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中国指导性案例项目
斯坦福法学院

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中国与2021年

今年是否会为中国和世界其他地区带来新的方法，增进彼此的了解？答案可从《中国法律连接》中找到。该期刊是一个值得信赖的消息来源，并已经与全球200,000多人分享了鲜为人知的事实和见解。

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Table of Contents
目录

Table of Contents
目录

编辑短笺*
Editor's Note**

熊美英博士
Dr. Mei Gechlik

尊敬的读者：

最高人民法院高级法官分享他对中国《民法典》、司法解释和指导性案例的远见

中国《民法典》（于2021年1月1日生效）的颁布促使最高人民法院（“最高法”）对当时有效的591件司法解释和139件指导性案例作出全面的清理工作，并通过了新的司法解释，以确保《民法典》在中国法院得到统一正确实施。《民法典》是中国第一部以法典命名的法律。法典内有1200多个条款，涉及广泛的法律关系，例如婚姻、继承、收养、合同、担保、物权和侵权责任等。鉴于《民法典》的重要性，它将如何影响司法解释和指导性案例的发展？

为了回答此问题，中国指导性案例项目（“CGCP”）非常荣幸在本期《中国法律连接》（“《中法连》”）中，发表由最高法高级法官兼研究室执行主任郭锋法官撰写的文章。基于其参加《民法典》编纂立法、主管司法解释和指导性案例工作所积累的经验，郭法官对《民法典》时代司法解释与指导性案例的五项重要发展趋势作出分析，并分享其远见。此外，郭法官还对其他方面作出说明，包括：

- 最高法清理现存的司法解释的工作结果；
- 新制定的司法解释的重点；和
- 最高法采取前所未有的一步，决定两个指导性案例（即：指导案例9号和20号）不再“参照”的原因。

Dear Readers,

Senior Judge of the Supreme People's Court Shares His Vision About China's *Civil Code*, Judicial Interpretations, and Guiding Cases

China's promulgation of the *Civil Code* (which entered into effect on January 1, 2021) prompted the Supreme People's Court (the "SPC") to review all of the 591 judicial interpretations and 139 Guiding Cases that were in effect at the time and to adopt new judicial interpretations, in hopes of ensuring the uniform and correct implementation of the *Civil Code* in Chinese courts. The *Civil Code* is China's first national legislation designated as a legal code and has more than 1,200 articles covering a wide range of legal relationships, such as marriages, inheritances, adoptions, contracts, guarantees, property rights, and tort liabilities. Given the importance of the *Civil Code*, how will this shape the development of judicial interpretations and Guiding Cases?

To answer this question, the China Guiding Cases Project (the "CGCP") is very honored to feature in this issue of *China Law Connect* ("*CLC*") an article contributed by Judge GUO Feng, a senior judge of the SPC and the Executive Director of the Court's Research Office. Drawing on his experience accumulated from his participation in the enactment of the *Civil Code* and his supervision of all of the SPC's work related to judicial interpretations and Guiding Cases, Judge Guo shares his vision by analyzing five important trends that the development of judicial interpretations and Guiding Cases will follow in the *Civil Code* era. In addition, Judge Guo explains, *inter alia*:

- the results of the SPC's review of preexisting judicial interpretations;
- the key points of the newly formulated judicial interpretations; and
- the reasons that the SPC took an unprecedented step to decide that two Guiding Cases, namely, Guiding

Case Nos. 9 and 20, will no longer be for "reference and imitation".

例如，关于指导案例20号（《深圳市斯瑞曼精细化工有限公司诉深圳市坑梓自来水有限公司、深圳市康泰蓝水处理设备有限公司侵害发明专利权纠纷案》），郭法官解释说，该指导性案例所基于的法律原则已被确定为不符合《中华人民共和国专利法》相关规定的立法原意。

For example, regarding Guiding Case No. 20 (*Shenzhen Siruiman Fine Chemicals Co., Ltd. v. Shenzhen Kengzi Tap Water Co., Ltd. and Shenzhen Kangtailan Water Treatment Equipment Co., Ltd., A Dispute over Infringement of Invention Patent Rights*), Judge Guo explains how the underlying legal principle of the Guiding Case is now determined to be inconsistent with the original legislative intent of a related provision of the *Patent Law of the People's Republic of China*.

最高法对现存的指导性案例进行的仔细审查标志着一个程序的出现，而如果使用得当，该程序将有助于加强这些案例的发展，并确保这些案例促进中国法律的统一和准确适用。

The SPC's careful review of preexisting Guiding Cases signals the emergence of a process that, if used well, will help strengthen the development of these cases and ensure that they facilitate the uniform and accurate application of Chinese laws.

为什么指导案例9号不再具有指导作用？

Why Guiding Case No. 9 No Longer Has Guiding Effect?

在郭法官简短地解释了为何指导案例9号（《上海存亮贸易有限公司诉蒋志东、王卫明等买卖合同纠纷案》）不再具有指导作用之后，CGCP的两名资深编辑赵炜和程浩轩进一步查阅各种资料，包括一系列与该案例相关的案件，揭露了围绕该指导性案例的应用的主要争议。

Following Judge Guo's brief explanation regarding why Guiding Case No. 9 (*Shanghai Cunliang Trading Co., Ltd. v. JIANG Zhidong, WANG Weiming et al., A Sale and Purchase Contract Dispute*) no longer has guiding effect, two senior editors of the CGCP, David Wei Zhao and Haoxuan Cheng, went further to review various sources, including a series of cases relevant to Guiding Case No. 9, to uncover major controversies surrounding the application of this Guiding Case.

他们的研究表明，尽管指导性案例是由最高法发布，但这些案例的后续发展却掌握在该国各级法院的手中。通过帮助指导性案例中所包含的法律原则逐步发展，这些法院发挥了重要作用。关于指导案例9号，自2012年该案例发布后，多年的司法实践显示出其主要不足之处。为此，最高法在2019年召开了一次特别会议，以解决指导案例9号所引起的问题以及其他问题，并提供具体指导（被记录为会议纪要的一部分）。这些指导实际上已取代了该指导性案例。

Their study shows that while Guiding Cases are released by the SPC, subsequent developments with respect to them are very much in the hands of courts at different levels in the country. These courts play important roles by helping legal principles embedded in Guiding Cases gradually evolve. With respect to Guiding Case No. 9, years of judicial practices after its release in 2012 have revealed its major limitations. In response, the SPC convened a special conference in 2019 to address, *inter alia*, problems arising from Guiding Case No. 9 and provide specific guidance (written as part of the minutes of the conference) that have, in effect, replaced the Guiding Case.

该会议纪要提供了新的指导，这是值得欢迎的。但是，该文件的不明确法律地位以及其与指导性案例之间的不确定关系，都带出了新的问题。赵炜和程浩轩也在他们的文章中讨论了这个问题，并提出了相关建议。

While the new guidance offered by the conference minutes is welcome, the unclear legal status of the document and its uncertain relationship with Guiding Cases have given rise to new problems. David Wei Zhao and Haoxuan Cheng also discuss this issue in their article and offer related suggestions.

指导案例82号背后的几乎被遗忘的故事

The Almost Forgotten Story Behind Guiding Case No. 82

通过研究指导性案例，可以看到中国法律原则是如何适用和调整，以解决由真实事实所引起的法律问

Studying Guiding Cases allows one to see how Chinese legal principles are applied and fine-tuned to solve legal issues

题。但是，指导性案例可以提供的不仅于此。上海的两位律师许侨超和任若雨付出了很多努力，解释了指导案例82号（《王碎永诉深圳歌力思服饰股份有限公司、杭州银泰世纪百货有限公司侵害商标权纠纷案》）中的“奇怪案情”。由此，她们对中国行政机关（例如商标局）和法院在相关商标争议中认定商品或服务是否类似时所采用的不同标准进行了令人印象深刻的分析。

arising from real facts. However, Guiding Cases can offer more. The efforts contributed by two lawyers in Shanghai, Qiaochao Xu and Ruoyu Ren, to explain “strange facts” present in Guiding Case No. 82 (*WANG Suiyong v. Shenzhen Ellassay Fashion Co., Ltd. and Hangzhou Intime Century Department Store Co., Ltd., A Dispute over Infringement of Trademark Rights*) have produced an impressive analysis of different standards used by China's administrative organs (e.g., the Trademark Office) and courts in determining whether goods or services are similar in related trademark disputes.

指导案例82号的主要裁定是，王碎永以非善意取得的商标权对歌力思公司的正当使用行为提起的侵权之诉，构成权利滥用。歌力思公司在该案的胜诉使该公司有效地反对了诉争商标的注册。王碎永声称拥有该诉争商标的专用权。进一步的调查显示，王碎永还声称拥有另一个商标的专用权，而该商标也侵犯了歌力思公司的在先权利。然而，该公司在两个有争议商标的注册申请过程中仅对其中一个商标提出异议。为什么？在题为“探究指导案例82号背后的故事：‘类似商品’的行政与司法认定标准之差异与相关问题的讨论”的文章中，许侨超和任若雨利用经验数据解释指导案例82号这重要但似乎已被遗忘的一面。

The main ruling of Guiding Case No. 82 is that WANG Suiyong's use of trademark rights, which were not obtained in good faith, to bring an infringement of rights lawsuit against Ellassay Company's proper use of its trademark constituted an abuse of rights. Ellassay Company's victory in this case allowed the company to effectively oppose the registration of a disputed trademark, to which WANG Suiyong claimed to have exclusive rights. A closer investigation reveals that WANG Suiyong also claimed to have exclusive rights to another trademark, which also infringed on Ellassay Company's prior rights. Yet the company only filed an opposition against one of the two disputed trademarks during their registration application processes. Why? In the article titled “Understanding the Story Behind Guiding Case No. 82: Differences Between the Administrative and Judicial Standards for Determining ‘Similar Goods’ and a Discussion of Related Issues”, Qiaochao Xu and Ruoyu Ren draw on empirical data to explain this important but seemingly forgotten aspect of Guiding Case No. 82.

另一项法学教育的国际合作

Another International Collaboration in Legal Education

上一期的《中法连》刊登了一个CGCP专访。在该专访中，北京大学国际法学院荣誉副院长Stephen Yandle分享了该法学院如何在中国成功地增进了对美国法律的了解。本期《中法连》出版了另一个CGCP专访。在该专访中，中国政法大学中欧法学院（“CESL”）欧方执行院长Monty Silley解释了他的法学院如何帮助缩小中国与欧洲之间的差距。曾任CGCP编辑的Silley院长分享了以下观点：

The previous issue of *CLC* featured a CGCP Interview of Stephen Yandle, Vice Dean Emeritus of the Peking University School of Transnational Law (the “STL”), in which he shared the STL's success in promoting understanding of U.S. law in China. This issue features another CGCP Interview, in which Monty Silley, European Executive Co-Dean of the China–EU School of Law (the “CESL”) at the China University of Political Science and Law, explains how his law school helps bridge the gap between China and Europe. Formerly an editor of the CGCP, Co-Dean Silley shared this observation:

> “[…] 我认为CGCP和CESL的工作是一致的。两者都致力于将东西方联系起来，并让国际社会加深了解中国不断发展的法律环境。”

> […], I see the work of the CGCP and CESL as being well aligned. Both are dedicated to connecting the East and West and providing the international community with an enhanced understanding of China's evolving legal landscape.

这些令人鼓舞的话来得正及时，因为CGCP刚刚在2021年2月庆祝成立10周年。与项目成立之时相比，当前的

These encouraging words are most timely, as the CGCP just celebrated its 10th anniversary in February 2021.

世界形势似乎给我们所有人带来了更多挑战。然而，正是由于这些挑战，我们需要继续我们的使命，为中国特别是其司法部门带来更多好的改变。希望您继续支持我们，并喜欢《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

* 熊美英博士，编辑短笺，《中国法律连接》，第12期，第v页（2021年3月），http://cgc.law.stanford.edu/zh-hans/clc-12-202103。

Compared with the time when the project was founded, the current situation around the world seems to be presenting all of us with more challenges. Yet, it is exactly because of these challenges that we need to continue our mission to bring about more positive changes in China, especially its judiciary. We hope you will continue to support us and enjoy the insights and information shared in *CLC*!

Sincerely,

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

** Dr. Mei Gechlik, *Editor's Note*, 12 China Law Connect v (Mar. 2021), http://cgc.law.stanford.edu/clc-12-202103.

关于中国指导性案例项目

使命

斯坦福法学院的中国指导性案例项目（“CGCP”）旨在通过与世界各地的专家和其他利益相关者共同完善我们独特的知识库、为法律工作人员开展能力建设活动，以及促进公共教育和参与，提升对中国和中国法律的理解，并且帮助中国建立一个更加透明、更有问责性的司法制度。

历史简介

2010年11月，中国最高人民法院（“最高法”）建立了开创性的制度，把中国各级人民法院的案例经过遴选并提炼成为具有事实约束力的指导性案例，以指导类似的后续案件的审判工作，确保法律的统一适用。2011年2月，熊美英博士创立了CGCP，展开该项目的历史性使命。CGCP在这段短时间内，建立了一个拥有超过20万全球用户的网站，出版了双语季刊《中国法律连接》，为5,000多名中国法官和律师提供了培训，并主办了多次国际会议，其中有美国和中国的法官以及其他杰出的演讲者。

团队

CGCP拥有一支由法学院学生、其他研究生、律师、专业翻译人员组成的约200位成员的国际团队，并有包括美国联邦最高法院和中国最高人民法院法官在内的50多位杰出的专家顾问。■

About the CGCP

Mission

The China Guiding Cases Project (the “CGCP”) of Stanford Law School aims to advance the understanding of China and Chinese law and to help develop a more transparent and accountable judiciary in China by engaging experts and other stakeholders around the world to contribute to a unique knowledge base, undertaking capacity-building activities for legal actors, and promoting public education and participation.

Brief History

In November 2010, the Supreme People’s Court of China (the “SPC”) established a ground-breaking system in which certain Chinese court judgments are selected and re-issued as *de facto* binding Guiding Cases (“GCs”; 指导性案例) to guide the adjudication of similar subsequent cases and ensure the uniform application of law. In February 2011, Dr. Mei Gechlik founded the CGCP to carry out its historic mission. Within this short period of time, the CGCP has developed a website that has over 200,000 global users, published a bilingual quarterly journal, *China Law Connect*, provided training programs to more than 5,000 Chinese judges and lawyers, and hosted multiple international conferences featuring U.S. and Chinese judges and other distinguished speakers.

The Team

The CGCP team has grown to nearly 200 law students, other graduate students, lawyers, and translation professionals working across the globe and is advised by more than 50 distinguished experts, including justices from the U.S. Supreme Court and the SPC. ■

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熊美英博士

斯坦福法学院中国指导性案例项目创办人、总监

熊美英博士是中国指导性案例项目（China Guiding Cases Project；“CGCP”）的创办人与总监。曾于香港任终身教授的熊博士，于2007年开始在斯坦福法学院教授中国法律和商务，并于2011年创立CGCP。CGCP拥有一支由近200 位成员组成的国际团队，以及一个包括美国联邦最高法院法官和中国最高人民法院法官在内、由50多位杰出专家组成的顾问团体。在成员和顾问的支持下，CGCP已迅速成为具有事实约束力的指导性案例和相关法律发展的优质翻译和分析的重要来源（https://cgc.law.stanford.edu/zh-hans）。2018年6月，CGCP开始出版其季刊《中国法律连接》，帮助深化对中国和中国法律的理解。目前，该季刊已为CGCP网站带来了120,000名新用户。

CGCP亦受邀在世界银行、开放政府伙伴关系全球峰会，以及中美法律交流会议等各个知名论坛上发表演讲。此外，CGCP和熊博士也主办或参加了许多活动以提升项目的影响。2017年10月，CGCP组织了会议，让北京知识产权法院法官介绍了该法院的独特案例制度是如何提高司法一致性和透明度。2018年7月，熊博士受邀在中国外交部组织的“一带一路”论坛上就法律交流和合作发表演讲。2019年7月，在广东省高级人民法院的支持下，熊博士关于指导性案例和相关后续案件的演讲在全省视频广播，2000多名法官从而深入理解CGCP的分析。CGCP还组织了其他活动，包括持续法律教育项目、学生峰会和汇聚了美国和中国法官以及来自世界各地的其他专家的国际会议。

在加入斯坦福法学院之前，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。她曾向美国国会就有关中国的各种课题作证，并对推行法治计划向联合国和中国政府提供建议。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学位（MBA）和斯坦福法学院法律科学博士学位（JSD）。■

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Dr. Mei Gechlik is the Founder and Director of the China Guiding Cases Project (the “CGCP”). Formerly a tenured professor in Hong Kong, she began teaching Chinese law and business at Stanford Law School in 2007 and founded the CGCP in 2011. With support from an international team of nearly 200 members and an advisory board of approximately 50 distinguished experts, including justices from the U.S. Supreme Court and the Supreme People’s Court of China, the CGCP has quickly become the premier source of high-quality translations and analyses of Guiding Cases—China’s *de facto* binding precedents—and related legal developments (http://cgc.law.stanford.edu). In June 2018, the CGCP began publishing its quarterly journal, *China Law Connect*, to help deepen the understanding of China and Chinese law. To date, the journal has already brought more than 120,000 new users to the CGCP website.

The CGCP has presented at notable forums, including the World Bank, the Open Government Partnership Global Summit, and U.S.–China Legal Exchange Conferences. In addition, the CGCP and Dr. Gechlik have hosted or participated in multiple events to increase the project’s impact. In October 2017, the CGCP organized meetings featuring judges from the Beijing Intellectual Property Court to explain how the court’s unique case system has increased judicial consistency and transparency. In July 2018, Dr. Gechlik spoke on legal exchange and collaboration at the Belt and Road Forum organized by China’s Ministry of Foreign Affairs. In July 2019, with support from the High People’s Court of Guangdong Province, Dr. Gechlik’s talk on Guiding Cases and related subsequent cases was broadcast across the province to bring the CGCP’s insights to more than 2,000 judges. Other events organized by the CGCP include Continuing Legal Education programs, student summits, and international conferences featuring U.S. and Chinese judges as well as other experts from different parts of the world.

Prior to joining Stanford Law School, Dr. Gechlik worked from 2001 to 2005 for the Carnegie Endowment for International Peace, a Washington D.C.–based think tank, testifying before the U.S. Congress on various topics about China and advising the United Nations and the Chinese government on implementing rule of law programs. 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. ■

Results from the "Cleanup" of Judicial Interpretations and Guiding Cases and Trends in Their Development in the Era of China's *Civil Code**

Judge GUO Feng

Abstract

China's Case Guidance System has made considerable progress in the ten years since it was founded in 2010. Through the *Provisions of the Supreme People's Court Concerning Work on Case Guidance* (2010), the *Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"* (2015), the *Guiding Opinions of the Supreme People's Court on Unifying the Application of Law and Strengthening the Search for Similar Cases (Trial Implementation)* (2020), and 27 batches of Guiding Cases (156 in total) covering different areas of law, the Supreme People's Court (the "SPC") has gradually established and improved the mechanism for case guidance and the mechanism for the search for similar cases. Building on the preexisting foundation laid by judicial interpretations that unified adjudication rules, the SPC has, through the Guiding Cases, taken another step to summarize adjudication experiences, enhance adjudication quality, and safeguard judicial impartiality.

The *Civil Code of the People's Republic of China* (the "*Civil Code*") is China's first national legislation designated as a legal code. The promulgation of the *Civil Code* provides a good opportunity for the SPC to, firstly, clean up (清理; *qing li*) all of its judicial interpretations and Guiding Cases, and, secondly, formulate judicial interpretations supporting the *Civil Code* and revise a related regulatory document. Drawing on his rich experience accumulated from his participation in the compilation and enactment of the *Civil Code* and his supervision of all of the SPC's work related to judicial interpretations and Guiding Cases, the author of this article discusses in detail the results of the SPC's cleanup as well as the key points of the newly formulated judicial interpretations and the revised regulatory document. More importantly, the author shares his vision by analyzing, at the end of the article, five important trends that the development of judicial interpretations and Guiding Cases will follow in the *Civil Code* era.

Introduction

The *Civil Code of the People's Republic of China* (the "*Civil Code*"), which entered into effect on January 1, 2021, is the first national legislation designated as a legal code in Communist Party-ruled China.[1] The *Civil Code* covers all aspects of Chinese society and economic life, further improves the basic legal system and rules of conduct in the areas of civil and commercial affairs, provides basic compliance standards for various civil and commercial activities, and sets forth examples of equal protection of rights in different areas, including life and health, securing of property, transaction convenience, satisfaction in life, and personal dignity. At the same time, the *Civil Code* realizes the unification of the country's civil law system and provides systematic rules and bases for Chinese courts to unify adjudication standards and handle civil cases in a fair and efficient manner.

The promulgation of the *Civil Code* prompted the Supreme People's Court of China (the "SPC") to, firstly, clean up (清理; *qing li*) preexisting judicial interpretations and Guiding Cases, and, secondly, formulate new judicial interpretations and revise a related regulatory document, i.e., the *Provisions on the Causes of Action in Civil Cases*. In this article, the author will first discuss these two important tasks and then analyze the five important trends for the development of judicial interpretations and Guiding Cases in the *Civil Code* era.

Results from the Cleanup of Judicial Interpretations and Guiding Cases

After the *Civil Code* was passed and promulgated by the National People's Congress on May 28, 2020, the SPC launched a comprehensive cleanup of 591 judicial interpretations[2] and 139 Guiding Cases that were in effect at the time with the goal of ensuring the uniform and correct implementation of the *Civil Code* in the Chinese courts. This comprehensive cleanup of judicial interpretations took place after two cleanups had already occurred in 2011 and 2018.

Unlike the previous cleanups, which primarily aimed at repealing judicial interpretations, this cleanup aimed at

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Judge Guo founded the China Securities Law Institute ("CSLI") and has been continuously elected as its chairman since its founding. CSLI remains China's most prestigious legal research institute in the field of capital markets. As one of a few pioneers to receive a PhD in law in the early 1990s, Judge Guo was appointed as a professor at the reputable law school of Renmin University of China.

safeguarding the implementation of the *Civil Code*. Its scope involved various tasks, including repealing, revising, or compiling preexisting judicial interpretations, as well as formulating new ones to support the *Civil Code*. Using the *Civil Code* as a benchmark, the cleanup was carried out to review every article, paragraph, and item of all of the judicial interpretations that were effective at the time (which involved different areas of law, including civil, criminal, administrative, and state compensation), as well as all of the Guiding Cases released since 2011.

After the cleanup was completed, on December 23, 2020, the Adjudication Committee of the SPC passed the *Report of the Supreme People's Court on the Comprehensive Cleanup of Judicial Interpretations Carried Out to Ensure the Implementation of the Civil Code* and annexed decisions to repeal 116 and revise 111 of the 591 judicial interpretations that were reviewed.[3] In other words, after the cleanup, 364 judicial interpretations—covering different areas of law, namely, 157 civil judicial interpretations, 158 criminal judicial interpretations, 36 administrative judicial interpretations, and 13 state compensation judicial interpretations—remain unchanged, with their full texts made available in the new compilation of all judicial interpretations edited and recently published by the SPC. Regarding the 139 Guiding Cases that were reviewed, the Adjudication Committee of the SPC deliberated and decided that two Guiding Cases will no longer be for "reference and imitation", while the other 137 Guiding Cases will remain unchanged.

In the following sections, the author discusses in more detail the judicial interpretations that were repealed or revised, and the reasons why the two Guiding Cases will no longer be for "reference and imitation".

1. 116 Judicial Interpretations Were Repealed

The 116 judicial interpretations that the Adjudication Committee of the SPC decided to repeal include 114 civil judicial interpretations and two state compensation judicial interpretations.[4] The decision to repeal these judicial interpretations entered into effect on January 1, 2021. The three reasons for repealing these judicial interpretations are as follows:

- Some judicial interpretations were issued a long time ago and they are no longer suitable for current economic and social situations. For example, issued in 1985, the *Several Provisions of the Supreme People's Court on the Judicial Statistics Work of the People's Courts*[5] is incompatible with the statistical work actually done now under the current conditions of informatization.

- The main content of some judicial interpretations has been incorporated into or replaced by the *Civil Code*, related laws, or newly formulated judicial interpretations. For example, the *Interpretation of the Supreme People's Court on Issues Concerning the Application of Laws in Adjudicating Disputes Involving Debts of Husband and Wife*[6] addressed "joint debts of the husband and wife", with the content already having been incorporated into Article 1064 of the *Civil Code*.[7]

- Issues related to the application of laws addressed by some judicial interpretations can now be addressed by directly citing the *Civil Code* or related laws and judicial interpretations. For example, published in 1990, the *Reply of the Supreme People's Court on Whether a Bank Bears Civil Liability for a Depositor's Loss Caused by the Bank Staff's Failure to Handle the Depositor's Reported Loss in Accordance with Regulations*[8] concerned issues that can now be addressed by directly citing the provisions of the *Civil Code* on liability for breach of contract and tort liability.

2. 111 Judicial Interpretations Were Amended

Of the 111 judicial interpretations that the Adjudication Committee of the SPC decided to amend, 109 concerned civil law, one concerned criminal law, and one concerned administrative law. To facilitate the search for these judicial interpretations and their application, the amended 111 judicial interpretations are divided into five specific categories: civil (27),[9] commercial (29),[10] intellectual property (18),[11] civil litigation (19),[12] and enforcement (18).[13] Decisions were formulated by the SPC to announce these categories of amended judicial interpretations.

These decisions announcing the amended judicial interpretations entered into effect on January 1, 2021, and the full texts of these amended judicial interpretations were also published. The amended content primarily covers four aspects:

- use of the *Civil Code* and related laws as benchmarks to correspondingly amend the names of the laws and numbers of articles cited in the judicial interpretations;

- use of the *Civil Code* and related laws as benchmarks to delete some articles or expressions;

- use of the *Civil Code* and related laws as benchmarks to increase relevant content or adjust relevant expressions; and

- in light of the fact that nine laws, including the *General Principles of the Civil Law of the People's Republic of China* and the *Contract Law of the People's Republic of China*, were repealed on the date when the *Civil Code* entered into effect,[14] judicial interpretations that supported these nine laws had to be changed in more extensive ways, which included deleting, amending, and/or expanding the use of names and/or content. There were 27 such judicial interpretations.

3. Two Guiding Cases Will No Longer Be for Reference and Imitation

The Adjudication Committee of the SPC decided that two Guiding Cases that are inconsistent with the spirit of judicial interpretations or regulatory documents will no longer be for reference and imitation. Through the *Notice of the Supreme People's Court on Guiding Cases That Will No Longer Be for Reference and Imitation*, the SPC made the following announcement:[15]

> In order to ensure the uniform and correct application of national laws, and in accordance with the *Civil Code of the People's Republic of China* and other relevant legal provisions as well as adjudication practices, the Adjudication Committee of the Supreme People's Court discussed and decided that **Guiding Case Nos. 9 and 20 will no longer be for reference and imitation**. However, the judgments and rulings of these Guiding Cases as well as the judgments and rulings rendered by referencing and imitating these Guiding Cases are still valid. (emphasis added)

(1) Reasons that Guiding Case No. 9 Will No Longer Be for Reference and Imitation

In Guiding Case No. 9 (*Shanghai Cunliang Trading Co., Ltd. v. JIANG Zhidong, WANG Weiming et al., A Sale and Purchase Contract Dispute*),[16] JIANG Zhidong and WANG Weiming were determined, based on the evidence, to "be idle in performing [liquidation] obligations". This determination is, however, no longer consistent with the spirit established in Article 15 of the *Minutes of the Conference on Civil and Commercial Adjudication Work in Courts Throughout the Country*,[17] which was passed on September 11, 2019 by the Civil and Administrative Specialized Committee of the Adjudication Committee of the SPC (the "*Conference Minutes*"). Article 15 provides:

> 【"Causal Relationship" Defense】 Where the shareholders of a limited liability company adduce evidence to prove that there is no causal relationship between their passive inaction of "being idle in performing obligations" and the result—the "disappearance of principal properties, accounts, and important documents of the company […] making it impossible to conduct the liquidation"—and [the shareholders] claim that they should not bear joint and several liability for clearance of the company's debts, a people's court shall support the claim in accordance with law.

(2) Reasons that Guiding Case No. 20 Will No Longer Be for Reference and Imitation

The Main Points of the Adjudication of Guiding Case No. 20 (*Shenzhen Siruiman Fine Chemicals Co., Ltd. v. Shenzhen Kengzi Tap Water Co., Ltd. and Shenzhen Kangtailan Water Treatment Equipment Co., Ltd., A Dispute over Infringement of Invention Patent Rights*)[18] are:

> ***"The 'pay[ment of] an appropriate fee' mentioned here in the Main Points of the Adjudication [of Guiding Case No. 20] is not 'an appropriate fee' based on infringement of patent rights, but on the 'right to claim ill-gotten gains'. This is not in line with the original legislative intent of Article 13 of the* Patent Law of the People's Republic of China *[…]."***

> In light of the fact that the *Patent Law* does not prohibit [a person from] making, selling, or importing an allegedly patent-infringing product during the provisional protection period [of the patent], which begins after the invention patent application is published and ends when the patent rights are granted, [acts of] using, offering to sell, and selling [the product] after [the period] **shall not be regarded as infringements of the patent rights**, even [if these acts are done] without permission from the patentee. However, the patentee may, in accordance with law, request that an entity or individual who exploits the invention during the provisional protection period **pay an appropriate fee**. (emphasis added)

The "pay[ment of] an appropriate fee" mentioned here in the Main Points of the Adjudication is not "an appropriate fee" based on infringement of patent rights, but on the "right to claim ill-gotten gains". This is not in line with the original legislative intent of Article 13 of the *Patent Law of the People's Republic of China*[19] (the "*Patent Law*"). This article provides:

> After an invention patent application is published, the applicant may request that the entity or individual exploiting his invention pay **an appropriate fee**. (emphasis added)

The premise of Article 13 of the *Patent Law* is that the entity or individual exploiting the patentee's invention is believed to have actually infringed on the rights of the patentee. On this basis, the SPC formulated Article 18 Paragraph 1 of the *Interpretation (II) of the Supreme People's Court on Several Issues Concerning the Application of Laws in Adjudicating Disputes over Infringement of Patent Rights*[20] as follows:

> Where an [invention patent] right-holder brings a lawsuit to request, in accordance with Article 13 of the *Patent Law*, the payment of an appropriate fee from the entity or individual who exploited the invention **during the period from the date when the invention patent application was published to the date when [the patent] was granted and announced**, a people's court may make a reasonable determination with reference to license fees of the relevant patent. (emphasis added)

This is consistent with the legislative spirit of Article 13 of the *Patent Law*. Therefore, the phrase "shall not be regarded as infringements of the patent rights" in the Main Points of the Adjudication of Guiding Case No. 20 actually reflects the use of the "right to claim ill-gotten gains" theory, rather than the infringement theory, to explain the "pay[ment of] an appropriate fee". This explanation does not conform to the original legislative intent of Article 13 of the *Patent Law*, nor does it conform to the original intent of Article 18 Paragraph 1 of the aforementioned judicial interpretation. Therefore, this Guiding Case will no longer be for reference and imitation.

The First Batch of Judicial Interpretations Supporting the *Civil Code* Was Formulated and a Related Regulatory Document Was Revised

In order to ensure the uniform and correct implementation of the *Civil Code*, the SPC formulated, in accordance with the principles of "having uniform planning, formulating [judicial interpretations] in batches, prioritizing adoption of those that are urgent, advancing key points, focusing on those that are easy before those that are hard, and ensuring quality",[21] the first batch (seven in total) of judicial interpretations supporting the *Civil Code* and revised a non-judicial interpretation type of regulatory document. All of these judicial interpretations and the regulatory document were reviewed and passed by the Adjudication Committee of the SPC and they entered into effect on January 1, 2021 concurrently with the *Civil Code*.

1. *Judicial Interpretation on the Temporal Effects of the* Civil Code *Was Formulated*

The *Civil Code* is a type of substantive law. In principle, the *Civil Code* only has binding effect on legal facts that occurred after its implementation and has no retroactive effect on legal facts that occurred before its implementation.

However, Article 93 of the *Law on Legislation of the People's Republic of China*[22] provides an exception:

> Laws, administrative regulations, local regulations, autonomous regulations, separate regulations, and rules are not retroactive, **except for those special provisions formulated to better protect the rights and interests of citizens, legal persons, and other organizations**. (emphasis added)

Therefore, in order to resolve the problems regarding the application of new and old laws and judicial interpretations encountered in adjudication practice after the implementation of the *Civil Code*, and to strictly regulate the conditions for applying the retroactive exception, it is necessary to formulate a specific judicial interpretation on the topic.

For this purpose, the Adjudication Committee of the SPC formulated, as well as reviewed and passed on December 14, 2020, the *Several Provisions of the Supreme People's Court Concerning Temporal Effects on the Application of the 'Civil Code of the People's Republic of China'*[23] (the "*Temporal Effects Judicial Interpretation*"). Article 1 Paragraph 2 of this judicial interpretation provides:

> For civil disputes arising from legal facts [occurring] before the implementation of the Civil Code, the provisions of the laws and judicial interpretations at the time shall apply, unless the laws and judicial interpretations provide otherwise.

In other words, in general, for those civil disputes arising from legal facts occurring before the implementation of the *Civil Code*, where the adjudication proceedings continue after the implementation of the *Civil Code*, the provisions of laws and judicial interpretations that were applicable at the time when the legal facts occurred—including the nine laws[24] and the aforementioned 116 judicial interpretations that were repealed on the date when the *Civil Code* came into effect—shall apply, instead of the provisions of the *Civil Code*.

In addition, based on Article 2 of the *Temporal Effects Judicial Interpretation* (see **Sidebar**), even if the laws and judicial interpretations at the time included provisions [regulating the disputes], the provisions of the *Civil Code* shall be retroactively applied if "the application of the provisions of the Civil Code is more conducive to protecting the legal rights and interests of civil subjects, is more conducive to maintaining social and economic order, and/or is more conducive to promoting the core values of socialism".

In particular, with respect to the application of the *Civil Code* versus the application of the nine old laws (i.e., the *Contract Law of the People's Republic of China*, the *Property Rights Law of the People's Republic of China*, and the others that were repealed on the date when the *Civil Code* came into effect), the *Temporal Effects Judicial Interpretation* clarifies, in accordance with law, the conditions for applying the retroactive exception. For example, Article 8 of the *Temporal Effects Judicial Interpretation* states:

> For a contract established before the implementation of the Civil Code, if the contract is invalid when the provisions of laws and judicial interpretations at the time apply but valid when the provisions of

Sidebar:

Several Provisions of the Supreme People's Court Concerning Temporal Effects on the Application of the 'Civil Code of the People's Republic of China'

Article 1

For civil disputes arising from legal facts [occurring] after the implementation of the Civil Code, the provisions of the Civil Code shall apply.

For civil disputes arising from legal facts [occurring] before the implementation of the Civil Code, the provisions of the laws and judicial interpretations at the time shall apply, unless the laws or judicial interpretations provide otherwise.

For civil disputes arising from legal facts which [began] before the implementation of the Civil Code and continue after the implementation of the Civil Code, the provisions of the Civil Code shall apply, unless the laws or judicial interpretations provide otherwise.

Article 2

For civil disputes arising from legal facts [occurring] before the implementation of the Civil Code, if the laws and judicial interpretations at the time had provisions [regulating the disputes], the provisions of the laws and judicial interpretations at the time shall apply, **unless the application of the provisions of the Civil Code is more conducive to protecting the legal rights and interests of civil subjects, is more conducive to maintaining social and economic order, and/or is more conducive to promoting the core values of socialism**.

(emphasis added)

> the Civil Code apply, the relevant provisions of the Civil Code shall apply.

The above provision is more in line with the autonomy of will of the parties and is also conducive to promoting and encouraging transactions.

In the months since the implementation of the *Civil Code*, some cases in Chinese courts have been adjudicated in accordance with the *Temporal Effects Judicial Interpretation* to apply the provisions of the *Civil Code* retroactively. For example, the No. 2 Intermediate People's Court of Beijing Municipality adjudicated an inheritance dispute involving a printed will.[25] Article 15 of the *Temporal Effects Judicial Interpretation* was relevant to the case; it reads:

> Where a testator made a will in print before the implementation of the Civil Code and parties [to the case] dispute the validity of the will, Article 1136 of the Civil Code shall apply, unless the estate has been disposed of before the implementation of the Civil Code.

The No. 2 Intermediate People's Court of Beijing Municipality decided:

> In terms of the form, [the will involved in this case] is a printed will. Although the will was made before the implementation of the Civil Code, the estate involved has not yet been disposed of. Now, the parties dispute the validity of the will and, in accordance with law, Article 1136 of the *Civil Code of the People's Republic of China* should apply. The provision is about printed wills and [reads]: "A printed will should be witnessed by two or more witnesses on site. The testator and the witnesses should, on each page of the will, sign and indicate the year, month, and day."

In short, while the legal facts of this case occurred before the implementation of the *Civil Code*, the situation met the requirements stated in the *Temporal Effects Judicial Interpretation* regarding the retroactive application of the *Civil Code*. Therefore, the relevant provision of the *Civil Code* was applied.[26]

2. *Judicial Interpretation on the Application of the Provisions of the* Civil Code *Regarding the Guarantee System Was Formulated*

The guarantee system plays an important role in upholding and improving China's basic economic system, optimizing the country's business environment, and promoting high-quality development. The "Getting Credit" indicator in the World Bank's report titled *Doing Business* basically measures the guarantee systems of countries studied in the report.[27]

In response to the significant improvement of the guarantee system provided by the *Civil Code*, the SPC, on the basis of repealing nine judicial interpretations related to guarantees, formulated the new *Interpretation of the Supreme People's Court on the Application of [the Provisions of] the "Civil Code of the People's Republic of China" Regarding the Guarantee System*[28] (the "*Guarantee System Judicial Interpretation*") to earnestly regulate the order of guarantee transactions, reduce financing costs, promote financing, expand measures for credit enhancement, safeguard the realization of creditors' rights, and alleviate the difficulty of financing faced by small and medium-sized enterprises.

The judicial interpretation addresses some complicated issues that have long caused concerns in judicial practice, including: whether a guarantor has the right of recovery in an external guarantee issued by a company, a branch of an institution, a school, or a hospital, or in a mixed guarantee; whether the guarantor should stop calculating interest when the debtor goes bankrupt; how to understand the defense of *beneficium ordinis*; whether the guarantee period can be applied when the guarantee contract is invalid; the effect of advance notice registration; and the nature of floating pledges and warehouse receipt pledges.

> ***"In the months since the implementation of the* Civil Code*, some cases in Chinese courts have been adjudicated in accordance with the* Temporal Effects Judicial Interpretation *to apply the provisions of the* Civil Code *retroactively."***

With respect to these issues, the *Guarantee System Judicial Interpretation* includes provisions in its "General Provisions" section that cover the relationship between a guarantee contract and main contract, qualifications for issuing guarantees, and external guarantees of a company.[29] In the "Surety Contracts" section, the judicial interpretation includes provisions on topics such as the surety period, general sureties, joint sureties, and the maximum surety amount.[30] The "Rights to a Collateral" section includes provisions on guarantees based on immovable property as well as guarantees based on movable property and rights.[31] The "Atypical Guarantees" section notes some judicially

applicable rules on topics such as retention of ownership and financial leasing.[32]

3. *Judicial Interpretations on Property Rights, Marriage and Family, Inheritance, Construction Contracts, and Labor Disputes Were Formulated*

In order to strengthen the judicial protection of people's livelihoods and to promptly respond to people's concerns, the SPC, in accordance with the principles of clarity, conciseness, and pertinence, repealed multiple judicial interpretations related to property rights, marriage and family, inheritance, construction contracts, and labor disputes, and then formulated five corresponding judicial interpretations, based on the new spirit of the *Civil Code*:

- the *Interpretation (I) of the Supreme People's Court on the Application of the "Property Rights" Part of the "Civil Code of the People's Republic of China"*,[33]
- the *Interpretation (I) of the Supreme People's Court on the Application of the "Marriage and Family" Part of the "Civil Code of the People's Republic of China"*[34] (the *"Marriage and Family Judicial Interpretation"*),
- the *Interpretation (I) of the Supreme People's Court on the Application of the "Inheritance" Part of the "Civil Code of the People's Republic of China"*[35] (the "*Inheritance Judicial Interpretation*"),
- the *Interpretation (I) of the Supreme People's Court on Issues Concerning the Application of Laws in Adjudicating Disputes over Construction Contracts*,[36] and
- the *Interpretation (I) of the Supreme People's Court on Issues Concerning the Application of Laws in Adjudicating Labor Disputes*.[37]

For example, the *Marriage and Family Judicial Interpretation* systematically integrates specific rules included in the original judicial interpretation on marriage and family. The content of the new judicial interpretation focuses on guiding the establishment of proper family education and family style to promote family virtues, as well as protecting the legal rights and interests of women, minors, the elderly, and the disabled.

Another example is the *Inheritance Judicial Interpretation*, which focuses on guiding all of society to develop positive trends related to respecting the old, loving the young, and helping one another. The judicial interpretation also expands the scope of support providers that qualify for entering into bequest-for-support agreements, and earnestly shows respect for the true wishes of a testator so as to ensure the smooth distribution of the testator's estate.

4. *A Regulatory Document that is Not a Type of Judicial Interpretation Was Revised:* Provisions on the Causes of Action in Civil Cases

In order to make it convenient for people to bring lawsuits, support the enforcement of adjudication documents, and facilitate the work of judicial statistics, the SPC revised and approved the *Provisions on the Causes of Action in Civil Cases*[38] to improve 152 causes of action. Based on the new system prescribed by the *Civil Code*, the SPC added new causes of action and standardized preexisting ones. The key changes are as follows:

- Following the development of network technology, abuse of personal information has become increasingly serious. To strengthen the protection of personal information, the SPC, in accordance with Article 1034 of the *Civil Code*,[39] added the cause of action titled "A Dispute over the Protection of Personal Information".[40]
- To promptly stop illegal acts that seriously infringe on personality rights and to earnestly protect the personality rights of people, the SPC, in accordance with Article 997 of the *Civil Code*,[41] added the cause of action titled "An Application for an Injunction Against Infringements of Personality Rights".[42]
- To highlight the "green principles" of the *Civil Code*[43] and promote the improvement of the ecological civilization system, specific causes of action involving the protection of ecology and the environment—"A Dispute Over Liability for Damage to Ecology" and "Civil Public Interest Litigation on the Protection of Ecology and the Environment"—were added.[44]
- For the purpose of comprehensively protecting the healthy development of minors, the cause of action titled "Civil Public Interest Litigation on the Protection of Minors" was added[45] to support the implementation of the revised *Law of the People's Republic of China on the Protection of Minors*.[46]

Moreover, the revision of this regulatory document also added, in accordance with the *Civil Code*, dozens of causes of actions covering various topics, including the protection of a natural person's voice,[47] residency rights,[48] and factoring contracts.[49] A first-level cause of action titled "Causes of Actions for Cases Under Special Litigation Procedures" was added,[50] under which multiple causes of action such

as "Public Interest Litigation",[51] "Litigation on Revocation by a Third Party",[52] and "Litigation on Objection in an Enforcement Proceeding",[53] were added to further improve the system of causes of action in civil cases.

Trends in the Development of Judicial Interpretations and Guiding Cases in the *Civil Code* Era

The promulgation of the *Civil Code* initiated a huge effort by the SPC to first clean up preexisting judicial interpretations and Guiding Cases, and then formulate new judicial interpretations and revise a related regulatory document. Looking to the future, in the *Civil Code* era, the development of judicial interpretations and Guiding Cases will follow five trends discussed below.

