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CGCP

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斯坦福法学院

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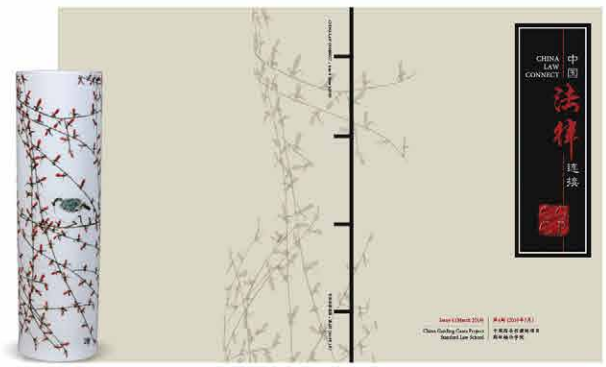

The CGCP thanks master ceramicist Mr. CHEN Xuncheng for allowing us to design the 2019 covers, based on his art pieces.

CGCP感谢陶瓷大师陈训成先生
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Editor's Note*

Dr. Mei Gechlik

Dear Readers,

The year 2020 will likely be remembered as the year the world was searching for a 20/20 vision of what lies ahead and how we should move forward during a particularly uncertain time.

Among many difficult questions, one might wonder: will the coronavirus pandemic drive foreign businesses and professionals away from China? Or, on the contrary, will the need to stay afloat during this trying time make them less risk-averse and more ready to seize any opportunities that arise?

China's *Foreign Investment Law*

To help businesses, professionals, policymakers, and others make prudent decisions, **I and Dimitri Phillips, former Co-Managing Director of the China Guiding Cases Project (the "CGCP")**, co-authored a CLC *Spotlight*™ piece, which is published in this issue of *China Law Connect* ("*CLC*"), that shares our meticulous English translation of China's *Foreign Investment Law*. We also draw on various sources, including two sets of rules issued by the country's State Council and the Supreme People's Court (the "SPC"), to provide key annotations on the new law.

Replacing China's old foreign investment legal framework that had been in place for four decades, the *Foreign Investment Law* came into effect on January 1st of this year, with explicit commitments to, among others, "further expand[ing] the opening [of China] to the outside [world]" and "protect[ing] the legal rights and interests of foreign investment". These commitments are not new. However, the imminent need to recover from the current economic crisis may prompt China to take extraordinary measures to realize these commitments. In the coming months, current and potential foreign investors will watch China closely to see how the country implements the *Foreign Investment Law*, especially provisions related to the following aspects:

- "Negative lists". Will these lists be significantly shortened so that fewer areas are precluded from foreign investment?
- The enterprise credit information publicity systems. Will the requirements for building these systems be eased so as to encourage more foreign investment?
- "Transparent and predictable" market environment. Will the Chinese government be more proactive in engaging foreign investors in the process of setting policies and rules and keeping them informed of measures that may affect their rights and interests?
- Intellectual property ("IP"). The *Foreign Investment Law* vows to protect the IP of foreign investors by, for example, prohibiting administrative departments from using administrative means to force foreign investors' transfer of technology and holding administrative personnel who disclose foreign investors' trade secrets liable. What specific measures will be taken to enhance IP protection?

Transparency, Predictability, and Intellectual Property

Transparency, predictability, and IP have been areas of focus for the Chinese judiciary. Ten years ago, the SPC established the Guiding Cases System with clearly identified goals: "to summarize adjudication experiences, unify the application of law, enhance adjudication quality, and safeguard judicial impartiality". In late December 2019, shortly before the *Foreign Investment Law* came into effect, 27 new Guiding Cases ("GCs") (i.e., Guiding Cases No. 113–139) were released, bringing the total number of GCs to 139.

The release of Guiding Case No. 113 (*Michael Jeffrey Jordan v. The Trademark Review and Adjudication Board of the State Administration for Industry and Commerce and Qiaodan Sports Co., Ltd., An Administrative Case Concerning a Dispute over the "乔丹" ("Qiao Dan") Trademark*) has formally turned a widely known dispute into a *de facto* binding precedent, and provided courts handling similar subsequent cases with guidance on a few legal principles, including the following:

1. The right to name is a personal right that a natural person has over his name, and the right to name can constitute a prior right provided for in the *Trademark Law*. Where the Chinese translation of a foreign natural person's foreign name meets [certain] conditions, [the foreign natural person] may legally claim that it be given protection as a specific name in accordance with relevant provisions regarding the right to name.
2. Where a foreign natural person claims the protection of the right to name with respect to a specific name, the specific name should meet the following three conditions: (1) the specific name is, to a certain degree, well-known in China and is known to the relevant public; (2)

> the relevant public uses the specific name to refer to the natural person; and (3) a stable correspondence relationship has already been established between the specific name and the natural person.

For more information about this GC, see the bilingual version published in this issue of *CLC*.

While GCs are important, their real significance lies in their positive impact on subsequent cases with respect to increasing predictability. In this issue of *CLC*, two China Cases *Insight*™ pieces shed light on this topic. In the first piece, **Ruoyu Ren, Assistant Managing Editor of the CGCP**, analyzes 24 subsequent cases that explicitly mentioned 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*). She explains, through her in-depth analysis, how courts handling the subsequent cases have shown their different understandings of the line of reasoning used in Guiding Case No. 82. She observed:

> These different insights can promote various interested parties' in-depth discussions of the scope of application of Guiding Cases so as to lay a solid foundation for the establishment of a better Guiding Cases System.

In the second China Cases *Insight*™ piece, **Zihao Zhou, Associate Managing Editor of the CGCP, and Chi Che, Editor of the CGCP**, analyze 66 subsequent cases that cited Guiding Case No. 8 (*LIN Fangqing v. Changshu Kailai Industrial Co., Ltd. and DAI Xiaoming, A Corporate Dissolution Dispute*). The "Main Points of the Adjudication" of Guiding Case No. 8 are:

> Article 183 of the *Company Law* makes "serious difficulty occurs in the operation and management of a company" one of the conditions under which shareholders may bring a corporate dissolution lawsuit. To determine "whether serious difficulty occurs in the operation and management of a company", the operational state of the company's organizational structure should be comprehensively analyzed. For a company that is in a profitable state but has long-term failure in its shareholders' meeting mechanism and serious impediments in its internal management and has plunged into a state of deadlock, it can still be determined that serious difficulty occurs in the operation and management of the company. If other conditions stated in the *Company Law* and relevant judicial interpretations are met, a people's court may decide to dissolve a company in accordance with law.

In 22 of these 66 subsequent cases, the courts reviewed the above main points in the reasoning section. Some courts carefully applied the GC, while others distinguished the GC from the pending case. Although the courts' analyses are quite brief, they reflect the emergence of a case-based judicial culture in a country that has traditionally relied on legislation only.

Transparency, predictability, and IP were also topics discussed in two meetings that I attended recently. In December 2019, I met with a delegation from the Jiangxi Development and Reform Commission to discuss e-governance and e-justice (https://cgc.law.stanford.edu/event/dec-2019-meeting-with-jiangxi-delegation). In February 2020, I gave a presentation to the Chief Intellectual Property Officers Council of the Conference Board, where I particularly emphasized the role of GCs in IP disputes and the implications of these cases for the implementation of the *U.S.–China Economic and Trade (Phase One) Agreement* (https://cgc.law.stanford.edu/event/feb-2020-discussion-re-ip-with-conference-board).

This issue ends with a page featuring ceramic master **Mr. CHEN Xuncheng's** series titled *Watching in Silence*. The series consists of four pieces, each of which will be used to decorate the covers of the four issues of *CLC* published in 2020. We are very grateful to Mr. Chen for his continued support.

We hope you enjoy the insights and information shared in this issue of *CLC*! Stay healthy during this difficult time!

Sincerely,

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

* Dr. Mei Gechlik, *Editor's Note*, 8 China Law Connect v (Mar. 2020), http://cgc.law.stanford.edu/clc-8-202003.

熊美英博士

编辑短笺*

尊敬的读者：

2020年很可能会被铭记为全世界都在寻求20/20（清晰）视野的一年，以期在一个特别不确定的时期内，看清前方和知道应该如何前进。

在许多难题之中，人们可能会问：冠状病毒大流行会驱使外国企业和专业人士离开中国吗？或者，相反，为了在这段艰难的时期维持经营、保持生计，他们会否减少规避风险，更愿意抓住任何出现的机会？

中国的《外商投资法》

为了帮助企业、专业人士、决策者和其他人做出审慎的决定，**我和中国指导性案例项目（"CGCP"）前联合执行编辑费德明**共同撰写了一篇刊于本期《中国法律连接》（"《中法连》"）的中法连*聚焦*™文章。该文章分享了我们对中国《外商投资法》一丝不苟的英语翻译。我们还借鉴了各种资料，包括中国国务院和最高人民法院（"最高法"）发布的两套规则，为此新法律作出关键注解。

中国《外商投资法》于2020年1月1日生效，取代已经存在了四十年的旧的外商投资法律框架。该法明确作出不同的承诺，包括："为了进一步扩大对外开放"、"保护外商投资合法权益"。这些都不是新的承诺。但是，鉴于有迫切需要从当前的经济危机中恢复过来，这可能会促使中国采取非一般的措施来实现这些承诺。在接下来的几个月中，当前和潜在的外国投资者将密切关注中国，以了解中国如何执行《外商投资法》，特别是与以下几方面有关的规定：

- "负面清单"。这些清单会否大大缩短，减少排除外国投资的领域？
- 企业信用信息公示系统。中国会否放宽对构建这些系统的要求，以鼓励更多的外国投资？
- "透明、可预期"的市场环境。中国政府会否更积极地让外国投资者参与制定政策和规则的过程，以及更积极地让这些投资者了解可能影响其权益的措施？
- 知识产权。《外商投资法》承诺保护外国投资者的知识产权。例如，该法律禁止行政机关利用行政手段强制外国投资者转让技术，并表明会对那些泄露外国投资者商业秘密的行政人员追究责任。中国将采取哪些具体措施来增强知识产权的保护？

透明度、可预期性和知识产权

透明度、可预期性和知识产权一直是中国司法部门关注的领域。十年前，最高法建立了指导性案例制度，其目标明确："为总结审判经验，统一法律适用，提高审判质量，维护司法公正"。在《外商投资法》生效之前不久的2019年12月下旬，最高法发布了27个新的指导性案例（即：指导案例113–139号），使指导性案例的总数达到139个。

指导案例113号（《迈克尔•杰弗里•乔丹与国家工商行政管理总局商标评审委员会、乔丹体育股份有限公司"乔丹"商标争议行政纠纷案》）的发布正式将一个广为人知的争端转变为一个事实上具有约束力的先例，并且向处理类似的后续案件的法院提供一些法律原则的指导，包括以下的原则：

1. 姓名权是自然人对其姓名享有的人身权，姓名权可以构成商标法规定的在先权利。外国自然人外文姓名的中文译名符合条件的，可以依法主张作为特定名称按照姓名权的有关规定予以保护。

2. 外国自然人就特定名称主张姓名权保护的，该特定名称应当符合以下三项条件：（1）该特定名称在我国具有一定的知名度，为相关公众所知悉；（2）相关公众使用该特定名称指代该自然人；（3）该特定名称已经与该自然人之间建立了稳定的对应关系。

有关指导案例113号的更多信息，请参阅刊于本期《中法连》的该案例的双语版本。

尽管指导性案例很重要，但其真正的意义在于对后续案件的积极影响，提高这些案件的可预期性。在本期《中法连》中，有两篇中国案例*见解*™文章阐明了这一点。在第一篇文章中，**CGCP助理执行编辑任若雨**分析了24个明确提及了指导案例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》）的后续案件。通过深入分析，她解释了处理后续案件的法院如何显示出他们对指导案例82号的判决思路的不同见解。她观察到：

> 见解的不同能促进各方深入探讨指导性案例的适用范围，为建立一个更完善的指导性案例制度提供稳固的基础。

在第二篇中国案例*见解*™文章中，**CGCP副执行编辑周子皓和CGCP编辑车驰**分析了66个援引指导案例8号（《林方清诉常熟市凯莱实业有限公司、戴小明公司解散纠纷案》）的后续案件。指导案例8号的“裁判要点”为：

> 公司法第一百八十三条将“公司经营管理发生严重困难”作为股东提起解散公司之诉的条件之一。判断“公司经营管理是否发生严重困难”，应从公司组织机构的运行状态进行综合分析。公司虽处于盈利状态，但其股东会机制长期失灵，内部管理有严重障碍，已陷入僵局状态，可以认定为公司经营管理发生严重困难。对于符合公司法及相关司法解释规定的其他条件的，人民法院可以依法判决公司解散。

这66个后续案件当中的22个，法院在说理部分探讨了以上要点。一些法院谨慎地适用了该指导性案例，而另一些法院则将该案例与未决案件作出区别。尽管法院的分析相当简短，但它们反映了基于案例的司法文化正在一个传统上仅依靠立法的国家中出现。

透明度、可预期性和知识产权也是我最近参加的两次会议中所讨论的主题。2019年12月，我会见了江西省发展和改革委员会代表团，讨论了电子政务和电子正义（https://cgc.law.stanford.edu/event/dec-2019-meeting-with-jiangxi-delegation）。2020年2月，我向世界大型企业联合会首席知识产权官委员会作出演讲。在会议上，我特别强调了指导性案例在解决知识产权纠纷中的作用，以及这些案例对执行《中美第一阶段经贸协议》的含义（https://cgc.law.stanford.edu/event/feb-2020-discussion-re-ip-with-conference-board）。

本期《中法连》以陶瓷艺术大师**陈训成先生**创作的名为《静观》的艺术系列作结。该系列由四幅作品组成，每幅作品将用来设计2020年出版的四期《中法连》的封面。我们非常感谢陈先生的持续支持。

我们希望您喜欢本期《中法连》所分享的见解和信息！也希望您能在这个困难时期保持健康！

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8期，第vii页（2020年3月），http://cgc.law.stanford.edu/zh-hans/clc-8-202003。

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 nearly 150,000 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.

关于中国指导性案例项目（"CGCP"）

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，建立了一个拥有近15万全球用户的网站，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。

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Dr. Mei Gechlik

Founder and Director, China Guiding Cases Project, Stanford Law School

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 60,000 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.

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60,000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）。

Guiding Case No. 82 and 24 Related Subsequent Judgments/Rulings: How to Coherently Apply the Principle of Good Faith in Trademark Infringement*

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Abstract

Guiding Case No. 82 ("GC82") is an innovative case that applies the principle of good faith in the area of trademark infringement. It is also one of a small number of intellectual property Guiding Cases that has a relatively large number of subsequent judgments/rulings. It has been cited by parties and/or courts in 24 subsequent judgments/rulings within only three years of its release. The author has examined all of these 24 subsequent judgments/rulings and has discovered that some courts did not properly respond to parties' references to GC82, while a few other courts did properly refer to GC82 and analyze it in detail.

Moreover, the courts rendering these subsequent judgments/rulings had different understandings of the line of reasoning behind the adjudication of GC82, and dealt with the Main Points of the Adjudication of GC82 in different ways. These diversified developments are very helpful in exploring the scope of application of these main points. Therefore, as more subsequent judgments/rulings based on GC82 are issued, such research should continue.

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*) ("GC82").[1] GC82 originated from a trademark infringement dispute that was finally decided by the SPC. During the adjudication, the SPC, based on the principle of good faith, comprehensively considered the propriety of WANG Suiyong's acts and determined that his acts of maliciously obtaining and exercising trademark rights were not protected by law. This case represents an active response by the SPC to conduct that has caused heated societal discussion, namely, the obtaining and exercising of trademark rights in bad faith, and is an innovative case implementing the principle of good faith in the area of trademark infringement.[2]

As of December 31, 2019, approximately three years after the release of GC82, the number of subsequent judgments/rulings ("SJ/Rs") mentioning GC82 had reached 24, which is more than the number of SJ/Rs of many other intellectual property Guiding Cases.[3] Through analyzing the attitudes of the courts that rendered these SJ/Rs towards referencing GC82 and their ways of dealing with the Main Points of the Adjudication of this case, this article further reveals the referential value of Guiding Cases and their impact on SJ/Rs.

The Origin of Guiding Case No. 82

Shenzhen Gelisi Garments Industrial Co., Ltd. (later renamed "Shenzhen Ellassay Fashion Co., Ltd." ("Ellassay Company"), i.e., the defendant of the first-instance adjudication in this case) and its affiliated enterprise first used "歌力思" (the transliteration of which is "Ge Li Si") as an enterprise shop name in 1996. They obtained the exclusive right to use the No. 1348583 "歌力思" trademark on Class 25 (clothing, etc.) commodities in 1999. In addition, Ellassay Company is also the registrant of the No. 4225104 "ELLASSAY" trademark. Ellassay Company sold bags bearing hangtags with the words "Chinese name of the brand: 歌力思; English name of the brand: ELLASSAY" at the "ELLASSAY" counters run by Hangzhou Intime Century Department Store Co., Ltd. ("Hangzhou Intime Company").

In June 2011, WANG Suiyong, the plaintiff of the first-instance adjudication, applied to register the No. 7925873 "歌力思" trademark. The commodities approved for use with the trademark are Class 18 (wallets, handbags, etc.). On July 7, 2004, WANG Suiyong also had applied to register the No. 4157840 "歌力思及图" ("歌力思 and graphic") trademark. Because, subsequently, the High People's Court of Beijing Municipality rendered a second-instance judgment on April 2, 2014, determining that the trademark No. 4157840 had harmed the prior rights to a shop name held by Shenzhen Ellassay Investment Management Co., Ltd., an affiliated enterprise of Ellassay Company, the No. 4157840 trademark would not be approved for registration.

On March 7, 2012, WANG Suiyong brought suit on the grounds that the acts of producing and selling the above-mentioned bags by Ellassay Company and Hangzhou Intime Company constituted infringement of the "歌力思" trademark and the "歌力思及图" trademark rights owned by WANG Suiyong.

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On February 1, 2013, the Intermediate People's Court of Hangzhou Municipality rendered the (2012) Zhe Hang Zhi Chu Zi No. 362 Civil Judgment,[4] opining that the acts of producing and selling the allegedly infringing commodities by Ellassay Company and Hangzhou Intime Company had infringed on WANG Suiyong's exclusive rights to use his registered trademarks. Unconvinced by the judgment, Ellassay Company appealed. On June 7, 2013, the High People's Court of Zhejiang Province rendered the (2013) Zhe Zhi Zhong Zi No. 222 Civil Judgment,[5] rejecting the appeal and upholding the original judgment.

Unconvinced by the second-instance judgment, both Ellassay Company and WANG Suiyong applied to the SPC for a retrial. The SPC ruled to bring the case up to the SPC for adjudication and, on August 14, 2014, rendered the (2014) Min Ti Zi No. 24 Civil Judgment,[6] revoking the first-instance and second-instance judgments and rejecting all of the litigation requests of WANG Suiyong.

Eventually, this case was selected as GC82 and its Main Points of the Adjudication are:[7]

> 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 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.

Overall Characteristics of Subsequent Judgments/Rulings

Table 1 lists 24 SJ/Rs that explicitly mention GC82 (i.e., the Guiding Case is mentioned in any part of the judgment/ruling, no matter whether the case name is identified in full or in part, or whether only the number of the Guiding Case is stated). The search for these SJ/Rs was conducted through December 31, 2019 by the author on the official "China Judgements [sic] Online" website ("中国裁判文书网"; http://wenshu.court.gov.cn).

Table 1 also lists who mentioned GC82 in each of these SJ/Rs: the parties (or their lawyers); the court, explicitly in the reasoning section titled "This Court opined" (see **grey rows**); and/or the court, in other sections of the SJ/R.

> ***"The number of [subsequent judgments/rulings] handled by intermediate courts […] far exceeds the number of those handled by high courts, basic courts, and a specialized court. […] reflects the jurisdiction requirement of this judicial interpretation."***

The following sections analyze these SJ/Rs by examining their distributions by year, level of court, stage of adjudication proceeding, and type of case, along with a review of how the courts dealt with situations where the parties mentioned GC82.

1. Distribution by Year

Table 2 shows the distribution of the 24 SJ/Rs of GC82 by year of adjudication. GC82 was released in March 2017; as a result, it was not widely cited in 2017. However, the number of the SJ/Rs citing this case significantly increased in 2018 (16 SJ/Rs), with five SJ/Rs in which the courts applied GC82 in the reasoning section,[8] and one in which the court analyzed in the reasoning section why GC82 was not applicable.[9] In 2019, even though the number of SJ/Rs decreased to five, there were still two SJ/Rs in which the courts applied GC82 in the reasoning section.[10]

2. Distribution by Level of Court

Table 3 shows the distribution of the 24 SJ/Rs by level of court. The number of SJ/Rs handled by intermediate courts (15) far exceeds the number of those handled by high courts, basic courts, and a specialized court. Among the 15 SJ/Rs handled by intermediate courts, with the exception of two second-instance civil cases[11] and two second-instance administrative cases,[12] the remaining 11 are all first-instance trademark civil cases. According to a related judicial interpretation of the SPC, first-instance trademark civil cases are usually under the jurisdiction of courts at the intermediate or higher level, while, with the SPC's approval, a small number of cases may

No.	Date of Adjudication	Subsequent Judgment/Ruling No.	Adjudicating Court	Who Mentioned Guiding Case No. 82*
1	2017/7/26	(2016) Su 02 Min Chu No. 71	Intermediate People's Court of Wuxi Municipality, Jiangsu Province	Court (reasoning section)
2	2017/8/21	(2016) Yue 0604 Min Chu No. 13131	Chancheng District People's Court of Foshan Municipality, Guangdong Province	Party(/-ies)/ lawyer(s); Court (other section(s))
3	2017/11/29	(2017) Min 0582 Min Chu No. 4139	People's Court of Jinjiang Municipality, Fujian Province	Party(/-ies)/ lawyer(s); Court (other section(s))
4	2018/1/29	(2017) Yu 0112 Min Chu No. 1753	Yubei District People's Court of Chongqing Municipality	Court (reasoning section)
5	2018/1/31	(2017) Yue 0604 Min Chu No. 11948	Chancheng District People's Court of Foshan Municipality, Guangdong Province	Party(/-ies)/ lawyer(s); Court (other section(s))
6	2018/5/28	(2018) Jin Min Zhong No. 114	High People's Court of Tianjin Municipality	Court (reasoning section)
7	2018/7/3	(2018) Yu 10 Min Chu No. 57	Intermediate People's Court of Xuchang Municipality, Henan Province	Party(/-ies)/ lawyer(s); Court (reasoning section)
8	2018/8/23	(2017) Zhe 01 Min Chu No. 867	Intermediate People's Court of Hangzhou Municipality, Zhejiang Province	Party(/-ies)/ lawyer(s); Court (other section(s))
9	2018/9/4	(2018) Hu 0115 Min Chu No. 28204	Pudong New District People's Court of Shanghai Municipality	Party(/-ies)/ lawyer(s)
10	2018/9/5	(2018) Yu Min Zhong No. 1166	High People's Court of Henan Province	Court (other section(s))
11	2018/9/10	(2018) Yu 01 Min Zhong No. 2179	No. 1 Intermediate People's Court of Chongqing Municipality	Party(/-ies)/ lawyer(s); Court (other section(s)); Court (reasoning section)
12	2018/9/28	(2017) Su Min Zhong No. 1874	High People's Court of Jiangsu Province	Party(/-ies)/ lawyer(s); Court (other section(s)); Court (reasoning section)
13	2018/11/12	(2018) Jin 01 Min Chu No. 175	No. 1 Intermediate People's Court of Tianjin Municipality	Court (reasoning section)
14	2018/12/24	(2018) Yu 04 Min Chu No. 335	Intermediate People's Court of Pingdingshan Municipality, Henan Province	Party(/-ies)/ lawyer(s)
15	2018/12/24	(2018) Yu 04 Min Chu No. 383	Intermediate People's Court of Pingdingshan Municipality, Henan Province	Party(/-ies)/ lawyer(s)
16	2018/12/24	(2018) Yu 04 Min Chu No. 384	Intermediate People's Court of Pingdingshan Municipality, Henan Province	Party(/-ies)/ lawyer(s)
17	2018/12/24	(2018) Yu 04 Min Chu No. 394	Intermediate People's Court of Pingdingshan Municipality, Henan Province	Party(/-ies)/ lawyer(s)
18	2018/12/26	(2018) Yu 04 Min Chu No. 364	Intermediate People's Court of Pingdingshan Municipality, Henan Province	Party(/-ies)/ lawyer(s)
19	2018/12/26	(2018) Yu 04 Min Chu No. 366	Intermediate People's Court of Pingdingshan Municipality, Henan Province	Party(/-ies)/ lawyer(s)
20	2019/1/17	(2018) Yue 03 Min Zhong No. 21433	Intermediate People's Court of Shenzhen Municipality, Guangdong Province	Court (reasoning section)
21	2019/4/3	(2017) Min 02 Min Chu No. 733	Intermediate People's Court of Xiamen Municipality, Fujian Province	Court (reasoning section)
22	2019/11/11	(2019) Jing 73 Min Zhong No. 2609	Beijing Intellectual Property Court	Party(/-ies)/ lawyer(s); Court (other section(s))
23	2019/11/29	(2019) Su 02 Xing Zhong No. 255	Intermediate People's Court of Wuxi Municipality, Jiangsu Province	Party(/-ies)/ lawyer(s)
24	2019/11/29	(2019) Su 02 Xing Zhong No. 256	Intermediate People's Court of Wuxi Municipality, Jiangsu Province	Party(/-ies)/ lawyer(s)

*This column indicates who mentioned Guiding Case No. 82 in the subsequent judgment/ruling:
(1) the party(/-ies) or his/her/their lawyer(s) (marked as "Party(/-ies)/lawyer(s)");
(2) the adjudicating court in the reasoning section titled "This Court opined" (marked as "Court (reasoning section)"); and
(3) the adjudicating court in section(s) of the subsequent judgment/ruling other than the reasoning section (marked as "Court (other section(s))").
If two or more of the above situations occurred, the corresponding entries are separated by ";".

Table 1: 24 Subsequent Judgments/Rulings Which Explicitly Mention Guiding Case No. 82 (identified through December 31, 2019)

Year of Adjudication	No. of SJ/Rs	No . of SJ/Rs Where Courts Mentioned Guiding Case No. 82 in the Reasoning Section
2017	3	1
2018	16	6
2019	5	2
Total	**24**	**9**

Table 2: Distribution of the 24 Subsequent Judgments/Rulings by Year of Adjudication

Level of Court	No. of SJ/Rs	No. of SJ/Rs Where Courts Mentioned Guiding Case No. 82 in the Reasoning Section
High	3	2
Intermediate	15	6
Basic	5	1
Specialized (Intellectual Property)	1	0
Total	**24**	**9**

Table 3: Distribution of the 24 Subsequent Judgments/Rulings by Level of Court

Stage of Adjudication Proceeding	No. of SJ/Rs	No. of SJ/Rs Where Courts Mentioned Guiding Case No. 82 in the Reasoning Section
First Instance	16	5
Second Instance	8	4
Total	**24**	**9**

Table 4: Distribution of the 24 Subsequent Judgments/Rulings by Stage of Adjudication Proceeding

Type of Case	No. of SJ/Rs	No. of SJ/Rs Where Courts Mentioned Guiding Case No. 82 in the Reasoning Section
Civil	22	9
Administrative	2	0
Total	**24**	**9**

Table 5: Distribution of the 24 Subsequent Judgments/Rulings by Type of Case

be accepted by one or two basic courts located in relatively large cities that have been designated by the corresponding high people's courts.[13] Therefore, the fact that 11 SJ/Rs were first-instance trademark civil cases handled by intermediate courts reflects the jurisdiction requirement of this judicial interpretation.

Similarly, most of the SJ/Rs in which the courts mentioned GC82 in the reasoning section were also rendered by intermediate courts. It is noteworthy that one subsequent case is a second-instance civil judgment rendered by the Beijing Intellectual Property Court, but this court did not provide any response in the reasoning section to the party's reference to GC82.[14] As a specialized court that mainly handles intellectual property cases, judges of this court should be more proactive in explaining the applicability of intellectual property Guiding Cases in the reasoning section of a judgment.

3. Distribution by Stage of Adjudication Proceeding

Table 4 shows the distribution of the 24 SJ/Rs by stage of adjudication proceeding. The number of SJ/Rs rendered in first-instance proceedings is twice the number of those rendered in second-instance proceedings. However, the quantities of these two types of SJ/Rs are similar when only SJ/Rs mentioning GC82 in the reasoning section are compared. This reflects that courts in second-instance proceedings were more proactive in citing GC82 in the reasoning section to handle cases.

4. Distribution by Type of Case

Two of the 24 SJ/Rs are administrative judgments,[15] while the rest are civil judgments (see **Table 5**). In each of the two administrative judgments, the appellee (i.e., the Market Supervision Bureau of Xishan District, Wuxi Municipality, the defendant of the first-instance adjudication) and the appellant (i.e., the party who challenged the administrative penalty imposed by the bureau) respectively cited GC82 to support their arguments. This reflects that the referential value of GC82 is not limited to trademark civil cases, but also extends to administrative trademark cases. However, in these two administrative judgments, the Intermediate People's Court of Wuxi Municipality, Jiangsu Province, did not respond to the parties' reference to GC82.

5. Courts' Attitudes Toward Citations of GC82 in Subsequent Judgments/Rulings

On May 13, 2015, the SPC released the *Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"* (the "*Detailed Implementing Rules*") to provide guidance on how to use Guiding Cases.[16] Article 9 states:

> Where a case being adjudicated is, in terms of the basic facts and application of law, similar to a Guiding Case released by the Supreme People's Court, the [deciding] people's court at any level **should** refer to the **"Main Points of the Adjudication"** of that relevant Guiding Case to render its ruling or judgment.
> (emphasis added)

Article 11 provides:

> In the process of handling a case, the personnel handling the case should inquire about relevant Guiding Cases. Where a relevant Guiding Case is quoted in the adjudication document, [the personnel] should, in the part [of the document where they provide] reasons for their adjudication, quote the serial number and the "Main Points of the Adjudication" of the Guiding Case.
>
> Where a public prosecution organ, a party to a case and 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 [providing] the reasons for the adjudication, **respond** [as to] whether [they] referred to the Guiding Case [in the course of their adjudication] and explain their reasons [for doing so].
>
> (emphasis added)

GC82 was released in 2017, and all of its 24 SJ/Rs were rendered after the *Detailed Implementing Rules* came into effect (see **Table 1**).

Of the 24 SJ/Rs, nine (i.e., 37.5%) are SJ/Rs in which the courts cited GC82 in the reasoning section (see **grey rows of Table 1**). While the court of one subsequent judgment indicated that GC82 was not applicable to that case,[17] the courts of the remaining eight SJ/Rs referred to the Main Points of the Adjudication of GC82 and rendered their judgments/rulings accordingly. This "37.5%" figure indicates that most courts did not take a sufficiently proactive attitude towards citing GC82 in the reasoning section and improvement is needed.

However, it is worth noting that in six of the above-mentioned nine SJ/Rs (i.e., 25% of all 24 SJ/Rs), the courts considered GC82 on their own initiative, even though the parties or their lawyers did not mention GC82. The efforts of those courts should be acknowledged.[18]

Among the 24 SJ/Rs, there are 17 SJ/Rs (i.e., 70.8%) in which parties or their lawyers mentioned GC82. Of these 17 SJ/Rs, there are only three in which the courts responded to such mentions in the reasoning section. Such a low response rate indicates that a relatively large number of courts do not respond to references to GC82 made by parties or their lawyers. This practice does not comply with the requirements of the *Detailed Implementing Rules*.

Analysis of Individual Subsequent Judgments/Rulings

Apart from analyzing the overall characteristics of the 24 SJ/Rs of GC82, the author has also carefully reviewed these SJ/Rs. Through an in-depth analysis of a few representative SJ/Rs, the author explores how the courts of these SJ/Rs understood the line of reasoning and the Main Points of the Adjudication of GC82.

The line of reasoning of GC82 is reflected in the "Reasons for the Adjudication" section of the case. The SPC first explained the importance of the principle of good faith. Then, based on this principle, the SPC analyzed the propriety of the acts of both parties. The SPC determined that Ellassay Company had legal prior rights to the business identifier "歌力思", and that the company's use of the identifier was proper. In contrast, WANG Suiyong's acts of obtaining and exercising the "歌力思" trademark rights "could hardly be called proper". On this basis, WANG Suiyong's use of trademark rights obtained in violation of the principle of good faith to bring an infringement of rights lawsuit against Ellassay Company's acts of proper use of its trademark constituted an abuse of rights and the SPC, therefore, rejected all of the litigation requests of WANG Suiyong.

The above line of reasoning was eventually summarized into the following Main Points of the Adjudication:[19]

> 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 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**.
>
> (emphasis added)

Upon a detailed examination of the 24 SJ/Rs, the author has discovered that the courts' understanding of the Main Points of the Adjudication and line of reasoning of GC82 can be roughly categorized into three types discussed below.

1. Courts Cited and Applied the Main Points of the Adjudication of Guiding Case No. 82

Among the nine SJ/Rs in which GC82 was mentioned in the reasoning section (see **grey rows of Table 1**), except for the (2018) Yu 01 Min Zhong No. 2179 Civil Judgment (see **next section**), the courts in all of the remaining eight SJ/Rs followed the line of reasoning used in the adjudication of GC82. These courts first reiterated the importance of the principle of good faith and then analyzed the propriety of the acts of the plaintiff and the defendant. In the end, most of these courts reached similar conclusions as those of GC82.

Two of these SJ/Rs are the first-instance judgment ((2016) Su 02 Min Chu No. 71), and second-instance judgment ((2017) Su Min Zhong No. 1874) of the *TELEMATRIX Trademark Case*. The courts rendering these judgments even extended the Main Points of the Adjudication of GC82 to the determination of malicious trademark litigation. This case involved Bittel Company, which obtained, by improper means and in violation of the principle of good faith, the registration of the trademark in dispute, and brought a trademark infringement lawsuit against Zhongxun Company (i.e., the prior user) to challenge Zhongxun Company's acts that were found to be proper and legally authorized. The High People's Court of Jiangsu Province upheld the first-instance judgment rendered by the Intermediate People's Court of Wuxi Municipality, Jiangsu Province, and provided the following clarification:

> […] although [Guiding] Case No. 82 **did not rule that [the acts of] WANG Suiyong constituted malicious litigation, there are similarities** between Bittel Company's acts of maliciously obtaining the registration of the TELEMATRIX trademark and bringing an infringement of rights lawsuit against Zhongxun Company, the proper user, and WANG Suiyong's acts of obtaining the registration of the "歌力思" trademark without good intentions and bringing an infringement of rights lawsuit against Ellassay Company, the holder of prior legal rights. The **principles and values of the adjudication** of [Guiding] Case No.82 **can serve as a reference in the adjudication of this case**. Therefore, Bittel Company's grounds for appeal—"the first-instance judgment improperly cited the Supreme People's Court's [Guiding] Case No. 82"—lacks a factual basis and is not supported by this court.
>
> (emphasis added)

The clarification mentioned above reflects the High People's Court of Jiangsu Province's careful consideration of the spirit of the ruling in GC82. This will help the development of this case in judicial practice.

> ***"[… the courts rendering] the first-instance judgment […] and second-instance judgment […] of the TELEMATRIX Trademark Case […] even extended the Main Points of the Adjudication of GC82 to the determination of malicious trademark litigation."***

2. Courts Did Not Apply Guiding Case No. 82

In the preceding section, the author points out that the (2018) Yu 01 Min Zhong No. 2179 Civil Judgment was, among the nine SJ/Rs in which GC82 was mentioned in the reasoning section, the only subsequent judgment that did not apply GC82. This judgment is the second-instance civil judgment of *Weijue Company and Heixiaomian Company, A Dispute over Infringement of Trademark Rights*. In the first-instance judgment of this case ((2017) Yu 0112 Min Chu No. 1753), the Yubei District People's Court of Chongqing Municipality referred to GC82 and determined that plaintiff Weijue Company's act of registering and using the trademark in dispute violated the principle of good faith and that the acts of defendant Heixiaomian Company did not constitute infringement.

However, in the second-instance judgment of this case ((2018) Yu 01 Min Zhong No. 2179), the No. 1 Intermediate People's Court of Chongqing Municipality clearly pointed out that there were differences between this case and the basic facts of GC82:

> […] the existing evidence was not sufficient to prove that the three trademarks involved in this case that were registered by Weijue Company conflicted with prior legal rights obtained by others. Furthermore, ***WANG Suiyong v. Shenzhen Ellassay Fashion Co., Ltd., A Dispute over Infringement of Trademark Rights* is different**. In that case, the alleged infringer [Ellassay Company] was the holder of prior rights, and, during the adjudication process, it raised a **clear** defense stating its **prior rights**. The Supreme People's Court comprehensively considered the evidence of the entire case and decided that the alleged infringer had the prior rights and that the right holder [WANG Suiyong]'s registration of the trademark was not based on good intentions.
>
> (emphasis added)

Ultimately, the No. 1 Intermediate People's Court of Chongqing Municipality decided that the first-instance court was wrong in rendering its judgment with reference to GC82, revoked the first-instance judgment, and determined that the defendant's acts constituted trademark infringement.

According to Article 9 of the *Detailed Implementing Rules*, "[w]here a case being adjudicated is, in terms of **the basic facts** and application of law, similar to a Guiding Case released by the Supreme People's Court, the [deciding] people's court [...] should **refer to the 'Main Points of the Adjudication' of that relevant Guiding Case** to render its ruling or judgment". (emphasis added). Therefore, the No. 1 Intermediate People's Court of Chongqing Municipality's identification of the differences between this case and the basic facts of GC82 and its decision of not applying GC82 complied with the requirements of Article 9.[20]

Interestingly, the No. 1 Intermediate People's Court of Chongqing Municipality also shared the following view:

> When determining whether the registration and use of a trademark by a person with the exclusive right to use the registered trademark violate the principle of good faith, [the court] should consider whether these acts are in line with business ethics, rather than making a judgment according to general morality.

Clearly, this view does not affect the court's decision to not apply GC82 and, therefore, strictly speaking, it was not necessary for the court to include this discussion in the judgment. However, it does reflect the court's thoughts about GC82. The author welcomes judges' discussions of Guiding Cases and hopes that similar discussions will vigorously develop outside judgments so as to encourage all interested parties to continue exploring the scope of application of Guiding Cases.

3. Courts Essentially Applied But Did Not Cite the Main Points of the Adjudication of Guiding Case No. 82

Among the 24 SJ/Rs of GC82, even though some courts essentially applied the Main Points of the Adjudication of GC82, they did not follow the requirements of Article 10 of the *Detailed Implementing Rules* to cite GC82 as "a reason for [their] adjudication".[21]

For instance, in the *No. 1 Luming Lake Case*, the first-instance court cited GC82 in the (2018) Yu 10 Min Chu No. 57 Civil Judgment, performed a detailed analysis, and eventually came to the same conclusion as GC82. In the (2018) Yu Min Zhong No. 1166 Civil Judgment, the second-instance court agreed with the result of the first-instance court's adjudication and line of reasoning. Specifically, it did, like the first-instance court, analyze the case by examining the propriety of the parties' acts, but did not cite GC82 or provide further explanation. Instead, the court directly followed Article 59 Paragraph 3 of the then-effective *Trademark Law* (amended in 2013) and rendered a judgment that reached the same conclusion as GC82, based on the view that the defendant had legal prior rights.

In addition, in the (2018) Hu 0115 Min Chu No. 28204 Civil Judgment, the Third-Party of the case, as the legal holder of the prior right to the identifier in dispute, referred to GC82 to support its argument. When conducting its analysis, the court also referred to the line of reasoning in the adjudication of GC82 to discuss the propriety of the parties' acts. However, the basis for the court's decision was also Article 59 Paragraph 3 of the *Trademark Law* (amended in 2013), and the court did not respond to the Third-Party's reference to GC82.

Article 59 Paragraph 3 of the *Trademark Law* (amended in 2013) provided:[22]

> Where, before a trademark registrant applies for the registration of a trademark, another person **has used earlier than the trademark registrant** on commodities that are of the same type as [the trademark registrant's commodities] or similar to them **a trademark that [(1)] is identical with or similar to the registered trademark and [(2)] has certain impact**, the holder of the exclusive right to use the registered trademark has no right to prohibit the [aforementioned] user from continuing to use the trademark within the original scope of use, but may require [the user] to add [to his commodities] appropriate distinguishing identifiers.
>
> (emphasis added)

Although this provision also protects prior rights, as do the Main Points of the Adjudication of GC82, their specific contents are different. The court's practice of using the provision as the basis of its adjudication but not citing GC82 as a reason for its adjudication was not proper.

Conclusion

GC82 shows how the SPC has used this case to advocate the application of the principle of good faith to the adjudication of related trademark infringement cases. The 24 SJ/Rs of GC82 clearly indicate that GC82 provides subsequent courts with an innovative line of reasoning for handling trademark infringement cases, and it has already been cited and referred to by many courts.

In addition, the author has noticed, through her examination of the 24 SJ/Rs, that in recent years, courts have been taking an increasingly active attitude towards citing Guiding Cases to deal with similar cases. It is encouraging that quite a few courts are willing to carefully consider the Main Points of the Adjudication and the spirit of the adjudication of Guiding Cases. Yet, there are also courts that still do not respond to citations of Guiding Cases by parties or their lawyers and this needs improvement.

Finally, in some SJ/Rs, the courts have shown their different understandings of the line of reasoning used in the adjudication of Guiding Cases. These different insights can promote various interested parties' in-depth discussions of the scope of application of Guiding Cases so as to lay a solid foundation for the establishment of a better Guiding Cases System. ■

> ***"Although [Article 59 Paragraph 3 of the* Trademark Law*] also protects prior rights, as do the Main Points of the Adjudication of GC82, their specific contents are different. The court's practice of using the provision as the basis of its adjudication but not citing GC82 as a reason for its adjudication was not proper."***

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* The citation of this China Cases *Insight*™ is: 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.
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[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》(*WANG Suiyong v. Shenzhen Ellassay Fashion Co., Ltd. and Hangzhou Intime Century Department Store Co., Ltd., A Dispute over Infringement of Trademark Rights*), 8 China Law Connect 71 (Mar. 2020), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC82), Mar. 2020, http://cgc.law.stanford.edu/guiding-cases/guiding-case-82 (hereinafter "*Guiding Case No. 82*").

[2] *See* 最高人民法院民三庭、案例指导工作办公室 (The Third Civil Tribunal and the Office for the Work on Case Guidance of the Supreme People's Court), 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》的理解与参照 (*Understanding and Referring to 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*), *in* 《中国案例指导》 (China Case Guidance) (姜启波等编, 法律出版社, 2018) (JIANG Qibo et al. ed., Law Press China, 2018), Volume 6, at 205–206.

[3] *See, e.g.*, Dr. Mei Gechlik & David Wei Zhao, *Pursuing Legal Certainty under an Uncertain System: How Chinese Lawyers and Judges Use Intellectual Property Guiding Cases*, 6 China Law Connect 11 (Sept. 2019), *also available at* Stanford Law School China Guiding Cases Project, Sept. 2019, http://cgc.law.stanford.edu/commentaries/clc-6-201909-30-gechlik-zhao.

