JUNHE
SPECIAL REPORT

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Key Points of the Civil Code Revision: An Expert Guide for Your Business

Overview

On May 28, 2020, the Third Session of the Thirteenth National People's Congress ("**NPC**") adopted by vote the *Civil Code of the People's Republic of China*, which is to take effect on 1 January 2021. The *Civil Code* is the first law to carry the title "code" in our country, and it is known as a declaration and guarantee for the protection of citizens' civil rights. The *Civil Code* consists of 1,260 articles in seven parts, including General Part, Part on Rights *in Rem*, Part on Contracts, Part on Personality Rights, Part on Marriage and Family, Part on Inheritance, Part on Tort Liability, and supplementary provisions. It involves the inheritance and integration of the current laws and judicial interpretations such as *General Provisions of the Civil Law*, *Property Law* and *Contract Law*, and also embodies the reflection and reconstruction of some defects or legislative gaps in the current legal system by the legislator. In this article, we will focus on the major provisions under some parts of contracts, rights *in Rem*, personality rights and tort liability that have a relatively large impact on the general business activities of enterprises, by comparing the old and the new laws, and to introduce the new added provisions as well as the amendments to the existing legal provisions under the *Civil Code* that companies should pay attention to in their commercial activities.

I. Part on Contracts

A. Defining the Validity of Preliminary Agreements

- **Comparison of Provision**

Art. 495, ***Civil Code***	**Art. 2,** ***Judicial Interpretations on Sales Contracts***
A purchase offer, purchase order, subscription book, or the like that the parties agree to contract within a certain time limit shall constitute a preliminary agreement. If one party fails to perform the obligation to contract as agreed in the preliminary agreement, the other party may request it to be liable for breach of the preliminary agreement.	Where both parties have signed preliminary agreements such as purchase offers, purchase orders, subscription books, letters of intent, and memorandums, and have agreed that a sales contract is to be concluded within a certain period of time, if one party does not perform the obligation of concluding a sales contract and the other party requests that it assumes liability for the breach of the preliminary agreements or demands the rescission of the preliminary agreements and claims compensation for damages, the people's court shall support such claims.

- **Key Takeaways**

The preliminary agreement was previously mainly stipulated in the *Interpretation of the Supreme People's Court on Issues Concerning the Application of Law for the Trial of Cases of Disputes over Sales Contracts* (Fa Shi [2012] No. 8) ("***Judicial Interpretations on Sales Contracts***"). The preliminary agreement was included in the *Civil Code* as a new provision this time, confirming the validity of the preliminary agreement, expanding the scope of the application of the preliminary agreement, and helping to clarify the legal relationship between the parties.

- **Practical Focus**

In commercial activities such as equipment procurement, business cooperation, investment, and mergers and acquisitions, companies often participate in arrangements such as signing letters of intent, framework agreements, and so on. Before signing the corresponding documents, a company should first clarify whether it is to sign a non-binding consultation document or a valid preliminary agreement, and then proceed with the drafting of the specific clauses. After the signing of the preliminary agreement, considering that the breach of obligations under the preliminary agreement should bear the corresponding liability for breach of contract, a company should strengthen its awareness of fulfilling such an agreement. The question of whether the observing party has the right to require the violating party to continue to perform the preliminary agreement and then sign a subsequent formal contract after the violating party violates the preliminary agreement is not specified in the *Civil Code*. Therefore, whether the preliminary agreement can be required to continue to perform needs to be analyzed in practice in conjunction with the specific case situation.

B. Emphasizing the Description Obligation Under the Format Contract

- **Comparison of Provision**

Art. 496, *Civil Code*	**Art. 39, *Contract Law***
Standard terms are terms drawn up by one party in advance for repeated use and not negotiated with the other party at the time of contracting. Where standard terms are adopted for contracting, the party furnishing the standard terms shall define the rights and obligations between the parties abiding by the principle of fairness, so inform in a reasonable manner as to enable the other party to note the terms excluding or limiting its liability or otherwise related to the material interest of the other party, and explain the terms upon request of the other party. If the party furnishing the standard terms fails to perform the informing or explanation obligation, resulting in the other party failing to note or understand the terms in which it has a material interest, the other party may argue that the terms are not a part of the contract.	Where standard terms are adopted in concluding a contract, the party supplying the standard terms shall define the rights and obligations between the parties, abiding by the principle of fairness, and shall inform the other party to note the exclusion or restriction of its liabilities in a reasonable way, and shall explain the standard terms upon request by the other party. Standard terms are clauses that are prepared in advance for general and repeated use by one party, and which are not negotiated with the other party when the contract is concluded.

- **Key Takeaways**

The *Civil Code* has absorbed the spirit of the *Consumer Rights and Interests Protection Law* (see Article 26 of the *Consumer Rights and Interests Protection Law*) in drafting the terms for the format contract, which further emphasizes the description obligations of the party providing the standard terms, and strengthens the protection of the party accepting the standard terms. Firstly, the article expands the scope of the description obligation. The scope of the description obligation of the party providing the standard terms stipulated in the *Contract Law* includes clauses that exempts or limits its liability, and Article 496, paragraph 2 of the *Civil Code* adds the "provision that has a material interest to the party that accepts the standard terms" on the basis of the *Contract Law*. Secondly, the legal consequences of failure to fulfill the description obligations are more favorable for the party accepting the standard terms. The *Contract Law* does not stipulate the legal consequences of failure to perform the description obligations. According to Article 9 of *Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China* (Fa Shi [2009] No. 5) ("***Judicial Interpretations II on Contract Law***"), where the party providing the standard terms violates the obligation to provide prompting and explanation and causes the other party's failure to notice the relevant clauses, the other party may claim to revoke such standard terms.

Article 496, paragraph 2 of the *Civil Code* further stipulates that in this case, the party that accepts the standard terms may claim that such standard terms shall not be the content of the agreement. In addition, the *Civil Code* specifies the circumstances in which the standard terms shall be deemed invalid. According to Article 40 of the *Contract Law*, when standard terms are under the circumstances stipulated in Articles 52 and 53 of the *Contract Law*, or the party which supplies the standard terms exempts itself from its liabilities, increases the liabilities of the other party, and deprives the material rights of the other party, the terms shall be invalid. The *Civil Code* has enumerated three types of situations where the standard terms shall be deemed invalid under Article 497. According to the second situation, when the party furnishing the standard terms unreasonably excludes or limits its liability, aggravates the liability of the other party, or restricts the main rights of the other party, such terms shall be invalid. Compared with the provisions under the *Contract Law*, the *Civil Code* has added a situation where the party providing the standard terms reduces its liability and restricts the other party's main rights, and "unreasonable" shall be a condition for determining such situations.

- **Practical Focus**

In order to improve efficiency and ensure standardized operations, production and service companies often draw up various types of format contracts, and generally makes the counterparty pay attention to the price, performance period, risk warnings, after-sales obligations, civil liability and other terms that may have a significant interest to the counterparty by bolding the font and underlining the text in the format contract. In the context of the *Civil Code* clearly strengthening the protection of the party that accepts the standard terms, companies should pay more attention to the description obligations for the recipient to avoid possible disputes arising from the validity of the relevant standard terms.

C. Presumption of Ordinary Guarantee in Guarantee Agreement

- **Comparison of Provision**

Art. 686 & 687, *Civil Code*	**Art. 16 & 19, *Guarantee Law***
- Article 686: Suretyship shall be divided into ordinary suretyship and joint and several suretyship according to different methods. If the parties fail to agree on the method of suretyship in the contract of suretyship, or the agreement is not clear, the suretyship shall be treated as ordinary suretyship. - Paragraph 1 of Article 687: Ordinary suretyship takes place where the parties agree in the contract of suretyship that the surety assumes suretyship liability when the debtor fails to perform the obligation.	- Article 16: There are two modalities of guarantee: (1) Ordinary guarantee; (2) Joint responsibility guarantee. - Article 19: When there is no arrangement or there is an unclear arrangement on the modality of the guarantee, the debtor and the guarantor shall assume joint guarantee responsibility.

- **Key Takeaways**

The *Civil Code* has changed the presumption rules for joint and several guarantee responsibilities stipulated in the *Guarantee Law*, and if the parties under the guarantee contract do not clearly stipulate the guarantee method, the presumed responsibility of the guarantor is changed from joint and several guarantee responsibility to ordinary guarantee responsibility. This amendment will, to a certain extent, reduce the burden of the guarantor. In addition, the *Civil Code* has made certain adjustments to the guarantor's right to recover, the guarantor's right to exclude the prelitigation demur right and the time limit for the commencement of litigation, etc., which requires special attention.

- **Practical Focus**

According to Article 687 and 688 of the *Civil Code*, "ordinary suretyship" takes place where the parties agree in the contract of suretyship that the surety assumes suretyship liability when the debtor fails to perform the obligation, and "joint and several suretyship" takes place where the

parties agree in the contract of suretyship that the surety and the debtor are jointly and severally liable for the obligation. The main difference between the above two kinds of responsibilities is whether the guarantor has the prelitigation demur right, that is, whether the guarantor has the "right to refuse to bear the guarantee responsibility to the creditor" before the disputes in the main contract have been solved by trial or arbitration procedures, and the debtor's property is still unable to perform relevant debt after being enforced. In addition, the ordinary guarantee and the joint guarantee are different in the rules such as the start time of the guarantor's performance of the guarantee obligations, the status of the lawsuit, and the start time of the limitation of action. It is recommended that when signing a guarantee contract (especially as a creditor), the company should focus on the guarantee method to avoid possible unfavorable situations if there is no agreement or if the agreement is unclear.