1. *Civil Judicial Interpretations and Guiding Cases Will Focus on the Protection of Personality Rights, Property Rights, Intellectual Property Rights, Ecology and the Environment, and Digital Technology*

With respect to the protection of personality rights, the SPC completed, in accordance with the "Personality Rights" part of the *Civil Code*,[54] amendments to judicial interpretations on personal injury compensation and other disputes related to personality rights. The major improvements include:

- The *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Laws in Adjudicating Personal Injury Compensation Cases*[55] has improved the definition of personal injury and the scope of compensation (i.e., in cases of infringement of material personality rights such as life, body, and health, the scope of compensation includes material harm and mental harm). In addition, there is a new provision that gives close relatives of a deceased victim the right to claim compensation for mental harm.[56] The judicial interpretation also states that "the living expenses of a dependent shall be included in the calculation of the amount of compensation for disability or the amount of compensation for death"[57] so as to better protect the rights and interests of the victims.

- The *Interpretation of the Supreme People's Court on Several Issues Concerning the Determination of Liability for Compensation for Civil Torts and Mental Harm*[58] has changed the protection targets of compensation for mental harm to "personal rights and interests" or "specific objects with personal significance".[59]

At present, the SPC is researching the judicial application of the new system of injunctions against infringement of personality rights, with a particular focus on issues such as conditions for the application of such injunctions and corresponding procedural rules. The SPC is drafting guiding opinions or judicial interpretations on injunctions against infringements of personality rights.

Regarding property rights, intellectual property rights, ecology and the environment, and digital technology, the SPC will also strengthen their protection through civil judicial interpretations and Guiding Cases. For the protection of property rights, the SPC will coherently implement provisions of the *Civil Code* regarding property rights[60] and contracts[61], equally protect property rights of all types of ownership, promote the construction of a market system with high standards, and create a market-oriented, rule-of-law-based, and internationalized business environment. In terms of the protection of intellectual property rights, the SPC will strictly enforce Article 123 of the *Civil Code* to protect the intellectual property rights to which civil subjects are legally entitled, assist in establishing a legislative system that supports punitive compensation for infringements of intellectual property rights, and take steps to further improve the judicial system in this area.

Furthermore, in terms of the protection of ecology and the environment, the SPC will accurately apply the provisions of the *Civil Code* regarding green principles and green clauses,[62] and put into practice the provisions that allow punitive compensation for intentional environmental pollution and ecological damage. Finally, for the protection of digital technology, the SPC will, in accordance with the *Civil Code*, properly handle cases involving the protection of data and network virtual property,[63] as well as the protection of personal information.[64] The SPC will also carefully study new judicial issues, including artificial intelligence, unmanned driving, the copyright ownership of robotic creations, and digital currency.

2. *A Multi-Level System of Judicial Interpretations Will Be Built in the* Civil Code *Era*

When reviewing the report of this cleanup of judicial interpretations, the Adjudication Committee of the SPC established the basic principles for the formulation of judicial interpretations in the *Civil Code* era. The approach used should be problem-oriented, bearing in mind the needs of executing adjudication and using as principles the accurate understanding and application of law. A multi-level system of judicial interpretations related to the *Civil Code*, instead of a large and comprehensive system of such judicial interpretations, should be built.

Specifically, it is necessary to build a multi-level system of judicial interpretations related to the *Civil Code* in accordance with the lines of reasoning for interpreting the overall application of the *Civil Code*, for interpreting the application of law issues regarding certain parts of the *Civil Code*, and for interpreting the application of law issues in specific types of cases. Such a system uses clear logic, sets forth distinct levels, and makes it convenient to retrieve and search for related information. The system is conducive to the study and application of civil judicial interpretations and facilitates the process of formulating and supplementing relevant judicial interpretations at any time, based on the implementation of the *Civil Code*.

3. The Roles of Judicial Interpretations and Guiding Cases in Unifying Adjudication Rules Will Be Further Brought into Play

The Chinese legal theory community has always had reservations about the legitimacy of judicial interpretations. However, the practice has proven that judicial interpretations can ensure the accurate application of laws, unify adjudication rules, resolve inconsistencies between procedural law and substantive law in judicial application, remedy deficiencies in legislation and the problem that some legislation lags behind society's needs, and promote the development of legislation.

To further bring into play the positive role of judicial interpretations in legislation, it is necessary to clarify the boundary between judicial interpretations and legislation. Judicial interpretations focus on interpreting specific issues concerning the application of laws and these issues are usually embodied in specific application targets or cases. Judicial interpretations cannot overstep and enter the domain of legislative authority. For example, unlike the *Civil Code*, judicial interpretations can neither create rights, obligations, or responsibilities for civil subjects, nor restrict their rights and increase their obligations and responsibilities. Judicial interpretations cannot amend or change the content of legal provisions, nor can judicial interpretations make "*ultra vires* interpretations" or expand interpretations to encroach on legislative or administrative power, let alone depart from existing legal provisions to create new legal norms.

Regarding Guiding Cases, some people believe that in the *Civil Code* era, there is a need to "transfer" the main values and functions of judicial interpretations to Guiding Cases, i.e., in situations where judicial interpretations cannot be passed in time to address new content presented in the *Civil Code*, Guiding Cases can be considered as a means to regulate new issues and new content. The essential flaw of this view is that it ignores the fact that Guiding Cases are not *de jure* binding.[65] Although the SPC has repeatedly emphasized that people's courts at all levels "should reference and imitate" Guiding Cases when adjudicating similar cases,[66] there is no legal basis for legal consequences in the case of a court's failure to reference and imitate a Guiding Case in situations where it should do so.

In addition, a look at the process for generating Guiding Cases reveals that is actually more stringent and longer than the process for generating judicial interpretations. The case upon which a Guiding Case is based takes, on average, two to three years to go through the relatively long cycle from the registration of the case through all other stages——trial, initial judgment, final second-instance judgment, recommendation to serve as a Guiding Case, selection, review and approval, and announcement of the case as a Guiding Case. There are obvious shortcomings, with respect to meeting the needs of judicial practice in a timely and effective manner. Therefore, Guiding Cases cannot replace the main values and functions of judicial interpretations.

4. Guiding Cases Will Be Strengthened

Although Guiding Cases have the shortcomings discussed above, they have played an active role in helping "summarize adjudication experiences, unify the application of law, enhance adjudication quality, and safeguard judicial impartiality"[67] and have received widespread attention and praise. Since the release of the first batch of Guiding Cases in November 2011, as of March 2021, 27 batches (i.e., 156 in total) of Guiding Cases have been released, with an average of 15 Guiding Cases released per year. As part of its next steps, the SPC will ensure the full realization of the roles of the case guidance mechanism and the mechanism for the search for similar cases[68] to ensure the quality and effectiveness of civil adjudication.

Specific tasks include the revision of the *Provisions of the Supreme People's Court Concerning Work on Case Guidance*[69] and its detailed implementing rules[70] as well as the revision of the styles for writing Guiding Cases so as to affirm the experiences accumulated in case compilation and improve the standards for the system. Under the coordination of the Research Office of the SPC, the enthusiasm of local courts, specialized courts, and tribunals and circuit courts of the SPC in recommending and compiling cases will be leveraged and a related information network platform will be developed and used. At the same time, cooperation with case research centers of law schools inside and outside China will be strengthened to encourage these centers to actively participate in the recommendation and selection

of Guiding Cases and to strengthen theoretical research. In the end, a new breakthrough in the quantity and quality of Guiding Cases will occur.

> ***"[…] the SPC will promote the establishment of a third-party evaluation mechanism for evaluating the effectiveness of implementing judicial interpretations and Guiding Cases and will encourage academic institutions and non-governmental organizations to conduct independent and competitive evaluations."***

5. *Mechanisms for Evaluating the Effectiveness of Judicial Interpretations and Guiding Cases and for Normalizing Their Cleanups Will Be Improved*

There does not yet exist an effective mechanism and means to evaluate the effectiveness of judicial interpretations and Guiding Cases after their release. Important issues that are worth studying include: can they help judges accurately understand and apply laws when adjudicating cases? With respect to the focal points of the dispute in a case, can they effectively provide interpretations about the application of laws and serve as similar cases for reference and imitation? Can they allow the public, the parties, and legal practitioners to form expectations that are consistent with the spirit of the law, legal principles, legal norms, and adjudication rules? Can they withstand the legality review conducted by the legislature?

In light of the need to understand these issues, the SPC will promote the establishment of a third-party evaluation mechanism for evaluating the effectiveness of implementing judicial interpretations and Guiding Cases and will encourage academic institutions and non-governmental organizations to conduct independent and competitive evaluations.

Also, on the basis of summarizing the work of this *Civil Code*-related cleanup, the SPC will adopt a method of combining cleanups that happen occasionally with specialized and centralized cleanups to normalize the cleanup function. This will lead to a mechanism for cleaning up judicial interpretations and Guiding Cases in a timely manner in accordance with new circumstances and new requirements arising from legal provisions and their amendments or repeals, representing another step in the improvement of judicial interpretations and Guiding Cases.

In summary, the five trends for the development of judicial interpretations and Guiding Cases in the *Civil Code* era will promote the smooth implementation of the *Civil Code*. The experience accumulated will also lay a solid foundation for the development of other legal codes in China in the future. ■

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[1] 《中华人民共和国民法典》 (*Civil Code of the People's Republic of China*), passed and issued on May 28, 2020, effective as of Jan. 1, 2021, http://www.npc.gov.cn/npc/c30834/202006/75ba6483b8344591abd07917e1d25cc8.shtml (hereinafter "*Civil Code*").

[2] Judicial interpretations and regulatory documents of the SPC have gone through multiple cleanups. The last cleanup before the promulgation of the *Civil Code* was carried out in 2018, and, after that cleanup, 561 judicial interpretations were kept as effective. These judicial interpretations, along with 30 new ones formulated afterwards, added up to a total of 591 as of May 28, 2020 and all of these judicial interpretations were within the scope of this latest cleanup.

In the relevant documents and information released after the completion of this cleanup, the expression "cleaning up judicial interpretations and related regulatory documents" has been used. The term "regulatory documents" has been included in the expression because some expressed the views that some judicial interpretations issued earlier are in forms such as "minutes of conferences", "notices", and "replies", and that they do not meet the formal requirements of judicial interpretations and should be treated as "regulatory documents". With respect to the formal requirements for judicial interpretations, Article 9 of the *Several Provisions of the Supreme People's Court on the Judicial Interpretation Work*, which entered into effect on July 1, 1997, stated: "There are three forms of judicial interpretations, [namely], 'interpretations', 'provisions', and 'replies'." This judicial interpretation was replaced by the *Provisions of the Supreme People's Court on the Judicial Interpretation Work*, which entered into effect on April 1, 2007 and Article 6 of which states: "There are four forms of judicial interpretations, [namely], 'interpretations', 'provisions', 'replies', and 'decisions'." *See* 《最高人民法院关于司法解释工作的若干规定》 (*Several Provisions of the Supreme People's Court on the Judicial Interpretation Work*), issued on June 23, 1997, entered into effect on July 1, 1997, ineffective as of Apr. 1, 2007, http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=ffe2015d319ad99abdfb; 《最高人民法院关于司法解释工作的规定》 (*Provisions of the Supreme People's Court on the Judicial Interpretation Work*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 11, 2006, issued on Mar. 9, 2007, effective as of Apr. 1, 2007, http://www.sc.gov.cn/sczb/lmfl/bmwjdx/200706/t20070607_185328.shtml.

However, the author holds different views. First, in the past ten years, when the Adjudication Committee of the SPC passed resolutions on the results of the cleanups, some "minutes of conferences", "notices", and "replies" issued earlier were still determined to be judicial interpretations. In addition, among the 591 judicial interpretations included in this latest cleanup were dozens of judicial interpretations that are in the form of "minutes of conferences", "notices", and "replies"; they are not regulatory documents in the general sense. Therefore, in this article, the expression "judicial interpretations" is used to describe this cleanup.

[3] *See* 乔文心 (QIAO Wenxin), 认真学习贯彻习近平法治思想 确保民法典统一正确实施 (*Studying Conscientiously and Putting into Practice Xi Jinping's Thoughts on the Rule of Law; Ensuring the Uniform and Correct Implementation of the Civil Code*), 《人民法院报》 (People's Court Daily), Dec. 29, 2020, http://rmfyb.chinacourt.org/paper/html/2020-12/29/content_175090.htm?div=0.

[4] 《最高人民法院关于废止部分司法解释及相关规范性文件的决定》 (*Decision of the Supreme People's Court on Repealing Some Judicial Interpretations and Related Regulatory Documents*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 23, 2020, issued on Dec. 29, 2020, effective as of Jan. 1, 2021, https://www.chinacourt.org/law/detail/2020/12/id/150223.shtml.

[5]《最高人民法院关于人民法院司法统计工作的若干规定》 (*Several Provisions of the Supreme People's Court on the Judicial Statistics Work of the People's Courts*), issued and entered into effect on Nov. 21, 1985, ineffective as of Jan. 1, 2021, http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=f771643e57d5fe33bdfb.

[6]《最高人民法院关于审理涉及夫妻债务纠纷案件适用法律有关问题的解释》 (*Interpretation of the Supreme People's Court on Issues Concerning the Application of Laws in Adjudicating Disputes Involving Debts of Husband and Wife*), passed by the Adjudication Committee of the Supreme People's Court on Jan. 8, 2018, issued on Jan. 16, 2018, entered into effect on Jan. 18, 2018, ineffective as of Jan. 1, 2021, http://www.court.gov.cn/zixun-xiangqing-77352.html.

[7] *Civil Code*, *supra* note 1, Article 1064. Article 1064 provides:

> Debts incurred by the joint signing of a husband and wife, or by their joint expression of intent to [incur the debts together], such as by one spouse's subsequent recognition of debts incurred by the other, as well as debts incurred, during the marriage relationship, by the husband or the wife in his or her personal name for the daily needs of the family are joint debts of the husband and wife.
>
> Debts incurred, during the marriage relationship, by the husband or the wife in his or her personal name for [items] exceeding the daily needs of the family are not joint debts of the husband and wife, unless the creditors can prove that the debts are used for the husband and wife's joint life or joint production and business operation, or that the debts are based on the husband and wife's joint expression of intent [to incur the debts together].

[8]《最高人民法院关于银行工作人员未按规定办理储户挂失造成储户损失银行是否担任民事责任的批复》(*Reply of the Supreme People's Court on Whether a Bank Bears Civil Liability for a Depositor's Loss Caused by the Bank Staff's Failure to Handle the Depositor's Reported Loss In Accordance with Regulations*), issued and entered into effect on Sept. 11, 1990, ineffective as of Jan. 1, 2021, http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=27c29826a6591e2fbdfb.

[9]《最高人民法院关于修改〈最高人民法院关于在民事审判工作中适用《中华人民共和国工会法》若干问题的解释〉等二十七件民事类司法解释的决定》(*Decision of the Supreme People's Court on Amending 27 Civil Judicial Interpretations, Including the "Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the 'Trade Union Law of the People's Republic of China' in Civil Adjudication"*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 23, 2020, issued on Dec. 29, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/zixun-xiangqing-282621.html.

[10]《最高人民法院关于修改〈最高人民法院关于破产企业国有划拨土地使用权应否列入破产财产等问题的批复〉等二十九件商事类司法解释的决定》(*Decision of the Supreme People's Court on Amending 29 Commercial Judicial Interpretations, Including the "Reply of the Supreme People's Court on Whether, Among Other Issues, a Bankrupt Enterprise's State-Owned and Assigned Land-Use Rights Should Be Included in the Bankruptcy Estate"*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 23, 2020, issued on Dec. 29, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/zixun-xiangqing-282631.html.

[11]《最高人民法院关于修改〈最高人民法院关于审理侵犯专利权纠纷案件应用法律若干问题的解释（二）〉等十八件知识产权类司法解释的决定》(*Decision of the Supreme People's Court on Amending 18 Intellectual Property Judicial Interpretations, Including the "Interpretation (II) of the Supreme People's Court on Several Issues Concerning the Application of Laws in Adjudicating Disputes over Infringement of Patent Rights"*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 23, 2020, issued on Dec. 29, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/zixun-xiangqing-282671.html.

[12]《最高人民法院关于修改〈最高人民法院关于人民法院民事调解工作若干问题的规定〉等十九件民事诉讼类司法解释的决定》(*Decision of the Supreme People's Court on Amending 19 Civil Litigation Judicial Interpretations, Including the "Provisions of the Supreme People's Court on Several Issues Concerning the Civil Mediation Work of the People's Courts"*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 23, 2020, issued on Dec. 29, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/zixun-xiangqing-282651.html.

[13]《最高人民法院关于修改〈最高人民法院关于人民法院扣押铁路运输货物若干问题的规定〉等十八件执行类司法解释的决定》(*Decision of the Supreme People's Court on Amending 18 Enforcement Judicial Interpretations, Including the "Provisions of the Supreme People's Court on Several Issues Concerning the Seizure by the People's Courts of Goods Carried by Rail"*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 23, 2020, issued on Dec. 29, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/zixun-xiangqing-282661.html.

[14] *Civil Code*, *supra* note 1, Article 1260. Article 1260 provides:

> This Law shall come into effect on January 1, 2021. Concurrently, the *Marriage Law of the People's Republic of China*, the *Inheritance Law of the People's Republic of China*, the *General Principles of the Civil Law of the People's Republic of China*, the *Adoption Law of the People's Republic of China*, the *Guarantee Law of the People's Republic of China*, the *Contract Law of the People's Republic of China*, the *Property Rights Law of the People's Republic of China*, the *Tort Liability Law of the People's Republic of China*, and the *General Provisions of the Civil Law of the People's Republic of China* shall be repealed.

[15]《最高人民法院关于部分指导性案例不再参照的通知》 (*Notice of the Supreme People's Court on Guiding Cases That Will No Longer Be for Reference and Imitation*), issued on Dec. 29, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/fabu-xiangqing-282441.html. For a discussion of why the term "reference and imitate" is used for "参照", see Provisions of the Supreme People's Court Concerning Work on Case Guidance, *People's Republic of China*, Article 7, Stanford CGCP *Global Guide*™, Aug. 2020, http://cgc.law.stanford.edu/sgg-on-prc-provisions-case-guidance.

[16]《上海存亮贸易有限公司诉蒋志东、王卫明等买卖合同纠纷案》 (*Shanghai Cunliang Trading Co., Ltd. v. JIANG Zhidong, WANG Weiming et al., A Sale and Purchase Contract Dispute*), 12 China Law Connect 73 (Mar. 2021), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC9), Mar. 2021, http://cgc.law.stanford.edu/guiding-cases/guiding-case-9.

[17]《最高人民法院关于印发〈全国法院民商事审判工作会议纪要〉的通知》(*Notice of the Supreme People's Court on Printing and Distributing the "Minutes of the Conference on Civil and Commercial Adjudication Work in Courts Throughout the Country"*), issued on and effective as of Nov. 8, 2019, http://www.court.gov.cn/zixun-xiangqing-199691.html.

[18]《深圳市斯瑞曼精细化工有限公司诉深圳市坑梓自来水有限公司、深圳市康泰蓝水处理设备有限公司侵害发明专利权纠纷案》 (*Shenzhen Siruiman Fine Chemicals Co., Ltd. v. Shenzhen Kengzi Tap Water Co., Ltd. and Shenzhen Kangtailan Water Treatment Equipment Co., Ltd., A Dispute over Infringement of Invention Patent Rights*), 12 China Law Connect 79 (Mar. 2021), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC20), Mar. 2021, http://cgc.law.stanford.edu/guiding-cases/guiding-case-20.

[19]《中华人民共和国专利法》(*Patent Law of the People's Republic of China*), passed and issued on Mar. 12, 1984, effective as of Apr. 1, 1985, amended four times, most recently on Oct. 17, 2020, effective as of June 1, 2021, http://www.moj.gov.cn/Department/content/2020-11/19/592_3260623.html. Article 13 remains unchanged in the 2020 version of the law. In the English translation of Article 13, the term "his" is used. The terms "he", "him", and "his" as used in this commentary are, unless the context indicates otherwise, gender-neutral terms that may refer to "she", "her", "it", and "its".

[20]《最高人民法院关于审理侵犯专利权纠纷案件应用法律若干问题的解释（二）》 (*Interpretation (II) of the Supreme People's Court on Several Issues Concerning the Application of Laws in Adjudicating Disputes over Infringement of Patent Rights*), passed by the Adjudication Committee of the Supreme People's Court on Jan. 25, 2016, issued on Mar. 21, 2016, effective as of Apr. 1, 2016, amended on Dec. 23, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/zixun-xiangqing-282641.html.

[21] 周强 (ZHOU Qiang), 以习近平新时代中国特色社会主义思想为指导 充分发挥审判职能作用 确保民法典正确贯彻实施 (*Guided by Xi Jinping's Thoughts on Socialism with Chinese Characteristics in the New Era, Fully Use the Functional Role of Adjudication and Ensure the Correct Implementation of the Civil Code*), 《求是》 (Qiushi), http://cpc.people.com.cn/n1/2020/0617/c64094-31750046.html.

[22]《中华人民共和国立法法》 (*Law on Legislation of the People's Republic of China*), passed and issued on Mar. 15, 2000, effective as of July 1, 2000, amended on and effective as of Mar. 15, 2015, http://www.npc.gov.cn/zgrdw/npc/dbdhhy/12_3/2015-03/18/content_1930713.htm.

[23]《最高人民法院关于适用〈中华人民共和国民法典〉时间效力的若干规定》 (*Several Provisions of the Supreme People's Court Concerning Temporal Effects on the Application of the 'Civil Code of the People's Republic of China'*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 14, 2020, issued on Dec. 29, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/fabu-xiangqing-282051.html.

[24] *Civil Code*, *supra* note 1, Article 1260. *See supra* note 14.

[25] (2021) 京02民终1518号民事判决 ((2021) Jing 02 Min Zhong No. 1518 Civil Judgment), rendered by the No. 2 Intermediate People's Court of Beijing Municipality on Jan. 28, 2021, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/beijing-2021-jing-02-min-zhong-1518-civil-judgment.

[26] Other cases include: a case adjudicated by the Chaoyang District People's Court of Beijing Municipality (a badminton player was hit in the right eye by a shuttlecock while playing the game and he sued the other player) and a case adjudicated by the Yuexiu District People's Court of Guangzhou Municipality, Guangdong Province (a dispute over liability for harm caused by an object tossed from a high-rise building). *See* 张蕾 (ZHANG Lei), 打羽毛球被击伤右眼 原告索赔被驳回 (*Right Eye Hit While Playing Badminton—Plaintiff's Claim for Damages Rejected*), 《北京日报》 (BEIJING DAILY), Jan. 5, 2021, http://bjrbdzb.bjd.com.cn/bjrb/mobile/2021/20210105/20210105_006/content_20210105_006_3.htm#page5; 毛一竹 (MAO Yizhu), 广州：高空抛物致人伤残被判赔9万多元 (*Guangzhou: Person Ordered to Pay More Than RMB 90,000 As Compensation for Injuries Caused by Objects Thrown at High Altitude*), 《新华网》 (XINHUANET), https://www.chinacourt.org/article/detail/2021/01/id/5690026.shtml.

[27] The World Bank, *Getting Credit Methodology*, DOINGBUSINESS.ORG, https://www.doingbusiness.org/en/methodology/getting-credit.

[28] 《最高人民法院关于适用〈中华人民共和国民法典〉有关担保制度的解释》 (*Interpretation of the Supreme People's Court on the Application of [the Provisions of] the "Civil Code of the People's Republic of China" Regarding the Guarantee System*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 25, 2020, issued on Dec. 31, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/zixun-xiangqing-282721.html.

[29] *Id.* Articles 1–24.

[30] *Id.* Articles 25–36.

[31] *Id.* Articles 37–62.

[32] *Id.* Articles 63–70.

[33] 《最高人民法院关于适用〈中华人民共和国民法典〉物权编的解释（一）》 (*Interpretation (I) of the Supreme People's Court on the Application of the "Property Rights" Part of the "Civil Code of the People's Republic of China"*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 25, 2020, issued on Dec. 29, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/zixun-xiangqing-282101.html.

[34] 《最高人民法院关于适用〈中华人民共和国民法典〉婚姻家庭编的解释（一）》 (*Interpretation (I) of the Supreme People's Court on the Application of the "Marriage and Family" Part of the "Civil Code of the People's Republic of China"*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 25, 2020, issued on Dec. 29, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/fabu-xiangqing-282071.html.

[35] 《最高人民法院关于适用〈中华人民共和国民法典〉继承编的解释（一）》 (*Interpretation (I) of the Supreme People's Court on the Application of the "Inheritance" Part of the "Civil Code of the People's Republic of China"*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 25, 2020, issued on Dec. 29, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/zixun-xiangqing-282091.html.

[36] 《最高人民法院关于审理建设工程施工合同纠纷案件适用法律问题的解释（一）》 (*Interpretation (I) of the Supreme People's Court on Issues Concerning the Application of Laws in Adjudicating Disputes over Construction Contracts*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 25, 2020, issued on Dec. 29, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/zixun-xiangqing-282111.html.

[37] 《最高人民法院关于审理劳动争议案件适用法律问题的解释（一）》 (*Interpretation (I) of the Supreme People's Court on Issues Concerning the Application of Laws in Adjudicating Labor Disputes*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 25, 2020, issued on Dec. 29, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/zixun-xiangqing-282121.html.

[38] 《民事案件案由规定》 (*Provisions on the Causes of Action in Civil Cases*), passed by the Adjudication Committee of the Supreme People's Court on Oct. 29, 2007, issued on Feb. 4, 2008, effective as of Apr. 1, 2008, amended two times, most recently on Dec. 14, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/fabu-xiangqing-282031.html.

[39] *Civil Code*, *supra* note 1, Article 1034. Paragraph 1 of this article clearly states: "The personal information of a natural person is protected by law."

[40] *Provisions on the Causes of Action in Civil Cases*, *supra* note 38, Item 8(2).

[41] *Civil Code*, *supra* note 1, Article 997. The article states:

> Where a civil subject has evidence to prove that an actor is committing or is about to commit an illegal act that infringes on [the civil subject's] personality rights, and that failure to stop [the act] in a timely manner will cause irreparable harm to [the civil subject's] legal rights and interests, [the civil subject] has the right to apply, in accordance with law, to a people's court for measures to enjoin the actor from carrying out the relevant act.

[42] *Provisions on the Causes of Action in Civil Cases*, *supra* note 38, Item 443.

[43] *See, e.g.*, *Civil Code*, *supra* note 1, Articles 1229–1235.

[44] *Provisions on the Causes of Action in Civil Cases*, *supra* note 38, Items 378 and 466.

[45] *Id.* Item 468.

[46] 《中华人民共和国未成年人保护法》 (*Law of the People's Republic of China on the Protection of Minors*), passed and issued on Sept. 4, 1991, effective as of Jan. 1, 1992, amended once and revised two times, most recently revised on Oct. 17, 2020, effective as of June 1, 2021, http://www.gov.cn/xinwen/2020-10/18/content_5552113.htm.

[47] *Provisions on the Causes of Action in Civil Cases*, *supra* note 38, Item 5.

[48] *Id.* Items 65 and 136.

[49] *Id.* Item 113.

[50] *Id.* Part Eleven.

[51] *Id.* Items 466–469.

[52] *Id.* Item 470.

[53] *Id.* Items 471–473.

[54] *Civil Code, supra* note 1, Part Four (i.e., Articles 989–1039).

[55] 《最高人民法院关于审理人身损害赔偿案件适用法律若干问题的解释》 (*Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Laws in Adjudicating Personal Injury Compensation Cases*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 4, 2003, issued on Dec. 26, 2003, effective as of May 1, 2004, amended on Dec. 23, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/zixun-xiangqing-282621.html.

[56] *Id.* Article 1. The article provides:

> Where, due to an infringement of his **life, body, or health**, a person entitled to compensation brings a lawsuit to request that a person obligated to pay compensation pay compensation for **material harm and mental harm**, a people's court should accept [the case].
>
> The "person entitled to compensation" referenced in this article refers to the victim who has directly suffered personal injury due to an infringing act or other causes of harm as well as **the close relatives of a deceased victim**.

> The "person obligated to pay compensation" referenced in this article refers to a natural person, legal person, or non-legal-person organization who, due to an infringing act [committed by] himself or others or other causes of harm should bear civil liability in accordance with law.
>
> (emphasis added)

[57] *Id.* Article 16.

[58] 《最高人民法院关于确定民事侵权精神损害赔偿责任若干问题的解释》 (*Interpretation of the Supreme People's Court on Several Issues Concerning the Determination of Liability for Compensation for Civil Torts and Mental Harm*), passed by the Adjudication Committee of the Supreme People's Court on Feb. 26, 2001, issued on Mar. 8, 2001, effective as of Mar. 10, 2001, amended on Dec. 23, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/zixun-xiangqing-282621.html.

[59] *Id.* Article 1. The article provides:

> Where, due to an infringement of **personal rights and interests** or of **specific objects with personal significance**, a natural person or his close relative brings a lawsuit in a people's court to request that compensation be paid for mental harm, the people's court should accept [the case] in accordance with law. (emphasis added)

See also Civil Code, *supra* note 1, Article 1183. The article provides:

> Where an infringement of the **personal rights and interests** of a natural person causes serious mental harm, the infringed person shall have the right to request that compensation be paid for mental harm.
>
> Where, due to intentional or gross negligence, an infringement of a natural person's **specific object with personal significance** causes serious mental harm, the infringed person shall have the right to request that compensation be paid for mental harm.
>
> (emphasis added)

[60] *Civil Code*, *supra* note 1, Part Two (i.e., Articles 205–462).

[61] *Id.* Part Three (i.e., Articles 463–988).

[62] *Id.* Articles 1229–1235.

[63] *Id.* Article 127. The article provides: "Where the law has provisions on the protection of data and network virtual property, follow those provisions."

[64] *Id.* Article 111. The article provides:

> The personal information of a natural person is protected by law. Any organization or individual who needs to obtain the personal information of others should obtain it in accordance with law and ensure the safety of the information; must not illegally collect, use, process, or transmit the personal information of others; and must not illegally buy or sell, provide, or disclose the personal information of others.

[65] Guiding Cases are still important because they are *de facto* binding. *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, the author 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)

[66] Provisions of the Supreme People's Court Concerning Work on Case Guidance, *People's Republic of China,* Article 7, *supra* note 15. For the original, Chinese version of the Provisions, see 《最高人民法院关于案例指导工作的规定》 (*Provisions of the Supreme People's Court Concerning Work on Case Guidance*), passed by the Adjudication Committee of the Supreme People's Court on Nov. 15, 2010, issued on and effective as of Nov. 26, 2010, http://zxsfy.chinacourt.gov.cn/article/detail/2019/07/id/4988096.shtml.

[67] *Id.* Preamble.

[68] 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. 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.

[69] *Provisions of the Supreme People's Court Concerning Work on Case Guidance*, *supra* note 66.

[70] 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. For the original, Chinese version of the Detailed Implementing Rules, see 《〈最高人民法院关于案例指导工作的规定〉实施细则》 (*Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"*), passed by the Adjudication Committee of the Supreme People's Court on Apr. 27, 2015, issued on and effective as of May 13, 2015, http://zxsfy.chinacourt.gov.cn/article/detail/2019/07/id/4988096.shtml.

中国《民法典》时代司法解释和指导性案例的清理成果与发展趋势*

郭锋法官

摘要

自2010年成立以来，中国案例指导制度在过去十年取得了长足的进步。通过2010年的《最高人民法院关于案例指导工作的规定》、2015年的《〈最高人民法院关于案例指导工作的规定〉实施细则》、2020年的《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）》，以及27批共156件涵盖不同法律领域的指导性案例，最高人民法院（“最高法”）逐步建设、完善案例指导和类案检索机制。在原有的司法解释统一裁判规则的基础上，最高法通过指导性案例进一步总结审判经验，提高审判质量，以及维护司法公正。

作为中国第一部以法典命名的法律，《中华人民共和国民法典》（“《民法典》”）的颁布给最高法带来很好的机会，清理所有司法解释和指导性案例，并且制定与《民法典》配套的司法解释和修订相关规范性文件。本文作者通过其参加《民法典》编纂立法、主管司法解释和指导性案例工作的丰富经验，详述清理成果和新制定的司法解释、修订的规范性文件的重点。更重要的是，作者高瞻远瞩，在文末分析《民法典》时代司法解释与指导性案例的五项重要发展趋势。

引言

2021年1月1日正式施行的《中华人民共和国民法典》（“《民法典》”）是共产党执政的中国第一部以法典命名的法律。[1] 该法典涉及中国社会和经济生活方方面面，进一步完善了民商事领域基本法律制度和行为规则，为各类民商事活动提供基本遵循，体现了对生命健康、财产安全、交易便利、生活幸福、人格尊严等各方面权利的平等保护。同时，该法典实现了民法体系的统一，为法院统一裁判尺度、公正高效审理民事案件提供了体系化的规则依据。

《民法典》的颁布启动了中国最高人民法院（“最高法”）对原有的司法解释和指导性案例作出清理，以及制定新的司法解释和修订相关的规范性文件，即《民事案件案由规定》。在本文中，笔者会先讨论这两项重要工作，再分析《民法典》时代中，司法解释和指导性案例的五项发展趋势。

司法解释和指导性案例的清理成果

《民法典》2020年5月28日由全国人民代表大会通过颁布后，为确保《民法典》在法院统一正确实施，最高法启动了对当时有效的591件司法解释、[2] 139件指导性案例的全面清理工作。这是继2011年、2018年司法解释清理之后又一次全面的清理。

与既往主要以废止为目标的清理工作不同，本次清理以保障《民法典》实施为目标，涉及废止、修改、进行合并编纂和制定新的配套司法解释等各方面。清理工作需对标《民法典》，覆盖当时有效的包括民事、刑事、行政、国家赔偿在内的所有司法解释的每一条、款、项，以及2011年以来发布的指导性案例。

清理工作完成后，2020年12月23日，最高法审判委员会通过了《最高人民法院关于为确保民法典实施进行司法解释全面清理的工作情况报告》和附件的废止决定、修改决定，对591件司法解释，废止116件，修改111件。[3] 换言之，保留继续适用的有364件（包括民事类157件，刑事类158件，行政类36件，国家赔偿类13件），其全文内容将刊载于最高法编辑出版的新的司法解释汇编中。而对139件指导性案例，最高法审判委员会审议决定“不再参照”2件，其余137件得到保留。

笔者在以下各节将更深入讨论关于废止和修改司法解释的内容，以及“不再参照”2件指导性案例的原因。

1. 废止116件司法解释

最高法审判委员会决定废止的116件司法解释，包括民事类114件、国家赔偿类2件。[4] 废止决定自2021年1月1日起施行。三个废止理由如下：

- 有的司法解释发布的时间较为久远，已经不适应当前的经济社会形势。如《最高人民法院关于人民法院司法统计工作的若干规定》[5]发布于1985年，已经无法适应当前信息化条件下的实际统计工作。

- 有的司法解释的主要内容已经被《民法典》及相关法律、新制定的司法解释吸收、替代。如《最

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郭锋是中华人民共和国最高人民法院高级法官、研究室执行主任。自2014年担任该研究室副主任以来，他主管最高人民法院的指导性案例制度等的研究、建设与发展工作。在此之前，郭法官曾担任中央财经大学法学院院长，历时八年之久。在他的领导下，中财法学院成为全国名列前茅的法学院，特别在银行法、资本市场制度和金融监管制度等专业领域享有盛名。

郭法官创立了中国证券法学研究会，自创立迄今被连续选任担当会长。直到现在，中国证券法学研究会依然是中国在资本市场研究领域中最负盛名的法律研究协会。作为九十年代初为数不多获得法学博士学位的先进，郭法官曾长期担任著名的中国人民大学法学院的教职。

高人民法院关于审理涉及夫妻债务纠纷案件适用法律有关问题的解释》[6]是关于“夫妻共同债务”的规定，已被《民法典》第一千零六十四条吸收。[7]

- 有的司法解释所解决的法律适用问题可以直接援引《民法典》及相关法律、司法解释的规定解决。如1990年发布的《最高人民法院关于银行工作人员未按规定办理储户挂失造成储户损失银行是否担任民事责任的批复》，[8]有关问题可以直接援引《民法典》关于违约责任、侵权责任的规定解决。

2. 修改111件司法解释

最高法审判委员会决定修改的111件司法解释，包括民事类109件，刑事类1件、行政类1件。为方便检索适用，将修改后的111件司法解释分为民事类（27件）、[9]商事类（29件）、[10]知识产权类（18件）、[11]民事诉讼类（19件）[12]及执行类（18件）[13]等5个类别，分别制定、发布修改决定。

这些修改决定自2021年1月1日起施行，修改后的司法解释文本重新公布。主要修改内容包涵四方面：

- 对标《民法典》等法律相应修改司法解释所援引的法律名称和条文序号；
- 对标《民法典》等法律删除个别条文或表述；
- 对标《民法典》等法律增加有关内容或调整有关表述；
- 鉴于《民法典》施行日，《中华人民共和国民法通则》、《中华人民共和国合同法》等9部法律同时废止，[14]与此9部法律配套的司法解释，从名称到内容都需要进行较大幅度删、改、增。此类司法解释共有27件。

3. 不再参照2件指导性案例

最高法审判委员会决定对2件与司法解释或规范性文件精神不符的指导性案例不再参照，并通过《最高人民法院关于部分指导性案例不再参照的通知》公布如下内容：[15]

> 为保证国家法律统一正确适用，根据《中华人民共和国民法典》等有关法律规定和审判实际，经最高人民法院审判委员会讨论决定，**9号、20号指导性案例不再参照**。但该指导性案例的裁判以及参照该指导性案例作出的裁判仍然有效。（强调后加）

（1）不再参照指导案例9号的理由

指导案例9号《上海存亮贸易有限公司诉蒋志东、王卫明等买卖合同纠纷案》，[16]从证据上认定蒋志东、王卫明“怠于履行[清算]义务”，与2019年9月11日经最高法审判委员会民事行政专业委员会通过的《全国法院民商事审判工作会议纪要》[17]（通称《九民会纪要》）第15条确立的精神不符。该条规定：

> 【因果关系抗辩】有限责任公司的股东举证证明其“怠于履行义务”的消极不作为与“公司主要财产、账册、重要文件等灭失，无法进行清算”的结果之间没有因果关系，主张其不应对公司债务承担连带清偿责任的，人民法院依法予以支持。

（2）不再参照指导案例20号的理由

指导案例20号《深圳市斯瑞曼精细化工有限公司诉深圳市坑梓自来水有限公司、深圳市康泰蓝水处理设备有限公司侵害发明专利权纠纷案》[18]的裁判要点是：

> 在发明专利申请公布后至专利权授予前的临时保护期内制造、销售、进口的被诉专利侵权产品不为专利法禁止的情况下，其后续的使用、许诺销售、销售，即使未经专利权人许可，也**不视为侵害专利权**，但专利权人可以依法要求临时保护期内实施其发明的单位或者个人**支付适当的费用**。（强调后加）

裁判要点中的“支付适当的使用费”不是基于侵害专利权，而是基于“不当得利请求权”而产生的“适当的费用”。这不符合《中华人民共和国专利法》[19]（“《专利法》”）第十三条规定的立法原意。该条规定：

> 发明专利申请公布后，申请人可以要求实施其发明的单位或者个人支付**适当的费用**。（强调后加）

《专利法》第十三条前提是认为实施其发明的单位或者个人实际上侵害了专利权人的权利。最高法制定的《最高人民法院关于审理侵犯专利权纠纷案件应用法律若干问题的解释（二）》[20]第十八条第一款据此规定：

侧边栏：

《最高人民法院关于适用〈中华人民共和国民法典〉时间效力的若干规定》

第一条

民法典施行后的法律事实引起的民事纠纷案件，适用民法典的规定。

民法典施行前的法律事实引起的民事纠纷案件，适用当时的法律、司法解释的规定，但是法律、司法解释另有规定的除外。

民法典施行前的法律事实持续至民法典施行后，该法律事实引起的民事纠纷案件，适用民法典的规定，但是法律、司法解释另有规定的除外。

第二条

民法典施行前的法律事实引起的民事纠纷案件，当时的法律、司法解释有规定，适用当时的法律、司法解释的规定，**但是适用民法典的规定更有利于保护民事主体合法权益，更有利于维护社会和经济秩序，更有利于弘扬社会主义核心价值观的除外。**

（强调后加）

> ***“[指导案例20号]裁判要点中的‘支付适当的使用费’不是基于侵害专利权，而是基于‘不当得利请求权’而产生的‘适当的费用’。这不符合《中华人民共和国专利法》第十三条规定的立法原意。”***

> 权利人依据专利法第十三条诉请**在发明专利申请公布日至授权公告日期间**实施该发明的单位或者个人支付适当费用的，人民法院可以参照有关专利许可使用费合理确定。（强调后加）

这与《专利法》第十三条立法精神是一致的。因此，指导案例20号裁判要点中认为“不视为侵害专利权”，实际上是用“不当得利请求权”理论而非侵权理论来解释“支付适当的费用”。这解释不符合《专利法》第十三条立法原意和上述司法解释第十八条第一款原意。所以，该指导性案例不再参照。

制定与《民法典》配套的第一批司法解释和修订相关规范性文件

为确保《民法典》统一正确实施，最高法按照“统一规划、分批制定，急用先行、重点推进，先易后难、确保质量”的原则，[21]制定并经审判委员会审议通过与《民法典》配套的第一批共7件新的司法解释，以及修订并经审判委员会审议通过的1件非司法解释类规范性文件。这些新的司法解释和修订后的规范性文件于2021年1月1日与《民法典》同时实施。

1. 制定关于《民法典》时间效力的司法解释

《民法典》属于实体法，原则上只对施行后发生的法律事实产生约束力，对施行前发生的法律事实无溯及力。但《中华人民共和国立法法》[22]第九十三条规定了例外情形：

> 法律、行政法规、地方性法规、自治条例和单行条例、规章不溯及既往，**但为了更好地保护公民、法人和其他组织的权利和利益而作的特别规定除外**。（强调后加）

因此，为了解决《民法典》施行后审判实践面临的有关新旧法律和司法解释衔接适用问题，并严格规范溯及例外情形的适用条件，有必要制定专门司法解释。

为此，最高法审判委员会制定并于2020年12月14日审议通过了《最高人民法院关于适用〈中华人民共和国民法典〉时间效力的若干规定》[23]（“《时间效力司法解释》”）。该司法解释第一条第二款规定：

> 民法典施行前的法律事实引起的民事纠纷案件，适用当时的法律、司法解释的规定，但是法律、司法解释另有规定的除外。

也就是说，《民法典》施行前的法律事实引起的民事纠纷案件，在《民法典》施行后尚未审结的，一般要适用当时的法律、司法解释的规定，包括《民法典》施行时同步废止的9部法律[24]和上述的116件司法解释，而不能适用《民法典》的规定。

同时，根据《时间效力司法解释》第二条的规定（见**侧边栏**），当时的法律、司法解释虽然有规定，“但是适用民法典的规定更有利于保护民事主体合法权益，更有利于维护社会和经济秩序，更有利于弘扬社会主义核心价值观的”，溯及适用《民法典》的规定。特别是针对《民法典》与《中华人民共和国合同法》、《中华人民共和国物权法》等九部法律的新旧衔接适用问题，《时间效力司法解释》依法明确了溯及适用这一例外情形的适用条件。比如，《时间效力司法解释》第八条规定：

