



CADERNOS DE DEREITO ACTUAL

www.cadernosdedereitoactuales.es

© **Cadernos de Direito Actual** Nº 33. Núm. Ordinário (2026), pp. 35-77

·ISSN 2340-860X - ·ISSNe 2386-5229

From shareholder primacy to stakeholder governance: Business judgment rule and China's sustainable path

Qiwei Wang^{1,*}

Macau University of Science and Technology

Summary: 1. Introduction. 2. Literature Review. 3. Methodology. 3.1 Sampling strategy and keyword definition. 3.2 Data retrieval and sample screening. 3.3 Data identification principles and limitations. 4. Results. 4.1 Review of directors' duty of care in China: Legislative framework and judicial practice. 4.1.1 Legislative absence and the lack of model choice for the safe harbor rule. 4.1.2 Descriptive statistics and the mapping of judicial practice. 4.1.3 Adjudicative characteristics of outcome-based imputation under the tort approach. 4.2 Institutional models of the U. S. And German business judgment rule and their application in the ESG context. 4.2.1 The U. S. Approach. 4.2.2 The German approach. 4.2.3 Summary of differences in the operation of the U. S. and German business judgment rules. 5. Discussion. 5.1 Causes of directors' decision-making dilemma in china and the paradox of sustainable governance. 5.1.1 The underlying logic of the judicial application dilemma caused by the absence of standards of review. 5.1.2 Managerial myopia engendered by result-oriented adjudication and the paradox of sustainable governance. 5.2 Governance mechanisms and boundaries of adaptation of extraterritorial business judgment rules. 5.2.1 Jurisprudential limits of procedural and substantive review standards. 5.2.2 Divergent approaches and common controversies. 5.2.3 Regulatory differences between the U. S. and Germany in the ESG context. 5.3 Model choice for the business judgment rule in china and its response to sustainable governance. 5.3.1 Design of the constitutive elements for local legislation. 5.3.2 Model choice for judicial application. 5.4 Practical implications and governance value of the dual-track model. 6. Conclusion. 7. References.

Abstract: As the concept of sustainable development has been increasingly reinforced in corporate governance worldwide, ESG has gradually become an

¹ Doctoral Student in Civil and Commercial Law, Macau University of Science and Technology, Macau SAR, China, Avenida Wai Long, Taipa, Macau. ORCID: <https://orcid.org/0009-0007-7667-9047>; E-mail: 3230006425@student.must.edu.mo (corresponding author).

important criterion for measuring corporate sustainability and has been progressively brought within the ambit of directors' duty of care. The refinement of the business judgment rule, the standard against which directors' duty of care is judicially reviewed, constitutes an important institutional tool for addressing short-termism in directors' decision-making and driving the transition of China's corporate governance from the shareholder primacy model to the stakeholder governance model. How to adjust the framework governing the application of the business judgment rule and strike a balance between the institutional requirements of sustainable governance and the boundaries of directors' liability constitutes a core issue to be addressed in China's current commercial legislation and judicial practice. This study analyzes the current state of legislative gaps and inconsistent judicial application of the business judgment rule in China, compares and draws upon the judicial experience of the United States and Germany, and proposes construction pathways based on China's legislative context: legislatively incorporating provisions on the business judgment rule; judicially applying an expansive interpretation of the constituent elements of the traditional business judgment rule to integrate ESG factors; and concurrently refining adjudicative logic by applying a dual-track application model tailored to different types of business decisions. The coordinated refinement of legislation and judicial practice will strike a balance between directors' liability and decision-making discretion and provide a robust institutional safeguard for enterprises to implement sustainable governance.

Keywords: Business Judgment Rule, ESG, Duty of Care, Prerequisite Model, Exculpation Model

1. Introduction

In recent years, sustainable development has been fundamentally reshaping global corporate governance. Companies are now required to fully consider long-term environmental and social values in their daily operations and development.^{2,3} The 2023 revised G20/OECD Principles of Corporate Governance introduces a dedicated chapter that explicitly requires boards of directors to give due consideration to financially material sustainability risks and opportunities and integrate them into strategic decision-making and risk oversight processes.⁴ In its thematic report *Climate Change and Corporate Governance*, the OECD further observes that the integration of ESG factors into directors' duty of care constitutes a contemporary interpretation of "the best interests of the corporation".⁵ The World Bank's *Environmental and Social Framework*⁶ and the International Finance Corporation's

² UNITED NATIONS GENERAL ASSEMBLY. Transforming our world: The 2030 agenda for sustainable development, Resolution A/RES/70/1, 21 October 2015. Available at: <https://undocs.org/zh/A/RES/70/1> (accessed on 1 July 2026).

³ INTERNATIONAL SUSTAINABILITY STANDARDS BOARD (ISSB). ISSB issues inaugural global sustainability disclosure standards. 2023. Available at: <https://www.ifrs.org/news-and-events/news/2023/06/issb-issues-ifrs-s1-ifrs-s2/> (accessed on 1 July 2026).

⁴ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. G20/OECD principles of corporate governance. 2023. Available at: https://www.oecd.org/en/publications/g20-oecd-principles-of-corporate-governance-2023_ed750b30-en.html (accessed on 1 July 2026).

⁵ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *Climate change and corporate governance*, OECD corporate governance working papers No. 27, 2021. Available at: https://www.oecd.org/en/publications/climate-change-and-corporate-governance_272d85c3-en.html (accessed on 1 July 2026).

⁶ WORLD BANK. *Environmental and social framework*. 2017. Available at: <https://projects.shihang.org/zh/projects-operations/environmental-and-social-framework> (accessed on 1 July 2026).

(IFC) Performance Standards⁷ require enterprises to establish a systematic Environmental and Social Management System to achieve upfront risk management.

This trend has prompted an active response within China's legislative and regulatory frameworks. At the regulatory level, requirements for enterprises to disclose ESG reports are being progressively rolled out, with "sustainability" established as a corporate development philosophy. At the statutory level, the comprehensive revision of China's Company Law in 2023 incorporated the "promotion of entrepreneurship" into its legislative intent and articulated the concept of "corporate social responsibility." In particular, Article 20 of the Company Law mandates that a company⁸ must consider both stakeholder and public interests during its business operations, thereby assuming its social responsibility.⁹ ESG frameworks have thus emerged as critical benchmarks for corporate sustainability, progressively falling within the scope of directors' duty of care. Directors' duty of care is strengthened under Article 180 of China's Company Law, following its comprehensive revision in 2023.¹⁰ However, this revision fails to provide the business judgment rule (BJR) as a standard of review for the duty of care.

As a standard for reviewing directors' duty of care, the refinement of the BJR is an important institutional tool to solve the problem of short-termism in directors' decision-making and to promote the transformation of Chinese corporate governance from shareholder primacy to the stakeholder governance model. The primary function of the BJR is to strike a balance between directorial liability and business freedom. Directors are not liable as long as they make business decisions based on sufficient information and follow reasonable procedures, even if those decisions ultimately fail. The core connotation of the BJR lies in guarding against a standard of review that retroactively infers the reasonableness of ex ante decisions from ex post outcomes. It is in essence a principle of judicial restraint, designed to remind judges not to interfere with business decisions through the exercise of judicial authority.

Although the BJR is absent from Chinese legislation, it is not uncommon in judicial practice. Courts frequently invoke the logic of the BJR in their judicial opinions. However, in the absence of statutory criteria and a uniform judicial application regime, judicial practice generally applies a tort liability imputation regime to determine whether directors have breached their duty of care, and courts adjudicating specific cases fall to varying degrees into the misconception of retroactively inferring the correctness of the decision itself from ex post outcomes. In addition, the directors' duty of care has been expanded by the ESG business evaluation system, following the growing emphasis on sustainable development in companies. When making decisions, directors must consider not only the interests of the company and its shareholders but also those of other stakeholders. The traditional BJR is based on a shareholder-centric corporate governance model, where the primary objective of the company is profit maximization. When judges review whether directors have fulfilled their duty of care, they often use "short-term financial results" as a basis for their decision. ESG-related investments may require long-term capital and have uncertain short-term returns.

⁷ INTERNATIONAL FINANCE CORPORATION. IFC performance standards On Environmental and Social Sustainability. 2012. Available at: <https://www.ifc.org/en/insights-reports/2012/publications-handbook-pps> (accessed on 16 August 2026).

⁸ For terminological accuracy, this article uses the term "corporation" for entities governed by United States corporate law and the German Stock Corporation Act (Aktiengesetz). In contrast, entities regulated by China's Company Law are referred to as "companies".

⁹ CHINA. Company Law of the People's Republic of China. Revised 29 December 2023, effective 1 July 2024. Art. 20. Available at: <https://www.pkulaw.com/chl/8ba805acd08846d7bdfb.html?keyword=%E5%85%AC%E5%8F%B8%E6%B3%95&way=listView> (accessed on 16 August 2026).

¹⁰ CHINA. Company Law of the People's Republic of China. Revised 29 December 2023, effective 1 July 2024. Ibid., 180.

When dealing with these investments, directors may make business decisions that prioritize short-term interests because they are concerned about personal liability risks. This may result in a lack of strategic innovation and long-term investments in the decision-making process. This fails to meet the legislative purpose of China's Company Law, which is the "promotion of entrepreneurship". Additionally, it is incompatible with actual judicial practice. To address this difficulty, it is necessary to introduce and construct a BJR suitable for the legislative environment in China. This view is widely agreed upon in academic circles.

In the transition to sustainable corporate governance, the essential cause of the problems encountered by China lies in institutional absence. Due to the lack of institutional guarantees, directors' decisions fail to balance shareholder interests, the company's long-term interests, and social public interests. The BJR occupies an important position in the institutional guarantee system. Its legislative absence and confusion over model selection constitute the core crux. This issue constitutes not only a key focus of the transition to sustainable governance under China's Company Law but also a shared concern for the Company Laws of all countries in the context of global sustainable governance. Accordingly, the improvement and standardization of China's BJR may safeguard directors' sustainable decision-making, thereby promoting the transition of companies to a stakeholder governance model and strengthening the concept of corporate sustainable development.

This study systematically reviews the problems concerning the BJR in Chinese judicial practice: legislative absence, confusion in model application, and inconsistent adjudicative standards, etc. Through a comparative legal study, particularly in the context of ESG factors being incorporated into directors' duty of care, this study analyzes variations in BJR models across different jurisdictions in the United States and Germany and derives institutional models and jurisprudential logic for reference. Grounded in China's institutional environment and current judicial practice, a dual-track application model of the BJR tailored to both traditional business decisions and hybrid ESG decisions is proposed, providing a systematic solution that combines local adaptability and operability for the judicial review of directors' duty of care in the context of sustainable governance.

2. Literature review

The United States was the first country to formally establish the BJR, and the specific provisions and application models of the BJR have largely matured since its establishment. However, alongside the strengthening of sustainable development principles, the ESG wave has severely challenged the traditional boundaries of directors' fiduciary duties. A fierce debate over the proper approach has unfolded in academic circles regarding whether ESG should be embedded into the ambit of fiduciary duties and whether the BJR can serve as a safe harbor for it. Certain pro-empowerment scholars contend that fiduciary duties incorporating ESG elements can drive corporations to assume public social responsibilities.¹¹ Corporations ought to bear greater social responsibility, and directors need not treat shareholder interests as the exclusive goal of corporate governance.^{12,13,14} Even if directors are nominally

¹¹ WILLIAMS, C. A. Fiduciary duties and corporate climate responsibility. *Vanderbilt Law Review*, v. 74, n. 6, 2021, pp. 1875-1916. Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol74/iss6/9> (accessed on 1 July 2026).

¹² BRUNER, C. M. Corporate governance reform in a time of crisis. *Journal of Corporation Law*, v. 36, 2011, pp. 308-341. Available at: <https://scholarlycommons.law.wlu.edu/wlufac/103/> (accessed on 31 July 2026).

¹³ ELHAUGE, E. "Sacrificing corporate profits in the public interest". *New York University Law Review*, v. 80, n. 3, 2025, pp. 733-869. Available at: <https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-80-3-Elhauge.pdf> (accessed on 2 June 2026).

required to pursue profit maximization, the BJR vests them with the discretion to pursue ESG; owing to the substantial deference afforded by the BJR, courts abstain from inquiring into the actual motives behind their decisions provided there is no manifest self-dealing. Accordingly, within the institutional interstices, directors enjoy the de facto latitude to sacrifice a portion of corporate profits for the public interest.¹⁵ Nevertheless, certain traditional and critical scholars maintain that attempting to forcibly embed ESG into the existing framework of fiduciary duties is meaningless. Vesting directors with the power to pursue ESG will inevitably serve as a mere pretext for management to evade accountability, rather than genuinely benefiting non-shareholder stakeholders.¹⁶ Directors must treat shareholder welfare as the exclusive objective; non-shareholder interests can only serve to advance shareholder interests.^{17,18}

In Germany, a representative civil law jurisdiction, academic and practical discussions concerning the integration of ESG into the fiduciary duties of members of the Management Board (German: Vorstand, hereinafter Vorstand) and the application of the BJR focus primarily on the application boundaries of the BJR and the dimensions of the burden of proof in ESG scenarios. In contrast to the deeply entrenched tradition of "shareholder primacy" in the United States, the German Stock Corporation Act (German: Aktiengesetz, hereinafter AktG) has historically emphasized the long-term value and social attributes of the corporation as an "institutional entity." German scholars generally observe that Section 93 of the AktG and relevant case law indicate that the "best interests of the corporation (Unternehmensinteresse)" do not equate to the narrow maximization of short-term shareholder profits but inherently encompass the pluralistic dimensions of employee rights, creditor interests, and the public interest.¹⁹ Section 93 of the current AktG constitutes the statutory exculpatory foundation of the BJR. Academic consensus maintains that for ordinary business decisions incorporating ESG elements made by the Vorstand with professional prudence, judicial restraint must be strictly observed and the standard BJR exculpation must be applied; courts are precluded from conducting ex post assessments of the business merits.²⁰ However, once a breach of mandatory statutory ESG obligations (such as failing to conduct supply chain due diligence or information disclosure in accordance with the law) is implicated, academic consensus generally supports precluding the application of the BJR and holding the Vorstand liable for negligence. For ESG business decisions within the boundaries of compliance,

¹⁴ WEST, D. "The purpose of the corporation in business and law school curricula". *Governance Studies at Brookings*, 2011, pp. 1-23. Available at: https://www.brookings.edu/wp-content/uploads/2016/06/0719_corporation_west.pdf (accessed on 1 July 2026).

¹⁵ ELHAUGE, E. "Sacrificing corporate profits in the public interest". 2025. Ibid.

¹⁶ BEBCHUK, L. A. and TALLARITA, R. "The illusory promise of stakeholder governance". *Cornell Law Review*, v. 106, 2020, pp. 91-178. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544978 (accessed on 31 July 2026).

¹⁷ STRINE, LEO, E. J. "The dangers of denial: The need for a clear-eyed understanding of the power and accountability structure established by the delaware general corporation law". *Wake Forest Law Review*, v. 50, 2015, pp. 761. Available at: <http://ssrn.com/abstract=2576389> (accessed on 1 July 2026).

¹⁸ EBAY DOMESTIC HOLDINGS, INC. v. NEWMARK, 16 A.3d 1 (Del. Ch. 2010). Available at: <https://www.courtlistener.com/opinion/2423041/ebay-domestic-holdings-inc-v-newmark/?q=eBay+Domestic+Holdings%2C+Inc.+v.+Newmark> (accessed on 31 July 2026).

¹⁹ FLEISCHER, H. Corporate purpose: A management concept and its implications for company law. *European Company Law*, v. 18, 2021. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3770656 (accessed on 1 July 2026).

²⁰ GLEIBNER, W. Nachhaltigkeit, ESG und wertorientierte Unternehmensführung. BOARD, 2021, 6. Available at: https://www.adar.info/fileadmin/public/Redaktion/Dokumente/PDF/Fachbeitraege_2021/nachhaltigkeit-esg-und-wertorientierte-Doc13076597.pdf (accessed on 31 July 2026).

however, divergence persists concerning the intensity of review and the triggering conditions for the inversion of the burden of proof. Certain comparative law scholars observe that, in contrast to the United States, Germany integrates ESG into the fiduciary duties of the Vorstand through federal laws such as Section 93 of the AktG and Sections 3 and 4 of the Supply Chain Act, adopting a mandatory statutory model; the inversion of the burden of proof subjects the Vorstand to more stringent liability risks.

Turning to China, introducing and constructing the BJR tailored to China's legislative environment, and embedding ESG concepts into the framework of directors' fiduciary duties for application, constitute the prevailing perspective within current academic circles.²¹ As for the precise criteria to determine whether directors have fulfilled their fiduciary duties and the model selection for the BJR, particularly as ESG has gradually become a vital standard for measuring company sustainability, Chinese academic and judicial circles have formed multiple differing propositions; to date, no consensus has been reached. Despite extensive comparative research, few studies have systematically integrated ESG elements into the framework of the BJR within the Chinese context. Existing proposals either establish independent review pathways divorced from the unified foundation of the BJR or remain at the level of abstract value advocacy, having yet to formulate a systematic application model combining adaptability to local litigation rules and judicial operability. This precisely constitutes the core research gap that this study seeks to address.

In existing research, some scholars propose embedding ESG into directors' fiduciary duties under a tiered governance paradigm, which divides ESG governance into three tiers: legal, economic, and discretionary.²² The BJR applies differentially across each tier: it is entirely excluded at the legal tier, has only a narrow scope for application at the economic tier, and the Exculpation Model applies exclusively to ESG decisions at the discretionary tier. The three-tier division of legal, economic and discretionary governance under the scholars' proposed model is, in essence, a doctrinal classification based on governance attributes. In practice, however, the vast majority of ESG decisions cannot be neatly categorized into a single tier, and the blurred boundaries between tiers directly give rise to difficulties in judicial application. The proposition that a full German-style Exculpation Model should apply directly to the discretionary tier—under which no presumption of compliance attaches to such decisions by default and the directors bear the full burden of proving the reasonableness of their decisions at all stages—would unquestionably raise the directors' decision-making costs, dampen their incentive to make long-term sustainable decisions, and hinder the long-term development of sustainable corporate governance.