[4] The first-instance judgment has not been found and may have been excluded from publication.

[5] The second-instance judgment has not been found and may have been excluded from publication.

[6] (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.

[7] For more information about the case, see *Guiding Case No. 82*, *supra* note 1.

[8] (2017) Yu 0112 Min Chu No. 1753 Civil Judgment, (2018) Jin Min Zhong No. 114 Civil Judgment, (2018) Yu 10 Min Chu No. 57 Civil Judgment, (2017) Su Min Zhong No. 1874 Civil Judgment, and (2018) Jin 01 Min Chu No. 175 Civil Judgment.

[9] (2018) Yu 01 Min Zhong No. 2179 Civil Judgment.

[10] (2018) Yue 03 Min Zhong No. 21433 Civil Judgment and (2017) Min 02 Min Chu No. 733 Civil Judgment.

[11] (2018) Yu 01 Min Zhong No. 2179 Civil Judgment and (2018) Yue 03 Min Zhong No. 21433 Civil Judgment.

[12] (2019) Su 02 Xing Zhong No. 255 Administrative Judgment and (2019) Su 02 Xing Zhong No. 256 Administrative Judgment.

[13] *See* 《最高人民法院关于审理商标案件有关管辖和法律适用范围问题的解释》 (*Interpretation of the Supreme People's Court on Issues Concerning the Jurisdiction and Scope of Application of Laws in Adjudicating Trademark Cases*), Article 2, passed by the Adjudication Committee of the Supreme People's Court on Dec. 25, 2001, issued on Jan. 9, 2002, effective as of Jan. 21, 2002, https://www.pkulaw.com/chl/19900c581946fb3fbdfb.html.

[14] (2019) Jing 73 Min Zhong No. 2609 Civil Judgment.

[15] *See supra* note 12.

[16] 《〈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, Stanford Law School China Guiding Cases Project, English Guiding Cases Rules, June 12, 2015 Edition, http://cgc.law.stanford.edu/guiding-cases-rules/20150513-english (hereinafter "*Detailed Implementing Rules*").

[17] (2018) Yu 01 Min Zhong No. 2179 Civil Judgment.

[18] (2016) Su 02 Min Chu No. 71 Civil Judgment, (2018) Jin 01 Min Chu No. 175 Civil Judgment, (2017) Min 02 Min Chu No. 733 Civil Judgment, (2018) Yue 03 Min Zhong No. 21433 Civil Judgment, (2017) Yu 0112 Min Chu No. 1753 Civil Judgment, and (2018) Jin Min Zhong No. 114 Civil Judgment.

[19] For more information about the case, see *Guiding Case No. 82*, *supra* note 1.

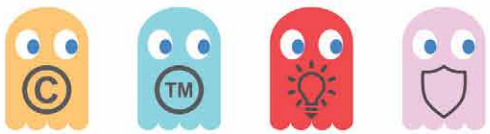
[20] *See* Judge GUO Feng, *On the Issue of the Application of the Supreme Court's Guiding Cases*, 1 China Law Connect 19 (June 2018), *also available at* Stanford Law School China Guiding Cases Project, June 2018, http://cgc.law.stanford.edu/commentaries/clc-1-201806-23-guo-feng ("Only in two sets of circumstances can judges not refer to Guiding Cases in rendering judgments and rulings. The first is where the [pending] case is indeed not similar to [any] Guiding Case. The second is where, even though the [pending] case is similar to a Guiding Case, judges have sufficient reasons to explain why [they] should not refer [to the Guiding Case]").

[21] *Detailed Implementing Rules*, *supra* note 16, Article 10. Article 10 provides: "Where a […] court […] refers to a Guiding Case when adjudicating a similar case, [it] should quote the Guiding Case as a reason for its adjudication, but not cite [the Guiding Case] as the basis of its adjudication.

[22] Article 59 Paragraph 3 remains the same in the currently effective version of the *Trademark Law*. *See* 《中华人民共和国商标法》 (*Trademark Law of the People's Republic of China*), passed and issued on Aug. 23, 1982, effective as of Mar. 1, 1983, amended four times, most recently on Apr. 23, 2019, effective as of Nov. 1, 2019, http://www.sipo.gov.cn/zcfg/zcfgflfg/flfgsb/fl_sb/1140931.htm.

Appendix: 24 Subsequent Judgments/Rulings Which Explicitly Mention Guiding Case No. 82 (identified through December 31, 2019)

No.	Date of Adjudication	Subsequent Judgment/Ruling No.	Link
1	2017/7/26	(2016) Su 02 Min Chu No. 71	http://cgc.law.stanford.edu/judgments/jiangsu-2016-su-02-min-chu-71-civil-judgment
2	2017/8/21	(2016) Yue 0604 Min Chu No. 13131	http://cgc.law.stanford.edu/judgments/guangdong-2016-yue-0604-min-chu-13131-civil-judgment
3	2017/11/29	(2017) Min 0582 Min Chu No. 4139	http://cgc.law.stanford.edu/judgments/fujian-2017-min-0582-min-chu-4139-civil-judgment
4	2018/1/29	(2017) Yu 0112 Min Chu No. 1753	http://cgc.law.stanford.edu/judgments/chongqing-2017-yu-0112-min-chu-1753-civil-judgment
5	2018/1/31	(2017) Yue 0604 Min Chu No. 11948	http://cgc.law.stanford.edu/judgments/guangdong-2017-yue-0604-min-chu-11948-civil-judgment
6	2018/5/28	(2018) Jin Min Zhong No. 114	http://cgc.law.stanford.edu/judgments/tianjin-2018-jin-min-zhong-114-civil-judgment
7	2018/7/3	(2018) Yu 10 Min Chu No. 57	http://cgc.law.stanford.edu/judgments/henan-2018-yu-10-min-chu-57-civil-judgment
8	2018/8/23	(2017) Zhe 01 Min Chu No. 867	http://cgc.law.stanford.edu/judgments/zhejiang-2017-zhe-01-min-chu-867-civil-judgment
9	2018/9/4	(2018) Hu 0115 Min Chu No. 28204	http://cgc.law.stanford.edu/judgments/shanghai-2018-hu-0115-min-chu-28204-civil-judgment
10	2018/9/5	(2018) Yu Min Zhong No. 1166	http://cgc.law.stanford.edu/judgments/henan-2018-yu-min-zhong-1166-civil-judgment
11	2018/9/10	(2018) Yu 01 Min Zhong No. 2179	http://cgc.law.stanford.edu/judgments/chongqing-2018-yu-01-min-zhong-2179-civil-judgment
12	2018/9/28	(2017) Su Min Zhong No. 1874	http://cgc.law.stanford.edu/judgments/jiangsu-2017-su-min-zhong-1874-civil-judgment
13	2018/11/12	(2018) Jin 01 Min Chu No. 175	http://cgc.law.stanford.edu/judgments/tianjin-2018-jin-01-min-chu-175-civil-judgment
14	2018/12/24	(2018) Yu 04 Min Chu No. 335	http://cgc.law.stanford.edu/judgments/henan-2018-yu-04-min-chu-335-civil-judgment
15	2018/12/24	(2018) Yu 04 Min Chu No. 383	http://cgc.law.stanford.edu/judgments/henan-2018-yu-04-min-chu-383-civil-judgment
16	2018/12/24	(2018) Yu 04 Min Chu No. 384	http://cgc.law.stanford.edu/judgments/henan-2018-yu-04-min-chu-384-civil-judgment
17	2018/12/24	(2018) Yu 04 Min Chu No. 394	http://cgc.law.stanford.edu/judgments/henan-2018-yu-04-min-chu-394-civil-judgment
18	2018/12/26	(2018) Yu 04 Min Chu No. 364	http://cgc.law.stanford.edu/judgments/henan-2018-yu-04-min-chu-364-civil-judgment
19	2018/12/26	(2018) Yu 04 Min Chu No. 366	http://cgc.law.stanford.edu/judgments/henan-2018-yu-04-min-chu-366-civil-judgment
20	2019/1/17	(2018) Yue 03 Min Zhong No. 21433	http://cgc.law.stanford.edu/judgments/guangdong-2018-yue-03-min-zhong-21433-civil-judgment
21	2019/4/3	(2017) Min 02 Min Chu No. 733	http://cgc.law.stanford.edu/judgments/fujian-2017-min-02-min-chu-733-civil-judgment
22	2019/11/11	(2019) Jing 73 Min Zhong No. 2609	http://cgc.law.stanford.edu/judgments/beijing-2019-jing-73-min-zhong-2609-civil-judgment
23	2019/11/29	(2019) Su 02 Xing Zhong No. 255	http://cgc.law.stanford.edu/judgments/jiangsu-2019-su-02-xing-zhong-255-administrative-judgment
24	2019/11/29	(2019) Su 02 Xing Zhong No. 256	http://cgc.law.stanford.edu/judgments/jiangsu-2019-su-02-xing-zhong-256-administrative-judgment



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*

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摘要

指导案例82号是商标侵权领域适用诚实信用原则的创新性案例，也是少有拥有较多后续裁判的知识产权指导性案例，其发布后三年内就被24个后续裁判中的当事人和/或法院所援引。本文作者检视了这24个后续裁判，发现部分法院对当事人提出指导性案例的情况未能作出适当回应，但也有法院恰当地详细分析和参照该指导性案例。此外，后续裁判的法院对指导案例82号裁判思路有不同的见解，对其裁判要点也有不尽相同的处理。这些多元发展对探索指导案例82号裁判要点的适用范围非常有助。因此，当指导案例82号有更多后续裁判时，此类的研究应继续进行。

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]指导案例82号源自一起最终由最高法判决的侵害商标权纠纷案。在判决时，最高法基于诚实信用原则，综合考虑王碎永行为的正当性，认定其恶意取得并行使商标权的行为不受法律保护。该案积极回应了社会反映强烈的不诚信获得和行使商标权的行为，属于商标侵权领域贯彻诚实信用原则的创新性案例。[2]

截至2019年12月31日，即在发布指导案例82号之后约三年，就有24个后续裁判提及该指导性案例，远远多于许多其他知识产权指导性案例。[3]本文通过分析后续裁判中法院对参照指导案例82号的态度和处理该案例裁判要点的方式，进一步展示了指导性案例的参考价值及对后续裁判的影响。

指导案例82号的由来

深圳歌力思服装实业有限公司（后更名为“深圳歌力思服饰股份有限公司”（“歌力思公司”），即一审被告人）及其关联企业自1996年开始将“歌力思”作为企业字号使用，并于1999年在第25类的服装等商品上取得“歌力思”注册商标专用权（第1348583号）。此外，歌力思公司是第4225104号“ELLASSAY”的商标注册人。歌力思公司在杭州银泰世纪百货有限公司（“杭州银泰公司”）的“ELLASSAY”专柜中销售带有“品牌中文名：歌力思，品牌英文名：ELLASSAY”字样吊牌的皮包。

一审原告人王碎永于2011年6月申请注册了第7925873号“歌力思”商标，该商标核定使用商品为第18类的钱包、手提包等。王碎永还曾于2004年7月7日申请注册第4157840号“歌力思及图”商标。后因北京市高级人民法院于2014年4月2日作出的二审判决认定，该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。

2012年3月7日，王碎永以歌力思公司及杭州银泰公司生产、销售上述皮包的行为构成对王碎永拥有的“歌力思”商标、“歌力思及图”商标权的侵害为由，提起诉讼。

杭州市中级人民法院于2013年2月1日作出（2012）浙杭知初字第362号民事判决，[4]认为歌力思公司及杭州银泰公司生产、销售被诉侵权商品的行为侵害了王碎永的注册商标专用权。歌力思公司不服，提起上诉。浙江省高级人民法院于2013年6月7日作出（2013）浙知终字第222号民事判决，[5]驳回上诉、维持原判。歌力思公司及王碎永均不服，向最高法申请再审。最高法裁定提审本案，并于2014年8月14日作出（2014）民提字第24号民事判决，[6]撤销一审、二审判决，驳回王碎永的全部诉讼请求。

最终，该案被选为指导案例82号，其裁判要点为：[7]

> 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。

后续裁判的总体特征

表1列出了截至2019年12月31日，笔者在“中国裁判文书网”（http://wenshu.court.gov.cn）官方网站上找到的24个明确提及指导案例82号的后续裁判（即：在裁判文书的任何部分中提及该指导性案例，不论是案例名称的全部或部分被提及，或仅提及指导案例案号）。

表1亦列出谁于后续裁判中提及指导案例82号：当事人（或其律师）；审判法院在题为“本院认为”的

任若雨
斯坦福法学院中国指导性案例项目助理执行编辑
任若雨是上海天尚律师事务所（Shanghai Law View Partners）的一名执业律师。其主要执业领域为娱乐法、知识产权法及公司法。在此之前，她在北京市竞天公诚律师事务所上海分所担任见习律师，提供过多项资本市场领域的法律服务。任若雨在南京大学法学院获得法学学士学位，随后在香港大学法学院获得公司与金融法方向的法律硕士学位（Master of Laws in Corporate and Financial Law）。

序号	审判日期	后续裁判号	审判法院	谁提及指导案例82号*
1	2017/7/26	（2016）苏02民初71号	江苏省无锡市中级人民法院	法院（说理部分）
2	2017/8/21	（2016）粤0604民初13131号	广东省佛山市禅城区人民法院	当事人/律师；法院（其他部分）
3	2017/11/29	（2017）闽0582民初4139号	福建省晋江市人民法院	当事人/律师；法院（其他部分）
4	2018/1/29	（2017）渝0112民初1753号	重庆市渝北区人民法院	法院（说理部分）
5	2018/1/31	（2017）粤0604民初11948号	广东省佛山市禅城区人民法院	当事人/律师；法院（其他部分）
6	2018/5/28	（2018）津民终114号	天津市高级人民法院	法院（说理部分）
7	2018/7/3	（2018）豫10民初57号	河南省许昌市中级人民法院	当事人/律师；法院（说理部分）
8	2018/8/23	（2017）浙01民初867号	浙江省杭州市中级人民法院	当事人/律师；法院（其他部分）
9	2018/9/4	（2018）沪0115民初28204号	上海市浦东新区人民法院	当事人/律师
10	2018/9/5	（2018）豫民终1166号	河南省高级人民法院	法院（其他部分）
11	2018/9/10	（2018）渝01民终2179号	重庆市第一中级人民法院	当事人/律师；法院（其他部分）；法院（说理部分）
12	2018/9/28	（2017）苏民终1874号	江苏省高级人民法院	当事人/律师；法院（其他部分）；法院（说理部分）
13	2018/11/12	（2018）津01民初175号	天津市第一中级人民法院	法院（说理部分）
14	2018/12/24	（2018）豫04民初335号	河南省平顶山市中级人民法院	当事人/律师
15	2018/12/24	（2018）豫04民初383号	河南省平顶山市中级人民法院	当事人/律师
16	2018/12/24	（2018）豫04民初384号	河南省平顶山市中级人民法院	当事人/律师
17	2018/12/24	（2018）豫04民初394号	河南省平顶山市中级人民法院	当事人/律师
18	2018/12/26	（2018）豫04民初364号	河南省平顶山市中级人民法院	当事人/律师
19	2018/12/26	（2018）豫04民初366号	河南省平顶山市中级人民法院	当事人/律师
20	2019/1/17	（2018）粤03民终21433号	广东省深圳市中级人民法院	法院（说理部分）
21	2019/4/3	（2017）闽02民初733号	福建省厦门市中级人民法院	法院（说理部分）
22	2019/11/11	（2019）京73民终2609号	北京知识产权法院	当事人/律师；法院（其他部分）
23	2019/11/29	（2019）苏02行终255号	江苏省无锡市中级人民法院	当事人/律师
24	2019/11/29	（2019）苏02行终256号	江苏省无锡市中级人民法院	当事人/律师

*本栏显示谁于后续裁判提及指导案例82号：
（1）当事人（或其律师）（标记为“当事人/律师”）；
（2）审判法院在题为“本院认为”的说理部分（标记为“法院（说理部分）”）；
（3）审判法院在说理部分以外的其他部分（标记为“法院（其他部分）”）。
如果上述两种或以上情况发生，则用“；”分隔。

表1：24个明确提及指导案例82号的后续裁判（截至2019年12月31日）

说理部分提及该案例（见**灰色行**）；或/和审判法院在“本院认为”说理部分以外的其他部分。

以下各节会通过按裁判年份、法院级别、裁判程序阶段、案件类型的分布，以及法院如何处理涉及当事人提出指导案例82号的情况来分析这些后续裁判。

1. 裁判年份分布

表2反映了指导案例82号24个后续裁判的裁判年份分布。指导案例82号于2017年3月发布，因而在2017年还尚未被广泛的引用。但是，该案例在2018年被引用数量大大增多（16个后续裁判），其中5个后续裁判的法

院在说理部分参照适用指导案例82号，[8] 1个后续裁判的法院在说理部分分析为何指导案例82号并不适用于该案件。[9] 到了2019年，虽然后续裁判数量有所减少，但5个后续裁判中仍有2个后续裁判的法院在说理部分参照适用指导案例82号。[10]

2. 法院级别分布

表3显示了24个后续裁判的审判法院级别分布。中级法院处理的后续裁判数量（15个）远远超过高级法院、基层法院及专门法院所处理的数量。在这15个由中级法院处理的后续裁判中，除了2个是二审民事案件、[11] 2个是二审行政案件外，[12] 其余11个均是商标领域的一审民事案件。根据最高法的相关司法解释，商标一审民事案件一般由中级以上的人民法院管辖，少量案件可以经最高法批准由高级人民法院在较大城市所确定的一到两个基层人民法院受理。[13] 因此，11个商标一审民事案件是由中级法院所处理的，反映了该司法解释对相关法院管辖的规定。

相应地，在说理部分提及指导案例82号的法院中，也是中级法院占较大多数。值得注意的是，一个后续案件是由北京知识产权法院作出的二审民事判决，但该法院并未在说理部分对当事人援引指导案例82号作出回应。[14] 作为主要处理知识产权案件的专门法院，该法院的法官应更积极地在说理部分解释知识产权领域的指导性案例是否适用。

3. 裁判程序阶段分布

表4显示了24个后续裁判的裁判程序阶段分布。可以看出，一审程序的裁判数量比二审程序的裁判数量多一倍，但法院在说理部分提及指导案例82号的裁判数量却相差不多，这反映出二审法院更加积极地在说理部分中援引指导案例82号处理案件。

4. 案件类型分布

在24个后续裁判中，2个是行政判决，其余都是民事判决（见**表5**）。在2个行政判决中，[15] 被上诉人（即一审被告无锡市锡山区市场监督局）和上诉人（即不服该局作出的行政处罚的当事人）分别援引指导案例82号来支持各自的主张。这反映出指导案例82号的参考价值不限于商标民事案件，也引申至商标行政案件。但前述两个行政判决中，江苏省无锡市中级人民法院均未对当事人提及指导案例82号的行为做出回应。

5. 后续裁判中法院面对援引指导案例82号的态度

针对如何使用指导性案例，最高法于2015年5月13日公布了《〈最高人民法院关于案例指导工作的规定〉实施细则》（“《实施细则》”）。[16] 其中第九条规定：

> 各级人民法院正在审理的案件，在基本案情和法律适用方面，与最高人民法院发布的指导性案例相类似的，**应当**参照相关指导性案例的**裁判要点**作出裁判。（强调后加）

第十一条规定：

> 在办理案件过程中，案件承办人员应当查询相关指导性案例。在裁判文书中引述相

裁判年份	后续裁判数量	其中：法院于说理部分提及指导案例82号的后续裁判数量
2017	3	1
2018	16	6
2019	5	2
总数	**24**	**9**

表2：24个后续裁判（按裁判年份分布）

法院级别	后续裁判数量	其中：法院于说理部分提及指导案例82号的后续裁判数量
高级	3	2
中级	15	6
基层	5	1
专门（知识产权）	1	0
总数	**24**	**9**

表3：24个后续裁判（按法院级别分布）

裁判程序阶段	后续裁判数量	其中：法院于说理部分提及指导案例82号的后续裁判数量
一审	16	5
二审	8	4
总数	**24**	**9**

表4：24个后续裁判（按裁判程序阶段分布）

案件类型	后续裁判数量	其中：法院于说理部分提及指导案例82号的后续裁判数量
民事	22	9
行政	2	0
总数	**24**	**9**

表5：24个后续裁判（按案件类型分布）

“中级法院处理的后续裁判数量[...]远远超过高级法院、基层法院及专门法院所处理的数量。[...]反映了该司法解释对相关法院管辖的规定。”

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

指导案例82号发布于2017年，其所有24个后续裁判都是在《实施细则》生效后作出的（见**表1**）。

在24个后续裁判中，共有9个后续裁判（即24个的37.5%）的法院在说理部分援引了指导案例82号（见**表1灰色行**），而除了1个后续裁判的法院指出指导案例82号并不适用于该案件之外，[17] 其余8个后续裁判的法院都参照了指导案例82号的裁判要点作出裁判。“37.5%”这个数字反映了多数法院对于在说理部分援引指导案例82号的态度不够积极，这是需要改进的。

但是，值得关注的是，在上述9个后续裁判中，有6个后续裁判（即所有24个后续裁判的25%）的法院是在当事人及其律师未提及指导案例82号的情形下，主动考虑参照指导案例82号，这些法院的努力应得到肯定。[18]

在24个后续裁判中，当事人或其律师提及指导案例82号的共有17个（即24个的70.8%）；其中，仅有3个后续裁判得到了法院在说理部分的回应。这么低的回应率表明，仍有较多法院对于当事人或其律师提及指导案例82号的情况不予回应，这样的做法不符合《实施细则》的要求。

后续裁判的个案分析

除了分析指导案例82号的24个后续裁判的总体特征，笔者也仔细查阅这些后续裁判，并通过深入分析当中具有典型性的个案来探究这些后续裁判的法院到底是如何理解指导案例82号的裁判思路和裁判要点。

指导案例82号的裁判思路体现于该案例的“裁判理由”部分。首先，最高法说明诚实信用原则的重要性。之后，最高法依据此原则分析双方当事人行为的正当性。最高法认为歌力思公司对于商业标识“歌力思”享有合法的在先权利，并且对此标识的使用具有正当性。相反，王碎永取得和行使“歌力思”商标权的行为“难谓正当”。基于此，王碎永以违反诚实信用原则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，最高法驳回王碎永的全部诉讼请求。

以上的裁判思路最终被归纳为以下的裁判要点：[19]

> 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**。
> （强调后加）

通过详细检视24个后续裁判，笔者发现法院对于指导案例82号的裁判要点和裁判思路的理解大致有以下三种类型。

1. 法院援引适用指导案例82号裁判要点

在9个于说理部分提及指导案例82号的后续裁判中（见**表1灰色行**），除了（2018）渝01民终2179号民事判决之外（见**下一节**），其余8个后续裁判的法院都按上述指导案例82号的裁判思路，先重申诚实信用原则的重要性，再分析原告及被告行为的正当性。这些后续裁判的法院多数都得出了与指导案例82号相似的结论。

其中，《TELEMATRIX商标案》的一审判决（即：（2016）苏02民初71号）和二审判决（即：（2017）苏民终1874号）更把指导案例82号的裁判要点延伸到商标领域恶意诉讼的认定。该案涉及比特公司以违反诚实信用的不正当手段获得了系争商标的注册，并对中讯公司（即：在先使用人）经合法授权的正当使用行为提起侵权之诉。江苏省高级人民法院维持该省无锡市中级人民法院的一审判决，并作出如下说明：

> [...] 虽然82号案例并**没有判定王碎永构成恶意诉讼**，但比特公司恶意取得TELEMATRIX商标注册，并对正当使用人中讯公司提起侵权之讼，与王碎永非善意取得“歌力思”商标注册，并对在先合法权利人歌力思公司提起侵权之诉，**具有类似性**，82号案例的**裁判原则和价值取向可以作为本案审理时的参考**，故比特公司提出的“一审判决引用最高人民法院82号案例不当”的上诉理由，无事实依据，本院不予支持。
> （强调后加）

“《TELEMATRIX商标案》的一审判决[...]和二审判决[...]更把指导案例82号的裁判要点延伸到商标领域恶意诉讼的认定。”

上述的说明反映了江苏省高级人民法院深入思考了指导案例82号的判决精神，有助于该案例在司法实践中的发展。

2. 法院不予适用指导案例82号

在上一节，笔者已经指出（2018）渝01民终2179号民事判决是九个在说理部分提及指导案例82号的后续裁

判中唯一一个没有援引适用指导案例82号的后续裁判。该民事判决是《味爵公司与嘿小面公司侵害商标权纠纷案》的二审判决。在该案一审判决（即：（2017）渝0112民初1753号）中，重庆市渝北区人民法院参照指导案例82号认定原告味爵公司注册和使用涉案商标的行为违反诚实信用原则且被告嘿小面公司不构成侵权。

但是，在二审判决（即：（2018）渝01民终2179号）中，重庆市第一中级人民法院清楚指出该案与指导案例82号的基本案情有区别：

> [...] 现有证据不足以证明昧爵公司注册的涉案三项商标与他人在先取得的合法权利相冲突。而**王碎永诉深圳歌力思服饰股份有限公司侵害商标权案则与此不同**，该案中的被控侵权人[歌力思公司]即为在先权利人，其在案件审理过程中提出了**明确的在先权利**抗辩，最高人民法院综合全案证据认为被控侵权人享有在先权利，权利人[王碎永]注册商标非善意。
> （强调后加）

最终，重庆市第一中级人民法院认为一审法院参照指导案例82号所作出的判决有误，予以撤销该判决，并认定被告的行为构成商标侵权。

根据《实施细则》第九条的规定，"[...]法院正在审理的案件，在**基本案情**和法律适用方面，与最高人民法院发布的指导性案例相类似的，应当**参照相关指导性案例的裁判要点**作出裁判"（强调后加）。因此，重庆市第一中级人民法院在判决中明确了该案与指导案例82号基本案情的差异，继而不参照指导案例82号的做法符合第九条的要求。[20]

有趣的是，重庆市第一中级人民法院也分享了如下看法：

> 在判断注册商标专用人注册、使用商标的行为是否违反诚实信用原则时应考虑其行为是否符合商业道德，而非进行一般的道德判断。

当然，这些看法并不影响该法院不予适用指导案例82号的决定。所以，严格而言，这些讨论在该判决中是不必要的，但其亦反映了该法院对指导案例82号的思考。笔者乐见法官们对指导性案例的探讨，并希望类似讨论能在判决以外蓬勃发展，鼓励各方不断探索指导性案例的适用范围。

3. 法院实质适用却未援引指导案例82号裁判要点

在指导案例82号的24个后续裁判中，部分法院尽管实质适用指导案例82号的裁判要点，但却没有依照《实施细则》第十条的规定，将指导案例82号作为"裁判理由"引述。[21]

例如，在《鹿鸣湖壹号案》中，一审法院在（2018）豫10民初57号民事判决中援引了指导案例82号，并进行了详细分析，最终得出了与指导案例82号相同的结论。而二审法院在（2018）豫民终1166号民事判决中，虽然认可了一审法院的判决结果及分析思路，同样从行为正当性角度出发分析当事人行为，但却未重新援引指导案例82号，也未说明理由，而是直接依据当时有效的2013年修正的《商标法》第五十九条第三款，从被告享有合法在先权利角度直接作出了与指导案例82号结论相同的判决。

> ***"尽管[《商标法》第五十九条第三款]亦如指导案例82号裁判要点一样，保护在先权利，但两者具体内容不同，将前者作为裁判依据而没有把后者以裁判理由援引的做法并不适当。"***

此外，在（2018）沪0115民初28204号民事判决中，第三人作为诉争标识的合法在先权利人，援引指导案例82号支持其主张。法院在进行分析时，同样参照指导案例82号的裁判思路对各方当事人行为的正当性进行了论证，但其依据同样是2013年修正的《商标法》第五十九条第三款，也并未对第三人提及指导案例82号作出回应。

2013年修正的《商标法》第五十九条第三款规定：[22]

> 商标注册人申请商标注册前，他人已经在同一种商品或者类似商品上**先于商标注册人使用与注册商标相同或者近似并有一定影响的商标**的，注册商标专用权人无权禁止该使用人在原使用范围内继续使用该商标，但可以要求其附加适当区别标识。
> （强调后加）

尽管该条款亦如指导案例82号裁判要点一样，保护在先权利，但两者具体内容不同，将前者作为裁判依据而没有把后者以裁判理由援引的做法并不适当。

结论

指导案例82号展示了最高法如何通过该案例倡导适用诚实信用原则来处理相关商标侵权案件。指导案例82号的24个后续裁判清楚表明该案例为后续法院提供了处理商标侵权案件的创新性思路，并得到了很多法院的援引和参照。

此外，通过检视24个后续裁判，作者意识到近几年法院对于援引指导性案例处理类似案件的态度越来越积极。不少法院愿意对指导性案例的裁判要点和判决精神进行深入思考，这是值得欣喜的。当然，也有部分法院仍然未对当事人或其律师提及指导性案例的行为进行回应，这是需要改善的。

最后，部分法院在后续裁判中表达了其对指导性案例的判决思路的不同见解。见解的不同能促进各方深入探讨指导性案例的适用范围，为建立一个更完善的指导性案例制度提供稳固的基础。■

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* 此中国案例*见解*™的引用是：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。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 *见*最高人民法院民三庭、案例指导工作办公室，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》的理解与参照，*载于*《中国案例指导》（姜启波等编，法律出版社，2018），总第6辑，第205–206页。

3 *见，例如，*熊美英博士、赵炜，在不确定制度下追求法律确定性：中国律师和法官如何使用知识产权指导性案例，《中国法律连接》，第6期，第23页（2019年9月），*亦见于*斯坦福法学院中国指导性案例项目，2019年9月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-6-201909-30-gechlik-zhao。

4 一审判决书尚未找到，有可能已被排除在公布之外。

5 二审判决书尚未找到，有可能已被排除在公布之外。

6 （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。

7 关于该案的更多内容，见指导案例82号，注释1。

8 （2017）渝0112民初1753号民事判决、（2018）津民终114号民事判决、（2018）豫10民初57号民事判决、（2017）苏民终1874号民事判决和（2018）津01民初175号民事判决。

9 （2018）渝01民终2179号民事判决。

10 （2018）粤03民终21433号民事判决和（2017）闽02民初733号民事判决。

11 （2018）渝01民终2179号民事判决和（2018）粤03民终21433号民事判决。

12 （2019）苏02行终255号行政判决和（2019）苏02行终256号行政判决。

13 *见*《最高人民法院关于审理商标案件有关管辖和法律适用范围问题的解释》，第二条，2001年12月25日由最高人民法院审判委员会通过，2002年1月9日公布，2002年1月21日起施行，https://www.pkulaw.com/chl/19900c581946fb3fbdfb.html。

14 （2019）京73民终2609号民事判决。

15 *见*注释12。

16 《〈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，斯坦福法学院中国指导性案例项目，中文指导性案例规则，2015年6月12日（最终版本），https://cgc.law.stanford.edu/zh-hans/guiding-cases-rules/20150513-chinese（以下简称“《实施细则》”）。

17 （2018）渝01民终2179号民事判决。

18 （2016）苏02民初71号民事判决、（2018）津01民初175号民事判决、（2017）闽02民初733号民事判决、（2018）粤03民终21433号民事判决、（2017）渝0112民初1753号民事判决和（2018）津民终114号民事判决。

19 关于该案的更多内容，见指导案例82号，注释1。

20 *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（“只有两种情况下，法官可以不参照指导性案例作出裁判：一是案件和指导性案例确实不相类似；二是案件尽管与指导性案例相类似，但法官有充分理由说明不应当参照。”）。

21 《实施细则》，注释16，第十条。该条规定：“[…]法院审理类似案件参照指导性案例的，应当将指导性案例作为裁判理由引述，但不作为裁判依据引用”。

22 在当前《商标法》有效版本中第五十九条第三款维持不变。*见*《中华人民共和国商标法》，1982年8月23日通过和公布，1983年3月1日起施行，经四次修正，最新修正于2019年4月23日，2019年11月1日起施行，http://www.sipo.gov.cn/zcfg/zcfgflfg/flfgsb/fl_sb/1140931.htm。

附录：24个明确提及指导案例82号的后续裁判（截至2019年12月31日）

序号	审判日期	后续裁判号	链接
1	2017/7/26	（2016）苏02民初71号	http://cgc.law.stanford.edu/zh-hans/judgments/jiangsu-2016-su-02-min-chu-71-civil-judgment
2	2017/8/21	（2016）粤0604民初13131号	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2016-yue-0604-min-chu-13131-civil-judgment
3	2017/11/29	（2017）闽0582民初4139号	http://cgc.law.stanford.edu/zh-hans/judgments/fujian-2017-min-0582-min-chu-4139-civil-judgment
4	2018/1/29	（2017）渝0112民初1753号	http://cgc.law.stanford.edu/zh-hans/judgments/chongqing-2017-yu-0112-min-chu-1753-civil-judgment
5	2018/1/31	（2017）粤0604民初11948号	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2017-yue-0604-min-chu-11948-civil-judgment
6	2018/5/28	（2018）津民终114号	http://cgc.law.stanford.edu/zh-hans/judgments/tianjin-2018-jin-min-zhong-114-civil-judgment
7	2018/7/3	（2018）豫10民初57号	http://cgc.law.stanford.edu/zh-hans/judgments/henan-2018-yu-10-min-chu-57-civil-judgment
8	2018/8/23	（2017）浙01民初867号	http://cgc.law.stanford.edu/zh-hans/judgments/zhejiang-2017-zhe-01-min-chu-867-civil-judgment
9	2018/9/4	（2018）沪0115民初28204号	http://cgc.law.stanford.edu/zh-hans/judgments/shanghai-2018-hu-0115-min-chu-28204-civil-judgment
10	2018/9/5	（2018）豫民终1166号	http://cgc.law.stanford.edu/zh-hans/judgments/henan-2018-yu-min-zhong-1166-civil-judgment
11	2018/9/10	（2018）渝01民终2179号	http://cgc.law.stanford.edu/zh-hans/judgments/chongqing-2018-yu-01-min-zhong-2179-civil-judgment
12	2018/9/28	（2017）苏民终1874号	http://cgc.law.stanford.edu/zh-hans/judgments/jiangsu-2017-su-min-zhong-1874-civil-judgment
13	2018/11/12	（2018）津01民初175号	http://cgc.law.stanford.edu/zh-hans/judgments/tianjin-2018-jin-01-min-chu-175-civil-judgment
14	2018/12/24	（2018）豫04民初335号	http://cgc.law.stanford.edu/zh-hans/judgments/henan-2018-yu-04-min-chu-335-civil-judgment
15	2018/12/24	（2018）豫04民初383号	http://cgc.law.stanford.edu/zh-hans/judgments/henan-2018-yu-04-min-chu-383-civil-judgment
16	2018/12/24	（2018）豫04民初384号	http://cgc.law.stanford.edu/zh-hans/judgments/henan-2018-yu-04-min-chu-384-civil-judgment
17	2018/12/24	（2018）豫04民初394号	http://cgc.law.stanford.edu/zh-hans/judgments/henan-2018-yu-04-min-chu-394-civil-judgment
18	2018/12/26	（2018）豫04民初364号	http://cgc.law.stanford.edu/zh-hans/judgments/henan-2018-yu-04-min-chu-364-civil-judgment
19	2018/12/26	（2018）豫04民初366号	http://cgc.law.stanford.edu/zh-hans/judgments/henan-2018-yu-04-min-chu-366-civil-judgment
20	2019/1/17	（2018）粤03民终21433号	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2018-yue-03-min-zhong-21433-civil-judgment
21	2019/4/3	（2017）闽02民初733号	http://cgc.law.stanford.edu/zh-hans/judgments/fujian-2017-min-02-min-chu-733-civil-judgment
22	2019/11/11	（2019）京73民终2609号	http://cgc.law.stanford.edu/zh-hans/judgments/beijing-2019-jing-73-min-zhong-2609-civil-judgment
23	2019/11/29	（2019）苏02行终255号	http://cgc.law.stanford.edu/zh-hans/judgments/jiangsu-2019-su-02-xing-zhong-255-administrative-judgment
24	2019/11/29	（2019）苏02行终256号	http://cgc.law.stanford.edu/zh-hans/judgments/jiangsu-2019-su-02-xing-zhong-256-administrative-judgment

Guiding Case No. 8 and 66 Related Subsequent Judgments/Rulings: How to Determine "Whether Serious Difficulty Occurs in the Operation and Management of a Company"*

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Abstract

Shareholders who bring corporate dissolution lawsuits must meet the "serious difficulty occurs in the operation and management of a company" condition. Guiding Case No. 8 ("GC8") makes up for the inadequate regulation of this condition in China's *Company Law* and a related judicial interpretation by providing a clearer method for its determination to be used in judicial practice. Since GC8 has important referential value, as of December 31, 2019, 66 subsequent judgments/rulings ("SJ/Rs") in which the parties and/or courts cited this Guiding Case have already been identified.

The authors of this article have conducted in-depth research on these 66 SJ/Rs and found that the facts of these SJ/Rs are varied and complex, and the parties and courts interpreted and used GC8 quite differently. When the parties sought to apply GC8, some courts failed to respond properly, whereas quite a few other courts referred to and applied this Guiding Case correctly.

Overall, GC8 has had a noticeable guiding effect on the adjudication of most of these SJ/Rs, but in some of the SJ/Rs, the courts held different opinions on the line of reasoning used in GC8. For example, some courts had different views about the conditions that need to be satisfied in lawsuits seeking compulsory corporate dissolution, while a few other courts allowed, on the basis of GC8, for exceptions in consideration of actual situations in society.

These different understandings of GC8 show many Chinese judges' serious attitudes toward the development of cases. As more SJ/Rs related to GC8 are adjudicated, the determination method and specific application of the "serious difficulty occurs in the operation and management of a company" condition will certainly and gradually become clear so as to achieve the ultimate goals of the Guiding Cases System: "to summarize adjudication experiences, unify the application of law, enhance adjudication quality, and safeguard judicial impartiality".[1]

Introduction

According to Article 183 of the *Company Law of the People's Republic of China*[2] (the "*Company Law*") (see **Sidebar 1**), a shareholder who brings a lawsuit to dissolve a company must satisfy the "serious difficulty occurs in the operation and management of a company" condition. However, neither the *Company Law* nor Article 1 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"* (the "*Company Law Interpretation (II)*")[3] (see **Sidebar 2**) further explains how to interpret this condition. As Article 183 contains multiple vague terms, including "operation and management", "serious difficulty", "shareholders' interests", "substantial loss", and "any other means", it is difficult for courts to grasp the adjudication standards in judicial practice.

On April 9, 2012, the Supreme People's Court (the "SPC") released Guiding Case No. 8 (*LIN Fangqing v. Changshu Kailai Industrial Co., Ltd. and DAI Xiaoming, A Corporate Dissolution Dispute*) ("GC8").[4] The case originated from a corporate dissolution dispute that was ultimately decided by the High People's Court of Jiangsu Province. According to the judgment of the court, the determination of "whether serious difficulty occurs in the operation and management of a company" should be made by analyzing the overall operational state of the company's organizational structure, with a focus on examining whether there are serious internal impediments in the company's management, including the long-term failure of the shareholders' meeting mechanism

Sidebar 1:

***Company Law of the People's Republic of China* (2005 Version)**

Article 183

Where **serious difficulty occurs in the operation and management of a company**, [the company's] continued existence will cause a **substantial loss** to **shareholders' interests**, and [the difficulty] cannot be resolved by **any other means**, the shareholder who holds ten percent or more of the voting rights of all the shareholders of the company may request that a people's court dissolve the company.

(emphasis added)

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and an inability to make decisions regarding the company's operation and management. The term "serious difficulty occurs in the operation and management of a company" should not be partially understood to mean operational difficulty, such as the company's lack of capital and serious financial loss. Therefore, for a company that is in a profitable state but has the aforementioned serious management impediments, a court can still determine that serious difficulty occurs in the operation and management of the company.

The SPC summarized the above reasons for the decision of the High People's Court of Jiangsu Province as the

Sidebar 2:

***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"* (2008 Version)**

Article 1

Where a shareholder individually or collectively holding ten percent or more of the voting rights of all the shareholders of the company brings a lawsuit to dissolve the company on one of the following grounds and in conformity with **Article 183 of the *Company Law***, a people's court should accept [the lawsuit]:

(1) the company has been unable to hold a shareholders' meeting or shareholders' general meeting for two or more consecutive years, and [thus] serious difficulty occurs in the operation and management of the company;

(2) during voting, the shareholders cannot reach the statutory ratio or the ratio prescribed by the company's articles of association, making it impossible to have a valid resolution of a shareholders' meeting or shareholders' general meeting for two or more consecutive years, and [thus] serious difficulty occurs in the operation and management of the company;

(3) for a long time, the directors of the company have been in conflict, which cannot be resolved by a shareholders' meeting or shareholders' general meeting, and [thus] serious difficulty occurs in the operation and management of the company;

(4) other types of serious difficulties occur in the operation and management [of the company], and [the company's] continued existence will cause a substantial loss to shareholders' interests.

Where a shareholder brings a lawsuit to dissolve the company on the grounds that his rights and interests, such as the right to information and the right to request distribution of profits, have been harmed, that the company has lost money and its property is insufficient to pay off all [the company's] debts, or that the enterprise legal person business license of the company has been cancelled but liquidation has not been carried out, a people's court shall not accept [the lawsuit].

(emphasis added)

Main Points of the Adjudication of GC8 (see **below**), providing courts handling similar subsequent cases with clearer guidance on the determination of "whether serious difficulty occurs in the operation and management of a company". Considering there are large differences in the facts on which shareholders rely to bring their corporate dissolution lawsuits, and these facts—covering different aspects, including "management impediments", "state of profitability", and "shareholding ratio"—influence how the Main Points of the Adjudication of GC8 are interpreted, as of December 31, 2019, 66 subsequent judgments/rulings ("SJ/Rs") citing GC8 have already been identified. This makes GC8 one of the Guiding Cases with a relatively large number of SJ/Rs.

By analyzing how the courts of these 66 SJ/Rs interpreted and used GC8, this article addresses the difficulty of determining "whether serious difficulty occurs in the operation and management of a company" in adjudication, and clarifies the referential value of GC8 and its impact on subsequent judicial practice.

The Origin of Guiding Case No. 8

LIN Fangqing and DAI Xiaoming were the shareholders of Changshu Kailai Industrial Co., Ltd. ("Kailai Company"), each owning 50% of its shares. DAI Xiaoming was the statutory representative and executive director of the company, while LIN Fangqing was the general manager and supervisor of the company. Kailai Company's articles of association clearly stated:

> Resolutions of shareholders' meetings must be passed by shareholders representing more than half of the voting rights. However, any resolution concerning an increase or a decrease of the registered capital, merger, dissolution, change of corporate form, or amendment to the articles of association must be passed by shareholders representing more than two-thirds of the voting rights.

Voting rights at shareholders' meetings were exercised by shareholders in proportion to their capital contributions.