> 民法典施行前成立的合同，适用当时的法律、司法解释的规定合同无效而适用民法典的规定合同有效的，适用民法典的相关规定。

以上规定更加符合当事人的意思自治，也有利于促进和鼓励交易。

《民法典》施行后的几个月内，中国法院一些案件已按照《时间效力司法解释》进行裁判，溯及适用了《民法典》的规定。比如，北京市第二中级人民法院审理的一起涉打印遗嘱继承纠纷案件。[25]该案涉及《时间效力司法解释》第十五条，其规定如下：

> ***“《民法典》施行后的几个月内，中国法院一些案件已按照《时间效力司法解释》进行裁判，溯及适用了《民法典》的规定。”***

> 民法典施行前，遗嘱人以打印方式立的遗嘱，当事人对该遗嘱效力发生争议的，适用民法典第一千一百三十六条的规定，但是遗产已经在民法典施行前处理完毕的除外。

北京市第二中级人民法院认为：

> [该案涉及的遗嘱]从形式上看属于打印遗嘱，虽然遗嘱订立于民法典施行之前，但其中所涉及的遗产至今尚未处理完毕，现当事人对该遗嘱效力发生争议，依法应当适用《中华人民共和国民法典》第一千一百三十六条有关打印遗嘱的规定，即“打印遗嘱应当有两个以上见证人在场见证。遗嘱人和见证人应当在遗嘱每一页签名，注明年、月、日。”

简言之，虽然此案件的法律事实发生在《民法典》施行前，但是该案情况符合《时间效力司法解释》中有关溯及适用的规定，故适用了《民法典》的有关规定。[26]

2. 制定关于适用《民法典》担保制度的司法解释

担保制度对于坚持和完善中国基本经济制度、优化营商环境、推动高质量发展，具有重要作用。世界银行《营商环境报告》中的“获得信贷”指标，基本衡量的就是该报告分析的有关国家的担保制度。[27]

适应《民法典》对担保制度重大完善的情况，最高法在清理废止以往与担保有关的9件司法解释的基础上，为切实规范担保交易秩序，减轻融资成本，促进资金融通，扩大增信手段，保障债权实现，缓解中小企业融资难融资贵问题，新制定了《最高人民法院关于适用〈中华人民共和国民法典〉有关担保制度的解释》[28]（“《担保制度司法解释》”）。

该司法解释针对了长期困扰司法实践的疑难问题，包括：在公司对外担保、分支机构对外担保、学校医院对外担保、混合担保中，担保人有无追偿权；债务人破产时保证人应否停止计息；如何认识先诉抗辩权；保证合同无效时能否适用保证期间；预告登记的效力；流动质押和仓单质押的性质。为此，《担保制度司法解释》在“一般规定”中规定了担保合同与主合同的关系、担保资格、公司对外担保等。[29]在“保证合同”中规定了保证期间、一般保证、共同保证、最高额保证等。[30]在“担保物权”中规定了不动产担保、动产和权利担保。[31]在“非典型担保”中规定了所有权保留、融资租赁等司法适用规则。[32]

3. 制定关于物权、婚姻家庭、继承、建设工程施工合同、劳动争议等司法解释

为强化民生司法保障，及时回应人民群众关切，最高法对涉及物权、婚姻家庭、继承、建设工程施工合同、劳动争议等方面的司法解释，按照清晰、简明、针对性强的原则，在废止原有众多司法解释的基础上，根据《民法典》的新精神，制定为5件相应司法解释：《最高人民法院关于适用〈中华人民共和国民法典〉物权编的解释（一）》、[33]《最高人民法院关于适用〈中华人民共和国民法典〉婚姻家庭编的解释（一）》[34]（“《婚姻家庭编司法解释》”）、《最高人民法院关于适用〈中华人民共和国民法典〉继承编的解释（一）》[35]（“《继承编司法解释》”）、《最高人民法院关于审理建设工程施工合同纠纷案件适用

法律问题的解释（一）》、[36]《最高人民法院关于审理劳动争议案件适用法律问题的解释（一）》。[37]

比如，《婚姻家庭编司法解释》对原婚姻家庭司法解释具体规则进行了体系化整合，内容上注重引导树立良好的家教、家风，弘扬家庭美德，注重保护妇女、未成年人、老年人和残疾人的合法权益。《继承编司法解释》注重引导全社会形成尊老爱幼、互帮互助的良好风尚，扩大遗赠扶养协议中扶养人的主体范围，切实尊重遗嘱人的真实意愿，确保遗产顺利分配。

4. 修订非司法解释类规范性文件：《民事案件案由规定》

为便利人民群众诉讼、服务审判执行、便于司法统计，最高法修改并审议通过了《民事案件案由规定》，[38]对152个案由进行了修改完善。按照《民法典》规定的新制度增加新的案由、规范原有案由。重点修改如下：

- 随着网络技术发展，个人信息被滥用的问题日益严重，为加强个人信息保护，根据《民法典》第一千零三十四条等规定，[39]增加了“个人信息保护纠纷”案由。[40]

- 为及时制止严重侵害人格权的违法行为，切实保护广大人民群众人格权，依照《民法典》第九百九十七条的规定，[41]增加了“申请人格权侵害禁令”案由。[42]

- 为彰显《民法典》的“绿色原则”，[43]推动完善生态文明制度体系，专门增加了涉及生态环境保护的具体案由，即“生态破坏责任纠纷”、“生态环境保护民事公益诉讼”案由。[44]

- 为全面保护未成年人健康成长，专门增加了“未成年人保护民事公益诉讼”案由，[45]配合修订后《中华人民共和国未成年人保护法》的施行。[46]

此外，这次修订还对照《民法典》增加了自然人声音的保护、[47]居住权、[48]保理合同[49]等几十个案由。另外，还增加了“特殊诉讼程序案件案由”第一级案由，[50]并在其项下增加相应的“公益诉讼”、[51]“第三人撤销之诉”、[52]“执行程序中的异议之诉”[53]等案由，进一步完善了民事案件案由体系。

《民法典》时代司法解释和指导性案例的发展趋势

《民法典》的颁布启动了最高法付出庞大的努力，清理原有的司法解释和指导性案例，以及制定新的司法解释和修订相关规范性文件。展望将来，在《民法典》时代中，司法解释与指导性案例将有以下五项发展趋势。

1. 民事司法解释和指导性案例将会重点突出人格权、财产权、知识产权、生态环境、数字科技等领域的保护

在人格权保护方面，最高法根据《民法典》“人格权”编规定，[54]对人身损害赔偿等有关人格权纠纷的司法解释完成了修改。其中重大的改善包括：

- 《最高人民法院关于审理人身损害赔偿案件适用法律若干问题的解释》[55]完善了人身损害的内涵和赔偿范围，即生命、身体和健康等物质性人格权遭受侵害，赔偿范围包括物质损害和精神损害；增加规定死亡受害人的近亲属有权主张精神损害赔偿。[56]该司法解释亦规定“被扶养人生活费计入残疾赔偿金或者死亡赔偿金”，[57]以更好地维护受害人权益。

- 《最高人民法院关于确定民事侵权精神损害赔偿责任若干问题的解释》[58]将精神损害赔偿的保护对象调整为“人身权益”或者“具有人身意义的特定物”。[59]

目前，最高法正在针对人格权侵害禁令这项新制度的司法适用开展调研，聚焦适用条件和相应程序规则等问题，起草关于人格权侵害禁令的指导意见或者司法解释。

针对财产权、知识产权、生态环境和数字科技，最高法亦将会通过民事司法解释和指导性案例加强保护。在财产权保护方面，最高法会贯彻实施好《民法典》关于物权、[60]合同[61]等制度规定，平等保护各种所有制产权，推动建设高标准市场体系，营造市场化法治化国际化营商环境。在知识产权保护方面，最高法会严格执行《民法典》第一百二十三条规定，保护民事主体依法享有的知识产权，协助建立对知识产权侵权进行惩罚性赔偿的立法制度，进一步完善司法制度。

此外，在生态环境保护方面，最高法会准确适用《民法典》关于绿色原则和绿色条款的规定，[62]落实故意污染环境、破坏生态的惩罚性赔偿规定。最后，在数字科技保护方面，最高法会按照《民法典》规定，处理好涉及数据、网络虚拟财产，[63]和个人信息保护等案件，[64]认真研究人工智能、无人驾驶、机器人创作著作权归属、数字货币等新的司法问题。

2. 构建《民法典》时代的多层次司法解释体系

最高法审判委员会在审议司法解释清理报告时，确立了对《民法典》时代的司法解释制定的基本原则，

即：以问题为导向、以审判执行需求为出发点、以准确理解和适用法律为原则，构建多层次的《民法典》司法解释体系，而不追求大而全的司法解释体系。

具体而言，要按照《民法典》解释整体适用问题、解释该法典某一编的法律适用问题、解释某类具体案件的法律适用问题的思路，构建多层次的《民法典》司法解释体系。这样的体系逻辑清晰、层次分明，便于检索、查找，有利于对民法司法解释的学习和适用，也便于根据《民法典》实施情况，随时补充制定有关司法解释。

“最高法将推动建立对司法解释和指导性案例实施效果而进行评估的第三方评估机制，鼓励学术机构、民间团体进行独立的竞争性评估评价。”

3. 进一步发挥司法解释和指导性案例统一裁判规则的作用

中国法学理论界一直对司法解释存在的正当性持有非议，但实践证明，司法解释可以保证法律准确适用，统一裁判规则，解决程序法和实体法在司法适用上的不协调，弥补立法的不足和滞后问题，并促进立法的发展。

要进一步发挥司法解释对立法的积极作用，有需要厘清司法解释与立法的界限。司法解释是就法律具体应用问题进行解释，且通常以具体的适用对象或案件作为载体，司法解释不能僭越立法权限。例如，司法解释不能像《民法典》那样为民事主体创设权利、义务和责任，也不能限制、限缩权利，增加义务、责任。司法解释不能修改、变更法律条文的内容，作出“越权解释”、扩大解释，侵犯立法权或者行政权，更不能脱离法律的规定，创制新的法律规范。

关于指导性案例，有的观点认为，在《民法典》时代，司法解释的主要价值和功能需“让渡”给指导性案例，即将《民法典》创制性的内容，在来不及进行司法解释的情形下，可以考虑由指导性案例对这类新问题、新内容进行规范。这种观点的本质缺陷是忽视了指导性案例没有法律拘束力这一事实。[65]尽管最高法一再强调各级人民法院审判类似案件时“应当参照”指导性案例，[66]但“应当参照”而不参照的法律后果缺少法律依据。再从指导性案例产生的程序来看，事实上比司法解释更为严格、周期更长。指导性案例所基于的案件从立案开始，走完各个环节——开庭、判决、二审终审、推荐与筛选、审核与通过、公告发布——的周期，总体上较为漫长，平均2–3年，在及时有效地满足司法实践需求方面具有明显不足之处。所以，指导性案例不能取代司法解释的主要价值和功能。

4. 强化指导性案例

尽管指导性案例有上述不足之处，其在“总结审判经验，统一法律适用，提高审判质量，维护司法公正”[67]等方面发挥了积极作用，受到广泛关注和好评。自2011年11月发布第一批指导性案例以来，截止2021年3月，共发布了27批156件指导性案例，平均每年发布数量约15件。下一步，最高法会充分发挥案例指导和类案检索机制[68]作用，确保民事审判质效。

具体工作包括修订《最高人民法院关于案例指导工作的规定》[69]及其实施细则、[70]指导性案例编写体例，确认已经形成案例编选经验，完善制度标准。在最高法研究室的统筹下，充分发挥全国地方法院、专门法院、最高法各审判庭和巡回法庭推荐、编选案例的积极性，并开发利用信息网络平台。同时，加强和国内外法律院校案例研究中心的合作，鼓励他们深度参与最高法指导性案例的推荐编选，并加强理论研究。最终实现指导性案例数量和质量的新突破。

5. 完善司法解释和指导性案例的效果评估和常态化清理机制

一直以来，没有有效的机制与手段评估司法解释和指导性案例发布后的效果。值得研究的重要问题包括：它们是否有助于法官在审判案件时准确理解与适用法律；是否能够有效地为案件争议焦点提供法律适用的解释和类似案例作参照；是否可以让社会公众、当事人和法律服务执业者形成与法律精神、法律原则、法律规范、裁判规则相契合的预期；是否经得起立法机关的合法性审查等等。因为需要了解这些问题，所以最高法将推动建立对司法解释和指导性案例实施效果而进行评估的第三方评估机制，鼓励学术机构、民间团体进行独立的竞争性评估评价。

同时，最高法会在总结本次基于《民法典》的清理工作的基础上，采取随时清理、专项清理与集中清理相结合的方式，将清理工作常态化。这将会形成根据法律规定、修改或者废止的新情况、新要求及时清理司法解释和指导性案例的工作机制，进一步完善司法解释和指导性案例。

综上，《民法典》时代司法解释与指导性案例的五项发展趋势，不仅会促进《民法典》的顺利实施，当中的经验，亦会为中国日后发展其他法典奠定坚实的基础。■

* 此评论的引用是：郭锋法官，中国《民法典》时代司法解释和指导性案例的清理成果与发展趋势，《中国法律连接》，第12期，第14页（2021年3月），*亦见于*斯坦福法学院中国指导性案例项目，2021年3月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-12-202103-34-guo-feng。中文原文由熊美英博士编辑。载于本评论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。

[1] 《中华人民共和国民法典》，2020年5月28日通过和公布，2021年1月1日起施行，http://www.npc.gov.cn/npc/c30834/202006/75ba6483b8344591abd07917e1d25cc8.shtml（以下简称“《民法典》”）。

[2] 最高法的司法解释和规范性文件经过了多次清理。《民法典》颁布之前的最后一次清理是于2018年进行，清理后有效的司法解释为561件。加上后来制定的30件，到2020年5月28日，当时有效的司法解释共有591件，全部纳入这次清理范围。

在这次清理完成后公布的有关文件和信息中，有的使用了“清理司法解释和相关规范性文件”的表述。之所以出现“规范性文件”一词，是因为有观点认为部分之前发布的司法解释采用了“会议纪要”、“通知”、“答复”等形式，不符合司法解释的形式要件，应该视之为“规范性文件”。关于司法解释的形式要件，1997年7月1日起施行的《最高人民法院关于司法解释工作的若干规定》第九条规定：“司法解释的形式分为‘解释’、‘规定’、‘批复’三种。”2007年4月1日起施行的《最高人民法院关于司法解释工作的规定》取代了前述司法解释后，其第六条规定：“司法解释的形式分为‘解释’、‘规定’、‘批复’和‘决定’四种。”*见*《最高人民法院关于司法解释工作的若干规定》，1997年6月23日公布，1997年7月1日起施行，2007年4月1日起失效，http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=ffe2015d319ad99abdfb；《最高人民法院关于司法解释工作的规定》，2006年12月11日由最高人民法院审判委员会通过，2007年3月9日公布，2007年4月1日起施行，http://www.sc.gov.cn/sczb/lmfl/bmwjdx/200706/t20070607_185328.shtml。

但是，笔者持不同看法。首先，在最高法审判委员会最近10年审议通过的清理结果决议中，将历史上发布的部分有关“会议纪要”、“通知”、“答复”仍然定性为司法解释。此外，本次纳入清理范围的591件司法解释文件包括了数十件采用“会议纪要”、“通知”、“答复”等形式的司法解释，它们并非一般意义上的规范性文件。因此，在本文中，一律使用清理“司法解释”的表述。

[3] *见*乔文心，认真学习贯彻习近平法治思想 确保民法典统一正确实施，《人民法院报》，2020年12月29日，http://rmfyb.chinacourt.org/paper/html/2020-12/29/content_175090.htm?div=0。

[4] 《最高人民法院关于废止部分司法解释及相关规范性文件的决定》，2020年12月23日由最高人民法院审判委员会通过，2020年12月29日公布，2021年1月1日起施行，https://www.chinacourt.org/law/detail/2020/12/id/150223.shtml。

[5] 《最高人民法院关于人民法院司法统计工作的若干规定》，1985年11月21日公布，同日起施行，2021年1月1日起失效，http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=f771643e57d5fe33bdfb。

[6] 《最高人民法院关于审理涉及夫妻债务纠纷案件适用法律有关问题的解释》，2018年1月8日由最高人民法院审判委员会通过，2018年1月16日公布，2018年1月18日起施行，2021年1月1日起失效，http://www.court.gov.cn/zixun-xiangqing-77352.html。

[7] 《民法典》，注释1，第一千零六十四条。该条规定：

> 夫妻双方共同签名或者夫妻一方事后追认等共同意思表示所负的债务，以及夫妻一方在婚姻关系存续期间以个人名义为家庭日常生活需要所负的债务，属于夫妻共同债务。
>
> 夫妻一方在婚姻关系存续期间以个人名义超出家庭日常生活需要所负的债务，不属于夫妻共同债务；但是，债权人能够证明该债务用于夫妻共同生活、共同生产经营或者基于夫妻双方共同意思表示的除外。

[8] 《最高人民法院关于银行工作人员未按规定办理储户挂失造成储户损失银行是否担任民事责任的批复》，1990年9月11日公布，同日起施行，2021年1月1日起失效，http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=27c29826a6591e2fbdfb。

[9] 《最高人民法院关于修改〈最高人民法院关于在民事审判工作中适用《中华人民共和国工会法》若干问题的解释〉等二十七件民事类司法解释的决定》，2020年12月23日由最高人民法院审判委员会通过，2020年12月29日公布，2021年1月1日起施行，http://www.court.gov.cn/zixun-xiangqing-282621.html。

[10] 《最高人民法院关于修改〈最高人民法院关于破产企业国有划拨土地使用权应否列入破产财产等问题的批复〉等二十九件商事类司法解释的决定》，2020年12月23日由最高人民法院审判委员会通过，2020年12月29日公布，2021年1月1日起施行，http://www.court.gov.cn/zixun-xiangqing-282631.html。

[11] 《最高人民法院关于修改〈最高人民法院关于审理侵犯专利权纠纷案件应用法律若干问题的解释（二）〉等十八件知识产权类司法解释的决定》，2020年12月23日由最高人民法院审判委员会通过，2020年12月29日公布，2021年1月1日起施行，http://www.court.gov.cn/zixun-xiangqing-282671.html。

[12] 《最高人民法院关于修改〈最高人民法院关于人民法院民事调解工作若干问题的规定〉等十九件民事诉讼类司法解释的决定》，2020年12月23日由最高人民法院审判委员会通过，2020年12月29日公布，2021年1月1日起施行，http://www.court.gov.cn/zixun-xiangqing-282651.html。

[13] 《最高人民法院关于修改〈最高人民法院关于人民法院扣押铁路运输货物若干问题的规定〉等十八件执行类司法解释的决定》，2020年12月23日由最高人民法院审判委员会通过，2020年12月29日公布，2021年1月1日起施行，http://www.court.gov.cn/zixun-xiangqing-282661.html。

[14] 《民法典》，注释1，第一千二百六十条。该条规定：

> 本法自2021年1月1日起施行。《中华人民共和国婚姻法》、《中华人民共和国继承法》、《中华人民共和国民法通则》、《中华人民共和国收养法》、《中华人民共和国担保法》、《中华人民共和国合同法》、《中华人民共和国物权法》、《中华人民共和国侵权责任法》、《中华人民共和国民法总则》同时废止。

[15] 《最高人民法院关于部分指导性案例不再参照的通知》，2020年12月29日公布，2021年1月1日起施行，http://www.court.gov.cn/fabu-xiangqing-282441.html。

[16] 《上海存亮贸易有限公司诉蒋志东、王卫明等买卖合同纠纷案》，《中国法律连接》，第12期，第73页（2021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（CGC9），2021年3月，https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-9。

[17] 《最高人民法院关于印发〈全国法院民商事审判工作会议纪要〉的通知》，2019年11月8日公布，同日起施行，http://www.court.gov.cn/zixun-xiangqing-199691.html。

[18] 《深圳市斯瑞曼精细化工有限公司诉深圳市坑梓自来水有限公司、深圳市康泰蓝水处理设备有限公司侵害发明专利权纠纷案》，《中国法律连接》，第12期，第79页（2021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（CGC20），2021年3月，https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-20。

[19] 《中华人民共和国专利法》，1984年3月12日通过和公布，1985年4月1日起施行，经四次修正，最新修正于2020年10月17日，2021年6月1日起施行，http://www.moj.gov.cn/Department/content/2020-11/19/592_3260623.html。第十三条在该法2020年修正时维持不变。

[20] 《最高人民法院关于审理侵犯专利权纠纷案件应用法律若干问题的解释（二）》，2016年1月25日由最高人民法院审判委员会通过，2016年3月21日公布，2016年4月1日起施行，并于2020年12月23日修正，2021年1月1日起施行，http://www.court.gov.cn/zixun-xiangqing-282641.html。

[21] 周强：以习近平新时代中国特色社会主义思想为指导 充分发挥审判职能作用 确保民法典正确贯彻实施，《求是》，http://cpc.people.com.cn/n1/2020/0617/c64094-31750046.html。

[22] 《中华人民共和国立法法》，2000年3月15日通过和公布，2000年7月1日起施行，并于2015年3月15日修正，同日起施行，http://www.npc.gov.cn/zgrdw/npc/dbdhhy/12_3/2015-03/18/content_1930713.htm。

[23] 《最高人民法院关于适用〈中华人民共和国民法典〉时间效力的若干规定》，2020年12月14日由最高人民法院审判委员会通过，2020年12月29日公布，2021年1月1日起施行，http://www.court.gov.cn/fabu-xiangqing-282051.html。

[24] 《民法典》，注释1，第一千二百六十条。*见*注释14。

[25] （2021）京02民终1518号民事判决，2021年1月28日由北京市第二中级人民法院作出，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/beijing-2021-jing-02-min-zhong-1518-civil-judgment。

[26] 其他案件包括：北京市朝阳区人民法院审理的一起打羽毛球被击中右眼状告球友案、广东省广州市越秀区人民法院审理的一起高空抛物损害责任纠纷案。*见*张蕾，打羽毛球被击伤右眼 原告索赔被驳回，《北京日报》，2021年1月5日，http://bjrbdzb.bjd.com.cn/bjrb/mobile/2021/20210105/20210105_006/content_20210105_006_3.htm#page5；毛一竹，广州：高空抛物致人伤残被判赔9万多元，《新华网》，https://www.chinacourt.org/article/detail/2021/01/id/5690026.shtml。

[27] 世界银行，获得信贷，《营商环境报告》：方法与研究，https://chinese.doingbusiness.org/zh/methodology/getting-credit。

[28] 《最高人民法院关于适用〈中华人民共和国民法典〉有关担保制度的解释》，2020年12月25日由最高人民法院审判委员会通过，2020年12月31日公布，2021年1月1日起施行，http://www.court.gov.cn/zixun-xiangqing-282721.html。

[29] *同上*，第一条到第二十四条。

[30] *同上*，第二十五条到第三十六条。

[31] *同上*，第三十七条到第六十二条。

[32] *同上*，第六十三条到第七十条。

[33] 《最高人民法院关于适用〈中华人民共和国民法典〉物权编的解释（一）》，2020年12月25日由最高人民法院审判委员会通过，2020年12月29日公布，2021年1月1日起施行，http://www.court.gov.cn/zixun-xiangqing-282101.html。

[34] 《最高人民法院关于适用〈中华人民共和国民法典〉婚姻家庭编的解释（一）》，2020年12月25日由最高人民法院审判委员会通过，2020年12月29日公布，2021年1月1日起施行，http://www.court.gov.cn/fabu-xiangqing-282071.html。

[35] 《最高人民法院关于适用〈中华人民共和国民法典〉继承编的解释（一）》，2020年12月25日由最高人民法院审判委员会通过，2020年12月29日公布，2021年1月1日起施行，http://www.court.gov.cn/zixun-xiangqing-282091.html。

[36] 《最高人民法院关于审理建设工程施工合同纠纷案件适用法律问题的解释（一）》，2020年12月25日由最高人民法院审判委员会通过，2020年12月29日公布，2021年1月1日起施行，http://www.court.gov.cn/zixun-xiangqing-282111.html。

[37] 《最高人民法院关于审理劳动争议案件适用法律问题的解释（一）》，2020年12月25日由最高人民法院审判委员会通过，2020年12月29日公布，2021年1月1日起施行，http://www.court.gov.cn/zixun-xiangqing-282121.html。

[38] 《民事案件案由规定》，2007年10月29日由最高人民法院审判委员会通过，2008年2月4日公布，2008年4月1日起施行，经两次修正，最新修正于2020年12月14日，2021年1月1日起施行，http://www.court.gov.cn/fabu-xiangqing-282031.html。

[39] 《民法典》，注释1，第一千零三十四条。该条第一款明确规定："自然人的个人信息受法律保护。"

[40] 《民事案件案由规定》，注释38，第8（2）项。

[41] 《民法典》，注释1，第九百九十七条。该条规定：

> 民事主体有证据证明行为人正在实施或者即将实施侵害其人格权的违法行为，不及时制止将使其合法权益受到难以弥补的损害的，有权依法向人民法院申请采取责令行为人停止有关行为的措施。

[42] 《民事案件案由规定》，注释38，第443项。

[43] *见，例如*，《民法典》，注释1，第一千二百二十九条到第一千二百三十五条。

[44] 《民事案件案由规定》，注释38，第378、466项。

[45] *同上*，第468项。

[46] 《中华人民共和国未成年人保护法》，1991年9月4日通过和公布，1992年1月1日起施行，经一次修正和两次修订，最新修订于2020年10月17日，2021年6月1日起施行，http://www.gov.cn/xinwen/2020-10/18/content_5552113.htm。

[47] 《民事案件案由规定》，注释38，第5项。

[48] *同上*，第65、136项。

[49] *同上*，第113项。

[50] *同上*，第十一部分。

[51] *同上*，第466–469项。

[52] *同上*，第470项。

[53] *同上*，第471–473项。

[54] 《民法典》，注释1，第四编（即：第九百八十九条到第一千零三十九条）。

[55] 《最高人民法院关于审理人身损害赔偿案件适用法律若干问题的解释》，2003年12月4日由最高人民法院审判委员会通过，2003年12月26日公布，2004年5月1日起施行，并于2020年12月23日修正，2021年1月1日起施行，http://www.court.gov.cn/zixun-xiangqing-282621.html。

[56] *同上*，第一条。该条规定：

> 因**生命、身体、健康**遭受侵害，赔偿权利人起诉请求赔偿义务人赔偿**物质损害和精神损害**的，人民法院应予受理。
>
> 本条所称"赔偿权利人"，是指因侵权行为或者其他致害原因直接遭受人身损害的受害人以及**死亡受害人的近亲属**。
>
> 本条所称"赔偿义务人"，是指因自己或者他人的侵权行为以及其他致害原因依法应当承担民事责任的自然人、法人或者非法人组织。
>
> （强调后加）

[57] *同上*，第十六条。

[58] 《最高人民法院关于确定民事侵权精神损害赔偿责任若干问题的解释》，2001年2月26日由最高人民法院审判委员会通过，2001年3月8日公布，2001年3月10日起施行，并于2020年12月23日修正，2021年1月1日起施行，http://www.court.gov.cn/zixun-xiangqing-282621.html。

[59] *同上*，第一条。该条规定：

> 因**人身权益**或者**具有人身意义的特定物**受到侵害，自然人或者其近亲属向人民法院提起诉讼请求精神损害赔偿的，人民法院应当依法予以受理。（强调后加）

亦见《民法典》，注释1，第一千一百八十三条。该条规定：

> 侵害自然人**人身权益**造成严重精神损害的，被侵权人有权请求精神损害赔偿。
>
> 因故意或者重大过失侵害自然人**具有人身意义的特定物**造成严重精神损害的，被侵权人有权请求精神损害赔偿。
>
> （强调后加）

[60] 《民法典》，注释1，第二编（即：第二百零五条到第四百六十二条）。

[61] *同上*，第三编（即：第四百六十三条到第九百八十八条）。

[62] *同上*，第一千二百二十九条到第一千二百三十五条。

[63] *同上*，第一百二十七条。该条规定："法律对数据、网络虚拟财产的保护有规定的，依照其规定。"

[64] *同上*，第一百一十一条。该条规定：

> 自然人的个人信息受法律保护。任何组织或者个人需要获取他人个人信息的，应当依法取得并确保信息安全，不得非法收集、使用、加工、传输他人个人信息，不得非法买卖、提供或者公开他人个人信息。

[65] 指导性案例仍然有其重要性，因为它们具备事实拘束力。*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，笔者写道："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）。

[66] 中华人民共和国《最高人民法院关于案例指导工作的规定》，第七条，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。关于该规定的原文，见《最高人民法院关于案例指导工作的规定》，2010年11月15日由最高人民法院审判委员会通过，2010年11月26日公布，同日起施行，http://zxsfy.chinacourt.gov.cn/article/detail/2019/07/id/4988096.shtml。

[67] *同上*，前言。

[68] 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。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。

[69] 《最高人民法院关于案例指导工作的规定》，注释66。

[70] 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。关于该实施细则的原文，见《〈最高人民法院关于案例指导工作的规定〉实施细则》，2015年4月27日由最高人民法院审判委员会通过，2015年5月13日公布，同日起施行，http://zxsfy.chinacourt.gov.cn/article/detail/2019/07/id/4988096.shtml。

Reasons That Guiding Case No. 9 "Will No Longer Be for Reference and Imitation": An In-Depth Discussion of Relevant Cases and Authoritative Provisions*

David Wei Zhao & Haoxuan Cheng

Abstract

On December 29, 2020, the Supreme People's Court (the "SPC") issued a notice that essentially pronounced the "death" of Guiding Case No. 9. This is the first time since China established the Case Guidance System in 2010 that the SPC has announced that a Guiding Case "will no longer be for reference and imitation". This marks a crucial step in the gradual improvement of the system.

Unfortunately, however, the SPC did not clearly specify in the aforementioned notice why Guiding Case No. 9 "will no longer be for reference and imitation". By reviewing cases relevant to Guiding Case No. 9 as well as the controversies surrounding the actual application of this Guiding Case and the relevant provisions of the *Minutes of the Conference on Civil and Commercial Adjudication Work in Courts Throughout the Country* (which the Civil and Administrative Specialized Committee of the Adjudication Committee of the SPC passed on September 11, 2019), the authors of this article explore the reasons for the SPC's decision with respect to Guiding Case No. 9 and draw corresponding conclusions. The analysis conducted by the authors also raises questions about the circumstances under which a Guiding Case no longer has guiding effect, in response to which the authors offer related suggestions.

Introduction

On December 29, 2020, the Supreme People's Court (the "SPC") issued the *Notice of the Supreme People's Court on Guiding Cases That Will No Longer Be for Reference and Imitation*,[1] stating:

> In order to ensure the uniform and correct application of national laws, and in accordance with the *Civil Code of the People's Republic of China* and other relevant legal provisions as well as adjudication practices, the Adjudication Committee of the Supreme People's Court discussed and decided that Guiding Case Nos. 9 and 20 **will no longer be for reference and imitation**. However, the judgments and rulings of these Guiding Cases as well as the judgments and rulings rendered by referencing and imitating these Guiding Cases are still valid. (emphasis added)

The notice entered into effect on January 1, 2021.

Article 1 of the *Provisions of the Supreme People's Court Concerning Work on Case Guidance*[2] states:

> 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. (emphasis added)

In addition, Article 7 provides that people's courts at all levels "should reference and imitate"[3] Guiding Cases when adjudicating similar cases. In light of these two provisions, the fact that Guiding Case No. 9 (*Shanghai Cunliang Trading Co., Ltd. v. JIANG Zhidong, WANG Weiming et al., A Sale and Purchase Contract Dispute*)[4] "will no longer be for reference and imitation" seems to indicate that the case will no longer have guiding effect. Regarding the expression "no longer has guiding effect", Article 12 of the *Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"*[5] provides:

> 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.
> (emphasis added)

Among the more than 150 Guiding Cases that have been released so far, no new Guiding Cases have replaced Guiding

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Case No. 9. Is Guiding Case No. 9 "in conflict with a new law, administrative regulation, or judicial interpretation"? Through an analysis of Guiding Case No. 9 and related cases as well as other judicial developments, this article explores the reasons why this Guiding Case will no longer be for reference and imitation.

Origin of Guiding Case No. 9

1. Main Content of Guiding Case No. 9

Guiding Case No. 9 was among the third batch of Guiding Cases released by the SPC on September 18, 2012.

As stated in Guiding Case No. 9, Shanghai Cunliang Trading Co., Ltd. ("Cunliang Company") supplied, in accordance with a contract, goods to Changzhou Tuoheng Mechanical Equipment Co., Ltd. ("Tuoheng Company"), but Tuoheng Company was unable to follow the contract to make the full payment of goods. FANG Hengfu, JIANG Zhidong, and WANG Weiming were the shareholders of Tuoheng Company, owning 40%, 30%, and 30% of the company's shares, respectively. As the shareholders of Tuoheng Company, they should have promptly organized the liquidation of Tuoheng Company after its business license was revoked. However, they were idle in performing their liquidation obligations, causing the disappearance of principal properties, accounts, etc. of Tuoheng Company and making it impossible to conduct the liquidation. The acts of FANG Hengfu, JIANG Zhidong, and WANG Weiming in being idle in performing their liquidation obligations violated the relevant provisions of the *Company Law* and its judicial interpretation.[6] Therefore, it was determined that they should bear joint and several liability for the clearance of Tuoheng Company's debts. The Songjiang District People's Court of Shanghai Municipality made this decision in its (2009) Song Min Er (Shang) Chu Zi No. 1052 Civil Judgment, which was rendered on December 8, 2009.[7]

"[…] no new Guiding Cases have replaced Guiding Case No. 9. Is Guiding Case No. 9 'in conflict with a new law, administrative regulation, or judicial interpretation'?"

After the judgment was pronounced, JIANG Zhidong and WANG Weiming appealed. On September 1, 2010, the No. 1 Intermediate People's Court of Shanghai Municipality rejected the appeal and upheld the original judgment.[8] According to the content included in Guiding Case No. 9, the main reasons for the second-instance judgment were:

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> Tuoheng Company is a limited liability company. Legally, all of its shareholders, as a whole, should be the company's liquidation obligor. The *Company Law* and its related judicial interpretation do not provide the exceptions claimed in defense by JIANG Zhidong and WANG Weiming. Therefore, **regardless of the amount of shares JIANG Zhidong and WANG Weiming held in Tuoheng Company and whether or not they actually participated in the company's operation and management**, both individuals, after Tuoheng Company's business license was revoked, had an obligation to conduct liquidation of Tuoheng Company in accordance with law within the time limit prescribed by law. (emphasis added)

The SPC summarized the above principles as the "Main Points of the Adjudication" of Guiding Case No. 9:

> Shareholders of a limited liability company, or directors and controlling shareholders of a joint stock limited company, should, in accordance with law, perform liquidation obligations upon revocation of the company's business license. **They cannot be exempted from the liquidation obligations on the grounds that they are not *de facto* control persons or do not actually participate in the company's operation and management**. (emphasis added)

2. Reasons for the Selection of Guiding Case No. 9[9]

According to the Office for the Work on Case Guidance of the SPC, the sale and purchase contract dispute between Cunliang Company, on the one side, and JIANG Zhidong, WANG Weiming, and others, on the other, was selected to be a Guiding Case mainly for the following reason:[10]

> In adjudication practice, some shareholders of limited liability companies and some directors and controlling shareholders of joint stock limited companies **have defended [their positions] on the grounds that they are not *de facto* control persons or do not actually participate in the company's operation and management**. [Courts in] different regions understand and handle this defense differently. (emphasis added)

The differences stem from the fact that courts throughout the country have different understandings of Article 18 of the *Provisions (II) of the Supreme People's Court on Several Issues Concerning the Application of the "Company Law of the People's Republic of China"*[11] (the *"Judicial Interpretation (II) of the Company Law"*). The article provides:

> Where the shareholders of a limited liability company or the directors and controlling shareholders of a joint stock limited company do not form a liquidation group to begin the liquidation within the statutory time limit, causing the depreciation, loss, damage, or disappearance of company properties, if a creditor claims that [the shareholders, directors, and/or controlling shareholders] shall, within the scope of losses caused, be liable for compensation for the company's debts, a people's court should support the claim in accordance with law.
>
> Where the shareholders of a limited liability company or the directors and controlling shareholders of a joint stock limited company are **idle in performing obligations, causing the disappearance of principal properties, accounts, and important documents of the company** and making it impossible to conduct the liquidation, if a creditor claims that [the shareholders, directors, and/or controlling shareholders] shall bear joint and several liability for clearance of the company's debts, a people's court should support the claim in accordance with law.
>
> **Where any of the aforesaid circumstances are caused by the *de facto* control persons, if a creditor claims that the *de facto* control persons shall bear the corresponding civil liability for the company's debts, a people's court should support the claim in accordance with law.**
>
> (emphasis added)

In adjudication practice, this issue has come up quite frequently: if the situations stated in Article 18 Paragraphs 1 and 2 of the *Judicial Interpretation (II) of the Company Law* are caused by the *de facto* control persons, can the shareholders of a limited liability company or the directors and controlling shareholders of a joint stock limited company be exempted from the liquidation obligations?[12] Through Guiding Case No. 9, especially its Main Points of the Adjudication, the SPC has clarified the above issue, stating: "[s]hareholders of a limited liability company, or directors and controlling shareholders of a joint stock limited company […] cannot be exempted from the liquidation obligations on the grounds that they are not *de facto* control persons or do not actually participate in the company's operation and management". The Office for the Work on Case Guidance of the SPC explains in this way:[13]

"In Guiding Case No. 9, the SPC seems to have clarified the liquidation obligations of the shareholders of a limited liability company and those of the directors and controlling shareholders of a joint stock limited company. However, the analysis of Article 18 Paragraph 2 of the* Judicial Interpretation (II) of the Company Law *in the 'Reasons for the Adjudication' section of the Guiding Case has caused some controversies in judicial practice."

> For the shareholders of a limited liability company or the directors and controlling shareholders of a joint stock limited company, as long as a cause of dissolution of the company emerges, they must form a liquidation group to begin the liquidation within the statutory time limit. Even if other shareholders or *de facto* control persons hinder [the process] or do not cooperate, [the shareholders, directors, and/or controlling shareholders]—as the [company's] liquidation obligors and **regardless of the amount of shares they hold [in the company] and whether or not they can actually control the company**—should take further measures to require other liquidation obligors or *de facto* control persons to organize the liquidation until an application for compulsory liquidation is made, in accordance with law, to the court. Otherwise, [the shareholders, directors, and/or controlling shareholders] violate their statutory liquidation obligations and should bear the corresponding liabilities. **Only in this way can small shareholders, who are [also the company's] liquidation obligors, be urged to apply, in accordance with law, to a people's court for liquidation of the company when large shareholders do not actively perform their liquidation obligations** [(authors' note: neither "large shareholders" nor "small shareholders" is defined in the article)]. **[This is] to protect the interests of creditors, advocate for the principle of honesty and trustworthiness, and maintain a good market economic order**. (emphasis added)

As shown by the above explanation, the SPC attaches great importance to the protection of the interests of creditors and emphasizes that both large and small shareholders should perform their liquidation obligations.

Controversies Surrounding Guiding Case No. 9

In Guiding Case No. 9, the SPC seems to have clarified the liquidation obligations of the shareholders of a limited liability company and those of the directors and controlling shareholders of a joint stock limited company. However, the analysis of Article 18 Paragraph 2 of the *Judicial Interpretation (II) of the Company Law* in the "Reasons for the Adjudication" section of the Guiding Case has caused some controversies in judicial practice. The paragraph provides:

> Where the shareholders of a limited liability company or the directors and controlling shareholders of a joint stock limited company are **idle in performing obligations, causing the disappearance of principal properties, accounts, and important documents of the company** and making it impossible to conduct the liquidation, if a creditor claims that [the shareholders, directors, and/or controlling shareholders] shall bear joint and several liability for clearance of the company's debts, a people's court should support the claim in accordance with law. (emphasis added)

The controversies mainly involve the determination of what constitutes "idle in performing [liquidation] obligations" as well as the causal relationship between being "idle in performing [liquidation] obligations" and the "disappearance of principal properties, accounts, and important documents of the company".

1. *The Determination of Being "Idle in Performing [Liquidation] Obligations"*

The "Reasons for the Adjudication" section of Guiding Case No. 9 points out:

> Because FANG Hengfu, JIANG Zhidong, and WANG Weiming **were idle in performing their liquidation obligations, causing the disappearance of principal properties, accounts, etc. of Tuoheng Company and making it impossible to conduct the liquidation**, the acts of FANG Hengfu, JIANG Zhidong, and WANG Weiming in being idle in performing their liquidation obligations violated the relevant provisions of the *Company Law* and its judicial interpretation [**authors' note: i.e., Article 18 Paragraph 2 of the *Judicial Interpretation (II) of the Company Law***]. Therefore, they should bear joint and several liability for clearance of Tuoheng Company's debts.
>
> [...]
>
> JIANG Zhidong and WANG Weiming's agent entrustment contract which entrusted a lawyer

> to conduct the liquidation, as well as the lawyer's evidence, could prove only that JIANG Zhidong and WANG Weiming **intended** to conduct liquidation of Tuoheng Company. **In actuality, no** liquidation of Tuoheng Company **was conducted**. Accordingly, [the court] could not determine that JIANG Zhidong and WANG Weiming had performed their liquidation obligations in accordance with law. (emphasis added)

The above content shows that the court adopted objective requirements, which are stricter than subjective requirements, in the determination of what constitutes being "idle in performing [liquidation] obligations". In other words, even though JIANG Zhidong and WANG Weiming had the subjective intent to conduct liquidation of Tuoheng Company, JIANG Zhidong and WANG Weiming were still "idle in performing their liquidation obligations" if, in fact, the liquidation of the company had not been conducted.