Additionally, one scholar argues that where a director's decision concerns only social responsibility matters, it fails to satisfy the prerequisites for application of the BJR by reason of the high inherent risk of conflict of interest, and an intermediate review standard should apply; strategic social responsibility conduct pursued for business operation purposes remains subject to the BJR.²³ Under the intermediate

²¹ ZHU, C. and LYU, C. "The rise of ESG and the proactive response of modern company law". *Chinese and Foreign Law*, v. 5, 2022, pp. 1241-1259. <https://doi.org/10.3969/j.issn.1002-4875.2022.05.007>

²² CHEN, J. and HE, T. "The tiered governance paradigm of corporate ESG: Selection of the embedded model for directors' fiduciary duties". *Journal of Zhengzhou University (Philosophy and Social Sciences Edition)*, v. 56, n. 3, 2023, pp. 43-51. Available at: https://kns.cnki.net/kcms2/article/abstract?v=J6dHN9cz2Tuj2E2d7N51bKE_IC6vKUHqK1xKYbeF1d7gzmONmV_csqwNR-GFyhCqh7ZT_zeQoRjGcj9By2BvG7KrZA-bdasSJsPjyeamsauH2qpJm6G0j3NfBAjthTu7GqQDHwJUWtw_3jS36AdEj7sbEFhQbnULzQTPvVYE3BI74ILlqJ6WaQ==&uniplatform=NZKPT&language=CHS (accessed on 1 June 2026).

²³ SUN, B. "Theoretical reflection and rule response to judicial review of directors' duties under the social responsibility clause". *Tsinghua Law Review*, v. 18, n. 6, 2024, pp. 144-158. Available

review standard advanced by this scholar, the plaintiff need only prove that the decision falls within social responsibility matters, and the full burden of proof shifts to the director, who must establish the reasonableness of both the decision-making process and the decision under the then-prevailing circumstances. This burden-shifting mechanism is in substance equivalent to a "threshold-free" reversal of the burden of proof and tends to impose a heavier burden on directors.

Another scholar contends that, for directors' decisions in the ESG context, a social judgment standard should be established in addition to the traditional BJR. The two standards are weighed in conjunction and operate as mutual safe harbors, together forming the core of the test for the legitimacy of directors' discharge of their duties.²⁴ This scholar has expanded the value dimension of directors' duties at the theoretical level and systematically formulated the conceptual framework of social judgment. Yet as for the scholar's proposition that decisions may be abstractly classified into two categories of "business judgment" and "social judgment", the vast majority of ESG decisions in practice are of a hybrid nature. The proposed notion of "weighed in conjunction and operating as mutual safe harbors" serves as a conceptual methodological guide, and does not set out specific judicial review procedures, adjudicative criteria, or procedural elements.

The aforementioned scholars have, respectively, provided theoretical support for the integration of ESG into directors' duty of care across the dimensions of rule system, review intensity, and value dimension and advanced divergent positions on the concrete application of the BJR. All such proposals share the common limitation of insufficient alignment with judicial practice. When facing the challenges of sustainable corporate governance, the introduction and application of the BJR in China should be approached with greater prudence, aligning not only with China's current legislative reality but also accommodating the corporate governance philosophy of sustainable development. Building on this, this study grounds itself in China's statutory law tradition and the basic civil litigation principle that he who asserts must prove, integrates ESG into directors' duty of care, and constructs a dual-track application system uniformly founded on the BJR. The system classifies decisions by their content: the standard Prerequisite Model applies to traditional business decisions aimed directly at maximizing shareholders' economic interests, while the modified Prerequisite Model applies to hybrid decisions involving ESG elements, under which a limited reversal of the burden of proof is triggered by the threshold condition of "manifest unreasonableness". Adhering to the principles of judicial restraint and Procedural Review, the system strikes an institutional balance between encouraging ESG investment and preventing improper decision-making, reconciles directors' liability with entrepreneurial freedom, and effectively fosters entrepreneurship in China.

3. Methodology

This study adopts a multi-dimensional comprehensive methodological framework, aiming to systematically analyze the application dilemmas of the BJR and explore paths for its institutional reconstruction.

First, this study employs normative analysis and mixed empirical research methods to conduct a comprehensive analysis of the legislative absence of the BJR in

at:

https://kns.cnki.net/kcms2/article/abstract?v=J6dHN9cz2Tt2Z_2NR1bIAA2mRWIQZh-C6vjhz nP1y3QeNuK8f8TyyFLr1LpFvGI08CAaD7sc4FJtFIVunG_41WPLJags03N5VRD4y449rvS_XVwdg B8iiQ9ERZxPku0Hf6WERV1aWEAZofNuTuBCPGHj7sVKMcpnR7vw1BIK_-NMhNa9Uo8cCg==&u niplatform=NZKPT&language=CHS (accessed on 1 July 2026).

²⁴ JIANG, D. "The transformation of directors' duties by ESG: The evolution from business judgment to social judgment". *China Legal Science*, 2024. <https://doi.org/10.14111/j.cnki.zgfx.2024.04.005>

China and the current state of judicial adjudication: at the legislative level, it carries out textual and doctrinal analyses of the law; at the judicial practice level, through the construction of a sample database, it delineates the actual application ecology of the BJR in domestic adjudication via an approach of "quantitative description supporting in-depth qualitative exploration".

Second, this study introduces the functional method of comparative law, shifting its research focus from domestic issues to foreign experience. In the United States and Germany—typical representative countries of the two major legal families—the specific provisions and application models of the BJR have largely matured and merit reference by China. To avoid reducing the study to a mere parallel enumeration of legal rules, this study establishes a uniform comparative framework and strictly compares two core dimensions: the BJR application model and burden of proof allocation rules, and the application of the BJR in ESG decision-making. This comparative study relies mainly on primary sources, including core Delaware precedents, the Model Business Corporation Act (hereinafter MBCA), the AktG, and landmark decisions of the German Federal Court of Justice (Bundesgerichtshof, BGH).

In the empirical research phase, this study employs a mixed empirical research methodology, with qualitative analysis as the primary approach and quantitative description as the supplement. It constructs a sample database by establishing strict search parameters and false-positive exclusion criteria in the database, and examines the actual application logic of the BJR in judicial practice by integrating multi-dimensional descriptive statistics with cross-instance case comparisons. The specific data collection and processing procedures are as follows:

3.1 Sampling strategy and keyword definition

In setting the search parameters for the empirical samples, this study fully considers China's judicial practice context. In China's judicial practice, despite the legislative absence of the BJR, the application of this rule is not uncommon, as judges often invoke the BJR in the adjudication process. In general, in Chinese written judicial judgments, apart from the use of the term 'BJR', there are other variant expressions that carry the exact same legal meaning (see Table 1).

Table 1. Semantic nuances of keywords.

Keywords	Literal Translation	Semantic Nuance
Shangye panduan guize (商业判断规则)	Business judgment rule	The standard and most common translation
Jingying panduan guize (经营判断规则)	Management judgment rule	Emphasizes the act of managing
Yewu panduan guize (业务判断规则)	Business judgment rule	Emphasizes the specific operational transactions
Shangshi panduan guize (商事判断规则)	Commercial judgment rule	Uses the formal legal term for "commercial"
Shangye panduan yuanze (商业判断原则)	Business judgment principle	Uses "principle" rather than "rule"

It should be clarified that, in written judgments, beyond the directly corresponding synonymous expressions set out above, judges frequently employ descriptive and functional language in judicial reasoning to expound the core spirit of the BJR. Such expressions include "reasonable deference to business decisions", the "principle of judicial self-restraint", "the boundaries of the duty of care applicable to

directors and senior managers", "normal business risks", and "the propriety of decision-making procedures", among others. To ensure the definiteness of quantitative sample boundaries and the objectivity of statistical criteria, the quantitative search conducted in this study is strictly confined to the explicit rule terms set out in Table 1. Broad functional expressions are not included as direct search terms, but their substantive reasoning will be examined in subsequent in-depth qualitative case analysis.

3.2 Data retrieval and sample screening

Based on the terminology specified in Table 1, this study conducts full-text searches on PKULaw (Beida Fabao)²⁵, using "Shangye panduan guize (商业判断规则)", "Jingying panduan guize (经营判断规则)", "Yewu panduan guize (业务判断规则)", "Shangshi panduan guize (商事判断规则)", and "Shangye panduan yuanze (商业判断原则)" as search keywords. As of June 16, 2026, a total of 111 cases were retrieved (basic search details are provided in Table 2).

Table 2. Basic search information.

Database Searched	PKULaw
Date Range	Through June 16, 2026
Search Method	Full-text search
Keywords	Shangye panduan guize (商业判断规则) Jingying panduan guize (经营判断规则) Yewu panduan guize (业务判断规则) Shangshi panduan guize (商事判断规则) Shangye panduan yuanze (商业判断原则) (Boolean "OR" logic, full-text search)
Cause of Action Filter	Unrestricted

By establishing a standardized screening process to exclude duplicate, lower-court, and irrelevant cases, this study arrives at a final set of 44 valid samples. Cases are eligible for inclusion where the party explicitly invokes the BJR as a defense in litigation, or where the court explicitly references the BJR in its adjudicative reasoning, provided that the core dispute of the case concerns directors' duty of care (for detailed statistics on the sample screening process, see Table 3).

Table 3. Statistics of the data screening process.

Screening Stage	Number of Cases	Notes
Initial Search Results	111	For specific search methods, please refer to Table 2.
Exclusion of Duplicate Cases	15	Excluded duplicate cases resulting from keyword cross-hits.
Exclusion of Lower-Instance Judgments	8	Retained only the highest-instance judgment for the same case (retrial > second instance > first instance).
Exclusion of Irrelevant Cases	44	Criteria for irrelevant cases (a case is deemed irrelevant if it meets any of the following conditions): 1. Cases where the core dispute is unrelated to the directors' duty of care. 2. Cases that mention search terms such as the "business judgment rule," but do not refer to its substantive legal meaning.
Final Valid Sample	44	

²⁵ PKULaw (Beida Fabao) is an intelligent legal information retrieval platform in China.

3.3 Data identification principles and limitations

All research samples for this section are drawn from judicial documents publicly available at the time of search, as retrieved from the PKULaw database. The search was conducted on June 16, 2026. This study makes no absolute presumption as to the final legal effect of individual written judgments, and takes only the judicial reasoning set forth therein as the subject of analysis; for cases where only first-instance judgments are publicly available and no corresponding second-instance or retrial judgments can be retrieved, such cases are directly included in the sample, without any presumption that the judgment is legally effective and without tracing subsequent litigation proceedings not publicly disclosed in the database.

The identification of the same case follows the principle of "case number priority, supplemented by substantive matching": priority is given to matching written judgments of different instances for the same case through case number correlation; where case numbers cannot be matched, substantive identification is carried out under the three-pronged standard of "parties + cause of action + core facts" to avoid duplicate counting.

4. Results

4.1 Review of directors' duty of care in china: Legislative framework and judicial practice

4.1.1 Legislative absence and the lack of model choice for the safe harbor rule

The required degree of care under the duty of care is not uniform, as it differs according to the scope and circumstances of each company. Moreover, the standard of judgment is uncertain because of the differences that exist among individual directors. Thus, it is usually defined in legislation through a combination of abstract and general provisions and scattered specific stipulations.²⁶ Article 180 of the 2023 revision of China's Company Law makes substantial amendments to the former legislation, explicitly defining the essential substance and specific elements of the duty of care. Article 180, Paragraph 2 provides that directors, supervisors, and senior executives owe a duty of care to the company. In performing their duties, they must act for the best interests of the company and exercise the reasonable care ordinarily expected of a manager.²⁷

Legal doctrine generally divides the application models of the BJR into the Prerequisite Model and the Exculpation Model. Within the Prerequisite Model, courts presume the reasonableness of directors' decision-making, and courts may intervene only if the plaintiff proves that the board's conduct fails to satisfy the constituent elements of the BJR. Under the Exculpation Model, the court considers the BJR as a ground for exculpating directors from liability when examining whether directors have breached the duty of care. Within this model, directors must bear the burden of proving that their conduct amounts to a reasonable business judgment.²⁸

At present, China's current Company Law and relevant judicial interpretations have not explicitly stipulated the specific application model of the BJR, and the application of the BJR in judicial practice is only reflected as a "Judicial Habitual Practice". Regarding the model selection of the BJR, a variety of divergent

²⁶ LI, J. 600 questions on company law. Law Press China, Beijing, 2025.

²⁷ CHINA. Company Law of the People's Republic of China. Art. 180. Available at: <https://www.pkulaw.com/chl/8ba805acd08846d7bdfb.html?keyword=%E5%85%AC%E5%8F%B8%E6%B3%95&way=listView> (accessed on 16 August 2026).

²⁸ CHEN, J. and HE, T. "The tiered governance paradigm of corporate ESG: Selection of the embedded model for directors' fiduciary duties". 2023. Ibid.

propositions have been formed in academic and judicial circles, and no consensus has been reached to date.^{29,30,31} In the area of judicial review following the incorporation of ESG into directors' duty of care in particular, divisions of opinion among the parties concerned are more pronounced. No uniform standard with general practical operability for adjudication has taken shape, and this absence further compounds the ambiguity of adjudicative standards in practice.

4.1.2 Descriptive statistics and the mapping of judicial practice

Case searches indicate (see Figure 1) that the term "business judgment rule" appeared in court judgments as early as 2010. Judges invoked the BJR as a basis for adjudicative reasoning in recognition of directors' decision-making autonomy. An examination of court judgments shows that neither legislation nor judicial practice lays down a uniform definition of the BJR's application, and the rule is for the most part treated as a principle of judicial restraint. For example, in *Li v. Lu*³², a dispute over compensation for damage to shareholders' interests caused by directors and senior management personnel, the court applied the BJR and held that the defendant, acting as a director and senior manager, had discharged his duty of care. Even though the company failed to achieve its business plan, the defendant was not liable for damages to the company or its shareholders.

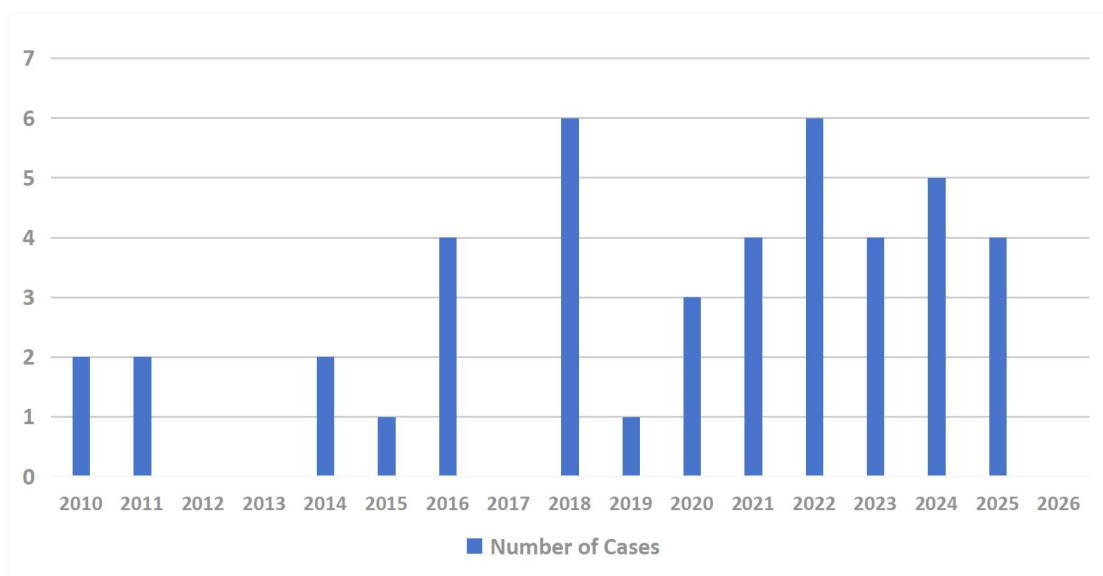


Figure 1. Distribution of cases by year.

As shown in Table 1 and Figure 2, terminological inconsistency is evident in Chinese courts' invocation of the BJR. Beyond the prevailing Chinese rendering

²⁹ CHEN, J. and HE, T. The tiered governance paradigm of corporate ESG: Selection of the embedded model for directors' fiduciary duties. 2023. Ibid.

³⁰ SUN, B. "Theoretical reflection and rule response to judicial review of directors' duties under the social responsibility clause". 2024. Ibid.

³¹ JIANG, D. "The transformation of directors' duties by ESG: The evolution from business judgment to social judgment". 2024. Ibid.

³² CHUN'AN COUNTY PEOPLE'S COURT OF ZHEJIANG PROVINCE. Judgment (2009) Hang Chun Shang Chu Zi No. 1212. 2009. Available at: <https://www.pkulaw.com/pfnl/a25051f3312b07f36a2dddf661325ee880d350d50a2c9406bdfb.html?keyword=%282009%29%E6%9D%AD%E6%B7%B3%E5%95%86%E5%88%9D%E5%AD%97%E7%AC%AC1212%E5%8F%B7&way=listView#anchor-documentno> (accessed on 31 July 2026).

"shangye panduan guize (business judgment rule)", two alternative expressions appear frequently in judicial judgments: "shangye panduan yuanze (商业判断原则)" and "jingying panduan guize (经营判断规则)".

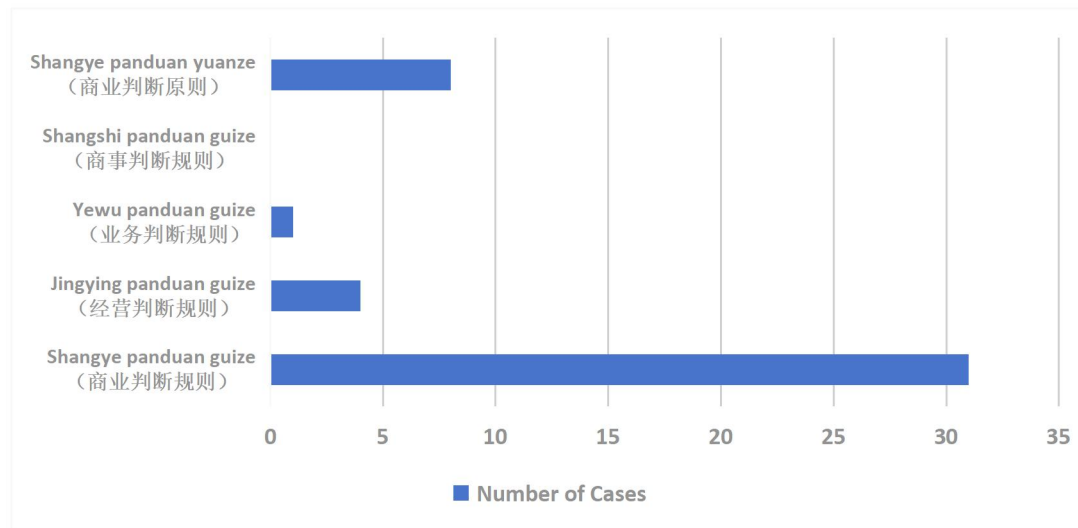


Figure 2. Distribution of valid cases by keyword.

