部或部分的中文翻译，并明确肯定这些译名所蕴含的经济利益需要得到保护。

基于这新发展，如外国自然人有意在中国境内进行商业发展，从建立姓名权权利基础的角度，应尽力和尽早布局其姓名统一的中文翻译。尽管最高法已指出“使用”不是主张姓名权的前提，但在实践中，建立稳定对应关系往往依靠长期、重复的使用，当中包括自

然人本身对该译名的使用，其对外商业许可使用该译名，以及媒体以该译名作报道。

针对媒体报道，在中国境内，微信公众号、纸媒、网络媒体、电视媒体各自为阵，对外国娱乐、体育明星以及其他类型知名人士予以报道时，姓名翻译有时天差地别。因此，为了避免因使用不同的中文翻译而削弱稳定的对应关系，具有一定知名度的外国自然人在进入中国市场初期应通过使用统一的中文翻译，以建立在中文语境下的知名度和稳定对应关系，使之满足建立姓名权的前提条件。

"[...乔丹]公司原想以'乔丹'作为卖点在市场上大展拳脚，却因一系列相关商标争议而步步维艰。"

2. 外国自然人应确保其笔名和艺名的中文翻译在中国境内得到统一使用

如前所述，最高法对数起主要的"乔丹"商标案件作出判决后，便立刻发布了《商标授权确权行政案件规定》。其中第二十条第二款规定了自然人可以对其笔名、艺名、译名等特定名称主张姓名权，条件是"该特定名称具有一定的知名度，与该自然人建立了稳定的对应关系，相关公众以其指代该自然人"。事实上，迈克尔·乔丹未能成功针对"QIAODAN"、"qiaodan"主张姓名权，主要原因在于他未能提供证据证明，在中国境内"QIAODAN"、"qiaodan"能够与其建立稳定的对应关系，且相关公众用之以指代他。

在《金龟子案》中，[18] 北京市高级人民法院认定，

> [...]在商标确权行政案件中，在先姓名权益的保护应当从以下几个方面综合考量：一是相关公众是否能够将所涉的姓名、艺名、绰号等主体识别标志与特定自然人建立起对应关系[...]。

该法院查明，刘纯燕在1994–2014年间，使用"金龟子"作为艺名主持不同的具有较高知名度的少儿节目。她于2006年出版的自传《我是金龟子》和参加的活动中大量使用"金龟子"艺名。她提交的中国国家图书馆检索报告和所获荣誉中亦使用"金龟子"指代她。因此，北京市高级人民法院认定，该等证据可以证明相关公众已将"金龟子"与刘纯燕建立起对应关系。

基于以上的发展，具有一定知名度的外国自然人有意在中国境内进行全方位的商业发展，欲对其笔名、艺名及外国姓名中文翻译的拼音主张姓名权的，应尽力、尽早布局对这些特定名称的统一使用和媒体覆盖。例如，外国知名艺人可以通过其在中国境内的粉丝团，统一对该艺人特有的称呼，并通过媒体报道和商业许可等方式，将其笔名、艺名和其他特有名称与该艺人建立稳定的对应关系。

对于在外国知名但尚未在中国境内形成一定知名度的人士，或相关公众较少使用某特定名称指代该人士的，其亦应尽早在中国境内推广、使用特定名称，使之成为其姓名权的保护基础。

3. 知名人士"肖像"的保护

在上述已经讨论的（2015）知行字第332号行政裁定中，最高法明确指出受保护的肖像剪影"应当具有可识别性，其中应当包含足以使社会公众识别其所对应的权利主体，即特定自然人的个人特征，从而能够明确指代其所对应的权利主体"。

很可能受到以上裁定的启发，2019年4月24日，北京市高级人民法院发布《北京市高级人民法院商标授权确权行政案件审理指南》，[19] 其中第16.15节规定：

> 当事人主张诉争商标的申请注册损害其在先肖像权的，应当举证证明诉争商标标志具有**足以使相关公众识别其所对应的特定自然人的个性特征**，从而使该标志与该自然人之间形成了**稳定的对应关系**，相关公众容易认为标有诉争商标的商品与该自然人存在许可等特定联系。**人形剪影未包含可识别的特定自然人个性特征，当事人据此主张损害其在先肖像权的，不予支持**。（强调后加）

"[...]因为绝大多数商标确权类行政诉讼由北京地区法院享有管辖权，[《北京市高级人民法院商标授权确权行政案件审理指南》]在一定程度上为当事人提供了抗辩指引，也为案件审理结果提供了预测。所以，其重要性不容忽略。"

尽管这一审理指南不是法律规定，但在实践中，相关法官、律师肯定会按审理指南处理这类案件。这是因为绝大多数商标确权类行政诉讼由北京地区法院享有管辖权，上述审理指南在一定程度上为当事人提供了抗辩指引，也为案件审理结果提供了预测。所以，其重要性不容忽略。

上述要求相当清晰，但由此带来的问题是，侧脸剪影、人形姿势剪影、卡通形象往往可能缺乏自然人

的个性特征，因而可能不被认定为构成侵犯个人肖像权。因此，知名人士有意在中国境内以其个人肖像进行商业拓展的，应尽力通过媒体报道、商业许可、网络推广等方式将该等“肖像”与自然人个人形成特定联系。此外，这些知名人士亦应考虑在肖像权的基础上，通过在中国境内将相关“肖像”图像注册为商标、剪影设计登记美术作品的方式，建立商标权、著作权权利基础，或在商业许可中明确约定特定使用方式，以对抗以知名人士人像剪影、卡通形象等个人特征不显著的肖像进行商标恶意注册的情况。

4. 知名人士如何对抗恶意注册的企业名称

“乔丹”文字商标和包含“乔丹”两字的图形商标得以无效，但是乔丹公司的企业名称仍然有“乔丹”两字。在中国法律规定中，企业名称与商标存在构成要素、登记机关、使用范围、救济途径等多方面的不同。因此，“乔丹”商标系列案件所基于的法律原则——知名人士可以用其姓名权对抗商标的恶意注册——不能直接用于对抗企业恶意以知名人士的姓名注册企业名称。那么，对于恶意注册的企业名称，知名人士是否还有救济手段呢？

实践中，已注册商标及未注册的驰名商标的持有人可结合《商标法》、《中华人民共和国反不正当竞争法》（“《反不正当竞争法》”）[20]的相关规定，以不正当竞争作为出发点尝试要求恶意注册企业名称的企业更改企业名称。

《阿里巴巴集团诉广东天猫投资集团有限公司等案》（“《阿里巴巴案》”）是一个很好的例子。[21] 阿里巴巴集团基于其多个包含“天猫”字样的已注册商标，对广东天猫投资集团有限公司等17家企业恶意注册含有“天猫”字样的企业名称及在日常经营活动中突出使用“天猫”字样等行为，提起了商标侵权及不正当竞争之诉。浙江省杭州市中级人民法院以《商标法》第五十八条、《反不正当竞争法》第二条作为法律依据（见**侧边栏2**），在判决中认定，被诉企业恶意注册的企业名称构成不正当竞争，应当承担包括停止使用商号、虚假宣传、变更企业名称等法律责任。值得关注的是，作出判决前，浙江省杭州市中级人民法院发出了中国境内首例知识产权类诉中行为保全裁定，要求被诉企业在诉讼中立即停止使用系争企业名称，并于裁定生效之日起十五日内向有关部门申请变更企业名称，效力维持至判决生效之日止。[22]

直至现在，暂未见仅以姓名权作为权利基础，要求法院以《反不正当竞争法》第二条判决认定企业名称构成不正当竞争，进而要求相关企业修改企业名称、商号的成功案例。但是，《阿里巴巴案》为知名人士对抗企业恶意以知名人士的各种特有名称注册作为企业名称提供了维权思路。结合中国法院实践及“类案”对日后法院审理的影响，在符合法律规定的前提下，当事人向法院提起的行为保全申请在知识产权类诉讼中更易获得法院的支持。

外国知名人士的艺名、笔名、外国名字中文翻译、特有名称存在显著特征的，应尽早布局全方位的商标方案，在相关服务、商品类别上予以注册并在商业许可、网络推广中予以使用，以使相关注册商标获得一定知名度，用于对抗他人恶意注册企业名称的情况。当恶意注册企业所从事的经营活动与外国知名人士所从事的商业活动存在较大差异时，上述的准备尤其需要。最后，这些知名人士要注意，通过已注册商标作为权利基础时，往往还需涉及对商标是否构成驰名商标的认定，在实践中需要大量的证明材料以证明该已注册商标的知名度。

结语

围绕“乔丹”商标系列案件的纠纷长达十年，其结果逐渐清晰明朗。该系列案件对知名人士在中国境内进行商业版图开发的知识产权保护带来了诸多启示。

知名人士，尤其是外国自然人，往往因语言差异、对法律的不熟悉，而疏忽了如译名、艺名及其翻译、其他特定名称、肖像剪影等具有个人特色的称谓和图表的知识产权保护。针对可能在中国境内发生的他人商标抢注、企业名称抢注、商号使用等各方面的知识产权保护领域，“乔丹”商标系列案件为知名人士提示了当中可能存在的问题。最重要的是，知名人士从该系列案件中学到重要的一课：其在中国境内外应尽量使用统一的译名、艺名及其翻译、其他特定名称，并应以上述元素及肖像剪影进行组合搭建而注册完善的商标体系。■

侧边栏2：

《中华人民共和国商标法》

第五十八条

将他人注册商标、未注册的驰名商标作为企业名称中的字号使用，误导公众，构成不正当竞争行为的，依照《中华人民共和国反不正当竞争法》处理。

《中华人民共和国反不正当竞争法》

第二条

经营者在生产经营活动中，应当遵循自愿、平等、公平、诚信的原则，遵守法律和商业道德。

* 此中国案例*见解*™的引用是：陈懿、朱新玥，“乔丹”商标系列案件：对侵权公司的影响和对知名人士带来的启示，《中国法律连接》，第10期，第25页（2020年9月），*亦见于*斯坦福法学院中国指导性案例项目，中国案例*见解*™，2020年9月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-10-202009-insights-10-chen-zhu。中文原文由熊美英博士编辑。载于本中国案例*见解*™的信息和意见作者对其负责，它们并不一定代表中国指导性案例项目的工作或意见。

[1]《迈克尔·杰弗里·乔丹与国家工商行政管理总局商标评审委员会、乔丹体育股份有限公司“乔丹”商标争议行政纠纷案》，《中国法律连接》，第8期，第77页（2020年3月），*亦见于*斯坦福法学院中国指导性案例项目，中文指导性案例（CGC113），2020年3月，https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-113。

[2] *见*郭锋法官，关于最高法院指导性案例的适用问题，《中国法律连接》，第1期，第23页（2018年6月），*亦见于*斯坦福法学院中国指导性案例项目，2018年6月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-1-201806-23-guo-feng。在文中，郭锋法官写道：“如果不赋予指导性案例以一定的效力，案例指导制度就形同虚设。赋予指导性案例以**事实拘束力**，类似案件如果作出了不同的裁判，上级法院在审理该案件的上诉时，原判将面临改判风险。”（强调后加）。

*亦见*中华人民共和国《〈最高人民法院关于案例指导工作的规定〉实施细则》，斯坦福CGCP*全球指南*™，2020年8月，http://cgc.law.stanford.edu/zh-hans/sgg-on-prc-detailed-implementing-rules-provisions-case-guidance。

[3] *见*中华人民共和国《最高人民法院关于统一法律适用加强类案检索的指导意见（试行）》，斯坦福CGCP*全球指南*™，2020年8月，http://cgc.law.stanford.edu/zh-hans/sgg-on-prc-guiding-opinions-search-similar-cases（以下简称“《类案检索指导意见》”）。该指导意见规定：“四、类案检索范围一般包括：（一）最高人民法院发布的指导性案例；（二）最高人民法院发布的典型案例及裁判生效的案件[…]”。

*亦见*熊美英博士，《最高人民法院关于统一法律适用加强类案检索的指导意见（试行）》与相关注解，《中国法律连接》，第10期，第71页（2020年9月），*亦见于*斯坦福法学院中国指导性案例项目，中法连*聚焦*™，2020年9月，http://cgc.law.stanford.edu/zh-hans/clc-spotlight/clc-10-202009-others-8-mei-gechlik。

[4] *同上*。该指导意见规定：

> 九、检索到的类案为指导性案例的，人民法院应当参照作出裁判，但与新的法律、行政法规、司法解释相冲突或者为新的指导性案例所取代的除外。
>
> 检索到其他类案的，人民法院可以作为作出裁判的参考。

[5] 指导案例113号所依据的最终判决明确引用2001年修正的《商标法》第三十一条（注意：该案的再审申请人于2012年10月31日请求再审被申请人商标评审委员会撤销“乔丹”商标，而当时2001年版的《商标法》仍然有效）。2013年修正案对该条重新编号为第三十二条，在当前《商标法》有效版本中第三十二条维持不变。*见*《中华人民共和国商标法》，1982年8月23日通过和公布，1983年3月1日起施行，经四次修正，最新修正于2019年4月23日，2019年11月1日起施行，http://www.sipo.gov.cn/zcfg/zcfgflfg/flfgsb/fl_sb/1140931.htm。

[6]《中华人民共和国民法通则》，1986年4月12日通过和公布，1987年1月1日起施行，并于2009年8月27日修正，同日起施行，http://www.npc.gov.cn/zgrdw/npc/lfzt/rlys/2014-10/28/content_1883354.htm。

[7]《中华人民共和国侵权责任法》，2009年12月26日通过和公布，2010年7月1日起施行，http://www.gov.cn/flfg/2009-12/26/content_1497435.htm。

[8]《最高人民法院关于审理商标授权确权行政案件若干问题的规定》，2016年12月12日由最高人民法院审判委员会通过，2017年1月10日公布，2017年3月1日起施行，http://www.court.gov.cn/zixun-xiangqing-34732.html。

[9]《发审委2011年第263次工作会议公告》，2011年11月21日由中国证券监督管理委员会公布，http://www.csrc.gov.cn/pub/zjhpublic/G00306202/201111/t20111121_202113.htm。

[10]《乔丹体育股份有限公司首发招股说明书（申报稿）》，2011年11月21日由中国证券监督管理委员会公布，http://www.csrc.gov.cn/pub/zjhpublic/G00306202/201111/t20111121_202116.htm。

[11]《发审委2011年第263次会议审核结果公告》，2011年11月25日由中国证券监督管理委员会公布，http://www.csrc.gov.cn/pub/zjhpublic/G00306202/201111/t20111125_202314.htm。

[12] 中国证监会，2014年11月28日新闻发布会，www.csrc.gov.cn，http://www.csrc.gov.cn/pub/newsite/zjhxwfb/xwfbh/201411/t20141128_264381.html。

[13]《首次公开发行股票并上市管理办法》，第二十八条，2006年5月17日由中国证券监督管理委员会通过，2006年5月17日公布，2006年5月18日起施行，经三次修正，最新修正于2020年7月10日，同日起施行，http://www.csrc.gov.cn/pub/zjhpublic/zjh/202007/P020200710623477821356.pdf。2015年第一次修正前，第二十八条被编号为第三十五条。

[14] 乔丹官方旗舰店，https://qiaodan.tmall.com。

[15] 43500807号商标，《中国商标网》，http://wcjs.sbj.cnipa.gov.cn。

[16] *见*吴桐，卖“aj”标“乔丹”侵权吗？，《北京知识产权法院网》，2020年7月20日，http://bjzcfy.chinacourt.gov.cn/article/detail/2020/07/id/5360654.shtml。

[17]《类案检索指导意见》，注释3。该指导意见规定：“一、本意见所称类案，是指与待决案件在基本事实、争议焦点、法律适用问题等方面具有相似性，且已经人民法院裁判生效的案件”。“九、[…]类案为指导性案例的，人民法院应当参照作出裁判[…。]检索到其他类案的，人民法院可以作为作出裁判的参考”。

[18]（2019）京行终7285号行政判决，2019年11月12日由北京市高级人民法院作出。

[19] 北京市高级人民法院知识产权庭，《北京市高级人民法院商标授权确权行政案件审理指南》，2019 年 4 月 24 日，http://bjgy.chinacourt.gov.cn/article/detail/2019/04/id/3850624.shtml。

[20]《中华人民共和国反不正当竞争法》，1993年9月2日通过和公布，1993年12月1日起施行，2017年11月4日修订，2018年1月1日起施行，2019年4月23日修正，同日起施行，http://www.fdi.gov.cn/1800000121_23_74874_0_7.html。

[21]（2017）浙01民初1681号民事判决，2018年11月13日由浙江省杭州市中级人民法院作出。

[22]（2017）浙01民初1681号之一民事裁定，2017年12月19日由浙江省杭州市中级人民法院作出。

An In-Depth Analysis of a Guiding Case That Has Been Used in Hundreds of Subsequent Cases: Is Guiding Case No. 15's Ground-Breaking Determination of Commingled Personalities of Affiliated Companies a Success?*

David Wei Zhao & Ziwen Tan

Abstract

In Anglo-American legal systems, the principle of "piercing the corporate veil" that has developed through cases can be flexibly applied to a variety of factual situations. In China, there is a similar system of denying the personality of a corporate legal person, which is provided for in Article 20 of the *Company Law of the People's Republic of China* (the "*Company Law*"). Due to the limitations of the statutory law, it is impossible for the *Company Law* to enumerate all situations in which this system applies. In order to strike a balance between stability and flexibility in the application of Article 20 of the *Company Law*, the Supreme People's Court of China (the "SPC") released Guiding Case No. 15 ("GC15") to discuss commingled personalities of affiliated companies and summarize relevant legal principles as two paragraphs in the "Main Points of the Adjudication" section. This has improved China's system of denying the personality of a corporate legal person and provided Chinese judges handling subsequent cases with clearer standards and methods for deciding when to deny the personality of a corporate legal person.

Based on select subsequent judgments/rulings, the authors of this commentary discuss in depth the treatment of GC15 by the SPC and other Chinese courts. These courts have enriched the content of the "Main Points of the Adjudication" section of the Guiding Case, making the main legal takeaways easier to apply. However, at the same time, these courts' treatment of GC15 has given rise to some concerns and reflections about certain issues. Nevertheless, these subsequent judgments/rulings have made the standards for determining "commingled personalities of affiliated companies" and related legal liabilities clearer and more specific. This also shows that China's Guiding Cases System is becoming more mature.

Introduction

Article 20 of the *Company Law of the People's Republic of China* (the "*Company Law*")[1] is an important legal provision concerning the system of denying the personality of a corporate legal person in China (see **Sidebar 1**). Article 20 Paragraph 3 clearly provides:

> Shareholders of a company who abuse the independent status of the corporate legal person and the limited liability of shareholders, evade debts, and seriously harm the interests of the company's creditors should bear joint and several liability for the company's debts.

The text of Paragraph 3 seems to suggest that it does not concern the commingling of personalities among affiliated companies. However, through the release of Guiding Case

Sidebar 1:

Company Law of the People's Republic of China

Article 20

Shareholders of a company should abide by laws, administrative regulations, and articles of association, and should exercise the rights of shareholders in accordance with law. [They] must not abuse the rights of shareholders to harm the interests of the company or other shareholders. [They] must not abuse the independent status of the corporate legal person and the limited liability of shareholders to harm the interests of the company's creditors.

Shareholders of a company who abuse the rights of shareholders and cause losses to the company or other shareholders should be liable for compensation in accordance with law.

Shareholders of a company who abuse the independent status of the corporate legal person and the limited liability of shareholders, evade debts, and seriously harm the interests of the company's creditors should bear joint and several liability for the company's debts.

David Wei Zhao
Associate Managing Editor, China Guiding Cases Project

David Wei Zhao is a civil and commercial lawyer in Kunming, provincial capital city of Yunnan Province in southern China. He works at Yunnan Baqian Law Firm and specializes in providing legal services to various clients, including well-known asset management corporations, major Chinese state-owned enterprises, and banks in China. He served as a clerk to a deputy chief judge of the First Civil Tribunal within the Wuhua District People's Court in Kunming Municipality and previously taught civil law and procedure at a judicial police vocational college in Yunnan. Mr. Zhao graduated from Yunnan University and holds a Master of Economic Law degree. He is interested in the study of law and society, as well as the development of Guiding Cases in China and their impact abroad.

No. 15 ("GC15") (*XCMG Construction Machinery Co., Ltd. v. Chengdu Chuanjiao Industry and Trade Co., Ltd. et al., A Dispute over a Sale and Purchase Contract*) on January 31, 2013,[2] the Supreme People's Court of China (the "SPC") clearly makes Paragraph 3 also applicable to situations in which affiliated companies commingle personalities. In the "Main Points of the Adjudication" section of GC15, the SPC states:

> ***"[...] for those affiliated companies that are determined, in accordance with the standards stated in [the first Main Point of the Adjudication], to have commingled personalities, if the affiliated companies 'seriously harm the interests of their creditors', they 'bear joint and several liability among themselves for the external debts' [(see the second Main Point of the Adjudication)]."***

> 1. The overlap or commingling of personnel, business, finances, and other aspects of affiliated companies that leads to the impossibility of separating out property and the loss of independent personalities constitutes the commingling of personalities.
>
> 2. Where affiliated companies commingle personalities and seriously harm the interests of their creditors, the affiliated companies bear joint and several liability among themselves for the external debts.

In other words, for those affiliated companies that are determined, in accordance with the standards stated in the first paragraph of the "Main Points of the Adjudication" of GC15 (the "first Main Point of the Adjudication"), to have commingled personalities, if the affiliated companies "seriously harm the interests of their creditors", they "bear joint and several liability among themselves for the external debts" (see **the second paragraph of the "Main Points of the Adjudication"** (the "second Main Point of the Adjudication")).

GC15 is noteworthy for three reasons: it constitutes a break from the traditional scope of application of Article 20 Paragraph 3 of the *Company Law*, expands the application of China's system of denying the personality of a corporate legal person, and provides courts handling subsequent similar cases with a new adjudication reference for addressing the controversial issue of the debt liability of affiliated companies.

Ziwen Tan
Editor, China Guiding Cases Project
LL.M. Candidate, China University of Political Science and Law

Ziwen Tan is currently pursuing a Master of Laws degree at China University of Political Science and Law. He has interned at Yuanda Law Firm, where he assisted the law firm in providing legal services in regulatory compliance and data protection to financial institutions, telecommunication firms, and Internet companies from both China and the United States. Mr. Tan received his Bachelor of Laws degree from China University of Political Science and Law and studied at Singapore Management University for one semester.

In fact, the importance of GC15 has been reflected in judicial practice. As of March 31, 2020, hundreds of subsequent judgments/rulings ("SJ/Rs") have explicitly mentioned GC15; among them, 171 SJ/Rs were rendered either by the SPC or by other courts and these other courts mentioned GC15 in the reasoning section of the SJ/Rs. In these cases, the facts about the affiliated companies involved are very different, and the courts faced many questions about how to determine the commingled personalities of affiliated companies and these companies' legal liabilities. After an overview of the characteristics revealed in geographical and other distributions of these 171 SJ/Rs, the authors of this commentary will, through an analysis of how 20 select SJ/Rs interpreted GC15, attempt to clarify the specific standards for determining whether the situation among affiliated companies "constitutes the commingling of personalities" and whether these companies are required to "bear joint and several liability among themselves for the external debts" involved. Through this in-depth analysis, the authors hope that lawyers and courts may better grasp relevant standards when dealing with similar cases in the future, and that the use of GC15 in judicial practice can be promoted further.

The Origin of Guiding Case No. 15

GC15 is basically the SPC's summary of the (2011) Su Shang Zhong Zi No. 0107 Civil Judgment rendered by the High People's Court of Jiangsu Province on October 19, 2011,[3] plus the aforementioned "Main Points of the Adjudication", which have guiding effect.

This case involved Chengdu Chuanjiao Industry and Trade Co., Ltd. ("Chuanjiao Industry and Trade Company"), which owed XCMG Construction Machinery Co., Ltd. ("XCMG Company") more than RMB 10 million renminbi for its payment for goods, as well as interest on the overdue payment. Chuanjiao Industry and Trade Company was no longer able to clear its debts (but its registration had not yet been cancelled). XCMG Company argued that Chengdu Chuanjiao Engineering Machinery Co., Ltd. ("Chuanjiao Machinery Company"), Sichuan Ruilu Construction Engineering Co., Ltd. ("Ruilu Company"), and Chuanjiao Industry and Trade Company had commingled personalities, and, therefore, Chuanjiao Machinery Company, Ruilu Company, and their shareholders should bear joint and several liability for the clearance of the aforementioned debts.

The court determined that there was commingling of personnel, business, and finances among Chuanjiao Industry and Trade Company, Chuanjiao Machinery Company, and Ruilu Company. The findings are summarized in the "Reasons for the Adjudication" section of GC15 as follows:

"commingling of personnel"	"The three companies have the same general manager, person in charge of finances, cashier accountant, and manager of industry and commerce procedures. Other management personnel are also in a situation of having overlapping appointments. The appointment and dismissal of Chuanjiao Industry and Trade Company's personnel is in a situation of being determined by Chuanjiao Machinery Company."
"commingling of business"	"The actual operations of the three companies all involve businesses related to construction machinery, and during the distribution process, there are situations where sales manuals and distribution agreements are shared. There is commingling of information in their public announcements."
"commingling of finances"	"The three companies use shared accounts and the signature of WANG Yongli [i.e., the actual person in control of the three companies] serves as the basis for the specific use of funds. [Thus, the companies] are unable to prove that their funds and allocations are separate [from one another's]. The claims and debts, company performance, accounts, and rebates between the three companies and XCMG Company are all calculated under the name of Chuanjiao Industry and Trade Company."

Hence, the factors (personnel, business, finances, etc.) characterizing the personalities of the three companies showed a high degree of commingling, resulting in an inability to distinguish individual property. The three companies had already lost their independent personalities, constituting the commingling of personalities. Based on this as well as the facts that "Chuanjiao Industry and Trade Company [bore] the debts of all affiliated companies but [was] unable to clear the debts" and that "it also allow[ed] the other affiliated companies to evade huge debts, seriously harming the interests of the creditors", the High People's Court of Jiangsu Province rejected, in the second instance of this case, the appeal brought by Chuanjiao Machinery

Company and Ruilu Company, and ordered them to bear joint and several liability for the clearance of the debts of Chuanjiao Industry and Trade Company.

This case provides a new breakthrough in the application of Article 20 of the *Company Law*. At the same time, it reiterates other legal bases for denying the independent personality of a corporate legal person (i.e., Article 4 of the *General Principles of the Civil Law of the People's Republic of China*[4] *and Article 3 of the Company Law*[5]*;* see **Sidebar 2**). Given the importance of this case, it was issued by the SPC in the form of GC15 on January 31, 2013. The Office for the Work on Case Guidance of the SPC describes the importance of GC15 as follows:

> This case involved issues concerning the determination of commingled personalities of affiliated companies and these companies' legal liabilities. This case is conducive to further improving the system of denying the personality of a corporate legal person in our country. It is conducive to preventing affiliated companies from abusing the independent status of a corporate legal person and the limited liability of shareholders [for the purpose of] maliciously evading debts and harming the interests of the company's creditors. It is conducive to standardizing the operating acts of affiliated companies as well as promoting the production and operation of enterprises in accordance with law and the healthy development of enterprises.[6]

Sidebar 2:

General Principles of the Civil Law of the People's Republic of China

Article 4

Civil activities should follow the principles of voluntariness, fairness, exchange of equal values, and good faith.

Company Law of the People's Republic of China

Article 3

A company is an enterprise legal person, has independent property of a legal person, and enjoys property rights of a legal person. A company is liable for its debts to the extent of its entire property.

A shareholder of a limited liability company is liable for the company to the extent of the amount of the capital contributed by the shareholder. A shareholder of a joint-stock company is liable for the company to the extent of the shares subscribed to by the shareholder.

Overall Characteristics of 171 Select Subsequent Judgments/Rulings

1. Methodology for Selecting Subsequent Judgments/Rulings

As of March 31, 2020, the authors found on the official "China Judgements [sic] Online" website ("中国裁判文书网"; http://wenshu.court.gov.cn) several hundred SJ/Rs that explicitly mentioned GC15. Due to the large quantity of these SJ/Rs, the authors selected 171 of them in accordance with the following two criteria:

> (1) any SPC judgment/ruling in which GC15 was mentioned in any part of the judgment/ruling;
>
> (2) any judgment/ruling rendered by a court other than the SPC where the court mentioned GC15 in the reasoning section titled "This Court opined" of the judgment/ruling.

Appendix 1 lists these 171 SJ/Rs. All of them are civil cases. In the following sections, the authors analyze the overall characteristics of these SJ/Rs by examining their distributions by year, level of court, stage of adjudication proceeding, and location of court.

2. Distribution by Year

Table 1 reflects the distribution of the 171 select SJ/Rs by year of adjudication. Although the number of SJ/Rs decreased in 2019, compared with the number in 2018, the numbers of SJ/Rs increased consistently from 2014 to 2018. For 2020, no SJ/Rs that meet the selection criteria used in this study were found. This is likely due to the fact that this study only covers cases adjudicated as of March 31, 2020 and, from January to March of the year, the adjudication work of the courts in China was affected by both the Chinese Lunar New Year holidays and the COVID-19 outbreak.