Due to sharp conflicts between LIN Fangqing and DAI Xiaoming, Kailai Company had not held a shareholders' meeting since June 1, 2006. In addition, the opinions of these two shareholders differed and they refused to cooperate. The company could not be managed by means of resolutions of shareholders' meetings, and the shareholders' meeting mechanism had failed. In conflict with the other shareholder, Executive Director DAI Xiaoming was unable to implement resolutions of shareholders' meetings in his acts of managing the company. As the supervisor of the company, LIN Fangqing was unable to exercise the authority of a supervisor in a normal manner and was unable to play a supervisory role. Therefore, Kailai Company's internal mechanisms could not operate normally and could not make decisions on the operation of the company. Although the company was not yet in a state of financial loss, the High People's Court of Jiangsu Province found that serious difficulty in the operation and management of the company had occurred and finally ordered the company to be dissolved.[5]

Because the High People's Court of Jiangsu Province explained with clear reasons both Article 183 of the *Company Law* and Article 1 of the "*Company Law Interpretation (II)* so as to provide standards for determining whether "serious difficulty occurs in the operation and management of a company", the court's judgment was identified as "adequately protecting the legal rights and interests of the shareholders, reasonably regulating the corporate governance structure, and promoting the healthy and orderly development of a market economy".[6] Therefore, the case was released by the SPC as GC8 on April 9, 2012. The Main Points of the Adjudication of GC8 are:[7]

> Article 183 of the *Company Law* makes "serious difficulty occurs in the operation and management of a company" one of the conditions under which shareholders may bring a corporate dissolution lawsuit. To determine "whether serious difficulty occurs in the operation and management of a company", the operational state of the company's organizational structure should be comprehensively analyzed. For a company that is in a profitable state but has long-term failure in its shareholders' meeting mechanism and serious impediments in its internal management and has plunged into a state of deadlock, it can still be determined that serious difficulty occurs in the operation and management of the company. If other conditions stated in the *Company Law* and relevant judicial interpretations are met, a people's court may decide to dissolve a company in accordance with law.

Overall Characteristics of Subsequent Judgments/Rulings

The **Appendix** lists 66 SJ/Rs that explicitly mention GC8 (i.e., the Guiding Case is mentioned in any part of the judgment/ruling, no matter whether the case name is identified in full or in part, or whether only the number of the Guiding Case is stated). The search for these SJ/Rs was conducted through December 31, 2019 by the authors on the official "China Judgements [sic] Online" website ("中国裁判文书网"; http://wenshu.court.gov.cn).

The **Appendix** also lists who mentioned GC8 in each of these SJ/Rs: the parties (or their lawyers); the court, explicitly in the reasoning section titled "This Court opined" (see **grey rows**); and/or the court, in other sections of the SJ/R.

The following sections analyze the overall characteristics of these SJ/Rs by examining their distributions by year, level of court, stage of adjudication proceeding, and location of court.

1. Distribution by Year

The years of adjudication of these 66 SJ/Rs of GC8 show that there were two SJ/Rs in 2013, five in 2014, seven in 2015, six in 2016, 18 in 2017, 11 in 2018, and 17 in 2019. It is, therefore, clear that the number of SJ/Rs has generally increased year by year, and, since 2017, the number of SJ/Rs has not been fewer than 10 per year.

There can be many reasons for this increase in SJ/Rs, but one of the reasons is probably related to the rapid increase in the number of enterprises in China: from 8.287 million in 2012 to 18.098 million in 2017.[8] Since the Eighteenth National Congress of the Communist Party of China was held in November 2012, the reform of China's commercial system has developed on all fronts. The reform of China's market access system and the optimization of the business environment have promoted the rapid increase in the number of enterprises in the country.[9] With the increasing complexity of business models, many companies face situations similar to that in GC8. Therefore, the number of lawsuits that were brought to seek compulsory corporate dissolution and that cited GC8 has also increased.

2. Distribution by Level of Court

Of the 66 SJ/Rs mentioning GC8, 15 were rendered by basic courts, 37 by intermediate courts, 12 by high courts, and two by the SPC. This shows that the number of SJ/Rs handled by intermediate courts far exceeds those handled by other courts. Of the 37 SJ/Rs rendered by intermediate courts, 34 are second-instance cases. The authors believe that because compulsory corporate dissolution lawsuits involve relationships among shareholders, directors, supervisors, and relevant personnel of the companies, are characterized by having disputes of different types and complicated legal relationships, and address matters that determine the life or death of these companies, parties of these lawsuits are likely to have different views about the first-instance judgments and then choose to appeal to intermediate courts for further adjudication.

3. Distribution by Stage of Adjudication Proceeding

All of the 66 SJ/Rs mentioning GC8 are civil cases, with 18 being first-instance cases, 42 second-instance cases, and six cases having gone through retrial proceedings. It is clear from this distribution and the aforementioned distribution of cases by level of court that a significant portion of the SJ/Rs of GC8 were adjudicated by intermediate courts and/or second-instance cases. These data reflect that corporate dissolution lawsuits generally cover many controversial issues and complicated relationships and are difficult to adjudicate. Although GC8 plays, to a certain extent, a guiding role, it is still controversial as to how GC8 should be interpreted and used in cases having different facts.

> ***"Since the Eighteenth National Congress of the Communist Party of China was held in November 2012, […] the reform of China's market access system and the optimization of the business environment have promoted the rapid increase in the number of enterprises in the country. With the increasing complexity of business models, many companies face situations similar to that in GC8. Therefore, the number of lawsuits that were brought to seek compulsory corporate dissolution and that cited GC8 has also increased."***

4. Distribution by Location of Court

According to the analysis of the geographical location of the courts that adjudicated the 66 SJ/Rs of GC8, the authors noted that 25 cases (i.e., nearly 40% of all cases) were adjudicated by courts of various levels in Guangdong Province. Of these 25 cases, 18 were adjudicated during a period spanning from 2017 to 2019. This phenomenon may be due to the fact that Guangdong Province is a coastal and open province, with frequent domestic and foreign trade activities, a higher level of economic development, and a higher density of companies. As a result, Guangdong courts at all levels encounter more cases involving corporate disputes.

Since the signing of the *Framework Agreement on Deepening Guangdong–Hong Kong–Macao Cooperation in the Development of the Bay Area* in 2017,[10] Guangdong Province, as the core province of the Guangdong–Hong Kong–Macao Bay Area, has attracted substantial foreign investment, and the proportion of emerging industries, including 5G, chip manufacturing, artificial intelligence, and medical reform, has increased in the province. In addition, the Belt and Road Initiative has also attracted a large number of enterprises to be based in the Guangdong–Hong Kong–Macao Bay Area. The increase in the number of enterprises and the diverse types of investment in the area explains the greater number of compulsory corporate dissolution lawsuits.

"Guangdong Province, as the core province of the Guangdong–Hong Kong–Macao Bay Area, has attracted substantial foreign investment, and the proportion of emerging industries […] has increased in the province. In addition, the Belt and Road Initiative has also attracted a large number of enterprises to be based in the Guangdong–Hong Kong–Macao Bay Area. The increase in the number of enterprises and the diverse types of investment in the area explains the greater number of compulsory corporate dissolution lawsuits."

Treatment of Guiding Case No. 8 by Courts Rendering Subsequent Judgments/Rulings

1. Overall Analysis

Among the 66 SJ/Rs citing GC8, 42 are SJ/Rs in which the parties cited GC8 but the courts did not respond in accordance with Article 11 Paragraph 2 of the *Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"*[11] (the "*Detailed Implementing Rules*") (see **Sidebar 3**) by explaining in the reasoning section of the judgment/ruling whether GC8 was applied.

Of the remaining 24 SJ/Rs, five are SJ/Rs in which the courts did respond in accordance with the above-mentioned provision, 17 are SJ/Rs in which the courts took the initiative to consider GC8 even though the parties did not cite it, and two are SJ/Rs in which the courts mentioned GC8 in their judgments/ruling but in a section other than the reasoning section. With respect to the last two SJ/Rs, the two courts are both second-instance courts. Although each court mentioned outside the reasoning section of its judgment that the first-instance court referred to and applied GC8, it did not analyze in the reasoning section whether GC8 was applicable (see **Appendix: SJ/R Nos. 28 and 30**).

According to the above data, there are a total of 22 SJ/Rs in which the courts considered GC8 in the reasoning section of the judgments/rulings. In five of these SJ/Rs, the courts responded to the parties' reference to GC8, whereas in 17 of these SJ/Rs, the courts took the initiative to consider GC8 (see **Appendix: grey rows**). These courts, including the SPC (see **Appendix: SJ/R No. 36**), basically followed Article 11 Paragraph 1 of the *Detailed Implementing Rules* (see **Sidebar 3**) to quote the serial number and the Main Points of the Adjudication of GC8 in the reasoning section of the judgments/rulings.

The following two sections will discuss how the SPC handled GC8 and analyzed the conditions stated in Article 183 of the *Company Law*, and how the courts of other SJ/Rs explored the scope of application of the Main Points of the Adjudication of GC8.

2. How the SPC Handled Guiding Case No. 8 and Analyzed the Conditions Stated in Article 183 of the Company Law

SJ/R Nos. 27 and 36 are both civil cases adjudicated by the SPC during retrial proceedings.

In June 2017, the ruling of SJ/R No. 27 was rendered by a panel of three SPC judges, who were formally identified as the case's "presiding adjudicator" ("审判长"; a judge who leads the panel presiding over a case) and two "acting adjudicators" ("代理审判员"; "acting adjudicators" have a chance to become "adjudicators" after they accumulate more experience). In this case, the retrial applicant claimed, "the situation is basically the same as the facts in Guiding Case No. 8. At present, the shareholders' meeting of the company [involved in the case] is in a state of deadlock, and the court should decide to dissolve the company in accordance with Guiding Case No. 8". Although the aforementioned content was recorded outside the reasoning section of the ruling, the panel adjudicating the case did not follow Article 11 Paragraph 2 of the *Detailed Implementing Rules* by explaining in the reasoning section whether GC8 was applicable. Instead, the panel directly relied on Article 183 of the *Company Law* and Article 1 of the *Company Law Interpretation (II)* to point out:

> To dissolve a company, three conditions must be satisfied, namely, **serious difficulty occurs in the operation and management of a company, [the company's] continued existence will cause a substantial loss to shareholders' interests, and [the difficulty] cannot be resolved by any other means**.

Sidebar 3:

Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"

Article 11

In the process of handling a case, the personnel handling the case should inquire about relevant Guiding Cases. Where a relevant Guiding Case is quoted in the adjudication document, [the personnel] **should, in the part [of the document where they provide] reasons for their adjudication, quote the serial number and the "Main Points of the Adjudication" of the Guiding Case**.

Where a public prosecution organ, a party to a case and 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 [providing] the reasons for the adjudication, respond [as to] whether [they] referred to the Guiding Case [in the course of their adjudication] and explain their reasons [for doing so]**.

(emphasis added)

> Judging from the [retrial appellant's] litigation claims and the evidence submitted, none of the above three conditions is satisfied in this case, i.e., this case does not meet the conditions for corporate dissolution. (emphasis added)

Six months later, in December 2017, the ruling of SJ/R No. 36 was rendered by another panel of three SPC judges, who were formally identified as the "presiding adjudicator" and two "adjudicators" of the case. Apart from pointing out, in accordance with the above-mentioned provisions of the *Company Law* and the *Company Law Interpretation (II)*, the three conditions for corporate dissolution, the panel overseeing SJ/R No. 36 also took the initiative to consider GC8 and clearly explained:

> According to **Article 9 of the *Detailed Implementing Rules on the "Provisions of the Supreme People's Court Concerning Work on Case Guidance"***, [w]here a case being adjudicated is, in terms of **the basic facts and application of law**, similar to a Guiding Case released by the Supreme People's Court, the [deciding] people's court at any level **should refer to the "Main Points of the Adjudication" of that relevant Guiding Case to render its ruling or judgment**.
>
> The Main Points of Adjudication of […] Guiding Case No. 8 […] are: [t]o determine "whether serious difficulty occurs in the operation and management of a company", the operational state of the company's organizational structure should be comprehensively analyzed. For a company that is in a profitable state but has long-term failure in its shareholders' meeting mechanism and serious impediments in its internal management and has plunged into a state of deadlock, it can still be determined that serious difficulty occurs in the operation and management of the company. **This case is similar to the basic facts of the Guiding Case, and the Main Points of the Adjudication of the Guiding Case should be used as a reference for this case**.
> (emphasis added)

Decided only six months apart, SJ/R Nos. 27 and 36 reveal completely different treatments of GC8 by the SPC. In the former, the SPC did not respond to a party's reference to GC8, whereas in the latter, the SPC took the initiative to consider GC8 even though the parties did not mention it. This difference may be attributable to the fact that the panel of the former case had two "acting adjudicators", while the panel of the latter case had the benefit of having two "adjudicators", who are, as distinguished by the formal title, more experienced.

Apart from their different treatments of GC8, the courts of SJ/R Nos. 27 and 36 also analyzed the conditions set out in Article 183 of the *Company Law* in slightly different ways:

Condition	SPC's Decision in SJ/R No. 27	SPC's Decision in SJ/R No. 36
"serious difficulty occurs in the operation and management of a company"	"As for the problem that [the company] has been unable to hold a shareholders' meeting for four consecutive years, although both parties have not held any shareholders' meeting, they **have been communicating and negotiating** on matters regarding the operation and management of the company. [Thus,] this problem cannot prove that serious difficulty has occurred in the operation and management of the company."	"**The focus of 'serious difficulty occurs in the operation and management of a company'** is on the existence of serious internal impediments in the company's management, including the failure of the shareholders' meeting mechanism and **an inability to make decisions regarding the company's operation and management**. In this case, Hong Bai Lan Company has not officially held any shareholders' meeting since 2011, the company cannot be managed by means of resolutions of shareholders' meetings, and the shareholders' meeting mechanism has failed."
"[the company's] continued existence will cause a substantial loss to shareholders' interests"	"On the problem of [shareholder] WANG Guiying's rights being ignored and WANG Guiying's having no knowledge of the company's operational state and financial situation: this problem is not an issue that needs to be considered when determining whether serious difficulty occurs in the operation and management of a company. Even if the above problem exists, WANG Guiying **can resolve it by bringing a shareholders' right-to-know lawsuit**."	"Because the internal operating mechanism of Hong Bai Lan Company has long failed, the shareholders' rights of 15 people, including LIU Lining, have long been in a state of not being able to be exercised. **The purpose of their investment in Hong Bai Lan Company cannot be realized** and it can be determined that there is a substantial loss to these shareholders' interests."

The above decisions of the SPC have two implications for judicial practice. First, when considering the "serious difficulty occurs in the operation and management of a company" condition, it is certainly important to examine whether the shareholders' meeting mechanism has failed. Yet, if the shareholders are able to continue communicating and negotiating on issues concerning the company's operation and management, this means that the shareholders are still able to make decisions about the company's operation and management, and the condition cannot be said to be met.

Second, when considering the "[the company's] continued existence will cause a substantial loss to shareholders' interests" condition, a court must not only examine whether there is a substantial loss to shareholders' interests, but also decide whether the loss can be addressed by other means. If there are other means to realize the shareholders' interests, the court cannot consider this condition to be met.

3. How the Courts of Other SJ/Rs Explored the Scope of Application of Guiding Case No. 8's Main Points of the Adjudication

Among the 22 SJ/Rs in which the courts considered GC8 in the reasoning section of the judgment/ruling, only SJ/R No. 36 was adjudicated by the SPC, with the remaining SJ/Rs being adjudicated by other courts. Of these 22 SJ/Rs, 16 are SJ/Rs in which the courts cited and applied the Main Points of the Adjudication of GC8 (see **Appendix: SJ/R Nos. 3, 5, 11, 18, 21, 23, 35–37, 40, 44, 45, 50, 55, 58, and 59**), and six are SJ/Rs in which the courts decided that GC8 was inapplicable (see **Appendix: SJ/R Nos. 12, 17, 24, 34, 47, and 51**).

The authors have discussed in the previous section how the SPC dealt with GC8 in SJ/R No. 36. In this section, the authors will discuss how the courts of the remaining 21 SJ/Rs explored the scope of application of the Main Points of the Adjudication of GC8 and will share important views of some courts.

First of all, one should note that the Main Points of the Adjudication of GC8 consist of two points:

- "Article 183 of the *Company Law* makes 'serious difficulty occurs in the operation and management of a company' **one of the conditions** under which shareholders may bring a corporate dissolution lawsuit. To determine 'whether serious difficulty occurs in the operation and management of a company', the operational state of the company's organizational structure should be **comprehensively analyzed**. For a company that is in a profitable state but has long-term failure in its shareholders' meeting mechanism and serious impediments in its internal management and has plunged into a state of deadlock, it can still be determined that serious difficulty occurs in the operation and management of the company."

- "If **other conditions stated in the *Company Law* and relevant judicial interpretations are met**, a people's court may decide to dissolve a company in accordance with law."

(emphasis added)

The courts of the remaining 21 SJ/Rs were generally able to follow the first point in the Main Points of the Adjudication of GC8 to comprehensively analyze the operational state of a company's organizational structure so as to determine "whether serious difficulty occurs in the operation and management of a company". However, with respect to the second point, due to its broad content (i.e., "other conditions stated in the *Company Law* and relevant judicial interpretations"), the courts had different views about its scope of application. The differences are particularly salient in their analyses of the condition stated in Article 1 Item (1) of the *Company Law Interpretation (II)* (i.e., "the company has been unable to hold a shareholders' meeting or shareholders' general meeting for two or more consecutive years, and [thus] serious difficulty occurs in the operation and management of the company") and the issue as to whether social interests should be considered.

(1) "[T]he company has been unable to hold a shareholders' meeting or shareholders' general meeting for two or more consecutive years, and [thus] serious difficulty occurs in the operation and management of the company"

According to Article 1 Item (1) of the *Company Law Interpretation (II)*, if "[a] company **has been unable to hold a shareholders' meeting or shareholders' general meeting for two or more consecutive years**, and [thus] serious difficulty occurs in the operation and management of the company", "a shareholder individually or collectively holding ten percent or more of the voting rights of all the shareholders of the company" may bring a lawsuit to dissolve the company.

With respect to the phrase "unable to hold a shareholders' meeting", the court of SJ/R No. 51 decided:

> [The phrase] "unable to hold a shareholders' meeting" **does not refer to the objective situation that "no shareholders' meetings have been held", but refers to the failure to hold a shareholders' meeting due to legal impediments**, such as the number of shareholders attending the shareholders'

> meeting falls below the minimum number of shareholders required for holding a shareholders' meeting. In this case, [… the company involved] did not hold any shareholders' meeting because Third-Party HUAI Hui, as an executive director, did not perform the duty to convene or hold shareholders' meetings, and the plaintiff did not exercise the right to propose holding a provisional shareholders' meeting. (emphasis added)

However, the court in SJ/R No. 5 emphasized:

> The determination [of the condition stated in Article 1 Item (1) of the *Company Law Interpretation (II)*] hinges on this phrase "serious difficulty occurs in the operation and management of the company". Therefore, regardless of whether it has been "unable to hold" a shareholders' meeting or "has not held" a shareholders' meeting, as long as **the company has been objectively plunged into a deadlock and has been unable to make effective decisions, this conforms to the situation prescribed in the aforementioned provision**. (emphasis added)

Some courts also considered whether "for two or more consecutive years" is a necessary condition for determining whether serious difficulty occurs in the operation and management of a company. The court in SJ/R No. 17 decided that the interpretation of this phrase must strictly follow the literal meaning and stated:

> [Shareholder] LIU Weika brought this lawsuit on January 26, 2015 on the grounds that the shareholders of the company [involved in this case] have long been in conflict and [thus] serious difficulty occurs in the operation and management [of the company]. This does not comply with the time limit required for determining whether "serious difficulty occurs in the operation and management of the company" as stated in Article 1 Item (1) of the *Company Law Interpretation (II)*. Even with reference to March 7, 2016, i.e., the date of investigation by the second-instance court, the period of the state of corporate deadlock as alleged by LIU Weika **has not reached two years**. (emphasis added)

Nonetheless, a greater number of courts dealt with the requirement of "for two or more consecutive years" in a more flexible manner, placing an emphasis on whether serious difficulty occurs in the operation and management of a company. For example, the court of SJ/R No. 34 decided:

> [The phrase] "has been unable to hold a shareholders' meeting […] for two or more consecutive years" stated in the *Company Law Interpretation (II)* refers to a manifestation of the company's deadlock that the company has been unable to hold a shareholders' meeting for a long time. Here, **"two years" is not a period that is like a time limit, and it cannot be understood to mean that a deadlock of the company appears once no shareholders' meetings have been held for more than two years.** […] Based on the ratio of the shares with voting rights held by the two shareholders of the company [involved in this case], even when the two shareholders disagree, effective resolutions can still be made in the shareholders' meetings and **it is not easy for a deadlock to appear**. This is also an important factual distinction between this case and the Guiding Case. (emphasis added)

The court of SJ/R No. 21 decided that even if a company has been unable to hold a shareholders' meeting for less than two years, the company may still be dissolved when the company's interpersonal cooperation foundation is lost and the company cannot operate. This court first emphasized the Main Points of the Adjudication of GC8 and then explained:

> **The company [involved in this case] has met the conditions for dissolution** for the following reasons: 1. **Serious difficulty has occurred in the operation and management** of the company […]. Since the incorporation of […] company, conflicts among the shareholders of the company have continued to escalate and it has not been possible to manage the company by passing resolutions of the shareholders' meetings. […] **No regular meetings have been held in the last six months**. […] There are substantial differences in shareholders' opinions and the conflicts of interest and disputes about rights among the shareholders are serious. […] **The interpersonal cooperation foundation on which the company's existence relies has been lost. The company has been unable to operate normally and a state of deadlock in its operation and management has arisen. [The company's] continued existence will cause a substantial loss to shareholders' interests**. (emphasis added)

(2) "Social interests"

The Main Points of the Adjudication in GC8 first provide guidance on how to determine "whether serious difficulty occurs in the operation and management of a company" and then end with this sentence: "If **other conditions stated in the *Company Law*** and relevant judicial interpretations **are met**, a people's court may decide to dissolve a company in accordance with law." Therefore, for a court to decide whether to dissolve a company, it cannot merely look at "whether serious difficulty occurs in the operation and management of a company", but needs to consider whether other conditions are met.

The term "social interests" is not explicitly mentioned in the three conditions set out in Article 183 of the *Company Law*: "serious difficulty occurs in the operation and management of a company", "[the company's] continued existence will cause a substantial loss to shareholders' interests", and "[the difficulty] cannot be resolved by any other means". When courts handle corporate dissolution lawsuits, should they consider "social interests"? The courts handling most of the SJ/Rs analyzed by the authors did not consider "social interests". Two SJ/Rs are the exceptions.

In SJ/R No. 12, the court compared and contrasted the case with GC8, pointing out:

> This court finds that what **[the case and GC8] have in common** is that due to shareholders' differences in opinions and lack of cooperation, the two companies [involved in these two cases] were unable to hold a shareholders' meeting for two or more consecutive years, and [thus] serious difficulty occurred in the operation and management of each of the companies, causing, to some extent, a loss to shareholders' interests. But **this case has certain special characteristics.** The **real estate projects** operated by the company [involved in this case] bear **a greater social responsibility** than the ordinary products operated by Kailai Industrial Co., Ltd. [in GC8]. This court believes that when determining whether a company should be dissolved, a court must consider not only shareholders' interests but also **social and public interests**. (emphasis added)

Additionally, the court of SJ/R No. 47 took this position:

> The dissolution of a company involves a variety of interests, i.e., not only the interests of shareholders, but also those of **multiple stakeholders**, including the company's creditors and employees. It is related to the stability and tranquility of the market economic order. The judiciary should adopt a more prudent attitude towards the dissolution of a company that is subject to pressure from shareholders. (emphasis added)

The consideration of "social interests" by the above-mentioned courts seems to have gone beyond the scope of the three conditions stated in Article 183 of the *Company Law*. However, the authors believe that the third condition in Article 183, i.e., "[the difficulty] cannot be resolved by any other means", has opened a window for considering "social interests". In other words, "social interests" should be considered as part of this condition. For example, during the negotiation and mediation among the shareholders, all parties can discuss different interests and impacts, including "social interests", and strive to resolve the serious difficulties facing the company so as to prevent substantial losses to shareholders' interests and social interests. Therefore, if the serious difficulties still cannot be resolved by these different means, the court should consider that the condition where "[the difficulty] cannot be resolved by any other means" is met.

The intention of these courts to consider "social interests" is certainly good. However, if serious difficulties have already occurred in the operation and management of a company, the company's continued existence will cause substantial losses to shareholders' interests and social interests, and the difficulties cannot be resolved and the losses cannot be avoided by any other means, a court's decision to disallow dissolution of the company despite these challenges may lead to bigger problems. This would ultimately cause concern and hesitation for those who wish to incorporate a company and promote the development of the socialist market economy.

Conclusion

Corporate dissolution disputes present an important and difficult category of issues handled in corporate dispute cases. GC8 has undoubtedly played a guiding role for the adjudication of subsequent cases. This Guiding Case limits the concept of "serious difficulty occurs in the operation and management of a company" to internal impediments in the company's management (e.g., the failure of the shareholders' meeting mechanism, an inability to make decisions regarding the company's operation and management, etc.), but does not partially understand the concept to mean operational difficulty (e.g., the company's lack of capital, serious financial loss, etc.). This helps to change the adjudication of "serious difficulty occurs in the operation and management of a company" from an abstract approach to a concrete approach, thereby making judicial adjudication in these types of cases more operable.

Nevertheless, the 66 SJ/Rs analyzed in this article also reveal the limitations of GC8. Many courts handling these SJ/Rs did not cite GC8 or only cited it in part. This may be due to the fact that the Main Points of the Adjudication in GC8 cannot be easily applied to complicated situations encountered in judicial practice.

Based on the analysis of the 66 SJ/Rs, the authors have observed that the courts paid close attention to the following three points when deciding whether a company should be dissolved:

1. whether the shareholders with relatively large shareholding ratios have been in a state of long-term confrontation and escalated conflicts;
2. whether the shareholders' meetings have objectively been plunged into a deadlock and, due to impediments of interpersonal cooperation, no shareholders' meetings have been held to make effective decisions; and
3. whether shareholders have exhausted other remedial means to resolve the serious difficulty in the operation and management of the company.

For companies that have exhausted other means, including negotiation and mediation, but are still unable to maintain their interpersonal cooperation foundation, the authors believe that courts should be prudent and should refrain from deciding not to dissolve the companies on the basis of "social interests". This approach will help ensure the function and value of corporate dissolution lawsuits. ■

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[1] 《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*), Preamble, passed by the Adjudication Committee of the Supreme People's Court on Nov. 15, 2010, issued on and effective as of Nov. 26, 2010, Stanford Law School China Guiding Cases Project, English Guiding Cases Rules, June 12, 2015 Edition, http://cgc.law.stanford.edu/guiding-cases-rules/20101126-english.

[2] This article refers to Article 183 of the *Company Law* in accordance with GC8. The *Company Law* as cited in GC8 should mean the 2005 version, which was in effect when the Guiding Case was released in 2012 and when the final judgment upon which the Guiding Case is based was rendered. Article 183 is numbered Article 182 in the currently effective version. *See* 《中华人民共和国公司法》 (*Company Law of the People's Republic of China*), passed and issued on Dec. 29, 1993, effective as of July 1, 1994, amended four times, most recently on Oct. 26, 2018, effective as of Oct. 26, 2018, http://www.fdi.gov.cn/1800000121_23_74633_0_7.html.

[3] This article refers to Article 1 of the *Company Law Interpretation (II)* in accordance with GC8. The *Company Law Interpretation (II)* as cited in GC8 should mean the 2008 version, which was in effect when the Guiding Case was released in 2012 and when the final judgment upon which the Guiding Case is based was rendered. In 2014, Article 1 of the *Company Law Interpretation (II)* was slightly amended to change "Article 183" of the *Company Law* referenced to "Article 182", reflecting the change in the number used in the *Company Law*. *See* 《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 on Feb. 17, 2014, effective as of Mar. 1, 2014, http://www.court.gov.cn/zixun-xiangqing-6135.html.

[4] 《林方清诉常熟市凯莱实业有限公司、戴小明公司解散纠纷案》 (*LIN Fangqing v. Changshu Kailai Industrial Co., Ltd. and DAI Xiaoming, A Corporate Dissolution Dispute*), 8 China Law Connect 63 (Mar. 2020), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC8), Mar. 2020, http://cgc.law.stanford.edu/guiding-cases/guiding-case-8 (hereinafter "*Guiding Case No. 8*").

[5] (2010) 苏商终字第0043号民事判决 ((2010) Su Shang Zhong Zi No. 0043 Civil Judgment), rendered by the High People's Court of Jiangsu Province on Oct. 19, 2010, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/jiangsu-2010-su-shang-zhong-zi-0043-civil-judgment.

[6] *Guiding Case No. 8*, *supra* note 4, "Reasons for the Adjudication" section. *See also*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8号《林方清诉常熟市凯莱实业有限公司、戴小明公司解散纠纷案》的理解与参照 (*Understanding and Referring to Guiding Case No. 8, LIN Fangqing v. Changshu Kailai Industrial Co., Ltd. and DAI Xiaoming, A Corporate Dissolution Dispute*), 《人民司法・应用》 (The People's Judicature • Application), Issue No. 15, at 59 (2012).

[7] For more information about the case, see *Guiding Case No. 8*, *supra* note 4.

[8] 国家统计局 (National Bureau of Statistics), 单位数量快速增长 市场活力不断激发——新中国成立70周年经济社会发展成就系列报告之二十一 (*The Number of Units Increases Rapidly; Market Vitality [Shows] Continuous Stimulation—The 21st Series of the Reports on the Economic and Social Development Achievements [to Celebrate] the 70th Anniversary of the Founding of New China*), 《国家统计局网》 (www.stats.gov.cn), Aug. 26, 2019, http://www.stats.gov.cn/tjsj/zxfb/201908/t20190826_1693395.html.

[9] *Id. See also*《中共中央关于全面深化改革若干重大问题的决定》 (*Decision of the Central Committee of the Communist Party of China on Several Major Issues Concerning Comprehensively Deepening Reforms*), passed and issued at the Third Plenary Session of the Eighteenth Central Committee of the Communist Party of China on Nov. 12, 2013, effective as of Nov. 12, 2013, http://www.scio.gov.cn/zxbd/nd/2013/document/1374228/1374228.htm (pointing out, *inter alia*, that "economic system reform is the focus of comprehensively deepening reforms"); 《中共中央关于全面推进依法治国若干重大问题的决定》 (*Decision of the Central Committee of the Communist Party of China on Several Major Issues Concerning Comprehensively Promoting the Rule of Law*), passed and issued at the Fourth Plenary Session of the Eighteenth Central Committee of the Communist Party of China on Oct. 23, 2014, effective as of Oct. 23, 2014, http://www.ccps.gov.cn/xytt/201812/t20181212_123256.shtml (pointing out the importance of "improving the legal system of socialist market economy, with guidance based on protection of property rights, upholding of contracts [...] and effective supervision"); 沈荣华 (SHEN Ronghua), 十八大以来我国 "放管服" 改革的成效、特点与走向 (*The Effectiveness, Characteristics, and Trends of China's Reforms to "Delegate Power, Streamline Administration, and Optimize Government Services" Since the Eighteenth National Congress of the Communist Party of China*), 《行政管理改革》 (Administrative Reform), Issue No. 9, at 10 (2017), http://theory.people.com.cn/n1/2017/1102/c40531-29623408.html.

[10] 《深化粤港澳合作 推进大湾区建设框架协议》 (*Framework Agreement on Deepening Guangdong-Hong Kong-Macao Cooperation in the Development of the Bay Area*), issued by the National Development and Reform Commission on July 1, 2017, effective as of July 1, 2017, https://www.ndrc.gov.cn/fzggw/jgsj/dqs/sjdt/201707/W020190909487713229129.pdf.

[11] 《〈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, Stanford Law School China Guiding Cases Project, English Guiding Cases Rules, June 12, 2015 Edition, http://cgc.law.stanford.edu/guiding-cases-rules/20150513-english.

Appendix: 66 Subsequent Judgments/Rulings Which Explicitly Mention Guiding Case No. 8 (identified through December 31, 2019)

No.	Date of Adjudication	Subsequent Judgment/ Ruling No.	Adjudicating Court	Who Mentioned Guiding Case No. 8*	Link
1	2013/3/1	(2013) Ji Min Er Zhong Zi No. 23	High People's Court of Hebei Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/hebei-2013-ji-min-er-zhong-zi-23-civil-judgment
2	2013/7/12	(2012) Xiu Min Er Chu Zi No. 314	Xiuwu County People's Court, Henan Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/henan-2012-xiu-min-er-chu-zi-314-civil-judgment
3	2014/1/17	(2014) Zhe Tai Shang Zhong Zi No. 18	Intermediate People's Court of Taizhou Municipality, Zhejiang Province	Court (reasoning section)	http://cgc.law.stanford.edu/judgments/zhejiang-2014-zhe-tai-shang-zhong-zi-18-civil-judgment
4	2014/6/22	(2014) Tong Min Shang Chu Zi No. 00018	Tongbai County People's Court, Henan Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/henan-2014-tong-min-shang-chu-zi-00018-civil-judgment
5	2014/7/23	(2014) Chuan Min Shen Zi No. 1145	High People's Court of Sichuan Province	Party(/-ies)/ lawyer(s); Court (reasoning section)	http://cgc.law.stanford.edu/judgments/sichuan-2014-chuan-min-shen-zi-1145-civil-ruling
6	2014/7/25	(2014) Hui Zhong Fa Min Er Zhong Zi No. 79	Intermediate People's Court of Huizhou Municipality, Guangdong Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/guangdong-2014-hui-zhong-fa-min-er-zhong-zi-79-civil-judgment
7	2014/11/25	(2014) Dong Zhong Fa Min Er Zhong Zi No. 974	Intermediate People's Court of Dongguan Municipality, Guangdong Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/guangdong-2014-dong-zhong-fa-min-er-zhong-zi-974-civil-judgment
8	2015/3/20	(2015) Sui Zhong Fa Min Er Zhong Zi No. 70	Intermediate People's Court of Guangzhou Municipality, Guangdong Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/guangdong-2015-sui-zhong-fa-min-er-zhong-zi-70-civil-ruling
9	2015/6/15	(2015) E Dan Jiang Kou Min Chu Zi No. 00008	People's Court of Danjiangkou Municipality, Hubei Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/hubei-2015-e-dan-jiang-kou-min-chu-zi-00008-civil-judgment
10	2015/6/19	(2014) Su Shang Zhong Zi No. 00360	High People's Court of Jiangsu Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/jiangsu-2014-su-shang-zhong-zi-00360-civil-judgment
11	2015/6/24	(2014) Shen Zhong Fa She Wai Zhong Zi No. 134	Intermediate People's Court of Shenzhen Municipality, Guangdong Province	Court (reasoning section)	http://cgc.law.stanford.edu/judgments/guangdong-2014-shen-zhong-fa-she-wai-zhong-zi-134-civil-judgment
12	2015/10/23	(2015) Lu Min Zai Zi No. 5	High People's Court of Shandong Province	Party(/-ies)/ lawyer(s); Court (reasoning section)	http://cgc.law.stanford.edu/judgments/shandong-2015-lu-min-zai-zi-5-civil-judgment
13	2015/10/28	(2015) Hui Zhong Fa Min Er Zhong Zi No. 365	Intermediate People's Court of Huizhou Municipality, Guangdong Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/guangdong-2015-hui-zhong-fa-min-er-zhong-zi-365-civil-judgment
14	2015/12/15	(2015) He Shang Chu Zi No. 92	Intermediate People's Court of Heze Municipality (Region), Shandong Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/shandong-2015-he-shang-chu-zi-92-civil-judgment
15	2016/4/8	(2016) Jing 01 Min Zhong No. 1502	No. 1 Intermediate People's Court of Beijing Municipality	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/beijing-2016-jing-01-min-zhong-1502-civil-judgment

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16	2016/5/2	(2016) Yu 01 Min Zhong No. 760	No. 1 Intermediate People's Court of Chongqing Municipality	Party(/-ies)/ lawyer(s); Court (other section(s))	http://cgc.law.stanford.edu/judgments/chongqing-2016-yu-01-min-zhong-760-civil-judgment
17	2016/6/2	(2016) Yue 03 Min Zhong No. 3161	Intermediate People's Court of Shenzhen Municipality, Guangdong Province	Court (reasoning section)	http://cgc.law.stanford.edu/judgments/guangdong-2016-yue-03-min-zhong-3161-civil-judgment
18	2016/6/16	(2015) Shen Zhong Fa She Wai Zhong Zi No. 92	Intermediate People's Court of Shenzhen Municipality, Guangdong Province	Court (reasoning section)	http://cgc.law.stanford.edu/judgments/guangdong-2015-shen-zhong-fa-she-wai-zhong-zi-92-civil-judgment
19	2016/11/16	(2016) Lu Min Zhong No. 714	High People's Court of Shandong Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/shandong-2016-lu-min-zhong-714-civil-judgment
20	2016/12/29	(2016) Ji 0103 Min Chu No. 598	Kuancheng District People's Court, Changchun Municipality, Jilin Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/jilin-2016-ji-0103-min-chu-598-civil-judgment
21	2017/1/22	(2016) Yue 04 Min Chu No. 58	Intermediate People's Court of Zhuhai Municipality, Guangdong Province	Court (reasoning section)	http://cgc.law.stanford.edu/judgments/guangdong-2016-yue-04-min-chu-58-civil-judgment
22	2017/3/21	(2017) Nei 29 Min Zhong No. 19	Intermediate People's Court of Alxa League, Inner Mongolia Autonomous Region	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/inner-mongolia-2017-nei-29-min-zhong-19-civil-judgment
23	2017/3/24	(2017) Wan 0706 Min Chu No. 150	Yi'an District People's Court, Tongling Municipality, Anhui Province	Court (reasoning section)	http://cgc.law.stanford.edu/judgments/anhui-2017-wan-0706-min-chu-150-civil-judgment
24	2017/5/5	(2017) Su 07 Min Zhong No. 784	Intermediate People's Court of Lianyungang Municipality, Jiangsu Province	Court (reasoning section)	http://cgc.law.stanford.edu/judgments/jiangsu-2017-su-07-min-zhong-784-civil-judgment
25	2017/5/10	(2017) Liao 0102 Min Chu No. 529	Heping District People's Court, Shenyang Municipality, Liaoning Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/liaoning-2017-liao-0102-min-chu-529-civil-judgment
26	2017/6/20	(2017) Su 04 Min Zhong No. 619	Intermediate People's Court of Changzhou Municipality, Jiangsu Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/jiangsu-2017-su-04-min-zhong-619-civil-ruling
27	2017/6/28	(2017) Zui Gao Fa Min Shen No. 2342	Supreme People's Court	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/spc-2017-zui-gao-fa-min-shen-2342-civil-ruling
28	2017/7/27	(2017) Wan 07 Min Zhong No. 314	Intermediate People's Court of Tongling Municipality, Anhui Province	Court (other section(s))	http://cgc.law.stanford.edu/judgments/anhui-2017-wan-07-min-zhong-314-civil-judgment
29	2017/8/7	(2017) Liao 14 Min Zhong No. 988	Intermediate People's Court of Huludao Municipality, Liaoning Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/liaoning-2017-liao-14-min-zhong-988-civil-judgment
30	2017/8/25	(2017) Yue Min Zhong No. 1308	High People's Court of Guangdong Province	Court (other section(s))	http://cgc.law.stanford.edu/judgments/guangdong-2017-yue-min-zhong-1308-civil-judgment
31	2017/9/12	(2016) Nei 0627 Min Chu No. 1990	People's Court of Ejin Horo Banner, Inner Mongolia Autonomous Region	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/inner-mongolia-2016-nei-0627-min-chu-1990-civil-judgment

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32	2017/10/11	(2017) Shan Min Zhong No. 990	High People's Court of Shaanxi Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/shaanxi-2017-shan-min-zhong-990-civil-judgment
33	2017/10/20	(2017) Xiang 01 Min Zhong No. 5672	Intermediate People's Court of Changsha Municipality, Hunan Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/hunan-2017-xiang-01-min-zhong-5672-civil-judgment
34	2017/10/25	(2017) E 08 Min Chu No. 31	Intermediate People's Court of Jingmen Municipality, Hubei Province	Court (reasoning section)	http://cgc.law.stanford.edu/judgments/hubei-2017-e-08-min-chu-31-civil-judgment
35	2017/12/11	(2016) Nei 2201 Min Chu No. 4837	People's Court of Ulanhot Municipality, Inner Mongolia Autonomous Region	Court (reasoning section)	http://cgc.law.stanford.edu/judgments/inner-mongolia-2016-nei-2201-min-chu-4837-civil-judgment
36	2017/12/20	(2017) Zui Gao Fa Min Shen No. 4394	Supreme People's Court	Court (reasoning section)	http://cgc.law.stanford.edu/judgments/spc-2017-zui-gao-fa-min-shen-4394-civil-ruling
37	2017/12/26	(2017) Lu 11 Min Zhong No. 2073	Intermediate People's Court of Rizhao Municipality, Shandong Province	Court (reasoning section)	http://cgc.law.stanford.edu/judgments/shandong-2017-lu-11-min-zhong-2073-civil-judgment
38	2017/12/26	(2017) Yue 13 Min Zhong No. 3712	Intermediate People's Court of Huizhou Municipality, Guangdong Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/guangdong-2017-yue-13-min-zhong-3712-civil-judgment
39	2018/2/11	(2017) Yue 0703 Min Chu No. 5738	Pengjiang District People's Court, Jiangmen Municipality, Guangdong Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/guangdong-2017-yue-0703-min-chu-5738-civil-judgment
40	2018/4/9	(2017) Yue 03 Min Zhong No. 20300	Intermediate People's Court of Shenzhen Municipality, Guangdong Province	Party(/-ies)/ lawyer(s); Court (reasoning section)	http://cgc.law.stanford.edu/judgments/guangdong-2017-yue-03-min-zhong-20300-civil-judgment
41	2018/5/21	(2017) Su 0311 Min Chu No. 8013	Quanshan District People's Court, Xuzhou Municipality, Jiangsu Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/jiangsu-2017-su-0311-min-chu-8013-civil-judgment
42	2018/8/10	(2018) Yue 03 Min Zhong No. 4571	Intermediate People's Court of Shenzhen Municipality, Guangdong Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/guangdong-2018-yue-03-min-zhong-4571-civil-judgment
43	2018/8/13	(2018) Gan Min Zhong No. 287	High People's Court of Jiangxi Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/jiangxi-2018-gan-min-zhong-287-civil-judgment
44	2018/9/13	(2018) Qian 0113 Min Chu No. 860	Baiyun District People's Court, Guiyang Municipality, Guizhou Province	Court (reasoning section)	http://cgc.law.stanford.edu/judgments/guizhou-2018-qian-0113-min-chu-860-civil-judgment
45	2018/10/10	(2018) Yue 0391 Min Chu No. 497	Qianhai Cooperation Zone People's Court, Shenzhen Municipality, Guangdong Province	Court (reasoning section)	http://cgc.law.stanford.edu/judgments/guangdong-2018-yue-0391-min-chu-497-civil-judgment
46	2018/10/22	(2018) Ji 0110 Min Chu No. 3336	Luquan District People's Court, Shijiazhuang Municipality, Hebei Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/hebei-2018-ji-0110-min-chu-3336-civil-judgment

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47	2018/11/5	(2018) E Min Zhong No. 5	High People's Court of Hubei Province	Party(/-ies)/ lawyer(s); Court (other section(s)); Court (reasoning section)	http://cgc.law.stanford.edu/judgments/hubei-2018-e-min-zhong-5-civil-judgment
48	2018/11/9	(2018) Yun 26 Min Zhong No. 874	Intermediate People's Court of Wenshan Zhuang and Miao Autonomous Prefecture, Yunnan Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/yunnan-2018-yun-26-min-zhong-874-civil-judgment
49	2018/11/23	(2018) Yue 01 Min Zhong No. 17201	Intermediate People's Court of Guangzhou Municipality, Guangdong Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/guangdong-2018-yue-01-min-zhong-17201-civil-judgment
50	2019/1/8	(2018) Yue 05 Min Zhong No. 1074	Intermediate People's Court of Shantou Municipality, Guangdong Province	Court (reasoning section)	http://cgc.law.stanford.edu/judgments/guangdong-2018-yue-05-min-zhong-1074-civil-judgment
51	2019/2/25	(2018) Yue 0391 Min Chu No. 251	Qianhai Cooperation Zone People's Court, Shenzhen Municipality, Guangdong Province	Court (reasoning section)	http://cgc.law.stanford.edu/judgments/guangdong-2018-yue-0391-min-chu-251-civil-judgment
52	2019/3/20	(2018) Chuan Min Zhong No. 216	High People's Court of Sichuan Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/sichuan-2018-chuan-min-zhong-216-civil-judgment
53	2019/3/25	(2019) Yue 01 Min Zhong No. 2326	Intermediate People's Court of Guangzhou Municipality, Guangdong Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/guangdong-2019-yue-01-min-zhong-2326-civil-judgment
54	2019/4/1	(2019) Yue 01 Min Zhong No. 341	Intermediate People's Court of Guangzhou Municipality, Guangdong Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/guangdong-2019-yue-01-min-zhong-341-civil-judgment
55	2019/5/20	(2019) Gan 0502 Min Chu No. 1149	Qinzhou District People's Court, Tianshui Municipality, Gansu Province	Court (reasoning section)	http://cgc.law.stanford.edu/judgments/gansu-2019-gan-0502-min-chu-1149-civil-judgment
56	2019/6/5	(2019) Yue 13 Min Zhong No. 1375	Intermediate People's Court of Huizhou Municipality, Guangdong Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/guangdong-2019-yue-13-min-zhong-1375-civil-judgment
57	2019/6/12	(2018) Yue 03 Min Zhong No. 15263	Intermediate People's Court of Shenzhen Municipality, Guangdong Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/guangdong-2018-yue-03-min-zhong-15263-civil-judgment
58	2019/6/14	(2019) Jing 03 Min Zhong No. 8046	No. 3 Intermediate People's Court of Beijing Municipality	Party(/-ies)/ lawyer(s); Court (reasoning section)	http://cgc.law.stanford.edu/judgments/beijing-2019-jing-03-min-zhong-8046-civil-judgment
59	2019/6/21	(2019) Yue 01 Min Zhong No. 5933	Intermediate People's Court of Guangzhou Municipality, Guangdong Province	Court (reasoning section)	http://cgc.law.stanford.edu/judgments/guangdong-2019-yue-01-min-zhong-5933-civil-judgment
60	2019/6/28	(2018) Yue Min Shen No. 5954	High People's Court of Guangdong Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/guangdong-2018-yue-min-shen-5954-civil-ruling
61	2019/7/1	(2019) Zhe 03 Min Zhong No. 2474	Intermediate People's Court of Wenzhou Municipality, Zhejiang Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/zhejiang-2019-zhe-03-min-zhong-2474-civil-judgment

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62	2019/7/5	(2018) Yue Min Shen No. 12089	High People's Court of Guangdong Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/guangdong-2018-yue-min-shen-12089-civil-ruling
63	2019/7/12	(2019) Chuan 32 Min Zhong No. 99	Intermediate People's Court of Ngawa Tibetan and Qiang Autonomous Prefecture, Sichuan Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/sichuan-2019-chuan-32-min-zhong-99-civil-judgment
64	2019/8/19	(2019) Yue 01 Min Zhong No. 12603	Intermediate People's Court of Guangzhou Municipality, Guangdong Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/guangdong-2019-yue-01-min-zhong-12603-civil-judgment
65	2019/10/25	(2019) Gan 05 Min Zhong No. 467	Intermediate People's Court of Tianshui Municipality, Gansu Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/gansu-2019-gan-05-min-zhong-467-civil-judgment
66	2019/11/20	(2019) Su 02 Min Zhong No. 3807	Intermediate People's Court of Wuxi Municipality, Jiangsu Province	Party(/-ies)/ lawyer(s)	http://cgc.law.stanford.edu/judgments/jiangsu-2019-su-02-min-zhong-3807-civil-judgment

*This column indicates who mentioned Guiding Case No. 8 in the subsequent judgment/ruling:

(1) the party(/-ies) or his/her/their lawyer(s) (marked as "Party(/-ies)/lawyer(s)");
(2) the adjudicating court in the reasoning section titled "This Court opined" (marked as "Court (reasoning section)"); and
(3) the adjudicating court in section(s) of the subsequent judgment/ruling other than the reasoning section (marked as "Court (other section(s))").