D. Adjusting the Definition of the Principle of Change of Circumstances

- **Comparison of Provision**

Art. 533, ***Civil Code***	**Art. 26,** ***Judicial Interpretations II on Contract Law***
Where the basic conditions of a contract undergoes a material change unforeseeable by the parties at the time of contracting which is not a commercial risk after the formation of the contract, rendering the continuation of the performance of the contract unconscionable for either party, the adversely affected party may renegotiate with the other party; and if the renegotiation fails within a reasonable time limit, the party may request the people's court or an arbitration institution to modify or terminate the contract. The people's court or arbitration institution shall change or terminate the contract based on the actual circumstances of the case, in accordance with the principle of fairness.	Where any major change which is unforeseeable, is not a business risk and is not caused by a force majeure occurs after the formation of a contract, and if the continuous performance of the contract is obviously unfair to the other party or cannot realize the purposes of the contract and a party files a request for the modification or rescission of the contract with the people's court, the people's court shall decide whether to modify or rescind the contract under the principle of fairness and in light of the actualities of the case.

- **Key Takeaways**

The principle of change of circumstances was previously stipulated in the *Judicial Interpretations II on Contract Law*. Relevant content of the judicial interpretation is clearly stated in the *Civil Code* this time, which makes the principle of change of circumstances formally established at the legal level. Different from the definition under the *Judicial Interpretations II on Contract Law*, the *Civil Code* deletes the prerequisite elements of "not caused by a force majeure", and confirms that the principle of change of circumstances can be applied to force majeure events. In addition, an arbitration institution has been added to the *Civil Code* as one of the authorities authorized to confirm whether the principle of change of circumstances can be applied.

- **Practical Focus**

In the context of the outbreak of the 2019 Novel Coronavirus Pneumonia Epidemic ("**COVID-19**") at the beginning of this year, whether the principle of change of circumstances can be applied to force majeure events has been one of the hot topics in the industry in recent months. According to the original definition under the *Judicial Interpretations II on Contract Law*, the major changes that occurred after the signing of the contract shall not be caused by force majeure. This has led to the fact that some parties to the contract that would apparently be unfair due to the impact of COVID-19 cannot apply the principle of force majeure for exemption, nor can they apply the principle of change of circumstances to request change or rescind the contract to the court. This revision of the *Civil Code* is intended to resolve the aforementioned contradictions, which has practical significance, and the revision also provides a clearer basis for

enterprises to resolve disputes caused by COVID-19.

E. Confirming the Validity of Contracts Involving Approval Obligations

- **Comparison of Provision**

Art. 502 Para. 2, *Civil Code*	**Art. 1, *Judicial Interpretations I on Foreign Enterprises***
With regard to contracts that are subject to approval as stipulated by relevant laws or administrative regulations, the provisions thereof shall be followed. If the approval and other procedures fail to be performed, precluding the contract from becoming effective, the validity of the terms of the obligation to apply for approval and related terms of the contract is not affected. If the party obligated to apply for approval and other procedures fails to perform the obligation, the other party may request it to be liable for breach of the obligation.	Where a contract concluded during the formation, modification, etc. of a foreign-funded enterprise does not take effect until it is approved by the foreign-funded enterprise examination and approval organ in accordance with the laws and administrative regulations, it shall become effective upon the date of approval. If the contract is not approved, the people's court shall determine the contract as ineffective. If any party concerned requests the court to determine the contract as invalid, it shall not be upheld by the people's court. If a contract as mentioned in the preceding paragraph is determined as ineffective because it is not approved, it does not affect the effectiveness of the clause on the parties' fulfillment of the obligation of obtaining approval and that of the relevant clauses set for such obligation in the contract.

- **Key Takeaways**

Regarding determination of the validity of contracts with pre-approval requirements, Article 502 of the *Civil Code* inherits the position in Article 1, paragraph 2 of the *Provisions of the Supreme People's Court on Several Issues concerning the Trial of Disputes Involving Foreign-Funded Enterprises (I)* (Fa Shi [2010] No. 9) ("***Judicial Interpretations I on Foreign Enterprises***") that affirms the independence of the provisions of the approval obligation and related provisions, and clarifies that if the approval and other procedures fail to be performed, precluding the contract from becoming effective, the validity of the terms of the obligation to apply for approval and related terms of the contract shall not be affected. In addition, Article 8[1] of the *Judicial Interpretations II on Contract Law* defines the legal consequences of breach of the obligation to apply for approval as a liability for contracting fault, and the parties can therefore only claim compensation for the corresponding losses. However, the *Civil Code* stipulates that "if the party obligated to apply for approval and other procedures fails to perform the obligation, the other party may request it to be liable for breach of the obligation". This essentially establishes the legal remedy for breach of the obligation of approval on the basis of liability for breach of contract, which will further protect the legitimate rights and interests of the parties.

- **Practical Focus**

The business contract or investment contract signed by enterprises in commercial activities may require pre-approval by the government before such contract becomes effective. The recognition of the validity of the approval obligation and relevant terms in the *Civil Code* can effectively avoid the disputes that may be caused by the failure of the obligor to perform approval application related obligations in practice due to the validity of the contract.

F. Improving the Rules for Fulfillment to Third Parties; Welcoming New Rules for Third-party Liquidation and Debt Participation

- **Comparison of Provision**

[1] Article 8: After the formation of a contract which does not become effective until it is approved or registered under a relevant law or administrative regulation, if the party which has the obligation to apply for going through the approval or registration formalities fails to apply for approval or registration under the relevant law or contractual provisions, such a failure shall fall within the scope of "any other act in violation of the principle of good faith", and the people's court may, as the case may be and upon the request of the opposite party, rule that the opposite party shall go through the relevant formalities by itself; however, the other party shall be liable for compensating the opposite party for the expenses

Art. 522 to Art. 524, Art. 552, *Civil Code*	***Contract Law***
- Article 522: Where the parties agree that the debtor shall perform the obligation to a third party, and the debtor fails to perform its obligations to such third party or the performance of the obligations is not in conformity with the agreement, the debtor shall be liable to the creditor for breach of contract. When the law requires or the parties agree that a third party may directly request the debtor to perform the obligation to it, if the third party fails to expressly refuse within a reasonable time limit, and the debtor fails to perform the obligation to the third party, or the performance of the obligation is not in conformity with the agreement, the third party may request the debtor to be liable for breach of contract; and the debtor may raise against the third party defenses against the creditor. - Article 523: Where the parties agree that a third party performs the obligation to the creditor, and the third party fails to perform the obligation, or the performance is not in conformity with the agreement, the debtor shall be liable to the creditor for breach of contract. - Article 524: Where a debtor fails to perform the debt, and a third party has a lawful interest in performing the debt, the third party shall have the right to perform the obligation to the creditor on its behalf, unless the nature of the debt, the parties, or the law requires that only the debtor may perform. After the creditor has accepted the performance from the third party, the obligation owed by the debtor to it shall be assigned to the third party, unless otherwise agreed by the debtor and the third party. - Article 552: Where a third party and the debtor agree on its joining the debtor in the obligation and notify the creditor, or the third party notifies the creditor of its willingness to join the debtor in the obligation, and the creditor fails to explicitly refuse within a reasonable time limit, the creditor may request the third party, to the extent of the obligation that it is willing to assume, and the debtor to assume the obligation jointly and severally.	- Article 64: Where the parties agree that the obligor shall perform the obligations to a third party, and the obligor fails to perform its obligations to such third party or its performance of the obligations is not in conformity with the agreement, the obligor shall be liable to the obligee for breach of contract. - There are no clear provisions under the *Contract Law* regarding debt participation and liquidation for third party beneficiary.

incurred thereof and the losses actually caused to the opposite party.

- **Key Takeaways**

The provisions of the *Civil Code* on contracts involving third parties are, to a certain extent, breaking the "relativity" principle of contracts under Article 64 of the *Contract Law*, and clarifies that in a contract performed with a third party, the third party has the right to directly request the debtor to assume responsibility for breach of contract, which protects the interests of the third party. In addition, the *Civil Code* adds the third-party liquidation system under Article 524, which stipulates that where a debtor fails to perform the debt, and a third party has a lawful interest in performing the debt, the third party shall have the right to perform the obligation to the creditor on its behalf. The *Civil Code* also adds a third-party debt participation rule under Article 552, which provides a substantive legal basis for a third party to voluntarily join the legal relationship of the contract, become a party to the contract, and assume joint and several liability with the debtor to the creditor.

- **Practical Focus**

Since the *Civil Code* clearly stipulates the legal relationship between the parties involved in third-party contracts, companies involved in the three situations in the aforementioned provisions in commercial activities, especially for the debt participation situations, should pay close attention, as the legal consequences of debt participation will be that the enterprise and the debtor will jointly assume the liability for repayment.

G. Welcoming the New Rules for Factoring Contracts

- **Comparison of Provision**

Art. 761, *Civil Code*	***Contract Law***
A factoring contract is a contract by which an accounts receivable	There is no specific

creditor assigns existing or future accounts receivable to a factor, who provides financial facilities, management or collection of accounts receivable, assurance of payment from accounts receivable debtors, and other services.	provision for factoring contracts in the *Contract Law*.

