The views stated in this submission are presented on behalf of the Section of International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

The Section of International Law (“Section”) of the American Bar Association (“ABA”) submits these comments on the “Provisions of the Supreme People’s Court on Certain Issues Concerning the Application of the ‘Company Law of the People’s Republic of China’ (IV) (Draft for Comments)” (the “Draft Provisions”). The Section offers these comments in the hope that they will assist the Supreme People’s Court (“SPC”) in refining the Draft Provisions. The comments reflect the expertise and experience of the Section’s members with company law around the world. The Section is available to provide additional comments, or to participate in consultations, as the SPC may deem appropriate.

Executive Summary

The Section welcomes these interpretive provisions for the better administration of the Company Law of the People’s Republic of China (the “Company Law”). As a general matter, the Section suggests that the Draft Provisions avoid duplicating or potentially undermining the Company Law or the Civil Procedure Law of the People’s Republic of China (the “Civil Procedure Law”), and urges that the SPC ensure that the Draft Provisions will be interpreted in a way that does not create such ambiguity or conflict.

The Section suggests that Article 1 may benefit from clarification that it applies only to actions in which the listed classes of plaintiffs have a direct interest in the contents of the resolutions, and not to derivative actions under Article 151 of the Company Law. The Section also offers several specific suggestions for clarification of aspects of Article 1. The Draft Provisions establish in Article 2 the contemporaneous ownership rule, which may benefit from several suggested revisions. The Section agrees that, under the circumstances specified in Article 3 of the Draft Provisions, the company should be added as a defendant, and suggests a few revisions to clarify some aspects. Similarly, the Section agrees that a distinction ought to be made between invalid resolutions (treated in Article 5 of the Draft Provisions) and resolutions that have

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1 The Section members who drafted these comments included Maritza T. Adonis, Larry Backer, Paul Edelberg, Virginia Harper-Ho, and Emilia Liu, with helpful input from a task force of the ABA Section of Business Law Corporate Laws Committee.

2 The Section’s comments are based on an unofficial translation of the Draft Provisions, which is annexed.
not been adopted (treated in Article 4 of the Draft Provisions). The Section suggests that the functional taint standard should be adopted in Article 5. The Section notes that the grounds for invalidity set forth in Article 6 do not add to or reduce the grounds set out in the Company Law, especially those in Articles 22 and 146-150 of the Company Law. The Section offers some suggestions as to Article 8 regarding ex post consents to resolutions and suggests the adoption of the first alternative Article 9 as to the direct affirmation of the effectiveness of resolutions. As a provision for establishing standards for granting temporary relief in such circumstances, the Section is concerned about the use of the word “prohibited” (禁止) in Article 10 without limit, and the apparent overbreadth of other parts of that Article. The Section also suggests some clarifications in Articles 11 and 12.

The Section encourages the SPC to clarify how the provisions of Part II of the Draft Provisions on inspection rights apply to supervisors. The Section welcomes the clarification provided in Article 15 regarding a shareholder’s right under Article 33 of the Company Law to request the People’s Court to enforce the inspection rights of shareholders, but is concerned that the condition for obtaining such a judgment is unclear. The Section offers some suggested clarifications to Article 16 regarding inspection of original vouchers. The Section agrees with Article 18’s imposition of personal civil liability on company directors and senior officers of the company if they fail to adequately maintain the company’s documents and records, and offers some suggestions.

The Section welcomes the SPC’s clarification in Article 22 that, as a default rule, the statutory right of first refusal should not apply to transfers on account of a shareholder’s death. As to Article 23, the Section notes that, if the shareholders wish to restrict transfers on death, it is incumbent on them to include any rights of first refusal in the articles of association. The Section agrees that, as a default rule, there should not be any statutory right of first refusal on transfers between shareholders (Article 23) or on partial transfers (Article 24), and suggests a clarification as to the application of Article 71 of the Company Law to transfers upon death and partial transfers. The Section offers several suggestions to clarify Article 25 regarding the content of written orders or the period for exercise of preemptive rights. Article 29 adopts an important principle of transferability, but would benefit from clarification as to the meaning of “excessive” restrictions, and revisions to avoid potential conflict with Articles 71 and 141 of the Company Law. The Section suggests that the SPC consider the non-exclusive list of permissible restrictions that is applied by the U.S. State of Delaware as a guide when determining the presence of “excessive” restrictions.

The Section agrees with the general objectives of Article 31 in clarifying the scope of Article 151 of the Company Law. The Section suggests that Article 33 be expanded to provide guidance as to when the company may seek to replace a shareholder as plaintiff, without the shareholder’s consent or before the case has been tried.

Comments

The Section’s comments are organized according to the 4 parts of the Draft Provisions on which the Section offers comments: (I) validity of resolutions by shareholder/board of director meetings; (II) shareholder right to be informed; (IV) preemptive rights; and (V) derivative lawsuits.
I. Cases involving the effectiveness of the resolutions of the meetings or
general meetings of shareholders and board of directors

Article 1 (Plaintiffs to the actions for confirmation)

The Section agrees with the general objective of Article 1 of the Draft Provisions — to provide a basic standard for courts to determine whether an action for confirmation of the validity of a resolution should be accepted in accordance with the law. Article 1 appears to apply only to actions in which the listed classes of plaintiffs have a direct interest in the content of the resolutions, and not to derivative actions under Article 151 of the Company Law. However, the Section suggests that Article 1 may benefit from clarification on this point.

The Section understands that the initial burden of plaintiffs pursuing an action under ¶1 of Article 22 of the Draft Provisions must include a showing of a “direct interest in the content of the resolutions” that has caused harm personally to them beyond any interest arising from their responsibilities as directors, supervisors, shareholders, employees, and officers of the company. The Section notes that the issue of classifying actions as direct versus derivative remains challenging in the United States. The test adopted by the courts of the U.S. State of Delaware\(^3\) to identify a direct claim turns solely on two questions: (1) who suffered the alleged harm (the corporation or the suing shareholders, individually; and (2) who would receive the benefit of any recovery or other remedy (the corporation or the shareholders individually). Similarly, the American Law Institute (“ALI”) in its Principles of Corporate Governance § 7.01 provides that the court must look to the nature of the wrong, to whom the relief should go, the independence of the direct injury from any injury to the company, and whether the plaintiff can show that the duty breached was owed to the plaintiff and whether the plaintiff can prevail without showing a harm to the company. The ALI Principles of Corporate Governance § 7.01(c) also provide that transactions may give rise to both direct and derivative actions simultaneously but that “any special restrictions or defenses pertaining to the maintenance, settlement, or dismissal of either action should not apply to the other.” These approaches may prove useful in the context of the Draft Provisions and its instructions for judges in seeking to distinguish between Article 22 actions by shareholders and Article 151 actions under the Company Law.

The Section suggests that further clarification would strengthen the guidance for judges intended in Article 1 with respect to the following points:

a. It is understood that the scope of Article 1 of the Draft Provisions is limited to the first paragraph of Article 22 of the Company Law. It is further understood, then, that only shareholders may seek judicial relief under Article 22 ¶¶ 2 and 3 of the Company Law relating to deficiencies in the conduct of meetings and their resulting actions, and that those paragraphs do not require a showing of direct personal interest. It is understood that such shareholder action is subject to the authority of supervisors under Article 53 to correct misconduct. However, Article I does not make that clear, and a modification with appropriate cross references might be useful to judges seeking guidance.

b. Article 1 references only resolutions of the shareholders and the boards of directors. It does not reference the important resolutions of the supervisors under Articles 53 through 55 of the Company Law. Because these provisions give supervisors substantial authority to issue resolutions and to suggest changes to the resolutions of the board of directors, it is as likely that direct injury could result from supervisor resolutions as from those of directors and shareholders. Therefore, the Section suggests that Article 1 be expanded to include such resolutions.

c. Article 1 usefully provides a list of those classes of plaintiffs that may file actions under Article 22 ¶ 1 of the Company Law. The inclusion of an open ended term—“etc.”—suggests that the court has the authority to expand the classes of plaintiffs under Article 1 ¶ 1 at will. Because that is unlikely the intended meaning, Article 1 should be modified to eliminate the term “etc.” in order to clarify that ¶ 1 provides an exclusive list of all of the classes of plaintiffs that may take advantage of Article 22 ¶ 1 filings.