If two or more of the above situations occurred, the corresponding entries are separated by ";".

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指导案例8号与66个相关后续裁判：如何判定“公司经营管理是否发生严重困难”*

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摘要

股东诉请解散公司需满足“公司经营管理发生严重困难”的条件。指导案例8号弥补了中国《公司法》和相关司法解释对此条件的规范不足，为司法实践提供了较明确的判定方式。由于指导案例8号有重要参考价值，截至2019年12月31日，已有66个后续裁判的当事人和/或法院援引了该案例。

本文作者深入研究这66个后续裁判，发现其事实纷繁复杂，当事人和法院对指导案例8号的解读和使用不尽相同。当事人提出适用指导案例8号后，部分法院未能作出适当的回应，但也有法院正确地参照适用该案例。

整体而言，指导案例8号对大部分后续案件裁判的导向作用明显，但部分后续案件的法院对该案例的裁判思路有不同见解。例如，一些法院对公司强制解散之诉所需满足的条件持有不同看法；亦有一些法院结合社会实际情况，允许在指导案例8号的基础上存有例外情形。

对指导案例8号不同的见解正反映了很多中国法官对案例发展的认真态度。通过更多后续裁判的探索，“公司经营管理发生严重困难”的判定方法与具体应用肯定会越来越清晰，达到指导性案例制度的最终目标——“总结审判经验，统一法律适用，提高审判质量，维护司法公正”。[1]

引言

根据《中华人民共和国公司法》（“《公司法》”）第一百八十三条[2]的规定（见**侧边栏1**），股东提起解散公司之诉需满足“公司经营管理发生严重困难”的条件。然而，《公司法》和《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）》（“《公司法解释（二）》”）第一条[3]（见**侧边栏2**）都没有进一步说明如何解读此条件。由于第一百八十三条包含多个模糊词汇，例如“经营管理”、“严重困难”、“股东利益”、“重大损失”、“其他途径”等，因此在司法实践中，法院难以把握具体的裁判尺度。

2012年4月9日，最高人民法院（“最高法”）发布指导案例8号《林方清诉常熟市凯莱实业有限公司、戴小明公司解散纠纷案》。[4]该案源自一起最终由江苏省高级人民法院判决的公司解散纠纷案件。根据该法院的判决，“公司经营管理是否发生严重困难”的判断，应从公司组织机构的整体运行状态分析，侧重判断公司管理是否存在严重内部障碍，如股东会机制长期失灵、无法就公司的经营管理进行决策等，不应片面理解为公司资金缺乏、严重亏损等经营性困难。因此，公司虽处于盈利状态，但存在上述严重管理障碍的，法院仍可认定公司经营管理已发生严重困难。

最高法把以上裁判理由归纳为指导案例8号的裁判要点（见**下文**），为处理类似的后续案件的法院在判定“公司经营管理是否发生严重困难”时提供较明确

侧边栏1：

《中华人民共和国公司法》（2005年版本）

第一百八十三条

公司经营管理发生严重困难，继续存续会使**股东利益**受到**重大损失**，通过其他途径不能解决的，持有公司全部股东表决权百分之十以上的股东，可以请求人民法院解散公司。

（强调后加）

侧边栏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）》（2008年版本）

第一条

单独或者合计持有公司全部股东表决权百分之十以上的股东，以下列事由之一提起解散公司诉讼，并符合**公司法第一百八十三条**规定的，人民法院应予受理：

（一）公司持续两年以上无法召开股东会或者股东大会，公司经营管理发生严重困难的；

（二）股东表决时无法达到法定或者公司章程规定的比例，持续两年以上不能做出有效的股东会或者股东大会决议，公司经营管理发生严重困难的；

（三）公司董事长期冲突，且无法通过股东会或者股东大会解决，公司经营管理发生严重困难的；

（四）经营管理发生其他严重困难，公司继续存续会使股东利益受到重大损失的情形。

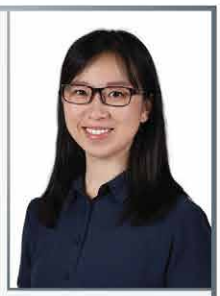
股东以知情权、利润分配请求权等权益受到损害，或者公司亏损、财产不足以偿还全部债务，以及公司被吊销企业法人营业执照未进行清算等为由，提起解散公司诉讼的，人民法院不予受理。

（强调后加）

周子皓
斯坦福法学院中国指导性案例项目副执行编辑

周子皓是美国科律律师事务所的一名律师，亦是该所的亚洲资本市场业务创始成员。在加入科律前，他是世达国际律师事务所的一名法律专业人士。周律师专长于为中国“新经济”公司提供关于复杂商业交易的咨询，内容包括早期与后期的股权融资、兼并收购、公司治理事宜，以及与美国证监会相关的合规事宜。过去几年，他参与了全球范围内其中几个最大的、对市场有示范效应的科技公司上市项目。周律师于山东大学获得法学学士学位（优秀毕业生），并获全额学术奖学金于香港大学完成普通法法学硕士学位课程。2020年秋季，他将入读斯坦福法学院的法学（公司治理）硕士项目。

车驰
斯坦福法学院中国指导性案例项目编辑



车驰目前在英国牛津大学攻读法学学士学位（BA in Jurisprudence）。此前，她曾在英国诺顿罗氏律师事务所北京代表处和美国贝克麦坚时国际律师事务所北京代表处分别担任律师助理和初级律师的职位，其主要工作领域为能源项目和融资业务，并参与过多项跨国并购和融资交易，为大型国有企业和银行提供法律服务。车驰于2014年在荷兰乌特勒支文理学院取得社会科学学士学位，并于2015年在英国剑桥大学取得公司法硕士学位（Master's Degree in Corporate Law）。

的指导。因为不同案件中的股东诉请解散公司所依据的“管理障碍”、“盈利状态”和“股权比例”等事实均存在较大差异，而这些事实对于如何解读指导案例8号的裁判要点均有影响，所以截至2019年12月31日，已有66个后续裁判援引该指导性案例，是众多指导性案例中有较多后续裁判的案例之一。

本文通过分析这66个后续裁判的法院如何解读和应用指导案例8号，回应司法实务中“公司经营管理是否发生严重困难”的判定难题，理清该指导性案例的参考价值以及对后续司法实践的影响。

指导案例8号的由来

林方清与戴小明系常熟市凯莱实业有限公司（“凯莱公司”）的股东，各占50%的股份。戴小明任公司法定代表人及执行董事，林方清任公司总经理兼公司监事。凯莱公司章程明确规定：股东会的决议须经代表二分之一以上表决权的股东通过，但对公司增加或减少注册资本、合并、解散、变更公司形式、修改公司章程作出决议时，必须经代表三分之二以上表决权的股东通过。股东会会议由股东按照出资比例行使表决权。

因林方清与戴小明二者矛盾突出，凯莱公司自2006年6月1日起未召开过股东会。而且，两名股东意见分歧、互不配合，无法以通过股东会决议的方式管理公司，股东会机制已失灵。执行董事戴小明作为互有矛盾的两名股东之一，其管理公司的行为已无法贯彻股东会的决议。林方清作为公司监事不能正常行使监事职权，无法发挥监督作用。因此，凯莱公司的内部机制已无法正常运行，无法对公司的经营作出决策，即使尚未处于亏损状况，江苏省高级人民法院认为该公司的经营管理已发生严重困难，最终判决该公司解散。[5]

由于江苏省高级人民法院在判决理由中详细解读《公司法》第一百八十三条和《公司法解释（二）》第一条以对“公司经营管理发生严重困难”作出认定标准，该判决“充分保护股东合法权益，合理规范公司治理结构，促进市场经济健康有序发展”，[6] 因此该案于2012年4月9日被最高法以指导案例8号的形式予以发布。其裁判要点为：[7]

> 公司法第一百八十三条将“公司经营管理发生严重困难”作为股东提起解散公司之诉的条件之一。判断“公司经营管理是否发生严重困难”，应从公司组织机构的运行状态进行综合分析。公司虽处于盈利状态，但其股东会机制长期失灵，内部管理有严重障碍，已陷入僵局状态，可以认定为公司经营管理发生严重困难。对于符合公司法及相关司法解释规定的其他条件的，人民法院可以依法判决公司解散。

后续裁判的总体特征

附录列出了截至2019年12月31日，笔者在“中国裁判文书网”（http://wenshu.court.gov.cn）官方网站上找到的66个明确提及指导案例8号的后续裁判（即：在裁判文书的任何部分中提及该指导性案例，不论是案例名称的全部或部分被提及，或仅提及指导案例案号）。

附录亦列出谁于后续裁判中提及指导案例8号：当事人（或其律师）；审判法院在题为“本院认为”的说理部分提及该案例（见**灰色行**）；或/和审判法院在“本院认为”说理部分以外的其他部分。

以下各节会通过按裁判年份、法院级别、裁判程序阶段和裁判地域的分布，来分析这些后续裁判的总体特征。

1. 裁判年份分布

根据指导案例8号66个后续裁判的裁判年份来看，2013年有2例案件，2014年有5例，2015年有7例，2016年有6例，2017年有18例，2018年有11例，2019年有17例。由此可见，后续裁判大致逐年增加，而从2017年开始，后续裁判数量每年都不少于10个。

后续裁判的增多，原因固然可以很多，但其中很可能与中国企业从2012年的828.7万家迅速增长至2017年的1809.8万家有关。[8] 自中国共产党第十八次全国代表大会于2012年11月召开后，中国商事制度改革全面发展，市场准入制度的改革和营商环境的优化推动了国内企业数量的迅速增长。[9] 随着商业模式日益复杂，很多企业面对类似指导案例8号的情况，故引用该案例的公司强制解散之诉也相应增加。

2. 法院级别分布

66个提及指导案例8号的后续裁判中，有15个由基层法院作出，中级法院有37个，高级法院有12个，最高法有2个。由此可见，中级法院处理的后续裁判数量远超其他级别的法院。在中级法院作出的37个后续裁判中，34个为二审案件。笔者认为，由于公司强制解散之诉案件涉及公司的股东、董事、监事及相关人员之间的关系，具有纠纷类型多样以及法律关系复杂等特点，且公司强制解散之诉事关公司存亡，因此诸多当事人对初审判决的结果存在异议，选择上诉至中级法院进一步审理。

3. 裁判程序阶段分布

所有66个提及指导案例8号的后续裁判都是民事案件，其中一审案件有18件，二审案件有42件，进入再审程序的有6件。通过结合上述法院级别分布情况可发现，极大部分的指导案例8号后续裁判是中级法院审理的案件和/或二审案件。这些数据反映出公司解散之诉的争议点多、关系复杂、判定困难。尽管指导案例8号发挥一定的指导作用，但不同案情下，如何解读和应用指导案例8号仍存争议。

4. 裁判地域分布

根据对审理指导案例8号66个后续裁判的法院所处地域的分析，笔者注意到由广东省各级法院裁判的案件有25件，占所有案件比例近40%，而其中于2017年至2019年裁判的共有18件。此现象可能是由于广东省属于沿海开放省份，对内对外贸易频繁，经济发展水平较高，公司密度大，广东各级法院面临更多公司纠纷的案件。随着2017年《深化粤港澳合作 推进大湾区建设框架协议》的达成，[10]广东省作为粤港澳大湾区的核心省份，引入外部投资较多，5G、芯片制造、人工智能、医改等新兴产业比重提升，“一带一路”政策吸引了大量企业入驻粤港澳大湾区。企业数量的增加，以及投资类型的多样，公司强制解散之诉的基数相应增大。

> ***“自[十八大]于2012年11月召开后，中国[...]市场准入制度的改革和营商环境的优化推动了国内企业数量的迅速增长。随着商业模式日益复杂，很多企业面对类似指导案例8号的情况，故引用该案例的公司强制解散之诉也相应增加。”***

后续裁判的法院对指导案例8号的处理

1. 整体分析

在66个援引指导案例8号的后续裁判中，有42个是当事人引述指导案例8号但法院未依照《〈最高人民法院关于案例指导工作的规定〉实施细则》[11]（“《实施细则》”）第十一条第二款的规定（见**侧边栏3**），在裁判理由中回应指导案例8号是否适用。

其余24个后续裁判中，有5个为法院依照上述规定作出回应，17个为法院在当事人没有引述指导案例8号的情况下，主动于裁判理由中考虑指导案例8号，以及2个为法院在非裁判理由部分提及指导案例8号——这两个法院都是二审法院，都在非裁判理由部分提及一审法院参照了指导案例8号，但本身没有于裁判理由中分析该案例是否适用（见**附录：序号28后续裁判、序号30后续裁判**）。

依照上述数据，法院于裁判理由中考虑指导案例8号的后续裁判合共22个——5个是回应当事人对该案例的引述，17个是法院主动地考虑该案例（见**附录灰色行**）。这些法院包括最高法（见**附录：序号36后续裁判**）在内，都基本遵循《实施细则》第十一条第一款

侧边栏3：

《〈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

在办理案件过程中，案件承办人员应当查询相关指导性案例。在裁判文书中引述相关指导性案例的，**应在裁判理由部分引述指导性案例的编号和裁判要点**。

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

（强调后加）

"广东省作为粤港澳大湾区的核心省份，引入外部投资较多，[...]新兴产业比重提升，'一带一路'政策吸引了大量企业入驻粤港澳大湾区。企业数量的增加，以及投资类型的多样，公司强制解散之诉的基数相应增大。"

的规定（见**侧边栏3**），于裁判理由部分引述该案例的编号和裁判要点。

以下两节会分别讨论最高法如何处理指导案例8号和分析《公司法》第一百八十三条的条件，以及其他后续裁判的法院如何探索该案例的裁判要点的适用范围。

2. 最高法如何处理指导案例8号、分析《公司法》第一百八十三条的条件

序号27和36后续裁判是2例由最高法审理的案件，两者均是再审民事案件。

2017年6月，最高法由一位审判长、两位代理审判员所组成的合议庭作出序号27后续裁判。再审申请人称该案"情况与[...]指导案例8的案情基本一致。目前[涉案]公司股东会已经形成僵局状态，法院应当按指导案例8判决解散公司"。尽管以上内容都被记录于裁定书的非裁判理由部分，审理此案的合议庭并没有依照《实施细则》第十一条第二款的规定，在裁判理由中回应指导案例8号是否适用。合议庭仅直接根据《公司法》第一百八十三条和《公司法解释（二）》第一条的规定，指出：

> 公司解散，必须具备三个条件，即**公司经营管理发生严重困难、继续存续会使股东利益受到重大损失、通过其他途径不能解决**。而从[再审申请人]的诉讼主张及其所提交的证据看，上述三个条件本案均不具备，即本案不符合公司解散条件。（强调后加）

"相隔6个月，最高法于序号27和36后续裁判中对指导案例8号的处理完全不同。前者没有回应当事人对指导案例8号的援引，后者却在当事人没有提及指导案例8号情况下，主动考虑该案例。"

六个月后，即2017年12月，最高法由另一位审判长、两位审判员所组成的合议庭作出序号36后续裁判。除了一样根据上述《公司法》和《公司法解释（二）》的规定，指出该三个公司解散条件，序号36后续裁判的合议庭还主动考虑指导案例8号并清晰说明：

> 根据《**〈最高人民法院关于案例指导工作的规定〉实施细则》第九条**的规定，各级人民法院正在审理的案件，在**基本案情和法律适用**方面，与最高人民法院发布的指导性案例相类似的，**应当参照相关指导性案例的裁判要点作出裁判**。[...]指导案例8号[...]的裁判要点为，判断"公司经营管理是否发生严重困难"，应从公司组织机构的运行状态进行综合分析，公司虽处于盈利状态，但其股东会机制长期失灵，内部管理有严重障碍，已陷入僵局状态，可以认定为公司经营管理发生严重困难。**本案与该指导案例基本案情相类似，其裁判要点应作为本案参照**。（强调后加）

相隔6个月，最高法于序号27和36后续裁判中对指导案例8号的处理完全不同。前者没有回应当事人对指导案例8号的援引，后者却在当事人没有提及指导案例8号情况下，主动考虑该案例。当中区别，可能涉及前者的合议庭有两位"代理审判员"，而后者的合议庭有两位经验更丰富的"审判员"。

除了对指导案例8号的处理不同之外，序号27、36后续裁判对《公司法》第一百八十三条的条件作出的分析也略有不同：

条件	序号27后续裁判中最高法的决定	序号36后续裁判中最高法的决定
"公司经营管理发生严重困难"	"至于连续四年无法召开股东会问题，虽然双方没有开过股东会，但双方在公司的经营管理问题上**一直在进行沟通和协商**，该问题不能证明公司的经营管理发生了严重困难。"	"**'公司经营管理发生严重困难'的侧重点**在于公司管理方面存有严重内部障碍，如股东会机制失灵、**无法就公司的经营管理进行决策**等。本案中，红白蓝公司自2011年以来没有正式召开过股东会，也就无法通过股东会决议的方式管理公司，股东会机制已经失灵。"
"继续存续会使股东利益受到重大损失"	"关于[股东]王桂英的权利被无视，王桂英对公司的经营情况、财务状况毫不知情问题。该问题不是判断公司经营管理是否发生严重困难时所要考虑的问题，即便存在上述问题，王桂英也**可以通过提起股东知情权诉讼的方式解决**。"	"由于红白蓝公司的内部运营机制早已失灵，刘礼宁等15人的股东权长期处于无法行使的状态，**其投资红白蓝公司的目的无法实现**，可以认定其利益受到重大损失。"

以上最高法的决定对司法实践有两点提示。第一，在判定“公司经营管理发生严重困难”的条件上，股东会机制是否失灵固然重要，但如果股东能在公司的经营管理问题上一直进行沟通和协商，即表明股东仍能就公司的经营管理进行决策，不能符合此条件。

第二，在判定“继续存续会使股东利益受到重大损失”的条件上，法院不能仅看股东利益是否受到重大损失，还需要决定这些损失是否可以通过其他方式解决。如果有其他解决方式来实现这些股东利益，法院便不能认为符合此条件。

3. 其他后续裁判的法院如何探索指导案例8号裁判要点的适用范围

在22个法院于裁判理由部分考虑指导案例8号的后续裁判中，除了序号36后续裁判是由最高法审理外，其余的都由其他法院审理。在这22个后续裁判中，法院援引适用指导案例8号裁判要点的共有16个（见**附录：序号3、5、11、18、21、23、35-37、40、44、45、50、55、58、59后续裁判**），而法院决定不适用指导案例8号的共有6个（见**附录：序号12、17、24、34、47、51后续裁判**）。

在上一节，笔者已讨论最高法在序号36后续裁判中如何处理指导案例8号。本节讨论处理其他21个后续裁判的法院如何探索指导案例8号裁判要点的适用范围，并分享一些法院的重要观点。

首先，应注意到指导案例8号裁判要点包含两点：

- “公司法第一百八十三条将‘公司经营管理发生严重困难’作为股东提起解散公司之诉的**条件之一**。判断‘公司经营管理是否发生严重困难’，应从公司组织机构的运行状态**进行综合分析**。公司虽处于盈利状态，但其股东会机制长期失灵，内部管理有严重障碍，已陷入僵局状态，可以认定为公司经营管理发生严重困难。”
- “对于**符合公司法及相关司法解释规定的其他条件**的，人民法院可以依法判决公司解散。”

（强调后加）

处理其他21个后续裁判的法院普遍能依照指导案例8号裁判要点的第一点，综合分析公司组织机构的运行状态，来判断“公司经营管理是否发生严重困难”。由于裁判要点的第二点涉及广泛内容（即：“公司法及相关司法解释规定的其他条件”），法院在探索其适用范围时，存在不同的观点。当中差异在分析《公司法解释（二）》第一条第（一）项规定的“公司持续两年以上无法召开股东会或者股东大会，公司经营管理发生严重困难”的条件，以及社会利益应否被考虑时，尤为显著。

（1）“公司持续两年以上无法召开股东会或者股东大会，公司经营管理发生严重困难”

根据《公司法解释（二）》第一条第（一）项规定：“公司**持续两年以上无法召开股东会或者股东大会**，公司经营管理发生严重困难的”；“单独或者合计持有公司全部股东表决权百分之十以上的股东”，可以提起解散公司诉讼。

关于“无法召开股东会”，序号51后续裁判的法院认为：

> “无法召开股东会”**不是指“没有召开过股东会”的客观情况，而是指因法律障碍召开不了股东会**，如出席股东会的股东人数达不到召开股东会的最低股东人数。本案中，[...涉案公司]未召开股东会是因为第三人怀慧作为执行董事没有履行召集召开股东会的职责，原告没有行使提议召开临时股东会的权利。（强调后加）

但是，序号5后续裁判的法院强调：

> [判断《公司法解释（二）》第一条第（一）项的条件]侧重点都在于“公司管理发生严重困难”，因此无论公司股东会议“无法召开”还是“没有召开”，只要**在客观上使公司陷入僵局，不能做出有效决策，就符合上述规定的情形**。（强调后加）

一些法院亦考虑“持续两年以上”是否为判定公司经营管理发生严重困难的必要条件。序号17后续裁判的法院认为，必须严格按照条文文义进行解释：

> [股东]刘维卡于2015年1月26日便以[涉案]公司股东长期冲突，经营管理发生严重困难为由提起本案诉讼，不符合公司法解释（二）第1条所规定的认定公司经营管理发生严重困难的时限性要求。即使截至二审法庭调查之日即2016年3月7日，刘维卡所称的公司僵局状态亦**未达到两年**。（强调后加）

但更多的法院灵活处理“持续两年以上”的要求，把重点放在公司经营管理是否发生严重困难。例如，序号34后续裁判的法院认为：

> 公司法司法解释二中“持续两年以上无法召开股东会”，意指作为公司僵局的一种表现，公司长期无法召开股东会。其中**“两年”并非类似时效的期间，不能理解为超过两年未召开股东会即出现公司僵局**。[...]基于[涉案]公司两位股东持有表决权的股份比例，即使两位股东意见不一，股东会通常也能形成有效决议，**不易出现僵局**。这也是本案与指导案例之间重要的事实区别。（强调后加）

序号21后续裁判的法院认为，就算未召开股东会的时间不足两年，但公司人合性基础丧失而无法经营，仍

可解散。该法院先强调指导案例8号裁判要点，然后说明：

> [涉案]**公司已经符合解散的条件**，理由如下：一、[...]公司的**经营管理已发生严重困难**。[...]公司成立后，公司股东之间的矛盾不断激化，无法通过股东会决议的方式管理公司，[...]而**最近半年未召开定期会议**。[...]股东意见存在巨大分歧，相互间的利益冲突和权利争执严重，[...]**该公司赖以存在的人合性基础已经丧失，且公司无法正常经营，已形成经营管理僵局，继续存续将会使股东利益受到重大损失**。（强调后加）

（2）“社会利益”

> ***“法院考虑‘社会利益’的本意固然是好的，但如果公司经营管理已经发生严重困难、继续存续会使股东和社会利益都受到重大损失，且通过其他途径都不能解决这些困难、避免这些损失，法院仍不理会这些挑战而决定不让公司解散所导致的问题可能更大。”***

指导案例8号裁判要点先对如何判断“公司经营管理是否发生严重困难”作出指导。继而指出，“对于**符合公司法**及相关司法解释**规定的其他条件**的，人民法院可以依法判决公司解散”。因此，法院能否判决公司解散，不能只看“公司经营管理是否发生严重困难”，仍需考虑其他条件是否已符合。

《公司法》第一百八十三条的三个条件——公司经营管理发生严重困难、继续存续会使股东利益受到重大损失、通过其他途径不能解决——没有明确提及“社会利益”。法院在处理公司解散之诉时，到底应否考虑“社会利益”?在笔者分析的后续裁判中，大部分法院都没有考虑“社会利益”，两个裁判是例外。

在序号12后续裁判中，法院将该案件与指导案例8号对比并指出：

> 本院认为，**[本案与指导案例8号]相同之处**在于公司均因股东之间存有分歧、互不配合而持续两年以上无法召开股东会，公司经营管理发生严重困难，对股东的利益都造成一定损害。但**本案又存在一定特殊性**，[涉案]公司经营的**房地产项目**相比[指导案例8号中的]凯莱实业有限公司经营的普通产品而言承担着**更大的社会责任**。本院认为，在判断公司应否解散时，不仅要考虑股东利益还要考虑到**社会公众利益**。（强调后加）

此外，序号47后续裁判的法院认为：

> 公司解散涉及多种利益，不仅仅涉及股东利益，还涉及公司债权人、公司员工等**多方利益主体**，关涉市场经济秩序的稳定和安宁。司法对股东压迫情形下的公司解散更应采取审慎态度。（强调后加）

以上法院对“社会利益”作出考虑，似乎是超出了《公司法》第一百八十三条的三个条件的范围。但是，笔者认为，该条的第三个条件“通过其他途径不能解决”提供了考虑“社会利益”的平台。换言之，“社会利益”应作为“通过其他途径不能解决”的一部分考虑。例如，在股东之间的谈判、调解中，各方可以探讨不同利益、影响，包括“社会利益”等，尽力解决公司所面对的严重困难，以避免股东、社会利益受到重大损失。因此，如果通过这些不同途径都不能解决所面对的严重困难，法院应当认为已符合了“通过其他途径不能解决”的条件。

法院考虑“社会利益”的本意固然是好的，但如果公司经营管理已经发生严重困难、继续存续会使股东和社会利益都受到重大损失，且通过其他途径都不能解决这些困难、避免这些损失，法院仍不理会这些挑战而决定不让公司解散所导致的问题可能更大。最终，有志成仍不理会这些挑战而决定立公司、推动社会主义市场经济发展之士会有所顾虑、却步不前。

结论

公司解散之争是公司纠纷案件中既重要又困难的一类问题。指导案例8号对后续案件无疑发挥了指导作用。该案例将“公司经营管理发生严重困难”的概念限定为公司管理方面的内部障碍，如股东会机制失灵、无法就公司的经营管理进行决策等，而非片面理解为公司资金缺乏、严重亏损等经营性困难，这有利于“公司经营管理发生严重困难”的判定方法由抽象转变为具体，提高司法裁判的可操作性。

但本文所分析的66个后续裁判亦反映了指导案例8号的限制性。许多处理这些后续裁判的法院都没有对指导案例8号作出援引或仅作部分援引。这可能是由于指导案例8号裁判要点不容易适用于审判实务中遇到的纷繁复杂的情况。

基于对66个后续裁判的分析，笔者观察到法院判断公司应否解散时，特别注重三点：（1）持股比例比较大的股东是否处于长期对立、矛盾激化的状况；（2）股东会是否已在客观上陷入僵局，且因人合障碍无法召开并作出有效决策；（3）股东是否已穷尽其他救济途径解决公司经营管理的严重困难。而对于已穷尽谈判、调解等不同途径仍不能维系人合性基础的公司，笔者认为法院应审慎克制基于“社会利益”而判定不予解散，以实现公司解散之诉的功能与价值。■

* 此中国案例*见解*™的引用是：周子皓、车驰，指导案例8号与66个相关后续裁判：如何判定“公司经营管理是否发生严重困难”，《中国法律连接》，第8期，第33页（2020年3月），*亦见*于斯坦福法学院中国指导性案例项目，中国案例*见解*™，2020年3月，http://cgc.law.stanford.edu/zh-hans/commentaries/clc-8-202003-insights-9-zhou-che。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 《最高人民法院关于案例指导工作的规定》，序言，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，斯坦福法学院中国指导性案例项目，中文指导性案例规则，2010年11月26日（最终版本），https://cgc.law.stanford.edu/zh-hans/guiding-cases-rules/20101126-chinese。

2 本文依照指导案例8号而引用《公司法》第一百八十三条。该案例所引用的《公司法》应指2005年版本，该版本于指导案例8号在2012年发布时，以及其所依据的最终判决作出时已生效。第183条在当前有效版本中编号为第182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，经四次修正，最新修正于2018年10月26日，同日起施行，http://www.fdi.gov.cn/1800000121_23_74633_0_7.html。

3 本文依照指导案例8号而引用《公司法解释（二）》第一条。该案例所引用的《公司法解释（二）》应指2008年版本，该版本于指导案例8号在2012年发布时，以及其所依据的最终判决作出时已生效。2014年，《公司法解释（二）》第一条进行了小幅修改，将所提及的《公司法》“第一百八十三条”改为“第一百八十二条”，以反映《公司法》中所用编号的变化。*见*《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，并于2014年2月17日修正，2014年3月1日起施行，http://www.court.gov.cn/zixun-xiangqing-6135.html。

4 《林方清诉常熟市凯莱实业有限公司、戴小明公司解散纠纷案》，《中国法律连接》，第8期，第63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（CGC8），2020年3月，https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-8（以下简称“指导案例8号”）。

5 （2010）苏商终字第0043号民事判决，2010年10月19日由江苏省高级人民法院作出，全文载于斯坦福法学院中国指导性案例项目网站，http://cgc.law.stanford.edu/zh-hans/judgments/jiangsu-2010-su-shang-zhong-zi-0043-civil-judgment。

6 指导案例8号，注释4，“裁判理由”部分。*亦见*最高人民法院案例指导工作办公室，指导案例8号《林方清诉常熟市凯莱实业有限公司、戴小明公司解散纠纷案》的理解与参照，《人民司法·应用》，第15期，第59页（2012）。

7 关于该案的更多内容，见指导案例8号，注释4。

8 国家统计局，单位数量快速增长 市场活力不断激发——新中国成立70周年经济社会发展成就系列报告之二十一，《国家统计局网》，2019年8月26日，http://www.stats.gov.cn/tjsj/zxfb/201908/t20190826_1693395.html。

9 *同上*。*亦见*《中共中央关于全面深化改革若干重大问题的决定》，2013年11月12日中国共产党第十八届中央委员会第三次全体会议通过和公布，同日起施行，http://www.scio.gov.cn/zxbd/nd/2013/document/1374228/1374228.htm（指出“经济体制改革是全面深化改革的重点”等）；《中共中央关于全面推进依法治国若干重大问题的决定》，2014年10月23日中国共产党第十八届中央委员会第四次全体会议通过和公布，同日起施行，http://www.ccps.gov.cn/xytt/201812/t20181212_123256.shtml（指出“以保护产权、维护契约[…]、有效监管为基本导向，完善社会主义市场经济法律制度”的重要性）；沈荣华，十八大以来我国“放管服”改革的成效、特点与走向，《行政管理改革》，第9期，第10页（2017），http://theory.people.com.cn/n1/2017/1102/c40531-29623408.html。

10 《深化粤港澳合作 推进大湾区建设框架协议》，2017年7月1日由国家发展和改革委员会公布，同日起施行，https://www.ndrc.gov.cn/fzggw/jgsj/dqs/sjdt/201707/W020190909487713229129.pdf。

11 《〈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，斯坦福法学院中国指导性案例项目，中文指导性案例规则，2015年6月12日（最终版本），https://cgc.law.stanford.edu/zh-hans/guiding-cases-rules/20150513-chinese。

附录：66个明确提及指导案例8号的后续裁判（截至2019年12月31日）

序号	审判日期	后续裁判号	审判法院	谁提及指导案例8号*	链接
1	2013/3/1	（2013）冀民二终字第23号	河北省高级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/hebei-2013-ji-min-er-zhong-zi-23-civil-judgment
2	2013/7/12	（2012）修民二初字第314号	河南省修武县人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/henan-2012-xiu-min-er-chu-zi-314-civil-judgment
3	2014/1/17	（2014）浙台商终字第18号	浙江省台州市中级人民法院	法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/zhejiang-2014-zhe-tai-shang-zhong-zi-18-civil-judgment
4	2014/6/22	（2014）桐民商初字第00018号	河南省桐柏县人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/henan-2014-tong-min-shang-chu-zi-00018-civil-judgment
5	2014/7/23	（2014）川民申字第1145号	四川省高级人民法院	当事人/律师；法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/sichuan-2014-chuan-min-shen-zi-1145-civil-ruling
6	2014/7/25	（2014）惠中法民二终字第79号	广东省惠州市中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2014-hui-zhong-fa-min-er-zhong-zi-79-civil-judgment
7	2014/11/25	（2014）东中法民二终字第974号	广东省东莞市中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2014-dong-zhong-fa-min-er-zhong-zi-974-civil-judgment
8	2015/3/20	（2015）穗中法民二终字第70号	广东省广州市中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2015-sui-zhong-fa-min-er-zhong-zi-70-civil-ruling
9	2015/6/15	（2015）鄂丹江口民初字第00008号	湖北省丹江口市人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/hubei-2015-e-dan-jiang-kou-min-chu-zi-00008-civil-judgment
10	2015/6/19	（2014）苏商终字第00360号	江苏省高级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/jiangsu-2014-su-shang-zhong-zi-00360-civil-judgment
11	2015/6/24	（2014）深中法涉外终字第134号	广东省深圳市中级人民法院	法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2014-shen-zhong-fa-she-wai-zhong-zi-134-civil-judgment
12	2015/10/23	（2015）鲁民再字第5号	山东省高级人民法院	当事人/律师；法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/shandong-2015-lu-min-zai-zi-5-civil-judgment
13	2015/10/28	（2015）惠中法民二终字第365号	广东省惠州市中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2015-hui-zhong-fa-min-er-zhong-zi-365-civil-judgment
14	2015/12/15	（2015）菏商初字第92号	山东省菏泽市（地区）中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/shandong-2015-he-shang-chu-zi-92-civil-judgment
15	2016/4/8	（2016）京01民终1502号	北京市第一中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/beijing-2016-jing-01-min-zhong-1502-civil-judgment
16	2016/5/2	（2016）渝01民终760号	重庆市第一中级人民法院	当事人/律师；法院（其他部分）	http://cgc.law.stanford.edu/zh-hans/judgments/chongqing-2016-yu-01-min-zhong-760-civil-judgment
17	2016/6/2	（2016）粤03民终3161号	广东省深圳市中级人民法院	法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2016-yue-03-min-zhong-3161-civil-judgment
18	2016/6/16	（2015）深中法涉外终字第92号	广东省深圳市中级人民法院	法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2015-shen-zhong-fa-she-wai-zhong-zi-92-civil-judgment
19	2016/11/16	（2016）鲁民终714号	山东省高级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/shandong-2016-lu-min-zhong-714-civil-judgment
20	2016/12/29	（2016）吉0103民初598号	吉林省长春市宽城区人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/jilin-2016-ji-0103-min-chu-598-civil-judgment
21	2017/1/22	（2016）粤04民初58号	广东省珠海市中级人民法院	法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2016-yue-04-min-chu-58-civil-judgment
22	2017/3/21	（2017）内29民终19号	内蒙古自治区阿拉善盟中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/inner-mongolia-2017-nei-29-min-zhong-19-civil-judgment
23	2017/3/24	（2017）皖0706民初150号	安徽省铜陵市义安区人民法院	法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/anhui-2017-wan-0706-min-chu-150-civil-judgment
24	2017/5/5	（2017）苏07民终784号	江苏省连云港市中级人民法院	法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/jiangsu-2017-su-07-min-zhong-784-civil-judgment
25	2017/5/10	（2017）辽0102民初529号	辽宁省沈阳市和平区人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/liaoning-2017-liao-0102-min-chu-529-civil-judgment
26	2017/6/20	（2017）苏04民终619号	江苏省常州市中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/jiangsu-2017-su-04-min-zhong-619-civil-ruling

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27	2017/6/28	（2017）最高法民申2342号	最高人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/spc-2017-zui-gao-fa-min-shen-2342-civil-ruling
28	2017/7/27	（2017）皖07民终314号	安徽省铜陵市中级人民法院	法院（其他部分）	http://cgc.law.stanford.edu/zh-hans/judgments/anhui-2017-wan-07-min-zhong-314-civil-judgment
29	2017/8/7	（2017）辽14民终988号	辽宁省葫芦岛市中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/liaoning-2017-liao-14-min-zhong-988-civil-judgment
30	2017/8/25	（2017）粤民终1308号	广东省高级人民法院	法院（其他部分）	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2017-yue-min-zhong-1308-civil-judgment
31	2017/9/12	（2016）内0627民初1990号	内蒙古自治区伊金霍洛旗人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/inner-mongolia-2016-nei-0627-min-chu-1990-civil-judgment
32	2017/10/11	（2017）陕民终990号	陕西省高级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/shaanxi-2017-shan-min-zhong-990-civil-judgment
33	2017/10/20	（2017）湘01民终5672号	湖南省长沙市中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/hunan-2017-xiang-01-min-zhong-5672-civil-judgment
34	2017/10/25	（2017）鄂08民初31号	湖北省荆门市中级人民法院	法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/hubei-2017-e-08-min-chu-31-civil-judgment
35	2017/12/11	（2016）内2201民初4837号	内蒙古自治区乌兰浩特市人民法院	法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/inner-mongolia-2016-nei-2201-min-chu-4837-civil-judgment
36	2017/12/20	（2017）最高法民申4394号	最高人民法院	法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/spc-2017-zui-gao-fa-min-shen-4394-civil-ruling
37	2017/12/26	（2017）鲁11民终2073号	山东省日照市中级人民法院	法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/shandong-2017-lu-11-min-zhong-2073-civil-judgment
38	2017/12/26	（2017）粤13民终3712号	广东省惠州市中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2017-yue-13-min-zhong-3712-civil-judgment
39	2018/2/11	（2017）粤0703民初5738号	广东省江门市蓬江区人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2017-yue-0703-min-chu-5738-civil-judgment
40	2018/4/9	（2017）粤03民终20300号	广东省深圳市中级人民法院	当事人/律师；法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2017-yue-03-min-zhong-20300-civil-judgment
41	2018/5/21	（2017）苏0311民初8013号	江苏省徐州市泉山区人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/jiangsu-2017-su-0311-min-chu-8013-civil-judgment
42	2018/8/10	（2018）粤03民终4571号	广东省深圳市中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2018-yue-03-min-zhong-4571-civil-judgment
43	2018/8/13	（2018）赣民终287号	江西省高级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/jiangxi-2018-gan-min-zhong-287-civil-judgment
44	2018/9/13	（2018）黔0113民初860号	贵州省贵阳市白云区人民法院	法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/guizhou-2018-qian-0113-min-chu-860-civil-judgment
45	2018/10/10	（2018）粤0391民初497号	广东省深圳前海合作区人民法院	法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2018-yue-0391-min-chu-497-civil-judgment
46	2018/10/22	（2018）冀0110民初3336号	河北省石家庄市鹿泉区人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/hebei-2018-ji-0110-min-chu-3336-civil-judgment
47	2018/11/5	（2018）鄂民终5号	湖北省高级人民法院	当事人/律师；法院（其他部分）；法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/hubei-2018-e-min-zhong-5-civil-judgment
48	2018/11/9	（2018）云26民终874号	云南省文山壮族苗族自治州中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/yunnan-2018-yun-26-min-zhong-874-civil-judgment
49	2018/11/23	（2018）粤01民终17201号	广东省广州市中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2018-yue-01-min-zhong-17201-civil-judgment
50	2019/1/8	（2018）粤05民终1074号	广东省汕头市中级人民法院	法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2018-yue-05-min-zhong-1074-civil-judgment
51	2019/2/25	（2018）粤0391民初251号	广东省深圳前海合作区人民法院	法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2018-yue-0391-min-chu-251-civil-judgment
52	2019/3/20	（2018）川民终216号	四川省高级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/sichuan-2018-chuan-min-zhong-216-civil-judgment

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53	2019/3/25	（2019）粤01民终2326号	广东省广州市中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2019-yue-01-min-zhong-2326-civil-judgment
54	2019/4/1	（2019）粤01民终341号	广东省广州市中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2019-yue-01-min-zhong-341-civil-judgment
55	2019/5/20	（2019）甘0502民初1149号	甘肃省天水市秦州区人民法院	法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/gansu-2019-gan-0502-min-chu-1149-civil-judgment
56	2019/6/5	（2019）粤13民终1375号	广东省惠州市中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2019-yue-13-min-zhong-1375-civil-judgment
57	2019/6/12	（2018）粤03民终15263号	广东省深圳市中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2018-yue-03-min-zhong-15263-civil-judgment
58	2019/6/14	（2019）京03民终8046号	北京市第三中级人民法院	当事人/律师；法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/beijing-2019-jing-03-min-zhong-8046-civil-judgment
59	2019/6/21	（2019）粤01民终5933号	广东省广州市中级人民法院	法院（说理部分）	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2019-yue-01-min-zhong-5933-civil-judgment
60	2019/6/28	（2018）粤民申5954号	广东省高级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2018-yue-min-shen-5954-civil-ruling
61	2019/7/1	（2019）浙03民终2474号	浙江省温州市中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/zhejiang-2019-zhe-03-min-zhong-2474-civil-judgment
62	2019/7/5	（2018）粤民申12089号	广东省高级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2018-yue-min-shen-12089-civil-ruling
63	2019/7/12	（2019）川32民终99号	四川省阿坝藏族羌族自治州中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/sichuan-2019-chuan-32-min-zhong-99-civil-judgment
64	2019/8/19	（2019）粤01民终12603号	广东省广州市中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/guangdong-2019-yue-01-min-zhong-12603-civil-judgment
65	2019/10/25	（2019）甘05民终467号	甘肃省天水市中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/gansu-2019-gan-05-min-zhong-467-civil-judgment
66	2019/11/20	（2019）苏02民终3807号	江苏省无锡市中级人民法院	当事人/律师	http://cgc.law.stanford.edu/zh-hans/judgments/jiangsu-2019-su-02-min-zhong-3807-civil-judgment

*本栏显示谁于后续裁判提及指导案例8号：
（1）当事人（或其律师）（标记为“当事人/律师”）；
（2）审判法院在题为“本院认为”的说理部分（标记为“法院（说理部分）”）；
（3）审判法院在说理部分以外的其他部分（标记为“法院（其他部分）”）。
如果上述两种或以上情况发生，则用“；”分隔。

《中华人民共和国外商投资法》与其实施条例、司法解释和相关注解*

熊美英博士
中国指导性案例项目创办人与总监

费德明
中国指导性案例项目前联合执行编辑

Foreign Investment Law of the People's Republic of China, Its Implementing Regulation and Judicial Interpretation, and Related Annotations**

Dr. Mei Gechlik
Founder and Director,
China Guiding Cases Project

Dimitri Phillips
Former Co-Managing Director,
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摘要

中国于2019年3月15日通过《中华人民共和国外商投资法》("《外商投资法》")，取代已经存在了四十年的旧的外商投资法律框架。2019年12月26日，即《外商投资法》于2020年1月1日生效的前几天，国务院和最高人民法院分别发布《中华人民共和国外商投资法实施条例》("《实施条例》"；共49条）和《最高人民法院关于适用〈中华人民共和国外商投资法〉若干问题的解释》("《司法解释》")；共7条），以促进该法律的实施。

在此篇中法连*聚焦*™中，作者分享了他们对《外商投资法》一丝不苟的英语翻译，并借鉴了《实施条例》和《司法解释》等各种资料，对新法律作出关键注解。

Abstract

China passed the *Foreign Investment Law of the People's Republic of China* (the "*Foreign Investment Law*") on March 15, 2019, to replace the old foreign investment legal framework that had been in place for four decades. On December 26, 2019, a few days before the *Foreign Investment Law* came into effect on January 1, 2020, the State Council and the Supreme People's Court issued, respectively, the *Implementing Regulation of the Foreign Investment Law of the People's Republic of China* (the "*Implementing Regulation*"; with 49 articles in total) and the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Foreign Investment Law of the People's Republic of China* (the "*Judicial Interpretation*"; with 7 articles in total) to facilitate the implementation of the law.