- **Key Takeaways**

Before the promulgation of the *Civil Code*, the provisions on factoring business were scattered in the general principles of international factoring, judicial interpretations, departmental regulations and other documents, and considering that the factoring contract is an unnamed contract, the court will generally analyze the issues in factoring contract disputes in accordance with the relevant provisions of the transfer of claims in the *Contract Law*. This caused a certain degree of difficulty for parties to determine the legal relationships, rights and obligations. The *Civil Code* stipulates the rules of factoring contracts in detail in Chapter 16 through nine clauses, including the definition of the factoring contract, the content and form of the factoring contract, the legal consequences of fictitious receivables, the obligation of the factor to indicate its identity, the effect of changing or terminating the basic transaction contract without justifiable reasons for the factor, factoring with recourse, factoring without recourse, the order of settlement of multiple factoring and the application of the transfer of creditor's rights. Accordingly, the factoring contract has officially become a new type of typical contract in our country from an unnamed contract, which provides a legal basis for the development of factoring business and helps promote the healthy development of the industry.

- **Practical Focus**

Factoring business is an important driving force for corporate receivables financing, which can promote corporate capital turnover and alleviate the difficulty of corporate financing. On the one hand, the *Civil Code* has established a system foundation for enterprises to standardize the factoring business from the legislative level; on the other hand, it has strengthened the role of using legal means to protect the rights and interests of enterprises.

II. Part on Rights *in Rem*

A. Providing Right of Recourse for Mortgage

- **Comparison of Provision**

Art. 406, *Civil Code*	**Art. 191, *Property Law***
The mortgagor may transfer the mortgaged property during the mortgage term. If it is otherwise agreed upon by the parties, their agreement shall prevail. A Mortgage is not affected if the mortgaged property is transferred. The mortgagor that transfers the mortgaged property shall notify the mortgagee in a timely manner. If the mortgagee is able to prove that the mortgage may be damaged due to the transfer of the mortgaged property, the mortgagee may request the mortgagor to pay off the debt with the proceeds obtained from such transfer to the mortgagee in advance or set aside the proceeds. The part of the proceeds obtained from the transfer exceeding the amount of claim shall belong to the mortgagor, and if the proceeds are insufficient to pay the debt, the shortfall shall be paid off by the debtor.	In case a mortgagor transfers a property under mortgage during the mortgage term upon consent of the mortgagee, the mortgagor shall pay off its debts to the mortgagee with the money incurred from the transfer in advance or submit the said money to a competent authority for keeping. The value exceeding the obligee's rights shall belong to the mortgagor, and the gap shall be paid off by the obligor. A mortgagor shall not transfer a property under mortgage during the mortgage term without the mortgagee's consent, unless the transferee pays off the debts on its behalf so as to eliminate the right to mortgage.

- **Key Takeaways**

Allowing the transfer of collateral and granting the right of recourse for the mortgagee under Article 406 of the *Civil Code* is an important change to the existing Article 191 of the *Property Law*. According to the *Civil Code*, the transfer of collateral no longer requires the prior consent of the mortgagee, and the mortgagee's mortgage

right is not affected by the transfer of the collateral. This has changed the long-lasting rules in our country to protect the mortgagee by restricting the transfer of collateral and is more in line with the legal principles of the security rights. In addition, if the mortgagee is able to prove that a mortgage may be damaged due to the transfer of the mortgaged property, according to the *Civil Code*, the mortgagee may request the mortgagor to pay off the debt with the proceeds obtained from such transfer to the mortgagee in advance or set aside the proceeds. The part of the proceeds obtained from transfer exceeding the amount of claim shall belong to the mortgagor, and if the proceeds are insufficient to pay the debt, the shortfall shall be paid off by the debtor. This provision provides better protection for the interests of the mortgagee.

- **Practical Focus**

Companies often encounter real estate mortgages and transfers in their financing, acquisitions and asset transactions. Keeping abreast of relevant mortgage laws and regulations helps companies better protect their rights and interests.

B. Including Future Property in the Scope of Guarantee

- **Comparison of Provision**

Art. 396 & 440, *Civil Code*	**Art. 181 & 223, *Property Law***
- Article 396: An enterprise, industrial and commercial household, or agricultural producer or trader may mortgage its existing and anticipated production equipment, raw materials, semi-finished products, and products, and if the debtor fails to pay the due debt or falls under any circumstance where mortgage shall be exercised as agreed upon by the parties, the creditor shall have the priority of compensation made with the movable determined as the mortgaged property. - Article 440: The following rights that the debtor or a third party is entitled to dispose of may be pledged: … (6) Existing and anticipated accounts receivable.	- Article 181: Upon the written agreement between the parties concerned, an enterprise, individual industrial and commercial household or agricultural production operator may mortgage the manufacturing facilities, raw materials, semi-manufactured goods and products it has already owned or is going to own, and when the obligor fails to pay their due debts or any circumstance for realizing the right to mortgage as stipulated by the parties concerned occurs, the obligee shall be entitled to seek preferred payments from the movable properties that exist when the parties concerned stipulate to realize the right to mortgage. - Article 223: The following rights which an obligor or third party has the right to dispose of may be pledged: … (6) Accounts receivable.

- **Key Takeaways**

The adjustment of the provisions of the secured property in the *Civil Code* is worthy of attention. Firstly, Articles 400 and 427 of the *Civil Code* allow a general description of the name and quantity of the secured property in the security contract, without having to enumerate the basic information in details such as the name, the quantity, the quality and the condition of the secured property as required under the *Property Law*. Secondly, Article 440 of the *Civil Code* echoes the provisions of Article 2, paragraph 1[2] of the *Measures for the Registration of the Pledge of Accounts Receivable* that the right to request payment of accounts receivable should include existing and future monetary claims, and expands the range of pledgeable accounts receivable to "existing and anticipated" accounts receivable. According to this, the *Civil Code* clearly reflects in two places that future property can be included in the scope of guarantees, that is, to allow "anticipated accounts receivable" to be pledged, and allow "existing and anticipated production equipment, raw materials, semi-finished products, and products" to be mortgaged.

[2] Article 2: For the purposes of these Measures, "accounts receivable" means the rights obtained by the rights holder to require the obligor to make payment for certain goods, services or facilities provided and other legal claims for payment, including existing and future pecuniary claims, but excluding claims for payment arising from commercial papers or other negotiable securities and claims for payment prohibited from assignment by any law or administrative regulation.

- **Practical Focus**

The state and local governments in recent years have been vigorously promoting enterprises to raise funds through pledged accounts receivable to enhance their liquidity. Since the outbreak of COVID-19 this year, in order to reduce the financing burden of enterprises and help enterprises to resume work and production, the state has also provided enterprises with preferential policies on the pledge of accounts receivable (for example, according to the *Notice of the National Development and Reform Commission on Periodic Reduction and Exemption of Certain Credit Information Service Charges* (Fa Gai Jia Ge [2020] No. 291), from March 1 to June 30, 2020, enterprises can be exempted from the charge of registration, change of registration and objection registration of accounts receivable). The timely tracking of the relevant provisions of the pledge registration of accounts receivable by companies will help companies better carry out their relevant financing business.

C. Welcome New Rules for the Priority Right of the Chattel Mortgagee over the Purchase Price of Goods

- **Comparison of Provision**

Art. 416, *Civil Code*	***Property Law***
Where the principal claim secured by mortgage on a movable is the price of the mortgaged property, and mortgage registration is undergone within 10 days after the delivery of the subject matter, the mortgagee has the priority of compensation over other security interest holders of the buyer of the mortgaged property, except the lienor.	There are no relevant provisions under the *Property Law*.

- **Key Takeaways**

The *Civil Code*, for the first time, stipulates the priority of mortgage on the purchase price of movable property in Article 416, which fills the gap in the provisions of the *Property Law* and protects the legitimate rights and interests of the seller of goods.

- **Practical Focus**

The production process of a production enterprise usually involves a large amount of goods. When the enterprise is the seller and has signed the contract for the sale of goods with a buyer, after the buyer mortgages the movable property to the seller as a guarantee for the price, and then sets up another guarantee for another creditor and performs the relevant publicity procedures for the movable property, the seller, as the guarantor to be announced later, is obviously at a disadvantage. The provisions of the *Civil Code* as mentioned above have solved this contradiction to a certain extent. In addition, the provisions under this article are of some help to the establishment of floating mortgages on the equipment, production materials and other movable assets of enterprises.

III. Part on Personality Rights

A. Clarifying the Scope of Personal Information and the Protection of Personal Information

- **Comparison of Provision**

Art. 1034 & 1035, *Civil Code*	***General Provisions of the Civil Law* & *Cybersecurity Law***
- Article 1034: The personal information of natural persons is protected by law. Personal information is various information recorded electronically or in other forms that can identify a specific natural person separately or in combination with other information, including a natural person's name, date of birth, identity card number, biological recognition information, address, telephone number, e-mail address, health information, and whereabouts information, among others. Private	- Art. 111, *General Provisions of the Civil Law*: The personal information of a natural person shall be protected by law. Any organization or individual needing to obtain the personal information of other persons shall legally obtain and ensure the security of such information, and shall not illegally collect, use, process, or transmit the personal information of other persons, nor illegally

information in personal information shall be governed by the provisions on privacy rights; where there are no provisions, the provisions on the protection of personal information shall apply. - Article 1035: The personal information of a natural person shall be handled under the principles of lawfulness, justification and necessity, shall not be excessively handled, and shall meet the following conditions: (1) With the consent of the natural person or their guardian, unless as otherwise prescribed by laws and administrative regulations. (2) The rules for publicly handling information. (3) Expressly indicating the purpose, method and scope of handling information. (4) Not violating the provisions of the laws or administrative regulations or the agreement between both parties. The handling of personal information includes the collection, storage, use, handling, transmission, provision, and disclosure, among others, of personal information.	buy, sell, provide, or publish the personal information of other persons. - Art. 76 Para. 5, *Cybersecurity Law*: "Personal information" means all kinds of information recorded in electronic or other forms, which can be used, independently or in combination with other information, to identify a natural person's personal identity, including but not limited to the natural person's name, date of birth, identity certificate number, biology-identified personal information, address and telephone number.