d. Article 1 does not specify the appropriate defendants. The Section notes that Article 3 of the Draft Provisions requires that the company be listed as a defendant under certain circumstances. The classes of individuals who may be named as defendants apparently include those who failed in their duties as specified in Articles 20 and 146-151 of the Company Law, which are limited to shareholders, directors, and supervisors. But it should also include representatives of staff members who participate in general meetings and issue resolutions under Article 18 of the Company Law, and should also include the legal representative of the company under Article 13 of the Company Law.

e. The Draft Provisions do not specify the right of the state or state organs to initiate actions under Article 1 of the Draft Provisions. The Section suggests that, in the event state and state organs are subject to other rules, Article 1 may be revised to expressly indicate that fact.

f. The Section understands that direct actions under Article 22 ¶ 1 of the Company Law will arise in the context of Article 1 of the Draft Provisions only in a situation in which the plaintiff has suffered some unique loss. In many cases the action should center on the loss, usually by reason of the Company’s application of the resolution at issue. In many of those cases, then, the determination of the validity issue arises as a defense against an action by plaintiffs unless the plaintiffs seek to have a declaration of invalidity in anticipation of harm to their direct interests. But if that is the case then it is not clear that the plaintiffs have suffered any harm, and a plaintiff can seek such declaration only to the extent that such declaratory procedures are permitted generally under Chinese law. Article 1, however, is drafted to suggest that a lawsuit may be filed to attack the validity of a resolution where the litigant *anticipates* harm to direct interest as well as where such direct interests have already been harmed. The Section suggests that clarity on this issue is important and that a plaintiff’s right to sue be limited to cases where actual harm has occurred or is unavoidable. Otherwise, Article 1 broadens Section 22 ¶ 1 of the Company Law to permit any person to interfere with corporate action with which they disagree. The result would be to reduce efficiency and potentially flood the courts with actions that amount to little more than disagreement among stakeholders in corporate activity.
Article 2 (Plaintiffs to the actions for revocation)

The Section agrees that a contemporaneous ownership rule is a useful mechanism, and one that is common in other jurisdictions. In addition, the Section offers the following suggestions:

a. The Section suggests that since only shareholders have the authority to file actions under Article 22 ¶ 2 of the Company Law, the word plaintiff be changed to “plaintiff-shareholders” to make the concept of the class of plaintiffs and the shareholder status of the litigants clear.

b. Article 2 of the Draft Provisions appears to encourage arbitrage of shareholder status so that shares can be transferred within a 60-day period to a third party who may have been disadvantaged by the corporate action and wants to take legal action. The Section suggests as an alternative a modification of Article 2 of the Draft Provisions to provide that shareholder status should be determined both as of the date of the resolutions and as of the date of the filing.

c. The Section suggests that it may be useful to clarify Article 2 of the Draft Provisions to provide that litigation may proceed as long as there is at least one plaintiff who meets the standing requirement (share ownership). Moreover, it is not clear what happens under Article 3 of the Draft Provisions if all parties drop out except the company. In that case, it might be useful to include a provision permitting the company to dismiss the suit subject to its obligations under Articles 53 and 151 of the Company Law.

d. The Section notes the difference in the language of Article 1 of the Draft Provisions (“requesting conformation of the resolution as invalid or valid”) and Article 2 (“requesting revocation of the resolution”). The Section notes that the language of Article 2 appears narrower than that of Article 1 and suggests that both be made consistent, using the language of Article 1. The reason for this choice is that this provides consistency between Articles 1 and 2, and more importantly, better aligns with the objectives of Article 9 of the Draft Provisions on affirmance.

Article 3 (Litigation status of the parties concerned)

The Section agrees that, under the circumstances specified in ¶1 of Article 3 of the Draft Provisions, the company should be added as a defendant. The Section also offers these specific comments and suggestions:

a. It is unclear whether, in the circumstances of Article 5 of the Draft Provisions, the legal representative of the company should also be named.

b. If the company is to be named as a defendant then it is important to determine who speaks for the company. In this case, it appears that this is the supervisors, but in the event the supervisors themselves are the cause of the liability then it is unclear who is authorized to speak for the company.

c. The connection between Articles 3, 4 and 5 is important. However, it might be useful for judges and litigants if that connection is made more comprehensively explicit, perhaps by
changing the order of the provisions or otherwise revising to make it easier for the litigant and judge to better understand the structure of the instructions provided in the Draft Provisions.

d. With respect to ¶2 of Article 3, consideration should be given to adding a proviso to the effect that a judge may elect not to permit the participation of a co-plaintiff if the application is made after the commencement of court debate and the judge determines that participation would disrupt the proceedings.

**Article 4 (Non-existence of resolutions)**

The Section agrees that a distinction ought to be made between invalid resolutions (treated in Article 5 of the Draft Provisions) and resolutions that have not been adopted (treated in Article 4 of the Draft Provisions). The Section offers the following comments:

a. Article 4 presumably will be interpreted in a way that does not otherwise impede shareholders, directors, staff or supervisors in their vigorous exercise of the fiduciary duty to the company. Likewise, it presumably will not be interpreted in a way that otherwise permits action that would be considered corrupt. Specific reference might be made to Article 147 of the Company Law as a limiting standard to the application of Article 4 of the Draft Provisions.

b. Article 4 only addresses what claims will be upheld from a Plaintiff under Article 1. The Section understands that the grounds for invalidity under Article 2 are specified in Article 22 ¶ 2 of the Company Law.

**Article 5. (Failure to form valid resolutions)**

The Section appreciates the request for suggestions as to the two alternative versions of Article 5(3) respecting falsified signatures. The Section understands that the issue is between choosing an absolute taint standard (any falsification voids the resolution) or a functional taint standard (falsification voids only where there are insufficient valid signatures to adopt the resolution). The Section believes that the functional taint standard would be the better alternative. Otherwise a minority that sought to impede the majority could do so simply by strategically inserting one or two falsified signatures and then cause a lawsuit to be filed. That would substantially interfere with the valid operation of the company and would not further the foundational aim of the Draft Provisions, which is “effectively protecting the lawful rights and interests of companies, shareholders and other entities, and promoting the social and economic development.”

**Article 6 (Causes for invalidity of resolutions)**

The Section agrees on the utility of this provision that specifies the grounds for invalidity of resolutions. Such grounds do not add to or reduce the grounds set out in the Company Law, especially those in Articles 22 and 146-150 of the Company Law. The Section raises the additional following points:
a. Article 6 of the Draft Provisions offers no guidance on the meaning of “excessive” distribution of profits. Helpful guidance is available, for example, in the Model Business Corporation Act (“MBCA”), promulgated by the Corporate Laws Committee of the Business Law Section of the American Bar Association and followed by a majority of states in the United States. MBCA §6.40 protects creditors by prohibiting distributions if, after giving effect to a distribution, the corporation would not be able to pay its debts as they become due in the ordinary course of business or the corporation’s total assets would be less than its total liabilities.

b. Article 34 of the Company Law references only the methods of distribution, and Article 37(6) of the Company Law vests shareholders with approval authority for dividend distributions. However, Article 46(5) of the Company Law vests the board of directors with the authority to formulate profit distribution plans and vests the supervisors with oversight authority to correct conduct that prejudices the interests of the company. Thus, in the case of dividend distributions there may be multiple resolutions involved and clarification regarding how conflicting resolutions should be addressed would be useful. Article 18 of the Company Law requires consultation with the company staff through their general meeting; those consultations may also touch on issues of the drafting and implementation of dividend distribution plans. A failure to consult may also affect the validity of the actions of the company, guidance on which may be usefully added to this article of the Draft Provisions.