There could be many reasons for the overall increase in the number of SJ/Rs. One reason may be attributed to the significantly increased caseload since China implemented a reform of its case acceptance system in May 2015. The purpose of this reform is to ensure that "each case which

should be accepted by a people's court in accordance with law is registered and adjudicated so as to protect the litigation rights of the parties".[7] According to statistics, the number of cases registered by the courts across the country from May 2015 to March 2017 rose 33.92%, compared with the number in the preceding period.[8]

Year of Adjudication	No. of SJ/Rs
2014	1
2015	5
2016	13
2017	54
2018	65
2019	33
Total	**171**

Table 1: Distribution of the 171 Select Subsequent Judgments/Rulings by Year of Adjudication

3. Distribution by Level of Court

Table 2 shows the distribution of the 171 select SJ/Rs by level of court. The number of SJ/Rs handled by basic courts far exceeds the sum of SJ/Rs handled by intermediate courts, high courts, the SPC, and specialized courts. Specifically, the number of SJ/Rs handled by intermediate courts is approximately half of the SJ/Rs handled by basic courts.

The situation mentioned above is consistent with the characteristics associated with the adjudication levels of courts in China. The number of cases adjudicated by basic courts, which are the first-instance courts of most cases, is usually the greatest. Since the basic courts have the most widespread conditions and scope for accepting cases, this distribution also indicates how common cases involving commingled personalities of affiliated companies are. In addition, this type of lawsuit often concerns many parties and a debtor's inability to pay off debts, and is characterized by the involvement of many controversial issues, complicated relationships, difficulty in determining the issues themselves, and significant implications of its outcome. Parties who are dissatisfied with the outcome of these first-instance cases often choose to appeal or apply for a retrial. Therefore, intermediate courts, as the courts immediately above basic courts, naturally have also handled many of these cases, as reflected in the data.In addition, four SJ/Rs were rendered by specialized courts focusing on intellectual property and maritime law. This shows that disputes concerning commingled personalities of affiliated companies sometimes intersect with intellectual property and maritime disputes.

Level of Court	No. of SJ/Rs
Basic	100
Intermediate	47
High	13
Supreme	7
Specialized	4
Total	**171**

Table 2: Distribution of the 171 Select Subsequent Judgments/Rulings by Level of Court

4. Distribution by Stage of Adjudication Proceeding

Table 3 lists the distribution of the 171 select SJ/Rs by stage of adjudication proceedings. The number of SJ/Rs rendered in first-instance proceedings is the largest and these SJ/Rs far outnumber those rendered in second-instance proceedings or retrial proceedings. The authors believe that these phenomena can also be explained by the distribution of SJ/Rs by level of court and related reasons. For example, the number of SJ/Rs rendered by basic courts is far greater than those rendered by other courts and this, of course, means that many SJ/Rs were rendered in first-instance proceedings.

Stage of Adjudication Proceeding	No. of SJ/Rs
First Instance	121
Second Instance	37
Retrial	13
Total	**171**

Table 3: Distribution of the 171 Select Subsequent Judgments/Rulings by Stage of Adjudication Proceeding

5. Distribution by Location of Court

Table 4 presents the distribution of the 171 select SJ/Rs by the location of the court. Overall, cases concerning commingled personalities of affiliated companies are distributed across the country. Among them, courts of various levels in Guangdong Province adjudicated the largest number of cases, i.e., 24 in total. The authors believe that this is, to a certain extent, related to the fact that Guangdong Province, being one of the most economically developed regions in China, is home to numerous business enterprises and has an active economy. Moreover, courts in Shandong, Fujian, and Zhejiang, which are provinces located in the same eastern coastal area as Guangdong Province, also rendered relatively more SJ/Rs, with 17, 14, and 10 SJ/Rs, respectively.

However, it is noteworthy that Anhui and Inner Mongolia, which are located in relatively less developed inland areas, still had a significant number of SJ/Rs, i.e., 15 and 14 respectively. This shows that economic factors cannot completely determine the geographical distribution of these SJ/Rs. This also illustrates that whether in coastal areas or inland areas, the commingling of personalities among affiliated companies is an issue which parties pay attention to and seek judicial remedies to address.

Location of Court (Province/ Provincial-Level Municipalities)	No. of SJ/Rs
Guangdong	24
Shandong	17
Anhui	15
Inner Mongolia	14
Fujian	14
Zhejiang	10
Guizhou	9
Sichuan	9
SPC	7
Chongqing	4
Gansu	4
Hubei	4
Jiangsu	4
Jilin	4
Shanghai	4
Shanxi	4
Hainan	3
Henan	3
Hunan	3
Jiangxi	3
Liaoning	3
Hebei	2
Ningxia	2
Beijing	1
Guangxi	1
Heilongjiang	1
Shaanxi	1
Tianjin	1
Total	**171**

Table 4: Distribution of the 171 Select Subsequent Judgments/Rulings by Location of Court

> ***"Table 4 presents the distribution of the 171 select [subsequent judgments/rulings] by the location of the court. Overall, cases concerning commingled personalities of affiliated companies are distributed across the country. Among them, courts of various levels in Guangdong Province adjudicated the largest number of cases, i.e., 24 in total."***

Treatment of Guiding Case No. 15 in 20 Select Subsequent Judgments/Rulings

Of the 171 select SJ/Rs of GC15, seven were rendered by the SPC, while 13 were rendered by other courts which analyzed GC15 in detail (see **Appendix 2**).

The SPC's seven SJ/Rs are divided by the authors into three categories, based on who mentioned GC15:

Who Mentioned GC15?	SJ/R No.	Appendix 2
(1) the party(/-ies) or his/her/their lawyer(s)	(2014) Min Ti Zi No. 111	No. 2
(2) the adjudicating court in the reasoning section titled "This Court opined"	(2016) Zui Gao Fa Min Shen No. 3168	No. 3
	(2017) Zui Gao Fa Min Zai No. 91	No. 12
	(2018) Zui Gao Fa Min Shen No. 4702	No. 15
	(2018) Zui Gao Fa Min Shen No. 4021	No. 16
(3) both the parties/ lawyers and the court mentioned GC15	(2017) Zui Gao Fa Min Shen No. 2458	No. 7
	(2017) Zui Gao Fa Min Shen No. 1162	No. 8

In the first category of SJ/Rs, the party(/-ies) or his/her/their lawyer(s) mentioned GC15, but the SPC did not respond. Article 11 Paragraph 2 of the *Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"* provides:[9]

> Where a public prosecution organ, a party to a case or his defender, or a litigation agent quotes a Guiding Case as a ground [for the] prosecution (litigation) or defense, the personnel handling the case **should**, in the reasons for the adjudication, **respond** as to whether [they] referenced and imitated the Guiding Case [in

> the adjudication of the case] and explain their reasons. (emphasis added)

Clearly, whatever considerations drove the SPC to not provide a response, this approach is open to objection.

In the remaining six SJ/Rs rendered by the SPC and the 13 SJ/Rs rendered by other courts, the SPC and these other courts analyzed in detail the following "Main Points of the Adjudication" of GC15:

> 1. The overlap or commingling of personnel, business, finances, and other aspects of affiliated companies that leads to the impossibility of separating out property and the loss of independent personalities constitutes the commingling of personalities.
>
> 2. Where affiliated companies commingle personalities and seriously harm the interests of their creditors, the affiliated companies bear joint and several liability among themselves for the external debts.

Through the first Main Point of the Adjudication, the SPC provides two elements for determining whether the situation of affiliated companies "constitutes the commingling of personalities": (1) "the overlap or commingling of personnel, business, finances, and other aspects of affiliated companies" and (2) "that [overlap or commingling] leads to the impossibility of separating out property and the loss of independent personalities".

Through the second Main Point of the Adjudication, the SPC points out that where it is determined that affiliated companies "commingle personalities" and "seriously harm the interests of their creditors", the affiliated companies are required to "bear joint and several liability among themselves for the external debts".

The following sections will discuss how the six SJ/Rs rendered by the SPC and the 13 SJ/Rs rendered by other courts analyzed and referenced these two Main Points of the Adjudication.

1. *Element 1 for Determining Whether the Situation of Affiliated Companies "Constitutes the Commingling of Personalities": "the Overlap or Commingling of Personnel, Business, Finances, and Other Aspects of Affiliated Companies"*

(1) Commingling of "Personnel, Business, and Finances": These Three Aspects Need Not Co-Exist and Commingling Is Not Limited to These Three Aspects

In (2018) Zui Gao Fa Min Shen No. 4702 (see **Appendix 2: No. 15**), the SPC pointed out that the affiliated companies in that case commingled their personnel, finances, and property before determining that there was commingling of personalities in these affiliated companies. The SPC did not discuss whether anything that could constitute commingling of "business" occurred in the case.

Because this case was adjudicated by the SPC, it can be used in the future by Chinese courts handling similar cases "**as [a] reference for rendering a ruling or judgment**", according to the *Guiding Opinions of the Supreme People's Court on Unifying the Application of Law and Strengthening the Search for Similar Cases (Trial Implementation)*.[10] The fact that the SPC did not discuss the commingling of business suggests that, in the future, when courts determine whether the situation of affiliated companies "constitutes the commingling of personalities", it is not necessary for all of the three named aspects of commingling (i.e., "personnel, business, and finances") to be present.

In addition, in the first Main Point of the Adjudication of GC15, the SPC uses the character "等" (the pinyin transliteration of which is "Deng", and which here has a similar meaning to "etc." in English writing) to indicate that the overlap or commingling is not limited to the named aspects concerning "personnel, business, and finances". In a related article, the Office for the Work on Case Guidance of the SPC provides the following explanation:

> The commingling of personalities is manifested in various forms and the commingling methods are constantly updated. Therefore, were it determined that a certain form of manifestation characterizes the "commingling of personalities", some companies would inevitably try to avoid these characteristics, while still maintaining the commingling in substance. This would greatly increase the difficulty for creditors to collect evidence and for a court to determine whether the situation "constitutes the commingling of personalities".[11]

This flexible approach is reasonable and is also reflected in three SJ/Rs.

In (2016) Zui Gao Fa Min Shen No. 3168 (see **Appendix 2: No. 3**), the SPC, apart from examining whether there was commingling of "personnel, business, and finances", also discussed the affiliated companies' shared "registered address". Similarly, in (2018) Chuan 15 Min Zhong No. 1733 (see **Appendix 2: No. 17**), the court stated:

> […] the three enterprises have the same **industrial and commercial registration address**, the same personnel for handling procedures for enterprise changes, etc. These facts are *prima facie* evidence showing that counterparties to [the enterprises'] transactions might have been led to mistakenly believe that **the three enterprises are one entity** and such evidence helps determine the commingling of personalities among the affiliated enterprises. (emphasis added)

In (2018) E 05 Min Zhong No. 461 (see **Appendix 2: No. 13**), the court, apart from examining whether there was commingling of "personnel, business, and finances", also considered the use of official seals among the affiliated companies.[12] The court explained:

> **An official seal is the core representation of a corporate legal person's external expression of its independent will (company will)** and is a sign that the corporate legal person substantively enjoys the freedom of expressing its will in civil activities. If, in external civil interaction activities, a corporate legal person cannot independently use its official seal in accordance with its own will, this suggests that the corporate legal person does not substantively enjoy the **freedom of expressing its will**. (emphasis added).

(2) Commingling of Personnel

GC15 uses the following expressions to analyze the "commingling of personnel":

> The three companies have the same general manager, person in charge of finances, cashier accountant, and manager of industry and commerce procedures. **Other management personnel** are also in a situation of having overlapping appointments. The appointment and dismissal of Chuanjiao Industry and Trade Company's personnel is in a situation of being determined by Chuanjiao Machinery Company. (emphasis added)

Evidently, the focus is on the commingling of "management personnel". This focus is also reflected in judicial practice. In (2017) Lu 10 Min Zhong No. 1023 (see **Appendix 2: No. 9**), the two defendant companies had the same legal representative and controlling shareholders. Ultimately, it was determined that there was commingling of founding personnel. Additionally, in (2017) Ji 07 Min Zhong No. 1636 (see **Appendix 2: No. 11**), the court specifically stated:

> […] the commingling of personnel refers to the commingling between a company's **senior executives**, such as shareholders, directors, and managers, **or people who control the company** and **similar personnel of another company**, to the extent that the independent will of the company is subject to control. WANG Jianping is the legal representative of [defendant] Sales Company, but she is also acting as Vice Chairman of [defendant] Technology Company. And LIU Zhiyou, Supervisor of Sales Company, as well as other personnel of the company also serve as senior executives of Technology Company.
>
> **The commingling [of personnel] means that [the companies had] the same or overlapping [personnel]; the concept cannot be limited to mean having the exact same [personnel]**. The commingling of directors and senior executives, as described above, **is sufficient to influence the decision-making and corresponding operations of the companies, and, therefore, this conforms to the concept of commingling of personnel**. (emphasis added)

The court emphasized that the relevant commingling of personnel must be "sufficient to influence the decision-making and corresponding operations of the companies". Similar interpretations are also seen in the following two cases. In (2017) Yu 01 Min Zhong No. 2155 (see **Appendix 2: No. 4**), the court pointed out:

> [In the two affiliated companies, which are the defendants in this case,] although there is overlap in the appointment of some individual staff members working in financial and treasury positions, [...] the shareholders of the two companies have always been different and there has been no general overlap in the appointment of senior executives. With respect to the appointment and removal of personnel, the two companies **have not influenced each other, nor has one company controlled the other**. […] the evidence adduced is hardly sufficient to prove that there is a high degree of commingling of personnel between the two companies […]. (emphasis added)

In (2016) Yue 0391 Min Chu No. 431 (see **Appendix 2: No. 6**), the court adopted a similar view. The evidence in this case was only able to prove that one supervisor of the two defendant companies was the same, and this did not influence the companies' decision-making. Therefore, the existence of commingling of personnel could not be established.

Finally, some courts have cautioned that overlapping appointments of personnel among affiliated companies that belong to the same group of companies is not unusual *per se*. These situations cannot be generalized and must be carefully determined. For example, in (2017) Lu 11 Min Zhong No. 1556 (see **Appendix 2: No. 10**), the court opined:

> Among the [defendant] companies' **senior executives, only YANG Linchuan has overlapping appointments**, while other senior executives have none. The two [defendant] companies' online banking operators and management personnel **have partially overlapping appointments**. The personnel handling industry and business procedures are the same, but this is a specific situation. The group's internal practice of dispatching staff members from one company to another and *vice versa* facilitates the group's implementation of a unified management system. **As long as this does not infringe upon each other's corporate independent personality**, this is not a type of commingling of personalities […]. (emphasis added)

In other words, under the above circumstances, only if the corporate independent personality of each company is infringed will this be considered to be a type of commingling of personalities. This is basically consistent with the spirit of the requirement discussed above that the commingling be "sufficient to influence the decision-making and corresponding operations of the companies". Therefore, it is worth noting whether, in the future, courts will use the "sufficient to influence the decision-making and corresponding operations of the companies" requirement as a uniform standard for determining "commingling of personnel".

(3) Commingling of Business

GC15 uses the following expressions to analyze "commingling of business":

> The actual operations of the three companies all involve **businesses related to construction machinery**, and during the distribution process there are **situations where sales manuals and distribution agreements are shared**. There is commingling of **information in their public announcements**. (emphasis added)

Through the SJ/Rs analyzed in this study, a point has become clearer: the determination of whether "commingling of business" exists hinges not on external publicity, contract formats, and other external representation, but on the actual business operations of the affiliated companies. For example, in (2014) Lu Shang Zhong Zi No. 214 (see **Appendix 2: No. 1**), the court opined:

> Having the same or similar business address, publicity of sales, and contract formats cannot lead to the determination of commingling of business.

In (2017) Ji 07 Min Zhong No. 1636 (see **Appendix 2: No. 11**), the court clearly pointed out that "commingling of business refers to the commingling of business types, operational models, transaction methods, and pricing mechanisms among companies". This understanding is consistent with the viewpoint of the Office for the Work on Case Guidance of the SPC on "commingling of business". The office has written:

> ["Commingling of business"] refers to [the situation where] affiliated companies engage in the same business activities and are not distinguishable from each other in the course of operating their business. For example, the same business is sometimes carried out in the name of one company but other times in the name of another company, so that **counterparties who transact with them cannot tell which company they are dealing with**.[13] (emphasis added)

Regarding the specific application of the "commingling of business" standard, (2018) Yue 03 Min Chu No. 581 (see **Appendix 2: No. 14**) is worthy of reference. Based on the following three points, the court decided that there was commingling of business among the affiliated companies involved in the case:

- In the certification letter of defendants Aitengda Company and Zhongding Company, the names of the two companies were printed side by side at the top of the letter, indicating that the two companies had no objections to the outside world's seeing them as affiliated companies or thinking that their businesses are closely connected.

- The production and sales business of Aitengda Company had been transferred to Zhongding Company.

- The ways the two companies used their seals:

  - the first page of the Commodity Standard Material Certificate was stamped with Aitengda Company's "Special Seal for Standard Materials" and the last page indicated "Production Unit: Aitengda Company (Zhongding Company)";
  - receipts of payments were stamped with Aitengda Company's special seal for finance; and

  - the name of the delivery unit printed on the notes for the delivery of goods was Aitengda Company, but the notes were stamped with Zhongding Company's special seal for delivery of goods.

In short, the two companies adopted a mode of close coordination and mutual cooperation to jointly run their business, making it impossible for transaction counterparties to distinguish which company they were dealing with. Thus, there was commingling of business.

(4) Commingling of Finances

GC15 uses the following expressions to analyze "commingling of finances":

> The three companies use **shared accounts** and WANG Yongli's signature serves as the basis for the specific use of funds. [Thus, the companies] are unable to prove that their funds and allocations are separate [from one another's]. The **claims and debts**, company **performance, accounts, and rebates** between the three companies and XCMG Company are all calculated under the name of Chuanjiao Industry and Trade Company. (emphasis added)

The specific application of the concept "commingling of finances" in the following SJ/Rs has deepened the understanding of this type of commingling.

In (2017) Zui Gao Fa Min Shen No. 2458 (see **Appendix 2: No. 7**), affiliated companies A and B jointly performed a construction contract signed by Company B and a third-party company. To determine whether Companies A and B commingled their finances, the SPC, which adjudicated this case, considered two points: (1) Company A withdrew, in its own name, project funds from the third-party company, an action to which Company B did not object; and (2) the same financial staff handled external business for Companies A and B. In the end, the SPC determined that the two companies had commingled their finances.

In (2018) Chuan Min Zai No. 484 (see **Appendix 2: No. 20**), the court decided:

> Commingling of finances refers to the commingling of accounting books and accounts among affiliated companies, or improper offsets made between them.

In (2018) Xiang 08 Min Chu No. 52 (see **Appendix 2: No. 19**), the court considered various situations, including whether the registered capital funds of affiliated companies were commingled and whether unreasonably large amounts of capital had been exchanged among the affiliated companies.

In (2018) Yue 03 Min Chu No. 581 (see **Appendix 2: No. 14**), the court used the term "common community of interests" to highlight the characteristics of commingling of finances among affiliated companies. The court put it this way:

> When the two defendants operate the business externally, sales are made in the name of one of them and payments are received in the name of the other. However, they can still eventually balance their accounts internally. This shows that the two defendants do not deliberately distinguish their identities when operating externally and receiving payments. To put it directly, the two defendants actually constitute one **common community of interests** when they receive external payments for goods. There is commingling of finances. (emphasis added)

In sum, in order to meet the requirements of Element 1 for determining whether the situation of affiliated companies "constitutes the commingling of personalities" (i.e., "the overlap or commingling of personnel, business, finances, and other aspects of affiliated companies"), there must be sufficient evidence to prove that there is a high level of commingling of whichever aspect is being considered and such commingling makes it impossible for the outside world to distinguish the affiliated companies as independent entities.

2. Element 2 for Determining Whether the Situation of Affiliated Companies "Constitutes the Commingling of Personalities": "That [Overlap or Commingling] Leads to the Impossibility of Separating Out Property and the Loss of Independent Personalities"

Element 2 for determining whether the situation of affiliated companies "constitutes the commingling of personalities" (i.e., "that [overlap or commingling] leads to the impossibility of separating out property and the loss of independent personalities") was not widely discussed in the SJ/Rs reviewed in this study. This may be due to the fact that once Element 1 (i.e., "the overlap or commingling of personnel, business, finances, and other aspects of affiliated companies") is not established, there is no need to discuss Element 2. For example, in (2016) Zui Gao Fa Min Shen No. 3168 (see **Appendix 2: No. 3**), the SPC reasoned in the following way when discussing the property of affiliated companies:

> […] **with respect to the property** of the companies, Kunhe Company denied that it commingled its finances with those of Yuanfeng Company. The evidence submitted by ZHU Kongwen **was insufficient to prove that the financial books of Yuanfeng Company and Kunhe Company were commingled**. Also, he did not provide evidence to prove that Kunhe Company and Yuanfeng Company transferred funds to each other frequently and arbitrarily. Therefore, it was not improper for the second-instance court to decide that ZHU Kongwen had no evidence proving **unclear property boundaries** between the two companies as well as commingling of the two companies' books and accounts or inappropriate offsetting of the accounts. (emphasis added)

> ***"[…] in order to meet the requirements of Element 1 for determining whether the situation of affiliated companies 'constitutes the commingling of personalities' […], there must be sufficient evidence to prove that there is a high level of commingling of whichever aspect is being considered and such commingling makes it impossible for the outside world to distinguish the affiliated companies as independent entities."***

It is gratifying that some courts did focus and elaborate on Element 2—"that [overlap or commingling] leads to the impossibility of separating out property and the loss of independent personalities". In (2018) Chuan 15 Min Zhong No. 1733 (see **Appendix 2: No. 17**), the court clearly noted the importance of discussing the "commingling of property":

> **The core standard for determining** the commingling of personalities among companies is **the commingling of property**. As far as a company is concerned, **the lack of property means the lack of personality. Independence of a company's property is the basis for the company to have independent personality**. [...] Commingling of property is defined as the commingling of the company's property and that of its shareholders or the commingling of affiliated companies' property. And, as a result, the property cannot be clearly or strictly separated, and the shareholders and affiliated companies may occupy and transfer the company's property at will. (emphasis added)

The above discussion is consistent with the following content written by the SPC in the "Reasons for the Adjudication" section of GC15:

> A company's independent bearing of liability as a legal person is premised upon its independent personality. Article 3 Paragraph 1 [of the *Company Law*] provides:
>
> > A company is an enterprise legal person, has independent property of a legal person, and enjoys property rights of a legal person. A company is liable for its debts to the extent of its entire property.
>
> **A company's independent property is the material guarantee of its independent bearing of liability. The independent personality of a company is also manifested prominently in the independence of property**. When affiliated companies are unable to separate their property and lose their independent personalities, they lose the basis for bearing liability independently. (emphasis added)

It is particularly worth noting that the above content does not appear in the original second-instance judgment upon which GC15 is based, i.e., the (2011) Su Shang Zhong Zi No. 0107 Civil Judgment rendered by the High People's Court of Jiangsu Province on October 19, 2011.[14] In other words, the above content was specifically added by the SPC when it prepared GC15. This reflects the SPC's emphasis on the discussion of the independence of a company's property.

In addition, in (2016) Yue 0391 Min Chu No. 753 (see **Appendix 2: No. 5**), the court provided specific factors for consideration when determining the element "that [overlap or commingling] leads to the impossibility of separating out property and the loss of independent personalities":

> The substantive factor of the commingling of personalities among affiliated companies is the commingling of property. Commingling of property means that the ownership of property among affiliated companies is unclear and **it is difficult to separate their respective property**. Examples would include affiliated companies that have **the same domicile and business premise, jointly use the same office facilities as well as the same machinery and equipment, commingle their capital funds, do not distinguish their respective incomes, and transfer to each other their property at will**. (emphasis added)

3. *Whether Affiliated Companies with "Commingle[d] Personalities" Are Required to "Bear Joint and Several Liability Among Themselves for the External Debts"?*

Through the second Main Point of the Adjudication, the SPC points out that where it is determined that affiliated companies "commingle personalities" and "seriously harm the interests of their creditors", the affiliated companies are required to "bear joint and several liability among themselves for the external debts".

The authors' in-depth analysis of the six SJ/Rs rendered by the SPC and the 13 SJ/Rs rendered by other courts reveals that most of these courts did not discuss the second Main Point of the Adjudication. This may be due to the fact that in only nine SJ/Rs (see **Appendix 2: Nos. 7, 9, 11, 13–15, 17, 19, and 20**) did the courts find that the affiliated companies had commingled personalities. The courts rendering the other ten SJ/Rs determined that the affiliated companies did not commingle personalities and thus, these courts did not need to further discuss whether the affiliated companies were required to "bear joint and several liability among themselves for the external debts" (the answer is already a clear "no").

In the nine SJ/Rs where the courts determined that the affiliated companies commingled personalities, the courts' discussions of the second Main Point of the Adjudication, as examined below, will help guide the adjudication of similar cases in the future.

In (2017) Zui Gao Fa Min Shen No. 2458 (see **Appendix 2: No. 7**), the SPC ruled that the two companies with commingled personalities had "seriously harm[ed] the interests of their creditors", on the basis of what was stated in an enforcement notice prepared by a people's court: "[the court] has not discovered [...] any property that can be used for enforcement". In (2018) Zui Gao Fa Min Shen No. 4702 (see **Appendix 2: No. 15**), the SPC concluded that relevant companies with commingled personalities had "seriously harm[ed] the interests of their creditors", on the basis of the content of a document issued by one party of the case to a state-owned asset management company. The document showed that the debtor company had no other assets for paying back the amount involved in the case.

Interestingly, in (2018) Chuan Min Zai No. 484 (see **Appendix 2: No. 20**), the court stated:

> Although Huamao Company and Zhongmao Company are ostensibly independent limited liability companies, the two companies have no evidence to prove the independence of their assets and finances. [Their situation] actually constitutes the commingling of assets, **seriously harming the interests of their creditors and relief cannot be given by other means**. The two companies' defense, which claims that there is no commingling of assets between them, is not supported by evidence and is, therefore, not accepted by this court. [...] hence, **in this case, as Zhongmao Company cannot pay off the rent in arrears, Huamao Company should be jointly and severally liable for the clearance of the aforementioned debt of Zhongmao Company**. (emphasis added)

The court in this case emphasized this condition: "relief cannot be given by other means". In other words, if other means could be used to clear the debts owed to the creditors, the affiliated companies would not be required to bear the joint and several liability for the debts. It is worth seeing whether this condition will be taken into account by future courts handling similar cases.

Conclusion

The use of a Guiding Case to discuss new situations in which the system of denying the personality of a corporate legal person applies (i.e., the commingled personalities of affiliated companies and their legal liabilities) is a beneficial attempt at promoting the development of Chinese judicial theory and practice.

Specifically, GC15 has expanded the application of Article 20 of the *Company Law* and provided new lines of reasoning for handling cases in which affiliated companies abuse the independent status of corporate legal persons and evade debt liability. The "Main Points of the Adjudication"

section of GC15 states two elements for determining whether the situation of affiliated companies "constitute the commingling of personalities" and the circumstances under which affiliated companies are required to "bear joint and several liability for the external debts". This provides an effective reference for courts handling similar subsequent cases.

The courts rendering many of the SJ/Rs analyzed in this study have enriched and strengthened the understanding of the "Main Points of the Adjudication" of GC15 and this has prompted new reflections. Broadly speaking, this Guiding Case has further improved China's system of denying the personality of a corporate legal person and this improvement is conducive to protecting the interests of creditors, regulating the operations of companies, and creating a good business environment for transactions.

However, in the process of analyzing select SJ/Rs, the authors also noticed that most of the courts focused their discussions on Element 1 of the first Main Point of the Adjudication (i.e., "the overlap or commingling of personnel, business, finances, and other aspects of affiliated companies"), without sufficiently analyzing other content in the "Main Points of the Adjudication" section of the Guiding Case. The authors hope that when handling future similar cases, Chinese courts will be able to comprehensively analyze the various aspects of the "Main Points of the Adjudication" section of GC15 so as to ensure that the case is correctly referenced going forward and its guiding function optimized. ■

* The citation of this China Cases *Insight*™ is: David Wei Zhao & Ziwen Tan, *An In-Depth Analysis of a Guiding Case That Has Been Used in Hundreds of Subsequent Cases: Is Guiding Case No. 15's Ground-Breaking Determination of Commingled Personalities of Affiliated Companies a Success?*, 10 China Law Connect 33 (Sept. 2020), *also available at* Stanford Law School China Guiding Cases Project, China Cases *Insights*™, Sept. 2020, http://cgc.law.stanford.edu/commentaries/clc-10-202009-insights-11-zhao-tan.