With respect to this issue, the Intermediate People's Court of Shenzhen Municipality, Guangdong Province, which rendered the (2019) Yue 03 Min Zhong No. 7477 Civil Judgment on June 15, 2019, had a different opinion. This court identified some circumstances under which the shareholders may be deemed not to be idle in performing their liquidation obligations:[14]

> […] the so-called "being idle" in [performing] liquidation obligations refers to [a person's] being able to perform liquidation obligations but not performing [the obligations]. If shareholders of a limited liability company can adduce evidence to prove that they **have made active efforts to perform their liquidation obligations**, or that their inability to perform liquidation obligations is **due to objective reasons such as intentional delays or the refusal of shareholders who actually control** the principal properties, accounts, and documents of the company **to liquidate**; or if [the shareholders] can prove that **they have not participated in the operation of the company, nor have they managed its accounts and documents**, then they are not idle in performing their liquidation obligations. (emphasis added)

In summary, the above determination standards combine a shareholder's subjective intent to conduct liquidation with the shareholder's objective ability to perform his[15] liquidation obligations. The Intermediate People's Court of Shenzhen Municipality did not directly conclude from the objective result—i.e., that the company had not been liquidated—that the company's shareholders were idle in conducting liquidation. In another case adjudicated by the court after this case, the court continued to express its reservations about the determination standards adopted in Guiding Case No. 9.[16]

2. The Causal Relationship Between Being "Idle in Performing [Liquidation] Obligations" and the "Disappearance of Principal Properties, Accounts, and Important Documents of the Company"

The expression used in Article 18 Paragraph 2 of the *Judicial Interpretation (II) of the Company Law* is: "[…] the shareholders […] are idle in performing obligations, **causing** the disappearance of principal properties, accounts, and important documents of the company […]" (emphasis added). The causal relationship between these two elements is clear. With respect to this causal relationship, the "Reasons for the Adjudication" section of Guiding Case No. 9 states:

> Regarding the defense claim asserted by JIANG Zhidong and WANG Weiming that Tuoheng Company had already carried a large amount of debt before its business license was revoked, and that **even if they were idle in performing their liquidation obligations, [their idleness] had no causal relationship with the disappearance of Tuoheng Company's properties**. According to ascertained facts, the circumstance that enforcement against Tuoheng Company was suspended in other cases due to the absence of properties available for enforcement **could only prove that the people's courts had not located Tuoheng Company's properties during enforcement. It could not prove that all of Tuoheng Company's properties had disappeared before its business license was revoked.** There existed a causal relationship between the idleness of the three Tuoheng Company shareholders to perform their liquidation obligations and the disappearance of Tuoheng Company's properties and accounts. JIANG Zhidong and WANG Weiming's ground of defense on this point could not stand. (emphasis added)

The above inference is quite unreasonable, and the court should not simply attribute the disappearance of Tuoheng Company's properties to the shareholders' acts of being idle in performing their liquidation obligations. Regarding this issue, the (2019) Yue 03 Min Zhong No. 7477 Civil Judgment is worthy of reference.[17] Similar to Guiding Case No. 9, the company involved in that case received an enforcement ruling before its liquidation. In that ruling,

the company was determined to have no properties for enforcement. On the determination of the causal relationship between a party being "idle in performing [liquidation] obligations" and the "disappearance of principal properties, accounts, and important documents of the company", the Intermediate People's Court of Shenzhen Municipality made the following analysis:

> In this case, according to ascertained [facts], the original creditor applied on October 31, 2001 to the Futian District People's Court of Shenzhen Municipality for compulsory enforcement [...]. In the course of enforcement, the court ruled to suspend the enforcement because "the 'whereabouts' of [the company involved in the case] are unknown and there are no properties available for enforcement". Therefore, **in the absence of contrary evidence, it can be presumed** that when the business license of **the company [involved]** was revoked in 2004, giving rise to a cause of liquidation, the company had already been in a state that its 'whereabouts' were unknown and there were no properties available for enforcement. **Whether or not [the shareholders were] idle in conducting liquidation would not change the fact that the company's 'whereabouts' were unknown and that there were no properties available for enforcement, and that the principal properties had disappeared**, nor would it change the fact that its debts could not be paid off in full. (emphasis added)

The inference made by the Intermediate People's Court of Shenzhen Municipality is more pertinent. The courts in other subsequent cases also disagreed with Guiding Case No. 9 on the determination of the causal relationship as discussed above.[18]

Minutes of the Conference on Civil and Commercial Adjudication Work in Courts Throughout the Country

Controversies arising from Article 18 Paragraph 2 of the *Judicial Interpretation (II) of the Company Law* in judicial practice also captured attention at the Conference on Civil and Commercial Adjudication Work in Courts Throughout the Country, which was convened by the SPC in Harbin Municipality, Heilongjiang Province, on July 3–4, 2019. Related issues and guidance are recorded in the *Minutes of the Conference on Civil and Commercial Adjudication Work in Courts Throughout the Country*[19] (the "*Conference Minutes*"), which was passed on September 11, 2019 by the Civil and Administrative Specialized Committee of

> ***[…] the* Conference Minutes *point outs that when determining whether a shareholder of a limited liability company should be liable for compensation due to an infringement of a creditor's right, courts should pay attention to three points: the "determination of 'being idle in performing liquidation obligations'", the "'causal relationship' defense", and the "limitation period for litigation".***

the Adjudication Committee of the SPC. The *Conference Minutes* mentions the following issues:

> With respect to the determination of the liquidation responsibilities of shareholders of a limited liability company, the results of some cases have inappropriately expanded the liquidation responsibilities of these shareholders. [...] Some people's courts did not accurately grasp the application conditions stated in [Article 18 Paragraph 2 of the *Judicial Interpretation (II) of the Company Law*]. They decided that small shareholders who **were not "idle in performing [liquidation] obligations" or those who were "idle in performing [liquidation] obligations" but [whose idleness] had no causal relationship with the disappearance of principal properties, accounts, and important documents of the company** had to bear such liability for the company's debts that far exceeded their capital contributions. This led to an obvious imbalance of interests. (emphasis added)

To address these issues, the *Conference Minutes* points out that when determining whether a shareholder of a limited liability company should be liable for compensation due to an infringement of a creditor's right, courts should pay attention to three points: the "determination of 'being idle in performing liquidation obligations'", the "'causal relationship' defense", and the "limitation period for litigation". The *Conference Minutes* also provides related guidance on each of these points.

1. The Determination of "Being Idle in Performing Liquidation Obligations" and the "Causal Relationship" Defense

Articles 14 and 15 of the *Conference Minutes* provide guidance on the "determination of 'being idle in performing liquidation obligations'" and the "'causal relationship' defense", respectively.

> 14. 【Determination of "Being Idle in Performing Liquidation Obligations"】 [The expression] "[being] idle in performing obligations" stated in

Article 18 Paragraph 2 of the *Judicial Interpretation (II) of the Company Law* refers to **passive acts** of the shareholders of a limited liability company—**i.e., intentional delay or refusal to perform liquidation obligations, or negligence, making it impossible to conduct the liquidation**—[occurring] after a statutory cause of liquidation has emerged and **under the circumstance that [the shareholders] are able to perform the liquidation obligations**.

Where the shareholders adduce evidence to prove that they have taken active measures to perform liquidation obligations, or the small shareholders adduce evidence to prove that they are not members of the company's board of directors or board of supervisors, nor have they selected personnel to serve as members of [the board(s)], and [the small shareholders] have never participated in the company's operation and management [(authors' note: the term "small shareholders" is not defined in the *Conference Minutes*)], and [the shareholders or small shareholders] assert that they should not bear joint and several liability for clearance of the company's debts on the grounds that they are not "idle in performing obligations", a people's court shall support the assertion in accordance with law.

15. 【"Causal Relationship" Defense】 Where the shareholders of a limited liability company **adduce evidence to prove** that **there is no causal relationship** between their passive inaction of "being idle in performing obligations" and the result—i.e., the "disappearance of principal properties, accounts, and important documents of the company [...] making it impossible to conduct the liquidation"—and [the shareholders] assert that they should not bear joint and several liability for clearance of the company's debts, a people's court shall support the assertion in accordance with law.

(emphasis added)

Article 14 clearly negates the objective method adopted by Guiding Case No. 9 for the determination of what constitutes being "idle in performing liquidation obligations". Also, unlike Guiding Case No. 9, Article 15 explicitly allows courts to support the citation of evidence by shareholders to prove that there is no causal relationship between their acts of "being idle in performing [liquidation] obligations" and the "disappearance of principal properties, accounts, and important documents of the company".

Interestingly, it seems that the approaches provided in Articles 14 and 15 of the *Conference Minutes* can be traced to specific sources. In the (2016) Zui Gao Fa Min Zai No. 37 Civil Judgment, which was rendered on June 21, 2016, the SPC wrote:[20]

> To be liable for the above-mentioned liquidation compensation, a liquidation obligor should meet the following requirements: First, the liquidation obligor has, in violation of legal provisions, **committed an act of being idle in performing liquidation obligations**, i.e., after the company is dissolved, [the liquidation obligor] fails to carry out or complete the liquidation affairs within the [respective] statutory period and, **in terms of the subjective [requirement, the liquidation obligor] is at fault for not taking actions or not executing liquidation affairs properly, infringing on the interests of creditors.** [...] Third, **legally, there is a causal relationship between the liquidation obligor's act of being idle in performing liquidation obligations and the loss of the company's properties** or the creditors' losses. [...] (emphasis added)

More interestingly, in the above case, the SPC did not respond to the parties' (or their lawyers') reference to Guiding Case No. 9. No matter what the SPC's consideration was, this lack of response from the SPC does not conform to Article 11 Paragraph 2 of the *Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"*.[21] Nevertheless, does this suggest that the SPC had reservations about the approach in Guiding Case No. 9 as early as the adjudication of this case and, thus, the above analysis was directly provided by the SPC without mentioning Guiding Case No. 9? This possibility is worth noting.

2. Limitation Period for Litigation

Article 16 of the *Conference Minutes* provides guidance on the issue concerning the "limitation period for litigation" involved in Article 18 Paragraph 2 of the *Judicial Interpretation (II) of the Company Law*:

> 16. 【Limitation Period for Litigation】 Where a creditor of a company requests that the shareholders bear joint and several liability for clearance of the company's debts, and the shareholders defend on the grounds that the creditor's claim against the company is [made] beyond **the limitation period for litigation** and this is verified to be

true, a people's court shall support [the defense] in accordance with law.

Where a creditor of a company requests, on the basis of Article 18 Paragraph 2 of the *Judicial Interpretation (II) of the Company Law*, that the shareholders of a limited liability company bear joint and several liability for clearance of the company's debts, **the limitation period for litigation shall be calculated from the date when the creditor of the company knew or should have known** that it is impossible for the company to conduct liquidation.

(emphasis added)

Guiding Case No. 9 does not address the "limitation period for litigation" issue. However, in order to fully discuss the guidance of the *Conference Minutes* related to Article 18 Paragraph 2 of the *Judicial Interpretation (II) of the Company Law*, the authors briefly explain below how Article 16 of the *Conference Minutes* is consistent with two decisions of the SPC. This reflects the stability of the court's views on this issue.

As early as 2014, in response to a request for instructions made by the High People's Court of Shanghai Municipality in the course of handling a case, the Second Civil Tribunal of the SPC pointed out in the *Reply to the Request for Instructions on the Issue Concerning the Limitation [Period] for Litigation for a Creditor's Claim that the Shareholders of a Company Shall Be Liable for Liquidation Compensation*:[22]

Based on [Article 18 of the *Judicial Interpretation (II) of the Company Law*], where the shareholders of a company, as the liquidation obligors, are idle in performing liquidation obligations, causing losses to a creditor of the company, the creditor of the company has the right to request that the shareholders of the company be liable for compensation. The nature of that right to request compensation is a type of creditor's claim right. According to Article 1 of the *Provisions of the Supreme People's Court on Several Issues Concerning the Application of a System of Limitation Periods for Litigation in Adjudicating Civil Cases*, a creditor **should be bound by the system of limitation periods for litigation** when exercising this right.

According to Article 137 of the *General Principles of the Civil Law of the People's Republic of China*, the limitation period for litigation for the right to request compensation **should be calculated from the date when the creditor knew or should have known that his claims are being harmed due to the failure of the shareholders of the company to perform liquidation obligations.**

(emphasis added)

Later, in the (2017) Zui Gao Fa Min Shen No. 4782 Civil Ruling rendered on December 28, 2017, the SPC clarified:[23]

The limitation period for litigation for a claim that a creditor has—to request, on the basis of [Article 18 Paragraph 2 of the *Judicial Interpretation (II) of the Company Law*], that liquidation obligors bear joint and several liability for clearance [of the company's debts]—**should be calculated from the date when the creditor knew or should have known that, due to the liquidation obligors' failure to perform liquidation obligations**, the creditor has [suffered] **losses of properties** resulting from the disappearance of principal properties, accounts, and important documents of the company and **the impossibility to conduct the liquidation**. (emphasis added)

Guiding Case No. 9 and the *Minutes of the Conference on Civil and Commercial Adjudication Work in Courts Throughout the Country*

The guidance in Articles 14 and 15 of the *Conference Minutes* regarding the "determination of 'being idle in performing liquidation obligations'" and the "'causal relationship' defense" is clearly inconsistent with Guiding Case No. 9. Before the SPC decided that Guiding Case No. 9 "will no longer be for reference and imitation", how did the courts handle the conflict?

To answer this question, courts had to understand the nature of the *Conference Minutes*. In the *Notice of the Supreme People's Court on Printing and Distributing the "Minutes of the Conference on Civil and Commercial Adjudication Work in Courts Throughout the Country"*,[24] the SPC states:

The release of the *Conference Minutes* is significant, in terms of unifying lines of reasoning in adjudication; regulating judges' discretionary power; increasing the openness, transparency, and predictability of civil and commercial adjudication; and improving judicial credibility. People's courts at all levels need to correctly grasp, understand, and apply the spirit, essence, and basic content of the *Conference Minutes*. […]

3. Accurately Understand the Scope of Application of the *Conference Minutes*

> **Minutes are not judicial interpretations** and cannot be cited as bases for adjudication. After the *Conference Minutes* is released, when people's courts specifically analyze, in the "This Court opines" section of the adjudication documents for those first-instance and second-instance cases that are still pending, the reasons for the application of laws, they **may explain the reasons based on relevant provisions of the *Conference Minutes*.** (emphasis added)

In light of the fact that the *Conference Minutes* is not a judicial interpretation[25] and that the content of Articles 14 and 15 has not been incorporated into "a new law [or] administrative regulation", even though Guiding Case No. 9 is in conflict with the *Conference Minutes*, this alone, based on Article 12 of the *Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"* (which states that any Guiding Case that "is in conflict with a new law, administrative regulation, or judicial interpretation" no longer has guiding effect), cannot make the Guiding Case lose its guiding effect. Facing this situation, the No. 2 Intermediate People's Court of Beijing Municipality used the following strategy in the (2020) Jing 02 Min Zhong No. 1620 Civil Judgment,[26] which it rendered on November 30, 2020, to handle the conflict:

> This Court opines: When [creditor] SHEN Wei brought the aforesaid suit in the Xicheng District People's Court of Beijing Municipality in January 2015, the *Minutes of the Conference on Civil and Commercial Adjudication Work in Courts Throughout the Country* had not been released and Guiding Case No. 9, which was released by the Supreme People's Court, still has its guiding effect for judicial practice. In addition, taking into account ordinary parties' [inadequate] legal knowledge as well as their [limited] abilities to adduce evidence to prove the facts of a case and to analyze and judge legal relationships, it is inappropriate to demand that the parties [here] have sufficient and precise knowledge of legal provisions and judicial cases. Therefore, **this Court opines that there is no intentional or gross negligence in SHEN Wei's bringing the aforesaid suit and applying for property preservation on the basis of Guiding Case No. 9.** (emphasis added).

The court avoided dealing with the conflict between Guiding Case No. 9 and Articles 14 and 15 of the *Conference Minutes*. This approach is clearly not satisfactory. Therefore, the SPC's formal announcement that Guiding Case No. 9 "will no longer be for reference and imitation" from January 1, 2021 allows courts across the country to avoid the conflict between Guiding Case No. 9 and Articles 14 and 15 of the *Conference Minutes*.

Concluding Remarks

The determination of what constitutes being "idle in performing liquidation obligations" and the determination of the causal relationship between "being idle in performing liquidation obligations" and the "disappearance of principal properties, accounts, and important documents of the company" in Guiding Case No. 9 led to controversies in judicial practice. As a result, quite a few courts adopted other standards when determining these two issues so as to better protect and balance the interests of shareholders and creditors. These judicial practices received support from the SPC and are reflected in the *Conference Minutes*. The *Conference Minutes* negates Guiding Case No. 9's standards for determining the above two issues. Therefore, in effect, the *Conference Minutes* has replaced Guiding Case No. 9.

Through the release of the *Notice of the Supreme People's Court on Guiding Cases That Will No Longer Be for Reference and Imitation* (the "*Notice*"), the SPC "cleared out" outdated Guiding Case No. 9, avoided the conflict in the application between this case and the *Conference Minutes*, and unified adjudication standards while promoting the healthy development of the Case Guidance System.

Although the above approach is worthy of recognition, this leads to a new question. According to the *Notice*, the decision that Guiding Case No. 9 "will no longer be for reference and imitation" is "in accordance with […] other relevant legal provisions as well as **adjudication practices**" (emphasis added). Yet, neither "adjudication practices" nor the *Conference Minutes* (which has essentially replaced Guiding Case No. 9) is a type of "circumstance" under which a Guiding Case is said to no longer have guiding effect according to Article 12 of the *Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"* (see above). Therefore, it is worth considering whether the *Detailed Implementing Rules* should be revised to explicitly include the SPC's minutes of conferences as a covered "circumstance", and/or whether Article 6 of the *Provisions of the Supreme People's Court on the Judicial Interpretation Work*[27] should be revised to expand beyond the four current forms of judicial interpretations (namely, "interpretations", "provisions", "replies", and "decisions") to include other documents such as the SPC's minutes of conferences. ■

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[1] 《最高人民法院关于部分指导性案例不再参照的通知》 (*Notice of the Supreme People's Court on Guiding Cases That Will No Longer Be for Reference and Imitation*), issued on Dec. 29, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/fabu-xiangqing-282441.html.

[2] Provisions of the Supreme People's Court Concerning Work on Case Guidance, *People's Republic of China*, Article 7, Stanford CGCP *Global Guide*™, Aug. 2020, http://cgc.law.stanford.edu/sgg-on-prc-provisions-case-guidance. For the original, Chinese version of the Provisions, see 《最高人民法院关于案例指导工作的规定》 (*Provisions of the Supreme People's Court Concerning Work on Case Guidance*), passed by the Adjudication Committee of the Supreme People's Court on Nov. 15, 2010, issued on and effective as of Nov. 26, 2010, http://zxsfy.chinacourt.gov.cn/article/detail/2019/07/id/4988096.shtml.

[3] For more information about how to understand this expression, see *id*.

[4] 《上海存亮贸易有限公司诉蒋志东、王卫明等买卖合同纠纷案》 (*Shanghai Cunliang Trading Co., Ltd. v. JIANG Zhidong, WANG Weiming et al., A Sale and Purchase Contract Dispute*), 12 China Law Connect 73 (Mar. 2021), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC9), Mar. 2021, http://cgc.law.stanford.edu/guiding-cases/guiding-case-9.

[5] 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. For the original, Chinese version of the Detailed Implementing Rules, see 《〈最高人民法院关于案例指导工作的规定〉实施细则》 (*Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"*), passed by the Adjudication Committee of the Supreme People's Court on Apr. 27, 2015, issued on and effective as of May 13, 2015, http://zxsfy.chinacourt.gov.cn/article/detail/2019/07/id/4988096.shtml.

[6] 《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, revised once and amended four times, most recently on Oct. 26, 2018, effective as of Oct. 26, 2018, http://gkml.samr.gov.cn/nsjg/fgs/201906/t20190625_302790.html; 《最高人民法院关于适用〈中华人民共和国公司法〉若干问题的规定（二）》 (*Provisions (II) of the Supreme People's Court on Several Issues Concerning the Application of the "Company Law of the People's Republic of China"*), passed by the Adjudication Committee of the Supreme People's Court on May 5, 2008, issued on May 12, 2008, effective as of May 19, 2008, amended two times, most recently on Dec. 23, 2020, effective as of Jan. 1, 2021, https://www.waizi.org.cn/doc/97989.html.

[7] (2009) 松民二（商）初字第1052号民事判决 ((2009) Song Min Er (Shang) Chu Zi No. 1052 Civil Judgment), rendered by the Songjiang District People's Court of Shanghai Municipality on Dec. 8, 2009. This judgment has not been found and may have been excluded from publication.

[8] (2010) 沪一中民四（商）终字第1302号民事判决 ((2010) Hu Yi Zhong Min Si (Shang) Zhong Zi No. 1302 Civil Judgment), rendered by the No. 1 Intermediate People's Court of Shanghai Municipality on Sept. 1, 2010, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/shanghai-2010-hu-yi-zhong-min-si-shang-zhong-zi-1302-civil-judgment.

[9] Part of the content in this section was written with reference to an article published earlier by the China Guiding Cases Project. *See* Dr. Mei Gechlik and Derek Xie, *Guiding Case No. 9: CGCP Annotations*, Stanford Law School China Guiding Cases Project, Guiding Cases *in Perspective*™, August 2014.

[10] 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9号《上海存亮贸易有限公司诉蒋志东、王卫明等买卖合同纠纷案》的理解与参照 (*Understanding as well as Referencing and Imitating Guiding Case No. 9, Shanghai Cunliang Trading Co., Ltd. v. JIANG Zhidong, WANG Weiming et al., A Sale and Purchase Contract Dispute*), 《人民司法·应用》 (The People's Judicature • Application), Issue No. 3, at 25 (2013), https://kns.cnki.net/kcms/detail/detail.aspx?dbcode=CJFD&dbname=CJFD2013&filename=RMSF201303009&v.

[11] *Provisions (II) of the Supreme People's Court on Several Issues Concerning the Application of the "Company Law of the People's Republic of China"*, *supra* note 6. After two amendments, Article 18 remains the same.

[12] The Office for the Work on Case Guidance of the Supreme People's Court, *supra* note 10, at 27.

[13] *Id*., at 28.

[14] (2019) 粤03民终7477号民事判决 ((2019) Yue 03 Min Zhong No. 7477 Civil Judgment), rendered by the Intermediate People's Court of Shenzhen Municipality, Guangdong Province, on June 15, 2019, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/guangdong-2019-yue-03-min-zhong-7477-civil-judgment.

[15] 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".

[16] (2019) 粤03民终27409号民事判决 ((2019) Yue 03 Min Zhong No. 27409 Civil Judgment), rendered by the Intermediate People's Court of Shenzhen Municipality, Guangdong Province, on Mar. 12, 2020, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/guangdong-2019-yue-03-min-zhong-27409-civil-judgment.

[17] (2019) Yue 03 Min Zhong No. 7477 Civil Judgment, *supra* note 14.

[18] *See, e.g.*, (2014) 郑民三终字第1111号民事判决 ((2014) Zheng Min San Zhong Zi No. 1111 Civil Judgment), rendered by the Intermediate People's Court of Zhengzhou Municipality, Henan Province, on Aug. 25, 2014, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/henan-2014-zheng-min-san-zhong-zi-1111-civil-judgment.

[19] 《最高人民法院关于印发〈全国法院民商事审判工作会议纪要〉的通知》 (*Notice of the Supreme People's Court on Printing and Distributing the "Minutes of the Conference on Civil and Commercial Adjudication Work in Courts Throughout the Country"*), issued on and effective as of Nov. 8, 2019, http://www.court.gov.cn/zixun-xiangqing-199691.html.

[20] (2016) 最高法民再37号民事判决 ((2016) Zui Gao Fa Min Zai No. 37 Civil Judgment), rendered by the Supreme People's Court on June 21, 2016, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/spc-2016-zui-gao-fa-min-zai-37-civil-judgment.

[21] Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance", *People's Republic of China*, *supra* note 5, Article 11 Paragraph 2. The provision states:

> 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)

[22] 《最高人民法院民二庭关于债权人主张公司股东承担清算赔偿责任诉讼时效问题请示的答复》 (*Reply of the Second Civil Tribunal of the Supreme People's Court to the Request for Instructions on the Issue Concerning the Limitation [Period] for Litigation for a Creditor's Claim that the Shareholders of a Company Shall Be Liable for Liquidation Compensation*), issued on and effective as of Dec. 11, 2014, https://www.pkulaw.com/chl/0e7cbfa0b0c739c6bdfb.html.

[23] (2017) 最高法民申4782号民事裁定 ((2017) Zui Gao Fa Min Shen No. 4782 Civil Ruling), rendered by the Supreme People's Court on Dec. 28, 2017, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/spc-2017-zui-gao-fa-min-shen-4782-civil-ruling.

[24] *Notice of the Supreme People's Court on Printing and Distributing the "Minutes of the Conference on Civil and Commercial Adjudication Work in Courts Throughout the Country"*, *supra* note 19.

[25] There is disagreement as to whether the SPC's minutes of these conferences are judicial interpretations. There are views stating that these minutes of conferences are judicial interpretations. *See, e.g.*, Judge GUO Feng, *Results from the "Cleanup" of Judicial Interpretations and Guiding Cases and Trends in Their Development in the Era of China's* Civil Code, 12 China Law Connect 1 (Mar. 2021), *also available at* Stanford Law School China Guiding Cases Project, Mar. 2021, http://cgc.law.stanford.edu/commentaries/clc-12-202103-34-guo-feng. There are also opposing views. *See, e.g.*, 侯猛 (HOU Meng), 纪要如何影响审判——以人民法院纪要的性质为切入点 (*How the Minutes Affect Adjudication——Beginning [the Discussion] with the Nature of the Minutes of People's Courts*), 《吉林大学社会科学学报》 (Jilin University Journal Social Science Edition), Issue No. 6, at 58 (2020), http://www.fxcxw.org.cn/dyna/content.php?id=15594. The difference between these two views mainly lies in the fact that the former emphasizes that these conference minutes function as *de facto* judicial interpretations, while the latter points out that these minutes do not meet the formal requirements of judicial interpretations as stated in Article 6 of the *Provisions of the Supreme People's Court on the Judicial Interpretation Work* (i.e., "There are four forms of judicial interpretations, [namely], 'interpretations', 'provisions', 'replies', and 'decisions'."). *See* 《最高人民法院关于司法解释工作的规定》 (*Provisions of the Supreme People's Court on the Judicial Interpretation Work*), passed by the Adjudication Committee of the Supreme People's Court on Dec. 11, 2006, issued on Mar. 9, 2007, effective as of Apr. 1, 2007, http://www.sc.gov.cn/sczb/lmfl/bmwjdx/200706/t20070607_185328.shtml.

[26] (2020) 京02民终1620号民事判决 ((2020) Jing 02 Min Zhong No. 1620 Civil Judgment), rendered by the No. 2 Intermediate People's Court of Beijing Municipality on Nov. 30, 2020, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/beijing-2020-jing-02-min-zhong-1620-civil-judgment.

[27] *Provisions of the Supreme People's Court on the Judicial Interpretation Work*, *supra* note 25.

指导案例9号“不再参照”的原因：深入探讨相关案件与权威规定*

赵炜、程浩轩

摘要

2020年12月29日，最高人民法院（“最高法”）的一纸通知宣告了指导案例9号的寿终正寝。这是中国自2010年建立案例指导制度以来最高法首次对既存指导性案例的“不再参照”，表明该制度在逐渐健全完善过程中迈出了十分关键的一步。

然而，令人颇为遗憾的是，最高法上述的通知并未说明指导案例9号“不再参照”的具体原因。本文作者在该指导性案例的相关案件的基础上，以该案例实际运用过程中引起的争议为先导，结合2019年9月11日经最高法审判委员会民事行政专业委员会通过的《全国法院民商事审判工作会议纪要》相关规定，一探其中缘由并得出对应结论。同时，这分析亦为指导性案例在何种情形下不再具有指导作用提出了新思考，而作者亦提出相关建议。

引言

2020年12月29日，最高人民法院（“最高法”）发出《最高人民法院关于部分指导性案例不再参照的通知》，[1]指出：

> 为保证国家法律统一正确适用，根据《中华人民共和国民法典》等有关法律规定和审判实际，经最高人民法院审判委员会讨论决定，9号、20号指导性案例**不再参照**。但该指导性案例的裁判以及参照该指导性案例作出的裁判仍然有效。（强调后加）

该通知自2021年1月1日起施行。

《最高人民法院关于案例指导工作的规定》[2]第一条规定，“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”（强调后加）。此外，第七条规定，各级人民法院审判类似案件时“应当参照”[3]指导性案例。结合以上两条的规定，“不再参照”指导案例9号（《上海存亮贸易有限公司诉蒋志东、王卫明等买卖合同纠纷案》），[4]似乎表明该案例已经“不再具有指导作用”。而关于“不再具有指导作用”，《〈最高人民法院关于案例指导工作的规定〉实施细则》[5]第十二条规定如下：

> 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。
> （强调后加）

在目前已发布的150多个指导性案例中，没有新的指导性案例取代了指导案例9号。该案例是否“与新的法律、行政法规或者司法解释相冲突”？本文通过分析指导案例9号及相关案件和其他司法发展，探究为何该案例不再在参照之列。

指导案例9号的由来

1. 指导案例9号的主要内容

指导案例9号是最高法于2012年9月18日发布的第三批指导性案例的其中一起案例。

根据该案例所载，上海存亮贸易有限公司（“存亮公司”）按约为常州拓恒机械设备有限公司（“拓恒公司”）供货后，拓恒公司未能按约付清货款。房恒福、蒋志东和王卫明为拓恒公司的股东，所占股份分别为40%、30%、30%。作为股东，他们均应在拓恒公司被吊销营业执照后及时组织清算。但是，由于他们怠于履行清算义务，导致拓恒公司的主要财产、帐册等均已灭失，无法进行清算。其怠于履行清算义务的行为，违反了公司法及其司法解释的相关规定，[6]应当对拓恒公司的债务承担连带清偿责任。通过（2009）松民二（商）初字第1052号民事判决，上海市松江区人民法院于2009年12月8日作出如是判决。[7]

宣判后，蒋志东、王卫明提出上诉。2010年9月1日，上海市第一中级人民法院驳回其上诉，维持原判。[8]根据指导案例9号所载，二审裁判理由主要为：

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。

> 拓恒公司作为有限责任公司，其全体股东在法律上应一体成为公司的清算义务人。公司法及其相关司法解释并未规定蒋志东、王卫明所辩称的例外条款，因此**无论蒋志东、王卫明在拓恒公司中所占的股份为多少，是否实际参与了公司的经营管理**，两人在拓恒公司被吊销营业执照后，都有义务在法定期限内依法对拓恒公司进行清算。（强调后加）

"[...]没有新的指导性案例取代了指导案例9号。该案例是否'与新的法律、行政法规或者司法解释相冲突'？"

最高法将以上原则归纳为指导案例9号的"裁判要点"：

> 有限责任公司的股东、股份有限公司的董事和控股股东，应当依法在公司被吊销营业执照后履行清算义务，**不能以其不是实际控制人或者未实际参加公司经营管理为由，免除清算义务**。（强调后加）

2. 指导案例9号入选的原因[9]

根据最高法案例指导工作办公室所述，存亮公司诉蒋志东、王卫明等买卖合同纠纷案被选为指导性案例的一大原因是：[10]

> 审判实践中，有的有限责任公司的股东、股份有限公司的董事和控股股东，以**不是实际控制人或者未参加实际经营管理为由进行抗辩**，各地对此认识不一，处理也不尽一致。（强调后加）

当中的分歧源于各地法院对《最高人民法院关于适用〈中华人民共和国公司法〉若干问题的规定（二）》[11]（"公司法司法解释（二）"）第十八条的不同的理解。该条规定：

> 有限责任公司的股东、股份有限公司的董事和控股股东未在法定期限内成立清算组开始清算，导致公司财产贬值、流失、毁损或者灭失，债权人主张其在造成损失范围内对公司债务承担赔偿责任的，人民法院应依法予以支持。
>
> 有限责任公司的股东、股份有限公司的董事和控股股东**因怠于履行义务，导致公司主要财产、账册、重要文件等灭失**，无法进行清算，债权人主张其对公司债务承担连带清偿责任的，人民法院应依法予以支持。
>
> **上述情形系实际控制人原因造成，债权人主张实际控制人对公司债务承担相应民事责任的，人民法院应依法予以支持。**（强调后加）

审判实践中，经常出现这一问题：公司法司法解释（二）第十八条第一、二款规定的情况如果是实际控制人造成的，那么有限责任公司的股东、股份有限公司的董事和控股股东是否可以免除清算义务？[12] 通过

程浩轩
中国指导性案例项目助理执行编辑

程浩轩目前正在国立台湾大学攻读法学硕士学位，期间曾前往荷兰奈梅亨大学做交换生一学期。他本科就读于南京师范大学，获得法学学士学位。程浩轩的工作经验包括担任南京知识产权法庭法官助理，以及盈科律师事务所实习生，协助处理公司商事案件及经济类刑民交叉案件。

指导案例9号，尤其是其裁判要点，最高法对以上问题作出澄清，指出："有限责任公司的股东、股份有限公司的董事和控股股东[...]不能以其不是实际控制人或者未实际参加公司经营管理为由，免除清算义务"。最高法案例指导工作办公室说明如下：[13]

> 对于有限责任公司的股东、股份有限公司的董事和控股股东，只要有公司解散的事由出现，其必须在法定的期限内成立清算组开始清算，即使有其他股东或实际控制人阻碍或不予配合，作为清算义务人**不管所占股份多少，不管是否能实际控制公司**，也应采取进一步的手段要求其他清算义务人或实际控制人组织清算，直至依法向法院申请进行强制清算。否则，其即违反了法定的清算义务，应承担相应的责任。**这样才可以督促作为清算义务人的小股东在大股东不积极履行清算义务的情况下依法申请人民法院对公司进行清算，[笔者注：文章没有对"大股东"或"小股东"作出定义]，以保护债权人利益，倡导诚实守信的原则，维护良好的市场经济秩序**。（强调后加）

以上说明最高法重视对债权人利益的保护，并强调不管是大股东还是小股东都应履行清算义务。

指导案例9号引起的争议

最高法在指导案例9号似乎明确了有限责任公司的股东、股份有限公司的董事和控股股东的清算义务，但是该案例"裁判理由"部分涉及公司法司法解释（二）第十八条第二款的分析在司法实践中引起争议。该款规定：

> 有限责任公司的股东、股份有限公司的董事和控股股东**因怠于履行义务，导致公司主要财产、账册、重要文件等灭失**，无法进行清算，债权人主张其对公司债务承担连带清偿责任的，人民法院应依法予以支持。（强调后加）

争议主要涉及"怠于履行[清算]义务"的认定，以及"怠于履行[清算]义务"与"公司主要财产、账册、重要文件等灭失"的因果关系。

1. "怠于履行[清算]义务"的认定

指导案例9号"裁判理由"指出：

> 因房恒福、蒋志东和王卫明**怠于履行清算义务，导致拓恒公司的主要财产、帐册等均已灭失，无法进行清算**，房恒福、蒋志东和王卫明怠于履行清算义务的行为，违反了公司法及其司法解释的相关规定[**笔者注：即公司法司法解释（二）第十八条第二款**]，应当对拓恒公司的债务承担连带清偿责任。
> [...]
> 蒋志东、王卫明委托律师进行清算的委托代理合同及律师的证明，仅能证明蒋志东、王卫明**欲对**拓恒公司进行清算，但**事实上**对拓恒公司的清算**并未进行**。据此，不能认定蒋志东、王卫明依法履行了清算义务[...]。（强调后加）

> ***"最高法在指导案例9号似乎明确了有限责任公司的股东、股份有限公司的董事和控股股东的清算义务，但是该案例'裁判理由'部分涉及公司法司法解释（二）第十八条第二款的分析在司法实践中引起争议。"***

根据以上内容，法院对"怠于履行清算义务"的认定采用了更严格的客观要求。换言之，就算蒋志东、王卫明主观上意欲对拓恒公司进行清算，如果事实上该公司的清算并未进行，蒋志东和王卫明依然是"怠于履行清算义务"。

对此，于2019年6月15日作出（2019）粤03民终7477号民事判决的广东省深圳市中级人民法院持不同意见，示明了股东不构成怠于履行清算义务的一些情形：[14]

> [...]所谓"怠于"清算义务，指的是能够履行清算义务而不履行。有限责任公司股东如果能够举证证明其**已经为履行清算义务作出了积极努力**，或者未能履行清算义务**是由于实际控制**公司主要财产、账册、文件的**股东的故意拖延、拒绝清算行为等客观原因所致**，或者能够证明**自己没有参与经营、也没有管理账册文件的**，均不构成怠于履行清算义务。（强调后加）

概言之，以上认定标准结合了股东的主观清算意图与客观履行其清算义务的能力。深圳市中级人民法院并未直接从未经清算的客观结果而作出公司股东怠于清算的结论。在之后审判的另一案件中，该法院亦对指导案例9号所用的认定标准继续表示保留。[15]

2. "怠于履行[清算]义务"与"公司主要财产、账册、重要文件等灭失"的因果关系

公司法司法解释（二）第十八条第二款的表述是，"[...]股东**因**怠于履行[清算]义务，**导致**公司主要财产、账册、重要文件等灭失"（强调后加），两者

的因果关系显然易见。就这因果关系，指导案例9号的“裁判理由”有如下内容：

> 关于蒋志东、王卫明辩称拓恒公司在被吊销营业执照前已背负大量债务，**即使其怠于履行清算义务，也与拓恒公司财产灭失之间没有关联性**。根据查明的事实，拓恒公司在其他案件中因无财产可供执行被中止执行的情况，**只能证明人民法院在执行中未查找到拓恒公司的财产，不能证明拓恒公司的财产在被吊销营业执照前已全部灭失**。拓恒公司的三名股东怠于履行清算义务与拓恒公司的财产、帐册灭失之间具有因果联系，蒋志东、王卫明的该项抗辩理由不成立。（强调后加）

以上的推断不尽合理，法院不应把拓恒公司财产灭失简单归因于股东怠于履行清算义务的行为。值得参考的是（2019）粤03民终7477号民事判决。[16] 与指导案例9号的案情类似，该案的案涉公司清算前已有执行裁定，认定该公司无财产可供执行。针对“怠于履行[清算]义务”与“公司主要财产、账册、重要文件等灭失”的因果关系的认定，深圳市中级人民法院作出如下分析：

> 本案中，根据查明，原债权人于2001年10月31日向深圳市福田区人民法院申请强制执行[...]。在执行过程中，因“[案涉公司]下落不明，无财产可供执行”，法院裁定中止执行。**故在无相反证据的情况下，可以推定[案涉]公司**在2004年营业执照被吊销产生清算事由时，公司早已处于下落不明、无财产可供执行的状态。**是否怠于清算均不能改变公司下落不明、无财产可供执行、主要财产等灭失的事实**，也不能改变债权无法足额清偿的事实。（强调后加）

可见，深圳市中级人民法院的推断更中肯。还有其他后续案件的法院亦不认同指导案例9号对上述因果关系的认定。[17]

《全国法院民商事审判工作会议纪要》

公司法司法解释（二）第十八条第二款在司法实践中引起的争议，也于2019年7月3日至4日最高法在黑龙江省哈尔滨市召开的全国法院民商事审判工作会议中受到关注。相关问题和指导也记录于2019年9月11日经最高法审判委员会民事行政专业委员会通过的《全国法院民商事审判工作会议纪要》[18]（“《会议纪要》”）。《会议纪要》提及以下问题：

> 关于有限责任公司股东清算责任的认定，一些案件的处理结果不适当地扩大了股东的清算责任。[...]有的人民法院没有准确把握[公司法司法解释（二）第18条第2款]规定的适用条件，判决**没有“怠于履行义务”的小股东或者虽“怠于履行义务”但与公司主要财产、账册、重要文件等灭失没有因果关系的小股东**对公司债务承担远远超过其出资数额的责任，导致出现利益明显失衡的现象。（强调后加）

针对以上问题，《会议纪要》指出，在认定有限责任公司股东是否应当对债权人承担侵权赔偿责任时，法院应当注意“怠于履行清算义务的认定”、“因果关系抗辩”和“诉讼时效期间”这三点。《会议纪要》并作出相关指导。

1. 怠于履行清算义务的认定与因果关系抗辩

《会议纪要》第14、15条分别针对“怠于履行清算义务的认定”和“因果关系抗辩”作出指导：

> 14.【怠于履行清算义务的认定】公司法司法解释（二）第18条第2款规定的“怠于履行义务”，是指有限责任公司的股东在法定清算事由出现后，**在能够履行清算义务的情况下，故意拖延、拒绝履行清算义务，或者因过失导致无法进行清算的消极行为**。股东举证证明其已经为履行清算义务采取了积极措施，或者小股东举证证明其既不是公司董事会或者监事会成员，也没有选派人员担任该机关成员，且从未参与公司经营管理[（笔者注：《会议纪要》没有对“小股东”一词作出定义）]，以不构成“怠于履行义务”为由，主张其不应当对公司债务承担连带清偿责任的，人民法院依法予以支持。

“[...]《会议纪要》指出，在认定有限责任公司股东是否应当对债权人承担侵权赔偿责任时，法院应当注意‘怠于履行清算义务的认定’、‘因果关系抗辩’和‘诉讼时效期间’这三点。”

> 15.【因果关系抗辩】有限责任公司的股东**举证证明**其“怠于履行义务”的消极不作为与“公司主要财产、账册、重要文件等灭失，无法进行清算”的结果之间**没有因果关系**，主张其不应对公司债务承担连带清偿责任的，人民法院依法予以支持。（强调后加）

第14条清楚否定了指导案例9号所采取的对“怠于履行清算义务”的客观认定方法。同时，与指导案例9

号不同，第15条明确容许法院支持股东举证证明其“怠于履行义务”的行为与“公司主要财产、账册、重要文件等灭失”没有因果关系。

有趣的是，《会议纪要》第14、15条的处理方法，似乎有迹可循。在2016年6月21日由最高法作出的（2016）最高法民再37号民事判决中，该法院写道：[19]

> 清算义务人承担上述清算赔偿责任，应符合以下构成要件：第一，清算义务人有违反法律规定，**怠于履行清算义务的行为**，即在公司解散后未在法定时间内开展清算事务或未在法定时间内完成清算事务，**主观上存在不作为的过错，或者不适当执行清算事务，侵犯债权人利益**。[…] 第三，**清算义务人怠于履行清算义务的行为与公司财产**或债权人**的损失之间具有法律上的因果关系**。[…]（强调后加）

更有趣的是，在以上一案中，最高法并未对当事人（或其律师）提及指导案例9号作出回应。不论出于何种考虑，这一做法不符合《〈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。[20] 然而，这是否意味着最高法早在此案件审判时，其已对指导案例9号相关处理方法有所保留，故直接提供以上分析，而没有提及该案例？这一可能性值得注意。

2. 诉讼时效期间

《会议纪要》第16条针对公司法司法解释（二）第十八条第二款涉及的“诉讼时效期间”问题作出指导：

> 16.【诉讼时效期间】公司债权人请求股东对公司债务承担连带清偿责任，股东以公司债权人对公司的债权已经超过**诉讼时效期间**为由抗辩，经查证属实的，人民法院依法予以支持。
>
> 公司债权人以公司法司法解释（二）第18条第2款为依据，请求有限责任公司的股东对公司债务承担连带清偿责任的，**诉讼时效期间自公司债权人知道或者应当知道**公司无法进行清算之日起计算。（强调后加）

指导案例9号未涉及“诉讼时效期间”问题，但为了完整讨论《会议纪要》涉及公司法司法解释（二）第十八条第二款的指导，笔者在此处简单说明《会议纪要》第16条与以下两个最高法的决定内容一致。这反映了该院对此问题的一贯看法。

早于2014年，针对上海市高级人民法院在处理一起案件而作出的请示，最高法民二庭在《关于债权人主张公司股东承担清算赔偿责任诉讼时效问题请示的答复》中，已指出：[21]

> 依据[公司法司法解释（二）]第十八条的规定，作为清算义务人的公司股东怠于履行清算义务导致公司债权人损失的，公司债权人有权请求公司股东承担赔偿责任。该赔偿请求权在性质上属于债权请求权，依据《最高人民法院关于审理民事案件适用诉讼时效制度若干问题的规定》第一条的规定，债权人行使该项权利，**应受诉讼时效制度约束**。
>
> 依据《中华人民共和国民法通则》第一百三十七条的规定，该赔偿请求权的诉讼时效期间**应从债权人知道或者应当知道因公司股东不履行清算义务而致其债权受到损害之日起计算**。（强调后加）

之后，在2017年12月28日作出的（2017）最高法民申4782号民事裁定中，最高法明确指出：[22]

> 债权人基于[公司法司法解释（二）第十八条第二款]规定对于清算义务人享有的请求其承担连带清偿责任请求权的诉讼时效期间，**应从债权人知道或者应当知道由于清算义务人不履行清算义务**、导致债权人因公司主要财产、账册、重要文件等灭失，**无法进行清算，产生财产损失之日起算**。（强调后加）