Article 8 (Ex post consent to resolution)

The Section notes as to Article 8 of the Draft Provisions:

a. It is not clear whether Article 8 applies to actions under ¶ 1 and ¶ 2 of Article 22 of the Company Law or just to ¶2. If it applies to ¶1, then, according to Article 1 of the Draft Provisions, the defenses listed in Article 8 should not be limited to shareholders as Article 8 suggests. The Section suggests that clarification here would improve the utility of this Article for judges.

b. Article 8 § 3 references “new resolutions”. It is assumed that these include resolutions of the supervisors under Article 53 of the Company Law. It is not clear whether this provision also includes resolutions adopted under Article 151 of the Company Law. That is, the Section assumes that the resolutions referenced in Article 8 § 3 include all resolutions that might supersede the defective resolution, and not just a resolution passed by the same body that originally enacted the allegedly defective resolution. Article 8 might be clarified in this regard.

c. The Section recommends deleting the word “expressly” in subparagraph (1) as this standard is nearly impossible to demonstrate. Instead, the provision might be modified to reference written consent.

d. The Section also recommends deleting the word “expressly” in subparagraph (2), as it would appear to have no relation to actions.
Article 9 (Direct affirmation of the effectiveness of the resolutions)

The Section appreciates the two alternatives presented for Article 9 of the Draft Provisions relating to the direct affirmation of the effectiveness of resolutions. The Section believes that the language in the first option is preferable. If the facts of the case do not substantiate the plaintiff’s claim, the plaintiff should not be given an opportunity to amend or re-litigate his/her case. The company should not be hampered by the continuation of an action that is not substantiated by the facts. The SPC may want to consider substituting the word “contrary to” for “inconsistent with” to give the People’s Courts discretion on technical, rather than substantive, inconsistencies. In addition, the Section assumes that this provision does not otherwise modify general rules under the Civil Procedure Law for claim or issue preclusion, which presumably continues to apply. The availability of general issue and claim preclusion rules should be sufficient to protect the rights of plaintiffs, especially where the issue revolves around direct harm as specified in Article 1 of the Draft Provisions and Article 22 ¶ 1 of the Company Law.

Article 10 (Preservation of acts)

The Section appreciates the need for temporary relief (the application of interim measures) from the actions of the company where such acts may produce irremediable harm. As a provision for establishing standards for granting temporary relief in such circumstances, the Section is concerned about the use of the word “prohibited” (禁止) in Article 10 without limit. The SPC may want to consider, in lieu of “prohibited”, the phrase “stayed temporarily or until resolution of the action” or the phrase “halted as an interim measure.”

The Section also notes the following:

a. The Section is also concerned that the phrase “lawful rights and interests of the parties concerned or the interested parties” is too broad. The Section suggests that a materiality provision be included—a standard which would require the court to balance the harm to the company of halting the operation of the resolution against the harm to the plaintiff’s interest if the resolution implementation proceeds. That consideration might be useful as well in considering the amount of security to be posted under Article 10 ¶ 2 of the Draft Provisions. The Section notes the potential application of Article 101 of the Civil Procedure Law and expects that Article 10(2) will be applied consistently with the general bonding provisions of the Civil Procedure Law and binding SPC precedent.

b. The Section also assumes that the phrase “application by the plaintiff” refers to the action of plaintiffs after suit has been filed in accordance with Article 22 ¶ 1 of the Company Law and Article 1 of the Draft Provisions, and suggests clarification on this aspect.

c. The Section agrees that the application should be dismissed upon a showing of malice or delay, as stated in Article 10 ¶ 3 of the Draft Provisions. The Section suggests clarification about what is being dismissed, because the reference could be either to the action for interim measures covered in Article 10 or the entire action filed or both. In addition, such a dismissal might be used as evidence should the company then seek to file an action against the plaintiff for violation of their obligations under Articles 146-150 of the Company Law.
Article 11 (Retrospective effect of judgments)

The Section believes that Article 11 of the Draft Provisions should provide some protection for individuals who relied on a resolution in good faith before the commencement of the litigation. The SPC might consider whether such individuals should be allowed to sue the company after the resolution is declared invalid and the party suffers loss. That might be implied as part of Article 4 of the Draft Provisions where an individual suffers direct harm for the failure *ab initio* (i.e. from the outset) of a resolution on which he relied thinking that it was in force. That option should be made clear in the Draft Provisions.

Article 12 (Application by reference)

The Section understands that Article 12 of the Draft Provisions seeks to permit courts to apply the first 11 articles of the Draft Provisions to litigation involving single-owner limited liability companies and state-owned enterprises, to the extent they are useful or relevant. The Section appreciates the effort to thus create a more coherent rule of law environment for company law. The Section notes, especially in the case of state-owned enterprises, however, that it may be necessary to litigate against parties other than the shareholder.

II. Cases involving shareholders’ rights to be informed

Article 53(1) of the Company Law gives the board of supervisors certain inspection rights regarding financial matters and Article 53 otherwise authorizes supervisors to exercise other governance rights, including oversight of the board of directors and senior management and the right to initiate litigation on behalf of the company. The Section encourages the SPC to clarify how the provisions of Part II of the Draft Provisions on inspection rights apply to supervisors.

Article 15 (Text of judgments and exercise of rights to be informed by proxy)

The Section welcomes the clarification provided in Article 15 regarding a shareholder’s right under Article 33 of the Company Law to request the People’s Court to enforce the inspection rights of shareholders. However, the Section is concerned that the condition for obtaining such a judgment is unclear.

Article 15 states that the People’s Court shall order the company to give shareholders access to information when it “finds that the claims of the plaintiff comply with the provisions of the Company Law” (人民法院经查认为原告的诉讼请求符合公司法规定的). In inspection cases premised upon a shareholder assertion of wrongdoing, this language may in fact impede shareholder inspection rights by leading courts to require plaintiffs to provide evidence sufficient to prove their underlying claims in a proceeding that is only intended to obtain access to relevant information to decide whether to commence litigation. The Section suggests that Article 15 be supplemented to state that, with respect to requests for board of directors and supervisory board minutes, as well as financial and accounting records, the shareholders need only demonstrate a credible basis for the claim from which the court can infer that there is possible wrongdoing. That standard, to require the plaintiff to show *some* evidence of possible wrongdoing, parallels a similar
judicial standard adopted by the state courts in Delaware.\textsuperscript{4} It may also be advisable, as in Delaware, to require, in cases seeking board minutes or financial records, that relief be limited to that portion of board minutes or financial records directly connected to the purpose or purposes of the shareholder.

The Section suggests that, consistent with Article 33 and Article 97 of the Company Law, Article 15 be revised to state that, whenever a shareholder seeks the court’s help in obtaining access for inspection, the court shall render a judgment in favor of the shareholder if the shareholder’s claims are based on the Company Law, are not for an improper purpose, as defined by Article 17, and will not impair the lawful interests of the company.

The Section also suggests that the SPC clarify that shareholders who seek inspection or duplication of a company’s documents must pay for the costs of copying such materials. The current draft Judicial Interpretation and the Company Law are currently silent on this issue. Should the SPC adopt such a standard, Article 15 should be revised to provide that the People’s Courts should ensure that such costs are reasonable and should guard against abuse. To the extent records are maintained electronically, the costs of such reproduction should be relatively insubstantial. Abuse might occur, for example, where a party seeks to provide photocopies of records maintained electronically, which could be easily provided instead in a “pdf” or similar format. Alternatively, Article 15 may be revised to provide that the People’s Courts may specify the amount of reasonable compensation for the costs of copying.

\textbf{Article 16 (Inspection of original vouchers)}

The Section views Article 16 as applying the provisions of Article 33 of the Company Law. Article 16 permits the company to reject any request for inspection that is for an “improper purpose” or “may prejudice the legitimate interests of the company.” The Section suggests that the last sentence of Article 16 be revised to add “as defined in Article 17 herein” after “improper purpose.” The Section also suggests that the SPC define more clearly the “legitimate interests of the company” in a similar manner to the clarification of “improper purpose” provided in Article 17. The Section believes that it may be useful to require that the company specify in detail the basis for its conclusion of improper purpose, and that only those reasons may serve as the defense against shareholder actions to inspect under Article 33 of the Company Law. Provision should also be made where there has been an abuse of shareholder power, especially by a dominant shareholder, as liability for such abuse is provided under Article 20 of the Company Law.