The original, Chinese version of this China Cases *Insight*™ was edited by Dr. Mei Gechlik. The English version was prepared by Qi Lei, Straton Papagianneas, Ziqi Yang, David Wei Zhao, and Xinyue Zhu, and was finalized by Shanahly Wan, Jennifer Ingram, Nathan Harpainter, and Dr. Mei Gechlik. The information and views set out in this China Cases *Insight*™ are the responsibility of the authors and do not necessarily reflect the work or views of the China Guiding Cases Project.

[1] 《中华人民共和国公司法》(*Company Law of the People's Republic of China*), passed and issued on Dec. 29, 1993, effective as of July 1, 1994, amended four times, most recently on Oct. 26, 2018, effective as of Oct. 26, 2018, http://www.fdi.gov.cn/1800000121_23_74633_0_7.html. The *Company Law* cited in Guiding Case No. 15 should refer to the 2005 version, which was in effect when the Guiding Case was released in 2013 and when the final judgment upon which the Guiding Case is based was rendered. Article 20 remains the same in the currently effective version.

[2] 《徐工集团工程机械股份有限公司诉成都川交工贸有限责任公司等买卖合同纠纷案》(*XCMG Construction Machinery Co., Ltd. v. Chengdu Chuanjiao Industry and Trade Co., Ltd. et al., A Dispute over a Sale and Purchase Contract*), 10 China Law Connect 85 (Sept. 2020), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC15), Sept. 2020, http://cgc.law.stanford.edu/guiding-cases/guiding-case-15.

[3] (2011) 苏商终字第0107号民事判决 ((2011) Su Shang Zhong Zi No. 0107 Civil Judgment), rendered by the High People's Court of Jiangsu Province on Oct. 19, 2011, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/jiangsu-2011-su-shang-zhong-zi-0107-civil-judgment.

[4] 《中华人民共和国民法通则》 (*General Principles of the Civil Law of the People's Republic of China*), passed and issued on Apr. 12, 1986, effective as of Jan. 1, 1987, amended on and effective as of Aug. 27, 2009, http://www.npc.gov.cn/zgrdw/npc/lfzt/rlys/2014-10/28/content_1883354.htm.

[5] *Company Law of the People's Republic of China*, *supra* note 1, Article 3.

[6] 最高人民法院案例指导工作办公室 (The Office for the Work on Case Guidance of the Supreme People's Court), 指导案例15号《徐工集团工程机械股份有限公司诉成都川交工贸有限责任公司等买卖合同纠纷案》的理解与参照 (*Understanding, Referencing, and Imitating Guiding Case No. 15, XCMG Construction Machinery Co., Ltd. v. Chengdu Chuanjiao Industry and Trade Co., Ltd. et al., A Dispute over a Sale and Purchase Contract*), 《人民司法·应用》 (The People's Judicature · Applications), Issue No. 15, at 34 (2013).

[7] 《中共中央关于全面推进依法治国若干重大问题的决定》(*Decision of the Central Committee of the Communist Party of China on Several Major Issues Concerning the Comprehensive Promotion of Ruling the Country In Accordance With Law*), passed by the Fourth Plenary Session of the 18th Central Committee of the Communist Party of China on Oct. 23, 2014, issued on Oct. 29, 2014, http://www.court.gov.cn/zixun-xiangqing-8371.html.

[8] 最高人民法院(Supreme People's Court), 全国法院立案登记制改革两周年新闻发布会 (*Press Conference on the Second Anniversary of the Reform of the Case Registration System in Courts Across the Country*), 《中华人民共和国最高人民法院网》 (Web of the Supreme People's Court of the People's Republic of China Online), May 18, 2017, http://www.court.gov.cn/zixun-xiangqing-45022.html.

[9] Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance", *People's Republic of China*, Stanford CGCP *Global Guide*™, Aug. 2020, http://cgc.law.stanford.edu/sgg-on-prc-detailed-implementing-rules-provisions-case-guidance.

[10] *See* Guiding Opinions of the Supreme People's Court on Unifying the Application of Law and Strengthening the Search for Similar Cases (Trial Implementation), *People's Republic of China*, Stanford CGCP *Global Guide*™, Aug. 2020, http://cgc.law.stanford.edu/sgg-on-prc-guiding-opinions-search-similar-cases. The Guiding Opinions provide:

> 4. The scope of a search for similar cases generally includes:
>
> (1) Guiding Cases released by the Supreme People's Court;
>
> (2) typical cases released by the Supreme People's Court, and **cases** that have been **adjudicated by [the Supreme People's Court] and have come into effect**;
>
> […]
>
> 9. Where a similar case that has been retrieved is a Guiding Case, a people's court should reference and imitate it to render a ruling or judgment, unless [the Guiding Case] is in conflict with a new law, administrative regulation, or judicial interpretation or is replaced with a new Guiding Case.
>
> **Other similar cases** that have been retrieved **may be used by a people's court as references for rendering a ruling or judgment**.
>
> (emphasis added)

[11] The Office for the Work on Case Guidance of the Supreme People's Court, *supra* note 6, at 35.

[12] In China, although a company's official seal does not have any special status under the law, Chinese companies still generally consider both official seals and signatures to be indispensable in the conclusion of contracts.

[13] The Office for the Work on Case Guidance of the Supreme People's Court, *supra* note 6, at 35.

[14] *See XCMG Construction Machinery Co., Ltd. v. Chengdu Chuanjiao Industry and Trade Co., Ltd. et al., A Dispute over a Sale and Purchase Contract*, *supra* note 2, at 85.

Appendix 1: 171 Subsequent Judgments/Rulings of Guiding Case No. 15 (identified through March 31, 2020)

No.	Date of Adjudication	Subsequent Judgment/Ruling No.	Adjudicating Court
1	2014/9/12	(2014) Lu Shang Zhong Zi No. 214	High People's Court of Shandong Province
2	2015/2/9	(2014) Shi Shang Chu Zi No. 112	Shiguai District People's Court of Baotou Municipality, Inner Mongolia Autonomous Region
3	2015/3/25	(2014) Shi Shang Chu Zi No. 113	Shiguai District People's Court of Baotou Municipality, Inner Mongolia Autonomous Region
4	2015/9/23	(2015) Yu Yi Zhong Fa Min Chu Zi No. 00178	No. 1 Intermediate People's Court of Chongqing Municipality
5	2015/11/21	(2014) Min Ti Zi No. 111	Supreme People's Court
6	2015/12/31	(2015) Zi Shang Chu Zi No. 157	Intermediate People's Court of Zibo Municipality, Shandong Province
7	2016/2/29	(2014) Lu Min Si Chu Zi No. 8	High People's Court of Shandong Province
8	2016/5/16	(2016) Xiang 0691 Min Chu No. 5	Quyuan Administrative District People's Court of Yueyang Municipality, Hunan Province
9	2016/5/18	(2016) Yue 03 Min Zhong No. 6701	Intermediate People's Court of Shenzhen Municipality, Guangdong Province
10	2016/6/28	(2015) E Xiang Yang Zhong Min San Chu Zi No. 00111	Intermediate People's Court of Xiangyang Municipality, Hubei Province
11	2016/7/28	(2015) Su Min Zhong Zi No. 00401	High People's Court of Jiangsu Province
12	2016/8/8	(2016) Qiong 96 Min Zhong No. 704	No. 1 Intermediate People's Court of Hainan Province
13	2016/8/8	(2016) Zhe 72 Min Chu No. 772	Ningbo Maritime Court, Zhejiang Province
14	2016/8/15	(2016) Qiong 96 Min Zhong No. 705	No. 1 Intermediate People's Court of Hainan Province
15	2016/9/12	(2015) Wei Min Chu Zi No. 856	Weiyuan County People's Court of Neijiang Municipality, Sichuan Province
16	2016/9/21	(2016) Yue 06 Min Zhong No. 4264	Intermediate People's Court of Foshan Municipality, Guangdong Province
17	2016/9/30	(2016) Zhe 0521 Min Chu No. 2755	Deqing County People's Court of Huzhou Municipality, Zhejiang Province
18	2016/12/20	(2016) Yue 0606 Min Chu No. 11277	Shunde District People's Court of Foshan Municipality, Guangdong Province
19	2016/12/23	(2016) Zui Gao Fa Min Shen No. 3168	Supreme People's Court
20	2017/1/6	(2016) Jin 0116 Min Chu No. 2829	Binhai New District People's Court of Tianjin Municipality
21	2017/1/25	(2016) Su 0402 Min Chu No. 1378	Tianning District People's Court of Changzhou Municipality, Jiangsu Province
22	2017/2/2	(2015) Xing Min Chu Zi No. 1866	Xingqing District People's Court of Yinchuan Municipality, Ningxia Hui Autonomous Region
23	2017/2/9	(2016) Lu 0306 Min Chu No. 2017	Zhoucun District People's Court of Zibo Municipality, Shandong Province
24	2017/3/5	(2016) Chuan 0107 Min Chu No. 6598	Wuhou District People's Court of Chengdu Municipality, Sichuan Province
25	2017/3/13	(2017) Yu 01 Zhi Yi No. 129	Intermediate People's Court of Zhengzhou Municipality, Henan Province
26	2017/6/8	(2017) Yu 01 Min Zhong No. 2155	No. 1 Intermediate People's Court of Chongqing Municipality

No.	Date of Adjudication	Subsequent Judgment/Ruling No.	Adjudicating Court
27	2017/6/26	(2016) Lu 0921 Min Chu No. 3394	Ningyang County People's Court of Tai'an Municipality, Shandong Province
28	2017/6/26	(2016) Nei 0105 Min Chu No. 9200	Saihan District People's Court of Hohhot Municipality, Inner Mongolia Autonomous Region
29	2017/6/26	(2016) Nei 0105 Min Chu No. 9199	Saihan District People's Court of Hohhot Municipality, Inner Mongolia Autonomous Region
30	2017/6/26	(2016) Nei 0105 Min Chu No. 9154	Saihan District People's Court of Hohhot Municipality, Inner Mongolia Autonomous Region
31	2017/6/26	(2016) Nei 0105 Min Chu No. 9157	Saihan District People's Court of Hohhot Municipality, Inner Mongolia Autonomous Region
32	2017/6/26	(2016) Nei 0105 Min Chu No. 9158	Saihan District People's Court of Hohhot Municipality, Inner Mongolia Autonomous Region
33	2017/6/26	(2016) Nei 0105 Min Chu No. 9156	Saihan District People's Court of Hohhot Municipality, Inner Mongolia Autonomous Region
34	2017/6/26	(2016) Nei 0105 Min Chu No. 9125	Saihan District People's Court of Hohhot Municipality, Inner Mongolia Autonomous Region
35	2017/6/27	(2017) Qiong 01 Min Chu No. 341	Intermediate People's Court of Haikou Municipality, Hainan Province
36	2017/6/28	(2017) Nei 0781 Min Chu No. 774	Manzhouli City People's Court of Hulunbuir Municipality, Inner Mongolia Autonomous Region
37	2017/6/28	(2017) Nei 0781 Min Chu No. 762	Manzhouli City People's Court of Hulunbuir Municipality, Inner Mongolia Autonomous Region
38	2017/7/5	(2016) Gan 0829 Min Chu No. 1853	Anfu County People's Court of Ji'an Municipality, Jiangxi Province
39	2017/7/9	(2016) Yue 0391 Min Chu No. 753	Qianhai Cooperation Zone People's Court of Shenzhen Municipality, Guangdong Province
40	2017/7/27	(2017) Chuan 0411 Min Chu No. 816	Renhe District People's Court of Panzhihua Municipality, Sichuan Province
41	2017/8/3	(2016) Yue 0391 Min Chu No. 431	Qianhai Cooperation Zone People's Court of Shenzhen Municipality, Guangdong Province
42	2017/8/4	(2016) Yue 0391 Min Chu No. 432	Qianhai Cooperation Zone People's Court of Shenzhen Municipality, Guangdong Province
43	2017/8/30	(2017) Yue 0606 Min Chu No. 6937	Shunde District People's Court of Foshan Municipality, Guangdong Province
44	2017/9/12	(2017) Zhe 0206 Min Chu No. 2756	Beilun District People's Court of Ningbo Municipality, Zhejiang Province
45	2017/9/13	(2017) Zui Gao Fa Min Shen No. 2458	Supreme People's Court
46	2017/9/18	(2017) Gan 08 Min Chu No. 12	Intermediate People's Court of Pingliang Municipality, Gansu Province
47	2017/9/20	(2017) Zui Gao Fa Min Shen No. 1162	Supreme People's Court
48	2017/9/27	(2017) Lu 10 Min Zhong No. 1023	Intermediate People's Court of Weihai Municipality, Shandong Province
49	2017/10/18	(2017) Yue 06 Min Zhong No. 9837	Intermediate People's Court of Foshan Municipality, Guangdong Province
50	2017/10/23	(2017) Nei 01 Min Zai No. 34	Intermediate People's Court of Hohhot Municipality, Inner Mongolia Autonomous Region
51	2017/10/25	(2017) Zhe 0203 Min Chu No. 4061	Haishu District People's Court of Ningbo Municipality, Zhejiang Province
52	2017/10/30	(2017) Qian 0203 Min Chu No. 406	Liuzhi Special District People's Court of Liupanshui Municipality, Guizhou Province

No.	Date of Adjudication	Subsequent Judgment/Ruling No.	Adjudicating Court
53	2017/11/6	(2017) E 05 Min Zai No. 22	Intermediate People's Court of Yichang Municipality, Hubei Province
54	2017/11/14	(2017) Jin 09 Min Zhong No. 1261	Intermediate People's Court of Xinzhou Municipality, Shanxi Province
55	2017/11/14	(2017) Lu 11 Min Zhong No. 1556	Intermediate People's Court of Rizhao Municipality, Shandong Province
56	2017/11/16	(2017) Ji 07 Min Zhong No. 1636	Intermediate People's Court of Songyuan Municipality, Jilin Province
57	2017/11/29	(2017) Wan 1102 Min Chu No. 1579	Langya District People's Court of Chuzhou Municipality, Anhui Province
58	2017/11/29	(2017) Wan 1102 Min Chu No. 1577	Langya District People's Court of Chuzhou Municipality, Anhui Province
59	2017/11/29	(2017) Wan 1102 Min Chu No. 1582	Langya District People's Court of Chuzhou Municipality, Anhui Province
60	2017/11/29	(2017) Wan 1102 Min Chu No. 1956	Langya District People's Court of Chuzhou Municipality, Anhui Province
61	2017/11/29	(2017) Wan 1102 Min Chu No. 2944	Langya District People's Court of Chuzhou Municipality, Anhui Province
62	2017/11/29	(2017) Wan 1102 Min Chu No. 1822	Langya District People's Court of Chuzhou Municipality, Anhui Province
63	2017/11/29	(2017) Wan 1102 Min Chu No. 1576	Langya District People's Court of Chuzhou Municipality, Anhui Province
64	2017/11/29	(2017) Wan 1102 Min Chu No. 1888	Langya District People's Court of Chuzhou Municipality, Anhui Province
65	2017/11/29	(2017) Wan 1102 Min Chu No. 1583	Langya District People's Court of Chuzhou Municipality, Anhui Province
66	2017/11/29	(2017) Wan 1102 Min Chu No. 1585	Langya District People's Court of Chuzhou Municipality, Anhui Province
67	2017/11/29	(2017) Wan 1102 Min Chu No. 1587	Langya District People's Court of Chuzhou Municipality, Anhui Province
68	2017/11/29	(2017) Wan 1102 Min Chu No. 1580	Langya District People's Court of Chuzhou Municipality, Anhui Province
69	2017/12/7	(2017) Zui Gao Fa Min Zai No. 91	Supreme People's Court
70	2017/12/8	(2017) Lu 0125 Min Chu No. 908	Jiyang District People's Court of Jinan Municipality, Shandong Province
71	2017/12/8	(2017) Lu 0125 Min Chu No. 907	Jiyang District People's Court of Jinan Municipality, Shandong Province
72	2017/12/12	(2017) Min 09 Min Chu No. 167	Intermediate People's Court of Ningde Municipality, Fujian Province
73	2017/12/30	(2016) Yu 0711 Min Chu No. 1151	Muye District People's Court of Xinxiang Municipality, Henan Province
74	2018/2/5	(2016) Yue 0391 Min Chu No. 927	Qianhai Cooperation Zone People's Court of Shenzhen Municipality, Guangdong Province
75	2018/2/6	(2017) Hu 72 Min Chu No. 2388	Shanghai Maritime Court
76	2018/2/11	(2017) Gui 0124 Min Chu No. 1311	Mashan County People's Court of Nanning Municipality, Guangxi Zhuang Autonomous Region
77	2018/3/23	(2017) Ning 0104 Min Chu No. 13953	Xingqing District People's Court of Yinchuan Municipality, Ningxia Hui Autonomous Region
78	2018/4/3	(2018) Yue 03 Min Zhong No. 1592	Intermediate People's Court of Shenzhen Municipality, Guangdong Province

No.	Date of Adjudication	Subsequent Judgment/Ruling No.	Adjudicating Court
79	2018/4/20	(2018) E 0325 Min Chu No. 158	Fang County People's Court of Shiyan Municipality, Hubei Province
80	2018/4/20	(2018) Wan 1102 Min Chu No. 953	Langya District People's Court of Chuzhou Municipality, Anhui Province
81	2018/4/22	(2017) Yue 01 Min Zhong No. 9142	Intermediate People's Court of Guangzhou Municipality, Guangdong Province
82	2018/5/4	(2016) Yu 05 Min Chu No. 826	No. 5 Intermediate People's Court of Chongqing Municipality
83	2018/5/29	(2018) Zhe Min Zhong No. 180	High People's Court of Zhejiang Province
84	2018/6/5	(2018) E 05 Min Zhong No. 461	Intermediate People's Court of Yichang Municipality, Hubei Province
85	2018/6/8	(2018) Xiang 07 Min Zhong No. 82	Intermediate People's Court of Changde Municipality, Hunan Province
86	2018/6/11	(2017) Ji 2426 Min Chu No. 411	Antu County People's Court of Yanbian Korean Autonomous Prefecture, Jilin Province
87	2018/6/11	(2018) Wan 1102 Min Chu No. 1462	Langya District People's Court of Chuzhou Municipality, Anhui Province
88	2018/6/12	(2018) Yue 03 Min Zhong No. 7052	Intermediate People's Court of Shenzhen Municipality, Guangdong Province
89	2018/6/27	(2018) Chuan 0823 Min Chu No. 168	Jiange County People's Court of Guangyuan Municipality, Sichuan Province
90	2018/7/20	(2018) Gan 0302 Min Chu No. 188	Anyuan District People's Court of Pingxiang Municipality, Jiangxi Province
91	2018/7/20	(2017) Lu 1482 Min Chu No. 1004	Yucheng City People's Court of Dezhou Municipality, Shandong Province
92	2018/7/23	(2018) Min 05 Min Zhong No. 3113	Intermediate People's Court of Quanzhou Municipality, Fujian Province
93	2018/7/30	(2018) Yue 0309 Min Chu No. 1635	Longhua District People's Court of Shenzhen Municipality, Guangdong Province
94	2018/8/8	(2018) Ji 0422 Min Chu No. 331	Dongliao County People's Court of Liaoyuan Municipality, Jilin Province
95	2018/8/10	(2018) Ji 0682 Min Chu No. 542	Dingzhou City People's Court of Baoding Municipality, Hebei Province
96	2018/8/29	(2017) Ji 2426 Min Chu No. 412	Antu County People's Court of Yanbian Korean Autonomous Prefecture, Jilin Province
97	2018/9/7	(2018) Yue 03 Min Zhong No. 3315	Intermediate People's Court of Shenzhen Municipality, Guangdong Province
98	2018/9/14	(2018) Yu 0702 Min Chu No. 1763	Hongqi District People's Court of Xinxiang Municipality, Henan Province
99	2018/9/19	(2018) Chuan 1525 Min Chu No. 201	Gao County People's Court of Yibin Municipality, Sichuan Province
100	2018/9/27	(2018) Jing 0155 Min Chu No. 17622	Daxing District People's Court of Beijing Municipality
101	2018/9/28	(2018) Jin Min Zhong No. 575	High People's Court of Shanxi Province
102	2018/10/9	(2017) Lu 0784 Min Chu No. 4127	Anqiu City People's Court of Weifang Municipality, Shandong Province
103	2018/10/16	(2018) Ji 1102 Min Chu No. 1645	Taocheng District People's Court of Hengshui Municipality, Hebei Province
104	2018/10/23	(2018) Hu 72 Min Chu No. 1182	Shanghai Maritime Court

No.	Date of Adjudication	Subsequent Judgment/Ruling No.	Adjudicating Court
105	2018/10/26	(2018) Lu 1482 Min Chu No. 1468	Yucheng City People's Court of Dezhou Municipality, Shandong Province
106	2018/11/5	(2018) Yue 03 Min Chu No. 581	Intermediate People's Court of Shenzhen Municipality, Guangdong Province
107	2018/11/7	(2018) Qian 2328 Min Chu No. 1252	Anlong County People's Court of Qianxinan Buyi and Miao Autonomous Prefecture, Guizhou Province
108	2018/11/7	(2018) Qian 2328 Min Chu No. 1253	Anlong County People's Court of Qianxinan Buyi and Miao Autonomous Prefecture, Guizhou Province
109	2018/11/7	(2018) Qian 2328 Min Chu No. 1259	Anlong County People's Court of Qianxinan Buyi and Miao Autonomous Prefecture, Guizhou Province
110	2018/11/7	(2018) Su 12 Min Zhong No. 1971	Intermediate People's Court of Taizhou Municipality, Jiangsu Province
111	2018/11/7	(2018) Qian 2328 Min Chu No. 1251	Anlong County People's Court of Qianxinan Buyi and Miao Autonomous Prefecture, Guizhou Province
112	2018/11/7	(2018) Qian 2328 Min Chu No. 1260	Anlong County People's Court of Qianxinan Buyi and Miao Autonomous Prefecture, Guizhou Province
113	2018/11/7	(2018) Qian 2328 Min Chu No. 1261	Anlong County People's Court of Qianxinan Buyi and Miao Autonomous Prefecture, Guizhou Province
114	2018/11/7	(2018) Qian 2328 Min Chu No. 1249	Anlong County People's Court of Qianxinan Buyi and Miao Autonomous Prefecture, Guizhou Province
115	2018/11/8	(2018) Lu 11 Min Zhong No. 1913	Intermediate People's Court of Rizhao Municipality, Shandong Province
116	2018/11/8	(2018) Su 01 Min Zhong No. 6172	Intermediate People's Court of Nanjing Municipality, Jiangsu Province
117	2018/11/9	(2018) Hu 0105 Min Chu No. 12795	Changning District People's Court of Shanghai Municipality
118	2018/11/12	(2018) Lu 02 Min Zhong No. 6462	Intermediate People's Court of Qingdao Municipality, Shandong Province
119	2018/11/13	(2018) Min 0203 Min Chu No. 11797	Siming District People's Court of Xiamen Municipality, Fujian Province
120	2018/11/13	(2018) Min 0203 Min Chu No. 11809	Siming District People's Court of Xiamen Municipality, Fujian Province
121	2018/11/13	(2018) Min 0203 Min Chu No. 11794	Siming District People's Court of Xiamen Municipality, Fujian Province
122	2018/11/13	(2018) Min 0203 Min Chu No. 11804	Siming District People's Court of Xiamen Municipality, Fujian Province
123	2018/11/13	(2018) Min 0203 Min Chu No. 11802	Siming District People's Court of Xiamen Municipality, Fujian Province
124	2018/11/15	(2017) Gan 08 Min Chu No. 26	Intermediate People's Court of Pingliang Municipality, Gansu Province
125	2018/11/15	(2018) Zui Gao Fa Min Shen No. 4702	Supreme People's Court
126	2018/11/16	(2018) Min 0203 Min Chu No. 11795	Siming District People's Court of Xiamen Municipality, Fujian Province
127	2018/11/16	(2018) Min 0203 Min Chu No. 11793	Siming District People's Court of Xiamen Municipality, Fujian Province
128	2018/11/16	(2018) Min 0203 Min Chu No. 11798	Siming District People's Court of Xiamen Municipality, Fujian Province
129	2018/11/19	(2018) Zui Gao Fa Min Shen No. 4021	Supreme People's Court
130	2018/11/23	(2018) Yue 03 Min Zhong No. 729	Intermediate People's Court of Shenzhen Municipality, Guangdong Province

No.	Date of Adjudication	Subsequent Judgment/Ruling No.	Adjudicating Court
131	2018/11/27	(2018) Min 0203 Min Chu No. 11805	Siming District People's Court of Xiamen Municipality, Fujian Province
132	2018/11/27	(2018) Min 0203 Min Chu No. 11799	Siming District People's Court of Xiamen Municipality, Fujian Province
133	2018/11/27	(2018) Min 0203 Min Chu No. 11811	Siming District People's Court of Xiamen Municipality, Fujian Province
134	2018/11/27	(2018) Chuan 15 Min Zhong No. 1733	Intermediate People's Court of Yibin Municipality, Sichuan Province
135	2018/12/17	(2018) Yue Po Zhong No. 39	High People's Court of Guangdong Province
136	2018/12/17	(2018) Yue Po Zhong No. 38	High People's Court of Guangdong Province
137	2018/12/17	(2018) Yue Po Zhong No. 37	High People's Court of Guangdong Province
138	2018/12/20	(2018) Jin Min Zhong No. 687	High People's Court of Shanxi Province
139	2019/1/10	(2018) Lu 1602 Min Chu No. 4079	Bincheng District People's Court of Binzhou Municipality, Shandong Province
140	2019/1/14	(2018) Liao 0214 Min Chu No. 4083	Pulandian District People's Court of Dalian Municipality, Liaoning Province
141	2019/3/14	(2018) Chuan 0421 Min Chu No. 1233	Miyi County People's Court of Panzhihua Municipality, Sichuan Province
142	2019/4/4	(2019) Yu 03 Po Zhong No. 1	No. 3 Intermediate People's Court of Chongqing Municipality
143	2019/4/10	(2019) Hei 03 Min Zhong No. 157	Intermediate People's Court of Jixi Municipality, Heilongjiang Province
144	2019/4/15	(2018) Zhe 0481 Min Chu No. 8446	Haining City People's Court of Jiaxing Municipality, Zhejiang Province
145	2019/4/22	(2019) 0214 Min Chu No. 204	Pulandian District People's Court of Dalian Municipality, Liaoning Province
146	2019/4/24	(2018) Qian 0115 Min Chu No. 5527	Guanshanhu District People's Court of Guiyang Municipality, Guizhou Province
147	2019/4/29	(2019) Lu 01 Min Zhong No. 629	Intermediate People's Court of Jinan Municipality, Shandong Province
148	2019/5/6	(2017) Gan 01 Min Chu No. 456	Intermediate People's Court of Nanchang Municipality, Jiangxi Province
149	2019/5/8	(2019) Nei 0781 Min Chu No. 242	Manzhouli City People's Court of Hulunbuir Municipality, Inner Mongolia Autonomous Region
150	2019/5/8	(2019) Zhe 0303 Min Chu No. 1690	Longwan District People's Court of Wenzhou Municipality, Zhejiang Province
151	2019/5/31	(2018) Hu 0116 Min Chu No. 728	Jinshan District People's Court of Shanghai Municipality
152	2019/6/10	(2019) Jin Min Zai No. 21	High People's Court of Shanxi Province
153	2019/6/14	(2019) Yue 03 Min Zhong No. 8167-8176	Intermediate People's Court of Shenzhen Municipality, Guangdong Province
154	2019/6/21	(2018) Xiang 08 Min Chu No. 52	Intermediate People's Court of Zhangjiajie Municipality, Hunan Province
155	2019/6/24	(2019) Wan 0208 Min Chu No. 1478	Sanshan District People's Court of Wuhu Municipality, Anhui Province
156	2019/6/28	(2018) Chuan Min Zai No. 484	High People's Court of Sichuan Province

No.	Date of Adjudication	Subsequent Judgment/Ruling No.	Adjudicating Court
157	2019/7/3	(2019) Liao 01 Min Zhong No. 5768	Intermediate People's Court of Shenyang Municipality, Liaoning Province
158	2019/7/3	(2019) Nei 03 Min Chu No. 31	Intermediate People's Court of Wuhai Municipality, Inner Mongolia Autonomous Region
159	2019/7/10	(2017) Yue 73 Min Chu No. 4659	Guangzhou Intellectual Property Court, Guangdong Province
160	2019/8/1	(2018) Yue 0783 Min Chu No. 4497	Kaiping City People's Court of Jiangmen Municipality, Guangdong Province
161	2019/8/12	(2019) Zhe 04 Min Zhong No. 1394	Intermediate People's Court of Jiaxing Municipality, Zhejiang Province
162	2019/8/15	(2019) Gan 0503 Min Chu No. 428	Maiji District People's Court, Tianshui Municipality, Gansu Province
163	2019/8/15	(2019) Gan 0503 Min Chu No. 619	Maiji District People's Court, Tianshui Municipality, Gansu Province
164	2019/9/5	(2019) Min 0481 Min Chu No. 2351	Yong'an City People's Court of Sanming Municipality, Fujian Province
165	2019/9/11	(2019) Zhe Min Shen No. 2091	High People's Court of Zhejiang Province
166	2019/9/18	(2018) Yue 03 Min Chu No. 873	Intermediate People's Court of Shenzhen Municipality, Guangdong Province
167	2019/9/18	(2018) Yue 03 Min Chu No. 871	Intermediate People's Court of Shenzhen Municipality, Guangdong Province
168	2019/9/28	(2018) Zhe 1021 Min Chu No. 6196	Yuhuan County People's Court of Taizhou Municipality, Zhejiang Province
169	2019/9/29	(2019) Shan 07 Min Chu No. 15	Intermediate People's Court of Hanzhong Municipality, Shaanxi Province
170	2019/10/30	(2019) Chuan Min Zai No. 551	High People's Court of Sichuan Province
171	2019/11/18	(2019) Lu 0921 Min Chu No. 647	Ningyang County People's Court of Tai'an Municipality, Shandong Province