指导案例9号与《全国法院民商事审判工作会议纪要》

《会议纪要》第14、15条针对“怠于履行清算义务的认定”和“因果关系抗辩”的指导，明显与指导案例9号不一致。在最高法决定“不再参照”指导案例9号前，法院如何处理两者的冲突？

要回答这问题，法院必须准确掌握《会议纪要》的性质。在《最高人民法院关于印发〈全国法院民商事审判工作会议纪要〉的通知》中，[23] 最高法指出：

> 《会议纪要》的出台，对统一裁判思路，规范法官自由裁量权，增强民商事审判的公开性、透明度以及可预期性，提高司法公信力具有重要意义。各级人民法院要正确把握和理解适用《会议纪要》的精神实质和基本内容。
>
> […]
>
> 三、准确把握《会议纪要》的应用范围
>
> **纪要不是司法解释**，不能作为裁判依据进行援引。《会议纪要》发布后，人民法院尚未

> 审结的一审、二审案件，在裁判文书“本院认为”部分具体分析法律适用的理由时，**可以根据《会议纪要》的相关规定进行说理**。（强调后加）

由于最高法已明确指出《会议纪要》不是司法解释，[24] 且第14、15条的内容亦未载于“新的法律、行政法规”中，因此按照《〈最高人民法院关于案例指导工作的规定〉实施细则》第十二条的规定（即：“与新的法律、行政法规或者司法解释相冲突”的指导性案例，不再具有指导作用），尽管指导案例9号与《会议纪要》相冲突，该案例也不能因此而“不再具有指导作用”。面对这局面，北京市第二中级人民法院于2020年11月30日作出的（2020）京02民终1620号民事判决中，[25] 采用以下对策：

> 本院认为，[债权人]沈蔚在2015年1月向北京市西城区人民法院提起上述诉讼时，《全国法院民商事审判工作会议纪要》尚未颁布，且最高人民法院发布的9号指导性案例仍对司法实践具备指导性。同时，考虑到一般当事人的法律知识、对案件事实的举证证明能力以及对法律关系的分析判断能力等，不宜苛求当事人对法律规定及司法案例具备充分且精准的认知。**故本院认为沈蔚以9号指导性案例为依据提起上述诉讼并申请财产保全不存在故意或者重大过失**。（强调后加）

该法院回避了指导案例9号与《会议纪要》第14、15条的矛盾。显然，这处理方法并不理想。因此，最高法正式宣布自2021年1月1日起“不再参照”指导案例9号，便可以让全国法院不用继续面对指导案例9号与《会议纪要》第14、15条的冲突。

结语

由于指导案例9号对怠于履行清算义务、怠于履行该义务与“公司主要财产、账册、重要文件等灭失”的因果关系的认定在司法实务中引起争议，不少法院在认定上述两个问题过程中往往采取了其他标准，以期更好地保护和平衡股东与债权人的利益。这些司法实践得到最高法的支持，并反映于《会议纪要》。《会议纪要》否定了指导案例9号对前述两个问题的认定标准。因此，《会议纪要》实际上取代了指导案例9号。

通过发布的《最高人民法院关于部分指导性案例不再参照的通知》（“《通知》”），最高法清理了不合时宜的指导案例9号，避免了该案例与《会议纪要》之间的运用冲突，统一了裁判尺度的同时也促进了案例指导制度的良性发展。

尽管上述做法值得肯定，但不无新的疑问。《通知》明确指出，“不再参照”指导案例9号的决定是“根据[...]有关法律规定和审判实际”（强调后加）。但是，不论是“审判实际”，还是实际取代指导案例9号的《会议纪要》，二者均不属于《〈最高人民法院关于案例指导工作的规定〉实施细则》第十二条规定的指导性案例不再具有指导作用的任一情形（见上文）。因此，该《实施细则》是否应当作出修改，明确纳入最高法的会议纪要作为另一“情形”，和/或是应当修改《最高人民法院关于司法解释工作的规定》第六条，[26] 将司法解释的形式从目前的“解释”、“规定”、“批复”和“决定”四种扩大至最高法的会议纪要这类文件，均值得进一步思考探讨。

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* 此中国案例*见解*™的引用是：赵炜、程浩轩，指导案例9号“不再参照”的原因：深入探讨相关案件与权威规定，《中国法律连接》，第12期，第34页（2021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*™，2021年3月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-12-202103-insights-12-zhao-cheng。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 《最高人民法院关于部分指导性案例不再参照的通知》，2020年12月29日公布，2021年1月1日起施行，http://www.court.gov.cn/fabu-xiangqing-282441.html。

2 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。关于该规定的原文，见《最高人民法院关于案例指导工作的规定》，2010年11月15日由最高人民法院审判委员会通过，2010年11月26日公布，同日起施行，http://zxsfy.chinacourt.gov.cn/article/detail/2019/07/id/4988096.shtml。

3 有关如何理解此表述的更多信息，见*同上*。

4 《上海存亮贸易有限公司诉蒋志东、王卫明等买卖合同纠纷案》，《中国法律连接》，第12期，第73页（2021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（CGC9），2021年3月，https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-9。

5 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。关于该实施细则的原文，见《〈最高人民法院关于案例指导工作的规定〉实施细则》，2015年4月27日由最高人民法院审判委员会通过，2015年5月13日公布，同日起施行，http://zxsfy.chinacourt.gov.cn/article/detail/2019/07/id/4988096.shtml。

6 《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，经一次修订和四次修正，最新修正于2018年10月26日，同日起施行，http://gkml.samr.gov.cn/nsjg/fgs/201906/t20190625_302790.html；《最高人民法院关于适用〈中华人民共和国公司法〉若干问题的规定（二）》，2008年5月5日由最高人民法院审判委员会通过，2008年5月12日公布，2008年5月19日起施行，经两次修正，最新修正于2020年12月23日，2021年1月1日起施行，https://www.waizi.org.cn/doc/97989.html。

7 （2009）松民二（商）初字第1052号民事判决，2009年12月8日由上海市松江区人民法院作出。此判决书尚未找到，有可能已被排除在公布之外。

8 （2010）沪一中民四（商）终字第1302号民事判决，2010年9月1日由上海市第一中级人民法院作出，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/shanghai-2010-hu-yi-zhong-min-si-shang-zhong-zi-1302-civil-judgment。

[9] 本节部分内容参考了中国指导性案例项目早期出版的文章。*见*熊美英博士、谢庆涛，指导案例9号：CGCP注解，斯坦福法学院中国指导性案例项目，指导性案例*透视*™，2014年8月。

[10] 最高人民法院案例指导工作办公室，指导案例9号《上海存亮贸易有限公司诉蒋志东、王卫明等买卖合同纠纷案》的理解与参照，《人民司法·应用》，第3期，第25页（2013），https://kns.cnki.net/kcms/detail/detail.aspx?dbcode=CJFD&dbname=CJFD2013&filename=RMSF201303009&v。

[11]《最高人民法院关于适用〈中华人民共和国公司法〉若干问题的规定（二）》，注释6。经两次修正后，第十八条维持不变。

[12] 最高人民法院案例指导工作办公室，注释10，第27页。

[13] *同上*，第28页。

[14]（2019）粤03民终7477号民事判决，2019年6月15日由广东省深圳市中级人民法院作出，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/guangdong-2019-yue-03-min-zhong-7477-civil-judgment。

[15]（2019）粤03民终27409号民事判决，2020年3月12日由广东省深圳市中级人民法院作出，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/guangdong-2019-yue-03-min-zhong-27409-civil-judgment。

[16]（2019）粤03民终7477号民事判决，注释14。

[17] *见，例如，*（2014）郑民三终字第1111号民事判决，2014年8月25日由河南省郑州市中级人民法院作出，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/henan-2014-zheng-min-san-zhong-zi-1111-civil-judgment。

[18]《最高人民法院关于印发〈全国法院民商事审判工作会议纪要〉的通知》，2019年11月8日公布，同日起施行，http://www.court.gov.cn/zixun-xiangqing-199691.html。

[19]（2016）最高法民再37号民事判决，2016年6月21日由最高人民法院作出，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/spc-2016-zui-gao-fa-min-zai-37-civil-judgment。

[20] 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》，注释5，第十一条第二款。该款规定："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）。

[21]《最高人民法院民二庭关于债权人主张公司股东承担清算赔偿责任诉讼时效问题请示的答复》，2014年12月11日公布，同日起施行，https://www.pkulaw.com/chl/0e7cbfa0b0c739c6bdfb.html。

[22]（2017）最高法民申4782号民事裁定，2017年12月28日由最高人民法院作出，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/spc-2017-zui-gao-fa-min-shen-4782-civil-ruling。

[23]《最高人民法院关于印发〈全国法院民商事审判工作会议纪要〉的通知》，注释18。

[24] 关于最高法的会议纪要是否属于司法解释，存在争议。有观点认为会议纪要属于司法解释，见，例如，郭锋法官，中国《民法典》时代司法解释和指导性案例的清理成果与发展趋势，《中国法律连接》，第12期，第14页（2021年3月），*亦见于*斯坦福法学院中国指导性案例项目，2021年3月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-12-202103-34-guo-feng。也有观点认为会议纪要不属于司法解释，见，例如，侯猛，纪要如何影响审判——以人民法院纪要的性质为切入点，《吉林大学社会科学学报》，第6期，第58页（2020），http://www.fxcxw.org.cn/dyna/content.php?id=15594。

以上观点的不同主要是由于前者强调会议纪要具有"事实上"司法解释的功能，而后者针对会议纪要不符合《最高人民法院关于司法解释工作的规定》第六条对司法解释的形式的规定（即"司法解释的形式分为'解释'、'规定'、'批复'和'决定'四种。"）。*见*《最高人民法院关于司法解释工作的规定》，2006年12月11日由最高人民法院审判委员会通过，2007年3月9日公布，2007年4月1日起施行，http://www.sc.gov.cn/sczb/lmfl/bmwjdx/200706/t20070607_185328.shtml。

[25]（2020）京02民终1620号民事判决，2020年11月30日由北京市第二中级人民法院作出，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/beijing-2020-jing-02-min-zhong-1620-civil-judgment。

[26]《最高人民法院关于司法解释工作的规定》，注释24。

Understanding the Story Behind Guiding Case No. 82: Differences Between the Administrative and Judicial Standards for Determining "Similar Goods" and a Discussion of Related Issues*

Qiaochao Xu & Ruoyu Ren

Abstract

On March 6, 2017, the Supreme People's Court (the "SPC") released Guiding Case No. 82. The case originated from a dispute over infringement of trademark rights brought by WANG Suiyong against Shenzhen Ellassay Fashion Co., Ltd. ("Ellassay Company") that was ultimately adjudicated by the SPC. The case mainly revolved around WANG Suiyong's claim that he had the exclusive rights to two disputed trademarks. The SPC revoked the first-instance and second-instance judgments and rejected all of the litigation requests of WANG Suiyong. Due to its significance, the case was selected by the SPC as Guiding Case No. 82, the "Main Points of the Adjudication" of which have already been cited by multiple subsequent cases.

It should, however, be noted that although each of the two disputed trademarks might be deemed to be a "similar trademark" that infringed on the prior rights enjoyed by Ellassay Company, the company (or its affiliated company) filed an opposition against only one of them during the disputed trademarks' registration applications. In the end, following administrative litigation, the opposed trademark was not approved for registration. The status of the other disputed trademark, however, was unclear until the SPC's judgment of WANG Suiyong's aforementioned suit against Ellassay Company was rendered: WANG Suiyong's use of trademark rights, which were not obtained in good faith, to bring an infringement of rights lawsuit against Ellassay Company's proper use of its trademark constituted an abuse of rights.

Why did Ellassay Company file an opposition against only one of the disputed trademarks? Through a review of the registration processes of the two disputed trademarks and other public information, as well as an analysis of the trends in the development of trademark administrative lawsuits handled by Chinese courts before and after Guiding Case No. 82, the authors of this article discovered that trademark administrative organs and judicial organs in China have used quite different standards to determine what constitutes "similar goods". These differences might have caused Ellassay Company to adopt different strategies in response to the disputes over the two trademarks. Two issues are worthy of attention: what are the differences between the standards used by the administrative organs and judicial organs in determining what constitutes "similar goods"? What impact do these differences have on China's mechanism for trademark protection? In this article, the authors discuss these issues in detail and offer related suggestions.

Introduction

On March 6, 2017, the Supreme People's Court (the "SPC") released Guiding Case No. 82 (*WANG Suiyong v. Shenzhen Ellassay Fashion Co., Ltd. and Hangzhou Intime Century Department Store Co., Ltd., A Dispute over Infringement of Trademark Rights*).[1] The Guiding Case originated from a dispute over infringement of trademark rights that was ultimately adjudicated by the SPC. On March 7, 2012, WANG Suiyong brought suit on the grounds that the acts of Shenzhen Ellassay Fashion Co., Ltd. ("Ellassay Company") and another party in producing and selling certain bags constituted infringement of the No. 7925873 "歌力思" (the transliteration of which is "Ge Li Si") trademark and the No. 4157840 "歌力思及图" (meaning "歌力思 and graphic") trademark that WANG Suiyong claimed to own. Both first-instance[2] and second-instance[3] courts ruled in favor of WANG Suiyong.

Interestingly, on April 2, 2014—i.e., four months before the SPC rendered, on August 14, 2014, its judgment in the retrial of the above-mentioned dispute between WANG Suiyong and Ellassay Company—the High People's Court of Beijing Municipality rendered a second-instance judgment of another case involving the No. 4157840 trademark.[4] In this case, it was decided that the No. 4157840 trademark had harmed the prior rights to a shop name held by Shenzhen Ellassay Investment Management Co., Ltd., an affiliated enterprise

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of Ellassay Company, and that the No. 4157840 trademark should, therefore, not be approved for registration.

In light of this judgment of the High People's Court of Beijing Municipality, the SPC pointed out, in the retrial judgment of the above-mentioned dispute between WANG Suiyong and Ellassay Company,[5] that WANG Suiyong had no right to rely on the No. 4157840 trademark to sue anyone for infringement of trademark rights. Therefore, the SPC only considered whether the acts of Ellassay Company and another party infringed on WANG Suiyong's rights to the No. 7925873 trademark. The SPC revoked the first-instance and second-instance judgments and rejected all of the litigation requests of WANG Suiyong. The main reasons for the SPC's decision were the following:

- Ellassay Company had the legal basis to claim "prior rights" (this was because Ellassay Company and its affiliated enterprise began using "歌力思" as an enterprise shop name in 1996, and the company first obtained the exclusive right to use the "歌力思" registered trademark on goods such as clothing in 1999); and

- WANG Suiyong's use of trademark rights that were not obtained in good faith to bring an infringement of rights lawsuit against Ellassay Company's proper use of its trademark constituted an abuse of rights.

Due to the importance of this case, the SPC selected it as Guiding Case No. 82 and summarized relevant principles into the following "Main Points of the Adjudication", which have guiding effect:

> Where a party violates the principle of good faith, harms the legal rights and interests of others, disrupts the fair competition order of the market, maliciously obtains and exercises trademark rights, and claims that others have infringed on his[6] rights, a people's court should, on the grounds that [these acts] constitute an abuse of rights, decide not to support [the party's] litigation requests.

The above "Main Points of the Adjudication" are certainly significant, as reflected in their citations in subsequent cases.[7] However, the facts of Guiding Case No. 82 reveal a point that is very important but has not captured any attention: given that Ellassay Company considered both the No. 7925873 "歌力思" trademark and the No. 4157840 "歌力思 and graphic" trademark to infringe upon Ellassay Company's prior rights, why did the company only file an opposition against the No. 4157840 trademark (the registration of which the High People's Court of Beijing Municipality finally ruled against)? Why did Ellassay Company adopt different strategies in response to these two trademarks?

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After conducting a review of the registration processes of these two trademarks and other public information, as well as an analysis of related trademark administrative lawsuits handled before and after Guiding Case No. 82, the authors believe that Ellassay Company's different strategies in response to these two trademarks might be related to the different standards used by trademark administrative organs and judicial organs when these organs determine what constitutes "similar goods". In this article, the authors discuss, *inter alia*, the differences in these standards and their causes, and offer relevant suggestions in the conclusion.

The Different Destinies of the No. 4157840 Trademark and the No. 7925873 Trademark

1. *The No. 4157840 "歌力思 and Graphic" Trademark Was Not Approved for Registration*

On June 8, 1999, Shenzhen Gelisi Garments Industrial Co., Ltd. was established (which was renamed "Shenzhen Ellassay Fashion Co., Ltd." ("Ellassay Company") in November 2011). In December 2008, the company, by assignment, obtained from Ellassay Fashion Design Co., Ltd. (which was renamed "Shenzhen Ellassay Investment Management Co., Ltd." in May 2011) the No. 1348583 "歌力思" trademark. The trademark had been approved for use on Class 25 ("clothing", etc.) goods and was approved for registration in December 1999. On November 19, 2009, the trademark was approved for renewal registration, with the validity period to be from December 28, 2009 to December 27, 2019. After Shenzhen Gelisi Garments Industrial Co., Ltd. went through the aforementioned name change, the registrant of the No. 1348583 "歌力思" trademark was correspondingly changed to Ellassay Company on March 1, 2012.[8]

On July 7, 2004, a certain Mr. He applied for the registration of the No. 4157840 "歌力思 and graphic" trademark to be used on Class 18 ("handbags", "wallets", "briefcases", etc.) goods. On July 2, 2007, the trademark was transferred, after approval, to WANG Suiyong. After the trademark was preliminarily approved and announced, Ellassay Fashion Design Co., Ltd. filed an opposition with the Trademark Office of the former State Administration for Industry and Commerce (the "original Trademark Office"),[9] arguing that the No. 4157840 trademark and the No. 1348583 trademark constituted similar trademarks for similar goods and, therefore, the former should not be approved for registration.[10] On March 2, 2011, the original Trademark Office decided that "the goods for which [the two trademarks] have been specified for use are not similar goods; and the two trademarks do not constitute similar trademarks for use on similar goods, and confusion or misidentification among consumers will not be caused". As a result, the original Trademark Office ruled to approve the registration of the No. 4157840 trademark.[11]

On April 11, 2011, Ellassay Fashion Design Co., Ltd. applied to the Trademark Review and Adjudication Board of the former State Administration for Industry and Commerce[12] (the "original Trademark Review and Adjudication Board") for a review. On August 13, 2013, the board issued a ruling, agreeing with the original Trademark Office's views. Unconvinced by the ruling, Ellassay Fashion Design Co., Ltd. brought suit in the No. 1 Intermediate People's Court of Beijing Municipality under the company's new name, i.e., Ellassay Investment Management Co., Ltd., requesting that the ruling be revoked. The court opined:[13]

> ***"[…] but Ellassay Company did not file an opposition against the No. 7925873 trademark. Was it because Ellassay Company was disappointed with the fact that the No. 4157840 '歌力思 and graphic' trademark was approved for registration (despite the company's opposition) and, therefore, it did not adopt the same approach in response to this other trademark? Or, was it the case that the company had considered more objective factors and decided not to file an opposition?"***

> **Comparing the "animal (skins), wallets" on which the opposed trademark has been specified for use with the "clothing, [etc.]" goods on which the cited trademark has been approved for use, [one can see that] the sales channels and consumer groups are basically the same,** and the situation in which the same manufacturer produces and sells these "wallets" and "clothing" is very common. Under the circumstance that the opposed trademark and the cited trademark are highly similar, "animal (skins), wallets" and "clothing" constitute related goods. [...] Therefore, the opposed trademark and the cited trademark **constitute similar trademarks on similar goods**, and the application for registration of the opposed trademark violates the *Trademark Law of the People's Republic of China* [...] and [the opposed trademark] should not be approved for registration. (emphasis added)

Unconvinced by the judgment, WANG Suiyong appealed to the High People's Court of Beijing Municipality. The court pointed out that "it was proper for the court of the original adjudication to determine that the opposed trademark and the cited trademark constitute similar trademarks used on

similar goods". The court rejected WANG Suiyong's appeal and upheld the original judgment.[14]

2. The No. 7925873 "歌力思" Trademark Was Approved for Registration

On December 18, 2009, WANG Suiyong applied to register the No. 7925873 "歌力思" trademark for use on Class 18 ("wallets", "handbags", "briefcases", etc.) goods. On June 21, 2011, the trademark was approved for registration and for use on such goods.[15]

An important point should be noted: the announcement date of the preliminary approval of the No. 7925873 trademark was March 20, 2011[16]—a mere 18 days from March 2, 2011, when the original Trademark Office issued a ruling approving the registration of the No. 4157840 "歌力思 and graphic" trademark—but Ellassay Company did not file an opposition against the No. 7925873 trademark. Was it because Ellassay Company was disappointed with the fact that the No. 4157840 "歌力思 and graphic" trademark was approved for registration (despite the company's opposition) and, therefore, it did not adopt the same approach in response to this other trademark? Or, was it the case that the company had considered more objective factors and decided not to file an opposition? This will be discussed in depth in the next section.

3. Reasons for Not Opposing the No. 7925873 "歌力思" Trademark

(1) Background

In order to explore Ellassay Company's reasons for not opposing the No. 7925873 "歌力思" trademark, it is necessary to understand the trends in the development of China's relevant trademark management mechanism before and after the case.

According to the *Trademark Law of the People's Republic of China* (the "*Trademark Law*"),[17] a party who is unconvinced by a decision made by the Trademark Office (including the original Trademark Review and Adjudication Board; hereinafter, any reference to the "Trademark Office" includes the original Trademark Review and Adjudication Board unless specified otherwise) may bring an administrative lawsuit to request that a court render its judgment on the case. In first-instance cases, the courts often agree with the Trademark Office and, thus, there are not many cases in which the office loses. Among those cases in which the courts ruled against the Trademark Office, the office's loss was due to different reasons, including those courts deciding that the Trademark Office's determination of "similar goods", "prior right-holders", or "well-known trademarks" was incorrect. If a first-instance case in which the Trademark Office lost proceeds to the second instance, the second-instance court often upholds the first-instance judgment, i.e., it is highly unlikely for the second-instance court to reverse the first-instance judgment and rule in favor of the Trademark Office.

Table 1 lists the data covering the period from 2011 to 2019 collected by the authors from the official website of the Trademark Office (http://sbj.cnipa.gov.cn). The table shows, among all first-instance administrative litigation cases in which the Trademark Office lost in a certain year, what percentage of these cases are those in which the loss was due to the office's determination of what constituted "similar goods". In 2012, the Trademark Office's determination of what constituted "similar goods" became the main reason for the office's loss in these cases. From 2014, the percentage began to decrease, reaching 4.4% in 2019. This reveals that

Year	Percentage of First-Instance Administrative Litigation Cases Lost by the Trademark Office on the Basis of the Office's Determination of What Constituted "Similar Goods"	Rank According to Frequency Where Determination of What Constituted "Similar Goods" Was the Reason the Trademark Office Lost (Compared to Other Cited Reasons)
2010	12%	-
2011	18%	2
2012	24%	1
2013	22%	2
2014	16%	2
2015	11%	3
2016	14.2%	2
2017	5.4%	6
2018	6.2%	4
2019	4.4%	4
"-" as used in the table indicates that relevant data is unknown.		

Table 1: Percentage of First-Instance Administrative Litigation Cases Lost by the Trademark Office on the Basis of the Office's Determination of What Constituted "Similar Goods" (2011–2019)

over the past 10 years, disagreement has decreased between the Trademark Office and the courts over the determination of what constitutes "similar goods".

(2) Ellassay Company's Considerations

As mentioned above, the preliminary approval of the No. 7925873 trademark was announced on March 20, 2011. Eighteen days earlier, i.e., on March 2, 2011, the original Trademark Office ruled to approve the registration of the No. 4157840 "歌力思 and graphic" trademark. The authors believe that since Ellassay Company was uncertain in March 2011 whether its opposition against the No. 4157840 trademark would ultimately be supported, the company was likely thinking that if it proceeded to file a similar opposition against the No. 7925873 trademark with the original Trademark Office, there was a high probability that the company's claim would be rejected.

Even if, in March 2011, Ellassay Company sought assistance from professional legal counsel and learned that the Trademark Office and the courts had, at the time, considerable disagreement regarding the determination of what constituted "similar goods" and that there was a possibility (but the possibility was not that high) that the Trademark Office's ruling would be overturned during the first-instance administrative litigation, the company would also need to consider the time and energy it would need to expend on the subsequent review and administrative litigation regarding the No. 7925873 trademark.

All of these considerations might have prompted Ellassay Company to decide not to file an opposition against the No. 7925873 trademark. Whether or not the authors are correct in their belief regarding the reasons why Ellassay Company did not oppose the No. 7925873 trademark, the different standards used by trademark administrative organs and the courts for determining what constitutes "similar goods" as well as the related impact are worthy of in-depth study. In the remaining sections of this article, the authors discuss in detail specific standards adopted by administrative organs (represented by the Trademark Office) and judicial organs (represented by the courts) for determining what constitutes "similar goods", as well as other important issues behind the above-mentioned data.

Administrative and Judicial Standards for Determining What Constitutes "Similar Goods"

Article 31 of the *Trademark Law* provides:[18]

> Where two or more trademark registration applicants **apply for registration of identical or similar trademarks** for goods that are of the same type or **similar goods**, the trademark for which registration **is applied first** shall be preliminarily approved and announced. Where [the registrations] are applied for on the same day, the trademark which **is used first** shall be preliminarily approved and announced, while others' applications shall be rejected and not announced. (emphasis added)

Therefore, in China, it is not permitted to register, for similar goods, a trademark that is identical with or similar to a trademark which has previously been applied for or used. However, administrative organs and judicial organs have different standards for determining what constitutes similar goods. In the following sections, the authors will discuss the standards used by administrative organs and judicial organs for determining what constitutes similar goods.

1. Standards for Administrative Determination——Objective Ones Are Primary, Subjective Ones Are Secondary

The Trademark Office is the administrative organ in charge of the examination and registration of trademarks. The Trademark Office formulated the *Standards for Trademark Examination and Adjudication* and is responsible for revising and updating the standards "for all examiners of the Trademark Office, the Trademark Review and Adjudication Board, and the Trademark Examination Cooperation Center to enforce when examining trademarks and adjudicating trademark cases".[19]

With respect to "similar goods", the following definitions are provided in Chapter 8 "Adjudication Standards on Similar Goods or Services" of "Part Two: Standards for Trademark Adjudication" in the *Standards for Trademark Examination and Adjudication*:

> 2.1 Similar goods refer to goods that are identical or have a comparatively substantial relatedness in terms of various aspects, including functions, uses, main raw materials, production departments, sales channels, sales locations, and consumer groups.

In addition, the introduction of Chapter 8 clearly explains:[20]

> In order to **stabilize the order of trademark registration, increase the adjudication efficiency**, and unify adjudication standards, the Trademark Office and the Trademark Review and Adjudication Board **should, in principle, refer to the *Similar Goods and Services Classification Table*** when adjudicating cases. [**authors' note: i.e., objective**

> **standards (see below)**]. However, due to the continuous upgrading and development of goods and services, the continuous changes in market transactions, and the differences in individual trademark cases, the determination of similar goods or services will also be adjusted accordingly. Where the determination of the similarity between goods or services is involved in **the adjudication of trademark cases concerning rejection review, opposition, non-registration review, invalidation, invalidation review, revocation, and revocation review, the standards [stated here] shall be used as principles for judging individual cases [authors' note: i.e., subjective standards (see below)]**. (emphasis added)

In other words, when an administrative organ makes a determination about similar goods, "objective standards" and "subjective standards" are used as primary and secondary standards, respectively. The following two sections will discuss, in more detail, these two types of standards.

(1) Objective Standards

Edited by the Trademark Office, the *Similar Goods and Services Classification Table* (the "*Classification Table*") was "formulated based on the *International Classification of Goods and Services for the Purposes of the Registration of Marks* and a summary of years of practical experiences in the classification of similar goods or services".[21] The *Classification Table* divides goods and services into 45 classes, and each class is further divided into several subclasses.

The Trademark Office offers this explanation: "Goods or services in a subclass are, in principle, similar goods or services".[22] For example, according to the *Classification Table*, mouses (090614) and mouse pads (090662) are, in principle, similar goods because both are in Subclass 0901 "computers and their peripheral devices". Because cell phones (090734) are in Subclass 0907 "communication and navigation equipment" and tablet computers (090724) are in Subclass 0901 "computers and their peripheral devices", they are, in principle, not similar goods.

In practice, at the stage of preliminary examination of a trademark, administrative organs, in principle, refer to the existing classification and special explanations included in the annotations of the *Classification Table* to determine what constitutes similar goods. Such determination standards are "objective standards", i.e., when determining whether goods are similar, the administrative organs use objectively existing facts, such as functions, uses, and main raw materials of the goods to make their judgments. "The degree to which a trademark is well-known and its distinctiveness, as well as the subjective state of the right-holder of a disputed trademark" are not considered.[23]

As mentioned above, Ellassay Fashion Design Co., Ltd. filed an opposition against the No. 4157840 "歌力思 and graphic" trademark. When handling the opposition, the administrative organs adopted objective standards and determined that the No. 4157840 trademark (Class 18 ("bags", etc.) goods) and the No. 1348583 trademark (Class 25 ("clothing", etc.) goods) were not similar trademarks registered for similar goods.[24]

(2) Subjective Standards

The *Standards for Trademark Examination and Adjudication* also provides that "[w]here the determination of the similarity between goods or services is involved in the adjudication of trademark cases concerning rejection review [etc.], these standards shall be used as principles for judging individual cases".[25] Therefore, when adjudicating trademark cases, the administrative organs also make case-by-case judgments on what constitutes similar goods based on the specific circumstances of each case. These determination standards are called "subjective standards". As for the specific standards, the original Trademark Review and Adjudication Board offered the following explanation in 2013:[26]

> The purpose of determining the similarity of trademarks and the similarity of goods is to protect the distinguishing functions of trademarks so as to **avoid confusion among consumers**. The determination of these two types of similarity is by no means merely a comparison, as literally understood, of the trademark identifiers or a comparison of the relevant objective attributes of the goods. These two types [of similarity] **should be judged by using, as a fundamental standard, whether they are likely to cause confusion among the relevant public**. (emphasis added)

The above standard was reflected in the *Xin Ba Lin Case*. In that case, the original Trademark Review and Adjudication Board ruled that Class 7 ("cooling radiators of automobile engines", etc.) goods for which the disputed trademark "鑫八菱" had been approved for use and Class 12 ("vehicle radiators", etc.) goods for which the cited trademark "八菱" had been approved for use had "a comparatively substantial relatedness in terms of various aspects, including functions, uses, consumer groups, and sales channels" and that the two trademarks' "co-existence in the market is likely to cause confusion or misidentification among consumers about the sources of the goods". Therefore, the two types of

goods were determined to be similar goods. This view was supported by the first-instance and second-instance courts, and the trademark "鑫八菱" was finally declared invalid.[27]

In summary, when determining what constitutes similar goods, administrative organs mainly refer to the *Classification Table*, with an overall tendency to use objective standards. However, they also incorporate subjective standards in their analysis of individual cases (see **Table 2**).

2. Standards for Judicial Determination——Subjective Ones are Primary, Objective Ones are Secondary

Standards for people's courts to use when determining what constitutes similar goods are provided in the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Laws in Adjudicating Trademark Civil Disputes*[28] and the *Opinions of the Supreme People's Court on Several Issues Concerning the Adjudication of Administrative Cases Involving Authorization or Confirmation of Trademark Rights*.[29] Article 11 Paragraph 1 of the former states:

> Similar goods as stated in Article 57 Item (2) of the *Trademark Law*[30] refer to goods that are identical in terms of various aspects, including functions, uses, production departments, sales channels, and target consumers, or goods that **the relevant public generally believes have specific connections and are likely to cause confusion**. (emphasis added)

Article 12 provides:

> To determine, in accordance with Article 57 Item (2) of the *Trademark Law*,[31] whether goods or services are similar, a people's court **should make a comprehensive judgment based on the general knowledge of the relevant public about the goods** or services. The *International Classification of Goods and Services for the Purposes of the Registration of Marks* and the *Similar Goods and Services Classification Table* **may** be used as **references** for determining similar goods or services. (emphasis added)

In the *Opinions of the Supreme People's Court on Several Issues Concerning the Adjudication of Administrative Cases Involving Authorization or Confirmation of Trademark Rights*, Opinions 14 and 15 state:

> 14. To determine the **similarity of goods** and the similarity of trademarks during the adjudication of administrative cases involving authorization or confirmation of trademark rights, people's courts **may refer to** relevant provisions of the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Laws in Adjudicating Trademark Civil Disputes*.
>
> 15. In reviewing and determining **whether** relevant **goods** or services **are similar**, people's courts should consider **whether the functions, uses, production departments, sales channels, consumer groups, etc. of the goods are identical or** have a comparatively substantial relatedness; whether the purposes, contents, methods, targets, etc. of the services are identical or have a comparatively substantial relatedness; and whether the goods and services have a comparatively substantial relatedness and whether it is likely to make the relevant public believe that the goods or services are provided by the same subject, or there is a specific connection between the providers. *The International Classification of Goods and Services for the Purposes of the Registration of Marks and the Similar Goods and Services Classification Table* **may** be used as **references** for determining similar goods or services. (emphasis added)

The above content shows that when determining what constitutes similar goods, people's courts primarily use subjective standards (e.g., courts are required to make a comprehensive judgment based on "the general knowledge of the relevant public about the goods" and decide whether the "relevant public" "generally believes" that the goods "are likely to cause confusion"), supplemented with objective standards (e.g., the *Classification Table* is only used as a "reference"). For example, in the *Beer and Fruit Wine Case*, the High People's Court of Beijing Municipality determined that although Class 32 ("beer", "ginger beer", etc.) goods—for which the opposed trademark had been specified for use—and Class 33 ("fruit wine (containing alcohol)", "wine", "rice wine", etc.) goods—for which the cited trademark had been approved for use—were of different classes in the *Classification Table*, they "[are] both alcoholic beverages and are highly similar in terms of their functions, uses, production departments, sales channels, consumer groups, etc." If the two trademarks "are used together for the above-mentioned goods, which have a comparatively substantial relatedness, this will likely cause confusion or misidentification among the relevant public about the sources of the goods". The court, therefore, decided that the opposed trademark should not be registered.[32]

However, since 2014, the Chinese courts have gradually incorporated objective standards into their determination of what constitutes similar goods. For example, in the *KYB Case*, the High People's Court of Beijing Municipality, based

	As Primary Standards	As Secondary Standards
Administrative Organs	**Objective Standards:** **In principle, refer to the *Classification Table*** to determine whether the objective attributes of the goods (i.e., functions, uses, production departments, sales channels, sales locations, consumer groups, etc.) are similar.	**Subjective Standards:** The purpose of determining […] the similarity of goods is to […] **avoid confusion among consumers**. The determination […] is by no means merely a comparison, as literally understood, of […] the relevant objective attributes of the goods. [Similarities] **should be judged by using, as a fundamental standard, whether they are likely to cause confusion among the relevant public**. (e.g., the *Xin Ba Lin Case*)
Judicial Organs	**Subjective Standards:** Consider whether the objective attributes of the goods (i.e., functions, uses, production departments, sales channels, consumer groups, etc.) are identical or have a comparatively substantial relatedness, and consider whether they **will likely cause confusion or misidentification among the relevant public about the sources of the goods**. (e.g., the *Beer and Fruit Wine Case*)	**Objective Standards:** **May refer to the *Classification Table*** to determine whether the objective attributes of the goods (i.e., functions, uses, production departments, sales channels, consumer groups, etc.) are similar. However, if **"no evidence is available [that attempts] to prove"** that the objective attributes of the goods **"are not close and [thus,] that confusion or misidentification among consumers about the sources of the goods will not be caused"**, the determination of similar goods **should, in principle, be made by referring to the *Classification Table*** etc. (e.g., the *KYB Case*)

Table 2: Administrative and Judicial Standards for Determining What Constitutes "Similar Goods" and Specific Elements for Consideration

on the classification of goods clearly listed in the 10th edition of the *Classification Table*, decided that although the "shock absorbers for vehicles and pumping shock absorbers for vehicles", for which the cited trademark had been approved for use, did not match the standard description of any item listed in the *Classification Table*, the meaning of the phrase covered "automobile shock absorbers", which were in Subclass 1202. Therefore, the "shock absorbers for vehicles and pumping shock absorbers for vehicles" could be classified as belonging to Subclass 1202. Since "motorcycles", for which the opposed trademark had been specified for use, were in Subclass 1202, the goods for which the two trademarks had been approved/specified for use were in the same subclass, which meant they constituted similar goods. With respect to when the objective attributes of goods can be used as the basis for judgment, the High People's Court of Beijing Municipality gave the following explanation:[33]

> The *International Classification of Goods and Services for the Purposes of the Registration of Marks* and the *Similar Goods and Services Classification Table* are merely used as references in the determination of what constitutes similar goods. However, if **the similarity of the marks is relatively high** and **no evidence is available [that attempts] to prove that the functions, uses, production departments, sales channels, consumer groups, etc. of the goods are not close and [thus,] that confusion or misidentification among consumers about the sources of the goods will not be caused**, the determination of similar goods should, in principle, be made by referring to the *International Classification of Goods and Services for the Purposes of the Registration of Marks* and the *Similar Goods and Services Classification Table*. (emphasis added)

In other words, when there is no clearly contrary evidence to allow the courts to go beyond the objective standards, the courts will use objective standards such as the *Classification Table* to determine what constitutes similar goods.

In summary, when determining what constitutes similar goods, judicial organs tend to use subjective standards. However, in recent years, there is a trend for these organs to use objective standards along with subjective standards (see **Table 2**).

Differences Between Standards Used in Administrative Determinations and Judicial Determinations: Causes, Problems, and Efforts in "Seeking Commonalities While Reserving Differences"

1. Causes of Differences

The existence of differences between administrative organs and judicial organs in the determination of what constitutes similar goods is an issue that has a long history.[34] In fact, the Trademark Office and the SPC have responded to this issue on different occasions.

The Trademark Office explained that the differences between administrative organs and judicial organs in the determination of what constitutes similar goods are mainly due to these organs' different responsibilities and needs: "Administrative procedures occur at an early stage where efficiency is more important, whereas judicial procedures occur at a later stage where impartiality is more important".[35] In 2014, the original Trademark Review and Adjudication Board clearly pointed out the importance of efficiency:[36]

> If, in all cases, examiners search for factors beyond the *Classification Table* to again determine the classification of similar goods, the operation of the trademark legal system will **stagnate due to low efficiency**, even though **the accuracy of the determination and the impartiality of individual cases** may increase accordingly. (emphasis added)

The SPC, however, emphasized in the *Woodpecker Trademark Case* the uniqueness of each case so as to protect civil rights and interests:[37]

> With upgrades of goods and services and continuous changes in market transactions, the similarities of goods and services are not static. **Trademark oppositions and disputes are different from the system set up for the examination of applications for the registration of trademarks. Serving different functions in the [trademark] system and being oriented toward different values, [trademark oppositions and disputes] are more concerned with the protection of specific civil rights and interests and emphasize the uniqueness and the actual situation of each case.** [This is true,] especially in cases entering litigation proceedings, where the judicial remedy for each individual case is emphasized to a greater extent.
>
> In these situations, if [trademark oppositions and disputes] are still based on maintaining consistency and stability without considering the actual situation and factors in each case, there is a deviation from the purpose and function set up in the [trademark] system. Therefore, when determining the similarity of goods in trademark oppositions, disputes, and subsequent lawsuits, as well as in infringement lawsuits, the *Classification Table* must not be mechanically or simplistically taken as the basis or standard [for judgment]. Instead, more practical elements should be considered and the determination should be made in conjunction with the circumstances of individual cases. (emphasis added)

2. Problems Arising from the Differences; Efforts in "Seeking Commonalities While Reserving Differences"

Although administrative organs and judicial organs have, due to their needs, used different standards for determining what constitutes similar goods, it is undeniable that if their standards are too different, this may lead to a large number of trademarks being approved for registration by administrative organs at the early stage, but then being unregistered or invalidated after judicial determination at the later stage. This may further produce a negative impact on the stability of the registration and usage of trademarks. Therefore, it is crucial to find a balance between recognizing the different functions of administrative organs and judicial organs, and the stability of trademark registration.

As mentioned above, since 2014, there has been a decrease in the differences between judicial organs and administrative organs in the determination of what constitutes similar goods (**Table 1**). The decrease is likely due to the two organs having reached a relatively uniform opinion on the specific factors to be considered when determining what constitutes similar goods. A careful comparison of the content in **Table 2** shows their efforts in "seeking commonalities while reserving differences". In the determination of what constitutes similar goods, although administrative organs use objective and subjective standards as primary and secondary standards, respectively, while judicial organs do the opposite, the specific factors considered for subjective and objective standards are very similar:

- For the objective standard, both administrative and judicial organs use the *Classification Table* as a basis and consider the similarities of the objective attributes of the two types of goods, such as the functions, uses, production departments, sales channels, and consumer groups.

- For the subjective standard, both organs usually consider whether the similarities of the objective attributes of the two types of goods and the extent that they are related are likely to cause confusion or misidentification among the relevant public about the sources of the goods.

Since the factors considered by both organs for the objective and subjective standards are essentially the same, parties involved in trademark disputes can more clearly predict the decisions that are likely to be made by different organs regarding similar goods, and adopt more effective means to protect their legal rights and interests accordingly. The authors believe that if both administrative organs and judicial organs systematically provide more relevant cases to illustrate and clarify how they apply the aforementioned subjective and objective standards, parties involved in trademark disputes will be able to make more accurate predictions, thereby promoting the stability of trademark registration in China.

For example, when Ellassay Company was deciding whether to file an opposition against the No. 7925873 trademark, if the company (1) had access to a sufficient number of prior cases to help it predict that the court would likely apply the subjective standards to determine what constituted similar goods (i.e., consider whether the similarities of the objective attributes of the goods and the extent that they are related would likely cause confusion or misidentification among the relevant public about the sources of the goods), and (2) had sufficient evidence to prove the company's claim from the above-mentioned perspective, then the company would likely adopt the same strategy that it used for the No. 4157840 trademark to deal with the No. 7925873 trademark, i.e., it would have filed an opposition. In other words, even if the administrative organs might still not support Ellassay Company's opposition against the No. 7925873 trademark, Ellassay Company could still bring administrative lawsuits against both trademarks. It is not difficult to predict that if Ellassay Company had chosen the above strategy, it is likely that both trademarks ultimately would have not been approved for registration. This would have prevented WANG Suiyong from abusing the trademark rights, which were not obtained in good faith, to bring an infringement of rights lawsuit against Ellassay Company.

Concluding Remarks

Beginning from an examination of the different destinies of the two trademarks involved in Guiding Case No. 82 and its related lawsuits, this article analyzes the legal rules regarding, and practical operations for, the determination by administrative organs and judicial organs of what constitutes similar goods. The article discusses the differences in the standards employed by the two organs in determining similar goods.

> ***"[…] if both administrative organs and judicial organs systematically provide more relevant cases to illustrate and clarify how they apply the aforementioned subjective and objective standards, parties involved in trademark disputes will be able to make more accurate predictions, thereby promoting the stability of trademark registration in China."***

In light of the different focuses of administrative and judicial procedures, administrative organs primarily conduct trademark examination and adjudication based on objective standards to ensure the efficiency of trademark examination, while judicial agencies focus on subjective standards to safeguard the impartial handling of individual cases. It is clear that if the standards used by the administrative organs and judicial organs are too different, this will eventually have a negative impact on the stability of trademark registration and usage in China.