\textbf{Article 18 (Liability for compensation in case inspection is impossible)}

Article 18 appears to impose personal civil liability on company directors and senior officers of the company if they fail to adequately maintain the company’s documents and records. The Section offers the following suggestions:

\footnote{4 Seinfeld v. Verizon Communications, Inc., 909 A.2d 117 (Del. 2006).}
a. The Section recommends that there be included some standard of culpability and materiality if liability is to be imposed.

b. The Section recommends that the SPC clarify whether civil liability might also extend to the supervisors and whether the liability of directors and senior officers is limited by actions of the supervisors. For example, where the board of supervisors has failed to oversee record-keeping, does that failure give rise to civil liability for the supervisors as well, and if so, does the liability of the supervisors displace the potential liability of directors and senior officers? Article 18 might be revised to clarify the application of Articles 149 and 152 of the Company Law in such circumstances, as Article 149 of the Company Law provides that supervisors who violate laws, administrative regulations or the company’s articles during the performance of their duties will be liable for compensation if any loss is caused to the company, and Article 152 of the Company Law limits liability in similar circumstances only to directors and senior managers where the damage is directly to the interests of shareholders.

c. The Section understands that the intent of Article 18 is to protect the general interests of the company rather than the direct interests of the shareholders. At least to that extent, and for that reason, the Section suggests that Article 18 be revised to clarify that supervisors may be subject to personal civil liability for a failure to oversee the company’s directors and senior officers to such a degree that the Company fails to adequately maintain documents and records. Where such compensation under Article 18 is sought for damage to the direct interest of the shareholder, however, supervisors should not be liable. Provision should also be made where the failure to maintain books and records is caused by an abuse of shareholder power, especially by a dominant shareholder, as liability for such abuse is provided under Article 20 of the Company Law.

IV. Cases involving preemptive rights

Article 22 (Circumstances where preemptive rights are not applicable)

The Section welcomes the SPC’s clarification that, as a default rule, the statutory right of first refusal should not apply to transfers on account of a shareholder’s death.

Article 23 (No claim of preemptive right in the transfer of equity between shareholders)

The Section notes that, if the shareholders wish to restrict transfers on death, it is incumbent on them to include any rights of first refusal in the articles of association.

Article 24 (Meaning of equal terms)

The Section agrees that, as a default rule, there should be no statutory right of first refusal on transfers between shareholders (Article 23) or on partial transfers (Article 24). Free transferability of equity interests encourages capital investment, and transfers among existing shareholders and their beneficiaries more closely follows the typical expectation of investors. The Section suggests that, if investors want to restrict transferability of equity interests under such circumstances, they are free to insert those restrictions in the articles of association.
The Section recommends that, if this is in fact the intention of the SPC, the SPC should clarify in the Draft Provisions that transfers upon death and partial transfers are not subject to the consent of a majority of the shareholders as required in the ¶2 of Article 71 of the Company Law.

**Article 25 (Content of written order or the period for exercise of preemptive right)**

The Section offers the following suggestions:

a. The Section suggests that the SPC provide clarification in the Draft Provisions to confirm that the exercise period for any transfer must be at least 30 days. The Section notes that Clause (1) states that “the exercise period shall be the period in the transferring shareholder’s notice.” In that case, Clause (2) could be construed as contradictory in that it specifies that any exercise period, whether in the notice or not, must be at least 30 days. The Section therefore suggests that Clause (1) be revised as follows, or with similar language: “Where the exercise period is specified in the notice and is at least 30 days, such period shall prevail.”

b. The Section suggests that the SPC clarify the concept of exercise in the Draft Provisions.

c. The Section assumes that any transfer of equity interests is not effective until registration of the equity transfer with the registration authorities, but notes that such registration may take longer than 30 days. The Section’s concerns in this regard increase if there is a foreign transfer either by a foreign shareholder or to a foreign transferee. Therefore, the Section recommends that a statement be added that notice within the exercise period constitute a valid “exercise”, even if the transfer has not been registered with the registration authorities within the exercise period.

**Article 29 (Effectiveness of the clauses of the articles of association restricting equity transfer)**

The Section commends the SPC for its inclusion of Article 29, which the Section regards as an important principle of transferability. The Section suggests that some guidance be given to the meaning of an “excessive” restriction and offers the following suggestions for such guidance:

a. The Section suggests that a separate clause be added to Article 29 to avoid a potential conflict with the restrictions set forth in Articles 71 and 141 of the Company Law and clarify that those restrictions are not “excessive”.

b. The Section recommends that the SPC consider the non-exclusive list of permissible restrictions that is applied by Delaware as a guide when determining the presence of “excessive” restrictions. That list designates the following transfer restrictions as permissible: (1) options granted to the company and/or its shareholders to purchase the transferred shares; (2) a requirement that the company and/or the shareholders consent to the transfer or approve the transferee or restrict or approve the amount of shares that may be owned by any one person or group of persons; (3) a requirement that the transferring shareholder sell his or her shares to the company and/or shareholders, or a restriction that any attempt to transfer automatically results in
the transfer of his or her shares to the company; and (4) a prohibition or restriction on transfers to certain persons or groups of persons, provided the designation of such person or groups of persons is not manifestly unreasonable.5

The Section recommends that the SPC expand Article 29 to cover not just clauses in the articles of association, but also restrictions contained in any agreement among shareholders.

V. Lawsuits filed directly and lawsuits filed by shareholder representative

Article 31 (Meanings of directors, senior executives, board of supervisors, supervisors and others)

The Section agrees with the general objective of Article 31 of the Draft Provisions – to clarify the scope of ¶ 1 and ¶ 2 of Article 151 of the Company Law to include the directors, senior executives, board of supervisors, and supervisors of wholly-owned subsidiaries. Additionally, the Section agrees with Article 31’s general objective to define “other” for the purpose of ¶ 3 of Article 151 of the Company Law to include persons other than the directors, supervisors, and senior executives of the company or the wholly-owned subsidiaries thereof.

Article 32 (Participation of other shareholders in litigation)

The last line of Article 32 states that “The judgement shall have legal force and effect on the shareholders not participating in the litigation.” The Section understands that the extent of issue or claim preclusion is subject to the general rules of the Civil Procedure Law and other applicable laws and administrative regulations and that Article 32 of the Draft Provisions is not meant to deviate from or modify the application of general law.

Article 33 (Replacement of the shareholder by the company as the plaintiff)

It appears that Article 33 of the Draft Provisions seeks to clarify when the company has the right to replace the shareholder as the plaintiff, limiting this action to require consent by the shareholder and to after the trial of the case. The Section understands that Article 33 focuses on actions in which the company itself has been damaged and that, under the circumstances of Article 151 of the Company Law, the appropriate representatives of the company ought to have direction of the litigation against wrongdoers to protect its own interests directly. In that respect the Section calls attention to the obligations and responsibilities of the legal representative of the company set forth in Company Law Article 13 and the role of the supervisors. The Section suggests that Article 33 be expanded to provide guidance as to when the company may seek to replace a shareholder as plaintiff, either without the shareholder’s consent or before the case has been tried.

Conclusion

The Section appreciates the SPC’s consideration of its comments.

5 See Section 202(c) of the Delaware General Corporation Law.
最高人民法院关于就《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（四）》（征求意见稿）向社会公开征求意见的公告

Announcement of the Supreme People's Court on Soliciting Public Opinions on the "Provisions of the Supreme People's Court on Certain Issues Concerning the Application of the Company Law of the People's Republic of China (IV)" (Draft for Comments)

颁布机关: 
Promulgating Institution: 
最高人民法院
Supreme People's Court

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为准确适用《中华人民共和国公司法》，最高人民法院颁布了关于适用《中华人民共和国公司法》若干问题的规定（一）、（二）、（三），解决了人民法院审理民商事案件适用公司法的部分问题。为进一步适应经济发展及司法实践需求，针对公司治理及股东权益保护方面的法律适用问题，最高人民法院起草了关于适用《中华人民共和国公司法》若干问题的规定（四）（征求意见稿）。为进一步完善该司法解释稿，提高司法解释质量，更加准确地贯彻立法原意，更加稳妥地解决公司法适用中的实际问题，切实保护公司、股东及其他主体的合法权益，促进社会经济发展，现通过有关媒体向社会公开征求意见。欢迎社会各界人士踊跃提出宝贵意见。特别欢迎各高校法律院系及各法学科研院所组织讨论并集体提出意见。具体的修改意见反馈可采取书面寄送或者电子邮件的方式，并请在提出建议时说明具体理由。书面意见可寄给北京市东城区东交民巷27号最高人民法院民事审判第二庭杨婷，邮政编码100745；电子邮件请发送至邮箱gsfjss_yang@163.com。本次公开征求意见的截止日期为2016年5月13日。