- **Key Takeaways**

The *Civil Code* separates the personality rights into a single part and specifically stipulates the right to privacy and protection of personal information through Chapter 6, reflecting the legislator's emphasis on citizens' privacy and personal information. The definition of personal information in Article 1034 of the *Civil Code* combines the principles of the *General Provisions of the Civil Law* and the *Cybersecurity Law*, and clarifies that personal information refers to "various information recorded electronically or in other forms that can identify a specific natural person separately or in combination with other information". The e-mail address, health information and whereabouts information are included in the scope of protection of personal information. Articles 1035 and 1036 clarify the principles and conditions to be followed when processing personal information, and the exemption grounds for processing personal information. According to the work report of the NPC Standing Committee this year [3], the "*Personal Information Protection Law*" and "*Data Security Law*" have been incorporated into the legislative plan and the progress of the introduction of special laws on personal information and data protection is expected to accelerate. In the context of the rapid development of big data, cloud computing, AI and other technologies, this will be of great significance for establishing a comprehensive personal information protection and compliance system as soon as possible and strengthening the protection of personal information rights.

- **Practical Focus**

According to the *Civil Code*, if an enterprise needs to collect the personal information of its employees in its business activities, even if the relevant information does not constitute the employee's private information, it should also comply with the principles of lawfulness, justification and necessity under Article 1035 of the *Civil Code*, and such collection should be agreed to by the employees. In addition, an enterprise shall have the obligation to ensure the safety of an employee's personal information. When processing the collected employee information, the enterprise shall not disclose or tamper with any personal information collected or stored, or illegally provide such information to any other person (except the information through which the specific individual cannot be identified after processing and which cannot be restored). This will put forward higher requirements for the enterprise to properly preserve employee

[3] See the Beijing News dated May 25, 2020 (https://baijiahao.baidu.com/s?id=1667648951079014119&wfr=spider&for=pc).

personal information in business activities, improve employee information management rules, and pay attention to information desensitization when using employee information.

B. Clarifying the Company's Obligation to Prevent and Stop Sexual Harassment

- **Comparison of Provision**

Art. 1010, ***Civil Code***	**Art. 11,** ***Special Rules on the Labor Protection of Female Employees***
In the event of sexual harassment against another person by words, character, images, or physical acts, the victim has the right to request the mitigator to assume civil liability according to the law. Bodies, enterprises, schools and other entities shall take reasonable measures for the prevention, acceptance of complaints, investigation and handling, so as to prevent and stop sexual harassment conducted by violators by making use of their powers and affiliation relationships.	Employers shall prevent and prohibit the sexual harassment of female employees in their workplace.

- **Key Takeaways**

The provisions on sexual harassment in our country were previously distributed in the *Criminal Law*, the *Law on the Protection of Women's Rights and Interests*, and the *Special Rules on the Labor Protection of Female Employees*, which mainly emphasized the prohibition of sexual harassment against women. The *Civil Code* replaces the expression "women" with "another person" and expands the scope of sexual harassment objects between the same sex and the opposite sex. In addition, the *Civil Code* stipulates that bodies, enterprises, schools and other entities have the obligation to prevent and cease sexual harassment and shall take reasonable measures of prevention, the acceptance of complaints, investigation and handling, which strengthens the responsibilities of bodies, enterprises and schools.

- **Practical Focus**

It is recommended that enterprises should improve the rules and regulations related to sexual harassment, internal compliance systems, employee manuals, etc., as well as the handling mechanisms for sexual harassment in accordance with the requirements of the *Civil Code*, to effectively protect the interests of employees. Otherwise, if the enterprise does not take reasonable measures of prevention, the acceptance of complaints, investigation etc., it may need to bear corresponding responsibilities.

IV. Part on Tort Liability

A. Welcoming New Rules for Punishment Compensation for Ecological Environment Infringement, Environmental Restoration Responsibility and Compensation Systems

- **Comparison of Provision**

Art. 1232 to Art. 1235, ***Civil Code***	***Tort Law***
- Article 1232: Where a tortfeasor violates the provisions issued by the state and causes environmental pollution or ecological damage, resulting in serious consequences, the victim shall have the right to claim corresponding punitive compensation. - Article 1234: Where a violation of the provisions issued by the state causes harm to the ecology and environment, and the ecology and environment are capable of remediation, the authority specified by the state or the organization specified by law shall have the right to require the tortfeasor to assume the liability for remediation within a reasonable time limit. If the tortfeasor fails to do so, the authority specified by the state or the organization specified by law may conduct remediation by itself or by entrusting others at the expense of the tortfeasor.	- The *Tort Law* does not clearly stipulate that punitive damages can be applied for ecological environment infringement. - The current law does not clearly stipulate the system of environmental restoration responsibility and environmental compensation.

- Article 1235: Where a violation of the provisions issued by the state causes harm to the ecology and environment, the authority specified by the state or the organization specified by law shall have the right to require the tortfeasor to make compensation for the following: (1) The loss resulting from the privation of service functions from the time when damage is caused to the ecology and environment to the completion of remediation. (2) The loss resulting from permanent damage to the ecological and environmental functions. (3) Expenses of investigation, authentication, and assessment of ecological and environmental damage. (4) Expenses of pollution removal and ecological and environmental remediation. (5) Reasonable expenses incurred to prevent the occurrence and aggravation of damage.	

- **Key Takeaways**

The *Civil Code*, for the first time, stipulates that punitive damages will be applied to infringements that intentionally pollute the environment and damage the ecology, which is a breakthrough in the existing law. However, the specific scope of the amount of punitive damages has not been mentioned in the *Civil Code* and still needs to be further clarified by the laws. The content of the environmental restoration obligation and environmental compensation liability of the infringer was previously mainly stipulated in some judicial interpretations (for example, Article 11[4] and Article 12[5] of *Several Provisions of the Supreme People's Court on the Trial of Cases on Compensation for Damage to the Ecological Environment*; Article 19[6] of *Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Conduct of Environmental Civil Public Interest Litigations*). The *Civil Code* clearly gives the authority specified by the state or the organization specified by law the right to claim compensation and the legal right to request the infringer to repair the ecological environment, providing a substantive legal basis for environmental public interest relief.

- **Practical Focus**

With the continual strengthening of environmental governance in our country, and after the effect of the *Civil Code*, infringers who deliberately damage the environment will be held accountable with the strictest punitive damages. This will also provide a powerful legal guarantee for authorities with regulatory responsibilities when they supervise enterprises and file corresponding environmental compensation or public interest litigation. Enterprises should pay more attention to environmental compliance in the production and construction process to avoid unnecessary civil, administrative and even criminal liability.

B. Applying Punitive Damage Rules to Violations of Intellectual Property Rights

- **Comparison of Provision**

Art. 1185, *Civil Code*	**Art. 63 Para. 1, *Trademark Law***

[4] Article 11: Where the defendant pollutes the environment and destroys the ecology in violation of any law or regulation, the people's court shall, according to the plaintiff's claim and specific case circumstances, reasonably render a judgment on the defendant's civil liability for restoring the ecological environment, compensating for the loss, ceasing the infringement, removing the obstruction, eliminating the danger, and extending a formal apology, among others.

[5] Article 12: Where the damaged ecological environment can be restored, the people's court shall, in accordance with the law, render a judgment that the defendant shall assume the restoration liability, and at the same time, determine the ecological environment restoration expenses that the defendant shall bear when it fails to perform the restoration obligation. The ecological environment restoration expenses include the expenses of making and implementing the restoration plan, the expenses of monitoring and supervision during the restoration period, the acceptance check expenses after the completion of restoration, and the expenses for the post-assessment of restoration effects, among others. Where the plaintiff requests the defendant's compensation for damage to the service function from the period when the ecological environment is damaged to the completion of restoration, the people's court shall render a judgment according to the specific case circumstances.

[6] Article 19: Where, for the purpose of preventing the occurrence and enlargement of damage to the ecological environment, the plaintiff requests the defendant to cease the tortious act, remove the obstruction, and eliminate the danger, the people's court may support such a request in accordance with the law. Where the plaintiff requests the defendant to assume the expenses incurred for taking reasonable prevention and disposal measures so as to cease the tortious act, remove the obstruction and eliminate the danger, the people's court may support such a request in accordance with the law.

Where any harm caused intentionally by a tort to the intellectual property rights of another person has serious circumstances, the victim of the tort shall have the right to request corresponding punitive damages.	The amount of damages for infringement upon the right to exclusively use a registered trademark shall be determined according to the actual losses suffered by the rights holder from the infringement; where it is difficult to determine the amount of actual losses, the amount of damages may be determined according to the benefits acquired by the infringer from the infringement; where it is difficult to determine the rights holder's losses or the benefits acquired by the infringer, the amount of damages may be a reasonable multiple of the royalties. If the infringement is committed in bad faith with serious circumstances, the amount of damages shall be the amount, but not more than five times the amount, determined in the aforesaid method. The amount of damages shall include reasonable expenses of the rights holder for stopping the infringement.