Drawing on three sets of distribution data—the distribution of causes of action in Chinese BJR cases (see Table 4), the distribution of BJR cases by trial level (see Figure 3), and the distribution of cases by court tier (see Figure 4)—comprehensive analysis confirms that liability disputes over harm to company interests constitute the core cause of action for holding directors or senior officers liable in Chinese judicial practice, accounting for 65.91% of all cases. Most such cases proceed to second-instance proceedings, and intermediate people's courts across various provinces hear the overwhelming majority of these cases.

Table 4. Distribution of causes of action in BJR cases.

Cause of Action	Number of Cases	Percentage
Liability disputes over harm to company interests	29	65.91%
Liability disputes over harm to shareholders' interests	4	9.09%
Disputes over compensation for property damage	3	6.82%
Equity transfer disputes	2	4.55%
Liability disputes over harm caused by related-party transactions	2	4.55%
Other civil disputes related to companies, securities, insurance, and negotiable instruments	2	4.55%
Tort liability disputes	1	2.27%
Sales contract disputes	1	2.27%
Total	44	100%

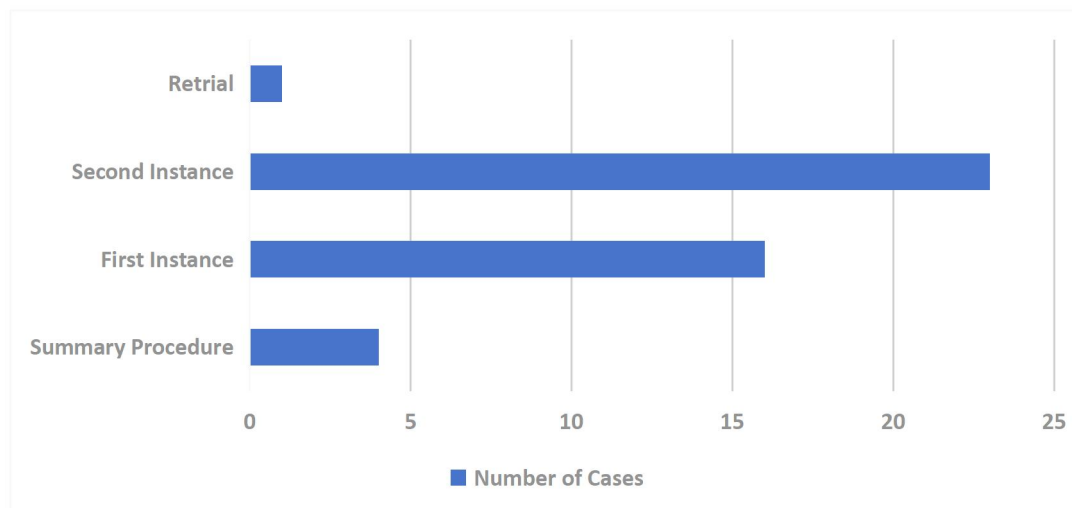


Figure 3. Distribution of BJR cases by trial instance.

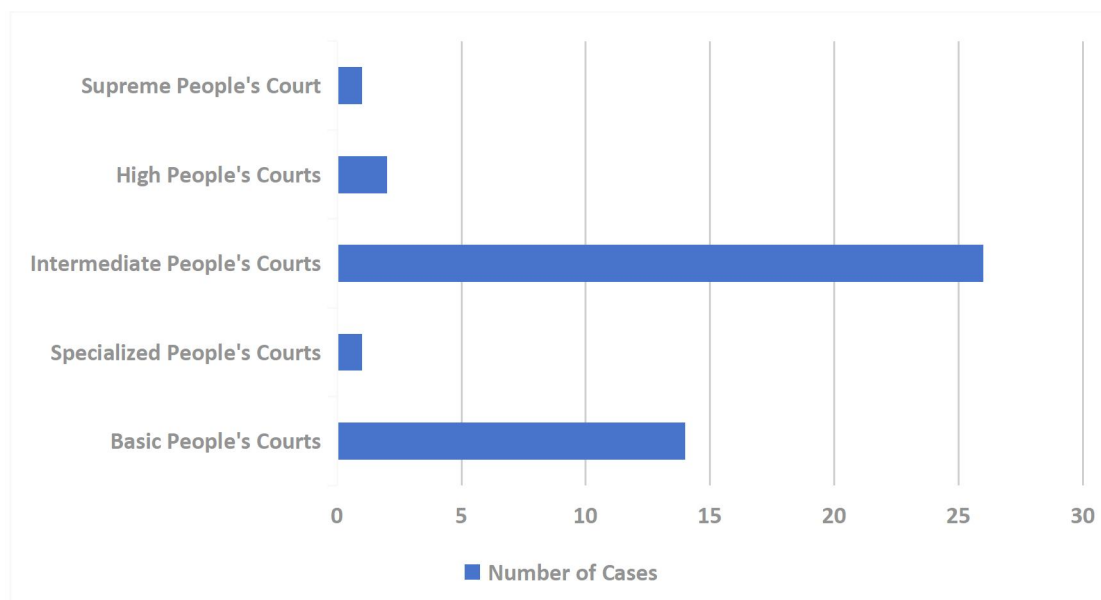


Figure 4. Distribution of cases by court level.

As shown by the distribution of reference contexts (see Figure 5), the current application of the BJR in China's judicial practice is characterized by a pattern dominated by party-raised defenses. Among the 44 sample cases that explicitly reference the BJR, 23 involve the rule raised exclusively by the parties as an exculpatory defense, accounting for more than half of the total; 14 involve people's courts invoking the BJR *sua sponte* as adjudicative logic in judicial reasoning; and 7 feature alignment between party contentions and court adjudications, with both explicitly referencing the BJR.

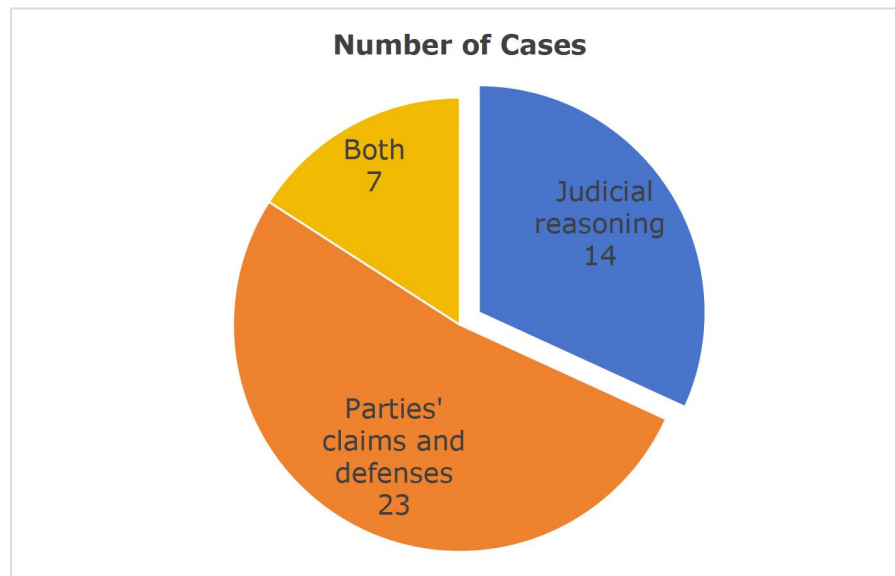


Figure 5. Statistics on BJR mention scenarios.

4.1.3 Adjudicative characteristics of outcome-based imputation under the tort approach

In judicial practice, for cases concerning whether a director has breached the duty of care and shall bear liability for damage to company interests, the vast majority of Chinese courts cite Article 188 of China's Company Law, adjudicate such cases primarily based on the elements of general tort liability, and apply the principle that the party making a claim bears the burden of proof. For example, in the case of *Company A v. Lin* (a dispute over liability for damage to company interests)³³, the court explicitly stated in its judgment the following: "A party shall bear the burden of providing evidence in support of its own claims. The action for dispute over liability for damage to company interests initiated by the plaintiff in this case is essentially a tort action. The plaintiff therefore bears the burden of proving that the elements of tort liability are established in this case, namely, that the defendant committed an unlawful act and acted with subjective fault, that the plaintiff sustained damage, and that a causal relationship exists between the unlawful act and the damage".

In judicial adjudication across China, courts in different regions apply divergent adjudicative standards in their understanding of the core connotation of the BJR—the principle that the correctness of a business decision itself shall not be inferred retroactively from its outcome.

In the case of *Sun and Zhao v. Gong* (dispute over liability for damage to company interests)³⁴, there exists a clear divergence in adjudicative logic between the court of first instance and the court of second instance. In its adjudicative reasoning, the court of first instance nominally acknowledged that custody of the company's seals and licenses fell within the scope of internal corporate self-governance. With respect to the

³³ WUHUA DISTRICT PEOPLE'S COURT OF KUNMING CITY, YUNNAN PROVINCE. Civil judgment (2025) Yun 0102 Min Chu No. 15292. 2025. Available at: <https://www.pkulaw.com/pfnl/c7ed112b8012f816402fba83f6eaead36e668403c41a97e9bdfb.html?keyword=2025%E4%B7%B7&way=listView#anchor-documentno> (accessed on 1 July 2026).

³⁴ HEFEI INTERMEDIATE PEOPLE'S COURT OF ANHUI PROVINCE. Civil judgment (2017) Wan 01 Min Zhong No. 7360. 2017. Available at: <https://www.pkulaw.com/pfnl/a25051f3312b07f3196c23653656b83896915780940c9408bdfb.html?keyword=%282017%E4%B7%B7&way=listView#anchor-documentno> (accessed on 31 July 2026).

director's act of publishing a avoidance notice in a newspaper following the loss of various company seals and licenses, however, the court of first instance stated that "as the executive director and legal representative of the company, Gong may bring an action for the return of various company seals and licenses against the relevant responsible persons in accordance with applicable provisions, but may not declare the loss of such seals and licenses and apply for reissuance without convening a shareholders' meeting to adopt a resolution and reach a consensus". The court finally ruled that the director's act of "reporting the loss via public newspaper notice" was void. The defendant director expressly contended that the decision to report the loss of the seals and licenses was made for the reason that "the whereabouts of the official seal and licenses could not be ascertained, and the act was performed to ensure that the company's rights and interests would not be impaired". The court of second instance in this case corrected this holding. It explicitly stated in the judgment that "in light of the complexity of the company's business operations and the inherent characteristics of business decisions, the BJR shall be referred to when assessing the liability of the company's executive director." Applying three criteria—that the executive director making the business judgment has no personal interest in the subject of the judgment, that the director has reasonable grounds to believe the information available for the business judgment under the circumstances at the time is sufficient, proper and reliable, and that the business judgment is in the best interests of the company—the court found that the director did not breach the duty of care. The court of second instance found that Gong reported the loss via public newspaper notice under emergency circumstances where the company's seals were out of control and third parties were improperly concluding contracts in the company's name. The court held that Gong acted subjectively in the company's interests, pursued no private gain, and relied on reasonable information. This business decision fell within the protection of the BJR, and the act in question was valid.

A similar adjudicative divergence appeared in the first and second instances of the case of *Song v. Company A* (dispute over liability for damage to company interests). The court of first instance in this case held that "Song signed and consented to the cancellation of Diao's non-compete obligation without reporting to the company's board of directors, and that Diao immediately joined Company B, a competitor of Company A, upon his resignation from Company A". On this basis, the court found that Song, as a director, had breached the duty of care, and ordered Song to bear liability for compensation on the ground that "Song ought to have recognized yet failed to recognize that exempting Diao from his non-compete obligation might harm the interests of Company A, and that Song had signed and consented to such exemption without authorization".³⁵ With respect to the legal effect of the affixation of the company's official seal, the court of first instance, based on the plaintiff's unilateral allegation that the general manager had "taken advantage of his position", imposed on the senior manager the burden of proving the negative fact that the affixation of the official seal was not his arbitrary personal act. The judgment of the court of first instance stated that "Song contends that the affixation of Company A's official seal indicates the company's consent to exempt Diao from his non-compete obligation. However, Company A's seal was affixed to the notice under the instruction of Song in his capacity as general manager, which does not show that the result was not caused by Song's decision." The court of second instance shifted its perspective during its review. Proceeding from whether the process was compliant, it examined separately whether Song's conduct exceeded his scope of authority, whether it violated the

³⁵ CHAOYANG DISTRICT PEOPLE'S COURT OF BEIJING MUNICIPALITY. Civil judgment (2019) Jing 0105 Min Chu No. 48545. 2019. Available at: <https://www.pkulaw.com/pfnl/c05aeed05a57db0a9753dc896684c3f03d46e5197670eb5bdfb.html?keyword=2019%E4%BA%AC0105%E6%B0%91%E5%88%9D48545%E5%8F%B7&way=listView#anchor-documentno> (accessed on 31 July 2026).

company's approval procedures, and whether there was subjective fault on his part.³⁶ Before the court of second instance, the appellant (Song, the defendant at first instance) likewise invoked the BJR as a defense. Although the court of second instance did not explicitly cite the doctrinal concept of the BJR, it substantively adopted the Procedural Review Standard of the BJR.

The courts of second instance in both of the above cases set aside the first-instance judgments. In judicial practice, in most cases where the BJR is applied to determine whether a director bears liability for breach of the duty of care, courts, after reviewing whether the director has breached the duty of care against the elements of the BJR, further examine the existence of causation between the director's conduct and the damage suffered. In the second-instance judgment of the case of *Song v. Company A* (dispute over liability for damage to company interests), after expressly applying the BJR to find that the director did not breach the duty of care, the court nonetheless addressed the absence of a causal link between the relevant conduct and the damage. Second-instance judgments following adjudicative logic similar to that of the present case include those in the case of Fan and Jiang (dispute over liability for damage to company interests)³⁷ and the case of *Siyang County Company D v. Yu* (dispute over liability for damage to company interests)³⁸. By comparison, in the second-instance judgment of the case of *Shaoxing Company B v. Zhang* (dispute over liability for damage to company interests)³⁹, the court likewise examined the causal link between the director's conduct and the damage. This examination, however, was conducted at the stage where the director had been found to have breached the duty of care and the BJR was inapplicable.

4.2 Institutional models of the U.S. and German business judgment rule and their application in the ESG context

From a comparative law perspective, the United States and Germany represent typical models of common law and civil law systems. The BJR frameworks and practical experiences in these two countries deserve to be studied by China. The United States, which formally established the BJR, adopts a "presumption followed by review" model in its judicial system.⁴⁰ This model is often described as a

³⁶ BEIJING NO. 3 INTERMEDIATE PEOPLE'S COURT. (2021). Civil judgment (2021) Jing 03 Min Zhong No. 3414. Available at: <https://www.pkulaw.com/pfnl/c05aeed05a57db0a00cdd7a21b273aa5008e953aa36bdb06bdfb.html?keyword=2021%E5%BC%89%E4%BA%AC03%E6%B0%91%E7%BB%883414%E5%8F%B7&way=listView#anchor-documentno> (accessed on 31 July 2026).

³⁷ HEFEI INTERMEDIATE PEOPLE'S COURT OF ANHUI PROVINCE. Civil judgment (2017) Wan 01 Min Zhong No. 7901. 2017. Available at: <https://www.pkulaw.com/pfnl/a25051f3312b07f3f8ef98728603ab5503e49c587cfa66cbdfb.html?keyword=%282017%29%E7%9A%9601%E6%B0%91%E7%BB%887901%E5%8F%B7&way=listView#anchor-documentno> (Accessed: 16 August 2026).

³⁸ SUQIAN INTERMEDIATE PEOPLE'S COURT OF JIANGSU PROVINCE. Judgment (2013) Su Zhong Shang Chu Zi No. 0140. 2013. Available at: <https://www.pkulaw.com/pfnl/a25051f3312b07f39475477b98f38e8fc83895d12c7ac118bdfb.html?keyword=2013%E5%BC%89%E5%AE%BF%E4%B8%AD%E5%95%86%E5%88%9D%E5%AD%97%E7%AC%AC0140%E5%8F%B7&way=listView#anchor-documentno> (accessed on 1 July 2026).

³⁹ SHAOXING INTERMEDIATE PEOPLE'S COURT OF ZHEJIANG PROVINCE. Civil judgment (2024) Zhe 06 Min Zhong No. 964. 2024. Available at: <https://www.pkulaw.com/pfnl/08df102e7c10f206f1720b0e6185dbfeb2a9f36f4340b31dbdfb.html?keyword=%EF%BC%882024%E5%BC%89%E6%B5%9906%E6%B0%91%E7%BB%88964%E5%8F%B7&way=listView#anchor-documentno> (accessed on 1 July 2026).

SHI, T. Treatise on corporate law, 3rd ed., Law Press China, Beijing, 2021.

⁴⁰ PALM, C. W. and KEARNEY, M. A. "A primer on the basics of directors' duties in Delaware: The rules of the game (Part I)". *Villanova Law Review*, v. 40, n. 5, 1995, pp. 1297-1364. Available at: <https://digitalcommons.law.villanova.edu/vlr/vol40/iss5/1/> (accessed on 28 August 2026).

"presumption".⁴¹ Germany, a typical civil law country, has codified the BJR within its corporate law. In its judicial practice, Germany adopts a "review followed by exculpation" model, commonly known as the "Safe Harbor Model".⁴² Chinese scholars characterize these two approaches as the "Prerequisite Model" and the "Exculpation Model", respectively.⁴³ To maintain consistency, this study will use the terms "Prerequisite Model" and "Exculpation Model" in the subsequent analysis.

4.2.1 The U.S. approach

The BJR is formally established in the United States as the judicial review standard for U.S. courts to determine whether directors have breached the duty of care. It is frequently applied in the United States and carries general significance. The BJR often serves to remind judges to delineate the boundary between judicial authority and commercial affairs. Unless directors act with gross negligence, courts should not evaluate the correctness of directors' decisions *ex post* according to their own perceptions, nor shall they make business decisions in place of directors. This logic is also known as the Abstention Doctrine, under which courts voluntarily abstain from Substantive Review of the relevant decisions if the statutory prerequisites are met, that is, no fraud, no illegality, and no self-dealing.⁴⁴ The Abstention Doctrine was proposed by American scholar Stephen M. Bainbridge and has gained widespread recognition in the U.S. legal academia.