In order to accurately apply the Company Law of the People's Republic of China, the Supreme People's Court has promulgated the Provisions of the Supreme People's Court on Certain Issues Concerning the Application of the "Company Law of the People's Republic of China" (I), (II) and (III) and solved some issues concerning the application of the Company Law in trial of civil and commercial cases by the people's courts. With a view to further meeting the demand of economic development and judicial practices and addressing the issues of application of laws in corporate governance and protection of shareholders' rights and interests, the Supreme People's Court has drafted the Provisions of the Supreme People's Court on Certain Issues Concerning the Application of the "Company Law of the People's Republic of China" (IV) (Draft for Comments). For the purposes of further refining such draft of judicial interpretation, improving the quality of judicial interpretation, accurately implementing the legislative intention, further prudentially addressing the practical issues concerning the application of the Company Law, effectively protecting the lawful rights and interests of companies, shareholders and other entities, and promoting the social and economic development, public opinions are hereby solicited through relevant media. Persons from all sectors of society are welcome to provide valuable comments. The schools and departments of law of colleges and universities and all scientific research institutes of law are in particular welcome to organize discussions and present opinions collectively. The feedback on specific revisions, together with reasons therefor, may be sent in writing by post or email. The written opinions may be sent to Yang Ting of the Civil Adjudication Tribunal No. 2 of the Supreme People's
Provisions of the Supreme People's Court on Certain Issues Concerning the Application of the "Company Law of the People's Republic of China" (IV) (Draft for Comments)

For accurate application of the Company Law of the People's Republic of China, based on the actuality of litigation work of the people's courts, the issues concerning the application of relevant clauses are hereby interpreted as follows:

I. Cases involving the effectiveness of the resolutions of the meetings or general meetings of shareholders and board of directors

Article 1 (Plaintiffs to the actions for confirmation)

Companies' shareholders, directors, supervisors as well as the senior executives, employees and creditors, etc. that have direct interests in the content of the resolutions of meetings or general meetings of shareholders and board of directors file actions in accordance with Paragraph 1 of Article 22 of the Company Law requesting the confirmation of the resolutions as invalid or valid, such actions shall be accepted in accordance with the law.

Article 2 (Plaintiffs to the actions for revocation)

The plaintiffs that file actions in accordance with Paragraph 2 of Article 22 of the Company Law requesting the revocation of the resolutions of meetings or general meetings of shareholders and board of directors shall have shareholder status at the time when the actions are filed. Where a plaintiff ceases to
be a shareholder after the case is accepted, the action shall be dismissed.

Article 3  (Litigation status of the parties concerned)

In the cases filed by plaintiffs for confirming the non-existence of a resolution as prescribed in Article 4 hereof, failure to form a valid resolution as prescribed in Article 5 hereof and the invalidity, validity or revocation of resolutions, companies shall be listed as defendants.

Where another person applies for participating in the litigation with the claims same as those made by the plaintiff prior to the end of the court debate in the first instance and is eligible to be a party to the litigation as required under the Civil Procedure Law and the Company Law, such person shall be listed as co-plaintiff.

Article 4  (Non-existence of resolutions)

If a plaintiff specified in Article 1 hereof presents evidence showing that the disputed resolution falls under any of the following circumstances and claims for confirming the non-existence of the resolution, the claim of the plaintiff shall be upheld:

(一) Where the company fails to convene a meeting or general meeting of shareholders or a meeting of the board of directors, unless the company renders the decision directly without convening the meeting or general meeting of shareholders as prescribed in Paragraph 2 of Article 37 of the Company Law or the company's articles of association and the written decision is sighed or sealed by all shareholders; and

(2) Where the company convenes a meeting or general meeting of shareholder or a meeting of the board of directors but fails to vote on the resolution.

Article 5  (Failure to form valid resolutions)

Where the company convenes a meeting or general meeting of shareholders or the meeting of the board of directors and renders a resolution, but a plaintiff specified in Article 1 hereof presents evidence
showing the existence of any of the following circumstances and claims for confirming the failure to form a valid resolution, the claim of the plaintiff shall be upheld:

(一) 出席会议的人数或者股东所持表决权不符合公司章程的规定；

(1) Where the number of the people present at the meeting or the voting rights held by shareholders fail to conform to the provisions of the company's articles of association;

(二) 决议通过比例不符合公司法或者公司章程的规定；

(2) Where the proportion of the votes for adoption of the resolution fails to conform to the provisions of the Company Law or the company's articles of association;

(三) 决议上的部分签名系伪造, 且被伪造签名的股东或者董事不予认可；

(3) Some of the signatures on the resolution are falsified and are not accepted by the shareholders or directors whose signatures are falsified; and

另一种观点：决议上的部分签名系伪造，且被伪造签名的股东或者董事不予认可，在去除伪造签名后通过比例不符合公司法或者公司章程的规定；

Another opinion: Some of the signatures on the resolution are falsified and are not accepted by the shareholders or directors whose signatures are falsified and the proportion of the votes for adoption of the resolution fails to conform to the provisions of the Company Law or the company's articles of association after removal of the falsified signatures; and

(四) 决议内容超越股东会或者股东大会、董事会的职权。

(4) The content of the resolution exceeds the authority of the meeting or general meeting of shareholders or the board of directors.

Article 6 (Causes for invalidity of resolutions)

股东会或者股东大会、董事会决议存在下列情形之一的，应当认定无效；

A resolution of the meeting or general meeting of shareholders or the meeting of board of directors that falls under any of the following circumstances shall be determined to be invalid:

(一) 股东滥用股东权利通过决议损害公司或者其他股东的利益；

(1) Where the shareholders abuse the rights of shareholders and impair the interests of the company or other shareholders through the resolution;

(二) 决议过度分配利润、进行重大不当关联交易等导致公司债权人利益受到损害；

(2) Where the resolution provides for excessive distribution of profits, major improper affiliated transactions or other arrangements, causing harm to the interests of the company's creditors; and

(三) 决议内容违反法律、行政法规强制性规定的其他情形。

(3) Other circumstances where the content of the resolution violates the compulsory provisions of laws and administrative regulations.
Article 7  (Causes for revocation of resolutions)

公司法第二十二条第二款所称的“召集程序”和“表决方式”，包括股东会或者股东大会、董事会会议的通知、股权登记、提案和议程的确定、主持、投票、计票、表决结果的宣布、决议的形成、会议记录及签署等事项。

For the purpose of Paragraph 2 of Article 22 of the Company Law, "convening procedures" and "voting methods" include the matters such as notices for the meetings or general meetings of shareholders and the meetings of the board of directors, equity registration, determination of proposals and agendas, presiding over such meetings, voting, count of votes, announcement of voting results, formation of resolutions, meeting minutes, and the signing of the meeting minutes.

修改公司章程的有效决议不属于公司法第二十二条第二款所规定的“决议内容违反公司章程”。

A valid resolution for revising the company's articles of association does not fall under the circumstances where "the content of a resolution violates the company's articles of association" as prescribed in Paragraph 2 of Article 22 of the Company Law.

第八条  （事后同意决议）

Article 8  (Ex post consent to resolutions)

股东起诉请求撤销股东会或者股东大会、董事会决议，公司有证据证明存在下列情形之一的，应当驳回诉讼请求：

Where a shareholder files an action requesting the revocation of a resolution of the meeting or general meeting of shareholders or the meeting of board of directors and the company presents evidence showing the existence of any of the following circumstances, the action shall be dismissed:

（一）决议作出后，股东明确表示同意决议内容；

(1) Where the shareholder expressly consents to the content of the resolution after it is made;

（二）决议作出后，股东以自己的行为明确表示接受决议内容；

(2) Where the shareholder expressly indicates through its actions the acceptance of the content of the resolution after it is made; and

（三）作出新的决议，实质认可股东诉讼请求的内容。

(3) Where new resolution is made to substantially recognize the content of the litigious claims of the shareholder.