- **Key Takeaways**

On November 24, 2019, the General Office of the CPC Central Committee and the General Office of the State Council issued the *Opinions on Strengthening the Protection of Intellectual Property Rights*, which pointed out that "the establishment of a punitive damage system for infringement of patents and copyrights shall be quickened. The upper limit of statutory compensation for infringement shall be raised significantly, and the compensation for damages shall be increased". Under such a policy orientation, the *Civil Code* has formally established unified general legal rules for punitive damages infringing intellectual property rights in Article 1185, which has raised the legislative level of intellectual property protection. The country has only introduced a punitive compensation mechanism in Article 63 of the *Trademark Law* for malicious infringement of trademark exclusive rights and incorporated punitive damages into the disciplinary measures for malicious violations of trade secrets in Article 17, paragraph 3[7] of the *Anti-Unfair Competition Law*. At present, the revised drafts of the *Patent Law* and the *Copyright Law* have not been formally released, but judging from the published draft amendments, punitive damages will also apply to acts of intentional infringement of patent rights and copyrights.

- **Practical Focus**

Ways to avoid the risk whereby an enterprise may infringe the intellectual property rights of others in the course of business operations and how to prevent the risk that the enterprise's own intellectual property rights are infringed by others due to loopholes in its own management system are important components of the establishing of an enterprise's intellectual property compliance system. After the establishment of general rules on punitive damages to intellectual property rights, the cost of an infringement of intellectual property rights by infringers will be greatly increased, and the consequences of infringement will be more serious. This requires the management of the company to increase its emphasis on the ability to effectively protect intellectual property rights and to prevent risks.

C. Bearing Necessary Expenses of Infringed Persons When Recalling Defective Products

- **Comparison of Provision**

Art. 1206, *Civil Code*	**Art. 46, *Tort Law***
Where any defect of a product is found after the product is put into circulation, the manufacturer or seller shall take such remedial measures as ceasing sale, warning and	Where any defect of a product is found after the product is put into circulation, the manufacturer or seller shall take

[7] Article 17, paragraph 3: The amount of compensation for the damage caused to a business by any act of unfair competition shall be determined as per the actual loss of the business incurred for the infringement or if it is difficult to calculate the actual loss, as per the benefits acquired by the tortfeasor from the infringement. If a business infringes upon a trade secret in bad faith with serious circumstances, the amount of compensation may be determined to be more than one time but not more than five times the amount determined by the aforesaid method. The amount of compensation shall also include reasonable disbursements made by the business to prevent the infringement.

recall in a timely manner; and the manufacturer or seller who fails to take remedial measures in a timely manner or take sufficient and effective measures and has caused the aggravation of any harm, shall also assume the tort liability for the aggravation. Where recall measures are taken in accordance with the preceding paragraph, the manufacturer or seller shall bear the necessary expenses incurred by the victim.	such remedial measures as warning and recall in a timely manner. The manufacturer or seller who fails to take remedial measures in a timely manner or take sufficient and effective measures and has caused any harm, shall assume the tort liability.

- **Key Takeaways**

On the basis of the existing *Tort Law*, the *Civil Code* adds a remedy of "ceasing sale" for defective products, and adds a rule that the necessary costs incurred by the infringer in the recall of defective products shall be borne by the producer and seller. This amendment improves the recall system for defective products and strengthens the protection of consumer rights.

- **Practical Focus**

In the context of the increasingly effective system for recalling defective products in regulations such as the *Civil Code* and the *Interim Provisions on the Administration of Recall of Consumer Goods* issued by the State Administration for Market Regulation on November 21, 2019 and effective on January 1, 2020, production enterprises should strengthen their control of product quality to avoid adversely affecting their operations due to product problems.

V. Conclusion

After the implementation of the *Civil Code* next year, the country's civil rights protection will officially enter the era of "code". The important amendments of the *Civil Code* and its improvement of the existing laws and regulations are not limited to the foregoing. We hereby only share several key points that we believe will have a great impact on an enterprise. We will, according to specific needs, carry out in-depth research to provide targeted services for an enterprise.

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君合专题研究报告 JUNHE

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企业客户视野下应关注的民法典修订要点

前言

*2020年5月28日，第十三届全国人民代表大会第三次会议表决通过了《中华人民共和国民法典》（以下简称"**《民法典》**"），自2021年1月1日起正式施行。《民法典》是我国第一部以"典"命名的法律，被誉为公民"民事权利的宣言书和保障书"。《民法典》共七编、1260条，包括总则编、物权编、合同编、人格权编、婚姻家庭编、继承编、侵权责任编以及附则，其中既是对《民法总则》、《物权法》、《合同法》等现行法律及司法解释的继承与整合，也体现了立法者对当前法律制度及法律体系中一些缺陷或立法空白进行的反思与重构。*

本篇专题文章我们将聚焦对企业一般经营活动影响相对较大的《民法典》中合同编、物权编、人格权编及侵权责任编涉及的内容，对照新旧法律规定，为企业客户在商事活动中应重点关注的民法典新增及对现有法律做出修订的内容进行介绍。

一、合同编

（一） 明确预约合同效力

- **法规对比**

《民法典》第 495 条	《买卖合同司法解释》第 2 条
当事人约定在将来一定期限内订立合同的认购书、订购书、预订书等，构成预约合同。当事人一方不履行预约合同约定的订立合同义务的，对方可以请求其承担预约合同的违约责任。	当事人签订认购书、订购书、预订书、意向书、备忘录等预约合同，约定在将来一定期限内订立买卖合同，一方不履行订立买卖合同的义务，对方请求其承担预约合同违约责任或者要求解除预约合同并主张损害赔偿的，人民法院应予支持。

- **修改要点**

预约合同此前主要规定在最高人民法院《关于审理买卖合同纠纷案件适用法律问题的解释》（法释〔2012〕8 号）（简称"**《买卖合同司法解释》**"）中，本次将预约合同作为新增条款收录在《民法典》中，确认了预约合同的合同效力，扩大预约合同的适用范围，有助于明确交易主体之间的法律关系。

- **对企业商事活动的意义**

企业在设备采购、业务合作、投资、并购等商事活动中经常涉及签署意向书、框架协议等情况，在企业签署相应文件前，应首先明确其签署的是一份不具有约束力的磋商性文件，还是一份具有效力的预约合同，进而进行相关条款的设计。在签署预约合同后，由于违反合同项下义务将承担相应违约责任，企业应加强履约意识。关于守约一方在违约方违反预约合同约定后，是否有权要求违约方继续履行合同、缔结本约的问题在《民法典》中未予明确，合同是否能够继续履行需在实践中结合具体案情进行判断。

（二） 强调格式合同的说明义务

- **法规对比**

《民法典》第 496 条	《合同法》第 39 条
格式条款是当事人为了重复使用而预先拟定，并在订立合同时未与对方协商的条款。采用格式条款订立合同的，提供格式条款的一方应当遵循公平原则确定当事人之间的权利和义务，并采取合理的方式提示对方注意免除或者减轻其责任等与对方有	采用格式条款订立合同的，提供格式条款的一方应当遵循公平原则确定当事人之间的权利和义务，并采取合理的方式提请对方注意免除或者限制其责任的条款，按照对方的

重大利害关系的条款，按照对方的要求，对该条款予以说明。提供格式条款的一方未履行提示或者说明义务，致使对方没有注意或者理解与其有重大利害关系的条款的，对方可以主张该条款不成为合同的内容。	要求，对该条款予以说明。格式条款是当事人为了重复使用而预先拟定，并在订立合同时未与对方协商的条款。

- **修改要点**

《民法典》在格式合同的规定上借鉴了《消费者权益保护法》中保护消费者的精神（见《消费者权益保护法》第二十六条），一是进一步强化提供格式条款一方的提示说明义务，加强对接受格式条款一方的保护。首先，本条扩大了提示说明义务的范围。《合同法》所规定的提供格式条款一方的提示说明义务的范围为免除或者限制其责任的条款，《民法典》第 496 条第 2 款在此基础上，增加了“与接受格式条款一方有重大利害关系”的条款。其次，对于未履行提示说明义务的法律后果作出了更有利于接受格式条款一方的规定。《合同法》对未履行提示说明义务的法律后果未作规定。最高人民法院《关于适用〈中华人民共和国合同法〉若干问题的解释（二）》（法释〔2009〕5 号）（以下简称“**《合同法司法解释（二）》**”）第九条规定，提供格式条款的一方未尽提示说明义务，导致对方没有注意相关条款，对方可以申请撤销该格式条款。《民法典》第 496 条第 2 款则进一步规定，此种情形下，接受格式条款的一方可以主张该条款不成为合同的内容。 二是本条细化了格式条款无效的情形。《合同法》第 40 条规定，格式条款具有本法第 52 条和第 53 条规定情形的，或者提供格式条款一方免除其责任、加重对方责任、排除对方主要权利的，该条款无效。《民法典》第 497 条分三项对格式条款无效的情形进行罗列。其中第二项规定，提供格式条款的一方不合理地免除或者减轻其责任、加重对方责任、限制对方主要权利的，该格式条款无效。相较于《合同法》的规定，《民法典》中增加了提供格式条款一方减轻其责任、限制对方主要权利的情形，同时对于此类情形以“不合理”作为限定条件。