Appendix 2: 20 Subsequent Judgments/Rulings of Guiding Case No. 15 Selected for In-Depth Analysis (identified through March 31, 2020)

No.	Date of Adjudication	Subsequent Judgment/Ruling No.	Adjudicating Court	Link
1	2014/9/12	(2014) Lu Shang Zhong Zi No. 214	High People's Court of Shandong Province	https://cgc.law.stanford.edu/judgments/shandong-2014-lu-shang-zhong-zi-214-civil-judgment
2	2015/11/21	(2014) Min Ti Zi No. 111	Supreme People's Court	https://cgc.law.stanford.edu/judgments/spc-2014-min-ti-zi-111-civil-judgment
3	2016/12/23	(2016) Zui Gao Fa Min Shen No. 3168	Supreme People's Court	https://cgc.law.stanford.edu/judgments/spc-2016-zui-gao-fa-min-shen-3168-civil-ruling
4	2017/6/8	(2017) Yu 01 Min Zhong No. 2155	No. 1 Intermediate People's Court of Chongqing Municipality	https://cgc.law.stanford.edu/judgments/chongqing-2017-yu-01-min-zhong-2155-civil-judgment
5	2017/7/9	(2016) Yue 0391 Min Chu No. 753	Qianhai Cooperation Zone People's Court of Shenzhen Municipality, Guangdong Province	https://cgc.law.stanford.edu/judgments/guangdong-2016-yue-0391-min-chu-753-civil-judgment
6	2017/8/3	(2016) Yue 0391 Min Chu No. 431	Qianhai Cooperation Zone People's Court of Shenzhen Municipality, Guangdong Province	https://cgc.law.stanford.edu/judgments/guangdong-2016-yue-0391-min-chu-431-civil-judgment
7	2017/9/13	(2017) Zui Gao Fa Min Shen No. 2458	Supreme People's Court	https://cgc.law.stanford.edu/judgments/spc-2017-zui-gao-fa-min-shen-2458-civil-ruling
8	2017/9/20	(2017) Zui Gao Fa Min Shen No. 1162	Supreme People's Court	https://cgc.law.stanford.edu/judgments/spc-2017-zui-gao-fa-min-shen-1162-civil-ruling
9	2017/9/27	(2017) Lu 10 Min Zhong No. 1023	Intermediate People's Court of Weihai Municipality, Shandong Province	https://cgc.law.stanford.edu/judgments/shandong-2017-lu-10-min-zhong-1023-civil-judgment
10	2017/11/14	(2017) Lu 11 Min Zhong No. 1556	Intermediate People's Court of Rizhao Municipality, Shandong Province	https://cgc.law.stanford.edu/judgments/shandong-2017-lu-11-min-zhong-1556-civil-judgment
11	2017/11/16	(2017) Ji 07 Min Zhong No. 1636	Intermediate People's Court of Songyuan Municipality, Jilin Province	https://cgc.law.stanford.edu/judgments/jilin-2017-ji-07-min-zhong-1636-civil-judgment
12	2017/12/7	(2017) Zui Gao Fa Min Zai No. 91	Supreme People's Court	https://cgc.law.stanford.edu/judgments/spc-2017-zui-gao-fa-min-zai-91-civil-judgment
13	2018/6/5	(2018) E 05 Min Zhong No. 461	Intermediate People's Court of Yichang Municipality, Hubei Province	https://cgc.law.stanford.edu/judgments/hubei-2018-e-05-min-zhong-461-civil-judgment
14	2018/11/5	(2018) Yue 03 Min Chu No. 581	Intermediate People's Court of Shenzhen Municipality, Guangdong Province	https://cgc.law.stanford.edu/judgments/guangdong-2018-yue-03-min-chu-581-civil-judgment
15	2018/11/15	(2018) Zui Gao Fa Min Shen No. 4702	Supreme People's Court	https://cgc.law.stanford.edu/judgments/spc-2018-zui-gao-fa-min-shen-4702-civil-ruling

No.	Date of Adjudication	Subsequent Judgment/Ruling No.	Adjudicating Court	Link
16	2018/11/19	(2018) Zui Gao Fa Min Shen No. 4021	Supreme People's Court	https://cgc.law.stanford.edu/judgments/spc-2018-zui-gao-fa-min-shen-4021-civil-ruling
17	2018/11/27	(2018) Chuan 15 Min Zhong No. 1733	Intermediate People's Court of Yibin Municipality, Sichuan Province	https://cgc.law.stanford.edu/judgments/sichuan-2018-chuan-15-min-zhong-1733-civil-judgment
18	2019/5/31	(2018) Hu 0116 Min Chu No. 728	Jinshan District People's Court of Shanghai Municipality	https://cgc.law.stanford.edu/judgments/shanghai-2018-hu-0116-min-chu-728-civil-judgment
19	2019/6/21	(2018) Xiang 08 Min Chu No. 52	Intermediate People's Court of Zhangjiajie Municipality, Hunan Province	https://cgc.law.stanford.edu/judgments/hunan-2018-xiang-08-min-chu-52-civil-judgment
20	2019/6/28	(2018) Chuan Min Zai No. 484	High People's Court of Sichuan Province	https://cgc.law.stanford.edu/judgments/sichuan-2018-chuan-min-zai-484-civil-judgment

深入分析一起被使用于数百个后续裁判的指导性案例：指导案例15号对关联公司人格混同的突破性认定是成功的吗？*

赵炜、谭子文

摘要

在英美法律体系中，通过案例而发展出来的“刺破公司面纱”原则能够灵活运用于多种不同的案情。在中国，类似的制度是公司法人人格否认制度，由《中华人民共和国公司法》（“《公司法》”）第二十条规定。由于成文法有其局限性，《公司法》无法一一列举适用该否认制度的各种情形。为使《公司法》第二十条的适用能在稳定性与灵活性之间取得平衡，中国最高人民法院（“最高法”）发布了指导案例15号，讨论了关联公司人格混同的情形并总结相关法律原则为该案例“裁判要点”的两段内容。这进一步完善了中国的公司法人人格否认制度，并为处理后续案件的法官提供了更清晰的标准和方法，以决定何时否认公司法人的人格。

本文作者以精选的后续裁判为基础，深入探讨了最高法与其他法院对指导案例15号的处理。这些法院丰富了该案例裁判要点的内容，使之更容易操作，但同时其对指导案例15号的处理也引发了对某些问题的关注和思考。但无论如何，这些后续裁判都使得判定“关联公司人格混同”的标准和相关法律责任更加具体和明确，亦表明了中国指导性案例制度正越趋成熟。

引言

《中华人民共和国公司法》（“《公司法》”）第二十条[1]是中国公司法人人格否认制度的一个重要法律规定（见**侧边栏1**）。该条第三款明确规定：

> 公司股东滥用公司法人独立地位和股东有限责任，逃避债务，严重损害公司债权人利益的，应当对公司债务承担连带责任。

从文意上看，第三款似乎与关联公司之间的人格混同无关。但是，通过2013年1月31日发布的指导案例15号《徐工集团工程机械股份有限公司诉成都川交工贸有限责任公司等买卖合同纠纷案》，[2]中国最高人民法院（“最高法”）明确将第三款也适用于关联公司之间人格混同的情形。通过指导案例15号的“裁判要点”部分，最高法指出：

1. 关联公司的人员、业务、财务等方面交叉或混同，导致各自财产无法区分，丧失独立人格的，构成人格混同。

2. 关联公司人格混同，严重损害债权人利益的，关联公司相互之间对外部债务承担连带责任。

换言之，根据“裁判要点”第一段（“第一个裁判要点”）的标准而被认定为人格混同的关联公司，如果其“严重损害债权人利益”，它们“之间对外部债务承担连带责任”（见**“裁判要点”第二段**（“第二个裁判要点”））。

指导案例15号值得注意的原因有三个：它突破了《公司法》第二十条第三款的传统适用范围、扩充了中国公司法人人格否认制度的适用情形并为处理后续类似案件的法院在解决充满争议的关联公司债务负担问题时提供了新的裁判参考。

侧边栏1：

《中华人民共和国公司法》

第二十条

公司股东应当遵守法律、行政法规和公司章程，依法行使股东权利，不得滥用股东权利损害公司或者其他股东的利益；不得滥用公司法人独立地位和股东有限责任损害公司债权人的利益。

公司股东滥用股东权利给公司或者其他股东造成损失的，应当依法承担赔偿责任。

公司股东滥用公司法人独立地位和股东有限责任，逃避债务，严重损害公司债权人利益的，应当对公司债务承担连带责任。

赵炜
中国指导性案例项目副执行编辑

赵炜是中国昆明的一位民商事律师，目前就职于云南八谦律师事务所，专于为知名资产管理公司、大型国有企业和银行等提供法律服务。他曾担任昆明市五华区人民法院民一庭副庭长的实习助理，并曾在云南司法警官职业学院教授民事实体与程序法。他毕业于云南大学，获经济法硕士学位。他对法律社会学以及中国指导性案例的发展及其在国外的影响很感兴趣。

事实上，指导案例15号的重要性已体现在司法实践中。截至2020年3月31日，明确提及指导案例15号的后续裁判已达数百个之多；其中，有171个后续裁判由最高法作出或是由其他法院作出而这些法院在裁判说理部分提及了指导案例15号。在这些案件中，有关关联公司的事实千差万别，且法院对于如何认定关联公司人格混同及其法律责任的承担仍面临不少问题。本文作者在概述这171个后续裁判的地理分布和其他分布所显示的特征后，会通过分析其中20个精选后续裁判是如何解读指导案例15号，来尝试厘清关联公司“构成人格混同”、是否需要“对外部债务承担连带责任”的具体标准。通过这深入的分析，笔者希望律师和法院将来在处理类似案件时，更能掌握相关的标准，进一步推动指导案例15号在司法实践中的使用。

“[...]根据[第一个裁判要点]的标准而被认定为人格混同的关联公司，如果其‘严重损害债权人利益’，它们‘之间对外部债务承担连带责任’[（见第二个裁判要点）]。”

指导案例15号的由来

指导案例15号基本上是最高法对江苏省高级人民法院于2011年10月19日作出的（2011）苏商终字第0107号民事判决[3]的总结并加上上文讨论的指导性的裁判要点。

该案涉及成都川交工贸有限责任公司（“川交工贸公司”）拖欠徐工集团工程机械股份有限公司（“徐工机械公司”）超过1千余万元的货款及逾期付款利息。川交工贸公司已无清偿能力（但未被注销）。徐工机械公司认为成都川交工程机械有限责任公司（“川交机械公司”）、四川瑞路建设工程有限公司（“瑞路公司”）与川交工贸公司人格混同，故两所公司及股东等人均应对上述债务承担连带清偿责任。

法院认定川交工贸公司、川交机械公司、瑞路公司在公司人员、业务、财务等三方面存在混同。指导案例15号“裁判理由”部分总结如下：

“人员混同”	“三个公司的经理、财务负责人、出纳会计、工商手续经办人均相同，其他管理人员亦存在交叉任职的情形，川交工贸公司的人事任免存在由川交机械公司决定的情形。”
“业务混同”	“三个公司实际经营中均涉及工程机械相关业务，经销过程中存在共用销售手册、经销协议的情形；对外进行宣传时信息混同。”
“财务混同”	“三个公司使用共同账户，以[三个公司实际控制人]王永礼的签字作为具体用款依据，对其中的资金及支配无法证明已作区分；三个公司与徐工机械公司之间的债权债务、业绩、账务及返利均计算在川交工贸公司名下。”

谭子文
中国指导性案例项目编辑
中国政法大学硕士生

谭子文目前在中国政法大学攻读硕士学位。他曾经在元达律师事务所实习，并协助该律师事务所在监管合规、数据保护领域，为中美金融机构、通信公司、互联网公司提供法律服务。谭子文在中国政法大学获得法学学士学位，并曾前往新加坡管理大学学习一学期。

因此，三个公司之间表征人格的因素（人员、业务、财务等）高度混同，导致各自财产无法区分，已丧失独立人格，构成人格混同。基于此以及“川交工贸公司承担所有关联公司的债务却无力清偿，又使其他关联公司逃避巨额债务，严重损害了债权人的利益”的事实，江苏省高级人民法院在二审中驳回了川交机械公司和瑞路公司提起的上诉，并认定他们对川交工贸公司的债务承担连带清偿责任。

该案是对《公司法》第二十条适用的新突破，同时重申了否认公司法人独立人格的其他法律依据（即《中华人民共和国民法通则》第四条[4]和“《公司法》”第三条[5]；见**侧边栏2**）。鉴于其重要性，此案于2013年1月31日被最高法以指导案例15号的形式予以发布。指导案例15号的重要性就如最高法案例指导工作办公室所言明的那样：

> 该案例涉及关联公司人格混同的认定及法律责任承担问题，有利于进一步完善我国公司法人人格否认制度，有利于防止关联公司滥用公司法人独立地位和股东有限责任，恶意逃避债务，损害公司债权人利益，有利于规范关联公司的经营行为，促进企业依法生产经营和健康发展。[6]

171个精选后续裁判的总体特征

1. 后续裁判的精选方法

截至2020年3月31日，笔者在“中国裁判文书网”（http://wenshu.court.gov.cn）官方网站上找到数百个明确提及指导案例15号的后续裁判。由于数量多，笔者依照以下两个标准精选出其中171个后续裁判：

（1）最高法裁判文书的任何部分提及指导案例15号的案件；

（2）其他法院作出的裁判文书，而其在“本院认为”说理部分提及指导案例15号的案件。

附录1列出了这171个后续裁判。它们均为民事案件。以下各节，笔者将以这些后续裁判的裁判年份、法院级别、裁判程序阶段及裁判地域的分布来分析其总体特征。

2. 裁判年份分布

表1反映了171个精选后续裁判的裁判年份分布。虽然2019年的案件数量比2018年有所回落，但从2014到2018年，后续裁判数量一直上升。另外，2020年并没有符合后续裁判设定标准的案件出现。这很可能是由于检索截止时间为2020年3月31日，而从2020年1月到3月，法院审判工作受中国农历新年长假及新冠病毒疫情的双重影响。

后续裁判数量总体增加的原因固然很多。其中一个原因可能是反映了中国自2015年5月实施案件受理制度改革后，案件数量大大增加。该改革是为了确保“人民法院依法应该受理的案件，做到有案必立、有诉必理，保障当事人诉权”。[7]根据统计，2015年5月至2017年3月，全国法院的登记立案数量同比上升33.92%。[8]

裁判年份	后续裁判数量
2014	1
2015	5
2016	13
2017	54
2018	65
2019	33
总数	**171**

表1：171个精选后续裁判（按裁判年份分布）

3. 法院级别分布

表2呈现了171个精选后续裁判的法院级别分布。基层法院处理的后续裁判数量远超中级、高级、最高和专门法院各自处理的数量之和。其中，中级法院处理的数量约是基层法院处理的数量的一半。

侧边栏2：

《中华人民共和国民法通则》

第四条

民事活动应当遵循自愿、公平、等价有偿、诚实信用的原则。

《中华人民共和国公司法》

第三条

公司是企业法人，有独立的法人财产，享有法人财产权。公司以其全部财产对公司的债务承担责任。

有限责任公司的股东以其认缴的出资额为限对公司承担责任；股份有限公司的股东以其认购的股份为限对公司承担责任。

上述情况符合中国法院审判级别分布的特点。基层法院作为大部分案件的一审法院，其所审理的数量一般是最多的。由于基层法院受理案件的条件和范围最为广泛，这分布也表明了涉及关联公司人格混同案件的普遍性。同时，该类诉讼常牵涉较多主体且伴随债务人无法清偿债务的情形，具有争议多、关系复杂、判断难、影响面大等特征，许多当事人面对一审裁判结果不服时，往往选择上诉或申请再审。因此，中级法院作为基层法院的上一级法院，自然也会作出大量有关裁判。

除此之外，有4个后续裁判是由知识产权、海事专门法院作出的。这显示出关联公司人格混同纠纷有时会与知识产权、海事纠纷相交叉。

法院级别	后续裁判数量
基层	100
中级	47
高级	13
最高	7
专门	4
总数	**171**

表2：171个精选后续裁判（按法院级别分布）

4. 裁判程序阶段分布

表3列明了171个精选后续裁判的裁判程序阶段分布。一审的裁判数量最多，二审、再审的裁判数量与之相比，差距很大。笔者认为，这些现象亦能从前述法院级别分布情况及其原因中得到对应解释。比如，后续裁判发生在基层法院的数量远多于其他法院，即决定了大量的一审裁判。

裁判程序阶段	后续裁判数量
一审	121
二审	37
再审	13
总数	**171**

表3：171个精选后续裁判（按裁判程序阶段分布）

5. 裁判地域分布

表4呈现了171个精选后续裁判的裁判地域分布。整体而言，关联公司人格混同的案件遍布全国各地。其中，广东省各级法院裁判的案件数量最多，有24件。笔者相信，这与广东省作为中国经济最发达的地区之一，公司企业众多，经济活动活跃有一定关联性。除此之外，与广东省同属东部沿海地区的山东、福建、浙江等省份的后续裁判数量也较多，分别为17、14、10件。

但是，值得注意的是，属于经济相对不发达的内陆地区的安徽、内蒙古等地后续裁判数量，也并不少，分别为15、14件。这显示出经济因素也并不能完全决定此类案件的裁判地域分布。这也说明，无论是在沿海地区，还是在内陆地区，关联公司人格混同都是当事人关注并寻求司法救济的问题。

裁判地域（省/省级市）	后续裁判数量
广东	24
山东	17
安徽	15
内蒙古	14
福建	14
浙江	10
贵州	9
四川	9
最高法	7
重庆	4
甘肃	4
湖北	4
江苏	4
吉林	4
上海	4
山西	4
海南	3
河南	3
湖南	3
江西	3
辽宁	3
河北	2
宁夏	2
北京	1
广西	1
黑龙江	1
陕西	1
天津	1
总数	**171**

表4：171个精选后续裁判（按裁判地域分布）

20个精选后续裁判对指导案例15号的处理

在171个精选的指导案例15号后续裁判中，共有7个来自最高法，以及13个来自其他法院而这些法院都对指导案例15号作出深入的分析（见**附录2**）。

针对7个来自最高法的后续裁判，笔者根据提及指导案例15号的主体，将其分为三类：

谁提及指导案例15号？	后续裁判号	附录2
（1）当事人（或其律师）	（2014）民提字第111号	序号2
（2）审判法院（在题为“本院认为”的说理部分）	（2016）最高法民申3168号 （2017）最高法民再91号 （2018）最高法民申4702号 （2018）最高法民申4021号	序号3 序号12 序号15 序号16
（3）以上主体都提及指导案例15号	（2017）最高法民申2458号 （2017）最高法民申1162号	序号7 序号8

在第一类后续裁判中，当事人（或其律师）提及指导案例15号，但最高法并未回应。依照《〈最高人民法院关于案例指导工作的规定〉实施细则》第十一条第二款的规定：[9]

> 公诉机关、案件当事人及其辩护人、诉讼代理人引述指导性案例作为控（诉）辩理由的，案件承办人员**应当**在裁判理由中**回应**是否参照了该指导性案例并说明理由。（强调后加）

显然，不论最高法出于何种考虑而没有作出回应，这一做法都值得商榷。

在余下6个来自最高法的后续裁判，以及上述13个来自其他法院的后续裁判，最高法和这些法院均对以下指导案例15号的裁判要点进行细化分析。

1. 关联公司的人员、业务、财务等方面交叉或混同，导致各自财产无法区分，丧失独立人格的，构成人格混同。

2. 关联公司人格混同，严重损害债权人利益的，关联公司相互之间对外部债务承担连带责任。

通过第一个裁判要点，最高法提供了如何认定关联公司“构成人格混同”的两个要件：（1）“关联公司的人员、业务、财务等方面交叉或混同”和（2）“[交叉或混同]导致各自财产无法区分，丧失独立人格”。通过第二个裁判要点，最高法指出被认定为“人格混同”的关联公司，在“严重损害债权人利益”的情况下，需要“相互之间对外部债务承担连带责任”。

下文将深入讨论6个来自最高法的后续裁判和13个来自其他法院的后续裁判如何分析、参照这两个裁判要点。

1. 认定关联公司“构成人格混同”的要件1：“关联公司的人员、业务、财务等方面交叉或混同”

（1）“人员、业务、财务”混同：这三方面不需共存、混同也不限于这三方面

在（2018）最高法民申4702号（见**附录2：序号15**）中，最高法指出该案的关联公司的人员、财务和财产均有混同，进而认定关联公司人格混同。最高法没有讨论“业务”方面是否混同。

因为该案是由最高法审理的，所以根据《最高人民法院关于统一法律适用加强类案检索的指导意见（试行）》，中国法院将来在处理类案时可以把该案“作为作出裁判的参考”。[10] 在该案中，最高法没有讨论业务混同，这意味着日后法院在认定关联公司是否“构成人格混同”时，“人员、业务、财务”三方面的交叉或混同并不需共存。

此外，在指导案例15号第一个裁判要点中，最高法使用了“等”字来表明交叉或混同不局限于“人员、业务、财务”这三方面。在相关的文章中，最高法案例指导工作办公室有这样的说明：

> 由于人格混同的表现形式多样，混同的手段也不断翻新，一旦确定某一表现形式构成人格混同的表征，则某些公司必然尽力规避这些表征，同时依然保有实质混同，使债权人的取证和法院认定判断是否构成人格混同的难度大大增加。[11]

这种灵活的处理方法有其道理，也反映于三个后续裁判中。

在（2016）最高法民申3168号（见**附录2：序号3**）中，最高法在“人员、业务、财务”三个方面的混同外，还讨论了关联公司共用的“注册地址”。同样，在（2018）川15民终1733号（见**附录2：序号17**）中，法院指出：

> [...]三家企业的**工商登记住所地**一致、企业变更手续人员相同等，属于让交易相对

> 人误以为**三家企业为一家企业**的表面性证据，对认定关联企业之间的人格混同具有辅助作用。（强调后加）

而在（2018）鄂05民终461号（见**附录2：序号13**）中，法院在“人员、业务、财务”三个方面的混同外，还考虑了关联公司间公章的使用情况。[12] 法院认为：

> **公章是企业法人对外独立意思表达（公司意志）的核心表征**，是企业法人在民事活动中实质上享有意思表达自由的标志，如果企业法人在对外的民事交往活动中不能依自己意思独立使用公章，则意味着该企业法人实质上不享有**意思表达的自由**。（强调后加）

（2）人员混同

在分析“人员混同”时，指导案例15号的表述是：

> 三个公司的经理、财务负责人、出纳会计、工商手续经办人均相同，**其他管理人员**亦存在交叉任职的情形，川交工贸公司的人事任免存在由川交机械公司决定的情形。（强调后加）

可见，重点是“管理人员”的混同。这一点亦体现于司法实践中。在（2017）鲁10民终1023号（见**附录2：序号9**）中，两被告公司的法定代表人相同、控股股东相同，最终被认定存在成立人员的混同。此外，在（2017）吉07民终1636号（见**附录2：序号11**）中，法院更具体指出：

> [...]人员混同是指公司的股东、董事、经理等**公司高管或者控制公司的人与其他公司的同类人员混同**以至于控制公司的独立意志。[...被告]销售公司法定代表人为王建萍。但是王建萍同为[被告]科技公司的副董事长，销售公司总监刘志友以及其他人均在科技公司任高管，**混同是指存在相同或者交叉，不能限定为完全相同**。以上董事和高管的混同，**足以影响公司的决策和相应的经营，符合人员混同的概念**。（强调后加）

上述的法院强调相关的人员混同必须是“足以影响公司的决策和相应的经营”。类似的理解也见于以下两案。在（2017）渝01民终2155号（见**附录2：序号4**）中，法院指出：

> [作为被告的两个关联公司]虽有财务、库管等岗位个别工作人员存在交叉任职情形，[...]但两家公司股东一直互不相同，且并未存在高管人员普遍交叉任职的情形，两家公司在人事任免上**也未相互影响或由一方对另一方进行操纵控制**，[...]所举证据难以充分证明两家公司存在高度的人员混同[...]。（强调后加）

在（2016）粤0391民初431号（见**附录2：序号6**）中，法院也持类似的观点。在该案中的证据仅能证明两被告公司的一位监事相同，并未影响公司的决策，因此人员混同不能成立。

> *“表4呈现了171个精选后续裁判的裁判地域分布。整体而言，关联公司人格混同的案件遍布全国各地。其中，广东省各级法院裁判的案件数量最多，有24件。”*

最后，有法院忠告，同属一个集团的关联公司之间的人员交叉任职本身并不异常，不能一概而论，需要审慎判断。如在（2017）鲁11民终1556号（见**附录2：序号10**）中，法院认为：

> [被告]公司**高管中只有杨林川一人存在交叉任职**，其他高管并不存在交叉任职的情形；[被告]两公司网银操作员、管理员**存在部分交叉任职**，工商手续经办人相同，但这属于个别情况，且集团内部相互派遣工作人员，便于集团公司执行统一的管理制度，**只要不侵犯彼此的公司独立人格**，不属于人格混同[...]。（强调后加）

换言之，在以上的情形下，只有侵犯了彼此的公司独立人格，才属于人格混同。这与之前讨论的“足以影响公司的决策和相应的经营”的精神基本一致。所以，日后法院在认定“人员混同”时，是否会以“足以影响公司的决策和相应的经营”作为统一的标准，值得注意。

（3）业务混同

在分析“业务混同”时，指导案例15号的表述是：

> 三个公司实际经营中均涉及**工程机械相关业务**，经销过程中存在**共用销售手册、经销协议的情形；对外进行宣传时信息**混同。（强调后加）

通过此文分析的后续裁判，目前更清晰的一点是判断“业务混同”是否存在，关键不在于对外宣传、

合同格式等一些外在的表现，而是关联公司的实际经营业务情况。如在（2014）鲁商终字第214号（见**附录2：序号1**）中，法院认为：

> 经营地址、销售宣传、合同格式的相同或相似，并不能得出业务混同的认定。

在（2017）吉07民终1636号（见**附录2：序号11**）中，法院明确指出“业务混同是指公司之间的业务类型、经营模式、交易方式、定价机制等混同”。这种理解与最高法案例指导工作办公室对“业务混同”的观点一致。该办公室分享其看法并写道：

> [“业务混同”]是指关联公司之间从事相同的业务活动，在经营过程中彼此不分。如同一业务有时以这家公司名义进行，有时又以另一公司名义进行，以至于**与之交易的对方当事人无法分清与哪家公司进行交易活动**。[13]（强调后加）

关于“业务混同”标准的具体应用，（2018）粤03民初581号（见**附录2：序号14**）很值得参考。基于以下三点，法院认为相关公司存在业务混同：

- 作为被告的艾腾达公司和中鼎公司的证明函件中，将两公司的名字并排印制在函件顶部，表明两公司不反对外界将其视为关联公司或认为其业务前后承接。
- 艾腾达公司的生产和销售业务已转移到中鼎公司。
- 两家公司使用印章的方法：商品标准物质证书的首页加盖了艾腾达公司的“标准物质专用章”，而在尾页注明“生产单位：艾腾达公司（中鼎公司）”；收款收据加盖了艾腾达公司的财务专用章；送货单上印制的送货单位名称为艾腾达公司，但加盖了中鼎公司的送货专用章。

简言之，两公司采取了密切配合、相互协作的方式共同经营，使得与之交易的对方当事人无法分清楚究竟是与哪家公司交易，构成了业务混同。

（4）财务混同

在分析“财务混同”时，指导案例15号的表述是：

> 三个公司使用**共同账户**，以王永礼的签字作为具体用款依据，对其中的资金及支配无法证明已作区分；三个公司与徐工机械公司之间的**债权债务、业绩、账务及返利**均计算在川交工贸公司名下。（强调后加）