In this CLC *Spotlight*™ piece, the authors share their meticulous English translation of the *Foreign Investment Law* and draw on various sources, including the *Implementing Regulation* and the *Judicial Interpretation*, to provide key annotations on the new law.

《中华人民共和国外商投资法》

（2019年3月15日
第十三届全国人民代表大会
第二次会议通过）

Foreign Investment Law of the People's Republic of China

(Passed at the Second Session of the
Thirteenth National People's Congress on
March 15, 2019)

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

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

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

费德明 | Dimitri Phillips
中国指导性案例项目前联合执行编辑 | Former Co-Managing Director, China Guiding Cases Project

费德明律师是位于北京的达辉律师事务所争议解决、合规与公司/并购业务团队的成员。从2012年到2015年，费律师担任中国指导性案例项目的联合执行编辑，主要职责是确保该项目的英文翻译和分析维持高质量。此后，他以顾问的身份，继续为该项目提供这方面的协助。

在其法律业务中，费律师为已在中国有业务或打算在中国开展业务的外国公司以及在海外投资的中国公司提供广泛的服务。费律师为客户提供诉讼、国际仲裁、合规、境内外投资及一般公司事务方面的法律服务，涵盖金融、TMT（技术、媒体和电信）及传统制造等各行业。

费律师于波士顿大学取得印欧语系方面的学士学位，又于牛津大学取得语言学的硕士学位，专门研究英语的历史与结构。此后，在他的法学教育过程中，费律师还曾在北京大学学习中国法律并在位于北京的中国国际经济贸易仲裁委员会（“CIETAC”）实习。从斯坦福法学院获得JD学位后，他于纽约的克拉瓦斯施伟摩尔律师事务所（Cravath, Swaine & Moore LLP）担任诉讼律师。

Dimitri Phillips is a member of DaHui Lawyer's Dispute Resolution, Compliance, and Corporate/M&A practice groups, based in Beijing. From 2012 to 2015, Mr. Phillips served as Co-Managing Editor of the China Guiding Cases Project, with the primary responsibility to ensure the top quality of the project's English translations and analyses, which he has continued to do since then as a consultant.

In his legal practice, Mr. Phillips handles a range of issues for foreign companies doing or seeking to do business in China as well as Chinese companies going abroad. Mr. Phillips has advised clients on litigation, international arbitration, compliance, inbound and outbound investment, and general corporate matters. His advice spans industries from finance to technology, media, and telecom (“TMT”) to traditional manufacturing.

Mr. Phillips obtained a bachelor's degree from Boston College, specializing in Indo-European languages, and a master's degree in linguistics from Oxford University, specializing in the history and structure of English. Thereafter, in his legal education, he studied Chinese law for a semester at Peking University and interned at the China International and Economic Trade Arbitration Commission (“CIETAC”) in Beijing. After obtaining a JD from Stanford Law School, he worked as a litigation associate at the law firm of Cravath, Swaine & Moore LLP in New York.

第一章　总则

第一条

为了进一步扩大对外开放，积极促进外商投资，保护外商投资合法权益，规范外商投资管理，推动形成全面开放新格局，[1]促进社会主义市场经济健康发展，根据宪法，[2]制定本法。

第二条

在中华人民共和国境内（以下简称中国境内）的外商投资，适用本法。[5]

本法所称外商投资，是指外国的自然人、企业或者其他组织（以下称外国投资者）直接或者间接在中国境内进行的投资活动，包括下列情形：

（一）外国投资者单独或者与其他投资者[7]共同在中国境内设立外商投资企业；

（二）外国投资者取得中国境内企业的股份、股权、财产份额或者其他类似权益；

（三）外国投资者单独或者与其他投资者[8]共同在中国境内投资新建项目；

（四）法律、行政法规或者国务院规定的[9]其他方式的投资。

本法所称外商投资企业，是指全部或者部分由外国投资者投资，依照中国法律在中国境内经登记注册设立的企业。

第三条

国家坚持对外开放的基本国策，鼓励外国投资者依法在中国境内投资。

国家实行高水平投资自由化便利化政策，建立和完善外商投资促进机制，营造稳定、透明、可预期和公平竞争的市场环境。

第四条

国家对外商投资实行准入前国民待遇加负面清单管理制度。[13]

前款所称准入前国民待遇，是指在投资准入阶段给予外国投资者及其投资不低于

Chapter I　General Provisions

Article 1

This Law is formulated, in accordance with the Constitution,[3] to further expand the opening [of China] to the outside [world], actively promote foreign investment, protect the legal rights and interests of foreign investment, standardize the administration of foreign investment, give impetus to the formation of the new state of being open on all fronts,[4] and promote the healthy development of the socialist market economy.

Article 2

This Law applies to foreign investment within the territory of the People's Republic of China (hereinafter referred to as "within China").[6]

"Foreign investment" as stated in this Law refers to investment activities carried out by foreign natural persons, enterprises, or other organizations (hereinafter referred to as "foreign investors") directly or indirectly within China, including the following situations:

(1) a foreign investor establishes, alone or jointly with other investors,[10] a foreign-invested enterprise within China;

(2) a foreign investor obtains shares, equity, property shares, or other similar rights and interests of an enterprise within China;

(3) a foreign investor invests, alone or jointly with other investors,[11] in a newly-established project within China;

(4) investment by other methods prescribed by laws, administrative regulations, or the State Council.[12]

"Foreign-invested enterprise" as stated in this Law refers to an enterprise wholly or partly invested in by [one or more] foreign investor(s) and registered, in accordance with China's law, as established within China.

Article 3

The State adheres to the basic national policy of opening [China] to the outside [world] and encourages foreign investors to invest within China in accordance with law.

The State implements high-level investment liberalization and facilitation policies, establishes and improves mechanisms for promoting foreign investment, and creates a stable, transparent, predictable, and fair-competition market environment.

Article 4

With respect to foreign investment, the State implements an administrative system of pre-access[14] national treatment plus negative lists.[15]

[The term] "pre-access national treatment" as stated in the preceding paragraph refers to the treatment, which is no less favorable than [the

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注解 | Annotations

[1]《中华人民共和国外商投资法实施条例》第二条没有使用“推动形成全面开放新格局”的表述，而是更清晰地表明：“持续优化外商投资环境，推进更高水平对外开放”。*见*《中华人民共和国外商投资法实施条例》，2019年12月12日由国务院通过，2019年12月26日公布，2020年1月1日起施行，http://www.xinhuanet.com/2019-12/31/c_1125409533.htm（以下简称“《实施条例》”）。

[2]《中华人民共和国宪法》，1982年12月4日通过和公布，同日起施行，经五次修正，最新修正于2018年3月11日，同日起施行，http://www.mod.gov.cn/regulatory/2018-03/22/content_4807615.htm。

[3]《中华人民共和国宪法》(*Constitution Law of the People's Republic of China*), passed on, issued on, and effective as of Dec. 4, 1982, amended five times, most recently on Mar. 11, 2018, effective as of Mar. 11, 2018, http://www.mod.gov.cn/regulatory/2018-03/22/content_4807615.htm.

[4] Instead of using the expression "give impetus to the formation of the new state of being open on all fronts", Article 2 of the *Implementing Regulation of the Foreign Investment Law of the People's Republic of China* states: "continue to optimize the foreign investment environment, and promote higher levels of opening up". *See*《中华人民共和国外商投资法实施条例》(*Implementing Regulation of the Foreign Investment Law of the People's Republic of China*), passed by the State Council on Dec. 12, 2019, issued on Dec. 26, 2019, effective as of Jan. 1, 2020, http://www.xinhuanet.com/2019-12/31/c_1125409533.htm (hereinafter "*Implementing Regulation*").

[5]《实施条例》第四十七条规定，中国境内的外商投资“适用外商投资法**和本条例的有关规定**”（强调后加）。
关于香港、澳门和台湾的投资者以及“定居在国外的中国公民”在中国大陆的投资，《实施条例》第四十八条指出所适用的规定。例如，台湾投资者在大陆的投资“适用《中华人民共和国台湾同胞投资保护法》[…]及其实施细则的规定”，而该法及其实施细则未规定的事项，“参照外商投资法和本条例执行”。*见*《中华人民共和国台湾同胞投资保护法》，1994年3月5日通过和公布，同日起施行，经两次修正，最新修正于2019年12月28日，2020年1月1日起施行，http://www.waizi.org.cn/doc/75257.html。
此外，“为正确适用《中华人民共和国外商投资法》，依法平等保护中外投资者合法权益”，最高人民法院发布司法解释，对“投资合同纠纷案件适用法律问题”作出解释。*见*《最高人民法院关于适用〈中华人民共和国外商投资法〉若干问题的解释》，序言，2019年12月16日由最高人民法院审判委员会通过，2019年12月26日公布，2020年1月1日起施行，http://www.court.gov.cn/zixun-xiangqing-212921.html（以下简称“《司法解释》”）。《司法解释》第一条对“投资合同”一词作出定义。
《司法解释》第六条明确规定人民法院审理香港、澳门和台湾的投资者以及“定居在国外的中国公民”在中国大陆的投资的相关纠纷案件，“可以参照适用**本解释**”（强调后加）。

[6] Article 47 of the *Implementing Regulation* provides that "the *Foreign Investment Law* **and relevant provisions of this Regulation** apply" (emphasis added) to foreign investment within China.
Regarding investments in Mainland China made by investors from Hong Kong, Macau, or Taiwan, or by "citizens of China who reside outside the country", Article 48 of the *Implementing Regulation* specifies which legal provisions should be applied. For example, "the *Law of the People's Republic of China on the Protection of Investments by Taiwan Compatriots* […] and provisions of its implementing rules apply" to investments in Mainland China made by investors from Taiwan, and matters not prescribed by that law or its implementing rules "shall be implemented with reference to the *Foreign Investment Law and this Regulation*". *See*《中华人民共和国台湾同胞投资保护法》(*Law of the People's Republic of China on the Protection of Investments by Taiwan Compatriots*), passed on, issued on, and effective as of Mar. 5, 1994, amended two times, most recently on Dec. 28, 2019, effective as of Jan. 1, 2020, http://www.waizi.org.cn/doc/75257.html.
Moreover, "in order to correctly apply the *Foreign Investment Law of the People's Republic of China* and equally protect, in accordance with law, the legal rights and interests of Chinese and foreign investors", the Supreme People's Court issued a judicial interpretation to provide interpretations on issues regarding the "application of laws in disputes over investment contracts". *See*《最高人民法院关于适用〈中华人民共和国外商投资法〉若干问题的解释》(*Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Foreign Investment Law of the People's Republic of China*), Preamble, passed by the Adjudication Committee of the Supreme People's Court on Dec. 16, 2019, issued on Dec. 26, 2019, effective as of Jan. 1, 2020, http://www.court.gov.cn/zixun-xiangqing-212921.html (hereinafter "*Judicial Interpretation*"). Article 1 of the *Judicial Interpretation* defines the term "investment contracts".
Article 6 of the *Judicial Interpretation* clearly states that people's courts adjudicating disputes related to investments in Mainland China made by investors from Hong Kong, Macau, or Taiwan, or by "citizens of China who reside outside the country" "may refer to and apply **this Interpretation**" (emphasis added).

[7]《实施条例》第三条指出“其他投资者”也包括“中国的自然人”。

[8] *同上*。

[9] 这意味着有权发布行政法规的国务院还可以通过发布行政法规以外的方式规定“其他方式的投资”。然而，尚不清楚这是否可以通过（1）国务院某些部门在获得国务院批准后所发布的规章和/或（2）国务院本身发布的其他类型的规范性文件来规定“其他方式的投资”。有关（2）的例子，见《国务院关于在自由贸易试验区暂时调整实施有关行政法规规定的通知》，2020年1月15日由国务院公布，同日起施行，http://www.gov.cn/zhengce/content/2020-01/22/content_5471605.htm。
有关中国各种立法，见《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。

[10] Article 3 of the *Implementing Regulation* points out that "other investors" also include "China's natural persons".

本国投资者及其投资的待遇；所称负面清单，是指国家规定在特定领域对外商投资实施的准入特别管理措施。国家对负面清单之外的外商投资，给予国民待遇。

treatment] given to a domestic investor and his[16] investment, given to a foreign investor and his investment at the investment access stage. [The term] "negative lists" as stated [in the preceding paragraph] refers to special administrative measures for access implemented for foreign investment in specific areas, as prescribed by the State. The State grants national treatment to foreign investment outside the negative lists.

负面清单由国务院发布或者批准发布。[17]

Negative lists are issued by or approved for issuance by the State Council.[18]

中华人民共和国缔结或者参加的国际条约、协定对外国投资者准入待遇有更优惠规定的，可以按照相关规定执行。

Where an international treaty or agreement concluded or acceded to by the People's Republic of China has more favorable provisions regarding access treatment for foreign investors, the relevant provisions may be implemented.

第五条

Article 5

国家依法保护外国投资者在中国境内的投资、收益和其他合法权益。

The State protects, in accordance with law, foreign investors' investments, revenues, and other legal rights and interests within China.

第六条

Article 6

在中国境内进行投资活动的外国投资者、外商投资企业，应当遵守中国法律法规，不得危害中国国家安全、损害社会公共利益。

Foreign investors and foreign-invested enterprises that carry out investment activities within China should abide by the laws and regulations of China and must not endanger China's national security or harm social and public interests.

第七条

Article 7

国务院商务主管部门、投资主管部门按照职责分工，开展外商投资促进、保护和管理工作；国务院其他有关部门在各自职责范围内，负责外商投资促进、保护和管理的相关工作。[19]

The commerce department and the investment department of the State Council shall conduct, in accordance with division of [their] duties, the promotion, protection, and administration of foreign investment. Other relevant departments of the State Council shall be, within the scopes of their respective duties, responsible for work related to the promotion, protection, and administration of foreign investment.[20]

县级以上地方人民政府有关部门依照法律法规和本级人民政府确定的职责分工，开展外商投资促进、保护和管理工作。

The relevant departments of local people's governments at or above the county level shall conduct, in accordance with laws and regulations and with the divisions of [their] duties determined by the local people's governments, the promotion, protection, and administration of foreign investment.

第八条

Article 8

外商投资企业职工依法建立工会组织，开展工会活动，维护职工的合法权益。外商投资企业应当为本企业工会提供必要的活动条件。

Employees of foreign-invested enterprises shall, in accordance with law, establish labor unions, conduct labor union activities, and protect the legal rights and interests of employees. A foreign-invested enterprise should provide the labor union of the enterprise with necessary conditions for [such] activities.

"关于香港、澳门和台湾的投资者以及'定居在国外的中国公民'在中国大陆的投资，《实施条例》第四十八条指出所适用的规定。"

"Regarding investments in Mainland China made by investors from Hong Kong, Macau, or Taiwan, or by 'citizens of China who reside outside the country', Article 48 of the Implementing Regulation specifies which legal provisions should be applied."

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注解 | Annotations

[11] *Id.*

[12] This suggests that the State Council, which has the authority to issue administrative regulations, can prescribe "investment by other methods" in ways other than the issuance of administrative regulations. It is, however, unclear whether "investment by other methods" can be prescribed by (1) rules issued by certain departments of the State Council after receiving approval from the State Council and/or (2) by other types of normative documents issued by the State Council itself. For an example of (2), see 《国务院关于在自由贸易试验区暂时调整实施有关行政法规规定的通知》(*Notice of the State Council on Temporarily Adjusting the Implementation of the Provisions of Relevant Administrative Regulations in the Pilot Free Trade Zones*), issued by the State Council on Jan. 15, 2020, effective as of Jan. 15, 2020, http://www.gov.cn/zhengce/content/2020-01/22/content_5471605.htm. For details about different types of legislation in China, see 《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.

[13] 在《外商投资法》生效前几个月发布的两个负面清单仍然有效。见《外商投资准入特别管理措施（负面清单）（2019年版）》，2019年6月30日由国家发展和改革委员会、商务部公布，2019年7月30日起施行，http://images.mofcom.gov.cn/wzs/201906/20190629212130154.pdf；《自由贸易试验区外商投资准入特别管理措施（负面清单）（2019年版）》，2019年6月30日由国家发展和改革委员会、商务部公布，2019年7月30日起施行，http://images.mofcom.gov.cn/wzs/201906/20190629212301720.pdf。

2020年1月，国家发改委新闻发言人表示，负面清单将在2020年进一步缩短，以扩大外资市场准入。见发改委：2020年将继续推动负面清单修订加大自贸试验区开放试点力度，《每经网》，2020年1月19日，http://www.nbd.com.cn/articles/2020-01-19/1401495.html。

[14] The term "**准入**前" is translated herein as "pre-**access**", in accordance with the use of the term "market **access**" for "市场**准入**" in the *Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China*, which was signed on January 15, 2020. As stated in Article 8.6 of the agreement, the English and Chinese versions of the agreement are "equally authentic". The two versions of the agreement are available at https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf and http://images.mofcom.gov.cn/www/202001/20200116104122611.pdf. Had the term "access" not been widely used for "准入" in this and similar contexts (e.g., the long names of the negative lists (*infra* note 15)), "entry" would have been chosen by the authors to clearly indicate the act of entering the Chinese market (which is the meaning of "准入"), not just the ability/authorization to approach/enter the market. The word "access", which carries these two meanings, may cause confusion.

[15] Two negative lists, which were issued a few months before the *Foreign Investment Law* came into effect, remain effective. *See* 《外商投资准入特别管理措施（负面清单）（2019年版）》(*Special Administrative Measures for the Access of Foreign Investment (Negative List) (2019 Edition)*), issued by the National Development and Reform Commission and the Ministry of Commerce on June 30, 2019, effective as of July 30, 2019, http://images.mofcom.gov.cn/wzs/201906/20190629212130154.pdf; 《自由贸易试验区外商投资准入特别管理措施（负面清单）（2019年版）》(*Special Administrative Measures for the Access of Foreign Investment in Pilot Free Trade Zones (Negative List) (2019 Edition)*), issued by the National Development and Reform Commission and the Ministry of Commerce on June 30, 2019, effective as of July 30, 2019, http://images.mofcom.gov.cn/wzs/201906/20190629212301720.pdf.

In January 2020, a spokesperson of the National Development and Reform Commission announced that the negative lists would be further shortened in 2020 to increase the market access of foreign investment. *See* 发改委：2020年将继续推动负面清单修订 加大自贸试验区开放试点力度 (*Development and Reform Commission: Will Continue to Promote the Revision of the Negative Lists in 2020; Increase the Opening Up of the Pilot Free Trade Zones*), 《每经网》(www.nbd.com.cn), Jan. 19, 2020, http://www.nbd.com.cn/articles/2020-01-19/1401495.html.

[16] 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".

[17] 《实施条例》第四条第一款规定，负面清单由"国务院投资主管部门会同国务院商务主管部门等有关部门提出，报国务院发布或者报国务院批准后由国务院投资主管部门、商务主管部门发布"。第四条第二款规定，"国家根据进一步扩大对外开放和经济社会发展需要，适时调整负面清单。调整负面清单的程序，适用前款规定。"

[18] According to Article 4 Paragraph 1 of the *Implementing Regulation*, the negative lists are "proposed by the investment department of the State Council, together with the commerce department of the State Council and other relevant departments, and reported to the State Council for its issuance". Alternatively, they are jointly "issued by the State Council's investment department and commerce department after [these departments] receive approval from the State Council".

Article 4 Paragraph 2 states that "the State shall adjust the negative lists at the right time, based on the needs of further expanding the opening [of China] to the outside [world] and [the needs of] economic and social development. With respect to the procedures for adjusting the negative lists, the preceding paragraph shall apply."

[19] 目前尚不清楚哪种工作仅是"外商投资促进、保护和管理"的"相关"工作，而不是"外商投资促进、保护和管理"工作。此规定的首部分表明，只有国务院商务主管部门、投资主管部门有权开展外商投资促进、保护和管理工作。

[20] It is not clear what type of work is considered to be merely "related to" the promotion, protection, and administration of foreign investment" ("PPA"), but not PPA itself, as the first part of this provision suggests that only the commerce department and the investment department of the State Council have the authority to conduct PPA.

第二章　投资促进

第九条

外商投资企业依法平等适用国家支持企业发展的各项政策。[21]

第十条

制定与外商投资有关的法律、法规、规章，应当采取适当方式[23]征求外商投资企业的意见和建议。

与外商投资有关的规范性文件、裁判文书等，应当依法及时公布。[25]

第十一条

国家建立健全外商投资服务体系，为外国投资者和外商投资企业提供法律法规、政策措施、投资项目信息等方面的咨询和服务。

第十二条

国家与其他国家和地区、国际组织建立多边、双边投资促进合作机制，加强投资领域的国际交流与合作。

第十三条

国家根据需要，设立特殊经济区域，[27]或者在部分地区实行外商投资试验性政策措施，[28]促进外商投资，扩大对外开放。

第十四条

国家根据国民经济和社会发展需要，鼓励和引导外国投资者在特定行业、领域、地区投资。[31]外国投资者、外商投资企业可以依照法律、行政法规或者国务院的规定享受优惠待遇。[32]

第十五条

国家保障外商投资企业依法平等[35]参与标准制定工作，强化标准制定的信息公开和社会监督。

国家制定的强制性标准平等[37]适用于外商投资企业。

Chapter II　Promotion of Investment

Article 9

The State's various policies to support the development of enterprises shall be equally applied to foreign-invested enterprises in accordance with law.[22]

Article 10

In formulating laws, regulations, and rules related to foreign investment, appropriate methods[24] should be adopted to solicit opinions and suggestions from foreign-invested enterprises.

Normative documents, adjudication documents, etc. that are related to foreign investment should be issued in a timely manner in accordance with law.[26]

Article 11

The State establishes a sound foreign investment service system to provide foreign investors and foreign-invested enterprises with consultations and services on laws and regulations, policies and measures, information about investment projects, and other aspects.

Article 12

The State establishes multilateral and bilateral cooperative mechanisms for promoting investment with other countries, regions, and international organizations to strengthen international exchange and cooperation in the investment area.

Article 13

Based on [its] needs, the State establishes special economic zones[29] or implements, in some regions, experimental policies and measures for foreign investment[30] so as to promote foreign investment and expand the opening [of China] to the outside [world].

Article 14

Based on national economic and social development needs, the State encourages and guides foreign investors to invest in specific industries, areas, and regions.[33] Foreign investors and foreign-invested enterprises may enjoy preferential treatment in accordance with laws, administrative regulations, or provisions of the State Council.[34]

Article 15

The State safeguards foreign-invested enterprises' equal[36] participation, in accordance with law, in the formulation of standards [to] strengthen information disclosure and social supervision in the formulation of standards.

Mandatory standards formulated by the State shall equally be applied to foreign-invested enterprises.[38]

第二章　投资促进 | Chapter II　Promotion of Investment

注解 | Annotations

[21]《实施条例》第六条规定这些政策“应当依法公开”。

[22] Article 6 of the *Implementing Regulation* states that these policies “should be made public in accordance with law”.

[23]《实施条例》第七条第一款指出“书面征求意见以及召开座谈会、论证会、听证会等”多种形式。

[24] Article 7 Paragraph 1 of the *Implementing Regulation* specifies different forms, including “soliciting opinions in writing and holding seminars, argumentation meetings, hearings, etc.”

[25]《实施条例》第七条第二款规定：“与外商投资有关的规范性文件应当依法及时公布，未经公布的不得作为行政管理依据。[…]”。

[26] Article 7 Paragraph 2 of the *Implementing Regulation* provides: “normative documents that are related to foreign investment should be issued in a timely manner in accordance with law; [any such document] that has not been issued must not be used as a basis for administrative management”.

[27]《实施条例》第十条第一款指出“特殊经济区域”是指“经国家批准设立、实行更大力度的对外开放政策措施的特定区域”。

[28]《实施条例》第十条第二款规定“经实践证明可行”的“外商投资试验性政策措施”会“根据实际情况在其他地区或者全国范围内推广”。

[29] Article 10 Paragraph 1 of the *Implementing Regulation* points out that “special economic zones” refer to “specific zones established with the approval of the State to implement greater opening-up policy measures”.

[30] Article 10 Paragraph 2 of the *Implementing Regulation* states that “experimental policies and measures for foreign investment” that “have been proven feasible in practice” will be “promoted, based on actual situations, to other regions or nationwide”.

[31]《实施条例》第十一条明确指出这些“特定行业、领域、地区”详列于“鼓励外商投资产业目录”。该目录由“国务院投资主管部门会同国务院商务主管部门等有关部门拟订，报国务院批准后由国务院投资主管部门、商务主管部门发布”。*见*《鼓励外商投资产业目录（2019年版）》，2019年6月30日由国家发展和改革委员会、商务部公布，2019年7月30日起施行，https://www.ndrc.gov.cn/xxgk/zcfb/fzggwl/201906/W020190905495192418125.pdf。

[32]《实施条例》第十二条表明这些优惠待遇包括“财政、税收、金融、用地等方面”。

[33] Article 11 of the *Implementing Regulation* clearly states that these “specific industries, areas, and regions” are listed in detail in *The Catalogue of Industries for Encouraging Foreign Investment*. The catalogue is “drafted by the investment department of the State Council, together with the commerce department of the State Council and other relevant departments, reported to the State Council for approval, and then issued by the State Council’s investment department and commerce department”. *See*《鼓励外商投资产业目录（2019年版）》(*The Catalogue of Industries for Encouraging Foreign Investment (2019 Edition)*), issued by the National Development and Reform Commission and the Ministry of Commerce on June 30, 2019, effective as of July 30, 2019, https://www.ndrc.gov.cn/xxgk/zcfb/fzggwl/201906/W020190905495192418125.pdf.

[34] Article 12 of the *Implementing Regulation* indicates that such preferential treatment includes “fiscal, tax, financial, land use, and other aspects”.

[35]《实施条例》第十三条阐明此处使用的“平等”的含义。该条规定：“外商投资企业依法**和内资企业平等**参与国家标准、行业标准、地方标准和团体标准的制定、修订工作。[…]”（强调后加）。

[36] Article 13 of the *Implementing Regulation* clarifies the meaning of the word “equal” as used here. The provision states: “[f]oreign-invested enterprises **and domestic-funded enterprises** participate, on an **equal** basis and in accordance with law, in the formulation and revision of national standards, industry standards, local standards, and group standards. […]” (emphasis added).

[37]《实施条例》第十四条阐明此处使用的“平等”的含义。该条规定：“国家制定的强制性标准对外商投资企业**和内资企业平等**适用，不得专门针对外商投资企业适用高于强制性标准的技术要求”（强调后加）。

[38] Article 14 of the *Implementing Regulation* clarifies the meaning of the word “equal” as used here. The provision states: “[t]he mandatory standards formulated by the State apply **equally** to foreign-invested enterprises **and domestic-funded enterprises**. No technical requirements higher than mandatory standards shall be specifically applied to foreign-invested enterprises” (emphasis added).

[39]《实施条例》第十五条阐明此处使用的“平等”的含义。该条第一款规定：“政府及其有关部门不得阻挠和限制外商投资企业自由进入本地区和本行业的政府采购市场”。第二款规定：“政府采购的采购人、采购代理机构[…]不得对外商投资企业在中国境内生产的产品、提供的服务**和内资企业**区别对待”。

[40] Article 15 of the *Implementing Regulation* clarifies the meaning of the word “equal” as used here. Article 15 Paragraph 1 states: “[t]he government and its related departments must not obstruct or restrict foreign-invested enterprises from freely entering the government procurement markets in the region and in [a certain] industry”. Article 15 Paragraph 2 states: “[p]rocurers and procurement agencies of government procurement [...] must not treat products produced, and services provided, by foreign-invested enterprises within China and those by **domestic enterprises** differently” (emphasis added).

[41]《实施条例》第十八条提供更多内容。该条规定：“外商投资企业可以依法**在中国境内或者境外**通过公开发行股票、公司债券等证券，**以及公开或者非公开发行其他融资工具、借用外债等方式**进行融资”（强调后加）。“依法在[…]境外[…]进行融资”这表述中的“法”有可能是指进行融资的外国的法律。

[42] Article 18 of the *Implementing Regulation* provides more details. The provision states: “[f]oreign-invested enterprises may carry out, in accordance with law, financing **within China or abroad** by publicly issuing securities, including shares and corporate bonds, and by other means, **including publicly or non-publicly issuing other financing instruments and borrowing foreign debt**” (emphasis added). The “law” as used in the phrase “carry out, in accordance with law, financing […] abroad” could mean the law of the foreign country where financing is carried out.

第十六条

国家保障外商投资企业依法通过公平竞争参与政府采购活动。政府采购依法对外商投资企业在中国境内生产的产品、提供的服务平等[39]对待。

Article 16

The State safeguards foreign-invested enterprises' participation, in accordance with law and through fair competition, in government procurement activities. Products produced, and services provided, by foreign-invested enterprises within China shall be treated equally[40] in government procurement in accordance with law.

第十七条

外商投资企业可以依法通过公开发行股票、公司债券等证券和其他方式进行融资。[41]

Article 17

Foreign-invested enterprises may carry out, in accordance with law, financing by publicly issuing securities, including shares and corporate bonds, and by other means.[42]

第十八条

县级以上地方人民政府可以根据法律、行政法规、地方性法规的规定，在法定权限内制定外商投资促进和便利化政策措施。[43]

Article 18

A local people's government at or above the county level may, within the authority set forth in the provisions of laws, administrative regulations, and local regulations, formulate policies and measures for promoting and facilitating foreign investment.[44]

第十九条

各级人民政府及其有关部门应当按照便利、高效、透明的原则，简化办事程序，提高办事效率，优化政务服务，进一步提高外商投资服务水平。

Article 19

The people's governments at all levels and their relevant departments should, in accordance with the principles of convenience, high efficiency, and transparency, simplify work procedures, increase work efficiency, and optimize government services so as to further improve foreign-investment services.

有关主管部门应当编制和公布外商投资指引，为外国投资者和外商投资企业提供服务和便利。[45]

Relevant departments-in-charge should prepare and issue foreign-investment guidelines to provide foreign investors and foreign-invested enterprises with services and convenience.[46]

侧边栏 1 | Sidebar 1:

《外商投资法》的关键术语和定义 | Key Terms and Definitions of the *Foreign Investment Law*

《外商投资法》 关键术语和定义	*Foreign Investment Law* Key Terms and Definitions
中国境内（第二条）	Within China (Article 2)
外商投资（第二条）	Foreign Investment (Article 2)
外国投资者（第二条）	Foreign Investor (Article 2)
外商投资企业（第二条）	Foreign-Invested Enterprise (Article 2)
准入前国民待遇（第四条）	Pre-Access National Treatment (Article 4)
负面清单（第四条）	Negative List (Article 4)

第二章　投资促进 | Chapter II　Promotion of Investment

注解 | Annotations

[43]《实施条例》第十九条指出这些政策措施包括“费用减免”和“公共服务提供”等方面。

[44] Article 19 of the *Implementing Regulation* points out that these policies and measures cover different aspects, including “reduction in fees” and “provision of public services”.

[45]《实施条例》第二十条指出这些外商投资指引“应当包括投资环境介绍、外商投资办事指南、投资项目信息以及相关数据信息等内容，并及时更新”。

[46] Article 20 of the *Implementing Regulation* points out that these foreign investment guidelines “should include an introduction of the investment environment, guides for handling foreign investments, information about investment projects, related data and information, and other content, and [the foreign investment guidelines] should be updated in a timely manner”.

“这意味着有权发布行政法规的国务院还可以通过发布行政法规以外的方式规定‘其他方式的投资’。”

“This suggests that the State Council, which has the authority to issue administrative regulations, can prescribe ‘investment by other methods’ in ways other than the issuance of administrative regulations.”

“《实施条例》第十四条[…]规定：‘国家制定的强制性标准对外商投资企业和内资企业平等适用，不得专门针对外商投资企业适用高于强制性标准的技术要求’（强调后加）。”

“Article 14 of the* Implementing Regulation *[…] states: ‘[t]he mandatory standards formulated by the State apply** equally **to foreign-invested enterprises** and domestic-funded enterprises. **No technical requirements higher than mandatory standards shall be specifically applied to foreign-invested enterprises’ (emphasis added).”

第三章　投资保护

Chapter III　Protection of Investment

第二十条

国家对外国投资者的投资不实行征收。

在特殊情况下，国家为了公共利益的需要，可以依照法律规定对外国投资者的投资实行征收或者征用。征收、征用应当依照法定程序进行，并及时给予公平、合理的补偿。[48]

Article 20

[Under normal circumstances,][47] the State does not expropriate foreign investors' investments.

Under special circumstances, the State may, for the needs of public interests, expropriate or requisition foreign investors' investments in accordance with legal provisions. The expropriation or requisition should be carried out in accordance with statutory procedures and fair and reasonable compensation should be given in a timely manner.[49]

第二十一条

外国投资者在中国境内的出资、利润、资本收益、资产处置所得、知识产权许可使用费、依法获得的补偿或者赔偿、清算所得等，可以依法以人民币或者外汇自由汇入、汇出。[50]

Article 21

Capital contributions, profits, capital gains, proceeds from disposition of assets, intellectual property license fees, compensation [(from lawful or unlawful infringements)][51] legally obtained, proceeds from liquidation, and other amounts [received] by foreign investors within China may be freely remitted in and out [of China], in accordance with law, in renminbi or foreign currency.[52]

第二十二条

国家保护外国投资者和外商投资企业的知识产权，保护知识产权权利人和相关权利人的合法权益；对知识产权侵权行为，严格依法追究法律责任。

国家鼓励在外商投资过程中基于自愿原则和商业规则开展技术合作。技术合作的条件由投资各方遵循公平原则平等协商确定。行政机关及其工作人员不得利用行政手段强制转让技术。[53]

Article 22

The State protects the intellectual property of foreign investors and foreign-invested enterprises, and protects the legal rights and interests of right-holders of intellectual property and related right-holders. [The State] strictly pursues, in accordance with law, legal liability for infringement of intellectual property.

The State encourages the carrying out of technology cooperation in the course of foreign investment, based on the principle of voluntariness and commercial rules. Conditions for technology cooperation are determined by all investment parties through equal negotiation in adherence to the principle of fairness. Administrative organs and their staff members must not use administrative means to force the transfer of technology.[54]

第二十三条

行政机关及其工作人员对于履行职责过程中知悉的外国投资者、外商投资企业的商业秘密，应当依法予以保密，不得泄露或者非法向他人提供。[55]

Article 23

Administrative organs and their staff members should keep confidential, in accordance with law, the trade secrets of foreign investors and foreign-invested enterprises learned in the course of performing their duties and must not disclose them or illegally provide them to others.[56]

第二十四条

各级人民政府及其有关部门制定涉及外商投资的规范性文件，应当符合法律法规的规定；[57] 没有法律、行政法规依据的，不得减损外商投资企业的合法权益或者增加其义务，不得设置市场准入和退出条件，不得干预外商投资企业的正常生产经营活动。

Article 24

Normative documents concerning foreign investment formulated by the people's governments at all levels and their relevant departments should conform to provisions of laws and regulations.[58] Those normative documents that are not based on laws or administrative regulations must not impair the legal rights and interests of foreign-invested enterprises or increase their obligations, must not set conditions for market access and exit, and must not interfere with the normal production and operation activities of foreign-invested enterprises.

第三章　投资保护 | Chapter III　Protection of Investment

注解 | Annotations

[47] For details about "special circumstances", see Article 20 Paragraph 2 of the *Implementing Regulation*.

[48]《实施条例》第二十一条第二款规定征收补偿是"按照被征收投资的市场价值"来计算。该条第三款规定"外国投资者对征收决定不服的，可以依法申请行政复议或者提起行政诉讼"。以上的规定没有提及征用，表明了这些规定不适用于征用。

[49] Article 21 Paragraph 2 of the *Implementing Regulation* provides that the amount of compensation for expropriation is calculated "in accordance with the market value of the expropriated investment". Article 21 Paragraph 3 provides that "[f]oreign investors who are unconvinced by the expropriation decisions may, in accordance with law, apply for administrative reconsideration or bring an administrative lawsuit". The lack of reference to requisition suggests that these provisions do not apply to requisition.

[50]《实施条例》第二十二条强调"任何单位和个人不得违法对币种、数额以及汇入、汇出的频次等进行限制"。

[51] The text reads "依法获得的补偿或者赔偿" (literally "compensation or compensation legally obtained"). In China, "补偿" is used to refer to compensation paid as a remedial measure for parties whose rights and interests are harmed by *lawful* acts (e.g., expropriation legally carried out by the government), whereas "赔偿" is used to refer to compensation paid for parties whose rights and interests are harmed by *unlawful* acts (e.g., infringement of the parties' rights). *See, e.g.*, 李慧杰 (LI Huijie), 行政赔偿与行政补偿的区别 (*The Difference between Administrative Compensation (Peichang) and Administrative Compensation (Buchang)*), 《北京法院网》 (BJGY.CHINACOURT.GOV.CN), Oct. 13, 2009, http://bjgy.chinacourt.gov.cn/article/detail/2009/10/id/871376.shtml. For more information about state compensation, see 《中华人民共和国国家赔偿法》(*State Compensation Law of the People's Republic of China*), passed and issued on May 12, 1994, effective as of Jan. 1, 1995, amended two times, most recently on Oct. 26, 2012, effective as of Jan. 1, 2013, https://www.spp.gov.cn/sscx/201404/t20140424_71280.shtml.

[52] Article 22 of the *Implementing Regulation* emphasizes that "[n]o unit or individual may illegally restrict the currency, amount, or frequency of remittances in and out [of China]".