No uniform federal corporate law exists in the United States, and the application of the BJR is scattered across the statutory and case law of individual states. To date, the normative structure of the BJR under U.S. corporate law has developed into a mature system centered on two core pillars, that is, Delaware case law and the statutory provisions of the MBCA, with localized adaptations in a small number of states. Delaware has not adopted the MBCA. Instead, it maintains its own independent Delaware General Corporation Law (DGCL) and has developed an extensive body of corporate law precedents through its specialized Court of Chancery system. In judicial practice, the Delaware model carries strong persuasive weight for judicial practice across most states. The MBCA, drafted by the American Bar Association, serves as the direct legislative template for the corporate codes of more than 30 U.S. states. For these reasons, this study selects the Delaware model and the MBCA model as its core analytical subjects, as they represent the two major streams of development and the highest theoretical consensus in modern U.S. corporate law.

Prerequisite model and burden of proof

The United States, where the BJR was formally established, applies a judicial model classified in comparative law as the Prerequisite Model. In litigation, courts first presume the reasonableness of decisions made by defendant directors, and the plaintiff bears the burden of proof to rebut this presumption of reasonableness. However, with respect to the threshold for rebutting the presumption, two distinct evolutionary paths exist within U.S. law:

In Delaware, a plaintiff seeking to prove that directors have breached the duty of

⁴¹ ARONSON v. LEWIS, 473 A.2d 805 (Del. 1984). Available at: <https://www.courtlistener.com/opinion/2379496/aronson-v-lewis/?q=Aronson+v.+Lewis%2C+473+A.2d+805> (accessed on 31 July 2026).

⁴² LU, J. "The application of business judgment rule in dividend litigation". *Hebei Law Science*, v. 36, n. 1, 2018, pp. 67-77. <https://doi.org/10.16494/j.cnki.1002-3933.2018.01.006>

⁴³ CHEN, J. and HE, T. "The tiered governance paradigm of corporate ESG: Selection of the embedded model for directors' fiduciary duties". 2023. *Ibid*.

⁴⁴ BAINBRIDGE, S. M. "The business judgment rule as abstention doctrine". *Vanderbilt Law Review*, v. 57, n. 1, 2004, pp. 83-130. <https://doi.org/10.2139/ssrn.429260>

care must establish gross negligence in the directors' decision-making process.⁴⁵ In the landmark 2005 case *In re Walt Disney Co. Derivative Litig.*, the Delaware Court of Chancery synthesized prior precedents to define gross negligence, and established the prevailing standard for gross negligence applied in Delaware today: "In the duty of care context with respect to corporate fiduciaries, gross negligence has been defined as a 'reckless indifference to or a deliberate disregard of the interests of the whole body of stockholders' or actions which are 'without the bounds of reason'".⁴⁶ This sets an extremely high threshold for Procedural Review.

The MBCA defines the standards of conduct and standards of liability for directors in Sections 8.30 and 8.31, respectively. Subsections 8.30(a) and (b) establish the basic standards of conduct for all directors. This provision requires that a director, or a member of the board of directors, shall act in the following manner when discharging their duties: (i) in good faith; (ii) in a manner the director reasonably deems to be in the best interests of the corporation; and (iii) with the degree of care that a person in a comparable position would reasonably consider appropriate under similar circumstances in the discharge of their duties.⁴⁷ The drafters of the Corporate Laws Committee of the American Bar Association have stated that the focus of Section 8.30 is on the manner in which a director makes a decision, not on the substantive correctness of the decision itself. Boards of directors and corporate management routinely make decisions involving the balance of corporate risk and return. Although some decisions ultimately prove ill-advised or stem from an error in judgment, it is unreasonable to impose liability for choices made in good faith and on an informed basis, even when judged with the benefit of hindsight.⁴⁸ Accordingly, the BJR does not itself constitute a standard of conduct for directors, but a standard of review. Under this rule, courts first presume that directors have complied with the standard of conduct required by Section 8.30, and this presumption may be rebutted only if the plaintiff alleges specific facts sufficient to prove that directors failed to discharge their duties in accordance with that standard.

The MBCA, through Section 8.31(a)(2), establishes specific statutory circumstances as the threshold for rebutting the presumption. Doctrinally, these circumstances may be summarized as follows: (i) lack of good faith; (ii) irrational belief or uninformed decision; (iii) lack of objectivity or independence; (iv) sustained inattention or failure to oversee; (v) improper financial benefit.

Where a plaintiff fails to discharge its burden of proof, courts ordinarily decline to conduct further review of the substantive merits of the business decision, and may dispose of the action through procedural devices such as a motion to dismiss or summary judgment. Where the plaintiff successfully rebuts the presumption of reasonableness, courts proceed to a further stage of review.

Where a case involves breaches of the duty of loyalty such as conflicts of interest, both Delaware courts and courts operating under the MBCA framework shift the burden of proof and apply the Entire Fairness Review instead, requiring defendant directors to prove that the transaction is fair in both aspects of fair dealing and fair price. In such cases, courts inevitably conduct Substantive Review of the substantive outcomes of the business decision.

Under the Delaware model, Section 102(b)(7) of the DGCL sets forth exculpatory provisions for directors in cases involving only breaches of the duty of care.⁴⁹ This

⁴⁵ ARONSON v. LEWIS, 473 A.2d 805 (Del. 1984). Ibid.

⁴⁶ IN RE WALT DISNEY CO. DERIVATIVE LITIGATION, 906 A.2d 27 (Del. 2006). Available at: <https://www.courtlistener.com/opinion/2393941/in-re-walt-disney-co-derivative-litigation/?q=+In+re+Walt+Disney+Co.+Derivative+Litig.> (accessed on 31 July 2026).

⁴⁷ AMERICAN BAR ASSOCIATION. Model business corporation act. Chicago: American Bar Association, 2024.

⁴⁸ Ibid.

⁴⁹ STATE OF DELAWARE. Delaware code, Title 8, § 102(b)(7). Available at: <https://delcode.delaware.gov/title8/c001/sc01/index.html> (accessed on 16 August 2026).

provision is an enabling rule for corporate certificates of incorporation. It permits a corporation to include director exculpation clauses in its certificate of incorporation to eliminate directors' personal liability for monetary damages arising solely from breaches of the duty of care, while establishing five statutory exceptions under which exculpation is absolutely unavailable.⁵⁰ Accordingly, claims for monetary damages against individual directors are ordinarily dismissed at the pleading stage only where a compliant Section 102(b)(7) provision is contained in the corporation's certificate of incorporation, and the plaintiff alleges only a simple breach of the duty of care by directors without asserting any statutory exception. Such dismissal, however, applies only to the individual monetary liability of directors, and does not extend to equitable remedies or the liability of other parties.⁵¹

Under the MBCA model, pursuant to Section 8.31(b) of the MBCA, where a plaintiff successfully proves procedural defects on the part of directors, the court proceeds to Substantive Review. The burden of proof remains on the plaintiff at all times, who must further prove that the corporation has suffered actual damages and that proximate cause exists between such damages and the directors' conduct. At this stage, courts still do not assess the merits of the business outcome. It bears noting that Section 2.02(b)(4) of the MBCA⁵² likewise incorporates exculpatory clauses for directors, and its practical effect in precluding monetary damage liability is largely consistent with that under Delaware law.

In sum, despite divergences in theoretical approaches, judicial review in cases involving only breaches of the duty of care, in practical effect, typically terminates at the stage of procedural defects and the application of exculpatory clauses, avoiding substantive evaluation of the decision's outcome. As the Delaware Supreme Court reaffirmed in *Brehm v. Eisner*: "Due care in the decision-making context is process due care only."⁵³

Beyond the Delaware model and the MBCA model, there are two other models: an "ultra-protective model" represented by Virginia⁵⁴, Ohio⁵⁵, and Indiana⁵⁶, and a "statutorily strict but judicially lenient model" represented by California⁵⁷ and New York⁵⁸. The former explicitly rejects Delaware's gross negligence standard in statutory

⁵⁰ (i) A director or officer for any breach of the director's or officer's duty of loyalty to the corporation or its stockholders; (ii) A director or officer for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) A director under § 174 of this title; (iv) A director or officer for any transaction from which the director or officer derived an improper personal benefit; or (v) An officer in any action by or in the right of the corporation.

⁵¹ MALPIEDE v. TOWNSON, 780 A.2d 1075 (Del. 2001). Available at: <https://www.courtlistener.com/opinion/1535019/malpiede-v-townson/pdf/> (accessed on 31 July 2026).

⁵² AMERICAN BAR ASSOCIATION. Model business corporation act. 2024. Ibid.

⁵³ BREHM v. EISNER, 746 A.2d 244 (Del. 2000). Available at: <https://law.justia.com/cases/delaware/supreme-court/2000/60450.html> (accessed on 31 July 2026).

⁵⁴ STATE OF VIRGINIA. Code of Virginia. Available at: <https://law.justia.com/codes/virginia/title-13-1/chapter-9/section-13-1-690/> (accessed on 1 July 2026).

⁵⁵ STATE OF OHIO. Ohio revised code. Available at: <https://law.justia.com/codes/ohio/title-17/chapter-1701/section-1701-59/> (accessed on 1 July 2026).

⁵⁶ STATE OF INDIANA. Indiana code. Available at: <https://iga.in.gov/laws/2025/ic/titles/23#23-1-35> (accessed on 1 July 2026).

⁵⁷ STATE OF CALIFORNIA. California corporations code. Available at: <https://law.justia.com/codes/california/code-corp/title-1/division-1/chapter-3/section-309/> (accessed on 1 July 2026).

⁵⁸ STATE OF NEW YORK. New York business corporation law. Available at: <https://law.justia.com/codes/new-york/bsc/article-7/717/> (accessed on 1 July 2026).

law and provides that directors are exculpated if they act in good faith. A plaintiff must prove willful misconduct or subjective bad faith on the part of directors to rebut this protection, making this the most director-protective model across the United States. The latter requires directors to meet the standard of care of an ordinarily prudent person under similar circumstances in its statutory law, that is, an ordinary negligence standard. In judicial adjudication, however, judges, to avoid substituting their own business judgment for that of directors, still read the gross negligence standard into statutory interpretation, presenting a state of "strict legislation, lenient judiciary".^{59,60}

The United States adopts a typical Prerequisite Model in applying the BJR, with Procedural Review as its core and Substantive Review as an exception, and the burden of proof rests on the plaintiff.

Application of the business judgment rule in ESG decisions

A growing number of public and private corporations in the United States are integrating ESG and sustainability considerations into their decision-making earlier in their growth trajectory. In fact, as of September 2023, the Science-Based Targets Initiative alone accounted for over 6000 corporations that have either committed to net zero or set science-based targets to reduce their emissions.⁶¹ Some scholars observe that fiduciary duties may prompt corporations to assume social and public responsibilities.⁶²

The United States has not enacted federal legislation compelling directors to integrate ESG considerations into the duty of care. Instead, it achieves the institutional integration of ESG and long-term sustainable investment by drawing on the presumptive effect of the BJR, alongside policy and regulatory guidance and layered adaptation of state-level legislation. Several U.S. corporations have established dedicated ESG committees within their boards of directors to strengthen accountability mechanisms for the board's ESG duties. The board of directors performs dual functions of decision-making and supervision. Ordinarily, the articles of incorporation explicitly provide that the corporation shall conduct its operations under the supervision and direction of the board.

Delaware courts substantively accommodate ESG-oriented long-term investment through the "reasonable relation standard". This standard also serves as the core benchmark for demarcating the scope of the duty of care from breaches of the duty of loyalty: consideration of non-shareholder interests must bear a reasonable relation to the enhancement of long-term shareholder value to fall within the scope of business judgment and be protected by the BJR; where such consideration is entirely divorced from shareholder value and pursues other objectives purely, it may constitute a breach of the duty of loyalty.

In 2020, Delaware clarified in *eBay Domestic Holdings, Inc. v. Newmark* that directors may not adopt defensive measures prejudicial to shareholder interests on the grounds of non-shareholder interests such as "protecting corporate culture" and "upholding community values"; all considerations of non-shareholder interests must

⁵⁹ WOO CHUL LEE V. INTERINSURANCE EXCHANGE OF AUTOMOBILE CLUB, 50 Cal. App. 4th 694 (Cal. 1996). Available at: <https://www.courtlistener.com/opinion/2292638/woo-chul-lee-v-interinsurance-exchange-of-automobile-club/?q=Lee+v.+Interinsurance+Exchange> (accessed on 31 July 2026).

⁶⁰ AUERBACH v. BENNETT, 47 N.Y.2d 619 (N.Y. 1979). Available at: <https://www.courtlistener.com/opinion/5683550/auerbach-v-bennett/?q=Auerbach+v.+Bennett%2C> (accessed on 31 July 2026).

⁶¹ CITI COMMERCIAL BANK. Starting early on ESG and sustainability strategies can support growth long-term for privately held companies. 2023. Available at: <https://www.citigroup.com/global/insights/starting-early-on-esg-and-sustainability-strategies> (accessed on 2 June 2026).

⁶² WILLIAMS, C. A. Fiduciary duties and corporate climate responsibility. 2021. Ibid.

bear a reasonable relation to the enhancement of shareholder value. "Promoting, protecting, or pursuing non-stockholder considerations must lead at some point to value for stockholders".⁶³ The court stated that, when conducting review under the BJR, it does not question the board's rational judgments as to how the advancement of non-shareholder interests ultimately enhances shareholder value. In its opinion, the court provided specific examples: whether making a charitable contribution, paying employees higher salaries and benefits, or promoting a specific corporate culture, courts will defer to such decisions as long as the underlying rationale is to ultimately advance shareholder value. Where a decision is entirely unmotivated by shareholder interests and purely pursues the personal values of directors or third-party interests, it constitutes a breach of the duty of loyalty (disloyalty in bad faith) and directly precludes the application of the BJR.

In 2023, in the Delaware case *Kenneth T. Simeone v. The Walt Disney Company*⁶⁴, the court held that taking public stances on social issues such as public policy and social matters constitutes an ordinary business decision falling within the scope of the duty of care. The court's opinion noted that shareholders may not obtain inspection of the corporation's books and records merely because they disagree with the board's decision, even if the decision turned out poorly in hindsight. The court emphasized that it will not interfere with the board of directors' rational judgments to advance non-shareholder interests in pursuit of long-term shareholder value, unless the plaintiff can adduce legitimate grounds to challenge the fairness of the board.

Delaware sets the floor for accountability through two judicial procedural standards. In determining whether ESG-related business decisions constitute a breach of the duty of care, judicial practice continues to apply the "gross negligence" standard; however, directors must fulfill their procedural obligations of conducting adequate information gathering and deliberation prior to making such decisions. A decision made without obtaining core information or exercising prudent deliberation constitutes gross negligence and may rebut the BJR presumption, but monetary damages for such liability may be eliminated through charter provisions under DGCL § 102(b)(7). Courts do not assess the strategic merits of sustainable investments. They only review whether the decision-making process meets the standard of prudence, which aligns with the institutional purpose of the BJR, and the Prerequisite Model remains applicable in the application of the BJR. In *National Center for Public Policy Research v. Schultz*, the board of directors was sued for breach of the duty of care over an ESG-related decision. In its opinion, the court emphasized: "Courts of law have no business involving themselves with reasonable and legal decisions made by the board of directors of public corporations." When reviewing the substance of the defendant's decision, the court focused on the decision-making process. Ultimately, on the ground that "Plaintiff fails to rebut the business judgment presumption," the court held that "the Complaint can also be dismissed for failing to overcome the BJR."⁶⁵

In Delaware, the vast majority of cases involving breaches of fiduciary duties in ESG contexts concern the duty of oversight. This duty was first established in the 1996 decision *In re Caremark International Inc. Derivative Litigation*⁶⁶, and is

⁶³ EBAY DOMESTIC HOLDINGS, INC. v. NEWMARK, 16 A.3d 1 (Del. Ch. 2010). Ibid.

⁶⁴ KENNETH T. SIMEONE v. THE WALT DISNEY COMPANY, 302 A.3d 956 (Del. Ch. 2023). Available at: <https://www.courtlistener.com/opinion/9409818/kenneth-t-simeone-v-the-walt-disney-company/?q=Simeone+v.+The+Walt+Disney+Company> (accessed on 1 July 2026).

⁶⁵ NATIONAL CENTER FOR PUBLIC POLICY RESEARCH v. SCHULTZ, No. 2:22-CV-00267-SAB, 2023 WL 5820464. (E.D. Wash. Sept. 11, 2023). Available at: <https://law.justia.com/cases/federal/district-courts/washington/waedce/2:2022cv00267/101253/35/> (accessed on 31 July 2026).

⁶⁶ IN RE CAREMARK INTERNATIONAL INC. DERIVATIVE LITIGATION, 698 A.2d 959 (Del. Ch. 1996). Available at:

therefore also referred to as the "Caremark duty of oversight". In that case, Justice Allen articulated the affirmative duty of directors to ensure that the corporation establishes a compliant information and reporting system. Directors will face personal liability where they "utterly fail to attempt to assure a reasonable information and reporting system exists". This form of systemic dereliction of duty "establishes lack of good faith as a necessary condition for the imposition of liability". In the context of that ruling, Justice Allen employed the expression "lack of good faith". For this reason, many scholars and practitioners classify the duty of oversight as falling within the scope of the duty of care, in that it pertains to directors' "inaction" or "negligence". In 2006, the Delaware Supreme Court expressly held in *Stone v. Ritter*⁶⁷ that a breach of the Caremark duty of oversight constitutes, in essence, a breach of the duty of loyalty. The court stated that good faith is not itself a third fiduciary duty separate from the duty of care and the duty of loyalty, but a subsidiary element of the duty of loyalty. In 2019, in *Marchand v. Barnhill*⁶⁸, the court further refined the elements of liability for breach of the duty of oversight, holding that liability requires a subjective showing of bad faith and that the directors' conduct must satisfy either of the following circumstances: first, the directors completely fail to implement any reporting or information system or controls; second, having implemented such a system or controls, they consciously fail to monitor or oversee its operations. Since a breach of the duty of oversight turns on the directors' subjective bad faith, it falls outside the protection of the director exculpation provision under DGCL § 102(b)(7). As for the burden of proof, the plaintiff bears the burden of establishing the directors' subjective bad faith.