以下数个后续裁判对“财务混同”的具体应用加深了对该类混同的理解。

在（2017）最高法民申2458号（见**附录2：序号7**）中，关联公司甲、乙共同履行公司乙与第三方公司签订的施工合同。审判此案的最高法在认定公司甲、乙是否构成财务混同时，参考了两点：（一）公司甲以自己名义在第三方公司支取工程款项，而公司乙对此并未提出异议；（二）公司甲、乙在该工程中均由同一财务人员对外办理业务。最终，最高法认定两家公司构成财务混同。

在（2018）川民再484号（见**附录2：序号20**）中，法院认为：

> 财务混同，是指关联公司之间账簿、账户混同，或者两者之间不当冲账。

在（2018）湘08民初52号（见**附录2：序号19**）中，法院考虑了关联公司的注册资本金是否混同、关联公司之间是否存在不合理的大量资金往来等。

在（2018）粤03民初581号（见**附录2：序号14**）中，法院用了“利益共同体”来点出关联公司存在财务混同的特点。该法院认为：

> 两被告在对外经营过程中，即便以一方的名义销售，以另一方的名义收款，最终也可以在公司内部实现账目作平。由此表明，两被告在对外经营并收取货款时并不对其二人的身份刻意区分，质言之，两被告在对外收取货款时实为**利益共同体**，存在财务混同的情形。（强调后加）

总括而言，要符合认定关联公司“构成人格混同”要件1（即“关联公司的人员、业务、财务等方面交叉或混同”）的要求，不论是交叉或混同的那些方面都必须达到有足够证据能够证明其高度混同，导致外界无法区分关联公司为独立的个体。

2. 认定关联公司“构成人格混同”的要件2：“[交叉或混同]导致各自财产无法区分，丧失独立人格”

认定关联公司“构成人格混同”的要件2（即“[交叉或混同]导致各自财产无法区分，丧失独立人格”）没有在本文分析的后续裁判中被广泛讨论。这可能是由于要件1（即“关联公司的人员、业务、财务等方面交叉或混同”）不成立后，根本不需要讨论要件2。例如，在（2016）最高法民申3168号（见**附录2：序号3**）中，最高法在讨论关联公司的财产时以如下方式推理：

> […]在公司**财产方面**，昆和公司否认与源丰公司财务混同，朱孔文提交**证据不足以证实源丰公司与昆和公司财务账簿混同**，也未提供证据证实昆和公司、源丰公司之间资金转移频繁任意。因此，二审法院认为朱孔文没有证据证明两公司之间**财产界限不明确**，两公司账簿、账户混同或者两者之间不当冲账，并无不妥。（强调后加）

令人欣喜的是，一些法院有重点关注要件2——"[交叉或混同]导致各自财产无法区分，丧失独立人格"——并展开了较为详细的阐述。在（2018）川15民终1733号（见**附录2：序号17**）中，法院明确指出了讨论财产混同的重要性：

> 公司人格混同**最核心的判断标准即财产混同**，就公司而言，**无财产即无人格，公司财产独立是公司拥有独立人格的基础**[…]财产混同的定义为公司的财产与股东的财产，或者关联公司之间的财产混为一体，不能明确严格地区分，从而股东、关联公司对公司财产随意占有、转移。（强调后加）

> *"[…]要符合认定关联公司'构成人格混同'要件1[…]的要求，不论是交叉或混同的那些方面都必须达到有足够证据能够证明其高度混同，导致外界无法区分关联公司为独立的个体。"*

以上的讨论跟最高法在指导案例15号"裁判理由"部分所写的如下内容一致：

> 公司人格独立是其作为法人独立承担责任的前提。[《公司法》]第三条第一款规定："公司是企业法人，有独立的法人财产，享有法人财产权。公司以其全部财产对公司的债务承担责任。"**公司的独立财产是公司独立承担责任的物质保证，公司的独立人格也突出地表现在财产的独立上**。当关联公司的财产无法区分，丧失独立人格时，就丧失了独立承担责任的基础。

尤为值得注意的是，以上内容并没有出现于指导案例15号所基于的原二审判决书，即：江苏省高级人民法院于2011年10月19日作出的（2011）苏商终字第0107号民事判决。[14] 换言之，以上内容是最高法在撰写指导案例15号时特别添加的，这反映了最高法重视讨论公司财产的独立性。

此外，在（2016）粤0391民初753号（见**附录2：序号5**）中，法院给出了判断"[交叉或混同]导致各自财产无法区分，丧失独立人格"的具体考量因素：

> 关联公司人格混同的实质因素是财产混同。财产混同是指关联公司之间的财产归属不明，**难以区分各自的财产**。如关联公司的**住所地、营业场所相同，共同使用同一办公设施、机器设备，公司之间的资金混同，各自的收益不加区分，公司之间的财产随意调用等**。（强调后加）

3. "人格混同"的关联公司是否需要"相互之间对外部债务承担连带责任"？

通过第二个裁判要点，最高法指出被认定为"人格混同"的关联公司，在"严重损害债权人利益"的情况下，需要"相互之间对外部债务承担连带责任"。

笔者深入分析的6个最高法和13个其他法院审理的后续裁判中，大部分的法院也没有讨论第二个裁判要点。这可能是由于只有9个后续裁判（见**附录2：序号7、9、11、13-15、17、19、20**），其法院认定关联公司有人格混同，而其他10个后续裁判中的法院认定关联公司没有人格混同后，故法院根本不用讨论关联公司是否需要"对外部债务承担连带责任"（答案已很清晰：不需要）。

在法院认定关联公司有人格混同的9个后续裁判中，以下法院对第二个裁判要点的讨论会对日后类案的审判有助。

在（2017）最高法民申2458号（见**附录2：序号7**）中，最高法以人民法院执行通知书载明的"未发现[…]有可供执行的财产"为依据，判定两家人格混同的公司已"严重损害债权人利益"。而在（2018）最高法民申4702号（见**附录2：序号15**）中，最高法以一方当事人向某国有资产管理公司发出的文件内容证明债务公司已无其他资产可供偿还涉案款项为依据，判定相关人格混同的公司已"严重损害债权人利益"。

有趣的是，（2018）川民再484号（见**附录2：序号20**），法院指出：

> 华茂公司、中茂公司虽然在表面上是彼此独立的有限责任公司，但二公司无证据证明二公司之间资产、财务的独立性，已实际构成资产混同，**严重损害了债权人的利益，且无法通过其他途径予以救济**。二公司关于其相互之间不存在资产混同的抗辩理由无证据支持，本院不予采纳。[…]因

> 此，本案中，**在中茂公司不能清偿拖欠租金的情况下，华茂公司应对中茂公司的上述债务承担连带清偿责任**。（强调后加）

案中的法院强调了“无法通过其他途径予以救济”的条件。换言之，如果可以通过其他途径来使债权人的债务得到清偿，则不能要求关联公司承担连带责任。日后法院处理类案时是否都会考虑该条件值得关注。

结论

以指导案例的形式讨论适用公司法人人格否认的新情形——关联公司人格混同及其法律责任——是促进中国司法理论与实践发展的有益尝试。

具体而言，指导案例15号扩展了对《公司法》第二十条的适用情形，对于处理关联公司滥用公司法人独立地位和逃避债务责任的案件提供了新思路。其裁判要点提出了关联公司构成人格混同的两个要件和需要“对外部债务承担连带责任”的情形，这为处理类似后续案件的法院提供了有效的参照。

许多作出本文分析的后续裁判的法院丰富和强化了对指导案例15号裁判要点的理解并引发了新的思考。从广义上讲，该指导案例进一步完善了中国的公司法人人格否认制度，有利于保护债权人利益，规范公司经营行为，营造良好交易环境。

但是，笔者在对精选后续裁判的梳理分析过程中也发现，绝大多数法院集中讨论指导案例15号第一个裁判要点的要件1（即“关联公司的人员、业务、财务等方面交叉或混同”），而没有充分分析该案例裁判要点的其他内容。笔者寄望日后中国法院在处理类案时，能够更全面地分析指导案例15号裁判要点各方面的内容，确保该案例得到正确的参照，充分发挥其指导作用。■

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* 此中国案例*见解*™的引用是：赵炜、谭子文，深入分析一起被使用于数百个后续裁判的指导性案例：指导案例15号对关联公司人格混同的突破性认定是成功的吗？，《中国法律连接》，第10期，第55页（2020年9月），*亦见于*斯坦福法学院中国指导性案例项目，中国案例*见解*™，2020年9月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-10-202009-insights-11-zhao-tan。中文原文由熊美英博士编辑。载于本中国案例*见解*™的信息和意见作者对其负责，它们并不一定代表中国指导性案例项目的工作或意见。

1 《中华人民共和国公司法》，1993年12月29日通过和公布，1994年7月1日起施行，经四次修正，最新修正于2018年10月26日，同日起施行，http://www.fdi.gov.cn/1800000121_23_74633_0_7.html。指导案例15号所引用的《公司法》应指2005年版本，该版本于指导案例15号发布时（即2013年）、该指导性案例所依据的最终判决作出时已生效。第二十条在当前有效版本中维持不变。

2 《徐工集团工程机械股份有限公司诉成都川交工贸有限责任公司等买卖合同纠纷案》，《中国法律连接》，第10期，第85页（2020年9月），*亦见于*斯坦福法学院中国指导性案例项目，中文指导性案例（CGC15），2020年9月，https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-15。

3 （2011）苏商终字第0107号民事判决，2011年10月19日由江苏省高级人民法院作出，全文载于斯坦福法学院中国指导性案例项目网站，http://cgc.law.stanford.edu/zh-hans/judgments/jiangsu-2011-su-shang-zhong-zi-0107-civil-judgment。

4 《中华人民共和国民法通则》，1986年4月12日通过和公布，1987年1月1日起施行，*并于*2009年8月27日修正，同日起施行，http://www.npc.gov.cn/zgrdw/npc/lfzt/rlys/2014-10/28/content_1883354.htm。

5 《中华人民共和国公司法》，注释1，第三条。

6 最高人民法院案例指导工作办公室，指导案例15号《徐工集团工程机械股份有限公司诉成都川交工贸有限责任公司等买卖合同纠纷案》的理解与参照，《人民司法·应用》，第15期，第34页（2013）。

7 《中共中央关于全面推进依法治国若干重大问题的决定》，2014年10月23日由中国共产党第十八届中央委员会第四次全体会议通过，2014年10月29日公布，http://www.court.gov.cn/zixun-xiangqing-8371.html。

8 最高人民法院，全国法院立案登记制改革两周年新闻发布会，《中华人民共和国最高人民法院网》，2017年5月18日，http://www.court.gov.cn/zixun-xiangqing-45022.html。

9 中华人民共和国《〈最高人民法院关于案例指导工作的规定〉实施细则》，斯坦福CGCP*全球指南*™，2020年8月，http://cgc.law.stanford.edu/zh-hans/sgg-on-prc-detailed-implementing-rules-provisions-case-guidance。

10 *见*中华人民共和国《最高人民法院关于统一法律适用加强类案检索的指导意见（试行）》，斯坦福CGCP*全球指南*™，2020年8月，http://cgc.law.stanford.edu/zh-hans/sgg-on-prc-guiding-opinions-search-similar-cases。该指导意见规定：

> 四、类案检索范围一般包括：（一）最高人民法院发布的指导性案例；（二）**最高人民法**院发布的典型案例及**裁判生效的案件**[…]。
>
> […]
>
> 九、检索到的类案为指导性案例的，人民法院应当参照作出裁判，但与新的法律、行政法规、司法解释相冲突或者为新的指导性案例所取代的除外。
>
> 检索到**其他类案的，人民法院可以作为作出裁判的参考**。
>
> （强调后加）

11 最高人民法院案例指导工作办公室，注释6，第35页。

12 在中国，虽然公司的公章并没有被法律赋予一种特殊的地位，但是中国公司在签订合同时仍普遍认为公章和签字缺一不可。

13 最高人民法院案例指导工作办公室，注释6，第35页。

14 *见*《徐工集团工程机械股份有限公司诉成都川交工贸有限责任公司等买卖合同纠纷案》，注释2，第85页。

附录1：171个指导案例15号的后续裁判（截至2020年3月31日）

序号	审判日期	后续裁判号	审判法院
1	2014/9/12	（2014）鲁商终字第214号	山东省高级人民法院
2	2015/2/9	（2014）石商初字第112号	内蒙古自治区包头市石拐区人民法院
3	2015/3/25	（2014）石商初字第113号	内蒙古自治区包头市石拐区人民法院
4	2015/9/23	（2015）渝一中法民初字第00178号	重庆市第一中级人民法院
5	2015/11/21	（2014）民提字第111号	最高人民法院
6	2015/12/31	（2015）淄商初字第157号	山东省淄博市中级人民法院
7	2016/2/29	（2014）鲁民四初字第8号	山东省高级人民法院
8	2016/5/16	（2016）湘0691民初5号	湖南省岳阳市屈原管理区人民法院
9	2016/5/18	（2016）粤03民终6701号	广东省深圳市中级人民法院
10	2016/6/28	（2015）鄂襄阳中民三初字第00111号	湖北省襄阳市中级人民法院
11	2016/7/28	（2015）苏民终字第00401号	江苏省高级人民法院
12	2016/8/8	（2016）琼96民终704号	海南省第一中级人民法院
13	2016/8/8	（2016）浙72民初772号	浙江省宁波海事法院
14	2016/8/15	（2016）琼96民终705号	海南省第一中级人民法院
15	2016/9/12	（2015）威民初字第856号	四川省内江市威远县人民法院
16	2016/9/21	（2016）粤06民终4264号	广东省佛山市中级人民法院
17	2016/9/30	（2016）浙0521民初2755号	浙江省湖州市德清县人民法院
18	2016/12/20	（2016）粤0606民初11277号	广东省佛山市顺德区人民法院
19	2016/12/23	（2016）最高法民申3168号	最高人民法院
20	2017/1/6	（2016）津0116民初2829号	天津市滨海新区人民法院
21	2017/1/25	（2016）苏0402民初1378号	江苏省常州市天宁区人民法院
22	2017/2/2	（2015）兴民初字第1866号	宁夏回族自治区银川市兴庆区人民法院
23	2017/2/9	（2016）鲁0306民初2017号	山东省淄博市周村区人民法院
24	2017/3/5	（2016）川0107民初6598号	四川省成都市武侯区人民法院
25	2017/3/13	（2017）豫01执异129号	河南省郑州市中级人民法院
26	2017/6/8	（2017）渝01民终2155号	重庆市第一中级人民法院
27	2017/6/26	（2016）鲁0921民初3394号	山东省泰安市宁阳县人民法院
28	2017/6/26	（2016）内0105民初9200号	内蒙古自治区呼和浩特市赛罕区人民法院
29	2017/6/26	（2016）内0105民初9199号	内蒙古自治区呼和浩特市赛罕区人民法院
30	2017/6/26	（2016）内0105民初9154号	内蒙古自治区呼和浩特市赛罕区人民法院
31	2017/6/26	（2016）内0105民初9157号	内蒙古自治区呼和浩特市赛罕区人民法院
32	2017/6/26	（2016）内0105民初9158号	内蒙古自治区呼和浩特市赛罕区人民法院
33	2017/6/26	（2016）内0105民初9156号	内蒙古自治区呼和浩特市赛罕区人民法院
34	2017/6/26	（2016）内0105民初9125号	内蒙古自治区呼和浩特市赛罕区人民法院
35	2017/6/27	（2017）琼01民初341号	海南省海口市中级人民法院

序号	审判日期	后续裁判号	审判法院
36	2017/6/28	（2017）内0781民初774号	内蒙古自治区呼伦贝尔市满洲里市人民法院
37	2017/6/28	（2017）内0781民初762号	内蒙古自治区呼伦贝尔市满洲里市人民法院
38	2017/7/5	（2016）赣0829民初1853号	江西省吉安市安福县人民法院
39	2017/7/9	（2016）粤0391民初753号	广东省深圳前海合作区人民法院
40	2017/7/27	（2017）川0411民初816号	四川省攀枝花市仁和区人民法院
41	2017/8/3	（2016）粤0391民初431号	广东省深圳前海合作区人民法院
42	2017/8/4	（2016）粤0391民初432号	广东省深圳前海合作区人民法院
43	2017/8/30	（2017）粤0606民初6937号	广东省佛山市顺德区人民法院
44	2017/9/12	（2017）浙0206民初2756号	浙江省宁波市北仑区人民法院
45	2017/9/13	（2017）最高法民申2458号	最高人民法院
46	2017/9/18	（2017）甘08民初12号	甘肃省平凉市中级人民法院
47	2017/9/20	（2017）最高法民申1162号	最高人民法院
48	2017/9/27	（2017）鲁10民终1023号	山东省威海市中级人民法院
49	2017/10/18	（2017）粤06民终9837号	广东省佛山市中级人民法院
50	2017/10/23	（2017）内01民再34号	内蒙古自治区呼和浩特市中级人民法院
51	2017/10/25	（2017）浙0203民初4061号	浙江省宁波市海曙区人民法院
52	2017/10/30	（2017）黔0203民初406号	贵州省六盘水市六枝特区人民法院
53	2017/11/6	（2017）鄂05民再22号	湖北省宜昌市中级人民法院
54	2017/11/14	（2017）晋09民终1261号	山西省忻州市中级人民法院
55	2017/11/14	（2017）鲁11民终1556号	山东省日照市中级人民法院
56	2017/11/16	（2017）吉07民终1636号	吉林省松原市中级人民法院
57	2017/11/29	（2017）皖1102民初1579号	安徽省滁州市琅琊区人民法院
58	2017/11/29	（2017）皖1102民初1577号	安徽省滁州市琅琊区人民法院
59	2017/11/29	（2017）皖1102民初1582号	安徽省滁州市琅琊区人民法院
60	2017/11/29	（2017）皖1102民初1956号	安徽省滁州市琅琊区人民法院
61	2017/11/29	（2017）皖1102民初2944号	安徽省滁州市琅琊区人民法院
62	2017/11/29	（2017）皖1102民初1822号	安徽省滁州市琅琊区人民法院
63	2017/11/29	（2017）皖1102民初1576号	安徽省滁州市琅琊区人民法院
64	2017/11/29	（2017）皖1102民初1888号	安徽省滁州市琅琊区人民法院
65	2017/11/29	（2017）皖1102民初1583号	安徽省滁州市琅琊区人民法院
66	2017/11/29	（2017）皖1102民初1585号	安徽省滁州市琅琊区人民法院
67	2017/11/29	（2017）皖1102民初1587号	安徽省滁州市琅琊区人民法院
68	2017/11/29	（2017）皖1102民初1580号	安徽省滁州市琅琊区人民法院
69	2017/12/7	（2017）最高法民再91号	最高人民法院
70	2017/12/8	（2017）鲁0125民初908号	山东省济南市济阳区人民法院
71	2017/12/8	（2017）鲁0125民初907号	山东省济南市济阳区人民法院

序号	审判日期	后续裁判号	审判法院
72	2017/12/12	（2017）闽09民初167号	福建省宁德市中级人民法院
73	2017/12/30	（2016）豫0711民初1151号	河南省新乡市牧野区人民法院
74	2018/2/5	（2016）粤0391民初927号	广东省深圳前海合作区人民法院
75	2018/2/6	（2017）沪72民初2388号	上海海事法院
76	2018/2/11	（2017）桂0124民初1311号	广西壮族自治区南宁市马山县人民法院
77	2018/3/23	（2017）宁0104民初13953号	宁夏回族自治区银川市兴庆区人民法院
78	2018/4/3	（2018）粤03民终1592号	广东省深圳市中级人民法院
79	2018/4/20	（2018）鄂0325民初158号	湖北省十堰市房县人民法院
80	2018/4/20	（2018）皖1102民初953号	安徽省滁州市琅琊区人民法院
81	2018/4/22	（2017）粤01民终9142号	广东省广州市中级人民法院
82	2018/5/4	（2016）渝05民初826号	重庆市第五中级人民法院
83	2018/5/29	（2018）浙民终180号	浙江省高级人民法院
84	2018/6/5	（2018）鄂05民终461号	湖北省宜昌市中级人民法院
85	2018/6/8	（2018）湘07民终82号	湖南省常德市中级人民法院
86	2018/6/11	（2017）吉2426民初411号	吉林省延边朝鲜族自治州安图县人民法院
87	2018/6/11	（2018）皖1102民初1462号	安徽省滁州市琅琊区人民法院
88	2018/6/12	（2018）粤03民终7052号	广东省深圳市中级人民法院
89	2018/6/27	（2018）川0823民初168号	四川省广元市剑阁县人民法院
90	2018/7/20	（2018）赣0302民初188号	江西省萍乡市安源区人民法院
91	2018/7/20	（2017）鲁1482民初1004号	山东省德州市禹城市人民法院
92	2018/7/23	（2018）闽05民终3113号	福建省泉州市中级人民法院
93	2018/7/30	（2018）粤0309民初1635号	广东省深圳市龙华区人民法院
94	2018/8/8	（2018）吉0422民初331号	吉林省辽源市东辽县人民法院
95	2018/8/10	（2018）冀0682民初542号	河北省保定市定州市人民法院
96	2018/8/29	（2017）吉2426民初412号	吉林省延边朝鲜族自治州安图县人民法院
97	2018/9/7	（2018）粤03民终3315号	广东省深圳市中级人民法院
98	2018/9/14	（2018）豫0702民初1763号	河南省新乡市红旗区人民法院
99	2018/9/19	（2018）川1525民初201号	四川省宜宾市高县人民法院
100	2018/9/27	（2018）京0115民初17622号	北京市大兴区人民法院
101	2018/9/28	（2018）晋民终575号	山西省高级人民法院
102	2018/10/9	（2017）鲁0784民初4127号	山东省潍坊市安丘市人民法院
103	2018/10/16	（2018）冀1102民初1645号	河北省衡水市桃城区人民法院
104	2018/10/23	（2018）沪72民初1182号	上海海事法院
105	2018/10/26	（2018）鲁1482民初1468号	山东省德州市禹城市人民法院
106	2018/11/5	（2018）粤03民初581号	广东省深圳市中级人民法院
107	2018/11/7	（2018）黔2328民初1252号	贵州省黔西南布依族苗族自治州安龙县人民法院

序号	审判日期	后续裁判号	审判法院
108	2018/11/7	（2018）黔2328民初1253号	贵州省黔西南布依族苗族自治州安龙县人民法院
109	2018/11/7	（2018）黔2328民初1259号	贵州省黔西南布依族苗族自治州安龙县人民法院
110	2018/11/7	（2018）苏12民终1971号	江苏省泰州市中级人民法院
111	2018/11/7	（2018）黔2328民初1251号	贵州省黔西南布依族苗族自治州安龙县人民法院
112	2018/11/7	（2018）黔2328民初1260号	贵州省黔西南布依族苗族自治州安龙县人民法院
113	2018/11/7	（2018）黔2328民初1261号	贵州省黔西南布依族苗族自治州安龙县人民法院
114	2018/11/7	（2018）黔2328民初1249号	贵州省黔西南布依族苗族自治州安龙县人民法院
115	2018/11/8	（2018）鲁11民终1913号	山东省日照市中级人民法院
116	2018/11/8	（2018）苏01民终6172号	江苏省南京市中级人民法院
117	2018/11/9	（2018）沪0105民初12795号	上海市长宁区人民法院
118	2018/11/12	（2018）鲁02民终6462号	山东省青岛市中级人民法院
119	2018/11/13	（2018）闽0203民初11797号	福建省厦门市思明区人民法院
120	2018/11/13	（2018）闽0203民初11809号	福建省厦门市思明区人民法院
121	2018/11/13	（2018）闽0203民初11794号	福建省厦门市思明区人民法院
122	2018/11/13	（2018）闽0203民初11804号	福建省厦门市思明区人民法院
123	2018/11/13	（2018）闽0203民初11802号	福建省厦门市思明区人民法院
124	2018/11/15	（2017）甘08民初26号	甘肃省平凉市中级人民法院
125	2018/11/15	（2018）最高法民申4702号	最高人民法院
126	2018/11/16	（2018）闽0203民初11795号	福建省厦门市思明区人民法院
127	2018/11/16	（2018）闽0203民初11793号	福建省厦门市思明区人民法院
128	2018/11/16	（2018）闽0203民初11798号	福建省厦门市思明区人民法院
129	2018/11/19	（2018）最高法民申4021号	最高人民法院
130	2018/11/23	（2018）粤03民终729号	广东省深圳市中级人民法院
131	2018/11/27	（2018）闽0203民初11805号	福建省厦门市思明区人民法院
132	2018/11/27	（2018）闽0203民初11799号	福建省厦门市思明区人民法院
133	2018/11/27	（2018）闽0203民初11811号	福建省厦门市思明区人民法院
134	2018/11/27	（2018）川15民终1733号	四川省宜宾市中级人民法院
135	2018/12/17	（2018）粤破终39号	广东省高级人民法院
136	2018/12/17	（2018）粤破终38号	广东省高级人民法院
137	2018/12/17	（2018）粤破终37号	广东省高级人民法院
138	2018/12/20	（2018）晋民终687号	山西省高级人民法院
139	2019/1/10	（2018）鲁1602民初4079号	山东省滨州市滨城区人民法院
140	2019/1/14	（2018）辽0214民初4083号	辽宁省大连市普兰店区人民法院
141	2019/3/14	（2018）川0421民初1233号	四川省攀枝花市米易县人民法院
142	2019/4/4	（2019）渝03破终1号	重庆市第三中级人民法院
143	2019/4/10	（2019）黑03民终157号	黑龙江省鸡西市中级人民法院

序号	审判日期	后续裁判号	审判法院
144	2019/4/15	（2018）浙0481民初8446号	浙江省嘉兴市海宁市人民法院
145	2019/4/22	（2019）0214民初204号	辽宁省大连市普兰店区人民法院
146	2019/4/24	（2018）黔0115民初5527号	贵州省贵阳市观山湖区人民法院
147	2019/4/29	（2019）鲁01民终629号	山东省济南市中级人民法院
148	2019/5/6	（2017）赣01民初456号	江西省南昌市中级人民法院
149	2019/5/8	（2019）内0781民初242号	内蒙古自治区呼伦贝尔市满洲里市人民法院
150	2019/5/8	（2019）浙0303民初1690号	浙江省温州市龙湾区人民法院
151	2019/5/31	（2018）沪0116民初728号	上海市金山区人民法院
152	2019/6/10	（2019）晋民再21号	山西省高级人民法院
153	2019/6/14	（2019）粤03民终8167-8176号	广东省深圳市中级人民法院
154	2019/6/21	（2018）湘08民初52号	湖南省张家界市中级人民法院
155	2019/6/24	（2019）皖0208民初1478号	安徽省芜湖市三山区人民法院
156	2019/6/28	（2018）川民再484号	四川省高级人民法院
157	2019/7/3	（2019）辽01民终5768号	辽宁省沈阳市中级人民法院
158	2019/7/3	（2019）内03民初31号	内蒙古自治区乌海市中级人民法院
159	2019/7/10	（2017）粤73民初4659号	广东省广州知识产权法院
160	2019/8/1	（2018）粤0783民初4497号	广东省江门市开平市人民法院
161	2019/8/12	（2019）浙04民终1394号	浙江省嘉兴市中级人民法院
162	2019/8/15	（2019）甘0503民初428号	甘肃省天水市麦积区人民法院
163	2019/8/15	（2019）甘0503民初619号	甘肃省天水市麦积区人民法院
164	2019/9/5	（2019）闽0481民初2351号	福建省三明市永安市人民法院
165	2019/9/11	（2019）浙民申2091号	浙江省高级人民法院
166	2019/9/18	（2018）粤03民初873号	广东省深圳市中级人民法院
167	2019/9/18	（2018）粤03民初871号	广东省深圳市中级人民法院
168	2019/9/28	（2018）浙1021民初6196号	浙江省台州市玉环县人民法院
169	2019/9/29	（2019）陕07民初15号	陕西省汉中市中级人民法院
170	2019/10/30	（2019）川民再551号	四川省高级人民法院
171	2019/11/18	（2019）鲁0921民初647号	山东省泰安市宁阳县人民法院