Hence, in the authors' opinion, it is worth advocating for China's administrative organs and judicial organs to jointly explore and learn from each other what specific factors need to be considered for the subjective and objective standards. Such advocacy is of great importance. These efforts in "seeking commonalities while reserving differences" not only ensure that the two organs are able to fully perform their functions, but also increase the predictability of the determination of what constitutes similar goods at different stages. This is conducive to the full protection of the rights and interests of trademark right-holders and applicants. Based on this, the authors suggest that administrative organs and judicial organs provide more relevant cases to illustrate how they apply the subjective and objective standards. This will allow parties of trademark disputes to more accurately predict the outcomes of their cases, thereby promoting the stability and fairness of China's trademark protection system. ■

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2 (2012) 浙杭知初字第362号民事判决 ((2012) Zhe Hang Zhi Chu Zi No. 362 Civil Judgment), rendered by the Intermediate People's Court of Hangzhou Municipality, Zhejiang Province, on Feb. 1, 2013. This judgment has not been found and may have been excluded from publication.

3 (2013) 浙知终字第222号民事判决 ((2013) Zhe Zhi Zhong Zi No. 222 Civil Judgment), rendered by the High People's Court of Zhejiang Province on June 7, 2013. This judgment has not been found and may have been excluded from publication.

4 (2014) 高行终字第466号行政判决 ((2014) Gao Xing Zhong Zi No. 466 Administrative Judgment), rendered by the High People's Court of Beijing Municipality on Apr. 2, 2014, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/beijing-2014-gao-xing-zhong-zi-466-administrative-judgment.

5 (2014) 民提字第24号民事判决 ((2014) Min Ti Zi No. 24 Civil Judgment), rendered by the Supreme People's Court on Aug. 14, 2014, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/spc-2014-min-ti-zi-24-civil-judgment.

6 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".

7 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.

8 Guiding Case No. 82, *supra* note 1; (2014) Gao Xing Zhong Zi No. 466 Administrative Judgment, *supra* note 4.

9 On November 15, 2018, based on the *Reply of the State Commission Office for Public Sector Reform Concerning the Institutional Arrangements for Public Institutions Affiliated with the State Intellectual Property Office* (《中央机构编制委员会办公室关于国家知识产权局所属事业单位机构编制的批复》), the original Trademark Office, Trademark Review and Adjudication Board, and Trademark Examination Cooperation Center of the original State Administration for Industry and Commerce were integrated into the Trademark Office of the China National Intellectual Property Administration. The new Trademark Office is a public institution of the China National Intellectual Property Administration. *See* 商标局简介 (*Introduction to the Trademark Office*), 《国家知识产权局网站》 (China National Intellectual Property Administration Online), https://www.cnipa.gov.cn/art/2020/1/3/art_533_146147.html.

10 (2014) Gao Xing Zhong Zi No. 466 Administrative Judgment, *supra* note 4.

11 *Id.*

12 *See Introduction to the Trademark Office*, *supra* note 9.

13 (2014) Gao Xing Zhong Zi No. 466 Administrative Judgment, *supra* note 4.

14 *Id.*

15 *Id.*

16 《商标初步审定公告》 (*Announcement of the Preliminary Approval of a Trademark*), 《国家知识产权局商标局》 (Trademark Office of the China National Intellectual Property Administration), Issue No. 1256, at 1632 (March 20, 2011), http://wsgg.sbj.cnipa.gov.cn:9080/tmann/annInfoView/annSearch.html?annNum=1256.

17 《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.

18 *Id.*

19 中华人民共和国国家工商行政管理总局商标局商标评审委员会 (The Trademark Office and the Trademark Review and Adjudication Board of the State Administration for Industry and Commerce of the People's Republic of China), 商标审查及审理标准 (*Standards for Trademark Examination and Adjudication*), 《国家知识产权局商标局》 (Trademark Office of the China National Intellectual Property Administration) at 2 (December 2016), http://spw.sbj.cnipa.gov.cn/zcfg/201701/P020170210855985809679.pdf.

20 *Id.*, at 187.

21 *Id.* For more information about the *International Classification of Goods and Services for the Purposes of the Registration of Marks*, see *Nice Classification*, World Intellectual Property Organization, https://www.wipo.int/classifications/nice/en.

22 *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), at ii, http://sbj.cnipa.gov.cn/sbsq/sphfwfl/200902/W020190712537779217641.pdf.

23 李勤 (LI Qin), 《商品类似判断的行政审理与司法审查之比较》 (*A Comparison of Administrative Adjudication and Judicial Review Regarding the Determination of Similar Goods*), June 5, 2018, https://www.ccpit-patent.com.cn/zh-hans/node/5137.

24 (2014) Gao Xing Zhong Zi No. 466 Administrative Judgment, *supra* note 4.

25 *Standards for Trademark Examination and Adjudication*, *supra* note 19, at 187.

26 2012年商标评审案件行政诉讼情况汇总分析 (*Summary Analysis of Administrative Litigation of Trademark Review and Adjudication Cases in 2012*), 《国家工商行政管理总局商标评审委员会法务通讯》 (Newsletter on Legal Affairs of the Trademark Review and Adjudication Board of the State Administration for Industry and Commerce), Issue No. 60 (April 27, 2013), http://spw.sbj.cnipa.gov.cn/fwtx/201304/t20130427_226895.html.

27 (2016) 京行终571号行政判决 ((2016) Jing Xing Zhong No. 571 Administrative Judgment), rendered by the High People's Court of Beijing Municipality on Feb. 29, 2016, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/beijing-2016-jing-xing-zhong-571-administrative-judgment.

28 《最高人民法院关于审理商标民事纠纷案件适用法律若干问题的解释》 (*Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Laws in Adjudicating Trademark Civil Disputes*), passed by the Adjudication Committee of the Supreme People's Court on Oct. 12, 2002, issued on Oct. 12, 2002, effective

as of Oct. 16, 2002, amended on Dec. 23, 2020, effective as of Jan. 1, 2021, https://sciiip.gdufs.edu.cn/info/1027/1666.htm. The specific amendment decision is posted at http://www.hncourt.gov.cn/public/detail.php?id=183614.

[29] 《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意见》 (*Opinions of the Supreme People's Court on Several Issues Concerning the Adjudication of Administrative Cases Involving Authorization or Confirmation of Trademark Rights*), issued on and effective as of Apr. 20, 2010, https://www.chinacourt.org/law/detail/2010/04/id/142068.shtml.

[30] Before the amendment in 2020, the article referenced here was "Article 52 Item (1) of the *Trademark Law*". Other content remains the same after the amendment.

[31] *Id*.

[32] (2016) 京行终4867号行政判决 ((2016) Jing Xing Zhong No. 4867 Administrative Judgment), rendered by the High People's Court of Beijing Municipality on Feb. 28, 2017, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/beijing-2016-jing-xing-zhong-4867-administrative-judgment.

[33] (2015) 高行 (知) 终字第3693号行政判决 ((2015) Gao Xing (Zhi) Zhong Zi No. 3693 Administrative Judgment), rendered by the High People's Court of Beijing Municipality on Dec. 14, 2015, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/beijing-2015-gao-xing-zhi-zhong-zi-3693-administrative-judgment.

[34] *Summary Analysis of Administrative Litigation of Trademark Review and Adjudication Cases in 2012*, *supra* note 26. The article discusses three major differences between the courts and the Trademark Review and Adjudication Board in their determination of similar goods.

[35] 段晓梅 (DUAN Xiaomei), 商标评审案件中类似商品或者服务判定的审理实践 (*Adjudication Practice of the Determination of Similar Goods or Services in Trademark Review Cases*), 《商标评审委员会网》 (Trademark Review and Adjudication Board Online), Feb. 11, 2014, http://spw.sbj.cnipa.gov.cn/llyj/201402/t20140211_229736.html.

[36] *Id*.

[37] (2011) 知行字第37号行政其他 ((2011) Zhi Xing Zi No. 37 Administrative–Other), rendered by the Supreme People's Court on July 12, 2011, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/beijing-2011-zhi-xing-zi-37-administrative-others.

探究指导案例82号背后的故事：“类似商品”的行政与司法认定标准之差异与相关问题的讨论*

许侨超、任若雨

摘要

2017年3月6日，最高人民法院（“最高法”）发布指导案例82号。该案源自一起最终由最高法判决的王碎永诉深圳歌力思服饰股份有限公司（“歌力思公司”）的侵害商标权纠纷案。该案主要围绕王碎永声称拥有两个诉争商标的专用权。最高法撤销一审、二审判决，驳回王碎永的全部诉讼请求。由于该案的重要性，最高法选其为指导案例82号，而其中的“裁判要点”亦已被不少后续案件所引用。

但值得注意的是，尽管两个诉争商标均属于可能侵犯歌力思公司享有在先权利的类似商标，但早在两个诉争商标被申请注册时，该公司或其关联企业却仅对其中一个诉争商标提出过异议。最终，被异议的商标通过行政诉讼后，不被核准注册，而另一个诉争商标则等到最高法对上述王碎永诉歌力思公司案判决后才确认：王碎永以非善意取得的商标权对歌力思公司的正当使用行为提起的侵权之诉，构成权利滥用。

为什么歌力思公司仅对一个诉争商标提出异议？通过查阅两个诉争商标的注册流程及其他公开资料，并分析指导案例82号发生前后中国法院商标行政诉讼的发展趋势，本文作者发现中国商标行政机关与司法机关在认定“类似商品”时采取的标准存在一定的差异，而这样的差异可能导致歌力思公司针对两个诉争商标采取了不同的应对策略。其中更值得关注的是，行政机关与司法机关就“类似商品”的认定标准究竟有何不同，这样的不同又会对中国商标保护机制带来何种影响。本文作者对此作出深入讨论并提出相关建议。

引言

2017年3月6日，最高人民法院（“最高法”）发布指导案例82号《王碎永诉深圳歌力思服饰股份有限公司、杭州银泰世纪百货有限公司侵害商标权纠纷案》。[1] 该案源自一起最终由最高法判决的侵害商标权纠纷案。2012年3月7日，王碎永以深圳歌力思服饰股份有限公司（“歌力思公司”）等生产、销售皮包的行为构成对王碎永所称拥有的第7925873号“歌力思”商标、第4157840号“歌力思及图”商标的侵害为由，提起诉讼。一审[2]、二审[3]法院都判王碎永胜诉。

有趣的是，2014年8月14日最高法作出上述王碎永诉歌力思公司案再审判决前的四个月，即2014年4月2日，北京市高级人民法院作出另一涉及第4157840号商标的案件的二审判决，[4] 认定第4157840号商标损害了歌力思公司的关联企业歌力思投资管理有限公司的在先字号权，因此不应予以核准注册。

基于北京市高级人民法院的这一判决，最高法在上述王碎永诉歌力思公司案的再审判决中，[5] 指出王碎永无权据第4157840号商标对他人提起侵害商标权之诉，故最高法只考虑歌力思公司等的行为是否侵害王碎永的第7925873号商标权。最高法撤销一审、二审判决，驳回王碎永的全部诉讼请求，其主要理由为：

- 歌力思公司拥有合法的在先权利基础（这是由于歌力思公司及其关联企业自1996年已将“歌力思”作为企业字号使用，并于1999年已在服装等商品上取得“歌力思”注册商标专用权）；
- 王碎永以非善意取得的商标权对歌力思公司的正当使用行为提起的侵权之诉，构成权利滥用。

由于该案的重要性，最高法选其为指导案例82号，并将相关原则归纳为以下具指导性的“裁判要点”：

> 当事人违反诚实信用原则，损害他人合法权益，扰乱市场正当竞争秩序，恶意取得、行使商标权并主张他人侵权的，人民法院应当以构成权利滥用为由，判决对其诉讼请求不予支持。

以上“裁判要点”固然重要，这反映于后续案件已对之引用。[6] 但是，指导案例82号的案情揭示了很重要但未被注意的一点：尽管歌力思公司认为第7925873号“歌力思”商标、第4157840号“歌力思及图”商标均侵犯其在先权利，但该公司仅对第4157840号商标提出了异议，而最后北京市高级人民法院亦判决不应核准注册该商标。为什么歌力思公司对这两个商标采取了不同的应对策略？

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许侨超是上海天尚律师事务所一名在提供娱乐法及知识产权法咨询方面具有丰富经验的律师。在此之前，她在北京市集佳律师事务所上海分所担任见习律师，为化妆品、金融和娱乐传媒等公司提供法律解决方案，协助其获取注册商标专用权。许侨超毕业于东华大学并获颁发法学学士学位。

通过查阅这两个商标的注册流程及其他公开资料，并分析指导案例82号发生前后的相关商标行政诉讼，笔者发现歌力思公司的应对策略的不同可能涉及商标行政机关与司法机关在认定“类似商品”时所采取的标准有差异。在本文中，笔者会讨论这些差异、成因等，并在结语部分作出相关建议。

第4157840号商标和第7925873号商标的不同命运

1. 第4157840号“歌力思及图”商标没有被核准注册

1999年6月8日，深圳歌力思服装实业有限公司成立（后于2011年11月更名为深圳歌力思服饰股份有限公司（“歌力思公司”））。2008年12月，该公司通过受让方式从歌力思服饰设计有限公司（后于2011年5月更名为“歌力思投资管理有限公司”）取得第1348583号“歌力思”商标，该商标核定使用于第25类的服装等商品之上，核准注册于1999年12月。2009年11月19日，该商标经核准续展注册，有效期自2009年12月28日至2019年12月27日。深圳歌力思服装实业有限公司进行前述更名后，2012年3月1日，第1348583号“歌力思”商标的注册人相应变更为歌力思公司。[7]

2004年7月7日，何某申请在第18类的手提袋、钱包、公文箱等商品上注册第4157840号“歌力思及图”商标。2007年7月2日，该商标经核准转让给王碎永。该商标初步审定公告后，歌力思服饰设计有限公司向原国家工商行政管理总局商标局[8]（“原商标局”）提出异议，认为该商标与第1348583号商标构成使用在类似商品上的近似商标，不应被核准注册。[9] 2011年3月2日，原商标局认为两个商标“指定使用商品不属于类似商品，双方商标未构成使用在类似商品上的近似商标，不会造成消费者混淆和误认”，裁定核准注册第4157840号商标。[10]

2011年4月11日，歌力思服饰设计有限公司向原国家工商行政管理总局商标评审委员会[11]（“原商评委”）申请复审。2013年8月13日，原商评委作出裁定，同意原商标局的观点。歌力思服饰设计有限公司不服，以更名后的歌力思投资管理有限公司名义向北京市第一中级人民法院提起诉讼，请求撤销原商评委的裁定。该法院认为：[12]

> ***“[...]歌力思公司却未对第7925873号商标提出异议。这是否由于歌力思公司对第4157840号‘歌力思及图’商标被核准注册（尽管该公司对该商标提出过异议）感到失望，故没有采取同样的应对方法？还是，该公司考虑到更多的客观因素而决定不提出异议？”***

被异议商标指定使用的“动物（皮）、钱包”与引证商标核定使用的“服装”等商品对比，销售渠道、消费群体基本相同，而且由同一生产商同时生产销售“钱包”和“服装”的情况十分普通，在被异议商标与引证商标标识高度近似的情况下，“动物（皮）、

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> 钱包”与“服装”构成关联商品。[…]因此，被异议商标与引证商标**构成类似商品上的近似商标**，被异议商标的申请注册违反了《中华人民共和国商标法》[…]，不应予以核准注册。（强调后加）

王碎永不服该判决，向北京市高级人民法院提起上诉。该法院指出“原审法院认定被异议商标与引证商标构成使用在类似商品上的近似商标是正确的”，并驳回上诉，维持原判。[13]

2. 第7925873号“歌力思”商标被核准注册

2009年12月18日，王碎永申请注册第7925873号“歌力思”商标，用于第18类的“钱包”、“手提包”、“公文包”等商品上。该商标于2011年6月21日核准注册，核定使用在第18类的“钱包”、“手提包”、“公文包”等商品上。[14]

很重要的一点是，第7925873号商标初步审定公告日为2011年3月20日，[15] 距离原商标局于2011年3月2日作出核准第4157840号“歌力思及图”商标注册的裁定仅仅18天，而歌力思公司却未对第7925873号商标提出异议。这是否由于歌力思公司对第4157840号“歌力思及图”商标被核准注册（尽管该公司对该商标提出过异议）感到失望，故没有采取同样的应对方法？还是，该公司考虑到更多的客观因素而决定不提出异议？下一节会对此作出深入讨论。

3. 对第7925873号“歌力思”商标不提出异议的原因

（1）背景

要探究歌力思公司对第7925873号“歌力思”商标不提出异议的原因，必须先理解案发前后相关的中国商标管理机制发展趋势。

根据《中华人民共和国商标法》（“《商标法》”）的规定，[16] 当事人对商标局（含原商评委，以下如无特别说明，均含原商评委）作出的商标决定不服，可以提起行政诉讼，请求法院作出判决。在一审中，法院往往与商标局看法一致，判决该局败诉的案件不多。在那些该局败诉的案件中，败诉原因涉及各方面，包括法院认为该局对“类似商品”、“在先权利人”、“驰名商标”等的认定不正确。如果商标局败诉的案件进入二审程序，二审法院往往维持一审判决，改判商标局胜诉的情况不多。

表1列出了笔者在商标局官网（http://sbj.cnipa.gov.cn）中检索到的自2011年至2019年该局因“类似商品”认定问题导致其败诉的案件占同年度该局所有一审行政诉讼中败诉的案件的比例。在2012年，“类似商品”认定问题成为商标局在一审程序中败诉的首要原因。从2014年开始，该比例开始呈现下降趋势。直至2019年，该比例已经降至4.4%。由此可见，商标局与法院在过去十年里，在“类似商品”认定问题上的分歧逐步减少。

年份	因“类似商品”认定问题导致商标局败诉占同年度该局所有一审行政诉讼败诉的案件的比例	在所有原因中的排名
2010	12%	-
2011	18%	2
2012	24%	1
2013	22%	2
2014	16%	2
2015	11%	3
2016	14.2%	2
2017	5.4%	6
2018	6.2%	4
2019	4.4%	4
表中使用的“-”表示相关数据不详。		

表1：“类似商品”认定问题导致商标局败诉的一审行政诉讼案件占同年度该局所有一审行政诉讼败诉的案件的比例（2011年–2019年）

（2）歌力思公司的考虑

上文提到，第7925873号商标初步审定公告日为2011年3月20日。18天前，即2011年3月2日，原商标局裁定核准第4157840号“歌力思及图”商标注册。笔者推测，由于歌力思公司在2011年3月时尚不能确认针对第4157840号商标的异议是否最终得到支持，所以该公司很可能会想到如果其同样向原商标局对第7925873号商标提出异议，这样的主张有很大概率被驳回。

即使歌力思公司在2011年3月寻求过专业法律顾问的帮助，知道当时商标局与法院在“类似商品”认定问题上有颇大的分歧，商标局的裁决会有可能（但可能性也不是很高）于一审行政诉讼中被撤销，该公司也会考虑到需要花费时间和精力针对第7925873号商标进行后续的复审及行政诉讼。

因此，以上种种考虑很可能导致歌力思公司决定对第7925873号商标不作出异议。无论上述的推测是否

正确，商标行政机关与法院在类似商品认定标准上存在的分歧和相关影响都值得深入研究。笔者在下文将详细梳理以商标局为代表的行政机关与以法院为代表的司法机关在类似商品问题上所采取的具体认定标准，及上述数据背后值得我们深入思考的其他问题。

“类似商品”的行政认定与司法认定标准

《商标法》第三十一条规定：[17]

> 两个或者两个以上的商标注册申请人，在同一种商品或者**类似商品上，以相同或者近似的商标申请注册**的，初步审定并公告**申请在先**的商标；同一天申请的，初步审定并公告**使用在先**的商标，驳回其他人的申请，不予公告。（强调后加）

因此，在中国，在类似商品上注册与在先申请或在先使用的商标相同或近似的商标是不被允许的。然而，行政机关与司法机关对类似商品的认定标准却有所不同。以下笔者将分别论述行政机关和司法机关认定类似商品的标准。

1. 行政认定标准——客观为主，主观为辅

商标局是负责商标审查和注册的行政机关。商标局制定并负责修订更新《商标审查及审理标准》，以“供商标局、商标评审委员会、商标审查协作中心的全体审查人员在商标审查及商标案件审理时执行”。[18]

关于“类似商品”，《商标审查及审理标准》内“下篇 商标审理标准”的第八章“类似商品或者服务审理标准”中，提供了以下定义：

> 2.1 类似商品是指在功能、用途、主要原料、生产部门、销售渠道、销售场所、消费群体等方面相同或者具有较大关联性的商品。

此外，第八章的引言部分清楚说明：[19]

> 为**稳定商标注册秩序、提高审理效率**、统一审理标准，商标局、商标评审委员会在审理案件时**原则上应当参照《类似商品和服务区分表》**[**笔者评:即客观标准（见下文）**]。但由于商品和服务项目在不断更新、发展，市场交易的状况也不断变化以及商标案件的个案差异，类似商品或者服务的判定也会随之调整。在**商标驳回复审、异议、不予注册复审、无效宣告、无效宣告复审、撤销、撤销复审案件审理**中，涉及商品或者服务类似与否判定问题的，**以本标准为原则进行个案判定**[**笔者评:即主观标准（见下文）**]。（强调后加）

换言之，行政机关作出类似商品认定时，是以“客观标准”为主、“主观标准”为辅。以下两节将会对这两个标准作出更深入的讨论。

（1）客观标准

《类似商品和服务区分表》（“《区分表》”）是由商标局编辑，“以《商标注册用商品和服务国际分类表》为基础，总结多年的类似商品或者服务划分的实践经验制定”而成的。[20]《区分表》将商品和服务分为45个类别，每个类别下还分为数个类似群。

根据商标局的说明：“一个类似群内的商品和服务项目原则上是类似商品和服务”。[21] 例如，根据《区分表》的分类，鼠标（090614）和鼠标垫（090662）因同属于0901“电子计算机及其外部设备”这个类似群，所以原则上是类似商品。而手机（090734）属于0907“通信导航设备”这个类似群，平板电脑（090724）则属于0901“电子计算机及其外部设备”这个类似群，所以它们原则上不是类似商品。

实践中，在商标初审阶段，行政机关原则上参照《区分表》已有的分类及注释部分的特别说明而作出类似商品的认定。此种认定标准为“客观标准”，即行政机关在认定商品类似时以商品本身的功能、用途、主要原料等客观存在的事实进行判定，而“商标的知名度、显著性、诉争商标权人的主观状态等”都不在考虑之列。[22]

上述提及歌力思服饰设计有限公司对第4157840号“歌力思及图”商标提出异议。行政机关在处理该异议时即采取了客观标准，认定第4157840号商标（第18类的“包”商品）与第1348583号商标（第25类的“服装”商品）不属于在类似商品上注册的近似商标。[23]

（2）主观标准

由于《商标审查及审理标准》同时也规定，“在商标驳回复审[等]案件审理中，涉及商品或者服务类似与否判定问题的，以本标准为原则进行个案判定”，[24] 所以行政机关在商标案件审理中，也会根据案件的具体情况，就类似商品进行个案判定。此种认定标准称为“主观标准”。具体的标准，原商评委于2013年作出如下说明：[25]

> 对商标近似和商品类似的判定的目的是保护商标的区别功能，**避免消费者产生混淆**，对二者进行判定绝非字面含义上理解的仅仅是对商标标识或商品的相关客观属性进行比对，**应以是否容易造成相关公众混淆为根本标准，对二者进行判定**。（强调后加）

以上标准在《鑫八菱案》中即有体现。在该案中，原商评委裁定，争议商标“鑫八菱”核定使用的第7类“汽车发动机冷却散热器”等商品与引证商标“八菱”核定使用的第12类“车辆散热器”等商品“在功能用途、消费群体、销售渠道等方面存在较大关联性”，两商标“共存于市场易导致消费者对商品来源产生混淆、误认”，两类商品构成类似商品。以上观点得到一审、二审法院的支持，“鑫八菱”商标最终被宣告无效。[26]

综上，行政机关在认定类似商品时，主要参照《区分表》，整体上倾向于采用客观标准，但在进行个案分析时也会融合主观标准（见**表2**）。

2. 司法认定标准——主观为主、客观为辅

《最高人民法院关于审理商标民事纠纷案件适用法律若干问题的解释》[27]和《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意见》[28]提供了人民法院认定类似商品的标准。前者第十一条第一款规定：

> 商标法第五十七条第（二）项[29]规定的类似商品，是指在功能、用途、生产部门、销售渠道、消费对象等方面相同，或者**相关公众一般认为其存在特定联系、容易造成混淆**的商品。（强调后加）

第十二条规定：

> 人民法院依据商标法第五十七条第（二）项[30]的规定，认定商品或者服务是否类似，**应当以相关公众对商品**或者服务**的一般认识综合判断**；《商标注册用商品和服务国际分类表》《类似商品和服务区分表》**可以**作为判断类似商品或者服务的**参考**。（强调后加）

后者第14、15项意见为：

> 14、人民法院在审理商标授权确权行政案件中判断**商品类似**和商标近似，**可以参照**《最高人民法院关于审理商标民事纠纷案件适用法律若干问题的解释》的相关规定。
>
> 15、人民法院审查判断相关**商品**或者服务**是否类似**，应当考虑**商品的功能、用途、生产部门、销售渠道、消费群体等是否相同或者具有较大的关联性**；服务的目的、内容、方式、对象等是否相同或者具有较大的关联性；商品和服务之间是否具有较大的关联性，是否容易使相关公众认为商品或者服务是同一主体提供的，或者其提供者之间存在特定联系。《商标注册用商品和服务国际分类表》、《类似商品和服务区分表》**可以**作为判断类似商品或者服务的**参考**。（强调后加）

	“为主”的标准	“为辅”的标准
行政机关	**客观标准：** **原则上参照《区分表》**，判断商品客观属性（即：功能、用途、生产部门、销售渠道、销售场所、消费群体等）是否相似。	**主观标准：** 对[...]商品类似的判定的目的是[...]**避免消费者产生混淆**，[...]进行判定绝非字面含义上理解的仅仅是对[...]商品的相关客观属性进行比对，**应以是否容易造成相关公众混淆为根本标准，[...]进行判定**。（如《鑫八菱案》）
司法机关	**主观标准：** 考量商品客观属性（即：功能、用途、生产部门、销售渠道、消费群体等）是否相同或者具有较大的关联性，并考量其是否**容易导致相关公众对商品来源产生混淆误认**。（如《啤酒果酒案》）	**客观标准：** **可以参考《区分表》**，判断商品客观属性（即：功能、用途、生产部门、销售渠道、消费群体等）是否相似。 但是，如果**“无证据证明”**商品客观属性**“并不接近，不会使相关公众对商品来源产生混淆误认”，原则上应当参考《区分表》**等对构成类似商品进行认定。（如《KYB案》）

表2：“类似商品”的行政认定与司法认定标准和具体考量因素

以上内容显示出人民法院认定类似商品的标准以主观为主（如：要求法院综合判断“相关公众对商品[...]的一般认识”及“相关公众”是否“一般认为”该商品“容易造成混淆”）、客观为辅（如：《区分表》仅作为判断的“参考”）。例如，在《啤酒果酒案》中，北京市高级人民法院认定被异议商标指定使用的“啤酒”、“姜汁啤酒”等（第32类）商品与引证商标核定使用的“果酒（含酒精）”、“葡萄酒”、“米酒”等（第33类）商品虽然在《区分表》中分属不同类别，但“均为含酒精的酒类饮品，在功能用途、生产部门、销售渠道、消费群体等方面高度近似”。若两商标“共同使用在上述具有较大关联的商品上，容易导致相关公众对商品来源产生混淆误认”，因此该法院认为被异议商标应不予注册。[31]

但是，2014年后，中国法院在判断类似商品时，也逐渐加大融合客观标准。如在《KYB案》中，北京市高级人民法院根据第十版《区分表》中明确罗列的商品分类，认为引证商标核定使用的“车辆用减震器、车辆用抽压减震器”虽不属于该《区分表》中标准描述项，但其词义中包含了属于1202群组的“汽车减震器”，故可被划归为1202群组。由于被异议商标指定使用的“摩托车”属于第1202群组，所以两商标核定/指定使用的商品同属一群组，构成类似商品。针对何时可以利用商品客观属性作为判断基础，北京市高级人民作出了如下说明：[32]

> 虽然《商标注册用商品和服务国际分类表》、《类似商品和服务区分表》只是作为类似商品判断的参考，但是，如果在**标志近似程度较高，且无证据证明商品的功能、用途、生产部门、销售渠道、消费群体等并不接近，不会使相关公众对商品来源产生混淆误认**，原则上应当参考《商标注册用商品和服务国际分类表》、《类似商品和服务区分表》对构成类似商品进行认定。（强调后加）

换言之，当无明显相反的证据可以突破客观标准时，法院会以《区分表》等客观标准认定类似商品。

综上，司法机关在认定类似商品时倾向于主观标准，但近年来，司法机关也逐渐呈现在采用主观标准的同时融合客观标准的趋势（见**表2**）。

行政与司法认定标准的差异：成因、带来的问题和“求同存异”的努力

1. 差异的成因

行政机关与司法机关在类似商品认定上存在差异的问题由来已久。[33]而对于这个问题，商标局及最高法其实也已分别作出回应。

商标局认为，行政机关与司法机关对于类似商品的认定存在差异，主要是由于两者的分工和需要都不同：“行政程序在前期，效率更重要，司法程序在后期，公正更重要”。[34] 2014年，原商评委便清晰指出效率的重要性：[35]

> 如果在所有个案中审查员都去寻求《区分表》以外的因素来重新判断类似商品的划分问题，即便因此而提高了**判断的准确性和个案的公正性**，商标法律制度的运行也会由于**效率低下而陷入停滞**。（强调后加）

而最高法在《啄木鸟商标案》中，强调个案性以保护民事权益：[36]

> 商品和服务的项目更新和市场交易情况不断变化，类似商品和服务的类似关系不是一成不变，**而商标异议、争议是有别于商标注册申请审查的制度设置，承载不同的制度功能和价值取向，更多涉及特定民事权益的保护，强调个案性和实际情况**，尤其是进入诉讼程序的案件，更强调司法对个案的救济性。在这些环节中，如果还立足于维护一致性和稳定性，而不考虑实际情况和个案因素，则背离了制度设置的目的和功能。因此在商标异议、争议和后续诉讼以及侵权诉讼中进行商品类似关系判断时，不能机械、简单地以《区分表》为依据或标准，而应当考虑更多实际要素，结合个案的情况进行认定。（强调后加）

2. 差异带来的问题和“求同存异”的努力

尽管因一定的需要行政机关与司法机关采取了不同的类似商品认定标准，但是，不可否认的是，如果差异过大，可能会导致大量商标前期经行政核准注册，但后期经司法认定不予注册或商标无效的情况，进而对于商标注册及使用的稳定性带来负面影响。因此，如何能够找到一个兼顾行政机关与司法机关的不同职能及商标注册稳定性的平衡点是至关重要的。

上文提及，2014年后，司法机关与行政机关在类似商品认定问题上存在的分歧有明显的下降趋势（**表1**）。这种分歧的缓解很有可能是两机关对认定类似商品时所考量的具体因素达成了相对统一的意见。仔细比较本文**表2**所列内容便可以看出这种“求同存异”的努力。对于类似商品认定，尽管行政机关以客观标准为主，主观标准为辅，而司法机关刚好相反，但是主客观标准具体的考量因素都非常相似：

- 客观标准层面二者均以《区分表》为基础，考量两类商品的功能、用途、生产部门、销售渠道、消费群体等客观属性的相似性；

- 主观标准则二者通常都考量两类商品的客观属性的相似性及关联性是否容易使相关公众对商品来源产生混淆误认。

由于主客观标准具体的考量因素都基本一样，涉及商标争议的当事人可以更清晰地预判不同机关可能作出的类似商品的认定结论，并采取更有效的手段来保护其合法权益。笔者认为，如果行政机关与司法机关都有系统地提供更多的相关案例阐明它们如何应用上述的主客观标准，涉及商标争议的当事人能作出更准确的预判，从而促进中国商标注册稳定性。

> *"[...]如果行政机关与司法机关都有系统地提供更多的相关案例阐明它们如何应用上述的主客观标准，涉及商标争议的当事人能作出更准确的预判，从而促进中国商标注册稳定性。"*

例如，在歌力思公司决定是否应对第7925873号商标提出异议时，如果该公司（1）有充分案例预判到法院很可能会从主观标准角度出发认定类似商品（即：考虑商品的客观属性的相似性及关联性是否容易使相关公众对商品来源产生混淆误认），并（2）有足够证据从该角度证明其提出的主张，那么歌力思公司也很有可能对第7925873号商标采取其对第4157840号商标同样的处理策略，即同样提出异议。换言之，即使行政机关可能同样不支持歌力思公司对于第7925873号商标的异议，但是歌力思公司可以对两个商标均提起行政诉讼。不难猜测，如果歌力思公司选择了上述策略，则两个商标很可能都不会被核准注册，避免了日后王碎永滥用其以非善意取得的商标权，对歌力思公司提起侵权之诉。

结语

本文从指导案例82号及其关联诉讼涉及的两个诉争商标的不同命运出发，通过分析行政机关及司法机关认定类似商品的法律条文及实践操作，进一步探讨了两机关认定类似商品的不同标准。

鉴于行政及司法程序的侧重点不同，行政机关以客观标准为主进行审查审理，以保证商标审查的效率，而司法机关以主观标准为主，以保证个案公正处理。不可否认的是，如果行政机关与司法机关认定标准差异过大，最终会对中国商标注册及使用的稳定性带来负面影响。

因此，笔者认为，中国行政机关与司法机关共同探索并互相借鉴主客观标准分别所需考量的具体因素是值得提倡并且具有积极意义的。这样的"求同存异"的努力不但可以确保二者充分发挥各自的职能，又能增强不同阶段类似商品认定的可预判性，有利于充分保护商标权利人及申请人的权益。在此基础上，笔者建议行政机关与司法机关提供更多的相关案例阐明其如何应用主客观标准，让商标争议当事人更准确地作出预判，从而促进中国商标保护制度的稳定性和公平性。■

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* 此中国案例*见解*™的引用是：许侨超、任若雨，探究指导案例82号背后的故事："类似商品"的行政与司法认定标准之差异与相关问题的讨论，《中国法律连接》，第12期，第53页（2021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*™，2021年3月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-12-202103-insights-13-xu-ren。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 《王碎永诉深圳歌力思服饰股份有限公司、杭州银泰世纪百货有限公司侵害商标权纠纷案》，《中国法律连接》，第8期，第71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（CGC82），2020年3月，https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-82（以下简称"指导案例82号"）。

2 （2012）浙杭知初字第362号民事判决，2013年2月1日由杭州市中级人民法院作出。此判决书尚未找到，有可能已被排除在公布之外。

3 （2013）浙知终字第222号民事判决，2013年6月7日由浙江省高级人民法院作出。此判决书尚未找到，有可能已被排除在公布之外。

4 （2014）高行终字第466号行政判决，2014年4月2日由北京市高级人民法院作出，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/beijing-2014-gao-xing-zhong-zi-466-administrative-judgment。

5 （2014）民提字第24号民事判决，2014年8月14日由最高人民法院作出，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/spc-2014-min-ti-zi-24-civil-judgment。

6 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。

7 指导案例82号，注释1；（2014）高行终字第466号行政判决，注释4。

8 2018年11月15日《中央机构编制委员会办公室关于国家知识产权局所属事业单位机构编制的批复》规定，将原国家工商行政管理总局商标局、商标评审委、商标审查协作中心整合为国家知识产权局商标局，是国家知识产权局所属事业单位。见商标局简介，《国家知识产权局网站》，https://www.cnipa.gov.cn/art/2020/1/3/art_533_146147.html。

9 （2014）高行终字第466号行政判决，注释4。

10 *同上*。

11 *见*商标局简介，注释8。

12 （2014）高行终字第466号行政判决，注释4。

13 *同上*。

14 *同上*。

15 《商标初步审定公告》，《国家知识产权局商标局》，第1256期，第1632页（2011年3月20日），http://wsgg.sbj.cnipa.gov.cn:9080/tmann/annInfoView/annSearch.html?annNum=1256。

[16]《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。

[17] *同上*。

[18] 中华人民共和国国家工商行政管理总局商标局、商标评审委员会，商标审查及审理标准，《国家知识产权局商标局》，第2页（2016年12月），http://spw.sbj.cnipa.gov.cn/zcfg/201701/P020170210855985809679.pdf。

[19] *同上*，第187页。

[20] *同上*。有关《商标注册用商品和服务国际分类表》更多的信息，见*Nice Classification*，World Intellectual Property Organization，https://www.wipo.int/classifications/nice/en。

[21]《类似商品和服务区分表——基于尼斯分类第十一版（2019文本）》（国家知识产权商标局编，知识产权出版社，2019），第ii页，http://sbj.cnipa.gov.cn/sbsq/sphfwfl/200902/W020190712537779217641.pdf。

[22] 李勤，《商品类似判断的行政审理与司法审查之比较》，2018年6月5日，https://www.ccpit-patent.com.cn/zh-hans/node/5137。

[23]（2014）高行终字第466号行政判决，注释4。

[24]《商标审查及审理标准》，注释18，第187页。

[25] 2012年商标评审案件行政诉讼情况汇总分析，《国家工商行政管理总局商标评审委员会法务通讯》，总第60期（2013.4.27），http://spw.sbj.cnipa.gov.cn/fwtx/201304/t20130427_226895.html。

[26]（2016）京行终571号行政判决，2016年2月29日由北京市高级人民法院作出，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/beijing-2016-jing-xing-zhong-571-administrative-judgment。

[27]《最高人民法院关于审理商标民事纠纷案件适用法律若干问题的解释》，2002年10月12日由最高人民法院审判委员会通过，同日公布，2002年10月16日起施行，并于2020年12月23日修正，2021年1月1日起施行，https://sciiip.gdufs.edu.cn/info/1027/1666.htm。具体修正决定载于：http://www.hncourt.gov.cn/public/detail.php?id=183614。

[28]《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意见》，2010年4月20日公布，同日起施行，https://www.chinacourt.org/law/detail/2010/04/id/142068.shtml。

[29] 2020年修正前所述条文为“商标法第五十二条第（一）项”，其他内容修正前后都一样。

[30] *同上*。

[31]（2016）京行终4867号行政判决，2017年2月28日由北京市高级人民法院作出，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/beijing-2016-jing-xing-zhong-4867-administrative-judgment。

[32]（2015）高行（知）终字第3693号行政判决，2015年12月14日由北京市高级人民法院作出，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/beijing-2015-gao-xing-zhi-zhong-zi-3693-administrative-judgment。

[33] 2012年商标评审案件行政诉讼情况汇总分析，注释25。文中讨论了法院与商评委在类似商品认定上的三种分歧情况。

[34] 段晓梅，商标评审案件中类似商品或者服务判定的审理实践，《商标评审委员会网》，2014年2月11日，http://spw.sbj.cnipa.gov.cn/llyj/201402/t20140211_229736.html。

[35] *同上*。

[36]（2011）知行字第37号行政其他，2011年7月12日由最高人民法院作出，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/beijing-2011-zhi-xing-zi-37-administrative-others。

CGCP Interview: Monty Silley*

Xinyue Zhu
Assistant Managing Editor, China Guiding Cases Project
Yang Xiao
Editor, China Guiding Cases Project

"[…], I see the work of the CGCP and CESL as being well aligned. Both are dedicated to connecting the East and West and providing the international community with an enhanced understanding of China's evolving legal landscape." ——*Monty Silley*

- ***You are a member of the New York State Bar, possess a Certificate of Qualification from the Federation of Law Societies of Canada, and are certified as a mediator. You have also taught at various law schools in Europe and China. How did you manage to learn the laws of these different jurisdictions to gain these qualifications? Do you notice major similarities and differences among the laws of these jurisdictions?***

My interest in different jurisdictions reflects my interest in different countries and cultures in general. It is probably a result of my upbringing, having grown up between Europe and North America. After completing my undergraduate studies in Canada, I went to law school in the United States. Later on, I returned to Europe to continue my graduate studies in Germany, Italy, and the Netherlands. More than studying, however, my experience living and working in different countries (now eight) has given me the opportunity to learn and appreciate how different societies operate around the world.

Laws are the rules for determining how a society functions. I enjoy exploring not only the differences between cultures, but also the different legal systems used across the world. However, on the most basic level, I continually find that people's inherent notions of fairness and justice are remarkably similar. So, even if the legal rules and judicial procedures between countries have some differences, comparable patterns naturally tend to emerge, and often the possible legal outcomes are not unique. Sometimes the biggest differences are not in the legal rules themselves, but in their execution and application.

Having said that, our globalized world enables enhanced knowledge exchange between countries and the ability to replicate practices that have been proven to work elsewhere. Laws cannot always be transcribed across cultures, but for some fields—in the private sector, for example—everyone should be propelled towards the adoption of more efficient practices and better policies for economic development.

- ***Prior to joining the China–EU School of Law ("CESL") at the China University of Political Science and Law, you gained extensive European experience while pursuing your own education and teaching. Your appointment at CESL is, however, your first full China experience. To many, this might seem like a huge move and a significant change to your work and life. What prompted you to shift from being a practicing lawyer to an educator, and then go one step further to break out of your comfort zone and venture out to China?***

You are right in identifying a few big moves I have taken throughout the course of my career. First, from practicing law to academia. After working as an attorney in New York for some years, I wanted to pursue further graduate studies in Europe. Since I was a university student, I was always interested in the prospect of teaching one day, but I expected that this might only occur at a later stage of my career. When an opportunity to teach law in Germany arose, I was excited to give it a try. I found that I really enjoyed it, even more than I expected, so I naturally continued teaching. Actually, I still get excited every time I enter a classroom.

The second big move was my coming to China. While I did not have much experience with China, I certainly had an interest in the country. When the chance came to head a leading law school in China, I could not resist, both from a personal and professional perspective. Given that one of CESL's missions is to connect scholars as a bridge between the East and West, the school has also been a perfect platform for me to discover more about China, legally as well as culturally. I have always been comfortable making big moves, geographically and otherwise, so I was delighted to take this step. Now that some time has passed, I can say that it has been an extremely enriching experience.

- ***Are you doing what you planned to do when you first accepted the position at CESL? Or are you doing more in response to unforeseen opportunities?***

I came to CESL with some ideas about what I wanted to work on. These included fairly standard things, such as expanding academic exchanges between China and Europe, increasing our alumni engagement, and organizing more extracurricular activities, all of which I have been doing.

Monty Silley
European Executive Co-Dean
China–EU School of Law

Ronald Montague ("Monty") Silley currently serves as European Executive Co-Dean of the China–EU School of Law at the China University of Political Science and Law. Elected as a Fellow of the European Law Institute, Co-Dean Silley is an expert in both anti-corruption and alternative dispute resolution. Prior to his current position, he taught at the University of Hamburg, Bucerius Law School, the Hamburg School of Business Administration, and Humboldt University of Berlin. To help promote distinguished legal research and writing, he has edited numerous law journals, including the *Canada–United States Law Journal* and the *China–EU Law Series*, and served as an Editor of Stanford Law School's China Guiding Cases Project.

Co-Dean Silley held a variety of positions before entering academia. He was a judicial law clerk at the Fourth District Court of Appeals in Florida and worked for the Attorney General of the State of New York. He also worked in private practice in New York, where he focused on corporate and commercial law. While working on Wall Street, Co-Dean Silley dealt with many high-profile contract, securities, and white-collar criminal litigation cases. He also served as Associate General Counsel for a leading fashion company and has advised numerous start-ups.

