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## TABLE OF CONTENTS / 本期内容

### CAPITAL MARKET / 资本市场

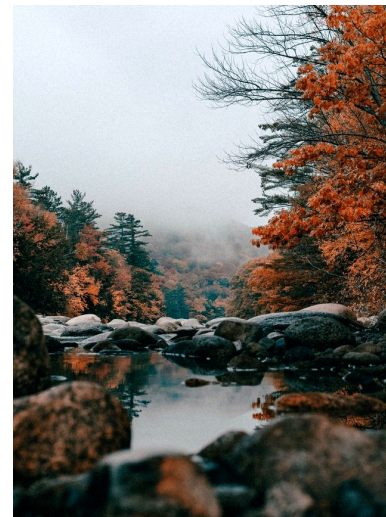
CSRC Issued Guidelines on *Full Circulation* of H-Share Companies /  
H股“全流通”全面推开 2

### COMPANY LAW / 公司法

Summary of the National Courts' Work Conference on Civil and  
Commercial Trials Released for Judicial References / 全国法院民商事  
审判工作会议纪要发布 统一争议问题裁判思路 2

### MARKET ACCESS / 市场准入

New Version of the *Negative List for Market Access* Released / 2019年  
版市场准入负面清单发布 3



## CAPITAL MARKET / 资本市场

### CSRC Issued Guidelines on *Full Circulation* of H-Share Companies H股“全流通”全面推开

2019年11月15日，中国证券监督管理委员会（“证监会”）发布了《H股公司境内未上市股份申请“全流通”业务指引》（“《业务指引》”，自发布之日起实施）以及相关的答记者问，意味着证监会将在2018年完成三家H股公司“全流通”试点工作的基础上，全面推开H股“全流通”。

H股公司即在香港联合证券交易所股份有限公司（“联交所”）上市的境内股份有限公司，其股份划分为境外上市外资股和境内上市内资股两类股份，目前除了部分试点公司外，其他H股公司的内资股均不能在境外上市流通，因此持有内资股的股东无法在香港二级市场退出。而根据《业务指引》，H股公司（含已上市H股公司及拟申请H股首发上市的公司）的境内未上市股份，包括境外上市前境内股东持有的内资股、境外上市后在境内增发的内资股以及外资股东持有的未上市股份，可在符合国有资产、外商投资、行业监管等规定的前提下，由境内未上市股份股东自主协商确定申请流通的股份数量和比例，向证监会申请到联交所上市流通。但需注意的是，境内未上市股份经证监会核准到联交所上市流通后，不得再转回境内。

相较于2018年的“全流通”试点要求，本次全面推开H股“全流通”不再对公司行业、规模设置条件，并且不设家数限制和完成时限，将有助于解决H股公司内资股的境外上市流通问题，畅通境内公司香港上市的路径，并促进H股公司各类股东利益一致和公司治理完善。但需注意的是，鉴于H股“全流通”仍需符合外商投资等规定，对于外商投资准入特别管理措施中对外资比例存在限制的行业，H股公司在境外上市流通的股份数量和比例可能仍需受限于外资持股比例限制。

## COMPANY LAW / 公司法

### Summary of the National Courts' Work Conference on Civil and Commercial Trials Released for Judicial References 全国法院民商事审判工作会议纪要发布 统一争议问题裁判思路

经全国法院民商事审判工作会议讨论及向全社会公开征求意见，2019年11月14日，最高人民法院正式发布《全国法院民商事审判工作会议纪要》（“《纪要》”）。《纪要》共计12部分130个问题，内容涉及公司、合同等民商事审判领域存在争议的法律适用问题。《纪要》虽不是司法解释，但一定程度上代表了相关问题的统一裁判思路。以下为我们对《纪要》中公司纠纷领域主要热点问题的总结：

1. “对赌协议”的效力及履行：《纪要》确立了与目标公司对赌原则上有效的裁判指引，即投资方与目标公司订立的“对赌协议”在不存在法定无效事由的情况下，应认定有效，目标公

On November 15, 2019, CSRC issued the *Guidelines on Applying for Full Circulation of Unlisted Domestic Shares of H-Share Companies* (the “Guidelines”) with immediate effect. Together with the related Q&As, the Guidelines signals a full scale circulation of the stocks of H-share companies after the successful pilot reform since 2018.