附录2：20个被深入分析的指导案例15号的后续裁判（截至2020年3月31日）

序号	审判日期	后续裁判号	审判法院	链接
1	2014/9/12	（2014）鲁商终字第214号	山东省高级人民法院	https://cgc.law.stanford.edu/zh-hans/judgments/shandong-2014-lu-shang-zhong-zi-214-civil-judgment
2	2015/11/21	（2014）民提字第111号	最高人民法院	https://cgc.law.stanford.edu/zh-hans/judgments/spc-2014-min-ti-zi-111-civil-judgment
3	2016/12/23	（2016）最高法民申3168号	最高人民法院	https://cgc.law.stanford.edu/zh-hans/judgments/spc-2016-zui-gao-fa-min-shen-3168-civil-ruling
4	2017/6/8	（2017）渝01民终2155号	重庆市第一中级人民法院	https://cgc.law.stanford.edu/zh-hans/judgments/chongqing-2017-yu-01-min-zhong-2155-civil-judgment
5	2017/7/9	（2016）粤0391民初753号	广东省深圳前海合作区人民法院	https://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2016-yue-0391-min-chu-753-civil-judgment
6	2017/8/3	（2016）粤0391民初431号	广东省深圳前海合作区人民法院	https://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2016-yue-0391-min-chu-431-civil-judgment
7	2017/9/13	（2017）最高法民申2458号	最高人民法院	https://cgc.law.stanford.edu/zh-hans/judgments/spc-2017-zui-gao-fa-min-shen-2458-civil-ruling
8	2017/9/20	（2017）最高法民申1162号	最高人民法院	https://cgc.law.stanford.edu/zh-hans/judgments/spc-2017-zui-gao-fa-min-shen-1162-civil-ruling
9	2017/9/27	（2017）鲁10民终1023号	山东省威海市中级人民法院	https://cgc.law.stanford.edu/zh-hans/judgments/shandong-2017-lu-10-min-zhong-1023-civil-judgment
10	2017/11/14	（2017）鲁11民终1556号	山东省日照市中级人民法院	https://cgc.law.stanford.edu/zh-hans/judgments/shandong-2017-lu-11-min-zhong-1556-civil-judgment
11	2017/11/16	（2017）吉07民终1636号	吉林省松原市中级人民法院	https://cgc.law.stanford.edu/zh-hans/judgments/jilin-2017-ji-07-min-zhong-1636-civil-judgment
12	2017/12/7	（2017）最高法民再91号	最高人民法院	https://cgc.law.stanford.edu/zh-hans/judgments/spc-2017-zui-gao-fa-min-zai-91-civil-judgment
13	2018/6/5	（2018）鄂05民终461号	湖北省宜昌市中级人民法院	https://cgc.law.stanford.edu/zh-hans/judgments/hubei-2018-e-05-min-zhong-461-civil-judgment
14	2018/11/5	（2018）粤03民初581号	广东省深圳市中级人民法院	https://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2018-yue-03-min-chu-581-civil-judgment
15	2018/11/15	（2018）最高法民申4702号	最高人民法院	https://cgc.law.stanford.edu/zh-hans/judgments/spc-2018-zui-gao-fa-min-shen-4702-civil-ruling
16	2018/11/19	（2018）最高法民申4021号	最高人民法院	https://cgc.law.stanford.edu/zh-hans/judgments/spc-2018-zui-gao-fa-min-shen-4021-civil-ruling
17	2018/11/27	（2018）川15民终1733号	四川省宜宾市中级人民法院	https://cgc.law.stanford.edu/zh-hans/judgments/sichuan-2018-chuan-15-min-zhong-1733-civil-judgment
18	2019/5/31	（2018）沪0116民初728号	上海市金山区人民法院	https://cgc.law.stanford.edu/zh-hans/judgments/shanghai-2018-hu-0116-min-chu-728-civil-judgment
19	2019/6/21	（2018）湘08民初52号	湖南省张家界市中级人民法院	https://cgc.law.stanford.edu/zh-hans/judgments/hunan-2018-xiang-08-min-chu-52-civil-judgment
20	2019/6/28	（2018）川民再484号	四川省高级人民法院	https://cgc.law.stanford.edu/zh-hans/judgments/sichuan-2018-chuan-min-zai-484-civil-judgment

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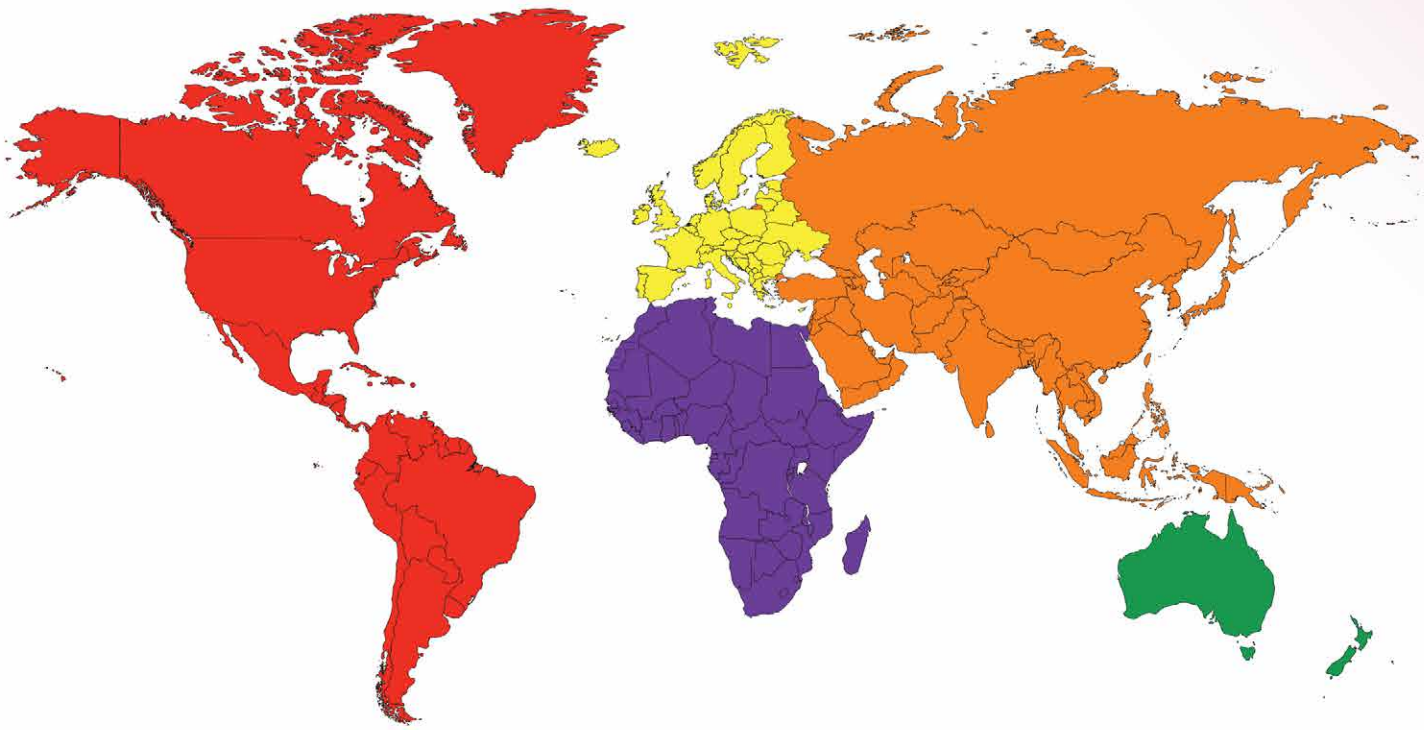
Founded in February 2011, the China Guiding Cases Project has shared its knowledge-base via its bilingual website (https://cgc.law.stanford.edu). As of early 2020, the website has benefited more than 150,000 global users residing in different continents.



■ Americas | 美洲 - 71,681　■ Asia | 亚洲 - 62,940　■ Europe | 欧洲 - 13,515

■ Oceania | 大洋洲 - 2,657　■ Africa | 非洲 - 1,738　□ Unknown | 不详 - 1,372

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《最高人民法院关于统一法律适用加强类案检索的指导意见（试行）》与相关注解*

Guiding Opinions of the Supreme People's Court on Unifying the Application of Law and Strengthening the Search for Similar Cases (Trial Implementation) and Related Annotations**

熊美英博士

Dr. Mei Gechlik

摘要

继2010年和2015年发布两套规则后（见**附录1和2**），最高人民法院（"最高法"）于2020年7月发布了另一套规则对指导性案例的使用等事项作出规定。每五年发布一次规则的做法可能会被视为中国又一个五年计划——中国常用的方法来设定各个领域的目标，当中包括国家的社会和经济发展计划和司法改革——以统筹指导性案例制度的发展。

这三套规则都规定了一些不同的要求。而从这些要求，可以看到最高法在一个传统上只关注立法的国家中采取了逐步的措施来培养基于案例的法律文化。

2010年发布的《最高人民法院关于案例指导工作的规定》指示中国法官在审判与指导性案例相类似的案件时，要适用这些具有事实上约束力的先例（见**附录1第七条**）。2015年发布的《〈最高人民法院关于案例指导工作的规定〉实施细则》为法官提供指导，让他们知道如何在后续类似案件中援引指导性案例所依据的法律原则，以及如何回应当事人对指导性案例的引用（见**附录2第九和十一条**）。

2020年发布的《最高人民法院关于统一法律适用加强类案检索的指导意见（试行）》涵盖了指导性案例和中国其他重要的司法案件（例如：最高法或不同省高级法院判决的案件）。该指导意见指示所有中国法官检索这些案例或案件，

Abstract

In what might be seen as yet another one of China's five-year plans—following an approach typically used by the country to set goals every five years for various areas, ranging from its social and economic development initiatives to judicial reform efforts—for the development of the Guiding Cases System, the Supreme People's Court (the "SPC") released in July 2020 a set of rules guiding, *inter alia*, the use of Guiding Cases, after the SPC released two other sets of rules in 2010 and 2015 (see **Appendices 1 and 2**).

Each of the three sets of rules specify some distinct requirements and, together, one can see progressive steps taken by the SPC to cultivate a case-based legal culture in a country that has traditionally focused on legislation only.

The 2010 rules—*Provisions of the Supreme People's Court Concerning Work on Case Guidance*—instruct Chinese judges to apply Guiding Cases when adjudicating cases that are similar to these *de facto* binding precedents (see **Appendix 1, Article 7**). The 2015 rules—*Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"* —provide judges with guidance on how to cite the legal principles upon which Guiding Cases are based in the judgments of subsequent similar cases and on how to respond to parties' reference to Guiding Cases (see **Appendix 2, Articles 9 and 11**).

The 2020 rules—*Guiding Opinions of the Supreme People's Court on Unifying the Application of Law and Strengthening the Search for Similar Cases (Trial Implementation)*—go beyond Guiding Cases to also cover other important judicial cases in China (e.g., cases adjudicated by the SPC or by high courts of different provinces) as the rules instruct all Chinese judges to search for these cases to

熊美英博士 | Dr. Mei Gechlik
中国指导性案例项目创办人与总监 | Founder and Director, China Guiding Cases Project

熊美英博士是斯坦福法学院中国指导性案例项目（“CGCP”）的创办人与总监。曾于香港任终身教授的熊美英博士，于2011年2月创立CGCP。在2007年加入斯坦福法学院教授有关中国法律和商务的课程之前，熊博士于2001至2005年期间担任华盛顿智囊机构卡内基国际和平基金会的研究员。熊博士在英格兰、威尔士和香港均有出庭律师执业资格，同时也是纽约和哥伦比亚特区的律师。她获得宾夕法尼亚大学沃顿商学院金融学工商管理硕士（MBA）和斯坦福法学院法律科学博士（JSD）学位。

Dr. Mei Gechlik is the Founder and Director of the China Guiding Cases Project (the “CGCP”). Formerly a tenured professor in Hong Kong, she founded the CGCP in February 2011. Prior to joining Stanford Law School in 2007 to teach courses related to Chinese law and business, Dr. Gechlik worked from 2001 to 2005 for the Carnegie Endowment for International Peace, a Washington D.C.–based think tank. Dr. Gechlik is admitted as a barrister in England, Wales, and Hong Kong and is a member of the Bar in New York and the District of Columbia. She received an M.B.A. in Finance from the Wharton School at the University of Pennsylvania and a Doctor of the Science of Law (J.S.D.) from Stanford Law School.

以确定其中是否至少有一个案例或案件与法官面前的待决案件“类似”，而如果是，则相应地适用类似的法律原则。该指导意见还解释了在检索类案时必须遵循的顺序，意味着当代中国首次存在司法案件的等级制度。

在此篇中法连*聚焦*™中，作者分享了她对这三套规则的一丝不苟的英语翻译，并对2020的规则作出关键注解（她对2010年和2015年的规则的全部注解已刊登在中国指导性案例项目的网站上：https://cgc.law.stanford.edu/zh-hans/stanford-cgcp-global-guide）。如果确实有指导性案例制度发展的明确或隐含的五年计划，那么在未来五年中应非常仔细地研究2020年规则及其执行情况。人们一定想知道：在2025年之前，中国是否会准备好宣布指导性案例具有正式的约束力？如果发生这种情况，这将是一项非凡的成就，它将使中国的法律制度达到前所未有的水平，并使中国赢得全球尊重。

determine whether at least one of them is “similar” to the pending case before the judges and, if yes, apply similar legal principles accordingly. The 2020 rules also explain the order that needs to be followed during any search for similar cases, suggesting, for the first time in contemporary China, the existence of a hierarchy among Chinese judicial cases.

In this CLC *Spotlight*™ piece, the author shares her meticulous English translations of the three sets of rules and provides key annotations on the 2020 rules (her full annotations on the 2010 and 2015 are published on the website of the China Guiding Cases Project: https://cgc.law.stanford.edu/stanford-cgcp-global-guide). If, somewhere, there are indeed explicit or implicit five-year plans for the development of the Guiding Cases System, the 2020 rules and their implementation should be examined very closely in the coming five years. One must wonder: will China be ready to declare by 2025 that Guiding Cases are *de jure* binding? If this happens, it will be a remarkable achievement that will take the Chinese legal system to an unprecedented level and allow China to win global respect.

《最高人民法院关于统一法律适用加强类案检索的指导意见（试行）》

Guiding Opinions of the Supreme People's Court on Unifying the Application of Law and Strengthening the Search for Similar Cases (Trial Implementation)

（2020年7月27日公布
2020年7月31日起施行）

(Issued on July 27, 2020 and
Effective as of July 31, 2020)

为统一法律适用，[1]提升司法公信力，结合审判工作实际，就人民法院类案检索工作提出如下意见。

In order to unify the application of law[2] and enhance judicial credibility, [the Supreme People's Court], in light of the reality of adjudication work, [hereby] puts forward the following opinions regarding the work of people's courts on searching for similar cases.

一、本意见所称类案，是指与待决案件在基本事实、争议焦点、法律适用问题等方面具有相似性，[3]且已经人民法院裁判生效的案件。

1. The [term] "similar case" referred to in this [set of] Opinions means a case that is similar to the pending case in terms of various aspects, including the basic facts, focal points of the dispute, or issues regarding the application of law,[4] and that has been adjudicated by a people's court and has come into effect.

二、人民法院办理案件具有下列情形之一，应当进行类案检索：

2. A people's court that handles a case under one of the following circumstances should conduct a search for similar cases:

（一）拟提交专业（主审）法官会议或者审判委员会讨论的；

(1) [The case] is to be submitted to the professional (presiding) judges' meeting or the adjudication committee for discussion.

（二）缺乏明确裁判规则或者尚未形成统一裁判规则的；

(2) There is a lack of clear adjudication rules, or a unified adjudication rule has not yet been formed.

（三）院长、庭长根据审判监督管理权限要求进行类案检索的；

(3) The president [of the court] or the chief judge of a division [of the court], based on [his[5]] authority to supervise and manage adjudication, requires that a search for similar cases be conducted.

（四）其他需要进行类案检索的。

(4) Other [circumstances] under which a search for similar cases needs to be conducted.

三、承办法官依托中国裁判文书网、审判案例数据库等进行类案检索，并对检索的真实性、准确性负责。

3. The judge(s) handling [a case] shall conduct a search for similar cases by relying on databases such as China Judgements Online [http://wenshu.court.gov.cn] and Database of Chinese Trial Cases [http://www.chncase.cn/case] and shall be responsible for the authenticity and accuracy of the search.

四、类案检索范围一般包括：

4. The scope of a search for similar cases generally includes:

（一）最高人民法院发布的指导性案例；[6]

(1) Guiding Cases released by the Supreme People's Court;[7]

（二）最高人民法院发布的典型案例[8]及裁判生效的案件；

(2) typical cases released by the Supreme People's Court,[9] and cases that have been adjudicated by [the Supreme People's Court] and have come into effect;

（三）本省（自治区、直辖市）高级人民法院发布的参考性案例及裁判生效的案件；

(3) reference cases released by the high people's court of the province (or autonomous region or municipality directly under the Central People's Government) [where the court conducting the search is located] and

注解 | Annotations

[1]《最高人民法院关于案例指导工作的规定》的序言中也提及这一目标。*见*附录1，《最高人民法院关于案例指导工作的规定》（以下简称“《案例指导规定》”）。

《〈最高人民法院关于案例指导工作的规定〉实施细则》第一条提及类似的目标（“统一法律适用标准”）。*见*附录2，《〈最高人民法院关于案例指导工作的规定〉实施细则》（以下简称“《实施细则》”）。

[2] The same goal is stated in the preamble of the *Provisions of the Supreme People's Court Concerning Work on Case Guidance*. *See* Appendix 1, *Provisions of the Supreme People's Court Concerning Work on Case Guidance,* (hereinafter "*Provisions on Case Guidance*").

A similar goal (i.e., to "unify standards for the application of law") is stated in Article 1 of the *Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"*. *See* Appendix 2, *Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"* (hereinafter "*Detailed Implementing Rules*").

[3]《实施细则》第九条仅要求待决案件，在“基本案情和法律适用方面”，与指导性案例相类似。因此，此处的“在基本事实、争议焦点、法律适用问题等方面具有相似性”，应该不是指每一方面都需要具有相似性，否则对于指导性案例而言，其超出了《实施细则》第九条的要求。*见*《实施细则》，注释1，第九条。

[4] Article 9 of the *Detailed Implementing Rules* only requires that a pending case be similar to a Guiding Case in terms of "the basic facts and application of law". In light of this provision, "or" is used here because using "and" would suggest that a pending case needs to be similar to a Guiding Case in terms of other aspects in addition to "basic facts" and "application of law". *See Detailed Implementing Rules*, *supra* note 2, Article 9.

[5] The terms "he", "him", and "his" as used herein are, unless the context indicates otherwise, gender-neutral terms that may refer to "she", "her", "it", and "its".

[6] 有关指导性案例的更多信息，见《案例指导规定》，注释1；《实施细则》，注释1。

[7] For more information about Guiding Cases, see *Provisions on Case Guidance*, *supra* note 2; *Detailed Implementing Rules*, *supra* note 2.

[8] 有关两个重要典型案例的讨论，见许璐，一带一路典型案例13：更加开明地解读互惠原则以承认和执行外国判决，《中国法律连接》，第1期，第32页（2018年6月），*亦见于*斯坦福法学院中国指导性案例项目，中国案例*见解*™，2018年6月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-1-201806-insights-3-alison-xu；高尚、李隽文，通过《西门子诉黄金置地案》，中国改革涉及自由贸易区的仲裁，为“一带一路”作出准备，《中国法律连接》，第1期，第53页（2018年6月），*亦见于*斯坦福法学院中国指导性案例项目，中国案例*见解*™，2018年6月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-1-201806-insights-5-gao-li。

[9] For discussions of two important typical cases, see Alison Lu Xu, *Belt & Road Typical Case 13: Towards a Liberal Interpretation of the Reciprocity Principle for Recognition and Enforcement of Foreign Judgments*, 1 China Law Connect 26 (June 2018), *also available at* Stanford Law School China Guiding Cases Project, China Cases *Insights*™, June 2018, http://cgc.law.stanford.edu/commentaries/clc-1-201806-insights-3-alison-xu; Tereza Gao & Edison Li, *Through* Siemens v. Golden Landmark, *China Reforms Arbitration for Free Trade Zones in Order to Prepare for "Belt & Road"*, 1 China Law Connect 48 (June 2018), *also available at* Stanford Law School China Guiding Cases Project, China Cases *Insights*™, June 2018, http://cgc.law.stanford.edu/commentaries/clc-1-201806-insights-5-gao-li.

“[…]在未来五年中应非常仔细地研究2020年规则及其执行情况。人们一定想知道：在2025年之前，中国是否会准备好宣布指导性案例具有正式的约束力？”

“[…] the 2020 rules and their implementation should be examined very closely in the coming five years. One must wonder: will China be ready to declare by 2025 that Guiding Cases are* de jure *binding?”

cases that have been adjudicated [by said high people's court] and have come into effect;

（四）上一级人民法院及本院裁判生效的案件。

(4) cases that have been adjudicated by a people's court at the next higher level [above the court conducting the search] or by the court [conducting the search] and have come into effect.

除指导性案例以外，优先检索近三年的案例或者案件；[10] 已经在前一顺位中检索到类案的，可以不再进行检索。[11]

Except for Guiding Cases, searches for [typical and reference] cases of the past three years or [other aforementioned] cases [of the past three years] take priority.[12] If a similar case has been retrieved [from a group of cases] ranked higher [in the above order], no further search is required.[13]

五、类案检索可以采用关键词检索、法条关联案件检索、案例关联检索等方法。

5. Searches for similar cases may use various methods, including a keyword search, a search for cases [involving] related legal rules, and a search for related cases.

六、承办法官应当将待决案件与检索结果进行相似性识别和比对，确定是否属于类案。

6. The judge(s) handling [a case] should compare the pending case with a search result and identify [their] similarities to determine whether [the search result] is a similar case.

七、对本意见规定的应当进行类案检索的案件，承办法官应当在合议庭评议、专业（主审）法官会议讨论及审理报告中对类案检索情况予以说明，或者制作专门的类案检索报告，并随案归档备查。[14]

7. For a case that, as stated in this [set of] Opinions, a search for similar cases should be conducted, the judge(s) handling [the case] should explain, in the deliberation of the collegial panel, the discussion of the professional (presiding) judges' meeting, and the adjudication report, details about the search for similar cases, or should prepare a specialized report on the search for similar cases and file it, together with the case, for review.[15]

八、类案检索说明或者报告应当客观、全面、准确，包括检索主体、时间、平台、方法、结果，类案裁判要点[16]以及待决案件争议焦点等内容，并对是否参照[17]或者参考类案等结果运用情况予以分析说明。

8. The explanation or report of a search for similar cases should be objective, comprehensive, and accurate, covering the subject, time, platform, method(s), and result(s) of the search as well as the main points of the adjudication of any similar case [retrieved],[18] focal points of the dispute of the pending case, and other content. [The explanation or report should] also analyze and explain the use of the [search] result(s), including whether a similar case is referenced and imitated[19] or referenced [in adjudicating the pending case].

九、检索到的类案为指导性案例的，人民法院应当参照作出裁判，但与新的法律、行政法规、司法解释相冲突或者为新的指导性案例所取代的除外。[20]

9. Where a similar case that has been retrieved is a Guiding Case, a people's court should reference and imitate it to render a ruling or judgment, unless [the Guiding Case] is in conflict with a new law, administrative regulation, or judicial interpretation or is replaced with a new Guiding Case.[21]

检索到其他类案的，人民法院可以作为作出裁判的参考。

Other similar cases that have been retrieved may be used by a people's court as references for rendering a ruling or judgment.

十、公诉机关、案件当事人及其辩护人、诉讼代理人等提交指导性案例作为控（诉）辩理由的，人民法院应当在裁判文书说理中回应是否参照并说明理由；[22]提交其他类案作为控（诉）辩理由的，人民法院可以通过释明[23]等方式予以回应。

10. Where a public prosecution organ, a party to a case or his defender,[24] a litigation agent,[25] or the like submits a Guiding Case as a ground [for the] prosecution (litigation) or defense, a people's court should, in the reasoning of the ruling or judgment, respond as to whether [the court] referenced and imitated the Guiding Case [in the adjudication of the case] and explain [the court's] reasons.[26] Where other similar cases are

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[10] 此处的“或者”很可能是误写，原意应该是用“和”一字。这是由于上列的案例和案件都应被检索。

[11] 有关显示中国法官如何参考不同案例以分析知识产权问题的示例，见杨静博士，抢注外国商标：中国商标法与相关司法案例，《中国法律连接》，第9期，第21页（2020年6月），*亦见于*斯坦福法学院中国指导性案例项目，2020年6月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-9-202006-32-yang-jing。

[12] The text reads “案例或者案件” (“cases or cases”). Only exemplary cases can be “案例”. Thus, based on the context, the phrase is translated here as “[typical and reference] cases […] or [other aforementioned] cases”. It should be noted that the term “或者” (“or”) is likely meant to be “和” (“and”), as both of the two groups of cases, i.e., “typical and reference cases” as well as “other aforementioned cases” should be searched for.

[13] For an example showing how a Chinese judge refers to different cases to analyze intellectual property issues, see Dr. YANG Jing, *Squatting on Foreign Trademarks: China's Trademark Law and Related Judicial Cases*, 9 China Law Connect 11 (June 2020), *also available at* Stanford Law School China Guiding Cases Project, June 2020, http://cgc.law.stanford.edu/commentaries/clc-9-202006-32-yang-jing.

[14] 有关“备查”的详细信息（例如，由谁进行、何时进行和如何进行）尚不清楚。

[15] Details about the review (e.g., by whom, when, and how) are unclear.

[16] 每个指导性案例都包括标题为“裁判要点”的部分。对于最高人民法院判决的部分知识产权案例，该法院正式发布了“裁判要旨”，其性质类似于“裁判要点”。对于其他“类案”，其裁判要点可能由提供类案检索说明或者报告的人起草。有关裁判要旨的更多讨论，见崔亚东，知识产权案例裁判要旨：彰显中国知识产权司法保护的进步，《中国法律连接》，第9期，第7页（2020年6月），*亦见于*斯坦福法学院中国指导性案例项目，2020年6月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-9-202006-31-cui-yadong。

[17] 根据《汉语大辞典》，“参照”是指“参考并仿照”，通常指“参考并仿照（方法、经验等）”。*见*《汉语大辞典》，http://www.hydcd.com/cidian/2885.htm。例如，在《辽宁省高级人民法院关于加强参考性案例工作的意见（试行）》中，“参照”一词明确被定义为“参考并仿照”。*见*《辽宁省高级人民法院关于加强参考性案例工作的意见（试行）》，2013年5月17日由辽宁省高级人民法院审判委员会通过，2013年5月17日公布，同日起施行，http://www.dffy.org/ssf/201608/41013.html。在该意见中，辽宁省高级人民法院指出：“省法院发布的参考性案例，全省三级法院在审理[…]类似案件时可以参照”。

*亦见*胡云腾，关于参照指导性案例的几个问题，《人民法院报》，2018年8月1日，http://news.sina.com.cn/sf/news/fzrd/2018-08-01/doc-ihhacrce8229615.shtml。作者于2009年至2014年担任最高人民法院研究室主任。在文中，作者分享了其对“参照”的含义的观点。他写道，该词不应理解为“参考、按照”或“参考、依照”，因为“按照”和“依照”对指导性案例而言并不合适，这是由于指导性案例的法律地位尚无定论。作者建议将“参照”理解为“参考、比照”，而具体意思是：“指导性案例是怎么认定事实、适用法律的，待决的案件就应当参照指导性案例认定事实和适用法律”。

[18] Each Guiding Case includes a section titled “裁判要点” (“Main Points of the Adjudication”). For select intellectual property cases adjudicated by the Supreme People's Court, a formal set of “裁判要旨” (“adjudication essentials”)—their nature is similar to the “Main Points of the Adjudication”—was released by the Supreme People's Court. For other “similar cases”, their main points of the adjudication are likely to be drafted by the person(s) providing the explanation or report of a search for similar cases. For more discussion of adjudication essentials, see CUI Yadong, *Adjudication Essentials of Intellectual Property Cases: Highlighting the Progress of Judicial Protection of Intellectual Property Rights in China*, 9 China Law Connect 1 (June 2020), *also available at* Stanford Law School China Guiding Cases Project, June 2020, http://cgc.law.stanford.edu/commentaries/clc-9-202006-31-cui-yadong.

[19] The text reads “参照”, which, according to 《汉语大辞典》 (“*Chinese Dictionary*”), means “参考并仿照” (which is translated in this Stanford CGCP *Global Guide*™ as “reference and imitate”) and is usually used in the context of “参考并仿照（方法、经验等）” (“referencing and imitating methods and experiences”). *See* 《汉语大辞典》 (“*Chinese Dictionary*”), http://www.hydcd.com/cidian/2885.htm. For example, the term “参照” is explicitly defined as “参考并仿照” in 《辽宁省高级人民法院关于加强参考性案例工作的意见（试行）》 (*Opinions of the High People's Court of Liaoning Province Concerning the Strengthening of the Work on Reference Cases (Trial Implementation)*), passed by the Adjudication Committee of the High People's Court of Liaoning Province on May 17, 2013, issued on and effective as of May 17, 2013, http://www.dffy.org/ssf/201608/41013.html. In this document, the High People's Court of Liaoning Province explains in Chinese: “省法院发布的参考性案例，全省三级法院在审理[…]类似案件时可以参照” (“courts at the three levels in the province may reference and imitate reference cases released by the provincial court when adjudicating […] similar cases”).

See also 胡云腾 (HU Yunteng), 关于参照指导性案例的几个问题 (*Several Issues Concerning “Can Zhao” Guiding Cases*), 《人民法院报》 (*People's Court Daily*), Aug. 1, 2018, http://news.sina.com.cn/sf/news/fzrd/2018-08-01/doc-ihhacrce8229615.shtml. In this article, the author, who served as the Director of the Research Office of the Supreme People's Court from 2009 to 2014, shared his views about the meaning of “参照” in the context of Guiding Cases. He wrote that the term should not be understood as “参考、按照” or “参考、依照” because both “按照” and “依照” mean “according to”, which is not an appropriate term for Guiding Cases as their legal status remains unclear. The author suggested that “参照” be understood as “参考、比照” (“reference and compare”), which, in the context of Guiding Cases, essentially means that the approach used in a Guiding Case to determine the facts and apply the law should be used in a similar pending case.