Co-Dean Silley received his Bachelor's degree from the University of British Columbia and his Juris Doctor degree from Case Western Reserve University. He also completed the European Master in Law and Economics program and holds an LL.M. from the University of Hamburg, a Master's degree from the University of Bologna, and an LL.M. from Erasmus University Rotterdam. Co-Dean Silley is admitted to the New York State Bar, has a Certificate of Qualification from the Federation of Law Societies of Canada, and is a certified mediator.

Since CESL has been almost entirely dependent on European Union ("EU") grant funding for the past twelve years, one of my main goals was to put the school in a more financially self-sustainable position. This meant implementing various—sometimes significant—changes. I am happy to say that this endeavor has been successful to the extent that now CESL is economically secure and no longer reliant on EU or other external sources of financial support.

"We did not consider the modifications taken in response to the pandemic as hardships, but rather as an opportunity to leverage technology and implement new educational capabilities."

In terms of our academic curriculum, we have extended our "Chinese Law Taught in English" program and launched a new "International Master in Chinese Law" LL.M. for international students. We have also expanded the European exchanges component of our "Master of European and International Law" ("MEIL") program, so that students can experience longer stays for their studies abroad. Finally, our Double Master program has recently been restructured to allow the entire second year of instruction to take place in Europe.

While it is necessary to work towards a well-planned long-term vision, staying flexible and dynamic is also necessary to manage unexpected changes, as well as identify and seize new opportunities as they arise. This was critical when it came to dealing with the challenges posed by COVID-19. For example, we were able to efficiently transition all of our teaching online, even though we had never offered an online course before. Furthermore, our ability to take decisive actions in January 2020 helped ensure the health and safety of all of our students and staff in China, so that not a single person was infected with the virus.

We did not consider the modifications taken in response to the pandemic as hardships, but rather as an opportunity to leverage technology and implement new educational capabilities. For example, we were able to integrate into our curricula new guest speakers from firms and organizations located around the world through virtual connections. We also made use of a new online career services platform to support our students and alumni with networking as well as finding internships and jobs. We were able to host online academic conferences connecting diverse scholars and judges to share their views on the legal implications of the pandemic. We also initiated online professional education, for example, collaborating with the prestigious National Prosecutor's College in Beijing to provide Chinese

Co-Dean Monty Silley being appointed in December 2019 to serve as a foreign expert of the Sanya Fenghuang Notary Research Institute

Co-Dean Silley provides advice concerning the creation of the new Hainan Free Trade Port

prosecutors with knowledge about the newest cybercrimes. Since we also enhanced our online recruitment activities to be more effective during this time, we have received more applications for our MEIL program than ever before.

Finally, there have been a number of notable China-related legal developments in the past year, ranging from the adoption of China's new civil code and the revision of various other laws, to an agreement in principle on the EU–China Comprehensive Agreement on Investment. CESL continues to play an important role not only as a resource, when connecting scholars and conducting academic research, but also in supporting and providing advice regarding such significant legal developments. We will continue to be at the forefront of Chinese and European legal dialogues going forward, especially as both regions forge closer trading relationships in the future.

- ***As you know, traditional European legal philosophy, especially that of Germany and France, has had a profound impact on the construction of China's modern legal system. Quite distinct from the Anglo-American legal system, the binding force of precedents is generally rejected by these European civil law countries, even though recent trends show more acceptance of the use of prior cases for guidance.***

  China took an important step to embrace the use of prior cases in 2010, when the Supreme People's Court established the Guiding Cases System, granting de facto binding force to Guiding Cases. After ten years, in July 2020, the Supreme People's Court went further to set up the "search for similar cases" system, instructing all judges to search for similar cases (e.g., Guiding Cases and other important cases) and compare them with the pending cases before judgments are rendered.[1] The China Guiding Cases Project (the "CGCP") of Stanford Law School has been following these developments closely and you have served as an editor for the project. Do you think similar developments may take place in any of the civil law-dominated jurisdictions of Europe in the coming years? How do you think different legal cultures will interact with each other against the backdrop of globalization?

It is somewhat ironic how most comparative legal scholars instinctively emphasize the differences between jurisdictions, rather than draw attention to their similarities. While there is no doubt about the disparities that exist between civil and common law countries, these distinctions have continually diminished over time. The roots of their judicial processes are different, but these supposedly divergent legal families share a growing resemblance in how they actually behave.

All common law countries nowadays are heavily reliant on statutes, codes, and regulations, which tend to carry more weight than judge-made rules. At the same time, many civil law systems have moved towards some acceptance of *stare decisis*. This can be seen in Germany, France, and Italy, among other continental European countries.[2] Sometimes there is even an obligation for civil law courts to follow authoritative case law, for example, the judgments of the German Bundesgerichtshof (Federal Court of Justice). But even when previously rendered decisions are not deemed binding, the interpretations of other higher courts are often still considered to be extremely persuasive. Indeed, there are normally expectations that lower courts will apply the same *ratio decidendi* as previously used by higher tribunals in their adjudication of a case.

> ***"[…] most comparative legal scholars instinctively emphasize the differences between jurisdictions, rather than draw attention to their similarities."***

China is a perfect example of this trend in practice, with the Guiding Cases and other important cases that the CGCP tracks. While academics may debate the binding nature of such cases, the developments over the past decade show

Co-Dean Monty Silley and the two China–EU School of Law teams that won First and Second place prizes at the Foreign Direct Investment (FDI) Moot Shenzhen in October 2020

a broadening acceptance of an approach that very closely resembles legal precedent. I do see this convergence continuing, as leading court decisions continue to be accorded more influence in civil law jurisdictions around the world. As such cases can be seen as more reliable indicators for future decisions—for example, in the case of China's "search for similar cases" system—it means this tradition of looking to and following precedents is no longer exclusively for common law jurisdictions.

- ***Despite your heavy research agenda and other commitments, you remain so supportive of the CGCP. Could you please tell us why you are so supportive and what do you think people can expect to learn from the CGCP?***

After avidly following the CGCP, I was delighted to join the team in 2018. The CGCP is one of the leading resources for foreigners to understand the Chinese legal system. I have learned a tremendous amount from my participation in the project in addition to all that I have learned from simply reading the rich content published by the CGCP in its journal *China Law Connect* and on its website, e.g., Stanford CGCP *Global Guide*™. I believe the same is true for all readers who have come to the CGCP with an interest in keeping up to date with the most recent legal developments in China. In this respect, the CGCP is an invaluable resource, as it not only provides critical translations of cases, but also important annotations and insightful commentary by top experts. While CESL does keep me very busy, I see the work of the CGCP and CESL as being well aligned. Both are dedicated to connecting the East and West and providing the international community with an enhanced understanding of China's evolving legal landscape. This makes it easy for me to support the CGCP while being committed to my role as Co-Dean of CESL.

- ***Let's shift our discussion to commercial legal practice. You have extensive experience in this area. What kinds of legal skills do you think law schools in China and Europe should focus on to prepare their students for handling business transactions between China and Europe in the future? If possible, can you please provide examples to explain what CESL has been doing?***

Too many law schools excessively focus on theoretical knowledge and overlook the practical aspects of becoming a legal professional. It is important to cultivate a range of skills beyond simply learning the black letter law. As a foundation, legal research, writing, and oral presentation skills are all essential. After these basic skills, legal education becomes about fostering a mindset of critical thinking to

Co-Dean Monty Silley (seated second from right) helped organize in October 2020 a professional training for more than 100 Chinese prosecutors on the newest forms of cybercrime

be able to identify issues, logically analyze problems, and creatively envision effective solutions. For business lawyers, in particular, it is not enough to simply know the rules; it is vital to also understand the businesses with which one is dealing and to be able to come up with answers that can efficiently achieve a client company's desired commercial objectives.

For the academic year 2020–21, we hired more Assistant Professors; so even if our overall class size is larger, our student-to-faculty ratio and the sizes of our actual tutorial classes are now smaller than they have ever been. This allows us, in turn, to offer more interactive and engaging lessons, to do more practical case studies, and integrate into our curricula other activities like negotiation and moot court simulations. We can also focus more on the individual professional development of our students in addition to their doctrinal learning. In our MEIL program, for example, we have added short weekly assignments for students to practice applying their theoretical knowledge. These come in different forms (e.g., written and oral, individual and group work) so that students can hone different skills. Students receive feedback from their professors on a weekly basis, so they can implement their professors' guidance immediately. The greater personal attention devoted to supporting each student's learning and their advancement of

soft skills translates not only into better student performance on final exams, but also into more confident and capable future legal counsel.

We are also continuing to bring in more lawyers and other professionals from firms and other organizations to share their experiences from real practice. In addition, we have been increasing our participation in moot courts. As moot court students work together on thoroughly preparing a case over a prolonged period of time, this is another excellent way to improve their practical research and writing, verbal and written communication, and ability to work productively as part of a team, while also allowing them to practice being an advocate. Combining conventional lectures with the activation of these key skills prepares our CESL graduates to succeed as top legal professionals in their careers.

- ***It has been fascinating learning about your background and perspective. Thank you for your time and best of luck at CESL and with your expanding career in China!*** ■

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[1] *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.

[2] *See, e.g.*, Ninon Colneric, *Guiding by Cases in a Legal System Without Binding Precedent: The German Example*, Stanford Law School China Guiding Cases Project, June 19, 2013, http://cgc.law.stanford.edu/commentaries/7-judge-colneric; Laurent Cohen-Tanugi, *Case Law in a Legal System Without Binding Precedent: The French Example*, Stanford Law School China Guiding Cases Project, Feb. 29, 2016, http://cgc.law.stanford.edu/commentaries/17-Laurent-Cohen-Tanugi; Laura Baccaglini, Gabriella di Paolo, & Fulvio Cortese, *Judicial Precedent in the Italian Legal System: A Shift Toward a* Stare Decisis *Model?*, Stanford Law School China Guiding Cases Project, Apr. 7, 2017, http://cgc.law.stanford.edu/commentaries/19-baccaglini-di-paolo-cortese.

CGCP专访：Monty Silley*

朱新玥
中国指导性案例项目助理执行编辑
肖扬
中国指导性案例项目编辑

"[...] 我认为CGCP和CESL的工作是一致的。两者都致力于将东西方联系起来，并让国际社会加深了解中国不断发展的法律环境。"

——*Monty Silley*

- ***您取得纽约州律师资格，拥有加拿大法律协会联合会的资格证书，并且是一名经认证的调解员。您还曾在欧洲和中国的不同法学院任教。您是如何学习这些不同司法管辖区的法律以成功获得这些资格的？您是否注意到这些司法管辖区的法律之间存在什么主要的异同？***

我对不同司法管辖区的兴趣反映了总体上我对不同国家和文化的兴趣。这可能是我在欧洲和北美洲都有过成长经历的结果。在加拿大完成本科学习后，我赴美国法学院深造。之后，我回到欧洲，并作为研究生继续在德国、意大利和荷兰学习。但是，除了学习以外，我在不同国家（现在是八个）的生活和工作经验使我有机会学习和欣赏世界上不同社会的运作方式。

法律是决定一个社会如何运作的规则。我不仅喜欢探索不同文化之间的差异，而且喜欢探索使用于这个世界的不同法律制度。然而，在最基本的层面上，我不断发现人们对公平和正义的固有观念是非常相似的。因此，即使国家之间的法律规则和司法程序存在一些差异，可比较的模式自然会出现，而且可能的法律结果往往也不是唯一的。有时最大的区别不在于法律规则本身，而在于其执行和适用。

话虽如此，我们的全球化世界使各国之间的知识交流得以加强，并使人们有能力复制已被证明在其他地方行之有效的做法。法律无法经常跨文化地转录，但是对于某些领域（例如在私营部门中），应推动每个人采取更有效率的做法和更好的政策来促进经济发展。

- ***在加入中国政法大学中欧法学院（China-EU School of Law；"CESL"）之前，您在求学和执教期间积累了大量的欧洲经验。然而，您在CESL的工作是您首段完整的中国经历。对于很多人而言，这似乎是您工作和生活上的巨大转变。是什么驱使您从执业律师转变为教育者，并且进一步突破自己的舒适区来到中国？***

你正确点出了我职业生涯中很重要的几个大转变。首先，从法律执业到学术界。在纽约做了几年律师后，我想在欧洲继续研究生的学习。自我是一名大学生开始，我一直都想有朝一日能够开展教学，但是我以为这只会在我职业生涯后期实现。当我碰到了一个在德国教书的机会，我很兴奋地作出尝试。我发现我真的很享受教书，比我预料的更享受，所以我自然而然地继续教书。实际上，直到今天，每当我走进教室，我仍然会感到雀跃。

第二个大转变是来到中国。虽然当时我没有很多关于中国的经验，但我确实对这个国家有兴趣。当有机会在中国领导一所顶级的法学院时，无论从个人还是专业角度，我都无法抗拒这机会。CESL的使命之一就是作为东西方的桥梁连接学者，学院于我而言也是一个探索中国的完美平台，这包括对中国法律和文化方面的探索。对于在地域上还是在其他方面的重大改变，我一直处之泰然，所以我很高兴能迈出这一步。现在我在中国已有一段时间了，我可以说这是一段极其丰富充实的经历。

- ***您现在做的正是您当日接受CESL职位时计划要做的事情吗？还是您现在做的工作更多的是应对当时未预见的机遇呢？***

我来CESL时，已有一些想法到底要做什么。当中包括一些相当标准的事，例如扩大中欧学术交流，提高校友参与度和组织更多课外活动等。这些事我一直在做。由于CESL在过去12年里几乎都是完全依靠欧盟的资助，我的主要目标之一就是使学校在财政上更加自立。这意味着实施多项而有时是意义重大的改变。我很高兴地说，这努力已经带来成果了。现在CESL在经济上有了保障，不再依赖欧盟或其他外部财政支持。

在学术课程设置方面，我们已经扩展了"以英语教授中国法律"的项目，并为国际学生推出了新的"中国法律国际硕士"课程。我们还扩大了"欧洲-国际法学硕士"项目的中欧交流的部分，让学生们可以在国外留学更长的时间。最后，我们近期调整了双硕士项目，使整个第二年的授课可以在欧洲进行。

虽然努力实现计划周密的长期愿景是有必要的，但为了管理意料之外的变化和抓住新机会，保持灵活性和动态性也很有必要。在应对新冠疫情带来的挑战时，这一点至关重要。比如，我们能够高效地将所有课程过渡为线上教学，尽管此前我们从来都没有

Monty Silley
欧方执行院长
中欧法学院

Ronald Montague（“Monty”）Silley目前担任中国政法大学中欧法学院欧方执行院长。Silley院长被选为欧洲法律研究所的会员，也是研究反腐败以及替代争议解决的专家。在担任现职之前，他曾在汉堡大学、汉堡法学院、汉堡商学院和柏林洪堡大学任教。为了帮助促进杰出的研究和写作，他编辑了许多法律期刊，包括《加拿大–美国法律杂志》和《中欧法律丛书系列》，并曾担任斯坦福法学院中国指导性案例项目的编辑。

Silley院长在进入学术界之前曾担任过多个职位。他曾是佛罗里达州第四区上诉法院的法官助理，并曾为纽约州总检察长工作。他还曾于纽约私人执业，专注于公司法和商法。在华尔街工作期间，Silley院长处理了大量广受关注的合同、证券和白领刑事诉讼案件。他还曾担任一家领先的时装公司的副总法律顾问，并为许多初创企业提供法律咨询。

Silley院长获得了英属哥伦比亚大学的学士学位和凯斯西储大学的法律博士学位。他还完成了欧洲法律和经济硕士课程，并持有汉堡大学的法学硕士学位、博洛尼亚大学的硕士学位，和鹿特丹伊拉斯姆斯大学的法学硕士学位。Silley院长获得纽约州律师资格，持有加拿大法律协会联合会的资格证书，并且是一名经认证的调解员。

提供过线上课程。此外，我们能够在2020年1月采取果断行动，这有助于确保我们在中国的所有学生和教职员的健康和安全。最终，全校无一人感染该病毒。

我们没有将为应对全球性流行病所做出的调整看做是困难，而是将其视为利用技术和实施新的教育能力的机会。例如，我们可以通过线上连接把来自全球的律所和组织的新演讲嘉宾融入课程里。我们还采用了新的线上求职服务平台，以支持学生和校友建立联系网络和寻找实习机会与工作。我们还能组织在线学术会议，联系各领域的学者和法官，让他们分享全球性流行病对法律的启示。我们亦启动了线上专业教育，例如，与著名的北京国家监察官学院合作，给中国检察官带来最新的有关网络犯罪的知识。由于在此期间，我们还加强了在线招生活动，使其更加有效，我们收到的“欧洲–国际法学硕士”课程的申请数量比以往任何时候都要多。

“我们没有将为应对全球性流行病所做出的调整看做是困难，而是将其视为利用技术和实施新的教育能力的机会。”

最后，在过去的一年里，有几个与中国有关的法律发展值得注意，其中包括中国新《民法典》的通过和几部法律的修改，以及《中国–欧洲联盟全面投资协定》的原则性协议。对此，CESL持续扮演着重要的角色，其不仅在联系学者和进行学术研究时作为一种资源，而且还对这种重大法律发展提供支持和建议。

在今后的中欧法律对话中，尤其是两个地区在未来建立更紧密的贸易关系时，我们将继续站在前沿。

- ***如您所知，传统的欧洲法律哲学，尤其是德国和法国的法律哲学，对中国现代法律制度的建设产生了深远的影响。与英美法系截然不同的是，欧洲大陆法系国家普遍拒绝先例有约束力的做法，尽管最近的趋势表明这些国家越来越接受以先例作为指导。***

  2010年，中国迈出了支持使用在先案例的重要一步。当时，最高人民法院建立了案例指导制度，赋予了指导性案例事实上的拘束力。十年后，2020年7月，最高人民法院进一步建立了“类案检索”制度，指示全体法官对类案（如指导性案例和其他重要案件）进行检索，并与未决案件进行比较后再作出判决。[1] 斯坦福法学院的中国指导性案例项目（China Guiding Cases Project；“CGCP”）一直密切关注这些发展。您曾担任该项目的编辑。您认为在未来几年内，在欧洲任何一个由大陆法主导的司法管辖区是否也会出现类似的发展？您如何看待全球化背景下不同的法律文化之间的相互作用？

颇具讽刺意味的是，大多数比较法学者本能地强调不同法域间的差异，而不是注意它们之间的相似性。尽管毋庸置疑，大陆法系国家与普通法国家之间存在诸多差异，但随着时间的流逝，这些区别不断减少。它们司法程序的根源不相同，但这些本应相差甚远的法系在具体实施中却日渐趋同。

2019年12月，Monty Silley院长被任命为三亚凤凰公证研究院的外国专家

Monty Silley院长为建设新的海南自由贸易港提供建议

如今，所有普通法系的国家都十分依赖于法律、法典和法规，这些成文法往往会比通过法官造法而得出的规则更具分量。与此同时，许多大陆法系已趋向于在一定程度上接受遵循先例原则。这一点在德国、法国和意大利以及其他欧洲大陆法系国家都可以得到印证。[2] 有时，大陆法系法院甚至有义务遵循权威性的判例法，例如德国联邦最高法院（Bundesgerichthof）的判决。而对于其他不具约束力的先前裁决，高级法院在其中的解释也常常被认为是极具说服力的。事实上，人们往往会期望下级法院在审理案件时采用和上级法院先前裁决中相同的裁判理由。

> *"[...]大多数比较法学者本能地强调不同法域间的差异，而不是注意它们之间的相似性。"*

中国的指导性案例和其他CGCP追踪的重要案例表明，该国是这趋势在实践中的完美例证。尽管学者们可能会争论此类案例的拘束效力，但过去十年的发展表明，人们逐渐普遍地接受了这种类似于遵循先例的做法。我确实认为这种融合会持续，因为在世界各地的大陆法地区，其处于领导位置的法院的判决继续被赋予更多的影响力。因为这些案例可以看作是未来法院判决的更可靠的指标（中国的"类案检索"制度便是一例），这

Monty Silley院长和中欧法学院两支在2020年10月的投资仲裁深圳杯中分别获得一等奖和二等奖的队伍

2020年10月，Monty Silley院长（右二）协助为100多名中国检察官组织了一次关于网络犯罪最新形式的专业培训

意味着这种寻求遵循先例的传统不再仅限于普通法司法管辖区。

- ***尽管您有繁重的研究议程和其他任务，您仍然如此支持CGCP。请告诉我们为什么您如此支持CGCP，您认为人们可以从CGCP中学到什么？***

在热切跟进CGCP的发展后，我很高兴在2018年加入了该团队。CGCP是外国人了解中国法律制度的主要资源之一。通过参与该项目的工作，以及阅读CGCP在其《中国法律连接》期刊及其网站（例如斯坦福CGCP *全球指南*™）上发布的丰富内容，我学到了很多知识。我相信所有希望了解中国最新法律发展而到CGCP网站的读者也有同样体会。在这方面，CGCP是宝贵的资源，它不仅提供案例的重要翻译，而且还提供顶尖专家的重要注释和有见地的评论。尽管CESL确实让我非常忙，但我认为CGCP和CESL的工作是一致的。两者都致力于将东西方联系起来，并让国际社会加深了解中国不断发展的法律环境。这使我在致力于担任CESL的院长的同时，很容易地继续支持CGCP。

- ***让我们把讨论转移到商业法律实践上来。您在这个领域有丰富的经验。您认为中国和欧洲的法学院应着重于哪些法律技能，让其学生为将来处理中欧之间的商业交易做好准备？如果可能的话，请您举例说明CESL在这方面做了什么工作。***

太多的法学院过分注重理论知识，而忽视了成为法律专业人士的实践技能。重要的是，要培养一系列的技能，而不仅仅是学习书本上的法律条文。作为基础，法律研究、写作和口头陈述技巧都是必不可少的。针对这些基本技能之后，法学教育就要培养学生的批判性思维，使学生们能够识别问题、有逻辑地分析问题，以及能创造性地提出有效的解决方案。特别是对于商事律师来说，仅仅了解规则是不够的。同样重要的是，要了解所处理的商务，并能够提出答案让客户公司期望的商业目标有效地得到实现。

在2020–2021学年，我们聘用了更多的助理教授。因此，即使我们的整体班级规模变大，我们的师生比例和实际辅导班的规模也比以往任何时候都要小。这使我们能够提供更多的互动性和参与性强的课程，进行更多的实用案例的学习，并将其他活动（如谈判和模拟法庭）整合到我们的课程中。除了理论学习之外，我们还可更专注学生的个人专业发展。例如，在我们的“欧洲–国际法学硕士”课程中，我们增加了每周的简短作业，供学生练习运用他们的理论知识。这些作业以不同的形式（例如，书面和口头、个人和小组作业）出现，以便学生可以磨练不同的技能。学生每周都会收到他们的教授的反馈，让他们可以立即落实教授的指导。更多的注意力倾注在支持每个学生的学习和软技能的提高上，这不仅帮助学生在期末考试中表现得更好，而且还培养他们将来成为更自信和有能力的法律顾问。

我们还会继续从公司和其他组织邀请更多的律师和其他专业人员，分享他们在实务中的经验。此外，我们一直在提高对模拟法庭的参与度。因为参加模拟法庭的学生会在一段时期内共同努力为案件做充分准备，所以这是提高他们的实用研究和写作、口头和书面沟通以及团队合作能力的另一种极好的方法。同时参与模拟法庭还让他们练习，为未来成为出庭律师作出准备。通过结合常规讲座和这些关键技能的训练，CESL为我们的毕业生做好准备，让其在职业生涯中，成为顶级法律专业人士。

- ***很高兴能够了解您的精彩背景和观点。感谢您抽出时间，并祝您在CESL和在中国的事业蒸蒸日上。***■

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* 此中法连*聚焦*™的引用是：朱新玥、肖扬，CGCP专访：Monty Silley，《中国法律连接》，第12期，第67页（2021年3月），*亦见于*斯坦福法学院中国指导性案例项目，中法连*聚焦*™，2021年3月，http://cgc.law.stanford.edu/zh-hans/clc-spotlight/clc-12-202103-interview-11-zhu-xiao。

此专访的英文原文由Lisha Huang、Yang Xiao、Haiyun Zhang、Xinyue Zhu、Jennifer Ingram撰写，并由Jennifer Ingram、Nathan Harpainter和熊美英博士最后审阅。中文版本由董舒平、马金仪、杨子琪和张海韵翻译，并由朱新玥、肖扬和熊美英博士最后审阅。载于本专访中的信息和意见受访者对其负责。它们并不一定代表中国指导性案例项目的工作或意见。

1 *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。

2 *见，例如*，Ninon Colneric，无约束性先例的法律体系中的案例指导：以德国为例，斯坦福法学院中国指导性案例项目，2013年6月19日，http://cgc.law.stanford.edu/zh-hans/commentaries/7-judge-colneric；Laurent Cohen-Tanugi，无具约束性的判例的法律制度中之案例法：法国的例子，斯坦福法学院中国指导性案例项目，2016年2月29日，http://cgc.law.stanford.edu/zh-hans/commentaries/17-Laurent-Cohen-Tanugi；Laura Baccaglini、Gabriella di Paolo、Fulvio Cortese，意大利法律制度中的司法判例：转向遵循先例的模式？，斯坦福法学院中国指导性案例项目，2017年7月30日，http://cgc.law.stanford.edu/zh-hans/commentaries/19-baccaglini-di-paolo-cortese。

中国指导性案例项目成立于2011年2月，并通过其双语网站（https://cgc.law.stanford.edu/zh-hans）共享了项目的知识库。该网站已使居住在世界不同洲的20多万用户受益。

Founded in February 2011, the China Guiding Cases Project has shared its knowledge-base via its bilingual website (https://cgc.law.stanford.edu). The website has benefited more than 200,000 global users residing in different continents.

我们大多数用户居住于以下十个司法管辖区：

1	美国	80,000
2	中国大陆	52,000
3	香港	10,000
4	英国	5,000
5	日本	3,000
6	澳大利亚	2,900
7	菲律宾	2,800
8	印度	2,700
9	加拿大	2,600
10	新加坡	2,300

Most of Our Users Reside in the following 10 Jurisdictions:

1	United States	80,000
2	Mainland China	52,000
3	Hong Kong	10,000
4	United Kingdom	5,000
5	Japan	3,000
6	Australia	2,900
7	Philippines	2,800
8	India	2,700
9	Canada	2,600
10	Singapore	2,300

想通过我们的国际平台宣传贵公司的招聘职位或分享即将举行的活动的信息吗？

请联系中国指导性案例项目执行编辑**英珍妮**：**jaingram@stanford.edu**。

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上海存亮贸易有限公司诉蒋志东、王卫明等买卖合同纠纷案

Shanghai Cunliang Trading Co., Ltd. v. JIANG Zhidong, WANG Weiming et al., A Sale and Purchase Contract Dispute

指导案例9号
（最高人民法院审判委员会讨论通过
2012年9月18日发布、
2021年1月1日起不再参照）*

Guiding Case No. 9
(Discussed and Passed by the Adjudication Committee of the Supreme People's Court
Released on September 18, 2012,
Not for Reference and Imitation as of January 1, 2021)**

关键词

民事
公司清算义务
连带清偿责任

Keywords

Civil
Corporate Liquidation Obligation
Joint and Several Liability for Clearance [of Debts]

裁判要点

有限责任公司的股东、股份有限公司的董事和控股股东，应当依法在公司被吊销营业执照后履行清算义务，不能以其不是实际控制人或者未实际参加公司经营管理为由，免除清算义务。

Main Points of the Adjudication

Shareholders of a limited liability company, or directors and controlling shareholders of a joint stock limited company, should, in accordance with law, perform liquidation obligations upon revocation of the company's business license. They cannot be exempted from the liquidation obligations on the grounds that they are not *de facto* control persons or do not actually participate in the company's operation and management.

相关法条

《中华人民共和国公司法》第二十条、第一百八十四条[1]

Related Legal Rule(s)

Articles 20 and 184 of the *Company Law of the People's Republic of China*[2]

基本案情

原告上海存亮贸易有限公司（简称存亮公司）诉称：其向被告常州拓恒机械设备有限公司（简称拓恒公司）供应钢材，拓恒公司尚欠货款1395228.6元。被告房恒福、蒋志东和王卫明为拓恒公司的股东，拓恒公司未年检，被工商部门吊销营业执照，至今未组织清算。因其怠于履行清算义务，导致公司财产流失、灭失，存

Basic Facts of the Case[3]

Plaintiff Shanghai Cunliang Trading Co., Ltd.[4] (hereinafter referred to as "Cunliang Company") claimed: it supplied steel materials to defendant Changzhou Tuoheng Mechanical Equipment Co., Ltd.[5] (hereinafter referred to as "Tuoheng Company") [but] Tuoheng Company still owed RMB 1,395,228.6 for payment of the goods. Defendants FANG Hengfu, JIANG Zhidong, and WANG Weiming were the shareholders of Tuoheng Company. Tuoheng Company did not undergo its annual inspection, and its business license was revoked

亮公司的债权得不到清偿。根据公司法及相关司法解释规定，房恒福、蒋志东和王卫明应对拓恒公司的债务承担连带责任。故请求判令拓恒公司偿还存亮公司货款1395228.6元及违约金，房恒福、蒋志东和王卫明对拓恒公司的债务承担连带清偿责任。

by the industry and commerce department; to date,[6] [these three defendants] have not organized [Tuoheng Company's] liquidation. Their idleness in performing their liquidation obligations led to the outflow and disappearance of properties of [Tuoheng] Company, and Cunliang Company's claims of debt were not settled. According to the provisions of the *Company Law* and related judicial interpretation, FANG Hengfu, JIANG Zhidong, and WANG Weiming should bear joint and several liability for Tuoheng Company's debts. Therefore, [Cunliang Company] requested that [the court] order Tuoheng Company to pay Cunliang Company RMB 1,395,228.6 for payment of goods and pay [separate] damages for breach of contract and order FANG Hengfu, JIANG Zhidong, and WANG Weiming to bear joint and several liability for clearance of Tuoheng Company's debts.

被告蒋志东、王卫明辩称：1. 两人从未参与过拓恒公司的经营管理；2. 拓恒公司实际由大股东房恒福控制，两人无法对其进行清算；3. 拓恒公司由于经营不善，在被吊销营业执照前已背负了大量债务，资不抵债，并非由于蒋志东、王卫明怠于履行清算义务而导致拓恒公司财产灭失；4. 蒋志东、王卫明也曾委托律师对拓恒公司进行清算，但由于拓恒公司财物多次被债权人哄抢，导致无法清算，因此蒋志东、王卫明不存在怠于履行清算义务的情况。故请求驳回存亮公司对蒋志东、王卫明的诉讼请求。

Defendants JIANG Zhidong and WANG Weiming claimed in defense: 1. the two of them had never taken part in Tuoheng Company's operation and management; 2. Tuoheng Company was actually controlled by major shareholder FANG Hengfu, and the two of them had no means to conduct the liquidation [of Tuoheng Company]; 3. due to poor operations, Tuoheng Company already bore a large amount of debt and was insolvent before its business license was revoked, and the disappearance of Tuoheng Company's properties was not caused by the idleness of JIANG Zhidong and WANG Weiming in performing their liquidation obligations; 4. JIANG Zhidong and WANG Weiming had entrusted a lawyer to conduct the liquidation of Tuoheng Company, but because Tuoheng Company's properties had been looted by creditors on multiple occasions, liquidation was impossible, and therefore JIANG Zhidong and WANG Weiming could not be considered as having been idle in performing their liquidation obligations. Accordingly, [JIANG Zhidong and WANG Weiming] requested that the court reject Cunliang Company's litigation requests against them.

被告拓恒公司、房恒福未到庭参加诉讼，亦未作答辩。

Defendants Tuoheng Company and FANG Hengfu did not appear in court to participate in the litigation, nor did they make a reply.

法院经审理查明：2007年6月28日，存亮公司与拓恒公司建立钢材买卖合同关系。存亮公司履行了7095006.6元的供货义务，拓恒公司已付货款5699778元，尚欠货款1395228.6元。另，房恒福、蒋志东和王卫明为拓恒公司的股东，所占股份分别为40%、30%、30%。拓恒公司因未进行年检，2008年12月25日被工商部门吊销营业执照，至今股东未组织清算。现拓恒公司无办公经营地，帐册及财产均下落不明。拓恒公司在其他案件中因无财产可供执行被中止执行。

The court handled the case and ascertained: on June 28, 2007, Cunliang Company and Tuoheng Company established a contractual relationship for the sale and purchase of steel materials. Cunliang Company performed its obligation of supplying goods that were worth RMB 7,095,006.6. Tuoheng Company had already paid RMB 5,699,788 for the goods and still owed RMB 1,395,228.6. In addition, FANG Hengfu, JIANG Zhidong, and WANG Weiming were the shareholders of Tuoheng Company, owning 40%, 30%, and 30% of the shares, respectively. Because Tuoheng Company did not undergo its annual inspection, its business license was revoked by the industry and commerce department on December 25, 2008. To date,[7] the shareholders have not organized the liquidation [of Tuoheng Company]. Now,[8] Tuoheng Company does not have an office or place of operations, and the whereabouts of its accounts and properties are all unclear. Enforcement against Tuoheng Company in other cases was suspended because the company did not have any properties available for enforcement.

裁判结果

上海市松江区人民法院于2009年12月8日作出（2009）松民二（商）初字第1052号民事判决：[9]一、拓恒公司偿付存亮公司货款1395228.6元及相应的违约金；二、房恒福、蒋志东和王卫明对拓恒公司的上述债务承担连带清偿责任。宣判后，蒋志东、王卫明提出上诉。上海市第一中级人民法院于2010年9月1日作出（2010）沪一中民四（商）终字第1302号民事判决：[10]驳回上诉，维持原判。

Results of the Adjudication

On December 8, 2009, the Songjiang District People's Court of Shanghai Municipality rendered the (2009) Song Min Er (Shang) Chu Zi No. 1052 Civil Judgment:[11]

1. [The court ordered] Tuoheng Company to pay Cunliang Company RMB 1,395,228.6 for payment of goods and corresponding damages for breach of contract.

2. [The court ordered] FANG Hengfu, JIANG Zhidong, and WANG Weiming to bear joint and several liability for clearance of the aforementioned debts of Tuoheng Company.

After the judgment was pronounced, JIANG Zhidong and WANG Weiming appealed. On September 1, 2010, the No. 1 Intermediate People's Court of Shanghai Municipality rendered the (2010) Hu Yi Zhong Min Si (Shang) Zhong Zi No. 1302 Civil Judgment:[12] [the court] rejected the appeal and upheld the original judgment.

裁判理由[13]

法院生效裁判认为：存亮公司按约供货后，拓恒公司未能按约付清货款，应当承担相应的付款责任及违约责任。房恒福、蒋志东和王卫明作为拓恒公司的股东，应在拓恒公司被吊销营业执照后及时组织清算。因房恒福、蒋志东和王卫明怠于履行清算义务，导致拓恒公司的主要财产、帐册等均已灭失，无法进行清算，房恒福、蒋志东和王卫明怠于履行清算义务的行为，违反了公司法及其司法解释的相关规定，[15]应当对拓恒公司的债务承担连带清偿责任。拓恒公司作为有限责任公司，其全体股东在法律上应一体成为公司的清算义务人。公司法及其相关司法解释并未规定蒋志东、王卫明所辩称的例外条款，因此无论蒋志东、王卫明在拓恒公司中所占的股份为多少，是否实际参与了公司的经营管理，两人在拓恒公司被吊销营业执照后，都有义务在法定期限内依法对拓恒公司进行清算。

Reasons for the Adjudication[14]

In the effective judgment, the court opined:[16] after Cunliang Company supplied goods in accordance with the contract, Tuoheng Company was unable to adhere to the contract to make the full payment of goods and should bear the corresponding responsibility for payment and for breach of contract. As the shareholders of Tuoheng Company, FANG Hengfu, JIANG Zhidong, and WANG Weiming should have promptly organized the liquidation of Tuoheng Company after its business license was revoked. Because FANG Hengfu, JIANG Zhidong, and WANG Weiming were idle in performing their liquidation obligations, causing the disappearance of principal properties, accounts, etc. of Tuoheng Company and making it impossible to conduct the liquidation, the acts of FANG Hengfu, JIANG Zhidong, and WANG Weiming in being idle in performing their liquidation obligations violated the relevant provisions of the *Company Law* and its judicial interpretation.[17] Therefore, they should bear joint and several liability for clearance of Tuoheng Company's debts. Tuoheng Company is a limited liability company. Legally, all of its shareholders, as a whole, should be the company's liquidation obligor. The *Company Law* and its related judicial interpretation do not provide the exceptions claimed in defense by JIANG Zhidong and WANG Weiming. Therefore, regardless of the amount of shares JIANG Zhidong and WANG Weiming held in Tuoheng Company and whether or not they actually participated in the company's operation and management, both individuals, after Tuoheng Company's business license was revoked, had an obligation to conduct liquidation of Tuoheng Company in accordance with law within the time limit prescribed by law.

关于蒋志东、王卫明辩称拓恒公司在被吊销营业执照前已背负大量债务，即使其怠于履行清算义务，也与拓恒公司财产灭失之间没有关联性。根据查明的事实，拓恒

Regarding the defense claim asserted by JIANG Zhidong and WANG Weiming that Tuoheng Company had already carried a large amount of debt before its business license was revoked, and that even if they were idle in performing their liquidation obligations, [their idleness] had

公司在其他案件中因无财产可供执行被中止执行的情况，只能证明人民法院在执行中未查找到拓恒公司的财产，不能证明拓恒公司的财产在被吊销营业执照前已全部灭失。拓恒公司的三名股东怠于履行清算义务与拓恒公司的财产、帐册灭失之间具有因果联系，蒋志东、王卫明的该项抗辩理由不成立。蒋志东、王卫明委托律师进行清算的委托代理合同及律师的证明，仅能证明蒋志东、王卫明欲对拓恒公司进行清算，但事实上对拓恒公司的清算并未进行。据此，不能认定蒋志东、王卫明依法履行了清算义务，故对蒋志东、王卫明的该项抗辩理由不予采纳。[18]

no causal relationship with the disappearance of Tuoheng Company's properties. According to ascertained facts, the circumstance that enforcement against Tuoheng Company was suspended in other cases due to the absence of properties available for enforcement could only prove that the people's courts had not located Tuoheng Company's properties during enforcement. It could not prove that all of Tuoheng Company's properties had disappeared before its business license was revoked. There existed a causal relationship between the idleness of the three Tuoheng Company shareholders to perform their liquidation obligations and the disappearance of Tuoheng Company's properties and accounts. JIANG Zhidong and WANG Weiming's ground of defense on this point could not stand. JIANG Zhidong and WANG Weiming's agent entrustment contract which entrusted a lawyer to conduct the liquidation, as well as the lawyer's evidence, could prove only that JIANG Zhidong and WANG Weiming intended to conduct liquidation of Tuoheng Company. In actuality, no liquidation of Tuoheng Company was conducted. Accordingly, [the court] could not determine that JIANG Zhidong and WANG Weiming had performed their liquidation obligations in accordance with law. Therefore, it did not accept JIANG Zhidong and WANG Weiming's ground of defense on this point.[19]

CGCP 备注

备注1:

《中华人民共和国公司法》[20]

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。

CGCP Notes

Note 1:

Company Law of the People's Republic of China[21]

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 so as 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 so as 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.

第一百八十四条

公司因本法第一百八十一条[22]第（一）项、第（二）项、第（四）项、第（五）项规定而解散的，应当在解散事由出现之日起十五日内成立清算组，开始清算。有限责任公司的清算组由股东组成，股份有限公司的清算组由董事或者股东大会确定的人员组成。逾期不成立清算组进行清算的，债权人可以申请人民法院指定有关人员组成清算组进行清算。人民法院应当受理该申请，并及时组织清算组进行清算。

Article 184

Where a company is dissolved according to Article 181[23] Items (1), (2), (4), or (5) of this Law, a liquidation group should be formed within 15 days of the occurrence of the cause of dissolution to begin the liquidation. The liquidation group of a limited liability company is composed of the shareholders, while that of a joint stock limited company is composed of the directors or other people as determined by a shareholders' meeting. Where no liquidation group is formed within the time limit to conduct the liquidation, the creditors may apply to a people's court to designate relevant people to form a liquidation group to conduct the liquidation. The people's court should accept the [creditors'] application and promptly form a liquidation group to conduct the liquidation.

备注2:

Note 2:

《最高人民法院关于适用〈中华人民共和国公司法〉若干问题的规定（二）》[24]

Provisions (II) of the Supreme People's Court on Several Issues Concerning the Application of the "Company Law of the People's Republic of China" [25]

第十八条

有限责任公司的股东、股份有限公司的董事和控股股东未在法定期限内成立清算组开始清算，导致公司财产贬值、流失、毁损或者灭失，债权人主张其在造成损失范围内对公司债务承担赔偿责任的，人民法院应依法予以支持。

Article 18

Where the shareholders of a limited liability company or the directors and controlling shareholders of a joint stock limited company do not form a liquidation group to begin the liquidation within the statutory time limit, causing the depreciation, loss, damage, or disappearance of company properties, if a creditor claims that [the shareholders, directors, and/or controlling shareholders] shall, within the scope of losses caused, be liable for compensation for the company's debts, a people's court should support the claim in accordance with law.

有限责任公司的股东、股份有限公司的董事和控股股东因怠于履行义务，导致公司主要财产、账册、重要文件等灭失，无法进行清算，债权人主张其对公司债务承担连带清偿责任的，人民法院应依法予以支持。

Where the shareholders of a limited liability company or the directors and controlling shareholders of a joint stock limited company are idle in performing obligations, causing the disappearance of principal properties, accounts, and important documents of the company and making it impossible to conduct the liquidation, if a creditor claims that [the shareholders, directors, and/or controlling shareholders] shall bear joint and several liability for clearance of the company's debts, a people's court should support the claim in accordance with law.

上述情形系实际控制人原因造成，债权人主张实际控制人对公司债务承担相应民事责任的，人民法院应依法予以支持。■

Where any of the aforesaid circumstances are caused by the *de facto* control persons, if a creditor claims that the *de facto* control persons shall bear the corresponding civil liability for the company's debts, a people's court should support the claim in accordance with law. ■

* 此案例的中文引用是：《上海存亮贸易有限公司诉蒋志东、王卫明等买卖合同纠纷案》，《中国法律连接》，第12期，第73页（2021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（CGC9），2021年3月，https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-9。

案例原文载于：《最高人民法院网》，http://www.court.gov.cn/shenpan-xiangqing-13306.html。亦见《最高人民法院关于发布第三批指导性案例的通知》，2012年9月18日公布，同日起施行，http://www.chinacourt.org/law/detail/2012/09/id/145946.shtml；《最高人民法院关于部分指导性案例不再参照的通知》，2020年12月29日公布，2021年1月1日起施行，http://www.court.gov.cn/fabu-xiangqing-282441.html。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: 《上海存亮贸易有限公司诉蒋志东、王卫明等买卖合同纠纷案》 (*Shanghai Cunliang Trading Co., Ltd. v. JIANG Zhidong, WANG Weiming et al., A Sale and Purchase Contract Dispute*), 12 China Law Connect 73 (Mar. 2021), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC9), Mar. 2021, http://cgc.law.stanford.edu/guiding-cases/guiding-case-9.