[53]《实施条例》第二十四条举例说明这些"行政手段"包括"行政许可"、"行政检查"和"行政处罚"等。

[54] Article 24 of the *Implementing Regulation* gives a few examples of these "administrative means": "administrative licensing", "administrative inspection", and "administrative penalties".

[55]《实施条例》第二十五条要求行政机关"严格控制知悉[外国投资者、外商投资企业的商业秘密的]范围，与履行[该行政机关]职责无关的人员不得接触有关材料、信息"。

[56] Article 25 of the *Implementing Regulation* requires administrative organs to "strictly control the scope of knowing" the trade secrets of foreign investors and foreign-invested enterprises, and "persons who are not involved in performing [the administrative organs'] duties must not access relevant materials and information" of the trade secrets.

[57]《实施条例》第二十六条第一款规定这些"规范性文件，应当按照国务院的规定进行合法性审核"。第二款规定："外国投资者、外商投资企业认为行政行为所依据的国务院部门和地方人民政府及其部门制定的**规范性文件不合法**，在依法对行政行为申请行政复议或者提起行政诉讼时，可以一并请求对**该规范性文件进行审查**"（强调后加）。

[58] Article 26 Paragraph 1 of the *Implementing Regulation* states that the legality of these normative documents "should be reviewed in accordance with the provisions of the State Council".

Article 26 Paragraph 2 further provides: "[any] foreign investor/foreign-invested enterprise who considers that a **normative document** formulated by the State Council's department or by a local people's government or its department upon which an administrative act [against the investor/enterprise] is based is **illegal** may also request **a review of the normative document** when applying for administrative reconsideration or bringing an administrative lawsuit against the administrative act in accordance with law" (emphasis added).

[59]《实施条例》第二十七条指出"政策承诺"是指"地方各级人民政府及其有关部门在法定权限内，就外国投资者、外商投资企业在本地区投资所适用的支持政策、享受的优惠待遇和便利条件等作出的书面承诺。政策承诺的内容应当符合法律、法规规定"。

[60] Article 27 of the *Implementing Regulation* explains that the term "policy commitment" means "written commitments made, within statutory authority, by the local people's governments at all levels and their relevant departments regarding the support policies, preferential treatment, and convenience conditions applicable to foreign investors' and foreign-invested enterprises' investments in the locality. Contents of the policy commitments should conform to provisions of laws and regulations".

[61]《实施条例》第二十八条要求补偿是"公平、合理"的。

[62] Article 28 of the *Implementing Regulation* requires the compensation to be "fair and reasonable".

[63]《实施条例》第二十九条规定"县级以上人民政府及其有关部门应当按照公开透明、高效便利的原则"建立此机制。

[64] Article 29 of the *Implementing Regulation* provides that "people's governments at or above the county level and their relevant departments should establish [these mechanisms] in accordance with the principles of openness, transparency, high efficiency, and convenience".

[65]《实施条例》第三十条第一款规定"协调结果应当以书面形式及时告知申请人"。

[66] Article 30 Paragraph 1 of the *Implementing Regulation* provides that "the result of the coordination should be notified to the applicant in writing in a timely manner".

第二十五条

地方各级人民政府及其有关部门应当履行向外国投资者、外商投资企业依法作出的政策承诺[59]以及依法订立的各类合同。

因国家利益、社会公共利益需要改变政策承诺、合同约定的，应当依照法定权限和程序进行，并依法对外国投资者、外商投资企业因此受到的损失予以补偿。[61]

Article 25

The local people's governments at all levels and their relevant departments should perform their policy commitments[60] made, in accordance with law, to foreign investors and foreign-invested enterprises, and should perform the various kinds of contracts concluded, in accordance with law, by them and [these investors and enterprises].

For those policy commitments or contractual agreements that need to be changed because of national interests or social and public interests, [the changes] should be made in accordance with statutory authority and procedures, and compensation shall be paid, in accordance with law, to foreign investors and foreign-invested enterprises for the resulting losses suffered.[62]

第二十六条

国家建立外商投资企业投诉工作机制，[63]及时处理外商投资企业或者其投资者反映的问题，协调完善相关政策措施。

外商投资企业或者其投资者认为行政机关及其工作人员的行政行为侵犯其合法权益的，可以通过外商投资企业投诉工作机制申请协调解决。[65]

外商投资企业或者其投资者认为行政机关及其工作人员的行政行为侵犯其合法权益的，除依照前款规定通过外商投资企业投诉工作机制申请协调解决外，还可以依法申请行政复议、提起行政诉讼。

Article 26

The State establishes complaint mechanisms for foreign-invested enterprises[64] to handle, in a timely manner, issues reported by foreign-invested enterprises or their investors, and to coordinate and improve relevant policies and measures.

A foreign-invested enterprise or its investor that believes that an administrative act of an administrative organ or its staff member infringes upon the enterprise's legal rights and interests may apply for a coordinated settlement [of the issue] through a complaint mechanism for foreign-invested enterprises.[66]

A foreign-invested enterprise or its investor that believes that an administrative act of an administrative organ or its staff member infringes upon the enterprise's legal rights and interests may also apply for administration reconsideration or bring an administrative lawsuit, in addition to applying, in accordance with the preceding paragraph, for a coordinated settlement [of the issue] through a complaint mechanism for foreign-invested enterprises.

第二十七条

外商投资企业可以依法成立和自愿参加商会、协会。商会、协会依照法律法规和章程的规定开展相关活动，维护会员的合法权益。

Article 27

Foreign-invested enterprises may, in accordance with law, establish and voluntarily participate in chambers of commerce and associations. Chambers of commerce and associations shall, in accordance with provisions of laws, regulations, and their charters, conduct relevant activities and protect the legal rights and interests of their members.

"[《实施条例》第二十六条] 第二款规定：'外国投资者、外商投资企业认为行政行为所依据的国务院部门和地方人民政府及其部门制定的规范性文件不合法，在依法对行政行为申请行政复议或者提起行政诉讼时，可以一并请求对该规范性文件进行审查'（强调后加）。"

"Article 26 Paragraph 2 [of the* Implementing Regulation*]

further provides: '[any] foreign investor/foreign-invested enterprise who considers that a** normative document **formulated by the State Council's department or by a local people's government or its department upon which an administrative act [against the investor/enterprise] is based is** illegal **may also request** a review of the normative document **when applying for administrative reconsideration or bringing an administrative lawsuit against the administrative act in accordance with law' (emphasis added)."

侧边栏 2 | Sidebar 2:

说明《外商投资法》的《实施条例》和《司法解释》规定 |
Provisions of the *Implementing Regulation* and the *Judicial Interpretation* that Explain the *Foreign Investment Law*

	《外商投资法》 *Foreign Investment Law* 第[ ]条 | Article []	《实施条例》 *Foreign Investment Law* 第[ ]条 | Article []	《司法解释》 *Foreign Investment Law* 第[ ]条 | Article []
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第四章　投资管理

第二十八条

外商投资准入负面清单规定禁止投资的领域，外国投资者不得投资。[67]

外商投资准入负面清单规定限制投资的领域，外国投资者进行投资应当符合负面清单规定的条件。[69]

外商投资准入负面清单以外的领域，按照内外资一致的原则实施管理。

第二十九条

外商投资需要办理投资项目核准、备案的，按照国家有关规定执行。[71]

第三十条

外国投资者在依法需要取得许可的行业、领域进行投资的，应当依法办理相关许可手续。

有关主管部门应当按照与内资一致的条件和程序，审核外国投资者的许可申请，法律、行政法规另有规定的除外。[73]

第三十一条

外商投资企业的组织形式、组织机构及其活动准则，适用《中华人民共和国公司法》、《中华人民共和国合伙企业法》等法律的规定。

第三十二条

外商投资企业开展生产经营活动，应当遵守法律、行政法规有关劳动保护、社会保险的规定，依照法律、行政法规和国家有关规定办理税收、会计、外汇等事宜，并接受相关主管部门依法实施的监督检查。

第三十三条

外国投资者并购中国境内企业或者以其他方式参与经营者集中的，应当依照《中华人民共和国反垄断法》的规定接受经营者集中审查。

Chapter IV　Administration of Investment

Article 28

Foreign investors must not invest in areas prohibited from investment by the negative list(s) on the access of foreign investment.[68]

In investing in areas in which investment is restricted by the negative list(s) on the access of foreign investment, foreign investors should conform to the conditions provided for in the negative list(s).[70]

Administration of [investment in] areas outside the negative list(s) on the access of foreign investment shall be carried out in accordance with the principle of identity [of treatment] for domestic and foreign investments.

Article 29

Where foreign investment requires approval and recordation of the investment project, [the approval and recordation] shall be implemented in accordance with relevant provisions of the State.[72]

Article 30

A foreign investor who invests in an industry or an area in which obtaining a license in accordance with law is needed should go through relevant licensing procedures in accordance with law.

Relevant departments-in-charge should review foreign investors' license applications in accordance with conditions and procedures that are identical to those for domestic investments, unless otherwise provided for in laws or administrative regulations.[74]

Article 31

With respect to the organizational forms, organizational structures, and activity guidelines of foreign-invested enterprises, provisions of the *Company Law of the People's Republic of China, the Law of the People's Republic of China on Partnership Enterprises*, etc. shall apply.

Article 32

In conducting production and operation activities, foreign-invested enterprises should abide by provisions concerning labor protection and social insurance in laws and administrative regulations, handle taxation, accounting, foreign exchange, and other matters in accordance with laws, administrative regulations, and relevant provisions of the State, and accept the supervision and inspection implemented by relevant departments-in-charge in accordance with law.

Article 33

Where a foreign investor merges with or acquires an enterprise that is within China, or participates in the concentration of business operators in other ways, [the foreign investor] should accept, in accordance with the provisions of the *Anti-Monopoly Law of the People's Republic of China*, a review of the concentration of business operators.

第四章　投资管理 | Chapter IV　Administration of Investment

注解 | Annotations

[67] 《司法解释》第三条规定："外国投资者投资外商投资准入负面清单规定禁止投资的领域，当事人主张投资合同无效的，人民法院应予支持。"但是，根据《司法解释》第五条，如果在生效裁判作出前，负面清单作出调整，该案所涉的禁止投资领域不再被禁止，并且当事人主张投资合同有效，则人民法院应支持这新主张。

[68] Article 3 of the *Judicial Interpretation* provides: "[w]here a foreign investor invests in an area prohibited from investment by the negative list(s) on the access of foreign investment and [one or more] party(ies) claim(s) that the investment contract is invalid, the people's court should support [the claim]". However, according to Article 5 of the *Judicial Interpretation*, if, before the final judgment is rendered, the negative list(s) is/are changed so that the investment area at issue is no longer prohibited and the party(ies) claim(s) that the contract is now valid, the people's court should support this new claim.

[69] 《实施条例》第三十三条指出条件包括"股权要求"和"高级管理人员要求"等。
此外，《司法解释》第四条第一款规定："外国投资者投资外商投资准入负面清单规定限制投资的领域，当事人以违反限制性准入特别管理措施为由，主张投资合同无效的，人民法院应予支持。"但是，根据《司法解释》第四条第二款，如果在生效裁判作出前，限制性准入特别管理措施的要求得到满足，并且当事人主张投资合同有效，则人民法院应支持这新主张。
再者，根据《司法解释》第五条，如果在生效裁判作出前，负面清单作出调整，该案所涉的限制外国投资领域不再被限制，并且当事人主张投资合同有效，人民法院也应支持这新主张。

[70] Article 33 of the *Implementing Regulation* indicates that the conditions include "equity requirements" and "requirements about senior management personnel".
In addition, Article 4 Paragraph 1 of the *Judicial Interpretation* provides: "[w]here a foreign investor invests in an area in which investment is restricted by the negative list(s) on the access of foreign investment and [one or more] party(ies) claim(s) that the investment contract is invalid on the grounds that the party(ies) violate(s) the special administrative measures for restrictive access, the people's court should support [the claim]". However, according to Article 4 Paragraph 2, if, before the final judgment is rendered, the requirements of the special administrative measures for restrictive access are met and the party(ies) claim(s) that the contract is now valid, the people's court should support this new claim.
Further, according to Article 5 of the *Judicial Interpretation*, if, before the final judgment is rendered, the negative list(s) is/are changed so that foreign investment in the area at issue is no longer restricted and the party(ies) claim(s) that the contract is now valid, the people's court should also support this new claim.

[71] 《实施条例》第三十六条逐字重复了此规定。

[72] Article 36 of the *Implementing Regulation* repeats this provision verbatim.

[73] 《实施条例》第三十五条规定有关主管部门"不得在许可条件、申请材料、审核环节、审核时限等方面对外国投资者设置歧视性要求"。

[74] Article 35 of the *Implementing Regulation* provides that relevant departments-in-charge "must not set discriminatory requirements regarding licensing conditions, application materials, sections of the review, time limits of the review, and other aspects for foreign investors".

[75] 详细内容，见《外商投资信息报告办法》，2019年12月19日由商务部通过，并经国家市场监督管理总局同意，2019年12月30日公布，2020年1月1日起施行，http://www.fdi.gov.cn/1800000121_23_75233_0_7.html。

[76] 见《企业信息公示暂行条例》，2014年7月23日由国务院通过，2014年8月7日公布，2014年10月1日起施行，http://www.gov.cn/zhengce/content/2014-08/23/content_9038.htm。该暂行条例第四条规定："省、自治区、直辖市人民政府领导本行政区域的企业信息公示工作，按照国家社会信用信息平台建设的总体要求，推动本行政区域企业信用信息公示系统的建设"。

[77] For details, see《外商投资信息报告办法》(*Measures for the Reporting of Foreign Investment Information*), passed by the Ministry of Commerce on Dec. 19, 2019, approved by the State Administration for Market Regulation, issued on Dec. 30, 2019, effective as of Jan. 1, 2020, http://www.fdi.gov.cn/1800000121_23_75233_0_7.html.

[78] *See*《企业信息公示暂行条例》(*Interim Regulation on the Publicity of Enterprise Information*), passed by the State Council on July 23, 2014, issued on Aug. 7, 2014, effective as of Oct. 1, 2014, http://www.gov.cn/zhengce/content/2014-08/23/content_9038.htm. Article 4 of this regulation states: "[t]he people's governments of provinces, autonomous regions, and municipalities directly under the Central Government shall lead the work regarding enterprise information publicity in their respective administrative regions, and shall, in accordance with the State's general requirements for the construction of a national social credit information platform, promote the construction of enterprise credit information publicity systems in their respective administrative regions".

[79] 《实施条例》第三十九条规定"外国投资者或者外商投资企业报送的投资信息应当真实、准确、完整"。

[80] Article 39 of the *Implementing Regulation* provides that "investment information submitted by foreign investors or foreign-invested enterprises should be true, accurate, and complete".

[81] 将这种制度实施于自由贸易试验区的试行办法很可能会作为参考。见《自由贸易试验区外商投资国家安全审查试行办法》，2015年4月8日由国务院通过和公布，2015年5月8日起施行，http://www.gov.cn/zhengce/content/2015-04/20/content_9629.htm。

[82] Trial measures for implementing such a system in pilot free trade zones will likely be a reference. *See*《自由贸易试验区外商投资国家安全审查试行办法》(*Trial Measures for the National Security Review of Foreign Investment in Pilot Free Trade Zones*), passed by the State Council on and issued on Apr. 8, 2015, effective as of May 8, 2015, http://www.gov.cn/zhengce/content/2015-04/20/content_9629.htm.

第三十四条

国家建立外商投资信息报告制度。[75] 外国投资者或者外商投资企业应当通过企业登记系统以及企业信用信息公示系统[76]向商务主管部门报送投资信息。

外商投资信息报告的内容和范围按照确有必要的原则确定；通过部门信息共享能够获得的投资信息，不得再行要求报送。[79]

Article 34

The State establishes a foreign investment information reporting system.[77] Foreign investors or foreign-invested enterprises should submit investment information to the departments in charge of commerce through an enterprise registration system and an enterprise credit information publicity system.[78]

The content and scope of foreign investment information reporting shall be determined in accordance with the principle of necessity. Investment information that can be obtained by departmental information sharing must not be required to be submitted again.[80]

第三十五条

国家建立外商投资安全审查制度，对影响或者可能影响国家安全的外商投资进行安全审查。[81]

依法作出的安全审查决定为最终决定。

Article 35

The State establishes a foreign investment security review system to carry out security review of foreign investment that affects or may affect national security.[82]

Security review decisions made in accordance with law are final decisions.

第五章　法律责任

Chapter V　Legal Liability

第三十六条

外国投资者投资外商投资准入负面清单规定禁止投资的领域的，由有关主管部门责令停止投资活动，限期处分股份、资产或者采取其他必要措施，恢复到实施投资前的状态；有违法所得的，没收违法所得。

外国投资者的投资活动违反外商投资准入负面清单规定的限制性准入特别管理措施的，由有关主管部门责令限期改正，采取必要措施满足准入特别管理措施的要求；逾期不改正的，依照前款规定处理。

外国投资者的投资活动违反外商投资准入负面清单规定的，除依照前两款规定处理外，还应当依法承担相应的法律责任。

Article 36

Where a foreign investor invests in an area prohibited from investment by the negative list(s) on the access of foreign investment, relevant departments-in-charge shall order [the foreign investor] to cease the investment activities, set time limits for disposing of shares and assets or for taking other necessary measures, and restore [the situation] to the state before investment was made. Where there is illegal income, the illegal income shall be confiscated.

Where a foreign investor's investment activity violates special administrative measures for restrictive access provided in the negative list(s) on the access of foreign investment, relevant departments-in-charge shall order [the foreign investor] to, within a time limit, make corrections by taking necessary measures to meet the requirements of the special administrative measures for access. Failure to make corrections within the time limit shall be handled in accordance with the provisions of the preceding paragraph.

A foreign investor whose investment activity violates the provisions of the negative list(s) on the access of foreign investment should bear corresponding legal liability in accordance with law, while [the situation should] be dealt with in accordance with the provisions of the preceding two paragraphs.

第三十七条

外国投资者、外商投资企业违反本法规定，未按照外商投资信息报告制度的要求报送投资信息的，由商务主管部门责令限期改正；逾期不改正的，处十万元以上五十万元以下的罚款。

Article 37

Where, in violation of this Law, foreign investors and foreign-invested enterprises do not submit investment information as required by the foreign investment information reporting system, the commerce departments shall order corrections within a time limit. [Anyone] who does not make corrections within the time limit shall be subject to a fine ranging from RMB 100,000 to RMB 500,000.

“《司法解释》第三条规定：‘外国投资者投资外商投资准入负面清单规定禁止投资的领域，当事人主张投资合同无效的，人民法院应予支持。’但是，根据《司法解释》第五条，如果在生效裁判作出前，负面清单作出调整，该案所涉的禁止投资领域不再被禁止，并且当事人主张投资合同有效，则人民法院应支持这新主张。”

“Article 3 of the Judicial Interpretation *provides: ‘[w]here a foreign investor invests in an area prohibited from investment by the negative list(s) on the access of foreign investment and [one or more] party(ies) claim(s) that the investment contract is invalid, the people’s court should support [the claim]’. However, according to Article 5 of the* Judicial Interpretation*, if, before the final judgment is rendered, the negative list(s) is/are changed so that the investment area at issue is no longer prohibited and the party(ies) claim(s) that the contract is now valid, the people’s court should support this new claim.”*

“《司法解释》第四条第一款规定：‘外国投资者投资外商投资准入负面清单规定限制投资的领域，当事人以违反限制性准入特别管理措施为由，主张投资合同无效的，人民法院应予支持。’但是，根据《司法解释》第四条第二款，如果在生效裁判作出前，限制性准入特别管理措施的要求得到满足，并且当事人主张投资合同有效，则人民法院应支持这新主张。”

“Article 4 Paragraph 1 of the Judicial Interpretation *provides: ‘[w]here a foreign investor invests in an area in which investment is restricted by the negative list(s) on the access of foreign investment and [one or more] party(ies) claim(s) that the investment contract is invalid on the grounds that the party(ies) violate(s) the special administrative measures for restrictive access, the people’s court should support [the claim]’. However, according to Article 4 Paragraph 2, if, before the final judgment is rendered, the requirements of the special administrative measures for restrictive access are met and the party(ies) claim(s) that the contract is now valid, the people’s court should support this new claim.”*

第五章　法律责任 | Chapter V　Legal Liability

注解 | Annotations

[83] 《实施条例》第四十一条至第四十三条规定了其他涉及追究责任的情形，包括“政府和有关部门及其工作人员[…]违法限制外国投资者汇入、汇出资金”、“政府采购的采购人、采购代理机构以不合理的条件对外商投资企业实行差别待遇或者歧视待遇”和“行政机关及其工作人员利用行政手段强制或者变相强制外国投资者、外商投资企业转让技术”。

[84] Articles 41 to 43 of the *Implementing Regulation* provide other situations involving liability, including when “governments and relevant departments as well as their staff [...] illegally restrict foreign investors’ remittances of funds in or out [of China]”, “procurers and procurement agencies of government procurement use unreasonable conditions to implement differential treatment or discrimination against foreign-invested enterprises”, and “administrative organs and their staff use administrative means to force or, in effect, force foreign investors and foreign-invested enterprises to transfer technology”.

第三十八条

对外国投资者、外商投资企业违反法律、法规的行为，由有关部门依法查处，并按照国家有关规定纳入信用信息系统。

Article 38

Violations of laws and regulations by foreign investors and foreign-invested enterprises shall be investigated and dealt with by relevant departments in accordance with law, and shall be included in the credit information system in accordance with relevant provisions of the State.

第三十九条

行政机关工作人员在外商投资促进、保护和管理工作中滥用职权、玩忽职守、徇私舞弊的，或者泄露、非法向他人提供履行职责过程中知悉的商业秘密的，依法给予处分；构成犯罪的，依法追究刑事责任。[83]

Article 39

Where, in the promotion, protection, and administration of foreign investment, staff members of administrative organs abuse their authority, neglect their duties, play favoritism, or commit irregularities, or disclose trade secrets learned in the course of performing their duties or illegally provide them to others, [these staff members] shall be punished in accordance with law. If a crime is constituted, criminal liability shall be pursued in accordance with law.[84]

第六章　附则

Chapter VI　Supplemental Provisions

第四十条

任何国家或者地区在投资方面对中华人民共和国采取歧视性的禁止、限制或者其他类似措施的，中华人民共和国可以根据实际情况对该国家或者该地区采取相应的措施。

Article 40

Where any country or region adopts discriminatory prohibitions, restrictions, or other similar measures against the People's Republic of China in terms of investment, the People's Republic of China may, according to the actual circumstances, adopt corresponding measures against the country or region.

第四十一条

对外国投资者在中国境内投资银行业、证券业、保险业等金融行业，或者在证券市场、外汇市场等金融市场进行投资的管理，国家另有规定的，依照其规定。

Article 41

Where the State has other provisions on the administration of foreign investors' investments in financial industries within China, including banking, securities, and insurance industries, or [their] investments in financial markets within China, including securities markets and foreign exchange markets, these provisions shall be followed.

第四十二条

本法自2020年1月1日起施行。《中华人民共和国中外合资经营企业法》、[85]《中华人民共和国外资企业法》、[86]《中华人民共和国中外合作经营企业法》[87]同时废止。

本法施行前依照《中华人民共和国中外合资经营企业法》、《中华人民共和国外资企业法》、《中华人民共和国中外合作经营企业法》设立的外商投资企业，在本法施行后五年内可以继续保留原企业组织形式等。具体实施办法由国务院规定。[91] ■

Article 42

This Law shall come into effect on January 1, 2020. At the same time, the *Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures*,[88] the *Law of the People's Republic of China on Wholly Foreign-Owned Enterprises*,[89] and the *Law of the People's Republic of China on Sino-Foreign Cooperative Joint Ventures*[90] shall be repealed.

A foreign-invested enterprise established, in accordance with the *Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures*, the *Law of the People's Republic of China on Wholly Foreign-Owned Enterprises*, or the *Law of the People's Republic of China on Sino-Foreign Cooperative Joint Ventures*, before this Law comes into effect may continue to keep its original organizational form, etc. for five years after this Law's coming into effect. Specific implementing measures shall be prescribed by the State Council.[92] ■

第六章　附则 | Chapter VI　Supplemental Provisions

注解 | Annotations

[85]《中华人民共和国中外合资经营企业法》，1979年7月1日通过，1979年7月8日公布，同日起施行，经三次修正，最新修正于2016年9月3日，2016年10月1日起施行，http://www.npc.gov.cn/zgrdw/npc/xinwen/2016-09/06/content_1997113.htm（已失效）。

[86]《中华人民共和国外资企业法》，1986年4月11日通过和公布，同日起施行，经两次修正，最新修正于2016年9月3日，2016年10月1日起施行，http://www.npc.gov.cn/zgrdw/npc/xinwen/2016-09/06/content_1997114.htm（已失效）。

[87]《中华人民共和国中外合作经营企业法》，1988年4月13日通过和公布，同日起施行，经四次修正，最新修正于2017年11月4日，2017年11月5日起施行，http://www.npc.gov.cn/zgrdw/npc/xinwen/2017-11/28/content_2032723.htm（已失效）。

[88]《中华人民共和国中外合资经营企业法》(*Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures*), passed on July 1, 1979, issued on and effective as of July 8, 1979, amended three times, most recently on Sept. 3, 2016, effective as of Oct. 1, 2016, http://www.npc.gov.cn/zgrdw/npc/xinwen/2016-09/06/content_1997113.htm (lost effect).

[89]《中华人民共和国外资企业法》(*Law of the People's Republic of China on Wholly Foreign-Owned Enterprises*), passed on, issued on, and effective as of Apr. 11, 1986, amended two times, most recently on Sept. 3, 2016, effective as of Oct. 1, 2016, http://www.npc.gov.cn/zgrdw/npc/xinwen/2016-09/06/content_1997114.htm (lost effect).

[90]《中华人民共和国中外合作经营企业法》(*Law of the People's Republic of China on Sino-Foreign Cooperative Joint Ventures*), passed on, issued on, and effective as of Apr. 13, 1988, amended four times, most recently on Nov. 4, 2017, effective as of Nov. 5, 2017, http://www.npc.gov.cn/zgrdw/npc/xinwen/2017-11/28/content_2032723.htm (lost effect).

[91]《实施条例》第四十四条第一款规定这些外商投资企业“在外商投资法施行后5年内，可以依照《中华人民共和国公司法》、《中华人民共和国合伙企业法》等法律的规定调整其组织形式、组织机构等，并依法办理变更登记，也可以继续保留原企业组织形式、组织机构等”。

第四十四条第二款规定：“自2025年1月1日起，对未依法调整组织形式、组织机构等并办理变更登记的现有外商投资企业，市场监督管理部门不予办理其申请的其他登记事项，并将相关情形予以公示。”

[92] Article 44 Paragraph 1 of the *Implementing Regulation* states that these foreign-invested enterprises "may, during the five years after the *Foreign Investment Law*'s coming into effect, adjust their organizational forms, organizational structures, etc. in accordance with the provisions of the *Company Law of the People's Republic of China*, the *Law of the People's Republic of China on Partnership Enterprises*, etc. and change the registrations in accordance with law. These enterprises may also continue to retain their original organizational forms, organizational structures, etc."

Article 44 Paragraph 2 states: "[b]eginning from January 1, 2025, with respect to existing foreign-invested enterprises that have not, in accordance with law, adjusted their organizational forms, organizational structures, etc. and registered for these changes, departments of market supervision and administration will not process their applications for other registrations and will publicize the relevant situations".

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* 此中法连*聚焦*™的引用是：熊美英博士、费德明，《中华人民共和国外商投资法》与其实施条例、司法解释和相关注解，《中国法律连接》，第8期，第43页（2020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*™，2020年3月，http://cgc.law.stanford.edu/zh-hans/clc-spotlight/clc-8-202003-others-7-gechlik-phillips。载于本文中的信息和意见作者对其负责。它们并不一定代表中国指导性案例项目的工作或意见。

关于此法原文，见《中华人民共和国外商投资法》，2019年3月15日通过和公布，2020年1月1日起施行，http://www.gov.cn/xinwen/2019-03/20/content_5375360.htm。

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For the original, Chinese version of this law, see《中华人民共和国外商投资法》(*Foreign Investment Law of the People's Republic of China*), passed and issued on Mar. 15, 2019, effective as of Jan. 1, 2020, http://www.gov.cn/xinwen/2019-03/20/content_5375360.htm. This English translation was prepared by Dr. Mei Gechlik and Dimitri Phillips. Minor editing, such as adding a few words included in square brackets and boldfacing the numbers of the provisions, was done to make the piece more comprehensible to readers. The following text is otherwise a direct translation of the original text released by the People's Republic of China.

林方清诉常熟市凯莱实业有限公司、戴小明公司解散纠纷案

LIN Fangqing v. Changshu Kailai Industrial Co., Ltd. and DAI Xiaoming, A Corporate Dissolution Dispute

指导案例8号
（最高人民法院审判委员会讨论通过
2012年4月9日发布）*

Guiding Case No. 8
(Discussed and Passed by the Adjudication Committee of the Supreme People's Court
Released on April 9, 2012)**

关键词

民事
公司解散
经营管理严重困难
公司僵局

Keywords

Civil
Corporate Dissolution
Serious Difficulty in Operation and Management
Corporate Deadlock

裁判要点

公司法第一百八十三条将“公司经营管理发生严重困难”作为股东提起解散公司之诉的条件之一。判断“公司经营管理是否发生严重困难”，应从公司组织机构的运行状态进行综合分析。公司虽处于盈利状态，但其股东会机制长期失灵，内部管理有严重障碍，已陷入僵局状态，可以认定为公司经营管理发生严重困难。对于符合公司法及相关司法解释规定的其他条件的，人民法院可以依法判决公司解散。

Main Points of the Adjudication

Article 183 of the *Company Law* makes “serious difficulty occurs in the operation and management of a company” one of the conditions under which shareholders may bring a corporate dissolution lawsuit. To determine “whether serious difficulty occurs in the operation and management of a company”, the operational state of the company's organizational structure should be comprehensively analyzed. For a company that is in a profitable state but has long-term failure in its shareholders' meeting mechanism and serious impediments in its internal management and has plunged into a state of deadlock, it can still be determined that serious difficulty occurs in the operation and management of the company. If other conditions stated in the *Company Law* and relevant judicial interpretations are met, a people's court may decide to dissolve a company in accordance with law.

相关法条

《中华人民共和国公司法》第一百八十三条[1]

Related Legal Rule(s)

Article 183 of the *Company Law of the People's Republic of China*[2]

基本案情

原告林方清诉称：常熟市凯莱实业有限公司（简称凯莱公司）经营管理发生严重困难，陷入公司僵局且无法通过其他方法解决，其权益遭受重大损害，请求解散凯莱公司。

Basic Facts of the Case

Plaintiff LIN Fangqing claimed: serious difficulty occurred in the operation and management of Changshu Kailai Industrial Co., Ltd.[3] (hereinafter referred to as “Kailai Company”). It had plunged into corporate deadlock which could not be resolved through other means, causing substantial harm to his[4] rights and interests. He requested dissolution of Kailai Company.

被告凯莱公司及戴小明辩称：凯莱公司及其下属分公司运营状态良好，不符合公司解散的条件，戴小明与林方清的矛盾有其他解决途径，不应通过司法程序强制解散公司。

Defendants Kailai Company and DAI Xiaoming defended their positions, claiming: the state of the business operation of Kailai Company and its subsidiary/subsidiaries was good. The conditions for corporate dissolution were not met. The conflict between DAI Xiaoming and LIN Fangqing could be resolved by other means and the company should not be compulsorily dissolved through judicial process.

法院经审理查明：凯莱公司成立于2002年1月，林方清与戴小明系该公司股东，各占50%的股份，戴小明任公司法定代表人及执行董事，林方清任公司总经理兼公司监事。凯莱公司章程明确规定：股东会的决议须经代表二分之一以上表决权的股东通过，但对公司增加或减少注册资本、合并、解散、变更公司形式、修改公司章程作出决议时，必须经代表三分之二以上表决权的股东通过。股东会会议由股东按照出资比例行使表决权。2006年起，林方清与戴小明两人之间的矛盾逐渐显现。同年5月9日，林方清提议并通知召开股东会，由于戴小明认为林方清没有召集会议的权利，会议未能召开。同年6月6日、8月8日、9月16日、10月10日、10月17日，林方清委托律师向凯莱公司和戴小明发函称，因股东权益受到严重侵害，林方清作为享有公司股东会二分之一表决权的股东，已按公司章程规定的程序表决并通过了解散凯莱公司的决议，要求戴小明提供凯莱公司的财务账册等资料，并对凯莱公司进行清算。同年6月17日、9月7日、10月13日，戴小明回函称，林方清作出的股东会决议没有合法依据，戴小明不同意解散公司，并要求林方清交出公司财务资料。同年11月15日、25日，林方清再次向凯莱公司和戴小明发函，要求凯莱公司和戴小明提供公司财务账册等供其查阅、分配公司收入、解散公司。

The court handled the case and ascertained: Kailai Company was established in January 2002; LIN Fangqing and DAI Xiaoming were the company's shareholders, each owning 50% of the shares. DAI Xiaoming was the statutory representative and executive director of the company, while LIN Fangqing was the general manager and supervisor of the company. Kailai Company's articles of association clearly stated:

> Resolutions of shareholders' meetings must be passed by shareholders representing more than half of the voting rights. However, any resolution concerning an increase or a decrease of the registered capital, merger, dissolution, change of corporate form, or amendment to the articles of association must be passed by shareholders representing more than two-thirds of the voting rights.

Voting rights at shareholders' meetings were exercised by shareholders in proportion to their capital contributions. Beginning in 2006, the conflict between LIN Fangqing and DAI Xiaoming had become increasingly apparent. On May 9 of the same year, LIN Fangqing proposed and gave notice to hold a shareholders' meeting. Because DAI Xiaoming believed that LIN Fangqing did not have the right to convene a shareholders' meeting, the meeting could not be held. On June 6, August 8, September 16, October 10, and October 17 of the same year, LIN Fangqing entrusted a lawyer to send Kailai Company and DAI Xiaoming a letter, claiming that because shareholders' rights and interests had been seriously harmed, LIN Fangqing, as a shareholder enjoying half of the voting rights at the shareholders' meetings of the company, had voted and passed, in accordance with the procedures stated in the articles of association, a resolution dissolving Kailai Company. [In the letter, LIN Fangqing also] required DAI Xiaoming to provide such information as Kailai Company's financial books and to carry out liquidation of Kailai Company. On June 17, September 7, and October 13 of the same year, DAI Xiaoming wrote back, stating that the resolution of the shareholders' meeting made by LIN Fangqing did not have a legal basis and that DAI Xiaoming disagreed on corporate dissolution and required LIN Fangqing to hand over the company's financial information. On November 15 and 25 of the same year, LIN Fangqing again sent Kailai Company and DAI Xiaoming a letter, requesting that Kailai Company and DAI Xiaoming provide the company's financial books, etc. for his inspection, distribute corporate revenues, and dissolve the company.

江苏常熟服装城管理委员会（简称服装城管委会）证明凯莱公司目前经营尚正常，且愿意组织林方清和戴小明进行调解。

The Jiangsu Changshu Garments Town Management Committee[5] (hereinafter referred to as the "Garments Town Management Committee") proved that Kailai Company was still operating normally and was willing to organize LIN Fangqing and DAI Xiaoming to conduct mediation.

另查明，凯莱公司章程载明监事行使下列权利：（1）检查公司财务；（2）对执行

[The court] also ascertained that Kailai Company's articles of association stated that the supervisor(s) of the company could exercise the following rights:

董事、经理执行公司职务时违反法律、法规或者公司章程的行为进行监督；（3）当董事和经理的行为损害公司的利益时，要求董事和经理予以纠正；（4）提议召开临时股东会。从2006年6月1日至今，凯莱公司未召开过股东会。服装城管委会调解委员会于2009年12月15日、16日两次组织双方进行调解，但均未成功。

(1) inspect the company's finances;

(2) supervise those acts carried out in violation of laws, regulations, or the articles of association by executive directors and managers when they perform their corporate authority;

(3) require directors and managers to make corrections when the acts of directors and managers are detrimental to the interests of the company; [and]

(4) propose holding interim shareholders' meetings.

From June 1, 2006 to the present,[6] Kailai Company had yet to hold a shareholders' meeting. On December 15 and 16, 2009, the Mediation Committee of the Garments Town Management Committee twice tried to organize the two parties to conduct mediation, but it was unsuccessful.

裁判结果

江苏省苏州市中级人民法院于2009年12月8日以（2006）苏中民二初字第0277号民事判决，[7] 驳回林方清的诉讼请求。宣判后，林方清提起上诉。江苏省高级人民法院于2010年10月19日以（2010）苏商终字第0043号民事判决，[8] 撤销一审判决，依法改判解散凯莱公司。

Results of the Adjudication

On December 8, 2009, the Intermediate People's Court of Suzhou Municipality, Jiangsu Province, by the (2006) Su Zhong Min Er Chu Zi No. 0277 Civil Judgment,[9] rejected LIN Fangqing's litigation requests. After the judgment was pronounced, LIN Fangqing appealed. On October 19, 2010, by the (2010) Su Shang Zhong Zi No. 0043 Civil Judgment,[10] the High People's Court of Jiangsu Province revoked the first-instance judgment and ordered in accordance with law Kailai Company instead to be dissolved.

裁判理由[11]

法院生效裁判认为：首先，凯莱公司的经营管理已发生严重困难。根据公司法第一百八十三条[13]和《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）》（简称《公司法解释（二）》）第一条的规定，[14]判断公司的经营管理是否出现严重困难，应当从公司的股东会、董事会或执行董事及监事会或监事的运行现状进行综合分析。“公司经营管理发生严重困难”的侧重点在于公司管理方面存有严重内部障碍，如股东会机制失灵、无法就公司的经营管理进行决策等，不应片面理解为公司资金缺乏、严重亏损等经营性困难。本案中，凯莱公司仅有戴小明与林方清两名股东，两人各占50%的股份，凯莱公司章程规定“股东会的决议须经代表二分之一以上表决权的股东通过”，且各方当事人一致认可该“二分之一以上”不包括本数。因此，只要两名股东的意见存有分歧、互不配合，就无法形成有效表决，显然影响公司的运营。凯莱公司已持续4年未召开股东会，无法形成有效股东会决议，也就无法通过股东会决议的方式管理公司，股东会机制已经失灵。执行董事戴小明作为互有矛盾的两

Reasons for the Adjudication[12]

In the effective judgment, the court opined: [15] first, serious difficulty had occurred in the operation and management of Kailai Company. According to Article 183 of the *Company Law* [16] and Article 1 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"* (hereinafter referred to as the "*Company Law Interpretation (II)*"),[17] in order to determine whether serious difficulty occurs in the operation and management of a company, the operational state of the company's shareholders' meetings, board of directors or executive director(s), and board of supervisors or supervisor(s) should be comprehensively analyzed. The focus of "serious difficulty occurs in the operation and management of a company" is on the existence of serious internal impediments in the company's management, such as the failure of the shareholders' meeting mechanism and an inability to make decisions regarding the company's operation and management. It should not be partially understood as operational difficulties, such as the company's lack of capital and serious financial loss.

In this case, Kailai Company only had two shareholders, DAI Xiaoming and LIN Fangqing, each owning 50% of the shares. Kailai Company's articles of association prescribed that "resolutions of shareholders' meetings must be passed by shareholders representing more than half of the voting rights". In addition, all the parties unanimously agreed that "more than half" was non-inclusive. Therefore, as long as the opinions of the two shareholders differed and they refused to cooperate, a valid vote could not be formed, and [this] clearly affected the operation of the

名股东之一，其管理公司的行为，已无法贯彻股东会的决议。林方清作为公司监事不能正常行使监事职权，无法发挥监督作用。由于凯莱公司的内部机制已无法正常运行、无法对公司的经营作出决策，即使尚未处于亏损状况，也不能改变该公司的经营管理已发生严重困难的事实。

company. Kailai Company had not held a shareholders' meeting for four consecutive years; it was unable to form a valid resolution of shareholders' meetings. The company could not be managed by means of resolutions of shareholders' meetings, and the shareholders' meeting mechanism had failed. Executive Director DAI Xiaoming was one of the two shareholders who were in conflict with each other; his acts of managing the company were unable to implement resolutions of shareholders' meetings. As the supervisor of the company, LIN Fangqing was unable to normally exercise the authority of a supervisor and was unable to play a supervisory role. Because Kailai Company's internal mechanisms could not operate normally and could not make decisions on the operation of the company, even though the company was not yet in a state of financial loss, this did not change the fact that serious difficulty in the operation and management of the company had occurred.

其次，由于凯莱公司的内部运营机制早已失灵，林方清的股东权、监事权长期处于无法行使的状态，其投资凯莱公司的目的无法实现，利益受到重大损失，且凯莱公司的僵局通过其他途径长期无法解决。《公司法解释（二）》第五条明确规定了“当事人不能协商一致使公司存续的，人民法院应当及时判决”。[18] 本案中，林方清在提起公司解散诉讼之前，已通过其他途径试图化解与戴小明之间的矛盾，服装城管委会也曾组织双方当事人调解，但双方仍不能达成一致意见。两审法院也基于慎用司法手段强制解散公司的考虑，积极进行调解，但均未成功。

In addition, because Kailai Company's internal operational mechanism had already failed [and] LIN Fangqing's shareholders' rights and supervisory rights had been in an inoperable state for a long time, his purpose of investing in Kailai Company could not be realized and there was a substantial loss to his interests. Moreover, Kailai Company's deadlock was unable to be resolved by other means for a long time. Article 5 of the *Company Law Interpretation (II)* clearly stated that "[w]here the parties cannot reach consensus, after negotiation, to maintain the company's existence, a people's court should render a judgment in a timely manner".[19] In this case, prior to bringing the corporate dissolution lawsuit, LIN Fangqing had already tried to resolve the conflict with DAI Xiaoming by other means. The Garments Town Management Committee had also organized both parties to have mediation, but the parties could not reach any consensus. The courts of the two instances also actively carried out mediation based on the consideration that judicial measures to compulsorily dissolve a company should be used carefully, but neither court succeeded.

此外，林方清持有凯莱公司50%的股份，也符合公司法关于提起公司解散诉讼的股东须持有公司10%以上股份的条件。

Furthermore, LIN Fangqing held 50% of Kailai Company's shares, which met the condition stated in the *Company Law* that a shareholder who brings a corporate dissolution lawsuit hold 10% or more of the company's shares.