4.2.2 The German approach

Germany is a prime example of the codification of the BJR, and German legislation not only expressly enshrines the BJR within its corporate law framework, but also establishes a detailed typology of the specific conduct standards governing the Vorstand's duty of care.

Section 93(1) of the AktG imposes a statutory obligation on members of the Vorstand to conduct corporate affairs with the care of a prudent and conscientious business manager. When a Vorstand member reaches a business decision on the strength of adequate information and holds reasonable grounds to conclude the decision serves the corporation's best interests, such conduct shall in no way constitute a breach of their statutory duties.⁶⁹ The first sentence of this statutory provision prescribes the specific requirements governing the duty of care owed by Vorstand members pursuant to the AktG, whilst the provision's second sentence codifies the statutory substance of the BJR. Upon incorporating the BJR, Germany aligned the doctrine with its civil law tradition of statutory codification. The legislature embedded the rule's core philosophy directly into the provisions governing the duties of the Vorstand. This formed a "principle + exception" application model. This provision provides a safe harbor for unsuccessful business decisions. Under this provision, if members of the Vorstand make a decision based on appropriate

<https://www.courtlistener.com/opinion/1968607/in-re-caremark-international-inc-derivative-litigation/?q=In+re+Caremark+Int%27l+Inc.+Deriv.+Litig> (accessed on 31 July 2026).

⁶⁷ *STONE v. RITTER*, 911 A.2d 362 (Del. 2006). Available at: <https://www.courtlistener.com/opinion/2334726/stone-v-ritter/?q=Stone+v.+Ritter> (accessed on 1 July 2026).

⁶⁸ *MARCHAND v. BARNHILL*, 212 A.3d 805 (Del. 2019). Available at: <https://www.courtlistener.com/opinion/4631113/marchand-v-barnhill/?q=Marchand+v.+Barnhill+> (accessed on 31 July 2026).

⁶⁹ GERMANY. German stock corporation act (Aktiengesetz, AktG). 2024, sec. 93, para. 1. Available at: https://www.gesetze-im-internet.de/aktg/_93.html (accessed on 16 August 2026).

information and in pursuit of the corporation's interests, their action can be deemed rational, and they are not considered to have breached their corresponding duties. If a Vorstand member's decision fails to meet these threshold prerequisites, the Vorstand member's negligence shall be adjudicated on a case-specific basis, and the Vorstand member bears the burden of production and proof herein.⁷⁰ Based on the provisions of Section 93(1) of the AktG, the prerequisites for a Vorstand member to be exempted from liability include the following: (i) an entrepreneurial business decision; (ii) conduct taken in the interests of the corporation; (iii) absence of private personal interest (no conflict of interest); (iv) a decision made on the basis of adequate information; (v) good faith.⁷¹ These are also the five elements of the BJR.

The German legislature restricts the scope of the BJR, as stipulated in Section 93(1), sentence 2, of the AktG, exclusively to entrepreneurial decisions. This rule shall not apply in cases where a member of the Vorstand breaches any other duties.⁷²

It is particularly important to emphasize that decisions made by Vorstand members must be based on adequate information. The German legislature has taken into account that Vorstand members make most of their decisions under significant pressure. Accordingly, the requirement of "being based on adequate information" does not mandate that Vorstand members must rely on all de facto available and statutorily prescribed sources of information when making a decision. The standard for judging whether the "adequate information" requirement is satisfied shall be ascertained by reference to the particular facts and circumstances of each individual case in specific proceedings.⁷³

Exculpation model and burden of proof

In applying the BJR, Germany adopts the "Safe Harbor Model"⁷⁴, which is classified as the Exculpation Model in comparative law.

In Vorstand liability proceedings, the plaintiff must, when instituting the action, set forth specific factual allegations in the pleading, describe the conduct at issue, and explain how such conduct may constitute a breach of duty, in order to discharge its burden of assertion.⁷⁵ Once the court enters the substantive trial phase, the plaintiff bears the initial burden of proving the following: (i) the act complained of was undertaken by a member of the Vorstand or the Vorstand and falls within the scope of their official duties; (ii) the corporation has sustained definite property damage; and (iii) a causal link for the establishment of liability exists between the act and the damage. Only upon the plaintiff's successful proof of the three foregoing foundational facts will subsequent liability review and the application of the reversed burden of proof rule be triggered, and the court will presume that the conduct at issue breaches the duty of care and that the Vorstand is at fault.

Once the BJR review procedure is initiated, pursuant to the reversed burden of proof rule under Section 93(2) of the AktG, the Vorstand bears the burden of proving that its decisions fully satisfy all elements of the BJR, to invoke the "safe harbor" and preclude liability.⁷⁶ At this stage, the court conducts only Procedural Review of the decision-making process, without assessing the commercial reasonableness of the

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ LU, J. "The application of business judgment rule in dividend litigation". 2018. Ibid.

⁷⁵ GERMANY. German code of civil procedure (Zivilprozessordnung, ZPO). 2024, sec. 138, para. 1. Available at: https://www.gesetze-im-internet.de/zpo/_138.html (accessed on 16 August 2026).

⁷⁶ GERMANY. German stock corporation act (Aktengesetz, AktG). 2024, sec. 93, para. 2. Available at: https://www.gesetze-im-internet.de/aktg/_93.html (accessed on 16 August 2026).

decision's substance or the merits of its ex post outcome, and the review standard corresponds fully to the aforementioned elements.

If the court finds that the Vorstand has adduced sufficient evidence and the decision satisfies all elements of the BJR, it shall directly hold that no breach of the duty of care exists on the part of the Vorstand, dismiss the plaintiff's claim for damages arising from such business decision, enter judgment exculpating the Vorstand from liability, and thereupon conclude the proceedings. Where the Vorstand fails to prove that the decision meets all required elements, the safe harbor protection shall not take effect. The court will then conduct Substantive Review of the decision's substance, apply the standard of a prudent and conscientious manager to determine whether the Vorstand has breached the duty of care and whether culpable negligence is present, and finally ascertain whether liability for damages is established.

In sum, Germany adopts a typical Exculpation Model in applying the BJR, with Procedural Review as the general principle and Substantive Review as the exception, and the burden of proof rests on the Vorstand.

Application of the business judgment rule in ESG decisions

Germany adopts an overall model combining the domestic transposition of EU directives with the statutory expansion of the duty of care. Rather than creating an "independent and general ESG duty" clause in the AktG, it establishes compliance with ESG-related laws as a statutory obligation for corporations through specialized legislation including the German Supply Chain Due Diligence Act (Lieferkettensorgfaltspflichtengesetz, LkSG) and the CSRD Implementation Act (CSRD-Umsetzungsgesetz, CSRD-UG). For the Vorstand, which administers corporate affairs, ensuring the corporation's compliance with laws and regulations is itself a core element of the duty of care.

Rather than creating an "independent and general ESG duty" clause in the AktG, The Corporate Sustainability Reporting Directive (CSRD), adopted by the European Union in 2022, constitutes the core legal basis for Germany's ESG information disclosure policy. It requires large enterprises and listed corporations to disclose comprehensive ESG information covering climate risks, environmental and social impacts, and governance structures, and explicitly stipulates the collective responsibility of the Vorstand for ESG strategy and disclosure.⁷⁷ EU instruments including the Sustainable Finance Disclosure Regulation (SFDR)⁷⁸ and Regulation (EU) 2020/852⁷⁹ compel listed corporations to strengthen ESG governance by imposing requirements on the investment side of financial institutions. The German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin) has simultaneously introduced detailed regulatory provisions, requiring the Vorstand to bear ultimate responsibility for the ESG risks of financial institutions.^{80,81}

⁷⁷ EUROPEAN PARLIAMENT AND COUNCIL. Directive (EU) 2022/2464 of the European parliament and of the council of 14 December 2022 amending regulation (EU) No 537/2014, directive 2004/109/EC, directive 2006/43/EC and directive 2013/34/EU, as regards corporate sustainability reporting. 2022. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022L2464> (accessed on 1 July 2026).

⁷⁸ EUROPEAN PARLIAMENT AND COUNCIL. Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector. 2019. Available at: <https://eur-lex.europa.eu/eli/reg/2019/2088/oj> (accessed on 1 July 2026).

⁷⁹ EUROPEAN PARLIAMENT AND COUNCIL. Regulation (EU) 2020/852 of the European parliament and of the council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088. 2020. Available at: <https://eur-lex.europa.eu/eli/reg/2020/852/oj> (accessed on 1 July 2026).

⁸⁰ BUNDESANSTALT FÜR FINANZDIENSTLEISTUNGSAUFSICHT. Minimum requirements for risk management (Mindestanforderungen an das Risikomanagement, MaRisk), 7. Novellierung, Rundschreiben 05/2023 (BA), AT 3. Available at:

German corporate law emphasizes the potential for long-term, sustainable value creation by enterprises. In administering corporate affairs, the Vorstand shall take into account and balance the interests of shareholders, the public interest, and the interests of the corporation's employees.⁸² Section 396(1) of the AktG provides that where a stock corporation endangers public welfare through unlawful conduct of its Vorstand members, and the supervisory board and general meeting of the corporation fail to secure the removal of such members in such circumstances, the court may dissolve the corporation by judgment upon application by the highest competent state authority of the state in which the corporation has its registered seat.⁸³ It follows from this that German corporate law has traditionally recognized that "the best interests of the corporation" are not equivalent to the maximization of short-term shareholder profits but encompass multiple dimensions including the long-term survival of the enterprise, employee rights and interests, and community impacts. Safeguarding employee interests and social and public interests is a requirement of the duty of care for the Vorstand of German stock corporations.

In 2021, the German Bundestag enacted the German Supply Chain Due Diligence Act (Lieferkettensorgfaltspflichtengesetz, LkSG). Sections 3 and 4 thereof require the Vorstand, within the scope of the duty of care, to establish a risk management system and ensure its effective operation.⁸⁴ Sections 289b to 289e of the German Commercial Code (Handelsgesetzbuch, HGB) mandate corporate management to prepare sustainability reports.⁸⁵ In 2025, the German Federal Government introduced the latest CSRD-UG draft bill, and the draft strengthens the Vorstand's duty of oversight over sustainability reports.⁸⁶

In the context of ESG-related business decisions, the application of the BJR still follows the Exculpation Model. ESG decisions—such as low-carbon transition investments, sustainable product R&D, and supply chain upgrades—made by the Vorstand based on professional advice fall within the scope of ordinary business judgment and are protected from liability under Section 93(1) of the AktG, provided that proper procedures, including information gathering, risk assessment, and collective deliberation, have been followed, even if they increase costs in the short term or fail to achieve expected returns. Courts will not second-guess the merits of an ESG strategy. If a Vorstand member fails to perform legally mandated ESG duties—such as conducting risk screening under the LkSG or making truthful ESG disclosures—and thereby causes penalties or reputational harm to the corporation,

https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Rundschreiben/2023/rs_05_2023_MaRisk_BA.html (accessed on 1 July 2026).

⁸¹ BUNDESANSTALT FÜR FINANZDIENSTLEISTUNGSAUFSICHT. Guidance notice on dealing with sustainability risks, 2019. Available at: https://www.bafin.de/SharedDocs/Downloads/EN/Merkblatt/dl_mb_Nachhaltigkeitsrisiken_en.html (accessed on: 1 July 2026).

⁸² SONG, H. "Localization of the business judgment rule: Theoretical basis and implementation path". *Journal of Shanghai University of International Business and Economics*, 2024. <https://doi.org/10.16060/j.cnki.issn2095-8072.2024.03.006>

⁸³ GERMANY. German stock corporation act (Aktengesetz, AktG). 2024. sec. 396, para. 1. Available at: https://www.gesetze-im-internet.de/aktg/___396.html (accessed on 16 August 2026)

⁸⁴ GERMANY. Act on corporate due diligence obligations in supply chains (Gesetz über die unternehmerischen sorgfaltspflichten in lieferketten, LkSG). Available at: <https://www.gesetze-im-internet.de/lksg/LkSG.pdf> (accessed on 1 July 2026).

⁸⁵ GERMANY. German commercial code (Handelsgesetzbuch, HGB). Available at: <https://www.gesetze-im-internet.de/hgb/HGB.pdf> (accessed on 1 July 2026).

⁸⁶ GERMANY. Draft Act implementing the Corporate Sustainability Reporting Directive (Entwurf eines Gesetzes zur Umsetzung der Richtlinie (EU) 2022/2464 hinsichtlich der Nachhaltigkeitsberichterstattung von Unternehmen, Bundestagsdrucksache 21/1857). Available at: <https://dserver.bundestag.de/btd/21/024/2102465.pdf> (accessed on 16 August 2026).

such failure constitutes a “gross negligence” breach of the duty of care and cannot be shielded by the BJR.

In contrast to the United States, Germany integrates ESG into the fiduciary duties of the Vorstand through federal statutes including Section 93 of the AktG and Sections 3 and 4 of the LkSG, adopting a mandatory statutory model. The reversal of the burden of proof exposes Vorstand members to stricter liability risks.

4.2.3 summary of differences in the operation of the U.S. and German business judgment rules

Although the BJR in the United States and that in Germany both adhere, in their application, to the principle of judicial restraint—that courts do not evaluate the merits of business decisions—they diverge in legislative form, mode of application, and core elements for exculpation, among other respects. A detailed comparison of the differences is provided in Table 5.

Table 5. Differences in the BJR between the U.S. and German.

Comparative Dimension	United States	Germany
Legislative Model	A common law model centered on case law, supplemented by statutory law	A civil law statutory model
Applicable Model	Prerequisite Model	Exculpation Model
Burden of Proof for Core Exculpatory Elements	Plaintiff	Vorstand
Standard of Judicial Review	Procedural Review + Substantive Review Substantive Review: review of the substantive elements of a claim for damages Procedural Review: the formal procedures and substantive sufficiency of directors' decision-making	
	The review does not at any stage evaluate the merits of the business decision itself, nor does it infer the correctness of the decision from its outcome.	
Exculpatory Mechanism for Pecuniary Damages	The articles of incorporation may exculpate directors from monetary liability for mere breaches of the duty of care. Delaware: DGCL § 102(b)(7) MBCA: MBCA § 2.02(b)(4)	No provision for ex ante exculpation via the articles of association.

Comparative Dimension	United States	Germany
Core Object of Judicial Review	Delaware: Whether the director's decision-making conduct constitutes gross negligence MBCA: Whether the director has failed to comply with the standard of conduct, which requires the director to have: (i) Acted in good faith; (ii) Acted in a manner the director reasonably believes to be in the best interests of the corporation; (iii) Exercised the care that a person in a like position would reasonably believe appropriate under similar circumstances; and the breach causes legally attributable harm.	Whether the Vorstand's decision-making conduct satisfies all constituent elements: (i) The decision constitutes an operational business judgment; (ii) The conduct is undertaken for the benefit of the corporation; (iii) No personal interest is involved; (iv) The decision is made on the basis of adequate information; (v) Good faith.
Threshold for ESG Justification	Requires a showing of reasonable nexus to the goal of maximizing shareholder wealth	Consistent with the corporation's long-term pluralistic interests, with no strict requirement to tie decisions to shareholder value

5. Discussion

5.1 Causes of directors' decision-making dilemma in china and the paradox of sustainable governance

5.1.1 The underlying logic of the judicial application dilemma caused by the absence of standards of review

In the 2023 revision of China's Company Law, Paragraph 2 of Article 180 clarifies the substance of the duty of care. The duty of care is an affirmative duty, which requires directors, supervisors and senior managers not only to possess the competence to duly handle entrusted affairs but also to actively exercise such competence to fulfill entrusted affairs. The sole standard governing the conduct of directors, supervisors, and senior managers in the performance of their duties is that they shall act in the best interests of the company. The professional standard of this duty is grounded in the professional character of modern business organizations, and requires managers to exercise the reasonable care ordinarily incumbent upon their role. In modern corporate law doctrine, the ultimate criterion for determining "reasonable care" is precisely the BJR, which serves as an important institutional safeguard for promoting entrepreneurial spirit. At present, however, there remains a legislative gap in China with respect to this rule. As no explicit statutory definition of this rule has been enacted by the legislature, terminological divergences (as shown in Table 1 and Figure 2) have further exacerbated the confusion surrounding judicial application standards.

In the absence of settled adjudicative standards, the actual judicial practice remains largely reactive. Empirical data indicate that the BJR currently functions only as the most commonly raised exculpatory defense by directors facing allegations of breach of the duty of care. It has not developed into a uniform adjudicative rule that courts apply on their own initiative across cases; its appearance in judgments is heavily contingent on the parties raising it expressly (see Figure 5). It follows that the deep uncertainty surrounding the BJR in Chinese judicial practice, combined with the high monetary stakes and intensely adversarial character of these disputes, has funneled a large volume of such cases to intermediate people's courts sitting as courts

of second instance (see Table 4, Figure 3, and Figure 4), resulting in significant waste of judicial resources.

Beyond the disarray in application standards at the macro level, courts in concrete micro-level judicial adjudication exhibit severe deviations in their grasp of the core tenet of the BJR—that the correctness of a business decision itself may not be inferred retroactively from its outcome. In individual trials, courts still fall to varying degrees into the error of reasoning backwards from the outcome to assess decision reasonableness and fail to uphold the principle of judicial restraint. The court of first instance in *Sun and Zhao v. Gong* (dispute over liability for damage to company interests)⁸⁷ adopted this typical outcome-driven adjudicative logic. It evaluated the director's contemporaneous emergency business decision from the perspective of a judicial adjudicator, a practice that constitutes judicial substitution of business judgment. The court of first instance in *Song v. Company A* (dispute over liability for damage to company interests)⁸⁸ reasoned backwards from the ex post damage outcome to find the decision unreasonable and the director subjectively at fault. The first-instance proceedings also involved a reversal of the burden of proof and the improper elevation of directors' liability. This practice of shifting the burden of proof, which properly rests with the plaintiff, to the defendant lays bare the vulnerable and reactive position of directors and senior managers in litigation in China in the absence of the BJR.

The underlying cause of such adjudicative deviations lies in courts' application of traditional tort liability attribution principles during trial, which causes their adjudicative reasoning to vacillate between Procedural Review and tort-based outcome-oriented thinking. In most cases where the BJR is applied to determine directors' liability for breach of the duty of care, courts, after examining whether a director has breached the duty of care against the elements of the BJR, further assess the causal link between the director's conduct and the damage suffered. This practice is a key factor leading courts to fall into the error of reasoning backwards from outcomes to judge the inherent correctness of the decision itself.