The H-share companies are incorporated in mainland China, with some of their stocks later listed on the Hong Kong Stock Exchange or HKEX. The shares of such companies are divided into two categories: listed offshore and retained domestically. Except for the companies that have participated in the early pilot program, stocks of H-share companies retained in mainland China are not tradable on the HKEX. As a result, the underlying shareholders cannot exit through secondary market in Hong Kong. According to the Guidelines, however, all H-share companies including those planning for IPOs on the HKEX, now can apply to CSRC for a “full circulation” or flotation of any stocks retained domestically (*including shares held by domestic Chinese shareholders prior to H-share listing, shares issued in mainland China after H-share listing, unlisted shares held by foreign shareholders and etc.*) when applicable regulatory restrictions on PRC state-owned assets, foreign investments and industrial policies, among others, are properly satisfied. Once approved by CSRC to be listed and traded on the HKEX, the stocks will however not be allowed to be converted back into domestically retained shares.

Compared to the 2018 experimental policies, the Guidelines removed restrictions on the size and industry requirements for qualified H-share companies, as well as limitations on the total number of eligible companies or specific timeframe to complete a “full-circulation” process, which are expected to facilitate the procedures, promote listings of Chinese companies on the HKEX, balance the interests of all shareholders and boost better corporate governance of H-share companies. It is noteworthy that the “full circulation” may still be limited in a sense since it will continue to be subject to some other regulatory requirements such as PRC foreign investment restrictions.

Based on the discussions at the courts' national civil and commercial trial work conference and the feedbacks of the general public, the Supreme People's Court released its official *Summary of the National Courts' Work Conference on Civil and Commercial Trials* (the “Summary”) on November 14, 2019, which addresses approximately 130 legal enforcement issues in some 12 sections with respect to the courts' civil and commercial trial practices involving corporate governance and contract disputes, among others. Although the Summary is not viewed as judicial interpretations, it presents to a certain extent the unified court hearing and trial guidance on the relevant issues. We have summarized below for your reference a few hot topics in the corporate governance area:

1. The Effectiveness and Enforceability of Contractual VAM Clauses: According to the Summary, the agreed valuation

司仅以存在股权回购或者金钱补偿约定为由，主张“对赌协议”无效的，人民法院不予支持。但投资方主张实际履行的，人民法院应当审查是否符合公司法关于“股东不得抽逃出资”及股份回购的强制性规定，判决是否支持其诉讼请求，具体而言：**(a)**投资方请求目标公司回购股权的，若目标公司未完成减资程序的，人民法院应当驳回其诉讼请求；**(b)**投资方请求目标公司承担金钱补偿义务的，若目标公司没有利润或者虽有利润但不足以补偿投资方的，人民法院应当驳回或者部分支持其诉讼请求，今后目标公司有利润时，投资方还可以依据该事实另行提起诉讼。

2. **股权转让**：关于侵犯优先购买权的股权转让合同的效力，实践中存在一些为保护其他股东的优先购买权而认定股权转让合同无效的司法判例。《纪要》对此明确了侵犯其他股东优先购买权的股权转让合同如无其他影响合同效力的事由，应当认定有效，其他股东行使优先购买权的，虽然受让人关于继续履行股权转让合同的请求不能得到支持，但可以依约向转让股东主张违约责任。
3. **公司对外担保**：公司对外提供担保属于高风险的经营活动，实践中引发的争议存在裁判尺度不统一的情况。《纪要》明确了法定代表人未经公司股东（大）会、董事会等公司机关的决议授权擅自为他人提供担保的，构成越权代表，但担保合同是否有效应区分债权人是否善意，原则上，如债权人对公司机关的决议内容尽到了形式上的审查义务，就应当认定其构成善意，担保合同有效，反之，担保合同无效。此外，在一些特别情况下，即使没有公司机关决议，也应认定担保合同符合公司的真实意思表示，认定担保合同有效。