- **对企业商事活动的意义**

生产和服务类企业在日常经营活动中为了提高效率和保证规范化操作，经常会拟定各类的格式合同，并通常会通过字体加粗、标记下划线等形式提请对方注意其产品或者服务的价格、履行期限、风险警示、售后、民事责任等与对方有重大利害关系的条款。在《民法典》明确加强对接受格式条款一方的保护的背景下，企业应更加关注对条款接收方的提示和说明义务，以避免相关条款在效力认定上可能引发的争议。

（三） 保证合同的一般保证责任推定

- **法规对比**

《民法典》第 686 条、第 687 条	**《担保法》第 16 条、第 19 条**
第 686 条：保证的方式包括一般保证和连带责任保证。当事人在保证合同中对保证方式没有约定或者约定不明确的，按照一般保证承担保证责任。 第 687 条第 1 款：当事人在保证合同中约定，债务人不能履行债务时，由保证人承担保证责任的，为一般保证。	第 16 条：保证的方式有：（一）一般保证；（二）连带责任保证。 第 19 条：当事人对保证方式没有约定或者约定不明确的，按照连带责任保证承担保证责任。

- **修改要点**

《民法典》改变了一直以来《担保法》中的连带保证责任推定规则，将当事人在保证合同中对保证方式约定不明时的连带责任推定修改为一般责任推定，这在一定程度上减轻了保证人的负担。此外，《民法典》中对于保证人的追偿权、保证人先诉抗辩权的除外事由、诉讼时效起算时点等规则均进行了一定调整，需要重点关注。

- **对企业商事活动的意义**

根据《民法典》第 687 及第 688 条的规定，“一般保证”指的是当事人在保证合同中约定当债务人不能履行债务时，由保证人承担的保证责任，而“连带责任保证”是指根据保证合同约定，保证人在债务人不履行债务时与债务人承担连带责任的保证。二者最主要的区别在于保证人是否拥有先诉抗辩权，即保证人在主合同纠纷未经审判或者仲裁，并

就债务人财产依法强制执行仍不能履行债务前，是否“有权拒绝向债权人承担保证责任”，此外一般保证和连带保证在保证人履行保证义务的起始时间、诉讼地位、诉讼时效期间的起算时间等规则上均有不同，建议企业在签署保证合同（尤其是作为债权人签署保证合同）时，应重点关注保证方式，避免在出现保证方式未做约定或约定不明情况下对企业造成不利局面。

（四） 调整情势变更原则的定义

- **法规对比**

《民法典》第 533 条	《合同法司法解释(二)》第 26 条
合同成立后，合同的基础条件发生了当事人在订立合同时无法预见的、不属于商业风险的重大变化，继续履行合同对于当事人一方明显不公平的，受不利影响的当事人可以与对方重新协商；在合理期限内协商不成的，当事人可以请求人民法院或者仲裁机构变更或者解除合同。人民法院或者仲裁机构应当结合案件的实际情况，根据公平原则变更或者解除合同。	合同成立以后客观情况发生了当事人在订立合同时无法预见的、非不可抗力造成的不属于商业风险的重大变化，继续履行合同对于一方当事人明显不公平或者不能实现合同目的，当事人请求人民法院变更或者解除合同的，人民法院应当根据公平原则，并结合案件的实际情况确定是否变更或者解除。

- **修改要点**

情势变更原则此前规定在《合同法司法解释（二）》中，本次将该部分司法解释的内容规定在《民法典》中，使情势变更原则正式在法律层级得到确立。与《合同法司法解释（二）》中的定义有所区别的是，《民法典》删除了情势变更中“非不可抗力造成”的前置要素，明确了不可抗力事件可适用情势变更的原则，此外《民法典》中新增了仲裁机构作为确认情势变更的主体之一。

- **对企业商事活动的意义**

在今年年初新冠疫情爆发的背景下，不可抗力事件是否可以适用情势变更原则一直是近几个月法律界热烈讨论的话题之一。根据《合同法司法解释（二）》的原有定义，合同订立后所发生的重大变化应是“非不可抗力造成”的，这导致某些因新冠疫情导致继续履行合同将发生明显不公的一方合同当事人在无法主张不可抗力原则进行免责的情况下，亦无法适用情势变更原则向法院主张变更或者解除合同。《民法典》本次的修改意在解决上述矛盾，具有现实意义，也为企业客户为解决疫情导致的纠纷提供了更为明确的依据。

（五） 确认涉及审批义务的合同效力

- **法规对比**

《民法典》第 502 条第 2 款	《外商投资企业纠纷司法解释》第 1 条
依照法律、行政法规的规定，合同应当办理批准等手续的，依照其规定。未办理批准等手续影响合同生效的，不影响合同中履行报批等义务条款以及相关条款的效力。应当办理申请批准等手续的当事人未履行义务的，对方可以请求其承担违反该义务的责任。	当事人在外商投资企业设立、变更等过程中订立的合同，依法律、行政法规的规定应当经外商投资企业审批机关批准后才生效的，自批准之日起生效；未经批准的，人民法院应当认定该合同未生效。当事人请求确认该合同无效的，人民法院不予支持。前款所述合同因未经批准而被认定未生效的，不影响合同中当事人履行报批义务条款及因该报批义务而设定的相关条款的效力。

- **修改要点**

针对需前置批准的合同的效力认定问题，《民法典》第 502 条承继了最高人民法院《关于审理外商投资企业纠纷案件若干问题的规定（一）》（法释〔2010〕9 号）第 1 条第 2 款中肯定报批义务条款与其他条款效力的独立性的立场，明确了未办理批准等手续影响合同生效的，不影响合同中履行报批等义务条款以及相关条款的效力。此外，《合同法司法解释（二）》第 8 条[1]将违反报批义务的法律后果归结为缔约过失责任，权利人只能要求赔偿相应损失，

[1] 第八条：依照法律、行政法规的规定经批准或者登记才能生效的合同成立后，有义务办理申请批准或者申请登记等手续的一方当事人未按照法律规定或者合同约定办理申请批准或者未申请登记的，属于合同法第四十二条第（三）项规定的“其他违背诚实信用原则的行为”，人民法院可以根据案件的具体情况和相对人的请求，判决相对人自己办理有关手续；对方当事人对由此产生的费用和给相对人造成的实际损失，应当承担损害赔偿责任。

但本次《民法典》的规定“应当办理申请批准等手续的当事人未履行义务的，对方可以请求其承担违反该义务的责任”，实质上是将违反报批义务的法律救济构筑在违约责任的基础上，这将更加利于保护当事人的合法权益。

- **对企业商事活动的意义**

企业间的商事活动中，一些业务或投资合同需要经过政府批准才正式生效，《民法典》对报批义务及相关合同条款的效力认可能够有效避免实践中因合同未生效，报批义务人怠于履行报批义务从而可能引发的争议。

（六） 完善向第三人履行合同、新增第三人清偿和债务加入规则

- **法规对比**

《民法典》第 522 条至第 524 条，第 552 条	《合同法》
第 522 条：当事人约定由债务人向第三人履行债务，债务人未向第三人履行债务或者履行债务不符合约定的，应当向债权人承担违约责任。法律规定或者当事人约定第三人可以直接请求债务人向其履行债务，第三人未在合理期限内明确拒绝，债务人未向第三人履行债务或者履行债务不符合约定的，第三人可以请求债务人承担违约责任；债务人对债权人的抗辩，可以向第三人主张。 第 523 条：当事人约定由第三人向债权人履行债务，第三人不履行债务或者履行债务不符合约定的，债务人应当向债权人承担违约责任。 第 524 条:债务人不履行债务，第三人对履行该债务具有合法利益的，第三人有权向债权人代为履行；但是，根据债务性质、按照当事人约定或者依照法律规定只能由债务人履行的除外。债权人接受第三人履行后，其对债务人的债权转让给第三人，但是债务人和第三人另有约定的除外。 第 552 条：第三人与债务人约定加入债务并通知债权人，或者第三人向债权人表示愿意加入债务，债权人未在合理期限内明确拒绝的，债权人可以请求第三人在其愿意承担的债务范围内和债务人承担连带债务。	第 64 条：当事人约定由债务人向第三人履行债务的，债务人未向第三人履行债务或者履行债务不符合约定，应当向债权人承担违约责任。 《合同法》中对债务加入及利益第三人清偿尚无明确规定。

- **修改要点**

《民法典》对于涉他合同的规定在一定程度上突破了《合同法》第 64 条项下合同的“相对性”原则，明确了在向第三人履行的合同中，第三人有权直接请求债务人承担违约责任，保护了第三人利益。此外，《民法典》在第 524 条项下新增第三人清偿制度，规定债务人不履行债务，第三人对履行该债务具有合法利益的，第三人有权向债权人代为履行。在第 552 条项下新增第三人债务加入规则，为第三人自愿加入债权债务关系之中，成为合同当事人，与债务人共同向债权人承担连带责任提供了实体法依据。

- **对企业商事活动的意义**

由于《民法典》本次明确规定了涉他合同当事人之间法律关系的相关内容，企业在商事活动中如涉及前述三种情形的，尤其是对于新增的债务加入规定中的情形，应高度关注，因企业债务加入法律后果将是与债务人一并承担连带清偿责任。

（七） 新增保理合同类型

- **法规对比**

《民法典》第 761 条	《合同法》
保理合同是应收账款债权人将现有的或者将有的应收账款转让给保理人，保理人提供资金融通、应收账款管理或者催收、应收账款债务人付款担保等服务的合同。	《合同法》中未就保理合同作专门规定。