This adjudicative pattern carries distinctively domestic Chinese traits. As China's Company Law contains no well-developed statutory provisions governing the BJR, judges deciding director and senior manager liability disputes remain anchored in the analytical logic of traditional tort liability review. Even where they seek to invoke the BJR to conduct Procedural Review, they can only embed the rule within a tort liability review framework structured around harm and causation. In fact, once a court concludes that a director's conduct satisfies the criteria for BJR protection—that the director has not breached the duty of care—no further examination of causation between the director's conduct and the damage is required. Under the U.S. model, this causation analysis ordinarily takes place at a subsequent stage, after the BJR has been found inapplicable. Bringing the causation inquiry forward to the stage of defining the duty of care inclines judges toward tort-based outcome-oriented thinking. By the core tenet of the BJR, the mere fact of damage supplies no valid basis for judging the reasonableness of the director's contemporaneous business decision.

5.1.2 Managerial myopia engendered by result-oriented adjudication and the paradox of sustainable governance

Although Article 180 of China's Company Law clarifies the basic connotation and specific content of the duty of care, the BJR has never been incorporated at the statutory level. Consequently, the rule applies in judicial practice solely in the form of adjudicative doctrine, with neither uniform application standards nor a departure from

⁸⁷ HEFEI INTERMEDIATE PEOPLE'S COURT OF ANHUI PROVINCE. Civil judgment (2017) Wan 01 Min Zhong No. 7360. 2017. Ibid.

⁸⁸ CHAOYANG DISTRICT PEOPLE'S COURT OF BEIJING MUNICIPALITY. Civil judgment (2019) Jing 0105 Min Chu No. 48545. 2019. Ibid.

the imputation logic of traditional tort liability. The direct consequence is a pervasive practice in judicial proceedings: even when courts invoke the BJR, they typically embed it within the elements of tort liability and retroactively infer the reasonableness of ex ante decisions from their outcomes, rather than reviewing the decision-making process against the information and circumstances available at the time of the decision. For directors, the exculpatory boundary of the duty of care is rendered uncertain, which in turn gives rise to a propensity among directors to avoid liability. In the absence of a statutory BJR, the optimal strategy for directors is to prioritize operational decisions that deliver short-term visible results, incorporate quantifiable financial indicators, and carry low risk of ex post liability, while proactively avoiding long-cycle, high-uncertainty projects with poor short-term financial performance. The entrenchment of this behavioral logic is the institutional root of persistent short-termism in corporate decision-making.

In the ESG context, the problems arising from this institutional gap are further amplified, and even directly impede the transition to sustainable corporate governance. The core characteristic of ESG decision-making lies in the long-term nature of its value and the uncertainty of its returns. Under a result-oriented adjudicative logic, the short-term financial outcomes of such decisions readily constitute a trigger for directors' liability. The resulting institutional paradox lies in the following: at the legislative level, the ongoing drive to incorporate ESG into the law requires directors to take sustainable development and stakeholder interests into account in their decision-making; at the judicial level, by contrast, directors' liability rules still take short-term financial results as their core evaluation criterion, compelling directors to adopt conservative short-sighted strategies. Over time, to shield themselves from personal risk, directors will inevitably reduce or even avoid long-term ESG investment. This will not only reduce directors' sustainable governance obligations to empty formalities but also fundamentally erode the long-term competitiveness of Chinese companies and their momentum for green transformation.

5.2 Governance mechanisms and boundaries of adaptation of extraterritorial business judgment rules

5.2.1 Jurisprudential limits of procedural and substantive review standards

In the judicial application of the BJR, both the United States and Germany consistently adhere to the principle of judicial restraint—courts do not evaluate the merits of business decisions, nor do they infer the correctness of a decision from its outcome. The intensity of judicial review in both jurisdictions takes the form of a combination of Procedural Review and Substantive Review.

Procedural Review encompasses review of the formal procedural aspects of directors' decision-making and review of the substantive sufficiency of the decision-making process. The former covers matters including whether meetings are duly convened, votes are duly taken, records are duly maintained, and the provisions of the corporation's articles of association are observed; the latter involves whether sufficient decision-making information has been collected, necessary professional advice has been solicited, core risks have been assessed, and key matters have been subject to prudent weighing, and constitutes the core content of Procedural Review.

In the United States, Procedural Review takes place at the stage of determining whether the BJR presumption may be rebutted, and directly determines whether directors may be shielded by the BJR. Once the presumption is rebutted, the case proceeds to Substantive Review on claims for damages, where a comprehensive examination is carried out across three constituent elements: breach of duty, actual loss and causation.

In Germany, Procedural Review occurs at the stage at which the Vorstand

establishes compliance with the core exculpatory elements of the BJR. If the Vorstand fails to discharge its burden of proof that the decision was made on the basis of adequate information, in the best interests of the corporation and in good faith, the BJR does not apply, and the court directly makes findings on all substantive elements of liability for damages.

In terms of review content, the Substantive Reviews conducted after the BJR is held inapplicable are highly convergent across the two jurisdictions. Both are centered on the elements of tort liability, and neither involves ex post evaluation that assesses the reasonableness of a decision on the basis of its outcome.

The jurisprudential logic of this tiered review provides a clear reference boundary for constructing the dual-track model in China. The core function of the BJR is to delineate the threshold for judicial intervention, rather than to grant indiscriminate immunity to directors; in this regard, Procedural Review serves as the central mechanism to safeguard the bottom line of judicial deference.

5.2.2 Divergent approaches and common controversies

In terms of institutional evolutionary trajectories, the United States and Germany have developed differentiated application models of the BJR rooted in their distinct legal traditions.

In Delaware, the regime takes as its institutional starting point the gross negligence review standard and the Two-Pronged Test prerequisite procedural threshold established in the 1984 decision *Aronson v. Lewis*.⁸⁹ Following the director liability panic triggered by the *Smith v. Van Gorkom*⁹⁰ judgment, Delaware narrowed the scope of monetary damages imposable on directors through the exculpation provision under DGCL § 102(b)(7), and dynamically adjusted shareholders' evidentiary access through the expansion and contraction of the books and records inspection right under DGCL § 220. In *United Food and Commercial Workers Union v. Zuckerberg*⁹¹, the court eventually abolished the "Two-Pronged Test" standard that had been in use for decades, completing the unified restructuring of the prerequisite review framework for derivative suits. The MBCA, by contrast, follows a separate statutory path, providing a rule option with greater certainty through a legislative model based on the dichotomy between conduct standards and liability standards.

Germany follows the civil law logic of "case law as the precursor and statutory law as the authoritative confirmation": the early version of the AktG only prescribed an abstract duty of care and the rule of reversal of the burden of proof. Courts reviewed business decisions under a strict objective negligence standard, and the Vorstand bore extremely high risk of joint and several liability. In 1997, the Federal Court of Justice introduced the BJR through the *ARAG/Garmenbeck* ruling, which immediately sparked academic controversy over "judicial usurpation of legislative authority and logical conflicts with the statutory burden of proof system". In 2005, the Act on the Modernization of Corporate Integrity and Avoidance Rights (UMAG) formally codified the rule into statutory law. On the basis of retaining the statutory reversal of the burden of proof, it integrated five constituent elements and supported the rule with a special auditor system to address the shortfall in shareholders' evidence-gathering

⁸⁹ ARONSON v. LEWIS, 473 A.2d 805 (Del. 1984). Ibid.

⁹⁰ SMITH V. VAN GORKOM, 488 A.2d 858 (Del. 1985). Available at: <https://www.courtlistener.com/opinion/1479784/smith-v-van-gorkom/?q=Smith+v.+Van+Gorkom> (accessed on 1 July 2026).

⁹¹ UNITED FOOD AND COMMERCIAL WORKERS UNION v. ZUCKERBERG, 262 A.3d 1034 (Del. 2021). Available at: https://www.courtlistener.com/opinion/5144237/united-food-and-commercial-workers-union-v-zuckerberg/?q=United+Food+and+Commercial+Workers+Union+and+Participating+Food+Industry+Employers+Tri-State+Pension+Fund+v.+Zuckerberg&type=o&order_by=score+desc&stat_Published=on (accessed on 1 July 2026).

capacity, completing the compatible alignment of the rule with the existing statutory law framework.⁹²

Despite the clear divergence in institutional paths, the core controversies over the BJR in the two countries share deep common ground, and both essentially point to the balancing dilemma between directors' business discretion and shareholders' rights of supervision and remedy.

First, the rationality of the rule has remained a persistent source of controversy. German legal scholarship has long debated whether the BJR constitutes an overreach of judicial authority by the Federal Supreme Court (Bundesgerichtshof, BGH), which created an exculpatory rule not prescribed in statutory law through case law, contradicting the statutory logic of burden of proof allocation; U.S. legal scholarship, by contrast, has persistently criticized that the combined effect of exculpation provisions and high litigation thresholds has effectively hollowed out monetary accountability for breaches of directors' duty of care, and that the protective boundary of the BJR has expanded excessively.

Second, the procedural dilemmas arising from information asymmetry are highly similar: both jurisdictions face the core challenge of shareholders' insufficient ability to adduce evidence in derivative suits. Germany addresses this problem through its special auditor system, and the United States through shareholders' right to inspect corporate books and records. Both, however, are caught in the same dilemma: overly permissive procedures readily give rise to abusive litigation, while overly restrictive procedures render remedial channels ineffective. Both have had to repeatedly calibrate the balance between procedural leniency and stringency through judicial precedents or legislative revisions.

Third, the calibration objectives for director liability risk are entirely consistent. Both jurisdictions have undergone a policy shift from strict accountability to moderate error tolerance: Germany evolved from the objective negligence standard to the codification of the BJR, while the United States transitioned from the director liability panic sparked by the *Smith v. Van Gorkom*⁹³ ruling to the widespread application of exculpation provisions. Both paths converge on the same core proposition: how to safeguard the autonomy of business decision-making and avoid excessive judicial intervention in corporate operations, without eviscerating the binding force of fiduciary duties on directors.

5.2.3 Regulatory differences between the U.S. and Germany in the ESG context

In 2025, the Organisation for Economic Co-operation and Development (OECD) compiled statistical data and conducted status assessments on the objective state of corporate governance across jurisdictions in the context of sustainable development in Chapter 5 of the OECD Corporate Governance Factbook 2025.⁹⁴

The OECD's latest 2025 report identifies a fundamental divergence between the United States and Germany in the sources of mandatory authority for ESG corporate governance. In the United States, as the SEC's climate disclosure rules face the prospect of full repeal, there is currently no statutory requirement for mandatory ESG disclosure at the federal level. This absence of hard law constraints, however, affords

⁹² GERMANY. Act on corporate integrity and modernization of avoidance law (Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts, UMAG), Bundesgesetzblatt (BGBl.) I, p. 2802, 2005. Available at: https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//%5b@at tr_id=%27bgbl105s2802.pdf%27%5d#/text/bgbl105s2802.pdf?_ts=1786877273741 (accessed on 16 August 2026).

⁹³ SMITH v. VAN GORKOM, 488 A.2d 858 (Del. 1985). Ibid.

⁹⁴ OECD. "OECD corporate governance factbook 2025". 2025. <https://doi.org/10.1787/f4f43735-en>

boards of directors substantial decision-making discretion when U.S. courts apply the BJR. By contrast, Germany has elevated ESG governance to legally mandatory requirements. Under German law, the Vorstand is required to disclose value chain information and oversee political donations and lobbying activities, and the introduction of mandatory third-party auditing is planned. This codified model of stringent regulation establishes a strict floor of the "duty of legality" for the Vorstand under substantive law.

5.3 Model choice for the business judgment rule in China and its response to sustainable governance

Grounded in China's institutional context, this study advocates that a dual-track application model of the BJR be adopted to strike a balance between directors' liability and decision-making freedom following the integration of ESG into directors' duties. Specific improvements shall be made in two dimensions: legislation and judicial application. Legislatively, it is proposed that a provision be added to Article 180 of China's Company Law to codify the BJR; judicially, courts shall apply an expansive interpretation to the constituent elements of the traditional BJR and incorporate ESG factors therein. Concurrently, a process-oriented adjudicative logic shall be established, under which the focus of judicial review shall shift from "decision outcomes" to "the decision-making process" and due respect shall be accorded to the professionalism and complexity of business decisions. With respect to the specific application mode, an innovative dual-track application model of the BJR is proposed. Depending on the different types of directors' decisions, the Prerequisite Model applies to traditional business decisions directly aimed at maximizing shareholders' economic interests, while a modified Prerequisite Model applies to hybrid decisions involving both commercial and ESG elements.

5.3.1 Design of the constitutive elements for local legislation

Under the model of sustainable corporate governance, embedding directors' ESG responsibilities into the fiduciary duty system is an effective way for a company to meet the multi-stakeholder requirements of sustainable governance.⁹⁵ Accordingly, the construction of the BJR is indispensable. The BJR does not supplant the duty of care. It functions purely as a supplementary adjudicative standard for assessing that duty, rather than operating as a freestanding substantive obligation. In terms of legislative model, in line with China's statutory legislative tradition, China should draw on Germany's codified integration model, add provisions in the Company Law, and clarify the constituent elements and scope of application of the BJR. Meanwhile, on the premise that directors' ESG responsibilities are embedded in the fiduciary duty system, an expansive interpretation shall be applied to the constituent elements of the BJR to integrate ESG content.

Based on a comparative legal analysis, the constituent elements of China's BJR may draw on the experience of the United States and Germany, and its constituent elements may be summarized as follows: (i) freedom from conflict of interest; (ii) the decision lies within the ambit of business judgments; (iii) the decision is predicated on adequate information; and (iv) a reasonable belief that the decision serves the best interests of the company.

"Freedom from conflict of interest" is the primary threshold prerequisite for BJR application. It mandates that directors and senior managerial personnel lack any substantial personal interest in the matter under consideration at the time of rendering business judgments, and exercise discretion from an objective,

⁹⁵ ZHU, C. and LYU, C. "The rise of ESG and the proactive response of modern company law". 2022. Ibid.

independent standpoint.⁹⁶ This requirement of no conflict of interest means that the decision-maker has no direct interest in the decision-making matter, nor any interest that may affect impartial decision-making with their close relatives, affiliated enterprises or other related parties.⁹⁷

The requirement that "the decision lies within the ambit of business judgments" defines the applicable boundary of the BJR. This element mandates that a director's decision qualify as a business judgment falling within the regular scope of corporate operations.⁹⁸ The essential characteristics of such a decision are its profit-seeking nature, risk-bearing nature and professional nature, and it is an operational and managerial decision made by the director based on business judgment.⁹⁹ It bears noting that in the context of sustainable corporate governance, directors' decisions include not only traditional business decisions that directly aim at the maximization of shareholder interests but also ESG-related decisions that take into account environmental, social and stakeholder interests. The benefits of such decisions possess a long-term orientation, potentially even prejudicing immediate corporate or shareholder interests. A strict application of the "business decision" criterion in this context risks excluding mixed decisions that incorporate ESG elements, thereby depriving them of the protection of the BJR. In this context, ESG decisions should be incorporated into the scope of "business decisions" through an expansive interpretation. Although ESG decisions cannot generate profits in the short term, they belong to long-term commercial value creation. In addition, under Article 20 of the prevailing Company Law, it is explicitly stipulated that a company is statutorily required to have due regard to stakeholder interests and bear social responsibility in its business activities. Therefore, the "scope of business decisions" should include traditional business decisions that directly pursue economic interests, as well as ESG-related decisions aimed at sustainable development, long-term value and reputational capital.

"The decision is predicated on adequate information" constitutes the central manifestation of the duty of care. The requirement of adequate information does not mean that the decision-maker grasps all information but that the decision-maker has conducted reasonable investigation and evidence collection before making the decision, did not overlook material information, and did not rely on obviously unreliable information sources. The judgment standard for whether a decision is based on adequate information needs to comprehensively consider the nature and importance of the decision, as well as the cost and difficulty of obtaining relevant information.¹⁰⁰ This element emphasizes the informed nature of the decision-maker in the course of decision-making, rather than the correctness of the resulting decision. Notwithstanding the ultimate failure of the decision, provided that the decision-maker made the decision based on adequate information, it may still be protected by the BJR.¹⁰¹ Under the concept of corporate sustainable development, directors' duties

⁹⁶ SHI, T. *Treatise on corporate law*, 3rd ed., Law Press China, Beijing, 2021.

⁹⁷ ZHAO, X. *Commercial law*, 5th ed., Higher Education Press, Beijing, 2022.

⁹⁸ YAN, X. Research on the introduction of the business judgment rule in China, Jiangsu Court Network, 2013. Available at: <http://www.jsfy.gov.cn/article/29366.html> (accessed on 1 July 2026).

⁹⁹ TANG, X. On directors' business judgment and liability, WANG, B. (ed.), *Commercial Law Forum*, Ed. Law Press China, Beijing, 1999.

¹⁰⁰ AMERICAN LAW INSTITUTE. *Principles of Corporate Governance: Analysis and Recommendations*. 1994, sec. 4.01(b).

¹⁰¹ ZHANG, W. Directors' duty of care and the business judgment rule under US law. *Zhengquan fa yuan (Securities Law Review)*, v. 37, n. 3, 2023, pp. 98-122. Available at: https://kns.cnki.net/kcms2/article/abstract?v=J6dHN9cz2TtC_xZY6heDf4xdBpKwvCOjM0XJzykNi2REure31w_7g4dpjryYArCTp5Hb-mIirftNtHsyn56Uzpgl3palzQvPYSmsNlca2jfbnZlJNCKW8KrWW3atHjmaotRU2s9uqcswm-ggbq06HtWTqAhwY0I6R0MViJyn39Wx_AzQA6Jjow==&uniplatform=NZKPT&language=CHS (accessed on 1 July 2026).

include ESG content. Therefore, if a director's decision involves ESG matters, the requirement of "adequate information" shall include information obtained through professional ESG consultation, stakeholder feedback, and third-party evaluations.

"A reasonable belief that the decision serves the best interests of the company" is the subjective core element of the BJR. This element mandates that the decision-maker operate in subjective good faith, while possessing objective, rational grounds to believe the decision serves the company's interests.¹⁰² This element does not mandate that the resulting decision actually achieve the optimal benefit of the company. Rather, it merely requires that, under the circumstances then prevailing, the decision-maker—acting upon an appropriate informational basis—possesses rational grounds to believe the measure will advantage the company.¹⁰³ In the context of sustainable corporate governance and heightened statutory focus on corporate social responsibility obligations enshrined within the Company Law, "the company's best interests" must be redefined. If any major strategic decision made by directors is seriously inconsistent with the direction of national planning, it will be difficult to establish the "reasonableness" of the decision and the claim that it "advances the company's best interests". Meanwhile, the social dimension of "corporate interests" requires directors to fully consider their social values when making decisions regarding matters such as industrial layout, employee welfare or supply chain management. Such decisions must align with the company's long-term reputation and sustainable development interests, which fully reflects the value of "stakeholders".