The original, Chinese version of this case is available at 《最高人民法院网》 (www.court.gov.cn), http://www.court.gov.cn/shenpan-xiangqing-13306.html. *See also* 《最高人民法院关于发布第三批指导性案例的通知》 (*Notice of the Supreme People's Court on the Release of the Third Batch of Guiding Cases*), issued on and effective as of Sept. 18, 2012, http://www.chinacourt.org/law/detail/2012/09/id/145946.shtml; 《最高人民法院关于部分指导性案例不再参照的通知》 (*Notice of the Supreme People's Court on Guiding Cases That Will No Longer Be for Reference and Imitation*), issued on Dec. 29, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/fabu-xiangqing-282441.html. For a discussion of why the term "reference and imitate" is used for "参照", see Provisions of the Supreme People's Court Concerning Work on Case Guidance, *People's Republic of China*, Article 7, Stanford CGCP *Global Guide*™, Aug. 2020, http://cgc.law.stanford.edu/sgg-on-prc-provisions-case-guidance.

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[1] 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2012年发布时、该指导性案例所依据的最终判决作出时已生效。第二十条、第一百八十四条在当前有效版本中编号为第二十条（即维持不变）、第一百八十三条。*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，经一次修订和四次修正，最新修正于2018年10月26日，同日起施行，http://gkml.samr.gov.cn/nsjg/fgs/201906/t20190625_302790.html（以下简称"《公司法》"）。*见*CGCP 备注1。

[2] The *Company Law* as cited here should mean the 2005 version, which was in effect when this Guiding Case was released in 2012 and when the final judgment upon which this Guiding Case is based was rendered. Article 20 and Article 184 are numbered Article 20 (i.e., remains unchanged) and Article 183, respectively, 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, revised once and amended four times, most recently on Oct. 26, 2018, effective as of Oct. 26, 2018, http://gkml.samr.gov.cn/nsjg/fgs/201906/t20190625_302790.html (hereinafter "*Company Law*"). *See* CGCP Note 1.

[3] The content in this section is a summary, based on the underlying judgment(s) of this Guiding Case, by the Supreme People's Court. In each Guiding Case, the parties' claim(s) and defense(s) as well as the court's ascertained facts are often copied verbatim from the original judgment(s). In the English translation, tenses are chosen in such a way as to reflect the status of claim(s), defense(s), facts, and information in them on the date when the final judgment (*see infra* note 12) was rendered.

[4] The name "上海存亮贸易有限公司" is translated herein literally as "Shanghai Cunliang Trading Co., Ltd.". The company does not appear to have an official English name.

[5] The name "常州拓恒机械设备有限公司" is translated herein literally as "Changzhou Tuoheng Mechanical Equipment Co., Ltd.". The company does not appear to have an official English name.

[6] The text reads "至今" ("to date"). It is not clear from the context the date to which this refers.

[7] The text reads "至今" ("to date"). It is not clear from the context the date to which this refers.

[8] The text reads "现" ("now"). It is not clear from the context the period to which this refers.

[9] 一审判决书尚未找到，有可能已被排除在公布之外。

[10] （2010）沪一中民四（商）终字第1302号民事判决，2010年9月1日由上海市第一中级人民法院作出，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/shanghai-2010-hu-yi-zhong-min-si-shang-zhong-zi-1302-civil-judgment（以下简称"《二审判决》"）。

[11] The first-instance judgment has not been found and may have been excluded from publication.

[12] (2010) 沪一中民四（商）终字第1302号民事判决 ((2010) Hu Yi Zhong Min Si (Shang) Zhong Zi No. 1302 Civil Judgment), rendered by the No. 1 Intermediate People's Court of Shanghai Municipality on Sept. 1, 2010, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/shanghai-2010-hu-yi-zhong-min-si-shang-zhong-zi-1302-civil-judgment (hereinafter "*Second-Instance Judgment*").

[13] 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判决（*见*注释9、10）的比较。以黄色突出显示的表述/信息并不用于判决的"本院认为"说理部分。

[14] Yellow highlights included in this section were added by the China Guiding Cases Project to reflect its comparison of this Guiding Case with the original judgment(s) upon which this Guiding Case is based (*see supra* notes 11 and 12). Expressions/details highlighted in yellow were not used in the "This Court Opines" reasoning sections of the original judgment(s). In the English translation, tenses are chosen in such a way as to reflect the status of claim(s), defense(s), facts, legal principles, and information in them on the date when the final judgment (*see supra* note 12) was rendered.

[15] 此处提到的司法解释应该是指《最高人民法院关于适用〈中华人民共和国公司法〉若干问题的规定（二）》，2008年5月5日由最高人民法院审判委员会通过，2008年5月12日公布，2008年5月19日起施行，经两次修正，最新修正于2020年12月23日，2021年1月1日起施行，https://www.waizi.org.cn/doc/97989.html。经两次修正后，第十八条维持不变。*见*CGCP 备注2。

[16] The Chinese text does not specify which court opined. Given the context, this should be the No. 1 Intermediate People's Court of Shanghai Municipality.

[17] The judicial interpretation as mentioned here should mean 《最高人民法院关于适用〈中华人民共和国公司法〉若干问题的规定（二）》(*Provisions (II) of the Supreme People's Court on Several Issues Concerning the Application of the "Company Law of the People's Republic of China"*), passed by the Adjudication Committee of the Supreme People's Court on May 5, 2008, issued on May 12, 2008, effective as of May 19, 2008, amended two times, most recently on Dec. 23, 2020, effective as of Jan. 1, 2021, https://www.waizi.org.cn/doc/97989.html. After two amendments, Article 18 remains the same. *See* CGCP Note 2.

[18] 本指导性案例没有提供此信息："生效裁判审判人员：姚蔚薇、何玲、徐越峰"。*见*《二审判决》，注释10。

[19] This Guiding Case does not provide the following information: "Adjudication personnel of the effective judgment: YAO Weiwei, HE Ling, and XU Yuefeng". *See Second-Instance Judgment, supra* note 12.

[20] 《公司法》，注释1。

[21] *Company Law*, *supra* note 2.

[22] 通过2013年《公司法》修正案，第184条成为第183条。在修正后，本条提及的第181条为第180条。其他内容维持不变。

[23] Through the 2013 amendment to the *Company Law*, Article 184 became Article 183. The reference to Article 181 in the text of this article, after the amendment, is to Article 180. The amendment did not otherwise change the content of this article.

[24] 《最高人民法院关于适用〈中华人民共和国公司法〉若干问题的规定（二）》，注释15。

[25] *Provisions (II) of the Supreme People's Court on Several Issues Concerning the Application of the "Company Law of the People's Republic of China"*, *supra* note 17.

深圳市斯瑞曼精细化工有限公司诉深圳市坑梓自来水有限公司、深圳市康泰蓝水处理设备有限公司侵害发明专利权纠纷案

Shenzhen Siruiman Fine Chemicals Co., Ltd. v. Shenzhen Kengzi Tap Water Co., Ltd. and Shenzhen Kangtailan Water Treatment Equipment Co., Ltd., A Dispute over Infringement of Invention Patent Rights

指导案例20号
（最高人民法院审判委员会讨论通过
2013年11月8日发布、
2021年1月1日起不再参照）*

Guiding Case No. 20
(Discussed and Passed by the Adjudication Committee of the Supreme People's Court
Released on November 8, 2013,
Not for Reference and Imitation as of January 1, 2021)**

关键词

民事
知识产权
侵害
发明专利权
临时保护期
后续行为

Keywords

Civil
Intellectual Property Rights
Infringement
Invention Patent Rights
Provisional Protection Period
Subsequent Acts

裁判要点

在发明专利申请公布后至专利权授予前的临时保护期内制造、销售、进口的被诉专利侵权产品不为专利法禁止的情况下，其后续的使用、许诺销售、销售，即使未经专利权人许可，也不视为侵害专利权，但专利权人可以依法要求临时保护期内实施其发明的单位或者个人支付适当的费用。

Main Points of the Adjudication

In light of the fact that the *Patent Law* does not prohibit [a person from] making, selling, or importing an allegedly patent-infringing product during the provisional protection period [of the patent], which begins after the invention patent application is published and ends when the patent rights are granted, [acts of] using, offering to sell, and selling [the product] after [the period] shall not be regarded as infringements of the patent rights, even [if these acts are done] without permission from the patentee. However, the patentee may, in accordance with law, request that an entity or individual who exploits the invention during the provisional protection period pay an appropriate fee.

相关法条

《中华人民共和国专利法》第十一条、第十三条、第六十九条[1]

Related Legal Rule(s)

Articles 11, 13, and 69 of the *Patent Law of the People's Republic of China*[2]

基本案情

深圳市斯瑞曼精细化工有限公司（以下简称斯瑞曼公司）于2006年1月19日向国家知识产权局申请发明专利，该专利于

Basic Facts of the Case[3]

Shenzhen Siruiman Fine Chemicals Co., Ltd.[4] (hereinafter referred to as "Siruiman Company") applied to the State Intellectual Property Office[5] for an invention patent on January 19, 2006. The patent [application][6] was

2006年7月19日公开，2009年1月21日授权公告，授权的发明名称为“制备高纯度二氧化氯的设备”，专利权人为斯瑞曼公司。该专利最近一次年费缴纳时间为2008年11月28日。2008年10月20日，深圳市坑梓自来水有限公司（以下简称坑梓自来水公司）与深圳市康泰蓝水处理设备有限公司（以下简称康泰蓝公司）签订《购销合同》一份，坑梓自来水公司向康泰蓝公司购买康泰蓝二氧化氯发生器一套，价款26万元。康泰蓝公司已于2008年12月30日就上述产品销售款要求税务机关代开统一发票。在上述《购销合同》中，约定坑梓自来水公司分期向康泰蓝公司支付设备款项，康泰蓝公司为坑梓自来水公司提供安装、调试、维修、保养等技术支持及售后服务。

published on July 19, 2006, and [the patent] was granted and announced on January 21, 2009. The invention patent is named “Equipment for Preparing High-Purity Chlorine Dioxide” and Siruiman Company is the patentee. The most recent annual fee payment for the patent [application][7] was made on November 28, 2008.

On October 20, 2008, Shenzhen Kengzi Tap Water Co., Ltd.[8] (hereinafter referred to as “Kengzi Tap Water Company”) and Shenzhen Kangtailan Water Treatment Equipment Co., Ltd.[9] (hereinafter referred to as “Kangtailan Company”) signed a *Purchase and Sale Contract*. Kengzi Tap Water Company purchased a set of Kangtailan chlorine dioxide generators from Kangtailan Company for a price of RMB 260,000. On December 30, 2008, Kangtailan Company requested that the tax authority issue a unified invoice regarding the sale price of the aforementioned product. In the *Purchase and Sale Contract*, [the parties] agreed that Kengzi Tap Water Company was to make the payment for the equipment to Kangtailan Company in installments and that Kangtailan Company was to provide installation, adjustment and testing, repair, maintenance, and other technical support and after-sale services to Kengzi Tap Water Company.

2009年3月16日，斯瑞曼公司向广东省深圳市中级人民法院诉称：其拥有名称为“制备高纯度二氧化氯的设备”的发明专利（以下简称涉案发明专利），康泰蓝公司生产、销售和坑梓自来水公司使用的二氧化氯生产设备落入涉案发明专利保护范围。请求判令二被告停止侵权并赔偿经济损失30万元、承担诉讼费等费用。在本案中，斯瑞曼公司没有提出支付发明专利临时保护期使用费的诉讼请求，在一审法院已作释明的情况下，[10]斯瑞曼公司仍坚持原诉讼请求。

On March 16, 2009, Siruiman Company claimed to the Intermediate People’s Court of Shenzhen Municipality, Guangdong Province: it holds the invention patent named “Equipment for Preparing High-Purity Chlorine Dioxide” (hereinafter referred to as the “invention patent involved in this case”). The chlorine dioxide production equipment produced and sold by Kangtailan Company and used by Kengzi Tap Water Company falls within the scope of protection of the invention patent involved in this case. Siruiman Company requested that [the court] order the two defendants to cease the infringements, pay RMB 300,000 as compensation for economic losses, and bear the costs of the litigation and other fees. In this case, Siruiman Company did not make a litigation request for payment of a usage fee covering the provisional protection period of the invention patent; Siruiman Company still insisted on [making] the original litigation requests after the first-instance court’s explanation and clarification [of related rules].[11]

裁判结果

Results of the Adjudication

广东省深圳市中级人民法院于2010年1月6日作出（2009）深中法民三初字第94号民事判决：[12]康泰蓝公司停止侵权，康泰蓝公司和坑梓自来水公司连带赔偿斯瑞曼公司经济损失8万元。康泰蓝公司、坑梓自来水公司均提起上诉，广东省高级人民法院于2010年11月15日作出（2010）粤高法民三终字第444号民事判决：[13]驳回上诉，维持原判。坑梓自来水公司不服二审判决，向最高人民法院申请再审。最高人民法院于2011年12月20日作出（2011）民提字第259号民事判决：[14]撤销原一、二审判决，驳回斯瑞曼公司的诉讼请求。

On January 6, 2010, the Intermediate People’s Court of Shenzhen Municipality, Guangdong Province, rendered the (2009) Shen Zhong Fa Min San Chu Zi No. 94 Civil Judgment:[15] [the court ordered] Kangtailan Company to cease the infringements, and Kangtailan Company and Kengzi Tap Water Company to jointly pay Siruiman Company RMB 80,000 as compensation for economic losses.

Both Kangtailan Company and Kengzi Tap Water Company appealed. On November 15, 2010, the High People’s Court of Guangdong Province rendered the (2010) Yue Gao Fa Min San Zhong Zi No. 444 Civil Judgment:[16] [the court] rejected the appeal and upheld the original judgment.

Unconvinced by the second-instance judgment, Kengzi Tap Water Company applied to the Supreme People's Court for a retrial.[17] On December 20, 2011, the Supreme People's Court rendered the (2011) Min Ti Zi No. 259 Civil Judgment:[18] [the court] revoked the first-instance and second-instance judgments and rejected the litigation requests of Siruiman Company.

裁判理由[19]

最高人民法院认为：斯瑞曼公司在本案中没有提出支付发明专利临时保护期使用费的诉讼请求，因此本案的主要争议焦点在于，坑梓自来水公司在涉案发明专利授权后使用其在涉案发明专利临时保护期内向康泰蓝公司购买的被诉专利侵权产品是否侵犯涉案发明专利权，康泰蓝公司在涉案发明专利授权后为坑梓自来水公司使用被诉专利侵权产品提供售后服务是否侵犯涉案发明专利权。

Reasons for the Adjudication[20]

The Supreme People's Court opined: in this case, Siruiman Company did not make a litigation request for payment of a usage fee covering the provisional protection period of the invention patent. Therefore, the main focuses of the dispute in this case are whether Kengzi Tap Water Company infringed on the invention patent rights involved in this case by using, after the invention patent rights involved in this case were granted, the allegedly patent-infringing product that it had bought from Kangtailan Company during the provisional protection period of the invention patent involved in this case, and whether Kangtailan Company infringed on the invention patent rights involved in this case by providing, after the invention patent rights involved in this case were granted, after-sales services to [support] Kengzi Tap Water Company's use of the allegedly patent-infringing product.

对于侵犯专利权行为的认定，应当全面综合考虑专利法的相关规定。根据本案被诉侵权行为时间，本案应当适用2000年修改的《中华人民共和国专利法》。专利法第十一条第一款规定：[21]“发明和实用新型专利权被授予后，除本法另有规定的以外，[22]任何单位或者个人未经专利权人许可，都不得实施其专利，即不得为生产经营目的制造、使用、许诺销售、销售、进口其专利产品，或者使用其专利方法以及使用、许诺销售、销售、进口依照该专利方法直接获得的产品。”第十三条规定：[23]“发明专利申请公布后，申请人可以要求实施其发明的单位或者个人支付适当的费用。”第六十二条规定：[24]“侵犯专利权的诉讼时效为二年，自专利权人或者利害关系人得知或者应当得知侵权行为之日起计算。发明专利申请公布后至专利权授予前使用该发明未支付适当使用费的，专利权人要求支付使用费的诉讼时效为二年，自专利权人得知或者应当得知他人使用其发明之日起计算，但是，专利权人于专利权授予之日前即已得知或者应当得知的，自专利权授予之日起计算。”综合考虑上述规定，专利法虽然规定了申请人可以要求在发明专利申请公布后至专利权授予之前（即专利临时保护期内）实施其发明的单位或者个人支付适当的费用，即享有请求给付发明专利临

For the determination of a patent-infringing act, the relevant provisions of the *Patent Law* should be thoroughly and comprehensively considered. Based on the time of the allegedly infringing acts in this case, this case should apply the *Patent Law of the People's Republic of China* as revised[25] in 2000. Article 11 Paragraph 1 of the *Patent Law* states:[26]

> After invention or utility model patent rights are granted, except as otherwise provided in this Law,[27] no entity or individual may, without the permission of the patentee, exploit the patent, that is, [the entity or individual] may not make, use, offer to sell,[28] sell, or import the patented product for production or business purposes; or use the patented process; or use, offer to sell, sell, or import a product obtained directly by the patented process.

Article 13 states:[29]

> After an invention patent application is published, the applicant may request that the entity or individual exploiting his[30] invention pay an appropriate fee.

Article 62 provides:[31]

> The time limit for bringing a suit for the infringement of patent rights is two years, calculated from the date on which the patentee or a stakeholder knows or should have known of the infringing act.
> Where an appropriate fee is not paid [by a person] for use of an invention [during a period] after the invention patent application is published but before the patent rights are granted, the time

时保护期使用费的权利，但对于专利临时保护期内实施其发明的行为并不享有请求停止实施的权利。因此，在发明专利临时保护期内实施相关发明的，不属于专利法禁止的行为。在专利临时保护期内制造、销售、进口被诉专利侵权产品不为专利法禁止的情况下，其后续的使用、许诺销售、销售该产品的行为，即使未经专利权人许可，也应当得到允许。也就是说，专利权人无权禁止他人对专利临时保护期内制造、销售、进口的被诉专利侵权产品的后续使用、许诺销售、销售。当然，这并不否定专利权人根据专利法第十三条规定行使要求实施其发明者支付适当费用的权利。对于在专利临时保护期内制造、销售、进口的被诉专利侵权产品，在销售者、使用者提供了合法来源的情况下，销售者、使用者不应承担支付适当费用的责任。

limit for the patentee to bring a suit to request the payment of the fee is two years, calculated from the date on which the patentee knows or should have known of the person's use of his invention. However, where, before the date on which the patent rights are granted, the patentee has known or should have known of [such use], [the time limit] is calculated from the date on which the patent rights are granted.

Comprehensively considering the aforementioned provisions, [it is clear that] the *Patent Law* provides that a [patent] applicant may request that an entity or individual exploiting his invention after the invention patent application is published but before the patent rights are granted (i.e., during the provisional protection period of the patent) pay an appropriate fee; that is, [the applicant] has the right to request the payment of a usage fee covering the provisional protection period of the invention patent. However, with respect to acts exploiting his invention during the provisional protection period of the patent, the applicant does not have the right to request that the exploitation cease.

Therefore, exploiting an invention during the provisional protection period of the invention patent is not a type of act prohibited by the *Patent Law*. In light of the fact that the *Patent Law* does not prohibit [a person from] making, selling, or importing an allegedly patent-infringing product during the provisional protection period of the patent, acts of using, offering to sell, and selling the product after [the period] should also be allowed, even without permission from the patentee. In other words, with respect to an allegedly patent-infringing product made, sold, or imported during the provisional protection period of the patent, a patentee does not have the right to prohibit others from using, offering to sell, or selling [the product] after [the period]. Certainly, this does not negate the patentee's right—that he can exercise in accordance with Article 13 of the *Patent Law*—to request that anyone exploiting his invention pay an appropriate fee. With respect to an allegedly patent-infringing product that is made, sold, or imported during the provisional protection period of the patent, the seller or user should not be liable for paying an appropriate fee as long as the seller or user provides legal origins [for the product].

认定在发明专利授权后针对发明专利临时保护期内实施发明得到的产品的后续使用、许诺销售、销售等实施行为不构成侵权，符合专利法的立法宗旨。一方面，专利制度的设计初衷是“以公开换保护”，且是在授权之后才能请求予以保护。对于发明专利申请来说，在公开日之前实施相关发明，不构成侵权，在公开日后也应当允许此前实施发明得到的产品的后续实施行为；在公开日到授权日之间，为发明专利申请提供的是临时保护，在此期间实施相关发明，不为专利法所禁止，同样也应当允许实施发明得到

For products obtained by exploiting an invention during the provisional protection period of the invention patent, the determination that exploiting—including using, offering to sell, and selling—them after the invention patent rights are granted does not constitute infringement conforms to the legislative purpose of the *Patent Law*.

First, the patent system is designed to "[grant] protection in return for disclosure" and the protection [of the invention] can only be requested after [the patent] rights are granted. In terms of an invention patent application, the exploitation of the related invention before the disclosure date does not constitute infringement. After the disclosure date, the acts of exploiting products that were obtained before this date by exploiting the invention should also be allowed. From the disclosure

的产品在此期间之后的后续实施行为，但申请人在获得专利权后有权要求在临时保护期内实施其发明者支付适当费用。由于专利法没有禁止发明专利授权前的实施行为，则专利授权前制造出来的产品的后续实施也不构成侵权。否则就违背了专利法的立法初衷，为尚未公开或者授权的技术方案提供了保护。

date to the date when the [patent] rights are granted, the invention patent application is given provisional protection. The exploitation of the related invention during this period is not prohibited by the *Patent Law*. Similarly, after [this provisional protection] period, the acts of exploiting products obtained [earlier] by exploiting the invention should also be allowed; but, after obtaining the patent rights, the applicant has the right to request that anyone who exploited his invention during the provisional protection period pay an appropriate fee. Because the *Patent Law* does not prohibit acts of exploitation taking place before the invention patent rights are granted, subsequent exploitation of products made before the patent rights are granted also does not constitute infringement. Otherwise, it would violate the original legislative intent of the *Patent Law* by providing protection to technical solutions that are not yet disclosed or patented.

另一方面，专利法规定了先用权，虽然仅规定了先用权人在原有范围内继续制造相同产品、使用相同方法不视为侵权，[32] 没有规定制造的相同产品或者使用相同方法制造的产品的后续实施行为是否构成侵权，但是不能因为专利法没有明确规定就认定上述后续实施行为构成侵权，否则，专利法规定的先用权没有任何意义。

Second, the *Patent Law* provides for prior use rights. [The law] only states that a prior user's continued making of the same product or use of the same process within the original scope is not regarded as an infringement;[33] [it] does not state whether, with respect to the same product that has been made [before the patent application date] or a product that has been made[, before the patent application date,] by using the same process, a subsequent act of exploiting [the product] constitutes infringement. But the aforementioned subsequent act of exploitation cannot be determined to constitute infringement merely because the *Patent Law* does not have clear provisions. Otherwise, the prior use rights provided for by the *Patent Law* would be meaningless.

本案中，康泰蓝公司销售被诉专利侵权产品是在涉案发明专利临时保护期内，该行为不为专利法所禁止。在此情况下，后续的坑梓自来水公司使用所购买的被诉专利侵权产品的行为也应当得到允许。因此，坑梓自来水公司后续的使用行为不侵犯涉案发明专利权。同理，康泰蓝公司在涉案发明专利授权后为坑梓自来水公司使用被诉专利侵权产品提供售后服务也不侵犯涉案发明专利权。[34]

In this case, the sale of the allegedly patent-infringing product by Kangtailan Company took place within the provisional protection period of the invention patent involved in this case. This act is not prohibited by the *Patent Law*. Under these circumstances, Kengzi Tap Water Company's subsequent acts of using the allegedly patent-infringing product that it purchased should also be allowed. Therefore, Kengzi Tap Water Company's subsequent acts of using [the product] did not infringe on the invention patent rights involved in this case. Likewise, Kangtailan Company's provision of after-sales services, after the invention patent rights involved in this case were granted, to [support] Kengzi Tap Water Company's use of the allegedly patent-infringing product also did not infringe on the invention patent rights involved in this case.[35]

CGCP 备注

备注1:

《中华人民共和国专利法》(2008年修正)[36]

第十一条

发明和实用新型专利权被授予后，除本法另有规定的以外，任何单位或者个人未经专利权人许可，都不得实施其专利，即不得为生产经营目的制造、使用、许诺销售、销售、进口其专利产品，或者使用其专利方法以及使用、许诺销售、销售、进口依照该专利方法直接获得的产品。[…]

第十三条

发明专利申请公布后，申请人可以要求实施其发明的单位或者个人支付适当的费用。

第六十八条[38]

侵犯专利权的诉讼时效为二年，自专利权人或者利害关系人得知或者应当得知侵权行为之日起计算。

发明专利申请公布后至专利权授予前使用该发明未支付适当使用费的，专利权人要求支付使用费的诉讼时效为二年，自专利权人得知或者应当得知他人使用其发明之日起计算，但是，专利权人于专利权授予之日前即已得知或者应当得知的，自专利权授予之日起计算。

第六十九条

有下列情形之一的，不视为侵犯专利权：

（一）[…]；

（二）在专利申请日前已经制造相同产品、使用相同方法或者已经作好制造、使用的必要准备，并且仅在原有范围内继续制造、使用的；

[…]。■

CGCP Notes

Note 1:

Patent Law of the People's Republic of China (Amended in 2008)[37]

Article 11

After invention or utility model patent rights are granted, except as otherwise provided in this Law, no entity or individual may, without the permission of the patentee, exploit the patent, that is, [the entity or individual] may not make, use, offer to sell, sell, or import the patented product for production or business purposes; or use the patented process; or use, offer to sell, sell, or import a product obtained directly by the patented process.

[…]

Article 13

After an invention patent application is published, the applicant may request that the entity or individual exploiting his invention pay an appropriate fee.

Article 68[39]

The time limit for bringing a suit for the infringement of patent rights is two years, calculated from the date on which the patentee or a stakeholder knows or should have known of the infringing act.

Where an appropriate fee is not paid [by a person] for use of an invention [during a period] after the invention patent application is published but before the patent rights are granted, the time limit for the patentee to bring a suit to request the payment of the fee is two years, calculated from the date on which the patentee knows or should have known of the person's use of his invention. However, where, before the date on which the patent rights are granted, the patentee has known or should have known of [such use], [the time limit] is calculated from the date on which the patent rights are granted.

Article 69

Where any of the following circumstances exists, [an act] shall not be regarded as infringement of patent rights:

(1) […];

(2) before the patent application date, the same product has been made, the same process has been used, or the necessary preparations for making [the same product] or using [the same process] have been made and [the product or process] is continued to be made or used within the original scope;

[…]. ■

* 此案例的中文引用是：《深圳市斯瑞曼精细化工有限公司诉深圳市坑梓自来水有限公司、深圳市康泰蓝水处理设备有限公司侵害发明专利权纠纷案》，《中国法律连接》，第12期，第79页（2021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（CGC20），2021年3月，https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-20。

案例原文载于：《最高人民法院网》，http://www.court.gov.cn/shenpan-xiangqing-6004.html。*亦见*《最高人民法院关于发布第五批指导性案例的通知》，2013年11月8日公布，同日起施行，http://www.chinacourt.org/law/detail/2013/11/id/147238.shtml；《最高人民法院关于部分指导性案例不再参照的通知》，2020年12月29日公布，2021年1月1日起施行，http://www.court.gov.cn/fabu-xiangqing-282441.html。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: 《深圳市斯瑞曼精细化工有限公司诉深圳市坑梓自来水有限公司、深圳市康泰蓝水处理设备有限公司侵害发明专利权纠纷案》 (*Shenzhen Siruiman Fine Chemicals Co., Ltd. v. Shenzhen Kengzi Tap Water Co., Ltd. and Shenzhen Kangtailan Water Treatment Equipment Co., Ltd., A Dispute over Infringement of Invention Patent Rights*), 12 China Law Connect 79 (Mar. 2021), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC20), Mar. 2021, http://cgc.law.stanford.edu/guiding-cases/guiding-case-20.

The original, Chinese version of this case is available at 《最高人民法院网》 (www.court.gov.cn), http://www.court.gov.cn/shenpan-xiangqing-6004.html. *See also* 《最高人民法院关于发布第五批指导性案例的通知》 (*Notice of the Supreme People's Court on the Release of the Fifth Batch of Guiding Cases*), issued on and effective as of Nov. 8, 2013, http://www.chinacourt.org/law/detail/2013/11/id/147238.shtml; 《最高人民法院关于部分指导性案例不再参照的通知》 (*Notice of the Supreme People's Court on Guiding Cases That Will No Longer Be for Reference and Imitation*), issued on Dec. 29, 2020, effective as of Jan. 1, 2021, http://www.court.gov.cn/fabu-xiangqing-282441.html. For a discussion of why the term "reference and imitate" is used for "参照", see Provisions of the Supreme People's Court Concerning Work on Case Guidance, *People's Republic of China*, Article 7, Stanford CGCP *Global Guide*™, Aug. 2020, http://cgc.law.stanford.edu/sgg-on-prc-provisions-case-guidance.

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 Thomas Rimmer, Randy Wu, and Steven Di Yao for preparing earlier translations of this Guiding Case.

1 此处引用的《专利法》应指2008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。第十一条、第十三条、第六十九条在2020年修正版本中编号为第十一条（即维持不变）、第十三条（即维持不变）、第七十五条。*见*《中华人民共和国专利法》，1984年3月12日通过和公布，1985年4月1日起施行，经四次修正，最新修正于2020年10月17日，2021年6月1日起施行，http://www.moj.gov.cn/Department/content/2020-11/19/592_3260623.html（以下简称"《专利法》"）。*见*CGCP 备注1。

2 The *Patent Law* as cited here should mean the 2008 version, which was already in effect when this Guiding Case was released in 2013 and when the final judgment upon which this Guiding Case is based was rendered. Article 11, Article 13, and Article 69 are numbered Article 11 (i.e., remains unchanged), Article 13 (i.e., remains unchanged), and Article 75, respectively, in the 2020 version (which is scheduled to replace the 2008 version on June 1, 2021). *See* 《中华人民共和国专利法》(*Patent Law of the People's Republic of China*), passed and issued on Mar. 12, 1984, effective as of Apr. 1, 1985, amended four times, most recently on Oct. 17, 2020, effective as of June 1, 2021, http://www.moj.gov.cn/Department/content/2020-11/19/592_3260623.html (hereinafter "*Patent Law*"). *See* CGCP Note 1.

3 The content in this section is a summary, based on the underlying judgment(s) of this Guiding Case, by the Supreme People's Court. In each Guiding Case, the parties' claim(s) and defense(s) as well as the court's ascertained facts are often copied verbatim from the original judgment(s). In the English translation, tenses are chosen in such a way as to reflect the status of claim(s), defense(s), facts, and information in them on the date when the final judgment (*see infra* note 18) was rendered.

4 The name "深圳市斯瑞曼精细化工有限公司" is translated herein as "Shenzhen Siruiman Fine Chemicals Co., Ltd." in accordance with the English name appearing on the company's website, at http://szssrljxhg.cn.gongxuku.com.

5 The name "国家知识产权局" is translated herein as the "State Intellectual Property Office". Due to government restructuring in 2018, the office is now named "国家知识产权局" ("China National Intellectual Property Administration"). For more information, see, e.g., *SIPO Changed its Name to CNIPA*, IP News, Sept. 3, 2018, https://www.ccpit-patent.com.cn/node/5402.

6 The term "专利" ("patent") is used here, but "专利申请" ("patent application") is more likely the term meant, as there was no patent for this invention until it was granted on January 21, 2009.

7 The term "专利" ("patent") is used here, but "专利申请" ("patent application") is more likely the term meant, as there was no patent for this invention until it was granted on January 21, 2009. For details about the annual fee payment system for patent applications, see 专利缴费指南 (Patents Payment Guide), http://www.cnipr.com/zy/ipsqzn/zl_6545/fmzlsq/201708/W020170811587028816100.pdf.

8 The name "深圳市坑梓自来水有限公司" is translated herein as "Shenzhen Kengzi Tap Water Co., Ltd." in accordance with the English name appearing in a prominent company database, at https://www.qcc.com/firm/fb46142332bfb054becad714c1286f0c.html.

9 The name "深圳市康泰蓝水处理设备有限公司" is translated herein literally as "Shenzhen Kangtailan Water Treatment Equipment Co., Ltd.". The company does not appear to have an official English name.

10 有关法官释明权的讨论，见卢绍荣，浅析民事诉讼法官释明权的释明尺度，《中国法院网》，2018年2月14日，https://www.chinacourt.org/article/detail/2018/02/id/3208414.shtml。

11 For a discussion of judges' power to offer explanations and clarifications, see卢绍荣 (LU Shaorong), 浅析民事诉讼法官释明权的释明尺度 (*A Brief Analysis of Standards for Judges' [Exercise of the] "Explanations and Clarifications" Power During Civil Litigation*),《中国法院网》(www.chinacourt.org), Feb. 14, 2018, https://www.chinacourt.org/article/detail/2018/02/id/3208414.shtml.

12 一审判决书尚未找到，有可能已被排除在公布之外。

13 （2010）粤高法民三终字第444号民事判决，2010年11月15日由广东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/guangdong-2010-yue-gao-fa-min-san-zhong-zi-444-civil-judgment（以下简称"《二审判决》"）。

14 （2011）民提字第259号民事判决，2011年12月20日由最高人民法院作出，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/spc-2011-min-ti-zi-259-civil-judgment（以下简称"《再审判决》"）。

15 The first-instance judgment has not been found and may have been excluded from publication.

16 （2010）粤高法民三终字第444号民事判决 ((2010) Yue Gao Fa Min San Zhong Zi No. 444 Civil Judgment), rendered by the High People's Court of Guangdong Province on Nov. 15, 2010, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/guangdong-2010-yue-gao-fa-min-san-zhong-zi-444-civil-judgment (hereinafter "*Second-Instance Judgment*").

17 The text reads "申请再审" ("applied [...] for a retrial"). Article 199 of the *Civil Procedure Law of the People's Republic of China* provides, *inter alia*, that a party who considers an effective judgment or ruling to be erroneous may apply to the court at the next higher level for a retrial. *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.

[18] (2011) 民提字第259号民事判决 ((2011) Min Ti Zi No. 259 Civil Judgment), rendered by the Supreme People's Court on Dec. 20, 2011, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/spc-2011-min-ti-zi-259-civil-judgment (hereinafter "*Retrial Judgment*").

[19] 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判决（见注释14）的比较。以黄色突出显示的表述/信息并不用于判决的"本院认为"说理部分。

[20] Yellow highlights included in this section were added by the China Guiding Cases Project to reflect its comparison of this Guiding Case with the original judgment(s) upon which this Guiding Case is based (*see supra* note 18). Expressions/details highlighted in yellow were not used in the "This Court Opines" reasoning sections of the original judgment(s). In the English translation, tenses are chosen in such a way as to reflect the status of claim(s), defense(s), facts, legal principles, and information in them on the date when the final judgment (*see supra* note 18) was rendered.

[21] 该条款在2008年版和2020年版的《专利法》中保持不变。见《专利法》，注释1。

[22] 见，例如，《专利法》（2000年版）第六十三条。该条列出了不视为侵犯专利权的情形。《专利法》（2008年版）第六十九条与该条类似但不完全相同。见CGCP备注1。

[23] 该条款在2008年版和2020年版的《专利法》中保持不变。见《专利法》，注释1。

[24] 在《专利法》（2008年版）中，该条编号为第六十八条，而在《专利法》（2020年版）中，该条编号为第七十四条（内容有所更改）。见CGCP备注1。

[25] The term "修改" ("revise") is used here, but "修正" ("amend") is more likely the term meant, as the *Patent Law* was officially reported to have been "amended" ("修正") on September 4, 1992, August 25, 2000, December 27, 2008, and October 17, 2020. *See Patent Law*, *supra* note 2.

[26] The provision remains the same in the 2008 and 2020 versions of the *Patent Law*. *See Patent Law*, *supra* note 2.

[27] *See, e.g.*, Article 63 of the 2000 version of the *Patent Law*. The provision listed a few circumstances that were not regarded as infringement of patent rights. A similar, but not identical, provision is numbered Article 69 in the 2008 version of the *Patent Law*. *See* CGCP Note 1.

[28] The text reads "许诺销售" ("promise to sell"), but is translated herein as "offer to sell". This term was added to the *Patent Law* in 2000 to prepare for China's accession to the World Trade Organization and to, specifically, bring the law in line with Article 28 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS; https://www.wto.org/english/docs_e/legal_e/27-trips.pdf), which covers the concept "offering for sale". For a discussion of the choice of this term "许诺销售" to capture the meaning of "offering for sale" in the context of patents, see 《专利法》第十一条中的"许诺销售"到底是什么？(*What is "许诺销售" in Article 11 of the Patent Law?*), 《拾贝》(SEBE), Aug. 27, 2018, https://www.ipsebe.com/cms/zixun/detail.htm?id=319.

[29] The provision remains the same in the 2008 and 2020 versions of the *Patent Law*. *See Patent Law*, *supra* note 2.

[30] 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".

[31] Numbered Article 68 in the 2008 version of the *Patent Law*, this article is numbered Article 74 (with some changes to the content) in the 2020 version. *See* CGCP Note 1.

[32] 《专利法》（2000年版）第六十三条第（2）项。在《专利法》（2008年版）中，相同的条款编号为第六十九条第（2）项。见CGCP备注1。

[33] Article 63 Item (2) of the 2000 version of the *Patent Law*. The same provision is numbered Article 69 Item (2) in the 2008 version of the *Patent Law*. *See* CGCP Note 1.

[34] 本指导性案例没有提供此信息："生效裁判审判人员：金克胜、郎贵梅、杜微科"。见《再审判决》，注释14。

[35] This Guiding Case does not provide the following information: "Adjudication personnel of the effective judgment: JIN Kesheng, LANG Guimei, and DU Weike". *See Retrial Judgment*, *supra* note 18.

[36] 《专利法》，注释1。

[37] *Patent Law*, *supra* note 2.

[38] 在2020年版的《专利法》中，该条编号为第七十四条，主要不同之处为：

> […]诉讼时效为**三年**，[…]应当知道侵权行为**以及侵权人**之日起计算。
>
> […]诉讼时效为**三年**，[…]。
>
> （强调后加）

[39] In the 2020 version of the *Patent Law*, this article is numbered Article 74, with the following main differences:

> The time limit […] is **three years**, […] should have known of the infringing act **and the infringer**.
>
> […] the time limit […] is **three years**, […].
>
> (emphasis added)

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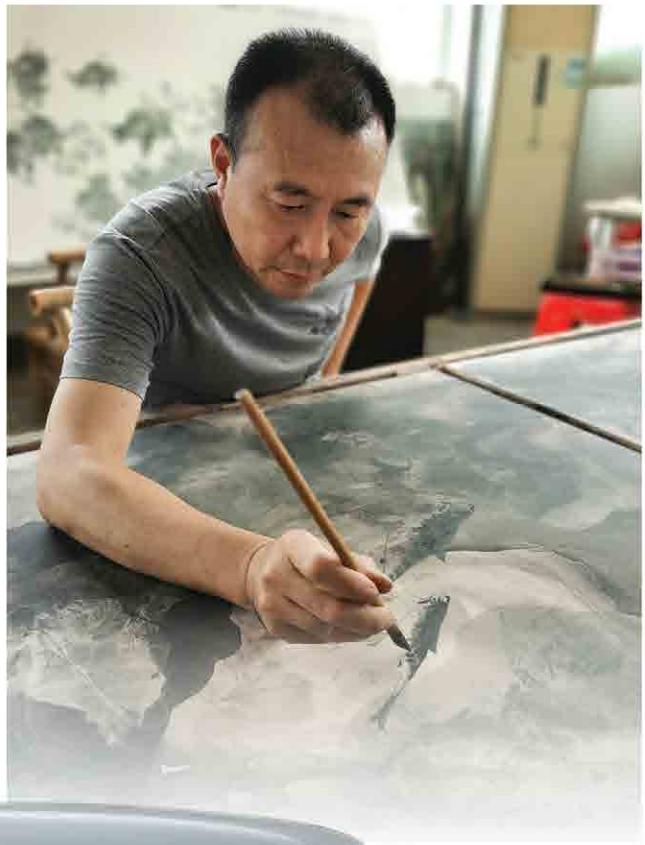

陈训成
CHEN Xuncheng

《紫气东来》| *A Purple Aura from the East*
（吉祥的征兆）| (a propitious omen)

陈训成

陈训成是中国广东省陶瓷艺术大师。自1994年毕业于景德镇陶瓷大学后，他展开了精彩的艺术旅程。他荣膺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。他的作品曾在亚洲卫视、广东卫视、南方卫视、东莞电视台、汕尾电视台、《环球时报》、《中国收藏》、《中国陶瓷》、《新周刊》、《中国当代艺术》、《艺术前沿》、《粤港直通》、南航《云中往来》、《广州文艺》、《南方都市报》、《广州日报》、《汕头特区报》、《汕尾日报》、《汕尾文艺》、《东岸》、《艺术市场》等媒体、刊物发表。

此外，陈训成的作品已被中国工艺美术馆、中国陶瓷博物馆、广东美术馆、江西省工艺美术馆、广州美术学院大学城美术馆、广东美术馆 • 深联美术馆、岭南美术馆、深圳罗湖美术馆，以及西班牙、法国、日本、香港、国内等私人机构收藏。

陈训成亦积极推动中国艺术发展，其要职包括：广东省美术家协会艺术委员会陶艺委员会副主任、粤港澳大湾区美术家联盟理事、广东省陶瓷艺术和设计专家库成员、广东省中国画学会理事、广州画院特聘画家、“广州国家青苗画家培育计划”课题组专家、广州大学美术与设计学院硕士研究生导师、广东技术师范大学产业教授、景德镇学院客座教授。■

CHEN Xuncheng

CHEN Xuncheng is a master of ceramic art in Guangdong Province, China. After his graduation from Jingdezhen Ceramic Institute in 1994, he began his wonderful journey of art. 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 works have been featured in various media and publications, including Star TV, Guangdong Radio and Television, TVS Television, Dongguan Radio and Television, Shanwei Radio and Television, *Global Times*, *China Collections*, *China Ceramics*, *New Weekly*, *Contemporary Chinese Art*, *Art Avant Garde*, *Let’s Go*, China Southern Airlines’s *Travel in the Air*, *Literature & Art of Guangzhou*, *Southern Metropolis Daily*, *Guangzhou Daily*, *Shantou Special Economic Zone Newspaper*, *Shanwei News*, *Literature and Art of Shanwei*, *East Coast Media*, and *Art Market*.

Furthermore, Mr. Chen’s works have been collected by the China Arts and Crafts Museum, the China Ceramics Museum, the Guangdong Museum of Art, the Jiangxi Arts and Crafts Museum, the University Town Art Museum at the Guangzhou Academy of Fine Arts, the Guangdong Museum of Art—Shenlian Art Museum, the Lingnan Museum of Fine Art, and the Shenzhen Luohu Art Museum, as well as by many private organizations in Spain, France, Japan, Hong Kong, and mainland China.

Mr. Chen also actively promotes the development of Chinese art. His major leadership roles include serving as a deputy director of the Ceramic Art Committee of the Art Committee of Guangdong Artists Association, a council member of the Guangdong–Hong Kong–Macao Greater Bay Area Artist Alliance, a member of the Guangdong Ceramic Art and Design Expert Pool, a council member of the Guangdong Chinese Painting Institute, a distinguished painter of the Guangzhou Painting Academy, an expert for the “National Cultivation Program for Young Painters in Guangzhou” course series, a graduate program advisor for the School of Fine Arts & Design at Guangzhou University, an industry professor at the Guangdong Polytechnic Normal University, and a visiting professor at the Jingdezhen Institute. ■

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