- **修改要点**

在《民法典》出台之前，关于保理业务的规定散见于国际保理相关通则、司法解释、部门规章等

文件之中，且由于保理合同属无名合同，法院一般依据《合同法》中债权转让相关规定审理保理合同纠纷中的问题，这对保理法律关系、权利义务的确定造成了一定程度的困难。《民法典》本次在第十六章设置九个条款专章规定了保理合同，包括保理合同的定义、内容与形式、虚构应收账款的法律后果、保理人表明身份义务、无正当理由变更或者终止基础交易合同行为对保理人的效力、有追索权保理、无追索权保理、多重保理的清偿顺序以及适用债权转让规定。至此保理合同从无名合同身份正式成为我国的一项新增的典型合同类型，为保理业务的发展提供了法律依据，有助于推动该行业的健康发展。

- **对企业商事活动的意义**

保理业务是企业应收账款融资的重要推动力，可促进企业资金周转，缓解企业融资难的问题。《民法典》一方面为企业规范开展保理业务从立法层面搭建了制度基础，另一方面也能够更好地用法律手段保障企业自身的权益。

二、物权编

（一） 赋予抵押权追及效力

- **法规对比**

《民法典》第 406 条	《物权法》第 191 条
抵押期间，抵押人可以转让抵押财产。当事人另有约定的，按照其约定。抵押财产转让的，抵押权不受影响。抵押人转让抵押财产的，应当及时通知抵押权人。抵押权人能够证明抵押财产转让可能损害抵押权的，可以请求抵押人将转让所得的价款向抵押权人提前清偿债务或者提存。转让的价款超过债权数额的部分归抵押人所有，不足部分由债务人清偿。	抵押期间，抵押人经抵押权人同意转让抵押财产的，应当将转让所得的价款向抵押权人提前清偿债务或者提存。转让的价款超过债权数额的部分归抵押人所有，不足部分由债务人清偿。抵押期间，抵押人未经抵押权人同意，不得转让抵押财产，但受让人代为清偿债务消灭抵押权的除外。

- **修改要点**

《民法典》第 406 条所规定的允许抵押物交易流转并赋予的抵押权人追及效力，是对现有《物权法》第 191 条的重要变革。在《民法典》的规定下，抵押物的转让不再必须经过抵押权人的事先同意，抵押权人的抵押权也不受抵押物转让的影响，改变了我国一直以来通过严格限制抵押物转让的方式实现对抵押权人的保护的情况，更加符合担保物权的法理规则。此外，如果抵押权人能够证明抵押财产转让可能损害抵押权的，根据《民法典》的规定，可以请求抵押人将转让所得的价款向抵押权人提前清偿债务或者提存。转让的价款超过债权数额的部分归抵押人所有，不足部分由债务人清偿。该规定对抵押权人的利益进行了更好的保护。

- **对企业商事活动的意义**

企业在融资、收购、资产交易中往往涉及不动产抵押及转让，及时了解国家抵押相关法律规则有利于企业更好地维护自身的权益。

（二） 未来财产纳入担保范围

- **法规对比**

《民法典》第 396 条、第 440 条	《物权法》第 181 条、第 223 条
第 396 条：企业、个体工商户、农业生产经营者可以将现有的以及将有的生产设备、原材料、半成品、产品抵押，债务人不履行到期债务或者发生当事人约定的实现抵押权的情形，债权人有权就抵押财产确定时的动产优先受偿。 第 440 条：债务人或者第三人有权处分的下列权利可以出质：…（六）现有的以及将有的应收账款。	第 181 条：经当事人书面协议，企业、个体工商户、农业生产经营者可以将现有的以及将有的生产设备、原材料、半成品、产品抵押，债务人不履行到期债务或者发生当事人约定的实现抵押权的情形，债权人有权就实现抵押权时的动产优先受偿。 第 223 条：债务人或者第三人有权处分的下列权利可以出质：…（六）应收账款。

- **修改要点**

《民法典》中对于担保财产规定的调整值得关注，首先，《民法典》第 400 条及第 427 条已允许在担保合同对担保财产可以只作名称、数量情况上的概括性描述，而无需按照《物权法》规定详细列举抵（质）押财产的名称、数量、质量、状况等基本

信息。第二，《民法典》在第 440 条呼应了《应收账款质押登记办法》第二条第 1 款[2]中关于应收账款付款请求权包括现有的和未来的金钱债权的规定，将可出质的应收账款范围扩大至“现有的以及将有的”应收账款。据此，《民法典》中已在两处明确反映了未来财产可纳入了担保范围，即允许“将有的应收账款”进行出质，以及“现有的以及将有的生产设备、原材料、半成品、产品”可以进行抵押。

- **对企业商事活动的意义**

国家及各地方层面近几年一直在大力推动企业通过应收账款质押方式融资，增强企业的流动性。今年疫情爆发以来，为降低企业融资负担，助力企业复工复产，国家也为企业提供应收账款质押上的政策优惠（例如《国家发展改革委关于阶段性减免部分征信服务收费的通知》（发改价格〔2020〕291 号）中规定：自 2020 年 3 月 1 日至 2020 年 6 月 30 日免收企业应收账款质押登记、变更登记、异议登记费）。企业及时跟踪应收账款质押登记相关规定有助于企业更好地开展相关融资业务。

（三） 新增动产抵押权人对货物买卖价款的优先权

- **法规对比**

《民法典》第 416 条	《物权法》
动产抵押担保的主债权是抵押物的价款，标的物交付后十日内办理抵押登记的，该抵押权人优先于抵押物买受人的其他担保物权人受偿，但是留置权人除外。	《物权法》中并无相关规定。

- **修改要点**

《民法典》本次在第 416 条中首次对动产购买价款抵押担保的优先权进行了明确规定，填补了过去《物权法》在该领域的空白，保障了货物卖方的合法权益。

- **对企业商事活动的意义**

生产类企业的经营过程中通常涉及大量的货物买卖，在企业作为卖方时，如买卖双方在货物买卖合同签署后，买受人在将动产抵押给出卖人作为价款担保后，又在办理抵押登记之前就该动产为其他债权人设置了担保物权且履行了公示手续，那么出卖人作为在后公示的担保物权人将处于不利地位，《民法典》的上述规定一定程度上解决了这个矛盾。此外，本条规定对于企业机器设备、生产原料等动产设置浮动抵押有一定帮助。

三、人格权编

（一） 明确个人信息范畴及个人信息保护

- **法规对比**

《民法典》第 1034 条&第 1035 条	《民法总则》&《网络安全法》
第 1034 条：自然人的个人信息受法律保护。个人信息是以电子或者其他方式记录的能够单独或者与其他信息结合识别特定自然人的各种信息，包括自然人的姓名、出生日期、身份证件号码、生物识别信息、住址、电话号码、电子邮箱、健康信息、行踪信息等。个人信息中的私密信息，适用有关隐私权的规定；没有规定的，适用有关个人信息保护的规定。 第 1035 条：处理个人信息的，应当遵循合法、正当、必要原则，不得过度处理，并符合下列条件：（一）征得该自然人或者其监护人同意，但是法律、行政法规另有规定的除外；（二）公开处理信息的规则；（三）明示处理信息的目的、方式和范围；（四）不违反法律、行政法规的规定和双方的约定。个人信息的处理包括个人信息的收集、存储、使用、加工、传输、提供、公开等。	《民法总则》第 111 条：自然人的个人信息受法律保护。任何组织和个人需要获取他人个人信息的，应当依法取得并确保信息安全，不得非法收集、使用、加工、传输他人个人信息，不得非法买卖、提供或者公开他人个人信息。 《网络安全法》第 76 条第 5 项：个人信息，是指以电子或者其他方式记录的能够单独或者与其他信息结合识别自然人个人身份的各种信息，包括但不限于自然人的姓名、出生日期、身份证件号码、个人生物识别信息、住址、电话号码等。

- **修改要点**

《民法典》中人格权独立成编且通过第六章专

[2] 第二条：本办法所称应收账款是指权利人因提供一定的货物、服务或设施而获得的要求义务人付款的权利以及依法享有的其他付款请求权，包括现有的和未来的金钱债权，但不包括因票据或其他有价证券而产生的付款请求权，以及法律、行政法规禁止转让的付款请求权。

章规定了隐私权及个人信息保护，体现了立法者对公民隐私及个人信息的重视。《民法典》在第 1034 条对个人信息的界定结合了《民法通则》及《网络安全法》的原则，明确了个人信息是指“以电子或者其他方式记录的能够单独或者与其他信息结合识别特定自然人的各种信息”，并将电子邮箱、健康信息和行踪信息等均纳入个人信息的保护范畴。在第 1035 条和第 1036 条明确了处理个人信息应遵循的原则和条件，以及处理个人信息的免责事由。根据今年全国人民代表大会常务委员会工作报告[3]，《个人信息保护法》、《数据安全法》已纳入立法计划，个人信息、数据保护方面的专项法律的出台进度有望进入加速状态，在当前大数据、云计算、AI 等技术迅猛发展的背景下尽快建立全面的个人信息保护合规体系，加强维护个人信息权利将具有重要意义。

- **对企业商事活动的意义**

根据《民法典》的规定，企业在经营活动中如需搜集其员工个人信息的，即使相关信息并不构成员工的隐私信息，也应遵循《民法典》第 1035 条中合法、正当、必要的原则，并应经员工同意。此外，企业负有保障员工个人信息安全的义务，在处理所收集的员工信息时不得泄露、篡改或者向他人非法提供员工的相关个人信息（除非是经过加工无法识别特定个人且不能复原的信息），这将对企业在经营活动中妥善保存员工个人信息、完善员工信息管理规则、使用员工信息时注重信息的脱敏化处理等环节提出了更高的要求。