For the statutory formulation of the specific rules, reference may be made to the German statutory model under which the BJR is embedded into the normative system of the duty of care. The core of the rule shall incorporate the "reasonable presumption" model of US law, consistent with China's fundamental civil litigation principle that he who asserts must prove. Specifically, on the premise of retaining the duty of care content outlined in Paragraph 2 of Article 180 of China's Company Law, a new Paragraph 3 may be added to provide for the BJR. The original Paragraph 3 of the provision shall be renumbered as Paragraph 4. The proposed wording of the provision is as follows:

Paragraph 2 of Article 180 of China's Company Law: "Directors, supervisors and senior management personnel owe a duty of care to the company, and shall exercise the reasonable care ordinarily expected of a manager in the best interests of the company in the performance of their duties."

A new Paragraph 3 is added to Article 180: "Ordinary business decisions made by directors and senior management personnel within the scope of their authority shall give rise to a presumption that the duty of care has been fulfilled. The aforementioned presumption shall not apply where there is gross negligence, a breach of decision-making procedures prescribed by law or the company's articles of association, or an interest in the subject matter of the decision. The determination of whether the duty of care has been fulfilled shall be based on the objective circumstances and information available at the time the decision is made. The reasonableness of the decision shall not be inferred retroactively from ex post results".

The newly added Paragraph 3 of Article 180 retains the burden of proof allocation principle of China's civil litigation: the presumptive effect of the BJR constitutes a legal presumption of directors' compliance at the substantive law level, and a party alleging a breach of the duty of care by a director must still prove the existence of the aforementioned statutory circumstances excluding the presumption before the compliance presumption may be rebutted and a breach of the duty of care established.

¹⁰² FENG, Q. "A study on the application of the business judgment rule in China". *Caijing Fayuan (Financial and Economic Law Review)*, v. 6, 2023, pp. 64-77. Available at: <https://link.cnki.net/doi/10.16823/j.cnki.10-1281/d.2023.06.008> (accessed on 1 July 2026).

¹⁰³ LU, J. "The application of business judgment rule in dividend litigation". 2018. Ibid.

Once a breach of duty is established, the general damages rules outlined in Article 188 of China's Company Law shall apply. The party seeking to impose liability bears the burden of proving the actual existence of loss and the causal link between the breach of duty and the damage, before the director may ultimately be held liable for damages.

5.3.2 Model choice for judicial application

Concerning the judicial application approach of the BJR, especially under the concept of corporate sustainable development, China may actively draw on the mature experience accumulated by countries such as Germany and the United States in this field and formulate a scientific and reasonable judicial application path by closely combining China's current actual judicial environment. As set forth above, reference is made to the German statutory model under which the BJR is embedded into the normative system of the duty of care. The core of the rule incorporates the "reasonable presumption" model of US law, consistent with China's fundamental civil litigation principle that he who asserts must prove.

Specifically, on the basis of the constituent elements of the BJR, this path needs to consider the following aspects: the application of the BJR model; the type of directors' business decisions; the allocation of the onus of proof; and the court's choice between Procedural Review and Substantive Review.

Under the sustainable corporate governance model, embedding directors' duty to implement ESG into the fiduciary duty framework is an effective way for companies to satisfy the multi-interest requirements of sustainable governance.¹⁰⁴ Once ESG obligations are embedded into directors' duty of care, judicial review is confronted with inherent value conflicts: courts are required to both encourage directors to actively fulfill their ESG duties and prevent them from making improper decisions under the guise of ESG. The traditional single-track review model fails to effectively balance these two objectives, making it necessary to construct a typified dual-track approach.

Based on their substantive content, directorial decisions can be bifurcated into two categories: traditional business decisions directly aimed at maximizing shareholder economic interests and hybrid decisions that incorporate both commercial and ESG elements. The former category is governed by the BJR under the Prerequisite Model. Under this approach, courts start from a presumption that directors have discharged their duty of care with respect to ordinary business decisions made within the scope of their authority. The plaintiff bears the burden of proof to rebut this compliance presumption and establish that directors have breached the duty of care. At this stage, the court conducts only Procedural Review. To hold directors liable for damages, the plaintiff must further adduce evidence to prove that the loss actually exists and that a causal link exists between the breach of duty and the loss. At this stage, the court conducts Substantive Review of the damages claim, focusing on two major constituent elements: the actual loss and the causal link between the act and such loss.

For hybrid decisions, a modified Prerequisite Model applies, intended to encourage directors to actively discharge their ESG duties while preventing them from making improper decisions under the guise of ESG. Under this approach, courts treat hybrid decisions made by directors as an integral whole. The presumption that directors have fulfilled their duty of care remains in place, and the plaintiff bears the burden of proof to rebut this presumption. At this stage, the plaintiff has two independent and parallel avenues of claim.

Path One: This path is consistent with the model applicable to traditional business

¹⁰⁴ ZHU, C. and LYU, C. "The rise of ESG and the proactive response of modern company law". 2022. Ibid.

decisions aimed directly at maximizing shareholders' economic interests.

Path Two: The plaintiff alleges that the ESG elements within the director's decision constitute a circumstance of "manifest unreasonableness". A "manifest unreasonableness" circumstance means that the director's decision, on its face, materially departs from the normal scope of decisions that a reasonable and prudent manager would reach under equivalent circumstances, to a degree of impropriety discernible without in-depth substantive examination. Examples include a severe cost-benefit imbalance, violation of mandatory provisions of law, complete irrelevance to core business, and disregard of material ESG risks. A finding that a decision amounts to "manifest unreasonableness" requires concurrent satisfaction of the following two conditions: first, the decision's cost input, risk level, business relevance, and other factors materially depart from the generally reasonable range of comparable business decisions; second, the director acts with gross negligence in relation to this materially improper decision—that is, the director fails to discharge even the most fundamental decision-making procedural and information-gathering duties, or proceeds with the decision despite actual knowledge of its material imbalance. The determination of both of the above conditions is benchmarked against objective information available at the time the decision is made, and the reasonableness of the decision at that time shall not be judged by ex post results.

The "manifest unreasonableness" circumstance constitutes the threshold standard for rebutting the BJR compliance presumption and triggering a reversal of the burden of proof. For claims of this nature, the court first conducts a threshold preliminary review to assess whether the prima facie evidence adduced by the plaintiff is sufficient to establish that the decision meets the "manifest unreasonableness" standard. Where this standard is satisfied, the original compliance presumption is rebutted, the case enters the Exculpation Model, and the burden of proof is reversed. Directors are then required to prove that the substance of their decisions satisfies the constituent elements of the BJR. During this phase, courts conduct only Procedural Review. Where the director successfully discharges this burden, the director is exculpated from liability. Otherwise, the case moves to Substantive Review focused on the two constituent elements: the actual loss and the causal link between the conduct and such loss. Where the plaintiff advances claims under both Path One and Path Two, courts prioritize review of the claim under Path One. If a breach of the duty of care by the director is directly established under Path One, courts need not conduct further review of whether the ESG elements are "manifestly unreasonable"; only where no liability of the director can be established under Path One shall courts proceed with the dedicated ESG review under Path Two.

To elaborate on the manner of judicial review under Path Two, this section takes "a severe cost-benefit imbalance resulting from a director's decision" as an illustrative example. Assume Company A is a medium-sized listed construction machinery manufacturer in China. In 2024, the board of directors deliberated and adopted an upgrade plan to invest CNY 50 million in the construction of a "low-carbon production line". The project yields both energy-saving returns and carbon emission compliance value, and is expected to recoup its costs within 3 to 5 years. Prior to the meeting, a third party was commissioned to produce an ESG assessment report, which noted an approximate 2% decline in short-term net profit. In 2026, the project incurred cumulative losses of CNY 32 million as a result of factors such as lower-than-expected carbon prices and an industry downturn. Shareholder A instituted a shareholder derivative suit, alleging that the decision entailed a severe cost-benefit imbalance and constituted "manifest unreasonableness", and sought to hold the directors liable pursuant to Path Two.

When conducting review under Path Two, the court shall carry out a threshold preliminary review based on the information available at the time the decision was made, with two possible findings:

First, the decision does not meet the "manifest unreasonableness" standard. The

decision is highly correlated with the company's principal business, the scale of investment falls within a reasonable industry range, and professional assessment and statutory decision-making procedures have been duly followed. Ex post losses constitute normal commercial risks and do not satisfy the "manifest unreasonableness" standard, which requires a significant deviation from the bounds of rationality. The plaintiff's prima facie case fails, the compliance presumption is upheld, and the claim is dismissed.

Second, the decision meets the "manifest unreasonableness" standard. If it is established that the board of directors proceeded without any feasibility analysis, unilaterally committed funds equivalent to 80% of the previous year's net profit to a carbon sink project unrelated to the principal business, and conducted no compliance or revenue projections, the decision may be found to entail a severe cost-benefit imbalance and exceed reasonable commercial boundaries, thereby satisfying the threshold standard. At this point, the burden of proof shifts to the directors, who must prove that the decision complies with the BJR. Where they fail to discharge this burden, a breach of the duty of care is established, and the court subsequently examines the elements of loss and causation to determine the directors' liability.

In sum, this study does not exclusively adopt the institutional model of either Germany or the United States. Grounded in China's statutory law tradition and the demands of judicial practice, it draws on the German statutory law model to incorporate the BJR into the duty of care system under Article 180 of China's Company Law, granting the rule codified statutory expression. In its operational framework, this study adopts the American presumption model, which aligns with China's foundational principle that he who asserts must bear the burden of proof. This structure avoids the reversal of the burden of proof inherent in the German model, a reversal that would increase directors' evidentiary burden and constrain their decision-making latitude, and instead preserves the autonomy of ordinary commercial decision-making.

For hybrid ESG decisions, the modified Prerequisite Model applies. Built upon the original Prerequisite Model, this framework integrates the burden of proof reversal rule of the Exculpation Model and establishes a threshold review mechanism for "manifestly unreasonable" decisions. The burden of proof shifts only when the plaintiff makes a prima facie showing that the decision meets the threshold of manifest impropriety, at which point directors bear the burden of proving the legitimacy of their decision.

This tiered model design forestalls heightened director liability through threshold constraints, while mitigating shareholders' information asymmetry in ESG contexts through conditional reversal of the burden of proof. It encourages directors to actively discharge their ESG duties while preventing improper decision-making under the guise of ESG.

5.4 Practical implications and governance value of the dual-track model

The legislative proposal for a dual-track BJR advanced in this study extends beyond doctrinal refinement of existing models. It generates institutional effects across three dimensions: judicial adjudication, incentives for corporate actors, and governance transformation. For China's corporate governance practice, the proposal supplies rules that combine operational feasibility with forward-looking design, and pursues the multiple goals of consistent judicial application, reduced liability burdens on corporate actors, and upgraded governance standards.

At the level of judicial application, the dual-track model provides clear practical guidance for courts adjudicating disputes over directors' duty of care. It responds directly to the practical flaws reflected in the preceding case samples: the reliance of adjudicative approaches on tort liability frameworks and the inconsistency of review standards. It corrects the entrenched pattern of liability attribution under which courts reason backwards from outcomes to assess the reasonableness of business decisions,

draws clear boundaries for judicial intervention and the parameters of judicial restraint, fosters uniform adjudicative standards, and enhances certainty and predictability in the trial of director liability disputes.

At the level of incentives for corporate actors, the dual-track model delivers stable institutional underpinning for entrepreneurial spirit. Statutory codification of the substantive content of the BJR bars assessment of decision reasonableness by reference to ex post operating outcomes, displaces the entrenched outcome-only logic of liability attribution, and creates a legal safe harbor for legitimate business risk-taking and innovative decision-making. The model further delineates clear boundaries of liability and conditions for its imposition, resolves the prevailing ambiguity of judicial standards, and enables corporate managers to form stable institutional expectations.

At the level of sustainable corporate governance, the dual-track model delivers durable rule-driven momentum for ESG implementation. It provides for dedicated protective rules governing hybrid decisions that incorporate ESG considerations, explicitly integrates ESG elements into the constituent elements of the BJR, bars evaluation of decision reasonableness on the basis of short-term interests, redresses short-termist tendencies in corporate governance, and strengthens directors' incentives to advance long-term sustainable investment. The "manifest unreasonableness" threshold review mechanism balances incentive and restraint. It obliges corporate managers to conduct due diligence assessments and follow formal deliberation procedures when making ESG decisions, and advances ESG governance from formal compliance to substantive implementation. At the rule level, the framework validates the reasonableness of non-financial benefits such as compliance value and long-term brand value, expands the dimensions of value assessment in corporate governance, and shifts governance models from the exclusive pursuit of shareholder interests to a model that balances multiple long-term values.

All three dimensions are unified by the institutional logic of long-termism: they ease constraints on entrepreneurial innovation, channel operational dynamism onto the path of sustainable value creation, and deliver coordinated improvement in corporate competitiveness, shareholder interests, and social value.

6. Conclusion

In recent years, sustainable development has been fundamentally reshaping global corporate governance. The BJR is an important institutional tool to solve the problem of short-termism in directors' decision-making and to promote the transformation of Chinese corporate governance from shareholder primacy to the stakeholder governance model.

In the 2023 revision of China's Company Law, while the amended legislation prioritized strengthening the statutory duties of loyalty and care incumbent on the company's directors, supervisors, and senior managerial personnel, specific rules governing the duty of care remain relatively broad and general. The BJR—the benchmark for assessing directors' fulfillment of the duty of care—remains absent. The broadness of the provisions on the duty of care, the absence of the BJR, and the uncertainty of the BJR's specific application models, have directly led to significant differences in application standards in judicial practice, which in turn has brought considerable dilemmas to directors' decision-making. This has made it difficult for directors to fully and comprehensively consider the company's long-term interests when making business decisions, thereby imposing a certain degree of constraint on the promotion of sustainable corporate governance. Under these circumstances, the practical experiences of the United States and Germany regarding the BJR can provide highly valuable reference examples for China.

Grounded in China's unique economic context and legislative environment, this study proposes a localization path for the BJR: adding provisions to China's Company

Law to grant the BJR codified statutory expression; applying an expansive interpretation to its constituent elements via judicial interpretation to incorporate ESG elements; establishing review rules centered on Procedural Review on the basis of clarifying its core tenet that decision-making conduct shall not be evaluated by outcomes; and finally proposing a dual-track application model based on the types of directors' decisions.

7. References

- AMERICAN BAR ASSOCIATION. Model business corporation act. Chicago: American Bar Association, 2024.
- AMERICAN LAW INSTITUTE. Principles of Corporate Governance: Analysis and Recommendations. 1994.
- ARONSON V. LEWIS, 473 A.2d 805 (Del. 1984). Available at: <https://www.courtlistener.com/opinion/2379496/aronson-v-lewis/?q=Aronson+v.+Lewis%2C+473+A.2d+805> (accessed on 31 July 2026).
- AUERBACH V. BENNETT, 47 N.Y.2d 619 (N.Y. 1979). Available at: <https://www.courtlistener.com/opinion/5683550/auerbach-v-bennett/?q=Auerbach+v.+Bennett%2C> (accessed on 31 July 2026).
- BAINBRIDGE, S. M. "The business judgment rule as abstention doctrine". *Vanderbilt Law Review*, v. 57, n. 1, 2004, pp. 83-130. <https://doi.org/10.2139/ssrn.429260>
- BEBCHUK, L. A. and TALLARITA, R. The illusory promise of stakeholder governance. *Cornell Law Review*, v. 106, 2020, pp. 91-178. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544978 (accessed on 31 July 2026).
- BEIJING NO. 3 INTERMEDIATE PEOPLE'S COURT. (2021). Civil judgment (2021) Jing 03 Min Zhong No. 3414. Available at: <https://www.pkulaw.com/pfnl/c05aeed05a57db0a00cdd7a21b273aa5008e953aa36bdb06bdfb.html?keyword=2021%E5%BC%89%E4%BA%AC03%E6%B0%91%E7%BB%883414%E5%8F%B7&way=listView#anchor-documentno> (accessed on 31 July 2026).
- BREHM V. EISNER, 746 A.2d 244 (Del. 2000). Available at: <https://law.justia.com/cases/delaware/supreme-court/2000/60450.html> (accessed on 31 July 2026).
- BRUNER, C. M. Corporate governance reform in a time of crisis. *Journal of Corporation Law*, v. 36, 2011, pp. 308-341. Available at: <https://scholarlycommons.law.wlu.edu/wlufac/103/> (accessed on 31 July 2026).
- BUNDESANSTALT FÜR FINANZDIENSTLEISTUNGS AUFSICHT. Guidance notice on dealing with sustainability risks, 2019. Available at: https://www.bafin.de/SharedDocs/Downloads/EN/Merkblatt/dl_mb_Nachhaltigkeitsrisiken_en.html (accessed on 1 July 2026).
- BUNDESANSTALT FÜR FINANZDIENSTLEISTUNGS AUFSICHT. Minimum requirements for risk management (Mindestanforderungen an das Risikomanagement, MaRisk), 7. Novellierung, Rundschreiben 05/2023 (BA), AT 3. Available at: https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Rundschreiben/2023/rs_05_2023_MaRisk_BA.html (accessed on 1 July 2026).
- CHAOYANG DISTRICT PEOPLE'S COURT OF BEIJING MUNICIPALITY. Civil judgment (2019) Jing 0105 Min Chu No. 48545. 2019. Available at: <https://www.pkulaw.com/pfnl/c05aeed05a57db0a9753dc8966684c3f03d46e5197670eb5bdfb.html?keyword=2019%E5%BC%89%E4%BA%AC0105%E6%B0%91%E5%88%9D48545%E5%8F%B7&way=listView#anchor-documentno> (accessed on 31 July 2026).
- CHINA. Company Law of the People's Republic of China. Revised 29 December 2023, effective 1 July 2024. Available at: <https://www.pkulaw.com/chl/8ba805acd08846d7bdfb.html?keyword=%E5%85%AC%E5%8F%B8%E6%B3%95&way=listView> (accessed on 16 August 2026).
- CHEN, J. and HE, T. "The tiered governance paradigm of corporate ESG: Selection of the embedded model for directors' fiduciary duties". *Journal of Zhengzhou University (Philosophy and Social Sciences Edition)*, v. 56, n. 3, 2023, pp. 43-51. Available at: https://kns.cnki.net/kcms2/article/abstract?v=J6dHN9cz2Tuj2E2d7N51bKE_IC6vKUHqK1