第九条  （决议效力的直接认定）

Article 9  (Direct affirmation of the effectiveness of resolutions)

原告起诉请求确认股东会或者股东大会、董事会决议不存在、未形成有效决议、决议无效或者撤销决议，与人民法院根据案件事实作出的认定不一致的，应当直接作出判决。

Where the plaintiff files an action for confirming that a resolution of the meeting or general meeting of shareholders or the meeting of board of directors fails to exist or form a valid resolution or is invalid or revoked, which is inconsistent with the decision rendered by the people's court based on the facts of the case, judgment shall be made directly.

另一种观点：原告起诉请求确认股东会或者股东大会、董事会决议不存在、未形成有效决议、决议
无效或者撤销决议，与人民法院根据案件事实依法认定的决议效力情形不一致的，应当告知原告可以变更诉讼请求。原告不变更的，应当驳回诉讼请求。

Another opinion: Where the plaintiff files an action for confirming a resolution of the meeting or general meeting of shareholders or the meeting of board of directors fails to exist or form a valid resolution or is invalid or revoked, which is inconsistent with the decision on the effectiveness of the resolution as rendered by the people's court based on the facts of the case and in accordance with the law, the plaintiff shall be notified that the litigious claims may be modified. If the plaintiff fails to make the modification, the action shall be dismissed.

第十条（行为保全）

Article 10 (Preservation of acts)

股东会或者股东大会、董事会决议存在实施后不能恢复原状或者使当事人、利害关系人的合法权益受到难以弥补的损害等情形的，可以依据原告的申请禁止实施有关决议。

Where a resolution of the meeting or general meeting of shareholders or the meeting of board of directors involves the circumstances where its implementation will make the restoration of the original condition impossible or cause irremediable harm to the lawful rights and interests of the parties concerned or the interested parties, the implementation of the resolution may be prohibited upon the application by the plaintiff.

人民法院采取前款规定的行为保全措施，可以根据公司的申请或者依职权责令原告提供相应担保。原告提供相应担保的，应当禁止实施有关决议。

Where the people's court adopts the measure of preservation of acts prescribed in the preceding paragraph, it may order the plaintiff to provide appropriate security upon application by the company or ex officio. If the plaintiff provides appropriate security, the implementation of relevant resolution shall be prohibited.

人民法院经审查认为，原告的申请存在恶意干扰或拖延决议实施情形的，应当驳回申请。

If the people's court, upon examination, finds that the application of the plaintiff involves the circumstance of maliciously disturbing or delaying the implementation of the resolution, it shall dismiss the application.

第十一条（判决的溯及力）

Article 11 (Retrospective effect of judgments)

人民法院判决股东会或者股东大会、董事会决议不存在、未形成有效决议、决议无效或者撤销决议的，该决议自始没有法律约束力。

Where the people's court rules that a resolution of the meeting or general meeting of shareholders or the meeting of board of directors fails to exist or form a valid resolution or is invalid or revoked, such resolution shall not be legally binding ab initio.

第十二条（参照适用）

Article 12 (Application by reference)

人民法院审理因一人有限责任公司依据公司法第六十一条作出的决定、国有资产监督管理机构依据公司法第六十六条行使股东会职权作出的决定效力发生争议的案件，可以参照适用本规定第一条至第十一条有关规定。
In the trial of the cases involving the disputes over the effectiveness of the decisions made by one-person limited liability companies in accordance with Article 61 of the Company Law or the decisions made by the State-owned assets supervision and administration departments by exercising rights of shareholders in accordance with Article 66 of the Company Law, the people's courts may apply relevant provisions of Article 1 through Article 11 hereof as reference.

II. Cases involving shareholders' rights to be informed

Article 13 (Shareholder status required for exercising the rights to be informed)

Where a shareholder, in accordance with Article 33 or Article 97 of the Company Law, files a lawsuit against the company requesting the inspection or duplication of the documents and materials of the company, such action shall be accepted in accordance with the law.

If the company provides evidence showing that the plaintiff has ceased to possess shareholder status at the time of filing the lawsuit or during the litigation, the lawsuit shall be dismissed.

Article 14 (Inherent rights)

Where the company makes defense on the grounds of the existence of any of the following circumstances, rejecting the inspection or duplication of the company's documents and materials by the shareholder in accordance with Article 33 or Article 97 of the Company Law or the provisions of relevant judicial interpretations, the defense of the company shall not be upheld:

(1) The capital contribution by the shareholder has defects;
(2) The company's articles of association restricts the inspection or duplication of company's documents and materials by shareholders; and
(3) The agreement among shareholders stipulates the restriction of inspection or duplication of company's documents and materials by shareholders.

Article 15 (Text of judgments and exercise of rights to be informed by proxy)
人民法院经审查认为原告的诉讼请求符合公司法规定的，应当判决在确定的时间、在公司住所地或者原告与公司协商确定的其他地点，由公司提供有关文件材料供股东查阅或者复制。股东可以委托代理人查阅、复制公司文件材料。

Where the people's court, upon examination, finds that the litigious claims of the plaintiff comply with the provisions of the Company Law, it shall render a judgment under which the company shall make relevant documents and materials available for inspection or duplication by the shareholder at the specified time and at the place of domicile of the company or any other place determined by the plaintiff and the company through consultation. The shareholder may inspect or duplicate the documents and materials of the company by proxy.

第十六条 (查阅原始凭证)

Article 16 (Inspection of original vouchers)

有限责任公司的股东起诉请求查阅公司会计账簿及与会计账簿记载内容有关的记账凭证或者原始凭证等材料的，应当依法受理。

Where a shareholder of a limited liability company files a lawsuit for inspection of the company's accounting books and the bookkeeping vouchers, original vouchers or other materials relating to the information recorded in the accounting books, the lawsuit shall be accepted in accordance with the laws.

公司提供证据证明股东查阅记账凭证或者原始凭证等有不正当目的，可能损害公司合法利益的，应当驳回诉讼请求。

If the company presents evidence showing that the inspection of the materials such as bookkeeping vouchers or original vouchers by the shareholder is for improper purposes and may impair the lawful interests of the company, the litigious claims shall be rejected.

第十七条 (不正当目的)

Article 17 (Improper purposes)

有限责任公司有证据证明存在下列情形之一的，应当依据公司法第三十三条第二款认定股东有不正当目的：

Where the limited liability company presents evidence showing the existence of any of the following circumstances, the shareholder shall be deemed to have improper purposes in accordance with Paragraph 2 of Article 33 of the Company Law:

（一）股东自营或者为他人经营与公司主营业务有实质性竞争关系的业务；

(1) Where the shareholder operates for himself or herself or for others the business that is substantially competing with the main business of the company;

（二）股东为了向第三人通报得知的事实以获取利益；

(2) Where the shareholder intends to notify a third party of the facts obtained so as to gain benefits;

（三）在过去的两年内，股东曾通过查阅、复制公司文件材料，向第三人通报得知的事实以获取利益；

(3) Where the shareholder has inspected or duplicated the documents and materials of the company and notified a third party of the facts obtained to gain benefits in the past two years; and

（四）能够证明股东以妨碍公司业务开展、损害公司利益或者股东共同利益为目的的其他事实。
Where there are other facts that can prove the shareholder is for the purpose of hindering the business operation of the company or impairing the interests of the company or the common interests of shareholders.

第十八条 无法查询的赔偿责任

Article 18 Liability for compensation in case inspection is impossible

公司未依法制作和保存公司法第三十三条规定或者第九十七条规定的公司文件材料，股东起诉请求公司董事、高级管理人员承担民事赔偿责任的，应予支持。

Where the company fails to prepare and keep the company's documents and materials prescribed in Article 33 or Article 97 of the Company Law and the shareholder files a lawsuit requiring the directors and senior executives of the company to bear civil compensation liability, such request shall be upheld.

三、关于利润分配请求权案件

III. Cases involving right of claim for distribution of profits

第十九条 当事人的诉讼地位

Article 19 Litigation status of parties concerned

股东请求公司分配利润案件，应当列公司为被告。

In a case where a shareholder requests the company to distribute profits, the company shall be listed as defendant.