（二） 明确企业防止和制止性骚扰的义务

- **法规对比**

《民法典》第 1010 条	《女职工劳动保护特别规定》第 11 条
违背他人意愿，以言语、文字、图像、肢体行为等方式对他人实施性骚扰的，受害人有权依法请求行为人承担民事责任。机关、企业、学校等单位应当采取合理的预防、受理投诉、调查处置等措施，防止和制止利用职权、从属关系等实施性骚扰。	在劳动场所，用人单位应当预防和制止对女职工的性骚扰。

[3] 见新京报 5 月 25 日新闻（链接：https://baijiahao.baidu.com/s?id=1667648951079014119&wfr=spider&for=pc）。

- **修改要点**

我国关于性骚扰的规定此前主要分布在《刑法》、《妇女权益保障法》、《女职工劳动保护特别规定》等规定中，其中主要强调禁止对妇女实施性骚扰。《民法典》将“妇女”替换为“他人”的表述，将性骚扰对象的范围扩大到同性、异性之间。此外，《民法典》明确机关、企业、学校等单位有预防和制止性骚扰的义务，强制要求单位采取合理的预防、受理投诉、调查处置等措施，强化了机关、企业、学校的主体责任。

- **对企业商事活动的意义**

建议企业按照《民法典》的要求，完善与性骚扰相关的规章制度、内部合规制度、员工手册等以及针对出现性骚扰情况的处理机制，切实保护劳动者利益，否则如企业并未采取合理的预防、受理投诉、调查处置等措施，可能需承担相应责任。

四、侵权编

（一） 新增生态环境侵权的惩罚性赔偿、环境修复责任及赔偿制度

- **法规对比**

《民法典》第 1232 条至第 1235 条	《侵权责任法》
第 1232 条：侵权人违反法律规定故意污染环境、破坏生态造成严重后果的，被侵权人有权请求相应的惩罚性赔偿。 第 1234 条：违反国家规定造成生态环境损害，生态环境能够修复的，国家规定的机关或者法律规定的组织有权请求侵权人在合理期限内承担修复责任。侵权人在期限内未修复的，国家规定的机关或者法律规定的组织可以自行或者委托他人进行修复，所需费用由侵权人负担。 第 1235 条：违反国家规定造成生态环境损害的，国家规定的机关或者法律规定的组织有权请求侵权人赔	《侵权责任法》中并未明确规定生态环境侵权适用惩罚性赔偿。 当前法律中并未明确规定环境修复责任及环境赔偿制度。

偿下列损失和费用：（一）生态环境受到损害至修复完成期间服务功能丧失导致的损失；（二）生态环境功能永久性损害造成的损失；（三）生态环境损害调查、鉴定评估等费用；（四）清除污染、修复生态环境费用；（五）防止损害的发生和扩大所支出的合理费用。	

- **修改要点**

《民法典》中首次明确了对于故意污染环境、破坏生态造成严重后果的侵权行为将适用惩罚性赔偿的制度，这是对既有法律规定的一项突破。不过惩罚性赔偿金额的具体范围未在本次《民法典》中提及，仍待法律的进一步明确。对于侵权人的环境修复义务及环境赔偿责任，此前主要规定在一些司法解释中（例如《最高人民法院关于审理生态环境损害赔偿案件的若干规定（试行）》第 11 条[4]、第 12 条[5]；《关于审理环境民事公益诉讼案件适用法律若干问题的解释》第 19 条[6]），本次《民法典》明确赋予了国家规定的机关或者法律规定的组织相应索赔权以及对侵权人修复生态环境的法定请求权，为环境公共利益救济提供了实体法依据。

- **对企业商事活动的意义**

随着我国对环境治理的力度不断强化，《民法典》出台后将以最严格的惩罚性赔偿追究故意破坏环境的侵权人责任，也将为负有监管职责的机关在监管企业及提起相应环境赔偿或公益诉讼时提供了更有力的法律保障，企业在生产建设过程中应更加关注环境合规工作，以避免不必要的民事、行政甚至刑事责任。

（二） 侵害知识产权将承担惩罚性赔偿

- **法规对比**

《民法典》第 1185 条	《商标法》第 63 条第 1 款
故意侵害他人知识产权，情节严重的，被侵权人有权请求相应的惩罚性赔偿。	侵犯商标专用权的赔偿数额，按照权利人因被侵权所受到的实际损失确定；实际损失难以确定的，可以按照侵权人因侵权所获得的利益确定；权利人的损失或者侵权人获得的利益难以确定的，参照该商标许可使用费的倍数合理确定。对恶意侵犯商标专用权，情节严重的，可以在按照上述方法确定数额的一倍以上五倍以下确定赔偿数额。赔偿数额应当包括权利人为制止侵权行为所支付的合理开支。

- **修改要点**

在 2019 年 11 月 24 日，中共中央办公厅、国务院办公厅印发了《关于强化知识产权保护的意见》，其中指出要“加快在专利、著作权等领域引入侵权惩罚性赔偿制度。大幅提高侵权法定赔偿额上限，加大损害赔偿力度。强化民事司法保护，有效执行惩罚性赔偿制度”。在这样的政策导向下，《民法典》本次在第 1185 条正式建立了统一的侵害知识产权惩罚性赔偿的一般法律规则，提高知识产权保护的立法层级。我国此前仅在《商标法》第 63 条中针对行为人恶意侵犯商标专用权引入了惩罚性赔偿机制，在《反不正当竞争法》第 17 条第 3 款[7]中将惩罚性赔偿纳入了对恶意侵犯商业秘密行为的惩戒措施中。目前专利法和著作权法的修订稿尚未正式出台，不过从已公布的修正案草案来看，惩罚性赔偿将同样适用于故意侵犯专利权和著作权的行为。

- **对企业商事活动的意义**

如何避免企业在经营过程中可能侵犯他人知识产权的风险以及如何防范企业因自身管理制度的漏

[4] 第十一条：被告违反法律法规污染环境、破坏生态的，人民法院应当根据原告的诉讼请求以及具体案情，合理判决被告承担修复生态环境、赔偿损失、停止侵害、排除妨碍、消除危险、赔礼道歉等民事责任。

[5] 第十二条：受损生态环境能够修复的，人民法院应当依法判决被告承担修复责任，并同时确定被告不履行修复义务时应承担的生态环境修复费用。生态环境修复费用包括制定、实施修复方案的费用，修复期间的监测、监管费用，以及修复完成后的验收费用、修复效果后评估费用等。原告请求被告赔偿生态环境受到损害至修复完成期间服务功能损失的，人民法院根据具体案情予以判决。

[6] 第十九条：原告为防止生态环境损害的发生和扩大，请求被告停止侵害、排除妨碍、消除危险的，人民法院可以依法予以支持。原告为停止侵害、排除妨碍、消除危险采取合理预防、处置措施而发生的费用，请求被告承担的，人民法院可以依法予以支持。

[7] 第十七条第 3 款：因不正当竞争行为受到损害的经营者的赔偿数额，按照其因被侵权所受到的实际损失确定；实际损失难以计算的，按照侵权人因侵权所获得的利益确定。经营者恶意实施侵犯商业秘密行为，情节严重的，可以在按照上述方法确定数额的一倍以上五倍以下确定赔偿数额。赔偿数额还应当包括经营者为制止侵权行为所支付的合理开支。

洞导致自有知识产权受他人侵害的风险是企业知识产权合规制度建设的重要组成部分。在国家知识产权惩罚性赔偿一般性规则的确立后，侵权行为人侵害知识产权的违法成本将大幅提高，侵权后果将更加严重，这更加要求企业的管理层面提高对有效开展知识产权保护和风险应对能力的重视。

（三） 召回缺陷产品应负担被侵权人的必要支出

- **法规对比**

《民法典》第 1206 条	《侵权责任法》第 46 条
产品投入流通后发现存在缺陷的，生产者、销售者应当及时采取停止销售、警示、召回等补救措施；未及时采取补救措施或者补救措施不力造成损害扩大的，对扩大的损害也应当承担侵权责任。依据前款规定采取召回措施的，生产者、销售者应当负担被侵权人因此支出的必要费用。	产品投入流通后发现存在缺陷的，生产者、销售者应当及时采取警示、召回等补救措施。未及时采取补救措施或者补救措施不力造成损害的，应当承担侵权责任。

- **修改要点**

在现有《侵权责任法》的基础上，《民法典》对缺陷产品增加了“停止销售”的补救措施，并增加了被侵权人在缺陷产品的召回中所产生的必要费用应由生产者、销售者负担的规则，完善了缺陷产品的召回制度，强化了对消费者权益的保护。

- **对企业商事活动的意义**

在《民法典》、国家市场监督管理总局于 2019 年 11 月 21 日出台并已于今年 1 月 1 日生效的《消费品召回管理暂行规定》等规定中对缺陷产品召回制度设计越发完善的背景下，生产类企业应加强产品质量把关，避免因产品问题而给企业经营带来不利影响。

结语

《民法典》在明年实施后，我国民事权利保护将正式进入法典时代。民法典的重要修订及对既有法律规定的完善并不止前述内容，我们在此仅分享了我们认为对企业会有较大影响的几项内容，未来我们会根据企业的具体需要进行深入研究，以为企业提供更有针对性的服务。

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