- xKYbeF1d7gzmONmV_csqwNR-GFyhCqh7ZT_zeQoRjGcj9By2BvG7KrZA-bdasSJsPjyeamsa
uH2qpJm6G0j3NfBAjthTu7GqQDHWJUWtw_3jS36AdEj7sbEFhQbnULzQTPvVYE3BI74ILlqJ6
WaQ==&uniplatform=NZKPT&language=CHS (accessed on 1 June 2026).
- CHUN'AN COUNTY PEOPLE'S COURT OF ZHEJIANG PROVINCE. Judgment (2009) Hang Chun
Shang Chu Zi No. 1212. 2009. Available at:
<https://www.pkulaw.com/pfnl/a25051f3312b07f36a2dddf661325ee880d350d50a2c9406bdfb.html?keyword=%282009%29%E6%9D%AD%E6%B7%B3%E5%95%86%E5%88%9D%E5%AD%97%E7%AC%AC1212%E5%8F%B7&way=listView#anchor-documentno>
(accessed on 31 July 2026).
- CITI COMMERCIAL BANK. Starting early on ESG and sustainability strategies can support
growth long-term for privately held companies. 2023. Available at:
<https://www.citigroup.com/global/insights/starting-early-on-esg-and-sustainability-strategies>
(accessed on 2 June 2026).
- EBAY DOMESTIC HOLDINGS, INC. v. NEWMARK, 16 A.3d 1 (Del. Ch. 2010). Available at:
<https://www.courtlistener.com/opinion/2423041/ebay-domestic-holdings-inc-v-newmark/?q=eBay+Domestic+Holdings%2C+Inc.+v.+Newmark> (accessed on 31 July 2026).
- ELHAUGE, E. "Sacrificing corporate profits in the public interest". *New York University Law Review*, v. 80, n. 3, 2025, pp. 733-869. Available at:
<https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-80-3-Elhaug.pdf> (accessed on 2 June 2026).
- EUROPEAN PARLIAMENT AND COUNCIL. Directive (EU) 2022/2464 of the European parliament
and of the council of 14 December 2022 amending regulation (EU) No 537/2014, directive
2004/109/EC, directive 2006/43/EC and directive 2013/34/EU, as regards corporate
sustainability reporting. 2022. Available at:
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022L2464> (accessed on 1
July 2026).
- EUROPEAN PARLIAMENT AND COUNCIL. Regulation (EU) 2020/852 of the European parliament
and of the council of 18 June 2020 on the establishment of a framework to facilitate
sustainable investment, and amending Regulation (EU) 2019/2088. 2020. Available at:
<https://eur-lex.europa.eu/eli/reg/2020/852/oj> (accessed on 1 July 2026).
- EUROPEAN PARLIAMENT AND COUNCIL. Regulation (EU) 2019/2088 on sustainability-related
disclosures in the financial services sector. 2019. Available at:
<https://eur-lex.europa.eu/eli/reg/2019/2088/oj> (accessed on 1 July 2026).
- FENG, Q. "A study on the application of the business judgment rule in China". *Caijing fayuan*
(*Financial and Economic Law Review*), v. 6, 2023, pp. 64-77. Available at:
<https://link.cnki.net/doi/10.16823/j.cnki.10-1281/d.2023.06.008> (accessed on 1 July
2026).
- FLEISCHER, H. Corporate purpose: A management concept and its implications for company
law. *European Company Law*, v. 18, 2021. Available at:
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3770656 (accessed on 1 July
2026).
- GERMANY. Act on corporate due diligence obligations in supply chains (Gesetz über die
unternehmerischen sorgfaltspflichten in lieferketten, LkSG). Available at:
<https://www.gesetze-im-internet.de/lksg/LkSG.pdf> (accessed on 1 July 2026).
- GERMANY. Act on corporate integrity and modernization of avoidance law (Gesetz zur
Unternehmensintegrität und Modernisierung des Anfechtungsrechts, UMAG),
Bundesgesetzblatt (BGBl.) I, p. 2802, 2005. Available at:
https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*/%5b@attr_id=%27bgbl105s2802.pdf%27%5d#/text/bgbl105s2802.pdf?_ts=1786877273741
(accessed on 16 August 2026).
- GERMANY. Draft Act implementing the Corporate Sustainability Reporting Directive (Entwurf
eines Gesetzes zur Umsetzung der Richtlinie (EU) 2022/2464 hinsichtlich der
Nachhaltigkeitsberichterstattung von Unternehmen, Bundestagsdrucksache 21/1857).
Available at: <https://dserver.bundestag.de/btd/21/024/2102465.pdf> (accessed on 16
August 2026).
- GERMANY. German code of civil procedure (Zivilprozessordnung, ZPO). 2024. Available at:
https://www.gesetze-im-internet.de/zpo/_138.html (accessed on 16 August 2026).
- GERMANY. German commercial code (Handelsgesetzbuch, HGB). Available at:

- <https://www.gesetze-im-internet.de/hgb/HGB.pdf> (accessed on 1 July 2026).
- GERMANY. German stock corporation act (Aktiengesetz, AktG). 2024. 1. Available at: https://www.gesetze-im-internet.de/aktg/___93.html (accessed on 16 August 2026).
- GLEIBNER, W. Nachhaltigkeit, ESG und wertorientierte Unternehmensführung. BOARD, 2021, 6. Available at: https://www.adar.info/fileadmin/public/Redaktion/Dokumente/PDF/Fachbeitraege_2021/nachhaltigkeit-esg-und-wertorientierte-Doc13076597.pdf (accessed on 31 July 2026).
- HEFEI INTERMEDIATE PEOPLE'S COURT OF ANHUI PROVINCE. Civil judgment (2017) Wan 01 Min Zhong No. 7360. 2017. Available at: <https://www.pkulaw.com/pfnl/a25051f3312b07f3196c23653656b83896915780940c9408bdfb.html?keyword=%282017%29%E7%9A%9601%E6%B0%91%E7%BB%887360%E5%8F%B7&way=listView#anchor-documentno> (accessed on 31 July 2026).
- HEFEI INTERMEDIATE PEOPLE'S COURT OF ANHUI PROVINCE. Civil judgment (2017) Wan 01 Min Zhong No. 7901. 2017. Available at: <https://www.pkulaw.com/pfnl/a25051f3312b07f3f8ef98728603ab5503e49c587cfff6cbdfb.html?keyword=%282017%29%E7%9A%9601%E6%B0%91%E7%BB%887901%E5%8F%B7&way=listView#anchor-documentno> (Accessed: 16 August 2026).
- INTERNATIONAL FINANCE CORPORATION. IFC performance standards On Environmental and Social Sustainability. 2012. Available at: <https://www.ifc.org/en/insights-reports/2012/publications-handbook-pps> (accessed on 16 August 2026).
- INTERNATIONAL SUSTAINABILITY STANDARDS BOARD (ISSB). ISSB issues inaugural global sustainability disclosure standards. 2023. Available at: <https://www.ifrs.org/news-and-events/news/2023/06/issb-issues-ifrs-s1-ifrs-s2/> (accessed on 1 July 2026).
- IN RE CAREMARK INTERNATIONAL INC. DERIVATIVE LITIGATION, 698 A.2d 959 (Del. Ch. 1996). Available at: <https://www.courtlistener.com/opinion/1968607/in-re-caremark-international-inc-derivative-litigation/?q=In+re+Caremark+Int%27+Inc.+Deriv.+Litig> (accessed on 31 July 2026).
- IN RE WALT DISNEY CO. DERIVATIVE LITIGATION, 906 A.2d 27 (Del. 2006). Available at: <https://www.courtlistener.com/opinion/2393941/in-re-walt-disney-co-derivative-litigation/?q=+In+re+Walt+Disney+Co.+Derivative+Litig>. (accessed on 31 July 2026).
- JIANG, D. "The transformation of directors' duties by ESG: The evolution from business judgment to social judgment". *China Legal Science*, 2024. <https://doi.org/10.14111/j.cnki.zgfx.2024.04.005>
- KENNETH T. SIMEONE V. THE WALT DISNEY COMPANY, 302 A.3d 956 (Del. Ch. 2023). Available at: <https://www.courtlistener.com/opinion/9409818/kenneth-t-simeone-v-the-walt-disney-company/?q=Simeone+v.+The+Walt+Disney+Company> (accessed on 1 July 2026).
- LI, J. 600 questions on company law. *Law Press China, Beijing*, 2025.
- LU, J. "The application of business judgment rule in dividend litigation". *Hebei Law Science*, v. 36, n. 1, 2018, pp. 67-77. <https://doi.org/10.16494/j.cnki.1002-3933.2018.01.006>
- MALPIEDE V. TOWNSON, 780 A.2d 1075 (Del. 2001). Available at: <https://www.courtlistener.com/opinion/1535019/malpiede-v-townson/pdf/> (accessed on 31 July 2026).
- MARCHAND V. BARNHILL, 212 A.3d 805 (Del. 2019). Available at: <https://www.courtlistener.com/opinion/4631113/marchand-v-barnhill/?q=Marchand+v.+Barnhill+> (accessed on 31 July 2026).
- NATIONAL CENTER FOR PUBLIC POLICY RESEARCH v. SCHULTZ, No. 2:22-CV-00267-SAB, 2023 WL 5820464. (E.D. Wash. Sept. 11, 2023). Available at: <https://law.justia.com/cases/federal/district-courts/washington/waedce/2:2022cv00267/101253/35/> (accessed on 31 July 2026).
- OECD. "OECD corporate governance factbook 2025". 2025. <https://doi.org/10.1787/f4f43735-en>
- ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. Climate change and

- corporate governance, OECD corporate governance working papers No. 27, 2021. Available at: https://www.oecd.org/en/publications/climate-change-and-corporate-governance_272d85c3-en.html (accessed on 1 July 2026).
- ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. G20/OECD principles of corporate governance. 2023. Available at: https://www.oecd.org/en/publications/g20-oecd-principles-of-corporate-governance-2023_ed750b30-en.html (accessed on 1 July 2026).
- PALM, C. W. and KEARNEY, M. A. "A primer on the basics of directors' duties in Delaware: The rules of the game (Part I)". *Villanova Law Review*, v. 40, n. 5, 1995, pp. 1297-1364. Available at: <https://digitalcommons.law.villanova.edu/vlr/vol40/iss5/1/> (accessed on 28 August 2026).
- SHI, T. *Treatise on corporate law*, 3rd ed., Law Press China, Beijing, 2021.
- SMITH V. VAN GORKOM, 488 A.2d 858 (Del. 1985). Available at: <https://www.courtlistener.com/opinion/1479784/smith-v-van-gorkom/?q=Smith+v.+Van+Gorkom> (accessed on 1 July 2026).
- SHAOXING INTERMEDIATE PEOPLE'S COURT OF ZHEJIANG PROVINCE. Civil judgment (2024) Zhe 06 Min Zhong No. 964. 2024. Available at: <https://www.pkulaw.com/pfnl/08df102e7c10f206f1720b0e6185dbfeb2a9f36f4340b31dbdfb.html?keyword=%EF%BC%882024%EF%BC%89%E6%B5%9906%E6%B0%91%E7%BB%88964%E5%8F%B7&way=listView#anchor-documentno> (accessed on 1 July 2026).
- STONE V. RITTER, 911 A.2d 362 (Del. 2006). Available at: <https://www.courtlistener.com/opinion/2334726/stone-v-ritter/?q=Stone+v.+Ritter> (accessed on 1 July 2026).
- SONG, H. "Localization of the business judgment rule: Theoretical basis and implementation path". *Journal of Shanghai University of International Business and Economics*, 2024. <https://doi.org/10.16060/j.cnki.issn2095-8072.2024.03.006>
- STATE OF CALIFORNIA. California corporations code. Available at: <https://law.justia.com/codes/california/code-corp/title-1/division-1/chapter-3/section-309/> (accessed on 1 July 2026).
- STATE OF DELAWARE. Delaware code, Title 8, § 102(b)(7). Available at: <https://delcode.delaware.gov/title8/c001/sc01/index.html> (accessed on 16 August 2026).
- STATE OF INDIANA. Indiana code. Available at: <https://iga.in.gov/laws/2025/ic/titles/23#23-1-35> (accessed on 1 July 2026).
- STATE OF NEW YORK. New York business corporation law. Available at: <https://law.justia.com/codes/new-york/bsc/article-7/717/> (accessed on 1 July 2026).
- STATE OF OHIO. Ohio revised code. Available at: <https://law.justia.com/codes/ohio/title-17/chapter-1701/section-1701-59/> (accessed on 1 July 2026).
- STATE OF VIRGINIA. Code of Virginia. Available at: <https://law.justia.com/codes/virginia/title-13-1/chapter-9/section-13-1-690/> (accessed on 1 July 2026).
- STRINE, LEO, E. J. "The dangers of denial: The need for a clear-eyed understanding of the power and accountability structure established by the delaware general corporation law". *Wake Forest Law Review*, v. 50, 2015, pp. 761. Available at: <http://ssrn.com/abstract=2576389> (accessed on 1 July 2026).
- SUN, B. "Theoretical reflection and rule response to judicial review of directors' duties under the social responsibility clause". *Tsinghua Law Review*, v. 18, n. 6, 2024, pp. 144-158. Available at: https://kns.cnki.net/kcms2/article/abstract?v=J6dHN9cz2TtZ2_2NR1bIAA2mRWIQZh-C6vjhznP1y3QeNuK8f8TyyFLr1LpFvGI08CAaD7sc4FjtFIVunG_41WPLJags03N5VRD4y449rvS_XVwdgB8iQ9ERZxPku0Hf6WERV1aWEAZofNuTuBCPGHj7sVKMcpnR7vw1BlK_-NMhNa9Uo8cCg==&uniplatform=NZKPT&language=CHS (accessed on 1 July 2026).
- SUQIAN INTERMEDIATE PEOPLE'S COURT OF JIANGSU PROVINCE. Judgment (2013) Su Zhong Shang Chu Zi No. 0140. 2013. Available at: <https://www.pkulaw.com/pfnl/a25051f3312b07f39475477b98f38e8fc83895d12c7ac118bdfb.html?keyword=2013%EF%BC%89%E5%AE%BF%E4%B8%AD%E5%95%86%E5%88%9D%E5%AD%97%E7%AC%AC0140%E5%8F%B7&way=listView#anchor-documentn>

- o (accessed on 1 July 2026).
- TANG, X. On directors' business judgment and liability, WANG, B. (ed.), Commercial Law Forum, Ed. Law Press China, Beijing, 1999.
- UNITED NATIONS GENERAL ASSEMBLY. Transforming our world: The 2030 agenda for sustainable development, Resolution A/RES/70/1, 21 October 2015. Available at: <https://undocs.org/zh/A/RES/70/1> (accessed on 1 July 2026).
- UNITED FOOD AND COMMERCIAL WORKERS UNION v. ZUCKERBERG, 262 A.3d 1034 (Del. 2021). Available at: https://www.courtlistener.com/opinion/5144237/united-food-and-commercial-workers-union-v-zuckerberg/?q=United+Food+and+Commercial+Workers+Union+and+Participating+Food+Industry+Employers+Tri-State+Pension+Fund+v.+Zuckerberg&type=o&order_by=score+desc&stat_Published=on (accessed on 1 July 2026).
- WEST, D. "The purpose of the corporation in business and law school curricula". *Governance Studies at Brookings*, 2011, pp. 1-23. Available at: https://www.brookings.edu/wp-content/uploads/2016/06/0719_corporation_west.pdf (accessed on 1 July 2026).
- WORLD BANK. Environmental and social framework. 2017. Available at: <https://projects.shihang.org/zh/projects-operations/environmental-and-social-framework> (accessed on 1 July 2026).
- WILLIAMS, C. A. Fiduciary duties and corporate climate responsibility. *Vanderbilt Law Review*, v. 74, n. 6, 2021, pp. 1875-1916. Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol74/iss6/9> (accessed on 1 July 2026).
- WOO CHUL LEE V. INTERINSURANCE EXCHANGE OF AUTOMOBILE CLUB, 50 Cal. App. 4th 694 (Cal. 1996). Available at: <https://www.courtlistener.com/opinion/2292638/woo-chul-lee-v-interinsurance-exchange-of-automobile-club/?q=Lee+v.+Interinsurance+Exchange> (accessed on 31 July 2026).
- WUHUA DISTRICT PEOPLE'S COURT OF KUNMING CITY, YUNNAN PROVINCE. Civil judgment (2025) Yun 0102 Min Chu No. 15292. 2025. Available at: <https://www.pkulaw.com/pfnl/c7ed112b8012f816402fba83f6eaead36e668403c41a97e9bdfb.html?keyword=2025%E5%BC%89%E4%BA%910102%E6%B0%91%E5%88%9D15292%E5%8F%B7&way=listView#anchor-documentno> (accessed on 1 July 2026).
- YAN, X. Research on the introduction of the business judgment rule in China, *Jiangsu Court Network*, 2013. Available at: <http://www.jsfy.gov.cn/article/29366.html> (accessed on 1 July 2026).
- ZHANG, W. Directors' duty of care and the business judgment rule under US law. *Zhengquan fa yuan (Securities Law Review)*, v. 37, n. 3, 2023, pp. 98-122. Available at: https://kns.cnki.net/kcms2/article/abstract?v=J6dHN9cz2TtC_xZY6heDf4xdBpKwvCOjM0XJzykNi2REure31w_7g4dpjryYArCTp5Hb-mIirftNtHsyn56Uzpgl3palzQvPYSmsNlca2jfbnZljNCKW8KrWW3atHjmaotRU2s9uqcswm-ggbq06HtWTqAhwY0I6R0MViJyn39Wx_AzQA6Jjow==&uniplatform=NZKPT&language=CHS (accessed on 1 July 2026).
- ZHAO, X. Commercial law, 5th ed., Higher Education Press, Beijing, 2022.
- ZHU, C. and LYU, C. "The rise of ESG and the proactive response of modern company law". *Chinese and Foreign Law*, v. 34, n. 5, 2022, pp. 1241-1259. <https://doi.org/10.3969/j.issn.1002-4875.2022.05.007>