[20] *见*《实施细则》，注释1，第九、十二条。

[21] *See Detailed Implementing Rules*, *supra* note 2, Articles 9 and 12.

[22] *见*《实施细则》，注释1，第十一条。

[23] 有关法院“释明”的讨论，见蔡虹，释明权：基础透视与制度构建，《法学评论》，第1期（2005），old.civillaw.com.cn/article/default.asp?id=37693。

[24] The text reads “辩护人” (“defender”). According to Article 33 of the *Criminal Procedure Law of the People's Republic of China*, a criminal suspect or defendant may retain one or two defenders. A defender may be (1) a lawyer (“律师”); (2) a person recommended by a people's group or the unit [where] a criminal suspect or defendant [works] (“人民团体或者犯罪嫌疑人、被告人所在单位推荐的人”); or (3) a guardian, relative, or friend of a criminal suspect or defendant (“犯罪嫌疑人、被告人的监护人、亲友”). A person who is serving a criminal sentence or whose personal freedom is deprived or restricted in accordance with law cannot serve as a defender. *See* 《中华人民共和国刑事诉讼法》 (*Criminal Procedure Law of the People's Republic of China*), passed on July 1, 1979, issued on July 7, 1979, effective as of Jan. 1, 1980, amended three times, most recently on and effective as of Oct. 26, 2018, http://paper.people.com.cn/rmrb/html/2019-01/24/nw.D110000renmrb_20190124_1-13.htm.

[25] The text reads “诉讼代理人” (“litigation agent”). According to Article 58 of the *Civil Procedure Law of the People's Republic of China*, a party or a statutory agent (“法定代理人”) may retain one or two persons as litigation agents. A litigation agent may be (1) a lawyer or legal service worker at the basic level (“律师、基层法律服务工作者”); (2) a close relative or staff member of a party (“当事人的近亲属或者工作人员”); or (3) a citizen recommended by the community [where the party resides], the unit [where the party works], or a relevant social organization (“当事人所在社区、单位以及有关社会团体推荐的公民”). *See* 《中华人民共和国民事诉讼法》 (*Civil Procedure Law of the People's Republic of China*), passed on, issued on, and effective as of Apr. 9, 1991, amended three times, most recently on June 27, 2017, effective as of July 1, 2017, http://www.moj.gov.cn/Department/content/2018-12/25/357_182594.html.

[26] *See Detailed Implementing Rules*, *supra* note 2, Article 11.

submitted as prosecution (litigation) or defense grounds, a people's court may respond by various means, including explanations and clarifications.[27]

十一、检索到的类案存在法律适用不一致的，人民法院可以综合法院层级、裁判时间、是否经审判委员会讨论等因素，依照《最高人民法院关于建立法律适用分歧解决机制的实施办法》[28]等规定，通过法律适用分歧解决机制予以解决。

11. Where there are inconsistencies in the application of law in the similar cases retrieved, a people's courts may resolve [the situation] by comprehensively [considering] the levels of the courts [adjudicating these similar cases], the times of their adjudications, whether they have been discussed by the adjudication committees, and other factors and by using the mechanism for resolving differences in the application of law in accordance with the *Implementing Measures of the Supreme People's Court on the Establishment of the Mechanism for Resolving Differences in the Application of Law*[29] and other prescriptive [documents].

十二、各级人民法院应当积极推进类案检索工作，加强技术研发和应用培训，提升类案推送的智能化、精准化水平。

12. People's courts at all levels should actively promote the work on searching for similar cases, strengthen the research and development of [related] technology and the training on its application, and increase the levels of [artificial] intelligence and precision of the push [technology] for similar cases.

各高级人民法院应当充分运用现代信息技术，建立审判案例数据库，[30] 为全国统一、权威的审判案例数据库建设奠定坚实基础。

All high people's courts should make full use of modern information technology to establish databases of adjudicated cases,[31] laying a solid foundation for the construction of a national, unified, and authoritative database of adjudicated cases.

十三、各级人民法院应当定期归纳整理类案检索情况，通过一定形式在本院或者辖区法院公开，供法官办案参考，并报上一级人民法院审判管理部门备案。

13. Each people's court at each level should regularly summarize and sort out details about searches for similar cases, publicize [these searches], in a certain form, in the court or [any of] the courts in the [same] jurisdiction for judges' reference [when] handling cases, and report [these searches] to the adjudication management department of the people's court at the next higher level for recordation.

十四、本意见自2020年7月31日起试行。■

14. This [set of] Opinions shall be implemented on a trial basis from July 31, 2020. ■

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* 此中法连*聚焦*™的引用是：熊美英博士，《最高人民法院关于统一法律适用加强类案检索的指导意见（试行）》与相关注解，《中国法律连接》，第10期，第71页（2020年9月），*亦见于*斯坦福法学院中国指导性案例项目，中法连*聚焦*™，2020年9月，http://cgc.law.stanford.edu/zh-hans/clc-spotlight/clc-10-202009-others-8-mei-gechlik。载于本文中的信息和意见作者对其负责。它们并不一定代表中国指导性案例项目的工作或意见。关于该指导意见的原文，见《最高人民法院关于统一法律适用加强类案检索的指导意见（试行）》，2020年7月27日公布，2020年7月31日起施行，http://www.court.gov.cn/fabu-xiangqing-243981.html。

** The citation of this CLC *Spotlight*™ is: Dr. Mei Gechlik, Guiding Opinions of the Supreme People's Court on Unifying the Application of Law and Strengthening the Search for Similar Cases (Trial Implementation) *and Related Annotations*, 10 China Law Connect 71 (Sept. 2020), *also available at* Stanford Law School China Guiding Cases Project, CLC *Spotlight*™, Sept. 2020, http://cgc.law.stanford.edu/clc-spotlight/clc-10-202009-others-8-mei-gechlik. The information and views set out in this piece are the responsibility of the author and do not necessarily reflect the work or views of the China Guiding Cases Project.

For the original, Chinese version of the Guiding Opinions, see 《最高人民法院关于统一法律适用加强类案检索的指导意见（试行）》 (*Guiding Opinions of the Supreme People's Court on Unifying the Application of Law and Strengthening the Search for Similar Cases (Trial Implementation)*), issued on July 27, 2020, effective as of July 31, 2020, http://www.court.gov.cn/fabu-xiangqing-243981.html.

This English translation of the Guiding Opinions was prepared by Dr. Mei Gechlik; it was finalized by her and Dimitri Phillips. Minor editing, such as splitting long paragraphs, adding a few words included in square brackets and boldfacing the headings, was done to make the piece more comprehensible to readers. The translated text is otherwise a direct translation of the original text released by the Supreme People's Court.

注解 | Annotations

[27] For a discussion of "explanations and clarifications" formally provided by courts, see 蔡虹(CAI Hong), 释明权：基础透视与制度构建 (*The Authority to Explain and Clarify: Basic Perspectives and the Construction of the System*), 《法学评论》 (Law Review), Issue 1 (2005), old.civillaw.com.cn/article/default.asp?id=37693.

[28] 《最高人民法院关于建立法律适用分歧解决机制的实施办法》，2019年9月9日由最高人民法院审判委员会通过，2019年10月11日公布，2019年10月28日起施行，http://www.dlhsfy.gov.cn/court/html/2019/flwgcx_1029/1269.html。

[29] 《最高人民法院关于建立法律适用分歧解决机制的实施办法》 (*Implementing Measures of the Supreme People's Court on the Establishment of the Mechanism for Resolving Differences in the Application of Law*), passed by the Adjudication Committee of the Supreme People's Court on Sept. 9, 2019, issued on Oct. 11, 2019, effective as of Oct. 28, 2019, http://www.dlhsfy.gov.cn/court/html/2019/flwgcx_1029/1269.html.

[30] 这意味着通过其他方法（例如司法调解）解决的案件不包括在这数据库内。有关在司法调解中使用先前案例的讨论，见朴艳红博士、江和平法官，案例在司法调解中的运用—基于知识产权系列案件的分析，《中国法律连接》，第4期，第11页（2019年3月），*亦见于*斯坦福法学院中国指导性案例项目，2019年3月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-4-201903-27-piao-jiang。

[31] This suggests that cases resolved by other methods, such as judicial mediation, are excluded. For a discussion of using prior cases in judicial mediation, see Dr. PIAO Yanhong & Judge JIANG Heping, *The Use of Cases in Judicial Mediation——Based on an Analysis of a Series of Intellectual Property Disputes*, 4 China Law Connect 1 (Mar. 2019), *also available at* Stanford Law School China Guiding Cases Project, Mar. 2019, http://cgc.law.stanford.edu/commentaries/clc-4-201903-27-piao-jiang.

> *"检索到的类案为指导性案例的，人民法院应当参照作出裁判，但[…]"*
>
> ***"Where a similar case that has been retrieved is a Guiding Case, a people's court should reference and imitate it to render a ruling or judgment, unless […]"***

> *"[…]人民法院应当在裁判文书说理中回应是否参照并说明理由[。]"*
>
> ***"[…] a people's court should, in the reasoning of the ruling or judgment, respond as to whether [the court] referenced and imitated the Guiding Case [in the adjudication of the case] and explain [the court's] reasons."***

> *"各高级人民法院应当充分运用现代信息技术，建立审判案例数据库，为全国统一、权威的审判案例数据库建设奠定坚实基础。"*
>
> ***"All high people's courts should make full use of modern information technology to establish databases of adjudicated cases, laying a solid foundation for the construction of a national, unified, and authoritative database of adjudicated cases."***

附录1

《最高人民法院关于案例指导工作的规定》

（最高人民法院审判委员会于
2010年11月15日讨论通过
2010年11月26日公布）

为总结审判经验，统一法律适用，提高审判质量，维护司法公正，根据《中华人民共和国人民法院组织法》等法律规定，就开展案例指导工作，制定本规定。

第一条

对全国法院审判、执行工作具有指导作用的指导性案例，由最高人民法院确定并统一发布。

第二条

本规定所称指导性案例，是指裁判已经发生法律效力，并符合以下条件的案例：

（一）社会广泛关注的；
（二）法律规定比较原则的；
（三）具有典型性的；
（四）疑难复杂或者新类型的；
（五）其他具有指导作用的案例。

第三条

最高人民法院设立案例指导工作办公室，负责指导性案例的遴选、审查和报审工作。

第四条

最高人民法院各审判业务单位对本院和地方各级人民法院已经发生法律效力的裁判，认为符合本规定第二条规定的，可以向案例指导工作办公室推荐。

各高级人民法院、解放军军事法院对本院和本辖区内人民法院已经发生法律效力的裁判，认为符合本规定第二条规定的，经本院审判委员会讨论决定，可以向最高人民法院案例指导工作办公室推荐。

Appendix 1

Provisions of the Supreme People's Court Concerning Work on Case Guidance

(Discussed and Passed by the
Adjudication Committee of the Supreme People's Court on
November 15, 2010 and Issued on November 26, 2010)

In order to summarize adjudication experiences, unify the application of law, enhance adjudication quality, and safeguard judicial impartiality, [the Supreme People's Court], pursuant to legal provisions, including the *Organic Law of the People's Courts of the People's Republic of China*, [hereby] formulates this [set of] Provisions to carry out work on case guidance.

Article 1

Guiding Cases, which have guiding effect on adjudication and enforcement work in courts throughout the country, shall be determined and uniformly released by the Supreme People's Court.

Article 2

The [term] "Guiding Cases" referred to in this [set of] Provisions means rulings and judgments that have come into legal effect and meet the following requirements:

(1) are of widespread concern to society;
(2) [involve] legal provisions that are of relatively general nature;
(3) are of a typical nature;
(4) are difficult, complicated, or of new types; [or]
(5) other cases which have guiding effect.

Article 3

The Supreme People's Court shall establish the Office for the Work on Case Guidance, which shall be in charge of such work as the selection, review, and submission for approval of Guiding Cases.

Article 4

Each adjudication unit of the Supreme People's Court may recommend to the Office for the Work on Case Guidance any ruling or judgment of the [Supreme People's] Court, or of any local people's court at any level, [provided the said ruling or judgment] has come into legal effect and is deemed [by the said unit] to meet the requirements set out in Article 2 of this [set of] Provisions.

Each high people's court and each military court of the People's Liberation Army may, following discussion and a decision by the adjudication committee of the said court, recommend to the Office for the Work on Case Guidance of the Supreme People's Court any ruling or judgment of the said court, or of any people's court in its jurisdiction, [provided the said ruling or judgment] has come into legal effect and is deemed [by the recommending court] to meet the requirements set out in Article 2 of this [set of] Provisions.

中级人民法院、基层人民法院对本院已经发生法律效力的裁判，认为符合本规定第二条规定的，经本院审判委员会讨论决定，层报高级人民法院，建议向最高人民法院案例指导工作办公室推荐。

[Each] intermediate people's court and [each] basic people's court may, following discussion and a decision by the adjudication committee of the said court, report to the high people's court [of its jurisdiction] level by level and suggest that [the high people's court] recommend to the Office for the Work on Case Guidance of the Supreme People's Court a ruling or judgment of the said court that has come into legal effect and is deemed [by the said court] to meet the requirements set out in Article 2 of this [set of] Provisions.

第五条

人大代表、政协委员、专家学者、律师，以及其他关心人民法院审判、执行工作的社会各界人士对人民法院已经发生法律效力的裁判，认为符合本规定第二条规定的，可以向作出生效裁判的原审人民法院推荐。

Article 5

Representatives of people's congresses, members of committees of the political consultative conference, experts, scholars, lawyers, and other people from all circles of society who care about the adjudication and enforcement work of people's courts may recommend any ruling or judgment of any people's court that has come into legal effect and is deemed [by the recommender] to meet the requirements set out in Article 2 of this [set of] Provisions to the original people's court which rendered such effective ruling or judgment.

第六条

案例指导工作办公室对于被推荐的案例，应当及时提出审查意见。符合本规定第二条规定的，应当报请院长或者主管副院长提交最高人民法院审判委员会讨论决定。

Article 6

The Office for the Work on Case Guidance should promptly put forward [its] review opinions on recommended cases. Where [a case] meets the requirements set out in Article 2 of this [set of] Provisions, [the Office] should report to the President or the Vice President–in-Charge and request that [he or she] submit [the case] to the Adjudication Committee of the Supreme People's Court for discussion and a decision.

最高人民法院审判委员会讨论决定的指导性案例，统一在《最高人民法院公报》、最高人民法院网站、《人民法院报》上以公告的形式发布。

The Guiding Cases discussed and decided upon by the Adjudication Committee of the Supreme People's Court shall be uniformly released in the form of announcements in the *Gazette of the Supreme People's Court*, on the website of the Supreme People's Court, and in the *People's Court Daily*.

第七条

最高人民法院发布的指导性案例，各级人民法院审判类似案例时应当参照。

Article 7

People's courts at all levels should reference and imitate the Guiding Cases released by the Supreme People's Court when adjudicating similar cases.

第八条

最高人民法院案例指导工作办公室每年度对指导性案例进行编纂。

Article 8

The Office for the Work on Case Guidance of the Supreme People's Court shall carry out the compilation of Guiding Cases annually.

第九条

本规定施行前，最高人民法院已经发布的对全国法院审判、执行工作具有指导意义的案例，根据本规定清理、编纂后，作为指导性案例公布。

Article 9

Those cases that have significance in guiding the adjudication and enforcement work of courts nationwide and that have been released by the Supreme People's Court prior to the implementation of this [set of] Provisions shall be sorted and compiled in accordance with this [set of] Provisions and then issued as Guiding Cases.

第十条

本规定自公布之日起施行。■

Article 10

This [set of] Provisions shall be implemented from the date of issuance. ■

附录2

《〈最高人民法院关于案例指导工作的规定〉实施细则》

（最高人民法院审判委员会于
2015年4月27日讨论通过
2015年5月13日公布）

第一条

为了具体实施《最高人民法院关于案例指导工作的规定》，加强、规范和促进案例指导工作，充分发挥指导性案例对审判工作的指导作用，统一法律适用标准，维护司法公正，制定本实施细则。

第二条

指导性案例应当是裁判已经发生法律效力，认定事实清楚，适用法律正确，裁判说理充分，法律效果和社会效果良好，对审理类似案件具有普遍指导意义的案例。

第三条

指导性案例由标题、关键词、裁判要点、相关法条、基本案情、裁判结果、裁判理由以及包括生效裁判审判人员姓名的附注等组成。指导性案例体例的具体要求另行规定。

第四条

最高人民法院案例指导工作办公室（以下简称案例指导办公室）负责指导性案例的征集、遴选、审查、发布、研究和编纂，以及对全国法院案例指导工作的协调和指导等工作。

最高人民法院各审判业务单位负责指导性案例的推荐、审查等工作，并指定专人负责联络工作。

各高级人民法院负责辖区内指导性案例的推荐、调研、监督等工作。各高级人民法院向最高人民法院推荐的备选指导性案例，应当经审判委员会讨论决定或经审判委员会过半数委员审核同意。

Appendix 2

Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"

(Discussed and Passed by the
Adjudication Committee of the Supreme People's Court on
April 27, 2015 and Issued on May 13, 2015)

Article 1

In order to concretely implement the *Provisions of the Supreme People's Court Concerning Work on Case Guidance*, to strengthen, standardize, and promote work on case guidance, to fully use the guiding effect of Guiding Cases in adjudication work, to unify standards for the application of law, and to safeguard judicial impartiality, [the Supreme People's Court hereby] formulates this [set of] Detailed Implementing Rules.

Article 2

Guiding Cases should be cases whose rulings or judgments have come into legal effect, [in which] facts are clearly determined, law is correctly applied, and reasoning for the adjudication is sufficient, and which [provide] good legal and social outcomes and have universal guiding significance for the adjudication of similar cases.

Article 3

Each Guiding Case is composed of a title, keywords, "Main Points of the Adjudication", "Related Legal Rule(s)", "Basic Facts of the Case", "Results of the Adjudication", "Reasons for the Adjudication", and notes that include the names of the adjudication personnel of the effective ruling or judgment. Specific requirements for the style of Guiding Cases shall be set forth separately.

Article 4

The Office for the Work on Case Guidance of the Supreme People's Court (hereinafter referred to as the "Case Guidance Office") is in charge of various tasks, including the collection, selection, review, release, study, and compilation of Guiding Cases, as well as the coordination and guidance of the work on case guidance [carried out] by courts nationwide.

Each adjudication unit of the Supreme People's Court is in charge of various tasks, including the recommendation and review of Guiding Cases, and shall designate specific personnel responsible for the liaison work.

Each high people's court is in charge of various tasks, including the recommendation, investigation, study, and supervision [of the use] of Guiding Cases in its jurisdiction. Candidate Guiding Cases recommended to the Supreme People's Court by each high people's court should [first] be discussed and decided upon by the adjudication committee [of the said high court] or examined and approved by more than half of the members of the adjudication committee.

中级人民法院、基层人民法院应当通过高级人民法院推荐备选指导性案例，并指定专人负责案例指导工作。

Intermediate people's courts and basic people's courts should recommend candidate Guiding Cases through high people's courts and designate specific personnel responsible for the work on case guidance.

第五条

Article 5

人大代表、政协委员、人民陪审员、专家学者、律师，以及其他关心人民法院审判、执行工作的社会各界人士，对于符合指导性案例条件的案例，可以向作出生效裁判的原审人民法院推荐，也可以向案例指导办公室提出推荐建议。

Representatives of people's congresses, members of committees of the political consultative conference, people's assessors, experts, scholars, lawyers, and other people from all circles of society who care about the adjudication and enforcement work of people's courts may recommend any case that meets the Guiding Case requirements to the original people's court which rendered the effective ruling or judgment and may also make recommendations to the Case Guidance Office.

案例指导工作专家委员会委员对于符合指导性案例条件的案例，可以向案例指导办公室提出推荐建议。

For cases that meet the Guiding Case requirements, members of the Experts Committee for the Work on Case Guidance may make recommendations to the Case Guidance Office.

第六条

Article 6

最高人民法院各审判业务单位、高级人民法院向案例指导办公室推荐备选指导性案例，应当提交下列材料：

Each adjudication unit of the Supreme People's Court and each high people's court should submit the following materials when they recommend a candidate Guiding Case to the Case Guidance Office:

（一）《指导性案例推荐表》；
（二）按照规定体例编写的案例文本及其编选说明；
（三）相关裁判文书。

(1) the *Guiding Case Recommendation Form*;
(2) the text of the case that is written in accordance with the prescribed style and an explanation of the edited and selected text; and
(3) the related ruling or judgment.

以上材料需要纸质版一式三份，并附电子版。

Three paper copies of [each of] the above materials, along with an electronic version, are required.

推荐法院可以提交案件审理报告、相关新闻报道及研究资料等。

The recommending court may submit [other materials], including a report on the adjudication of the case, as well as related news reports and research information.

第七条

Article 7

案例指导办公室认为有必要进一步研究的备选指导性案例，可以征求相关国家机关、部门、社会组织以及案例指导工作专家委员会委员、专家学者的意见。

For a candidate Guiding Case that the Case Guidance Office considers it necessary to research further, [the Office] may seek opinions from relevant organs and departments of the State, social organizations, members of the Experts Committee for the Work on Case Guidance, and [other] experts and scholars.

第八条

Article 8

备选指导性案例由案例指导办公室按照程序报送审核。经最高人民法院审判委员会讨论通过的指导性案例，印发各高级人民法院，并在《最高人民法院公报》《人民法院报》和最高人民法院网站上公布。

Candidate Guiding Cases shall be submitted by the Case Guidance Office for examination in accordance with [relevant] procedures. The Guiding Cases discussed and passed by the Adjudication Committee of the Supreme People's Court shall be printed for distribution to each high people's court and issued in the *Gazette of the Supreme People's Court*, in the *People's Court Daily*, and on the website of the Supreme People's Court.

第九条

各级人民法院正在审理的案件，在基本案情和法律适用方面，与最高人民法院发布的指导性案例相类似的，应当参照相关指导性案例的裁判要点作出裁判。

Article 9

Where a case being adjudicated is, in terms of the basic facts and application of law, similar to a Guiding Case released by the Supreme People's Court, the [deciding] people's court at any level should reference and imitate the "Main Points of the Adjudication" of that relevant Guiding Case to render its ruling or judgment.

第十条

各级人民法院审理类似案件参照指导性案例的，应当将指导性案例作为裁判理由引述，但不作为裁判依据引用。

Article 10

Where a people's court at any level references and imitates a Guiding Case when adjudicating a similar case, [it] should quote the Guiding Case as a reason for its adjudication, but not cite [the Guiding Case] as the basis for its adjudication.

第十一条

在办理案件过程中，案件承办人员应当查询相关指导性案例。在裁判文书中引述相关指导性案例的，应在裁判理由部分引述指导性案例的编号和裁判要点。

公诉机关、案件当事人及其辩护人、诉讼代理人引述指导性案例作为控（诉）辩理由的，案件承办人员应当在裁判理由中回应是否参照了该指导性案例并说明理由。

Article 11

In the process of handling a case, the personnel handling the case should inquire about relevant Guiding Cases. Where a relevant Guiding Case is quoted in the adjudication document, [the personnel] should, in the part [of the document where they provide] reasons for their adjudication, quote the serial number and the "Main Points of the Adjudication" of the Guiding Case.

Where a public prosecution organ, a party to a case or his defender, or a litigation agent quotes a Guiding Case as a ground [for the] prosecution (litigation) or defense, the personnel handling the case should, in the reasons for the adjudication, respond as to whether [they] referenced and imitated the Guiding Case [in the adjudication of the case] and explain their reasons.

第十二条

指导性案例有下列情形之一的，不再具有指导作用：

（一）与新的法律、行政法规或者司法解释相冲突的；
（二）为新的指导性案例所取代的。

Article 12

A Guiding Case no longer has guiding effect under any of the following circumstances:

(1) [the Guiding Case] is in conflict with a new law, administrative regulation, or judicial interpretation;
(2) [the Guiding Case] is replaced with a new Guiding Case.

第十三条

最高人民法院建立指导性案例纸质档案与电子信息库，为指导性案例的参照适用、查询、检索和编纂提供保障。

Article 13

The Supreme People's Court shall establish paper archives and an electronic information base for Guiding Cases to safeguard the application by reference and imitation, inquiry about, search for, and compilation of the Guiding Cases.

第十四条

各级人民法院对于案例指导工作中做出突出成绩的单位和个人，应当依照《中华人民共和国法官法》等规定给予奖励。

Article 14

People's courts at all levels should, in accordance with provisions, including the *Judges Law of the People's Republic of China*, give rewards to those units and individuals that have made outstanding achievements in the work on case guidance.

第十五条

本实施细则自印发之日起施行。■

Article 15

This [set of] Detailed Implementing Rules shall be implemented from the date of its printing for distribution. ■

中国指导性案例项目（“CGCP”）的成就得益于其拥有200名志愿者的强大团队，当中有来自世界各地的学生、专业翻译和律师。

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徐工集团工程机械股份有限公司诉成都川交工贸有限责任公司等买卖合同纠纷案

XCMG Construction Machinery Co., Ltd. v. Chengdu Chuanjiao Industry and Trade Co., Ltd. et al., A Dispute over a Sale and Purchase Contract

指导案例15号
（最高人民法院审判委员会讨论通过
2013年1月31日发布）*

Guiding Case No. 15
(Discussed and Passed by the Adjudication Committee of the Supreme People's Court
Released on January 31, 2013)**

关键词

民事
关联公司
人格混同
连带责任

Keywords

Civil
Affiliated Companies
Commingling of Personalities
Joint and Several Liability

裁判要点

1. 关联公司的人员、业务、财务等方面交叉或混同，导致各自财产无法区分，丧失独立人格的，构成人格混同。

2. 关联公司人格混同，严重损害债权人利益的，关联公司相互之间对外部债务承担连带责任。

Main Points of the Adjudication

1. The overlap or commingling of personnel, business, finances, and other aspects of affiliated companies that leads to the impossibility of separating out property and the loss of independent personalities constitutes the commingling of personalities.

2. Where affiliated companies commingle personalities and seriously harm the interests of their creditors, the affiliated companies bear joint and several liability among themselves for the external debts.

相关法条

《中华人民共和国民法通则》第四条[1]

《中华人民共和国公司法》第三条第一款、第二十条第三款[3]

Related Legal Rule(s)

Article 4 of the *General Principles of the Civil Law of the People's Republic of China*[2]

Article 3 Paragraph 1 and Article 20 Paragraph 3 of the *Company Law of the People's Republic of China*[4]

基本案情

原告徐工集团工程机械股份有限公司（以下简称徐工机械公司）诉称：成都川交工贸有限责任公司（以下简称川交工贸公司）拖欠其货款未付，而成都川

Basic Facts of the Case

Plaintiff XCMG Construction Machinery Co., Ltd.[5] (hereinafter referred to as "XCMG Company") claimed: Chengdu Chuanjiao Industry and Trade Co., Ltd.[6] (hereinafter referred to as "Chuanjiao Industry and Trade Company") was behind in its payment for goods. Chengdu Chuanjiao

交工程机械有限责任公司（以下简称川交机械公司）、四川瑞路建设工程有限公司（以下简称瑞路公司）与川交工贸公司人格混同，三个公司实际控制人王永礼以及川交工贸公司股东等人的个人资产与公司资产混同，均应承担连带清偿责任。请求判令：川交工贸公司支付所欠货款10916405.71元及利息；川交机械公司、瑞路公司及王永礼等个人对上述债务承担连带清偿责任。

Engineering Machinery Co., Ltd.[7] (hereinafter referred to as "Chuanjiao Machinery Company"), Sichuan Ruilu Construction Engineering Co., Ltd.[8] (hereinafter referred to as "Ruilu Company"), and Chuanjiao Industry and Trade Company had commingled personalities. The personal property of the the actual control person of the three companies, WANG Yongli, and [the personal property of] the shareholders of Chuanjiao Industry and Trade Company, were commingled with the assets of the companies; they should all bear joint and several liability for the clearance of debts. [Plaintiff XCMG Company] requested that Chuanjiao Industry and Trade Company be ordered to pay the owed amount of RMB 10,916,405.71 plus interest and that Chuanjiao Machinery Company, Ruilu Company, WANG Yongli, and other individuals bear joint and several liability for the clearance of the aforementioned debts.

被告川交工贸公司、川交机械公司、瑞路公司辩称：三个公司虽有关联，但并不混同，川交机械公司、瑞路公司不应对川交工贸公司的债务承担清偿责任。

Defendants Chuanjiao Industry and Trade Company, Chuanjiao Machinery Company, and Ruilu Company defended their position, claiming: although the three companies were affiliated, they were not commingled; Chuanjiao Machinery Company and Ruilu Company should not bear liability for the clearance of the debts of Chuanjiao Industry and Trade Company.