综上所述，凯莱公司已符合公司法及《公司法解释（二）》所规定的股东提起解散公司之诉的条件。二审法院从充分保护股东合法权益，合理规范公司治理结构，促进市场经济健康有序发展的角度出发，依法作出了上述判决。[20][21]

To summarize what is stated above, Kailai Company met the conditions concerning shareholders' bringing of corporate dissolution lawsuits provided by the *Company Law* and the *Company Law Interpretation (II)*. From the point of view of adequately protecting the legal rights and interests of the shareholders, reasonably regulating the corporate governance structure, and promoting the healthy and orderly development of a market economy, the second-instance court rendered the above judgment in accordance with law.[22][23]

CGCP 备注

备注1:

《中华人民共和国公司法》[24]

第一百八十三条

公司经营管理发生严重困难，继续存续会使股东利益受到重大损失，通过其他途径不能解决的，持有公司全部股东表决权百分之十以上的股东，可以请求人民法院解散公司。

备注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）》[27]

第一条

单独或者合计持有公司全部股东表决权百分之十以上的股东，以下列事由之一提起解散公司诉讼，并符合公司法第一百八十三条规定的，人民法院应予受理：

（一）公司持续两年以上无法召开股东会或者股东大会，公司经营管理发生严重困难的；

（二）股东表决时无法达到法定或者公司章程规定的比例，持续两年以上不能做出有效的股东会或者股东大会决议，公司经营管理发生严重困难的；

（三）公司董事长期冲突，且无法通过股东会或者股东大会解决，公司经营管理发生严重困难的；

（四）经营管理发生其他严重困难，公司继续存续会使股东利益受到重大损失的情形。

股东以知情权、利润分配请求权等权益受到损害，或者公司亏损、财产不足以偿还全部债务，以及公司被吊销企业法人营业

CGCP Notes

Note 1:

Company Law of the People's Republic of China[25]

Article 183

Where serious difficulty occurs in the operation and management of a company, [the company's] continued existence will cause a substantial loss to shareholders' interests, and [the difficulty] cannot be resolved by any other means, the shareholder who holds ten percent or more[26] of the voting rights of all the shareholders of the company may request that a people's court dissolve the company.

Note 2:

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" [28]

Article 1

Where a shareholder individually or collectively holding ten percent or more of the voting rights of all the shareholders of the company brings a lawsuit to dissolve the company on one of the following grounds and in conformity with Article 183 of the *Company Law*, a people's court should accept [the lawsuit]:

(1) the company has been unable to hold a shareholders' meeting or shareholders' general meeting for two or more consecutive years, and [thus] serious difficulty occurs in the operation and management of the company;

(2) during voting, the shareholders cannot reach the statutory ratio or the ratio prescribed by the company's articles of association, making it impossible to have a valid resolution of a shareholders' meeting or shareholders' general meeting for two or more consecutive years, and [thus] serious difficulty occurs in the operation and management of the company;

(3) for a long time, the directors of the company have been in conflict, which cannot be resolved by a shareholders' meeting or shareholders' general meeting, and [thus] serious difficulty occurs in the operation and management of the company;

(4) other types of serious difficulties occur in the operation and management [of the company], and [the company's] continued existence will cause a substantial loss to shareholders' interests.

Where a shareholder brings a lawsuit to dissolve the company on the grounds that his rights and interests, such as the right to information and the right to request distribution of profits, have been harmed, that the

执照未进行清算等为由，提起解散公司诉讼的，人民法院不予受理。

company has lost money and its property is insufficient to pay off all [the company's] debts, or that the enterprise legal person business license of the company has been cancelled but liquidation has not been carried out, a people's court shall not accept [the lawsuit].

第五条

人民法院审理解散公司诉讼案件，应当注重调解。当事人协商同意由公司或者股东收购股份，或者以减资等方式使公司存续，且不违反法律、行政法规强制性规定的，人民法院应予支持。当事人不能协商一致使公司存续的，人民法院应当及时判决。

经人民法院调解公司收购原告股份的，公司应当自调解书生效之日起六个月内将股份转让或者注销。股份转让或者注销之前，原告不得以公司收购其股份为由对抗公司债权人。■

Article 5

When adjudicating a corporate dissolution lawsuit, a people's court should emphasize mediation. Where the parties negotiated and agreed to let the company or its shareholders purchase the shares, or to maintain the company's existence by capital reduction or other methods, and [the agreement] does not violate mandatory provisions of laws and administrative regulations, a people's court should support [the agreement]. Where the parties cannot reach consensus, after negotiation, to maintain the company's existence, a people's court should render a judgment in a timely manner.

Where, after a people's court's mediation, a company purchases the plaintiff's shares, the company should transfer or cancel the shares within 6 months of the mediation statement's coming into effect. Before the shares are transferred or cancelled, the plaintiff must not act against the company's creditors on the grounds that the company is to acquire his shares. ■

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* 此案例的中文引用是：《林方清诉常熟市凯莱实业有限公司、戴小明公司解散纠纷案》，《中国法律连接》，第8期，第63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（CGC8），2020年3月，https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-8。
案例原文载于：《中国法院网》，http://rmfyb.chinacourt.org/paper/html/2012-04/14/content_43324.htm?div=-1。*亦见*《最高人民法院关于发布第二批指导性案例的通知》，2012年4月9日公布，同日起施行，http://tjjnfy.chinacourt.org/article/detail/2014/05/id/1298622.shtml。
除非另有说明，否则所有注释和"CGCP备注"均由中国指导性案例项目添加。

** The citation of this translation of this Guiding Case is: 《林方清诉常熟市凯莱实业有限公司、戴小明公司解散纠纷案》(*LIN Fangqing v. Changshu Kailai Industrial Co., Ltd. and DAI Xiaoming, A Corporate Dissolution Dispute*), 8 China Law Connect 63 (Mar. 2020), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC8), Mar. 2020, http://cgc.law.stanford.edu/guiding-cases/guiding-case-8.
The original, Chinese version of this case is available at 《中国法院网》 (www.chinacourt.org), http://rmfyb.chinacourt.org/paper/html/2012-04/14/content_43324.htm?div=-1. *See also* 《最高人民法院关于发布第二批指导性案例的通知》 (*Notice of the Supreme People's Court on the Release of the Second Batch of Guiding Cases*), issued on and effective as of Apr. 9, 2012, http://tjjnfy.chinacourt.org/article/detail/2014/05/id/1298622.shtml.
This document was prepared by Sean Webb, 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. All footnotes and "CGCP Notes", unless otherwise noted, 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 Richard Jiang, Oma Lee, Christine Qingyu Liu, MA Jing, Sylvia Hsin-Ling Tsai, Randy Wu, and XIA Linfei for preparing an earlier translation of this Guiding Case.

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183条在当前有效版本中编号为第182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，经四次修正，最新修正于2018年10月26日，同日起施行，http://www.fdi.gov.cn/1800000121_23_74633_0_7.html。

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 183 is numbered Article 182 in the currently effective version. *See* 《中华人民共和国公司法》(*Company Law of the People's Republic of China*), passed and issued on Dec. 29, 1993, effective as of July 1, 1994, amended four times, most recently on Oct. 26, 2018, effective as of Oct. 26, 2018, http://www.fdi.gov.cn/1800000121_23_74633_0_7.html.

3 The name "常熟市凯莱实业有限公司" is translated herein as "Changshu Kailai Industrial Co., Ltd." in accordance with the English name appearing on Infoclipper's website, at http://www.info-clipper.com/en/company/china/changshu-kailai-industrial-co-ltd.cnd8prt5y.html. Infoclipper specializes in collecting business and credit information.

4 Masculine pronouns are used to refer to this plaintiff, but the name "方清" ("Fangqing") can be found among females as well as males.

5 The name "江苏常熟服装城管理委员会" is translated herein literally as "The Jiangsu Changshu Garments Town Management Committee". The committee does not appear to have an official English name.

6 The text reads "至今" ("to the present"). The "present" likely refers to the time of the final judgment upon which this Guiding Case is based. *See infra* note 10.

7 一审判决书尚未找到，有可能已被排除在公布之外。

8 （2010）苏商终字第0043号民事判决，2010年10月19日由江苏省高级人民法院作出，全文载于斯坦福法学院中国指导性案例项目网站，http://cgc.law.stanford.edu/zh-hans/judgments/jiangsu-2010-su-shang-zhong-zi-0043-civil-judgment（以下简称"《二审判决》"）。

9 The first-instance judgment has not been found and may have been excluded from publication.

10 （2010）苏商终字第0043号民事判决 ((2010) Su Shang Zhong Zi No. 0043 Civil Judgment), rendered by the High People's Court of Jiangsu Province on Oct. 19, 2010, full text available on the Stanford Law School China Guiding Cases Project's website, at http://cgc.law.stanford.edu/judgments/jiangsu-2010-su-shang-zhong-zi-0043-civil-judgment (hereinafter "*Second-Instance Judgment*").

11 本部分的黄色亮点由中国指导性案例项目添加，以展示该项目对本指导性案例和其所依据的最终判决（即：《二审判决》，注释8）的比较。以黄色突出显示的表述/信息并不用于最终判决的"本院认为"说理部分。最高人民法院将这些表述/信息用于指导性案例中，可能是为了改进该案例的说理部分，继而再归纳成"裁判要点"。

[12] Yellow highlights included in this section were added by the China Guiding Cases Project to reflect its comparison of this Guiding Case with the final judgment upon which this Guiding Case is based (i.e., *Second-Instance Judgment*, *supra* note 10). Expressions/details highlighted in yellow were not used in the "This Court Opines" reasoning section of the final judgment. The Supreme People's Court likely included these expressions/details in the Guiding Case for the purpose of improving the Guiding Case's reasoning section, from which the "Main Points of the Adjudication" section was derived.

[13] 见注释1。

[14] 此处引用的《公司法解释（二）》应指2008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。2014年，《公司法解释（二）》第一条进行了小幅修改，将所提及的《公司法》"第一百八十三条"改为"第一百八十二条"，以反映《公司法》中所用编号的变化。见《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，并于2014年2月17日修正，2014年3月1日起施行，http://www.court.gov.cn/zixun-xiangqing-6135.html。

[15] The Chinese text does not specify which court opined. Given the context, this should be the High People's Court of Jiangsu Province.

[16] *See supra* note 2.

[17] The *Company Law Interpretation (II)* as cited here should mean the 2008 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. In 2014, Article 1 of the *Company Law Interpretation (II)* was slightly amended to change "Article 183" of the *Company Law* referenced to "Article 182", reflecting the change in the number used in the *Company Law*. *See* 《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 on Feb. 17, 2014, effective as of Mar. 1, 2014, http://www.court.gov.cn/zixun-xiangqing-6135.html.

[18] 见注释14。2014年，《公司法解释（二）》进行修改后，第五条的内容保持不变。

[19] *See supra* note 17. The content of Article 5 of the *Company Law Interpretation (II)* was not changed by the interpretation's 2014 amendment.

[20] 《二审判决》中没有这句子。句子中的一部分——"充分保护股东合法权益，[…]规范公司治理结构，促进市场经济健康[…]发展"——后来出现于一篇最高人民法院案例指导工作办公室的文章，当中说明了为何此案例被选为指导性案例。见最高人民法院案例指导工作办公室，指导案例8号《林方清诉常熟市凯莱实业有限公司、戴小明公司解散纠纷案》的理解与参照，《人民司法·应用》，第15期，第59页（2012）。

[21] 本指导性案例没有提供此信息："生效裁判审判人员：周成、雷新勇、史留芳"。见《二审判决》，注释8。

[22] This sentence is not found in the second-instance judgment. Part of this sentence—"adequately protecting the legal rights and interests of the shareholders, […] regulating the corporate governance structure, and promoting the healthy […] development of a market economy"—was later used in an article written by the Office for the Work on Case Guidance of the Supreme People's Court, in which reasons for selecting this case as a Guiding Case are provided. *See* 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8号《林方清诉常熟市凯莱实业有限公司、戴小明公司解散纠纷案》的理解与参照 (*Understanding and Referring to Guiding Case No. 8, LIN Fangqing v. Changshu Kailai Industrial Co., Ltd. and DAI Xiaoming, A Corporate Dissolution Dispute*), 《人民司法·应用》 (The People's Judicature · Application), Issue No. 15, at 59 (2012).

[23] This Guiding Case does not provide this information: "Adjudication personnel of the effective judgment: ZHOU Cheng, LEI Xinyong, and SHI Liufang". *See Second-Instance Judgment*, *supra* note 10.

[24] 见注释1。

[25] *See supra* note 2.

[26] The text reads "以上" ("above"). The *Company Law* (*supra* note 2) does not explain how to interpret this phrase. However, according to Article 205 of the *General Provisions of the Civil Law of the People's Republic of China*, any "above [a certain number]" expression used in China's civil law shall be read as inclusive. *See* 《中华人民共和国民法总则》 (*General Provisions of the Civil Law of the People's Republic of China*), passed and issued on Mar. 15, 2017, effective as of Oct. 1, 2017, http://www.npc.gov.cn/zgrdw/npc/xinwen/2017-03/15/content_2018907.htm. Article 205 covers the *Company Law*, as the *Company Law* is considered to be a "law that has specific provisions on civil relations". *See* 《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 the Printing for Release of the "Summary of the National Courts' Civil and Commercial Adjudication Work Conference"*), issued on and effective as of Nov. 8, 2019, http://www.csrc.gov.cn/pub/heilongjiang/xxfw/hljflfg/201911/t20191129_366724.htm (paragraph 3 explains the relationship between the *General Provisions of the Civil Law* and the *Company Law*).

[27] 见注释14。

[28] *See supra* note 17.

Founded in February 2011, the China Guiding Cases Project has shared its knowledge-base via its bilingual website (https://cgc.law.stanford.edu). As of early 2020, the website has benefited more than 130,000 global users residing in different continents.

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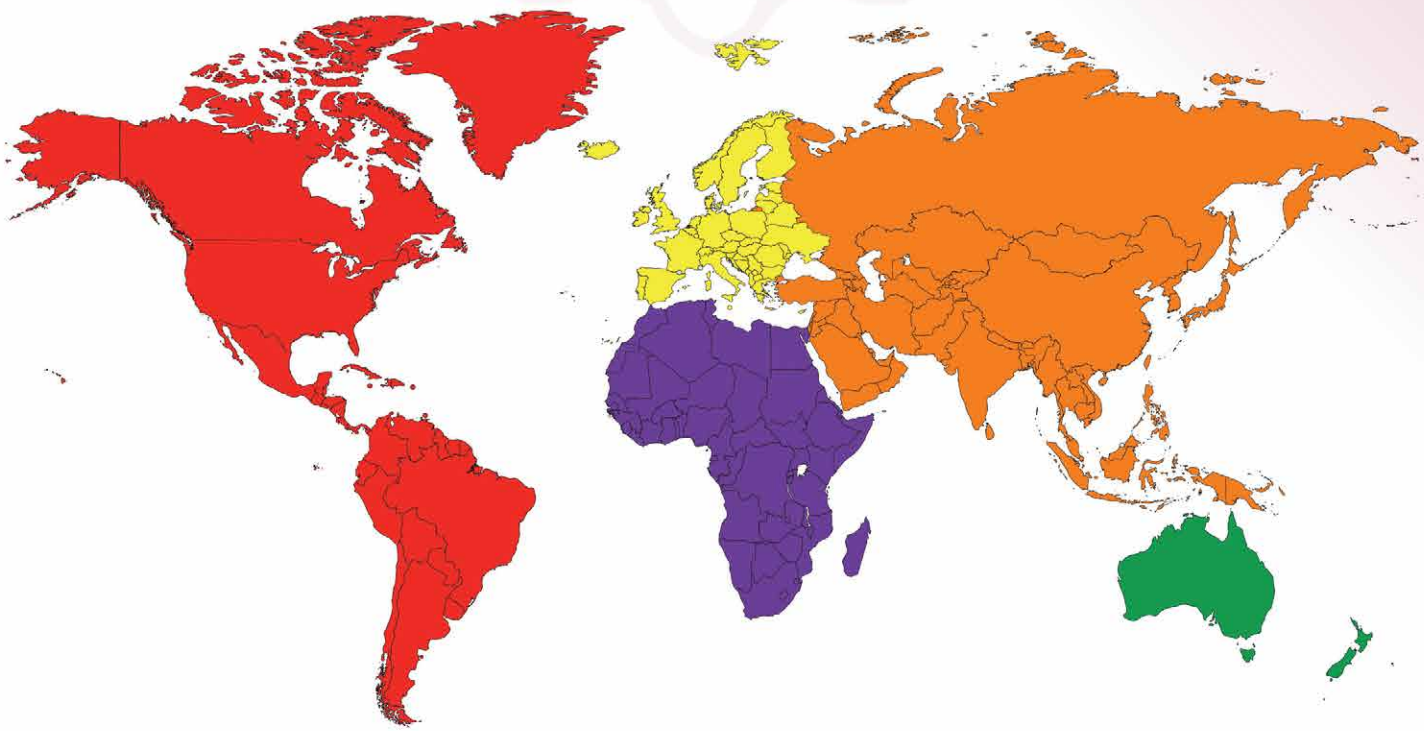

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王碎永诉深圳歌力思服饰股份有限公司、杭州银泰世纪百货有限公司侵害商标权纠纷案

WANG Suiyong v. Shenzhen Ellassay Fashion Co., Ltd. and Hangzhou Intime Century Department Store Co., Ltd., A Dispute over Infringement of Trademark Rights

指导案例82号
（最高人民法院审判委员会讨论通过
2017年3月6日发布）*

Guiding Case No. 82
(Discussed and Passed by the Adjudication Committee of the Supreme People's Court
Released on March 6, 2017)**

关键词

民事
侵害商标权
诚实信用
权利滥用

Keywords

Civil
Infringement of Trademark Rights
Good Faith
Abuse of Rights

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。

Main Points of the Adjudication

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[1] 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.

相关法条

《中华人民共和国民事诉讼法》第13条[2]

《中华人民共和国商标法》第52条[4]

Related Legal Rule(s)

Article 13 of the *Civil Procedure Law of the People's Republic of China*[3]

Article 52 of the *Trademark Law of the People's Republic of China*[5]

基本案情

深圳歌力思服装实业有限公司成立于1999年6月8日。2008年12月18日，该公司通过受让方式取得第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还是第4225104号“ELLASSAY”的商标注册人。该商标核定使用商品为第18类的（动物）皮；钱包；旅行包；文件夹（皮革制）；

Basic Facts of the Case

Shenzhen Gelisi Garments Industrial Co., Ltd.[6] was established on June 8, 1999. On December 18, 2008, the company obtained the No. 1348583 “歌力思” [the transliteration of which is “Ge Li Si”] trademark by assignment. The trademark had been approved for use on Class 25 ([different types of] clothing) commodities and for registration in December 1999. On November 19, 2009, the trademark was approved for renewal registration and the validity period is from December 28, 2009, to December 27, 2019.

Shenzhen Gelisi Garments Industrial Co., Ltd. is also the registrant of the No. 4225104 “ELLASSAY” trademark. The commodities approved for use

皮制带子；裘皮；伞；手杖；手提包；购物袋。注册有效期限自2008年4月14日至2018年4月13日。2011年11月4日，深圳歌力思服装实业有限公司更名为深圳歌力思服饰股份有限公司（以下简称歌力思公司，即本案一审被告人）。2012年3月1日，上述“歌力思”商标的注册人相应变更为歌力思公司。

with the trademark are Class 18 ((animal) skin; wallets; travel bags; folders (leather); leather belts; fur; umbrellas; canes; handbags; shopping bags). The registered validity period is from April 14, 2008, to April 13, 2018. On November 4, 2011, Shenzhen Gelisi Garments Industrial Co., Ltd. was renamed Shenzhen Ellassay Fashion Co., Ltd.[7] (hereinafter referred to as “Ellassay Company”, i.e., the defendant of the first-instance [adjudication] in this case). On March 1, 2012, the registrant of the aforementioned “歌力思” trademark was correspondingly changed to Ellassay Company.

一审原告人王碎永于2011年6月申请注册了第7925873号“歌力思”商标，该商标核定使用商品为第18类的钱包、手提包等。王碎永还曾于2004年7月7日申请注册第4157840号“歌力思及图”商标。后因北京市高级人民法院于2014年4月2日作出的二审判决认定，该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。

In June 2011, WANG Suiyong, the plaintiff of the first-instance [adjudication], applied to register the No. 7925873 “歌力思” trademark. The commodities approved for use with the trademark are Class 18 (wallets, handbags, etc.). On July 7, 2004, WANG Suiyong also had applied to register the No. 4157840 “歌力思及图” [(“歌力思 and graphic”)] trademark. Because, subsequently, the High People’s Court of Beijing Municipality rendered a second-instance judgment on April 2, 2014, determining that the [No. 4157840] trademark had harmed the prior rights to a shop name [held by] Shenzhen Ellassay Investment Management Co., Ltd.,[8] an affiliated enterprise of Ellassay Company, [the No. 4157840 trademark] would not be approved for registration.

自2011年9月起，王碎永先后在杭州、南京、上海、福州等地的“ELLASSAY”专柜，通过公证程序购买了带有“品牌中文名：歌力思，品牌英文名：ELLASSAY”字样吊牌的皮包。2012年3月7日，王碎永以歌力思公司及杭州银泰世纪百货有限公司（以下简称杭州银泰公司）生产、销售上述皮包的行为构成对王碎永拥有的“歌力思”商标、“歌力思及图”商标权的侵害为由，提起诉讼。

Beginning in September 2011, WANG Suiyong purchased, through notary procedures, bags bearing hangtags with the words “Chinese name of the brand: 歌力思; English name of the brand: ELLASSAY” at “ELLASSAY” counters in Hangzhou, Nanjing, Shanghai, Fuzhou, and other places. On March 7, 2012, WANG Suiyong brought suit on the grounds that the acts of producing and selling the above-mentioned bags by Ellassay Company and Hangzhou Intime Century Department Store Co., Ltd.[9] (hereinafter referred to as “Hangzhou Intime Company”) constituted infringement of the “歌力思” trademark and the “歌力思及图” trademark rights owned by WANG Suiyong.

裁判结果

Results of the Adjudication

杭州市中级人民法院于2013年2月1日作出（2012）浙杭知初字第362号民事判决，[10] 认为歌力思公司及杭州银泰公司生产、销售被诉侵权商品的行为侵害了王碎永的注册商标专用权，判决歌力思公司、杭州银泰公司承担停止侵权行为、赔偿王碎永经济损失及合理费用共计10万元及消除影响。歌力思公司不服，提起上诉。浙江省高级人民法院于2013年6月7日作出（2013）浙知终字第222号民事判决，[11] 驳回上诉、维持原判。歌力思公司及王碎永均不服，向最高人民法院申请再审。最高人民法院裁定提审本案，并于2014年8月14日作出（2014）民提字第24号判决，[12] 撤销一审、二审判决，驳回王碎永的全部诉讼请求。

On February 1, 2013, the Intermediate People’s Court of Hangzhou Municipality[, Zhejiang Province,] rendered the (2012) Zhe Hang Zhi Chu Zi No. 362 Civil Judgment,[13] opining that the acts of producing and selling the allegedly infringing commodities by Ellassay Company and Hangzhou Intime Company had infringed on WANG Suiyong’s exclusive rights to use [his] registered trademarks. [The court, therefore,] held that Ellassay Company and Hangzhou Intime Company [had to] undertake to cease the infringing acts, to pay WANG Suiyong a total of RMB 100,000 as compensation for economic losses and reasonable expenses [incurred], and to eliminate the effects [of their acts]. Unconvinced [by the judgment], Ellassay Company appealed. On June 7, 2013, the High People’s Court of Zhejiang Province rendered the (2013) Zhe Zhi Zhong Zi No. 222 Civil Judgment,[14] rejecting the appeal and upholding the original judgment.

Unconvinced [by the second-instance judgment], both Ellassay Company and WANG Suiyong applied to the Supreme People’s Court for a retrial. [15] The Supreme People’s Court ruled to bring [the case] up [to the Supreme People’s Court] for adjudication [16] and, on August 14, 2014, rendered the (2014) Min Ti Zi No. 24 [Civil] Judgment, [17] revoking the first-instance and second-instance judgments and rejecting all of the litigation requests of WANG Suiyong.

裁判理由[18]

法院生效裁判认为，诚实信用原则是一切市场活动参与者所应遵循的基本准则。一方面，它鼓励和支持人们通过诚实劳动积累社会财富和创造社会价值，并保护在此基础上形成的财产性权益，以及基于合法、正当的目的支配该财产性权益的自由和权利；另一方面，它又要求人们在市场活动中讲究信用、诚实不欺，在不损害他人合法利益、社会公共利益和市场秩序的前提下追求自己的利益。民事诉讼活动同样应当遵循诚实信用原则。[20] 一方面，它保障当事人有权在法律规定的范围内行使和处分自己的民事权利和诉讼权利；[21] 另一方面，它又要求当事人在不损害他人和社会公共利益的前提下，善意、审慎地行使自己的权利。任何违背法律目的和精神，以损害他人正当权益为目的，恶意取得并行使权利、扰乱市场正当竞争秩序的行为均属于权利滥用，其相关权利主张不应得到法律的保护和支持。

第4157840号“歌力思及图”商标迄今为止尚未被核准注册，王碎永无权据此对他人提起侵害商标权之诉。对于歌力思公司、杭州银泰公司的行为是否侵害王碎永的第7925873号“歌力思”商标权的问题，首先，歌力思公司拥有合法的在先权利基础。歌力思公司及其关联企业最早将“歌力思”作为企业字号使用的时间为1996年，最早在服装等商品上取得“歌力思”注册商标专用权的时间为1999年。经长期使用和广泛宣传，作为企业字号和注册商标的“歌力思”已经具有了较高的市场知名度，歌力思公司对前述商业标识享有合法的在先权利。其次，歌力思公司在本案中的使用行为系基于合法的权利基础，使用方式和行为性质均具有正当性。从销售场所来看，歌力思公司对被诉侵权商品的展示和销售行为均完成于杭州银泰公司的歌力思专柜，专柜通过标注歌力思公司的“ELLASSAY”商标等方式，明确表明了被诉侵权商品的提供者。在歌力思公司的字号、商标等商业标识已经具有较高的市场知名度，而王碎永未能举证证明其“歌力思”商标同样具有知名度的情况下，歌力思公司在其专柜中销售被诉侵权商品的行为，不会使普通消费者误认该商品来自于王碎永。从歌力思公司的具体使用方式来看，被诉侵权商品的

Reasons for the Adjudication[19]

In the effective judgment, the court opined: [22] the principle of good faith is a fundamental standard that all participants in market activities should follow. It encourages and supports the accumulation of social wealth and the creation of social values through honest labor. It protects property rights and interests formed on this basis as well as the freedoms and rights governing, for legal and proper purposes, these property rights and interests. [The principle of good faith] also requires people to pay attention to [their] credibility and honesty in market activities and—on the premise that legal rights and interests of others, social and public interests, and the order of the market are not harmed—to pursue their own rights and interests.

The principle of good faith should also be followed in civil litigation activities.[23] [The principle] ensures that the parties have the rights to exercise and dispose of, within the scope provided by law, their civil rights and litigation rights. [24] In addition, [the principle] also requires the parties, on the premise that rights and interests of others and social and public interests are not harmed, to exercise their own rights with good intentions and prudence. Any act that violates the purpose and spirit of the law, that is [carried out] for the purpose of harming the proper rights and interests of others, and that [results in] a malicious acquisition and exercise of rights and a disruption of the fair competition order of the market, is an abuse of rights. Claims for rights related to [such acts] should not be protected or supported by law.

As of [the date of the retrial judgment],[25] the No. 4157840 “歌力思及图” trademark was not approved for registration. WANG Suiyong had no right to rely on this [trademark] to bring a lawsuit against others for infringement of trademark rights.

On the issue of whether the acts of Ellassay Company and Hangzhou Intime Company infringed on the rights of WANG Suiyong's No. 7925873 “歌力思” trademark

First, Ellassay Company had the legal basis of “prior rights”. Ellassay Company and its affiliated enterprise first used “歌力思” as an enterprise shop name in 1996. They first obtained the exclusive right to use the “歌力思” registered trademark on [Class 25] (clothing etc.) commodities in 1999. After long-term use and extensive publicity, “歌力思”, as an enterprise shop name and a registered trademark, had already become relatively well-known in the market. Ellassay Company had legal prior rights to these business identifiers.

Second, Ellassay Company's acts of using [the registered trademark] in this case were based on legal rights, and both the ways of using [the registered trademark] and the nature of the acts were proper. Looking at the places of sale, Ellassay Company's acts of displaying and selling the allegedly infringing commodities were both carried out at the Ellassay counters of Hangzhou Intime Company. By displaying Ellassay Company's “ELLASSAY” trademark, the counters clearly indicated the supplier of the allegedly infringing commodities. Under the circumstances that Ellassay Company's business identifiers, such as [its] shop name and trademark, had already become relatively well-known in the market, while WANG

外包装、商品内的显著部位均明确标注了“ELLASSAY”商标，而仅在商品吊牌之上使用了“品牌中文名：歌力思”的字样。由于“歌力思”本身就是歌力思公司的企业字号，且与其“ELLASSAY”商标具有互为指代关系，故歌力思公司在被诉侵权商品的吊牌上使用“歌力思”文字来指代商品生产者的做法并无明显不妥，不具有攀附王碎永“歌力思”商标知名度的主观意图，亦不会为普通消费者正确识别被诉侵权商品的来源制造障碍。在此基础上，杭州银泰公司销售被诉侵权商品的行为亦不为法律所禁止。最后，王碎永取得和行使“歌力思”商标权的行为难谓正当。“歌力思”商标由中文文字“歌力思”构成，与歌力思公司在先使用的企业字号及在先注册的“歌力思”商标的文字构成完全相同。“歌力思”本身为无固有含义的臆造词，具有较强的固有显著性，依常理判断，在完全没有接触或知悉的情况下，因巧合而出现雷同注册的可能性较低。作为地域接近、经营范围关联程度较高的商品经营者，王碎永对“歌力思”字号及商标完全不了解的可能性较低。在上述情形之下，王碎永仍在手提包、钱包等商品上申请注册“歌力思”商标，其行为难谓正当。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。

Suiyong could not adduce evidence to prove that his “歌力思” trademark also had become well-known in the market, Ellassay Company's acts of selling the allegedly infringing commodities at its counters would not cause ordinary consumers to misidentify the commodities as belonging to WANG Suiyong. Looking at Ellassay Company's specific ways of using [the trademark], both the external packaging of the allegedly infringing commodities and the notable parts inside the commodities were clearly labeled with the “ELLASSAY” trademark. [The company] only used the words “Chinese name of the brand: 歌力思” on the hangtags of the commodities. Because “歌力思” is Ellassay Company's enterprise shop name and has a mutual reference relationship with the “ELLASSAY” trademark, there were no obvious problems for Ellassay Company to use the words “歌力思” on the hangtags of the allegedly infringing commodities to refer to the producer of the commodities. [Ellassay Company] did not have the subjective intent to piggyback on the degree that WANG Suiyong's “歌力思” trademark was well-known, nor did it create obstacles for ordinary consumers to correctly distinguish the origin of the allegedly infringing commodities. On this basis, Hangzhou Intime Company's acts of selling the allegedly infringing commodities were not prohibited by law.

Finally, WANG Suiyong's acts of obtaining and exercising the “歌力思” trademark rights could hardly be called proper. Composed of the Chinese characters “歌力思”, the “歌力思” trademark has completely the same textual composition as that of Ellassay Company's enterprise shop name in prior use and of the “歌力思” trademark in prior registration. “歌力思” is itself a made-up term without inherent meaning and has a relatively strong, inherent salience. Judging by common sense, in the absence of contact or knowledge, the possibility of having similar registrations resulting from coincidence is relatively low. WANG Suiyong is a business operator of commodities whose [target] geographical [area] was close [to that of Ellassay Company's commodities] and whose scope of business was quite closely related [to that of Ellassay Company]. The possibility of him being completely unaware of the “歌力思” shop name and trademark was relatively low. [Despite] the above-mentioned circumstances, WANG Suiyong still applied to register the “歌力思” trademark [for use] on commodities, including handbags and wallets. His acts could hardly be called proper. WANG Suiyong's use of trademark rights not obtained with good intentions to bring an infringement of rights lawsuit against Ellassay Company's acts of proper use [of its trademark] constituted an abuse of rights.

（生效裁判审判人员：王艳芳、朱理、佟姝）

(Adjudication personnel of the effective judgment: WANG Yanfang, ZHU Li, and TONG Shu)

CGCP 备注

备注1:

《中华人民共和国民事诉讼法》[26]

第十三条

民事诉讼应当遵循诚实信用原则。

当事人有权在法律规定的范围内处分自己的民事权利和诉讼权利。

备注2:

《中华人民共和国商标法》

第五十二条[28]

有下列行为之一的，均属侵犯注册商标专用权：

（一）未经商标注册人的许可，在同一种商品或者类似商品上使用与其注册商标相同或者近似的商标的；

（二）销售侵犯注册商标专用权的商品的；

（三）[…]；

（四）[…]；

（五）[…]。■

CGCP Notes

Note 1:

Civil Procedure Law of the People's Republic of China[27]

Article 13

The principle of good faith should be followed in civil litigation.

The parties have the rights to dispose of, within the scope provided by law, their civil rights and litigation rights.

Note 2:

Trademark Law of the People's Republic of China

Article 52[29]

Any of the following acts is an infringement of an exclusive right to use a registered trademark:

(1) using, without permission from a trademark registrant, a trademark that is identical with or similar to his registered trademark on commodities that are of the same type as [his commodities] or similar to them;

(2) selling commodities that infringe upon an exclusive right to use a registered trademark;

(3) […];

(4) [….]; and

(5) [….].■

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* 此案例的中文引用是：《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。

案例原文载于：《中国法院网》，http://www.chinacourt.org/article/detail/2017/03/id/2574902.shtml。*亦见*《最高人民法院关于发布第16批指导性案例的通知》，2017年3月6日公布，同日起施行，http://www.chinacourt.org/law/detail/2017/03/id/149260.shtml。除非另有说明，否则所有注释和"CGCP备注"均由中国指导性案例项目添加。

** The citation of this translation of this Guiding Case is: 《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》(*WANG Suiyong v. Shenzhen Ellassay Fashion Co., Ltd. and Hangzhou Intime Century Department Store Co., Ltd., A Dispute over Infringement of Trademark Rights*), 8 China Law Connect 71 (Mar. 2020), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC82), Mar. 2020, http://cgc.law.stanford.edu/guiding-cases/guiding-case-82.

The original, Chinese version of this case is available at 《中国法院网》 (www.chinacourt.org), http://www.chinacourt.org/article/detail/2017/03/id/2574902.shtml. *See also* 《最高人民法院关于发布第16批指导性案例的通知》 (*Notice of the Supreme People's Court on the Release of the 16th Batch of Guiding Cases*), issued on and effective as of Mar. 6, 2017, http://www.chinacourt.org/law/detail/2017/03/id/149260.shtml.

This document was prepared by Sean Webb, 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. All footnotes and "CGCP Notes", unless otherwise noted, 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.

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

[2] 此处引用的《民事诉讼法》应指2012年版本，该版本于本指导性案例在2017年3月发布时、该指导性案例所依据的最终判决（即：《再审判决》，注释12）作出时已生效。第13条在当前有效版本中维持不变。*见*《中华人民共和国民事诉讼法》，1991年4月9日通过和公布，同日起施行，经三次修正，最新修正于2017年6月27日，2017年7月1日起施行，http://www.moj.gov.cn/Department/content/2018-12/25/357_182594.html。

[3] The *Civil Procedure Law* as cited here should mean the 2012 version, which was in effect when this Guiding Case was released in March 2017 and when the final judgment upon which this Guiding Case is based (i.e., *Retrial Judgment*, *infra* note 17) was rendered. Article 13 remains the same in the currently effective version. *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.

[4] 此指导性案例所依据的最终判决（即：《再审判决》，注释12）明确引用"2013年修正前"的《商标法》第52条。2013年修正案对第52条进行了实质性更改，并将该条重新编号为第57条，在当前《商标法》有效版本中第57条维持不变。*见*《中华人民共和国商标法》，1982年8月23日通过和公布，1983年3月1日起施行，经四次修正，最新修正于2019年4月23日，2019年11月1日起施行，http://www.sipo.gov.cn/zcfg/zcfgflfg/flfgsb/fl_sb/1140931.htm。

[5] The final judgment upon which this Guiding Case is based (i.e., *Retrial Judgment*, *infra* note 17) explicitly cites Article 52 of the *Trademark Law* that was in effect "prior to the 2013 amendment". The 2013 amendment brought some substantive changes to Article 52 and re-numbered the provision as Article 57, which remains the same in the currently effective version of the law. *See*《中华人民共和国商标法》(*Trademark Law of the People's Republic of China*), passed and issued on Aug. 23, 1982, effective as of Mar. 1, 1983, amended four times, most recently on Apr. 23, 2019, effective as of Nov. 1, 2019, http://www.sipo.gov.cn/zcfg/zcfgflfg/flfgsb/fl_sb/1140931.htm.

[6] The name "深圳歌力思服装实业有限公司" is translated herein as "Shenzhen Gelisi Garments Industrial Co., Ltd." in accordance with the English name appearing on the website of the Ministry of Commerce of the People's Republic of China, at http://ccn.mofcom.gov.cn/194098.

[7] The name "深圳歌力思服饰股份有限公司" is translated herein as "Shenzhen Ellassay Fashion Co., Ltd." in accordance with the English name appearing on the company's website, at https://www.ellassay.com/contact.

[8] The name "歌力思投资管理有限公司" is translated herein as "Shenzhen Ellassay Investment Management Co., Ltd." with reference to the translation used in Shenzhen Ellassay Fashion Co., Ltd.'s profile, at http://www.4-traders.com/SHENZHEN-ELLASSAY-FASHION-23672771/company.

[9] The name "杭州银泰世纪百货有限公司" is translated herein as "Hangzhou Intime Century Department Store Co., Ltd." in accordance with the English name appearing for it in the document available at http://www.intime.com.cn/intime/front/investttnews/detail_en.html?id=17088.

[10] 一审判决书尚未找到，有可能已被排除在公布之外。

[11] 二审判决书尚未找到，有可能已被排除在公布之外。

[12] (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（以下简称"《再审判决》"）。

[13] The first-instance judgment has not been found and may have been excluded from publication.

[14] The second-instance judgment has not been found and may have been excluded from publication.

[15] 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*), *supra* note 3.

[16] The text reads "提审" ("bring [a case] up [to an upper-level court] for adjudication"). Article 198 Paragraph 2 of the *Civil Procedure Law of the People's Republic of China* provides, *inter alia*, that if the Supreme People's Court finds an error in a judgment or ruling rendered by a lower-level court and the judgment or ruling has already come into effect, the Supreme People's Court has the authority to adjudicate the case itself or to direct the lower-level court to conduct 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*), *supra* note 3.

[17] (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 (hereinafter "*Retrial Judgment*").

[18] 本部分的内容完全基于《再审判决》（*见*注释12）。通常指导性案例与其所依据的最终判决之间存在一些差异，这反映了最高人民法院在指导性案例制作过程中所作出的编写（*见*本期刊之前出版的双语指导性案例），但在此指导性案例中没有这样显而易见的差异。

[19] The content of this section is completely based on the *Retrial Judgment* (*see supra* note 17). Usually, there are some differences between a Guiding Case and the final judgment upon which the Guiding Case is based, reflecting the Supreme People's Court's editorial input during the preparation of the Guiding Case (*see* all bilingual Guiding Cases published in earlier issues of this journal), but no such differences are readily apparent in this Guiding Case.

[20] 这里使用的文字类似于《民事诉讼法》第十三条第一款。*见* CGCP备注1。

[21] 这里使用的文字类似于《民事诉讼法》第十三条第二款。*见* CGCP备注1。

[22] The Chinese text does not specify which court opined. Given the context, this should be the Supreme People's Court.

[23] The language used here is similar to Article 13 Paragraph 1 of the *Civil Procedure Law*. *See infra* CGCP Note 1.

[24] The language used here is similar to Article 13 Paragraph 2 of the *Civil Procedure Law*. *See infra* CGCP Note 1.

[25] The text reads "迄今为止" ("as of now"). It is translated here as "As of [the date of the retrial judgment]" because the word "now" likely refers to the time of the final judgment upon which this Guiding Case is based. *See infra* note 17.

[26] *见*注释2。

[27] *See supra* note 3.

[28] *见*注释4。

[29] *See supra* note 5.

迈克尔•杰弗里•乔丹与国家工商行政管理总局商标评审委员会、乔丹体育股份有限公司“乔丹”商标争议行政纠纷案

Michael Jeffrey Jordan v. The Trademark Review and Adjudication Board of the State Administration for Industry and Commerce and Qiaodan Sports Co., Ltd., An Administrative Case Concerning a Dispute over the “乔丹” Trademark

指导案例113号
（最高人民法院审判委员会讨论通过
2019年12月24日发布）*

Guiding Case No. 113
(Discussed and Passed by the Adjudication Committee of the Supreme People's Court
Released on December 24, 2019)**

关键词

行政
商标争议
姓名权
诚实信用

Keywords

Administrative
Trademark Dispute
The Right to Name
Good Faith

裁判要点

1. 姓名权是自然人对其姓名享有的人身权，姓名权可以构成商标法规定的在先权利。外国自然人外文姓名的中文译名符合条件的，可以依法主张作为特定名称按照姓名权的有关规定予以保护。

2. 外国自然人就特定名称主张姓名权保护的，该特定名称应当符合以下三项条件：（1）该特定名称在我国具有一定的知名度，为相关公众所知悉；（2）相关公众使用该特定名称指代该自然人；（3）该特定名称已经与该自然人之间建立了稳定的对应关系。

3. 使用是姓名权人享有的权利内容之一，并非姓名权人主张保护其姓名权的法定前提条件。特定名称按照姓名权受法律保护的，即使自然人并未主动使用，也不影响姓名权人按照商标法关于在先权利的规定主张权利。

4. 违反诚实信用原则，恶意申请注册商标，侵犯他人现有在先权利的“商标权人”，以该商标的宣传、使用、获奖、被

Main Points of the Adjudication

1. The right to name is a personal right that a natural person has over his[1] name, and the right to name can constitute a prior right provided for in the *Trademark Law*. Where the Chinese translation of a foreign natural person's foreign name meets [certain] conditions, [the foreign natural person] may legally claim that it be given protection as a specific name in accordance with relevant provisions regarding the right to name.

2. Where a foreign natural person claims the protection of the right to name with respect to a specific name, the specific name should meet the following three conditions: (1) the specific name is, to a certain degree, well-known in China[2] and is known to the relevant public; (2) the relevant public uses the specific name to refer to the natural person; and (3) a stable correspondence relationship has already been established between the specific name and the natural person.

3. Use is one of the rights that the holder of the right to name has, [but] is not a statutory prerequisite for his claim for protection of his right to name. Where a specific name is protected by law in accordance with the right to name, the claim for rights [made by] the holder of the right to name in accordance with the provisions of the *Trademark Law* regarding prior rights is not affected, even if the natural person does not take the initiative to use [the specific name].

4. Where a “trademark right-holder” who violates the principle of good faith, maliciously applies to register a trademark, and infringes on another person's existing prior right, claims that the registered trademark is legal

保护等情况形成了“市场秩序”或者“商业成功”为由，主张该注册商标合法有效的，人民法院不予支持。

and effective on the grounds that various circumstances (including the publicity, use, receipt of awards, and protection regarding the trademark) have formed an “order of the market” or “commercial success”, a people’s court shall not support [the claim].