其他股东在一审法庭辩论结束前以相同的诉讼请求申请参加诉讼的，应当列为共同原告；不同意分配利润的股东，可以列为第三人。

Any other shareholder that applies for participating in the litigation with the claims same as those made by the plaintiff prior to the end of the court debate in the first instance shall be listed as co-plaintiff; the shareholders that disagree to the distribution of profits may be listed as third parties.

第二十条 股东会或者股东大会决议分配方案

Article 20 Distribution plans under resolutions of the meetings or general meeting of shareholders

股东提交载明具体分配方案的股东会或者股东大会有效决议，起诉请求公司分配利润的，应当判决公司在一定期限内根据决议确定的方案向股东支付红利。判决对未参加诉讼的有利润分配请求权的股东发生法律效力。

Where a shareholder submits the valid resolution of the meeting or general meeting of shareholders specifying the distribution plan and thereby files a lawsuit requesting the company to distribute profits, judgment shall be made for the company to pay dividends to the shareholder within a specified time limit according to the plan determined in the resolution. The judgment shall be legally binding on the shareholders that fail to participate in the litigation but have the right of claim for distribution of profits.

股东起诉请求公司分配利润，未提交载明具体分配方案的股东会或股东大会决议的，应当驳回诉讼请求，但有限责任公司的股东有证据证明其他股东滥用股东权利或董事、高级管理人员存在欺诈行为导致公司不分配利润的除外。

Where a shareholder files an lawsuit requesting the company to distribute profits but fails to submit the resolution of the meeting or general meeting of shareholders specifying the distribution plan, the litigious
claims shall be rejected, unless a shareholder of a limited liability company presents evidence showing that the abuse of shareholder rights by any other shareholders or the fraud committed by any directors or senior executives has resulted in the failure of the company to distribute profits.

第二十一条 (未参加诉讼股东申请强制执行的权利)

Article 21 (Right of the shareholders without participating in litigation to apply for enforcement)

人民法院审理股东请求公司分配利润案件，驳回股东诉讼请求后，未参加诉讼的股东以相同的诉讼请求、事实和理由另行起诉的，应当不予受理。

Where, after the people's court has rejected the litigious claim of the shareholder for distribution of profits by the company, any shareholder that has not participated in the litigation files a lawsuit separately with the same claim, facts and reasons, such lawsuit shall not be accepted.

人民法院作出公司分配利润的判决后，未参加诉讼的有利润分配请求权的股东，可以据此申请强制执行。

After the people's court has rendered the judgment for the company to distribute profits, the shareholders that have not participated in the litigation but have the right of claim for the distribution of profits may apply for enforcement based on the judgment.

四、关于优先购买权案件

IV. Cases involving preemptive right

第二十二条 (不适用优先购买权的情形)

Article 22 (Circumstance where preemptive right is not applicable)

有限责任公司的股东因继承、遗赠等原因发生变化时，其他股东主张优先购买该股权的，不予支持，但公司章程另有规定的除外。

When there is change to a shareholder of a limited liability company due to reasons such as inheritance or legacy, the claim of any other shareholder for preemption of the equity concerned shall not be upheld, unless otherwise provided for by the company's articles of association.

第二十三条 (股东之间转让股权时不得主张优先购买权)

Article 23 (No claim of preemptive right in the transfer of equity between shareholders)

有限责任公司的股东之间相互转让其全部或者部分股权，其他股东主张优先购买的，不予支持，但公司章程另有规定的除外。

Where a shareholder claims preemptive right in the transfer of all or part of equity between other shareholders of a limited liability company, such claim shall not be upheld, unless otherwise provided for by the company's articles of association.

第二十四条 (同等条件的含义)

Article 24 (Meaning of equal terms)

公司法第七十一条第三款所称的“同等条件”，应当综合股权的转让价格、付款方式及期限等因素确定。

For the purpose of Paragraph 3 of Article 71 of the Company Law, "equal terms" shall be determined
by the factors such as the equity transfer price, payment method and payment period on comprehensively basis.

有限责任公司的股东向股东以外的人转让股权，其他股东主张优先购买部分股权的，不予支持，但公司章程另有规定的除外。

Where a shareholder of a limited liability company transfers equity to a person other than a shareholder, the claim of any other shareholder for preemption of part of the equity shall not be upheld, unless otherwise provided for by the company's articles of association.

第二十五条 （书面通知的内容和优先购买权的行使期间）

Article 25 （Content of written notice or the period for exercise of preemptive right）

有限责任公司的股东向股东以外的人转让股权，书面通知其他股东，通知中已经包括受让人的姓名或名称、转让股权的类型、数量、价格、履行期限及方式等股权转让合同主要内容的，其他股东在收到通知后，应当在公司章程规定的行使期间内主张优先购买；公司章程没有规定或者规定不明的，按照下列情形确定；

Where a shareholder of a limited liability company transfers equity to a person other than a shareholder and notifies other shareholders thereof in writing with the notice containing the main content of the equity transfer contract such as the name of the transferee, type and quantity of the transferred equity, price for the transfer, as well as the period and method of performance, such other shareholders shall, upon receiving the notice, claim the preemptive right within the exercise period prescribed by the company’s articles of association; where it is not prescribed or not clearly prescribed in the company's articles of association, it shall be determined according to the following circumstances:

（一）通知中载明行使期间的，以该期间为准；

1) Where the exercise period is specified in the notice, such period shall prevail; and

（二）通知中未载明行使期间，或者载明的期间短于通知送达之日起三十日的，为三十日。

2) Where the exercise period is not specified in the notice or the exercise period as specified is shorter than 30 days from the date of the service of the notice, the exercise period shall be 30 days.

其他股东没有在前款规定的行使期间内主张优先购买的，或者主张优先购买，但是不符合公司法和司法解释规定的同等条件的，视为同意转让并放弃优先购买权。

Where other shareholders fail to claim preemptive right during the exercise period prescribed in the preceding paragraph or claims preemptive right but the claim fails to conform to the equal terms specified in the Company Law and judicial interpretations, they shall be deemed as consenting to the transfer and waiving the preemptive right.

第二十六条 （股东放弃转让）

Article 26 （Withdrawal of transfer by shareholders）

有限责任公司的股东向股东以外的人转让股权，其他股东主张优先购买，股东明确表示放弃转让的，对其他股东的主张不予支持，但是双方已经达成股权转让协议或者公司章程另有规定的除外。

In respect of the transfer of equity by a shareholder of a limited liability company to a person other than a shareholder, if other shareholders claim preemptive right but the shareholder expressly indicates the withdrawal of the transfer, the claim of other shareholders shall not be upheld, unless both parties have reached the equity transfer agreement or it is otherwise provided for under the company's articles of association.
股东在诉讼中明确表示放弃转让的，诉讼费用由其负担。

The shareholder that expressly indicates the withdrawal of transfer during litigation shall bear court costs.

第二十七条（损害优先购买权合同的效力）

Article 27 (Effectiveness of contracts impairing preemptive right)

有限责任公司的股东向股东以外的人转让股权，有下列损害其他股东优先购买权的情形之一，其他股东请求确认转让合同无效的，应予支持：

Where a shareholder of a limited liability company transfers equity to a person other than a shareholder, which falls under any of the following circumstances impairing the preemptive right of other shareholders, the claim of other shareholders for confirming the transfer contract invalid shall be upheld:

（一）未履行公司法和司法解释规定的程序订立股权转让合同；

(1) Where the equity transfer contract is entered into without performing the procedures prescribed by the Company Law and judicial interpretations;

（二）其他股东放弃优先购买权后，股东采取减少转让价款等方式实质改变公司法和司法解释规定的同等条件向股东以外的人转让股权；

(2) Where the shareholder, after other shareholders have waived preemptive rights, transfers the equity to a person other than a shareholder by adopting such measures as reducing transfer price to substantially change the equal terms prescribed by the Company Law and judicial interpretations;

（三）股东与股东以外的人恶意串通，采取虚报高价等方式违反公司法和司法解释规定的同等条件，导致其他股东放弃优先购买权，但是双方的实际交易条件低于书面通知的条件。

(3) Where a shareholder engages in malicious collusion with a person other than a shareholder and violates the provisions on equal terms under the Company Law and judicial interpretations by such means as falsely offering a high price, which results in the waiver of preemptive right by other shareholders, while the actual transaction terms between both parties are lower than the terms in the written notice.