adjustment mechanism or VAM against target companies should generally be deemed valid, unless otherwise prohibited by applicable laws. Where a company seeks to void the VAM clauses merely based on the facts of the existence of the provisions of share redemption and/or cash compensation, its claims will unlikely be supported by the courts. When an investor seeks for specific performance of the VAM clauses by the company, the people's court will review and determine if the underlying performance complies with mandatory PRC company law provisions. Specifically, the investor's claim will unlikely be upheld or fully supported by the courts, if **(a)** it requires the target company to purchase back its shares while the company is undertaking capital reduction process; or **(b)** it requires the target company to make cash compensations while the company does not have profits or enough profits to fulfill such compensation. However, in the latter case, if the company becomes profitable afterwards, the investor may bring up a new lawsuit against the company.

2. **Transfer of Shares**: In judicial practice, there are some cases where a share transfer was ruled void by the courts on the basis of infringement of other shareholder's right of first refusals. To the contrary, the Summary has clarified that share transfer agreement which undermines other shareholders' right of first refusal can be deemed valid unless otherwise contradictory with applicable laws. If any other shareholder chooses to exercise its right of first refusal, the underlying share transfer shall not be further executed although the transferee party may seek to hold the transferor shareholder liable for damages on a breach of contract claim.
3. **External Guarantee by Companies**: External guarantee by companies often comes with high risks and disputes. To streamline the judicial practice, the Summary provides that, as a rule of thumb, any external guarantee signed by a company's legal representative without proper authorization from the shareholder(s) or board of directors of the company should be deemed *ultra vires*, which in turn will usually invalidate such an action. However, if the creditor can prove that it has acted in good faith by review of proper formalities of company authorization documents and etc., the people's court may determine that the guarantee is still valid and enforceable. Further, in some special cases absent any company authorization document, the guarantee may still be held valid and enforceable as long as it has represented the genuine intention of the company.

## MARKET ACCESS / 市场准入

### New Version of the Negative List for Market Access Released 2019年版市场准入负面清单发布

2019年11月22日，国家发改委、商务部联合发布了《市场准入负面清单（2019年版）》（“2019年版负面清单”），标志着负面清单年度动态修正机制的确立。

2019年版负面清单沿袭了2018年版负面清单的管理原则，即包含禁止和许可两类事项，明确列出在中国境内禁止和限制投资经营的行业、领域、业务等；对清单以外的行业、领域、业务等，各类市场主体皆可依法平等进入。与2018年版负面清单相比，2019年版负面清单进一步精简了清单长度，将清单条目由151条减至131条，同时将清单外的全国性市场准入类管理措施全部纳入，并取消了多个地区自行编制的市场准

On November 22, 2019, the Chinese National Development and Reform Commission and the Ministry of Commerce jointly promulgated the *Negative List for Market Access (2019 Edition)* (the “2019 Negative List”), which also marks the start of the annual amendment to the *negative list* on a systematic basis.

The 2019 Negative List inherited the administration principles of the 2018 edition, which set out industries, sectors and business areas that market players are prohibited or restricted to participate in China. In other words, any industries, sectors or businesses that are not included in the *negative list*, are open to all investors. We noticed that the 2019 Negative List has taken out some 20 items from the 2018 edition, which signals further open-ups. To unify the administration on a nationwide basis, it has eliminated several regional *negative lists* and introduced administrative measures otherwise adopted nationally on market access. It is also noteworthy that the private equity investments

入负面清单，促进“全国一张清单”体系建设。值得注意的是，2019年版负面清单将私募基金行业纳入市场准入负面清单予以规范，明确指出非金融机构、不从事金融活动的企业，在注册名称和经营范围中原则上不得使用“基金管理”字样，进一步明确了私募基金的准入要求和管理措施。

have for the first time been included in the *negative list*. Pursuant to the 2019 Negative List, no institution or enterprise that is not engaged in financial businesses may include “fund management” in its registered name or scope of business. It has further clarified the market entry and administrative requirements for private equity funds as well.

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