相关法条

1.《中华人民共和国商标法》（2013年修正）第32条（本案适用的是2001年修正的《中华人民共和国商标法》第31条）[3]

2.《中华人民共和国民法通则》第4条、第99条第1款[5]

3.《中华人民共和国民法总则》第7条、第110条[7]

4.《中华人民共和国侵权责任法》第2条第2款[9]

Related Legal Rule(s)

1. Article 32 of the *Trademark Law of the People’s Republic of China* (Amended in 2013) (Article 31 of the *Trademark Law of the People’s Republic of China* as amended in 2001 was applied to this case)[4]

2. Article 4 and Article 99 Paragraph 1 of the *General Principles of the Civil Law of the People’s Republic of China*[6]

3. Article 7 and Article 110 of the *General Provisions of the Civil Law of the People’s Republic of China*[8]

4. Article 2 Paragraph 2 of the *Tort Liability Law of the People’s Republic of China*[10]

基本案情

再审申请人迈克尔•杰弗里•乔丹（以下简称迈克尔•乔丹）与被申请人国家工商行政管理总局商标评审委员会（以下简称商标评审委员会）、一审第三人乔丹体育股份有限公司（以下简称乔丹公司）商标争议行政纠纷案中，涉及乔丹公司的第6020569号“乔丹”商标（即涉案商标），核定使用在国际分类第28类的体育活动器械、游泳池（娱乐用）、旱冰鞋、圣诞树装饰品（灯饰和糖果除外）。再审申请人主张该商标含有其英文姓名的中文译名“乔丹”，属于2001年修正的商标法第三十一条规定的“损害他人现有的在先权利”的情形，故向商标评审委员会提出撤销申请。

Basic Facts of the Case

In an administrative case concerning a trademark dispute, with retrial applicant Michael Jeffrey Jordan[11] (hereinafter referred to as “Michael Jordan”), retrial respondent[12] The Trademark Review and Adjudication Board of the State Administration for Industry and Commerce[13] (hereinafter referred to as “the Trademark Review and Adjudication Board”), and Third-Party of the first-instance [adjudication] Qiaodan Sports Co., Ltd.[14] (hereinafter referred to as “Qiaodan Company”), Qiaodan Company’s No. 6020569 “乔丹” [the transliteration of which is “Qiao Dan”] trademark (i.e., the trademark involved in this case) was involved.[15] [The trademark] had been approved for use on sports equipment, swimming pools (for recreation), roller skates, ornaments for Christmas trees (except lights and confectionery) [listed under] Class 28 of an international classification.[16]

The retrial applicant claimed that the trademark included the Chinese translation, “乔丹”, of his English name. This was a situation of “harm[ing] the existing prior right of another” provided for in Article 31 of the *Trademark Law* as amended in 2001. Therefore, he requested that the Trademark Review and Adjudication Board revoke [the trademark] application.

商标评审委员会认为，涉案商标“乔丹”与“Michael Jordan”及其中文译名“迈克尔•乔丹”存在一定区别，并且“乔丹”为英美普通姓氏，难以认定这一姓氏与迈克尔•乔丹之间存在当然的对应关系，故裁定维持涉案商标。再审申请人不服，向北京市第一中级人民法院提起行政诉讼。

The Trademark Review and Adjudication Board argued that there were some differences between “乔丹” (the trademark involved in this case) and “Michael Jordan” and “迈克尔•乔丹” (the Chinese translation of “Michael Jordan”), and that “Jordan” is a common British and American surname and it was difficult to determine that a stable correspondence relationship had certainly been established between this surname and Michael Jordan. Therefore, [the Board] ruled to uphold the trademark involved in this case. The retrial applicant was unconvinced and initiated administrative litigation in the No. 1 Intermediate People’s Court of Beijing Municipality.

裁判结果

北京市第一中级人民法院于2015年4月1日作出（2014）一中行（知）初字第9163

Results of the Adjudication

On April 1, 2015, the No. 1 Intermediate People’s Court of Beijing Municipality rendered the (2014) Yi Zhong Xing (Zhi) Chu Zi No. 9163

号行政判决，[17] 驳回迈克尔•杰弗里•乔丹的诉讼请求。迈克尔•杰弗里•乔丹不服一审判决，提起上诉。北京市高级人民法院于2015年8月17日作出（2015）高行（知）终字第1915号行政判决，[18] 驳回迈克尔•杰弗里•乔丹上诉，维持原判。迈克尔•杰弗里•乔丹仍不服，向最高人民法院申请再审。最高人民法院提审后，于2016年12月7日作出（2016）最高法行再27号行政判决：[19] 一、撤销北京市第一中级人民法院（2014）一中行（知）初字第9163号行政判决；二、撤销北京市高级人民法院（2015）高行（知）终字第1915号行政判决；三、撤销国家工商行政管理总局商标评审委员会商评字〔2014〕第052058号关于第6020569号“乔丹”商标争议裁定；四、国家工商行政管理总局商标评审委员会对第6020569号“乔丹”商标重新作出裁定。

Administrative Judgment,[20] rejecting Michael Jeffrey Jordan's litigation requests. Unconvinced by the first-instance judgment, Michael Jeffrey Jordan appealed. On August 17, 2015, the High People's Court of Beijing Municipality rendered the (2015) Gao Xing (Zhi) Zhong Zi No. 1915 Administrative Judgment,[21] rejecting Michael Jeffrey Jordan's appeal and upholding the original judgment.

Still unconvinced, Michael Jeffrey Jordan applied to the Supreme People's Court for a retrial.[22] The Supreme People's Court ruled to bring [the case] up [to the Supreme People's Court] for adjudication[23] and, on December 7, 2016, rendered the (2016) Zui Gao Fa Xing Zai No. 27 Administrative Judgment:[24]

1. [The court] revokes the No. 1 Intermediate People's Court of Beijing Municipality's (2014) Yi Zhong Xing (Zhi) Chu Zi No. 9163 Administrative Judgment.

2. [The court] revokes the High People's Court of Beijing Municipality's (2015) Gao Xing (Zhi) Zhong Zi No. 1915 Administrative Judgment.

3. [The court] revokes The Trademark Review and Adjudication Board of the State Administration for Industry and Commerce's Shang Ping Zi〔2014〕No. 052058 Ruling concerning the trademark dispute over the No. 6020569 "乔丹" trademark.

4. [The court orders] The Trademark Review and Adjudication Board of the State Administration for Industry and Commerce to render a new ruling regarding the No. 6020569 "乔丹" trademark.

裁判理由[25]

最高人民法院认为，[27] 本案争议焦点为争议商标的注册是否损害了再审申请人就“乔丹”主张的姓名权，违反2001年修正的商标法第三十一条关于“申请商标注册不得损害他人现有的在先权利”的规定。判决主要认定如下：

一、关于再审申请人主张保护姓名权的法律依据

商标法第三十一条规定：“申请商标注册不得损害他人现有的在先权利”。对于商标法已有特别规定的在先权利，应当根据商标法的特别规定予以保护。对于商标法虽无特别规定，但根据民法通则、侵权责任法和其他法律的规定应予保护，并且在争议商标申请日之前已由民事主体依法享有的民事权利或者民事权益，应当根据该概括性规定给予保护。《中华人民共和国民法通则》第九十九条第一款、《中华人民共和国侵权责任法》第二条第二款均明确规定，自然人依法享有姓名权。[29] 故姓名权可以构成商标法第三十一条规定的

Reasons for the Adjudication[26]

The Supreme People's Court opined:[28] the focal point of the dispute in this case is whether the registration of the trademark in dispute has harmed the right to name that the retrial applicant claims with respect to "乔丹", in violation of the provision in Article 31 of the *Trademark Law* as amended in 2001 that "[a]n application for trademark registration must not harm the existing prior right of another". The main determinations of the judgment are as follows:

1. On the legal basis of the retrial applicant's claim for protection of [his] right to name

Article 31 of the *Trademark Law* provides:

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

Prior rights that are specifically stated in the *Trademark Law* should be protected in accordance with the specific provisions of the *Trademark Law*. Civil rights or civil rights and interests[30] that [(i)] are not specifically stated in the *Trademark Law* but should be protected according to the *General Principles of the Civil Law*, the *Tort Liability Law*, and other legal provisions and [(ii)] have been legally enjoyed by [one or more] civil subject(s) before the application date of a trademark in dispute should be protected in accordance with those general provisions. Both Article

“在先权利”。争议商标的注册损害他人在先姓名权的，应当认定该争议商标的注册违反商标法第三十一条的规定。

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

姓名被用于指代、称呼、区分特定的自然人，姓名权是自然人对其姓名享有的重要人身权。随着我国社会主义市场经济不断发展，具有一定知名度的自然人将其姓名进行商业化利用，通过合同等方式为特定商品、服务代言并获得经济利益的现象已经日益普遍。在适用商标法第三十一条的规定对他人的在先姓名权予以保护时，不仅涉及对自然人人格尊严的保护，而且涉及对自然人姓名，尤其是知名人物姓名所蕴含的经济利益的保护。未经许可擅自将他人享有在先姓名权的姓名注册为商标，容易导致相关公众误认为标记有该商标的商品或者服务与该自然人存在代言、许可等特定联系的，应当认定该商标的注册损害他人的在先姓名权，违反商标法第三十一条的规定。

Names are used to refer to, call, and distinguish specific natural persons. The right to name is an important personal right that a natural person has over his name. With the continuous development of China's socialist market economy, the phenomenon of a natural person who is, to a certain degree, well-known, commercializing his name, using contracts and other means to endorse specific commodities and services, and obtaining economic benefits has become increasingly common.

Applying the provisions of Article 31 of the *Trademark Law* to protect the prior right to name of another involves not only the protection of the dignity of a natural person, but also the protection of the economic benefits embedded in the name of a natural person, especially in the name of a well-known person.

Where [a person] registers, without permission, as a trademark a name over which another person has a prior right to name, likely causing the relevant public to mistakenly believe that the commodities or services marked with the trademark have a specific connection with the natural person, such as an endorsement or a license, the registration of the trademark should be determined to have harmed the prior right to name of the [natural] person, in violation of Article 31 of the *Trademark Law*.

二、关于再审申请人主张的姓名权所保护的具体内容

2. On the specific content protected by the right to name that the retrial applicant claims

自然人依据商标法第三十一条的规定，就特定名称主张姓名权保护时，应当满足必要的条件。

When a natural person claims, in accordance with Article 31 of the *Trademark Law*, the protection of the right to name with respect to a specific name, the [following] necessary conditions should be met.

其一，该特定名称应具有一定知名度、为相关公众所知悉，并用于指代该自然人。《最高人民法院关于审理不正当竞争民事案件应用法律若干问题的解释》第六条第二款[32]是针对“擅自使用他人的姓名，引人误认为是他人的商品”的不正当竞争行为的认定作出的司法解释，该不正当竞争行为本质上也是损害他人姓名权的侵权行为。认定该行为时所涉及的“引人误认为是他人的商品”，与本案中认定争议商标的注册是否容易导致相关公众误认为存在代言、许可等特定联系是密切相关的。因此，在本案中可参照适用上述司法解释的规定，确定自然人姓名权保护的条件。

First, the specific name should be, to a certain degree, well-known, known to the relevant public, and used to refer to the natural person. Article 6 Paragraph 2 of the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Laws in Adjudicating Unfair Competition Civil Cases*[33] is a judicial interpretation made for determining this act of unfair competition: “using, without authorization, another's […] name to cause people to mistake [the business operators'] products for those of the other”. This act of unfair competition is essentially also an infringing act that harms another's right to name. [The condition] “cause people to mistake [the business operators'] products for those of the other” involved in the determination of the [infringing] act is closely related to [the condition involved in] the determination in this case of whether the registration of the trademark in dispute likely caused the relevant public to mistakenly believe that a specific connection with [the natural person], such as an endorsement or a license, existed. Therefore, in this case, the provision of the aforementioned judicial interpretation can be referenced

and applied to determine the conditions for the protection of the natural person's right to name.

其二，该特定名称应与该自然人之间已建立稳定的对应关系。在解决本案涉及的在先姓名权与注册商标权的权利冲突时，应合理确定在先姓名权的保护标准，平衡在先姓名权人与商标权人的利益。既不能由于争议商标标志中使用或包含有仅为部分人所知悉或临时性使用的自然人“姓名”，即认定争议商标的注册损害该自然人的姓名权；也不能如商标评审委员会所主张的那样，以自然人主张的“姓名”与该自然人形成“唯一”对应为前提，对自然人主张姓名权的保护提出过苛的标准。自然人所主张的特定名称与该自然人已经建立稳定的对应关系时，即使该对应关系达不到“唯一”的程度，也可以依法获得姓名权的保护。综上，在适用商标法第三十一条关于“不得损害他人现有的在先权利”的规定时，自然人就特定名称主张姓名权保护的，该特定名称应当符合以下三项条件：一是该特定名称在我国具有一定的知名度、为相关公众所知悉；二是相关公众使用该特定名称指代该自然人；三是该特定名称已经与该自然人之间建立了稳定的对应关系。

Second, a stable correspondence relationship should have already been established between the specific name and the natural person. When resolving the conflict between the prior right to name and the right to a registered trademark involved in this case, the standards for protecting the prior right to name should be reasonably determined [so as] to balance the rights and interests of the holder of the prior right to name and the trademark right-holder.

One cannot, on the basis that the mark of a trademark in dispute uses or includes a natural person's "name" that is only known to some people or that is temporarily used, immediately determine that the registration of that trademark in dispute harms the natural person's right to name. Nor can one use the formation of a "unique" correspondence between the "name" claimed by a natural person and the natural person as a prerequisite, as so asserted by the Trademark Review and Adjudication Board, to impose overly stringent standards on the natural person's claim for protection of [his] right to name. When a stable correspondence relationship has already been established between the specific name that the natural person claims and the natural person, the protection of the right to name can still be obtained in accordance with law, even if the correspondence relationship is not "unique".

In summary, when the provision in Article 31 of the *Trademark Law* that "[an application for trademark registration] must not harm the existing prior right of another" is applied [to a case in which] a natural person claims the protection of the right to name with respect to a specific name, the specific name should meet the following three conditions: first, the specific name is, to a certain degree, well-known in China and is known to the relevant public; second, the relevant public uses the specific name to refer to the natural person; third, a stable correspondence relationship has already been established between the specific name and the natural person.

在判断外国人能否就其外文姓名的部分中文译名主张姓名权保护时，需要考虑我国相关公众对外国人的称谓习惯。中文译名符合前述三项条件的，可以依法主张姓名权的保护。本案现有证据足以证明“乔丹”在我国具有较高的知名度、为相关公众所知悉，我国相关公众通常以“乔丹”指代再审申请人，并且“乔丹”已经与再审申请人之间形成了稳定的对应关系，故再审申请人就“乔丹”享有姓名权。

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

The existing evidence in this case is sufficient to prove that "乔丹" is, to a relatively high degree, well-known in China and is known to the relevant public. The relevant public in China often uses "乔丹" to refer to the retrial applicant, and a stable correspondence relationship has already been established between "乔丹" and the retrial applicant. Therefore, the retrial applicant has the right to name with respect to "乔丹".

三、关于再审申请人及其授权的耐克公司是否主动使用“乔丹”，其是否主动使用的事实对于再审申请人在本案中主张的姓名权有何影响

3. On [the issue of] whether the retrial applicant and his authorized [company], NIKE, Inc.,[34] took the initiative to use "乔丹" and how the fact about whether they took the initiative to use ["乔丹"] may affect the right to name claimed by the retrial applicant in this case

首先，根据《中华人民共和国民法通则》第九十九条第一款的规定，“使用”是姓名权人享有的权利内容之一，并非其承担的义务，更不是姓名权人“禁止他人干涉、盗用、假冒”，主张保护其姓名权的法定前提条件。

First, according to Article 99 Paragraph 1 of the *General Principles of the Civil Law of the People's Republic of China*, "use" is one of the rights enjoyed by the holder of the right to name. It is not an obligation that the holder of the right to name bears, nor is it a statutory prerequisite for his claim for protection of his right to name to "[prohibit] interference, misappropriation, and impersonation from others".

其次，在适用商标法第三十一条的规定保护他人在先姓名权时，相关公众是否容易误认为标记有争议商标的商品或者服务与该自然人存在代言、许可等特定联系，是认定争议商标的注册是否损害该自然人姓名权的重要因素。因此，在符合前述有关姓名权保护的三项条件的情况下，自然人有权根据商标法第三十一条的规定，就其并未主动使用的特定名称获得姓名权的保护。

Second, when applying Article 31 of the *Trademark Law* to protect the prior right to name of another, an important factor for determining whether the registration of a trademark in dispute harms a natural person's right to name is whether it is likely for the relevant public to mistakenly believe that the commodities or services marked with the trademark in dispute have a specific connection with the natural person, such as an endorsement or a license. Therefore, under the circumstance of meeting the aforementioned three conditions concerning the protection of the right to name, a natural person has the right to obtain, in accordance with Article 31 of the *Trademark Law*, the protection of the right to name with respect to a specific name that he has not taken the initiative to use.

最后，对于在我国具有一定知名度的外国人，其本人或者利害关系人可能并未在我国境内主动使用其姓名；或者由于便于称呼、语言习惯、文化差异等原因，我国相关公众、新闻媒体所熟悉和使用的“姓名”与其主动使用的姓名并不完全相同。例如在本案中，我国相关公众、新闻媒体普遍以“乔丹”指代再审申请人，而再审申请人、耐克公司则主要使用“迈克尔•乔丹”。但不论是“迈克尔•乔丹”还是“乔丹”，在相关公众中均具有较高的知名度，均被相关公众普遍用于指代再审申请人，且再审申请人并未提出异议或者反对。故商标评审委员会、乔丹公司关于再审申请人、耐克公司未主动使用“乔丹”，再审申请人对“乔丹”不享有姓名权的主张，不予支持。

Finally, with respect to a foreigner who is, to a certain degree, well-known in China, he himself or his stakeholders may not have taken the initiative to use his name within China; or, due to convenience in calling [the foreigner], language habits, cultural differences, and other reasons, the "name" known to and used by the relevant public and the news media in China is not exactly the same as the name that he has taken the initiative to use.

For example, in this case, the relevant public and the news media in China generally use "乔丹" to refer to the retrial applicant, whereas the retrial applicant and NIKE, Inc. mainly use "Michael Jordan". However, no matter whether it is "Michael Jordan" or "乔丹", both are, to a relatively high degree, well-known among the relevant public, and are generally used by the relevant public to refer to the retrial applicant. In addition, the retrial applicant has not raised any objection or opposition. Therefore, the claim of the Trademark Review and Adjudication Board and Qiaodan Company that the retrial applicant does not have the right to name with respect to "乔丹" [because] the retrial applicant and NIKE, Inc. have not taken the initiative to use "乔丹" shall not be supported.

四、关于乔丹公司对于争议商标的注册是否存在明显的主观恶意

4. On [the issue of] whether there was obvious subjective malice in Qiaodan Company's registration of the trademark in dispute

本案中，乔丹公司申请注册争议商标时是否存在主观恶意，是认定争议商标的注册是否损害再审申请人姓名权的重要考量因素。本案证据足以证明乔丹公司是在明知再审申请人及其姓名“乔丹”具有较高知名度的情况下，并未与再审申请人协商、谈判以获得其许可或授权，而是擅自注册了包括争议商标在内的大量与再审申请人密切相关的商标，放任相关公众误认为标记有争议商标的商品与再审申请人存在特定联系的损害结果，使得乔丹公司无需付出过多成本，即可实现由再审申请人为

In this case, an important consideration for determining whether the registration of the trademark in dispute has harmed the retrial applicant's right to name is whether there was obvious subjective malice when Qiaodan Company applied to register the trademark in dispute.

The evidence in this case is sufficient to prove that while knowing the retrial applicant and his name "乔丹" are, to a relatively high degree, well-known, Qiaodan Company did not obtain the retrial applicant's permission or authorization through consultations or negotiations, but instead registered, without authorization, a large number of trademarks that are closely related to the retrial applicant, including the trademark in dispute, and connived in having this damaging result—the relevant public

其“代言”等效果。乔丹公司的行为有违《中华人民共和国民法通则》第四条规定的诚实信用原则，其对于争议商标的注册具有明显的主观恶意。

mistakenly believe that the commodities marked with the trademark in dispute have a specific connection with the retrial applicant. As a result, Qiaodan Company could achieve the effect of having the retrial applicant's "endorsement", etc. without the need to pay much for the costs. Qiaodan Company's acts have violated the principle of good faith stated in Article 4 of the *General Principles of the Civil Law of the People's Republic of China* and there was obvious subjective malice in its registration of the trademark in dispute.

五、关于乔丹公司的经营状况，以及乔丹公司对其企业名称、有关商标的宣传、使用、获奖、被保护等情况，对本案具有何种影响

5. On [the issue of] what impact the state of operating Qiaodan Company and Qiaodan Company's publicity, use, receipt of awards, and protection regarding its enterprise name and related trademarks may have on this case

乔丹公司的经营状况，以及乔丹公司对其企业名称、有关商标的宣传、使用、获奖、被保护等情况，均不足以使争议商标的注册具有合法性。

Neither the state of operating Qiaodan Company nor Qiaodan Company's publicity, use, receipt of awards, and protection regarding its enterprise name and related trademarks is sufficient to make the registration of the trademark in dispute legal.

其一，从权利的性质以及损害在先姓名权的构成要件来看，姓名被用于指代、称呼、区分特定的自然人，姓名权是自然人对其姓名享有的人身权。而商标的主要作用在于区分商品或者服务来源，属于财产权，与姓名权是性质不同的权利。在认定争议商标的注册是否损害他人在先姓名权时，关键在于是否容易导致相关公众误认为标记有争议商标的商品或者服务与姓名权人之间存在代言、许可等特定联系，其构成要件与侵害商标权的认定不同。因此，即使乔丹公司经过多年的经营、宣传和使用，使得乔丹公司及其“乔丹”商标在特定商品类别上具有较高知名度，相关公众能够认识到标记有“乔丹”商标的商品来源于乔丹公司，也不足以据此认定相关公众不容易误认为标记有“乔丹”商标的商品与再审申请人之间存在代言、许可等特定联系。

First, looking at the nature of the rights and the constituent elements of harming a prior right to name, [one can determine that] names are used to refer to, call, and distinguish specific natural persons, and the right to name is a personal right that a natural person has over his name. And the main role of a trademark is to distinguish the source of commodities or services. It is a type of property right and its nature is different from that of the right to name.

When determining whether the registration of a trademark in dispute harms the prior right to name of another, the key lies in whether it is likely to cause the relevant public to mistakenly believe that the commodities or services marked with the trademark in dispute have a specific connection with the holder of the right to name, such as an endorsement or a license. The constituent elements [involved here] are different from those in the determination of infringement of trademark rights.

As a result, although Qiaodan Company, through its operation, publicity, and use for many years, has made Qiaodan Company and its "乔丹" trademark become, to a relatively high degree, well-known in specific categories of commodities and the relevant public can recognize that the commodities marked with the "乔丹" trademark originate from Qiaodan Company, it is not sufficient to rely on these [facts] to determine that the relevant public is unlikely to mistakenly believe that the commodities marked with the "乔丹" trademark have a specific connection with the retrial applicant, such as an endorsement or a license.

其二，[35]乔丹公司恶意申请注册争议商标，损害再审申请人的在先姓名权，明显有悖于诚实信用原则。商标评审委员会、乔丹公司主张的市场秩序或者商业成功并不完全是乔丹公司诚信经营的合法成果，而是一定程度上建立于相关公众误认的基础之上。维护此种市场秩序或者商业成功，不仅不利于保护姓名权人的合法权益，而且不利于保障消费者的利益，更不利于净化商标注册和使用环境。

Second, [36] Qiaodan Company's malicious application for registration of the trademark in dispute has harmed the retrial applicant's prior right to name; this clearly violates the principle of good faith.

The order of the market or commercial success asserted by the Trademark Review and Adjudication Board and Qiaodan Company is not entirely a lawful result of Qiaodan Company's honest business operation, but is, to some extent, based on the relevant public's mistaken belief. Keeping this type of order of the market or commercial success is not only detrimental to the protection of the legal rights and interests of the holders of the

rights to name, but also detrimental to the protection of the interests of consumers, and even more detrimental to the purification of the environment for trademark registration and use.

（生效裁判审判人员：陶凯元、王闯、夏君丽、王艳芳、杜微科）

(Adjudication personnel of the effective judgment: TAO Kaiyuan, WANG Chuang, XIA Junli, WANG Yanfang, and DU Weike)

CGCP 备注

备注1:

《中华人民共和国商标法》（2013年修正）[37]

第三十二条

申请商标注册不得损害他人现有的在先权利，也不得以不正当手段抢先注册他人已经使用并有一定影响的商标。

备注2:

《中华人民共和国民法通则》[39]

第四条

民事活动应当遵循自愿、公平、等价有偿、诚实信用的原则。

第九十九条第一款

公民享有姓名权、有权决定、使用和依照规定改变自己的姓名，禁止他人干涉、盗用、假冒。

备注3:

《中华人民共和国民法总则》[42]

第七条

民事主体从事民事活动，应当遵循诚信原则，秉持诚实，恪守承诺。

第一百一十条

自然人享有生命权、身体权、健康权、姓名权、肖像权、名誉权、荣誉权、隐私权、婚姻自主权等权利。

法人、非法人组织享有名称权、名誉权、荣誉权等权利。

CGCP Notes

Note 1:

***Trademark Law of the People's Republic of China* (Amended in 2013)[38]**

Article 32

An application for trademark registration must not harm the existing prior right of another, or preemptively register by improper means a trademark that has been used by another and that has a certain impact.

Note 2:

***General Principles of the Civil Law of the People's Republic of China*[40]**

Article 4

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

Article 99 Paragraph 1

Citizens have the right to name and the right to decide, use, and change, in accordance with [relevant] provisions,[41] their names so as to prohibit interference, misappropriation, and impersonation from others.

Note 3:

***General Provisions of the Civil Law of the People's Republic of China*[43]**

Article 7

Civil entities engaging in civil activities should follow the principle of good faith, uphold honesty, and abide by their commitments.

Article 110

Natural persons have the right to life, right to body, right to health, right to name, right to portrait, right to reputation, right to honor, privacy, marriage autonomy, and other rights.

Legal persons and unincorporated organizations have the right to name, right to reputation, right to honor, and other rights.

备注4:

《中华人民共和国侵权责任法》[44]

第二条

侵害民事权益，应当依照本法承担侵权责任。

本法所称民事权益，包括生命权、健康权、姓名权、名誉权、荣誉权、肖像权、隐私权、婚姻自主权、监护权、所有权、用益物权、担保物权、著作权、专利权、商标专用权、发现权、股权、继承权等人身、财产权益。

Note 4:

Tort Liability Law of the People's Republic of China[45]

Article 2

Those who infringe on civil rights and interests should bear tort liability in accordance with this Law.

Civil rights and interests referred to in this Law include the right to life, right to health, right to name, right to reputation, right to honor, right to portrait, privacy, marriage autonomy, guardianship, ownership, usufructuary rights, security rights, copyrights, patent rights, exclusive rights to trademarks, discovery rights, stock rights, inheritance rights, and other personal and property rights and interests.

备注5:

《最高人民法院关于审理不正当竞争民事案件应用法律若干问题的解释》[46]

第六条第二款

在商品经营中使用的自然人的姓名，应当认定为反不正当竞争法第五条第（三）项规定的“姓名”。具有一定的市场知名度、为相关公众所知悉的自然人的笔名、艺名等，可以认定为反不正当竞争法第五条第（三）项规定的“姓名”。

Note 5:

Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Laws in Adjudicating Unfair Competition Civil Cases[47]

Article 6 Paragraph 2

The name of a natural person used in the business operation of commodities should be determined to be the "name(s)" stated in Article 5 Item (3) of the *Anti-Unfair Competition Law*. Pen names, stage names, etc. of a natural person who is, to a certain degree, well-known in the market and is known to the relevant public may be determined to be "name(s)" stated in Article 5 Item (3) of the *Anti-Unfair Competition Law*.

备注6:

《中华人民共和国反不正当竞争法》（2003版）[48]

第五条

经营者不得采用下列不正当手段从事市场交易，损害竞争对手：

（一）[…]；

（二）[…]；

（三）擅自使用他人的企业名称或者姓名，引人误认为是他人的商品；

（四）[…]。■

Note 6:

***Anti-Unfair Competition Law of the People's Republic of China* (2003 version)**[49]

Article 5

Business operators must not use the following improper means to engage in market transactions and harm competitors:

(1) […];

(2) […];

(3) using, without authorization, another's enterprise name or name to cause people to mistake [the business operators'] products for those of the other;

(4) […].■

* 此案例的中文引用是：《迈克尔•杰弗里•乔丹与国家工商行政管理总局商标评审委员会、乔丹体育股份有限公司“乔丹”商标争议行政纠纷案》，《中国法律连接》，第8期，第77页（2020年3月），*亦见于*斯坦福法学院中国指导性案例项目，中文指导性案例（CGC113），2020年3月，https://cgc.law.stanford.edu/zh-hans/guiding-cases/guiding-case-113。
案例原文载于：《最高人民法院网》，http://www.court.gov.cn/fabu-xiangqing-216751.html。*亦见*《最高人民法院关于发布第22批指导性案例的通知》，2019年12月24日公布，同日起施行，http://rmfyb.chinacourt.org/paper/images/2020-01/15/03/2020011503_pdf.pdf。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: 《迈克尔•杰弗里•乔丹与国家工商行政管理总局商标评审委员会、乔丹体育股份有限公司“乔丹”商标争议行政纠纷案》(*Michael Jeffrey Jordan v. The Trademark Review and Adjudication Board of the State Administration for Industry and Commerce and Qiaodan Sports Co., Ltd., An Administrative Case Concerning a Dispute over the "乔丹" Trademark*), 8 China Law Connect 77 (Mar. 2020), *also available at* Stanford Law School China Guiding Cases Project, English Guiding Case (EGC113), Mar. 2020, http://cgc.law.stanford.edu/guiding-cases/guiding-case-113.

The original, Chinese version of this case is available at《最高人民法院网》(www.china.gov.cn), http://www.court.gov.cn/fabu-xiangqing-216751.html. *See also* 《最高人民法院关于发布第22批指导性案例的通知》 (*Notice of the Supreme People's Court on the Release of the 22nd Batch of Guiding Cases*), issued on and effective as of Dec. 24, 2019, http://rmfyb.chinacourt.org/paper/images/2020-01/15/03/2020011503_pdf.pdf.

This document was prepared by Xinyue Zhu, CHEN Yi, Sean Webb, 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. All footnotes and "CGCP Notes", unless otherwise noted, 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.

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

[2] The original text reads "我国" ("my/our country") and is translated herein as "China".

[3] 此指导性案例所依据的最终判决（即：《再审判决》，注释19）明确引用2001年修正的《商标法》第三十一条（可能是因为此案的再审申请人于2012年10月31日请求再审被申请人商标评审委员会撤销“乔丹”商标，而当时2001年版的《商标法》仍然有效）。2013年修正案对该条重新编号为第三十二条，在当前《商标法》有效版本中第三十二条维持不变。*见*《中华人民共和国商标法》，1982年8月23日通过和公布，1983年3月1日起施行，经四次修正，最新修正于2019年4月23日，2019年11月1日起施行，http://www.sipo.gov.cn/zcfg/zcfgflfg/flfgsb/fl_sb/1140931.htm。

[4] The final judgment upon which this Guiding Case is based (i.e., *Retrial Judgment*, *infra* note 24) explicitly cites Article 31 of the *Trademark Law* as amended in 2001 (likely because the retrial applicant of this case first requested that the Trademark Review and Adjudication Board, the retrial respondent, revoke the registration of the "乔丹" trademark on October 31, 2012, when the 2001 version of the *Trademark Law* was still in effect). The 2013 amendment re-numbered the provision as Article 32, which remains the same in the currently effective version of the law. *See*《中华人民共和国商标法》 (*Trademark Law of the People's Republic of China*), passed and issued on Aug. 23, 1982, effective as of Mar. 1, 1983, amended four times, most recently on Apr. 23, 2019, effective as of Nov. 1, 2019, http://www.sipo.gov.cn/zcfg/zcfgflfg/flfgsb/fl_sb/1140931.htm.

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

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

[7]《中华人民共和国民法总则》，2017年3月15日通过和公布，2017年10月1日起施行，http://www.npc.gov.cn/zgrdw/npc/xinwen/2017-03/15/content_2018907.htm。这法律在此指导案例所依据的最终判决（即：《再审判决》，注释19）作出后才生效。因此，《再审判决》和此指导案例的说理部分根本没有提及这法律。

[8]《中华人民共和国民法总则》 (*General Provisions of the Civil Law of the People's Republic of China*), passed and issued on Mar. 15, 2017, effective as of Oct. 1, 2017, http://www.npc.gov.cn/zgrdw/npc/xinwen/2017-03/15/content_2018907.htm. This law came into effect after the final judgment upon which this Guiding Case is based (i.e., *Retrial Judgment*, *infra* note 24) was rendered. Thus, the law is not mentioned at all in the *Retrial Judgment* or the reasoning section of this Guiding Case.

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

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

[11] The name "迈克尔•杰弗里•乔丹" is translated herein as "Michael Jeffrey Jordan" in accordance with the English name recorded in the final judgment upon which this Guiding Case is based (i.e., *Retrial Judgment*, *infra* note 24).

[12] The text reads "[再审]被申请人" ("the party against whom the application [for retrial] was filed") is translated herein as "retrial respondent" for brevity.

[13] The name "国家工商行政管理总局商标评审委员会" is translated herein as "The Trademark Review and Adjudication Board of the State Administration for Industry and Commerce" in accordance with the English name appearing on the website of the Ministry of Commerce of the People's Republic of China, at http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200211/20021100050683.shtml. Due to government restructuring in late 2018, the Board no longer exists and its responsibilities are now covered by the Trademark Office of the China National Intellectual Property Administration. For more information, see the description available at http://sbj.cnipa.gov.cn/sjjs.

[14] The name "乔丹体育股份有限公司" is translated herein as "Qiaodan Sports Co., Ltd." in accordance with the English name appearing on the company's website, at http://www.qiaodan.com/templates/about.html.

[15] The image of the trademark is saved in an online database, at http://wcjs.sbj.cnipa.gov.cn.

乔丹

[16] For more information about this international classification, see Nice Classification (11 Edition, Version 2020), https://www.wipo.int/classifications/nice/en.

[17] 一审判决书尚未找到，有可能已被排除在公布之外。

[18] 二审判决书尚未找到，有可能已被排除在公布之外。

[19]（2016）最高法行再27号行政判决，2016年12月7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-xing-zai-27-administrative-judgment（以下简称“《再审判决》”）。

[20] The first-instance judgment has not been found and may have been excluded from publication.

[21] The second-instance judgment has not been found and may have been excluded from publication.

[22] 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.

[23] The text reads "提审" ("bring [a case] up [to an upper-level court] for adjudication"). Article 198 Paragraph 2 of the *Civil Procedure Law of the People's Republic of China* provides, *inter alia*, that if the Supreme People's Court finds an error in a judgment or ruling rendered by a lower-level court and the judgment or ruling has already come

into effect, the Supreme People's Court has the authority to adjudicate the case itself or to direct the lower-level court to conduct 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*), *supra* note 22.

[24] (2016) 最高法行再27号行政判决 ((2016) Zui Gao Fa Xing Zai No. 27 Administrative Judgment), rendered by the Supreme People's Court on Dec. 7, 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-xing-zai-27-administrative-judgment (hereinafter "*Retrial Judgment*").

[25] 本部分的黄色亮点由中国指导性案例项目添加，以展示该项目对本指导性案例和其所依据的最终判决（即：《再审判决》，注释19）的比较。以黄色突出显示的表述/信息并不用于最终判决的"本院认为"说理部分。

[26] Yellow highlights included in this section were added by the China Guiding Cases Project to reflect its comparison of this Guiding Case with the final judgment upon which this Guiding Case is based (i.e., *Retrial Judgment*, *supra* note 24). Expressions/details highlighted in yellow were not used in the "This Court Opines" reasoning section of the final judgment.

[27] 《再审判决》，注释19。

[28] *Retrial Judgment*, *supra* note 24.

[29] 《再审判决》（注释19）引用了《中华人民共和国民法通则》第九十九条第一款、《中华人民共和国侵权责任法》第二条第二款的相关部分。在此，该短语总结了这些规定中所述的要点。

[30] The text reads "民事权利或者民事权益" ("civil rights or civil rights and interests"). It is not clear why this expression is used, as "民事权益" ("civil rights and interests") should be broad enough to cover both "civil rights" and "civil interests".

[31] The *Retrial Judgment* (*supra* note 24) quotes relevant parts of Article 99 Paragraph 1 of the *General Principles of the Civil Law of the People's Republic of China* and Article 2 Paragraph 2 of the *Tort Liability Law of the People's Republic of China*. Here, this phrase is used to summarize the essence stated in these provisions.

[32] 《最高人民法院关于审理不正当竞争民事案件应用法律若干问题的解释》，2006年12月30日由最高人民法院审判委员会通过，2007年1月12日公布，2007年2月1日起施行，http://www.npc.gov.cn/zgrdw/npc/xinwen/fztd/sfjs/2007-01/18/content_356791.htm。

[33] 《最高人民法院关于审理不正当竞争民事案件应用法律若干问题的解释》, passed by the Adjudication Committee of the Supreme People's Court on Dec. 30, 2006, issued on Jan. 12, 2007, effective as of Feb. 1, 2007, http://www.npc.gov.cn/zgrdw/npc/xinwen/fztd/sfjs/2007-01/18/content_356791.htm.

[34] The name "耐克公司" is translated herein as "NIKE, Inc." in accordance with the English name appearing on the company's website, at https://about.nike.com.

[35] 《再审判决》（注释19）在此段之前附加了一句："民法通则第四条规定：'民事活动应当遵循……诚实信用的原则'"。

[36] The *Retrial Judgment* (*supra* note 24) precedes this paragraph with this sentence: "Article 4 of the *General Principles of the Civil Law* provides: 'Civil activities should follow the principles of […] good faith'".

[37] *见*注释3。

[38] *See supra* note 4.

[39] *见*注释5。

[40] *See supra* note 6.

[41] The original, Chinese text of Article 99 Paragraph 1 does not indicate which provisions the right to change their names should be in accordance with.

[42] *见*注释7。

[43] *See supra* note 8.

[44] *见*注释9。

[45] *See supra* note 10.

[46] *见*注释32。

[47] *See supra* note 33.

[48] 此指导性案例所依据的最终判决（即：《再审判决》，注释19）明确引用1993年版的《反不正当竞争法》第五条第（三）项。2017年第五条第（三）项的内容被修订并编号为第六条第（二）项。在当前《反不正当竞争法》有效版本中，第六条第（二）项维持不变。*见*《中华人民共和国反不正当竞争法》，1993年9月2日通过和公布，1993年12月1日起施行，2017年11月4日修订，2018年1月1日起施行，2019年4月23日修正，同日起施行，http://www.fdi.gov.cn/1800000121_23_74874_0_7.html。

[49] The final judgment upon which this Guiding Case is based (i.e., *Retrial Judgment*, *supra* note 24) explicitly cites Article 5 Item (3) of the *Anti-Unfair Competition Law* (1993 version). Article 5 Item (3) was revised in 2017 and re-numbered as Article 6 Item (2), which remains the same in the currently effective version of the law. *See* 《中华人民共和国反不正当竞争法》(*Anti-Unfair Competition Law of the People's Republic of China*), passed and issued on Sept. 2, 1993, effective as of Dec. 1, 1993, revised on Nov. 4, 2017, effective as of Jan. 1, 2018, amended on and effective as of Apr. 23, 2019, http://www.fdi.gov.cn/1800000121_23_74874_0_7.html.

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Watching in Silence
《静观》

CHEN Xuncheng

CHEN Xuncheng is a master of ceramic art in Guangdong Province, China. He was awarded the honorary title of "Young and Middle-aged Ceramic Artists Influencing China's Media in 2012" by the Chinese Business and Media Leaders Annual Conference. His different works have won numerous provincial and national awards, including "Gold Award in the 2012 China Collection of Top Ten Artistic Ceramics", "Gold Award in the 15th China Contemporary Ceramic Art Exhibition (Strongest Performance Category)", and "Gold Award in the 15th China Contemporary Ceramic Art Exhibition (Competition Category)".

Mr. Chen's works have been exhibited at various art exhibitions, festivals, and cultural exchange activities at home and abroad, including the 26th Asian Art Exhibition held in Korea, ST.ART International Exhibition of Chinese Contemporary Ceramic Art held at the Today Art Museum in Beijing, the Chinese and American Ceramic Art Exhibition held at the University Art Museum of Guangzhou Academy of Fine Arts, and the 2017 Chinese New Year Arts and Culture Festival held at the Carreau du Temple in Paris. Mr. Chen's works have been collected by famous art galleries in China, including the China Arts and Crafts Museum, the China Ceramics Museum, the Guangdong Museum of Art, and the Jiangxi Arts and Crafts Museum, as well as by many private organizations in mainland China, Hong Kong, and Japan. Mr. Chen has organized many individual exhibitions and has been conducting academic research on ceramic culture. He has published more than ten collections of his works, including *CHEN Xuncheng's Ink* and *Zen of Life*.

Mr. Chen is a member of the China Arts and Crafts Association and the China Ceramics Industry Association. He plays important leadership roles, serving as the deputy director of the Ceramic Art Committee of the Art Committee of Guangdong Artists Association, the director of the Guangdong Ceramics Association, the director of the Chinese Painting Institute of Guangdong Province, and the director of the Guangdong–Hong Kong–Macao Greater Bay Area Artist Union. At the same time, Mr. Chen is also a distinguished research fellow at the Guangzhou Painting Academy, an expert for the "National Cultivation Program for Young Painters in Guangzhou", and an adjunct professor at Guangdong Polytechnic Normal University.

陈训成

陈训成是中国广东省陶瓷艺术大师，曾获得由中国企业领袖与媒体领袖年会颁发的“影响中国2012年度媒体关注的中青年陶艺家”荣誉称号。他的不同作品获得广东省省级和中国国家级奖项，包括“中国收藏2012年十大艺术陶瓷名品金奖”、“第十五届中国当代陶瓷艺术展实力派类别金奖”、“第十五届中国当代陶瓷艺术展竞赛类别金奖”等。

陈训成的作品曾在海内外多项艺术展、艺术节和文化交流活动中展出，包括韩国举行的第26届亚洲艺术展、北京今日美术馆“就地出发”中国当代陶瓷艺术国际大展、广州美术学院大学城美术馆“中美陶艺家作品展”和法国巴黎三区圣殿礼堂2017巴黎新春中法文化艺术节等。他的作品被中国工艺美术馆、中国陶瓷博物馆、广东美术馆、江西省工艺美术馆等国内著名艺术馆，以及日本、香港及国内多家私人机构所收藏。陈训成多次举办个人展览并不断探索陶瓷文化学术高度，并出版了《陈训成水墨》、《生活的禅》等十来册作品集。

陈训成是中国工艺美术家协会、中国陶瓷工业协会的会员，并担任广东省美术家协会艺术委员会陶艺委员会副主任、广东省陶瓷协会理事、广东省中国画学会理事、粤港澳大湾区美术家联盟理事等要职。同时，他还是广州画院特聘研究员、“广州国家青苗画家培育计划”课题组专家，以及广东技术师范大学客座教授。