转让合同被认定无效后，其他股东同时请求按照实际交易条件购买该股权的，应予支持。受让人交易时善意无过失，请求股东承担赔偿责任的，应予支持。

When the transfer contract is determined to be invalid, the claim made simultaneously by other shareholders for purchasing such equity based on the actual transaction terms shall be upheld. If the transferee is in good faith and has no fault in transaction, the request of such transferee for the shareholder to bear compensation liability shall be upheld.

第二十八条（国有股权转让的特殊规定）

Article 28 (Special provisions on transfer of State-owned equity)

依据国有资产管理法律、行政法规在依法设立的产权交易场所转让国有股权的，适用公司法第七十一条第二款和第三款规定的“书面通知”“同等条件”时，应当参照产权交易场所的交易规则。

When the "written notice" and "equal terms" prescribed in Paragraph 2 and Paragraph 3 of Article 71
of the Company Law is applied to the transfer of State-owned equity on the property exchanges established in accordance with the laws and administrative regulations on the administration of State-owned assets, the trading rules of the property exchanges shall be taken as reference.

第二十九条 （限制股权转让的章程条款的效力）

Article 29  （Effectiveness of the clauses of the articles of association restricting equity transfer）

有限责任公司章程条款过度限制股东转让股权，导致股权实质上不能转让，股东请求确认该条款无效的，应予支持。

Where the clauses of the articles of association of a limited liability company excessively restricts the equity transfer by shareholders, resulting in the impossibility of the transfer of equity in essence, the request of shareholders for confirming such clauses as invalid shall be upheld.

五、关于直接诉讼与股东代表诉讼案件

V. Lawsuits filed directly and lawsuits filed by shareholder representative

第三十条  （诉讼地位）

Article 30  （Litigation status）

监事会、监事或者董事会、执行董事依据公司法第一百五十一条第一款起诉的，应当列公司为原告，由监事会负责人、监事或者董事长、执行董事担任诉讼代表人。

Where the board of supervisors, any supervisor, the board of directors or the executive director files a lawsuit in accordance with Paragraph 1 of Article 151 of the Company Law, the company shall be the plaintiff and the person in charge of the board of supervisors, the supervisor, the chairman of the board of directors or the executive director shall act as the litigation representative.

人民法院受理股东依据公司法第一百五十一条第二款、第三款的规定提起诉讼的案件后，应当通知公司作为第三人参加诉讼。

The people's court shall, after accepting a case filed by a shareholder in accordance with Paragraph 2 or Paragraph 3 of Article 151 of the Company Law, notify the company to participate in the litigation as a third party.

第三十一条 （董事、高级管理人员、监事会、监事、他人的含义）

Article 31  （Meanings of directors, senior executive, board of supervisors, supervisors and others）

公司法第一百五十一条第一款、第二款所称的“董事、高级管理人员”、“监事会”、“监事”包括全资子公司的董事、高级管理人员、监事会、监事。

For the purpose of Paragraph 1 and Paragraph 2 of Article 151 of the Company Law, "directors, senior executives", "board of supervisors" and "supervisors" shall include the directors, senior executives, board of supervisors and supervisors of wholly-owned subsidiaries.

公司法第一百五十一条第三款所称的“他人”，是指除公司或者全资子公司的董事、监事、高级管理人员以外的其他人。

For the purpose of Paragraph 3 of Article 151 of the Company Law, "others" shall refer to the persons other than the directors, supervisors and senior executives of the company or the wholly-owned subsidiaries thereof.
第三十二条　（其他股东参加诉讼）

Article 32　(Participation of other shareholders in litigation)

人民法院审理股东依据公司法第一百五十一条第二款、第三款规定提起诉讼的案件，其他股东在一审法庭辩论结束前以相同的诉讼请求申请参加诉讼的，应当列为共同原告。已经进行的诉讼程序，对参加诉讼的其他股东发生法律效力。判决对未参加诉讼的股东发生法律效力。

When the people's court conducts trial of a case filed by a shareholder in accordance with Paragraph 2 or Paragraph 3 of Article 151 of the Company Law, any other shareholder that applies for participating in the litigation on the ground of the same claims prior to the end of the court debate in the first instance shall be listed as co-plaintiff. The legal proceedings already completed shall be legally binding on such other shareholder participating in the litigation. The judgment shall have legal force and effect on the shareholders not participating in the litigation.

第三十三条　（公司替代原告）

Article 33　(Replacement of the shareholder by the company as the plaintiff)

人民法院审理股东依据公司法第一百五十一条第二款、第三款规定提起诉讼的案件后，公司申请替代股东诉讼的，应当征得股东的同意。股东同意的，其已实施的诉讼行为有效；另行提起诉讼的，不予受理或者驳回起诉。

Where the company applies for replacing the shareholder in the lawsuit filed by the shareholder in accordance with Paragraph 2 or Paragraph 3 of the Article 151 of the Company Law after the people's court has tried the case, the consent of the shareholder shall be obtained. If the shareholder consents to the replacement, the litigation acts already performed thereby shall be valid; if a lawsuit is filed separately, the people's court shall refuse to accept or dismiss the lawsuit.

第三十四条　（诉讼中的调解）

Article 34　(Mediation in the litigation)

人民法院审理股东依据公司法第一百五十一条第二款、第三款规定提起诉讼的案件，当事人达成调解协议的，应提交股东会或者股东大会通过调解协议的决议。有限责任公司未提交股东会决议的，全体股东应当在调解协议书上签名、盖章或者向人民法院出具同意调解协议的书面意见。

Where the parties concerned reach a mediation agreement in the trial of a case filed by a shareholder in accordance with Paragraph 2 or Paragraph 3 of the Article 151 of the Company Law, the resolution of the meeting or general meeting of shareholders for approving the mediation agreement shall be submitted. If no resolution of the meeting of shareholders is submitted in the case of a limited liability company, all shareholders shall sign or seal the mediation agreement or issue to the people's court the written opinions for consent to the mediation agreement.

第三十五条　（胜诉利益处置）

Article 35　(Disposal of benefits in case of wining)

股东依据公司法第一百五十一条第二款、第三款规定请求被告直接向其承担民事责任的，不予支持。

Where the shareholder requests the defendant to directly bear civil liability thereto in accordance with Paragraph 2 or Paragraph 3 of Article 151 of the Company Law, such request shall not be upheld.

股东因公司的全资子公司利益受到损害，依据公司法第一百五十一条提起诉讼，请求被告向全资子
公司承担民事责任的，应予支持；请求被告向公司承担民事责任的，不予支持。

Where a shareholder, on the grounds that the interests of a wholly–owned subsidiary of the company is impaired, files a lawsuit in accordance with Article 151 of the Company Law requesting the defendant to bear civil liability towards the wholly–owned subsidiary, such request shall be upheld; if the shareholder requests the defendant to bear civil liability towards the company, such request shall not be upheld.

股东胜诉后，请求公司承担合理的律师费以及为诉讼支出的调查费、评估费、公证费等合理费用的，应予支持。

Where the shareholder, after winning the case, requests the company to bear reasonable attorney's fees as well as the reasonable expenses paid for the litigation such as investigation fees, evaluation fees and notarial fees, such request shall be upheld.

第三十六条 （施行时间及效力）

Article 36  (Time for implementation and effectiveness)

本规定自 年 月 日起施行。

These Provisions shall be implemented as of ________.

本规定施行后人民法院新受理的一审案件，适用本规定。

These Provisions shall apply to the first–instance cases accepted by the people's courts after the implementation hereof.

本规定施行前人民法院已经受理、施行后尚未审结的一审、二审案件，以及本规定施行前已经终审、施行后当事人申请再审或者按照审判监督程序决定再审的案件，不适用本规定。

These Provisions shall not apply to the first–instance and second–instance cases accepted by the people's courts before the implementation hereof but not yet concluded after the implementation hereof and the cases for which final judgments have been rendered before the implementation hereof but of which retrial is applied by the party concerned or decided according to trial supervision procedures.