王永礼等人辩称：王永礼等人的个人财产与川交工贸公司的财产并不混同，不应为川交工贸公司的债务承担清偿责任。

WANG Yongli et al. defended their position, claiming: the personal property of WANG Yongli et al. was not commingled with the property of Chuanjiao Industry and Trade Company; [WANG Yongli et al.] should not bear liability for the clearance of the debts of Chuanjiao Industry and Trade Company.

法院经审理查明：川交机械公司成立于1999年，股东为四川省公路桥梁工程总公司二公司、王永礼、倪刚、杨洪刚等。2001年，股东变更为王永礼、李智、倪刚。2008年，股东再次变更为王永礼、倪刚。瑞路公司成立于2004年，股东为王永礼、李智、倪刚。2007年，股东变更为王永礼、倪刚。川交工贸公司成立于2005年，股东为吴帆、张家蓉、凌欣、过胜利、汤维明、武竞、郭印，何万庆2007年入股。2008年，股东变更为张家蓉（占90%股份）、吴帆（占10%股份），其中张家蓉系王永礼之妻。在公司人员方面，三个公司经理均为王永礼，财务负责人均为凌欣，出纳会计均为卢鑫，工商手续经办人均为张梦；三个公司的管理人员存在交叉任职的情形，如过胜利兼任川交工贸公司副总经理和川交机械公司销售部经理的职务，且免去过胜利川交工贸公司副总经理职务的决定系由川交机械公司作出；吴帆既是川交工贸公司的法定代表人，又是川交机械公司的综合部行政经理。在公司业务方面，三个公司在工商行政管理部门登记的经营范围均涉及工程机械且部分重合，其中川交工贸公司的经营范围被

The court handled the case and ascertained: Chuanjiao Machinery Company was established in 1999; its shareholders were the Second Sichuan Road and Bridge Construction Company,[9] WANG Yongli, NI Gang, YANG Honggang, and others. In 2001, the shareholders changed to WANG Yongli, LI Zhi, and NI Gang. In 2008, the shareholders changed again to WANG Yongli and NI Gang.

Ruilu Company was established in 2004; its shareholders were WANG Yongli, LI Zhi, and NI Gang. In 2007, the shareholders changed to WANG Yongli and NI Gang. Chuanjiao Industry and Trade Company was established in 2005; its shareholders were WU Fan, ZHANG Jiarong, LING Xin, GUO Shengli, TANG Weiming, WU Jing, and GUO Yin. HE Wanqing became a shareholder in 2007. In 2008, the shareholders changed to ZHANG Jiarong (owning a 90% share) and WU Fan (owning a 10% share); with ZHANG Jiarong being WANG Yongli's wife.

In terms of company personnel, for all three companies, the company manager was WANG Yongli, the person in charge of finances was LING Xin, the cashier accountant was LU Xin, and the manager of industry and commerce procedures was ZHANG Meng. The management personnel of all three companies had overlapping appointments. For example, GUO Shengli concurrently held the positions of deputy general manager of Chuanjiao Industry and Trade Company and the sales manager of Chuanjiao Machinery Company, and the decision to relieve GUO Shengli of his position as deputy general manager of Chuanjiao Industry and

川交机械公司的经营范围完全覆盖；川交机械公司系徐工机械公司在四川地区(攀枝花除外)的唯一经销商，但三个公司均从事相关业务，且相互之间存在共用统一格式的《销售部业务手册》、《二级经销协议》、结算账户的情形；三个公司在对外宣传中区分不明，2008年12月4日重庆市公证处出具的《公证书》记载：通过因特网查询，川交工贸公司、瑞路公司在相关网站上共同招聘员工，所留电话号码、传真号码等联系方式相同；川交工贸公司、瑞路公司的招聘信息，包括大量关于川交机械公司的发展历程、主营业务、企业精神的宣传内容；部分川交工贸公司的招聘信息中，公司简介全部为对瑞路公司的介绍。在公司财务方面，三个公司共用结算账户，凌欣、卢鑫、汤维明、过胜利的银行卡中曾发生高达亿元的往来，资金的来源包括三个公司的款项，对外支付的依据仅为王永礼的签字；在川交工贸公司向其客户开具的收据中，有的加盖其财务专用章，有的则加盖瑞路公司财务专用章；在与徐工机械公司均签订合同、均有业务往来的情况下，三个公司于2005年8月共同向徐工机械公司出具《说明》，称因川交机械公司业务扩张而注册了另两个公司，要求所有债权债务、销售量均计算在川交工贸公司名下，并表示今后尽量以川交工贸公司名义进行业务往来；2006年12月，川交工贸公司、瑞路公司共同向徐工机械公司出具《申请》，以统一核算为由要求将2006年度的业绩、账务均计算至川交工贸公司名下。

Trade Company was made by Chuanjiao Machinery Company. [For another example,] WU Fan was both the statutory representative of Chuanjiao Industry and Trade Company and the executive manager of the General Department of Chuanjiao Machinery Company.

In terms of company business, the scopes of the three companies' businesses as registered with the industry and commerce administration departments involved construction machinery and partially overlapped. The business scope of Chuanjiao Industry and Trade Company was completely covered by that of Chuanjiao Machinery Company. Chuanjiao Machinery Company was the sole distributor for XCMG Company in the [entire] Sichuan region (excluding Panzhihua [Municipality]). But the three companies all carried out related business, and used [sets of] uniformly formatted *Business Manual of the Sales Department, Secondary Distribution Agreement*, and settlement accounts. When publicized externally, the three companies were not clearly distinguished. On December 4, 2008, the Notary Office of Chongqing Municipality issued a *Notarial Certificate*, which recorded:

> According to an Internet inquiry, Chuanjiao Industry and Trade Company and Ruilu Company jointly recruited employees on relevant websites, and the telephone numbers, fax numbers, and other contact methods that they left were the same. The recruitment information for Chuanjiao Industry and Trade Company and Ruilu Company included a large amount of promotional content on Chuanjiao Machinery Company's course of development, primary business, and corporate spirit; a part of Chuanjiao Industry and Trade Company's recruitment information was entirely dedicated to introducing Ruilu Company.

In terms of company finances, the three companies shared a common settlement account. There were transactions reaching amounts as high as hundreds of millions of renminbi [conducted] through the bank cards of LING Xin, LU Xin, TANG Weiming, and GUO Shengli. The source of capital included the funds of the three companies. WANG Yongli's signature was the sole basis of the external payments [made]; some of the receipts issued by Chuanjiao Industry and Trade Company to its customers carried its own financial seal, while others carried Ruilu Company's financial seal. Under the circumstances where all [three companies] had signed contracts and conducted business transactions with XCMG Company, the three companies jointly issued [a single document titled] *Instructions* to XCMG Company in August 2005, stating that Chuanjiao Machinery Company had expanded its business and registered two other companies. [Therefore,] they requested that all claims and debts and sales volume be calculated in the name of Chuanjiao Industry and Trade Company, and expressed that thereafter all business transactions be conducted in the name of Chuanjiao Industry and Trade Company as much as possible. In December 2006, Chuanjiao Industry and Trade Company and Ruilu Company jointly issued a [single document titled] *Application* to XCMG Company, requesting, for the reason of unified accounting, that the

business performance and accounts for 2006 be calculated under the name of Chuanjiao Industry and Trade Company.

另查明，2009年5月26日，卢鑫在徐州市公安局经侦支队对其进行询问时陈述：川交工贸公司目前已经垮了，但未注销。又查明徐工机械公司未得到清偿的货款实为10511710.71元。

[The court] also ascertained that on May 26, 2009, LU Xin stated, while being questioned by the Economic Investigation Branch of the Public Security Bureau of Xuzhou Municipality:

> Chuanjiao Industry and Trade Company has already collapsed[10] but its registration has not been cancelled.

[The court] further ascertained that the payment for goods not yet received by XCMG Company was actually RMB 10,511,710.71.

裁判结果

Results of the Adjudication

江苏省徐州市中级人民法院于2011年4月10日作出（2009）徐民二初字第0065号民事判决：[11] 一、川交工贸公司于判决生效后10日内向徐工机械公司支付货款10511710.71元及逾期付款利息；二、川交机械公司、瑞路公司对川交工贸公司的上述债务承担连带清偿责任；三、驳回徐工机械公司对王永礼、吴帆、张家蓉、凌欣、过胜利、汤维明、郭印、何万庆、卢鑫的诉讼请求。宣判后，川交机械公司、瑞路公司提起上诉，认为一审判决认定三个公司人格混同，属认定事实不清；认定川交机械公司、瑞路公司对川交工贸公司的债务承担连带责任，缺乏法律依据。徐工机械公司答辩请求维持一审判决。江苏省高级人民法院于2011年10月19日作出（2011）苏商终字第0107号民事判决：[12] 驳回上诉，维持原判。

On April 10, 2011, the Intermediate People's Court of Xuzhou Municipality, Jiangsu Province, rendered the (2009) Xu Min Er Chu Zi No. 0065 Civil Judgment:[13]

1. [The court orders] Chuanjiao Industry and Trade Company to pay, within 10 days of the judgment's coming into effect,[14] XCMG Company RMB 10,511,710.71 as payment for goods, as well as interest on the overdue payment.

2. [The court orders] Chuanjiao Machinery Company and Ruilu Company to bear joint and several liability for the clearance of the aforementioned debts of Chuanjiao Industry and Trade Company.

3. [The court rejects] XCMG Company's litigation requests against WANG Yongli, WU Fan, ZHANG Jiarong, LING Xin, GUO Shengli, TANG Weiming, GUO Yin, HE Wanqing, and LU Xin.

After the judgment was pronounced, Chuanjiao Machinery Company and Ruilu Company appealed, arguing that in the first-instance judgment, [the court's] determination that the personalities of the three companies were commingled was a type of unclear ascertainment of facts and [the court's] determination that Chuanjiao Machinery Company and Ruilu Company bear joint and several liability for the debts of Chuanjiao Industry and Trade Company lacked legal basis. XCMG Company replied, requesting that the first-instance judgment be upheld. On October 19, 2011, the High People's Court of Jiangsu Province rendered the (2011) Su Shang Zhong Zi No. 0107 Civil Judgment:[15] [the court] rejects the appeal and upholds the original judgment.

裁判理由[16]

Reasons for the Adjudication[17]

法院生效裁判认为：针对上诉范围，二审争议焦点为川交机械公司、瑞路公司与川交工贸公司是否人格混同，应否对川交工贸公司的债务承担连带清偿责任。

In its effective judgment, the court opined:[18] with respect to the scope of the appeal, the focal points of the dispute in the second instance are whether Chuanjiao Machinery Company and Ruilu Company have commingled personalities with Chuanjiao Industry and Trade Company and whether they should bear joint and several liability for the clearance of the debts of Chuanjiao Industry and Trade Company.

川交工贸公司与川交机械公司、瑞路公司人格混同。一是三个公司人员混同。三个公司的经理、财务负责人、出纳会计、工商手续经办人均相同，其他管理人员亦存在交叉任职的情形，川交工贸公司的人事任免存在由川交机械公司决定的情形。二是三个公司业务混同。三个公司实际经营中均涉及工程机械相关业务，经销过程中存在共用销售手册、经销协议的情形；对外进行宣传时信息混同。三是三个公司财务混同。三个公司使用共同账户，以王永礼的签字作为具体用款依据，对其中的资金及支配无法证明已作区分；三个公司与徐工机械公司之间的债权债务、业绩、账务及返利均计算在川交工贸公司名下。因此，三个公司之间表征人格的因素（人员、业务、财务等）高度混同，导致各自财产无法区分，已丧失独立人格，构成人格混同。

Chuanjiao Industry and Trade Company has commingled personalities with Chuanjiao Machinery Company and Ruilu Company. First, the three companies commingle personnel. The three companies have the same general manager, person in charge of finances, cashier accountant, and manager of industry and commerce procedures. Other management personnel are also in a situation of having overlapping appointments. The appointment and dismissal of Chuanjiao Industry and Trade Company's personnel is in a situation of being determined by Chuanjiao Machinery Company. Second, the three companies commingle business. The actual operations of the three companies all involve businesses related to construction machinery, and during the distribution process, there are situations where sales manuals and distribution agreements are shared. There is commingling of information in their public announcements. Third, the three companies commingle finances. The three companies use shared accounts and WANG Yongli's signature serves as the basis for the specific use of funds. [Thus, the companies] are unable to prove that their funds and allocations are separate [from one another's]. The claims and debts, company performance, accounts, and rebates between the three companies and XCMG Company are all calculated under the name of Chuanjiao Industry and Trade Company. Hence, the factors (personnel, business, finances, etc.) characterizing personalities of the three companies show a high degree of commingling, resulting in an inability to distinguish individual property. [The three companies] have already lost their independent personalities, constituting the commingling of personalities.

川交机械公司、瑞路公司应当对川交工贸公司的债务承担连带清偿责任。公司人格独立是其作为法人独立承担责任的前提。《中华人民共和国公司法》（以下简称《公司法》）第三条第一款规定："公司是企业法人，有独立的法人财产，享有法人财产权。公司以其全部财产对公司的债务承担责任。"公司的独立财产是公司独立承担责任的物质保证，公司的独立人格也突出地表现在财产的独立上。当关联公司的财产无法区分，丧失独立人格时，就丧失了独立承担责任的基础。《公司法》第二十条第三款规定："公司股东滥用公司法人独立地位和股东有限责任，逃避债务，严重损害公司债权人利益的，应当对公司债务承担连带责任。"本案中，三个公司虽在工商登记部门登记为彼此独立的企业法人，但实际上相互之间界线模糊、人格混同，其中川交工贸公司承担所有关联公司的债务却无力清偿，又使其他关联公司逃避巨额债务，严重损害了债权人的利益。上述行为违背了法人制度设立的宗旨，违背了诚实信用原则，其行为本质和危害结果与《公司法》第二十条第三款规定的情形相当，故参照《公司法》第二

Chuanjiao Machinery Company and Ruilu Company should bear joint and several liability for the clearance of Chuanjiao Industry and Trade Company's debts. A company's independent bearing of liability as a legal person is premised upon its independent personality. Article 3 Paragraph 1 of the *Company Law of the People's Republic of China* (hereinafter referred to as the "*Company Law*") provides:

> A company is an enterprise legal person, has independent property of a legal person, and enjoys property rights of a legal person. A company is liable for its debts to the extent of its entire property.

A company's independent property is the material guarantee of its independent bearing of liability. The independent personality of a company is also manifested prominently in the independence of property. When affiliated companies are unable to separate their property and lose their independent personalities, they lose the basis for bearing liability independently. Article 20 Paragraph 3 of the *Company Law* provides:

> Shareholders of a company who abuse the independent status of the corporate legal person and the limited liability of shareholders, evade debts, and seriously harm the interests of the company's creditors should bear joint and several liability for the company's debts.

十条第三款的规定，川交机械公司、瑞路公司对川交工贸公司的债务应当承担连带清偿责任。[19]

In this case, although the three companies were registered at industrial and commercial registration departments as enterprise legal persons independent of each other, they actually have blurry boundaries and commingled personalities among themselves. Chuanjiao Industry and Trade Company bears the debts of all affiliated companies but is unable to clear the debts; it also allows the other affiliated companies to evade huge debts, seriously harming the interests of the creditors. The aforementioned acts violate the purpose of establishing the legal person system and violate the principle of good faith. The nature of [Chuanjiao Industry and Trade Company's] acts and the harmful results are comparable to the situation stated in Article 20 Paragraph 3 of the *Company Law*. Thus, by referring to Article 20 Paragraph 3 of the *Company Law*, [this court opines that] Chuanjiao Machinery Company and Ruilu Company should bear joint and several liability for the clearance of debts of Chuanjiao Industry and Trade Company.[20]

CGCP 备注

CGCP Notes

备注1:

Note 1:

《中华人民共和国民法通则》[21]

第四条

民事活动应当遵循自愿、公平、等价有偿、诚实信用的原则。

***General Principles of the Civil Law of the People's Republic of China*[22]**

Article 4

Civil activities should follow the principles of voluntariness, fairness, exchange of equal values, and good faith.

备注2:

Note 2:

《中华人民共和国公司法》[23]

第三条

公司是企业法人，有独立的法人财产，享有法人财产权。公司以其全部财产对公司的债务承担责任。

有限责任公司的股东以其认缴的出资额为限对公司承担责任；股份有限公司的股东以其认购的股份为限对公司承担责任。

第二十条

公司股东应当遵守法律、行政法规和公司章程，依法行使股东权利，不得滥用股东权利损害公司或者其他股东的利益；不得

***Company Law of the People's Republic of China*[24]**

Article 3

A company is an enterprise legal person, has independent property of a legal person, and enjoys property rights of a legal person. A company is liable for its debts to the extent of its entire property.

A shareholder of a limited liability company is liable for the company to the extent of the amount of the capital contributed by the shareholder. A shareholder of a joint-stock company is liable for the company to the extent of the shares subscribed to by the shareholder.

Article 20

Shareholders of a company should abide by laws, administrative regulations, and articles of association, and should exercise the rights of shareholders in accordance with law. [They] must not abuse the

滥用公司法人独立地位和股东有限责任损害公司债权人的利益。

rights of shareholders to harm the interests of the company or other shareholders. [They] must not abuse the independent status of the corporate legal person and the limited liability of shareholders to harm the interests of the company's creditors.

公司股东滥用股东权利给公司或者其他股东造成损失的，应当依法承担赔偿责任。

Shareholders of a company who abuse the rights of shareholders and cause losses to the company or other shareholders should be liable for compensation in accordance with law.

公司股东滥用公司法人独立地位和股东有限责任，逃避债务，严重损害公司债权人利益的，应当对公司债务承担连带责任。■

Shareholders of a company who abuse the independent status of the corporate legal person and the limited liability of shareholders, evade debts, and seriously harm the interests of the company's creditors should bear joint and several liability for the company's debts. ■

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* 此案例的中文引用是：《徐工集团工程机械股份有限公司诉成都川交工贸有限责任公司等买卖合同纠纷案》，《中国法律连接》，第10期，第85页（2020年9月），*亦见于*斯坦福法学院中国指导性案例项目，中文指导性案例（CGC15），2020年9月，https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-15。
案例原文载于：《中国法院网》，http://www.chinacourt.org/article/detail/2013/02/id/893723.shtml。*亦见*《最高人民法院关于发布第四批指导性案例的通知》，2013年1月31日公布，同日起施行，http://www.chinacourt.org/article/detail/2013/02/id/893718.shtml。除非另有说明，否则所有注释和"CGCP备注"均由中国指导性案例项目添加。

** The citation of this translation of this Guiding Case is: 《徐工集团工程机械股份有限公司诉成都川交工贸有限责任公司等买卖合同纠纷案》 (*XCMG Construction Machinery Co., Ltd. v. Chengdu Chuanjiao Industry and Trade Co., Ltd. et al., A Dispute over a Sale and Purchase Contract*), 10 China Law Connect 85 (Sept. 2020), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC15), Sept. 2020, http://cgc.law.stanford.edu/guiding-cases/guiding-case-15.

The original, Chinese version of this case is available at 《中国法院网》 (www.chinacourt.org), http://www.chinacourt.org/article/detail/2013/02/id/893723.shtml. *See also* 《最高人民法院关于发布第四批指导性案例的通知》 (*Notice of the Supreme People's Court on the Release of the Fourth Batch of Guiding Cases*), issued on and effective as of Jan. 31, 2013, http://www.chinacourt.org/article/detail/2013/02/id/893718.shtml.

This document was prepared by Dimitri Phillips and Dr. Mei Gechlik. Minor editing, such as splitting long paragraphs, adding a few words included in square brackets, and boldfacing the headings, was done to make the piece more comprehensible to readers. Any "CGCP Notes" and any footnotes and endnotes, unless otherwise stated, have been added by the China Guiding Cases Project. The following text is otherwise a direct translation of the original text released by the Supreme People's Court. The China Guiding Cases Project thanks Yale Fu, Oma Lee, Joelle Tjahjadi, Randy Wu, ZHANG Xiaomeng, and ZHANG Xinyu for preparing an earlier translation of this Guiding Case.

[1] 《中华人民共和国民法通则》，1986年4月12日通过和公布，1987年1月1日起施行，并于2009年8月27日修正，同日起施行，http://www.npc.gov.cn/zgrdw/npc/lfzt/rlys/2014-10/28/content_1883354.htm。

[2] 《中华人民共和国民法通则》 (*General Principles of the Civil Law of the People's Republic of China*), passed and issued on Apr. 12, 1986, effective as of Jan. 1, 1987, amended on and effective as of Aug. 27, 2009, http://www.npc.gov.cn/zgrdw/npc/lfzt/rlys/2014-10/28/content_1883354.htm.

[3] 此处引用的《公司法》应指2005年版本，该版本于本指导性案例在2013年发布时、该指导性案例所依据的最终判决作出时已生效。第3、20条在当前有效版本中维持不变。*见*《中华人民共和国公司法》，1993年12月29日通过和公布，1994年7月1日起施行，经四次修正，最新修正于2018年10月26日，同日起施行，http://www.fdi.gov.cn/1800000121_23_74633_0_7.html。

[4] The *Company Law* as cited here should mean the 2005 version, which was in effect when this Guiding Case was released in 2013 and when the final judgment upon which this Guiding Case is based was rendered. Articles 3 and 20 remain the same in the currently effective version. *See* 《中华人民共和国公司法》 (*Company Law of the People's Republic of China*), passed and issued on Dec. 29, 1993, effective as of July 1, 1994, amended four times, most recently on Oct. 26, 2018, effective as of Oct. 26, 2018, http://www.fdi.gov.cn/1800000121_23_74633_0_7.html.

[5] The name "徐工集团工程机械股份有限公司" is translated herein as "XCMG Construction Machinery Co., Ltd." in accordance with the English name appearing in a prominent company database, at https://vip.stock.finance.sina.com.cn/corp/go.php/vCI_CorpInfo/stockid/000425.phtml.

[6] The name "成都川交工贸有限责任公司" is translated herein literally as "Chengdu Chuanjiao Industry and Trade Co., Ltd.". The company does not appear to have an official English name.

[7] The name "成都川交工程机械有限责任公司" is translated herein as "Chengdu Chuanjiao Engineering Machinery Co., Ltd." in accordance with the English name appearing in a prominent company database, at https://www.tianyancha.com/company/2439196666.

[8] The name "四川瑞路建设工程有限公司" is translated herein literally as "Sichuan Ruilu Construction Engineering Co., Ltd.". The company does not appear to have an official English name.

[9] The name "四川省公路桥梁工程总公司二公司" is translated here literally as "Second Sichuan Road and Bridge Construction Company". The company does not appear to have an official English name.

[10] Although the word "垮" is translated here literally as "collapse", it likely means "become insolvent".

[11] 一审判决书尚未找到，有可能已被排除在公布之外。

[12] (2011) 苏商终字第0107号民事判决，2011年10月19日由江苏省高级人民法院作出，全文载于斯坦福法学院中国指导性案例项目网站，http://cgc.law.stanford.edu/zh-hans/judgments/jiangsu-2011-su-shang-zhong-zi-0107-civil-judgment（以下简称"《二审判决》"）。

[13] The first-instance judgment has not been found and may have been excluded from publication.

[14] The original text reads "判决生效" ("the judgment's coming into effect"). According to Article 155 of the *Civil Procedure Law of the People's Republic of China*, judgments and rulings that have come into effect are judgments and rulings of the Supreme People's Court as well as judgments and rulings which, according to law, may not be appealed or which have not been appealed within the prescribed time limit. *See* 《中华人民共和国民事诉讼法》 (*Civil Procedure Law of the People's Republic of China*), passed on, issued on, and effective as of Apr. 9, 1991, amended three times, most recently on June 27, 2017, effective as of July 1, 2017, http://www.moj.gov.cn/Department/content/2018-12/25/357_182594.html.

[15] (2011) 苏商终字第0107号民事判决 ((2011) Su Shang Zhong Zi No. 0107 Civil Judgment), rendered by the High People's Court of Jiangsu Province on Oct. 19, 2011, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/jiangsu-2011-su-shang-zhong-zi-0107-civil-judgment (hereinafter "*Second-Instance Judgment*").

[16] 本部分的黄色亮点由中国指导性案例项目添加，以展示该项目对本指导性案例和其所依据的最终判决（即：《二审判决》，注释12）的比较。以黄色突出显示的表述/信息并不用于最终判决的“本院认为”说理部分。

[17] Yellow highlights included in this section were added by the China Guiding Cases Project to reflect its comparison of this Guiding Case with the final judgment upon which this Guiding Case is based (i.e., *Second-Instance Judgment*, *supra* note 15). Expressions/details highlighted in yellow were not used in the "This Court Opines" reasoning section of the final judgment.

[18] The Chinese text does not specify which court opined. Given the context, this should be the High People's Court of Jiangsu Province.

[19] 本指导性案例没有提供此信息：“生效裁判审判人员：段晓娟、史留芳、魏玮”。*见*《二审判决》，注释12。

[20] This Guiding Case does not provide this information: "Adjudication personnel of the effective judgment: DUAN Xiaojuan, SHI Liufang, and WEI Wei". *See Second-Instance Judgment*, *supra* note 15.

[21] *见*注释1。

[22] *See supra* note 2.

[23] *见*注释3。

[24] *See supra* note 4.

Watching in Silence
《静观》

陈训成

陈训成是中国广东省陶瓷艺术大师，曾获得由中国企业领袖与媒体领袖年会颁发的“影响中国2012年度媒体关注的中青年陶艺家”荣誉称号。他的不同作品获得广东省省级和中国国家级奖项，包括“中国收藏2012年十大艺术陶瓷名品金奖”、“第十五届中国当代陶瓷艺术展实力派类别金奖”、“第十五届中国当代陶瓷艺术展竞赛类别金奖”等。

陈训成的作品曾在海内外多项艺术展、艺术节和文化交流活动中展出，包括韩国举行的第26届亚洲艺术展、北京今日美术馆“就地出发”中国当代陶瓷艺术国际大展、广州美术学院大学城美术馆“中美陶艺家作品展”和法国巴黎三区圣殿礼堂2017巴黎新春中法文化艺术节等。他的作品被中国工艺美术馆、中国陶瓷博物馆、广东美术馆、江西省工艺美术馆等国内著名艺术馆，以及日本、香港及国内多家私人机构所收藏。陈训成多次举办个人展览并不断探索陶瓷文化学术高度，并出版了《陈训成水墨》、《生活的禅》等十来册作品集。

陈训成是中国工艺美术家协会、中国陶瓷工业协会的会员，并担任广东省美术家协会艺术委员会陶艺委员会副主任、广东省陶瓷协会理事、广东省中国画学会理事、粤港澳大湾区美术家联盟理事等要职。同时，他还是广州画院特聘研究员、“广州国家青苗画家培育计划”课题组专家，以及广东技术师范大学客座教授。■

CHEN Xuncheng

CHEN Xuncheng is a master of ceramic art in Guangdong Province, China. He was awarded the honorary title of “Young and Middle-aged Ceramic Artists Influencing China’s Media in 2012” by the Chinese Business and Media Leaders Annual Conference. His different works have won numerous provincial and national awards, including “Gold Award in the 2012 China Collection of Top Ten Artistic Ceramics”, “Gold Award in the 15th China Contemporary Ceramic Art Exhibition (Strongest Performance Category)”, and “Gold Award in the 15th China Contemporary Ceramic Art Exhibition (Competition Category)”.

Mr. Chen’s works have been exhibited at various art exhibitions, festivals, and cultural exchange activities at home and abroad, including the 26th Asian Art Exhibition held in Korea, ST.ART International Exhibition of Chinese Contemporary Ceramic Art held at the Today Art Museum in Beijing, the Chinese and American Ceramic Art Exhibition held at the University Art Museum of Guangzhou Academy of Fine Arts, and the 2017 Chinese New Year Arts and Culture Festival held at the Carreau du Temple in Paris. Mr. Chen’s works have been collected by famous art galleries in China, including the China Arts and Crafts Museum, the China Ceramics Museum, the Guangdong Museum of Art, and the Jiangxi Arts and Crafts Museum, as well as by many private organizations in mainland China, Hong Kong, and Japan. Mr. Chen has organized many individual exhibitions and has been conducting academic research on ceramic culture. He has published more than ten collections of his works, including *CHEN Xuncheng’s Ink* and *Zen of Life*.

Mr. Chen is a member of the China Arts and Crafts Association and the China Ceramics Industry Association. He plays important leadership roles, serving as the deputy director of the Ceramic Art Committee of the Art Committee of Guangdong Artists Association, the director of the Guangdong Ceramics Association, the director of the Chinese Painting Institute of Guangdong Province, and the director of the Guangdong–Hong Kong–Macao Greater Bay Area Artist Union. At the same time, Mr. Chen is also a distinguished research fellow at the Guangzhou Painting Academy, an expert for the “National Cultivation Program for Young Painters in Guangzhou”, and an adjunct professor at Guangdong Polytechnic Normal University. ■